

EMPLOYMENT RELATIONS TRIBUNAL

RULING

ERT/ RN 9/21

Before

Indiren Sivaramen	Acting President
Raffick Hossenbaccus	Member
Karen K. Veerapen	Member
Ghianeswar Gokhool	Member

In the matter of:-

Mr Vikash Beeharry (Disputant)

And

Multi Carrier (Mauritius) Ltd (Respondent)

I.P.O: Mr Visand Gunes (Co-Respondent)

The above case has been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 69(9)(b) of the Employment Relations Act (hereinafter referred to as “the Act”). The Co-Respondent was joined as a party in the present matter in the interests of justice and there was no objection on the part of the Disputant and the Respondent. All parties are assisted by Counsel.

The terms of reference of the dispute read as follows:

“Having been performing the duties for the post of Transmission Officer since July 2011, I Vikash Beeharry, should have been promoted to the post of Transmission Officer at the same time as Mr Visand Gunes, who was promoted to the post of Transmission Officer on 1st April 2019 although he does not possess the qualifications required for the post.”

Counsel for Co-Respondent has taken a preliminary objection which reads as follows:

1. *The Employment Relations Tribunal does not have the jurisdiction to make an award ordering the Respondent to promote the Disputant to the post of Transmission Officer in the Transmission /Technology Department.*
2. *The Co-Respondent, therefore, moves that the Disputant's statement of case be set aside.*

The Disputant is resisting the preliminary objection taken whilst the Respondent will abide by the decision of the Tribunal in relation to the preliminary objection. The Tribunal heard arguments on the preliminary point.

Counsel for Co-Respondent referred to the case of **E.Cesar And C.W.A, RN 785** where the Permanent Arbitration Tribunal (as the Tribunal was then called), referring to its earlier awards, stated that, subject to an abuse of powers on the part of management, matters regarding appointment and promotion of employees are essentially within the province of management. Reference was also made to the ruling delivered in the case of **Mr L.Wilson And Municipal Council of Quatre Bornes, in presence of 1. Local Government Service Commission and 2. Pay Research Bureau, RN 104/13.**

Counsel for Disputant referred to the case of **Rama v Vacoas Transport Co Ltd 1958 MR 184** where the Supreme Court held that where an objection *in limine* is based on disputed facts, the court must hear the evidence before it can rule on the point of law and that the objection cannot be taken *in limine*. He referred to the authority of the Tribunal to intervene whenever there is an abuse of authority or power by an employer. He suggested that this is a case which warrants the intervention of the Tribunal. He argued that the legislator intervened in 2008 to include specifically promotion within the jurisdiction of the Tribunal. He also referred to extracts from *Dr. D. Kok Kan, Introduction au droit du travail mauricien, 1/Les relations individuelles de travail*. He then referred to the case of **Mrs D.C.Y.P And The Sun Casinos Ltd, RN 202** which he suggested was very similar to the present matter. He argued that the then Permanent Arbitration Tribunal stated that it will intervene whenever there is an abuse. In reply, Counsel for Co-Respondent argued that there is no averment that the Respondent made an abuse of power or that the Tribunal should intervene to prevent an injustice.

The Tribunal has examined all the evidence on record including the arguments of both Counsel. "Labour dispute" is defined (the relevant part for the purposes of the preliminary objection) in section 2 of the Act as follows:

"labour dispute" –

- (a) *means a dispute between a worker, a recognised trade union of workers or a joint negotiating panel, and an employer which relates wholly or mainly to –*

- (i) *the wages, terms and conditions of employment of, promotion of, or allocation of work to, a worker or group of workers;*
- (ii) *the reinstatement of a worker; other than*

The present dispute is a dispute between a worker, the Disputant, and an employer, that is, Respondent. The dispute relates wholly or mainly to the promotion of Disputant as per the terms of reference where the dispute is whether Disputant should have been promoted to the post of Transmission Officer at the same time as Co-Respondent who was himself promoted to the said post on 1 April 2019. The present dispute is clearly a labour dispute. The dispute has been referred to the Tribunal under section 69(9)(b) of the Act which reads as follows:

69 (9) Where no agreement is reached under subsection (8), the Commission shall declare that a deadlock has been reached and the Commission shall –

- (a) not later than 7 days after the date of the deadlock submit a report to that effect to the parties; and*
- (b) unless the parties jointly refer the dispute for voluntary arbitration under section 63, refer the labour dispute to the Tribunal at the request of the party reporting the dispute.*

Section 70(1) of the Act provides as follows:

70(1) Where a labour dispute is referred to the Tribunal under section 63 or 69(9), the Tribunal shall enquire into the dispute and make an award thereon within 90 days of the referral.

Thus, where a labour dispute is referred to the Tribunal under the relevant sections of the Act, the Tribunal shall enquire into the dispute and make an award thereon. The Tribunal shall not enquire into a labour dispute where the dispute is specifically excluded from the jurisdiction of the Tribunal, for example, under section 71 of the Act.

Section 71 of the Act indeed provides as follows:

71. Exclusion of jurisdiction of Tribunal

The Tribunal shall not enquire into any labour dispute where the dispute relates to any issue –

- (a) within the exclusive jurisdiction of the Industrial Court;*
- (b) which is the subject of pending proceedings before the Commission or any court of law.*

In the present matter, there is no suggestion that the labour dispute is a dispute covered by section 71 of the Act or that the dispute is specifically excluded from the jurisdiction of the Tribunal under another piece of legislation. The Tribunal thus has to enquire into the present dispute subject to specific powers granted to the Tribunal under section 6 of the Second Schedule to the Act, in relation to the practice and procedure to be adopted by the Tribunal. Under section 6(2)(b) of the Second Schedule to the Act, the Tribunal may, for example, in relation to any dispute before it remit the matter, subject to such conditions as it may determine, to the parties for further consideration by them with a view to settling or limiting the several issues in dispute.

Counsel for Co-Respondent relied on the case of **Mr L.Wilson (see above)**. The present matter can be clearly distinguished from the said case where the powers of the Local Government Service Commission (LGSC) and more particularly sections 4(1) and 4(2) of the LGSC Act were in issue and which is clearly not the case here. Also, the case of **Cesar and C.W.A, RN 785** referred to by Counsel for Co-Respondent relates to a case which had been heard on its merits and there were testimonies of parties and eventually an award was delivered. Irrespective of principles mentioned in the award in the case of **Cesar (see above)**, the Tribunal has to enquire into the present matter first and provide the opportunity to parties to be heard before making any award. Counsel for Co-Respondent has suggested that there is no averment that the Respondent made an abuse of power or that the Tribunal should intervene to prevent an injustice. The Tribunal may, for instance, refer to paragraph 13 of the Statement of Case of the Disputant where it is averred that “...*the respondent has unreasonably, discriminately, unfairly and in complete disregard to the rules of natural justice withheld the promotion of the disputant to the post of Transmission officer.*”

The preliminary objection as worded is at best premature and it is only after the Tribunal has enquired into the present dispute, which is within its jurisdiction, and heard all the evidence that it can obviously decide on which award it can make.

For all the reasons given above, the preliminary objection as taken is at best premature and is set aside. The Tribunal will proceed with the hearing of the matter on its merits.

SD Indiren Sivaramen

SD Raffick Hossenbaccus

Acting President

Member

SD Karen K. Veerapen

Member

2 August 2021

SD Ghianeswar Gokhool

Member