## **EMPLOYMENT RELATIONS TRIBUNAL**

## AWARD

#### ERT/ RN 157/20

#### Before

Indiren Sivaramen	Acting President
Vijay Kumar Mohit	Member
Karen K. Veerapen	Member
Ghianeswar Gokhool	Member

In the matter of:-

Mr Emmanuel Jauffray Vaillant (Disputant)

And

Cargo Handling Corporation Ltd (Respondent)

i.p.o: (1) Mr Mamode Salim Malleck Hossen (Co-Respondent No 1)

(2) Mr Terasen Mardaymootoo (Co-Respondent No 2)

# (3) Port-Louis Maritime Employees Association (Co-Respondent No 3)

The above case has been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 70(4) of the Employment Relations Act, as amended (hereinafter referred to as "the Act"). The Co-Respondents have been joined as parties by the Tribunal following the Statement of Case filed on behalf of the Disputant and there being no objection on the part of the Respondent for the Co-Respondents to be joined as parties. The parties were assisted by Counsel except for Co-Respondents No 1 and 2 who were not assisted by Counsel. The terms of reference of the points in dispute read as follows:

1. "Whether the promotion exercise from post of Senior Supervisor Operation to the post of Assistant Terminal Superintendent based on the seniority list of 2017 instead of that of 2013, conducted by the Cargo Handling Corporation in 2017,

which the Disputant was not favoured through, was fair, just, reasonable and non-arbitrary."

2. "If the assessment in the (1) above is in the negative, whether the Tribunal should direct the CHCL to reconsider the promotion exercise to allow the Disputant to be promoted to the post of Assistant Terminal Superintendent based on the seniority list of 2013 with effect from Dec 2017 or otherwise."

Mr Moussa, a representative of the Maritime Transport and Ports Employees Union, made a declaration on behalf of the Disputant who was also a member of that union. He confirmed the contents of the Statement of Case filed on behalf of the Disputant. He stated that the term "physically in post" was first introduced in the collective agreement which the Co-Respondent No 3 entered into with the Respondent in October 2016 and which agreement applied with retrospective effect as from 1 January 2016. He explained that the term "physically in post" referred to the case where someone had no written document or was not appointed in a given post but was merely sent to work in the said post. He suggested that in fact such a person has no right to claim a promotion to the said post. He suggested that there was no record that the worker had been sent to work in a higher office, that there was no assignment letter and no document in relation to any allowance for allegedly working in a higher office.

Mr Moussa suggested that in the bargaining unit concerned with the present case there are five trade unions even though Co-Respondent No 3 has sole recognition. He agreed that a worker can no longer be a member of two or more trade unions. He averred that the new seniority list of 2017 has created "*un désordre indescriptible*". He stated that the seniority list of 2013 should prevail and that the Disputant should have been appointed and not the Co-Respondents (1 and 2).

In cross-examination, Mr Moussa did not agree that from Annex 5 to the Statement of Case of Disputant, one could trace the dates at which the relevant employees had been physically posted in the different posts. He maintained that one could not trace the dates mentioned in the column - physically in post. He however agreed that the criterion of 'physically in post' was in a collective agreement entered into by the Respondent and Co-Respondent no 3 which had sole recognition. He agreed that the criterion 'physically in post' was used when someone occupied a higher post continuously without any interruption. He conceded that 'physically in post' was different from actingship but he added that this did not make 'physically in post' a proper criterion. In re-examination, he stated that the promotion was a grade to grade promotion and that only seniority was used as criterion for promotion.

Mr H Dahari, HR Manager at the Respondent then deponed and he agreed with and confirmed the contents of the Statement of Case of the Respondent. He stated that

despite guidelines as to how to determine seniority position, there were many complaints from employees to the effect that some employees who had been 'assigned in a post' and not yet appointed in the said post were being relegated down the seniority lists. He stated that during negotiations in 2016 with the trade union having sole negotiating rights, the union requested the Respondent to consider the element of 'physical posting'. He stated that by 'assigned in a post' he meant people who have been called upon without any appointment or assignment letters to perform in a higher position following a need, and they have been assigned continuously, without any interruption, the higher posts until their appointments in those posts. He added that the element of physical posting caters for experience in a particular post.

Mr Dahari averred that when an agreement was reached with the Co-Respondent No 3, there was a general assembly of the workers where the agreement had to be approved by "l'ensemble des employés" whilst the Respondent had to consult its board of directors. He stated that the issue of impugned seniority lists concerns about five posts and that some 200 to 300 employees are concerned. As per the statements of case of Respondent and Co-Respondent No 3, the new criterion of "physical posting" was to correct an anomaly which existed within five posts which include the posts of Equipment Operator, Senior Equipment Operator, Lasher, Senior Supervisor and Terminal Officer. He explained that there is a logistics department which caters for the enlistment and recruitment of workers and their posting every day. He stated that even though there are no official letters asking the workers to perform higher tasks, the logistic department supplied the dates for the purposes of "physical posting". He stated that there was no complaint from Disputant following the new collective agreement and no request for his conditions of work to be governed by the previous collective agreement instead of the new one.

In cross-examination, Mr Dahari agreed that the general principle at the Respondent was that when people are assigned duties in a higher post, they do not have a claim to that post. He agreed that the Disputant was appointed officially in the immediately previous post (Senior Supervisor Operations) before the promotional post, first, before Co-Respondents 1 and 2. He did not have with him any official memo from the logistic department to prove the physical posting of the relevant parties. He agreed that following the agreement reached between Respondent and Co-Respondent No 3, people from lower ranks (as per the 2013 Seniority List), that is, who were ranked below the Disputant in terms of seniority have migrated to upper ranks ahead of Disputant based on 'physical posting'. In re-examination, Mr Dahari stated that the criterion used for promotion in the present case is still seniority but that an additional criterion has been added to determine this seniority which is 'first in post'.

The representative of Co-Respondent No 3 then deponed before the Tribunal and he solemnly affirmed as to the correctness of the contents of the Statement of Case filed

on behalf of Co-Respondent No 3. In cross-examination, he suggested that Co-Respondent No 3 invited all workers when it called for a special assembly to approve the collective agreement. He agreed that the principle for years had been for those who are senior in a post to be promoted to a promotional post in a grade to grade promotion. He agreed that there were many workers like Disputant who were frustrated because they had been relegated in the seniority list of 2017. To a question from Counsel for Respondent, he confirmed that before the collective agreement of 2016 was signed, all employees were agreeable to same.

Co-Respondent no 1 also deponed before the Tribunal and he stated that everything he stated in his Statement of Case was true. He stated that he occupied a post at the Respondent in 1999 whereas Disputant would have joined the Respondent only in 2001. In cross-examination, he agreed that in the (lower) posts he occupied before the promotional post he now occupies, it was the Disputant who was officially appointed before him by the Respondent. However, he added that they had a case before the Commission for Conciliation and Mediation in relation to same. He could not remember if he made an error at paragraph 5 of his Statement of Case. He then stated that in November 2007, he was 'physically posted' as SSO (Senior Supervisor Operation) whereas the Disputant was occupying the post of "Assistant STO" which was then two grades below that of Senior Supervisor Operation.

The Tribunal has examined carefully all the evidence on record including all the statements of case filed and the submissions of Counsel. The preliminary objection taken to the effect that the Disputant should have first proceeded by way of a variation of the terms of the collective agreement cannot stand. Indeed, the Disputant cannot apply for a variation of a collective agreement under section 58 of the Act (as amended by Act No. 21 of 2019) since he is not a party to the collective agreement though the collective agreement, by its very nature, provides rights and obligations for the collectivity of workers in the bargaining unit covered by the agreement. Thus, as per section 56 of the Act, a collective agreement shall bind (a) the parties to the agreement; and (b) all the workers in the bargaining unit to which the agreement applies. The preliminary objection on this issue thus cannot stand and is set aside.

The Tribunal will next consider the objection raised (though Counsel for Respondent made a statement that he will not pursue the preliminary objection under this limb) as to whether the relief sought is, in the absence of an application for variation of the terms of the collective agreement, a disguised declaration which ought not to be considered by the Tribunal. This aspect may be considered together with the objection taken under paragraph 2 of the preliminary objections which reads as follows:

2. "The terms of reference upon which the present dispute has been referred to the Employment Relations Tribunal is seeking a declaration from the Tribunal, which it cannot accede to."

The Tribunal has not been impressed with the objection taken that the relief sought is a disguised declaration or that a declaration is being sought from the Tribunal. Indeed, in the present case there are two points in dispute and the second point in dispute is intrinsically linked with the first point in dispute. The second point in dispute completes and supplements the first point in dispute. The second point in dispute at the same time seeks an award in the nature of a remedy. The present matter and the terms of reference here can easily be distinguished from the case of **Mr Jean Eric Soonil Ramdhun And Cargo Handling Corporation Ltd i.p.o Port Louis Maritime Employees Association & others, ERT/RN 112/18**, where the terms of reference read simply as follows: "Whether I was unfairly and wrongly treated when I was not selected as trainer for RTG Trainees or otherwise" with no other terms of reference of the two points in dispute before us and in the light of the duty of the Tribunal to enquire into a labour dispute and to make an award thereon (under section 70(1) of the Act), the Tribunal finds that the objection taken under this limb too cannot stand.

Preliminary objections have also been taken as follows:

- 1. "The Respondent moves that the present industrial dispute be set aside inasmuch as:-
- (i) the Respondent has reached an agreement with PLMEA (the union having the sole negotiating rights) as regards the guidelines and policies to determine the seniority position;
- (ii) the Applicant is bound by the agreement reached between PLMEA and the Respondent as regards the guidelines and policies to determine the seniority list;"

As far as the preliminary objections taken under paragraphs 1(i) and (ii) (above) of the Statement of Case of Respondent are concerned, the Tribunal finds that these relate mainly to the merits of the case and cannot be taken as preliminary issues. In the light of the stand of Counsel for Respondent in relation to the preliminary objections and the observation made above, the Tribunal will be dealing with issues raised by these objections when dealing with the merits of the case.

The main issue raised in the present matter is exactly the same issue which was raised in the case of **Mr Jean Eric Soonil Ramdhun (above)** which case has been referred to us by Counsel for Disputant who produced a copy of the award delivered in that case. The case of **Mr Jean Eric Soonil Ramdhun (above)** however dealt with other grades and not the grades of Senior Supervisor Operation and Assistant Terminal Superintendent. The "crux of the matter" as stated in the case of Mr Jean Eric Soonil Ramdhun (above) was "whether the Respondent is entitled to bring changes to an existing seniority list emanating from Respondent himself following a new collective agreement entered into with the trade union having exclusive negotiating rights at the Respondent." There is no dispute at all in the present case in relation to the existence and publication of the 2013 seniority list but the main averments of the Respondent are that the 2013 seniority list "has been reworked with a view not to prolong and perpetuate a prior discriminatory practice and anomaly which is that of not reckoning the seniority of those workers who were assigned the duties of that post on a continuous basis and "physically in post" well before those who have been duly appointed to the post with a proper appointment letter" (paragraph 7(xi) of the Statement of Case of Respondent). The reworking of the seniority list of 2013 to correct an undue and unfair practice was allegedly a concerted decision reached with Co-Respondent No 3, and the new seniority list of 2017 was thus in line with the collective agreement entered into between Co-Respondent No 3, having sole negotiating rights in this case and the Respondent (paragraphs 7(xii), (xiii) of the Statement of Case of Respondent).

In the case of **Mr Jean Eric Soonil Ramdhun (above)**, the Tribunal stated the following:

"The crux of the matter before us is whether the Respondent is entitled to bring changes to an existing seniority list emanating from Respondent himself following a new collective agreement entered into with the trade union having exclusive negotiating rights at the Respondent.

It is apposite to note, firstly, that in the present case, the two lists that we have, that is, Doc J (seniority list for RTG Operators (MCT) dated 1 August 2013) and Doc M (seniority list for Head of RTG dated 31 March 2017) do not pertain to the same posts. There is no evidence that the grade of RTG Operator (MCT) has been restyled as Head of RTG. In fact, as per Doc O and the evidence adduced before us, it is the grade of Trainer/ Foreman RTG which has been restyled as Head of RTG. The Tribunal will not venture to say more on Docs J and M.

However, on the issue of the posted "seniority list", the Tribunal is of the view that once an employer has posted or formally issued a "seniority list" to which relevant employees and/or the trade union have had access, it cannot, generally, after a substantial period of time, bring changes to that same list, in the sense of changing the relative seniority of the employees. The seniority list becomes the **status quo** between the parties for competitive status purposes (**vide "Seniority rights under the Collective Agreement" by R.I. Abrams and D.R. Nolan in The Labor Lawyer, Vol. 2, No. 1 at pp 99-144**). The authors cited above go on at page 115 (above) by stating the following: "Stability and certainty in making competitive employment decisions based on seniority, such as layoffs and promotions, require that an erroneous list be considered "frozen" after a period of time." The rules used for reckoning seniority may certainly be varied through collective bargaining (seniority will depend on the collective agreement) but a new collective agreement cannot, generally, affect a "posted seniority list" which has been there for a substantial period of time.

Reference has been made to the above article as guidance, and we may also refer to **rule 8(3)** of **The Punjab Civil Servants (Appointment and Conditions of Service) Rules** as guidance (though this applies for civil servants in the relevant jurisdiction). It reads as follows:

8(3) Notwithstanding the provisions of this rule, the seniority lists already prepared in accordance with the rules applicable immediately before the commencement of these rules shall be construed as seniority lists for the respective new grades in respect of persons already in service and amendments therein shall continue to be made in accordance with those rules to settle inter se seniority disputes among them.

The union and management may, no doubt, bargain for changes in seniority rules but unless the intention is clearly laid down in the agreement that the rules are to be given retrospective effect (vide Supreme Court of India judgment in the case of P. Mohan Reddy v E.A.A Charles (2001) 4SCC 433) and there are compelling reasons for the new rules such as a prior discriminatory practice, new seniority rules cannot be given retrospective effect."

The Tribunal will be guided by the above and by the case of **State Bank of Mauritius Limited v A. Jagessur 2008 SCJ 8**. In that case, the Supreme Court quoting from Dr D. Fokkan stated the following:

In his work, Introduction to Mauritius Labour Law, 2/The Law of Industrial Relations, Dr David Fokkan examines the issue of enforceability of collective agreements in Mauritius. After considering French and English decisions on the point he opines that it would be safe to conclude that the issue of whether collective agreements are legally enforceable or not is to be decided on the basis of the intention of the parties. Adopting this common sense approach he anticipates that a Mauritian Court would probably arrive at the conclusion that the intention of the parties is to make the collective agreement binding. The learned author, we have to say, anticipated correctly. We take the view that any collective agreement which does not go against the spirit of the law must be adhered to by the parties. (underlining is ours) The right of the Respondent and Co-Respondent No 3 to enter into the collective agreement and to change seniority rules cannot be challenged. However, the Tribunal bears in mind the terms of the agreement reached between Respondent and Co-Respondent No 3 (Doc A) and more particularly paragraphs 10 and 15 which read as follows:

10. The clauses contained in the Collective Agreement amend the existing terms and conditions of service of <u>all the workers in the bargaining unit to which the Collective</u> Agreement applies in so far as the relevant provisions of the Collective Agreement is [sic] <u>more favorable to the workers in the bargaining unit</u> to which the Collective Agreement applies as compared to any previous agreements. (underlining is ours)

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15. The Collective Agreement and any provisions thereof shall be deemed to take effect as from 01 January 2016.

From the proceedings, we understand that Doc B including section 2.7 in that document which bears the heading "Seniority List" forms part of the actual collective agreement reached between the parties (referred to as an addendum (Annex A) to Doc A). Section 2.7 of the collective agreement reads as follows:

# "2.7 Seniority List

Based on physically working for filling of post in line with manning agreement 2014. However, in future, promotion shall not be done only on the basis of seniority list but shall be subject on Performance Appraisal."

The Tribunal has not been enlightened as to the "manning agreement 2014". In the absence of this document, there is nothing in the collective agreement (the relevant part produced) to suggest that the parties (to the agreement) intended the 'new' criterion to determine seniority, that is, "physically working", or "physical posting" as referred to by the parties before us, to apply retrospectively and affect seniority rankings in already published seniority lists. Obviously, if this was the case, this would sit uncomfortably with paragraph 10 (above) of the preamble to the collective agreement. Thus, not only is there no explicit mention of any retrospective application to be given to section 2.7 of the agreement, paragraph 10 of the agreement (Doc A) reached between the Respondent and Co-Respondent No 3 would seem to indicate that there was no such intention since if this was the case, at least some of the workers <u>in the very same bargaining unit</u> (underlining is ours), would necessarily have been worse off being relegated to less favourable seniority rankings as compared to prior posted seniority lists. As per section 2.7 of the collective agreement, the "seniority list" determines promotion and even though "Performance Appraisal" is also mentioned as an additional

consideration in future, all parties before us proceeded on the basis that seniority was still the criterion used for promotion in the present case. The averment made at paragraph 7 of the Statement of Case of Co-Respondent No 3 to the effect that it was agreed by all employees that the new guidelines would bind all employees, if true at all, must thus be taken in its proper context.

On the other hand, the Tribunal understands the collective agreement to be amending the then existing terms and conditions of all the workers in the bargaining unit in so far as the relevant provisions of the collective agreement are more favourable to the workers in the bargaining unit. Also, even after having considered all the evidence on record, the Tribunal is not satisfied from the extracts of the collective agreement produced that the new criterion of "physically working" was meant to be given retrospective effect, that is, to be applied even prior to the date the collective agreement was deemed to take effect as per the agreement of the parties to the collective Indeed, there is no indication that the new criterion was to apply agreement. retrospectively to change the relative seniority of Disputant and Co-Respondents 1 and 2 as it already existed as per the seniority list of 2013. The Tribunal is not saying that a seniority list is something fixed or rigid but instead acknowledges that the list will change continuously over time. However, a posted seniority list should not be affected by a new criterion which comes only later unless there is a clear intention and compelling reasons for such a novel criterion to affect established relative seniority positions.

In any event, even if the parties to the agreement had intended to vary published seniority lists established at least as far back as 2013 (Annexure 4 to the Statement of Case of Disputant) based on the new criterion adopted in 2016, the collective agreement, to be legally enforceable, could not go against the spirit of the law (vide State Bank of Mauritius Limited v A.Jagessur (above)). A worker has an interest or more precisely a legitimate interest in 'seniority' in a case like the present one where seniority lists are posted and where promotion is in fact based on the seniority list. The Respondent and Co-Respondents have made averments to justify the "reworking" of the 2013 seniority list by the Respondent. Whilst the Tribunal has no issue with the new criterion to determine seniority and the rights of the relevant parties to decide on such criterion, subject obviously to availability of proper and reliable records, transparency and fairness, there is unfortunately no basis as per the collective agreement itself for the new criterion to apply retrospectively and to affect retrospectively established seniority lists which have been there for a substantial period of time, the more so, in the light of provisions in the same collective agreement including paragraphs 10 and 15 of Doc A.

Thus, the Tribunal finds that there is no indication at all in the collective agreement (at least the part thereof which has been produced) that the parties were bringing changes to seniority rankings as they existed prior to 1 January 2016 as per the posted seniority

list of 2013. The Respondent could and should certainly use latest updated seniority lists but the *inter partes* seniority ranking prior to 1 January 2016 could not be changed based on a new criterion which did not exist prior to 1 January 2016, unless there was a clear indication in the collective agreement which showed otherwise.

Averments have been made on behalf of both the Respondent and Co-Respondent No 3 (and also in line with averments in the Statement of Case of Co-Respondents No 1 and 2) that the new criterion was adopted to correct an anomaly and a discriminatory practice which existed within certain posts (though the new criterion would be applicable to all posts) where certain employees were performing duties as fully-fledged employees and were discriminated as their 'seniority' was simply not recognized. Different treatment does not necessarily lead to discrimination. For there to be discrimination, there must be different treatment to an aggrieved person attributable wholly or mainly to the status of that person such as his age, caste, colour, creed, ethnic origin, impairment, marital status, place of origin, political opinion, race, sex, sexual orientation or other status as may be provided by law whereas another person of a different status would not have been treated similarly.

In **Police v. Rose [1976 MR 79]**, the Supreme Court stated the following: "To differentiate is not necessarily to discriminate. As Lysias pointed out more than 2,000 years ago, true justice does not give the same to all, but to each his due: it consists not only in treating like things as like, but unlike things as unlike. Equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently."

In the present case, there is no evidence that the Disputant was indeed treated in a discriminatory manner which would warrant retrospective application of the new criterion and the reworking of a seniority list which was there for a considerable length of time. The averments in the Statement of Case of Respondent are telling on this issue and we simply propose to quote paragraphs 7(xiv) and (xvii):

7(xiv) The "physically in post" is neither out of the ordinary nor arbitrary. The Respondent avers that such criterion is objective in nature and is meant to consider the fitness and experience of the employee in his current post. In short, the new criterion takes into account the fact that an employee who has been requested to assume responsibilities that are different (or in a different grade) that [sic] his substantive responsibilities may be more suited to assume these responsibilities on a permanent basis once a vacancy arises.

7(xvii) It is fair and in the interest of good and harmonious industrial relations that those considered allegedly as "juniors" to the Disputant be entitled to have their seniority reckoned from the date of their physical posting to the post, no matter whether they have an appointment letter or not, to integrate the said post.

As regards the first point in dispute, the Tribunal observes that the parties were all bent on adducing evidence in relation to the seniority lists of 2013 and 2017 that no satisfactory evidence was adduced in relation to the promotion exercise allegedly conducted in 2017 at the Respondent. The Disputant does not aver at all in his Statement of Case that the Co-Respondents Nos 1 and 2 have been promoted, let alone as Assistant Terminal Superintendent. He only averred that the said post was not advertised and no interview was held. Respondent denied same and averred that there was a promotional exercise at the Respondent to fill vacant posts/s of Assistant Terminal Superintendent as per seniority list of 2017. Finally, the Co-Respondents Nos 1 and 2 averred that they have been duly and correctly promoted. There is no evidence as to how and when this promotion exercise was actually conducted or as to the number of employees who were actually promoted Assistant Terminal Superintendent following the alleged promotion exercise in 2017. To add confusion, Co-Respondent No 1 deponed to the effect that for the post he was promoted, there was a case before the Commission for Conciliation and Mediation.

In the light of the evidence on record, the Tribunal cannot make any award in relation to the promotion exercise conducted in 2017 and even less refer to its fairness, reasonableness or otherwise. For the reasons given above, the Tribunal is only satisfied that upon an interpretation of the collective agreement entered into in October 2016, there was no indication that the new criterion was to apply retrospectively to affect the previously posted seniority list of 2013 and thus change the relative seniority between Disputant and Co-Respondents Nos 1 and 2. For the reasons mentioned above, the first point in dispute is thus set aside.

As regards the second point in dispute which is closely linked with the first one, the Tribunal cannot award that the Respondent should reconsider the promotion exercise to allow the Disputant to be promoted to the post of Assistant Terminal Superintendent with effect from December 2017 or otherwise. The Tribunal wishes to add that even if there was sufficient evidence under the first dispute and the Tribunal had made a negative assessment as to the fairness of the promotion exercise, this would not necessarily have led to an award that the promotion exercise had to be reconsidered to allow the Disputant to be promoted to the post of Assistant Terminal Superintendent. Indeed, the Tribunal may in giving an award have regard to principles listed in section 97 of the Act. These include the principles and best practices of good employment relations. The Tribunal will not deliver an award whereby by curing an anomaly or dealing with a 'wrong' decision, it is likely to create more anomalies or create new issues or disputes for a larger proportion or section of the workforce. The Tribunal bears in mind the unchallenged evidence on record in relation to the various posts (Equipment Operator, Senior Equipment Operator, Lasher, Senior Supervisor and Terminal Officer) concerned with such an issue at the Respondent and that some 200 to

300 employees in those grades may be affected in one way or the other by an award of the Tribunal. The Tribunal has to see to it that conflicts are resolved and shall endeavour, as far as possible, to avoid any escalation of conflicts.

In the light of our observations under the first point in dispute the ball is in the court of the Respondent to see how best it can address the frustration of the Disputant following the 'reworking' of the seniority list of 2013. The Respondent cannot afford to have employees looking in different directions. The Respondent and its workforce can only work together to enable the Respondent to deliver on its mandate for the benefit of everyone and the country as a whole. The participation of the relevant trade unions will also be very important to find practical and long term solutions so that any conflicting interests may eventually be reconciled and this issue be at long last a matter of the past.

For the reasons given above, the second point in dispute is also set aside.

# SD Indiren Sivaramen

**Acting President** 

SD Vijay Kumar Mohit

Member

SD Karen K. Veerapen

Member

SD Ghianeswar Gokhool

Member

25 January 2021