

EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 96/2020

RULING

Before: -

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| Shameer Janhangeer | - | Vice-President |
| Francis Supparayen | - | Member |
| Karen K. Veerapen (Mrs) | - | Member |
| Kevin C. Lukeeram | - | Member |

In the matter of: -

Dr Sanjiv Kumar BABOOA

Disputant

and

Ministry of Blue Economy, Marine Resources, Fisheries and Shipping

Respondent

The present matter has been referred to the Tribunal for arbitration in terms of *section 69 (9)(b)* of the *Employment Relations Act* (the “Act”) by the Commission for Conciliation and Mediation (“CCM”). The Terms of Reference of the dispute read as follows:

Whether I should be reinstated as Head, Mauritius Maritime Training Academy given that my termination has been effected by reason of discrimination on the ground of casteism.

The Disputant was assisted by his Industrial Relations Consultant Mr D. Hurnam. Whereas the Respondent was assisted by Miss A.M.O. Ombrasine, Principal State Counsel instructed by Ms S. Angad, Principal State Attorney. The Respondent has raised a preliminary ground of objection in law as follows:

The present application is not a 'labour dispute' within the definition under the Employment Relations Act so that the Tribunal cannot validly proceed to enquire into same.

THE EVIDENCE OF WITNESSES

Mr Zaffrullah Bhugeloo, Manager Human Resources, was called to depone for the purpose of the preliminary objection. He has been deputed by the Respondent Ministry and confirmed that the post of Head, MMTA (i.e. Mauritius Maritime Training Academy) is established as per the *Civil Establishment Order* of 2016. The Scheme of Service of the post is under preparation at the level of the Ministry of Blue Economy. The Ministry sought and obtained delegation of powers for the recruitment of the Head, MMTA from the Public Service Commission ("PSC"). This delegation of powers was obtained prior to Dr Babooa filing the post on a contractual basis. Approval was sought in February 2016 and obtained in April 2016. They obtained the delegation of powers for appointment from the PSC and this was given to the Permanent Secretary of the Ministry.

Mr Bhugeloo, upon questions by the Disputant's Industrial Relations Consultant, notably stated that he cannot recall if the point that the labour dispute declared by Dr Babooa was not proper as the Ministry had delegated powers from the PSC was raised before the CCM. The request for delegated powers made in February 2016 was in writing from the Ministry. He cannot produce this letter as it is a classified confidential document, it is a correspondence with the PSC. The document is in a confidential file. It is not in the Disputant's personal file. He agreed to Recommendation 22, Paragraph 35.84 of the Pay Research Bureau Report 2016. The MMTA forms part of the Ministry. When created, the post appeared under the section '*Head, MMTA*' and it appears in the *Civil Establishment Order* under the section '*MMTA*'.

Mr Bhugeloo also stated that he joined the Ministry in January 2020. He was not at the Ministry when a letter was sent to the PSC seeking permission for delegated powers to recruit Dr Babooa. He obtained the information which he gave to the Tribunal from the Ministry. He was referred to an affidavit sworn by Mr Labonne, Deputy Permanent Secretary ("DPS") at the Ministry in 2016, and confirmed that there was no mention made therein that the appointment was by delegated powers from the PSC. He has put up an affidavit dated 16 October 2020 in a contempt of court case pending before the Supreme Court. He raised, for the first time, the issue

of delegated powers therein. As he is no longer at the Ministry, he cannot confirm if a letter was sent to the PSC requesting for delegated powers to recruit the Disputant on contract and he does not have access to the records. Before, in March this year, he did say that he did see the file. The file is a red one, written confidential. It is classified confidential.

Mrs Subhadra Kumari Panchoo, Manager Human Resources at the PSC, was called on behalf of the Respondent. On being asked that she was summoned to depone as to whether Dr Babooa was appointed by way of delegated powers to the post of Head, MMTA, she stated that she was deputed by the PSC to provide a document for the eyes of the Tribunal only. She stated that she was instructed not to depone but to produce the document. The Tribunal, however did not accept that the document be produced for its eyes only and same was not produced. Upon questions from the Disputant's Industrial Relations Consultant, she notably stated that she is not aware if the PSC issues a full report of all recruitments after a recruitment exercise is performed for a particular year.

The Disputant, Dr Sanjiv Kumar Babooa, also adduced evidence. He stated that the Ministry of Ocean Economy, Marine Resources, Fisheries and Outer Islands issued an advertisement for the post of Head, MMTA in April 2016, to which he applied. He was convened for an interview on 20 July 2016 by the Ministry. The selection panel was chaired by Mr Jean Daniel Labonne, Deputy Permanent Secretary; there was also Mrs Romeela Mohee, Vice-Chancellor at the University of Mauritius, Mr Prayag Hemant Singh, Chairman of the Mauritius Oceanography Institute and Mrs Juliette Mohit, Assistant Human Resources Manager. He was selected and issued a letter of appointment. He started on 1 September 2016.

Dr Babooa further stated that he was not recruited by delegated powers of the PSC. He undertook research and checked the reports of the PSC. Referring to the Annual Report 2016/2017, he extracted those appointments under delegated powers and referred to paragraph 2.8, paragraph 2.10.2 at page 114 and paragraph 2.10.4 thereof. Under delegated powers, three appointments were made to the posts of Trainer in Navigation Studies, Trainer in Seamanship and Lecturer in Nautical Studies.

Dr Babooa also referred to the 2015 Report, where there was one post under delegation powers from the PSC, at paragraph 5.9.1, by the Ministry of Ocean Economy and Marine Resources – that of Motorman/Engine Driver. He has also gone through the PSC Annual Reports of 2017/2018 and 2018/2019. Referring to the financial years 2017/2018 and 2018/2019, there

is only one recruitment under delegated powers by the Ministry, which is for the post of Lecturer in Nautical Studies at page 46. There is no mention of his post as Head of MMTA under delegated powers as per the reports of the PSC. He identified the extracts of the Annual Reports of the PSC of 2015, 2016/2017, 2017/2018 and 2018/2019 as being his searches and produced same (Document B).

Dr Babooa was questioned by Counsel for the Respondent. He notably stated that he could not recall if reference to the PSC was made in the advertisement for the post of Head, MMTA or in the application form for the aforesaid post. He never applied to the PSC. There was no person from the PSC on the interview panel, which was conducted at the Ministry and not at the PSC. He identified his letter of offer dated 26 August 2016 (Annex D.A to this Statement of Case) and stated that the PSC is not mentioned therein. The offer was to be employed at the level of the Ministry. The post was created by Cabinet and also by the Civil Service Establishment Order. He also confirmed that the PSC is not mentioned in the letter of termination (Annex D.E to his Statement of Case), which is signed by Mr Bhugeloo for the Permanent Secretary. He also confirmed the termination clause to be found in the contract of employment (Annex D.A *supra*).

Dr Babooa further produced a certified copy of the vacancy for the post of Head, MMTA dated 29 April 2016 (Document C); the letter dated 15 July 2016 convening him to an interview for the aforesaid post (Document D); and the application form for same signed by himself and dated 16 May 2016 (Document E). He did not agree that he was appointed by way of delegated powers from the PSC to the Ministry as he has already produced evidence from the PSC regarding the appointment.

SUBMISSIONS OF THE PARTIES

Principal State Counsel appearing for the Respondent notably submitted that Mr Bhugeloo deponed in a frank and clear manner to the effect that the Disputant's appointment was by way of delegated powers of the PSC and maintained his position in cross-examination. She invited the Tribunal to look at the evidence of the PSC as adding nothing new except that it was in possession of some sort of document and to infer nothing from the representative's deposition. Dr Babooa's evidence confirms that the PSC is absent from the documents he identified. The post was created at the level of the Ministry. As per the *Constitution*, the PSC has the responsibility to appoint public officers. It is clear that the offer of employment and

employment of Dr Babooa could only have been made by way of delegated powers, there is no other alternative. The definition of a labour dispute under the *Act* is clear.

The Disputant's Industrial Relations Consultant, on the other hand, notably referred to the Tribunal's previous ruling dated 19 January 2021 in this matter, whereby the Tribunal commented on the Disputant's contract of employment. It is clear that the Tribunal has already ruled on whether the labour dispute is within its jurisdiction. It is therefore akin to an appeal of the decision of the Tribunal. There is no indication as to whether the Ag. Permanent Secretary was directed to make the offer of employment to the aforesaid post by the PSC. Mr Bhugeloo was confronted with his affidavit evidence in cross-examination.

It was moreover submitted that the PSC can delegate powers and this must be examined in a specific manner. Mr Hurnam referred to *section 89 (2)* of the *Constitution* submitting that the directions must be in writing; but where is this document? The best evidence would have been for the public officer to whom the power was delegated to come and depone, but this is not the case. Mr Bhugeloo was not there at that point in time. The existence of the letter, which has not been seen, is not sufficient. Nowhere does the appointment of Dr Babooa figure in the Annual Reports produced for the years 2015 to 2017. This has remained unchallenged. There is sufficient evidence to confirm that there were no delegated powers by the PSC in the Disputant's appointment and the dispute is in accordance with the *Act*.

It was further submitted by Mr Hurnam that the only person who could have enlightened the Tribunal in relation to the preliminary objection raised was DPS Labonne, who was not called. Mr Bhugeloo was called instead. DPS Labonne had chaired the interview panel. Moreover, such an important aspect of the dispute was never raised before the CCM nor before the Judge in Chambers in the Disputant's application for injunctive relief. Reference was made to the affidavit at Annex D.D of the Disputant's Statement of Case, where DPS Labonne never averred that the appointment was by way of delegated powers from the PSC.

THE TRIBUNAL'S RULING

The dispute referred to the Tribunal in the present matter relates to the reinstatement of the Disputant as Head, MMTA. The preliminary objection that has been raised is to the effect that the dispute does not fall within the definition of a '*labour dispute*' under the *Act*.

A labour dispute has been defined under *section 2* of the *Act*. The relevant aspect of this definition with regard to the present dispute can be noted 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 a worker who is appointed by, or under delegated powers by, the Judicial and Legal Service Commission, the Public Service Commission or the Local Government Service Commission –*
 - (A) where the worker is suspended from employment, except where the alleged misconduct of the worker is subject to criminal proceedings; or*
 - (B) where the employment of the worker is terminated on the grounds specified in section 64(1A);*

As may be noted from the aforesaid definition, a labour dispute relating to reinstatement of a worker does not include a worker appointed by, or under delegated powers by, the PSC where *inter alia* the employment of the worker was terminated on grounds specified in *section 64 (1A)* of the *Act*. The Disputant is, as per the Terms of Reference of the dispute, alleging that his termination was effected by reason of discrimination on grounds of casteism. This ground falls squarely under the ambit of *section 64 (1A) (a)* of the *Act*.

The matter for the Tribunal to determine, in assessing whether the dispute falls within the definition of a labour dispute, would be whether the Disputant was appointed by or under delegated powers by the PSC. As per the arguments offered by both parties, the matter in issue is whether the PSC delegated its powers to the Respondent Ministry to appoint Dr Babooa to the post of Head, MMTA.

It is apposite to note that the PSC is a Constitutional body established by *section 88* of the *Constitution*. Moreover, *section 89* thereof vests the PSC with the power to appoint persons to hold or act in any office in the public service and to delegate any of its powers, under this section, to any public officer. The Judicial Committee of the Privy Council in *Fakeemeeah & Anor v Essouf & Ors* [1993 PVR 43] notably stated the following in relation to *section 89*:

Section 89 of the Constitution is in their Lordships' view the overriding provision in relation to appointments to offices in the public service and should be given a broad interpretation. It is only when offices are specifically excluded, as they are in subsections (3)(a) to (h) or under section 112 that section 89 does not apply.

The following may also be noted from what was stated in the matter of *Khedun-Sewgobind v The Public Service Commission* [2010 SCJ 6(a); 2010 MR 100]:

Now, pursuant to section 89 of the Constitution, the power to appoint persons to hold or act in any offices in the public service vests in the respondent which in terms of section 118(4) is not, in the exercise of its functions, subject to the direction or control of any person or authority. Moreover, pursuant to section 118(1), the respondent has by regulations made provision for regulating and facilitating the performance of its constitutional functions.

The *Civil Establishment Act (Act No. 27 of 1954)* confers power on the President of the Republic to establish offices in the public service. It has not been disputed by the Disputant that the office of Head, MMTA was established under the *Civil Establishment Order 2016*, which was made pursuant to *section 74* of the *Constitution* and *section 3* of the *Civil Establishment Act*. The post of Head, MMTA is thus an office in the public service.

It would also be pertinent to note what was stated by the Supreme Court in *Government Teachers Union & Anor v Roman Catholic Education Authority & Ors* [1987 MR 88] in relation to the establishment of public offices in the civil service:

The source for the establishment of the public service is section 74. In establishing posts for Mauritius the Governor-General is required, in pursuance of section 64(1) to act in accordance with the advice of the Minister charged with responsibility for the public service and also in accordance with the provisions of the Civil Establishment Act under section 3 of which the Governor General is empowered to establish by Regulations, known in common parlance as Civil Establishment Orders, offices in the public service

of Mauritius and to determine the number of such offices and the emoluments that they carry. These emoluments are required under section 8 of the Act, to be charged on, and paid out of, the Consolidated Fund and we may straightaway say that these emoluments could not properly be described as grants in aid for which there would presumably be separated budgetary provisions. With regard to appointments in the public service, since the powers conferred on the Governor-General are expressly made subject to the Constitution, one must therefore look to the relevant provisions of the Constitution governing powers of appointment with regard to the public service. And these are to be found in the provisions relating to the Service Commissions and their functions (Chapter VIII of the Constitution). In the matter that immediately concerns us, the appropriate provision is section 89(1) and (2) which we have earlier reproduced.
(The underlining is ours.)

The essence of the Respondent's evidence lies upon the testimony of Mr Bhugeloo. He clearly stated that the Ministry sought and obtained delegation of powers from the PSC for the recruitment for the post of Head, MMTA. Approval was sought in February 2016 and obtained in April 2016. The delegation of powers from the PSC was given to the Permanent Secretary of the Ministry. When cross-examined, although Mr Bhugeloo stated that the request for delegated powers was made in writing in February 2016, he could not produce this letter as it is a confidential document. He has based himself on the file which is a red one, marked confidential.

At this juncture, it would be useful to note that an advertisement dated 29 April 2016 to fill the post of Head, MMTA was made, to which the Disputant applied. He was convened to an interview on 20 July 2016 at the Ministry. The selection panel was chaired by DPS Mr Labonne. He was made an offer for the post of Head, MMTA on 26 August 2016 and, upon acceptance, started on 1 September 2016.

The Disputant, on the other hand, has been adamant that he was not recruited under delegated powers from the PSC. He has notably relied on extracts from the PSC Annual Reports produced for the years 2015, 2016/17, and 2017/18 and 2018/19. As per the extracts of these Annual Reports, nowhere is the post of Head, MMTA to be found under the section of recruitment under delegated powers. The extracts of the Annual Reports he produced were his own searches.

The Tribunal has taken note that the Disputant's evidence regarding the Annual Reports produced have not been challenged when he was questioned by Counsel for the Respondent.

The Tribunal, however, has to tread carefully as to the weight to be attached to this evidence. The extracts of the PSC Annual Reports produced did not emanate directly from the PSC but from the Disputant, who obtained same through his searches. It should also be noted that an Annual Report is not a document that is legally required to be produced by the PSC on a yearly basis or otherwise. Same has not been provided for under the *Constitution* nor under the *Public Service Commission Act (Act No. 23 of 1953)* nor under the *Public Service Commission Regulations, 1961*.

Despite the fact that the extracts of the Annual Reports produced do not mention the appointment of Dr Babooa having been made under delegated powers or otherwise, the Tribunal would be reluctant to place much emphasis upon same in view of the fact that the extracts or the whole reports themselves have no legal status and that they were not produced by the PSC or its representative, who was at some point in time summoned by the Disputant to depose for the purpose of the present preliminary objection raised.

The Tribunal has also noted that the Disputant has recognised that the post of Head, MMTA was created under the *Civil Establishment Order*. His Statement of Case also mentions that the aforesaid post was created following a Cabinet Decision of 19 February 2016 and that the PRB Report of 2016 Volume 2 Part I recommended the creation of the aforesaid post as per paragraph 35.84 thereof. It does thus necessary follow that the post of Head, MMTA, being a post in the public service, any appointment made thereto could only have been effected by the PSC or under delegated powers from the PSC. As has been previously noted, the PSC is the Constitutional body which has the responsibility for appointments to hold any office in the public service.

The evidence has demonstrated that the PSC did not directly appoint Dr Babooa to the post of Head, MMTA but that he was selected following an interview at the Ministry and offered a contract of employment dated 26 August 2016 signed by Dr S.P. Boodhun, Ag. Permanent Secretary of the Ministry. However, an Ag. Permanent Secretary is not empowered to act on his own to appoint a person to an office in the public service inasmuch as the PSC is the Constitutional body responsible for same. Thus, it could only have been by way of delegated powers from the PSC, as expounded from the Respondent's evidence, that the Disputant was made an offer of employment as Head, MMTA on 26 August 2016 and subsequently appointed.

The Disputant's Industrial Relations Consultant has submitted that pursuant to the Tribunal's ruling dated 19 January 2021 in the present matter that the current preliminary

objection raised by the Respondent would be akin to an appeal against the aforesaid ruling. The Tribunal cannot agree to this proposition inasmuch as the preliminary objection raised previously by the Respondent was with regard to the Ministry not being the appropriate party to the dispute and that the matter should have been referred anew to the CCM.

Although the Tribunal may have, in its ruling dated 19 January 2021, stated that there is no indication from the contract of employment that the Ag. Permanent Secretary was directed to make the offer of employment by the PSC, this observation should be taken to be in the context of the preliminary objections raised before the Tribunal at that point in time. As per the ruling, the Tribunal proceeded to an examination of the Disputant's contract of employment in an endeavour to determine whether the Ministry was the proper party before it. The Tribunal is, however, not stating that the contract of employment dated 26 August 2016 reads otherwise.

It has also been submitted on behalf of the Disputant that no document was produced and that the existence of a letter is not sufficient. In relation to this aspect, the Respondent's witness from the Ministry, as previously noted, did plainly state that the Ministry sought and obtained delegated powers from the PSC for recruitment to the aforesaid post. He, however, did not produce any letter showing the delegation of powers made to the Permanent Secretary of the Ministry relying on confidentiality.

The Tribunal has further noted that Mr Hurnam did move, prior to the close of the case for the Respondent on the present objection raised, that the Tribunal direct that the Respondent put in the letter requesting delegated powers as confidentiality had been waived. This motion was however later waived by the Industrial Relations Consultant. The Disputant having therefore waived its motion to have the document produced as well as any other communication between the Respondent and the Ministry made thereafter, the Tribunal cannot see how the Disputant should now insist that the letter should have been produced.

Moreover, as the Disputant did summon the representative of the PSC at some point in time but choose not to call her, this evidence could also have been elicited by the Disputant himself. It may also be noted that Mr Hurnam did not question the PSC's representative on this issue, when the PSC deponed on behalf of the Respondent.

The Tribunal having also found that the appointment of Dr Babooa to an office in the public service could only have been by way of delegated powers, it is assumed, basing oneself on the presumption of regularity (expressed by the maxim *omnia praesumuntur rite esse acta*), that the PSC conferred the delegation of the power for recruitment to the post of Head, MMTA to the Permanent Secretary of the Ministry in accordance with all necessary formalities as prescribed. Although no document has been produced to show that delegated powers were granted, there has been no evidence to the effect that the powers delegated for the aforesaid appointment were made in an irregular manner nor has it been shown that the appointment tainted with irregularity.

It has also been submitted that DPS Mr Labonne was the only person who could have enlightened the Tribunal in relation to the present preliminary objection and he was not called. The Tribunal cannot comment on whether it would have been more appropriate for Mr Labonne to depose instead of Mr Bhugeloo as this is a matter for the Respondent to decide. The Respondent has, in its wisdom, chosen to rest its case on the evidence of Mr Bhugeloo and it is not for the Tribunal nor the Disputant to direct the Respondent on the conduct of its case.

The Tribunal, in light of the above, can only therefore conclude that the Disputant was appointed to the office of Head, MMTA under delegated powers from the PSC. As the definition of a labour dispute under *section 2* of the *Act* relating to the reinstatement of a worker does not include a worker appointed by, or under delegated powers by, the PSC, the present dispute before the Tribunal cannot be deemed to be a labour dispute. The Tribunal cannot hence validly proceed to enquire into same.

The provisions relating to a dispute concerning the reinstatement of a worker, including amendments made to *section 2* of the *Act*, have been recently introduced by the *Employment Relations (Amendment) Act 2019 (Act No. 21 of 2019)*. In view of the exclusion that has been provided for a dispute of reinstatement where the worker is appointed by, or under delegated powers by, *inter alia* the PSC, it would be quite helpful if letters of appointment in the public service could specify in what manner the appointment of an individual to a particular office is being made. This would certainly avoid unnecessary prolonged hearings for all parties concerned.

The dispute is therefore set aside.

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SD Shameer Janhangeer
(Vice-President)

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SD Francis Supparayen
(Member)

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SD Karen K. Veerapen (Mrs)
(Member)

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SD Kevin C. Lukeeram
(Member)

Date: 15th October 2021