

# EMPLOYMENT RELATIONS TRIBUNAL

## AWARD

*Before: -*

Shameer Janhangeer	-	Vice-President
Marie Désirée Lily Lactive (Ms)	-	Member
Rabin Gungoo	-	Member
Ghianeswar Gokhool	-	Member

*In the matters of: -*

**ERT/RN 36/2021**

**Mrs Roshni APPADOO-NEEDOO**

*Disputant*

and

**DEVELOPMENT BANK OF MAURITIUS LTD**

*Respondent*

**ERT/RN 37/2021**

**Mrs Sushma Devi DAIBOO-GHURBURRUN**

*Disputant*

and

**DEVELOPMENT BANK OF MAURITIUS LTD**

*Respondent*

*In presence of: -*

1. Mrs Shameema Bibi MOHAMUDALLY
2. Mrs Narvada CHUNDERDEEP

- 3. Mrs Anouchka G. DOMUN**
- 4. Mrs Keerty JHINGOOR**
- 5. Mr Vishen SOOPARAYACHETTY**
- 6. Mrs Prubbha ELLIAH**
- 7. Mr Sadasiv TATEEA**

*Co-Respondents*

The present matters have each been referred to the Tribunal for arbitration by the Commission for Conciliation and Mediation pursuant to *section 69 (9)(b)* of the *Employment Relations Act* (the “*Act*”). The common Terms of Reference of each dispute reads as follows:

- 1. Whether the selection exercise, conducted by the Respondent in 2018 leading to the appointment in March 2019 for the promotion to the post of Development Officer, through which the Disputant was not favoured, was fair, just, reasonable and non-arbitrary.*
- 2. If the assessment in 1 above is in the negative whether the Respondent should be directed to reconsider the selection exercise and relevant appointment to allow the Disputant the fair chance of being appointed/promoted with effect from March 2019 or otherwise.*

Both parties were assisted by Counsel. Mr D. Ramano appeared for both Disputants, whereas Mr M. Ajodah appeared for the Respondent instructed by Mr R. Bucktowonsing, SA. Each party has submitted a Statement of Case in the present matter. Both matters were consolidated upon a motion of Counsel for the Disputants. The Co-Respondents are abiding by the decision of the Tribunal and have left default.

#### *THE DISPUTANTS’ STATEMENT OF CASE*

Both Disputants joined the Development Bank of Mauritius Ltd (“DBM”) as Clerks on 8 July 1999 and applied for the post of Development Officer on 13 June 2018. Mrs Appadoo-Needoo, at the time of the application, was holder of a degree in Business Management, had followed a course in Asset and Liability Management at the National Institute of Banking Management, Pune and was following an MBA course, which she completed in December 2019.

Mrs Daiboo-Ghurburrun had completed her degree in Business Management and was holder of a Diploma in the same field; this was mentioned in her CV and during the interview.

Mrs Appadoo-Needoo was already assuming higher duties mentioned in the scheme of duties of Development Officer and has served in several Departments, namely Finance, Branches, DBM Financial, Loan, Underwriting and Sales where she is presently. She was transferred from Underwriting to Sales in July 2020 and is the most senior officer after the Officer-in-Charge of the Sales Department, thus shouldering higher responsibilities. She is still performing the duties of Development Officer. She has been propelled by management to work as a front liner, dealing directly with clients. She was the contact person for the *guichet unique* of the Ministry of Finance and Economic Development providing information regarding different loan products to help entrepreneurs. She was posted for two days at the Economic Development Board and is also the Respondent's contact person on the Business Mauritius website. She was not confined to office work only, unlike those promoted, and was asked to conduct site visits to projects financed by the bank. She participated in different seminars, road shows and gave talks to showcase DBM products.

Mrs Daiboo-Ghurburrun was already assuming higher responsibilities in the scheme of duties of Development Officer and has served several Departments. In the Agricultural Department (1999 – 2008), she dealt with loans. At Curepipe Sub-Office (2008 – 2015), she shouldered higher responsibilities than clerical, seconded the Officer-in-Charge and attended and represented the bank in talks at Vacoas, Curepipe and the South. She dealt with arrears portfolio in the Arrears Department (2016 -2017). She did sales and marketing for the South at Curepipe Sub-Office (2017 – 2018). At the Underwriting Department (2019 – June 2020), she appraised loans. In the Wage Support Assistance Unit (2020), she performed appraisal and disbursement of wage for export oriented companies. In the Underwriting Department (June 2020 to date), she appraises loan applications for the Board Committee. She is still performing the duties of Development Officer and has worked as a front liner for several years dealing directly with clients. She has participated in seminars, road shows and given talks to showcase DBM products. Giving talks form part of the job of a Development Officer. After the promotion exercise, she replaced a Development Officer in a talk at Surinam. She has signatory powers for cheques and has always shouldered higher responsibilities at Curepipe Sub-Office.

It has also been averred that Mrs Shameema Bibi Mohamudally joined the bank in 1999 and was posted to only one Department doing one specific task. She has been recently posted

to the Leasing Department. She holds a BTS from the Mauritius Chamber of Commerce and Industry and as per the Mauritius Qualifications Authority, a BTS is inferior to a bachelor degree. Mrs Narvada Chunderdeep joined the bank as a typist, was upgraded to Confidential Assistant and has never worked in any operational Department of the bank. After her selection, she joined the Underwriting Department to evaluate credit proposals. She appears to hold an MBA and has preferred to opt for retirement in November 2020 after confirmation to the post of Development Officer.

Mrs Anouchka Domun, Mrs Keerty Jhingoor and Mr Vishen Sooparayachetty are the Disputants' juniors having joined the bank after 1999. They have performed specific tasks since joining and the latter two are still serving the same Department after their promotion. Mrs Prubbha Elliah joined the bank as a typist, was promoted to Clerk and has served mostly in the Arrears Department. She formerly, as President of the DBM Staff Association ("DBMSA"), made representations with management concerning a recent promotion exercise. Mr Sadasiv Tateea joined the bank after the Disputants as a Clerical Assistant and was later upgraded to the post of Clerk after 1999.

The Disputants aver that they performed well at the interview, that no report has been taken from their supervisors to assess their performance/capabilities and are convinced that their appraisal report was not considered.

#### *THE RESPONDENT'S STATEMENT OF DEFENCE*

The Respondent notably denies that the Disputants were assuming higher responsibilities. It has been averred that staff, including Clerks, may be required as per their contract of appointment, to serve in any department, including branches, and depending on their posting, they may be called to attend to cognate duties, responsibilities and to attend all duties of a banking nature. The Disputants were not the only officers to perform such duties. It is the duties of Clerks to provide general assistance in all matters of a banking nature and these are not higher responsibilities. The signatory power referred to by the second Disputant is granted by decision of the Board in order to allow the proper functioning of the activities and operations of the bank. This power is extended to staff at clerical grade posted in branches.

The Co-Respondents referred to were eligible and had the required qualifications for the post of Development Officer as per the approved scheme of service. It is denied that Mrs Mohamudally did not meet the minimum requirement to be selected and she did possess qualifications required for appointment as Development Officer – her *Brevet de technicien supérieure* being the equivalent of a Diploma. The Respondent is not aware of representations made by Mrs Elliah. The Respondent denies that the Disputants performed well at the interview; that no report was taken from their Supervisors to assess their performance and capabilities; and that their appraisal report was not considered.

It is the case for the Respondent that the vacancies at the level of Development Officer had been advertised and qualified candidates applied. 46 applicants, who were qualified for the post, were called for interview. Following the interview and selection exercise by the selection panel, appointments were made. The selection panel did not find that the Disputants ought to have been appointed as Development Officer. The selection exercise was based on merit and was carried out in all fairness. The Respondent moves that the matter be set aside.

#### *THE EVIDENCE OF WITNESSES*

Mrs Roshni Appadoo-Needoo was called to depose and swore as to the truth of her Statement of Case. She confirmed she has a BSc and has followed other courses. She has an edge over the Co-Respondents possessing a Diploma; her degree and MBA have helped sharpen her analytical skills and developed her critical thinking. She has 21 years' service as Clerk. Prior to the selection exercise, she was posted to the Central Loans Department performing several tasks, such as loan appraisal, disbursement, monitoring of disbursement, ensuring pre-disbursement conditions have been met, site visits, attending seminars and tasks and also keeping statistics for the whole bank, as stipulated in the vacancy of Development Officer. The duties she performed were in the Development Officer cadre.

Mrs Appadoo-Needoo moreover confirmed that her performance appraisal was not taken on board by the interview panel as on the day the selection was proclaimed, she phoned the former Chairman of the DBM Mr Babeea for clarifications. He stated that he was not aware that an appraisal system exists at the bank. Mr Babeea was on the interview panel. Regarding

her performance, she always had good marks and comments and this can be verified at the bank. Mrs P. Elliah, a former President of the DBMSA, made a representation to management to consider staff who ought to be promoted; it appears that she knew that there was something wrong with the selection exercise.

The Disputant also stated that Mrs Elliah joined the bank as Typist, was promoted as Clerk/Typist and upgraded to Clerk in 2016; she did not have the required 5 years' experience to be appointed Development Officer. The clause '*relaxable on possession of specialized knowledge/experience*' to be found in the vacancy would not apply to Mrs Elliah as she has served mainly in the Arrears Department, which is chasing clients, sending letters. She is currently in the Underwriting Department doing appraisals and loans are approved upon assessment. She has an edge over Mrs Elliah as she has recently been chosen to represent the bank at the *guichet unique* platform at the Ministry of Finance to assist entrepreneurs; she is also the contact person on the SME Mauritius portal and needs to have expertise to have been chosen for same. She did well in the interview, was asked questions regarding her work, technicalities of her task and the Asset and Liability Management course she followed in India. All her experience, skills and qualifications, as mentioned in her Statement of Case, was before the interview panel and she answered to same.

Mrs Appadoo-Needoo was questioned by Counsel for the Respondent. She notably stated that the recommendation is for an increment or not in the Performance Appraisal Form (blank copy produced as Document A). She agreed that no appraisal is made of a person who has reached the top of her salary scale. She is not aware if no appraisal was made of Co-Respondent Nos. 2 & 6 in the year before the interview. The year of assessment would be 1 July 2017 to 30 June 2018. She could not recall her scores in the assessment. She is not aware that the five other Co-Respondents scored much higher averages than her. She was not aware that Mrs Elliah was a Clerk for more than five years at the date of advertisement for the post of Development Officer. The post of Clerk/Typist was abolished in 2016 and Mrs Elliah became a Clerk by default in 2016.

Mrs Appadoo-Needoo moreover replied that she did not agree that the duties she was assuming form part of the duties of Clerk. She agreed that staff of the DBM including Clerks may be required to serve in any department including branches and be called upon to attend to cognate duties and even duties of a banking nature. She agreed, regarding Mrs Mohamudally, that normally a *brevet* is equivalent to a Diploma. She agreed that Mrs Mohamudally may have

been eligible to apply as was Mrs Chunderdeep. Mrs Domun, Mrs Jhingoor and Mr Sooparayachetty were also eligible to apply. Her complaint is that they have only worked in one department. Mr Tateea was also eligible to apply. She would not know if the Co-Respondents performed better than her at the interview. She is not aware of the parameters of the criteria at the interview. It is a subjective exercise. The Co-Respondents were appointed to her detriment.

Mrs Appadoo-Needoo was re-examined by her Counsel. She notably stated that the performance appraisal is a pertinent element before the interview panel. Neither the appraisal report or a report from the Supervisor was taken at the bank. The appraisal also concerns responsibilities not only marks, in particular the higher responsibilities she has been performing. The higher responsibilities mentioned in her Statement of Case related directly to the Development Officer cadre. She was a degree holder prior to the interview. She is more qualified and experienced as compared to the Co-Respondents.

Mrs Sushma Devi Daiboo-Ghurburrun also adduced evidence in the present matter. She swore as to the truth of her Statement of Case. She confirmed what Mrs Needoo-Appadoo stated and agreed with her. The same also applies to her. She possesses a Diploma, which is the minimum requirement for the post of Development Officer. She had already completed her BSc Business Management degree. At the time of the interview, she mentioned that she had completed her studies but had not yet graduated and did not have her certificate. She had submitted the detailed module results to the bank along with her CV, which clearly mentioned same. The interview panel was made aware of her BSc results.

Mrs Daiboo-Ghurburrun further stated that she is confident that her Appraisal Report was not considered by the interview panel as after the interview, she met with Mr Unmole, former Managing Director of the bank, and he verbally admitted that he was not aware of an Appraisal Performance Report. Same was also admitted by Mr Babeea when she spoke to him on the phone. Mr Unmole was new to the bank, did not know of procedures, that an Appraisal Report existed and should have been considered. Both Mr Unmole and Mr Babeea were on the interview panel. She did well at the interview and answered all questions put to her relating to her work and experience. Her qualifications and forthcoming BSc degree were before the interview panel.

Mrs Daiboo-Ghurburrun was also questioned by Counsel for the Respondent. She notably stated that she was not aware of her average score for the appraisal for the period 1 July 2017 to 30 June 2018. She is not surprised that she scored less than Co-Respondent Nos. 1, 3, 4, 5 & 7 as the appraisal can be subjective. She was not aware that no appraisal was conducted for Co-Respondent Nos. 2 & 6. At the time of the interview, she held a BSc but did not have her certificate and had given all her results. When she submitted her application, she did not have a BSc but a Diploma. She did not agree that she was not discharging higher responsibilities and the responsibilities she mentioned were that of Clerk. She agreed that as a Clerk, she may be called to do cognate duties such as signatory power. After her, there were many officers who were given signatory power. The job she and the other Disputant perform was previously done by higher graded officers, who went on VRS.

Mrs Daiboo-Ghurburrun also stated that Mrs Mohamudally was eligible to apply for the post of Development Officer if management was happy with the equivalence of her BTS to a Diploma. All the other Co-Respondents, except for Mrs Elliah, were eligible to apply for the aforesaid post. Mrs Elliah did not have five years and did not hold the experience mentioned in the vacancy. She does not know of the criteria of the selection panel to select candidates. She would not know if a person did better than her in the face-to-face interview. The purpose of the Performance Appraisal Exercise is mainly for an increment. There is no other recommendation made in the Performance Appraisal Form.

Mr Mario Deruisseau, Human Resources Manager, deposed on behalf of the Respondent. He swore as the correctness of the Statement of Defence put in respect of each Disputant as well as to the amendment made to the Statement of Defence in respect of Mrs Appadoo-Needoo. He stated that the purpose of the Performance Appraisal Exercise was to assess whether employees at the bank should get their increment at the end of the financial year or not. It has nothing to do with the selection process. No performance appraisal was carried out for Co-Respondent Nos. 2 & 6 as they were already on their top salary and could not be granted any more increments. The remaining Co-Respondents achieved higher marks in the appraisal exercise and the two Disputants were far behind. All seven Co-Respondents were eligible to apply for the post. Mrs Elliah held the post of Clerk since 2010. She was previously a Clerk/Typist, which was restyled following a report on conditions of service in 2010 and was Clerk as from that date. Mr Tateea was also eligible for the post of Development Officer.



Mr Deruisseau also stated that most of the duties performed by the Disputants were captured under specific terms within the existing scheme of service for the post of Clerk. The bank had difficulties in 2013 and most staff were called to perform additional duties and this was included in the scheme of service, which was amended or re-classified. They were not performing higher duties. In the interview for the post of Development Officer, the Co-Respondents scored higher than the Disputants. As to whether a report ought to have emanated from the interviewee's supervising officer for the benefit of the interview panel, the representative stated that this should have come from the HR Department if ever there is one. It would pertain only to staff on the interview who have disciplinary matters. The panel did not ask for any report from any Supervisor. If anyone had disciplinary issues, that issue would be brought to the attention of the panel.

Mr Deruisseau was questioned by Counsel for the Disputants. He notably stated that he was not at the bank during the selection exercise or the appointment process having joined in 2019. He came to know what happened through the file. The Performance Appraisal Exercise related only to increment. In Municipalities, submission of Performance Appraisal is a procedural requirement, which is not the case at the DBM. He agreed that generally, the purpose behind the appraisal is to appraise the candidate in relation to responsibilities, tasks, duties, performance and so on so that interviewers may have a knowledge of the candidate's track record. The DBM has a specific form where criteria are laid down. He does not agree that there should have been a Performance Appraisal Report from the reporting officer to the interview panel at the DBM.

Mr Deruisseau moreover answered that a Diploma was a minimum requirement for the post of Development Officer. He did not agree that someone with a BSc or a Masters would have more dexterities than someone possessing only a Diploma as it depends on what goes on during the interview as the evaluation is done as per specific criteria. The edge of having a higher qualification is covered by the evaluation sheet, where additional marks are given for a BSc or a Masters. He cannot recall if the Respondent had admitted in a previous case (ERT/RN 181/20) that the Disputants were performing higher responsibilities. He maintained that the Disputants were assuming additional duties years before the selection exercise and did not agree that they were assuming duties of the Development Officer cadre. There is a formal way of giving higher responsibilities to staff is done by the Board by formal assignment at a certain level. There are sections of the scheme of service which allow the organisation to entrust additional duties; this is called job enlargement or job enrichment. All staff were given additional duties as from 2013 as the bank was facing serious difficulties.

Mr Deruisseau also stated that he did not agree that the Disputants are more senior in the Clerk cadre than the Co-Respondents. Despite the admission that the Disputants have been doing additional duties, he did not agree that they have had multi-exposure in terms of work nor that they have more experience and skills. In relation to Mrs Elliah, Mr Deruisseau was shown page 9 of the Review of Pay and Grading Structures and Conditions at the DBM for the period 1 July 2016 to 30 June 2021 (produced as Document B), wherein he agreed that the post of Clerk/Typist was abolished. He maintained that the post was restyled to Clerk in 2013 with effect from 2010 and there was no recommendation to abolish it. In 2016, there was a recommendation for the post to be abolished. He was in fact referring to the report of 2008, not 2013. Mrs Elliah was doing her work as President of the Union when she wrote to management regarding representations (at Annex 8 of the Disputants' Statement of Case). The letter does not mention any problems with the selection exercise. There are five elements in the evaluation – personality, knowledge, competencies, leadership and commitment to work/attitude at work. He did not agree that the Disputants had an edge over the Co-Respondents as the evaluation exercise gives evidence to the contrary; they achieved less points than the Co-Respondents.

Under re-examination, Mr Deruisseau notably clarified that for someone who is more qualified with a BSc or Masters, more marks will be awarded during the interview. More marks are also allocated for those who have more than the minimum required years of experience – an additional point for each additional year. Both Disputants were given additional marks for qualifications and experience. Regarding Mrs Elliah, he produced page 6 of an Agreement between the DBM and the DBMSA dated 22 October 2008 together with its cover (Document C). The post of Clerk/Typist was Clerk as from 2008. In 2016, a recommendation was made to abolish the post. A copy of Mrs Elliah's payslip for the month of December 2010 was also produced (Document D).

#### *THE SUBMISSIONS OF COUNSEL*

Counsel for the Disputants notably submitted in relation to the duties performed by the Disputants. In the previous case that had started before this Tribunal, the Respondent admitted same and in the present case, this admission has been amended. Mrs Elliah did not contest

what the Disputants stated about her. Her post was abolished in 2016 as per the document produced. She does not meet the requirement of five years. The Tribunal is here to appreciate whether the interview panel was objective based on all the elements put in. As to qualifications, the Disputants have a BSc and a Masters, which is much higher than the Co-Respondents. The Disputants have been performing higher duties, which are in fact the duties of Development Officer. They have experience in the promotional post.

Counsel further submitted that the Disputants are even more senior in their cadre. Seniority in a selection exercise is not an overriding criteria, but it is a criteria. It has been admitted that they are front liners and have been exposed to different facets of duties and responsibilities of the bank. This brings skills and familiarity with the Development Officer cadre. In any case, the appraisal report of the candidate should be before the interview panel for them to assess. They would have to know the candidates' duties, whether it is that of Clerk or Development Officer. Performance at the interview is one element, points are given for qualifications, skills, experience, dexterities and seniority. Have the Disputant been fairly treated? Counsel has left same in the hands of the Tribunal to decide.

Counsel for the Respondent notably submitted that the Respondent has disputed, in its Statement of Case, that the Disputants were assuming higher responsibilities. The stand of the bank has been constant on this issue. Although it is admitted that there was a previous case, the record does not show that the position of the bank has changed since the first case. In fact, the previous court record should have been produced, which has not been done. It was also submitted that the only forum in Mauritius with equitable jurisdiction is the Supreme Court, which has the same powers of the High Court of England. The record shows that Mrs Elliah stated that she trusts the bank to bring whatever challenge that needs to be brought and it would not be correct to say that she admitted to everything that was said regarding her.

Counsel furthermore submitted that the evidence of Mr Deruisseau was clear on the issue of the restyling of the post of Clerk/Typist. A copy of Mrs Elliah's payslip for December 2010 was put in describing her as Clerk. The interview exercise is meant to assess the interviewees and is a subjective exercise. It has not been submitted before the Tribunal that the panel's decision is one that no reasonable person could have taken. The Tribunal cannot therefore intervene in the selection process, more specifically the interview aspect. It is conceded that the Disputants have higher qualifications and they were awarded higher marks in line with their qualifications. Marks are also given for years of experience. As to the

contention that the appraisal needed to be before the interview panel, the interviewees cannot now come and say that the process was unfair. The process ought to have been challenged at the time the advertisement for the vacancy was made.

### *THE MERITS OF THE DISPUTE*

The common Terms of Reference of the present disputes is asking the Tribunal to enquire into whether the selection exercise conducted by the Respondent in 2018, which led to appointment to the post of Development Officer in March 2019 and through which the Disputants were not favoured, was fair, just, reasonable and non-arbitrary. If the Tribunal finds this assessment to be in the negative, the second limb of the Terms of Reference is asking the Tribunal to enquire into whether the Respondent should be redirected to reconsider the selection exercise and appointment to allow the Disputants a fair chance of being appointed/promoted with effect from March 2019.

The two Disputants are currently employed as Clerks at the DBM since 8 July 1999. As per an internal vacancy for the post of Development Officer dated 13 July 2018, the Board of the DBM invited internal applications for the post. As per the scheme of service of the post, the qualifications required were as follows:

#### ***QUALIFICATIONS***

- *Diploma from a recognised university in either Accounts, Finance, Economics, Law, Engineering, Business Management or such other qualifications acceptable to the Development Bank of Mauritius Ltd.*
- *Candidates with relevant specialised experience will be considered at the discretion of Management.*
- *Candidates should also*
  - *have the ability to work under pressure*
  - *possess knowledge of the Bank's products and services*

- *be able to work well within a team*
- *have excellent verbal and written communication skills*

The scheme of service also set out the eligibility criteria for candidates to apply for the post of Development Officer as follows:

***ELIGIBILITY FOR APPLICATION***

- *Senior Clerk & Confidential Assistant*
- *Clerk with a minimum of 5 years service, relaxable on possession of specialised knowledge/experience*

It has been borne out that the Co-Respondents in this matter were appointed to the post of Development Officer in March 2019. The Disputants are thus aggrieved at not having been appointed to the post of Development Officer and have each reported the present labour dispute against the Respondent.

One of the main issues that the Disputants have raised with regard to the selection exercise is that their Performance Appraisal Report was not considered by the interview panel. This has, in fact, not been denied by the Respondent, who contended that it was not necessary to do so. When questioned by Counsel for the Respondent, both Disputants did acknowledge that the purpose of performance appraisal at the DBM was for whether an increment should be recommended for the employee concerned. This was also confirmed by the Respondent's representative in his evidence. It may also be noted that aforesaid purpose of the performance appraisal exercise has been clearly set out in the Staff Performance Appraisal Form produced.

Although it has been firmly contended by the Disputants that performance appraisal should have been a pertinent element before the interview panel and that this consists of their responsibilities and their marks, the employer's right in organising its business as it thinks fit, within the limits of our labour law, cannot be overlooked.

In this regard, it is pertinent to note what *Dr D. Fokkan* in *Introduction au Droit du Travail Mauricien 1/ Les Relations Individuelles de Travail, 2ème édition, p. 216* has stated on this subject:

*Le pouvoir de direction reconnu à l'employeur permet à celui-ci de prendre toutes les décisions concernant la gestion de l'entreprise, y compris les mesures ayant trait aux employés. Il décide ainsi du choix de ses employés, de la carrière de ceux-ci et éventuellement de leur licenciement. Il décide également de l'exécution du travail, de l'ouverture ou de la fermeture de tel ou tel atelier et éventuellement de celle de l'entreprise.*

The following may also be noted from *Dalloz, Répertoire de Droit du Travail, Tome III, Entreprise, 30 avril 1991*, regarding the powers of the employer in the enterprise:

*SECT. 1re . – Pouvoirs du chef d'entreprise.*

*17 ART. 2 – FORMES DU POUVOIR PATRONAL*

*§ 1 er . – Pouvoir de direction*

*...*

*103. Pour se limiter aux prérogatives sociales affectant la situation du personnel, on peut en relever deux séries de manifestations. D'abord, le pouvoir de direction comporte la maîtrise de l'emploi salarial ; en principe, c'est l'employeur qui choisit la personne du salarié et le Conseil constitutionnelle a reconnu que « ... l'employeur..., responsable de l'entreprise, doit pouvoir, en conséquence, choisir ses collaborateurs... » (Décis. n°88-244 DC du 20 juill. 1988, D.1989. 269, note F. Luchaire) ; il embauche le salarié, l'affecte à un emploi qu'il peut modifier, gère la carrière du salarié par des promotions, des déclassements, des déplacements, se sépare de lui par le licenciement, qui est l'expression la plus forte et la plus grave du pouvoir de direction.*

In considering the powers of the employer, notably with regard to the employee, the DBM cannot be faulted for not having taken into account the Disputants' Performance Appraisal Report during the selection process for the post of Development Officer. Whether a performance appraisal report should have been considered is within the employer's discretion. Besides, the Respondent has clearly established that the purpose of performance appraisal is for the grant of an increment to the employee and the Disputants also agreed to this.

It has also been contended that no report was obtained from the Disputants' Supervisors in relation to their duties and performance by the interview panel for the purpose of the selection exercise. This, as well, has not been disputed by the Respondent. However, Mr Deruisseau did explain that if ever there was one, this should have emanated from the Human Resources Department and would only pertain to staff with disciplinary issues, which would have to be brought to the attention of the panel.

Once more, given the powers of the employer to organise its business as it thinks fit (*vide Hong Kong Restaurant Group Ltd v Manick* [1997 SCJ 105]; *L'Ingénie v Baie du Cap Estates Ltd* [2000 MR 38]; *Dyers and Finishers Ltd v Permanent Arbitration Tribunal & ors.* [2010 SCJ 176]), the employer retains a discretion as to how it can proceed with the filling of posts in the enterprise. The DBM cannot therefore be faulted if the interview panel did not opt to have a report from the Supervising Officers of the Disputants in relation to the selection exercise for the post of Development Officer.

The Disputants have also asserted that they are better qualified than the Co-Respondents who have been appointed to the post of Development Officer. Mrs Appadoo-Neddoo, at the time of the application for the post of Development Officer, held a BSc in Business Management and was following a MBA course. Mrs Daiboo-Ghurburrun was holder of a Diploma in Business Management and had completed her degree in the same field. She had provided her degree results to the interview panel although she had yet to graduate. The minimum qualification requirement for the post, as per the internal vacancy, was a Diploma in a stated field or such other qualifications acceptable to the DBM.

The Respondent has not denied the Disputants' higher qualifications. In fact, Mr Deruisseau clearly explained that having a higher qualification is covered by the evaluation sheet used by the interview panel and additional marks are given for qualifications higher than a Diploma. He even confirmed that both Disputants were given additional marks for their higher qualifications. It cannot therefore be said that the selection exercise was unfair towards the Disputants as regards the qualifications they held. Although they claim to be better qualified than the Co-Respondents, it cannot be disputed that their higher qualifications were taken into account in the selection exercise for the post of Development Officer.

The Disputants have also put forward their years of service in relation to the present dispute. It has not been denied that both Disputants have been employed as Clerks at the DBM since 1999. However, the DBM's representative did not agree that the Disputants are more senior in the Clerk cadre than the Co-Respondents. It was also borne out from Mr Deruisseau that more marks, during the interview, were allocated for those who have more than the minimum required years of experience; and that the Disputants were given additional marks for their years of experience.

Although years of service in the present selection exercise for the post of Development Officer is a requisite for eligibility to apply for the post, it is trite law that seniority is not the dominant criteria in a selection process. The following may be noted from the recent Supreme Court decision in *Burrenchobay v The Honourable Prime Minister & Ors.* [2022 SCJ 125]:

*As a matter of fact, there is authority making it clear that in law, although seniority is a matter for consideration, it is not the overriding criteria for the confinement of a higher office by promotion and that at the end of the day, merit should prevail.*

The Tribunal cannot therefore see any fault in the selection exercise with regard to the Disputants' years of service in the Clerk cadre, particularly in light of the evidence of the Respondent on this issue.

As regards the Co-Respondents, although the Disputants are questioning their appointment to the post of Development Officer to their detriment, the Disputants have agreed that they were all, save for Mrs Elliah, eligible to apply for the post of Development Officer. There has been much contention in the present matter as to whether Mrs Elliah was eligible to apply for the post of Development Officer. It was firmly contended that Mrs Elliah did not have the required minimum five years' service as Clerk as she has been a Clerk only since 2016, having formerly held the post of Clerk/Typist.

The Respondent, on the other hand, categorically stated that the post of Clerk/Typist was restyled and that Mrs Elliah was a Clerk since 2010. A copy of Mrs Elliah's payslip dated December 2010 was produced whereby it can clearly be seen that her occupation is stated as Clerk. Mr Deruisseau also clarified that the post was abolished as per the 2016 salary report,



but was restyled in the 2008 report. Whatever be the issues regarding restyling or abolishing of the post of Clerk/Typist from the salary reports, the payslip produced is conclusive as to Mrs Elliah's post since 2010. It cannot therefore be said that Mrs Elliah was not eligible to apply for the post of Development Officer.

Counsel for the Disputants notably submitted that Mrs Elliah stated that she had nothing to say or to contest when she was called by the Tribunal in the course of the hearing of the matter. It was therefore submitted that whatever was said by the Disputants regarding this Co-Respondent must be accepted. As per the record of proceedings, although Mrs Elliah had no questions for either Disputant, it cannot be reasonably implied that she has accepted the Disputants' evidence against her. The record moreover reflects that Mrs Elliah did verbally state that she meets the bank's criteria and that the Disputants' statement is false. She also stated that the DBM will clear the issues. The Tribunal cannot therefore accept Counsel's submissions on this issue.

The Disputants have also relied on an email dated 22 May 2019 from Mrs Elliah, as President of the DBMSA, with subject '*President's Report*' wherein representations were supposedly made regarding the promotion exercise. From a perusal of this email, it should be noted that same is addressed to the Union's members and not directly to management. Moreover, the email does not specify which promotion exercise is concerned.

The Tribunal can only *ex facie* note that this email may be the President of the Union's report to its members and does not appear to be representations being made to management regarding the selection exercise for the post of Development Officer. The author of this email was not called by the Disputants to formally produce same and to give her explanations thereon. The Tribunal cannot therefore place much emphasis on this email, particularly with regard to any shortcomings with the selection exercise in issue.

Moreover, regarding the other Co-Respondents and the selection exercise, the Tribunal has noted that Mrs Daiboo-Ghurburrun recognised that she did not know of the selection panel's criteria to select candidates and that she would not know if the others performed better than her in the face-to-face interview. A similar stance was also adopted by Mrs Appadoo-Needoo when questioned by Counsel for the Respondent, who also stated that the selection exercise is subjective. Moreover, although the Disputants may claim that they

performed well in the interview and are more experienced and better qualified than the Co-Respondents, it has not been shown how this has had an adverse effect on the selection exercise to the extent that same may be considered to be unfair, unreasonable or arbitrary.

The Disputants have laid great emphasis on the duties they carry out at the DBM, which they consider to be in the Development Officer cadre. It should be noted that the Respondent has throughout denied that the Disputants are undertaking higher duties and has instead maintained they are undertaking additional responsibilities.

On this issue, the Tribunal must be alert that it cannot enquire into a matter which is not within the Terms of Reference of the dispute as was amply stated by the Supreme Court in *Air Mauritius Limited v Employment Relations Tribunal* [2016 SCJ 103]:

*Under section 70 (1) the Tribunal is required to enquire into the substance of the dispute that is referred to it and to make an award thereon and it is not empowered to enquire into any new matter that is not within the terms of reference of the dispute.*

As has been previously noted, the Terms of Reference in the present matter is mainly asking the Tribunal to enquire into the selection exercise which led to appointment to the post of Development Officer in March 2019. The issue of whether the duties that the Disputants were performing were that of Development Officer is not one to be found within the Terms of Reference of the dispute. It should also be noted that the point in dispute is not on whether the Disputants ought to have been promoted to Development Officer because of the duties they perform. The Tribunal would therefore be trespassing outside its mandate if it were to enquire into whether the Disputants were actually performing duties in the Development Officer cadre.

If this issue were to be relevant to the selection exercise, it would be in the context of the Disputants bringing to the selection panel's attention the duties they were performing, which they believe to be in the Development Officer cadre, and which would demonstrate their experience acquired to the panel. Although the Disputants did state that their experience was put before the interview panel, it has not been demonstrated that the panel did not properly consider same for the purposes of the selection exercise. It must however be noted that the Respondent did confirm that the Disputants were given additional points for their years of experience during the interview.

It may also be noted that the Disputants contended that their performance appraisal, which comprises their duties and included the alleged higher duties they were performing, and/or their Supervisors' report on their performance was not considered by the selection panel. The Tribunal has already dealt with this issue in this award and need not revisit same.

Counsel for the Disputants, in submissions, also highlighted that in a previous matter brought by the Disputants before this Tribunal (*ERT/RN 181/20*), the Respondent had admitted to the higher duties being performed by the Disputants. It is understood that this matter was withdrawn and the present matter was thereafter reported with corrected Terms of Reference before being eventually referred to the Tribunal.

Whatever be the admission of the Respondent in the previous matter, it should be noted the Tribunal is only concerned with the evidence that has been adduced in the present matter as well as the pleadings of the present matter. The issue of this alleged admission was never raised by the Disputants and it was only put to the Respondent's representative in cross-examination. Moreover, the pleadings containing this alleged admission by the Respondent have not been brought into evidence in the present case. It must also be reminded that each case is to be decided on its own merits.

Counsel for the Disputants has also made an appeal to the equitable character of the Tribunal. It must however be reminded that the Tribunal is set up under the *Act* and its powers are defined under same. The *Act* makes no mention of any equitable powers in relation to the Tribunal. It must however be noted that the Tribunal, in the exercise of its functions in relation to any matter before it, may *inter alia* have regard to the principles of natural justice (*vide section 97 of the Act*).

Although the Disputants are aggrieved at not having been appointed to the post of Development Officer, the employer's discretion in matters of appointment and promotion must be acknowledged. Indeed, the following may be noted from what was held by the then Permanent Arbitration Tribunal in *Mrs D.C.Y.P and The Sun Casino Ltd (RN 202 of 1988)*:

*There is no doubt that employers do have a discretion and powers in matters of appointment and promotion.*

It would also be apposite to note that the Tribunal has previously decided that matters of appointment and promotion are essentially within the province of management subject to an abuse of powers by the latter. In this context, it would be pertinent to note what was held by the Permanent Arbitration Tribunal in *E. Cesar and C.W.A. (RN 785 of 2005)*:

*The Tribunal holds that, subject to an abuse of powers on the part of management (Mrs D.C.Y.P. and Sun Casinos RN 202 of 1988), matters regarding appointment and promotion of employees are essentially within the province of management (M. Pottier and Ireland Blyth Ltd RN 279 of 1994, A. Ayrga and Tea Board RN 575 of 1998).*

Although the powers of the employer in matters of appointment have been recognised, the Tribunal would wish to draw the parties' attention to the following paragraph of the *Code of Practice* (at the *Fourth Schedule* of the *Act*) in relation to recruitment and selection as a matter of practical guidance for the promotion of good employment relations at the workplace:

49. *In recruiting and selecting workers, management shall –*

- (a) decide on the qualifications and experience required for the job;*
- (b) consider filling vacancies by transfer or promotion within the undertaking;*
- (c) obtain as much information about applicants as is relevant to selection for the job, but avoid inquiries which are unnecessary for that purpose;*
- (d) base selection on suitability for the job; and*
- (e) explain the main terms and conditions of employment and give any relevant information about existing trade union arrangements before an applicant is engaged.*

In light of the above, after having examined the issues raised by the Disputants in relation to the selection exercise which led to the appointment of Development Officers in March 2019, the Tribunal cannot come to the conclusion that the selection exercise was unfair,

unjust, unreasonable or arbitrary as it is being asked to determine under the first limb of the Terms of Reference of the dispute. As the assessment under the first limb is not in the negative, the Tribunal need not consider the second limb of the Terms of Reference.

The two consolidated disputes are therefore set aside.

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**SD Shameer Janhangeer**  
**(Vice-President)**

.....  
**SD Marie Désirée Lily Lactive (Ms)**  
**(Member)**

.....  
**SD Rabin Gungoo**  
**(Member)**

.....  
**SD Ghianeswar Gokhool**  
**(Member)**

**Date: 25<sup>th</sup> May 2022**