

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/ RN 67/22

Before

Indiren Sivaramen	Acting President
Vijay Kumar Mohit	Member
Abdool Feroze Acharauz	Member
Kevin C. Lukeeram	Member

In the matter of:-

Université des Mascareignes Academic Staff Union (Disputant)

And

Université des Mascareignes (Respondent)

The above case has been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 69(9)(b) of the Employment Relations Act, as amended (hereinafter referred to as “the Act”). The Disputant and Respondent were assisted by Counsel. The terms of reference of the points in dispute read as follows:

- 1) *“Whether the decision to launch a new promotional exercise in November 2018 for the post of Senior Lecturer was in accordance with Section 12 of the Memorandum of Understanding (MoU) signed between the Université des Mascareignes Academic Staff Union (UdMASU), previously the Technical School Management Trust Fund Lecturers Union (TSMFTLU), and the Université des Mascareignes (UdM).”*
- 2) *“If the answer in 1 above is in the negative, whether all the decisions in connection with the promotion exercise of November 2018 should be reconsidered, or otherwise.”*

It is apposite to note that Counsel for Disputant had initially informed the Tribunal in writing that he intended to make a motion that the officers who had been appointed as a result of the promotion exercise of 2018 be joined as parties in the present matter as Co-Respondents. However, Counsel later informed the Tribunal that he would need to seek further instructions as to whether the Disputant would be disputing the appointment of some thirty-seven members of staff appointed as a result of the 2018 promotion exercise. Counsel for Disputant finally informed the Tribunal that the Disputant would not be contesting the appointment of the Senior Lecturers appointed as a result of the promotion exercise of 2018 so that the Disputant would not be moving to include those Senior Lecturers as Co-Respondents.

The representative of Disputant, a lecturer, deposed before the Tribunal and he confirmed as to the truthfulness of the contents of the Statement of Case filed on behalf of Disputant. He produced a copy of a certificate of registration of change of name of the Technical School Management Trust Fund Lecturers' Union into that of Université des Mascareignes Academic Staff Union (Doc A). He also produced a copy of an extract of the minutes of proceedings of a special general meeting of the Disputant (Doc B). He stated that the deadline for signing the option for the PRB Report 2016 was end of April 2016 and that when he signed the said option, the scheme of service (for Senior Lecturer) had not yet been approved by the Board. He then produced copies of two extracts of the PRB Report 2016 (Docs C and D). The representative averred that there was no consultation with the union with regards to the scheme of service which was approved in 2016. He did not agree that the recruitment exercise carried out in November 2018 was correctly based on the scheme of service approved in May 2016 by the Board.

In cross-examination, the representative agreed that the Higher Education Commission (HEC) is the regulatory body for the Respondent which operates under the aegis of the Ministry of Education, Tertiary Education, Science and Technology. He accepted that in 2012 and 2014 there was no post of Senior Lecturer at the Respondent in the Pay Research Bureau (PRB) Report. He was referred to Annex 4.1 to the Statement of Case of Disputant and he agreed that the Internal Advertisement for Call for Applications for the post of Senior Lecturer (Internal Advertisement dated 11 August 2014) as per that Annex was on an actingship basis. He stated that there was no ad-hoc report of the PRB published for the Respondent and that there was instead the new PRB Report 2016. He suggested that the Li Kam Wah Report was supreme for existing staff and that for any change to the said report, there should have been negotiation with the union. He accepted that following the PRB Report 2016 the same procedures are applicable to all Tertiary Education Institutions in Mauritius. He stated that there was only 'initial' consultation with the union in relation to the scheme of service.

The representative stated that despite paragraph 87.21 (Recommendation 7) of the PRB Report 2016 (Volume 2, Part II), a Lecturer could be promoted Senior Lecturer without a Master's degree. The representative of Disputant stated that the scheme of service was approved by the Board in 2016 and that though it was circulated well after, he was positive that he became aware of the scheme of service within the year 2016 itself. He accepted that he could have brought the matter to the Commission for Conciliation and Mediation since 2016 when he became aware of the scheme of service. He stated that he could not go for an appeal since the call for applications for the post of Senior Lecturer of 2014 was not completed and that he received no reply in relation to his application made following the advertisement of 2014. When further pressed as to whether he could have appealed against the cancellation of the interview sessions, the representative suggested that the interview was later rescheduled for August 2016. He then stated that the call for application in 2018 was a different call for application with new criteria associated with the call for application. He stated that he did not apply for the 2018 exercise since he was not agreeable with the change in the criteria applied. He suggested that there was no consultation with the union before the new criteria were applied. He did not agree that there was consultation and that the scheme of service was fully valid.

The representative of Disputant agreed that Section 12 of the Memorandum of Understanding (MoU) (Annex 1.6 to the Statement of Case for Disputant) had been "*respected by*" the Respondent. He however denied that the launching of the promotion exercise in 2018 was not in contradiction with this section 12 of the MoU.

There was no objection for the representative of Disputant to be again tendered for cross-examination at another sitting of the Tribunal in relation to some documents which Respondent intended to produce. The representative stated that there was "initial consultation" with the union concerning the drafting of the schemes of service to send to the parent Ministry and to the Ministry of Civil Service and Administrative Reforms (as it was then called). The representative stated that he signed the option form for the PRB Report 2016 in April 2016 and that they were made aware that the scheme of service (for Senior Lecturer) had been approved by the Board in May 2016. He was questioned in relation to an email from the office of the Registrar of the Respondent (Doc F) whereby the views and comments of the union were being sought by a given date. The representative stated that the union sent its views on the technical issues concerning the salary scale. He suggested that as regard the scheme of service, the Li Kam Wah report had precedence.

The Director-General of the Respondent then deposed and he solemnly affirmed as to the truthfulness of the contents of the 'Reply to Statement of Case' filed on behalf of the Respondent. He stated that as of 9 March 2016, the trade union had no complaint in relation to the Master's requirement in the (proposed) scheme of service of Senior

Lecturer. He stated that there was no correspondence from the union to the effect that it was not agreeable that a Master's degree be required for promotion from Lecturer to Senior Lecturer. He stated that the post of Senior Lecturer was advertised in 2014 on an actingship basis since at that time there was no scheme of service for Senior Lecturer at the Respondent. He stated that only two points in the Li Kam Wah report were not approved by the Board. After consultation with the HEC and the parent Ministry and in a spirit of standardizing with other public universities in relation to promotion to Senior Lecturer, the Respondent through its Board decided that a Master's degree would be required for promotion to Senior Lecturer. And the second point was that one cannot be promoted from Lecturer to Associate Professor. He stated that the promotional exercise of 2018 was governed by the PRB Report.

In cross-examination, the Director-General of Respondent confirmed that the MoU of 2013 (Annex 1 to the Statement of Case for the Disputant) is still valid. He agreed that in the Li Kam Wah report, there was no mention of any Master's requirement. He agreed that though the Board had approved the Li Kam Wah report in 2014, yet there was no promotion exercise at the Respondent between 2014 and 2016. When it was put to the Director-General that there should have been consultation with the union before agreeing that a Master's degree would be required for the post of Senior Lecturer, the latter stated that there was an exchange of communication between the union and management and that the union did not make any protest in relation to the addition of the Master's requirement. He maintained that there was consultation with the union. He stated that most of the Li Kam Wah Report was adhered to except for one or two points where the Respondent had to take on board the policy of the parent Ministry and of the HEC.

The Tribunal has examined all the evidence on record including all documents produced and the submissions of both Counsel. There has been a lot of evidence adduced as to whether there was consultation or not with the union before the relevant scheme of service was adopted by the Board of Respondent in this particular case. It is apposite to note as highlighted by Counsel for Respondent that the Disputant at paragraph 17 of his Statement of Case stated the following:

17. Disputant have (sic) the information and verily believe that a proposed Scheme of Service (SoS) for the post of Senior Lecturer was approved at the 4th Board Meeting in May 2016 of the newly appointed Board. The Disputant is of the opinion that the Board has acted beyond it's powers and authority in not considering the required union consent prior to approval of the above SoS.

It is clear that this paragraph in the Statement of Case of Disputant cannot stand and that the Board of directors did not need to have the consent (underlining is ours) of the recognised union before approving the new scheme of service. Counsel for Disputant

did refer to another paragraph (paragraph 37) in the Statement of Case of Disputant where it was averred that there was need for consultation with the union for any change in criteria and procedures for promotion before making any new call for promotion.

The Tribunal will examine the evidence in relation to the new scheme of service. It is agreed that there was 'initial consultation' with the union in relation to the scheme of service. Indeed, the Tribunal takes note of an email sent on 4 March 2016 on behalf of the Acting Registrar of the Respondent to the President of the Disputant whereby a copy of a letter from the parent Ministry pertaining to the scheme of service for the grade of Senior Lecturer (among other schemes of service) was attached. The union was formally required to submit its views and comments thereon and to submit same to the office of the Registrar of the Respondent by a certain date. The attached letter mentioned above was dated 29 February 2016 and was addressed to the Respondent and bore the reference MTE/UdM/5 A V2 (Doc E). The said letter was clear and provided that "*You are requested to consult your Union/s (if any) prior to the approval of the proposed schemes of service by your Board, ...*". The Disputant replied by way of a letter dated 9 March 2016 (Doc G) to the Acting Registrar of the Respondent (among other addressees) whilst making reference to the letter dated 29 February 2016 with the relevant reference number MTE/UdM/5A V2. As per this letter, the concern of the union was that the salary scale for Senior Lecturer was not included and that the PRB was to provide the salary scales for the newly vetted posts (including the post of Senior Lecturer) only in its then forthcoming report. The union made formal suggestions in relation to the salary scale for Senior Lecturer. There were no comments/ views however in relation to the proposed scheme of service for the grade of Senior Lecturer. Instead in the same letter (Doc G), the Disputant stated the following: "*We would like to thank you for processing the proposed schemes of service (SoS).*"

However, the evidence in relation to the email and attached letter sent to the Disputant (Docs F and E respectively) and the reply from the Disputant (Doc G) must be viewed with care. A copy of the cover of the PRB Report 2016 has been produced and as per this document, the PRB Report 2016 is dated March 2016. The letters and email mentioned above predate the publication of the PRB Report 2016. The Disputant did write in Doc G that for the newly vetted positions it was expected that all salary scales would be included, and Disputant made recommendations in relation to salary scales pending the recommendations of the PRB Report 2016. There was no doubt at least 'initial' consultation but in the light of the justifications which Respondent tried to seek from the PRB Report 2016 (apart from reliance on policies of the parent Ministry, of the HEC and the need for some kind of standardization) for the requirement of a Master's degree for the post of Senior Lecturer, the Tribunal cannot exclude the possibility that the scheme of service adopted was not identical to the one on which there was consultation with Disputant.

However, there is no documentary evidence before us of an alleged initial or first proposed scheme of service for Senior Lecturer as compared to an alleged amended or second proposed scheme of service for the post of Senior Lecturer. Though there is a suggestion from the representative of Disputant that changes were allegedly brought to the initial proposed scheme of service and which changes were not discussed with the union, the representative of Disputant however did not have any document to substantiate the changes allegedly carried out to the proposed scheme of service. The Tribunal has not been further enlightened as to these documents. The Tribunal has insisted on numerous occasions during the proceedings to have the annexes which were supposed to have been already annexed to the 'Reply to Statement of Case' (of Respondent) but which were however not included with the Reply. When finally these 'annexes' were provided by Counsel for Respondent, the said Annex A referred to a copy of a proposed scheme of service for the post of Senior Lecturer at the Respondent (where a Master's degree was already included as a qualification required for the post) and the Annex A1 produced referred to a copy of a document in relation to the post of Lecturer where again a Master's degree was required.

Similarly, the Tribunal does not propose to rely on the evidence adduced in relation to the Board meeting of Respondent held on 9 December 2015 (a copy of an extract of the minutes was produced and marked Doc I) and the various statements made by Mr Cunden (who was then, as per Doc G, the President of the Disputant) at the said Board meeting in relation to schemes of service. The simple reason is that this Board meeting also predates the issue of the PRB Report 2016. There is evidence adduced on behalf of Respondent that the scheme of service is allegedly based on the PRB Report 2016. As stated above, the Tribunal cannot altogether exclude the possibility that the proposed scheme of service was at some point revised following the PRB Report 2016 (with or without further consultation with the Disputant). The Tribunal observes that whilst it is crucial to have consultation with the relevant union/s in relation to a draft scheme of service, such consultation would be pointless if subsequently there are amendments brought to the proposed scheme of service and in relation to which amendments there would be no consultation at all with the relevant union/s.

The Tribunal will however refer to a letter dated 6 June 2019 emanating from Disputant (Annex 25.1 to the Statement of Case for Disputant) where a request was being made specifically for three officers, including the representative of Disputant who deposed before us in the present case. There was again no mention whatsoever in the letter, despite that it was dated 6 June 2019, of the absence of consultation or any issue with the qualifications for the post of Senior Lecturer or any issue with the scheme of service for Senior Lecturer. Instead, what the union wanted was because there had been alleged derogations from "the draft Senior Lecturer Scheme of Service" in recent promotion exercises, the three officers mentioned in the letter should also benefit from

“derogations” (underlining is ours). The union wrote the following: “The union hence recommends that the three above colleagues be allowed to benefit from derogations.” This request was reiterated in a letter dated 3 May 2021 (Annex 24 to the Statement of Case for Disputant). The representative of the union however confirmed before the Tribunal that he had become aware of the scheme of service for Senior Lecturer in or around the year 2016 itself and the present dispute was reported to the Commission for Conciliation and Mediation only on 13 August 2021.

The Tribunal has examined carefully all the documents produced. Though there are letters emanating from the Disputant (mainly Annexes 12 and 15 to the Statement of Case for the Disputant), there is nothing to suggest that the union was complaining about the scheme of service for Senior Lecturer or inadequate consultation in relation to the said scheme of service although the union would have been aware of the scheme of service in 2016. Also, the letters of the Disputant mentioned above refer to the Li Kam Wah Report and not to the MoU.

The crux of the dispute before us, as per the terms of reference, is Section 12 of the MoU (Annex 1.6 to the Statement of Case for Disputant- vide above) which reads as follows:

“A Special Committee will be set up to analyse the criteria for statutes and promotion for both academic and general staff. The Chairperson presiding the committee will be an external person and all staff members of the UdM [that is Respondent] will be consulted accordingly.”

This section refers to the setting up of a Special Committee to analyse the criteria for statutes and promotion for both academic and general staff. The Chairperson presiding this Committee will be an external person and all staff members of the Respondent will be consulted accordingly. There is unchallenged evidence on record that the Special Committee was indeed set up and was headed as provided for under section 12 of the MoU by an external person. The Special Committee came up with a report referred to as Dr H Li Kam Wah’s Report at paragraph 5 of the Statement of Case for Disputant. Section 12 of the MoU thus was an agreement that a Special Committee as provided in that section would be set up. The Tribunal agrees with the submission of Counsel for Respondent that section 12 of the MoU (as mentioned in the terms of reference) relates to the setting up of that Special Committee and to who can preside such a committee. It is not a substantive clause which a promotional exercise has to be in line with. Dr H Li Kam Wah’s Report, on the other hand, may contain substantive provisions which may have a bearing on the criteria for statutes and promotion. The terms of reference however do not extend to particular provisions or sections of the Report of Dr H Li Kam Wah (as opposed to the MoU). The Tribunal thus cannot interpret or extend the terms

of reference so as to include other provisions in other documents for the purposes of delivering an award which would then certainly be *ultra petita*.

In the case of **S. Baccus & Ors vs. The Permanent Arbitration Tribunal, 1986 MR 272**, the Supreme Court stated the following:

An award of the Permanent Arbitration Tribunal which goes outside the terms of reference will be ultra petita and may be quashed just as any other award.

For all the reasons given above, the Tribunal cannot find that the decision to launch a new promotional exercise in November 2018, which was a decision within the province of the employer, was in breach or not in accordance with Section 12 of the MoU. The Tribunal thus cannot in relation to the first dispute award that the decision to launch the said new promotional exercise was not in accordance with section 12 of the MoU, and the dispute is purely set aside.

As regards the second dispute, in the light of the award of the Tribunal in relation to the first dispute, the second dispute is also set aside.

SD Indiren Sivaramen

Acting President

SD Vijay Kumar Mohit

Member

SD Abdool Feroze Acharauz

Member

SD Kevin C. Lukeeram

Member

16 August 2023