

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/ RN 9/21

Before

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

In the matter of:-

Mr Vikash Beeharry (Disputant)

And

Multi Carrier (Mauritius) Ltd (Respondent)

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

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

The terms of reference of the dispute read as follows:

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

Counsel for Co-Respondent had taken a preliminary objection prior to the case being heard on the merits, and the same panel delivered a ruling whereby the panel found that the preliminary objection taken was at best premature and it was thus set aside, and the Tribunal proceeded to hear the case on its merits.

Disputant deposed before the Tribunal and he stated that though his substantive post is Assistant Maintenance Officer, he was posted in the 'Transmission department' since he joined Respondent on probation in 2011. He suggested that he has not worked in the Maintenance department even though the post of Assistant Maintenance Officer falls, as per the organigram of the Respondent, in the Maintenance department. Whilst he was working in the 'Transmission department', he was confirmed as Assistant Maintenance Officer. He averred that he was told by the then CEO of Respondent that given that he was qualified for the post of Transmission Officer, he would be given the said job if there was any vacancy for the said post. He stated that as Assistant Maintenance Officer, he had to look after all transmission matters, radio, and television around the island and in outer islands like Rodrigues and Agalega. He stated that he worked with emitters, encoders and electronic equipment, and worked on the microlink network. He stated that the Chief Transmission Officer prepares log duties for the staff and will tell him where he has to work. He stated that he operates and maintains all the electronic equipment. He added that he was given a training in China on Outside Broadcasting Transmission High Definition.

Disputant stated that in April 2019 there was a review of the organizational structure at the Respondent and a promotion exercise. He stated that he was surprised that he was not promoted and that the qualification for appointment as Transmission Officer was changed to degree holder. He stated that he felt that he had been discriminated against in that he was not given the opportunity to become a Transmission Officer. He suggested that previously a Certificate City and Guilds Technical was required whereas now the qualification has been amended to require a degree. He then referred to the Co-Respondent, who is a colleague of his and who despite allegedly not holding the required qualifications would have nevertheless been promoted as Transmission Officer. However, in chief he was referred to the 'first intake note' inserted in the new profile summary for the post of Transmission Officer (vide Doc D and Annex C in Annex 5 to the Statement of Case of Disputant). He then suggested that though the 'first intake note' addresses the issue of the requirement of a degree qualification (under paragraph 2 of the 'Qualifications' for the post of Transmission Officer), the Co-Respondent does not even hold the qualification required under paragraph 1 of the 'Qualifications' for the post of Transmission Officer. He stated that even then Co-Respondent was appointed as Transmission Officer. He then suggested that he was more qualified than Co-Respondent when the latter was promoted. He added that he was not informed nor allowed to make representations prior to the change brought to

the qualifications for the post of Transmission Officer. He averred that the post was advertised in 2019 and that he applied for same. However, with the retirement of the then CEO, the Respondent did not proceed with that advertisement. He prayed for an award to request the Respondent to promote him to the post of Transmission Officer with effect from 1 April 2019.

In cross-examination, Disputant accepted that he was appointed by the Board of the Respondent and that it was the Board which was responsible for all decisions pertaining to nomination to a post. He agreed that he performed maintenance and operations. He also accepted that his substantive post has always been Assistant Maintenance Officer. He accepted that from 2012 up to 2019, an Assistant Maintenance Officer could not aspire to become a Transmission Officer. He agreed that the 2019 report (Doc D) recommended the creation of six posts of Transmission Officer and that these posts be filled, from then on, by candidates holding a degree. He also accepted that the report provided for Technical Assistants who had wide experience (in the duties of Transmission Officer) even though they did not possess a degree, for the first intake of Transmission Officer. He agreed that in the same 2019 report the post of Technical Assistant was abolished. He agreed that Co-Respondent was a Technical Assistant and that because his post was abolished, the latter was automatically granted promotion as per the recommendations of the 2019 report. He also accepted that prior to the restructuring, a Technical Assistant could be promoted as Transmission Officer. He agreed that Co-Respondent joined the grade of Transmission Officer because of the 'first intake note'. Disputant conceded that he was not qualified for the time being as per the profile summary for the post of Transmission Officer.

Disputant agreed that Co-Respondent was already working in the 'Transmission department' when he started working at the Respondent. He stated that the Tribunal should make an exception for him since, according to him, he has been doing the duties of Transmission Officer since he joined Respondent. He however stated that his line of promotion from Assistant Maintenance Officer is Maintenance Officer.

The Chief Transmission Officer was then called as a witness on behalf of Disputant and he stated that the Disputant works in the Control Room. He produced batches of documents purporting to be rosters for the 'Transmission department' (Docs H to H11). He stated that the Disputant reports to him as from the day he has been appointed Chief Transmission Officer and that Disputant was previously reporting to the ex-Chief Transmission Officer. In cross-examination, he stated that Co-Respondent who was not a Transmission Officer, but a Technical Assistant was also as from 2016 among the persons who were on the aforementioned rosters. He stated that the people mentioned in the rosters are working with the Duty Officer and accompany the latter whenever there are repairs or for checks. He stated that there were even drivers and cleaners on the said rosters. He however stated that Disputant was reporting to the Transmission

Manager and was assigned duties by the latter. In re-examination, he suggested that 'Transmission Continuity' is found in the 'Transmission department'. He stated that Disputant is an Assistant Maintenance Officer and has worked since 2012 in the 'Transmission department'.

An Administrative Assistant of the Respondent was then called as a witness on behalf of Disputant, and she produced copies of qualifications held by Disputant (Docs I to I9) and by Co-Respondent (Docs J to J5).

A representative of Respondent then deposed before the Tribunal, and he stated that the contents of the Statement of Defence of the Respondent are correct and accurate. He produced a copy of an internal advertisement for the post of Transmission Officer (among other posts) where the qualifications sought for Transmission Officer were as per the qualifications recommended by the salary consultant as per the new structure at the Respondent. He produced copies of profile summaries for the posts of Assistant Maintenance Officer and Technical Assistant with the relevant salary scales prior to the restructuring exercise at the Respondent (Docs L and M).

In cross-examination, the representative stated that he has been in the management team since 2007 and knows what each and every member of staff of the 'Transmission department' is doing. He agreed that the Disputant has been involved in the installation, operations, maintenance, and repairs of electronic equipment. He stated that Disputant works in a team which is composed of multi-disciplinary staff. He stated that the rosters produced mention 'Transmission Continuity' and that Disputant is in a team to ensure transmission continuity. He added that in the case of Disputant, his next promotion will be the grade of Maintenance Officer. He suggested that the Disputant is not in the 'Transmission department'.

When asked if there was any document to the effect that Disputant was requested to perform the duties of Transmission Officer due to a shortage of staff, the representative stated that there was no such document. He stated that it is only the Board of the Respondent which is mandated to give any undertaking to Disputant. He stated that as per the record there are four posts of Transmission Officer which are yet to be filled. He stated that Disputant was recruited as an Assistant Maintenance Officer and that his next promotion should be as Maintenance Officer whereas Co-Respondent was a Technical Assistant who could be promoted as Transmission Officer. He stated that with the new structure at the Respondent, the post occupied by Co-Respondent was being abolished and if Co-Respondent was not redeployed, he would be "left unemployed". He stated that Disputant can become a Transmission Officer but that he has to upgrade his qualifications as required under the new structure.

A Human Resource Manager then deposed, and she stated that her services had been retained by the Respondent to conduct the re-structuring exercise at the Respondent. She stated that following rapid technical development in the field of IT, there was need to professionalize the core activity of Respondent, which was 'transmission services'. She stated that the Board wanted to recruit degree holders for future vacancies which will arise. She added that in accordance with the then existing structure, the Co-Respondent was eligible to be promoted as Transmission Officer depending on his years of service. She stated that whilst the restructure was being done and the post of Technical Assistant phased out, the promotion prospects of officers in post as Technical Assistants had to be preserved failing which these officers would have no prospects for promotion at all. She stated that the Co-Respondent was already a serving officer in the organization, and that the degree which was put as an additional requirement for the post of Transmission Officer was waived as per the 'first intake' note. She added that the requirement of A-level was for newcomers because for serving officers there was no requirement for them to possess entry qualifications because they were already in the service. She stated that for the restructuring exercise, proposals were submitted to her by individual employees, and she had meetings with the trade union also.

In cross-examination, the HR Manager stated that Co-Respondent was already eligible for the relevant post prior to the restructuring exercise. She referred to the qualifications required for the post of Transmission Officer under the old structure and stated that even though the Co-Respondent did not possess the City & Guilds Telecommunications Technicians Certificate, he would have been eligible to become Transmission Officer on the basis of experience. A copy of the 'Qualifications' requirements for the post of Transmission Officer at the Respondent prior to the restructuring exercise was produced (Doc N). The HR Manager stated that the qualifications mentioned at 1 and 2 of the profile summary (under 'Qualifications') for the post of Transmission Officer (post restructure) (Annex C in Doc D) are for those who are outside the service and not for those who are already employed in the service. She stated that no exception was made for Co-Respondent and that the promotion prospects of Co-Respondent were simply preserved.

The Co-Respondent then deposed before the Tribunal, and he solemnly affirmed that the contents of his Statement of Defence are true. In cross-examination, he confirmed that at the time of the 'restructuring' of the post of Transmission Officer, he did not have the qualifications as were put to him by counsel for Disputant. He also confirmed that Disputant has been working in the 'Transmission department' together with him since 2011.

The Tribunal has examined all the evidence on record including the submissions of all counsel. The basis of the case of the Disputant as can be gathered from the manner in which the terms of reference have been drafted is that he should have been promoted

to the post of Transmission Officer because he was performing the duties for the post of Transmission Officer, and this at the same time as Co-Respondent who was promoted to the post of Transmission Officer on 1 April 2019. *Ex facie* the terms of reference, the intervention of the Tribunal is being sought to grant an award that the Disputant should have been promoted to the post of Transmission Officer on 1 April 2019. There is no alternative ‘prayer’ or reference to words such as “*or otherwise*” in the present terms of reference. The Tribunal has first to decide whether it has indeed the power or jurisdiction to give such an award (in its earlier ruling, the Tribunal has found that the preliminary objection taken on behalf of Co-Respondent was at best premature). The Tribunal will refer to the case of **The Mauritius Institute of Training and Development And The Employment Relations Tribunal, in presence of Mrs N.B.C Bacor and anor 2022 SCJ 413**, where the Supreme Court stated the following: “*It is worth noting that the Tribunal was well aware that the power to appoint and promote employees is that of the employer, but referred to previous awards of the then Permanent Arbitration Tribunal² before stating that the employee must be safeguarded against any abuse of power on the part of the employer. It went on to consider the material facts of the dispute, make a finding of abuse on the part of the employer and upgrade the first co-respondent. (who was the disputant before the Tribunal)*”

*We tend to agree with the Tribunal that it can, in a fit case disclosing a clear abuse of power on the part of the employer, make an award providing for the appointment or promotion of the disputant employee; to hold that the Tribunal is in all cases precluded from making such an award would be to make a mockery of the dispute settlement procedure provided for in the ERA. However such an award should be made in very exceptional cases as the power to appoint is vested generally in employers (see **Fokkan, Introduction au Droit du Travail Mauricien, 1. Les Relations Individuelles de Travail, 2e edition (2009) at page 216** on the “*pouvoir de direction*” of the employer) and, in the case of statutory corporations, in the Board, or other controlling body, of the statutory corporation. (...)*

² *D.C.Y.P and Sun Casino Ltd (RN 202 of 1988), E. Cesar and C.W.A. (RN 785 of 2005), M. Pottier and Ireland Blyth Ltd (RN 279 of 1994) and A. Ayrga and Tea Board (RN 575 of 1998)*

The Supreme Court in the case of **The Mauritius Institute of Training and Development And The Employment Relations Tribunal** (see above), then went on to state the following:

Having made a finding of abuse of power, the Tribunal should have left it to the employer to consider pursuant to its powers under section 13 of the MITD Act whether to upgrade the first co-respondent in the light of all relevant circumstances. (...)

Counsel for Disputant also referred to **Dr D. Fokkan, Introduction au Droit du Travail Mauricien, 1/ Les Relations Individuelles de Travail** and submitted an extract of same. The Tribunal notes that reference is made therein to “Le Pouvoir de Direction” and “L’abus du Pouvoir de Direction”. Thus Dr D.Fokkan writes the following:

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.

Bien que ce pouvoir soit très vaste, il convient à ce que l’employeur respecte les contrats de travail, la loi et éventuellement les conventions collectives dans la mesure où celles-ci concernent la gestion de l’entreprise.

Bien qu’exercé discrétionnairement par l’employeur, ce pouvoir ne saurait être abusé.

Dr D.Fokkan then proceeds to consider what would be “les critères du détournement de pouvoir”. He stated the following: “Il s’agit ainsi d’examiner le mobile du chef d’entreprise. La jurisprudence française a adopté la deuxième conception. C’est probablement également cette conception que le PAT a adoptée dans l’espèce *In Re: Mrs D.C.Y.P and The Sun Casino Ltd* et dans l’espèce *In Re: Mootoosamy and The Bank of Baroda*. Dans les deux cas, le PAT met en effet l’emphase sur l’intention malveillante du chef d’entreprise...

...

*Inversement c’est probablement l’absence d’une intention malveillante dans l’affaire *Pottier v Ireland Blyth Ltd* qui permet au PAT de rejeter les prétentions de l’employé. Ces cas démontrent clairement que même le PAT refuse d’intervenir sur une simple question d’opportunité.”*

The Tribunal bears in mind the clear and convincing testimony of the HR Manager whose services had been retained to conduct the re-structure exercise at the Respondent. Her evidence has in any event hardly been challenged and she maintained that no exception was made for Co-Respondent. The latter was a Technical Assistant and according to his line of promotion, his next promotion was Transmission Officer. Coupled with that, very importantly, she stated that with the restructuring, the post of Technical Assistant was phased out. The Tribunal finds nothing wrong that the promotion prospects of Co-Respondent who was in post as Technical Assistant were preserved. The HR Manager also stated that Co-Respondent under the previous structure (prior to the restructuring) would have been eligible to become Transmission Officer. A copy of the profile summary including qualifications for the post of Transmission Officer prior to the restructure was produced (Doc N) and the Tribunal

notes that only officers from the grade of Technical Assistant were eligible and could aspire to become Transmission Officers. The Tribunal finds no reason not to believe the evidence of the HR Manager that Co-Respondent would, with the relevant experience, have been qualified for the post of Transmission Officer in the light of the qualifications required for the post of Transmission Officer prior to the restructure. The Tribunal thus finds nothing odd or evil with the first intake note as per the profile summary for the post of Transmission Officer following the restructuring exercise at the Respondent. Disputant, on the other hand, was never eligible for the post of Transmission Officer before the restructure exercise at the Respondent. Though Disputant may have been working together with Co-Respondent, Disputant was all along, and this since 2011 until now, an Assistant Maintenance Officer. His line of promotion was different from that of Technical Assistant. The Tribunal also bears in mind that though Disputant was working together with Co-Respondent, the Disputant as Assistant Maintenance Officer had a higher salary scale when compared to Co-Respondent who was a Technical Assistant (vide Docs L and M).

The Tribunal also notes the evidence adduced on behalf of Respondent that Disputant was working in a team composed of multi-disciplinary staff and that the team had to ensure 'transmission continuity' at the Respondent. There is also no evidence on record of any formal complaint which the Disputant would have made in relation to him being allegedly asked to perform the duties of the post of Transmission Officer or of being posted in the 'Transmission department' with reporting responsibilities within the 'Transmission department' itself.

With the restructuring exercise, the Disputant now has the opportunity to become a Transmission Officer. The Respondent has averred at paragraph 17 of his Statement of Defence that "*Disputant will be offered appointment provided he satisfies the qualification requirements for the post in the new structure*". In the light of all the evidence on record, the Tribunal is not satisfied even on a balance of probabilities that there was such an abuse on the part of the employer (underlining is ours) which would warrant the intervention of the Tribunal in the present matter. However, the Tribunal wishes to highlight that as per page 7 of the report of February 2019 (Doc D) at Recommendation 8, it is provided as follows:

Recommendation 8

7.14 It is further recommended that the MCML Control Room at Malherbes should be operated only by Transmission Officers and Senior Transmission Officers.

There is evidence that Disputant has been working and is still working in the Control Room and in the light of same and any possible anomaly (which is different from the actual terms of reference before the Tribunal), the Respondent may be well advised to

consider seriously the possibility that appropriate measures be taken for the Disputant on a personal basis, if need be, in the light of all the evidence on record and the particular circumstances of the Disputant within the 'Transmission department'.

For all the reasons given above, the Tribunal thus finds that it cannot award that the Disputant should have been promoted to the post of Transmission Officer at the same time as Co-Respondent (underlining is as per the terms of reference as referred to us), and the dispute is otherwise set aside.

Indiren Sivaramen

Acting President

(SD)Raffick Hossenbaccus

Member

(SD)Karen K. Veerapen

Member

(SD)Ghianeswar Gokhool

Member

20 December 2023

