

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/RN 06/2022

Before: -

Shameer Janhangeer	-	Vice-President
Vijay Kumar Mohit	-	Member
Rabin Gungoo	-	Member

In the matter of: -

Mr Jeanloup Desire BEAUBOIS

Disputant

and

AIR MAURITIUS LTD

Respondent

In presence of: -

- 1. Mr Krishnan GOKHOOL**
- 2. Mr Shri Preetanand Sharma HEERAMUN**
- 3. Mrs Dhanishwaree REETOO**
- 4. Mrs Pritibye LUXIMON**
- 5. Mr Shyam MATHURA**
- 6. Mrs Jessycah RUGOONATH**

Co-Respondents

The present matter has 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 Terms of Reference of the dispute read as follows:

- (i) *Whether the selection exercise conducted in April 2019 by the Respondent (Air Mauritius Ltd) for the promotion to the post of Administrative Specialist Cargo was fair, just, reasonable and non-arbitrary.*
- (ii) *If the assessment in 1 above is in the negative whether the Respondent should be directed to reconsider the selection exercise to allow the Disputant the fair chance of being appointed/promoted or otherwise.*

The parties were assisted by Counsel. Mr T.A. Dabycharun, together with Mr D. Ramano, appeared for the Disputant; whereas Mr K. Colunday appeared for the Respondent. The Co-Respondents were assisted by Mr V. Runghen. The parties have each submitted their respective Statement of Case in the matter.

THE DISPUTANT'S AMENDED STATEMENT OF CASE

It has been averred that an Internal Vacancy Notice was launched on 19 December 2018 and interviews were conducted on 18 April 2019 resulting in the appointment of six candidates to the post of Administrative Specialist – Cargo (Level 5) with effect 1 August 2019. The Disputant submitted his application online for the aforesaid post and was called for an interview. The selection panel comprised Mrs Beedassy-Banerjee (Human Resource), Mr Domah (Cargo) and Mr Tan Yan (Commercial Department). He answered all questions properly and was satisfied and confident of being among the selected candidates.

The Disputant has notably set out the background of the Cargo Commercial Department in his Statement of Case and has also elaborated on the nature of business of the Cargo Section. The posts of Cargo Executive (PG 1), Administrative Specialist (Level 5) and Senior Operations Officer (Level 4) were advertised on 19 December 2019. It has been averred that the Collective Agreement made provision for the principles to be considered for promotion: ability to perform duties; additional relevant qualifications; past experience on doing same or similar work; past record of the employee; and past years of service. The Collective Agreement stipulates that these conditions, practices and guidelines must be followed in respect of promotional exercises.

The Disputant has also averred that he has worked closely with many managers and team members without any issues and was in direct contact with customers without receiving any

complaints. In 2007, he was promoted to Level 4 by a most senior panel. He spent about 15 years in Cargo during which he managed to build and maintain a strong business relationship with market players. He also had the opportunity to look after all the markets. He was solicited to assist the company following the Board decision to initiate an audit in the Cargo Department, which enabled the Department to streamline its internal processes. He flagged the inaccuracy of weight capture. His good works were only acknowledged but not rewarded. He was integrated in the Procurement Department as from 26 September 2017, where his Line Manager was satisfied with his performance and attitude at work. He was selected to support the Procurement Technical Services Team as the section was facing difficulties to turn the shift system. The company was under voluntary administration and employees were called to work part time. He was chosen to maintain key services up to the standards.

The six candidates appointed as Administrative Specialist Cargo were Mr Gokhool, Mrs Rugoonath, Mr Mathura, Ms Reetoo, Mr Heeramun and Mrs Luximon. Four were previously on Level 3 and the remaining were on Level 4 and 5 respectively. Mr Gokhool and Mrs Rugoonath, both on Level 3, were previously based in the Cargo Imports Section and were respectively shifted to Cargo Systems and Revenue Management. Mrs Rugoonath was not selected for the post of Senior Operations Officer (Level 4). She was found unfit to perform at Level 4 and was selected to perform at a higher position in the second round. The selection exercise for the post of Senior Operations Officer had an effect on the selection exercise for the post *in lite*.

It has also been averred that Mrs Luximon, a former Secretary, was also selected and had never delivered the duties and responsibilities mentioned in the Vacancy Notice. She left Cargo, together with Mr Leste and Mr Domah, to join the Ground Operations Department and was promoted to Level 5 quite rapidly. When Mr Leste and Mr Domah returned to the Cargo Department, so did their secretary; it is clear that there is a strong connection between these three persons.

The Collective Agreement states that past records of the employee must be considered for promotional purposes. However, it appears that no due diligence work was done as candidates with adverse reports were selected. The example of Mr Heeramun was cited. Management is well aware of his inappropriate behaviour to such an extent that his contract was put on hold and access to Cargo Systems was blocked. During the audit exercise, many photos of Ms Reetoo were found on the laptop of her manager. Mr Mathura had an issue with his previous reporting manager which ended in a disciplinary committee. The Head of Cargo had agreed to change his reporting ship within the Cargo Department to avoid friction.

The Disputant has discharged the duties of Level 4 since 2007 while four of the appointees were on Level 3. The duties of the two levels are distinct and Level 4 is higher remunerated compared to Level 3. The selection exercise unfairly scratched levelling edge to the advantage of lower grade candidates. A Secretary with no experience in performing similar work was appointed. In practice, sick leaves and Performance Appraisal records for the last three years are taken into consideration to demark candidates. He should have been ranked in the top six candidates in terms of punctuality if the selection exercise were accurate. The selection exercise failed to consider the exact number of the candidates' sick leaves to the advantage of contenders with higher sick leaves. Similarly, Performance Appraisal was not considered on a like with like basis.

The Disputant has also related an incident with one of the new managers who joined Cargo in 2016. He was not satisfied with the way the restructuring was done and reported same to the then CEO. This might be reason of Mr Parapen's hostility towards him. He reported the latter's unpleasant attitude to Mr Leste and to Human Resource ("HR"). No action was taken by management. He left Cargo after about 15 years due to a conflicting environment and was lengthily questioned on this topic during the interview. He advised that this incident was behind him and would not want same to impact on his career.

THE RESPONDENT'S STATEMENT OF REPLY

The Respondent has at the outset averred that as per its recruitment policy, there is no automatic promotion in the company. All vacant positions are advertised and all employees eligible to apply are free to submit their applications. It has also been averred that a Vacancy Notice was issued on 8 December 2006 for the post of Sales Representative in Business Development Management (LS 4) to which the Disputant was appointed on 1 May 2007. This appointment was challenged by the Air Mauritius Staff Association ("AMSA"), who declared a labour dispute. An agreement was thereafter reached with AMSA.

In view of a restructuring exercise carried out in the Cargo Department, three positions were advertised in 19 December 2018, i.e., Senior Operations Officer (LS 4), Administrative Specialist (LS 5) and Cargo Executive (PG 1). There were six vacancies for the position of Administrative Specialist for which interviews were held on 18 April 2019. 17 candidates applied

of which 16 were eligible as per the criteria set; and only 13 candidates attended the interview. Six candidates in order of rank were selected. There was a cut-off point of 45 marks and the 7th and 8th candidates, having scored 46 and 45 respectively, were put on a waiting list for a period of one year from the date of the interview. The candidate ranked 3rd had also applied for the higher post of Cargo Executive and accepted the offer for the latter post, as a result of which the candidate ranked 7th was offered the position of Administrative Specialist. The Disputant scored 42.5 and was ranked 9th on the list of selected candidates.

It has further been averred that the Disputant admitted that his working relationship with his line manager was difficult due to a complete mismatch of personality; the Disputant had challenged management's decision to appoint Mr Parapen, his direct line Manager, in the Cargo Department and stated that he was unwilling to work with the latter. Upon a request from the Disputant, he had to be laterally transferred to the Corporate Procurement Section of the Procurement & Facilities Department at Head Office on 26 September 2017. The Disputant, as well as other employees, were required to assist management by providing available information in the course of an internal enquiry conducted in the Cargo Department in 2015.

It has also been averred that both Mr Gokhool and Mrs Rugoonath work in the Cargo Department. The averments made against the latter are denied. The post of Senior Operations Officer was the subject of a separate selection exercise and is in no way relevant to the Disputant's application for the post of Administrative Specialist Cargo. Mrs Luximon was eligible to apply for the post of Administrative Specialist as per the criteria set in the Internal Vacancy Notice; she applied, went through the recruitment process and was found suitable for the post by the panel. The averments made by the Disputant regarding Mr Heeramun and Ms Reetoo are denied. Mr Mathura, together with another employee, reported a joint complaint against a manager in the Cargo Department. This was dealt with as per established procedures.

The selection was based on competencies assessed for the position, not on seniority and only the best candidates were appointed. The said Secretary mentioned by the Disputant was already performing at LS 5 prior to the selection exercise. The Performance Appraisal ratings and sick leave records for the past three years for all candidates who applied were provided to the panel members. The selected candidates had better performance ratings than the Disputant for the last three years (2016 – 2018). The Respondent strenuously denies the belief/opinions of the Disputant and emphasises its recruitment policy. The selection exercise for the post of Administrative Specialist Cargo was carried out in a fair and transparent manner as per the company's recruitment policy. At no point in time was the Disputant treated unfairly or in a

discriminatory manner. Documents pertaining to the selection exercise would be produced at the hearing of the matter before the Tribunal.

THE CO-RESPONDENTS' STATEMENT OF REPLY

The six Co-Respondents have submitted a single Statement of Reply. Co-Respondent No. 3 was previously known as Mrs Jankee. All the Co-Respondents have averred that at the time they applied for the post of Administrative Specialist Cargo in 2018, they all possessed the prerequisite qualifications as prescribed in the Internal Vacancy Notice for the post. There is nothing coincidental with their appointment to the aforesaid post.

It has notably been averred that Co-Respondent No. 1 possessed all the prerequisites required for the post of Administrative Specialist, namely: Higher School Certificate with passes in at least 2 subjects; 16 years of service with the Respondent, all in Cargo; degree in Tourism and Hospitality Management; Masters in Business Administration with specialisation in Marketing; and at least 10 years on LS 3 since November 2008 until when the post was advertised.

Regarding Co-Respondent No. 6, it is admitted that she was not selected for the post of Senior Operations Officer and avers that this bears no relevance to the present dispute. She possessed all the prerequisites for the aforesaid post, namely: Higher School Certificate with passes in at least 2 subjects; Bachelor in Business Administration; 16 years of service with the Respondent, 13 of which were in Cargo; and at least 10 years on LS 3 since 2008 until when the post was advertised. During her years in Cargo, she has successfully occupied several posts ranging from Clerk to Operations Assistant to Operations Officer to her current post of Administrative Specialist.

As regards Co-Respondent No. 4, it is noted that the comments made by the Disputant against her contain degrading, humiliating and unwarranted allegations and attacks on her personality which are uncalled for. She possessed all the prerequisites for the aforesaid post, namely: Higher School Certificate with passes in at least 2 subjects; ABE Level 6 Diploma in Business Management; 16 years of service with the Respondent, 10 of which were in Cargo; and at least 5 years on LS 5 since 2013 until when the post was advertised.

Co-Respondent No. 2 also possessed all the prerequisites required for the aforesaid post, namely: School Certificate passes with credits in 5 subjects; Diploma in Sales and Marketing; IATA Diploma Introductory Course and Rating; 16 years of service with the Respondent, all in Cargo; and at least 16 years on LS 4 since 2002 until when the post was advertised.

Regarding Co-Respondent No. 3, it is averred that she is deeply offended by the unfounded, unwarranted and degrading allegations made by the Disputant. She possesses all the prerequisites for the aforesaid post, namely: GCE Advanced Level; Diploma in Cargo Introductory Course; Bachelor Degree in Financial Management; 16 years of service with the Respondent, all in Cargo; and at least 11 years on LS 3 since 2007 until when the post was advertised.

As regards Co-Respondent No.5, it is averred that he did make a complaint against a manager in the Cargo Department, which was dealt with as per the Respondent's established procedures and has been disposed of several years back. He possessed all the prerequisites for the post, namely: Higher School Certificates with passes in at least 2 subjects; Diploma ABE in Business Management; IATA Diploma Introductory Course and Rating; 16 years of service with the Respondent, all in Cargo; at least 11 years on LS 3 since 2007 until when the post was advertised. He has successfully occupied several posts from Clerk to Operations Assistant to Operations Officer and eventually to his current post of Administrative Specialist.

The six Co-Respondents note that the unwarranted and unjustified attacks on their personality made in the Disputant's Statement of Case were totally uncalled for. They possess all the prerequisites for the post of Administrative Specialist Cargo and verily believe to possess the requisite knowledge, skills and experience for the post. They all underwent the selection exercise, as a result of which they were appointed based on their performance, merit and competence for the post.

THE EVIDENCE OF WITNESSES

The Disputant adduced evidence in the matter. He swore as to the correctness of his Amended Statement of Case together with the annexes. There was an Internal Vacancy Notice for the post of Administrative Specialist Cargo on 19 December 2018 and an interview on 18 April 2019. The Co-Respondents were the six candidates selected. He referred to the duties and responsibilities of the post as per the Internal Vacancy Notice and to the desirable criteria asked

for therein. The post was advertised together with the post of Cargo Executive and Senior Operations Officer. The interview panel was composed of Mrs Beedassy from HR, Mr Domah from Cargo and Mr Tan Yan from the Commercial Department. He was confident after the interview as he had answered correctly to all the questions and he also has 15 years' experience in Cargo; he was familiar with the terms used and was satisfied. He even queried HR as to when the results would be out. He met all the criteria as per the Internal Vacancy Notice.

Mr Beaubois stated that before he joined Air Mauritius Ltd, he worked at Rogers. Except for Mrs Rugoonath, all the other Co-Respondents were with him at Rogers and also joined the Respondent as Cargo Clerks. Mrs Rugoonath joined later. However, Mr Heeramun joined as Sales Representative, which is Level 4. There was a restructuration in 2007 and posts for Levels 3 & 4 were advertised; he applied to both posts and became Sales Representative. The other Co-Respondents, except for Mr Heeramun, moved to Level 3. There was another restructuration in 2018 and the posts of Cargo Executive, Administrative Specialist and Senior Operations Officer were advertised. Air Mauritius Ltd provides training for its employees which is based on Cargo.

Mr Beaubois also stated that he is a member of the AMSA. They have a Collective Agreement, which mentions the criteria for promotion. On the first criteria of '*ability to perform duties*', he stated that he has worked in the department for 15 years and has acquired experience to allow him to have a connection with all the clients on the market. When appointed as Sales Representative, he had an edge on the Co-Respondents. He was also called to give technical assistance in a disciplinary committee to show where there is fraudulent practice. He showed where there were loopholes, the Respondent acted and revenue started to increase.

Regarding the second criteria for promotion '*additional relevant qualification*', he referred to the training he received internally and stated that he fulfils the criteria mentioned as pre-requisite for the post of Administrative Specialist in the Internal Vacancy Notice. He has the Higher School Certificate, meets the requirements and has experience. Regarding the criteria of '*past experience in doing the same or similar job*', he stated that he has worked on various projects. E.g., he worked on a project for the Respondent to have its own business in Madagascar instead of a General Sales Agent ("GSA"). He also had a portfolio of agents falling under his category and managed to place three of them among the top five agents. He has also done market reports and budgets.

Regarding '*past record of the employee*', Mr Beaubois stated that he has a clean track record. He has earned his increments, through the annual Performance Appraisal System, without any problems. Two of his managers recommended that he has the capacity to occupy a higher position (Annex 8 to his Statement of Case) and the HR Manager gave him a reference recognising his contribution to the audit in Cargo (Annex 7 to his Statement of Case). Regarding his promotion, the Union stated that he cannot jump levels (from Level 1 to Level 4) and he had to forgo an increment and his probation period was extended. The increment was later paid. He had a relational issue with a manager who had joined the Cargo Department in 2016 and was transferred by HR upon his own request. He went to Procurement still on Level 4. At Annexes 5 & 6, he explains what happened with the GSA.

Regarding the Co-Respondents, Mr Beaubois stated that Mrs Rugoonath was in Cargo Imports and then went to Cargo Revenue Management; she applied for the posts of Senior Operations Officer and Administrative Specialist. Mr Gokool started in Cargo Import and was transferred to Cargo System. These functions are not related to post of Administrative Specialist. Mr Gokhool also applied for a post in another department on Level 5 but was not released by management in Cargo. He has been compensated by the Respondent's management. Mr Mathoora's work was more related to what was asked of Administrative Specialist. He had a personal issue with his manager and his reporting line was changed. He was then promoted to Level 5. Mrs Luximon was a Secretary in Cargo and joined Ground Operations in 2012. She was promoted to Level 5 in 2013 and re-joined Cargo. She was not involved in the business and took care of secretarial matters. Mr Heeramun has never been seen in the Respondent's uniform without being reprimanded. He is now in the Transport Department as from 1 June 2022.

Mr Beaubois further stated that he was in a conflictual relationship in the Cargo Department and could not express himself. He could not perform, found it more appropriate to ask for a transfer and HR transferred him quickly. He is now in Procurement. He is asking the Tribunal, in light of what he has stated, to study his case. See if the selection exercise for the post of Administrative Specialist was fair just, reasonable and non-arbitrary. If it is found that something was not properly done, that he be compensated or appointed to the post as from August 2019 or to redo the exercise in its entirety by a third party.

The Disputant was questioned by Counsel for the Respondent. He notably agreed that HR deals with a post that is vacant, inserts the requirements for the vacancy notice, shortlists the candidates and sets up the interview panel. He was not worked in HR but has an idea of the process. As per the Vacancy Notice for the post of Administrative Specialist, there are three

possibilities for one to apply. He possesses the Higher School Certificate, has followed internal courses at Air Mauritius, has 15 years' experience in Cargo and was thus eligible according to criteria A of the Vacancy Notice. He agreed that if a person meets either one of the two requirements, he would be eligible. The six Co-Respondents did meet the requirements.

The Disputant moreover agreed that the interview will determine who will be selected for the post. The three persons on the interview panel were considered as competent to conduct the interview to assess the candidates. He agreed that Mrs Beedassy is experienced to be a Manager HR and to sit on the panel. Mr Domah was in charge of the Cargo Department, and he agreed that there is no other who could master the functioning of cargo at Air Mauritius. Mr Tan Yan, who is a Senior Manager Commercial and Distribution, has great experience in his field and masters the functioning of Air Mauritius in his field. He did not question the Co-Respondents' eligibility criteria. He also stated that it is not completely true to say that there is no automatic promotion at the Respondent.

Mr Beaubois moreover answered that the assessment criteria for the post of Administrative Specialist was according to the Collective Agreement between the Union and management. He agreed that as per the Selection Report (later produced as Document A), the competencies assessed by the interview were Job Related/Technical Competencies; Analytical Thinking & Judgment; Planning/Prioritising/Organising; Process/System Focus; and Customer Focus. The candidates were asked questions by the interview panel and in light of the answers given, a report was made with their findings. According to the findings, he was classed ninth. As per the document, there were six vacancies. He is not aware of the number of vacancies as this was not mentioned in the advertisement. The duties mentioned in the Vacancy Notice are administrative duties in the Cargo Department. The post is not a managerial one but is a staff post. The interviewers attributed markings, but the document does not show how they arrived at their markings. He agreed that the interviewers gave markings according to their experience and wisdom. Certain candidates were favoured compared to him. He agreed that all the candidates were assessed on the same criteria.

Mr Beaubois was also shown a document on his Performance Appraisal scores (later produced as Document C), as well as that of the Co-Respondents, for the years 2016 to 2018. For 2015/16, he is among the best. He does not agree with that of 2017/18. For 2016/17, the Co-Respondents have a better score than him. For 2017/18, his score is inferior to the Co-Respondents. He is not aware of the circumstances Mr Heeramun was transferred to the Transport Department. He is not aware that there is no disciplinary matter in Mr Mathura's file.

Mrs Luximon was already on LS 5 and has moved laterally. She worked as a Secretary in Cargo; she did not report to him but they had interactions. He could not say what work Mrs Luximon was doing save for when he dealt with her. He asked for a transfer from Cargo due to an issue with a manager who is still there. As there are three managers in Cargo, it may not be automatic for him to report to the said manager. He is already indirectly working with the manager but not reporting to him. Mr Beaubois notably denied that there nothing arbitrary about the selection exercise.

The Disputant, when questioned by Counsel for the Co-Respondents, notably stated that he is good friends with the Co-Respondents having joined together with them, save for Mrs Rugoonath, from Plaisance Air Transport Services Ltd. As per the Selection Report, there were six posts vacant. He has no issue on the other candidates' eligibility for the interview. The selection was based on competence. He agreed, if one did not perform at the interview, that the assessors will base themselves on what they see. As per the Selection Report, he sees that there are elements demonstrating that the exercise was not clearly done. If it was clear, his points according to the five dimensions would be visible. What he has stated in his Statement of Case regarding the Co-Respondents are facts. There is no co-relation between secretarial and administrative work. Mr Mathura's case shows that it is possible to have friction with a person in the work environment. He agreed that as per the Vacancy Notice, the interviewers assessed qualification requisites, desirable criteria and candidate profile. There are six bullet points under '*Candidate Profile*', the last one being '*be a team player*'. He does not agree with the result of the selection exercise.

Mrs Shalini Beedassy-Banerjee, HR Business Partner at Air Mauritius Ltd, adduced evidence on behalf of the Respondent. She solemnly affirmed as to the truthfulness of the Respondent's Statement of Reply. She explained that when there is a vacancy in a department, the manager informs HR of the number of vacancies by filling an Employee Requisition Form. She produced the Selection/Interview Report for the post of Administrative Specialist Cargo (Document A) to which the Employee Requisition Form has been annexed. Initially there were 8 requests for the vacancies made by the manager. HR performed its due diligence and saw that only 6 would be required. The Vacancy Notice, which is also annexed to Document A, did not mention the number required. The aforesaid post is an administrative post and an extract of the Collective Agreement of December 2004 was produced to this effect (Document B). The Disputant as well as the Co-Respondents met the eligibility criteria for the post. 17 persons applied for the post of which 16 were eligible and only 13 appeared for the interview on 18 April 2019.

Mrs Beedassy-Banerjee also stated that the interview panel assessed the candidates according to the criteria at paragraph 4 of the report. The interview time was 15 to 20 minutes for each candidate. The candidate presented himself and explained what he does and his career at Air Mauritius. The panel asked questions. The Line Cargo Manager asked questions more or less related to Cargo. She was also present as HR together with a Senior Manager in Commercial. The panel is decided by the Officer-in-Charge and the Head of HR. The panel then deliberates, giving marks which are returned to HR. HR complies all and draws a Selection Report. After compiling the marks, a ranking is established. The first six are successful and two candidates were kept on a waiting list in this case. The first six received a letter of offer. Mr Jean Laval Gervais refused as he had accepted a higher post. The seventh candidate, Mrs Jessycah Ragoonath, was then offered the post. Mr Beaubois was ninth and was not on the waiting list.

Mrs Beedassy-Banerjee moreover stated that Mr Beaubois never raised any objection as to how the interview proceeded. After the interview, he never informed HR that he did not agree with what went on in the interview. Mr Beaubois came with objections when the letter of offer was issued. She is not aware of anything which was not equitable or unfair towards the Disputant in the interview or unreasonable or arbitrary. He was not treated differently from the other interviewees and was assessed the same. All the interviewees were treated the same. Referring to the criteria for promotion in the Collective Agreement, she stated that they went according to the competencies and criteria in the Selection Report. The panel members are not aware of the criteria in the Collective Agreement.

Mrs Beedassy-Banerjee furthermore stated that Mr Mathura appeared as a witness in a Disciplinary Committee against his manager. The committee had nothing to do with Mr Mathura's complaint against his manager. Mr Heeramun is no longer in Cargo having moved to the Transport Department. Mrs Luximon's post was Administrative Secretary in the Cargo Department. She also produced a Performance Appraisal Table of the Disputant and the Co-Respondents for the years 2015/2016, 2016/2017 and 2017/2018 (Document C). Save for the Disputant, no other interviewee has challenged the process. There have been no complaints from others who were not successful as to any unfairness of the interview.

Mrs Beedassy-Banerjee was questioned by Counsel for the Disputant. She notably stated that the Performance Appraisal table (Document C) was prepared prior to the interview, given to the panel members and is an internal document. Panel members can also check with the candidates' personnel file. Document C does not mention the level of the candidates. She agreed

that an appraisal for some on LS 4 and LS 5 is not the same. LS 4 and LS 3 do not have the same workload and their appraisals cannot be compared. She does not agree that Document C is not a reliable document for the Selection Committee to rely on as it does give an idea of performance. The performance criteria for LS 3 and LS 4 are the same despite the latter working more than the former.

Mrs Beedassy-Banerjee moreover stated that the Selection/Interview Report (Document A) was prepared after the interview. The Employee Requisition Form shows that the number of vacancies for the post was 8, which was cut to 6, which was also cut to 3, then '+ 3' was inserted. The HR Manager signed the form and also initialled at the number of vacancies. She does not agree that the document creates doubts. There is a note stating '*Process followed except that Advert does not mention how many vacancies there are to be filled.*' next to the CEO's signature in Document A. She cannot answer whether there were doubts on the number of vacancies as at 16 May 2019 when the Employee Requisition Form was attached to the report. Mrs Luximon's Assignment History (produced as Document D) mentions that she worked as Secretary, Administrative Assistant Cargo LS 1, Administrative Officer Cargo LS 3 and then Personal Assistant Customer LS 5.

Regarding the interview, Mrs Beedassy-Banerjee stated that they went according to their competencies. She did not deny that the Respondent was bound by the Collective Agreement with the AMSA and by the section on promotion therein. They did not use the criteria in the agreement for the interview, which was based on the competencies. Section 4 of the Selection/Interview Report mentions the five competencies in relation to which the interview panel asked questions and points were allocated. Annex C to the report mentions the names of the candidates, has three columns for the assessors, the total marks and percentage. There is no mention of the five competencies in the annex. There is an Assessment Sheet, filled by each panel member, for the marks allocated for each of the five competencies.

Mrs Beedassy-Banerjee moreover produced an edited bundle of three Evaluation Sheets pertaining to each panel member (Documents E, E₁ and E₂) dated 18 April 2019. The sheets set out a rating from '*Poor*' to '*Very Good*'. The five criteria upon which the candidates were assessed are also mentioned and have been defined in detail in Document A. The Disputant scored 2 points for Job Related/Technical Competencies with one assessor and scored 4 points with another for the same criteria. Regarding this criterion, she agreed that the Disputant has worked for 15 years in the Cargo Department and has performed on LS 4 for several years. The Co-Respondents, save for Mrs Luximon and Mr Heeramun, were on LS 3. Responsibilities pertaining to LS 4 are greater

than for LS 3 and the salary is different. She agreed that the Disputant received a letter dated 19 June 2017 (Annex 7 to his Statement of Case) appreciating the work he did regarding an audit but she was not a party to the enquiry.

Mrs Beedassy-Banerjee also stated that the criteria for the interview is based on the competency-based framework from HR. The Evaluation Sheets do not mention the criteria mentioned in the Collective Agreement. Punctuality forms part of the Performance Appraisal. However, the appraisal is not mentioned in the Evaluation Sheets. Referring the Document C, the marks of the Performance Appraisal are based on performance factors, which include attendance and punctuality. There is also '*quantity of work*', '*job knowledge*' and '*motivation and commitment*'. The Performance Appraisal Form for LS 3 and LS 4 is the same although their job functions are different. The Performance Appraisal gives an idea of how the person performs in his actual job, but they have not taken only this into consideration. As per Mrs Luximon's work history, she was a Secretary in 2002 to 2005 and then became an Administrative Assistant. In 2012, she became an Administrative Officer and in 2014, a Personal Assistant. She is not aware if the aforesaid positions do the same work as that of a Secretary. She is not aware that Mrs Luximon signs her emails as '*Secretary to Senior Manager*'.

Co-Respondent No.1, Mr Krishnan Gokhool was called on behalf of the other Co-Respondents and confirmed the truthfulness of their common Statement of Reply. When questioned by Counsel for the Disputant, he notably stated that he was promoted to LS 5 before becoming Administrative Specialist but was not released for the post on LS 5. He applied and was chosen for the post of Administrative Specialist.

THE SUBMISSIONS OF COUNSEL

Counsel for the Disputant has submitted on whether the selection exercise for the post of Administrative Specialist Cargo was fair, just, reasonable and non-arbitrary. He drew attention to the Disputant's demand for the Respondent to provide a list of courses, name of attendees and results obtained where applicable as stated in paragraphs 16 and 17 of his Statement of Case. This is crucial as it would demonstrate the degree of understanding, knowledge, skills and involvement of employees in the Cargo Department. At paragraph 45 of the Statement of Case, the Disputant has asked the Respondent to submit certain documents to demonstrate the quality of work undertaken by him. These have not been provided. This is important for the allocation of mark regarding the Co-Respondents and the Disputant. There was no demarcation between

the Disputant, who was on Level 4, and the Co-Respondents, who were on Level 3 in the selection exercise. Three posts were advertised and for Cargo Executive (PG 1), Level 3 candidates were not eligible to apply, whereas for Administrative Specialist, both Level 3 and 4 candidates could apply. Was it therefore, just, reasonable or non-arbitrary to have different approaches when dealing with the appointment of the selection exercise to all three posts?

Counsel further submitted that the Disputant was confident that he had performed well in the interview and that he would be enlisted for the post. No information has been disclosed with regard to the interview itself. There is no knowledge of what questions were asked, what marks were allocated to those questions and who got how many marks. The Disputant was lengthily questioned on his relationship with one of his managers, Mr Parapen. This is unfair on the Disputant. The Performance Appraisals produced (Document C) make no mention of the candidates' level and respective positions; only their marks have been given. This was a wrong consideration by the interview panel. The Disputant was moved to Procurement in 2017 referring to the appraisal of 2017/2018, where he scored 19 marks. The Procurement Manager's letter of recommendation dated 9 March 2020 should also have been taken onboard.

It was also submitted, on behalf of the Disputant, that the Selection Interview Report (Document A) lists the competencies on which the candidates were assessed. Whereas the Collective Agreement (Annex 3 of the Disputant's Statement of Case) sets guidelines which need to be followed for all promotion exercise. There is no evidence before the Tribunal that this has been considered. The selection panel has only considered the five criteria mention in the report. The selection exercise cannot therefore be fair, just, reasonable and non-arbitrary. Regarding the Employee Requisition Form (Annex A to Document A), there was initially provision for eight posts to be filled for Administrative Specialist Cargo, this was revised to three and then to six (3 + 3). It is not known who made these changes nor when they were made before or after the interview exercise. This confusion leaves the Tribunal in the dark as to how many people should have been selected and when the amendments were made. The explanations of the Respondent's representative were not helpful. If the initial eight positions had remained, they would not have been here.

In relation to the Co-Respondents, only one deposed and could not answer for the other Co-Respondents. The other Co-Respondents were not subject to cross-examination. Co-Respondent No.2 is holder only of a School Certificate, whereas the Disputant holds Higher School Certificate. It is not known why the said Co-Respondent was transferred from Cargo to the Transport Department. It was submitted that this was because of his conduct in Cargo. Mrs

Luximon (Co-Respondent No. 4) was promoted to Personal Assistant on Level 5 and why would somebody on Level 5 in Ground Services, having the same conditions of work, transfer to the Cargo Department on Level 5? Mrs Luximon scored more points than the Disputant despite there being no relation between the posts that she has occupied. Co-Respondent No. 6 applied for two posts and was selected for Administrative Specialist on Level 5, whereas the Disputant was on Level 4. The Disputant was on a level above the other Co-Respondents and was working as Sales Representative. He only scored two points on customer focus as per Document E, which does not reflect that the selection exercise was fair, just, reasonable or non-arbitrary.

On the other hand, Counsel for the Respondent has notably submitted that the candidates who were called should have performed in the interview on 18 April 2019 regardless of what they had done before. It was incumbent on the Disputant to prove that the process was not fair, unreasonable and arbitrary. It has been admitted by the Disputant that all those who were appointed and all who applied met the criteria. Regarding the number of vacancies as per the Employee Requisition Form, the discrepancy was clearly explained by the Respondent's representative. The candidates were not aware of the number of posts. Regarding the appraisal, this was given to the panel for them to have an indication. The candidates were assessed on basis of the competencies required and not on the appraisal. Someone on LS4 is assessed according to his actual position on LS 4 and likewise for someone on LS 5. How would this render the selection process unfair?

In relation to the criteria set in the Collective Agreement, Counsel submitted that it is not a promotional post, it is a selection exercise. The criteria set at paragraph 2.4 of the Collective Agreement is not mandatory. Counsel referred to the Tribunal's decision in *Khoderam & Ors. and Air Mauritius Ltd (ERT/RN 133/18 to 147/18)* in relation to the employer's *pouvoir de direction* and its discretion and powers in matters of appointment and promotion. Where is the abuse by management in this particular matter? There is none in Counsel's humble submissions. The process was carried out in a fair and just manner. At no point in time did the Disputant, during or even after the selection process, raise any point of unfairness. The unfairness cannot have happened after the list of successful candidates has been published. There is therefore nothing on record to suggest that this particular exercise was unjust, unfair or arbitrary.

Counsel for the Co-Respondent notably submitted that Co-Respondent No. 4 had 10 years' experience in Cargo and Co-Respondent No. 6 had 13 years in Cargo in refuting the Disputant's contention that these two appointees had no experience in Cargo. Regarding Co-Respondent No. 2, it is not a requirement to possess the Higher School Certificate as per the

Internal Vacancy Notice; he had 16 years in Cargo, when the requisite is at least 5 years. It was also submitted that the Disputant cannot ask for particulars in his Statement of Case. It is for the Disputant to discharge the burden and to bring his facts and evidence. Regarding the issue that the Disputant did not have the opportunity to cross-examine the other Co-Respondents, he did not move for them to be tendered for cross. As per the Selection Report (Document A), one assessor gave more or less the same marks to the Disputant and Co-Respondent Nos. 4 & 6, which shows that the markings were fair. It was submitted that not an iota of evidence has been adduced to show any unfairness.

THE MERITS OF THE DISPUTE

The Terms of Reference, in the present matter, is asking the Tribunal to enquire into whether the selection exercise conducted in April 2019 by the Respondent for promotion to the post of Administrative Specialist Cargo was fair, just, reasonable and non-arbitrary. If the Tribunal does not find this to be so, the second limb of the dispute is asking the Tribunal to see whether the Respondent should be directed to reconsider the selection exercise to allow the Disputant a fair chance of being appointed/promoted or otherwise.

The Respondent, on 18 December 2018, issued an Internal Vacancy Notice for the post of Administrative Specialist Cargo on the LS 5 (Level 5) salary scale. The Disputant was among the applicants to the post having been called for an interview on 18 April 2019. The six Co-Respondents were thereafter appointed to the aforesaid post with effect from 1 August 2019. The Disputant is aggrieved at not having been appointed to the position of Administrative Specialist Cargo following the selection exercise.

As per Counsel for the Disputant's submissions, one of the complaints raised regarding the selection exercise was that there was no demarcation between the Disputant (who was on Level 4) and the Co-Respondents who were on Level 3. The evidence on record has borne out that all the Co-Respondents were on Level 3, save for Co-Respondent No. 2 (who was on Level 4) and Co-Respondent No. 4 (who was on Level 5).

From a perusal of the Internal Vacancy Notice (Annex B to Document A), it can be noted that the candidates were required to have a minimum of 5 years on LS 3 and/or LS4 or be currently on LS 5. Thus, it is clear that the vacancy was open to candidates in the salary scale

ranging from Level 3 to Level 5. Thus, the issue of a demarcation between the levels the Disputant and the Co-Respondents were at prior to the interview cannot have any bearing on the fairness of the selection process. Moreover, the Disputant has not challenged the eligibility of the Co-Respondents to the post of Administrative Specialist Cargo. He notably admitted that they did meet the requirements for the post. The Tribunal cannot therefore see how the selection exercise has been rendered unjust, unfair, unreasonable or arbitrary in this particular aspect.

Counsel for the Disputant has also highlighted that the posts of Cargo Executive (PG 1) and Senior Operations Officer (LS 4) were advertised together with the post of Administrative Specialist Cargo. For Cargo Executive, Level 3 candidates were not eligible to apply in contrast to the post of Administrative Specialist. Counsel notably raised issue in having different approaches when dealing with the selection exercise to the three posts.

As per the per the Terms of Reference, the Tribunal is mandated to enquire in the selection exercise for the post of Administrative Specialist Cargo and not on the selection exercise for other posts which were advertised at the same time. Each post has its own particular eligibility requirements and to infer that the selection exercise for the post of Administrative Specialist would be flawed as the requirements for all three posts are not the same is not plausible by any stretch of the imagination. The Tribunal cannot therefore see how the selection exercise was unfair, unjust, unreasonable or arbitrary because of this.

Counsel has also emphasised that it was unfair on the Disputant in having been lengthily questioned on his relationship with one of his former managers when posted in Cargo. It should however be noted that as per the Disputant's evidence, although he mentioned that he had a conflictual relationship in the Cargo Department and asked to be transferred, he never stated that it was unfair on him in being so asked at the interview. The Tribunal cannot therefore see any merit with this assertion.

Questions have also been raised regarding the Performance Appraisal table produced (Document C) as no mention is made of the candidates' level and position. It must be borne out that this document was produced by the Respondent in evidence and is not among the reservations made by the Disputant in his Statement of Case or in his evidence. The Respondent's representative has clearly explained that this table is an internal document given to the interview panel members. It was also stated that panel members could also check with the candidates' personnel file. It was meant to give an idea of the candidates' performance.

Although from a perusal of the Performance Appraisal table, it is clear that only the names and marks of the applicants' Performance Appraisal for the years 2015/16, 2016/17 and 2017/18 are mentioned, it cannot be overlooked that the post of Administrative Specialist Cargo was open to applicants on Levels 3, 4 and 5 as per the Internal Vacancy Notice. Thus, the candidates mentioned in the table were necessarily within these Levels to have been called for the interview. It was also open for the panel members to check the candidates' personnel file if ever they wished to have more details on a particular applicant. The Tribunal cannot therefore see any unfairness, unreasonableness or arbitrariness in relation to this issue.

It has also been submitted that the letter of recommendation in favour of the Disputant made by his Procurement Manager should have been taken onboard. Although the Disputant's Statement of Case makes mention of this letter dated 9 March 2020 and the Disputant has referred to same in his evidence, the relevance of the letter has not been situated in the context of the selection exercise for the post of Administrative Specialist Cargo. There is no indication as to whether this letter was ever submitted to the interview panel and as to what extent it was considered or not.

Attention has also been drawn to the criteria upon which the candidates were assessed. The Disputant has notably relied on paragraph 2.4 of the Collective Agreement 2018 titled '*Promotion*'. Whereas, the Respondent has been adamant that the candidates were assessed on the competencies as mentioned in the Selection/Interview Report (Document A). It is apposite to note the following from the extract of the Collective Agreement:

2.4 *Promotion*

2.4.1 ...

2.4.2 *The following will, in principle, inter alia be taken into account for promotional purposes: ability to perform the duties, additional relevant qualifications, past experience in doing the same or similar work, the past records of the employee and past years of service.*

It is clear that paragraph 2.4, and sub-paragraph 2.4.2 in particular, deals with the matter of promotion. Was the selection exercise one for promotion to the post of Administrative

Specialist Cargo? The Internal Vacancy Notice for same does not mention the word '*promotion*' and is more in the nature of a call for applications for the post to which appointments were eventually made.

It can be noted that the post is on Level 5 and was also open to candidates on Level 5. Thus, for one who is already on Level 5, being appointed to a post on Level 5 is not necessarily a promotion. Furthermore, paragraph 2.4.2 of the Collective Agreement gives an exhaustive list of factors to be taken into account for promotional purposes among other relevant factors. This does not necessarily mean that the factors listed are not among the considerations upon which the candidates were assessed as per the Selection/Interview Report. The first competency relates to the understating of the job function and having the required technical skills to perform the job effectively which is the same as ability to perform the duties.

It should be noted from the Interview/Selection Report, the desirable criteria used in shortlisting the best potential candidates for the post were experience in the Cargo Department and higher relevant qualification. The prerequisites, as is also to be found in the Internal Vacancy Notice, mentioned in the Selection/Interview Report also refer to the required years of service that the candidate must possess depending on the level of his/her qualifications. The candidates' Performance Appraisal was also taken into account and as per the Respondent's representative, attendance and punctuality is part of the appraisal. Thus, it cannot be said that the past record of the employee was overlooked.

Although the selection exercise has applied specific competencies to assess the candidates for the post of Administrative Specialist Cargo, from a perusal of the Selection/Interview Report it cannot be said that the factors listed in the extract of the Collective Agreement have not been considered. It is also apposite to note that the selection exercise for the post *in lite* was not necessarily a promotional exercise as has been envisaged by the aforementioned extract of the Collective Agreement.

Likewise, the Terms of Reference of the dispute notably refers to selection exercise for the promotion to the post of Administrative Specialist Cargo. As has been considered, the selection exercise was not necessary a promotional exercise. It may be subjectively considered to be a promotion from the Disputant's point of view but the Tribunal is being asked to objectively consider *inter alia* the fairness of the selection exercise. As per the evidence on record, the exercise was one for appointment to the post Administrative Specialist Cargo.

Counsel for the Disputant has also pointed to discrepancies in the Employee Requisition Form (annexed to the Selection/Interview Report) regarding the number of vacancies for the post of Administrative Specialist Cargo. It can be seen from the form that the number has been modified from 8 to 6 and then to 3 + 3. It is known that the selection exercise resulted in the appointment of the six Co-Respondents.

The Internal Vacancy Notice has not mentioned the number of posts to be filled for this particular position. The candidates, including the Disputant, were therefore unaware of the number of persons that were eventually appointed at the time of their application. The number of posts for the position of Administrative Specialist Cargo was thus an internal matter and at the discretion of the employer. Had the Internal Vacancy Notice mentioned the number of posts available and same had not been respected, there could have been an issue regarding the selection exercise. This is however not the case. It should also be noted that this issue was not raised by the Disputant in his evidence and only came to light when the Selection/Interview Report was produced by the Respondent.

Comments have also been made regarding the Co-Respondents. Although Co-Respondent No. 2 only holds a School Certificate, as opposed to the Disputant having a Higher School Certificate, it has not been disputed that he met the requirements to apply for the post of Administrative Specialist Cargo. Being lesser qualified does not render the selection exercise unfair as long as the candidate was eligible to apply for the post. Moreover, the same Co-Respondent's transfer from Cargo to the Transport Department is of no relevance to the selection exercise nor was any evidence adduced that was because of his conduct.

The Tribunal cannot also see the relevance of Co-Respondent No. 4 applying for the post of Administrative Specialist Cargo when she was already on Level 5 in Ground Services. It has not been disputed that she had the required number of years of experience in the Cargo Department to be eligible to apply and eventually be appointed. Regarding Co-Respondent No.6, it does not matter that she was appointed despite being on Level 3 when the Disputant was on Level 4 inasmuch as the Internal Vacancy Notice *inter alia* required a minimum of 5 years on LS 3. Moreover, the Tribunal cannot see the relevance of her not being selected to another post on LS 4 in relation to the selection exercise for the post of Administrative Specialist Cargo and has uncovered no applicable evidence in relation to this.

It was also contended that only one of the Co-Respondents deposed and that the others were not subject to cross-examination. This is neither here nor there as it is not for the Co-Respondents to make out the case for the Disputant. It is trite that the Disputant has the burden of proving his case on a balance of probabilities and it is an ambiguous approach for him to rely on other parties to make out his case.

Counsel for the Disputant has also highlighted that no information has been disclosed in relation to the interview, the questions asked are unknown, as are the marks allocated to those questions and who got how many marks. The Respondent's representative did duly depose and was duly questioned by Counsel for the Disputant. If ever Counsel wanted to be enlightened as to the questions asked at the interview and the marks given thereto, he should have put questions to the representative regarding same. The Disputant cannot rely on the Respondent to make out its case. Regarding the marks obtained by the candidates, the Respondent did produce three Candidate Evaluation Sheets pertaining to each assessor (Documents E, E₁ and E₂) which showed the marks obtained by the Disputant and the Co-Respondents in relation to each competency. The Tribunal thus cannot see any unfairness towards the disputant on this score.

It was also highlighted that the Disputant had asked for, in his Statement of Case, details on courses followed and documents to demonstrate the quality of work undertaken by and these were not provided. It is trite law that the burden is on the Disputant to prove its case and he cannot rely on the Respondent or the Co-Respondents to furnish him with evidence to fuel his case. This demand moreover demonstrates that the Disputant may not have had a comprehensive file to show any alleged unfairness, unreasonableness or injustice regarding the selection exercise.

The Tribunal has observed that the Disputant did participate in the selection exercise and did not make any complaints in relation thereto. It was moreover confirmed by the Respondent's representative that the Disputant never raised any objection as to how the interview proceeded nor did he inform HR of any issues after the interview. His dispute arose when he became aware that he was not favourably considered for the post of Administrative Specialist Cargo.

If ever the Disputant had any qualms with the selection exercise, it was crucial for him to raise same at the material time. In this optic, the following can be noted from what was stated by the Supreme Court in *Hosanee & 9 Ors v The Public Bodies Appeal Tribunal* [2016 SCJ 123]:

In any case, as already stated above, the applicants willingly participated in the interview and expressed no reservation or objection at the material time.

The Tribunal has also noted that the Respondent has been very open and transparent regarding the selection exercise for the post in question. The Respondent has been outright in producing documents internal to the selection process, such as the Selection/Interview Report, the Performance Appraisal table as well as the Evaluation Sheets, to demonstrate the manner in which the exercise was conducted.

Although the Disputant is aggrieved at not having been appointed to the post of Administrative Specialist Cargo, the employer's discretion in matters of appointment and promotion must be acknowledged. It should be noted 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 is pertinent to note the following from 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).

Moreover, 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.*

Having examined the various issues put forward by the Disputant in challenging the fairness and reasonableness of the selection exercise for the post of Administrative Specialist Cargo, the Tribunal cannot come to the conclusion that the selection exercise was unfair, unjust, unreasonable or arbitrary as per the first limb of the Terms of Reference of the dispute. As the Tribunal has not found the selection exercise to be unfair, unjust, unreasonable or arbitrary, it need not consider the second limb of the Terms of Reference of the dispute.

The dispute is therefore set aside.

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SD Shameer Janhangeer
(Vice-President)

.....
SD Vijay Kumar Mohit
(Member)

.....
SD Rabin Gungoo
(Member)

Date: 14th March 2023