

# EMPLOYMENT RELATIONS TRIBUNAL

## INTERPRETATION OF AWARD

**ERT/RN 09/2023**

*Before: -*

<b>Shameer Janhangeer</b>	-	<b>Vice-President</b>
<b>Vijay Kumar Mohit</b>	-	<b>Member</b>
<b>Ghianeswar Gokhool</b>	-	<b>Member</b>

*In the matter of: -*

**DEVELOPMENT BANK OF MAURITIUS LTD**

*Applicant*

and

**Miss Purnima CHINIAH**

*Respondent*

*In presence of: -*

- 1. Mr Devanand GUNGARAM**
- 2. Mrs Corine BADERE**
- 3. Mrs Hoomantee RAMBURUN**

*Co-Respondents*

The Tribunal delivered an award in a labour dispute referred to it by the Commission for Conciliation and Mediation under *section 69 (9) (b)* of the *Employment Relations Act* (the “Act”) on 23 January 2023 (*vide Chiniah and Development Bank of Mauritius Ltd (ERT/RN 40/2021)* published in the Government Gazette as *GN 102 of 2023*). The Development Bank of Mauritius Ltd (“DBM”) is now seeking an interpretation of the award under *section 75* of the Act.

Both parties were assisted by Counsel. Mr M. Ajodah appeared for the Applicant instructed by Mr R. Bucktowonsing, SA. Mr T. Dabycharun appeared together with Mr D. Ramano for the Respondent. The Co-Respondents were *inops consilii* and have stated that they shall be abiding by the decision of the Tribunal. As per its application, the DBM has notably averred as follows:

*The operative part of the Award directs the Respondent to reconsider the selection exercise to give a fair chance to the Disputant, as well as other unsuccessful applicants, to be appointed to the post of Assistant Manager.*

*In the light of the above, the Respondent therefore seeks a declaration from the Tribunal on the interpretation of the Award as follows-*

- a. *Inasmuch as the Tribunal has rightly specified that it is trite law that matters of appointment and promotion are essentially within the province of the employer and as it has not quashed the appointments of the Co-Respondents, whether the correct interpretation of the Award is that –*
  - (i) *the appointments of the 3 Co-Respondents as Assistant Managers may be maintained by the Respondent to the initial posting, or*
  - (ii) *whether the appointment of the Co-Respondent No 3 only may be maintained to her initial posting by the Respondent; whilst the appointments of the Co-Respondent No 1 & 2 specifically in the MD's office and at the DBMFS Ltd respectively have to be cancelled, or*
  - (iii) *whether the Respondent can directly assess and consider whether the appointment of the Co-Respondents nos. 1 and 2 in one of the units listed in the vacancy notice dated 12 December 2017.*
- b. *whether the correct interpretation of the Award is that the Respondent has to base itself on the performance and marks scored during the exercise carried out in 2018 to decide whether to appoint the Disputant and/or any of the unsuccessful applicants or not, and if so, to which unit listed in the vacancy notice dated 12 December 2017,*
- c. *if any applicant is appointed by the Respondent based on the performance and marks scored during the exercise carried out in 2018, whether such appointment ought to take effect as from the 19 February 2019 as notified by the Respondent's memo dated 27 February 2019, or as at the current date of appointment if any, or otherwise.*

The Applicant and the Respondent have offered submissions in relation to the matter of interpretation being sought. Counsel for the Applicant has notably submitted that the DBM has appointed five persons to the post of Assistant Manager, two of whom were not challenged. The post of Underwriting and Marketing, to which the Respondent had applied to, were not filled. The Respondent had also applied for the post of Assistant Manager in the Recovery Department, where Co-Respondent No. 3 was appointed. Co-Respondent Nos. 1 & 2 were appointed to the MD's Office and DBM Financial Services Ltd respectively.

As per the last paragraph of the Tribunal's award, the DBM is being directed to reconsider the selection exercise. It is on account of the word '*reconsider*' that the DBM has made the present application. The Terms of Reference have not challenged the appointments made and it would seem that the appointments of the three Co-Respondents would continue to have effect. It is clear from the award that the appointments of Co-Respondents Nos. 1 & 2 are in issue as their positions were not advertised. The appointment of Co-Respondent No.3 is not in issue and the Tribunal's direction to reconsider the selection exercise is not a direction to carry out a new and fresh interview process *ab initio*.

As far as the DBM is concerned, the interpretation to be given to the award is to consider the results and the markings which came out of the process and then secondly, to decide whether the unsuccessful applicants, including the Respondent, ought to be appointed to one of the posts originally advertised and for which they had respectively applied for. The Applicant is before the Tribunal as the award does not state so in so many words and there are different possibilities as mentioned in the application. The DBM is not exactly sure how to reconsider. The points a, b and c listed in the application are possibilities arising from different interpretations of the word '*reconsider*'. Counsel also added that the issue of when the appointment should take effect, as per point c of the application, is not a matter within the ambit of interpretation of the award and did not insist on same.

Counsel for the Respondent has, on the other hand, notably submitted that the Respondent is only concerned with the three units she applied for. There is no issue with Co-Respondent No.3, who applied for the Recovery Unit, as she is at par with the Respondent. The Respondent has no issue with Co-Respondent Nos. 1 & 2 as they have been appointed outside the twelve units advertised for. The issue is only on the three units the Respondent applied for. She is asking for her position to be reconsidered for the two remaining posts. To allow the Respondent a fair chance, would be for the posts she had applied for with the appointment to

Recovery Unit not being disputed. It was notably submitted that *'reconsider'* would mean to reconsider the selection exercise based on what was done in 2018. By removing the three Co-Respondents, as there is no issue with them, and reconsidering the Respondent for the two positions.

The Terms of Reference upon which the Respondent's dispute was referred to the Tribunal reads as follows:

1. *Whether the selection exercise conducted by Respondent in year 2018 leading to the appointment in February 2019 for the promotion from Senior Development Officer to Assistant Manager was fair, reasonable, just and non-arbitrary.*
2. *If the assessment in (1) above is in the negative whether the DBM Ltd should be directed to reconsider the selection exercise and the relevant appointment/promotion to allow Miss Purnima Chiniah a fair chance to be promoted.*

The Tribunal, in its award, notably found that there was an element of unfairness in the selection exercise with Co-Respondent Nos. 1 & 2 being directly appointed to the posts of Assistant Manager in units not advertised for in the vacancy notice dated 12 December 2017. The Tribunal thus directed the Respondent to reconsider the selection exercise to give a fair chance to the Disputant (as well as to other unsuccessful applicants) to be appointed/promoted to the post of Assistant Manager in accordance with the Terms of Reference of the dispute.

It is trite law that the Tribunal is empowered to enquire into a dispute referred to it within the Terms of Reference of the dispute and cannot enquire into any matter which is not within the Terms of Reference of the dispute (*vide Air Mauritius Ltd v Employment Relations Tribunal [2016 SCJ 103]; Davasgaium & Ors v Employment Relations Tribunal [2022 SCJ 342]*). It would therefore follow that in giving an interpretation of its award, the Tribunal would be bound to act within the Terms of Reference of the dispute of the award it delivered. The more so that the declaration that the Tribunal would make is to form part of the original award.

The Applicant is seeking guidance on the interpretation of *'reconsider'* in relation to the award of the Tribunal. It has been noted that the word *'reconsider'* originates from the second limb of the Terms of Reference of the dispute and relates to the selection exercise. As per the

*Concise Oxford English Dictionary, 11<sup>th</sup> edition, revised*, the aforesaid word signifies '*consider again*'.

According to the Applicant, the correct interpretation of the award would be that the Respondent has to base itself on the performance and marks scored during the exercise carried out in 2018 to decide whether to appoint the Disputant and/or any other unsuccessful applicants or not and if so, to a unit listed in the vacancy notice dated 12 December 2017. The Respondent has also followed the same line of reasoning in submitting that the Applicant should reconsider the selection exercise based on what was done in 2018. In the same vein, it is apposite to note that the Tribunal never awarded that a fresh selection exercise for the post of Assistant Manager be carried out despite the unfairness that was uncovered nor was it within the Terms of Reference of the dispute for it to do so.

It should be noted that Tribunal's award notably directed the DBM to reconsider the selection exercise to allow the Respondent a fair chance of being promoted. This does not mean that in reconsidering the selection exercise, the DBM can exclude the Co-Respondents, who had also duly applied to the posts advertised in the vacancy notice. To give the Respondent as well other unsuccessful applicants a fair chance of being promoted/appointed does not imply that the Co-Respondents should be excluded from the selection process.

However, it is for the DBM to see whether the Co-Respondents have to be reconsidered in the selection exercise given that their appointments have not been quashed. The selection exercise for the various posts of Assistant Manager should be reconsidered in relation to the units advertised for as per the vacancy notice dated 12 December 2017.

The Tribunal therefore declares that the DBM must reconsider the selection exercise for the posts of Assistant Manager of the units advertised for in the vacancy notice dated 12 December 2017 based on the performance and marks scored during the exercise held in 2018.

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

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**SD Vijay Kumar Mohit**  
**(Member)**

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

**Date: 25<sup>th</sup> April 2023**