

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/RN 17/23

Before: -

Shameer Janhangeer	-	Vice-President
Vijay Kumar Mohit	-	Member
Jeanique Paul-Gopal (Mrs)	-	Member
Ghianeswar Gokhool	-	Member

In the matter of: -

Mrs Ajasavane SOOPRAMANIEN

Disputant

and

DEVELOPMENT BANK OF MAURITIUS LTD

Respondent

In presence of: -

1. Mrs Deviani GANOWRY
2. Mrs Mayadevi MONEESAWMY
3. Mrs Parween MAHERALLY
4. Miss Reshma Bibi BHUGEL
5. Mr Rishi MAGHOO
6. Mr Hemant Kumar MOOROTEEA
7. Mrs Karoona APPIAH

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 Terms of Reference of the dispute read as follows:

Whether I should have been selected for appointment in the post of Senior Development Officer given that I have requisite qualifications, experience, ability and knowledge for the said post and the more so, I am performing the duties of Senior Development Officer since January 2014.

Both parties were assisted by Counsel. Mr N. Poonisamy appeared for the Disputant; whereas Mr M. Ajodah appeared for the Respondent instructed by Mr R. Bucktowonsing, SA. Each party has submitted their Statement of Case in the present matter. The Co-Respondents have stated that they are abiding by the decision of the Tribunal and have left default.

THE DISPUTANT'S STATEMENT OF CASE

The Disputant has averred that she reckons 36 years of employment with the Development Bank of Mauritius Ltd ("DBM") and currently occupies the post of Development Officer ("DO") while performing the higher duties of Senior Development Officer ("SDO"). The Respondent failed to appoint Disputant to the post of SDO following an invitation of internal applications to the aforesaid post. The Disputant is aggrieved by the Respondent's decision not to promote her to the post of SDO whilst she has been successfully performing the duties of SDO from January 2014 to date. She has been deriving a Responsibility Allowance for performing same from February 2014 to July 2015. She relies on the qualifications required for the post of SDO as per its scheme of service.

It has also been averred that the Disputant reckons 22 years of experience at the level of DO. She has all the requisite skills, experience, knowledge and abilities to perform the duties of SDO as per its scheme of service for performing the duties of the post since January 2014 in the Administration and Human Resources ("HR") Department. She is the only one performing the duties of SDO in her department as at date. She was perceiving a Responsibility Allowance for same and following a Board decision, all Responsibility Allowances were withheld. She has

continued to perform the duties of SDO assigned to her up to date. She has never been subject of any adverse report, misconduct and/or disciplinary action.

Moreover, the Disputant has averred that the weightage given to the selection exercise by way of interview cannot reasonably outweigh the Disputant's flawless performance for the past nine years in discharging the duties of SDO till date. The acts and doings of the Respondent are unjust, unreasonable and most unfair since she is deemed fit to perform the duties of SDO and yet has not been promoted to the said post upon vacancies arising. She is being caused prejudice and harm in being burdened with higher responsibilities without deriving any benefits or perks of the post. She prays for an award as per the Terms of Reference of the dispute.

THE RESPONDENT'S AMENDED STATEMENT OF DEFENCE

The Respondent has notably averred that the Disputant reckons only 35 years of service with the Respondent. The Respondent denies that the Disputant has all the requisite skills, experience, knowledge and abilities to perform the duties of SDO as per its scheme of service and avers that the Disputant's assignment was limited only to certain specific duties normally performed by a SDO and not all. Co-Respondent Nos. 1 to 5 had, to various degrees, all been performing the duties of SDO just like the Disputant. Save and except that the Disputant was deriving a Responsibility Allowance from February 2014 to July 2015 and that all Responsibilities Allowances were withheld as per a Board decision, it is denied that the Disputant continued to perform the duties of SDO up to date. It is admitted that the Disputant has never been subject of any adverse report, misconduct and/or disciplinary action.

It has also been averred that the weightage to be given to the different criteria is a policy decision of the Respondent, which has at all times been indiscriminately applied to all candidates such that there was a transparent process and a level playing field between all the candidates. The Disputant did not achieve a satisfactory level following her interview following which her selection was not recommended. It has been maintained that the Disputant's assignment was limited only to certain specific duties normally performed by a SDO and not all duties assigned to the latter in the scheme of duties. The performance of such few duties does not confer an advantage, privilege or preference to the Disputant during selection exercises. Should any advantage, privilege or preference be given a person who has been given the responsibility to

perform a few duties normally performed by a SDO, then the selection process would be deemed to be unjust, unreasonable and unfair as it would penalise those who have not had to opportunity to take up such responsibilities.

THE EVIDENCE OF WITNESSES

The Disputant, Mrs Ajasavane Soopramanien, Development Officer at the DBM, was called to adduce evidence. She notably stated that she has been occupying the post of DO since May 2001 performing the duties of the post plus that of SDO. Since July 2015, she has not been receiving a Responsibility Allowance because of the Board's decision to freeze all allowances due to the bank's financial situation. The duties of SDO differ from posting to posting. In the Administration and HR Department, she has been performing the duties of SDO since mid-January 2014 to present. She was verbally requested by the Head of Department to assume duties of SDO as three SDOs had taken the Voluntary Retirement Scheme. She is the only DO in the said department and there is no SDO.

The Disputant moreover stated that she was qualified and was called for interview in January 2019 when the vacancy for the post of SDO was advertised on 4 September 2018. As a qualified candidate, she should have been selected for the post of SDO as she has the required skills, abilities, experience and knowledge for the post. She has a diploma and a degree. Regarding her conduct at the DBM, she has had no adverse report and no disciplinary action has been taken against her. She wishes that justice be rendered in her case.

The Disputant was questioned by Counsel for the Respondent. She notably stated that she cannot say if the Co-Respondents were qualified as she is not personally aware of their qualifications. She agreed that the Co-Respondents were eligible to apply but she could not say if they had the required skills to apply. She agreed that if her colleagues had the required skills, knowledge, experience and qualifications, they could be selected for the post. She cannot say if the Co-Respondents have had disciplinary issues. She was not performing all the duties of SDO as this depends on posting; the duties of SDO in the Finance Department are different from that of the Administration and HR Department. Over and above the duties of SDO she was performing, she was also doing the duties of DO. She went over the duties she was performing as per the scheme of duties for the post of SDO. Regarding the Co-Respondents, only Mrs Mooneesawmy

was performing duties of SDO, and she does not know what duties the other candidates were performing as she was not working in their department.

The Disputant further replied that, in her department, Mrs Mooneesawmy was appointed as SDO and is acting as Assistant Manager. She never protested or expressed her disapproval with the fact that the selection for the post of SDO included an interview process. She submitted herself to the interview. She did not express any disapproval after the interview. She is not aware of her weightage nor of her marks at the interview. The reason of her non-selection was that she did not have the required marks for the interview. She was so informed after having enquired from the HR Department. She agreed that the weightage to be given to each criterion is a policy decision of the Board. She also agreed with the maximum marks to be given for each criterion. She does not agree that she did not achieve a satisfactory level in the interview and was not recommended for selection as SDO by the selection panel. She did not agree that the selection exercise was fair, impartial and regular in all aspects nor that the selected candidates were legally and lawfully selected.

Mr Deoraz Hosanee, Company Secretary at the DBM, deposed on behalf of the Respondent. He affirmed as to the truthfulness of the Amended Statement of Defence and notably stated that all the Co-Respondents were performing duties of SDO. The Disputant did not achieve the pass mark at the interview. The Co-Respondents achieved much better results than her.

Upon questions from Counsel for the Disputant, Mr Hosanee notably stated that the Disputant is performing some of the duties of SDO in the Administration Department. It was a Board decision to withhold the allowance given to the Disputant. As all the Co-Respondents have also performed duties of SDO, the Disputant and the Co-Respondents were on a level playing field and there was no unfair advantage for the Disputant. In explaining what is meant by '*satisfactory level*', he stated that the Board accepted the pass mark to be satisfactorily considered to the level of SDO and the Disputant did not achieve the pass mark. He did not have information as to the pass mark nor the Disputant's assessment sheet on him. With the approval of the Board, he could produce same at a later stage. The candidate is selected based on the assessment, the score of the interview, qualifications and years of service. The criteria were set by the committee during the interview exercise and marks were allocated at the time of the interview to the candidates. He agreed that the grey area is during the interview.

THE SUBMISSIONS OF COUNSEL

Counsel for the Disputant briefly submitted that the Disputant has testified to the effect that she is qualified and has performed well during the interview, whereas the Respondent's representative could not disclose the pass marks to know whether the Disputant has reached the satisfactory level. Counsel pointed out that the Respondent could not assist the Tribunal with regard to the averment at paragraph 12 of the Statement of Defence regarding the satisfactory level to be reached during the interview.

Counsel for the Respondent has, on the other hand, notably submitted that the matter has no leg to stand on. The Disputant's 22 years of experience is not a reason for her to be selected for the post of SDO. She also stated that she has the required skills, knowledge and abilities but so do the others. Although she stated to be to only one performing the duties of SDO in her department, the other candidates were also performing duties of SDO just like her. Moreover, performance of the duties of SDO is not a criterion for the selection exercise referring to the criteria as averred in the Disputant's Statement of Case. The Disputant also agreed that it is not for her to decide on the weightage to be given for each criterion.

THE MERITS OF THE DISPUTE

As per the Terms of Reference of the present dispute, the Disputant wishes to know if she should have been selected for appointment to the post of SDO given that she has the requisite qualifications, experience, ability and knowledge for the said post and the more so, she is performing the duties of SDO since January 2014.

It has not been disputed that the post of SDO was advertised at the DBM on 4 September 2018 and the Disputant was called for an interview for the post in January 2019. As per her evidence, the Disputant contends that she should have been selected to the post of SDO as she has the required skills, abilities, experience and knowledge for the post. She also stated that she

was performing the duties of SDO in her department. Moreover, she has had no adverse report against her nor has any disciplinary action been taken against her.

The Respondent, on its part, has denied that the Disputant has all the required skills, experience, knowledge and abilities to perform the duties of SDO as per its scheme of service. The Respondent has also contended that the Disputant was performing some of the duties of SDO and not all. It has however been admitted that the Disputant has never been subject of any adverse report, misconduct and/or disciplinary action. Furthermore, the Respondent contends that the Disputant did not achieve the pass mark at the interview.

The case for the Disputant therefore relies on her attributes for the post of SDO and the fact that she has been performing the duties of SDO in her present post of DO in the Administration and HR Department. It has been borne out that there was a selection exercise for the post of SDO to which the Disputant was interviewed in January 2019. The Tribunal has, however, been left in the dark as to the vacancy notice issued for the post and as to how the selection exercise was conducted. Although the Disputant did reproduce the '*Qualifications*' section of the scheme of service of SDO in her Statement of Case, she did not solemnly affirm as to the correctness of same, nor has she referred to same in her evidence adduced before the Tribunal.

On the other hand, the Respondent's representative has clarified that the candidate for the post of SDO is selected based on an assessment, the interview score, qualifications and years of service. The criteria are set by the committee during the interview exercise and marks are allocated to the candidates at the interview. He also stated that the Disputant did not achieve the pass mark and that the Co-Respondents achieved much better results.

Having the required attributes for the post of SDO does not necessarily mean that the Disputant would be selected for same. Having the required attributes will render her eligible to apply for the post along with the other eligible candidates. It should be noted that the Disputant did recognise that the Co-Respondents were also eligible to apply for the post. She did also agree that if they had the required skills, knowledge, experience and qualifications, they could be selected to the post of SDO. Thus, the Disputant underwent a selection exercise with other

candidates, which included the Co-Respondents, following which the Respondent eventually selected the appointees to the post of SDO.

At this juncture, it is apposite to note that matters of appointment and promotion are essentially within the province of management subject to an abuse of powers by the latter as can be pertinently noted from the Permanent Arbitration Tribunal in *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. Ayrqa and Tea Board RN 575 of 1998).

The Respondent's evidence to the effect that the Disputant did not reach the pass mark at the interview has not really been contested. In fact, the Disputant has not adduced any evidence as to her performance at the interview. She notably agreed, when cross-examined, that the weightage to be given to each criterion is the DBM Board's decision although she was not aware of her the weightage or her marks at the interview.

Moreover, the Disputant's evidence, particularly when cross-examined, has borne out that she was performing some of the duties of SDO in her department but not all of the duties. She also recognised that Co-Respondent No.2 was also performing the duties of SDO despite not being aware of the duties that the other Co-Respondents were performing. Whereas the Respondent's representative has categorically stated that all the Co-Respondents were performing the duties of SDO. Despite relying on the fact that she is performing the duties of SDO, it has not been shown whether being assigned duties of SDO would be an advantage or a formal requirement of the selection exercise for the post of SDO. Besides, she was not the sole candidate convened to the selection exercise to be performing duties at the level of SDO.

The Disputant's cross-examination has also revealed that she did not protest or express her disapproval with the interview aspect of the selection exercise for the post of SDO. She admitted that she submitted herself to the interview and did not express any disapproval after the interview. If ever the Disputant had any issues with the selection exercise, it was crucial for

her to raise same at the material time. In this context, the following may be noted from what the Supreme Court observed in *Hosanee & 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 further noted that the Disputant has not relied upon any unfairness or irregularity in the selection process for the post of SDO nor is it part of her dispute as per the Terms of Reference. If there was no unfairness or irregularity in the selection exercise, it is difficult to see how the Respondent could be faulted for not having selected the Disputant for appointment to the post of SDO.

The Disputant's Counsel notably submitted that the Respondent's representative could not disclose the pass mark to know whether she has reached the satisfactory level. It must be noted that it is not reflected in the Terms of Reference of the dispute that the Disputant ought to have been appointed as she had achieved the pass mark during the selection process. In fact, she clearly stated that she was unaware of her marks. Furthermore, the record clearly shows that the representative was willing to disclose the pass mark and the Disputant's assessment sheet upon obtaining the Board's approval, but Counsel did not insist on same.

Having notably considered the specific grounds upon which the Disputant contends that she should have been appointed to the post of SDO as well as the whole of the evidence adduced, the Tribunal cannot find that the Disputant should have been selected for appointment to the post of SDO as she is asking for as per the Terms of Reference of the dispute.

The dispute is therefore set aside.

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SD Shameer Janhangeer
(Vice-President)

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SD Vijay Kumar Mohit
(Member)

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SD Jeanique Paul-Gopal (Mrs)
(Member)

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SD Ghianeswar Gokhool
(Member)

Date: 26th July 2023