

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/RN 40/2021

Before: -

Shameer Janhangeer	-	Vice-President
Vijay Kumar Mohit	-	Member
Ghianeswar Gokhool	-	Member

In the matter of: -

Miss Purnima CHINIAH

Disputant

and

DEVELOPMENT BANK OF MAURITIUS LTD

Respondent

In presence of: -

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

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:

- 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.*

Both parties were assisted by Counsel. Mr T.A. Dabycharun appeared, together with Mr D. Ramano, for the Disputant; whereas Mr M. Ajodah appeared for the Respondent instructed by Mr R. Bucktowonsing, SA. Each party has submitted a 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 is a Senior Development Officer (“SDO”) at the Development Bank of Mauritius (“DBM”) Ltd since 21 December 2004, having been initially appointed as a Clerk on 1 February 1988. The post of Assistant Manager was first advertised on 5 October 2016 to which the Disputant was interviewed on 13 December 2016; however, the post was not filled. It was advertised a second time on 12 December 2017 with a call of applications for the different units; Disputant applied but the posts were not filled. It was then advertised in July 2018 to which Disputant applied for three units (Underwriting, Recovery and Marketing) and was called for an interview on 19 July 2018. On 27 February 2019, she was informed by an office circular that offers of appointment to the post of Assistant Manager had been made to the three Co-Respondents. The Disputant was surprised and stunned at not being selected for the post.

The Disputant notably avers that she fully meets the requirements in terms of qualifications, length of service, experience and skills. She holds an ACIB from the Chartered Institute of Bankers, UK and a MSc Finance from the University of Mauritius. She has undergone continuous professional development with the former body in 1999, 2000 and 2001. She underwent training in India in Financing Small and Medium Enterprises and in Project Management. She is computer literate, has good communication skills and is fluent in both English and French. She was selected to participate as a Member of the Panel of Bankers in 2001 for a SMIDO workshop. She underwent training on Change Management in August 2009. She participated in a workshop on Referral Marketing in July 2010. She underwent training on Derivatives organised by the Mauritius Bankers Association in May 2011. She followed training on Professional Recovery Techniques in September 2012 and Core Negotiation Skills in November 2012. She followed training on Compliance on the Banking Sector in September 2019.

Regarding her professional experience, the Disputant has notably averred that she was Head of Department from 13 December 2017 to 13 February 2019 at the Central Loans Department; has been a member of the Board's Credit Committee as from April 2018; she has been called to serve as Officer-in-Charge in the Arrears Cell from April 2015 to 12 December 2017; she was selected after interview as SDO on a one-year contract starting 1 December 2012 and renewed for another year, which enabled her to acquire experience in Project Management and receive international exposure with Deloitte (India); after two years as Officer-in-Charge at Curepipe Branch, she was posted to the Arrears Department reporting to the ex-Chief Manager around 2006; she successfully tested and implemented a new online Arrears Monitoring System in December 2008; she underwent training and was involved in the testing phase of the implementation of a new banking package from August 2007 to May 2008; following promotion to SDO, she was posted as Officer-in-Charge at Curepipe Branch from December 2004 to April 2006; she assisted the Internal Auditor in the Supervising Audit Team in conducting specific and continuous audits at the Branches and Head Office from February 2002 to December 2004; upon promotion as Development Officer in July 1993, she was posted to the SME Loans Department and thereafter proceeded on study leave to the UK to complete her banking studies; during a study tour in India, she acquired experience as a Chartered Banker on Small Enterprise from 17 July 2000 to 22 September 2000; and as a member of the Executive Committee of the Chartered Institute of Bankers Mauritius Branch, she had the opportunity to keep abreast of new developments in the banking sector.

The Disputant has also averred that she has good communication and interpersonal skills, relates well to her colleagues. Her empathy and team spirit were recognised by the former Internal Auditor when she was posted to the Internal Audit Department. Her professionalism was also recognised by the former Deputy Managing Director, Mr Chooramun in a letter dated 08 January 1999 addressed to the Secretary of the Chartered Institute of Bankers, which was submitted with her application for the post of Assistant Manager. She performed well in the interview and has been a victim of a persistent tread of harassment by the former Managing Director ("MD"), Mr Unmole who was also part of the interview panel and was responsible for shortlisting and finalising selected appointees. She detailed a chronological order of events regarding the latter. A harassment case was reported to the former Chairman of the DBM, thereafter to the Mediation Unit of the Ministry of Labour and was referred to the Prosecution Unit of the Ministry of Labour in March 2020. She has sworn an affidavit on 20 August 2021 to confirm the veracity of the contents of her letter dated 5 March 2019.

The Disputant contends that she is more qualified and has more hands-on experience than Co-Respondent Nos. 1 & 2. Co-Respondent No.1 is an ACCA certified accountant while Co-Respondent

No.2 holds a BA Hons in Financial Services from Napier University. Co-Respondent No. 1 was appointed as Assistant Manager in the MD's office with no call for applications for this unit when the post was advertised. Co-Respondent No.2 was appointed as Assistant Manager in DBM Financial Services Ltd when there was no call for applications in the subsidiary when the post was advertised. She was not therefore given an equal chance to compete for these posts against Co-Respondent Nos. 1 & 2 based on her qualifications and experience.

Co-Respondent Nos. 2 & 3 were appointed as Assistant Managers (Recovery Unit) on 19 February 2019. She had applied for the same post based on her eight-year proven track record of performance and qualifications. The vacancies for the two posts of Assistant Manager in the Loans Department, as per the advertisement of 2017, were not filled. Two Risk Managers were instead appointed on a contract basis in the Loans Department and have now resigned. The post for Assistant Manager in Underwriting, to which she applied, was not filled and she legitimately believes that she possessed the prerequisites for the post. Her junior is now officiating as Officer-in-Charge in the Sales Unit. She also applied for the post of Assistant Manager in the Marketing Unit, but the post has not been filled.

She was assured by the new MD that the injustice towards her will be corrected. The injustice is still prevailing as four colleagues were given actingship in the post of Assistant Manager and she was not favoured. The Disputant believes that she had all the merits for the post of Assistant Manager and that she should have been appointed in lieu of the Co-Respondents. She prays for an award that would do her justice.

THE RESPONDENT'S STATEMENT OF DEFENCE

The Respondent has notably averred that applications were called from eligible candidates for the post of Assistant Manager and the note in the advertisement was meant to inform candidates of different duties they would be performing depending on their posting according to the structure of the Bank. Applications were called for eligible candidates for a third time in 2018 for the aforesaid post. The Disputant was called for an interview for one generic post of Assistant Manager. It is admitted that the Co-Respondents were offered appointment as Assistant Manager. The Respondent denies that the Disputant fully meets the requirements in terms of qualifications, length of service, experience and skills. It has also been averred that the Disputant was not posted to the Central Loans Department as Head and she was only entrusted with responsibility of the department as Officer-in-Charge. The Disputant was assigned with the duty and temporary posting of SDO in the Transformation Office setup to revamp the Bank.

The Respondent admits that the Disputant has never been reported upon and that she has a very good track record. It is admitted that she possesses good communication and interpersonal skills and that she has discharged her duties in a very reliable, timely and professional manner. It is denied that the Disputant has been victim of a trend of harassment by Mr L. Unmole, the former MD. The latter was never appointed as Executive Director. The segregation of the Central Loans Department into Sales and Underwriting was done for better control and good governance as recommended by the Bank of Mauritius. The Central Loans Department no longer exists. The Respondent is not aware if the Disputant had reported the alleged harassment to the former Chairman of the DBM.

The Disputant was invited to make proposals for discussions at a meeting of 8 February 2019, but instead she stated that she was not comfortable being assigned to the Sales Unit and made a verbal request to be transferred to the Leasing Unit in DBM Financial Services. Following the meeting, management proceeded with the reorganisation of the Sales Unit and Disputant was posted to the Arrears Department. It has also been averred that the former MD has passed away and that the Respondent received two letters, dated 5 March and 26 March 2019, regarding the alleged harassment. On 8 September 2019, a Special Committee Meeting heard the Disputant and proposed to transfer her to a newly created Complaint Unit; she later informed the Respondent that she was not interested and that she had reported a case at the CCM for not being appointed as Assistant Manager.

The Respondent denies that the Disputant is more qualified and has more hands-on experience than Co-Respondent Nos. 1 & 2. It is denied that Co-Respondent No.1 was appointed as Assistant Manager in the MD's Office when there was no call for applications for this unit. Co-Respondent No.1 was posted in the MD's Office to be responsible for strategic matters, pending a restructuring exercise currently in progress at the Bank. The post of Assistant Manager is generic on the Respondent's establishment and Assistant Managers can be posted to any department and perform duties pertaining to those departments. It is denied that Co-Respondent No.2 was appointed as Assistant Manager in DBM Financial Services Ltd with no call for applications when the post was advertised. Co-Respondent No.2 had already been seconded for duty as Officer-in-Charge at the DBM Financial Services Ltd and when appointed as Assistant Manager in 2019, she remained seconded there.

The Respondent has denied that the two posts of Assistant Manager in the Loans Department were not filled and that two Risk Managers were appointed on a contract basis in the aforesaid Department. There is no post of Assistant Manager in the Marketing Unit on the establishment of the

Bank. The new MD received the Disputant at her request and no assurance was given to correct any alleged injustice. The assignments in December 2020 to four SDOs referred to by Disputant have been made in order to ensure the continuous work flow of the Bank's operations pending the restructuring exercise now in progress. These have nothing to do with any injustice to which Disputant is allegedly subject to. It is the case for the Respondent that the posts of Assistant Managers have been filled following an open advertisement to all qualified candidates. All qualified applicants were called to an interview by a selection panel. Following the interview and selection exercise, appointments have been made. The selection panel did not find that the Disputant ought to be appointed as Assistant Manager.

THE EVIDENCE OF WITNESSES

The Disputant, Miss Purnima Chiniah, deposed in the present matter. She confirmed the veracity of her Statement of Case. All information as stated in the application notice dated 12 December 2017 was submitted to the interview panel. She has a first degree in Banking and Finance since 1999 and a MSc in Finance since 2004. She also holds a qualification from the Chartered Institute of Bankers. In 2014, there was a Voluntary Retirement Scheme at the Bank whereby all Chief Managers, most Managers and most Assistant Managers retired creating a vacuum that needed to be filled. The Bank then proceeded with a restructuring exercise whereby many SDOs were called to assume higher responsibility in the post of Assistant Manager, including herself. She was called to the Central Loans Department in 2017, where she was notably recommending loans, with two other colleagues as SDO, in the capacity of Officer-in-Charge. The responsibilities that she was performing in the Department pertained to the Assistant Manager cadre.

Miss Chiniah moreover stated that there was a call for applications in different units as per the advertisement notice dated 12 December 2017. She submitted her application for Underwriting, Recovery and Marketing. The restructuring plan is mentioned in the Annual Report 2017. She submitted her application in three envelopes mentioning the unit applied for. Co-Respondent No.3 was appointed in the Recovery Unit, whereas the Underwriting and Marketing Units have not been filled up to now. Co-Respondent No.1 was appointed as Assistant Manager in the MD's Office and Co-Respondent No.2 was appointed in Financial Services. These two units were not mentioned in the application form nor in the Annual Report 2017.

Miss Chiniah also stated that she swore an affidavit in connection with a trend of harassment as set in her Statement of Case. Mr Unmole joined the Bank on 9 April 2018 as MD and they worked together. After he was appointed as Executive Director on 22 June 2018, he started to pressurise her

regarding recommended clients and verbally instructed her to relax procedures and due diligence for such cases. She, as a professional banker, has applied the same stand for all clients, the MD was not happy with her stand and this is how the harassment against her person started. The appointments are dated 19 February 2019 and Mr Unmole had problems with her some months prior. He was on the interview panel in July 2018 and on all eleven of the Bank's committees, particularly the Nominations and Remunerations Committee. He had his say on the list of appointees. The trend of harassment has contributed to her non-selection as Assistant Manager.

Miss Chiniah was thoroughly questioned by Counsel for the Respondent. She notably stated that she is contesting her non-appointment in the three units she applied for, i.e., Underwriting, Marketing and Recovery. There was no selection exercise for Assistant Manager in the MD's Office in 2018. Mr Gungaram has been favoured as this is a tailor-made post for him. The post of Assistant Manager in DBM Financial Services Ltd was also not advertised and Mrs Badere's appointment was outside the scope of the advertisement. She also ought to have been appointed following Mrs Badere's pattern. The Disputant was referred to the second bullet point in the 'Notes' section of the advertisement for Assistant Manager and stated that she was aware that it is possible that the Board would not make certain appointments. Despite this, she was still very surprised that no one was appointed in the Underwriting and Marketing Units as the call for applications was in line with the restructuration plan.

Miss Chiniah also stated that she was Officer-in-Charge of the Central Loans Department replacing an Assistant Manager in the SDO grade and not Head of Department. She was assigned duty of and temporary posting as SDO in the Transformation Office and insisted that this was on contract. She was confirmed as SDO after serving as Officer-in-Charge at Curepipe Branch. Following her application for the post of Assistant Manager, she was interviewed once on 19 July 2018. An interview can be subjective from the perspective of those on the panel. She agreed that she should have got the marks she deserved for her qualifications. She had the three years' experience required. She agreed that marks are also allocated for performance at the interview. She observed that the MD and the Directors were new when the interview was conducted.

Miss Chiniah went on to state that Mr Unmole had joined the Bank in April 2018. There was an internal harassment against her from the moment Mr Unmole was appointed as Executive Director. The harassment occurred after the interview but before the appointments. When she received the letter to attend the interview, she had no reason to believe that the interview panel would be biased against her. The incidents occurred before the actual appointments in February 2019. She wrote to Mr Dhotah, Chairman of the Credit Committee (*vide* email dated 30 January 2019 produced as Document A) and he replied by an email dated 30 January 2019 (produced as Document

A₁). There was no correspondence to the Board. As per the advertisement, the DBM Board will not enter into any correspondence with any applicant regarding the selection to be made. She did not go to the Board but sent an email to Mr Dhotah making representations of what was happening in the department. She maintained her allegations of harassment against Mr Unmole and has sworn an affidavit to this effect. She also reported the matter to the ex-Chairman on 5 March 2019 and to the Mediation Unit of the Ministry of Labour thereafter.

Miss Chiniah moreover stated that there was a meeting with the MD on 7 February (2019) following which Mr Dhotah called her, Mr Gungaram, the Risk Manager Mr Appadoo and Mr Bhageerutty to make proposals. She was not comfortable with an assignment in the Sales Unit because of the trend of harassment against her. She made a verbal request to be transferred to the Leasing Unit in DBM Financial Services Ltd. She was then posted to the Arrears Department. She is more qualified and holds more hands-on experience than Co-Respondent Nos. 1 & 2 as she has served in every department, save for Industrial Estate, and was posted as Officer-in-Charge at Curepipe Branch. The two Co-Respondents have never worked in a branch. With the advertisement of 12 December 2017, posts have been segregated and this is substantiated in the Annual Report. She produced an extract of the Annual Report of 2017 (Document B) referring to paragraph 15 (b) thereof. All the units advertised are in line with whatever is in the report.

Miss Chiniah also replied that she has not seen the letter of appointments of the three Co-Respondents, which specified that *'You may also be posted to any other Bank's units or branches and you may require to serve in a tour of service in Rodrigues.'* This is a standard clause in any appointment letter. She agreed that the persons appointed can be moved from one position as Assistant Manager to another department, but this is in contradiction with the Bank's restructuring plan. Regarding that two Risk Managers (Underwriting Unit) were appointed on a contract basis to the Loans Department, she produced two memos dated 13 September 2018 (Document C) and 13 June 2019 (Document D) under the Respondent's heading. She produced a memo dated 8 February 2019 (Document E) showing that her junior, Mrs Gunowree was transferred to the Sales Department.

Miss Chiniah also confirmed that she had an appointment with the new MD, Mr Pandoo in March 2020 whereby he made a verbal proposition that to create a new department in recovery and that he would formalise same in a letter which never came. She maintained that he gave her the reassurance that the injustice inflicted upon her by the former MD will be corrected. Four colleagues at SDO level were given actingship in December 2020, when she is most senior. Mr Unmole was not party to this decision. She is not pinpointing anyone for this exercise. Regarding the appointment for Assistant Manager in February 2019, she agreed that the interview marks are given according to performance of the person being interviewed. She agreed that not all would have the same

performance before the panel. She does not agree that she did not perform well at the interview. She does not agree that in light of the results of the interview, she could not have been appointed.

In re-examination, Miss Chiniah notably stated that the interview is not the only relevant part of the selection process; the selection process consists of different stages from the internal vacancy notice, the application form filled in by the candidate together with all the documents, the call for interview, the interview itself and the appointment.

Mr Deoraz Hosanee, Company Secretary, was called to adduce evidence on behalf of the DBM. In relation to the Disputant's Statement of Case, he stated that after having verified the files, it is correct that the Disputant, after two years as Officer-in-Charge of Curepipe Branch, was posted to the Arrears Department as averred at paragraph 8 (vi) of thereof. Regarding paragraph 8 (x), it is correct to say that the Disputant was posted as Officer-in-Charge of Curepipe Branch from 26 September 2004 to April 2006. As regards paragraph 8 (xii), management did approve a years' leave without pay on 1 June 1995 and she resumed duty in October 1996 being posted to the SME Loan Department. Regarding paragraph 8 (xiii), the Disputant was effectively on a tour to India where she followed a course in Mumbai, which many of the Bank's staff had also attended to during past years. Regarding paragraph 13 (ii), the whole paragraph is admitted as Mr Unmole was appointed as Executive Director. As regards paragraph 13 (xvi), the Central Loans Department had already been segregated between Sales and Underwriting; the averment made is otherwise ok. He otherwise solemnly affirmed as to the correctness of the Respondent's Statement of Defence.

Mr Hosanee further stated that the Respondent was on the verge of closing down, a new Board had been set up and a restructuration plan was prepared and approved by the parent Ministry. An external recruitment for the post of MD was made and Mr Unmole was appointed in 2018. Targets and Key Performance Indicators ("KPI") were put on him and he had to meet the Board's objectives. The targets and KPI were not only imposed on the Disputant. The DBM has two core activities: sanctioning of loans and leasing of factory space. Recovery is the collection of past dues from debtors. The Co-Respondents have wide experience across all departments of the Bank. Mrs Goolaub, who was also appointed Assistant Manager but is not a Co-Respondent, is a technical person posted in the Legal Department. The Disputant was appointed as SDO in 2004. Co-Respondents Nos. 1 and 2 were appointed SDO in 2001. Mrs Ramburun was appointed to the post of Accounting Assistant, which is equivalent to the post of SDO, in 1996.

In relation to whether Mr Unmole was a member of the Nomination and Remuneration Committee, Mr Hosanee stated that the Board has seven sub committees, not eleven. The Sub

Committees comprise only non-executive members and Mr Unmole was only in attendance on this committee and not a member. The post of Assistant Manager was advertised for different departments. It is a generic post and although one has applied for 3 or 4 departments, the person was called for interview only once. An officer of the Bank is requested to work in all departments whenever management wishes. Once appointed, the person can be moved to another department. He produced the letters of appointment dated 22 February 2019 of Mr Gungaram (Document F), Mrs Badere (Document G) and Mrs Ramburun (Document H). As per the records of the selection panel, the performance of the five persons appointed to the post of Assistant Manager were much better than that of the Disputant.

Mr Hosanee was questioned by Counsel for the Disputant. He notably replied that in 2014, there was a VRS at the Bank leaving a vacuum in top management to which SDOs were called upon to assume higher responsibilities. He agreed that the restructuring exercise is mentioned in the extract of the Annual Report of 2017 (Document B). Following this report, there was an internal vacancy dated 12 December 2017 for several units (Annex 2 to the Disputant's Statement of Case). The internal vacancy sets the requirements for the post. He agreed that the Bank had no reproach against the Disputant prior to her application for the positions. He agreed to the letter of recommendation for the Disputant (Annex 19 to the Disputant's Statement of Case) and that the Disputant has displayed good leadership and interpersonal skills.

Mr Hosanee moreover agreed that the Disputant's qualifications were higher than the minimum required. Mrs Ramburun's ACCA qualification is higher than a MSc in his personal opinion. Mrs Ramburun is holder of a FCCA, MSc with specialisation in Finance, a Certificate in Banking and a Certificate in Finance. The Disputant is an Associate Chartered Banker and has spent more time than Co-Respondent No.3 in the Recovery Unit. Mrs Ramburun has a long tenure of service in the Arrears Department and she headed a team which collected dues to help salvage the institution. Mr Gungaram only holds an ACCA. Mrs Badere is holder of a BA in Financial Services. The Disputant was holder of a Masters Degree and was a Chartered Banker when she applied for the three positions of Assistant Manager. He agreed that the Disputant has acquired a lot of experience in the banking sector as well as exposure in different sections and levels as averred in her Statement of Case.

Mr Hosanee furthermore agreed that Underwriting, Marketing and Recovery are three strategic units created to enhance the performance of the Bank. Mr Appadoo was appointed as Underwriting and Risk Manager on contract after a selection process. Disputant applied for the posts in Underwriting and Marketing and was not selected. Co-Respondent Nos. 1 & 2 were appointed Assistant Manager in the MD's Office and in DBM Financial Services. These two aforementioned posts are not to be found in the internal vacancy dated 12 December 2017. The said Co-Respondents

applied for the positions as per the vacancy. The posts of Assistant Manager in the MD's Office and in DBM Financial Services were not advertised. The post of Assistant Manager is generic and management has the prerogative on where to post the selected candidates as stipulated in the letter of offer, they can be posted anywhere. The candidate has to write the unit being applied for on the envelope as per the internal vacancy. He agreed that if these two posts were advertised, the Disputant could have equally applied. The candidates applied for the 12 positions advertised. It is the prerogative of management to decide in which department they should be posted once they have passed the selection process.

Mr Hosanee also stated that Mrs Badere applied for the Sales, Marketing and Communication, Recovery and Underwriting Units. Mr Gungaram applied for the Sales, Marketing and Communication, Administration and HR, Risk Asset & Liability, Finance, Recovery and Underwriting and Internal Audit Units. One has to apply for each unit, mentioning the unit applied for. The MD's Office and DBM Financial Services is not on the list to which Co-Respondents Nos. 1 & 2 applied for. Mr Hosanee agreed that first, the person selected is posted to one of the units in the application and then he is sent to other units as per the prerogative of management. He did not agree that as the Disputant did not have the opportunity to apply for MD's Office and DBM Financial Services, the selection exercise was awkward and flawed.

Mr Hosanee further replied that Mr Unmole was only present in attendance on Sub Committees as Managing Director. He agreed that the Disputant never stated that Mr Unmole was a member of the Remuneration and Nomination Committee. He agreed that as Managing Director and Executive Director, Mr Unmole was the top man at the bank at the time. The interview panel was responsible for the shortlisting and finalising the list of candidates, not Mr Unmole. The selected candidates are given marks by the Selection Committee, i.e. the interview panel, and once finalised, this is sent to the Board of the DBM for consideration. Mr Unmole was part of the Board as Executive Director.

Mr Hosanee moreover stated that there has been a Board Sub Committee whereby it was highlighted that any issues between the Disputant and Mr Unmole were not considered during the interview exercise. Although, it was important to mention same in his Statement of Case, it escaped his mind. Mr Appadoo was appointed as Underwriting and Risk Manager by the Board on 17 September 2018 and was not recruited as Assistant Manager. He did not agree that it was not fair for Mr Unmole to sit on the Selection Committee because of the Disputant's complaint of harassment. He does not agree that the selection exercise of 19 July 2018 was not fair, just, reasonable and was arbitrary.

THE SUBMISSIONS OF COUNSEL

Learned Counsel for the Disputant notably submitted that the Disputant was working in the Central Loans Department from December 2017 to February 2019 and this included the Marketing, Sales and Underwriting Units. There was a segregation of these units and the Disputant applied for the post of Assistant Manager in these units. Co-Respondent Nos. 1 & 2 were appointed Assistant Manager in the MD's Office and DBM Financial Services respectively. The Respondent has not followed what it has preached. The said Co-Respondents were appointed to units which were not mentioned in the vacancy notice, whereas the Disputant did not have the opportunity to apply for these two units. This is not fair nor correct. Would the bystander think that this was fair, reasonable and non-arbitrary?

It was also submitted, on the Disputant's behalf, that the Disputant was not selected because of the trend of harassment against her by Mr Unmole, the Managing Director and also Executive Director at the bank. The alleged harasser was sitting on the selection panel and was also sitting on the Board of Directors, to which the list of selected candidates was sent. It was also submitted that Mr Appadoo was given a contract as Underwriting and Risk Manager after the selection exercise of 19 July 2018. A selection exercise had taken place and they were awaiting appointment and all of a sudden, a third person (Mr Appadoo) was appointed by no other than Mr Unmole. The selection exercise carried out in 2018, leading to appointment in February 2019 for promotion to the post of Assistant Manager, was therefore not fair, not reasonable, not just and arbitrary. The Disputant must therefore be given a fair chance of being assessed.

Learned Counsel for the Respondent has notably referred to the Terms of Reference in his submissions. He stated, laying stress on the word '*reasonable*', that it is not open for the Tribunal to substitute its own subjective views on the matter as only if the actions of a party is very unreasonable there can be any intervention. Regarding the supposed conduct of Mr Unmole, prior to the selection exercise there is no allegation of harassment from the Disputant's Statement of Case itself nor in her affidavit at Annex 22 of the same document. At the date of appointment in February 2019, the DBM had not been made aware that Mr Unmole had been harassing the Disputant. Once the selection exercise is completed, it is not open to the Disputant to complain, same has to be done before.

Counsel for the Respondent put in a copy of the Supreme Court judgment in *Hosanee & 9 Ors v The Public Bodies Appeal Tribunal [2016 SCJ 123]* whereby officers were appointed following a selection exercise and the order of seniority was changed. Therein, it has notably been stated that '...

the applicants willingly participated in the interview and expressed no reservation or objection at the material time.'. Counsel submitted that if you are unhappy with the process and the people conducting the process, you have to express your reservation at the material time and not *ex post facto*. The Disputant only mentioned that she made certain protests to her immediate superior. The Disputant has not convinced that the conduct of Mr Unmole is of any relevance to her case.

Counsel moreover submitted that the Disputant has laid stress of the appointment of Co-Respondent Nos. 1 & 2 in the MD's Office and DBM Financial Services. It is not part of the Terms of Reference to challenge the appointment of the two Co-Respondents. Regarding Mr Appadoo, he was appointed on contract as Underwriting and Risk Manager and not as Assistant Manager. This is completely different and the challenge to his appointment is not part of the Terms of Reference before the Tribunal. As per the vacancy notice dated 12 December 2017, it is clearly stated that the DBM reserves the right not to appoint anyone. It is not part of the Terms of Reference for the Tribunal to look into whether it was fair, reasonable, just and non-arbitrary not to appoint under certain units. Counsel also stated that there is no dispute as to qualifications, it is agreed that the Disputant and the Co-Respondents were fully qualified to apply.

THE MERITS OF THE DISPUTE

The Terms of Reference of the present dispute is asking the Tribunal to enquire into whether the selection exercise conducted by the Respondent in 2018, which led to appointment to the post of Assistant Manager in February 2019, was fair, just, reasonable and non-arbitrary. If the Tribunal finds this assessment to be in the negative, the second limb of the Terms of Reference is asking the Tribunal to enquire into whether the Respondent should be redirected to reconsider the selection exercise and appointment/promotion to allow the Disputant a fair chance of being promoted.

The Disputant is presently employed as a SDO at the DBM since December 2004. On 12 December 2017, the Respondent issued a vacancy notice inviting internal applications to the post of Assistant Manager in different units. The Disputant responded by applying for the aforesaid post in the Underwriting, Recovery and Marketing Units. She was called for an interview on 19 July 2018. On 27 February 2019, she was informed that the Co-Respondents had been appointed as Assistant Manager along with two other individuals, namely Mrs H. Goolaub and Miss G. Doomun with effect from 19 February 2019. It has not been disputed that the Underwriting and Marketing Units have not been filled up to now. The Disputant is not satisfied at not being appointed as Assistant Manager in the units she applied for.

It has been contended by both sides that the Respondent undertook a restructuration exercise following which an internal vacancy notice for the post of Assistant Manager in the units listed therein was issued on 12 December 2017. The DBM's representative, Mr Hossanee moreover agreed that there was no reproach against the Disputant prior to her application for the post; that she had displayed good leadership and interpersonal skills; and that her qualifications were higher than the minimum required in the vacancy notice. He further agreed that she has acquired great experience and exposure in the banking sector. He also stated that the Underwriting, Marketing and Recovery Units are strategic units created to enhance the Respondent's performance.

A major complaint regarding the selection exercise for the post of Assistant Manager conducted in 2018 is the presence of late Mr Unmole, the former MD of the DBM, on the selection panel. The Disputant has notably related to a trend of harassment against her person by the former MD. It has not been disputed that Mr Unmole was also a member of the Board of the DBM as an Executive Director. As explained by Mr Hosanee, once the selection panel has shortlisted and finalised the list of candidates, the selected candidates are sent to the Board for consideration.

The Disputant has, in support of her contentions regarding the alleged harassment, set a chronology of events at paragraph 13 of her Statement of Case and annexed an affidavit thereto, solemnly affirmed by herself, regarding her accusations. She also stated having made a complaint to her superior, Mr Dhotah by email dated 30 January 2019 (produced as Documents A and A₁). She did not however write to the Board regarding same as the latter was not allowed to enter into any correspondence with any applicant regarding the selection to be made. From her affidavit, it is apparent that she wrote to the Chairman of the DBM regarding the issue on 5 March 2019.

The chronology of events, as expounded in her Statement of Case, reveals that there was no incident between Mr Unmole's appointment on 9 April 2018 and the interview she attended on 19 July 2018. The chronology also reveals 22 January 2019 as the first time the Disputant was allegedly abused in a meeting with the former MD. Another incident has also been highlighted in a meeting on 7 February 2019. It must be noted that the appointments to the post of Assistant Manager were made on 19 February 2019. It should also be noted that the Disputant, when cross-examined, did admit that the harassment occurred after the interview but before the appointments.

It therefore clear that there is no complaint regarding Mr Unmole prior to the interview exercise. Moreover, it has been admitted by the Disputant that the Respondent's Board was not made aware of the allegations against the former MD despite the email to her superior. The Tribunal

also notes that it has not been given the benefit of the version of Mr Unmole in relation to these allegations of harassment as the former MD is no longer among us. It would therefore be unfair for the Tribunal to accept the allegations on its face value in the absence of any evidence from the alleged harasser and to conclude that this could have led to any unfairness or unreasonableness in the selection exercise for the post of Assistant Manager.

It may also be noted that Mr Hosanee, near the end of his cross-examination, revealed that there was a Board Sub Committee which highlighted that any issues between the Disputant and Mr Unmole were not considered during the selection exercise. This however has not been mentioned in the Respondent's Statement of Defence despite Mr Hosanee admitting that it was important to do so. Besides, the Disputant did not have the opportunity of giving her views regarding this Sub Committee.

The Respondent has notably relied on the case of *Hosanee & 9 Ors v The Public Bodies Appeal Tribunal (supra)* in submitting that the Disputant should have made her complaint regarding the harassment at the material time of the interview. The Tribunal does not however see how this case can apply to the present matter as at time of the interview on 19 July 2018, there was no complaint regarding Mr Unmole by the Disputant as may be noted from the chronology of events set in her Statement of Case.

The Tribunal, in light of the above, would not find it fair or reasonable to pronounce itself on whether the selection exercise was fair, reasonable, just and non-arbitrary because of the harassment allegedly subjected to the Disputant by Mr Unmole.

The Disputant has also raised the issue of one Mr Appadoo being appointed Underwriting and Risk Manager on 17 September 2018 and that this is unfair on the Disputant and the applicants for the post of Assistant Manager. The Tribunal fails to see how this is relevant to the present dispute, whereby it is being asked to enquire into the fairness of the selection exercise for the post of Assistant Manager conducted in 2018. The Terms of Reference of the dispute do not concern Mr Appadoo's appointment as Underwriting and Risk Manager at the DBM and it would be *ultra petita* for the Tribunal to venture into this matter.

The Disputant has also contended that Co-Respondent Nos. 1 & 2 were appointed to the posts of Assistant Manager in the MD's Office and DBM Financial Services respectively, which are not among the units listed in the vacancy notice dated 12 December 2017. Indeed, from a perusal of the

vacancy notice for the post of Assistant Manager, the units listed are: Sales; Marketing/Communication/Research & Business Support; Industrial Estates; Administration & HR; IT; Risk Asset & Liability Management/Compliance; Finance/Treasury; Legal; Contentieux; Recovery; Underwriting; and Audit. It has also been confirmed by Mr Hosanee, in cross-examination, that the posts of Assistant Manager in the MD's Office and DBM Financial Services were not advertised.

As per Mr Hosanee's evidence, Mr Gungaram applied for the Sales, Marketing and Communication, Administration & HR, Risk Asset & Liability, Finance, Recovery, Underwriting and Internal Audit Units. Mrs Badere, on her side, applied for the Sales, Marketing and Communication, Recovery and Underwriting Units. It is therefore clear that the two aforesaid Co-Respondents did not apply for the positions of Assistant Manager in MD's Office or DBM Financial Services, which were never advertised as per the vacancy notice.

Mr Hosanee has concisely explained that one has to apply mentioning the unit applied for. It is the prerogative of management to decide in which department an applicant may be posted once they have passed the selection process. He further agreed that the selected person is posted to a unit applied for in his/her application and may then be transferred to another unit as per the prerogative of management, the post of Assistant Manager being generic.

Mr Hosanee also produced the letters of appointment of Co-Respondent Nos. 1 & 2 (Documents F and G respectively) dated 22 February 2019. Mr Gungaram's letter of appointment clearly states, at paragraph 4, that he will be posted to the Managing Director's Unit; whereas, Mrs Badere's letter of appointment, at the same paragraph, states that she will be posted in the DBM Financial Services Unit. The memo dated 27 February 2019 notifying staff of appointments to the post of Assistant Manager, among others, also shows that Co-Respondents Nos. 1 & 2 were appointed to the MD's Office and DBM Financial Services in the grade of Assistant Manager.

The aforementioned letters of appointment have revealed that Co-Respondent Nos. 1 & 2 were appointed directly to the MD's Unit and DBM Financial Services Unit. It is undisputed that these two units are not among the different units listed in the vacancy notice dated 12 December 2017. It can only therefore be concluded that the two Co-Respondents *in lite* were not appointed to a position for which they had applied for in having been directly appointed to the abovementioned units. This is clearly in contradiction with Mr Hosanee's evidence regarding the posting of a selected applicant in the selection process.

The Disputant has been adamant that she has not been given an equal chance to compete for these units as they were not advertised. Moreover, Mr Hosanee agreed that if these two positions were advertised, the Disputant could have equally applied. The Tribunal can only therefore conclude that the Respondent has acted unfairly in directly appointing Co-Respondent Nos. 1 & 2 to the MD's Office and DBM Financial Services Units respectively when these specific units were never advertised in the vacancy notice dated 12 December 2017 for the post of Assistant Manager. The Tribunal can only find that this act of unfairness has a direct bearing on the selection exercise for the post of Assistant Manager.

Counsel for the Respondent has, in his submissions, notably stated that it is not part of the Terms of Reference to challenge the appointment of Co-Respondent Nos. 1 & 2. The Tribunal agrees that the Terms of Reference of the present dispute is not challenging the appointments of the Co-Respondents. However, the Terms of Reference has clearly mandated the Tribunal to enquire into whether the selection exercise conducted by the Respondent in 2018 was fair, reasonable, just and non-arbitrary.

The Tribunal's mandate under the Terms of Reference would therefore entail uncovering any unfairness, unreasonableness, injustice and arbitrariness in the selection exercise, which would obviously concern those involved in the process. Besides, it is in this optic that Mr Gungaram, Mrs Badere and Mrs Ramburun were added as Co-Respondents in the present matter prior to the hearing of the dispute.

The Tribunal also notes that notwithstanding the unfairness uncovered in the selection exercise, it is not quashing the appointments of the Co-Respondents nor does it have a mandate to do so. It is trite law that matters of appointment and promotion are essentially within the province of the employer subject to an abuse of power by the latter (*vide Mrs D.C.Y.P and The Sun Casino Ltd (RN 202 of 1988); Cesar and C.W.A. (RN 785 of 2005); and Mauritius Institute of Training and Development v Employment Relations Tribunal [2022 SCJ 413]*).

Counsel for the Respondent has also submitted that it is not open for the Tribunal to substitute its own views on the matter and that it is only if the actions of a party are unreasonable that there can be any intervention. However, no authorities were produced by Counsel in support of this submission. It must be recalled that once a dispute has been referred, the Tribunal has a duty to enquire and to make an award in relation thereon. This has been succinctly acknowledged by the Supreme Court in *Air Mauritius Ltd v Employment Relations Tribunal [2016 SCJ 103]* as follows:

Under section 70 (1) the Tribunal is required to enquire into the substance of the dispute that is referred to it and to make an award thereon and it is not empowered to enquire into any new matter that is not within the terms of reference of the dispute.

The Tribunal notes that it is not here to substitute its views for that of the Respondent but it is required to enquire into the substance of the dispute as per the Terms of Reference referred to it (*vide Davaigaium & 5 Ors v Employment Relations Tribunal [2022 SCJ 342]*).

The Respondent has also submitted that it is not part of the Terms of Reference for the Tribunal to see whether it was fair, reasonable, just and non-arbitrary for the Respondent not have appointed anyone under certain units. Regarding this, the Tribunal has noted that the Disputant did recognise, in her evidence, that it was open for the DBM not to make any appointments. Moreover, it is clearly stated in the vacancy notice dated 12 December 2017 that '*The DBM Board reserves the right not to make any appointment as a result of this advertisement.*'. Besides, the Tribunal has not enquired on whether Disputant should have been appointed to certain units applied for nor was it within the ambit of the Terms of Reference for it to do so.

In light of the above, the Tribunal has found the selection exercise, conducted in 2018 for promotion to the post of Assistant Manager, to be unfair in the Respondent having directly appointed Co-Respondent Nos. 1 & 2 to units not advertised for in the vacancy notice dated 12 December 2017. As per the Terms of Reference of the present dispute, the Tribunal therefore directs 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.

The Tribunal therefore awards accordingly.

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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: 23rd January 2023