

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

Before

Rashid Hossen	-	President
Geeanduth Gangaram	-	Member
Jheenarainsing Soobagrah	-	Member
Hurryjeet Sooreea	-	Member

In the matter of:-

RN 1062—Mr. Pierre Emmanuel Fidele and Cargo Handling Corporation Ltd

RN 1063—Mr. Pierre Tidlan Harrisson and Cargo Handling Corporation Ltd

RN 1064—Mr. Assiff Beharree and Cargo Handling Corporation Ltd

The above three cases have been consolidated.

The points in dispute are:-

“Whether Mr Pierre Emmanuel Fidele should be appointed as Terminal Assistant with effect from 01.06.2006 or otherwise.”

“Whether Mr Pierre Tidlan Harrisson should be appointed as Terminal Assistant as from 25.04 2006 or otherwise.”

“Whether Mr Assiff Beharree should be appointed as Terminal Assistant as from 01.06.2006.or otherwise.”

The present disputes were referred for arbitration by the Minister of Labour, Industrial Relations & Employment in accordance with section 82(1)(f) of the then Industrial Relations Act 1973.

The newly enacted Employment Relations Act 2008 that came into force last year makes provision for such disputes to be heard before the present Tribunal.

“108.Transitional Provisions -

Any proceedings pending immediately before the commencement of this Act before the Permanent Arbitration Tribunal and the Civil Service Arbitration Tribunal shall be deemed to be proceedings pending before this Act and may be proceeded with before the Tribunal.”

Statements of case of the Applicants

- (1) They were employed by the defendant as follows: - Mr P.E.Fidele was Operator (Plant & Equipment) Grade 1 from 1983; Mr P.T.Harrison was a driver from 2000; and Mr A.Beharree was driver at Head Office from 2001.
- (2)(a) On 01.06.2006 Mr P.E.Fidele was transferred from his post to that of Terminal Assistant.
- (b) Mr P.T.Harrison was redeployed as Terminal Assistant as from 24.04.06.
- (c) Mr A.Beharree was transferred from Head Office to the Multipurpose Terminal as from 01.06.2006 in the category of Terminal Assistant.
- (3) They had to report to the Terminal /Senior Terminal Manager /Logistics Section
- (4) Their new posting was considered as a promotion with better terms and conditions of employment.
- (5) On 06.10.2008 that is more than two years after they had worked as Terminal Assistant they were asked by respondent to revert to their former posts.
- (6) During their term of office as Terminal Assistant they had performed their duties without any complaint nor had they any adverse report against them.
- (7) They aver that their reversion is a demotion and is illegal.
- (8) They are asking the Tribunal to rule that they had been duly appointed as Terminal Assistant as from the date of transfer/redeployment in 2006 and therefore cannot be reverted to their former posts.

Statement of case of the Respondent

- (1) The defendant contends that as there was a shortage of Terminal Assistants at the Cargo Handling Corporation, applicants had to be moved to the Multi Purpose Terminal. At no time their posting was in a substantive capacity. They had been paid an acting allowance for the duties carried out as Terminal Assistant.
- (2) Appointment to a post in a substantive capacity is subject to the approval of the Staff Committee and the Board of the Cargo Handling Corporation.
- (3) The Cargo Handling Corporation decided to revert the applicants to their former posts because they did not possess the required qualifications for the post of Terminal Assistant.
- (4) The Staff Committee and the Board of Cargo Handling Corporation did not approve their appointment.
- (5) The respondent moves that the case be set aside.

Parties were represented by counsel who at some stage had endeavoured to find a settlement in the matter but were unsuccessful.

In examination-in-chief the applicants maintained their averments in their statement of case. They added that they had given training to new recruits in the grade of Terminal Assistants, who later on were even promoted to the grade of Senior Terminal Assistants. They stressed that in their letter of transfer/redeployment, no mention was made of any actingship or temporary posting. On the question of minimum qualification they agreed that they did not possess same. They, however, pointed out that there were other Terminal Assistants who also did not have such qualifications.

In cross-examination, they vehemently denied that they were working in an acting capacity on a temporary basis although they were paid an allowance. They explained that the allowance represented the difference between their pay and the salary of the next post. They agreed that they did not have the required qualifications, nor were they confirmed in the post of Terminal Assistant. Mr Fidele agreed that there were procedures to be followed and approved by management and the Board before proceeding to a nomination but he did not rebut the defendant counsel's argument that he was posted as Terminal Assistant because there was a shortage of such employees nor that he was reverted because the Board did not approve his nomination for lack of minimum qualifications. Mr Harrisson on his part did not agree that he was posted as Terminal Assistant because of a lack of such officers and that he was not nominated because of his lack of qualifications. Whilst Mr Beharree agreed that the Staff

Committee and the Board did not approve his nomination because he did not possess the required qualification and he was thereafter reverted to his former post.

In re-examination, Mr Fidele informed that there were about 100 Terminal Assistants in post who did not have the minimum requirements. Mr Harrison stated that he was still being paid the acting allowance even after his reversion. Mr Beharree confirmed that his acting allowance had ceased.

Counsel for the respondent called the Human Resource Manager as witness. He confirmed the applicants' date of entry in the respondent's service. He explained that in 2006, the applicants had been nominated Terminal Assistants because there was a shortage of staff in that grade. Each time an employee is called upon to perform higher duties he was paid an acting allowance. The employee performed such higher duties in an acting capacity for a certain time, up to two years in certain cases, after which their department would send their bio-data together with their performance record and qualification to the Staff Committee for their recommendation to the Board which would ultimately approve the nomination. In the case of applicants, they were reverted to their post because they did not have the required qualification i.e. S.C. with 5 credits including English, French, and Mathematics. However their pay packet remained the same after reversion. To a question regarding Terminal Assistants who did not possess the required qualifications, the witness explained that those employees were nominated before 2008. The decision regarding minimum qualifications was taken by the Board in 2008. The reason behind such decision was that if one day a Terminal Assistant having those qualifications would get promoted they would be able to perform to the satisfaction of management. He maintained that the redeployment of the applicants was in an acting capacity.

Under cross-examination the witness agreed that the letter of 2006 was scanty and did not mention that applicants were nominated in an acting capacity. They were reverted in 2008. To a question of counsel as to whether there are many employees without S.C. he replied that in 2008 there were only three, the applicants; those without S.C. had been nominated before 2008. Counsel cited the case of one Mr Andre Marco to which the witness replied that although the employee did not possess the minimum qualification he had been nominated before 2008 and he was subsequently promoted Senior Terminal Assistant. He informed that the Staff Committee met at irregular intervals ranging from 1 to 3 months. But the Board met each month. The case of the applicants was never referred to the Staff Committee as they were not ready as Terminal Assistants. Neither did their case receive the attention of the Board.

The witness stated that the pay packet of applicants did not suffer any loss after their reversion to their former posting because the employer did not want to penalize them. He admitted that he had signed both the letters, that of transfer/redeployment and that of reversion, and he did not mention actingship in the first letter. Upon a question of counsel as to the nomination to the post of Terminal Assistant, he maintained that nomination was in the domain of the Staff Committee and the Board.

He was not re-examined.

Counsel did not submit but left the matter in the hands of the Tribunal.

The Tribunal's considerations:-

- (1) It is clear from the evidence on record that the services of applicants were resorted to to palliate a shortage of a particular skill. Once the Respondent's need was fulfilled after applicants had trained new recruits, the latter were in a position to take over and applicants were made to step down.
- (2) The track record of applicants was unblemished while they were doing higher duties at the level of Terminal Assistants. Yet they had to revert because when they would be promoted they would not be able to perform to the satisfaction of Management.

It is trite law that an actingship does not give rise *per se* to an appointment in a substantive capacity. In **E. César and C.W.A Award of 12.10.05**, we referred to various authorities governing matters regarding appointment and promotion:-

*"The Award of the Permanent Arbitration Tribunal in the case of **D. Goburdhun and Irrigation Authority, RN 483 of 1998** shows that the Tribunal reconciled with the view that a substantive appointment does not necessarily have to be backdated from the date of actingship in such grade/post even where the appointee has been fulfilling such actingship over a considerable length of time. "The Tribunal is satisfied that there is no established practice in the Civil Service that a substantive appointment*

(to a post or grade) is backdated with effect from the date of actingship in such grade/post especially when the appointee had been filling such acting over a considerable length of time and is subsequently appointed to occupy the post in which he was previously acting". It is worth stressing that for the sake of good industrial relations, vacancies should be filled in as soon as possible and period of actingship should not be made to last for more than is necessary.

*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 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**)."*

However sympathetic a view one wishes to take regarding Mr César's claim, the moreso as it appears to be his last wish before embarking on retirement, there must be some basis upon which the Tribunal can hold to, lest it may create a bad precedent. However small and petty his request may appear to be, we cannot intervene in the absence of evidence in support of his claim. The Tribunal is not here to grant by the mere asking. A claim must be justified."

- (3) The Respondent's representative elaborated on the method of reporting whenever there is a worker's confirmation to be considered. But it rests solely on management to decide when the time is ripe. Management said that the three applicants were not ready to be sent before the Staff Committee.
- (4) Considering the above, the Tribunal, inspite of its efforts at some stage to prevail over the Respondent to reconsider the applicants' case, cannot conclude that the latter were confirmed in their posting at the Multi Purpose Terminal since 2006 and we cannot ask that they be reverted to their former posting in 2008. However, we are prepared to invite the Respondent to consider, upon next vacancy arising, the appointment of the

applicants to a higher level the moreso as Respondent itself does not challenge the unblemished track record of the applicants.

The dispute is otherwise set aside.

A copy of this Award is to be filed in each of the cases.

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(sd) Rashid Hossen
President

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(sd) Geeanduth Gangaram
Member

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(sd) Jheenarainsing Soobagrah
Member

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(sd) Hurryjeet Sooreea
Member

Date:10th May 2010