

EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN35/12

AWARD

Rashid Hossen	-	President
Christian Bellouard	-	Member
Jheenarainsing Soobagrah	-	Member
Renganaden Veeramootoo	-	Member

In the matter of:-

Mr Ugadiran Mooneeapen (Disputant)

And

The Mauritius Institute of Training and Development (Respondent)

On the 16th of February 2012, Mr Ugadiran Mooneeapen reported to the Commission for Conciliation and Mediation the existence of a labour dispute between himself and The Mauritius Institute of Training and Development (MITD) as per **Section 64 (1)** of the **Employment Relations Act 2008 (Act No. 32 of 2008)**.

Conciliation meetings were held at the Commission and no settlement has been possible.

In a referral dated 19th of April 2012 the Commission informed us that a dispute is being referred with the consent of the worker for arbitration in terms of **Section 69(7)** of the **Employment Relations Act 2008** with the following Terms of Reference:-

“Whether the Mauritius Institute of Training & Development should have proceeded with the Interview and Selection for the post of Officer-in-Charge N.T.C Foundation Course during my approved permission to leave the country from 25 November 2011 to 15 December 2011.”

What strikes us at the outset is the nature of the referral whereby a declaratory award is being sought for. We will expatiate on that issue at a later stage.

The Disputant was not legally assisted but was represented by the President of the Union whereas Respondent was represented by State Counsel, Miss D. Beesoondoyal.

In a Statement of Case Disputant avers that he is a staff of the Respondent posted at the Lycée Polytechnique Sir Guy Forget Flacq. He is 60 years of age and has 37 years of service and that includes 30 years of teaching experience at the Respondent. His present income is Rs 46,250 per month. During early May 2011, he applied for permission to proceed to India from 24.11.11 to 15.12.11 with his family on a group tour. In November 2011, the Respondent granted permission to Disputant to leave the country,

met the cost of Air-Tickets for him and his family and arranged for his replacement during the period of leave. It has been further averred that following an internal advertisement at the Respondent on 10.11.11 for a post of Officer-in-Charge, Disputant made the application in due form and in time and that he possessed all necessary qualifications and experience. On 1.12.11 the Respondent convened him for an interview on the 3rd December 2011 and the letter was sent at Disputant residential address in Mauritius. Respondent did not ask Disputant for an address in India and Disputant did not have a fixed address there as he was on a tour. Even if the convocation letter was to be forwarded to India, Disputant would not have been able to reach Mauritius and attend the interview on the 3rd of December 2011. Disputant avers that if there were any urgency to fill the same post, Respondent could have arranged for an interview some nine days later. Disputant proposed in his Statement of Case that he would be prepared to accept an amicable settlement if one increment on his basic salary is being offered to him as from 1.01.12 until his retirement.

The Respondent filed a statement of reply in which he avers that he is a body corporate established by the Mauritius Institute of Training and Development Act 2009 and that Disputant is a staff of the MITD posted at Lycée Polytechnique Sir Guy Forget, Flacq. Disputant will reach 60 years of age on 22 October 2012 and has 30 years of experience at the said institution, drawing a basic salary of Rs 45,000 with an allowance of Rs 1,250 on assignment of duties as Senior Trainer. He obtained one increment upon transfer of service to the MITD and applied to the Respondent on 14 September 2011 for permission to leave the country for India during school vacation as from 26 November 2011 to 17 December 2011. Respondent

further avers that on the 18 October 2011, Disputant informed Respondent that due to unavailability of seat on 26 November 2011, he would leave the country on 24 November 2011 and applied for a casual leave on 25 November 2011. At no time was the Respondent informed that Disputant would be going on a group tour to India and Disputant would make use of his passage benefit and arrangements were made to have him replaced at Lycée Polytechnique Sir Guy Forget during his time abroad. Disputant made an application for the post of Officer in Charge on 17 November 2011 following an internal advertisement on 10 November 2011. The Respondent avers that the Disputant satisfied the requirement for the post and on 01 December 2011, Disputant was convened by letter sent at Disputant's residential address by the Respondent for an interview on 03 December 2011. Disputant did not leave any contact address upon leaving Mauritius in spite of knowing full well that he had applied for a post. The only information that the Respondent had was that Disputant was leaving the country for India and no contact address or e-mail address was furnished. Respondent further avers that in view of the urgency to fill up the post, Respondent carried out with the interview exercise and Disputant was contacted at the address that he left. According to the averment in the Respondent's Statement of Reply, Disputant is allowed to remain in service up to January 2017 in accordance with the recommendations of PRB Report 2008. Disputant hold a permanent and pensionable post of Trainer and is drawing the basic salary of Rs 45,000 instead of Rs 43,750 which is already beyond top salary scale. He was granted one increment of Rs 1,250 on joining the MITD. Respondent avers that the grant of one increment to Disputant will not be in line with policy of PRB 2008 and Disputant is supposed to remain in service up to January 2017 in accordance with the recommendations of the PRB 2008. Respondent

avers that the interview for the said post was conducted without any intention on the part of the Respondent to prejudice the Disputant and having applied for a post and knowing that he would be away, the Disputant was duty bound to ensure that he would be reachable in case he was needed for an interview for the said post. Respondent moves that the present case be set aside.

The Disputant confirmed the correctness of his Statement of Case. He stated in cross-examination that when he made his application for leave he mentioned to the Respondent that he was travelling to India together with other teachers at the MITD on a “group tour” and he specified one Mr Koobally to be among those teachers. He could not remember whether that was put down in writing and the Respondent did not ask him for any address in India. With regard to his e-mail address there was no space to include it in his leave application. However, it could be found on his e-ticket. His passage benefits were reimbursed to him by the Respondent on the day he travelled. He was aware that the Respondent reserved its right to convene only the best qualified candidates for the selection exercise and he was aware that he could be called for an interview at any time. He did not expect that only two days would be allowed to him to attend an interview. The Disputant explained that he had been changing hotel on a daily basis and he could not see how an e-mail address would have been of great assistance to him since the Respondent only allowed two days to attend the interview. He added that if the Respondent knew that it had to proceed urgently with the recruitment it ought to have brought it to his attention and he could have cancelled his trip. His present post is that of Trainer and he was assigned the

duties of Senior Trainer. He received an increment upon his transfer to the MITD.

The Respondent's first witness, Mrs Nayeela Parveen Sakauloo, Human Resource Management Officer deponed to the effect that Disputant made an application for leave to proceed to India on vacation on the 14th of September 2011. It was an application to leave the country during school vacation and not vacation leave as such. Disputant only wrote his Lycée Polytechnique Flacq address and the MITD was already in possession of his home address. During the month of October 2011 the Disputant informed MITD of his change of date of departure. At no time he mentioned he was proceeding on a "group tour". He only mentioned he was proceeding to India. According to the witness, Disputant had in the past applied for vacation leave and following which he received a letter requesting him to provide his overseas address. Disputant mentioned only his residential address in his application for the post advertised on the 10th of November 2011. The witness confirmed that Disputant met the criteria for the post he applied for. On the 1st of December a letter was sent to his residential address inviting him for an interview on the 3rd December. She added that although Disputant wrote his mobile number on his form, Respondent did not contact him on that number knowing that he was abroad. She had to get in touch with him abroad but failed to do so.

During cross-examination, the witness stated that it is normal practice to specify whether one is going on a "group tour" or not. She agreed that Disputant submitted an e-ticket but it did not contain an e-mail address. She

also agreed that there was at the material time only one Senior Trainer in the employment of the MITD with a top salary of Rs 47,500.

Mr Suryakant Calleechurn, Assistant Manager, HR Division also deponed. According to him, Disputant holds the post of Trainer that carries a salary scale of Rs 14,200 to Rs 40,000. The PRB Report Section 10.52 allowed an option for salary movement up to Rs 43,750. As from September 2005 Disputant has been assigned Senior Trainer post for the same field and has been receiving incremental allowance as long as those two were added together are not higher than the top salary of the Senior Trainer that stops at Rs 45,000 with a salary movement up to Rs 46,250. Disputant was earning Rs 45,000 and received an increment upon his transfer. According to the witness he proceeded with the advertisement of the post of Officer in Charge in November 2011 as there was an urgency for it. There were three vacancies for three different centres and the officer was to start his work at latest the following January. Had the Respondent received representation from the Disputant to reschedule the interview, Respondent would have looked into it. The interview was fixed to the 3rd of December since a board meeting was scheduled earlier and Respondent only received a representation from Disputant after that board meeting. Therefore it was not possible to get the “approval of the board by circulation”. Respondent received the representation from Mr Mooneepen only on the 18th of December. The interview is a selection exercise and not a promotion policy. He confirmed that employees are not made aware when board meetings are being fixed. Normally the board meeting is held on the last Thursday of the month but only for that December it was held on the 18th at the request of the Chairman. The board meeting was held on the 18th because its members had family

commitments at the end of the year. The witness agreed that an employee who has joined MITD and earning Rs 47,500 is not in line with the scale of the PRB and the witness has drawn the attention of the PRB to that effect.

Counsel for the Respondent firstly submitted that the Terms of Reference do not include the question of salary. Secondly there was an urgency to fill up the post and had the Respondent been in possession of any contact address of the Disputant, needful could have been done to reschedule the interview to such time when Disputant could have been present. Counsel submitted that there has been no bad faith or abuse of power on the part of the Respondent which could justify our intervention in the present case. The President of the Union drew our attention to the non-submission of the e-mail address by the Disputant. She remarked that if that was a necessity it was for the MITD to bring it home to the Disputant before agreeing on his departure abroad.

TRIBUNAL'S CONSIDERATIONS

That the Respondent was fully aware that the Disputant was abroad when the interview exercise was being fixed and carried on is beyond dispute. That the Disputant satisfied the requirement for the post he had applied for is also beyond dispute. Mrs Sakauloo and Mr Calleechurn who deponed on behalf of the Respondent confirmed same. Further those undisputed facts are clearly spelled out in Respondent's Statement of Reply in particular in the following paragraphs:-

- “
- ...
5. *Disputant applied to the Respondent on 14 September 2011 for permission to leave the country for India during school vacation as from 26 November 2011 to 17 December 2011.*
6. *On 18 October 2011, Disputant informed Respondent that due to unavailability of seat on 26 November 2011, he would leave the country on 24 November 2011 and applied for a casual leave on 25 November 2011.*
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8. *The Disputant made use of his passage benefit and arrangements were made to have Disputant replaced at Lycée Polytechnique Sir Guy Forget during his time abroad.*
- ...
10. *The Disputant satisfied the requirement for the post and on 01 December 2011, Disputant was convened by the Respondent for an interview on 03 December 2011 at Disputant residential address.*
- ...
12. *The only information that the Respondent had was that Disputant was leaving the country for India and no contact address or e-mail address was furnished...”*

What strikes us is that it was within the knowledge of the Respondent that the Disputant's leave would end on the 17th of December and his interview could have been held upon his resumption of duty. Surely that would have necessitated clearance by the Board. If it was necessary to call an early Board meeting in December so as to allow its members to spend time with their families during the festive season, we fail to see why an urgent and special Board meeting could not have been held early January and that would have certainly allowed everybody qualified to participate in the interview to do so. **Section 97 (d) and (n) of the Employment Relations Act 2008**, make provisions for the Tribunal in the exercise of its functions to consider amongst others the principles of natural justice and the principles of best practices of employment relations. "*A fortiori*, deciding on the promotion of public officers by way of selection carries a duty to carry out the exercise in conformity with the rules of natural justice." (**The Public Service Commission v. The Public Bodies Appeal Tribunal and in the presence of Mrs Man Lan Wong Chow Ming [SCJ 382 of 2011]**).

We are far from saying that when an employee proceeds abroad after applying for a job that he should pack up and turn his back on his application and hope for the best. It is expected of him to carry on a follow up exercise from whichever part of the world he may be and for whatever purpose he may have to be abroad. In the present matter we understand that the Disputant being on a "group tour" is not expected to be cloistered in a hotel room and at one stop throughout his vacation. We cannot expect of him to move around with a Blackberry mobile phone or to call from India on a daily basis to check on the date of the interview.

We are puzzled as to the speed the Respondent decided to hold an interview simply because members of the Board had to spend time with their families during festive seasons. The courses were to start in January and that left sufficient time for the setting up of the interview panel. This would surely have avoided the sorry plight the Disputant finds himself on his arrival. A letter of convocation for the interview was forwarded to the Disputant's home address on the 1st of December to participate in the interview exercise scheduled only 48 hours after and knowing that he was on vacation abroad defeat the whole requirement of submission of an e-mail address or an address abroad. In any event, the insistence of Mrs Sakauloo that Disputant did not leave any e-mail address behind adds strength to the puzzle. Annex 1 is a copy of the application for passage benefit and permission to leave the country and it bears Disputant's e-mail address. We again see the e-mail address of Disputant on Annex 2 which is the electronic ticket submitted to the Human Resource Officer of the MITD. Indeed, to request an employee who is on vacation abroad and who has applied for a job and who is qualified to do so after satisfying the requirement for the post to participate in an interview in 48 hours is most unreasonable. We have not been impressed by the explanation given by the Respondent with regard to the urgency of the matter. A wrong has been done to the Disputant for depriving him of the opportunity to participate in the interview exercise on the same basis as others who were qualified and did so.

The Respondent could be inspired by the ***“Notes and Instructions to Candidates”*** annexed to any Application Form issued by the Public Service Commission where the following is clearly spelled out at paragraph 14:-

*“A candidate who is proceeding abroad, should **immediately** inform the Commission of his overseas address and the expected date of his return.”*

We need now to address our mind on the Terms of Reference as forwarded to us by the Commission for Conciliation and Mediation. They are not the best model of what Terms of Reference should be. The Tribunal is being merely asked to give a declaratory award on whether the Respondent should have proceeded with the interview or not. We quote here what was held in **Planche v. The PSC & Anor [SCJ 128 of 1993]**:-

“It seems to us that this application is incompetent if only for the reason that the question in issue is now purely an academic one. We can do no better than echo the dictum of Lord Justice Clerk Thomson in McNaughton v McNaughton’s Trs, (1953) SC 387, 392:-

“Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau.”

However, the Tribunal is entertaining the present matter in view of the spelling out of the relief sought by the Disputant in his Statement of Case, which relief we find to be reasonable. It is not the wish of the Tribunal to look only at the tree and leave the dispute unaddressed and unresolved and the Disputant’s claim will remain a sorry tale. **(Margaret Toumany & Another V. Mardaynaiken Veerasamy UKPC 13 of 2012).**

We hope that in future the Terms of Reference will include the relief/s sought so as to enable us to arbitrate *intra petita*. (See **S. P. Mootoosamy and the Bank of Baroda, RN 155 of 1984; P. Greedharee and Mauritius Ports Authority, RN 258 of 2011**).

We order Respondent to grant to Disputant one increment on his basic salary on a personal basis as from 01.01.12 until his retirement. The first witness for the Respondent confirmed that there is already one Senior Trainer at the MITD whose top salary is Rs 47,500. The additional increment granted to the Disputant will put him at par with the said Senior Trainer. He had in the past been assigned duties of Senior Trainer.

The Tribunal awards accordingly.

(Sd) Rashid Hossen
(President)

(Sd) Christian Bellouard
(Member)

(Sd) Jheenarainsing Soobagrah
(Member)

(Sd) Renganaden Veeramootoo
(Member)

Date: 11 September 2012