

EMPLOYMENT RELATIONS TRIBUNAL
AWARD

ERT/RN 10/2013

Before:

Shameer Janhangeer	-	Vice-President
Esther Hanoomanjee (Mrs)	-	Member
Denis Labat	-	Member
Georges Karl Louis	-	Member

In the matter of:-

Miss Mahentee Boolakee

Disputant

and

Central Electricity Board

Respondent

The present matter has been referred to the *Tribunal* by the *Commission for Conciliation and Mediation* (the “CCM”) for arbitration pursuant to *section 69 (7)* of the *Employment Relations Act* (the “Act”). The terms of reference of the dispute reads as follows:

Whether I, Miss Mahentee Boolakee should be reinstated in my post of Engineer at the Central Electricity Board with effect as from 16 November 2011.

Both parties were assisted by Counsel, who have each put in a statement of case in relation to the present dispute.

The Disputant has in her statement of case averred that she has been in the continuous employment of the Central Electricity Board (the “CEB”) since 7 June 2001 and was confirmed as Engineer and an employee of the CEB as from 7 June 2002 pursuant to an award of the *Tribunal*. In her averments, the Disputant has gone on a series of events between her immediate supervisor Mr J. Charitar, Chief Internal Auditor at the Respondent body, and herself relating to an assignment given to her by the latter. A series of emails

have been annexed to her statement of case to this effect. On 26 August 2011, the Disputant received a memorandum for an alleged misconduct which occurred on 22 August 2011 and was requested to furnish her explanation for same, which she did on the 31 August 2011. On 14 September 2011, the Respondent informed the Disputant that her explanations were not satisfactory and that a Disciplinary Committee was being set up hear and determine the charge against her. On or about 28 September 2011, the Disputant had a meeting with her immediate supervisor following which she confirmed that the assignment could now be performed and embarked upon same. The Disputant was informed that a Disciplinary Committee was constituted on or about 21 October 2011. The Disputant through her Counsel sought and was turned down an injunction in respect of the chairmanship of the Disciplinary Committee and upon legal advice, she refused to submit herself to same.

The Respondent wrote to the Disputant informing her that she has been found guilty of gross misconduct and that her employment was being terminated with immediate effect. She appealed against the decision of the Disciplinary Committee to an Appellate Committee set up by the Respondent. She was requested to appear before the Appellate Committee on 19 December 2011, being refused a postponement to seek legal advice she had no alternative but to submit herself to same. The Respondent informed her that the decision to terminate her employment was being maintained, following which she referred the matter to the *CCM*, where it was not possible to reach an amicable settlement. The letters she has referred to are also attached to her statement of case.

The Disputant is therefore praying that the *Tribunal* awards her reinstatement as an Engineer at the CEB in view of the fact the Respondent's conduct has all throughout been oppressive, unjust, arbitrary and unlawful.

The CEB, in its statement of case, has set out the career history of the Disputant at the Respondent body. She was reported by her Supervisor for having refused to carry out an assignment relating to the checking of Maximum Demand Indicator (MDI) customers and the Respondent sought explanations. Having found her explanations to be unsatisfactory, a charge of misconduct was leveled against her. A Disciplinary Committee was set up to determine the charge leveled against her and went on to find the charge proven against the Disputant. The Board of the Respondent at a special meeting on 16 November 2011 decided to terminate the Disputant's employment with immediate effect, on the ground of the gravity of the charge and her previous disciplinary record and the decision was communicated to her by way of a letter dated 16 November 2011. The Disputant made an appeal for a review and cancellation of the aforesaid decision, following which the appeal

was heard on 19 December 2011. The Board rejected the appeal and maintained its decision, which was communicated to the Disputant by way of letter.

On 16 January 2012, the Disputant made representations to the *Honourable Minister of Labour, Industrial Relations & Employment* requesting to be reinstated in her post and her representative proposed that the matter be referred for voluntary arbitration in terms of *section 63* of the *Act*. The Board of the Respondent, in a meeting held on 29 February 2012, resolved not to go for arbitration and maintained its previous decision. The Disputant then proceeded to report the existence of a labour dispute to the *CCM*, where the matter remained unresolved. The Board at its meeting of 29 August 2012 resolved that no offer be made to the Disputant regarding her case at the *CCM*.

The Respondent has further averred that the decision to terminate the Disputant's employment was based on the gravity of the charge as well as her deplorable disciplinary record, where no improvement had been noted despite that she was warned on several occasions that a recurrence might entail her dismissal. The Respondent has also set out details of sanctions following charges of gross misconduct leveled and proven by Disciplinary Committees held against her on two previous occasions (in December 2005 and April 2011).

The Disputant was called to adduce evidence. She stated that she is a Registered Professional Engineer and swore as to the correctness of her statement of case. She last occupied the post of Engineer Technical Audit at the CEB. She explained how she came to be confirmed as an Engineer at the CEB as from 7 June 2002 through an award of the *Tribunal* dated 16 December 2011. She also went over a series of emails which started with an audit assignment given by Mr J. Charitar on the 19 August 2011 for checking of MDI customers. There was an exchange of emails between Mr J. Charitar and herself in relation to the assignment as the instructions in the initial email of 19 August 2011 were very vague and she wanted to know what exactly she had to do. In relation to an email she sent to Mr J. Charitar on the same day at 14.26 hrs, she stated that she felt trapped with the past of how the CEB has been victimising her and felt harassed by the behaviour of her Supervisor. She felt harassed as on the one hand her Supervisor was expecting her to carry out an assignment and on the other when she asked for explanations to be able to do the job properly and to match the criteria for the job, he did not offer any explanation. She sent another email on 22 August 2011 at 09.59 hrs wherein she wrote that she cannot and shall not continue to allow the CEB to victimise her in all respects. Although she stated that she acted as Senior Audit Officer for about 9 months, she never carried out verification of MDI customers with non-technical audit staff as stated in an email from her Supervisor on 22 August 2011 at 10.46 hrs. She also stated that she was very keen to carry out the

assignment provided it was done within Safety Regulations and Safety Acts, with the proper equipment and tools and she had the proper instructions. Following an email on 28 September 2011 at 1010 hrs which she sent to her Supervisor, she attended a meeting with the latter with one Mr Nizam Bundhoo. Therein she requested some explanations which Mr J. Charitar offered about the assignment; she also told him that she could not go alone and Mr J. Charitar told her that she can take Nizam along with her.

In relation to the assignment, she explained that the checking of MDI meters is not within the province of the scheme of duties of an Engineer as they do not have the necessary equipment and this is usually done by technical officers. The second assignment she was given (on 28 September 2011) was about auditing and Mr Nizam will be performing the MDI checks and any engineering issue is seen by the Engineer. The assignment was submitted back to her Supervisor on 31 October 2011.

In between these discussions with her Supervisor, she received a memorandum dated 26 August 2011 from Mr S.K. Thannoo, Officer in Charge of the CEB, regarding an alleged misconduct which occurred on the 22 August 2011. She gave her written explanations to same on 31 August 2011. These were not found to be satisfactory and she was informed that a Disciplinary Committee was being set up to hear the charges against her. The assignment she received (in August 2011) and the charge laid against her were not the same. Through her Counsel, she raised an objection as to the composition of the Disciplinary Committee and even applied for an injunction. She did not depone before same upon advice of her Counsel. On 12 November 2011, she wrote to the Chairman of the CEB to complain about how procedures have not been respected with regard to the Disciplinary Committee and also wrote to the Minister of Labour on the same day expressing the same concern with regard to the Chairman of the Disciplinary Committee.

On 16 November 2011, the CEB wrote to her informing her that the Board is terminating her employment. She received this letter on 21 November 2011 and produced a photocopy of the Correspondence Book to this effect (Document A). Following the receipt of the letter, she appealed to the Board of the Respondent by way of a letter dated 26 November 2011 wherein she gave reasons why she believed that the charge was not founded. On 16 December 2011, she was convened to the Appellate Committee to be held on 19 December 2011 by way of letter. She received same on the same day of the hearing of the Appellate Committee and requested for a postponement as she had been unable to contact her Counsel. However, this was refused and she was forced to explain matters before the Committee where she was allowed to speak for only about 30 minutes. On 22 December 2011, she received a letter dated 20 December 2011 by post informing her that the Appellate Committee decided to terminate her employment with effect from 16

November 2011. She is requesting the *Tribunal* to make an award to be reinstated in her post as Engineer at the CEB in as much she considers her dismissal to have been done in an oppressive manner and it was unjust, totally arbitrary and unlawful.

The Disputant was questioned by Counsel for the Respondent. She stated that she attended the Disciplinary Committee but did not depose. She was not present when witnesses were deposing. She refused to submit herself to same upon advice from her Counsel and the Committee proceeded in her absence. Before the Appellate Committee, she was allowed to speak and also talked about her written grounds of appeal. She maintained that in an email she stated that she cannot allow the CEB to continue victimising and harassing her. She also stated that she felt harassed by the refusal of Mr J. Charitar, she expected to do work and requested explanations. She felt harassed by the circumstances and the CEB. She was warned by the CEB in the past that they might terminate her employment.

Mr Darmalingum Veragoo, Acting Human Resources Manager at the CEB, was called to depose on behalf of the Respondent. He affirmed as to the correctness of the Respondent's Statement of Case. He also added that the CEB has followed all existing procedures that are in force regarding this matter prior to the termination of the employment of the Disputant. Under questions from Counsel for the Disputant, Mr D. Veragoo stated that by procedures he means disciplinary procedures and also explained the provisions relating to gross misconduct under the Collective Agreement at the CEB. He also stated that the delay for a Disciplinary Committee to be set up is 10 days once they become aware of the misconduct and once the hearing is completed, the delay for dismissal is 7 days according to procedures at the CEB. The witness also produced a copy of the CEB Collective Agreement with CEBSA in respect of disciplinary procedures (Document B).

Mr Jadoonundun Charitar was also called to depose in the matter. He confirmed that he met with the Disputant in September. He also stated that he gave her only one assignment, the audit of meters that formed part of her duties and there were not two assignments. Mr J. Charitar, under questions from Counsel for the Disputant, also stated that the Disputant's schedule includes auditing of CEB meters at customers' premises, irrespective of the description of the meters. In relation to the written explanations dated 31 August 2011 provided by the Disputant to the Human Resources Manager, he stated that he examined same and provided material for reply.

The *Tribunal* on having been referred to the present labour dispute is being asked to enquire into whether the Disputant should be reinstated in her post of Engineer at the CEB

with effect from 16 November 2011. It may also be noted that the Disputant is praying for an award for reinstatement in view of the fact that the Respondent's conduct has been oppressive, unjust, arbitrary and unlawful.

From the evidence adduced by the Disputant, she has notably stated that she has felt trapped with the past of how the CEB has been victimising her and harassed by her immediate supervisor in relation to an assignment given to her on 19 August 2011 requesting her to carry out an audit of some major new customers who have been supplied electricity since March 2011 as evidenced by what she has written in an email on 19 August 2011 at 14.26 hrs to the latter. On 22 August 2011, through another email (at 09.59 hrs) to Mr J. Charitar, she wrote that she cannot and shall not continue to allow the CEB to victimise her in all respects. On the same day, in another email (at 11.14 hrs) to the same addressee, she wrote that Mr J. Charitar has discriminated against her and is continuing to harass her, she has already requested him to stop harassing her and now firmly requests him to stop victimising, discriminating and harassing her. Following a meeting with her supervisor on 28 September 2011, the Disputant confirmed that the assignment could now be performed and embarked upon execution of same.

The emails referred to show clearly that the Disputant very much believed that she was being victimised, harassed and even discriminated by the CEB and/or her immediate supervisor Mr J. Charitar the Chief Internal Auditor. At the same time, it could be noted that she had reported a dispute against the Respondent with regard to her appointment and confirmation as Engineer as a CEB employee and same was being heard before the *Tribunal*, which awarded the Disputant her confirmation as an Engineer and CEB employee as from 7 June 2002 on 16 December 2011. On the other hand, it cannot be discarded that Mr J. Charitar did not admit to any harassment upon the Disputant nor was he questioned as to same when called to adduce evidence before the *Tribunal*. He did however state that he only gave her one assignment. Furthermore, he also explained that the Disputant's schedule of duties included the auditing of CEB meters at customer premises in contrast to her assertion that the checking of MDI meters is not within her scheme of duties.

The Disputant has also mentioned the disciplinary process she has gone through following a memorandum she received regarding an alleged misconduct in relation to her refusal to carry out the assignment given to her by Mr J. Charitar. She was eventually informed by the Board that her employment has been terminated. Although she appealed against her dismissal, the Board after having considered the recommendation of the Appellate Committee maintained its decision to terminate her employment with effect from 16 November 2011. It may also be noted that she also mentioned certain discrepancies in

relation to the process which led to her dismissal whilst deposing as well as in the letter of appeal against her dismissal.

In relation to the Disciplinary Committee and her subsequent dismissal, it may be noted that there are provisions in the *Employment Rights Act* (the “ERA”) which apply in relation to the protection against termination of employment of an agreement (which includes a contract of employment), which also include provisions relating to an employer terminating a worker’s agreement on grounds of misconduct. It may also be noted that with regard to the charge laid against her, the Respondent stated that she is guilty of misconduct under *section 38 (2)* of the ERA (*vide* CEB Memorandum dated 26 August 2011). Furthermore, although the Collective Agreement at the CEB provides for its own provisions in relation to disciplinary matters, the provisions of the ERA applies to every agreement save for the exceptions that have been provided for (*vide section 3* of the ERA).

It is trite law that the *Industrial Court* has exclusive jurisdiction in relation to any matter arising out of the *Labour Act*, which has now been repealed by the ERA. In *Introduction au Droit du Travail Mauricien, 1/ Les Relations Individuelles de Travail (2^{ème} édition)*, Dr D. Fok Kan has noted the following in relation to the jurisdiction of the *Industrial Court* (at page 37):

La Cour Industrielle est une juridiction dite d’exception, dans le sens qu’elle n’est appelée à connaître que les litiges qui lui sont expressément déférés par une loi. Toutefois là où elle est compétente, sa juridiction est exclusive. Aux termes de la S.3 de L’ICA, sa compétence est déterminée par la nature du litige dans la mesure où elle n’est concernée que par l’application des lois expressément mentionnées dans la première cédule de la loi ou de toute autre loi lui donnant spécifiquement compétence.

Furthermore, from the case of *Raman Ismael v United Bus Service [1986 MR 182]*, it may be noted in relation to the jurisdiction of the *Industrial Court* that:

... the supervision and control of the Courts should apply in equal measure with regard to the exercise of the disciplinary power of the employer as with regard to the rights of employees guaranteed and protected, as they are, under our law. Secondly, the Industrial Court is given unrestricted competence in disputes arising out under the labour enactments specified in the Schedule to the Act establishing that Court.

It is therefore clear that despite the averments of the Disputant with regard to the Disciplinary Committee set up to hear the charge of misconduct laid against her and which led to her eventual dismissal, the *Tribunal* cannot probe into the complaints raised by the Disputant in relation to same.

The *Tribunal* shall enquire into a labour dispute and make an award thereon. Under *section 2* of the *Act*, a labour dispute means a dispute between a worker and an employer which relates wholly or mainly to, *inter alia*, reinstatement or suspension of a worker. As per the terms of reference of the present matter, the Disputant is asking for her reinstatement with effect from 16 November 2011 at the *CEB*.

Although the meaning of a labour dispute under the *Act* includes a dispute relating to reinstatement of a worker, the *Act* does not specifically make any provisions in relation to the reinstatement of a worker. As is customary in our legal system, we may turn to French Law for guidance as per what was stated in *The United Bus Service v Gokhool* [1978 *MR 1*]:

Our common law being derived from the French Codes, we have no doubt that the same principles should apply here – the more as they appear to us more realistic, more consistent with the spirit of our labour law (under which an employee should be dismissed only in the last resort) and more likely to conduce to a harmonious development of our law.

It may be noted from *Mementos Dalloz, Droit du travail Vol. 2* by J-M. Verdier, A. Coeuret and M-A. Souriac, 16e édition, that under French Law a worker may be reinstated in cases of *licenciement injustifié* and *nullité des licenciements portant atteinte à un droit fondamental*. In the former case, it may be noted (at page 287):

La procédure est respectée, mais la cause n'est pas réelle ou pas sérieuse.

- *Le juge peut proposer la réintégration. Il a donc un choix. La réintégration est facultative aussi pour les parties, donc pour l'employeur. Si la réintégration est effective, elle entraîne le maintien des avantages acquis, en particulier de ceux attachés à l'ancienneté (primes, durée du préavis, indemnités de licenciement, électorat, éligibilité...). En outre, la réintégration signifiant la continuation du contrat du travail, le salaire est dû entre le licenciement et la réintégration (une «indemnité» équivalente, pour la Cour de cassation, car il n'y a pas eu travail).*

Bien que facultative pour le juge et pour l'employeur, la réintégration constitue dans l'esprit de la loi la sanction normale. Mais, selon la Cour de cassation, le texte opérerait une conciliation raisonnable entre le droit de chacun d'obtenir un emploi et la liberté d'entreprendre (Soc. 14 avril 2010, Dr. Soc. 2010. 815).

In relation to the reinstatement of a worker in cases of *nullité des licenciements portant atteinte à un droit fondamental*, it may be noted (at page 288):

Bien qu'en vertu des dispositions de l'article L. 1235-3 du Code du travail, la réintégration du salarié soit facultative pour le juge et pour chacune des parties, la jurisprudence s'est orientée dans un sens différent lorsque le licenciement constitue une atteinte à une liberté fondamentale du salarié, auquel cas le juge pourrait ou devrait ordonner, au besoin sous astreinte, la poursuite de l'exécution du contrat et la réintégration du salarié, obligatoire pour l'employeur, le licenciement étant nul.

The basis for the reinstatement of a worker under French Law is either the unjustified dismissal of a worker or the nullity of a dismissal due to a breach of a fundamental right. However, given the lack of jurisdiction of the *Tribunal* in matters of unfair or unjustified dismissal of a worker, which arises out of the *ERA* as discussed above, French Law does not necessarily find its application. We may therefore turn to English Law for guidance.

Under the *Employment Rights Act 1996* (as amended) in the UK, in relation to reinstatement, the following has been provided for in *sections 113 & 114*:

113. The orders.

An order under this section may be –

- (a) an order for reinstatement (in accordance with section 114), or*
- (b) an order for re-engagement (in accordance with section 115),*

as the tribunal may decide.

114. Order for reinstatement.

- (1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.*

In the matter of *McBride v Strathclyde Police Joint Board [2013] CSIH 4*, reported in *[2013] IRLR 297*, the *Scottish Court of Session* held:

Reinstatement is unconditional; re-engagement is not. That reinstatement involves being returned in all respects to the contractual position is consistent with s.114(3) which specifies that a person reinstated must be treated as if they had benefited from any improvement in the terms and conditions of employment from which they would have benefited if not dismissed.

Furthermore, from *McBride v Strathclyde Police Joint Board (supra)*, the following may be noted in relation to factors to be taken into account by an *Employment Tribunal*:

In considering whether to make such an order, the tribunal were required under s.116 (1) of the Employment Relations Act 1996 ('the Act') to take into account whether the complainant wished to be reinstated and whether it was practicable for the employer to comply with such an order. They also required to consider whether the appellant had to some extent caused or contributed to her dismissal. (Vide paragraph 8)

As to the issue of whether the appellant caused or in some way contributed to her dismissal, the tribunal's finding on that matter was made wholly in the context of s.116(1)(c), which enjoins a tribunal, when considering reinstatement, to take into account 'where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement'. (Vide paragraph 33)

However, from section 111 of the *Employment Rights Act 1996*, it may be noted that a person may present a complaint to an *Employment Tribunal* against an employer that was unfairly dismissed by the employer, following which pursuant to section 112 the tribunal shall explain to the complainant what orders may be made under section 113 (i.e. reinstatement or re-engagement) in the event that the grounds of the complaint are well-founded. The relevant parts of sections 111 and 112 read as follows:

111 *Complaints to employment tribunal.*

- (1) *A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.*

112 *The remedies: order and compensation.*

- (1) *This section applies where, on a complaint under section 111, an employment tribunal finds that the grounds of the complaint are well-founded.*
- (2) *The tribunal shall-*
- (a) *explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and*
- (b) *ask him whether he wishes the tribunal to make such an order.*

It is therefore clear from the above provisions of the *Employment Rights Act 1996* in the UK that the basis of an order for reinstatement of a worker is a complaint of unfair dismissal, which under our law would be within the jurisdiction of the *Industrial Court* (vide section 3 of the *Industrial Court Act* (the "ICA"); and *Raman Ismael v United Bus Service* (*supra*)).

In the present matter, the Disputant has raised certain issues in support of her reinstatement at the Respondent body as has been highlighted by her Counsel in

submissions. Most of these relate to the Disciplinary Committee she was convened before following a CEB memorandum dated 26 August 2011 wherein she was informed that she was guilty of misconduct and was requested to furnish her explanations in writing. The Disputant has also averred that the provisions of the *ERA* were not respected in relation to her dismissal. It has also been borne out in evidence that she did eventually complete and handover her assignment in October following a meeting with her supervisor on 28 September 2011.

Furthermore, it has been noted that the issues of harassment, victimisation and discrimination raised by the Disputant in her emails to Mr J. Charitar with regard to an assignment cannot be taken to be proven in the absence of any evidence from the latter on this issue when he deposed. However, it appears that the Disputant and her immediate Supervisor did sort matters out in a meeting following which she was able to complete her assignment and submit same. In any event, it was and is still open for the Disputant to report the matter to the relevant authorities (e.g. the *Equal Opportunities Commission*; or the *Police*) on this issue if she does feel that same is well-founded.

The Respondent on the other hand asserted that the procedures in relation to her dismissal have been lawfully followed. Furthermore, the Respondent has also showed that the termination of the Disputant's employment was also based on her previous disciplinary record.

By virtue of *section 71 (a)* of the *Act*, it has been expressly provided that the *Tribunal* cannot enquire into any labour dispute where the dispute relates to any issue within the exclusive jurisdiction of the *Industrial Court*. On the facts of the present case, the Disputant is relying on the Respondent's alleged unfairness towards her relating notably to the Disciplinary Committee set up to hear a charge of misconduct which eventually led to her dismissal on 16 November 2011, despite her other averments with regard to the assignment given to her and the emails subsequently exchanged.

The *Tribunal*, in accordance with the exclusion of jurisdiction provided for under *section 71* of the *Act* and by virtue of the exclusive jurisdiction of the *Industrial Court* (*vide section 3* of the *ICA*), does not hence have the necessary jurisdiction to enquire and make an award into the present labour dispute.

The matter is therefore set aside.

(Sd) Shameer Janhangeer
(Vice-President)

(Sd) Esther Hanoomanjee (Mrs)
(Member)

(Sd) Denis Labat
(Member)

(Sd) Georges Karl Louis
(Member)

Date: 15th July 2013