

EMPLOYMENT RELATIONS TRIBUNAL
AWARD

RN 93/12

Before

Indiren Sivaramen	Vice-President
Raffick Hossenbaccus	Member
Rajesvari Narasingam Ramdoo	Member
Triboohun Raj Gunnoo	Member

In the matter of:-

Mr Abdool Rashid Johar (Disputant)

And

Cargo Handling Corporation Ltd (Respondent)

The present matter has been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 69(7) of the Employment Relations Act (hereinafter referred to as "the Act"). The two parties have not been able to reach an agreement and the Tribunal thus proceeded to hear the matter. Both parties were assisted by Counsel. The terms of reference read as follows:

"Whether I should have been promoted to Foreman at the last promotion exercise at the Cargo Handling Corporation Limited (CHCL), having regard to:

- (a) seniority;*
- (b) being first-in-post;*
- (c) my personal terms and conditions of employment as Technician Portique;*
- (d) representations and/or promises made to me by the Management of the CHCL."*

The Disputant deponed before the Tribunal and he solemnly affirmed to the truthfulness of the contents of his Statement of Case. He referred to his letter of appointment as Technician (Portique) dated 23 October 2000 emanating from the General Manager (copy annexed as Annex A to his Statement of Case). He averred that the date "10th of January 1999" had been mentioned in the aforesaid letter so that when there is a promotion exercise he can have his promotion together with the others (the group who had been appointed as Technician (Portique) ("Portiqueur") as from 1999), and then he added he would be promoted before the others. He suggested that he obtained the letter because of his seniority. He averred that the others would have started working as Portiqueur only as from 15 January 1999. He stated that his performance at work was very good and that there was no adverse report against him.

In cross-examination, Mr Johar stated that he joined the company in 1973 and worked as Stevedore and Winchman before he followed training and was appointed Portiqueur. He agreed that some of his colleagues actually started working as Portiqueur before him. He however did not agree that a French instructor would have come at the Respondent to select eight best Portiqueurs. He was shown a copy of another letter (Doc A) also dated 23 October 2000 and addressed to another worker. He agreed that that worker who had only started working at the Respondent in 1991 had also a letter where it was mentioned that for seniority purposes, the latter would be considered to have operated in the grade of Technician (Portique) since 10 January 1999. Mr Johar accepted that there were four teams of Technician (Portique) with each team having one Foreman. At this stage, he accepted that French people came on a number of occasions at the Respondent but maintained that there was no selection of employees. He also conceded that there were workers who had started working on the "Portique" before him and who had nevertheless not been appointed as Foreman. He added that those workers ought to have claimed their rights.

Mr Dahari, the Human Resource Manager of the Respondent then deponed and he solemnly affirmed to the truthfulness of the contents of "Respondent's Reply to Disputant's Statement of Case". He explained that training of Technician (Portique) was done in five batches. Mr Johar was appointed Technician (Portique) as from 3 May 1999 but this was backdated to 10 January 1999 just like for the other Technicians (Portique) (appointed as from 1999) so as not to penalize him and others who attended training in later batches. He then stated that an instructor from "Le Havre" came to Mauritius, did an 'on the job training' and selected the eight best Portiqueurs to work on the first ship in Mauritius - the Uvena - where the Portique was being used. This was on 15 January 1999. According to his version three among those eight selected workers who first worked with the Portique were eventually (in 2009) appointed Foremen. The remaining five workers were not fully fledged employees of Respondent but were employees "on loan from the Mauritius Ports Authority". A fourth Foreman was appointed a few months later (in 2010) among those who were physically doing the job. These appointments were allegedly based on merit and experience as Portiqueur and not on seniority to join the company.

When questioned by Counsel for the Disputant, Mr Dahari stated that the French instructor who came in 1999 made an appraisal. He agreed that performance or merit would be different from experience and conceded that up to now there is no performance appraisal exercise carried out in writing at the Respondent. He then stated that generally seniority is given priority but this is subject to what the relevant Head of Section has to say. If the candidate is not up to the standard, then the basis used will be merit. In the case of Mr Johar, there was no adverse report against him and his performance was according to expectation. He agreed that he did not personally carry out any appraisal of the workers appointed as Technician (Portique) to select who was more suitable for appointment as Foreman. He agreed when it was put to him that if one had proceeded on the basis of seniority, Mr Johar should have been promoted in 2009 or 2010. However, in re-examination Mr Dahari stated that when he referred to seniority he meant that the criteria usually used was seniority in the post and not seniority in the company. Since Mr Johar was not

physically acting as Portiqueur, he was not the senior most in post. He also stated that there is no scheme of duties for Foreman.

Counsel for Respondent submitted that the criteria which the Respondent was entitled to use is seniority in the post. It is for the company to decide on the criteria. She then referred to Annex A to the Statement of Case of Disputant and argued that the said document clearly demonstrates that the intention was to place Disputant at the same level as others and not ahead of other workers. She also relied on the letter produced as Doc A and issued to the other worker. Counsel then referred to other workers who might have a right to the post of Foreman Portiqueur based on the criteria used by Management.

Counsel for Disputant submitted that the letter issued to Disputant (Annex A to the Statement of Case of the Disputant) would be pointless if eventually promotion was to be granted to those who started working physically as Portiqueur before the others. He suggested that the Disputant was granted the letter since he was performing very well and was filling in another position at the request of the Respondent itself. He highlighted that the case of the Respondent was based on merit and yet there was no system at the Respondent whereby one could assess the performance of workers. Counsel submitted that Mr Johar was to be considered as being the most senior in the light of Annex A to the Statement of Case of the Disputant and that there was no adverse report against the latter. Mr Johar thus ought to have been appointed in 2009 or even in 2010 as Foreman.

The Tribunal has examined all the evidence on record including the submissions of Counsel. Annex A to the Statement of Case of the Disputant which has been drafted in a very similar manner to Doc A provides in the last part of its first paragraph the following:

“However, for seniority purposes, you will be considered to have operated in the grade of Technician (Portique) since the 10th of January 1999 together with your colleagues.” (Underlining is ours)

This clause does not grant the Disputant any priority over his colleagues in terms of seniority but may instead be interpreted as seeking to ensure that the latter is not penalized in relation to his colleagues who might have started operating in the said grade before him as a result of attending earlier training batches in France and earlier appointments as Technician (Portique). This letter cannot be interpreted to mean that it was confirming that Disputant was “*premier par labas*” as Disputant would aver. It is not denied that many colleagues of the Disputant, including the one who is referred to in Doc A, have been appointed as Technician (Portique) before Disputant. It is equally not disputed that a few of the colleagues of Disputant have physically been operating as Technician (Portique) before Disputant. The Tribunal thus finds that the Disputant cannot pretend that he was first-in-post as Technician (Portique).

There is also no evidence on record of any representations or promises (for whatever they would have been worth – **vide Mr Ng Cheong José Li Yun Fong and The Bank of Mauritius, RN 12 of 2012**) which would have been made to the Disputant that he would have been promoted Foreman. Any averments made to that

effect in the Statement of Case of the Disputant have been denied by the Respondent. Also, Disputant was quite hesitant in relation to the letter of 23 October 2000 (Annex A to his Statement of Case) and he initially stated that he could not say why the date 10 January 1999 was referred to in his letter and then he started by guessing, then he stated that when there is a promotion, he will be promoted together with the others before adding that he would be promoted before the others. Finally, he averred that the letter was meant to confirm he was first “*par labas*”. There is however no evidence that representations or promises were made to the Disputant that he was going to be appointed Foreman. Mention has also been made in the terms of reference of the dispute to the personal terms and conditions of employment of the Disputant as Technician Portique. Yet again, no evidence has been adduced or submissions made in relation to such alleged personal terms and conditions of employment.

We are thus left as per the terms of reference with the issue of seniority. A copy of the Award delivered in the case of **Mr Louis Christian D’Avoine And Cargo Handling Corporation Ltd, RN 85 of 2010** was annexed to the Statement of Case of the Disputant. Suffice it for the Tribunal to state that apart from the fact that each case must be decided on its own merits, the Award of **D’Avoine (above)** in no way sets a general principle that promotion is to be based on seniority. In its Award, the Tribunal in fact takes care to mention *a contrario* that there may be “good and valid reasons” for a junior colleague to pass over a more senior colleague. In that case, both parties were relying on seniority. The Cargo Handling Corporation Ltd was relying on the alleged seniority of another worker in a newly created Logistics Department to justify the appointment of the latter as Head of Logistics. On the facts of that case the Tribunal accepted the version of the disputant, Mr D’Avoine, on the issue of seniority and was satisfied that a wrong had been done to him.

Thus, the Award in the case of **D’Avoine (above)** is no proposition that promotion should, as a rule, be on the basis of seniority at the Respondent. The Tribunal will not decide for or impose upon Management which criteria it has to use within its organisation for the purpose of a promotion exercise. In the case of **Mr E.Cesar and Central Water Authority, RN 785 of 2005**, the Permanent Arbitration Tribunal had this to say: “The Tribunal holds that, subject to an abuse of powers on the part of management (**Mrs D.C.Y.P and Sun Casinos RN 202 of 1988**), matters regarding appointment and promotion of employees are essentially within the province of management. (**M.Pottier and Ireland Blyth Ltd RN 279 of 1994, A.Ayrga and Tea Board RN 575 of 1998**).” Management may even decide to change the criteria which have been used in the past for promotion to any particular job provided of course that the new criteria are reasonable and that this has been done whilst respecting the rights of the workers and/or any recognised trade unions.

In this particular case, initially the Respondent relied on performance mainly, that is, merit and later before the Tribunal sought to encompass “on the job” experience with merit. Be that as it may, it would not be proper for the Tribunal to award that the main or only criteria should have been seniority (in the company). The Respondent was perfectly entitled to decide on the criteria to be used for promotion subject to what we have stated above. There is no evidence before us of any agreement or scheme of service to the effect that promotion to Foreman (Portique) would be based only or mainly on seniority. It would thus not be proper for the Tribunal to award that

the Disputant should have been promoted having regard to seniority. Also, the Tribunal has not been impressed by the manner in which Annex A to the Statement of Case of the Disputant and Doc A have been drafted since despite the (common) provision in relation to “seniority purposes” quoted above, Disputant and the other worker concerned with Doc A have different appointment dates and very importantly different confirmation dates as Technician (Portique). This is not a case where the appointments/confirmations have been backdated (as is clear from Doc A and Annex A (above) and which even Mr Dahari completely overlooked when deponing). Some of the colleagues of Disputant have physically been working as Portiqueur before Disputant. The stand of the Respondent is that it relied on merit and “on the job” experience. Reference was also made to seniority in the post as opposed to seniority in the company. The Tribunal finds nothing wrong for the Respondent to rely on experience in the grade of Technician (Portique) as opposed to experience as Stevedore or Winchman. On the basis of experience and seniority in the post, one cannot argue that those who had been appointed (and confirmed) earlier as Technician (Portique) and who physically worked as such were less senior than Disputant. Thus, even under the heading “seniority” which in the present matter will be seniority in the post of Technician (Portique) (without having to have recourse to seniority in the company) the Tribunal is not satisfied that there was an abuse of powers in the appointment of Foreman (Portique). The Tribunal however observes that if ever the Respondent intends to encompass merit and experience for promotions in the future, well designed and appropriate performance appraisal systems have to be put in place at the Respondent and accepted (**vide Mr Dayanund Koobrawa and Sugar Investment Trust, RN 55 of 2012**). Also, it is important that the criteria adopted for promotion be clear and known to one and all.

Finally, the Tribunal wishes to make an observation on the manner in which the terms of reference have been drafted. The Tribunal is being required to deliver an Award in relation to whether Mr Johar should have been promoted to Foreman at the last promotion exercise (which we assume to be the appointment made in 2010 and not those made in 2009) at the Respondent having regard to a number of factors. As per the terms of reference, this is not a dispute where the Disputant is seeking to be promoted or to be promoted as from or effective as from 2010. With the terms of reference as couched, an Award of a declaratory nature is being sought. This Tribunal has in various cases emphasized on the importance of having well drafted terms of reference (**vide Mr Purussram Greedharee and Mauritius Ports Authority and other, RN 258 of 2011**) and has made certain observations in the case of **Mr Ugadiran Mooneeapen and The Mauritius Institute of Training and Development, RN 35 of 2012**, where the Tribunal was being asked to make a declaratory award.

For the reasons given above, the dispute is set aside.

(Sd) Indiren Sivaramen
Vice-President

(Sd) Rajesvari Narasingam Ramdoo
Member

(Sd) Raffick Hossenbaccus
Member

(Sd) Triboohun Raj Gunnoo
Member

9 May 2013