

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/RN 72/12

Before:

Shameer Janhangeer	-	Vice-President
Christian Bellouard	-	Member
Jheenarainsing Soobagrah	-	Member
Renganaden Veeramootoo	-	Member

In the matter of:-

Mr R.C.K. Rajcoomar

Disputant

and

Central Water Authority

Respondent

ipo

Mr J. Munbauhal

Co-Respondent

The present matter has been referred to the *Tribunal* by the *Commission for Conciliation and Mediation* for arbitration by virtue of *section 69 (7)* of the *Employment Relations Act* on the following terms of reference:

“Whether I should have been allowed to act as Deputy General Manager (Tech) as from January 2012.”

Both parties have put in a statement of case in the matter. The Disputant has also put in a reply to the Respondent’s statement of case. Upon an order of the *Tribunal*, Mr J. Munbauhal has been joined as a party in the present proceedings. He has also put up a

statement of case. All the parties, save for the Disputant, were represented by Counsel in the matter.

Mr R.C.K. Rajcoomar, who is Chief Engineer in the Water Resources & Operational Support Services at the Central Water Authority (the "CWA"), has mainly averred in his statement of case that he joined the CWA on 26th September 1977, has worked as Executive Engineer/Principal Engineer in all the different water supply zones of the island and has been Chief Engineer in Planning and Development, Operations and in the Water Resources and Operational Support Services. He also installed pressure filters in Rodrigues in 1986. He averred that the Central Water Board, on 28 November 2011, decided to appoint Mr J. Munbauhal as Acting Deputy General Manager (Technical) with effect from 3 January 2012 until further notice and this was made to the latter from the Human Resources Manager in three emails (enclosed as Documents 2, 3 & 4). He is governed by the recommendations of the *Pay Research Bureau* (the "PRB") and is relying on *paragraph 5.12* of the *PRB Report 2008*. Mr R.C.K. Rajcoomar has a Bachelor of Engineering (Civil Honours – 1st Class Honours with distinction) under the India Cultural Scholarship Scheme, a Master of Technology (Environmental Engineering – 1st Class) under the Indian Commonwealth Scholarship Scheme and a Certificate in Water Resources Management under the Italian Government Scholarship Scheme. He addressed a letter of protest on 18 January 2012 in relation to the acting ship offered to Mr J. Munbauhal to the Chairman of the CWA, the members of the Board, the Acting General Manager and the Union of Employees of the Central Water Authority. The Central Water Board has maintained its decision (vide letter dated 26 March 2011 from the Acting General Manager enclosed as Document 6). He reported the matter to the *Commission for Conciliation and Mediation* on 7 June 2012, where the Respondent maintained that its decision was based on a Public Service Commission Circular dating back to 2006. He is moving for the assignment of duties made to be cancelled in as much as seniority is not at all a criterion for promotion; Mr J. Munbauhal does not hold a Master's degree; he does not have the wide spectrum of experience that he possesses; there is no dearth of qualified cadre for the grade of Deputy General Manager (Technical) in the CWA; and no expression of interest, as is the practice at the CWA, has ever been invited for acting ship for the post of Deputy General Manager (Technical). He has also stated that he is due to retire in January 2014 and that in being deprived of this legitimate right will entail a lesser lump sum and pension which would be most unfair.

The Respondent in its statement of case has mainly averred that filling of vacancies in a substantive capacity is effected after approval of the Central Water Board and the Minister of Energy and Public Utilities is obtained and in line with standard practice and existing regulations, long term acting ship is given to the senior most employee in the respective grade. It has also been averred that the post of Deputy General Manager

(Technical) is temporary vacant since 18 December 2010 following the assignment to Mr Aukle of the duties and responsibilities of the post of Ag. General Manager. The staff of the CWA were addressed an email dated 18 January 2012 informing of the assignment of duties and responsibilities to Mr J. Munbauhal. The Respondent contends that *paragraph 5.15* of the *PRB Report 2008* is irrelevant to the present acting ship which is merely a temporary assignment of duties and responsibilities for practical reasons and is not a substantive appointment; and even if the job specifications were to be approved, the assignment would still in accordance with standard practice, have had to be made on the basis of seniority. It has been contended that the case is one of assignment of duties for practical reasons and that the assignment was made on the basis of seniority in accordance with standing practice and guidelines governing the conditions of service of public officers, more specifically the *Public Service Circular No.2 of 2006* (the "*PSC Circular*"). The Respondent has also stated that Mr J. Munbauhal is the senior most officer in the grade of Chief Engineer, being appointed in the post with effect from 8 April 2004 whereas the Disputant was appointed Chief Engineer with effect from 11 February 2008. It has also been averred that the current practice for assignment of duties for a specific post is not done through an expression of interest.

Mr J. Munbauhal has also put in a statement of case, wherein it has notably been averred that the recommendations which concern appointments in a substantive capacity are irrelevant to the present case. His qualifications, work experience, professional training and publications have been set out. In reply to the averment of the Disputant that he is due to retire in January 2014 and in being deprived of this legitimate right will subsequently entail a lesser lump sum and lesser pension after retirement, it has been averred that the criteria for appointments of any person, even in a temporary capacity, must rest on seniority and competence as opposed to that person's prospective pension and lump sum benefits. The Co-Respondent is fully supporting the stand of the Respondent which is fair and reasonable in this matter.

Mr R.C.K. Rajcoomar adduced evidence under oath in the matter and stated that as per the *PRB Report 2008*, a Master's Degree is required for the post of Deputy General Manager (Technical) which he averred that his colleague Mr J. Munbauhal did not have. In relation to the *PSC Circular No.2 of 2006*, he pointed out that it mentions that the senior most officer is to be considered and does not say selected. He contends that he should have been chosen over Mr J. Munbauhal who does not hold a Master's degree and that he is better qualified. He further stated that as per the *PSC Circular* if the appointment to act has been made for administrative convenience, then the acting ship should not last for a period of more than 6 months, whereas Mr J. Munbauhal has been in the post for almost a year. He also went over the job specifications of the post as well as the organisational structure of

the Respondent utility. He contended that he is the only person to have acquired sufficient experience in all the three posts of Chief Engineer at the CWA, whereas Mr J. Munbauhal has only been in two of these posts and has not worked as Chief Engineer. He has attached emails communicating the Board's decisions to his statement of case.

Under cross-examination from Counsel for the Respondent, Mr R.C.K. Rajcoomar agreed that Mr J. Munbauhal has not been substantively appointed as Deputy General Manager (Technical). He does not agree that in the case of an assignment there is no need for the person to be fully qualified as he would be for the substantive post. He maintained that Mr J. Munbauhal has not served in all departments of the CWA and that Mr J. Munbauhal does not have the experience to serve where he is serving right now, basing himself on the job specification for the post. Although, the job specifications does not mention that one needs to have served in all three departments to be appointed substantively to the post of Deputy General Manager (Technical), for him it is clear that one needs to have experience in Water Resources, Planning and Design and in the Operations Division. He does not agree that the assignment of duties has been properly made and that he was not entitled to be assigned duties at the time. However, it is clear that the fact that he will retire soon does not give him any claim or entitlement to a substantive appointment in a higher post. He further agreed that it has been written that the assignment of Mr J. Munbauhal is of a temporary nature.

Mr R.C.K. Rajcoomar was also questioned by Counsel appearing on behalf of the Co-Respondent. He notably stated that the substantive post holder, Mr Aukle is acting as General Manager at the moment. He obtained a Master's degree in 1982. He and Mr J. Munbauhal were appointed Principal Engineer on 1st August 1990. He stated that Mr J. Munbauhal was later appointed Chief Engineer on contract and was nominated by the Board when one Mr Jhowry retired. When Mr J. Munbauhal was on contract, he was Chief Engineer on a temporary basis. He also gave an account of the enquiries he was subject to at the CWA. According to the emails sent by the Human Resources Division, Mr J. Munbauhal has been assigned a duty. In relation to his averment that Mr J. Munbauhal does not have a postgraduate (degree) and he is not qualified to be assigned duties, he stated that *paragraph 5.15 of the PRB Report 2008* cannot be read in isolation. He also stated that Mr Aukle, the substantive holder of the post of Deputy General Manager (Technical) has never been affected to the Department of Water Resources, whereas Mr J. Munbauhal has been affected to that department. Although he conceded that he cannot read, he stated that he proposed to deal with confidential papers and files of which he only would be called to take cognisance of with the aid of a Confidential Assistant.

The Respondent called Mr Yateendranath Ramklelawon, Human Resources Manager at the CWA, to depone on its behalf. He confirmed the contents of the statement of case of the CWA. The job specification annexed to the Disputant's second statement of case is the existing job specifications of the post of Deputy General Manager (Technical) at the CWA. According to the job specifications, Mr J. Munbauhal does hold the necessary experience to be assigned the duties of Deputy General Manager (Technical). He added that Mr J. Munbauhal is the most senior officer and that the *PSC Circular* has been applied.

Under questions put in cross-examination, Mr Y. Ramklelawon stated that he is not aware of any staff committees and that the request for acting ship was a decision of the Board. He also stated in reply to Counsel for Mr J. Munbauhal that the Union did make representations in relation to the assignment of duties, whom they replied to in the course of meetings and that the matter has been taken up with the Disputant, to whom they have replied to and it has rested there.

Mr Jeetsing Munbauhal was also called to depone. He stated that he holds a Bachelor of Civil Engineering (Hons.) after graduating from the New South Wales University in 1977. He also confirmed his qualifications, work experience, professional training and publications as averred in his statement of case. He has experienced all three divisions of the CWA and has been there for 34 years.

Mr R.C.K. Rajcoomar as per the terms of reference of the present dispute is asking whether he should have been allowed to act as Deputy General Manager (Technical) as from January 2012.

The CWA who is the employer in the present matter is a body set up under the *Central Water Authority Act (Act 20 of 1971)* (the "*CWA Act*") under which it is established as a corporation having the responsibility for the control, development and conservation of water resources. Under the *CWA Act*, the *Authority* is administered and controlled by a Central Water Board. The *Authority* may also appoint or employ such officers necessary for the discharge of its duties under the *CWA Act* (vide *section 15* of the *CWA Act*).

The evidence adduced before the *Tribunal* has revealed that Mr J. Munbauhal, a Chief Engineer at the CWA, was assigned duties and responsibilities of the post of Deputy General Manager (Technical) in January 2012. Mr R.C.K. Rajcoomar, who is also a Chief

Engineer, does not agree to this assignment made in favour of his colleague for the reasons which he has set out before the *Tribunal*.

His first argument on the issue of whether he should have been allowed to act as Deputy General Manager (Technical) as from January 2012 is that he possesses a Masters Degree which his colleague Mr J. Munbauhal does not. The Disputant is notably relying on *paragraph 5.15* of the *PRB Report 2008*, which provides as follows:

We recommend that, in future, appointment to the grade of Deputy General Manager (Technical) should be made by selection from among candidates possessing a Master's Degree in Science or in a related field together with a minimum of eight years' proven experience at senior management level.

However, although the recommendations of the foregoing paragraph are clear as to the candidates who would be eligible for appointment to the grade Deputy General Manager (Technical), the evidence adduced before the *Tribunal* has borne out that Mr J. Munbauhal was appointed to act in the aforesaid post with effect from 3 January 2012 until further notice. Furthermore, the evidence has also shown that Mr Aukle is the substantive holder of the post *in lite* and since 18 December 2010 has been acting as General Manager at the Respondent utility. Moreover, the CWA in its statement of case has described the acting ship as a mere temporary assignment of duties and responsibilities for practical reasons and is not a substantive appointment.

With regard to acting assignment of duties, one may note what was stated by the *Supreme Court* in *Khedun-Sewgobin v The Public Service Commission & Ors. [2010 MR 100]* in relation to an appointment to act in a higher post (at page 115):

In any event, assignment of the duties of a higher post is not synonymous with appointment to a higher post.

The Disputant has also relied on the *PSC Circular* in support of his case. The *PSC Circular*, which is headed "Acting Appointment and Assignment of Duties", provides that acting appointment/assignment of duties is made in accordance with *Regulation 22* of the *Public Service Commission Regulations* (the "*PSC Regulations*") and the provisions laid down in *Public Service Commission Circular No. 1 of 2001*. Relying on the fact that the *PSC Circular* provides that "*the most senior officer serving in the particular grade from which an appointment would normally be made, should be considered for such acting appointment/assignment of duties.*", the Disputant is contending that the *PSC Circular* does

not say that it is the most senior officer that has to be selected. However, it may be noted that the CWA has stated, in its Statement of Case, that the assignment would still, in accordance with standing practice, have had to be made on the basis of seniority. The Respondent has cited the *PSC Circular* (enclosed as Annex A of its Statement of Case) in support of its contention that the assignment has been made on the basis of seniority in accordance with standing practice and guidelines governing the conditions of service of public officers (vide paragraph 9 b of its Statement of Case).

Although the Disputant's contention with regard to the issue of seniority cannot be disputed in light of what has been stated in the *PSC Circular*, according to *Regulation 22* of the *PSC Regulations*, in matters of acting appointments, the standards prescribed in *Regulation 14* ought to be applied, except that consideration may also be given to the interests of departmental efficiency (vide *regulation 22(3)* of the *PSC Regulations*). These standards are the maintenance of the high standard of efficiency necessary in the public service; to give due considerations to qualified officers serving in the public service and other Mauritian citizens provided that they hold the required qualifications; and in the case of serving public officers, take into account qualifications, experience, merit and suitability for the office in question before seniority.

Moreover, an assignment of duties of another office is considered to be in the interests of departmental efficiency and desirable on the ground of administrative convenience where the public officer does not hold the official qualifications applicable to that office or is not the senior most officer serving in the grade or class from which the acting appointment would normally be made (vide *Regulation 22(4)* of the *PSC Regulations*).

In *Dr G. Naidoo v The Public Service Commission & Anor.* [2007 SCJ 77], the Supreme Court stated the following in relation to *Regulation 14*:

Regulation 14 of the Public Service Commission Regulations enjoins the first respondent, in exercising its constitutional powers of appointment, to have regard to the maintenance of the high standard of efficiency necessary in the public service and to take into account qualifications, experience and merit before seniority in the public service.

In *G. Appadu & Ors. v The Public Service Commission & Anor.* [2003 MR 189], the Supreme Court noted in relation to the considerations to be found in *Regulation 14* of the *PSC Regulations*:

In the same way, although Regulation 14(1)(b) of the Public Service Commission Regulations states that in the Commission's quest to maintain a high standard of efficiency in the public service, it shall take into account qualifications, experience and merit before seniority, the underlying message is that seniority still remains a relevant factor where there is little else to demarcate the candidates.

The Disputant has also argued that the acting appointment of Mr J. Munbauhal to the post of Deputy General Manager (Technical) cannot be one of administrative convenience as it has been effective for more than 6 months. The CWA, through its Human Resource Manager, in its email dated 18.01.2012 (enclosed as Document 4 in the Disputant's statement of case) wrote the following on the acting appointment made to Mr J. Munbauhal:

Kindly note that Mr J. Munbauhal, Chief Engineer (Ops) has been assigned the duties and responsibilities of the post of Deputy General Manager (T) as from 16 January 2012 until further notice.

From the aforesaid communiqué, it has not been stated whether the assignment made is one of administrative convenience. However, the Respondent has also stated the following at paragraph 7 a of its Statement of Case:

*Recommendation 2 at paragraph 5.15 of the PRB Report 2008 is irrelevant and inapplicable to the present actingship which is merely a temporary assignment of duties and responsibilities for practical reasons and **is not a substantive appointment**.*

It may be worthwhile to note what has been stated in the *PSC Circular* in drawing the attention of Responsible Officers in matters of Acting Appointment and Assignment of Duties:

Acting Appointment/Assignment of duties is made in accordance with regulation 22 of the Public Service Commission Regulations and the provisions laid down in Public Service Commission Circular No.1 of 2001.

2. *The attention of Responsible Officers is drawn to the fact that when an acting appointment/assignment of duties is likely to last for a long period, that is, more than six months, the most senior officer serving in the particular grade from which an appointment would normally be made, should be considered for such acting appointment/assignment of duties. In such circumstances, acting appointment/assignment of duties should not be made on the ground of administrative convenience.*

3. *The Commission has decided that acting appointment/assignment of duties made on the ground of administrative convenience should not be of a long duration and should, as far as possible, be restricted to a period not exceeding six months.*

It does seem clear from the wordings of the *PSC Circular* that an appointment of long duration cannot be one of administrative convenience. However, what is not too clear is the stance of the CWA in relation to the assignment of duties made to Mr J. Munbauhal as has been evidenced in its email dated 18.01.2012 addressed to the staff of the CWA informing them of the assignment of duties and responsibilities to Mr J. Munbauhal until further notice and its averment made in its statement of case as to the temporary nature of the aforesaid assignment of duties and responsibilities.

Although this is not a case of promotion or of substantive appointment, it may be useful to note what was stated by the *Supreme Court* in *C. Chuttoo v The Public Service Commission [1998 SCJ 355]* in relation to administrative convenience:

The legitimate expectations of public officers to be treated fairly in any promotion exercise must take precedence over any administrative convenience of the Respondent which is the appointing body.

Furthermore, the following may also be noted from what was stated in *S. Ramparsad v The Public Service Commission [2009 SCJ 189]* in relation to assignment of duties for short periods:

Likewise, the assignment of duties, as an administrative expediency and for short periods, does not confer any right on the applicant to claim permanent appointment; nor, we may add, any advantage over other candidates.

The *Tribunal*, after having considered the *PSC Regulations* in relation to acting appointments as well as the *PSC Circular* which is meant as a guidance for Responsible Officers in matters of acting appointments/assignment made on the basis of administrative convenience or not, cannot therefore find that the assignment would still have had to be made on the basis of seniority when factors such as qualifications, experience, merit and suitability have to be taken into account for the maintenance of the high standard of efficiency necessary in the public service before considerations of seniority.

The Disputant has also put forward his experience as an officer of the CWA citing that he has worked in all three post of Chief Engineer at the utility and has contended that

one needs to have experience in the water resources, planning and design and the operations divisions in accordance with the job specification for the post of Deputy General Manager (Technical). The *Tribunal* has also noted that the Disputant has fully set out his qualifications in his statement of case. Mr J. Munbauhal has on the other hand also set out his qualifications, work experience, professional training as well as publications as has been stated in his statement of case. He has also stated that he has worked at the CWA for 34 years and has experience in all the three divisions.

Although, it cannot be overlooked that qualifications and experience are highly relevant to acting appointments/assignment of duties, the *Tribunal* cannot substitute itself for the Respondent Authority in determining whether one officer's qualifications and experience must prevail over another. However, the *Tribunal* is concerned with whether the Respondent has acted fairly and made a judicious use of its powers in the present case.

In *Auckloo v The State of Mauritius and Ors. [2004 SCJ 312]*, the *Supreme Court* stated the following in relation to the exercise of a power:

It is one of the sine qua non of a democratic set-up that where power is entrusted to a person, he or she should exercise it judiciously and not arbitrarily: Breen v Amalgamated Engineering Union [1971] 2 QB 175.

Likewise in *Khedun-Sewgobin v The Public Service Commission & Ors. [2010 MR 100]*, the *Supreme Court* stated the following in relation to the procedure adopted in dealing with appointments in the public service (at page 106):

yet any procedure it adopts must be consistent with fairness. In Lloyd v McMahon [1987] AC 625, Lord Bridge had this to say:

"It is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

Although this is not a case of appointment to the public service under *Regulation 17(1)* of the *PSC Regulations*, the Respondent being a statutory body established by an Act of the National Assembly must adhere to the requirements of fairness in its decision making process concerning individuals. In the same breath, it must be noted that the *CWA Act* confers upon the Authority to make provisions to govern the conditions of service of its

officers and particularly to deal with the appointment, among other matters, of its officers (vide *section 19* of the CWA Act).

In *Constitutional and Administrative Law, 14th edition* by A W Bradley and K D Ewing (at page 750), the following in relation to a decision making body can be noted:

In some contexts individuals do not have the right of an oral hearing, but if the body in question has to decide questions as to someone's conduct or competence, the individual is entitled to know what evidence is given against him or her and must have a fair opportunity to rebut it.

From the Respondent's own averments, there has been no expression of interest as per its current practice for assignment of duties for a specific post. However, in being guided by the requirements of fairness as well as the right of an individual to give his views on his competence and conduct, it does appear that the Respondent ought to have at least invited the Disputant as well as any other candidates for an interview prior to deciding upon whom to assign the duties and responsibilities of the post of Deputy General Manager (Technical).

The Respondent has also relied on *paragraph 18.10.13* of the *PRB Report 2008*, stating that the most senior officer in the grade may be assigned higher duties even if he does not possess the full qualifications for the higher post in which case he would be entitled to 80% of the responsibility allowance.

Although it cannot be disputed that where the officer to whom the assignment of duties has been made is not fully qualified to act in the post would be entitled to payment of 80% of the acting allowance applicable, this particular paragraph of the *PRB Report 2008* cannot be read in isolation to mean that the most senior officer should be assigned the duties of the higher grade when a clear procedure has been set out in the *PSC Regulations* for matters of acting appointments/assignment of duties.

The *Tribunal* has also noted that Mr R.C.K. Rajcoomar has during the proceedings recognised, despite the averment in his statement of case, that the fact that he will retire soon does not give him any claim to a substantive appointment in a higher post.

The *Tribunal* has, in noting the manner in which the acting appointment/assignment of duties has made in the present case and having considered the arguments put forward by

the Disputant and the Employer as well as the views of the officer who has been assigned the acting ship, come to appreciate that it has not been done with due regularity for the reasons which it has given.

In *Baccus v The Permanent Arbitration Tribunal [1986 MR 272]*, one may note what has been stated in relation to the terms of reference of a dispute, namely:

... one must in order to decide whether the order complained of was ultra petita or not look at the terms of reference of the dispute.

An award of the Permanent Arbitration Tribunal which goes outside the terms of reference will be ultra petita and may be quashed just as any other award.

The *Tribunal*, bearing in mind the terms of reference of the dispute and the relief sought, would therefore strongly recommend the Respondent to review and reconsider its decision in assigning the duties and responsibilities of the post of Deputy General Manager (Technical) in January 2012 to Mr J. Munbauhal and to properly carry out a new exercise in assigning the duties of the aforesaid post in light of the conclusions reached by the *Tribunal*.

Although it did not relate to a matter of an appointment or acting appointment in the public service, it may be proper to quote from the award of the *Permanent Arbitration Tribunal* in *Mrs. D.C.Y.P. and The Sun Casino Ltd [GN No. 1390 of 1988]*, wherein it was stated:

There is no doubt that employers do have a discretion and powers in matters of appointment and promotion. Such discretion and powers must, however, be exercised in such a way as not to cause prejudice and frustration to employees whose only 'fault' would seem loyalty, expertise and efficiency.

The *Tribunal* would also wish to draw the attention of the parties as to the need to promote good and harmonious employment relations at the workplace and the need to act fairly in matters of acting appointments/assignment of duties.

The *Tribunal* cannot therefore award that Mr R.C.K. Rajcoomar should be allowed to act as Deputy General Manager (Technical) as from January 2012.

The dispute is therefore accordingly set aside.

**(Sd) Shameer Janhangeer
(Vice-President)**

**(Sd) Christian Bellouard
(Member)**

**(Sd) Jheenarainsing Soobagrah
(Member)**

**(Sd) Renganaden Veeramootoo
(Member)**

Date: 7th February 2013

