

**EMPLOYMENT RELATIONS TRIBUNAL
AWARD**

RN 30/13

Before

Indiren Sivaramen	Vice-President
Vijay Kumar Mohit	Member
Rajesvari Narasingam Ramdoo	Member
Khalad Oochotoya	Member

In the matter of:-

Mr David Delore (Disputant)

And

Central Electricity Board (Respondent)

In presence of:

Mr Mahadev Bheeca (Co-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 Disputant and the Respondent as represented have not been able to reach an agreement and the Tribunal thus proceeded to hear the matter. The Co-Respondent was joined as a party to the proceedings following an order made by the Tribunal after that both parties had informed the Tribunal that they had no objection to the latter being joined as a party. All the parties including Co-Respondent were assisted by Counsel even though Counsel for Co-Respondent informed the Tribunal that the Co-Respondent would abide by the decision of the Tribunal. The terms of reference read as follows:

"Whether following the selection exercise carried out on 15 July 2011, the Central Electricity Board should have appointed me as Senior Audit Officer (Technical) as from 13 March 2012 in lieu and instead of Mr Bheeca on the basis of my qualifications, experience, merit and seniority."

The Disputant deponed under oath before the Tribunal and stated that he was promoted to the grade of Senior Technical Officer in November 2008 and has been assigned higher responsibilities. He applied for the post of Senior Audit Officer (Technical) and was called for a "selection interview". He averred that he was satisfied with his performance at the said interview. He added that based on his qualifications, experience, seniority and the good answers he gave to questions put to him during the interview he expected to be appointed for the post he had applied for. Save for the start of the interview where, according to him, he was being pressed to be brief in relation to his 33 years' career, he stated that the exercise was carried out to his satisfaction. He stated that it was Mr Bheeca who had been

appointed in an acting capacity for the post of Senior Audit Officer (Technical) after that Mr Narroo who had been selected for the said post was designated as Chairman of the Respondent and Mr Ram although selected had not been released to occupy the said post. He was upset and surprised as, according to him, Mr Bheeca who was Assistant Load Dispatcher at salary scale 3 obtained an actingship at salary scale 7 for the post of Senior Audit Officer whereas he was at salary scale 6 as Senior Technical Officer and expected to obtain this actingship. He contacted the union to protest against this appointment and lodged a written complaint (Annex E to Disputant's Statement of Case) with the General Manager. Mr Delore referred to his allegedly longer term of service and qualifications. He referred to his Full Technological Certificate and Notification of Performance from BTEC whereas Mr Bheeca would not have same.

Mr Delore added that according to his terms and conditions of employment as per paragraph 2.1.5 of Annex H to his Statement of Case, selection should have been carried out on the basis of qualifications, experience, merit and seniority. He averred that based on these criteria he had a legitimate expectation to be appointed Senior Audit Officer (Technical). He also referred to the need for an assessment sheet to be filled up during an interview as per paragraph 1.3.4 of the Staff Manual. He criticized the fact that the Respondent has not produced the assessment of each candidate. Mr Delore stated that the post of Senior Audit Officer was not a newly created post and that there was a restyling of the post of Technical Audit Officer to that of Senior Audit Officer (Technical) with the 2009 Appana Report. He did not agree that his performance at the selection interview was below standard and he prayed that he be appointed Senior Audit Officer (Technical) effective as from 13 March 2012 in lieu and instead of Mr Bheeca.

In cross-examination, Mr Delore accepted that he has never occupied the post of Technical Audit Officer nor Senior Audit Officer. He stated that he was not complaining about the time allotted to him during the interview but that he was asked to be brief when he was relating his long experience at Respondent. He then conceded that this was not an attack upon him and that the selection committee had time constraints bearing in mind that there were 21 candidates. He explained that the Full Technological Certificate is granted once one can justify having worked and acquired practical experience for the required period of time as per one's application. He would not know if Mr Bheeca has made an application for such a certificate and if so whether he has been granted same. Mr Delore averred that his experience and seniority differentiate him from Mr Bheeca. He referred to having worked in almost all sections at the Respondent and having acquired exposure on the business process to enable him to carry out audit work. He averred that he would have most of the information needed to assess the strength of Mr Bheeca's application for the post in lite. In re-examination, Mr Delore stated that he had asked the Respondent to disclose relevant curricula vitae and assessment sheets used during the interview.

Mr Veragoo, the acting Human Resources Manager of the Respondent then deposed and he related the career history of the Disputant at the Respondent since he joined on 1 March 1979 as apprentice. He stated that Messrs Narroo and Bundhoo were appointed to the post of Senior Audit Officer (Technical) and two candidates were placed on a waiting list following the selection exercise whereby there were 21 eligible candidates. Following the retirement of Mr Narroo, Mr Ram

who was first on the waiting list was appointed Senior Audit Officer (Technical). Subsequently, Mr Bheeca was appointed to the said post. Mr Veragoo stated that according to information available the qualifications of Messrs Delore and Bheeca would be more or less the same. He accepted that the length of service of Mr Delore at the Respondent is more than that of Mr Bheeca. Mr Veragoo stated that though length of service may be one of the criteria used for appointments it is not a decisive criterion. Mr Bheeca and the Disputant were working in the same department but Mr Bheeca was not the immediate subordinate of Disputant. Mr Veragoo ventured to say that if Disputant has not been appointed, the only explanation would be that Mr Bheeca has done better than the Disputant in the interview.

Mr Veragoo was then cross-examined in relation to documents he had with him in his file. Counsel for Disputant insisted to have the qualifications of Mr Bheeca on record. The Tribunal delivered a ruling after having heard arguments from all Counsel to the effect that the academic and professional qualifications of Mr Bheeca could be adduced in evidence for the purpose of the present dispute. Mr Veeragoo thus adduced evidence in relation to the qualifications of Mr Bheeca. Mr Bheeca was appointed Assistant Load Dispatcher in May 2009 and Senior Audit Officer (Technical) in 2012. The witness was then questioned in relation to vacancy notices for the posts of Assistant Load Dispatcher and Senior Audit Officer (Technical). The technical duties to be carried out by the Senior Technical Officer (Electrical) were put to Mr Veragoo. The latter agreed with the career history of Disputant as per paragraph 1 of the Reply of Disputant to Respondent's Statement of Case except for two minor adjustments in relation to dates. He confirmed that an Assistant Load Dispatcher is at level 3 in the salary scale whereas a Senior Technical Officer (including Senior Audit Officer (Technical)) is at salary scale 6.

Mr Veragoo added that a table of information is given to the selection panel for the purposes of the interview. The selection panel is the HR Committee and is a sub-committee of the Board. Mr Veragoo stated that it must have been on the recommendation of the Staff Committee, which he avers is now called the HR Committee, that Messrs Ram and Bheeca were placed on a waiting list. He confirmed that Disputant had a Full Technological Certificate whilst Mr Bheeca had a City & Guilds Diploma, Advanced Technical Diploma.

Mr Thannoo, the General Manager of the Respondent, then deponed before the Tribunal and he stated that he was a member of the HR Committee during the selection exercise. Disputant was not found to be at the expected level and he was not recommended for appointment nor was he placed on the waiting list. He stated that he could not give every piece of detail because the said exercise dates back to 2011. He stated that the panel was assisted by the Chief Internal Auditor who had set the technical question for the selection exercise. He stated that as far as he remembered, the answers Disputant gave to question raised were not to the expected level.

In cross-examination, Mr Thannoo stated that it was the Staff Committee that made recommendations to the Board as to who should be appointed or placed on the waiting list. He stated that at the interview none of the panel members had an assessment form. Mr Thannoo stated that 'the way the interview was conducted, this has always been the case'. The procedure adopted by the HR Committee has

remained unchallenged by the union which has sole bargaining power at the Respondent. He agreed however that he had to follow the internal regulations of Respondent. In re-examination, Mr Thannoo confirmed that having no assessment form was a practice. The requirement of assessment form does not form part of the internal procedure but forms part of an agreement with the union.

Counsel for Disputant in his submissions referred to the actingships held by Disputant and to the latter being well above Mr Bheeca in terms of experience. He stressed that Disputant was at level 6 compared to Mr Bheeca who was at level 3 in the hierarchy at Respondent and that hierarchy would be in terms of responsibilities, duties and qualifications. He referred to the professional qualifications of the parties, internal regulations and the staff manual. Counsel suggested that the Tribunal is in the dark as to what happened at the selection panel in the absence of assessment sheets. The Tribunal will thus have to take a decision based only on evidence in front of it. Counsel submitted that there is evidence that Disputant is more qualified, has more experience and is senior to Co-Respondent. As to merit, Counsel submitted that there was the mere appreciation of one witness as opposed to that of the panel. He then referred to the cases of **G. Appadu v The Public Service Commission & Anor 2003 SCJ 29**, **Taramatee Khedun-Sewgobind v The Public Service Commission 2010 SCJ 6**, **Peechandee Mooneyan v The Mauritius Examinations Syndicate & Anor 2004 SCJ 293**, **Mr R.C.K Rajcoomar and Central Water Authority ERT/RN 72/12** and **D.C.Y.P and The Sun Casino Ltd (GN No.1390 of 1988)**.

Counsel for Respondent stressed on the fact that the case law referred to by Counsel for Disputant would in fact suggest that the Tribunal cannot make an award appointing Disputant to the post of Senior Audit Officer in lieu and instead of Mr Bheeca. He agreed however that the Tribunal can still look into the matter. The case of the Respondent is that though Disputant may be senior to Co-Respondent, he is not more qualified than Co-Respondent and has failed at the interview. He argued that the qualifications of Disputant and Co-Respondent are basically of the same value for any employer. He referred to efficiency, the purpose of having interviews and to the evidence that Disputant failed to answer technical questions.

Counsel for Co-Respondent subscribed to submissions offered by Counsel for Respondent. He also referred to what he considered to be contradictions in the evidence adduced by Disputant and to the importance of an interview when appointing someone.

The Tribunal has examined all the evidence on record including the submissions of all Counsel. The unchallenged evidence on record shows that there were 21 eligible candidates (including Disputant) who were interviewed for the post of Senior Audit Officer (Technical). This is not a case where there are two contenders for the said post and where Disputant is aggrieved because the other one was appointed. As rightly observed by Counsel for Respondent, we have no clue whether Disputant ranked just after those on the waiting list or was assessed further down among the 21 candidates. Though Disputant has filed his Statement of Case and a Reply to Respondent's Statement of Case, he has not once mentioned the other candidates for the said post. If ever the Tribunal is to grant an Award in favour of Disputant, clearly this will be unfair towards other candidates who were convened for the

interview and who will have no say in the present matter. Also, as per the terms of reference, Disputant is not challenging the selection exercise itself but instead seeking an award as to whether he should have been appointed following the same selection exercise.

Matters of appointment or promotion are no doubt within the province of employers who will exercise their discretion and powers accordingly. Indeed, the employer is in a better position to assess the requirements of a post and the suitability of an employee for that post bearing in mind all relevant factors including the need to maintain the required standard of efficiency in the organisation. This is in line with clause 2.1.5 of the terms and conditions of employment at Respondent (a copy of an extract annexed as Annex H to Disputant's Statement of Case) which reads as follows:

“In filling any vacancy, the Board shall have regard to the maintenance of the high standard of efficiency necessary in the organisation and shall take into account qualifications, experience, merit and seniority.”

The Tribunal however has jurisdiction to enquire into a dispute which relates wholly or mainly to promotion and to make an award thereon. The Tribunal here is mostly concerned with whether the appointing body has acted fairly and judiciously in exercising its powers of promotion. The Tribunal will quote from a previous Award of the Tribunal in the case of **Mr R.C.K Rajcoomar (above)** where it stated the following though the Tribunal was there dealing with an acting appointment:

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 the case of **Taramatee Khedun-Sewgobind (above)**, the Supreme Court (in a majority judgment) which was dealing with an appointment made by the Public Service Commission stated the following:

*Although, pursuant to Regulation 17(1) of the Regulations, the respondent has control over the procedure to be followed in dealing with applications for appointment to the public service, 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.”

In the case of **Mr R.C.K Rajcoomar (above)**, the Tribunal went on to refer to the requirements of fairness in the decision making process. The Tribunal had this to say:

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.

The above will also apply in the present dispute inasmuch as the Respondent is a statutory body which has been constituted under the Central Electricity Board Act. Evidence has been adduced in relation to the interview exercise carried out and we were astonished to learn that having no assessment forms for interviews was a practice at the Respondent. This is clearly unacceptable. The General Manager of the Respondent who was called to depone, stated (very understandably) that he would not be able to give every piece of detail concerning the assessment of Disputant because the exercise dated back to 2011. The Staff Committee conducting the interview was under a duty to keep a record, be it called assessment sheet or otherwise, of their assessment of the various candidates who were interviewed. Beyond any contractual obligations of the Respondent, this duty forms part of the basic procedural safeguards which ensure the attainment of fairness in the whole decision-making process. Opacity leads to suspicion and breeds all kinds of allegations. Using and keeping record of the assessment notes/ sheets would have shed light on the whole selection exercise. It is a lame excuse to aver that the relevant trade union has never complained about the procedure used for interview in the face of clause 1.3.4 of Annex A to Disputant's Reply to Respondent's Statement of Case (which Mr Veragoo confirmed formed part of Respondent's Staff Manual) which reads as follows:

1.3.4 ASSESSMENT OF CANDIDATES FOR SELECTION

All qualified candidates shall be interviewed and the individual assessment shall be made by a definite marking system.

Each member of the panel will have an assessment sheet. The applicant with the highest overall marks will be eligible for appointment provided he has satisfied the panel on all criteria required for the post.

Assessment sheets on the candidates were crucial in the present matter the more so that Respondent relied heavily on the fact that Co-Respondent was initially placed on a waiting list. Indeed, clause 1.2.13 of Annex 2 to Respondent's Statement of Case reads as follows:

1.2.13 Appointment of Candidates on waiting list

When a ratification has been made for a vacant post and more than one candidate have scored above 60% of the marks and have satisfied the panel on all criteria required for the post, they shall be appointed in order of merit if similar vacancies arise within a period of one year from the date of ratification.

Such appointment shall be subject to the Board's approval and the above-mentioned period may be extended at the discretion of the Board with regards to the nature and exigencies of the post.

Thus, the actual marks obtained by candidates following the selection exercise are of the essence. Also, in the present matter, Disputant was occupying the post of Senior Technical Officer (Electrical) at level/salary scale 6 whilst Co-Respondent was an Assistant Load Dispatcher at level/salary scale 3.

The Tribunal is left with the evidence of the General Manager that the answers given by Disputant to the technical question raised were not to the expected level against that of Disputant that he answered well to questions put to him. The Tribunal cannot read into the mind of the members of the panel and certainly cannot find that shortcomings, if any, on the part of Disputant especially on a technical question were not material. In any event, as highlighted above, the Tribunal cannot award that Disputant is to be appointed in lieu and stead of Co-Respondent when there were other candidates in the race and where there is no indication whatsoever of the ranking of Disputant following the whole exercise. However, the Respondent has to see to it that henceforth assessment of candidates for selection is properly carried out and recorded.

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

(Sd) Indiren Sivaramen
Vice-President

(Sd) Vijay Kumar Mohit
Member

(Sd) Rajesvari Narasingam Ramdoo
Member

(Sd) Khalad Oochotoya
Member

21 February 2014