

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

RN 52/14

Before

Indiren Sivaramen	Vice-President
Soonarain Ramana	Member
Rabin Gungoo	Member
Georges Karl Louis	Member

In the matter of:-

Mr Dhan Khednee (Disputant)

And

National Transport Corporation (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. Respondent was assisted by senior counsel whilst the Disputant was assisted by his trade union representative. The terms of reference read as follows:

1. *"Whether I, Mr Dhan Khednee, Senior Technical and Mechanical Officer of the National Transport Corporation should have [been] assigned actingship duties of Depot Manager of Remy Ollier Depot as from September 2013 for one month as per section 18.10(4) of the PRB Report 2013."*
2. *"Whether I should be assigned actingship duties of Depot Manager henceforth as and when required when the Depot Manager of Remy Ollier Depot is on leave."*

The Disputant deponed and he averred that it is only the Senior Technical and Mechanical Officer (STMO) who is given the responsibility

to act as Depot /Manager whenever the Depot Manager goes on leave. This has been the practice until the new General Manager arrived when one Mr Dunputh was given additional responsibilities to see the day to day management of the depot in the absence of the then Technical Officer posted there.

Disputant observed that there were more buses at Remy Ollier Depot in the year 2003 when he was posted there than now. Also, according to him, managing a small depot of some 100 to 200 buses involves the same management skills as for a bigger depot. He produced a copy of an Organisation Chart for Respondent as at 31 March 2011 (Doc A) and the salary scales for workers (following the Pay Research Bureau (PRB) 2013 Report) at the Respondent (Doc B).

In cross-examination, Disputant stated that as STMO, he is responsible for the maintenance and repairs of buses and out shedding of buses. He agreed that Remy Ollier Depot is by far the largest depot of Respondent. With a great fleet of buses, one needs as Manager a person with experience in operations requirements and traffic. He does not have a degree. He agreed that there were more people using buses with less buses however to service those people (compared to 2013). Experienced and qualified people were thus required to handle the situation. He did not agree however that as STMO he was not the right and competent person to act as Depot Manager at Remy Ollier Depot.

Mr Mallam Hassam, representative of the Respondent then deponed and he confirmed the correctness of the Statement of Case of the Respondent. He stated that since 2004 no STMO has acted as Depot Manager at Remy Ollier Depot. There are 194 buses at Remy Ollier Depot whereas for depots at Forest Side there are 103 buses, La Tour Koenig, 76 buses, Rivière du Rempart, 66 buses and Souillac, 67 buses. He averred that at Remy Ollier Depot a Manager with traffic background is required because of the greater number of buses. He explained that the Remy Ollier Depot is a very important depot and has the major routes of Respondent so that someone well versed in traffic matters is needed to act as Depot Manager.

Mr Mallam Hassam averred that section 18.10.4 of the PRB Report relied upon by Disputant does not apply and is not relevant in this particular case. He also stated that the Depot Manager is supported on the engineering side by the STMO whilst on the traffic side there is the Senior Traffic Controller (STC). He averred that both grades would be at

the same level since they both report to the Depot Manager. He produced a copy of the scheme of service for the Depot Manager.

In cross-examination, Mr Mallam Hassam explained that the Depot Manager of Forest Side has been given the responsibility to take care of Souillac Depot whilst the Depot Manager of La Tour Koenig is also looking after Rivière du Rempart Depot. If the Depot Manager is on leave, it is the STMO who is replacing him in other depots.

Counsel for Respondent submitted that the duty of Depot Manager at Remy Ollier Depot would require the expertise of someone who has been working in the Traffic Department for a certain number of years. He referred to the lack of relevant qualifications of Disputant and to the STMO and STC being at the same level. The representative of the trade union was allowed to make a short statement to the Tribunal.

The Tribunal has examined all the evidence on record including documents produced. The terms of reference of the first point in dispute have been wrongly drafted. The Tribunal does not deliver declaratory awards the more so, we may add, when the period for the assignment of actingship duties is well over (**vide Mr Ugadiran Mooneeapen And The Mauritius Institute of Training and Development, RN 35/12; Mr Abdool Rashid Johar And Cargo Handling Corporation Ltd, RN 93/12**).

In the case of **M.Ramphul v. The Local Government Service Commission, in the presence of B.Rajee 1995 SCJ 79**, the Supreme Court stated the following:

*“The applicant's fears that the acting appointment of the co-respondent goes far beyond the actingship since the respondent may be expected to follow its own precedent can but be pure surmise. Furthermore, the actingship which is questioned has already been served and no one has yet invented a time machine which can be rewound for a playback. As aptly said by Lord Justice Clerk Thomson in *Mc Naughton v. Mc Naughton's Trs (1953) SC 387, 392*, considered in *Planche v. Public Service Commission & ors. [1993 SCJ 128]*, Courts of law deal with live, practical questions not hypothetical, premature or academic ones.”*

The Tribunal endeavours to be as practical as possible in its approach and will deliver awards which are practical and resolve disputes referred to it. The first dispute has been wrongly drafted and can only lead to an academic award. The dispute is thus purely and simply set aside.

In relation to the second dispute, Disputant is relying on section 18.10.4 of the 2013 Pay Research Bureau (PRB) Report (Volume 1) which reads as follows:

“The Responsible/Supervising Officer seeks approval from the appropriate Service Commission or under delegated power appoints an officer from the immediate lower grade (generally the senior most one) in an acting capacity in a higher office.”

What is being sought from the Tribunal is an award that Disputant should be assigned actingship duties of Depot Manager at Remy Ollier Depot henceforth as and when required. If granted, this may amount to an award of a blanket nature whereby Disputant should be assigned the actingship henceforth. Appointment in an acting capacity in a higher office is not an absolute right granted or pertaining to a particular worker/officer. Section 18.10.4 of the 2013 PRB Report (Volume 1) cannot be used in isolation but must be interpreted in the light of the whole of chapter 18.10 of the same report which deals with “Acting and Responsibility Allowances” and other relevant pieces of legislation. Already, from section 18.10.4 (see above), it is clear that no specific formula has been recommended with inclusion of words such as “generally the senior most one”. Also, sections 18.10.5 and 18.10.3 of the same report would serve no purpose if section 18.10.4 is interpreted as identifying one person with no discretion at all. These provisions in fact confirm that granting of actingship is not an automatic exercise and that much has to do with ensuring that service is not affected. Sections 18.10.3 and 18.10.5 of the report provide as follows:

“An acting appointment is an assignment given to an officer deemed capable of performing the full duties and assuming the full responsibilities of a vacant position on the replacement of an employee who is on authorized leave of absence, including sick leave, maternity leave, leave without pay, pre-retirement leave or a vacancy arising until it is filled on a permanent basis.”

“Before assigning the duties of a higher post to an officer, the Responsible / Supervising Officer ensures that the appointee has the relevant expertise/competencies to undertake most of the core duties and also to shoulder the responsibilities of the absentee.”

The Respondent is a body corporate set up under the National Transport Corporation Act. The object of the Respondent is to establish and operate public transport services and any other ancillary service in Mauritius. The Respondent shall have due regard to the interest of the travelling public. Only part of the employees of Respondent (including Disputant, the Senior Traffic Controller and the Depot Manager) fall under the purview of the PRB Report. The Respondent operates under the *aegis* of the Ministry of Public Infrastructure, National Development Unit, Land Transport and Shipping. Though the employees whose terms and conditions of work are governed by the PRB are not public officers, they enjoy certain terms and conditions which are similar to those of public officers. This is why, for instance, Disputant is relying on a particular section of the 2013 PRB Report in relation to appointment in an acting capacity in a higher office. For public officers the provisions of the PRB are always subject to the **Public Service Commission (PSC) Regulations 1961**, as amended. There is nothing to suggest that principles (and not every requirement) enunciated in such regulations should not guide the manner in which appointment is made at Respondent. In fact, in the case of **Public Service Commission v The Public Bodies Appeal Tribunal 2014 SCJ 94**, the Supreme Court stated clearly that the Human Resource Management Manual 2011 which seeks to incorporate the recommendation of the Report of the PRB of 2008 cannot supersede the PSC regulations made under section 118(1) of the Constitution.

“Appointment” in the PSC regulations includes the appointment of a public officer to act in any public office other than the office to which he is substantively appointed. Regulation 22 of the PSC regulations read as follows:

- 22 (1) *Where the holder of a public office is for any reason unable to perform the functions of his office and the responsible officer is of the opinion that some other public officer should be appointed to act in such office, the responsible officer shall report the matter to the Secretary and shall submit, for the consideration of the Commission, the name of the public officer whom he recommends should be appointed to act in such office.*
- (2) *Where a recommendation involves the supersession of any more senior officer serving in the Ministry or department, the responsible officer shall inform the Secretary of his reasons for recommending the supersession of each such officer.*
- (3) *In considering recommendations for acting appointments, the Commission shall apply the standards prescribed in regulation 14,*

except that consideration may also be given to the interests of departmental efficiency.

(4) Notwithstanding paragraph (3), a responsible officer may recommend that a public officer be assigned the duties of another office and the Commission may so assign such duties where -

(a) the public officer cannot be appointed to perform the functions of that other office in an acting capacity because the officer -

(i) does not hold the official qualifications applicable to that office; or

(ii) is not the most senior officer serving in the particular class or grade from which an appointment in an acting capacity would normally be made; and

(b) such assignment of duties is considered to be in the interests of departmental efficiency and desirable on the ground of administrative convenience.

Regulation 14(1) of the PSC regulations provides as follows:

14. (1) *In exercising its powers of appointment and promotion, including, subject to paragraph (5), promotion by selection, the Commission shall -*
- (a) have regard to the maintenance of the high standard of efficiency necessary in the public service;*
- (b) give due consideration to qualified officers serving in the public service and to other Mauritian citizens provided they hold the required qualifications; and*
- (c) in the case of officers serving in the public service, take into account qualifications, experience, merit and suitability for the office in question before seniority.*

Sub-paragraph (5) is not relevant here. The Tribunal thus finds that irrespective of section 18.10.4 of the 2013 PRB Report, matters such as qualifications, experience, merit, suitability for the office in question and interests of departmental efficiency may in an appropriate case be considered. What matters most is that the appointment of an officer in an acting capacity in a higher office is done in a fair manner. In the present case, there were mere allegations (which were all denied on behalf of Respondent) in Disputant's Statement of Case to suggest bias but no evidence was adduced by Disputant to substantiate same. In **Mr R.C.K Rajcoomar And Central Water Authority, ipo Mr J.Munbauhal, ERT/RN 72/12**, the Tribunal laid stress on fairness and the judicious use of the powers of the employer. The Tribunal stated the following:

*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."

In the present case, the evidence emanating from the Respondent to the effect that both the STMO and STC report to the Depot Manager has not been denied. Bearing in mind the factors which may be considered prior to appointing someone in an acting capacity in a higher office, the Disputant has failed to show why he should be given the actingship and not someone else. The Tribunal is not in presence of any evidence in relation to the qualifications, experience, merit or suitability of the officer (or officers) who has until now been appointed to act instead. Also, the Disputant has not adduced an iota of evidence to challenge the averment of Respondent that since 2004, the day to day management of Remy Ollier Depot has not been entrusted to a STMO. The Tribunal will refer to the case of **B.C. Ramjeet & Others v. The Public Service Commission, 1998 SCJ 266** which was in relation to a promotion proper but which we humbly believe contains principles which may also apply in relation to an appointment to act in a higher office. The Supreme Court concluded as follows:

The second complaint is also without any justification whatsoever. Not a word was said by learned Counsel for the applicants to justify this complaint. Be that as it may, as rightly pointed out by learned Counsel for the respondent, the latter, in exercising its powers in relation to the promotion of public officers, must have regard, pursuant to regulation 14(1) of the Public Service Commission Regulations, “to the maintenance of the high standard of efficiency necessary in the public service” and “shall take into account qualifications, experience and merit before seniority in the public service”.

The application is silent about the qualifications, experience and merit of the co-respondents. We are thus given a one-sided picture of the situation since we have been told only about the qualifications, experience and merit of the applicants. Consequently, we refuse to even consider, in the light of the scanty material before us, questioning the recommendations of the interviewing panel of the then respondent.

Though it is within the province of the employer to decide who is to be appointed to act in a higher office, the Tribunal will certainly intervene if an employer has acted unfairly or failed to make a judicious use of such powers. In an appropriate case, the Tribunal may even embark in a thorough examination of all relevant material including evidence of qualifications, experience, merit, suitability for the higher post (as per sections 18.10.3 and 18.10.5 of the 2013 PRB Report) and seniority. The Disputant has failed to substantiate his case before us the more so in the light of the averred specificity of Remy Ollier Depot and evidence adduced as to the qualifications required for the post of Depot Manager. It is apposite to note that the first duty of a Depot Manager (as per the scheme of duties – Doc C) is “to be accountable to the General Manager for the efficient performances of the Depot.” It is unchallenged before us that Remy Ollier Depot is the largest depot of Respondent serving the major routes of Respondent. In the public transport sector, efficiency is paramount and the Tribunal will certainly not venture on the basis of the evidence before it to suggest that the work of the Depot Manager at Remy Ollier Depot will require exactly the same management skills as for other depots.

However, the Tribunal will straightaway refer once more to the award delivered in the case of **Mr R.C.K Rajcoomar (above)**, where the Tribunal stated the following:

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 will deliberately abstain from granting any award of a blanket nature in relation to assignment of acting duties. The Tribunal however trusts that the Respondent when appointing an officer in an acting capacity in a higher office will act fairly. The fact that at other depots STMOs are appointed to act as Depot Managers is a major consideration and has indeed been duly considered by the Tribunal. The Tribunal understands that someone from the traffic side well versed in traffic matters has been appointed to act as Depot Manager at Remy Ollier Depot in the interests of departmental efficiency because of the uniqueness or specificity of Remy Ollier Depot.

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

(Sd) Indiren Sivaramen
Vice-President

(Sd) Soonarain Ramana
Member

(Sd) Rabin Gungoo
Member

(Sd) Georges Karl Louis
Member

22 July 2014