

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

RN 145/15

Before

Indiren Sivaramen	Vice-President
Raffick Hossenbaccus	Member
Rajesvari Narasingam Ramdoo	Member
Khalad Oochotoya	Member

In the matter of:-

Mr Cadrivel Munisamy (Disputant)

And

The State of Mauritius (Respondent)

as represented by

- (1) Ministry of Civil Service & Administrative Reforms**
- (2) Ministry of Health & Quality of Life**

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 a settlement and the Tribunal thus proceeded to hear the matter. Both parties were assisted by counsel. The terms of reference read as follows:

1. *"Whether the additional casual leave applied in accordance with recommendation 22.15 of the 2013 PRB Report at the Ministry of Health & Quality of Life denied to me since last year, be granted to me with effect from the same date as I am still suffering from disability."*

2. *“Whether the allowance denied to me in accordance with Paragraph 10.12 of Recommendation 2 of the 2008 PRB Report, be paid to me since the year 2014.”*
3. *“Whether the duties of Assistant Manager, Human Resources assigned to my seniors/juniors since last September 2014, be made to me with effect from the same date my seniors/juniors were assigned the higher duties.”*

The Disputant deposed before the Tribunal and he stated that there is no regulation or provision of the PRB Report 2013 which requires an employee with a disability to undergo a medical examination before being granted any type of leave. He referred to paragraphs 18.2.106 and 18.2.107 of the 2013 PRB Report. He also averred that his Ministry recognised that he was suffering from a disability since he was posted near to his place of residence. He stated that despite this his Ministry is not granting him the one day additional casual leave. He stated that he submitted a medical certificate to the effect that he is suffering from a disability. He averred that he has difficulty to walk and to climb stairs. He produced a medical certificate from a Government Medical Practitioner (Doc A). He suggested that someone suffering from a disablement of 1% would still be someone with a disability.

Under the second point, Disputant referred to Recommendation 10.12 of the PRB Report 2008 which recommendation he averred was maintained in the 2013 PRB Report at paragraph 10.17. He produced a copy of a MBA certificate in Human Resource with Knowledge Management (Doc B), a provisional certificate from Guru Gobind Singh Indraprastha University, Delhi (Doc C) and copies of certificates from the University of Technology and the Tertiary Education Commission (Docs E and E1 respectively). He also produced a copy of the scheme of service for Senior Human Resource Officer (Doc F) and a copy of a letter for training in India under the “ITEC/SCAAP Programme” (Doc G). Disputant stated that paragraph 10.12 falls under a different recommendation (Recommendation 2) compared to paragraph 10.11 which falls under Recommendation 1.

As regards the third point, Disputant averred that there was a breach of Public Service Commission (PSC) Circular No. 2 of 2006 when he was not assigned the higher duties of Assistant Manager, Human Resources. He stated that the assignment of duties has lasted more than one year and his juniors are still being assigned the higher duties.

In cross-examination, Disputant conceded that the grant of casual leave is not automatic and that it is subject to the exigencies of the service. He accepted that in his Statement of Case there is no mention that he is a person suffering from a disability. He stated that in the terms of reference, there is mention of his disability. Disputant agreed however that in Doc A there is no mention that he is suffering from a disability. He did not agree that the additional casual leave is subject to the condition that an employee is a disabled person and that he latter has to prove same. He agreed that he was examined by a Medical Board in August 2013 and the Board found him fit to discharge the duties of his post.

Disputant agreed that the matter was referred to the Disability Unit of the Ministry of Social Security and that the said Ministry scheduled a Medical Board. He did not go to that Medical Unit as according to him this is meant for the purpose of granting pension and he felt humiliated to go through a series of Medical Boards. Disputant averred that he had already submitted a medical certificate and he was instead required to go through a series of Medical Boards.

Disputant did not agree that paragraph 10.17 of the PRB Report 2013 (Volume 1) should be read along with paragraph 10.16 of the same report and paragraph 10.11 of the PRB Report 2008 (Volume 1). He averred that he is seeking an allowance under paragraph 10.17 of the PRB Report 2013 and not under paragraph 10.16 of the same report. Disputant was questioned in relation to Public Service Commission (PEC) Circulars No 2 of 2006 and No 1 of 2011 (Docs I and N respectively). He did not agree that point in dispute No 3 did not fall within the jurisdiction of the Tribunal.

Mrs Reega, Assistant Manager, Human Resources at the Ministry of Civil Service & Administrative Reforms deposed on behalf of the Respondent and she solemnly affirmed to the correctness of the contents of the Statement of Reply of the Respondent. In cross-examination, Mrs Reega stated that both Circulars No 2 of 2006 and No 1 of 2011 should be complied with. She maintained that the approval of the PSC must be obtained for acting appointments/assignment of duties for a period exceeding six months. She also stated that paragraph 18.2.107 of the PRB Report 2013 refers to refund of bus fares and not to additional casual leave. Mrs Reega insisted that there must be proof of a disability and where a Medical Certificate cannot satisfy this requirement, the matter has to be referred to the relevant competent

authority. She maintained that paragraph 10.17 of the PRB Report 2013 should be read along with paragraph 10.16.

As regards point in dispute No 3, Mrs Reega stated that the question of whether officers junior to Disputant have been assigned higher duties falls within the purview of the PSC and not the Ministry of Civil Service and Administrative Reforms. She could not confirm if Disputant was the senior most.

The Tribunal has examined all the evidence on record including the submissions of counsel for Respondent and the concluding remark made by Disputant. As regards point in dispute No 1, though it is mentioned in the terms of reference that "...as I am still suffering from a disability", the Disputant who is a Senior Human Resource Executive has not once averred in his Statement of Case that he suffers from a disability. In chief, Disputant did state that he had submitted a medical certificate to the effect that he is suffering from a disability. He added that he has difficulty walking, difficulty to climb staircase and he produced Doc A. The first medical certificate has not been produced before us and we cannot make any assumptions in relation to that document. The Tribunal has examined carefully paragraph 5(d) of Respondent's Statement of Case and there is nothing in that paragraph to suggest that there was mention in the said medical certificate that Disputant was suffering from a "disability". The definition of "disabled" in the National Pensions Act is specific to that Act and there are even different definitions for the same term for different provisions in the same Act. The word "disabilities" should be given its ordinary meaning in the particular context it has been used in the 2013 PRB Report. "Disability" is defined in the Concise Oxford English Dictionary as "1 a physical or mental condition that limits a person's movements, senses, or activities. 2 a disadvantage or handicap, especially one imposed or recognized by the law." Under the word "disabled" (having a physical or mental disability), the following note (still in the Concise Oxford English Dictionary) in relation to the usage of that word is enlightening. It provides "*The word disabled is the most generally accepted term in both British and US English today. It has superseded outmoded, now often offensive, terms such as crippled and handicapped and has not been overtaken itself by newer coinages such as **differently abled** or **physically challenged**. Some people regard the use of the adjective as a plural noun (as in the needs of the disabled) as dehumanizing. A more acceptable term would be **people with disabilities**.*"

'Employees with disabilities' will certainly not include an employee who has sprained his ankle even though that employee's movement may be temporarily hindered. 'Disabilities' as used in the PRB Report need to be established and same can only be done through medical evidence. Doc A certifies that Mr Munisamy is suffering from "Psoriatic Arthritis" and the medical officer goes on to say that the latter "Has difficulty walking, running, climbing stairs because of his arthritis". There is no reference to the word "disability" in Doc A and the Tribunal finds that Doc A falls short of showing that Disputant is actually suffering from a disability. It stands to reason that Disputant has to show that he suffers from a disability before benefitting from provisions applicable to employees with disabilities. Paragraph 18.2.107 of the PRB Report 2013 (Volume 1) cannot be of help to the Disputant since that recommendation caters for something completely different which is refund of bus fares. The Tribunal finds that Disputant has failed to prove on a balance of probabilities that he is an employee with a disability and point in dispute No 1 is set aside.

As regards point in dispute No 2, the Tribunal has no hesitation in finding that paragraph 10.17 of the PRB Report 2013 (Volume 1) must be read in line with paragraph 10.16 of the same report just like paragraph 10.12 of the PRB Report 2008 (Volume 1) must be read in line with paragraph 10.11 of the same report. It is quite misleading to aver that the said paragraph 10.12 falls under a different recommendation (Recommendation 2) compared to paragraph 10.11 which Disputant suggested fell under Recommendation 1. Both paragraphs 10.11 and 10.12 relate to Recommendation 2.

Paragraph 10.12 of the PRB Report 2008 (Volume 1) provides as follows:

10.12 We recommend that where an officer in a grade has a technical or professional qualification higher than what is required for the grade and his competency/ability on account of the possession of that qualification is effectively used by the organisations through allocation of relevant duties, such officer may, subject to the recommendation of the Responsible Officer/Supervising Officer and the approval of the MCSAR, be paid an appropriate allowance.

Paragraph 10.17 of the PRB Report 2013 (Volume 1) is very similar to the above paragraph.

Even from a cursory reading of paragraphs 10.11 and 10.12 of the PRB Report 2008 (Volume 1), it is clear that it is when an officer in a grade has a technical or professional qualification which is higher than what is required for the grade and his competency/ability on account of the possession of that qualification is effectively used by the organization through allocation of relevant duties that an allowance may be paid subject to the required recommendation and approval. The competency of the officer on account of his higher qualification must be effectively used and this necessarily implies that the relevant duties will be duties of a higher position distinct from the normal duties of that officer. We are not in the realm of incremental credits granted to “compensate officers possessing qualifications of relevance higher than the ones prescribed” (vide distinction made in paragraph 10.11 of the PRB Report 2008 (Volume 1)). There is no evidence that Disputant is performing duties of a higher position distinct from his normal duties in the present case. Point in dispute No 2 is thus purely and simply set aside.

As regards point in dispute No 3, the terms of reference refer to assignment of duties since last September 2014. The terms of reference also refer to “my seniors/juniors” but the “seniors/juniors” are not parties to the present matter. There is scanty evidence on record in relation to the assignment of duties referred to except that apparently more than one year would have elapsed since the said assignment of duties. Apart from the averment that juniors of Disputant would have been assigned higher duties, there is no evidence why Disputant should now be assigned higher duties with effect from September 2014 (underlining is ours). From Doc N (PSC Circular No 1 of 2011), it is provided at paragraph 2 that “Responsible Officers should continue to forward to the Commission the following cases for approval” and this includes acting appointments/assignment of duties for a period exceeding six months. Responsible Officers have delegated power to make assignment of duties in certain specific cases in grades falling under the responsibility of their respective Ministry/Department for period not exceeding six months. Ex facie the terms of reference and the state of the evidence before us on this issue, the assignment of duties in the present case exceeds six months and requires the approval of the PSC.

There is an averment at paragraph 15 of Disputant’s Statement of Case that there was a breach of PSC Circular No 2 of 2006 in relation to the assignment of duties complained of and taking effect from September 2014. As transpired from the terms of reference, the prayer of the Disputant is that the higher duties be assigned to him with effect from September 2014. The Tribunal fails to see how higher duties can be

assigned retrospectively (underlining is ours) to the Disputant with effect from September 2014. Also, the Tribunal cannot award that the said higher duties be assigned to Disputant with effect from September 2014 when such an assignment still requires under regulation 22(4) of the PSC Regulations (as amended) and PSC Circular No 1 of 2011 (Doc N) the approval of the PSC. For the reasons given above, and in the light of the scanty evidence before us in relation to the actual exercise of assignment of duties, point in dispute No 3 is also set aside.

(Sd) Indiren Sivaramen
Vice-President

(Sd) Raffick Hossenbaccus
Member

(Sd) Rajesvari Narasingam Ramdoo
Member

(Sd) Khalad Oochotoya
Member

29 October 2015