

**EMPLOYMENT RELATIONS TRIBUNAL**

**AWARD**

**Before:**

**Shameer Janhangeer  
Esther Hanoomanjee (Mrs)  
Denis Labat  
Triboohun Raj Gunnoo**

**Vice-President  
Member  
Member  
Member**

**In the matters of: -**

**ERT/RN 05/2015**

**Mr Girish LUCHMEE**

*Disputant*

**and**

**IRRIGATION AUTHORITY**

*Respondent*

**lpo: -**

**PAY RESEARCH BUREAU**

*Co-Respondent*

**ERT/RN 06/2015**

**Mr Maheswarnath MISTRY**

*Disputant*

**and**

**IRRIGATION AUTHORITY**

*Respondent*

**lpo: -**

**PAY RESEARCH BUREAU**

*Co-Respondent*

The present two disputes have been referred to the Tribunal by the *Commission for Conciliation and Mediation* (the “CCM”) for arbitration pursuant to *section 69 (7)* of the *Employment Relations Act 2008*. The terms of reference of the first dispute are:

- (i) *Whether I should have been assigned duties of the post of Executive Officer based on seniority, from 18 February 2011 till the date I was appointed Executive Officer i.e. 11 June 2013 or otherwise.*
  
- (ii) *Whether I should have been given the option to join the grade of Office Management Assistant (OMA) as per EOAC Report 2013 – Recommendation 15A (Parastatal Bodies & Other Statutory Bodies) or otherwise.*

The second dispute has been referred to the Tribunal solely on the second terms of reference. The first Disputant, Mr Girish Luchmee has not insisted on the first point of the dispute referred. Both cases have been consolidated and the Award of the Tribunal is in relation to the second terms of reference.

The two Disputants were assisted by their Trade Union representatives, initially Mr S. Manikon and Mr S. Kangloo thereafter. Whereas the Irrigation Authority and the Pay Research Bureau were each assisted by State Counsel instructed by State Attorney.

#### *THE STATEMENTS OF CASE*

Both Disputants have each respectively submitted their statements of case in the present matter. Mr Maheswarnath Mistry joined the Respondent on 01 July 1991 as a *Clerical Officer*, whereas Mr G. Luchmee joined on 11 July 2006 in the same post. They have set out their respective qualifications. A first post of *Executive Officer* (“EO”) became vacant

on 28 October 2010 and Mr Mistry was assigned the duties of the *EO*. A second post of *EO* became vacant as from August 2011. The post(s) of *EO* were internally advertised on 14 November 2011, interview of which were held on 20 November 2011. Both Disputants have opted for the *Pay Research Bureau Report 2013* (the "*PRB Report 2013*").

They both related an incident on 08 April 2013 between themselves and the General Manager of the Respondent regarding the time of departures of the latter. The aforesaid incident was reported by way of a letter dated 19 April 2013 addressed to the *Minister of Agro Industry & Food Security* signed by the Head of Administration and counter signed by Officers of the HR section themselves included. They were both offered appointment as *EO* on 11 June 2013 (the Board of the Respondent having approved the recommendation of the Staff Committee on 05 June 2013). It has notably been averred that the *Errors, Omissions and Anomalies Committee Report* (the "*EOAC Report*") which was submitted in March 2013 has recommended that the post of *EO* be made evanescent and that Management should have taken due care when appointing them as *EO* on 11 June 2013. They have been caused prejudice by the serious departures from the part of Management in the filling of the aforesaid post.

The *EOs* and *Higher Executive Officer(s)* ("*HEO*") in post at the Respondent, except for the two Disputants, were offered appointment as *Office Management Assistant* ("*OMA*"). Both Disputants are relying on *Recommendation 15A* of the *EOAC 2013* Volume 2 Part II in contending that they should be allowed to join the grade of *OMA*.

The Respondent organisation has also put in a statement of case in relation to each Disputant. It did not admit that it failed to fill the posts of *EO* on time upon the vacancies on 28 October 2010 and August 2011. It is admitted that two posts of *EO* were advertised internally on 14 November 2011 for which interviews were held on 3 October 2012. The scheme of service for the post of *OMA* was approved by the *Ministry of Civil Service and*

*Administrative Reforms* on 18 August 2014. The Board of the Respondent was not held on 21 December 2012 due to lack of quorum. The Disputants were thereafter appointed to the post of *EO* on 11 June 2013. The Respondent has averred that the scheme of service for the post of *OMA* contains a first intake note on the appointment of *OMAs* from the grades of *HEOs* and *EOs* in post as from 31 December 2012 (paragraph 11).

The Pay Research Bureau was made a party in the present matter. In its stand, it has notably averred that as per the recommendation at *paragraph 15A* of the *EOAC Report Vol.2 Part II*, only *HEOs* and *EOs* in post as at 31 December 2012 should be given the option to join the new grade of *OMA* on 1 July 2013. It has further been averred that the Disputants were appointed *EO* on 11 June 2013 and do not satisfy the criteria laid recommended in *paragraph 15A* of the *EOAC Report Vol.2 Part II*.

#### *THE EVIDENCE OF THE WITNESSES*

Mr Maheshwarnath Mistry, Executive Officer at the Irrigation Authority, was called to adduce evidence. Having joined the Irrigation Authority on 1 July 1991, he set out his qualifications. He applied for the advertised post of *EO* which became vacant on 28 October 2010. Prior to its advertisement on 14 November 2011, he was assigned duties to the said post as from its vacancy. He was called for the interview on 3 October 2012 but was not appointed. He gave his consent to the *PRB Report 2013* by signing the option form in the meantime. The *EOAC Report* was published in March 2013 and he cited the provision concerning *EO* and *HEO*. He was appointed *EO* on 11 June 2013. The *EOAC Report* states at *paragraph 15A (b)* that the post of *EO* and *HEO* are to be made evanescent. He agreed that as per the *PRB* and *EOAC Reports*, it was understood that all the grades of *EO* and *HEO* should have existed only as at 31 December 2012 despite of which he was appointed *EO* on 11 June 2013. He related an incident prior to his appointment as *EO* with the General Manager in relation to the times of his departure on certain dates and that this has caused him prejudice. Of the 3 *HEOs* and 4 *EOs*, only he and his colleague were not allowed to join

the grade of *OMA*. He is not aware of the reason why there was a delay in appointing him. He has not even been assigned duties for the post of *OMA* and this is causing him prejudice whereas *Management Support Officers ("MSO")*, formerly known as *Clerical Officers*, have been assigned same.

In response to questions from State Counsel, Mr Mistry notably stated that as at the time of the vacancy for the post of *EO* and when he was called for the interview, the present *PRB Reports* and the *EOAC Reports* were not out. He accepted the offer of the post of *EO* made to him in June 2013 despite being aware that *OMA* will be selected from *HEOs* and *EOs* in post as from 31 December 2012. The scheme of service for the post of *OMA* (produced as Document A) came into effect in August 2014. He agreed that if he had opted not to join the post of *EO* and remained in the post of *MSO* he would have been qualified to join the post of *OMA* as per the scheme of service having held the post of *Clerical Officer* for more than 4 years. He explained that he had to opt for the post of *EO* which was his first promotion in 22 years and he had spent a lot of money on higher education.

Mr Girish Luchmee, Executive Officer at the *Irrigation Authority*, was also called to adduce evidence. He affirmed as to what his colleague Mr Mistry stated. He confirmed that he is not insisting with the first point of his dispute. He was present when there was an incident with the General Manager on 8 August 2014 which has caused him prejudice.

Upon questions in cross examination, Mr Luchmee agreed that the option to join the grade of *OMA* arises from the scheme of service of the post of *OMA*. However, the *PRB* has made no provision for *EO* to join the grade on the condition and assumption that the grade of *EO* has to be made evanescent. The recommendation was made in March 2013. He accepted appointment for the post of *EO* in June 2013. He agreed that as per the present scheme of service, he cannot opt to join the post of *OMA* as he was not in post as at the date (i.e. 31 December 2012).

Mr Luchmee also clarified that the scheme of service for *OMA* was not ready when he was offered to join as *EO*. Had the scheme of service existed, he would have objected. He and Mr Mistry were verbally told by the Senior Human Resource Officer that they would be absorbed to the grade of *OMA* once the scheme of service would be ready.

Mrs Yajwantee Dulthummon, Senior Human Resource Officer at the Irrigation Authority, was called to adduce evidence on behalf of the Respondent. She notably explained that the management had prepared a proposed scheme of service approved by the Board and this was submitted to the parent Ministry in December 2013. The proposed scheme of service being approved by the *Ministry of Civil Service and Administrative Reforms* was submitted back to the Respondent and contained a note that the intake was for officers in post as *EO* as at 31 December 2012. However as the two Disputants were appointed *EO* on 11 June 2013, they fell outside the scheme of service. She did not have the authority to tell the Disputants that they would be absorbed into the grade of *OMA*, this depends on the Board. She only implements decisions and is not mandated to appoint.

Upon questions from the Disputant's Trade Union representative, the witness notably explained there is no written policy of filling of vacancies prevailing at the Irrigation Authority. When there is need to fill a vacancy, recommendations are sought from Heads of Department and then submitted to the parent Ministry; upon clearance from the parent Ministry, recommendations are submitted to the Staff Committee and following approval to the Board of the Respondent. She confirmed that the post of *EO* was advertised internally on 14 November 2011 after clearance from the parent Ministry. The interview was carried out on 3 October 2012 and recommendation of the Staff Committee was circulated to the Board for approval in December 2012. The two Disputants were appointed in June 2013. She agreed that the posts took 20 months to fill whereas according to the tendency it may take two to three months or up to a year in some cases.

Mrs Dulthummon further stated that there was a Staff Committee in August 2014 where a list of all *EOs* and *HEOs* were submitted by the secretary who stressed on the higher qualifications of the Disputants – Diploma and MBA respectively. However, the Committee pointed out that the Disputants did not meet the first intake note as per the approved scheme of service. There were 7 candidates for the post and 5 were appointed. She also produced *Circular No. 26 of 2013* (Document B) in relation to the *EOAC Report 2013* referring to paragraph 6 '*Application/Interpretation of the Report*' thereof. She also confirmed her signature on a letter relating to the incident between the General Manager and officers of the HR section on 8 April 2013. The Board meeting of 21 December 2012 was not held due to lack of quorum and the case of the two Disputants was considered in the Board meeting of 11 June 2013. She agreed that if the Board meeting had taken place on the earlier date, the present situation would not have arisen. She also confirmed that she was present on 8 April 2013 with the two Disputants when the General Manager threatened them with the words "*si zotte pas change bane l'heures la ene boute mo pas pou quitte zotte*". They did not agree to change the records on the attendance sheet that is why the General Manager called them to his office.

The representative of the *Pay Research Bureau*, Mr Appana Nagamah, Ag. Deputy Director, maintained as to the correctness of the stand submitted to the Tribunal. He stated that *paragraph 15A* of the *EOAC Report* would not apply to the Disputants as it applies only to *EOs* in post as at 31<sup>st</sup> December 2012 and the Disputants were appointed *EO* in June 2013. As regards the second part of the recommendation, he stated that once all of the officers have been appointed as *OMA* and there is nobody in post as *HEO* and *EO*, then the posts become evanescent. It is quite normal to have *EO* and *OMA* in an organisation; these are two different grades with two different schemes of service. He could not say if the two posts were doing the same job. If there are still holders of the post of *EO* and *HEO* by the time the next *PRB Report* is out, the grade will be there but on a personal basis. Until and unless there is somebody in the post, it cannot become evanescent. The two parts of the recommendation are intertwined as they are given an option and if they do not accept the

other grade should be there. The posts will be phased out once nobody is in the posts of *EO* and *HEO*.

#### *THE MERITS OF THE DISPUTE*

The Tribunal in the present matter is being asked to enquire into whether the Disputants should have been given the option to join the grade of *OMA* according to the recommendation made in *paragraph 15A* of the *EOAC Report Volume 2 Part II Parastatal Bodies and Other Statutory Bodies* (the “*EOAC Report*”).

The facts in the present matter have revealed that Messrs. Mistry and Luchmee were *Clerical Officers* at the Respondent organisation which they joined on 1 July 1991. The post of *EO* at the organisation was advertised on 14 November 2011. They both applied for the post and were interviewed on 3 October 2012 following which the Staff Committee’s recommendation was circulated to the Board for approval on 21 December 2012. However due to a lack of quorum, the Board could not meet on 21 December 2012. The Board met on 11 June 2013 and the two Disputants were appointed as *EO* on the same day. On 18 August 2014, the scheme of service for the grade of *OMA* was approved at the Irrigation Authority.

The importance of the Board in relation to the appointment of staff at the Irrigation Authority may be sufficiently gleaned from the following provisions of the *Irrigation Authority Act*:

#### **10. Appointment of staff**

(1) *The Board may employ, on such terms and conditions as it may determine, such staff as may be necessary for the proper discharge of its functions under this Act.*



...

**11. Conditions of service of staff**

*The Board may make provision, in such form as it may determine, to govern the conditions of service of the staff of the Authority, and in particular, to deal with—*

- (a) the appointment, dismissal, discipline, pay and leave of, and the security to be given by, staff;*

The post of *OMA* is new grade. Indeed, its making may be found from the following recommendation of the *EOAC Report Volume 2 Part II*:

***Recommendation EOAC 1***

- 12. The Committee, therefore, recommends the creation of the grades of Management Support Officer and Office Management Assistant on the establishment of all parastatal organisations on a needs basis and depending on operational requirements only.***

The recommendation made at *paragraph 15A* of the *EOAC Report* reads as follows:

***15A The Committee further recommends that:***

- (a) Higher Executive Officers and Executive Officers in post as at 31 December 2012 be given the option to join the new grade of Office Management Assistant on 1 July 2013 and on joining be granted one additional increment subject to the top salary of the new grade; and***
- (b) the grades of Higher Executive Officer and Executive Officer be made evanescent.***

It has been understood that the recommendation made in *paragraph 15A* of the *EOAC Report* applies to officers in the post of *HEO* and *EO* as at 31 December 2012. This is also reflected in the scheme of service of the post of *OMA* as confirmed by the evidence of the Respondent's Senior Human Resource Manager. The scheme of service contains the following 'Note' to this effect:

*For the first intake, by appointment of officers in the grades of Higher Executive Officer and Executive Officer in post as at 31 December 2012 and who have opted for the revised emoluments and terms and conditions set out in the PRB Report 2013 and Errors, Omissions and Anomalies Committee Report 2013 and who have opted to join the grade of Office Management Assistant on 18 August 2014.*

The Disputants are not unaware of this requirement to have been in post as *EO* as at 31 December 2012. It must however be noted that their evidence has borne out that there was a delay of about 20 months from the date of the advertisement of the post to the time when they were appointed *EO* on 11 June 2013. Even the Senior Human Resource Officer who represented the Irrigation Authority stated that the tendency is two to three months for a vacancy to be filled or even up to a year in some cases.

It has also come to light that the Board of the Irrigation Authority was due to meet on 21 December 2012 to consider the recommendation of the Staff Committee following the interview exercise for the post of *EO*. However, due to a lack of quorum they could not meet. The Disputants were subsequently appointed as *EO* following the Board meeting of 11 June 2013. As at 31 December 2012, there were still posted as *Clerical Officers* within the Respondent organisation.

The Disputants have further agreed that had they remained as *Clerical Officers*, they would have been in the post of *MSO* and would have been eligible to join the post of *OMA*.

However, as stated by Mr Mistry they had no alternative but to opt for their first promotion at the organisation to the post of *EO* particularly in view of the expenses incurred in pursuing higher studies. It has not been disputed that Mr Mistry has a BSc (Hons) in Human Resource Management from the University of Technology Mauritius as well as a MBA since 2011 from the same institution. Mr Luchmee, on his part, holds a Diploma in Business Administration since May 2005.

Both Disputants have related an incident on 8 April 2013 between themselves and the General Manager, which they believe is causing them prejudice. The incident was moreover confirmed by the Senior Human Resource Officer who was present when the same occurred in the office of the General Manager. Mr Mistry notably believes that he was not assigned higher duties because of the incident whereas his colleagues have been assigned the same. Prior to being appointed as *EO*, Mr Mistry was assigned the duties of *EO* as from 28 October 2010 and Mr Luchmee as from 18 February 2011.

The representative of the Pay Research Bureau enlightened the Tribunal as to the recommendation made at *paragraph 15A* of the *EOAC Report*. He notably stated that the person must be given the option to join the new grade of *OMA*. It is for the person to opt for the grade. If he or she chooses not to, he would remain in his previous post of *EO* or *HEO* on a personal basis. He notably stated that only once all *EOs* and *HEOs* have opted for the grade of *OMA*, only then can their former grades be made evanescent.

In this context it would be appropriate to note the intention behind the introduction of the new grade of *OMA* in the *EOAC Report*. This may be gleaned from the following passages of the latter report:

***General Grades in Parastatal and Other Statutory Bodies***

11. *The Ministry of Civil Service and Administrative Reforms has, in the context of restructuring the General Services grades in the Civil Service, recommended a new structure for the General Services Cadre comprising the grades of Management Support Officer and Office Management Assistant respectively. This recommendation is, in the context of this Report, being extended to all parastatal organisations.*

Likewise, it may be noted that the posts of *EO* at the *Ministry of Civil Service and Administrative Reforms* have been listed for abolition pursuant to the *Civil Service Establishment Order 2015 (GN No. 119 of 2015)*.

The Disputants despite being very well aware that they were not in post as *EOs* before 31 December 2012 wish to know if they should have been given the option to join the grade of *OMA*.

The Tribunal, having examined the facts pertaining to the dispute, has no difficulty in coming to the conclusion that the two Disputants have been the victims of unfair and unreasonable circumstances in the present matter. Namely, the undue length of time taken for them to have been appointed to the post of *EO*; the failure of the Board to meet and appoint them as *EO* before the 31 December 2012 due to lack of quorum; and the fact that they would have been eligible to opt for the post of *OMA* had they remained as *Clerical Officers* instead of accepting appointment as *EO* on 11 June 2013 within the organisation.

Although, it cannot be disputed the matters of employment are essentially within the province of management. As was stated by the Permanent Arbitration Tribunal in its award in *E. Cesar and C.W.A. (RN 785 of 2005)*:

*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).*

The facts pertaining to the present matter has clearly shown that the employer has acted in an unfair and unreasonably manner in not appointing the two Disputants in, *inter alia*, due time following their application for the post of EO advertised on 14 November 2011.

It cannot also be overlooked what was stated in *E. Cesar and C.W.A. (supra)* on the filing of vacancies:

*It is worth stressing that for the sake of good industrial relations, vacancies should be filled in as soon as possible and period of actingship should not be made to last for more than is necessary.*

It is amply clear that had these unfair circumstances not been present, the Disputants would have already been in post as EOs before 31 December 2012 and eligible for the option to join the grade of OMA. The fact that they were still *Clerical Officers* as at the aforesaid date cannot be imputed upon them.

Having regard to fundamental principles of fair employment (vide *Mrs. D.C.Y.P. and The Sun Casinos Ltd. [GN No. 1390 of 1988]*) and the need to maintain good and harmonious employment relations, the Tribunal can only come to the conclusion that Messrs. Mistry and Luchmee should have been given the option to join the grade of OMA as per the recommendation made at *paragraph 15A* of the EOAC Report.

It would be fitting in this matter to quote what was stated by the *Permanent Arbitration Tribunal* in *Mrs. D.C.Y.P. and The Sun Casinos Ltd.*:

*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 to be loyalty, expertise and efficiency.*

...

*After considering all the facts of this case, we have no hesitation in finding that the fundamental principles of fair employment have not been followed and that, as a result, one employee is feeling justly frustrated because of what she considers, and is considered, an 'injustice' with consequences affecting her not only materially, but morally.*

The Tribunal therefore awards accordingly.

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

**SD Esther Hanoomanjee (Mrs)  
(Member)**

**SD Denis Labat  
(Member)**

**SD Triboohun Raj Gunnoo  
(Member)**

**Date: 17<sup>th</sup> February 2016**