

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/RN 14/17

Before

Rashid Hossen	-	President
Vijay Kumar Mohit	-	Member
Abdool Feroze Acharauz	-	Member
Kevin C. Lukeeram	-	Member

In the matter of:-

ERT/RN 14 /17 – Abdool Fakrudhin Subratty (Disputant)

And

Financial Services Commission (Respondent)

Abdool Fakrudhin Subratty, the Disputant in the present matter, occupied the post of Lead Examiner at the Respondent, the Financial Services Commission until his demotion on 25th May 2015.

On 3rd November 2016, he reported to the President of the Commission for Conciliation and Mediation the existence of a labour dispute between himself and the Financial Services Commission by virtue of Section 64 (1) of the Employment Relations Act 2008 as amended (the ‘Act’). As no settlement could be reached, the Commission referred the labour dispute with the consent of the worker to the Tribunal for arbitration in terms of Section 69 (7) of the Act (Supra), with the following terms of reference:-

“Whether I Mr. Abdool Fakhrudin Subratty, should be reinstated as lead examiner at the Financial Services Commission.”

Mr Shakeel Mohamed, Counsel, instructed by Mr Kaviraj Bokhoree, Attorney at Law, appeared for the Disputant.

Mr Ravin Chetty, Senior Counsel, instructed by Mr Jean Marie Leclezio Attorney At Law, appeared for the Respondent.

In an amended fresh Statement of Case (containing less mistakes than the previous one) the Disputant averred that:-

- On or about February 2015, an anonymous whistle blowing letter was sent to the Ministry of Finance disclosing all the suspected malpractices at the level of the Respondent including figures relating to high bonuses of Top Management over and above their normal bonuses.
- On or about March 2015, after receiving the letter, the Ministry of Finance required Respondent’s management to comment on same. Management was very furious about the whistle blowing letter to the point that one of the then Executives, Mrs Veena Moloye openly said that “she will finish the person who did this.”
- On or about 18 March 2015, the Chief Executive ordered the IT Executive at the Respondent, who is also a member of top management, to shut down the server and carry an investigation in each and every person network account to try to identify the person behind the anonymous letter.

- Disputant was on or about the 07th April 2015 issued with letter of breaches of discipline and acts of misconduct issued to him stating that Respondent has evidence that shows that Disputant might have accessed, manipulated and tampered with the email account of one Mr Pusram who is the accountant at the Respondent. They required Disputant to give his explanations by 14 April 2015.
- On or about 13th April 2015, Disputant provided his explanation. Disputant gave them reassurance that he had not in any manner whatsoever during the course of his work accessed, manipulated and tampered with the email of the said Mr Pusram.
- On or about 23rd April 2015 letter of charges was issued to Disputant by management in which they stated that they are not satisfied with his explanation and as such they convened him for a disciplinary committee which took place on 29 April 2015.
- On or about 29th April 2015, Disputant avers that Disciplinary Committee was postponed to 21st May 2015.
- On 21st May 2015, the Disciplinary Committee was held. The Respondent was represented by one Mrs Nargis Bundhun SC; and the Respondent further appointed one Mrs Varuna Bunwaree of Counsel as the Chairperson of the Committee without obtaining Disputant's consent.
 - It was to the knowledge of the Disputant that the said Mrs Varuna Bunwaree is related to a member of top management,

the HR Executive who resigned in March 2015 following the anonymous letter.

- Disputant was represented by Mr Manish Gobin.
- On or about the 25th May 2015, one Mrs Veena Moloye informed the Disputant that following the Disciplinary Committee all the charges have been proved and as such they are demoting him from lead examiner to examiner and further are suspending him with immediate effect and are allegedly referring the matter to the police for an investigation.
- On or about the 26th May 2015, the Acting CEO of the Respondent, Mr P.K Kuriachen through a phone conversation explained to Disputant that he was not satisfied with the investigation carried by the IT Executive and this is the reason why he asked the police to conduct an independent investigation.
- On or about the 27th May 2015, an Appeal letter prepared by Disputant was sent to all Board members explaining in details stating that all the charges are unfounded and that the decision of the Board is very harsh.
- On or about 22nd June 2015, Disputant received a letter from the Respondent emanating from one Mrs Veena Moloye, informing him that following Board decision to demote him from lead examiner to examiner, his salary as examiner would be Rs 54,295 and that all the allowances which he was receiving and entitled as lead examiner would be stopped.
 - Disputant's new salary would be Rs 23,000 lower than what he was receiving as lead examiner. The Rs 23,000 represented his car allowance (allowance in lieu of duty), travelling allowance and ICT

allowance which in his opinion he should continue to receive even though he was under suspension.

- The said Mrs Veena Moloye resigned at the end of June 2015.
- On or about 16th May 2016 after some 12 months of suspension, the police has never convened him for a statement or an enquiry. In this respect, his Counsel has sent a letter to Mr Kuriachen asking for a meeting to discuss the way forward.
- About a month later in, or about 21st June 2016, Respondent by way of letter to the said Counsel turned down the meeting stating that there is a police enquiry in progress regarding this matter.
- On or about the 01st September 2016, Disputant sent a letter to the Ministry of Labour Industrial Relations and Employment seeking their intervention in the matter.
- On or about the 03rd October 2016, a meeting was held at the Conciliation and Mediation section of the Ministry of Labour Industrial Relations and Employment between the parties concerned, that is Disputant represented by Counsel and the Management of Respondent.
 - In the said meeting Disputant's Counsel proposed to the representatives of the Respondent to arrange a meeting for him with Respondent's Acting CEO and/or the Chairman so that he may explain to them that whatever Respondent is doing regarding this particular matter is illegal to all intents and purposes.

- On or about the 05th October 2016, the Acting CEO of Respondent refused to meet Disputant's Counsel on the fallacious ground that there is a police investigation and Respondent did not want to interfere.
- On or about the 01st November 2016, he sent a letter to the Commission for Conciliation and Mediation seeking its intervention.
- In or about November 2016, Disputant's state of health started to get affected due to the prevailing state of things.
 - Disputant started to feel a constant headache which did not subside even after taking painkillers.
 - On or about 06th December 2016, Disputant consulted a Neurologist who informed Disputant that his deteriorating health might be as a result of constant stress and even requested the Disputant to perform a brain MRI.
 - On or about 13th December 2016, Disputant consulted his Neurologist again since the headache did not subside even after taking the prescribed medicine.
 - On or about the 22nd December 2016, he conducted an MRI which revealed that everything was normal. The neurologist stated to him that the headache is definitely due to stress and he was prescribed anti stress medicine.
- On or about the 13th December 2016, Disputant wrote to the Acting CEO of the Respondent asking for his reinstatement to his post of lead examiner.

- On or about 13th January 2017, the management of the Respondent called Disputant for a meeting where the Acting CEO of the Respondent explained to him that the Board of Respondent had considered his letter and that the Board has decided to remove the suspension but it would maintain the demotion pending the alleged police enquiry.
 - The said Acting CEO also told Disputant that if he agreed with the above, management would prepare an agreement for him to sign without any reservation.
 - The said Acting CEO asked Disputant to think about the offer and let Respondent know his decision.
 - On or about the 27th January 2017, Disputant considered he had no alternative choice than to accept the agreement as he wanted to get back to work. The said agreement was signed on 27 January 2017.
- He resumed duty on 30 January 2017. Respondent posted him in the Administration Cluster and not in the Insurance Cluster where he had worked since joining the Respondent in 2003, i.e, for 13 years.
 - Once settled down, the Management of Respondent started harassing him to withdraw his case at the CCM.
- On the subsequent days the Management of Respondent kept asking him to withdraw his case before the CCM.
- At the second meeting at the CCM, the Chairperson of the said meeting asked him if he was agreeable to be reinstated to which he responded that he was not, because Respondent has maintained the demotion whilst in his

letter dated 13th December 2016, he requested to be reinstated as Lead Examiner.

- The Chairperson then asked the representatives of the Respondent if this was their final proposal to which the said representatives responded in the affirmative.
- Thereafter the matter has been referred to the Tribunal for determination.
- Since he has resumed duty, Respondent is not giving him access to a computer and network and neither has he been provided with a phone.
 - Consequently, he has been sitting idle and after several requests the Respondent has eventually given him a laptop but without any connection to the network.
 - Disputant has nothing to do as all the work at the Respondent is done on the network. Disputant is feeling like an outcast and morally affected.
- On or about the 07th February 2017, during office hours, management of Respondent called him for a meeting where he has been threatened that if he did not remove his case before this Tribunal, the Acting CEO of the Respondent would ask the Board of Respondent to suspend him again.
 - The management of the Respondent gave him an ultimatum until the next board meeting to remove the case.

- After advice Disputant has decided not to remove the case in view of the fact that deep injustice is being meted upon him and he does not deserve the treatments meted upon him.
- Disputant avers that on Friday the 17th February 2017, it was brought to his attention that a board meeting of Respondent would be held on Monday 20th February 2017.
 - Before leaving office at 5 pm Disputant asked the HR Executive of Respondent whether he should come to work on Monday given that the management had proposed the Board to suspend him again.
 - The HR Executive confirmed that indeed management has proposed the Board to suspend him again and on Monday during the Board meeting a decision will be taken.
 - The said HR Executive also told Disputant that it would be easier for him not to come on Monday to avoid the whole process of suspension again.
 - Disputant returned his access card and laptop and asked the HR Executive to inform him of the Board's decision on Monday through letter or phone or email.
- On the 20th February 2017, the Board meeting of Respondent was held at 8 am and he did not go to work and no one informed him of any Board's decision concerning him.
- On the 21st February 2017 he did not attend work as no one informed him of the decision of the board.

- Disputant sent an email to the HR executive asking what the board decided regarding his case. The HR Executive replied that she has not received the Board's minutes yet.
 - Later the assistant of the HR Executive called Disputant informing him that the Board was adjourned without considering his case. The said matter has been postponed for next Board meeting which would be held the following week.
 - She also asked the Disputant to come to work pending the next decision of the Board which would most probably suspend him again.
- Since the 22nd February 2017, he is back to work awaiting the decision of the Board of Respondent.
 - Because of the said demotion and long suspension, Disputant has been unable to apply for internal promotion and has to wait for another 5 years and was the most competent employee of his cluster as could be evidenced by the Respondent itself.
 - The alleged charges of tampering with the emails of another colleague are completely denied. Disputant has never tampered with any emails in any manner whatsoever.
 - Despite the fact the matter has allegedly been referred to the Police more than 18 months back, the Disputant has not been called for any defence statement.
 - The manner in which the demotion is being implemented is erroneous to all legal intents and purposes.

- Deep prejudice is being caused to the professional career as well as personal life of the Disputant. Being the main breadwinner of his family, deep financial prejudice is being caused to him in view of the loans instalments he has to pay monthly.
- The terms and conditions of work of the Respondent do not provide for demotion. In the event there is any gross misconduct the sanction is dismissal. In the case of the Disputant he has not performed any act of misconduct in any manner whatsoever.
- Disputant therefore prays from the Tribunal for an award declaring and decreeing that the demotion meted upon him by the Respondent is illegal and unlawful and that he is reinstated to his post of Lead Examiner with the Respondent.

In reply to the above, Respondent filed an amended Statement of Case which contained in substance the following:-

- This is an application which has been referred by the Commission for Conciliation and Mediation ('CCM') to the Tribunal under Section 69(7) of the Employment Relations Act. Following a hearing of the Disciplinary Committee set up by the Respondent, the charges of gross misconduct imputed at the Disputant were found to be proved and the Disputant was pending the outcome of the police enquiry into his case, demoted from the position of Lead Examiner to Examiner.
- Despite having knowingly and willingly signed the subsequent reinstatement agreement and having subsequently resumed duty, the Disputant is still not

agreeable to the decision of the Respondent and seeks to be reinstated to his former position as Lead Examiner.

- It is the Respondent's case that the decision reached was not unlawful in as much as all legal provisions as well as the regulations of the FSC's Policies and Procedure manual have been followed and complied with and that it has objectively and impartially reached its decision after giving due consideration to the Disputant's representations, as expatiated upon below. Therefore, this application is devoid of any merit and should be set aside.
- The Respondent has strong grounds to believe that the alleged 'whistleblowing' emanated from an FSC Staff, in as much as;
 - the Respondent took cognisance of the purported 'whistleblowing letter' after it had failed to reach one of its numerous intended recipients, i.e. 'Samedi Plus' as on 17th March 2015 an FSC envelope was returned to the sender, i.e. allegedly the Respondent, by reason of being undeliverable due to an incorrect address provided for the intended recipient, i.e. 'Samedi Plus'. The FSC marked envelope contained an anonymous letter, on the FSC template, addressed to Director General of ICAC;
 - The Chairman of the Respondent had also been forwarded copy of the same letter, which was addressed to the Minister of Financial Services, Good Governance and Institutional Reforms and;
 - On 23rd March 2015, the Respondent received a letter from the Equal Opportunities Commission (EOC) requesting explanations on complaints lodged in respect of alleged cases of discrimination. A copy of the same anonymous letter was attached (addressed to the

Equal Opportunities Commission and copied to the Honourable Prime Minister, the Minister of Finance as well as the Minister of Financial Services.)

- In April 2015, both the EOC and the ICAC invited the Respondent to furnish further explanations as per standard procedure, regarding the investigation in respect of alleged cases of discrimination. In May 2015, the EOC and the ICAC informed the Respondent that they had taken note of the detailed explanations given and that no further actions were required by either the EOC and/or the ICAC in these matters.
- In an endeavour to initiate remedial actions and to investigate the veracity of the allegations contained in the alleged ‘whistleblowing’ letter, the Respondent undertook an internal investigation exercise to identify its source. In this respect, comments from relevant clusters were sought, including from HR and Finance.
- As part of this exercise, the IT Cluster was also requested on 17th March 2015 to identify the source of the confidentiality breach. The assigned team proceeded with the investigation as follows:
 - Screening users’ workstations and file servers using keywords from the said letter;
 - Identifying the source file/generated document, in particular to the annexes;
 - Identifying access rights granted whereby the said information are stored;

- Tracking of e-mails whereby the information might have been in circulation and;
 - Analysing print reports.
- One of the findings of the IT investigation was that while investigating the Microsoft Exchange 2013 compliance audit report, the IT Team found that the corporate mailbox of Mr Rajhans Pusram (Head-Finance) had been accessed by another staff (non-owner mailbox access), Mr Fakhrudin Subratty (the Disputant) (Lead Examiner posted in the Surveillance – Insurance & Pensions cluster). It was found that ‘Deleted Item’ action was performed on the mailbox.
- The Respondent then proceeded to enlist the services of Tylers for an expert forensic investigation. Tylers’ digital forensic investigator submitted its report on 30 March 2015.
 - According to the findings of the expert report:

“It can be clearly deduced by the logs that an insider named Mr Subratty Fakhrudin accessed the email account, rpusram@fscmauritius.org and deleted some details on 20/02/2015.”
- Pursuant to the expert digital forensic report, the work computer of the Disputant was seized by the IT team on the 7th of April 2015 and handed to Tylers for further analysis.
- Mr Pusram was also informed that evidence showed that he had, without any cause and/or reason and/or authority, delegated access of his FSC email account to the FSC group mail and as a result Mr Subratty from Insurance &

Pensions Cluster had accessed his email account on or about 20 February 2015.

- On the 7th April 2015, both the Disputant and Mr Pusram were issued with letters requesting them to provide written explanations by Tuesday 14 April 2015.
- The Disputant submitted his written representations in a letter dated 13 April 2015, whereby he denied the charges levelled at him and stated that he would only submit his representations once evidence of the charges are provided to him.
- Following the Disputant's unsatisfactory written explanations, the Respondent further issued a letter, enunciating the charges against the Disputant on the 23rd April 2015 and he was convened to attend a Disciplinary Committee on the 29 April 2015, which was further postponed to the 21st May 2015, due to the non-availability of the Disputant's Counsel.
- The Respondent clearly informed the Disputant that he was in breach of Sections 3.4.3 (b) and 10.4.2 of the FSC Policies and Procedures Manual which prohibit unauthorised use, tampering and destruction of FSC's assets, in as much as, he committed:

“acts of gross misconduct and/or a serious offence by: (i) accessing and/or (ii) manipulating and/or (iii) tampering with the FSC email account of Mr Rajhans Pusram (rpusram@fscmauritius.org) on or about 20 February 2015 without any cause and/or reason and/or authority.”

- It is the stand of the Respondent that the Disputant had ample opportunity to make representations regarding his objection to the proceedings being presided over by Ms Varuna R Bunwaree-Goburdhun, Barrister, at the time of the hearing. The Disputant cannot retrospectively now impugn the professionalism and independence of the Chairperson and claim that he had been deprived of the opportunity to answer the charges against him in a fair and impartial manner.
- Moreover, the Respondent avers that it is erroneous to imply that the HR Executive's resignation was brought about by the 'anonymous' 'whistleblowing' letter. The HR Executive's official retirement date happened to be effective as from the 17th March 2015. Her retirement procedures had already been approved at an earlier date. Therefore, it is only mere coincidence that her retirement date was on the day that the anonymous letter was received as alleged undelivered post, to the Respondent.
- It is the Respondent's contention that the Chairperson's decision to sanction the Disputant as communicated to him by Mrs Veena Moloye was fully justified and supported by the expert report, dated 5 May 2015 and submitted by Tyler's digital forensic investigator. The report of the Forensic Investigation carried out on the Disputant's work computer, confirms that the Disputant had:
 - accessed the inbox, sent items and deleted items folders of Mr. Pusram;
 - deleted mail items from Mr. Pusram mailbox;

- accessed confidential data and files which are meant to be in limited circulation, whereby the latter is not an authorised user and;
 - that the unique identification code (SID) linked to the Disputant's account corresponds to the previous report/certified logs submitted by Tylers.
- The main findings of the Disciplinary Committee were as follows:
 - The email account of Mr. Pusram was accessed through the Disputant's account;
 - The Disputant did have access to the email account of Mr. Pusram and that he manipulated and tampered with items contained in the inbox of Mr. Pusram as per evidence submitted.
- The above findings have to be considered in conjunction with the findings of the Disciplinary Committee in the case of Mr Pusram;
 - There is no evidence that Mr Pusram delegated access of his mailbox;
 - Mr Pusram's mailbox was accessed on the day that he was on leave and;

- At the hearing of the Disciplinary Committee, the Disputant stated that Mr Pusram had never given him access to his email account.
- Therefore, it follows that the decision of the Board, as communicated by Mrs Veena Moloye to the Disputant in the letter dated 25 May 2015, was fully justified:
 - To demote the Disputant to the post of Examiner;
 - To report the matter to the police for investigation and;
 - To suspend the Disputant with pay and with effect from Monday 25 May 2015 pending the outcome of the Police enquiry.
- Disputant has erroneously stated that the Acting Chief Executive of the Respondent requested a Police investigation as he was not satisfied with the in-house investigation carried out by the Respondent's IT team. It is in fact, the serious nature of the breaches and the charges of gross misconduct against the Disputant which have prompted the Respondent to refer the matter to the Police. There is a high probability that Disputant's gross misconduct might potentially fall within the category of criminal offences under Section 46 of the ICT Act 2001.
- In a letter dated 22 June 2015 Mrs Moloye informed the Disputant that further to Board's decision in respect of his demotion as Examiner, he will be entitled to his basic salary and salary compensations amounting to Rs 54,295. He was also informed that the allowances (car allowance, travelling

allowance and communication allowance) which were paid to him in his capacity as Lead Examiner will be stopped as from 01 June 2015 until further notice.

- The allowances at May 2015 in relation to Lead Examiner and Examiner as well as the revised amounts following a review exercise are as follows:

Allowances	Lead Examiner		Examiner	
	As at May 2015	Revised rates as from 01 Jan 2016	As at May 2015	Revised rates as from 01 Jan 2016
Car Allowance	9,000	10,350	6,000	7,000
Travelling Allowance	10,200	11,000	8,000	9,000
Communication Allowance	1,200	1,200	Not Applicable	Not Applicable

- Following the review exercise, the gross basic salary of the Disputant amounted to Rs 62,400. Moreover, as per the FSC Terms and Conditions of Employment, travelling allowance is not payable in respect of absences for a complete calendar month.
- The Respondent avers that it was/and is not in a position to comment on the progress of the police enquiry as it is conducted at the discretion of the CCID.

- While the Disputant was fully entitled to seek the intervention of the Ministry of Labour or that of the Commission for Conciliation and Mediation (CCM) under Section 64 (1) of the Employment Relations Act 2008, in respect of a representation from the Disputant that he had been suspended by the Respondent with a reduced salary (of the Ministry), the Respondent was not bound to hold a meeting between the Respondent's Chairman and/or CEO and the Disputant, as it is a matter of good practice to avoid communication between parties, whilst a police enquiry into the case is in progress.

- Following a letter sent by the Disputant to the Acting CEO of the Respondent requesting a reinstatement to his former position of Lead Examiner on the 13 December 2016, the Board at its meeting of 16 December 2016 considered the additional representations made by the Disputant. The Board authorised the Acting Chief Executive of the Respondent to hold discussions with the Disputant to reach an agreement for his reinstatement pending the outcome of the Police case. However, the Board decided that the Disputant's access to the central computer network would be restricted.

- Respondent has consistently given fair and equitable treatment to the Disputant's representations. At a meeting held with the Disputant on the 13th January 2017, the Ag CE informed the Disputant that the Board has agreed to lift the suspension subject to
 - restricted access to the central computer network and;
 - not being posted in a technical cluster.

However, the demotion would be maintained as a reinstatement to his former position of Lead Examiner was contingent upon the outcome of the police enquiry.

- On the 19th of January 2017 the Applicant informed the Respondent that he was agreeable to the conditions of the proposed reinstatement as Examiner and requested a delay to seek legal advice and to have same vetted by his Counsel. The Respondent granted the delay and on the 27th of January 2017, the Applicant knowingly and willingly signed the reinstatement agreement and resumed duty on Monday 30th of January 2017.
- Disputant had already been informed in the meeting with the Acting Chief Executive on the 13th of January 2017 and moreover, as per the terms of the reinstatement agreement, he ought to have been aware that he would not have been posted in the Insurance Cluster or other Technical Clusters but to the Administration and Enterprise Risk Cluster. Therefore, he cannot now claim ignorance of the same, especially since he had signed the agreement after having sought legal advice.
- The Respondent denies the Disputant's allegations that Management or its representatives had purportedly harassed the Disputant to remove his case before the CCM.
- At the meeting convened by the CCM on the 2nd of February 2017, the Respondent informed the CCM that:
 - the lifting of the suspension is a temporary measure pending the outcome of the police enquiry into his case;

- the Disputant had been reinstated with effect from 30th January 2017 to the position of Examiner and subject to the terms of the reinstatement agreement to which he had been agreeable at the time of signing;
- At the same meeting of the CCM, the Disputant, in his own admission, agreed that he had signed the agreement.
- In view of the network access restrictions which have been imposed on the Disputant, the Respondent has made all reasonable adjustments to ensure that the Disputant is equipped with the adequate resources to complete the tasks to which he has been assigned.
 - On the 8th February 2017, the Disputant was provided with a laptop by the Respondent;
 - Arrangements have also been made for the Disputant to be able to use the telephones located in a meeting room next to his workstation as telephones at the Respondent's premises are linked with the server and since it is an essential condition of the Disputant's reinstatement that he is not to be allowed to have access to internal network peripherals at his workstation.
- Respondent denies that any of its representatives threatened the Disputant with a second suspension.

- Respondent denies that its Head HR had allegedly requested the Disputant to avoid from coming to the office on Monday 20th February 2017 as there was a risk of suspension by the Board.
- It is the Respondent's stand that on Friday the 17th February 2017, the Disputant upon taking cognisance that a Board meeting was scheduled for Monday 20th February 2017, decided not to come to the office on Monday out of his own volition. He had informed the Head HR that he does not want to go through another taxing process of suspension again. Consequently, he returned the laptop and his access card to his immediate supervisor and also informed the latter that he will not be attending duty on Monday as there is risk that the Board may suspend him again.
- Disputant had not been informed of any Board decision held on Monday 20th February 2017, simply because his case had not been on the Board's agenda for that meeting. It can reasonably be inferred that the Disputant had been under the mistaken impression that his suspension had been on the Board's agenda at the 20th February 2017 meeting.
- The Respondent's HR Manager had contacted the Disputant on the 21st February 2017 to inform him that the Board did not discuss his case and that the Board meeting had been adjourned for the following week on Thursday 02 March 2017. The Disputant was requested to resume duty pending the decision of the Board. However, the Respondent denies that the HR Manager speculated on the outcome of the Board decision by telling the Disputant that the Board would most probably suspend him again.

- The imputation of failure to communicate the Board’s decision and/or laxity, following the Board meeting of 02 March 2017, cannot stand.
- The Respondent had requested the Staff Committee, a sub-committee, of the Board to look into the case. The Staff Committee considered the case on 21 March 2017. It was decided that the Disputant would be allowed to continue to work as per the terms of the signed reinstatement agreement.
- On 23 March 2017, the Disputant was informed by the Head HR, in the presence of the Manager of HR and a representative from the Legal Cluster, that the Board has decided that he would be allowed to continue to work as per the signed agreement. The Disputant was asked whether he wished to respond but he chose not to do so.
- It is erroneous for the Applicant to aver that he allegedly needs to wait another 5 years before becoming eligible for any internal promotion. The Respondent does not have any prescribed time period to hold internal promotion exercises. Even more so, since internal promotion exercises have only been launched recently in January 2017. Promotion exercises are needs driven and depend highly on organisational strategy and manning requirements.
- Respondent contends that:
 - the Disputant cannot deny the charges levelled against him as the charges have been proved against him following the evidence gathered from the digital forensic expert investigation;

- The Respondent cannot comment on the procedures and timeframes of the police enquiry which are currently being conducted. However, the Respondent confirmed that recently, in January 2017, the workstation of the Disputant had been sealed and taken in the custody of the Police Cybercrime Unit.
 - The Respondent is fully empowered as per the Section 3.3.1 of the FSC Policies and Procedures Manual to impose sanctions against the Disputant.
- In light of the above, it is the Respondent's case that it did not err in its decision to maintain the demotion of the Disputant. The Disputant had willingly and knowingly signed an agreement confirming his reinstatement subject to specific conditions. Therefore, this application before the Tribunal ought to be dismissed.

In his deposition before the Tribunal, Disputant referred to the letter dated 7th April 2015, regarding alleged breaches of discipline and acts of misconduct. On 13th April 2015, he forwarded his explanation to the Respondent, in which he denied any act of gross misconduct. On 23rd April 2015, he received a letter containing charges against him from Management after the latter rejected his explanation. Around the 25th May 2015, he was informed that the charges against him had been proved. The matter had eventually been referred to the police and he was told that everything would be back to normal should there be no case against him. On 26th May 2015, he appealed in writing to all the Board Members at the Respondent. On 22nd June 2015, he received a letter informing him of the Board's decision to

demote him from Lead Examiner to Examiner. He went on to explain the differences between his initial and current salaries and allowances. He faces a similar situation when it comes to responsibility and duty. He added that he has never been convened by the police regarding the case. In 2003, when he was called for interview regarding the post for Examiner, he was handed a copy of the “Financial Services Commission Terms and Conditions of Employment”, which did not refer to demotion. In 2004, a salary review took place and again no mention of demotion is to be found in the Code of Conduct. In 2009, there was a Circular pertaining to salary review but again, no mention of it. There was another review in 2013, which did not bring any change in the Terms and Conditions of Employment regarding Code of Conduct and Procedures. Disputant came to know about demotion for the first time when he was issued the suspension letter. According to him, it was only in 2016 that demotion has been introduced in the Terms and Condition of Employment. He had been on suspension for 20 months and on 13th December 2016, he asked to be reinstated to his position. On 13th January 2017, he was informed that the Board would consider removing the suspension. He had to give a statement to the police regarding what he calls the ‘BAI’ case while he was on suspension. On 13th January 2017, management decided to remove this suspension and following which he signed an agreement to that effect. On 23rd January 2017, he received another letter stating that while the suspension is being lifted, his reinstatement awaits the outcome of the police enquiry. The post he is now holding does not give him access to network connection. There was also a promotion exercise which he could not participate while on suspension.

Mrs Jayshree Guness, HR Executive at the Respondent deponed to the effect that an anonymous letter in the Respondent's envelope was addressed to 'Samedi Plus' and it came back to the Respondent as the wrong address was used. Anonymous letters were also sent to the 'ICAC' and the Equal Opportunities Commission. An investigation was carried out at the Respondent and the Chief Executive sought comments from the IT Cluster. One Mr Chutoorgoon, an IT Executive, was given the responsibility to lead that investigation. Tylers Information Security Experts were also requested to carry out an audit in the IT Department regarding the anonymous letter. The finding of the report is that "*an insider named Subratty Fakhrudin accessed the email account, rpusram@fscmauriti.us.org and deleted some emails on 20/02/2015.*" The witness added that Mr Pusram was off on that day. The Respondent asked explanations from both Mr Fakhrudin and Mr Pusram. Not being satisfied with their explanations, they were both called before a disciplinary committee. The Chairperson of that committee found that there was no doubt that the email account of Mr Pusram was accessed through Mr Subratty's account and that Mr Subratty manipulated and tampered with items contained in the box of Mr Pusram. The 2004 Policies and Procedures Manual was brought to the attention of the staff and at each subsequent review the Code of Conduct and the Policies and Procedures Manual are mentioned in the Terms and Conditions of employment. An Option Form of the terms and conditions of work is signed by the employees and copies of the Policies and Procedures Manual are made available upon request.

We will now deal with the various points put forward by Disputant in support of his case for reinstatement:-

Power to demote

Disputant challenged the Respondent's power to inflict a sanction of demotion as same was not made aware to him.

Provisions regarding disciplinary procedures are found in part X of the Code of Practice (4th schedule to the Act):-

“140. Management shall ensure that fair and effective arrangements exist for dealing with disciplinary matters...”

In *Neenoth v/s Rose Belle Sugar State* (1976 MR 2004), “Mr D’Unienville, for the Respondent, contended that it was legitimate for an employer to frame certain rules which then became part of the contract of employment....”. The Court agreed to counsel’s proposition. In *Ramkalawon v/s Index Ltee (PLM AZURE)* (SCJ No.66 of 2000), the Court looked for the consent of the employee “...the more so as the ‘employee’ never denied having received a copy of the ‘Rules and Regulations’ and remained silent when it was put to him in cross examination that he had to....in accordance with the condition of his contract of employment.” Again in *Food and Agricultural Research Council v/s Heerasing* (SCJ No. 104 of 2003), it was held: “Rules and Regulations become part of the contract by virtue of a clause ‘in the letter of appointment’ which provided that ‘during your employment, you will be required to conform to the ‘Rules and Regulations’ in force at the AREU.”

It is apposite here to refer to some of the extracts of Disputant’s cross examination after he denied having signed receipt of a Code of Conduct in 2004 and subsequently after maintaining that he could not remember:-

MR CHETTY, SC.: *Now, you have said whilst deponing on the last occasion that you have never signed an acknowledgement receipt for the Code of Conduct?*

MR SUBRATTY: *I have said I never signed the acknowledgement receipt, the one I produced to the Tribunal.*

MR CHETTY, SC.: *That was 2016?*

MR SUBRATTY: *That was the 2016 one.*

MR CHETTY, SC.: *Before that you have never signed?*

MR SUBRATTY: *No, I don't remember I have signed.*

MR CHETTY, SC.: *You don't remember?*

MR SUBRATTY: *No.*

MR CHETTY, SC.: *I am showing to you a document dated 16th March 2004. Have a look at this document.*

[Document shown to the Disputant]

Do you accept that this is your signature?

MR SUBRATTY: *Yes.*

MR CHETTY, SC.: *It is your signature?*

MR SUBRATTY: *Yes.*

MR CHETTY, SC.: *It is a declaration and it says,*

“Adherence to FSC Code of Conduct”?

MR SUBRATTY: *Yes.*

MR CHETTY, SC.: *And handwritten is your name, is that your handwriting?*

MR SUBRATTY: *Yes, it seems to be mine.*

MR CHETTY, SC.: *The date also is handwritten, is that your handwriting?*

MR SUBRATTY: *Yes.*

MR CHETTY, SC.: And you undertake to adhere to the FSC Code of Conduct that was in 2004?

MR SUBRATTY: Yes.

MR CHETTY, SC.: Do you have any objection that this document be produced?

MR SUBRATTY: No.

MR CHETTY, SC.: So, I beg leave to produce this document at this stage.

[Document produced and marked as Doc.T]

Do you agree that you did undertake to comply with the Code of Conduct 2004?

MR SUBRATTY: Yes.

MR CHETTY, SC.: And do you agree that there was a Code of Conduct dated 2004?

MR SUBRATTY: Yes.

MR CHETTY, SC.: And in fact, according to my instructions that Code of Conduct remains in force until 2016?

MR SUBRATTY: Yes.

MR CHETTY, SC.: I am going to show you an extract of that Code of Conduct, page 12. In fact, let me show you the whole of the Code of Conduct and I will refer you to page 12 in particular. Let me show you a copy of the Code of Conduct at the FSC and I will refer you more particularly to page 12.

[Document shown to the Disputant]

Can you turn to page 12?

MR SUBRATTY: Yes, already.

MR CHETTY, SC.: If you look at that section which is "INVESTIGATION, ENFORCEMENT AND IMPLEMENTATION", if you go to paragraph 2 (h)?

MR SUBRATTY: Yes.

MR CHETTY, SC.: It provides,

"Serious breaches, or ongoing minor breaches, may involve sanctions (in order of seriousness) which include:

(h) demotion from current position.”

Do you agree?

MR SUBRATTY: *Yes.*

MR CHETTY, SC.: *So, that was already in force in 2004?*

MR SUBRATTY: *Yes, but in the letter given to me by Management, actions were taken as per the Policies and Procedures Manual.”*

Having conceded signing the receipt of the Code of Conduct and agreeing that it forms part of the contract, Disputant changed his shoulder gun from Code of Conduct to Policies and Procedures Manual. Since no mention is made in the letter of charges regarding the Code of Conduct and which letter refers only to Policies and Procedures Manual, he claims that the employer had no power to inflict the demotion. On being shown the letter of charges, he agreed that he never objected to it referring to the Policies and Procedures Manual. The following extract from his cross examination shows unquestionably to what extent he must have been made aware of the existence of the Policies and Procedures Manual prior to 2016 although he kept denying it:-

MR CHETTY, SC.: *Now, prior to the review in 2016, there was a Policies and Procedures Manual in force at the FSC?*

MR SUBRATTY: *No.*

MR CHETTY, SC.: *There was no Policies and Procedures Manual ever in force at the FSC?*

MR SUBRATTY: *No.*

MR CHETTY, SC.: *This is your answer?*

MR SUBRATTY: *Yes.*

MR CHETTY, SC.: So, why is it then when you received your first letter, Document A and Document C for the convocation for the Disciplinary Committee, do you have any explanation as to why FSC would refer to sections of the Procedure Manual which does not exist?

MR SUBRATTY: I don't know.

MR CHETTY, SC.: You don't?

TRIBUNAL: But was it not the 2016?

MR CHETTY, SC.: No, he was before his Disciplinary Committee in 2015.

MR CHETTY, SC.: You have seen the Statement of Case of the FSC, the Respondent and at paragraph 45 (iii), FSC refers to Annex H which is the last document to that Statement of Case. You have had a look at that document and according to FSC this is the Policies and Procedures Manual then in force. So, your version would be that this document did not exist 2015?

MR SUBRATTY: Yes.”

It is to us beyond logic for the Disputant who has been in employment since the year 2003 to claim that he had never taken cognizance of the Code of Conduct and the Policies and Procedures Manual. We have seen how he contradicted himself during cross examination when he admitted to having signed a declaration entitled “Adherence to FSC Code of Conduct” as far back as 2004. We conclude that to all intents and purposes, the Code of Conduct is binding upon him.

Disciplinary Committee

It has been confirmed that the Chairperson of the disciplinary committee, Mrs Varuna Bunwaree, is related to the Human Resource Executive at the Respondent and who according to the Disputant was the main target of the whistle blowing letter. The latter retired from the Respondent in March 2015 and the disciplinary

committee took place in May 2015. Disputant is challenging the legality of the decision taken by the disciplinary committee in the circumstances.

The relevant provision of the Employment Rights Act 2008 applicable to the above issue is Section 38 (2) (4A) as amended by Act No.6 of 2013 and which reads:-

“The oral hearing referred to in subsection (4) shall be presided by a person who has not been involved in the investigation and who is able to make an independent decision”

The requisites are thus that the person presiding over the disciplinary hearing firstly should not have been in any manner whatsoever involved in the investigation which led to the institution of the same disciplinary committee and secondly be in a position to make a totally independent decision.

Save and except that such provision has been included in a Procedure or Collective Agreement, the employer is under no legal obligation in law to consult the employee or to secure the latter’s consent in choosing who should preside over a disciplinary hearing.

The prerogative to appoint the person who will preside over the disciplinary committee rests solely with the employer by virtue of its inherent power of management as *‘chef d’entreprise’* of its organisation.

Did the family relationship between the Chairperson of the disciplinary committee and the Human Resource Executive at the Respondent in the present case impact on the decision taking of the committee? We believe the Disputant had the onus to

come up with something more sustainable than a mere statement averring family relationship.

Email tampering

The Disputant has consistently denied having committed acts of gross misconduct and attempted to provide what we consider untenable explanations during cross examination with regard to the unauthorized access of the corporate mail box of Mr Pusram. Given the internal investigation carried out by the Respondent's IT team and the subsequent report of Tylers, which corroborates the initial findings of the Respondent's IT Team, the Disputant denial cannot stand. It is noteworthy to highlight the consistency in the findings of both IT experts parties to track the unauthorised operations:-

“I conclude that the steps formerly taken by the FSC Staff matches the results obtained from the tests conducted on Friday 27th March 2015. It can be clearly deduced by the logs that an insider named Mr Subratty Fakhrudin accessed the email account, rpusram@fscmauritius.org and deleted some emails on 20/02/2015.”

Furthermore, the Respondent convened the Disputant before the disciplinary committee as regard the unauthorized access to the corporate mail box of Mr Pusram. Disputant was legally assisted and the committee rejected his explanations. It retained the evidence of Mr Chutoorgoon and accepted the expertise of Tylers. The committee found that the Disputant had accessed the mail box of Mr Pusram and that he manipulated and tempered with items therein. To our mind, this could only be counter challenged by expert evidence.

La rétrogradation and Non bis in idem

We need to reproduce the letter addressed by Respondent on the 25th May 2015 following the disciplinary committee hearing to the Disputant:





4. You are hereby informed that you will not be allowed access to the FSC premises during this period.
5. You are required to ensure a proper handing over to your Supervising Officer prior to leaving the office.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Veena Moloye', is written over a horizontal line.

Veena Moloye
Head - Executive Office

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We note that the Respondent upon being made aware of the alleged wrong doing of the Disputant chose not to suspend the latter, a right which it has as '*chef d'entreprise*', and proceeded with instituting a disciplinary hearing. The charges against Disputant were proved before the committee. The Respondent decided on two actions simultaneously: the demotion and the suspension and which suspension is ostensibly in the nature of a *mise à pied*. Although a *mise à pied conservatoire* is not interpreted to be a sanction *per se* since its purpose is to continue paying an employee his basic salary pending the outcome of an enquiry and following which an employer is to start any sanction, we see that in the present case the suspension came after the disciplinary hearing which gives the *mise à pied un caractère de mise à pied disciplinaire* and it therefore amounts to a sanction. This is against the principle of double sanctions for a wrong doing (*Non bis in idem*). The Respondent has put the cart before the horse, i.e, it has sanctioned and

has decided simultaneously to demote and suspend awaiting a police enquiry which to all intents and purposes amounts to it envisaging further sanctioning if need be for the same wrong doing. It is our view that after initially demoting the Disputant without his consent and after the disciplinary committee had run its course, the Respondent acted beyond his power, not only when it imposed the demotion but when it added the suspension to it. Granted that the Disputant may not have been a star employee, but such abuse of power on the part of Respondent offends the fundamental principles of fair employment. However, Disputant having confirmed in writing to the acceptance of his demotion, we cannot go beyond such agreement. It is significant to note that in the Privy Council case of **Adamas Limited v Cheung [2011] UKPC 32**, their Lordships adopted the approach taken by the French Cour de Cassation in **Raquin v Trappiez, 8 Octobre 1987** (Soc. 8 Oct, 1987, Raquin et Trappiez, D. 1988. 57, note Y. Saint – Jours) and also in **Société Ronéo** and stated as follows:

“.....what matters for present purpose is the general principle under French law, and in this respect the Board prefers the principle stated in the later case, Raquin et Trappiez. More recent authority, again in the area of reduction of salary, also speaks in terms consistent with Raquin et Trappiez: see Société Ronéo (31 October 2000, No de pourvoi: 98-44988 98-45118) where the Cour de Cassation stated that modification of a contract of employment for whatever reason that might be, requires the consent of the employee.

*The same approach was taken in the recent case of **Somags Ltée v Guckhool R [2017] SCJ 36** where it was held that “....it would be procedurally wrong for an employer to decide, unilaterally, to modify a*

contract of employment and to impose same on an employee without having consulted with the latter and sought his consent.....”

The Supreme Court, both in the case of **Vacoas Transport Co Ltd v Pointu [1970] MR 35** and **Periag International Beverages Ltd [1983] MR 108** defined constructive dismissal as taking place “*where an employer unjustifiably demoted an employee or otherwise unilaterally varies his terms or conditions of employment to his disadvantage.*”

In ***Periag vs International Beverages Ltd (1983 MR 108)***,

“The appellant had entered a claim before the Industrial Court against his employer, the respondent, for severance allowance at the punitive rate together with 3 months’ wages in lieu of notice and wages in lieu of leave due and not taken.

In support of his claim, the appellant contended that he had been in the continuous employment of the respondent since February 1976 but that in January 1979 he had been demoted from his previous post of Chief Salesman Driver with basic salary at Rs 1,152 to a post of Salesman Driver with basic salary at Rs 589.

.....

It is clear to us that the Court of Appeal did also give thought to the situation that would have arisen if mere reservations (simple reserves) had been made on the part of an employee, if he still carried on in his job. In this situation, there would have been an assent by the employee to the

changed terms of his contract of employment and could not have been construed as a dismissal....” (Underlining is ours).

Disputant having agreed to his own demotion and his assent being confirmed by the very fact of resuming work in the demoted position, cannot now contest what he had willingly agreed to.

For all the reasons stated above, we are unable to intervene in Disputant’s favour.

The dispute is set aside.

SD Rashid Hossen

President

SD Vijay Kumar Mohit

Member

SD Abdool Feroze Acharauz
Member

SD Kevin C.Lukeeram
Member

20th December 2017