

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/ RN 64/16

Before

Indiren Sivaramen	Vice-President
Ramprakash Ramkissen	Member
Rabin Gungoo	Member
Triboohun Raj Gunnoo	Member

In the matter of:-

Mr Mohammad Reza Khan Mustun (Disputant)

And

Mauritius Institute of Training and Development (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”). Both parties were assisted by Counsel. The terms of reference read as follows:

“Whether I, working as instructor at the Mauritius Institute of Training and Development should be upgraded to the grade of Training Officer.”

The Disputant deposed before the Tribunal and he solemnly affirmed that the contents of his Statement of Case were true. He averred that there was an advertisement in the newspaper of a vacancy at the Respondent and mention was made of the post of Training Officer. He applied for the said post and an offer as “Supply Instructor”, that is, Instructor on a month to month basis was made to him. In March 2013, he was

recruited on the permanent and pensionable establishment of Respondent. He averred that in his field, that is, 'electrical installation and electronics' the output of an Instructor and Training Officer would be the same when they both deliver courses. The only difference would be the qualifications required for the relevant posts. He suggested that he is doing everything that is in the scheme of duties of Training Officers. He sent a letter to request that he be upgraded to the post of Training Officer and he was informed (by Doc A) that he has to apply when the post of Training Officer is advertised. He stated that he has "GCE 2 A level, HSC equivalent" and a degree in the relevant field from a recognised institution. When he joined Respondent, he had a diploma in electrical engineering and later after following part-time studies he was awarded a degree in electronic engineering. He produced copies of his certificates (Docs B to B3). He can now teach up to level 6, that is, at all levels being taught at the Respondent.

He accepted that there were indeed advertisements for the post of Training Officer after the letter he had sent to Management but stressed on the fact that the post was advertised on a contract basis and not on the permanent and pensionable establishment of the Respondent. He could not apply as he would lose all his privileges acquired whilst on establishment. Respondent then referred to an employee who had been promoted automatically in 2011. The latter was upgraded from Instructor to Training Officer after he had upgraded his qualification. He learned about same following the management meeting. He averred that he had a "great expectation" that after completing his degree, he would have been upgraded. He added that the Respondent must come up with a policy for the retirement of Training Officers. Currently, Instructors are doing the work of retired Training Officers.

He stated that he has nothing against Respondent but that this is unfair and that he feels his dignity has been eroded. He prayed that the Tribunal puts an end to the said unfairness.

In cross-examination, Mr Mustun agreed that the last case where an Instructor had been upgraded to Training Officer was the case of the Instructor in Rodrigues which has been referred to in his Statement of Case. He agreed that it was his choice not to apply for the post of Training Officer 'on contract'. He agreed that there are currently representations made by the trade union for management to address the claims of Instructors at Respondent. He suggested however that he relies more on the Tribunal. In re-examination, Mr Mustun stated that employment on contractual basis is different from employment on a probation period.

Mr Makhan, the President of the *Union of Staff of the Mauritius Institute of Training and Development*, then deponed before the Tribunal and he stated that he is an Acting Training Centre Manager. He has worked at the Respondent since 1995 and he deponed as to the institutions which existed prior to the setting up of the Respondent.

He also referred to Training Officers and to the then Instructors 'A' as well as Instructors 'B'. He suggested that additional Instructors were recruited for the National Trade Certificate Foundation in line with the prevocational project. He then averred that as from 2006-2007, Instructors were recruited to replace Training Officers. At the Respondent, some Instructors are required to train students at National Certificate Level 3, 4 and 5 and some Instructors are even delivering courses at diploma level. Mr Makhan stated that Instructors were recruited for the National Trade Certificate (NTC) Foundation, a course delivered at the then Industrial and Vocational Training Board (IVTB) and which is the equivalent of Form 3 in normal stream. He added that if a particular course with the same students is run by both a Training Officer and an Instructor, then they would both be doing the same job since it would be the same curriculum, workshops and so on. He stated that today some Instructors have higher and better qualifications than Training Officers.

Mr Makhan suggested that the Respondent should have over 250 Training Officers. He stated that over the last ten years some thirty Training Officers have left Respondent and that there has been no advertisement to replace them on a permanent and pensionable basis. Instructors recruited for the NTC Foundation are required to provide their services to Respondent against an allowance. He stated that the Respondent has to come up with a well defined structure and that currently it is very difficult for an employee at the Respondent to know exactly what is his or her next step within the organisation. He stated that the union has not been provided with the reasons why a few Instructors had been upgraded. The evidence they have is that one Instructor (from Rodrigues) had upgraded his qualifications and the latter was exceptionally upgraded to the grade of Training Officer. He concludes that if one upgrades one's qualifications, one then has the possibility to be upgraded from Instructor to Training Officer at the Respondent.

In cross-examination, Mr Makhan conceded that the advertisement when Disputant was recruited in 2009 was for both Training Officer and Instructor. The qualifications required for a Training Officer are higher than those required for an Instructor. The salary scale of a Training Officer is higher than that of an Instructor. He averred that Instructors are being requested to provide their services at a higher level and yet are not paid according to work at that level. He stated that apart from the specific cases referred to by Disputant where there would have been "upgrades", he did not have information on any other such occurrences. He conceded that as regards the organisational structure of the Respondent, there was a "processus enclenché" whereby the trade union was involved. In re-examination, Mr Makhan averred that the fields on the advertisement produced (copy marked Doc C) related to the National Certificate which according to him was equivalent to Form V level and upwards. He averred that

Instructors were recruited by the then IVTB for the National Trade Certificate Foundation level, equivalent to a Form 3 level.

Mr Lillardry, Instructor at Respondent, then deponed and he stated that he holds a degree in Information Technology. He applied for the post of Training Officer. The relevant advertisement referred to both Training Officer and Instructor. The letter of offer issued to him was for Instructor. In cross-examination, he agreed that the qualifications required for Training Officers were different from those for Instructors. He was called for an interview for the post of Instructor. He conceded that he has only two A levels (main level) and not three for his Higher School Certificate (HSC).

Mr Kaulesarsingh, another Instructor at Respondent then deponed and he stated that he had applied for a post of Training Officer on a contractual basis at Respondent. He was offered the job but he refused since the job was not on establishment. He could not accept the post on a contractual basis because of the uncertainty associated with the renewal of a contract.

In cross-examination, Mr Kaulesarsingh accepted that he had been recruited on contract initially. He stated that a particular training course may be discontinued or changed because only a small number of students have registered for that course.

Mr Deerpaul, another Instructor deponed and he stated that he is an Instructor in the field of Aluminium and UPVC Joinery. He stated that there is no specific degree course in the said field. He thus suggested that even Training Officers would not hold a degree in that particular field. In cross-examination, he stated that he holds an equivalent certificate to the Higher School Certificate since he holds a "brevet technicien".

The Acting Deputy Director of Respondent, Mr Maudarbocus, then deponed before the Tribunal. He solemnly affirmed as to the correctness of the averments made in the Statement of Reply of the Respondent. He stated that as per the policy of Respondent, there is no automatic upgrading. When there is a vacancy, there is an advertisement, then an interview is carried out and a selection is made. He stated that in 2002, the IVTB had set up a new training centre to offer training for professional drivers. An advertisement was published in the press for Training Officers. There was however no candidate holding a degree. The Respondent had to start the centre at that time and thus the Board decided to nominate the best candidates to that post. They were offered the post based on the scarcity at that time. Mr Maudarbocus stated that there was another case involving an Instructor in Rodrigues in the field of welding and metal fabrication. There was no relevant degree course available in Rodrigues and the Instructor had upgraded his qualification by obtaining an Advanced Technical Diploma in Mechanical Engineering. The Instructor made an application for an upgrade which was turned down. One year later, the Instructor renewed his application since he had

not been able to find any degree course in Mechanical Engineering. The Board this time exceptionally approved that he be upgraded as Training Officer because of scarcity in that field and the specificity of Rodrigues. Apart from those cases, there has been no automatic upgrading at Respondent.

Mr Maudarbocus stated that the policy at Respondent is to offer first a contract of usually two years to someone. The reason is that Respondent is not aware how the employee will perform and adapt to work at the Respondent. After two years of contract, if there is a vacancy, for example, in the case of a Training Officer, and the Training Officer is needed and his performance is satisfactory, the officer is offered the job on the permanent and pensionable establishment. There is no automatic upgrading to the post of Training Officer and Disputant can only apply for the post when the post is advertised. He also stated that currently the organizational structure of Respondent is being looked into and the Board is meeting with the unions to discuss and finalize the structure. Every employee of Respondent will be concerned with the organization structure.

In cross-examination, he averred that if the conditions he mentioned for appointment on the permanent establishment are met, then there is no need for an application and the person is automatically appointed on the permanent and pensionable establishment after working two years on contract. This policy only dates back to 2012 according to Mr Maudarbocus. He averred that as from 2012 more than 150 employees have been appointed on the permanent and pensionable establishment after having served on contract. He did not have the exact figures with him but stated that there were about 180 Instructors and 150 Training Officers at the Respondent. He did not have the figures as regards the exact numbers of Training Officers and Instructors that are currently needed at the Respondent.

Mr Maudarbocus stated that currently the Disputant is not eligible for appointment on a permanent and pensionable basis since there is no vacancy in the field of electronics engineering. However he had the qualifications required for a Training Officer in that particular field. In the absence of relevant figures with him, he did not agree that there was a need for Training Officers in the field of electronics engineering. He stated that an Instructor can deliver courses up to level 5 whilst a Training Officer will teach up to level 6 courses. He was categorical that Disputant has not delivered courses at level 6 even though there may be Instructors who deliver courses at level 6. However, the Instructors are then paid an allowance for doing additional duties. He did not agree that Instructors and Training Officers are doing exactly the same job at the Respondent. He referred to duties such as preparation works before training, research required, technology used and other associated duties and averred that Instructors and Training Officers are not doing the same duties. He added that the duties are different as specified in the schemes of service.

Mr Maudarbocus stated that in the case of work in Rodrigues specific considerations apply such as the overall package including disturbance allowance which must otherwise be paid to an employee residing in Mauritius. He stated that as regards 'professional driving', the Respondent had advertised many times over the years and they have never found someone with a degree in 'heavy vehicle driving'.

Mr Maudarbocus stated that if a post is essential for the Respondent, the Board may decide to advertise the post directly as a permanent position if it is known that Respondent will not get people to work on contract for that post. Respondent has recruited Training Officers on contract during the past five years. He conceded that more Training Officers have left in one way or the other over the same period. He stated that there were vacancies for Training Officers at the Respondent and that the last recruitment for Training Officers was in November last year. Mr Maudarbocus agreed that for some time, Respondent has been using Instructors who are qualified to do additional duties. The Instructors are then paid an allowance for additional duties.

Mr Maudarbocus did not however agree that Instructors were carrying out the duties of Training Officers and were just being paid an allowance for doing so. He stated that to teach diploma courses one needs to have a degree in the relevant field and that in such cases Respondent is recruiting people. However, for lower levels, that is, levels 2, 3, 4 and 5 Instructors are being paid an additional allowance to do additional duties. He stated that this was so because, as stated by Mr Makhan, the Instructors had been recruited initially for the NTC Foundation. He stated that there is no promotion at the Respondent and that each post has its own requirement. Anyone who is eligible for a post can apply for the post. He stated that there are many other duties apart from delivering training listed in the scheme of duties and that even delivering training would not involve the same amount and nature of work for a Training Officer as compared to an Instructor.

Mr Maudarbocus stressed on current discussions being held with the unions and the fact that even the unions are proposing different things in relation to Instructors and Training Officers. He added that *"we cannot advertise something which is being discussed now and tomorrow we find ourselves in a situation where we have different people and we don't know where to situate them. This is the main issue. We are conscious about this problem but once we finalise, I hope so, it is my wish that we finalise this within the next month, next 2 months and we advertise."*

The Tribunal has examined all the evidence on record including the submissions of both Counsel. The Disputant has throughout used terms like "upgrading" or "upgrade". Mr Maudarbocus maintained that as per the policy at Respondent, there is no automatic upgrading at the Respondent. The Disputant relies on the case of an Instructor in Rodrigues who was upgraded after he had upgraded his qualifications and the case of

three Instructors from the drivers training centre who had also been upgraded. These “upgrades” occurred in 2002 and 2011 respectively. The Tribunal needs to consider whether the Disputant has established that he has a legitimate expectation to be upgraded too after he has upgraded his qualifications.

The Supreme Court has in the case of **Rosemond Laval Marvin and ors v MRA 2012 SCJ 438** considered the doctrine of “legitimate expectation” and had the following to say:

*“[23] Indeed, one of the conditions for a successful judicial review application based on legitimate expectation is that the representation of policy given by the public authority should be clear, unambiguous and devoid of any relevant qualification: see **R v North and East Devon Health Authority, ex parte Coughlan (2001) QB 213; [2000] 2 WLR 622**. The fact that the representation is made in the field of revenue law as opposed to other areas of the law makes no difference for an application of the principle: see **R v Inland Commissioners ex parte MFK Underwriting Agents Ltd (1991) WLR 1545**.*

*[24] The doctrine of legitimate expectation may be traced in English law to the case of **Schmidt v Secretary of State for Home Affairs [1969] 2 Ch. 149**. Two students of scientology were denied a renewal of their permission to stay in the United Kingdom to complete their studies at the Scientology College. Lord Denning commented that there was no duty on the Home Secretary to grant them a renewal. However, they had a legitimate expectation to stay until their visa expired. That could not be revoked without giving the two students a hearing. From that decision flows the proposition that an expectation of a procedure or benefit, arising from a promise or practice made by a public body, may be protected by law. A legitimate expectation may arise as a matter of procedure or as a matter of substance in a given situation, referred to as a procedural legitimate expectation or substantive legitimate expectation.*

*[25] In **R v North and East Devon Health Authority ex p Coughlan[supra]**, the residents of a nursing home were told that it would be their ‘home for life’. Subsequently, the Authority decided to withhold that right. It was held that it could not do so without giving them a hearing. This could be categorized as a case of procedural legitimate expectation.*

*[26] In **R v Inland Revenue Commissioners ex p Unilever [1996] COD 421**, the Court of Appeal found that the Inland Revenue should not be allowed to go back upon a past practice of allowing Unilever to file late tax returns which stretched back twenty years. The sudden enforcement of the strict legal rules on time for filing represented an abuse of power. This may be categorized as a substantive legitimate expectation.*

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*[30] **R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61** is a decision of the House of Lords on legitimate expectations, recently given. The decision endorses the principle that for a promise to be legitimate and successful against a public authority, the promise should be clearly and unambiguously held out. The majority decision took the view that the United Kingdom Government had*

*not made such a promise that the islanders would be returned for resettlement. On the application of the principle, see also **R (On the application of Grimsby Institute of Further and Higher Education) v Chief Executive of Skills Funding (2010) EWHC 2134.***

....

*In **R v Ministry of Defence ex p Walker [2000] 1 WLR 806**, the House of Lords emphasized that a person, seeking to rely upon an expectation that a policy will not be changed retrospectively, must have been personally aware of the terms of the policy. In this case, the officers were well aware of the fact that the policy was being systematically given effect to until they hit upon the notice in early 2008 that they had to sit for an examination on 22 March 2008 when they sought an injunction for the purpose of vindicating their rights ...”.*

Thus, for Disputant to have any legitimate expectation to be upgraded, any alleged policy of ‘upgrade’ following the upgrading of one’s qualifications must have been given effect systematically over a long period of time. The policy must have been applied in a clear and unambiguous manner and devoid of any relevant qualification. We do not have such conditions in the present matter and instead we have two isolated sets of circumstances which occurred very far apart in time in 2002 and 2011. Unrebutted evidence has been adduced to show the special circumstances of the two sets of cases involving, in the first case, in 2002 the setting up of a centre by the then IVTB to provide training for professional drivers at a time where there was a scarcity or no persons at all with a degree in ‘heavy vehicle driving’. In 2011, there was yet another special situation in relation to the field of “welding and metal fabrication” in Rodrigues. The evidence of Mr Maudarbocus on this issue including the specificity of Rodrigues from where the training was to be given, the scarcity in that field in Rodrigues at the material time and considerations such as disturbance allowance which might otherwise have been applicable have not been challenged. The Board took decisions based on very specific considerations and we are not prepared to find that the Board had created a legitimate expectation for Instructors generally to be upgraded on upgrading their qualifications.

Disputant has averred that with his new qualification, he can teach up to level 6. The Tribunal is however not satisfied that he is actually delivering courses at level 6. It is undisputed that if there are indeed Instructors delivering courses at diploma level, not all Instructors are delivering at that level. Mr Maudarbocus was categorical that Disputant has not delivered courses at level 6. It is apposite to note that even in his curriculum vitae annexed as Annex D to his Statement of Case, the Disputant never states that he is actually delivering courses at level 6 though he states that he is delivering courses from NC3 to NC4 levels. Mr Maudarbocus stated that the amount of research, technology used and other associated duties related to delivering a course at diploma

level are different from those required at lower levels. There is indeed evidence that Instructors are performing additional duties in that they are teaching at higher levels than they were supposed to initially. They are then being paid an allowance (which Disputant did not refer to at all in his Statement of Case just like the advertisement prior to Disputant's recruitment where Disputant refrained from mentioning in evidence that it referred to both Training Officer and Instructor) for these additional duties. However, there is insufficient evidence to show that Disputant is performing work of equal value to that of a Training Officer.

Since Disputant is relying, among others, on the principle of equal remuneration for work of equal value, one would have expected the latter to come forward with detailed evidence to satisfy the Tribunal that he is indeed doing work of equal value as a Training Officer. This would require a proper job evaluation exercise.

Reference has been made by Counsel for Disputant to the case of **E.Cesar And C.W.A, RN 785**. We fully endorse the observation made in **E.Cesar (above)** and which we reproduce below:

*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 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**).*

Counsel for Disputant suggested in his submissions that Disputant should be upgraded because there has been an abuse of powers on the part of management. He relied on five limbs in his submissions to suggest this alleged abuse of powers. The Tribunal may no doubt intervene in relation to matters regarding appointment and promotion of employees where there is an abuse of powers on the part of management. However, the Tribunal has considered these limbs and do not find any reason why, even if any or all of these limbs are true, Disputant should be automatically **upgraded** (whether at the expense of another employee or not) to the grade of Training Officer. There is insufficient evidence before us to show that Disputant is performing work of equal value to that of a Training Officer. There is also no evidence whatsoever that there is scarcity in the field of 'electrical installation and electronics'.

More importantly, this is a case where there are currently discussions between the unions and management with a view to coming up with a new organizational structure which will ideally help the organization fulfill its obligations and goals and at the same time provide the necessary motivation and drive to the hundreds of employees at the Respondent. The current structure at Respondent, where we understand that there is currently no promotion, is being addressed in view of suggestions made by the unions and which have been mentioned by Mr Maudarbocus. The latter accepted following a

question from Counsel for Disputant that the Respondent is also governed by the recommendations of the Pay Research Bureau (PRB). Mr Makhan also referred to recommendations of the PRB in relation to the Respondent. The Tribunal will refer to what the PRB wrote in his 2016 Report at paragraph 37.4:

“37.4 In the context of this review exercise, requests were made by both Management and the staff side for the creation and restyling of a number of grades. Management also informed that the new organisation structure of the MITD has recently been finalised by the Board. However, the profiles for the new grades requested were not submitted to the Bureau for grading and for inclusion in this Report. Positions pertaining to this new structure would, therefore, be graded by the Bureau whenever requested, on an ad hoc basis.”

The Tribunal will not linger over the reasons as to why the new structure has not yet been finalized despite what appears in the 2016 PRB Report. What is more important to the parties is the way forward. The Tribunal is certainly not here to create more problems when trying to find a solution in one particular case. The Tribunal has always been cautious not to intervene unnecessarily in a matter where there are ongoing discussions between management and relevant trade unions, as is the case in the present matter as admitted by all parties before us, the more so where the goal is to arrive at a new organizational structure for the organization. The Tribunal has to bear in mind the principles enunciated in section 97 of the Act which includes *“the interests of the persons immediately concerned and the community as a whole, principles of natural justice and the principles and best practices of good employment relations.”*

For all the reasons given above, the Tribunal finds that the Disputant has failed to show on a balance of probabilities that he should be upgraded to the grade of Training Officer. However, the present matter has revealed the need and hopefully the true willingness of all parties to embrace a change in the organizational structure of the Respondent for the betterment of the organization as a whole, promotion of good employment relations, and for the highest standards of training and development. We will end by quoting from the often quoted award of **Mrs D.C.Y.P And The Sun Casinos Ltd, RN 202**. Though that case pertained to a promotion, yet we feel that the principles mentioned therein will apply in the present matter. The Permanent Arbitration Tribunal, as it was then named, stated the following:

“There is no doubt that employers 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.

Whenever, as in the above case, officers are recruited and employed to work, they are entitled to expect a normal reward for their good work and acquired experience, and this necessarily includes access to promotion upon occasion arising.

Unless such a basic concept of employer/employee relations is present in modern enterprises, industrial disputes and bad blood are bound to be the order of the day.”

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

(SD) Indiren Sivaramen

Vice-President

(SD) Ramprakash Ramkissen

Member

(SD) Rabin Gungoo

Member

(SD) Triboohun Raj Gunnoo

Member

7 April 2017