

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/ RN 95/18 to ERT/RN 99/18

Before

Indiren Sivaramen	Vice-President
Abdool Kader Lotun	Member
Rabin Gungoo	Member
Ghianeswar Gokhool	Member

In the matter of:-

Mr Andre Herold Vernis (Disputant No. 1)

And

Cargo Handling Corporation Limited (Respondent)

Mr Ricardo Desire Donny Bot (Disputant No. 2)

And

Cargo Handling Corporation Limited (Respondent)

Mr Paul Rex Alexander Allaghen (Disputant No. 3)

And

Cargo Handling Corporation Limited (Respondent)

Mr Christian Joefferer Chung Koo Yuk (Disputant No. 4)

And

Cargo Handling Corporation Limited (Respondent)

Mr Sameer Enayate Mooradun (Disputant No. 5)

And

Cargo Handling Corporation Limited (Respondent)

I.P.O: (1) Port-Louis Maritime Employees Association (Co-Respondent No. 1)

(2) Mr Elisa Lee Valerio (Co-Respondent No. 2)

(3) Mr Rivet Jean Giani Carletto (Co-Respondent No. 3)

(4) Mr Petronille Louis Steeven (Co-Respondent No. 4)

(5) Mr Chetty Norani (Co-Respondent No. 5)

(6) Mr Bamma Vishal Singh (Co-Respondent No. 6)

(7) Mr Joly Hensley Michael (Co-Respondent No. 7)

(8) Mr Marie Thierry Prisley (Co-Respondent No. 8)

(9) Mr Francois Michael Joe (Co-Respondent No. 9)

(10) Mr Perrine Mario (Co-Respondent No. 10)

The above cases have 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”). All the cases were consolidated following a motion made by Counsel for Disputants and to which there was no objection. Co-Respondents were then joined as parties in the above cases. All the parties were assisted by Counsel. The terms of reference are similar (except for the names of the Disputants) in all the cases and read as follows:

“Whether I, [...], holding the post of ‘Winchman’ and carrying a longer period of service at the company should be given priority on the seniority list for the post of ‘Winchman’ to

be promoted to the post of 'Senior Winchman' over the employees who hold the post of 'Winchman' with a lesser period of service and who previously held the post of 'Stevedore'."

Disputant No. 1, a Winchman, deposed before the Tribunal and he identified and produced a copy of a seniority list for Winchman (Doc A) where the Disputants were ranked from 12th to 16th. The Co-Respondents were ranked from 3rd to 11th on the same list. He stated that the Disputants were "Opérateurs" before being appointed Winchmen. He stated that there was a notice from the Respondent that the company was recruiting Winchmen and he then applied for the said post. There was an interview and he was selected and followed a training with other successful colleagues. He accepted that moving from Operator to Winchman is not a promotional route. The Co-Respondents Nos. 2 to 10 were previously Stevedores and they too applied to become Winchmen. He averred that for them too it was not a promotional route. He stated that all Disputants and Co-Respondents Nos. 2 to 10 were appointed on the same date, that is, on 8 December 2008 as Winchmen. He then gave the dates of entry of the Disputants and the Co-Respondents Nos. 2 to 10 in the company (as per "D.O.E/ Casual Date" on Doc A). He stated that the Disputants joined the Respondent well before Co-Respondents Nos. 2-10. He stated that even for appointment to the last grade before Winchman, the Disputants joined their last grade before the Co-Respondents Nos. 2-10 joined theirs. At another sitting, the dates of entry for Disputant No. 5 and Co-Respondent No. 2 were stated to be as per Doc C (there being no objection to same).

Disputant No. 1 stated that the Disputants are not agreeable with the seniority list as per Doc A and that he has a longer length of service than Co-Respondents Nos. 2-10. He identified and produced a copy of guidelines published by Respondent on 4 December 2013 (Doc B). He averred that as per the said guidelines, the dates of entry in the company should be considered in this particular case. He stated that the Respondent has not applied the guidelines. He prayed that the seniority list be amended and that the Disputants be ranked as from the 3rd to 7th position on the said list.

In cross-examination, Disputant No. 1 agreed that before 2013, a Stevedore would first be appointed Winchman and then Foreman Stevedore. After 2013, there were changes and Winchman had, from then on, one route whilst Stevedore had another route. He did not agree however that prior to 2013, it was a 'promotion' to move from Stevedore to Winchman. He agreed that there was a shortage of Winchmen and management decided to open the application to become Winchmen to other categories of workers including Plant Operators. The notice was for Trainee Winchman and it was provided therein that priority would be given to Stevedores. He however suggested that once they were appointed Winchmen, they all became Winchmen together. He agreed that the guidelines he had referred to came into effect as from 2013 and thus could not apply

prior to that period. He agreed that in 2015 and 2017 there were two promotion exercises which were based on the seniority list which is being challenged today. He stated that he did not challenge the two promotion exercises because the workers who were then appointed were his seniors.

Disputant No. 1 added that he did not complain initially as he already knew the date he was appointed and his ranking. It was when he learned about the list on or about the end of 2016 that he complained. He stated in re-examination that he is not aware of any other seniority list before the list *in lite*.

Mr Seegoolam, Assistant HR Manager, then deponed on behalf of the Respondent and he stated that previously there were Stevedores and 'Specialized Deck Stevedores'. Stevedores work on ships and they were promoted to become 'Specialized Deck Stevedores'. The 'Specialized Deck Stevedores' are now referred to as Winchmen. He added that it was a practice at the Respondent for Stevedores to be considered for promotion as Winchmen. He averred that moving from Stevedore to become Winchman was considered as a promotional route at the Respondent. He added that it was a promotion which came with all relevant salary benefits. He stated that (prior to 2013) there was no grade of Learner Winchman or Trainee Winchman as such and that the persons recruited followed an 'on the job' training. On successful completion of the training, the workers were appointed Winchmen. In 2017, there was a shortage of Winchmen and management had to 'open the door to holders of other posts'. He explained that the Co-Respondents have been ranked before the Disputants since they were all appointed Winchmen on the same date but the Co-Respondents were given priority as former Stevedores. The Co-Respondents kept their seniority ranking. He stated that moving from Plant Operator to Winchman was not a promotional route. He suggested that the Co-Respondents had obtained a promotion automatically whereas the Disputants did not become Winchmen through promotion.

Mr Seegoolam stated that the guidelines made in 2013 for determining seniority position did not take effect prior to 4 December 2013 and thus could not affect the seniority list. He stated that in 2015 and 2017 there were two promotion exercises whereby some Winchmen were promoted Senior Winchmen. He stated that in 2015 there was no challenge received whilst in 2017 when the promotion was finalized, Disputant No. 1 came to the office of HR and made representations. Mr Seegoolam suggested that the seniority list for Winchmen is in order.

In cross-examination, Mr Seegoolam did not agree that the said seniority list was created only in 2013 but added that as there were going to be promotions, the list was updated. He was questioned in relation to averments in the Second Amended Statement of Case of the Respondent. He agreed that all the workers, irrespective of being Stevedores, willing to be trained as 'Trainee Winchman' as per the notice at Doc

E had to make an application. Mr Seegoolam stated that the guidelines which were issued in 2013 were in fact guidelines which already existed at the Respondent and which were only 'officialised' because of promotions which were to be carried out in 2014. He then conceded that the 'guidelines' were thus the same guidelines available to arrive at any initial seniority list for Winchmen. However, he insisted that the only exception to the guidelines was in the case of 'Winchman' where workers who were formerly Stevedores were given priority. He also stated that he will leave it to the Tribunal to decide if the list needs to be varied since the guidelines are presently being challenged in the company. Mr Seegoolam conceded that when management agreed with the union to come up with the guidelines in 2013, the said union did not have sole recognition yet. There were then four other recognised trade unions in the company. These unions were excluded from the discussions leading to the adoption of the guidelines in 2013. He stated that the 2013 guidelines were applied to the new entrants at the Respondent and were not applied to those who joined the Respondent before 4 December 2013.

Co-Respondent No. 10 then deponed before the Tribunal and he swore as to the truthfulness of the averments made in his amended Statement of Case. He stated that Stevedores work on ships whilst Plant Operators work on land. His promotional route has always been from Stevedore to Winchman.

The Tribunal has examined all the evidence on record including the submissions of all counsel. When the notice dated 19 March 2007 for Trainee Winchman (Doc E) was issued, Disputant, who was a Plant Operator, applied for the said opportunity. There was an interview and he was selected and he followed a training together with his other colleagues. He then became Trainee Winchman and eventually Winchman. The Co-Respondents, unlike the Disputants, were formerly Stevedores. In the said notice (Doc E), it was specifically provided that "*PRIORITE SERA DONNER (sic) AUX STEVEDORES.*" Evidence has also been adduced of notes of a meeting held on 4 May 2007 between management and Port Louis Harbour Dock Workers Union, the trade union which was then representing the relevant workers, whereby the union stated that priority for Learner Winchman should be given to Stevedores (as per Doc F).

It is not disputed that previously to become Winchman, one had to be a Stevedore and this had always been the case. However, Disputant No. 1 did not agree that to move from Stevedore to become Winchman was a promotion. What is more important however is that it is agreed that in 2007 there was a shortage of Winchmen and an invitation was then made to other categories of workers also to apply (Doc E). There was however a condition that priority would be given to Stevedores. Disputant No. 1 stated that priority was only to become Winchman but that once the appointment was done, then all appointees became Winchmen together. They may indeed become Winchmen on the same day or at the same time but yet this does not preclude a ranking

order among appointed Winchmen. The priority to be given to Stevedores was made known to one and all in the notice (Doc E) and was supported by the then relevant recognized trade union as is clear from Doc F. Also, this priority to be given to Stevedores is not challenged by the Disputants. On this aspect, the Tribunal bears in mind the unchallenged evidence on record that until this notice in 2007, it was always the case that someone had to be a Stevedore to become Winchman. Based on the evidence on record, the Tribunal finds that the grade of Stevedore and Winchman was indeed considered as a promotional route the more so that from Winchman, one could (at the relevant time) be appointed Foreman Stevedore. The Disputants, on the other hand, seems to rely on the basis that for a promotional route there can be no selection exercise proper. This is not necessarily the case and a promotion can, depending on the particular circumstances, be made on the basis of selection or through 'ordinary promotion' which would entail mainly seniority and merit.

The version of the Respondent can be found in the Second Amended Statement of Case of Respondent and more particularly at paragraphs 8(ii) to 8(viii) and 12. These read as follows:

8. (ii) At the material time that is in 2007, the promotional route which prevailed, was that stevedores were (sic) promoted to the post of "winchman" and from "winchman" they were promoted to the post of "foreman stevedore";

(iii) Meanwhile, in order to avoid an acute shortage of "winchman", the invitation for application to the post of "Trainee/Learner Winchman" was extended to employees other than stevedores, that is from the non-promotional route, with a proviso that priority for appointment to the post of "Trainee/Learner Winchman" would be given to stevedores;

(iv) the decision to give priority to stevedores for the appointment to the post of "Trainee/Learner Winchman" was further confirmed following an agreement reached between the Respondent and Port-Louis Harbour and Dock Workers Union (PLHDWU) vide Notes of Meeting dated 04 May 2007 (Annex D of the second amended statement of case of the Disputant), the then union which represented the grade of "Winchman" at that time;

(v) the Co-Respondents Nos 2 to 10 who were stevedores at the material time, were given priority over all other employees who applied to the post of "Trainee/Learner Winchman" and upon their appointment, they ranked higher on the seniority list which existed at the time;

(vi) With the Guidelines/Policies dated 4 December 2013, those employees including the Co-Respondents Nos 2 to 10, who were given priority as per the agreement reached with the PLHDWU, continued to maintain their seniority position as per the

previous seniority list being given that they were within the promotional route which existed at the time;

(vii) Being given that the Co-Respondents Nos 2 to 10 have been stevedores and were within the promotional route, when they were appointed to the post of “winchman” though on the same date as the Disputants, they already ranked higher than the Disputants;

(viii) with the coming of the Guidelines/Policies of 04 December 2013, the Co-Respondents Nos 2 to 10 preserved their ranking on the seniority list and were senior to the Disputants;

12. (...) The list of April 2019 which sets out the correct and exact ranking of the Disputants for promotion to the post of “Senior Winchman”, has been compiled and circulated by the Respondent in April 2019. The said list takes into consideration the seniority position held by the Co-Respondents Nos 2 to 10 prior to the adoption of the guidelines/policies of 2013 and has been issued following the agreement reached with the PLMEA, in all fairness to those who held the post of stevedores and who had been given priority over all other employees and without thwarting their rights. The promotion is being carried based on the seniority list already in force.

The fact that the Respondent avers at paragraph 3(iii) of his Second Amended Statement of Case that there was “another seniority list” that was established in 2014 by the Respondent for promotion from Winchman to Senior Winchman (underlining is ours) is not necessarily in contradiction with the above. Mr Seegoolam denied categorically that Doc A was created only in 2013. In fact, evidence has been adduced by the Respondent that the list was only updated because of promotion exercises which were forthcoming. This is in line with paragraph 3(ii) of the Second Amended Statement of Case of the Respondent which provides that in 2010, there was a seniority list established by the Respondent for promotion from Winchman to Foreman Stevedore. Also, even the Disputants acknowledge at paragraph 9 of their second Amended Statement of Case that Annex A is the latest seniority list issued by the Respondent but which they contend is the same list that has been the subject matter of the labour dispute but which list has been amended from time to time over the past months to reflect changes in the list in the light of those Winchmen who have been promoted or have retired since the dispute arose. It is worth noting that Doc A is dated 1 April 2019.

The Disputants had the burden to show that they should be given priority on the seniority list for the post of Winchman to be promoted to the post of Senior Winchman over the Co-Respondents. If we accept the ‘rectification’ brought to the date of entry of Co-Respondent No. 2 in Doc C (to which there was no objection), the latter will have a longer period of service as compared to Disputants Nos. 2 and 5. In any event, there is no evidence before us, which may suggest on a balance of probabilities that the

Disputants ought to be given priority on the seniority list for the post of Winchman to be promoted to the post of Senior Winchman (underlining is ours) over the Co-Respondents. On the other hand, the evidence suggests that the contrary is more plausible. Indeed, Plant Operator to Winchman was not a promotional route whilst previously one had to be a Stevedore to become a Winchman and it was already provided in Doc E that priority will be given to Stevedores for Trainee Winchman.

The Tribunal finds that it was not unreasonable for the 'Stevedores' eventually appointed Winchmen following the notice at Doc E to be considered as ranking higher among other Winchmen appointed on the very same day but coming from other grades (who would not normally have been entitled to be considered for the post of Winchman).

It is also worth noting what Co-Respondent No. 10, a former Stevedore, stated, that is, that Stevedores work on ships whilst Plant Operators work on land (shore). He stressed that his line of promotion since he started working was to become Winchman.

The Disputants relied on the 2013 guidelines (Doc B) but these guidelines came much after the 'appointment' of the Disputants and Co-Respondents Nos. 2 to 10 as Winchmen. These guidelines cannot, in the absence of clear indications to the contrary, vary the relative seniority of the workers as it existed prior to the adoption of the said guidelines. Even though these guidelines may have existed in some other form within the Respondent before their formalization in 2013, the Tribunal is not satisfied that this would have affected the ranking of the parties before us as Winchmen when the Disputants would not have been able to apply for the post of Winchmen save for Doc E which itself clearly provided that Stevedores would be given priority.

The Tribunal finds that the Disputants have failed to prove on a balance of probabilities that they should be given priority on the seniority list for the post of Winchman to be promoted to the post of Senior Winchman over Co-Respondents No. 2 to 10. For all the reasons given above, the dispute as laid down in the terms of reference before us is set aside.

SD Indiren Sivaramen

Vice-President

SD Abdool Kader Lotun

Member

SD Rabin Gungoo

Member

SD Ghianeswar Gokhool

Member

30 October 2019