

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/RN 45/19

Before

Rashid Hossen	-	President
Raffick Hossenbaccus	-	Member
Rabin Gungoo	-	Member
Parmeshwar Burosee	-	Member

In the matter of:-

ERT/RN 45 /19

Mr Mungul Mahendra Kumar (Disputant)

And

**The State of Mauritius as represented by
Mauritius Prison Service** (Respondent)

On the 12th of April 2019, the President of the Commission for Conciliation & Mediation referred a labour dispute to the Tribunal with regard to Mr Mungul Mahendra Kumar and the dispute was referred as between the said Mr Mungul Mahendra Kumar and the Commissioner of Prisons under Section 70(3) of the Employment Relations Act 2008 with the following Terms of Reference:

“Whether I, Mr Mungul Mahendra Kumar, should have been promoted to the grade of Principal Prison Officer during the last promotion exercise of Prison Officers/Senior Prison Officers/Lead Prison Officers to Principal Prison Officer held on 03 April 2019”.

When the matter was called for Arbitration Hearing on the 7th of May 2019, the Disputant, through his Negotiator withdrew the matter before the Tribunal on the ground that the wrong party had been put into cause as Respondent. The dispute was accordingly set aside.

On the same day, the President of the Commission for Conciliation & Mediation referred the present dispute and this time inserting the *The State of Mauritius as represented by Mauritius Prison Service* as Respondent with regard to the same Disputant and Terms of Reference as stated above. We will have more to say on this at the end of this Award.

For a full comprehension of the nature of the present dispute, we reproduce Disputant's Statement of Case as well as the reply given to it by the Respondent:

Statement of Case (Disputant)

1. Disputant was enlisted as Trainee Prison Officer in the Mauritius Prison Service on 06 May 1991 on a month-to-month basis for a trial period of not less than six months.
2. On or around 06 November 1991, Disputant was appointed as Prisons Officer Grade II on a probationary period of 12 months, to be subsequently confirmed in post on being favourably reported upon by the Head of the Department.
3. On or around 13 July 2018, Disputant, while perusing the official staff list, observed a discrepancy in his placement on the relative seniority list

wherein a few officers junior to him in the merged grade had superseded his placement.

4. By letter dated 16 July 2018 Disputant informed the Respondent of the discrepancy and requested for appropriate redress but to no avail.
5. By way of letter dated 20 February 2019 under the hand and signature of V. K. Bheekharry, Human Resource Manager at the Respondent, Disputant was informed that he was at the 30th position on the relative seniority list.
6. On or around 03 April 2019, Respondent carried out a “grade-to-grade” promotion exercise in the appointment of officers in the grade of Prison Officer/Senior Prison Officer, hereinafter referred to as “merged grades”, to the grade of Principal Prison Officer, hereinafter referred to as “PPO”.
7. Disputant avers that, in a grade-to-grade promotion, seniority in grade is one among the criteria to be considered during the promotion exercise: the others being professional or technical qualifications, experience, merit and suitability.
8. In the course of the promotion exercise *supra*, 23 officers in the merged grades were appointed to the grade of PPO among whom there were 12 officers, whose names are hereunder mentioned, who were junior to Disputant:

Messrs Noorani HOSSENY, Pravine Kumar GOORANSING, Kamal BISSOO, Sattanand PURAHOO, Raj Kumarsingh KHEDOO, Nambeo DOOMUN, Louis Desiré Patric FERRE, Maniram NOHUR, Kaviraj

SEEBALLUCK, Ramsamy VEEREN, Gerard Michel LAVENTURE, Sanjaye BIJMOHUN.

9. Disputant avers that this supersession has prejudiced his promotion prospect as well as his seniority ranking in the grade of PPO.
10. Pursuant to Section 2(a) of the Disciplined Forces Service Commission Regulations, the relative seniority of officers in a grade (rank) is determined by reference to the dates on which they respectively were substantively appointed or promoted to that grade (rank). Furthermore, for officers appointed in a grade on the same date, their relative seniority in that grade is determined by reference to their respective ages as provided for under Section 2(c) of the said regulations. On grounds of the latter determinant, Disputant avers that he is senior to the 12 officers mentioned above.
11. In the light of the above facts, Disputant prays the Tribunal for an award directing the Respondent to reinstate him to the correct relative seniority placement and undo the omission with regard to his appointment to the grade of PPO in mitigation of the prejudice caused to him.

Statement of Defence (Respondent)

1. Respondent admits paragraph 1 of the Applicant's Statement of Case and avers that Respondent was by letter dated 26 December 1990 informed of same by the Disciplined Forces Service Commission.

2. Respondent admits paragraph 2 of the Applicant's Statement of Case and avers that by letter dated 24 April 1992, following approval of the Commission, Applicant was offered appointment on 12 months' probation as Prison Officer Grade II with effect from 06 November 1991.
3. Respondent denies paragraph 3 of the Applicant's Statement of Case and avers that following the publication of the 2008 Pay Research Bureau Report, the grades of Prison Officer Grade I and Prison Officer Grade II were merged to the grade of Prison Officer/Senior Prison Officer.
4. In reply to paragraph 4 of the Applicant's Statement of Case, save and except that Applicant has informed Respondent of same, Respondent avers that an internal enquiry started at the level of Human Resource Unit towards the discrepancy that has occurred in the staff list available at the unit.
5. In reply to paragraph 5 of the Applicant's Statement of Case, Respondent avers that the then staff list of Prison Officer/Senior Prison Officer has been verified with the letter of enlistment as issued by the Disciplined Forces Service Commission and necessary corrections were made. After having ascertained the correct seniority placing of the respective officers in post including the Applicant, the latter was informed of his rank accordingly.
6. In reply to paragraph 6 of the Applicant's Statement of Case, Respondent avers that following the corrected seniority placing of the first 34 officers in post in the grade of Prison Officer/Senior Prison Officer, a recommendation was made to the Disciplined Forces Service

Commission on the 21st of February 2019 for the vacant posts of Principal Prison Officer to be filled in accordance with current regulations in force.

7. In reply to paragraph 7 of the Applicant's Statement of Case, Respondent avers that the grade to grade promotion of Prison Officer/Senior Prison Officer to the grade of Principal Prison Officer has been made in line with the provisions of the Disciplined Forces Service Commission Regulations 1997 as subsequently amended.
8. Respondent denies paragraphs 8 and 9 of the Applicant's Statement of Case and puts the Applicant to the proof thereof.
9. Respondent denies paragraph 10 of the Applicant's Statement of Case and avers that seniority placing was made by the Disciplined Forces Service Commission in its letter of 26 December 1990 (letter of enlistment). This has been in line with the PSC Circular no. 24 of 1983, despite the fact that certain officers have taken leave without pay or assumed duty at a later date within the prescribed time frame.
10. Respondent denies paragraph 10 of the Applicant's Statement of Case and avers that no prejudice has been caused to the Applicant.
11. Respondent, therefore, moves that the present application be set aside.

The Disputant testified as follows:

He joined the Prison Service as a Trainee Prison Officer on the 6th of May 1991. During the six months' period spent on probation, there was no adverse report on him. He was subsequently appointed as Prisons Officer Grade II on the 6th of November 1991.

His contention is that there are around 12 officers whose date of appointment were posterior to his but these officers nevertheless appear before him on the staff list. That is they are ranked higher than him in the seniority placing according to the official staff list of the Mauritius Prisons Service. According to him, those dates of appointment or joining of service differ from his by 1 day for some and a couple of days going up to 7 weeks for others.

Upon cross-examination by Counsel for the Respondent, the Disputant was shown the letter dated 26th of December 1990 that was sent by the Public Service Commission (PSC- then responsible for the recruitment of ‘Disciplined Forces’) to the Prisons and Correctional Department. The Disputant acknowledged that the list annexed thereto contained the names of those 81 Trainee Prisons Officers who were to undergo training and that his name was on the 66th position.

For ease of reference the Tribunal finds it apposite to reproduce paragraph 1 of the said letter:

“I am directed by the Public Service Commission to refer to your letters of the 28th August, 12th and 17th September and to inform you that the Commission, having considered the suitability of the qualified candidates at the last competition has decided, in exercise of the power vested in it by Section 89 of the Constitution, that the 81 candidates listed in the annex to this letter be enlisted as Trainee Prison Officer on a month-to-month basis for a trial period of not less than six months with a view to undergoing special training in your Department as from the date of their assumption of duty and in the order given” (emphasis added).

The Disputant agreed that the names were listed “in the order given” in the annex. However he failed to agree that the respective seniority of each candidate

is also determined according to that same order in the list. His explanation centered mainly on a difference which according to him exists between the order as to “enlistment” and “appointment”. He referred to the letter of enlistment dated the 25th April 1991 and addressed to him by the Commissioner’s Office. The relevant paragraphs relied on by the Disputant is reproduced below:

“I am directed by the Public Service Commission to inform you that the Commission has decided to offer you enlistment as Trainee Prison Officer on a month-to-month basis for a trial period of not less than 6 months...

2. On successful completion of your training and subject to your being favorably reported by the Commissioner of Prisons, you will be eligible for consideration for appointment to the Prisons Service as and when vacancies occur”

The Disputant compared the wordings of the above paragraph with those of his letter of appointment dated the 24th of April 1992 and addressed to him by the Mauritius Government Prison Service. He laid particular emphasis on the third paragraph of that letter, the relevant parts of which the Tribunal deems appropriate to reproduce below:

“I am directed by the Public Service Commission to inform you that the Commission has decided to offer you appointment as Prisons Officer Grade II in the Prisons and Correctional Institutions Department...

...

3. Your appointment will take effect from the 6th of November 1991...”

Disputant was further questioned by Counsel for the Respondent regarding the above-mentioned list. He agreed that Mr Noorani Hosseney, whom he claims has joined service after him, was ranked higher than him on the 10th position.

Disputant did not challenge that following a merger of Prison Officers of Grade II and those of Grade I as effected by the Report of the Pay Research Bureau of 2008, those officers of Grade I would necessarily be ranked higher than him in the new official staff list. However he still contests his position which is now 30th on the new list and this, for the same reasons given by him above.

Counsel for the Respondent then questioned him on his interpretation of the Public Service Commission Circular No. 3 of 2001 (to which the enlistment and appointment of Disputant is subject), the relevant part of which is reproduced below:

“Very often candidates, who are offered appointment or employment following selection exercises carried out by the Public Service Commission, request for a delay to assume duty either as they are already working elsewhere or for personal reasons. So far, all requests, be it for a few days or who for a few months, are submitted to the Public Service Commission for consideration...”

2. The Public Service Commission, in exercise of the power vested in it under the Section 89 of the Constitution and subject to Public Service Commission Regulations 1967, as subsequently amended, and to such instructions as the Commission may from time to time issue, has decided to delegate to you the power to approve all requests for delay to assume duty within two months. It is to be noted that seniority placing of candidates who assume duty within two months is not disturbed in accordance with Public Service Commission Circular No.24 of 1983.”

(emphasis added)

Furthermore, Disputant did not agree that if an officer took a few days’ leave during his training period, his seniority placing will be intact. He averred that their seniority is displaced by the relative number of days they were absent and

argued that an absence does not amount to a delay to assume duty according to his interpretation. He maintained that his 30th position on the staff list is miscalculated and that he ought to be reinstated to the correct relative seniority placement.

The representative of the Respondent, Mr Vicken Kumar Bheekhar, Human Resource Management Officer at the Prison Department, was called to depone on behalf of the Respondent. He solemnly affirmed the correctness of the Statement of Case filed by the Respondent.

He explained that the trainee officers were enlisted following a selection exercise carried out by the Public Service Commission. At the time their enlistment was notified to the prison department (letter dated 26th of December 1990 mentioned above), the respective seniority was already determined by the PSC. He averred that the official staff list of the prison department which also states the relative seniority of officers has always been prepared on the basis of the order given by the PSC when the officers were enlisted. He maintained that the Commissioner of Prisons or the prison department has absolutely no say in the order.

The representative was also asked the reason Mr Govindra Betun whose date of appointment is the 7th of November 1991 that is one day later than that of the Disputant is still ranked higher than the Disputant on the official staff list. He explained to the satisfaction of the Tribunal that if during the six months of training an officer is absent, this absence is unauthorised and his appointment date will be delayed by the number of days for which the officer was absent. And the seniority placing of that officer is not disturbed provided that the number of days for which he has been absent does not exceed the two months delay provided for in the PSC Circular No. 3 of 2001 as mentioned above. Similarly if someone assumed duty at a date later than that on which he was required to report for training at the prison department and the delay was less

than two months, his seniority is not affected. In short, the order as to seniority given by the PSC is always maintained within that two months' delay.

Mr Bheekharry also confirmed that the merger of grades of prison officers as described above was merely a restyling of the designations of the prison officers as Prisons Officers/Senior Prisons Officers for operational needs and that no change was brought to the relative seniority of the officers in that process. He was consistent in his explanation as to why appointment dates may differ. He also maintained that every official staff list of the prison department whether it be the list dated 1991, 2008 or the latest 'Seniority list of Prisons Officer/Senior Prisons Officer as at 20 February 2019' follows the same order given by the PSC at the time of enlistment of these prison officers.

In answer to the questions put by the negotiator, he stated that the order as to seniority had already been given by the PSC following a selection exercise and that irrespective of whether the order was determined on merit, the Commissioner of Prisons or the prison department was required to work their staff list according to the order already given by the PSC. Seniority is always determined by the PSC unless the Commissioner of Prisons is acting under delegated authority for a selection exercise which is not the case in the present matter. The case was then closed for the Respondent and the Tribunal proceeded to hear submissions from Counsel for the Respondent.

Counsel for the Respondent submitted that the action has been entered against the wrong party. He stated that the action should have been entered against the Disciplined Forces Service Commission ("DFSC") which now appoints persons to hold office in disciplined forces (at the time of enlistment of Disputant for the post of trainee officer it was the Public Service Commission). He relied on the case of **Wong Yuen Kook G v Disciplined Forces Service Commission & Ors (2003 SCJ 140)** in support of his submissions. He also submitted that on the merits of the case, in the light of the comparisons made between the

respective dates of appointment of some trainee officers and the apparent discrepancies as consistently and rightly explained under oath by Mr Bheekharry, the official staff list of 2019 and the promotions made therefrom stand good.

In the light of the evidence given by the witnesses, the Tribunal is satisfied that firstly, the trainee prison officers were enlisted by the Public Service Commission according to a given order which going by the letter dated the 26th of December 1990 it was for the prison department to follow when preparing an official staff list. At any rate Mr Bheekharry stated convincingly that it has always been the practice for a staff list whether it be that of 1991, 2008 after the merger of the grades of prison officer or the latest one of 2019 entitled *Seniority list of Prisons Officer/Senior Prisons Officer as at 20 February 2019* to follow the relative placing of these officers as given by the PSC at the time of their enlistment.

Secondly, the Tribunal is satisfied that the reasoning of the Disputant to the effect that those enlisted officers who assumed duty later than him or took leave during the six months' probation were necessarily "junior" to him, is clearly flawed in the light of the clear wording of the PSC Circular No. 3 of 2001. If the delay to assume training or the number of leaves taken during the probation period does not exceed a period of two-months, the relative seniority of each trainee officer as already determined by the PSC at the time of their enlistment is never disturbed. It is only their date of appointment that is reported to a later date by the number of days they assumed training later than required or by the number of leaves they took during their training. Therefore a person having an appointment date that is later than that of the Disputant is not junior to the Disputant since those delays as described above fell in the two months' time frame.

That the relative seniority placing is not disturbed by these delays is further reinforced by the evidence given by Mr Bheekharry to the effect that if those delays however exceed two months, it is then that the seniority of the enlisted candidates is disturbed. That seniority is then reviewed by the PSC upon notification from the prison department. This again confirms the view taken above that it is the PSC that has the sole discretion to establish seniority.

It is trite law that a “labour dispute” as defined by Section 2 of the Employment Relations Act of 2008 (the Act) is between an employer and an employee. Granted that the employer may have been the State of Mauritius as represented by the Mauritius Prison Service, an action for being aggrieved by a promotion exercise made by the Disciplined Forces Service Commission (DFSC) on a staff list that is prepared according to an order then determined by the PSC ought not to have been directed against the Mauritius Prison Service who has no say in the above matters.

The case of **Wong Yuen Kook G v Disciplined Forces Service Commission & Ors (2003 SCJ 140)** relied on by Counsel for the Respondent established the following principles. The plaintiff in that case was promoted Assistant Commissioner of Police and was subsequently assigned the duties of Deputy Commissioner of Police. Feeling aggrieved at not having been appointed Deputy Commissioner of Police, the plaintiff prayed to the Court to condemn the DFSC and a member of the DFSC as defendants. The Government of Mauritius was a third defendant and a plea *in limine* was taken to the effect that the third defendant should be put out of cause for having been wrongly sued and that consequently the action should be dismissed for having been entered outside delay. It was held:

“While the case against the first two defendants concerns an action in tort, there is absolutely no averment as to the capacity in which the third defendant, the Government of Mauritius, is being sued as defendant, as

opposed to a co-defendant. There is also no prayer at all asked against it. In the circumstances, I find that the argument that it should be put out of cause is well founded, as there is no case disclosed against it. The Government of Mauritius is accordingly put out of cause”.

The Tribunal is satisfied that the facts of the present matter before it do not disclose a case against the State of Mauritius as represented by the Mauritius Prison Office. If in the event that the promotion exercise was carried on the basis of relative seniority obtained from a staff list that was then prepared according to an order given by the Public Service Commission and that list, and consequently the promotion, is allegedly flawed, it is for the DFSC to answer for such flaw.

The Tribunal finds abode for its reasoning in the principles laid in the above judgment of the Supreme Court. It was held that given it is undisputed that the DFSC can be sued under the provisions of Section 119 of the Constitution, the question whether it is entitled to the protection of the Public Officers’ Protection Act (POPA) is to be answered in the affirmative. It was held that the DFSC which is an independent body established under Section 91 of the Constitution and vested with power to appoint persons to hold any office in the disciplined forces, is a “*person engaged... in the performance of a public duty*” within the meaning of Section 4 of the POPA and that the limitations applied for actions directed against such persons as the DFSC apply.

Consequently, the Tribunal holds that the appropriate course would be an action directed against the DFSC in the light of the findings made. Therefore, the dispute directed as it is against the State of Mauritius as represented by the Mauritius Prison Service, is accordingly set aside.

The Tribunal wishes to observe that upon the withdrawal of the previous dispute that was made against the wrong party, this new referral is again directed

against another wrong party. We appeal to the Commission for Conciliation and Mediation to give more considerations in applying the law whenever a referral for arbitration is being envisaged.

A dispute cannot stand if the wrong parties are put into cause. The end result is that a party may be prejudiced by time given that a labour dispute

“does not include a dispute that is reported more than 3 years after the act or omission that gave rise to the dispute” (Section 2 of the Act)

Furthermore a determination of the matter will prevent the Disputant from reporting another labour dispute. It is apposite at this stage to reproduce the relevant part of Section 67 of the Act:

“Where a labour dispute is reported to the President of the Commission under Section 64, no party to the dispute may report-

(a) any other labour dispute between the same parties within a period of 6 months immediately following the date on which the original report was made;

(b) a labour dispute on the same issue between the same parties within a period of 24 months following the date of the determination of the dispute...”

The Tribunal also wishes to highlight that Counsel for the Respondent at an indeed very late stage identified an issue as to the jurisdiction of the Tribunal namely that the Tribunal has got no jurisdiction to “promote” a disputant. He offered us no submissions on that matter besides merely stating it. At any rate, the case as it is before us, for the reasons given above, is itself flawed.

Consequently, it is set aside.

The Tribunal awards accordingly.

SD Rashid Hossen
President

SD Raffick Hossenbaccus
Member

SD Rabin Gungoo
Member

SD Parmeshwar Burosee
Member

4th of July 2019