EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/ RN 112/18

Before

Indiren Sivaramen	**Vice-President**
Vijay Kumar Mohit	**Member**
Karen K. Veerapen	**Member**
Kevin C. Lukeeram	**Member**

In the matter of:-

Mr Jean Eric Soonil Ramdhun (Disputant)

And

Cargo Handling Corporation Ltd (Respondent)

I.P.O: (1) Port Louis Maritime Employees Association

(2) Mr Alain Edouard

(3) Mr Gino Michael Duval

(4) Mr Maghen Sunjevee

(5) Mr Dario Steeve Laguette

The present matter has been referred to the Tribunal by the Commission for Conciliation and Mediation (CCM) under Section 69(7) of the Employment Relations Act (hereinafter referred to as "the Act"). Co-Respondent No 1, a trade union having exclusive bargaining rights on behalf of the relevant employees, and Co-Respondents No 2 to 5,

who have been selected as trainers for a batch of RTG ("Rubber, Tyre and Gantry", that is handling of containers in the yard as opposed to loading or unloading of containers on or from ships) Trainees, have been joined in as parties in the present matter. They were duly informed of the nature of the dispute and all parties were assisted by counsel. The terms of reference of the point in dispute read as follows:

"Whether I was unfairly and wrongly treated when I was not selected as trainer for RTG Trainees or otherwise."

The Disputant deponed before the Tribunal and he stated that he joined the Respondent on 3 January 2003 as Operator Grade 1, Plant & Equipment and was confirmed on 3 January 2004. He was employed as RTG Operator as from 6 August 2005 and confirmed in the said post with effect from 1 September 2006. He also referred to a warning given to him and to an agreement reached between Respondent and himself before the Commission for Conciliation and Mediation whereby the warning was waived and his promotion as Trainer RTG was to take effect as from 1 July 2014 for seniority purposes. He produced copies of a series of documents (Docs A, B, B1 to N). He averred that he was the senior most RTG Operator and he relied on the seniority list of 2013 (Doc J). He stated that he was called for an informal meeting in relation to training of Trainee RTG Operators of the Respondent. However, after some time he came to know that he was not in the pool of trainers. He sought explanations in a letter dated 10 July 2017 (copy marked Doc K) and he received a reply from the Officer-In-Charge to the effect that the Training Unit will be comprised of the "*2 Senior most Foreman RTG (their seniority was based on the date they were physically posted as ex RTG Trainer) namely Messrs. Dario Laguette and Maghen Sunjeevee assisted by Messrs. A. Edouard STS Trainer and Gino Duval Foreman STS (formerly assigned duties as STS Trainer)*" (Doc L).

Disputant then reported a dispute to the CCM and he came to know of the existence of another seniority list (copy marked Doc M) which is dated March 2017. He was ranked third on this new list of seniority. A new criterion which is the date on which one was "Physically Trainer RTG", that is, the date on which one started to do the work physically on the relevant site was added. He suggested that he was simply asked when he had actually started doing the work. He stated that the criterion of "physically in post" is a criterion which was accepted by management and a trade union. He also produced a copy of an extract of a collective agreement signed by management and that union (Doc N). He was in the bargaining unit of that trade union even though he was the member of another trade union. He suggested that his rights will be prejudiced if he remains third on the seniority list. He added that, according to him, Co-Respondents No 2 and 3 have nothing to do with the training of RTG Trainees being themselves from STS ("Ship to Shore" that is, involved in the loading or unloading of containers on or from ships) and not RTG.

In cross-examination, Disputant agreed that the trade union he mentioned was the union which had sole bargaining rights on behalf of all the employees of the Respondent. He agreed that following the SRC report 2016, the post of Trainer RTG was restyled Head of RTG. A copy of an extract of a Memorandum dated 3 July 2017 (Doc P) was shown to him and he agreed that Management had decided to constitute the Training Unit as comprising of two persons from RTG and STS respectively. He did not agree that Co-Respondents No 5 and 4 who were "physically posted" on 18 February 2013 and 25 February 2013 respectively were his seniors.

Mr Dahari, the HR Manager, then deponed on behalf of the Respondent and he stated that Disputant is 'Head of RTG'. He stated that Co-Respondent No 1 is the trade union which has sole bargaining rights in relation to terms and conditions of employment of the employees. He stated that the report signed with Co-Respondent No 1 in 2016 provided for the restyling of the post of Trainer RTG into that of Head of RTG. This applied for Disputant and three other ex-Trainers RTG including Co-Respondents No 4 and 5. He explained that the Respondent had to recruit RTG Trainees both from internal and external candidates. The Board thus decided to constitute a Training Unit for the purpose of the selection and it consisted of the two senior most ex-RTG Trainers and Co-Respondent Nos. 2 and 3 who were STS Trainer and Foreman STS (having allegedly been assigned duties of STS Trainer before) respectively. He stated that the seniority list of 2013 has now changed following the agreement reached with Co-Respondent No 1 whereby the main criteria now used to determine seniority is 'physical posting'. Mr Dahari explained the rationale for using 'physical posting' as he averred that there was some sort of anomaly mainly in relation to manual workers where some workers were paid to perform continuously in certain posts but without any appointment letter. Very often, a worker who came to work in that post much later but with an appointment letter was considered as senior most in that post.

Mr Dahari stated that management then had to amend all seniority lists, where applicable, based on the 'physical posting' criterion. He added that the decision to consider 'physical posting' was a decision taken following agreement reached with the relevant trade union. Management reworked the seniority list together with the relevant trade union based on the 'physical posting' criterion. According to him, Doc M was, thus, the prevailing seniority list for Head of RTG. Mr Dahari suggested that the Logistics Department is responsible for recruiting the personnel and decides where a worker is to be posted. He averred that the information concerning 'physical posting' came from the said department. He also stated that performance appraisal has nothing to do with the seniority list. He suggested that the relevant 'senior most' has priority whenever there is a promotion but that other criteria such as attendance, work conduct and work performance are also considered. There is no proper performance appraisal

at the Respondent but they do carry out a “performance appraisal at time” to give a promotion.

In cross-examination, Mr Dahari was requested to produce a copy of the Equal Opportunity Policy of the Respondent (Doc Q). He agreed that there are five trade unions which are recognised by management at the Respondent. He stated that Co-Respondent No 1 however has sole negotiating rights and agreed that when the latter bargains collectively with the Respondent, he bargains on behalf of all the other trade unions. He conceded that Doc J is in order and that, according to that document, Disputant was the senior most. He was confronted with the agreement entered into between Co-Respondent No 1 and Respondent (Doc N) and more particularly paragraph 10 thereof and the duration of the agreement. He agreed that if ‘physical posting’ was not considered, Disputant would have remained as the senior most (in his grade) as was provided in the 2013 seniority list.

The Tribunal has examined all the evidence on record and the submissions of all counsel.
The Tribunal whilst enquiring into the dispute referred to it is bound by the terms of reference. For ease of reference, we will reproduce, once more, the terms of reference of the dispute:

“Whether I was unfairly and wrongly treated when I was not selected as trainer for RTG Trainees or otherwise.”

The award being sought from the Tribunal in the present case will be of a declaratory nature. The Tribunal has stated in a number of cases that it does not deliver awards which are of a declaratory nature **(vide Mr Ugadiran Mooneeapen And The Mauritius Institute of Training and Development, ERT/RN 35/12, Mr Abdool Rashid Johar And Cargo Handling Corporation Ltd, ERT/RN 93/12, Mr Dhan Khednee And National Transport Corporation, ERT/RN 52/14, Mr Satianund Nunkoo And Beach Authority, ERT/RN 121/17).**

The Tribunal delivers awards which are binding on the parties (section 72 of the Act) and as per section 7A of the Second Schedule to the Act, the Tribunal has the power to issue execution of its orders.

However, in the light of the novel point raised in the present matter and in the interests of all parties and in furtherance of good and harmonious industrial relations within the organisation, the Tribunal feels that it should throw some light on the core of the issue raised in the present matter. The crux of the matter before us is whether the Respondent is entitled to bring changes to an existing seniority list emanating from

Respondent himself following a new collective agreement entered into with the trade union having exclusive negotiating rights at the Respondent.

It is apposite to note, firstly, that in the present case, the two lists that we have, that is, Doc J (seniority list for RTG Operators (MCT) dated 1 August 2013) and Doc M (seniority list for Head of RTG dated 31 March 2017) do not pertain to the same posts. There is no evidence that the grade of RTG Operator (MCT) has been restyled as Head of RTG. In fact, as per Doc O and the evidence adduced before us, it is the grade of Trainer/ Foreman RTG which has been restyled as Head of RTG. The Tribunal will not venture to say more on Docs J and M.

However, on the issue of the posted "seniority list", the Tribunal is of the view that once an employer has posted or formally issued a "seniority list" to which relevant employees and/or the trade union have had access, it cannot, generally, after a substantial period of time, bring changes to that same list, in the sense of changing the relative seniority of the employees. The seniority list becomes the ***status quo*** between the parties for competitive status purposes (**vide "*Seniority rights under the Collective Agreement*" by R.I. Abrams and D.R. Nolan in The Labor Lawyer, Vol. 2, No. 1 at pp 99-144**). The authors cited above go on at page 115 (above) by stating the following: "*Stability and certainty in making competitive employment decisions based on seniority, such as layoffs and promotions, require that an erroneous list be considered "frozen" after a period of time*." The rules used for reckoning seniority may certainly be varied through collective bargaining (seniority will depend on the collective agreement) but a new collective agreement cannot, generally, affect a "posted seniority list" which has been there for a substantial period of time.

Reference has been made to the above article as guidance, and we may also refer to **rule 8(3)** of **The Punjab Civil Servants (Appointment and Conditions of Service) Rules** as guidance (though this applies for civil servants in the relevant jurisdiction). It reads as follows:

8(3) Notwithstanding the provisions of this rule, the seniority lists already prepared in accordance with the rules applicable immediately before the commencement of these rules shall be construed as seniority lists for the respective new grades in respect of persons already in service and amendments therein shall continue to be made in accordance with those rules to settle inter se seniority disputes among them.

The union and management may, no doubt, bargain for changes in seniority rules but unless the intention is clearly laid down in the agreement that the rules are to be given retrospective effect (**vide Supreme Court of India judgment in the case of P. Mohan Reddy v E.A.A Charles (2001) 4SCC 433**) and there are compelling reasons for the

new rules such as a prior discriminatory practice, new seniority rules cannot be given retrospective effect.

For the reasons given above and more particularly the manner in which the terms of reference have been drafted, the dispute is otherwise set aside.

SD Indiren Sivaramen

Vice-President

SD Vijay Kumar Mohit

Member

SD Karen K. Veerapen

Member

SD Kevin C. Lukeeram

Member

23 August 2019