

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

Before: -

Shameer Janhangeer	-	Vice-President
Anundraj Seethanna	-	Member
Christelle P. D’Avrincourt (Mrs)-		Member
M. Nayid Simrick	-	Member

In the matters of: -

ERT/RN 158/2023

Mr Kailash CHADY

Disputant

and

MAURITIUS TELECOM LTD

Respondent

ERT/RN 159/2023

Mr Yoganaden SAMY

Disputant

and

MAURITIUS TELECOM LTD

Respondent

ERT/RN 160/2023

Mr Dillen SAWMY

Disputant

and

MAURITIUS TELECOM LTD

Respondent

ERT/RN 161/2023

Mr Aboo Bakar PEERMAMODE

Disputant

and

MAURITIUS TELECOM LTD

Respondent

All in presence of: -

1. **Mr Bikram DAMRY**
2. **Mr Salim HOOLASH**
3. **Ms Mira RAMFUL**
4. **Mr Senjit ROGBEER**
5. **Mr Zyad KORIMBOCCUS**
6. **Mr Bavesh BAIJNATH**
7. **Mr Hans BHULLAN**
8. **Mr Bam SANTHARUM**
9. **Ms Rekha DOMUN**
10. **Mr Poorooshotum RUGGOO**
11. **Mr Harry LUKHOO**
12. **Mr Kamlesh RAMSAHAI**
13. **Mr Harrish SEEBALUCK**
14. **Mr Arvish DOONGOOR**

Co-Respondents

The present matters have been referred to the Tribunal for arbitration by the Commission for Conciliation and Mediation pursuant to *section 69 (9)(b)* of the *Employment Relations Act* (the “Act”). The four matters have been consolidated. The common Terms of Reference of the disputes reads as follows:

1. *Whether the promotion exercise carried out by the employer, in and about May 2022, whereby a number of members of MT staff were promoted to the higher-grade posts of Manager, was fair and reasonable in regards to the fact that:*
 - (i) *No advertisement of vacancy for the posts was ever done by Mauritius Telecom*
 - (ii) *No selection exercise was ever conducted for the posts*
 - (iii) *and the Disputants were never given the opportunity nor information to postulate for the said posts.*
2. *If the answer to the above is in the negative, whether the exercise should be reconducted properly so that we are given a fair opportunity to be potentially appointed or otherwise.*

The Disputants, Respondent and Co-Respondent Nos. 7 to 11 were assisted by Counsel. Mr M. Ramano appeared for the Disputants, whereas Mr R. Chetty SC appeared for the Respondent and Co-Respondent Nos. 7 to 11 together with Ms J. Desai and Ms L. Veerapen instructed by Mr S. Maydaymootoo, Attorney-at-Law. The remaining Co-Respondents have stated that they shall be abiding by the decision of the Tribunal and have left default. The Disputants, Respondent and Co-Respondent Nos. 7 to 11 have each submitted a Statement of Case in the present matter.

THE DISPUTANTS’ STATEMENT OF CASE

The Disputants are Principal Engineers in the Networks Department at Mauritius Telecom (“MT”) Ltd. They have each been involved in various major projects within the company and have never been subjected to any adverse reports during their years of service. In or about May 2022, there was persistent information that a number of staff would be promoted to the grade of Manager and this was eventually confirmed when former CTO, Mr Guddoy called a meeting to

announce that a number of engineers have been promoted to managerial positions in the Networks Department. It was also mentioned that the new Managers were appointed in other MT departments in this exercise. As a result, the Co-Respondents have been promoted.

The Disputant aver that the said promotion exercise was carried out without any internal advertisement and as such, they were never given the opportunity to apply for the Manager posts. The announcement was a *fait accompli* since the promotion of new Managers took effect from May 2022 itself. Between July 2022 to December 2022, the Disputants strongly denounced the promotion exercise to the then management and even asked for the promotion exercise to be frozen since same was done in total opacity and in breach of good Human Resource (“HR”) practices and labour legislation. They had a legitimate expectation to be given a fair chance to be considered and given the opportunity to apply for any new positions arising with the Respondent. The proper approach would have been to allow for the promotional posts to be internally advertised before the promotion and selection exercise; to allow for proper consideration to qualifications, merit and seniority; and to allow for the Disputants to have a fair opportunity to postulate for the said posts.

THE RESPONDENT’S STATEMENT OF CASE

The Respondent has notably averred that it is not aware of Mr Guddoy’s statement to the effect that other Managers were also appointed in other MT departments. Disputant Nos. 1 & 2 are bound by the Collective Agreement on Review of Pay, Grading Structures and Terms & Conditions of Employment 2020 – 2024; Disputant Nos. 3 & 4 are also aware of its provisions and have benefitted from same and the Collective Agreement applies indiscriminately to all employees. A grading structure ranging from Grade SS1 to Grade SS10 has been implemented and the Disputants are at the topmost grade i.e. SS10. Clause 8.1 of the Collective Agreement provides that ‘*Vacant promotional posts shall normally be filled on the basis of experience, desired qualification, performance, merit and suitability*’. Clause 8.2 notably provides that all recommendations for promotion shall be made by the Manager/Head/Chief. The Collective Agreement is applicable for non-managerial grades and the appointment of management cadres is effected by the Chief Executive Officer upon recommendation of the relevant Manager/Head/Chief and thereafter ratified by the Board of Directors. Three of the Disputants were themselves promoted to the position of Senior Telecom Engineer following recommendations of their superiors in 2000, 2004 and 2012 respectively.

The Respondent has also averred that the promotion exercise was not in breach of any good HR practices and labour legislation. The promoted employees have already completed their respective probation periods and their employment has been confirmed. In fact, they are no longer employed by the Respondent and are employed by MT Services Ltd; as such it is not practical for the Respondent to implement another promotion exercise for these same positions which are no longer vacant. The Disputants were made aware of vacancies advertised on 7 June 2023 and 27 October 2023 and were given the opportunity to submit their applications for same. Disputant Nos. 1, 3 & 4 applied for the vacancies advertised on 7 June 2023 but were not selected. Disputant No. 1 applied and was successful for the positions advertised on 27 October 2023 but declined same. The Respondent has undergone an HR audit exercise last year and has now implemented a system of advertisement for vacant posts.

CO-RESPONDENT Nos. 7 to 11's STATEMENT IN REPLY

Co-Respondent Nos. 7 to 11 have notably averred that they have each completed their respective probation periods and that their employment has been confirmed. They are no longer employed by the Respondent but by MT Services Ltd. None of the said Co-Respondents were Engineers prior to promotion. The Disputants, who are Principal Telecom Engineers, did not and presently do not have the requisite qualifications, experience or skill to apply for the posts for which the Co-Respondents were appointed to. They and the Disputants are part of entirely separate departments and perform different functions within the Respondent company and its affiliated companies. It is highly improbable, if not impossible, for the Disputants, as engineers, to be promoted to the positions that the Co-Respondent Nos. 7 to 11 now occupy. The Disputants' case is misconceived and wrongly directed against the aforesaid Co-Respondents.

THE EVIDENCE OF WITNESSES

The second Disputant, Mr Yoganaden Samy, Principal Telecom Engineer, was called to adduce evidence on behalf of the Disputants. He confirmed and maintained everything that he has stated in his Statement of Case. He also stated that if the Respondent were to base itself on sections 8.1 and 8.2 of the Collective Agreement (Annex 1 to the Respondent's Statement of Case), it should take into consideration all sections of the agreement notably section 2. Section 2.1 is also important to consider. There were 14 staff nominated as Managers in the promotion

exercise of 2022 and there were no advertisements internally or externally. Section 8.1 of the Collective Agreement talks of vacant promotional posts, but the posts the Co-Respondents were promoted to did not exist at the time. They were not even aware when these posts have been created. Regarding section 8.2, as the posts did not exist, the question that must be asked is where are the job descriptions? They were not made aware of any job description that has been prepared by the organisation.

Mr Samy also stated that he and his colleagues have reached the topmost grade of their grading structure and many of the Co-Respondents were in lower grades than they are. A table of staff and position prior to promotion was produced (Document A). That they were given the opportunity to apply for vacancies in June 2023 and October 2023 is not relevant to their dispute. The HR audit exercise undergone at the Respondent last year is an admission that the exercise carried out is flawed; the Respondent is confirming, based on the recommendations of an HR audit, that they are now proceeding with advertising vacancies and with a proper selection exercise. He does not agree with the argument that the Disputants did not have the requisite qualifications to be considered for the posts as the job description was not known. The vacant posts should have been advertised as there should be transparency and everybody eligible should be given a fair chance to apply.

When questioned by Senior Counsel for the Respondent and for Co-Respondent Nos. 7 to 11, Disputant No. 2 notably stated that he is not aware that since April 2022, the Respondent has stopped recruitment for employees and that since 2008, the Respondent has stopped recruiting non-managerial employees. He agreed that none of Co-Respondent Nos. 7 to 11 were Principal Telecom Engineers. He agreed that the word '*normally*' is to be found in section 8.1 of the Collective Agreement. Section 2.1 states '*vacancies will generally be advertised ...*' and in general, the vacancies should have been advertised. He agreed that Co-Respondent Nos. 1, 6, 12 & 14 were employed by MT Services Ltd prior to the selection exercise. He agreed all the Co-Respondents, after the selection exercise, are employed by MT Services Ltd, which is a separate employer as per the statement of HR from the Respondent.

The Disputant did not agree that for a vacancy to be relevant to him, it should be in the field of engineering or require engineering skills stating that Disputant, Mr K. Chady had applied for a marketing post, was selected but then declined the post. He agreed that none of Co-Respondent Nos. 7 to 11 were promoted to Chief, Principal or Senior Engineer. He does not agree that his case should have been entered against MT Services Ltd as the promotion exercise was

carried out within MT and by MT. The ex-CTO, Mr D. Guddoy held a meeting after the nomination of the 14 Co-Respondents stating that several engineers from the Networks Department have been nominated as Managers and some other staff as well; this is how they became aware that the exercise was carried out within and by the Respondent. He agreed that none of the Co-Respondents were with the Respondent after the exercise as they were nominated in MT Services Ltd and had left the Respondent. He agreed that the employer of the Co-Respondents is MT Services Ltd as at today.

The Respondent's representative, Mr Nalakanden Moorroogen, Manager, was called to adduced evidence by his Counsel. He stated that the Respondent stands by the contents of its Statement in Reply. By the word '*normally*' at clause 8.1 of the Collective Agreement, he stated that in many cases, as per the practice at the Respondent, there are also promotions which were based on recommendations. Regarding clause 8.2 of the Collective Agreement, there are also promotions based on recommendation of the respective Manager, Head or Chief to appoint the employee to higher positions. As per paragraph 8.9 of the Statement of Reply, the Disputants themselves benefited from promotion based on recommendations in 2004 and 2012. He referred to a letter dated 25 May 2000 (Annex 2 to the Statement in Reply) addressed to Mr Peermamode.

The representative was also referred to Document A and stated that from the table, six employees hold the position of engineer; Mr Damry is described in a lower grade; the other engineers are of the same grade; Mr Damry was employed by MT Services Ltd whereas Mr Rogbeer was employed by MT. It is admitted that everybody is now employed at MT Services Ltd. Messrs Damry, Baijnath, Ramsahai and Doongoor were employed at MT Services Ltd prior to the exercise. He produced an offer of employment dated 25 June 2012 made to Mr Damry (Document B) on behalf of MT Services Ltd; an offer of employment made to Mr Baijnath dated 16 August 2012 (Document C) in MT Services Ltd; offer of employment to Mr Ramsahai dated 26 August 2016 (Document D) by MT Services Ltd; and an offer of employment dated 1 August 2017 to Mr Doongoor (Document E) by MT Services Ltd. The promotion exercise was carried out in 2022, it was upon recommendation and based on the approval of the Chief Executive Officer of MT Services Ltd.

Mr Moorroogen also produced an offer of employment dated 24 April 2022 made to Mr Bhullan (Document F) by MT Services Ltd and forms part of the promotion exercise; an offer of employment dated 25 April 2022 made to Mr Ruggoo (Document G) by MT Services Ltd which is after the exercise; and an offer of employment dated 25 April 2022 made to Mr Lukhoo by MT

Services Ltd (Document H) by MT Services Ltd. The Respondent is not in the process of recruiting people and has stopped recruiting employees since 2007 on the permanent and pensionable establishment. He produced a bundle of three certificates (Document I). The first certifying that MT is a company is dated 26 June 1997; the second is a change of name dated 25 June 1992; and the third dated 1 April 1988 is the incorporation of Mauritius Telecommunication Services Ltd. He also produced the Certificate of Incorporation of MT Services Ltd (Document J) dated 12 April 2012. Disputant Nos. 1, 2 and 4 submitted applications for vacancies in June 2023 and were not selected. Disputant No. 4 also applied for the October 2023 vacancy and was offered the position advertised but he declined. The case is against MT and MT no longer recruits or creates positions.

Mr Moorroogen was thoroughly questioned by Counsel for the Disputants. He notably stated that the promotion exercise was carried out without any advertisement and he agreed that the four Disputants were never given an opportunity to apply for these managerial positions. The Disputants' employer is MT. They have not raised any objection to the effect that MT was not concerned by the exercise. He has not mentioned in his Statement of Case that the recruitment exercise was carried out by MT Services. As per his Statement of Case, he is relying on a Collective Agreement to say that the Disputants are bound by this. He agreed that he cannot rely on the Collective Agreement to explain the decision made by MT Services. Section 2.1 of the Collective Agreement concerns appointment, recruitment and promotion and applies to the present dispute. As per this provision, the vacancies should have been advertised but it is also mentioned generally advertised and it has been the practice in the past that appointments were also made for the managerial cadre. The Collective Agreement does not mention anywhere as to when vacancies will be advertised or won't be advertised.

Mr Moorroogen moreover stated that advertising or not is a decision of the Chief Executive Officer and the Board. He is aware that there is a mandatory requirement for notice of vacancies be posted internally referring to the *Workers' Rights Act*. When advertised, employees have a fair chance to be considered. Section 8.1 of the Collective Agreement talks about experience, desired qualifications, performance, merit and suitability and these criteria are assessed against a prescribed job description. No prescribed job description has been produced for the managerial positions and he is not aware of same. Since there is no job description, he cannot say by which criteria those were appointed. As per clause 8.2, the recommendation is made by the Chief of the Department who knows what best suits the needs of the department. He does not agree that this points to a lack of transparency on the whole recruitment process.

Mr Moorooogen also confirmed that the Disputants were at the topmost of the Grading Structure. A number of Co-Respondents were of a lower grade than the Disputants. Even though the Co-Respondents were of a lower grade, they were better suited than the Disputants for the management positions. Disputant, Mr Peermamode became a Senior Telecom Engineer in May 2000 and a Principal Telecom Engineer in 2019. Co-Respondent No.1 was a Network Engineer at MT Services Ltd, who have a different grading structure. Disputant, Mr Sawmy was promoted to Senior Telecom Engineer following an interview process as he was for Principal Telecom Engineer. Disputant, Mr Chady went through an interview process for the Principal Telecom Engineer position. He maintained the recruitment was done in line with good HR practices. The Collective Agreement provides for vacancies to be advertised and also recommendations can be made. A system whereby advisement will be done has now been implemented; he disagreed that this is an admission that the 2022 exercise was flawed.

Mr Moorooogen also stated that MT Services is an affiliated company of MT. MT Services staff work together with MT staff and are based in the same building. An employee can be posted even if employed by one group. Some staff in MT have a reporting line in MT Services. Since the appointment in 2022, some of the Disputants are now reporting to the Co-Respondents. MT did not oversee this recruitment exercise. The exercise was carried out by MT Services and the Co-Respondents were appointed by MT Services. Prior to the exercise, some of the Co-Respondents were part of MT and some part of MT Services. For those part of MT, the recommendation was made by their respective Chief Managers. The Disputants are employees of MT and the Collective Agreement applies to them. The Collective Agreement is for the non-managerial cadre. The announcement and recommendation were made by their respective Managers and Chiefs who are employed by MT Services. The appointment of 2022 is being contested. He did not agree that it is irrelevant to the present matter that the Disputants did not get the position advertised in October 2023.

Mr Moorooogen was re-examined by his Counsel. He notably stated that the promotion was not carried out by MT but by MT Services. He referred to paragraph 11.1 of his Statement of Case where it is stated that *'those employees are no longer employed by the Respondent and are in fact employed by MT Services...'*. Prior to the exercise Mr Damry (Co-Respondent No.1) was employed by MT Services and post the exercise he is employed by MT Services. The Disputants, being employees of MT, their rights are protected by the Collective Agreement.

Co-Respondent No. 9, Ms Rekha Domun, Head of Accounting, was called to depone in her name and on behalf of Co-Respondent Nos. 7, 8, 10 & 11. She stated that she is employed by MT Services Ltd. The Co-Respondents Nos. 7 to 11 have all been confirmed in their positions and all are employed by MT Services Ltd. None of them are engineers nor have they been employed as engineer. All of their skills and qualifications pertain to each of their respective profession. They are employed in different departments from the Department of Engineering. An engineer cannot perform her present job. Upon questions from Counsel for the Disputants, the Co-Respondent notably stated that prior to MT Services Ltd, she was with MT. She was not aware of any job description prior to her appointment. Speaking for herself for the post of Head of Accounting, qualification as accountant is needed. The qualification is clear for her position. In re-examination, she notably stated that prior to the exercise she was in accounting and post the exercise, she is still in accounting.

THE SUBMISSIONS OF COUNSEL

Both Counsel have put in written submissions in relation to the dispute. Learned Counsel for the Disputants has, in his written submissions, notably stated that the promotion exercise was carried out without any internal advertisement and that the Disputants were never given the opportunity to apply for the Manager posts. Reference, in this context, has been made to *section 7* of the *Workers' Rights Act ("WRA")* which is aimed at preventing discrimination in employment and occupation. Clause 2.1 of the Collective Agreement is a reflection of *section 7* of the *WRA* and imposes an obligation on the Respondent to internally advertise all vacancies. This mandatory provision has not been abided to by the Respondent.

The Disputants have also submitted that the Respondent has relied heavily on clause 8.1 and 8.2 of the Collective Agreement, where the candidates for promotion are assessed against a job description. However, the hearing has borne out that there is no appropriate job description based on which recommendations could be made. This points to a lack of transparency and it has been submitted that this led to clear irregularities and anomalies in the promotion exercise. It has not been denied that some of the Co-Respondents are of a lower grade to the Disputants prior to the promotion, but this is not in itself a matter which makes the whole exercise flawed as they are open to the possibility that someone in a lower grade could potentially be skilled enough to be promoted. The Respondent found Mr Damry better suited to the Manager's role despite Mr Peermamode having been a Senior Telecom Engineer for 19 years before becoming a Principal Engineer. The exercise is anything but fair, transparent and just.

Regarding the issue of the Disputants' previous recommendations, it was shown that, in cross-examination of the Respondent's representative, that they had been through interviews, notably regarding Mr Samy and Mr Chady. The fact that the Disputants may have benefitted from recommendations in the past cannot be a bar for them to challenge the promotion exercise of 2022. Mention has also been made of MT Services by the Respondent, whereby evidence has been ushered that all the Co-Respondents are now employed by MT Services Ltd. The issue of who controlled the exercise was never canvassed in the Respondent's Statement of Case and this came up in the cross-examination of the Respondent.

The Respondent has tried to rely on provisions of the Collective Agreement to explain its decision and at the hearing, another version, i.e. it is MT Services Ltd which controlled the exercise, crept up. The Respondent ought to have objected that it was not concerned by the promotion exercise at all. In relying on the Collective Agreement to justify the promotion, the Respondent accepts that it controlled the promotion regardless of the fact that the Co-Respondents are now employed by another entity. Moreover, the Respondent cannot rely on an agreement to justify the decision of a third party.

In conclusion, it has been submitted that the Tribunal, in the exercise of its functions in a matter before, it must have regard to the interests of the persons immediately concerned, the principles of natural justice and the principles and best practices of good employment relations. The decision of *Mauritius Institute of Training and Development v The Employment Relations Tribunal [2022 SCJ 413]* was cited regarding the subject of abuse of power by an employer in submitting that the Tribunal can make a finding of abuse of power concerning a promotion dispute as it did in the case of *Chiniah and Development Bank of Mauritius Ltd (ERT/RN 40/2021)*.

On the other hand, Learned Senior Counsel for the Respondent and Co-Respondent Nos. 7 to 11 has notably submitted that the contested promotion exercise was not conducted by the Respondent but by MT Services Ltd as all the Co-Respondents are now employed by the latter, which is a separate and distinct entity from the Respondent. This contention is evidenced by the offer of employment produced for Co-Respondents Nos. 7, 10 & 11. It was clarified that Co-Respondent Nos. 1, 6, 12 & 14 were all employed by MT Services Ltd prior to the exercise. The Managers who issued recommendations are also employed by MT Services Ltd as stated by Mr

Mooroogen in cross-examination. As stated by Mr Mooroogen, the Respondent has stopped recruiting on the permanent and pensionable establishment since 2007.

It was also submitted that even if the promotion exercise were carried out by the Respondent, it was not unfair or unreasonable. The Disputants are relying on clause 2 of the Collective Agreement which applies in cases of recruitment and appointment of external candidates whereas the present matter concerns an internal promotion exercise. The use of the word '*generally*' indicates that there are cases where company may derogate from advertising vacancies. It is submitted that it is clause 8 of the Collective Agreement titled '*Promotion*' which is applicable to this case. The Collective Agreement does provide that promotions are based on recommendations of the Manager/Head/Chief as has happened for the promotion exercise of May 2022. The appointment of Management cadres has always been effected upon recommendation of the relevant Manager/Head/Chief since 2007 and the Disputants are well aware of. Disputants, Messrs Peermamode and Chady have been promoted based on recommendations in the past.

Regarding the Disputants' argument that the positions should have been advertised as per law, reference is made to *section 57* of the *Act* which provides for the scope of a collective agreement and *section 7* of the *WRA* does not form part of the list of sections in *section 57* from which a collective agreement cannot derogate from. It is therefore submitted that the process and provision for promotion binding on the Respondent is clause 8 of the Collective Agreement and not *section 7* of the *WRA*. One of the reasons why the promotion exercise is being contested is because the Co-Respondents were of a lower grade than the Disputants. It is submitted that seniority or grades is one of the criteria which the Manager has to consider and is not the only criterion. Reference has been made to *Burrenchobay v The Honourable Prime Minister & Ors. [2022 SCJ 125]* in submitting that seniority is not the dominant criteria in a selection process.

Moreover, it has routinely been upheld that matters of appointment and promotion are essentially within the province of the employer subject to an abuse of power by the latter (*vide Mrs D.C.Y.P and The Sun Casino Ltd (RN 202 of 1988); Cesar and C.W.A. (RN 785 of 2005); Mauritius Institute of Training and Development v Employment Relations Tribunal (supra)*). Reference has also been made to the authorities quoted in the Tribunal's award in *ERT/RN 36/2021*. This is not a case disclosing an abuse of power on the part of the employer and the promotion exercise was fair and reasonable.

THE MERITS OF THE DISPUTE

The Terms of Reference of the present consolidated matters is asking the Tribunal to see whether the promotion exercise carried out by the employer in May 2022, whereby a number of MT staff were promoted to higher grade posts of Manager was fair and reasonable in regard to the fact that no advertisement of vacancy for the posts was done by MT; no selection exercise was conducted for the posts; and the Disputants were never given the opportunity nor information to postulate for the said posts. The second limb of the Terms of Reference states that if the answer to the above is in the negative, whether the exercise should be reconducted properly so that the Disputants are given a fair opportunity to be potentially appointed or otherwise.

The four Disputants are employed at the Respondent company in the grade of Principal Telecom Engineer in the Network Department. According to the Disputants, in or about May 2022, it was announced that a number of engineers have been promoted to managerial positions in the Network Department. This has resulted in the promotion of the Co-Respondents. The Disputants are not satisfied with the promotion exercise of May 2022.

The Terms of Reference of the present dispute has notably asserted that the promotion exercise of May 2022 was carried out by the employer, which is MT. However, as per the evidence borne on record, Mr Samy, who deposed on behalf of the Disputants, agreed that the all the Co-Respondents are now presently employed by MT Services Ltd. This has moreover been averred in the Respondent's Statement of Case, to which the Respondent's representative stood by when adducing evidence. Mr Moorooogen, in evidence, notably stated that the promotion exercise carried out in 2022 was upon recommendation and based upon the approval of the Chief Executive Officer of MT Services Ltd. He also produced the certificate of incorporation of MT Services Ltd showing it to be a distinct legal entity although he did also recognise that it is an affiliated company of MT.

Although the Respondent's representative did agree, when cross-examined, that his Statement of Case does not mention that the recruitment exercise was carried out by MT Services Ltd, he did however maintain in cross-examination that the exercise was carried out by MT Services and the Co-Respondents were appointed by MT Services. He also notably stated, again

in cross-examination, that the announcement and recommendation was made by their respective Managers and Chiefs who are employed by MT Services. Moreover, it was clearly stated that the Respondent has stopped recruitment on its permanent and pensionable establishment since 2007 even though Mr Samy stated he was not aware of same.

It must also be noted that not all of the Co-Respondents were employed by MT prior the promotion exercise of May 2022. Mr Samy, when cross-examined, did recognise that Co-Respondent Nos. 1, 6, 12 & 14 were employed by MT Services prior to the exercise and this has moreover been confirmed by Mr Moorooogen in his evidence. It must also be noted that the offers of employment pertaining to the aforesaid Co-Respondents were produced by the Respondent to show that they were employed by MT Services Ltd prior to the promotion exercise.

The Disputants are notably relying on the announcement made by the then CTO of MT, Mr Guddoy in support of their contention that the promotion exercise was carried out by MT. However, the Tribunal does not have the benefit of Mr Guddoy's evidence on the matter for it to come to this conclusion. Even if it assumed that the announcement was made by the CTO of MT, this does not necessarily imply that the promotion exercise was carried out by MT nor has any evidence been adduced to show that this is the case. The Respondent's Statement of Case mentions that it is not aware of Mr Guddoy's statement to the effect that other Managers were also appointed in other MT departments; whereas the Mr Samy did recognise that the Co-Respondents, promoted following the exercise of May 2022, are now all employed by MT Services Ltd. It must be also noted that the Respondent's representative has maintained that the exercise was carried out by MT Services Ltd and the Co-Respondents were appointed by MT Services Ltd.

It has been submitted on behalf of the Disputants that in relying on the Collective Agreement to justify the promotion, the Respondent accepts that it controlled the promotion exercise regardless of the fact that the Co-Respondents are now employed by another entity. To say that the Respondent accepts that it controlled the promotion exercise just because it has relied on certain provisions of the Collective Agreement would be contrary to the evidence of its representative to the effect that the exercise was carried out by MT Services Ltd and the Co-Respondents were appointed by MT Services Ltd. As per the Respondent's submissions, it has contended that the contested promotion exercise was not conducted by the Respondent but by MT Services Ltd and the Respondent has argued in the alternative that if the exercise were conducted by the Respondent, it was not unfair or unreasonable. It can also be noted that, in

cross-examination, Mr Moorooogen did recognise that he cannot rely on the Collective Agreement to explain the decision made by MT Services Ltd.

Bearing in mind that it is not disputed that the Co-Respondents are all employed by MT Services Ltd and in view of the above, the Tribunal can only find that the promotion exercise was undertaken by MT Services Ltd and not the Respondent employer as has been averred in the Terms of Reference. In the same vein, the assertion, as per the Terms of Reference, that a number of MT staff were promoted also cannot stand as it has been recognised that some of the Co-Respondents were at MT Services Ltd prior to the promotion exercise.

It can also be noted that the grounds, as listed in the Terms of Reference, which the Disputants have put forward to question whether the promotion exercise was fair and reasonable have not been denied by the Respondent's representative in his evidence. Indeed, Mr Moorooogen did acknowledge that the promotion exercise was carried out without any advertisement and that the four Disputants were never given any opportunity to apply for these managerial positions. This however does not imply that the promotion exercise was conducted by MT as has already been considered by the Tribunal.

The issue of some of the Co-Respondents being in a lower grade than the Disputants prior to the promotion exercise has been also canvassed during the proceedings. Indeed, Mr Samy produced a table of the position of staff prior and after the promotion. It must be noted that as per the Terms of Reference of the dispute, the promotion exercise is being questioned on three specific grounds and the ground that the Co-Respondents could have been of lower grades to the Disputants is not among them. It would therefore be *ultra vires* for the Tribunal to enquire into this issue as can be noted from what was stated in *Air Mauritius Ltd v Employment Relations Tribunal* [2016 SCJ 103]:

Under section 70 (1) the Tribunal is required to enquire into the substance of the dispute that is referred to it and to make an award thereon and it is not empowered to enquire into any new matter that is not within the terms of reference of the dispute.

The issue of job descriptions has also arisen during the hearing of the matter in view of the provisions of clause 8 of the Collective Agreement. It has been submitted on behalf of the Disputants that there is no appropriate job description based on which recommendations could

have been made, which points to a lack of transparency in the promotion exercise. Having regard to the Terms of Reference, it is clear that this ground challenging the fairness and reasonableness of the promotion exercise has not been specifically invoked. It would not therefore be within the Tribunal's mandate to inquire into same.

The Disputants have also relied on *section 7* of *WRA* to assert that the posts should have been advertised. It has notably been submitted that this provision is a reflection of clause 2 of the Collective Agreement. *Section 7* of the *WRA* places an obligation on the employer when a vacancy in a higher grade arises. However, as has been noted, the Tribunal has found that the promotion exercise was not conducted by the Disputants' employer but by MT Services Ltd based on the evidence before it. It is also apposite to note that this particular section would fall under the exclusive jurisdiction of the Industrial Court (*vide section 3* and the *First Schedule* of the *Industrial Court Act*) and is excluded from the jurisdiction of the Tribunal by virtue of *section 71* of the *Act*.

It can also be noted that both parties have extensively referred to the Collective Agreement in their respective submissions in relation to which provision should apply in respect of the promotion exercise. Having found that the promotion exercise was conducted by MT Services Ltd, it would not serve any purpose to debate on the applicability of a Collective Agreement which binds the Respondent and not MT Services Ltd. Likewise, the Respondent's representative did agree that he cannot rely on the Collective Agreement to explain the decision made by MT Services Ltd.

Having considered the issues that arose during the hearing of the present matter and having notably found that the promotion exercise was conducted by MT Services Ltd and not the Respondent employer, the Tribunal cannot therefore award that the promotion exercise was unfair and unreasonable as it is being asked to do in the first limb of the Terms of Reference of the disputes. Accordingly, the second limb of the Terms of Reference would not therefore apply.

The four consolidated disputes are therefore set aside.

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(SD) Shameer Janhangeer
(Vice-President)

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(SD) Anundraj Seethanna
(Member)

.....
(SD) Christelle P. D'Avrincourt (Mrs)
(Member)

.....
(SD) M. Nayid Simrick
(Member)

Date: 6th November 2024