

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/RN 38/2021

Before: -

Shameer Janhangeer	-	Vice-President
Francis Supparayen	-	Member
Abdool Feroze Acharauz	-	Member

In the matter of: -

Mrs Satyami PARMESSUR

Disputant

and

DEVELOPMENT BANK OF MAURITIUS LTD

Respondent

In presence of: -

1. Mrs Narvada CHUNDERDEEP
2. Mrs Anouchka DOMUN
3. Mrs Prubha ELLIAH
4. Mrs Keerty Devi JHINGOOR
5. Mrs Marie Joan MEUNIER
6. Mrs Shameema Bibi MOHAMUDALLY
7. Mr Kadressen RAMASUBBOO
8. Mrs Varsha SEESUNKUR
9. Mr Vishen SOOPARAYACHETTY
10. Mrs Linda PILLAY SUNASSEE
11. Mr Sadasiv TATEA
12. Development Bank of Mauritius Staff Association

Co-Respondents

The present matter has 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 Terms of Reference of the dispute read as follows:

1. *Whether the selection exercise conducted by the Respondent in 2018 leading to the appointment in March 2019 for the promotion of the post of Development Officer, through which the Disputant was not favoured, was fair, just, reasonable and non-arbitrary.*
2. *If the assessment in 1 above is in the negative, whether the Respondent should reconsider the selection exercise and relevant appointment to allow the Disputant the fair chance of being selected/appointed/promoted with effect from March 2019 or otherwise.*

Both the Disputant and Respondent were assisted by Counsel. Mr T. A. Dabycharun appeared for the Disputant; whereas Mr M. Ajodah appeared for the Respondent instructed by Mr R. Bucktowosing, SA. They have each submitted a Statement of Case in the present matter. The Co-Respondents have stated that they are abiding by the decision of the Tribunal and have left default.

THE DISPUTANT'S STATEMENT OF CASE

The Disputant joined the Development Bank of Mauritius Ltd ("DBM") as Clerk on 3 December 1990, was promoted to Senior Clerk in 2000 and confirmed as same on 25 May 2001. She applied for the post of Development Officer ("DO") as per memo dated 13 June 2018. At the time of the application, she was holder of a Diploma in Business Practice, had followed an International Programme on Enterprise Development through Micro Finance and was holder of a BSc in Management with first class honours. She was also pursuing a six month course on the Fundamentals of the Principles and Practice of Quality Management, which she completed in June 2018, and the Commonwealth Executive Master of Business Administration, which she completed in June 2019. As per management memo dated 27 March 2019, 11 new DOs were appointed of which 7 were from the grade of Clerk, 3 from Senior Clerk (including one from Rodrigues) and one was a Confidential Assistant.

The Disputant has averred that the exercise was for an internal promotion and not for new recruits. As per an agreement between the Respondent's management and the DBM Staff Association ("DBMSA"), appointment to the post of DO should be made by a committee composed of the Managing Director, Assistant Managing Director and one Director. However, the interview panel was composed of the Chairman, Managing Director and one Director who did not form part of the Staff Committee. The panel could hardly evaluate the delivery of her duties in the actual operations and business of the Bank in a 20-minute interview, the more so they were unaware of her performance and knowledge of work. To her knowledge, no report was submitted to the panel by Human Resource ("HR")/Officer-in-Charge for an assessment/evaluation of her performance/competencies/skills.

It has been averred that performance, qualifications, years of service, management report on staff should be the criteria and should have been considered but was squarely ignored during the exercise. It is well known at the Bank that, for every promotion exercise, several criteria and weightage are taken into consideration. She met with the Managing Director and had a separate conversation with the Chairman and they admitted that the promotion exercise was based solely on the interview. She then addressed her grievance in a letter dated 29 March 2019 to the former and copied to the latter. Management replied that it was maintaining its decision. She also requested the DBMSA to provide her with the agreements made with management pertaining to staff matters, but no reply was received.

The Disputant has served in several Departments as Clerk and Senior Clerk. She has been assuming higher responsibilities pertaining to the post of DO. She has been called upon on several occasions to serve as replacement at branches where the DO or Senior Development Officer ("SDO") was on leave. She was also posted to the Internal Audit Department following an internal vacancy for which she did not apply. She was posted to the Finance Department in 2015 in replacement of a DO and performed as such prior to the nominations of DOs. She also worked at home after office hours with no allowance being paid to her. She has been dealing with the public for many years at operational level and has never been adversely reported. She is the only Senior Clerk entrusted with the responsibility to sign and co-sign for agreements to be registered at the Registrar Office. She is presently in the Covid Cell – Loan Department vetting loan deeds, which is not part of her scheme of service but is that of DO.

It has been averred that all the Co-Respondents, except for Nos. 1, 3, 7 and 10 joined after her and are her juniors. Co-Respondent Nos. 5, 7 and 10 joined as Clerk and were promoted to

Senior Clerk. Co-Respondent No. 1 joined as a typist and was promoted to Confidential Assistant, has never performed at operational level, was posted to the Underwriting Department after her nomination and has retired from the Bank soon after her confirmation as DO. Co-Respondent No. 5, a former President of the DBA Staff Association, was first in selection of the new appointees. She joined as a Typist, was promoted to Clerk/Typist after 2001, was repositioned as Clerk in 2016 and has mostly worked in the Arrears Department. Co-Respondent No. 11 joined as a Clerical Assistant in 2000 and was later promoted to Clerk. The other joined as Clerk and are junior to the Disputant. Co-Respondent No. 6 carried out specific tasks and following her appointment as Clerk, she has been posted to only one Department and is a regular latecomer. Co-Respondent Nos. 4, 9 and 11 are still serving in the same Department.

Disputant has the same signatory authority as Co-Respondent Nos. 2 and 8 as an Administrative Officer in the Leasing Unit. The appointees, save for Co-Respondent Nos. 2, 4, 7 and 9, have never worked at sub offices prior to their nominations. All other appointees, save for Co-Respondent Nos. 5 and 7, neither have signatory power nor have carried out duties at supervisory level. The Disputant has a clean track record and has not been adversely reported on her performance. She holds many years of hands-on experience in connection to the duties of DO compared to other appointees. She feels that she has been unjustly and unfairly discriminated compared to the appointees. She is praying for an award in terms of the Terms of Reference of the dispute.

THE RESPONDENT'S STATEMENT OF DEFENCE

The Respondent has notably averred that the selection exercise was for an appointment by selection and not for internal promotion and for new recruits. The post of Assistant Managing Director no longer exists. The Staff Rules 1993, as amended in 2001, gives the Respondent power to amend the rules, which it did. The Chairman was co-opted as a member of the panel. The agreement referred to by the Disputant is void due to the retirement of the holder of the grade of Assistant Manager and the resulting vacancy thereat. In 2018, a new agreement was entered with the DBMSA and the issue concerning appointment to the grade of DO was raised; it was agreed that appointment to the grade should be made from both internal and external applicants.

The Respondent has also averred that the exercise was a selection one. The vacancies at the level of DO were advertised and qualified candidates applied. 46 qualified applicants were

called for interview. Following the interview and selection exercise by the selection panel, appointments were made. The panel did not find that the Disputant ought to be appointed as DO. The selection exercise was based on merit and was carried out in all fairness. All the criteria listed regarding qualification requirements, skills and competencies for the post were taken into consideration. Interview is a process and all criteria mentioned by the Disputant are factors that are taken into consideration at the interview process and this starts with the advertisement for the vacancy, the scheme of service for the grade, qualifications laid in the scheme of service, experience and skills required for the post. Knowledge of duties, attitude at work, communication and appearance/personality are skills and competencies upon which candidates have been assessed during the interview process.

The Respondent is not aware of any conversation between the Disputant, the Managing Director and the Chairman. It is admitted that interview should not be the only criterion for promotion. It is admitted that the Disputant served in several departments as Clerk and Senior Clerk. It is denied that the Disputant is assuming higher responsibilities in the scheme of service for DO and the Respondent avers that as a Senior Clerk, the Disputant has only been performing her duties depending on her posting as provided in the scheme of service for her post. The signatory power referred to by the Disputant is granted by the Board to staff depending on their posting to ensure the smooth flow of work and the Bank's operations. The Disputant has never been assigned duties at the level of and/or called upon to replace any DO or SDO at branches.

The Respondent avers that the Disputant was performing the duties of Senior Clerk at the Internal Audit Department. It is denied that the Disputant performed the duties of DO in the Finance Department – she was only performing the duty of Senior Clerk and was not transferred to replace any DO. Allowance is paid to staff assigned with higher duties and as the Disputant was not assigned with the duties of DO, she was not paid any allowance. It is the duty of Senior Clerk to perform the duty of Teller and to provide assistance in all matters pertaining to the Bank's operations. It is common practice in the service to request officers to report for duty during leave whenever their service is needed as provided in the DBM Conditions of Employment; and leave not availed is refunded and/or extended by the number of days the officers had reported for duty whilst on leave. The Disputant has been performing at operational level as a Senior Clerk.

It has further been averred that the responsibilities to co-sign deeds of sale, lease agreements and related documents form part of the duties of Administrative Assistant, which the Disputant was performing as on secondment at the DBM Financial Services and the said

duties were not those of Senior Clerk. She was seconded there since 24 June 2019 to perform duties at the level of Administrative Assistant following a proposal and decision of the Board. Duties were assigned to staff in the aftermath of the Covid-19 pandemic and were not the core duties of the Disputant. Staff working on these schemes are often called upon to work outside their normal working hours and on Saturdays and are paid overtime.

It is admitted that the Co-Respondents, except for Nos. 1, 3, 7 and 10 joined the Bank after the Disputant and are her juniors; that Co-Respondent Nos. 5, 7 and 10 joined as Clerk and were promoted to Senior Clerk; that Co-Respondent No. 1 joined as a typist and was promoted to Confidential Assistant and has never performed at operational level. Co-Respondent No. 1 retired from service on grounds of age. The averments regarding Co-Respondent Nos. 3 and 11 are admitted. Co-Respondent No. 6 has never been subject of any disciplinary action and has been performing all the duties of her post. Co-Respondent Nos. 2, 4, 8, 9 and 11 have been performing all the duties of their post as per their posting. Co-Respondent No. 2 and Disputant were assigned duties as Relationship Officer and Administrative Officer in the Leasing Unit and Co-Respondent No. 6 is now a DO. It is admitted that the appointees, save for Co-Respondent Nos. 2, 4, 7 and 9, have never worked at sub offices prior to their nominations.

The Respondent admits that Disputant has a clean track record and has not adversely been reported on her performance. It is denied that the Disputant holds many years of hands-on experience in the duties of the post of DO compared to the other appointees. It is denied that the Disputant has been unjustly and unfairly discriminated against compared to the appointees. The appointments have been made based on criteria such as qualifications, merit, competencies and skills as required in the scheme of service for the post. The selection panel did not find that the Disputant ought to be appointed as DO and the selection exercise was carried out in all fairness.

THE EVIDENCE OF WITNESSES

Mrs Maya Moonesawmy, Ag. Assistant Manager at the DBM, was called on behalf of the Disputants to produced certain documents. She notably produced the DBM Conditions of Employment for the period 1 July 2016 to 30 June 2021 (Document A); the DBM Staff Rules 1993 (Document B); the Amended Staff Rules of 1993 (Document C); the minutes of meeting of the Joint Negotiating Council dated 10 January 2005 (Document D), which contain the criteria for promotion for the post of DO; an agreement between the DBM and the DBMSA dated 27 August

2018 (Document E); the Internal Vacancy for the post of DO dated 13 June 2018 (Document F); a memo dated 27 March 2019 (Document G) notifying the appointment of DOs; a memo dated 18 April 2005 (Document H) regarding the Disputant's posting to the SME Department in 2005; a memo dated 26 February 2004 (Document J) on the Disputant's posting to Mahebourg Branch; a memo dated 3 June 2015 (Document K) regarding the Disputant's posting to the Finance Department; a memo dated 4 October 2017 (Document L) regarding additional responsibilities assigned to the Disputant in 2017; the details of Co-Respondent Nos. 3, 4, 6, 9 & 11 (bundle marked as Document M) showing their respective date of appointment, years in service, designation, qualifications, duties and posting; an office memorandum from the DBM dated 26 February 2004 (Document N) on the signatory power given to the Disputant; and a bundle of documents showing the details of posting, grade, promotion, qualifications of Co-Respondent Nos. 1, 2, 5, 7, 8 and 10 (Document O). She was not able to trace out the weightage/allocation of marks dated 11 October 2001.

The Disputant, Mrs Satyami Parmessur, adduced evidence in the present matter. She notably solemnly affirmed as to the correctness of her Statement of Case dated 20 September 2021. She produced a copy of her scheme of service of Senior Clerk (Document P) and elaborated on her duties. According to the document, the only duty she is performing is signature of deed of loan; she has performed same for above Rs 200,000. All the duties she has performed are in the field of DO. She applied for the post of DO as per a memo dated 13 June 2018 and produced the scheme of service of the aforesaid post (Document Q). As per the eligibility, Senior Clerk and Confidential Assistant could apply and she also referred to the qualifications required.

Referring the scheme of duty of DO, Mrs Parmessur stated that the duties she performed were that of receiving loan applications; loan appraisal disbursements; ensure funds are disbursed in accordance with conditions attached to the deed of loan signed by customers; confirm inscription of charge and authorise final disbursement; authorise transactions entries in the Integrated Banking Package; verify entries in the Integrated Banking Package; assist management in preparing monthly Management Accounts/Cash Flow, budgets; responsible for banking transaction; reconciliation of bank statements; prepare cheques, obtain cheques signatories and remit same to clients; perform daily control and reconciliation of operations of the Branch and to make refill where appropriate; keep up to date statistical records for management use; and drafting, vetting and signature of deeds in respect of relevant deeds of loan.

At the time of application for the post of DO, she held a Diploma in Business Practice from the ICSA, she followed an international program on Enterprise Development through Micro Finance, she holds a first-class BSc (Hons) in Management with a first ranking and was pursuing a post graduate degree – Commonwealth Executive Master of Business Administration – and a short course on Fundamentals in Principles and Practices of Quality Management. As per memo dated 27 March 2019, 11 DOs were appointed. 7 were from the grade of Clerk, 3 from Senior Clerk, including Mrs Meunier from Rodrigues, and 1 was a Confidential Assistant.

Mrs Parmessur stated that the interview panel was composed of the Chairman, the Managing Director and one Director. According to Documents B and C, the interview should have been conducted by the Staff Committee composed of members of staff at management level. She referred to section 2.1.2 of the DBM Staff Rules 1993 (Document B), which has been amended on 26 September 2001. The interview panel was not composed of the proper people to assess her. The Chairman and Director are both independent Non-Executive Directors who only come for Board meetings; the Managing Director was newly appointed on contract in April 2018 with the interviews held in November 2018. She produced an extract of the Annual Report for the year ended 30 June 2018 (Document R), an extract of the Annual Report dated 30 June 2019 (Document S) and her letter of interview dated 25 October 2018 (Document T).

Mrs Parmessur stated that she was not aware of the composition of the interview panel prior to the interview. The panel was unaware of their performance and could not make a proper evaluation. She was asked questions with regard to her experience at the interview. There was no appraisal as she was already on her top salary since many years. There was no HR personnel present to assist the panel. According to her, the criteria should be qualification, experience, punctuality, interview, assessment i.e. management report, knowledge of duties, attitude at work, communication and personality. She does not think that these have been considered in her case. She went to see the Managing Director and spoke to the Chairman about the issue. They affirmed that selection was based only on the interview. She then wrote a letter of grievance dated 29 March 2019 (produced as Document U). She also produced a reply dated 5 April 2019 (Document V).

Mrs Parmessur furthermore stated that she has served in PNA, Legal, Accounts, Finance, Sub-Offices, Internal Audit, Small and Medium Enterprise and the Centralised Loan Department. She performed higher responsibilities as per memo produced as Document H. She reinforced the SME Department in Mahebourg. She has also replaced at Curepipe Branch several times. At Mahebourg, she replaced the DO and the SDO and she produced a memo dated 7 December

2005 (Document W) to this effect. She also produced a copy of the attendance report of Curepipe Branch (Document X). She was also posted to the Finance Department as per Document K where she replaced the DO and was assigned the duties of same. As per Document L, she replaced the SDO in the Accounts Department.

Mrs Parmessur has drawn up a table and listed the duties performed by her, the duties performed by Senior Clerk, the duties of DO and SDO together with her observations (Document Y). She produced the scheme of duties of Accounting Assistant (Document Z) for ease of reference as well as the scheme of service for the post of SDO (Document AA). The scheme of service for the post of DO prior to 13 June 2018 was also produced (Document AB). According to the comparative table produced, she has been mostly performing the duties of DO rather than Senior Clerk.

Regarding the Co-Respondents, Mrs Parmessur stated that apart from the Senior Clerks (Co-Respondent Nos. 5, 7 & 10) who have been appointed, she is more qualified than them. Co-Respondent No.1 Mrs N. Chunderdeep joined the Bank as a Typist and was promoted to Confidential Assistant. She only performed typing work, which is not related to the post of DO. Mrs Chunderdeep has now resigned after her promotion and confirmation to the post. Mrs P. Elliah joined the Bank on 3 December 1990 as Typist/Stenographer and was promoted to Clerk/Typist. She was appointed Clerk in 2016 and did not have the minimum 5 years for the post of DO. The post Typist/Clerk was restyled as Clerk in 2016. The post of Clerk/Typist was abolished in 2016 referring to the Salary Revision in 2016. She also stated that, at the interview, no marks were allocated for duties performed, years of service and post occupied. Co-Respondent No.6 should have scored less marks as she is not punctual. She is asking the Tribunal to see whether the selection exercise was fair, just and reasonable and if in the negative, to see whether the Respondent can reconsider the exercise. She moreover produced an agreement between the DBM and the DBMSA dated 22 October 2008 (Document AC).

Mrs Parmessur was thoroughly questioned by Counsel for the Respondent. She notably stated that the exercise was a selection exercise which included an interview as part of the process. The interview panel did include the Managing Director and one Director, but they were not staff on the establishment. Only the Assistant Managing Director was not present on the panel, this post had been voluntarily retired before 2018 with no one appointed to the post since. She agreed that there could not have been an Assistant Managing Director on the panel. However, the panel must have been composed of staff on establishment at a higher position as per the Amended Staff Rules 2001 (Document C). She agreed that her Statement of Case does

not mention that the panel should be include staff members. Referring to the amendment to the rules, under the heading of '*Joint Negotiating Council*', she agreed that there has not been a Chief Manager nor a Manager (HRM) since a long time and not in 2018.

The Disputant also stated that every interviewee was interviewed for the same amount of time. Management report on staff is a criterion for the selection process. As she had reached the top of her salary scale, there was no Staff Performance Appraisal carried out for her. Its purpose is for the DBM to decide whether increments should be given to staff or not. The management report is for the purpose of the promotion exercise and no report was submitted for assessment and evaluation of performance. She agreed that management report is not mentioned in her Statement of Case. At least 12 of her colleagues had reached the top of their salary scale. She agreed that that it would not have been possible to use the Performance Appraisal Report in the selection exercise as some had been appraised and others had not. The usual criteria are experience, qualification, seniority and management report. She agreed that the selection is done on the total marks obtained on all the criteria taken together.

Mrs Parmessur further stated that she is aware of the scheme of service for the post of DO and the contents thereof. She has never challenged the scheme of service. She agreed that the persons who were appointed met the eligibility criteria except for Mrs Elliah, who was a Clerk since 2016. She agreed that Document D referred to an advertisement for the post of DO recently advertise at the time of the meeting on 10 January 2005. She referred to a letter from the DBMSA dated 3 September 2008 to management on the criteria for promotion to the aforesaid post. She agreed that the criteria for selection is appearance and personality, knowledge and competencies, communication skills, leadership and commitment, and attitude at work. As per her conversation with the Managing Director and the Chairman, the appointments were based solely on the interview. She is sure her qualifications were ignored. She maintained that she has been performing duties in the higher grades of DO and SDO and above. The duties she performs are not her duties as per her scheme of service of Senior Clerk. She agreed that if she were assigned duties to replace someone in a higher position, she should have been paid an allowance. She has not been paid same. Despite performing these duties, she has not claimed any allowance.

Mrs Parmessur moreover stated that Co-Respondent No.1 was a typist and has retired on ground of age from the service. She did not agree that Mrs Elliah has been a Clerk since December 2010. This is not mentioned for Mrs Elliah in Document M, which states Clerk/Typist. Co-Respondent No. 6 has received a warning. She agreed that Co-Respondent Nos. 2, 4, 8, 9 and 11 have been performing clerical duties as per their posting at the Bank. She was assigned duties as

Administrative Officer at DBM Financial Services Ltd and Co-Respondent No.2 was assigned duties as Relationship Officer. It is true that she and her colleagues also have a clean track record and never been adversely reported for performance. She agreed that the appointments were made on specific criteria but these were not considered. She is not aware that she scored less marks in the selection exercise than those appointed. She did not protest against the composition of the interview panel at the time. In her grievance letter dated 29 March 2019, she mentions that the Chairman and the Director did not know the staff and not that they should not have been on the interview panel.

Under re-examination, the Disputant notably produced a letter dated 3 September 2008 from the DBMSA to the Managing Director (Document AD) which mentions the condition of 50% on merit and 50% on seniority for the post of DO. She received same when through the DBMSA as a member. Although Co-Respondent Nos. 5 and 7 had signatory powers, the other Co-Respondents never did. She was not privy to the assessment form before the selection panel nor was she aware of the markings allocated to all criteria in the form.

The Respondent's representative, Mr Deoraz Hosanee was called to adduce evidence. He solemnly affirmed as to the truth of the Respondent's Statement of Case as corrected. Regarding the composition of the interview panel, he stated that at the time there was no Assistant Managing Director in office as the post was cancelled on establishment. This is why he was replaced. The posts of Chief Manager and Manager HR were also vacant. Senior Management was composed only of the Managing Director and the next senior most level was Assistant Manager. The panel could not have been composed as mentioned by the Disputant. There is no requirement for the Managing Director and the Director to be staff on establishment as per Document C. A report from HR pertains to those with disciplinary issues and the panel did not ask for any such report from any supervisor. The Disputant nor the Co-Respondents did not have any disciplinary issues. Prior to coming before the Tribunal, the Disputant did not make any complaint regarding the criteria used by the panel. The decision to appoint was not based solely on interview, there was also qualifications, experience, years of service over and above the other criteria set by the interview panel. Additional marks are awarded for additional qualifications and for additional years of service.

Mr Hosanee also explained that in around 2013, the DBM was facing difficulties whereby over 25% of employees proceeded on a voluntary retirement scheme. The new Board of Directors, constituted in early 2015, took bold decisions among being requesting staff to perform additional duties over and above their normal duties in order to salvage the institution. Like other

staff, the Disputant has been performing duties of DO and SDO. The Disputant was performing some of the duties of DO based on her posting. The Co-Respondent were also requested to perform additional duties depending on their posting. The Disputant was deputed to Mahebourg as she had signatory powers and lived nearby. He produced an office memorandum dated 22 January 2014 (Document AE) on the restructure of the Bank. The duties performed by the Disputant as DO were done under the close supervision of the Officer-in-Charge and the Supervisors. Her responsibility to sign and co-sign as the Bank's representative pertained to her posting at the DBM Financial Services as Administrative Officer.

Mr Hosanee moreover stated that Mrs P. Elliah was qualified for the interview as her job of Clerk/Typist was realigned with Clerk in 2008 as per Document AC (2nd page). Mrs Elliah's payslip for December 2010 (produced as Document AF) shows her occupation to be Clerk. An office memorandum dated 21 February 2014 (produced as Document AG) shows the name of Mrs Elliah as Clerk. The selection exercise was for an appointment by selection as per the advertisement (Document F). Regarding the Disputant's claim that the panel could hardly evaluate the delivery of her duties, all applicants were assessed on specific criteria set by the interview panel and there was a level playing field. Performing additional duties does not confer an additional advantage/preference whenever there in an appointment by selection.

Mr Hosanee was thoroughly questioned by Counsel for the Disputant. He notably stated that the reason for Document AC is that salaries for the grades mentioned therein have been aligned. Document AG dates to 2014 and states that Mrs Elliah was occupying the position of Clerk and the selection exercise was in 2018. An office memorandum dated 31 March 2010 from the DBM (produced as Document AH) shows Mrs Elliah's job title to be Clerk/Typist. Given that the post of Manager HRM was vacant, he did not think it important to have someone well acquainted with the job of the applicants to the post of DO. He agreed that there was no staff acquainted with the performance of the candidates on the selection panel, which would have been a plus for the applicants. Referring to the scheme of service of DO (Document Q), the candidates needed to meet the criteria mentioned therein and he agreed that a Clerk must have minimum 5 years' service to be eligible to apply. The post of Clerk/Typist was restyled as Clerk in 2008. As per Document A, the post of Clerk/Typist was abolished in 2016. Mrs Elliah joined the Bank as Typist and was appointed to Clerk/Typist. He did not agree that Mrs Elliah was never promoted to Clerk and that she was always doing typing work.

Mr Hosanee moreover replied that the Disputant was not assigned higher responsibilities but she was doing additional duties over and above her own scheme of duties like other

candidates. As per Document W, the Disputant was replacing a DO and an SDO and it is a higher responsibility. He agreed that she was performing the duties of Administrative Assistant when seconded to the DBMFS without any acting remuneration. He agreed that the Disputant was performing at operational level as Senior Clerk. Co-Respondent No. 1 joined the Bank as Typist, was promoted to Confidential Assistant and has never performed at operational level; she replied successfully in the interview exercise and was appointed. He agreed that, in only reading Board papers, Mrs Chunderdeep would not have on the job experience, unlike the Disputant. Mrs Elliah was President of the DBMSA and ranked first in the selection exercise. Except for Co-Respondent Nos. 1, 3 and 10, all the Co-Respondents were junior to the Disputant. He did not agree that Co-Respondent No. 6 faced disciplinary action for being late all the time.

Responding to further questions from Counsel for the Disputant, Mr Hosanee read out paragraph (c) at page 3 of the Amended Staff Rules 1993 (Document C) regarding the composition of the Staff Committee conducting interview for appointment up to SDO. He also stated that Mrs Elliah was recruited as a Typist/Steno and was promoted as Clerk/Typist which was subsequently restyled in 2008 to Clerk. He agreed that the post of Clerk/Typist was abolished in 2016. He also agreed that additional responsibilities and higher responsibilities are two different things. He did not agree that a person needs to be capable of assuming higher responsibilities as there was a lack of staff at the DBM and all members were requested do additional responsibilities in the department and by assuming same, they were assuming higher responsibilities under the supervision of the Head of Department.

THE SUBMISSIONS OF COUNSEL

Learned Counsel for the Disputant notably stated in his submissions that the Disputant needs to show that the selection exercise was not fair, reasonable and non-arbitrary. He invited the Tribunal to consider the Amended Staff Rules (Document C), which made provision for the selection committee to be comprised of the Managing Director, Chief Manager and HR Manager. This is so as only the HR Manager would have personal knowledge or have relevant documents regarding the performance of the applicants to the post of DO and this would enable the selection committee to take an informed decision not only based on the interview but also based on experience, qualifications, knowledge of duties, attitude at work, communication skills and poor performance of the applicants. The interview panel was composed of the Director, Chairman and the Managing Director. It is thus not fair for the Disputant to have been assessed by people who were not clearly competent to take a decision regard the different criteria needed to assess the Disputant.

Regarding Co-Respondent No.1, Counsel for the Disputant submitted that she was a Confidential Secretary and although she was qualified to apply for the post of DO, based on experience and knowledge of duties, she could not have met those criteria. As regards Mrs Elliah, as per Document A, the post of Clerk/Typist was abolished in 2016. The payslip showing her to be a Clerk in 2010 caused doubts as how can two different documents come from the Respondent. There is no document to show that her post of Clerk/Typist was restyled as Clerk in 2008 as stated by Mr Hosanee. From 2016 to 2018, Mrs Elliah only had two years when the minimum requirement for the post of DO was five years. This also shows that the exercise was not fair, just and not reasonable. Concerning higher responsibilities assumed by the Disputant, this has not been denied and she would have more experience compared to Co-Respondent Nos. 1 & 3. She has produced ample evidence to this effect and is saying that she has more experience than all the Co-Respondents. Counsel also invited the Tribunal to disregard Mrs Elliah's payslip.

Learned Counsel for the Respondent notably stated in submissions that a party is bound by his pleadings; the Disputant cannot go outside the terms of the dispute and cannot go outside matters which have been raised in the Statement of Case. Counsel referred to paragraph 2.1 of Document C and paragraph 7 of the Disputant's Statement of Case where reference is made to the Managing Director, Assistant Managing Director and one Director as being the composition of the appointment committee. The case for the Disputant is that paragraph 2.1.2 of the Amended Staff Rules 1993 was not adhered, i.e. the composition of the interview panel. However, the new composition as per the rules has nothing to do with the case of the Disputant when compared to her Statement of Case. It has been borne in evidence that there has not been any Assistant Managing Director since long at the DBM and thus it would have been impossible for the Respondent to set up a committee in terms of paragraph 2.1.2, which has changed as per page 3 of Document C.

Counsel also submitted that there was a level playing field as far as the duration of the interview was concerned. The Disputant also stated that those who interviewed her were unaware of her performance at work. This is not possible as there was a single panel interviewing all the applicants and if the interviewers had no knowledge of her performance, they would equally have no knowledge of the performance of the other applicants. Reference was made to the qualifications expected under the scheme of service for the post of DO in submitting that the same criteria was used for all the interviewees. It was also raised that no report was submitted to the interview panel regarding her performance, competencies and skills. In evidence, no such report has been submitted in respect of any of the interviewees. The Disputant referred to a

management report but at the DBM, there is an Appraisal Report. The Disputant cannot be in a position to decide what the criteria for selection ought to be and this is for the Board to decide. Her letter addressed to the Chairman did not challenge the criteria applied by the panel.

It was also submitted that as per the Disputant's own evidence, she is aware that her qualifications and years of service were taken on board and that these were issues that were marked upon as per Mr Hosanee. This therefore contradicts her evidence that the decision to appoint was based on the interview only. On the issue of responsibilities, the Respondent has admitted that the Disputant performed duties which was not in her scheme of service as Clerk but is in the scheme of service of DO and even SDO. All other employees were in the same situation following the voluntary retirement exercise at the Bank. It is in evidence that all the Co-Respondents had also performed additional duties. At any rate, this is not a criteria before the interview panel. Regarding Mrs Elliah, there can be no better evidence than the payslip showing her to be a Clerk since 2010. There is also the verbal evidence of Mr Hosanee on the restyling of the post in 2008 despite no documentary evidence being available.

THE MERITS OF THE DISPUTE

The Terms of Reference of the present dispute is asking the Tribunal to enquire into whether the selection exercise conducted by the Respondent in 2018, which led to appointment to the post of Development Officer in March 2019, through which the Disputant was not favoured, was fair, just, reasonable and non-arbitrary. If the Tribunal finds its assessment to be in the negative, the second limb of the Terms of Reference is asking the Tribunal to enquire into whether the Respondent should be redirected to reconsider the selection exercise and appointment/promotion to allow the Disputant the fair chance of being selected/appointed/promoted with effect from March 2019 or otherwise.

The Disputant has been employed at the DBM since 1990 having joined as a Clerk. She was promoted to Senior Clerk and confirmed as same in May 2001. The Respondent advertised the post of DO, the Disputant applied for same on 13 June 2018 and attended an interview for the aforesaid post on 9 November 2018. As per a memo dated 27 March 2019, eleven new DOs were appointed comprising Co-Respondent Nos. 1 to 11. As per the scheme of service for the post of DO, the eligibility requirements were as follows:

ELIGIBILITY FOR APPLICATION

- *Senior Clerk & Confidential Assistant*
- *Clerk with a minimum of 5 years service, relaxable on possession of specialised knowledge/experience*

A major complaint that has been raised by the Disputant regarding the selection process for appointment to the post of DO is with regard to the composition of the selection committee which interviewed the various applicants for the aforesaid post. It has not been disputed that the interview panel was composed of the Chairman, the Managing Director and a Director. According to the Disputant's submissions, this is not in accordance with the Amended Staff Rules (Document C), which makes provision for the selection committee to be composed of the Managing Director, Chief Manager and Manager (HRM) for appointments to posts up to SDO.

As per the Disputant's Statement of Case, it has notably been averred that the panel should have been composed of the Managing Director, Assistant Managing Director and one Director (*vide* paragraph 7 of the Disputant's Statement of Case). The Disputant has however recognised, when cross-examined, that only the Assistant Managing Director was not present on the panel and she also agreed that her Statement of Case does not mention that the panel should include staff members. Moreover, in referring to the Amended Staff Rules, she agreed that there has not been a Chief Manager nor a Manager (HRM) since a long time and not in 2018.

The Respondent's representative, on this issue, notably stated that the post of Assistant Managing Director has been cancelled on establishment and the post of Chief Manager and Manager (HRM) are vacant. The panel could not have therefore been composed as mentioned by the Disputant. He added that there is no requirement for the Managing Director and the Director to be staff on establishment as per Document C.

The Disputant's contention that the selection committee was not properly composed has not been challenged by the Respondent. The Respondent, in its evidence, has clearly demonstrated that it was not possible to set up a panel according to the Amended Staff Rules and this has been recognised to some extent by the Disputant. She also did recognise that she did not protest against the composition of the interview panel at the time and that her grievance letter dated 29 March 2019 (Document U) addressed to the then Managing Director, Mr Unmole does not mention that the Chairman and Director should not have been on the interview panel.

It has been noted that the interview was conducted on 9 November 2018 and the appointments made to the post of DO were notified on 27 March 2019. If ever the Disputant had any issues with the selection exercise, notably regarding the composition of the interview panel, it was crucial for her to raise same at the material time and she failed to do so. In this context, the following may be noted from what the Supreme Court observed in *Hosanee & Ors v The Public Bodies Appeal Tribunal* [2016 SCJ 123]:

In any case, as already stated above, the applicants willingly participated in the interview and expressed no reservation or objection at the material time.

It has also been borne out that as per her Statement of Case, the Disputant has relied on the composition of the panel prior to the Amended Staff Rules in 2001. Whereas, in evidence, she is relying on the composition set in the Amended Staff Rules, which has clearly not been pleaded in her Statement of Case. It is trite law that in civil cases, a court cannot travel outside the pleadings (*vide Compagnie Sucrière de Bel Ombre Ltée v Bungaroo & ors* [1996 SCJ 334]). In *Tostee v Property Partnerships Holdings (Mauritius) Ltd* [2015 SCJ 41], the following was notably held:

Counsel for the petitioner is, in view of those authorities, right in his submission on it not being possible for a party or permissible for the Court to rely on evidence on matters not pleaded in order to come to a finding of fact.

...

In practice, our courts have also been guided by French and English authorities to reach the conclusion that the court should only consider matters which have been introduced in the pleadings. It is the responsibility of the defendant/respondent to aver matters in its plea that will enable the respondent to avail himself the benefit of having his version considered by the court, especially if it is a matter of fact which is supported by the law.

Likewise, in *Ramjan v Kaudeer* [1981 MR 411], it was notably held as follows:

Be that as it may, once a party has stated the facts on which he relies, these facts are binding and the court cannot ground its judgment on other facts which may come to light in the course of the trial.

Although the Tribunal is not strictly a court of law, it has been equated to a court of law by the Supreme Court in *Sooknah v CWA* [1998 SCJ 115]. Moreover, in *Greedharee v Mauritius Port Authority* [2016 SCJ 111], it was notably held that the decision of the Tribunal is, for all

intents and purposes, a judgment. It would not therefore be proper for the Tribunal to rely on evidence adduced by the Disputant which has not been pleaded in her Statement of Case.

It has also been submitted by Counsel for the Disputant that it was crucial for an HR Manager to have been present on the interview panel. The HR manager, it was argued, would have personal knowledge or have relevant documents of the applicants' performance which would have enabled the panel to take an informed decision regarding the applicants for the post. With regard to this argument, the Tribunal notes that there is no HR Manager presently in post at the DBM nor was there any in 2018. Thus, it would have been impossible for the Respondent to have had the HR Manager as part of the selection committee. It should also be noted that this particular aspect has not been averred in the Disputant's Statement of Case and cannot therefore be deemed to be part of her case in the present matter. In view of the above, the Tribunal cannot therefore find any fault in the selection exercise in question on the ground that the selection committee was not properly constituted or that the HR Manager was not present on the panel.

Another complaint highlighted by Disputant's Counsel in submissions related to Co-Respondent No. 3, Mrs P. Elliah. At some point in time, Mrs Elliah was a Clerk/Typist at the DBM and it has been submitted that, as the post of Clerk/Typist was abolished in 2016, she did not have the required minimum 5 years' service as Clerk to be eligible to apply for the post of DO in 2018. The Disputant has also placed emphasis on an Office Memorandum dated 31 March 2010 (Document AH) which shows Mrs Elliah to be designated as Clerk/Typist. On the other hand, the Respondent produced Mrs Elliah's payslip (Document AF) for the month of December 2010 showing her occupation to be Clerk. Mr Hosanee also produced a document dated 21 February 2014 (Document AG) which shows Mrs Elliah to be Clerk and categorically stated that the post of Clerk/Typist was restyled as Clerk in 2008.

The Tribunal has noted that it has not been disputed that the post of Clerk/Typist was abolished in 2016 as per the Review of Pay and Grading Structures and Conditions of Employment at the DBM (Document A). This does not however mean that it is upon the post being abolished in 2016 that Co-Respondent No. 3 became a Clerk as Document AG clearly shows that Mrs Elliah was a Clerk in February 2014. Despite the memorandum dated 31 March 2010 showing Mrs Elliah to be Clerk/Typist, it is clear that in December 2010, her occupation was Clerk as per the payslip produced.

In submissions, Counsel for the Disputant has invited the Tribunal to disregard the payslip. The Tribunal however notes that no reasons have been put forward why it should do so and further notes that if it were to disregard the payslip, it could equally disregard the other

documents showing Mrs Elliah to be a Clerk/Typist. The Tribunal cannot therefore find any valid reason for it to disregard the payslip and finds this to be conclusive in showing that Co-Respondent No. 3 was a Clerk as far back as December 2010 and that she did meet the minimum requirement of 5 years' service as Clerk to be eligible to apply for the post of DO.

Another issue raised regarding the selection exercise concerned Co-Respondent No. 1, Mrs N. Chunderdeep. This particular Co-Respondent was a Confidential Secretary prior to being appointed as DO in March 2019 and it was submitted that she could not have met the criteria based on her knowledge and experience. It was however not disputed that she was qualified to apply for the post of DO. The Tribunal notes that Co-Respondent No. 1 did not personally adduce evidence in the present matter and that any suggestion that she lacked the necessary experience or knowledge to have been appointed to the post of DO has not been put to her for the Tribunal to have the benefit of her version on same. Thus, it could not be proper for the Tribunal reach the conclusion that Co-Respondent No. 1 lacked knowledge and experience to be appointed to the post of DO based on the evidence before it.

The Tribunal also notes that for her to have been appointed, Mrs Chunderdeep must have performed well in the selection exercise. As per Mr Hosanee's evidence in cross-examination, she replied successfully in the interview exercise and was appointed. The Tribunal cannot therefore find any unfairness, injustice, unreasonableness or arbitrariness in the selection exercise for the post of DO in Co-Respondent No. 1 have been appointed.

The Disputant has also been very elaborate on the higher responsibilities which she has assumed at the level of DO and SDO. She even produced a comparative table listing the duties she performed as well as the duties of DO and SDO (Document Y). The Respondent has not denied that the Disputant was performing higher or additional duties but contends that she was not alone as the Co-Respondents were also requested to perform additional duties depending on their posting. The context of the DBM in 2013 with about 25% of its staff having proceeded on a voluntary retirement scheme and remaining staff being requested to perform additional duties over their normal duties in order to salvage the institution was thoroughly explained by Mr Hosanee. It cannot therefore be said that the Disputant was the only applicant to the post of DO to be performing additional or higher duties nor can it follow that she has more experience than all the Co-Respondents.

It is apposite to note the character of an assignment of duties as observed by the Supreme Court in *Burrenchobay v The Hon. Prime Minister & Ors.* [2022 SCJ 125]:

Furthermore, an assignment of duties does not have the character of a definite and permanent installation in an office, which a substantive appointment implies. It is a means of allocating the tasks of an office temporarily to an officer, most of the time for administrative convenience, which eventually does not entitle the officer to a claim to substantive appointment. That is why it is accepted that the recourse to an assignment of duties does not necessarily require strict compliance with the procedural requirements of an appointment or promotion.

Moreover, being assigned duties cannot confer an advantage over other candidates nor any right to claim permanent appointment as has been noted by the Supreme Court in *Chang-Siow & Grandcourt v Public Service Commission* [2020 SCJ 219]:

*As held in **S. Ramparsad v The Public Service Commission and Anor** [2009 SCJ 189] “... assignment of duties, as an administrative expediency and for short periods, does not confer any right on the applicant to claim permanent appointment; nor ... any advantage over other candidates”. The same principle was adopted in **M. Ramjeeawon v The Public Service Commission and Anor** [2013 SCJ 194].*

(The underlining is ours.)

It should also be noted that the Disputant in contending that she has performed additional and/or higher duties has not showed where the selection panel has been unfair, unjust, unreasonable or arbitrary with regard to this aspect. In fact, the Disputant did state that she was asked questions about her experience by the interview panel. It was also clearly stated by Mr Hosanee that the decision to appoint was not solely based on interview but also on qualifications, experience, years of service over and above other criteria set by the interview panel. Besides, a perusal of the scheme of service for the post of DO dated 13 June 2018 (Document Q) does not have as requirement having performed additional or higher duties in the grade of DO nor does its state that preference would be given to applicants who are performing the duties of DO. The Tribunal cannot therefore find any unfairness, unreasonableness, injustice or arbitrariness in the selection exercise for the post DO because of the higher and/or additional duties being performed by the Disputant.

Although the issue was not pressed upon by Counsel in his submissions, the Disputant also stated in her evidence that the selection exercise was based solely on interview as per what she was told by the Managing Director and Chairman. However, Mr Hosanee has elaborated on the criteria used in the selection exercise as previously noted and also stated that additional marks were allocated for additional qualifications and additional years of service. In respect to this, the Tribunal notes that this is what the Disputant stated that she was supposedly told and that it has not had the benefit of hearing the Chairman nor the then Managing Director on this

aspect. Having also considered Mr Hosanee's evidence on this issue, the Tribunal would therefore be very reluctant to find that the selection process for the post of DO was based solely on interview. The more so the Disputant agreed, when cross-examined, that selection is made on the total marks obtained on all the criteria taken together.

Relating to the same issue, the Disputant has put forward the criteria that she believes that ought to have been applied for the selection exercise. Moreover, when questioned by Counsel for the Respondent, she referred to a letter from the DBMSA dated 3 September 2008 (Document AD). A perusal of this letter shows that it is addressed to the Managing Director of the DBM and with subject matter '*Interview of staff on contract and written test for post Business Development Officer*'. In conclusion, the letter states '*... at a Joint Negotiating Council held on 10 June 2005, Management agreed that for the post of D.O, 50% will be selected as per usual criteria and the other 50% on seniority and merit basis*'.

This letter, which refers to a certain usual criteria for selection to the post of DO, is from the DBMSA and it is not known what was the response of the Respondent to this letter or whether it still applies at the time of the present dispute. It should also be noted that this letter was not referred to in the Disputant's Statement of Case and thus, the Respondent has not had the benefit of giving its views on this letter in its Statement of Reply. It would not also be proper for the Disputant to put forward her belief on what the criteria should have been when this is a matter left to the discretion of the Respondent as rightly pointed by Counsel for the Respondent.

It is therefore apposite to note that matters of promotion are normally within the province of the employer as observed by the then Permanent Arbitration Tribunal in *E. Cesar and C.W.A. (RN 785 of 2005)*:

The Tribunal holds that, subject to an abuse of powers on the part of management (Mrs D.C.Y.P. and Sun Casinos RN 202 of 1988), matters regarding appointment and promotion of employees are essentially within the province of management (M. Pottier and Ireland Blyth Ltd RN 279 of 1994, A. Ayrga and Tea Board RN 575 of 1998).

The following may also be noted from *JurisClasseur Travail Traite, Fasc. 18-1 : Droits Et Obligations Des Parties, 1er Décembre 2016* on power of recruitment of the employer:

1 ° Pouvoirs de direction et de gestion

a) Lors de la formation du contrat du travail

8. – Etendue de la liberté de choix des salaires – La liberté d’entreprendre implique la liberté d’embauche. Si l’employeur n’est pas libre de poser toutes les questions qu’il souhaite, notamment des questions relevant de la vie privée sans aucun rapport avec l’éventuelle prestation de travail à venir, il n’en demeure pas moins que cette liberté est fondamentale. Sous réserve des dispositions légales protectrices des candidats à l’embauche (V. JCI. Travail Traité, fasc. 17-10), l’employeur recrute qui il veut.
(The underlining is ours.)

The Disputant has also raised the issue that no management report was submitted to interview panel during the selection process for the post of DO. However, the evidence has clearly borne out that there was there was no such management report at the DBM and that there are Appraisal Reports. The Disputant did acknowledge that there was no such appraisal for her as she was already on her top salary since many years and that management report is not mentioned in her Statement of Case. Mr Hosanee on his part stated that a report from HR pertains to those with disciplinary issues and the panel did not ask for any such report from any supervisor. The Disputant, when cross-examined, did recognise that her colleagues have a clean track record and have never been adversely reported for performance. It is therefore clear that the issue of a management report does not therefore arise in the context of the selection exercise in question.

Having duly considered the grounds raised by the Disputant pertaining to the selection exercise conducted by the Respondent in 2018 for appointment to the post of DO in March 2019, the Tribunal has not uncovered any unfairness, injustice, unreasonableness or arbitrariness in relation thereto as it has been asked to do under the first limb of the Terms of Reference of the dispute. The Tribunal need not therefore consider the second aspect of the Terms of Reference as it has not found the assessment under the first limb of the Terms of Reference to be negative.

The dispute is therefore set aside.

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SD Shameer Janhangeer
(Vice-President)

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SD Francis Supparayen
(Member)

.....
SD Abdool Feroze Acharauz
(Member)

Date: 25th March 2024

