

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/ RN 105/23

Before

Indiren Sivaramen	Acting President
Anundraj Seethanna	Member
Kirsley E. Bagwan	Member
Ghianeswar Gokhool	Member

In the matter of:-

Mr Mohamed Ziyaad Dowlut (Complainant)

And

Cargo Handling Corporation Limited (Respondent)

The above case has been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 69(9)(b) of the Employment Relations Act, as amended (hereinafter referred to as “the Act”). Both parties were assisted by Counsel. The terms of reference of the points in dispute read as follows:

“Whether the decision of the Respondent to revert the Disputant to the post of Lasher instead of confirming the post of RTG Operator is wrong, unjustified, illegal, unfair, arbitrary, unjust, unreasonable and in bad faith.”

“If the assessment in (1) above is in the positive, whether the Respondent should be directed to confirm the Disputant to the post of RTG Operator with effect as from the 01 June 2021 or in the alternative for the Disputant to be reinstated to the post of Trainee RTG Operator as from the 01 June 2021 for a probation period of a reasonable time whereby the Disputant shall be fairly and reasonably assessed for the post of RTG Operator.”

The Tribunal proceeded to hear the case. The Disputant deposed and he stated that he worked for some sixteen years at the Respondent. He worked as Lasher for nearly two

years and in 2018 he applied for the post of RTG Operator. He suggested that there was an assessment carried out and that he was pre-selected for the post of RTG Operator. He then stated that there was an accident which occurred in December 2018 and he gave a statement in relation to same to the Respondent. He was found guilty for negligence for the said accident and was sanctioned by the Respondent. To a question from his counsel that according to Respondent he would not have returned to work after his approved vacation leave was over, Disputant stated that he had applied for ten days' vacation leave and after the ten days, he would have filled a form to inform of his intention to extend his vacation leave. He stated that he worked as Trainee RTG Operator from 2018 to 2021. He suggested that he should have been on probation for a period of six months. He identified the document pertaining to the sanctions taken against him following the accident which had occurred in December 2018 (Doc A). He averred that his performance at work was good after the above mentioned accident. On 31 May 2021, he received a letter (Doc B) from the Respondent to the effect that he was reverted to the post of Lasher. He did not agree with the reasons mentioned in the letter informing him that he was reverted to the post of Lasher (Doc B). He suggested that his "supérieur" was one Mr Laguette and that the latter told him that his performance at work was good. The latter allegedly also gave him a copy of the email (copy marked Doc C) which the latter had sent to management to confirm that his performance at work was good. Disputant then produced a copy of an assessment carried out by Mr Multra in relation to his appointment as Trainee RTG Operator (Doc D).

Disputant agreed that on 11 December 2019, he had received a severe warning for absences without good and sufficient cause for the period January 2019 to 15 November 2019. He stated that he could not remember when asked about a warning which he would have received on 12 August 2020. He however stated that he did sign a warning but did not know for which date it was. Disputant was quite hesitant on the issue of the second warning, and later referred to not being aware of same. Then he stated that he knew that he signed a warning and believed it was after the "confinement". Still later, he stated that "*mo pas pe exactement rappel si mo ti gagner*". He stated that he did not agree with what was stated in the assessment signed by Mr Multra (Doc D). He averred that he had no reproaches in relation to his work. He stated that he did not agree with the decision not to confirm him in the post of RTG Operator. He prayed that he be given a just and equal opportunity to be assessed for the post of RTG Operator.

In cross-examination, the Disputant stated that he relied on the email from Mr Laguette (Doc C) to say that his performance was good. He did not know if there were further exchanges of emails between the sender and addressee of the said email. He agreed that Doc C mentioned that during the period 1 November 2019 to 31 January 2021 there was no problem with his performance at work. Disputant did not agree that the letter of 11 December 2019 (Doc E) where he was informed of the sanctions inflicted upon him

for absences without good and sufficient cause for the period January 2019 to 15 November 2019 was in contradiction with Doc C. Disputant was shown documents showing his absences from work during the years 2020 and 2021 (Docs F and G respectively). He stated that he worked on a shift system and normally worked five times per week though he could sometimes work six times per week. He did not deny it when it was put to him that he thus worked some 240 days annually. When it was put to Disputant that yet he took some 145 days of leave in 2021, he stated that he was ill and had informed the Respondent with a medical certificate. At this stage, upon further questioning, the Disputant conceded that he had signed on a letter dated 6 August 2020 (Doc H). He then agreed that he did receive the warnings mentioned in the assessment of Mr Multra in Doc D. He however stated that he never had any problem with members of the staff of the Respondent. He agreed that the two warnings mentioned in the assessment of Mr Multra were given to him but however did not agree that the latter was right to refer to the two warnings in his assessment. He did not agree that in the light of his absences from work the Respondent was right not to confirm him because of the two warnings mentioned in Doc D.

Mr Multra, the Terminal Operations Manager at Respondent then deposed and he stated that he is in charge of operations at the Mauritius Container Terminal and the Multipurpose Terminal of the Respondent. He explained that Doc D is not filled by him. Recommendations and remarks from HR are considered, and he also has discussions with his subordinates such as the Terminal Superintendent whereby the performances of the staff concerned are considered one by one. At the end of the day, he gives his approval for Doc D. He explained that the duty of a Trainee RTG is a skilled work and that there are two persons per machine for every shift of eight hours. He added that at any one point in time, there is one operator operating the machine and that as per the collective agreement, one operator will be operating the machine for two hours and then is replaced by the other one for the next two hours. He explained that when someone is absent, the latter can only be replaced by an officer from the same group of officers. He stated that absenteeism may affect the efficiency of the port and the service delivered to clients inasmuch as overtime is not mandatory, and the Respondent may need to put a machine aside and not operate same.

Mr Multra stated that in the case of the Disputant, apart from absenteeism, there were also many complaints from customers. He stated that it was reported that Disputant has an uncooperative attitude towards the staff of the Respondent and that there were also complaints from customers against Disputant. Mr Multra stated that the Respondent could not rely on operators who were not taking their responsibility. He insisted on the importance of the port sector. When confronted with the email of Mr Laguette (Doc C), he stated that the latter is only the Head of RTG Operators and that besides the latter, there are Supervisors, the Assistant Terminal Superintendent and the Terminal

Superintendent. He said that the procedure is to have a meeting with other Heads and that it is only then that a final evaluation is arrived at. He added that Mr Laguette may be looking only at one side of the coin.

In cross-examination, Mr Multra agreed that on Doc D for both time periods for which the Disputant was assessed, the unauthorised absences were nil and the percentage of attendance was 100%. In relation to the columns bearing 'Conduct at work' and 'Performance Report from Head of Section', Mr Multra conceded that there were no documentary reports to substantiate same. However, he referred to meeting all the Heads of Units, and the uncooperative attitude of Disputant towards the staff and customers was highlighted. He agreed that Mr Laguette wrote that the performance of Disputant from 1 November 2019 to 31 January 2021 was good. He also accepted that Disputant worked as a Trainee RTG Operator for some 3 years. Mr Multra however did not agree when it was put to him that he reached his assessment on Disputant arbitrarily and unfairly and that he was not well informed when he made his assessment for appointment as Trainee RTG Operator.

Mr Dahari, the HR Manager of the Respondent then deposed before the Tribunal and he stated that the Disputant was pre-selected on 16 May 2018 for the post of Trainee RTG Operator. He stated that despite the name, Trainee RTG Operator is a post in itself as per the collective agreement of 2016. The post was advertised internally for employees of Respondent. He stated that the board had appointed a foreign consultant to do the pre-selection of candidates. All candidates meeting the job requirements were sent to the consultant who carried out a series of tests with the pre-selected candidates. The latter ultimately came out with a list of candidates who were given on the job training. He stressed on the fact that the candidates had not been appointed as such as Trainee RTG Operator. He then produced a copy of a letter issued to Disputant dated 16 May 2018 (Doc I) where the latter was informed that he was pre-selected for the post of Trainee RTG Operator. He stated that the letter was clear and mentioned the following: *“as well as an “on the job-training” which ultimately will determine your final selection for the post of Trainee RTG Operator”*.

Mr Dahari stated that the post of Trainee RTG Operator is different from the post of RTG Operator. The next step from Trainee RTG Operator would have been RTG Operator. He stated that Disputant has never been considered or pre-selected for the post of RTG Operator. He stated that Doc F showed the leaves taken by the Disputant during the year 2020 whilst Doc G was for the year 2021, and he confirmed that both documents emanated from HR. He also confirmed that the Disputant had acknowledged the letter dated 11 December 2019 (Doc E). He added that the Disputant also acknowledged receipt of Doc H which concerned his absences from work.

In cross-examination, Mr Dahari stated that when someone is given a training, the latter is given the opportunity, if ever there is any weakness or if the latter is not able to work to the required standard, to improve. In the case of Disputant, there were two extensions of time given to the latter. He added that the training of the Disputant was during the Covid-19 period and that this also contributed to the long period of time that Disputant has been on training. He stated that Disputant was still a Lasher and he was on the job training for the post of Trainee RTG Operator. He stated that Disputant was working as a Trainee RTG Operator whilst still being a Lasher. When confronted with the assessment of Mr Multra (Doc D), he explained that the attendance is mentioned as 100% on Doc D since the practice at the Respondent is for unauthorised absences only to be deducted from the 100%. He agreed that for the relevant periods mentioned in Doc D, the 'unauthorised absences' for Disputant was nil.

The Tribunal has examined all the evidence on record including the submissions of both counsel. As regards the terms of reference under the first dispute, the Tribunal notes, as rightly submitted by counsel for Respondent, that reference is made to the post of RTG Operator and not to the post of Trainee RTG Operator. There is unchallenged evidence before the Tribunal that the posts of Trainee RTG Operator and RTG Operator are two separate posts and that the post of RTG Operator is a promotional post from the post of Trainee RTG Operator. The Tribunal thus cannot make any award in relation to the confirmation of the Disputant to the post of RTG Operator when Disputant has not occupied the post of or worked as RTG Operator. The letter dated 16 May 2018 addressed to the Disputant (Doc I) is clear to that effect. Indeed, the Disputant was informed that *“you have been pre-selected for the post of Trainee RTG Operator”*. The letter continued as follows: *“In this context, you will be called upon to undergo a medical examination as well as an “on the job-training” which ultimately will determine your final selection for the post of Trainee RTG Operator.”*

The Tribunal also notes that though Disputant was “pre-selected” for the post of Trainee RTG Operator and had to undergo an “on the job-training”, his substantive post was that of Lasher. There is no evidence at all that he had been appointed in the post of Trainee RTG Operator (which might have been a position which is of permanent nature). The Disputant had the burden to show that the decision of the Respondent not to appoint/confirm him as Trainee RTG Operator (and not RTG Operator in any event) was wrong, unjustified, illegal, unfair, arbitrary, unjust, unreasonable and in bad faith. Whilst there were averments in the Statement of Case of Disputant that the Terminal Operations Manager, Mr Multra, always had a personal grudge with the Disputant (at paragraph 19) and that the report/ assessment signed by the latter (Doc D) contained false information (at paragraph 24), there was no such evidence adduced before us. Instead, the Disputant has cut a poor figure when questioned in relation to the warnings mentioned in the said assessment. The Tribunal has no hesitation in finding that the Disputant was indeed

issued warnings as per the assessment signed by both (underlining is ours) the Terminal Operations Manager and the Human Resource Manager. Mr Multra has deposed in a straightforward manner before us and he explained the consequences of absenteeism on the 'Operations' and on efficiency in the port. He explained that the assessment at Doc D was arrived at after meeting Heads of Units including the Terminal Superintendent. The Tribunal has no reason not to believe him. Reference was made to the email from the Head of the RTG Operators (Doc C). The Tribunal notes that Doc C refers to a period which, curiously, includes the period from 11 March 2020 to 11 August 2020 where it is undisputed that Disputant was not working at all. In Doc H, the Respondent even sought to rely on section 61(4) of the Workers' Rights Act in relation to the absence of the Disputant during the above mentioned period of time. The present dispute as drafted does not require the Tribunal to enquire specifically into this period of time from 11 March 2020 to 11 August 2020, and in any event the issue concerning this period of time would be within the exclusive jurisdiction of the Industrial Court. The Tribunal was simply not impressed at all with Doc C which was in very general terms and which did not even address the issue of conduct of the Disputant though same was specifically requested as can be seen from the email thread shown on Doc C itself.

This Tribunal will no doubt intervene in a case where there is a clear abuse of power on the part of the employer. However, in the absence of such a finding, the Tribunal shall be cautious to intervene since the power to appoint or promote an officer is vested generally in the employer.

In the case of **The Mauritius Institute of Training and Development and The Employment Relations Tribunal, i.p.o Mrs Naseema Banon Carim Bacor & another, 2022 SCJ 413**, the Supreme Court stated the following:

It is worth noting that the Tribunal was well aware that the power to appoint and promote employees is that of the employer, but referred to previous awards of the then Permanent Arbitration Tribunal² before stating that the employee must be safeguarded against any abuse of power on the part of the employer. It went on to consider the material facts of the dispute, make a finding of abuse on the part of the employer and upgrade the first co-respondent.

*We tend to agree with the Tribunal that it can, in a fit case disclosing a clear abuse of power on the part of the employer, make an award providing for the appointment or promotion of the disputant employee; to hold that the Tribunal is in all cases precluded from making such an award would be to make a mockery of the dispute settlement procedure provided for in the ERA. However such an award should be made in very exceptional cases as the power to appoint is vested generally in employers (see **Fokkan, Introduction au Droit du Travail Mauricien, 1. Les Relations Individuelles de Travail, 2e édition (2009) at page 216** on the "pouvoir de direction" of the employer) and, in the case of statutory corporations, in the Board, or other controlling body, of the statutory corporation.*

2 D.C.Y.P and Sun Casino Ltd (RN 202 of 1988), E. Cesar and C.W.A. (RN 785 of 2005), M. Pottier and Ireland Blyth Ltd (RN 279 of 1994) and A. Ayrga and Tea Board (RN 575 of 1998)

For all the reasons given above, the Tribunal finds that the Disputant has not shown, even on a balance of probabilities, that he should have been confirmed in the post of RTG Operator. Since the substantive post of Disputant is Lasher, and in the light of the assessment signed by both the Terminal Operations Manager and the Human Resource Manager (Doc D), the Tribunal finds nothing wrong that the Disputant was reverted to his substantive post of Lasher. The Tribunal cannot intervene under the first point in dispute and the dispute is set aside.

As regards the second point in dispute, in the light of the award of the Tribunal under the first point in dispute, the second point in dispute is also set aside.

SD Indiren Sivaramen

Acting President

SD Anundraj Seethanna

Member

SD Kirsley E. Bagwan

Member

SD Ghianeswar Gokhool

Member

8 May 2024