

# PERMANENT ARBITRATION TRIBUNAL

## AWARD

RN 790

BEFORE

Rashid Hossen	-	Acting President
M. Goinden	-	Member
S. Lingachetti	-	Member

In the matter of:

Maritime Transport & Port Employees Union  
And  
Mauritius Ports Authority

The following disputes have been referred to the Tribunal for compulsory arbitration by the Minister of Labour, Industrial Relations and Employment by virtue of Section 82 (1) (f) of the Industrial Relations Act 1973, as amended.

The Union was assisted by Counsel D. Ramano whilst Mr. R. Pursem, of counsel, appeared for the Respondent.

The Terms of Reference are:

*“ (i) Whether*

*(a) Captain T. Saugar should be appointed as Assistant Port Master with effect from July 2002, or otherwise*

*(b) Mr S. Parahoo should be appointed as Port Emergency & Environment Controller with effect from July 2002, or otherwise.*

*(ii) Whether the periodicity of the Collective Agreement should be of 3 years and the next review thereof be with effect from 1 July 2003, or otherwise.*

*(iii) Whether employees who have performed duties with payment of actingship allowance should once appointed in the promotional post, be appointed on an hypothetical basis with effect from the date they were paid their actingship allowance, or otherwise.*

Out of the three items, disputes (i) (a), (i) (b) and (ii) have been amicably settled between parties and subsequently withdrawn. We can but encourage such laudable initiative from the parties for the promotion of good and harmonious industrial relations.

As regards item (iii), Mr J. Bizlall, who calls himself "negotiator" of the Union, deponed to the effect that for promotional posts, acting allowance and responsibility allowance, are spelt out in the conditions of employment which form part of the collective agreement between Respondent and the Union. Generally speaking, there are two instances whereby actingship is granted. The first one is temporary vacancy when somebody is on long sick leave, long vacation leave, overseas study or leave without pay. The second one is the permanent vacancy. Here, the employer may opt to fill the post by actingship pending procedures for selection and appointment. The main element regarding actingship is that "Employees should in general not be made to act in higher vacant post for more than a year". Exceptionally, there was an agreement between the Respondent and the Union where actingship was allowed for a second year as, at that particular time, because of the reorganization at the Mauritius Ports Authority, it was not sure whether that post would be maintained. The situation in the port is such that certain cases of vacancy have to be filled whilst others perhaps not. This transitional period, which may last up to the end of this decade, is causing some problem in the filling of vacancies. Nevertheless, when a permanent vacancy exists, it is bound to be filled within a reasonable delay which may be extended up to two years, if need be. This is where the Union is asking for a hypothetical conversion; that is, where an employee has done, say 2 years actingship in a higher post, 2 points on the higher salary scale should be granted to him as from the date of his appointment.

Counsel for the Applicant submitted that Respondent is saving money at the expense of employees who are appointed after several years of actingship with the initial entry point of the scale of the higher post, despite the fact that the post was vacant as from the very first day of actingship.

Applicant recognizes Respondent's prerogative to appoint, but argues that same must be exercised reasonably and within the terms and conditions. True it is that the Port is passing through a transitional period. This is the reason why the Union is proposing a win-win situation. Once an appointment is made, following a long actingship, the incumbent moves along the higher scale, depending on the number of years he has acted in the higher post, for the period of actingship.

Counsel for the Respondent submitted that there is no dispute with respect to existing terms and conditions. The only thing the Union is asking is to get the Tribunal to declare, as a matter of principle, that this ought to be like that. He added that there may be specific cases where an employee feels that he has been prejudiced by a decision taken by Respondent whereby he is being made to act for more than 2 years. Then, it is open to that person to declare a dispute. It would not be appropriate for the Union to come to the Tribunal asking for a declaration, as a matter of principle, whereby the Mauritius Ports Authority invariably should be made to accept the principle that if someone has been in an acting capacity for more than 2 years, or whatever period, and is thereafter appointed in that post, his appointment should be backdated as far as the date of commencement of his actingship.

We fully endorse Counsel for the Respondent's view.

In **Planche v The PSC & anor SCJ 128 of 1993**:the Court stated:

"It seems to us that this application is incompetent if only for the reason that the question in issue is now purely an academic one. We can do no better than echo the dictum of Lord Justice Clerk Thomson in McNaughton v MC Naughton's Trs. (1953) SC 387, 392:-

*"Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau."*

We do not consider having a live issue to adjudicate upon. Item (iii) is therefore set aside.

R. Hossen  
Ag President

M. Goinden  
Member

S. Lingachetti  
Member

Date: 11 July 2006