

PERMANENT ARBITRATION TRIBUNAL

AWARD

RN 858

Before:-

Rashid Hossen	-	Ag President
Binnodh Ramburn	-	Member
Rajendranath Sumputh	-	Member

In the matter of:-

Mrs Uma Rani Moothoosamy
And
The Waste Management Authority

The present dispute has been referred for compulsory Arbitration by the Minister responsible for Labour, Industrial Relations and Employment in accordance with Section 82(1) (f) of the Industrial Relations Act 1973, as amended.

Mr N Patten, of Counsel appears for Mrs Uma Rani Moothoosamy. hereinafter referred as the Applicant. Mr R D'Unienville, QC appears for the Waste Management Authority, hereinafter referred as the Respondent.

The Terms of Reference read:-

“Whether the Board of the Wastewater Management Authority acting on the recommendations of the Staff Committee of the said Authority, has acted unfairly, unwarrantedly, unreasonably in refusing to appoint Mrs Uma Rani Moothoosamy to one of the two vacant posts of Divisional Manager presently existing on the establishment of the Authority, the more-so that she is fully qualified for the said post which the Board itself has entrusted her in an acting capacity since 19 July 2004”.

In her Statement of case dated 23rd January 2005, the applicant avers that:-

1. The Wastewater Management Authority, through a press advertisement in the “Week-End” newspaper of the 19th February 2004 (should be “Week-End” of Sunday 22nd February 2004) invited applications for, inter alia, the post of Divisional Manager, either on a permanent basis with a specified salary scale or on contract with a negotiable salary.
2. The qualification for the said post of Divisional Manager were specified as follows:-

Candidates should be registered as Professional Engineers (Civil) with the Council of Registered Professional Council Act No. 49 of 1965 as amended and should reckon at least 10 years experience in the relevant field of engineering along with the required administrative and organizing ability and good interpersonal, leadership and managerial skills.

3. It is submitted that on the basis of qualifications, merit and experience (seniority is not an issue), which are the criteria that any authority minded to act fairly and reasonably would use in a selection process, Mrs Moothoosamy has the required qualification.

4. Feeling aggrieved of the decision of the Authority to open up the posts of Divisional Manager and those of Works Manager to persons wishing to be employed on contract, the technical personnel of the Authority including Mrs Moothoosamy made representations to the latter.
5. Mrs Moothoosamy was informed by the Authority by an internal memorandum dated 23 February 2004 that the post of Divisional Manager was being advertised and she might submit her application. Mrs Moothoosamy applied for the said post.
6. There are 3 posts of Divisional Manager on the establishment of the Authority. One was already filled in at the time of the advertisement. There remained therefore 2 vacancies.
7. Three candidates were called for interview. One of them was Mrs Moothoosamy and she was requested to attend an interview on the 26th of April 2004.
8. Following the interview, the Authority appointed to one of the two posts an external candidate, who was until then an employee of the Central Water Authority. He was offered the post of Divisional Manager on a yearly contract basis, renewable every year with a monthly salary of Rs65,000/ excluding monthly travel grant – with on top the end of year gratuity and an additional gratuity of 25% of the total income earned for the duration of the contract.
9. It is the contention of the applicant that the contractual employee, although a qualified engineer, does not have any specific experience in wastewater management.
10. The applicant, being on the establishment of the Authority, had she been employed to the said post would have been eligible for a monthly salary of Rs36,000/ in the scale of Rs32000 x 1000 – 39000.
11. Mrs Moothoosamy was not even appointed to the substantive post of Divisional Manager with a lesser salary than the contractual employer.

12. Instead she was *assigned* the duties of Divisional Manager and was informed accordingly by letter dated 16th July 2004.
13. It was made clear in her letter of appointment that the assignment would not give her any claim for substantive appointment to the grade of Divisional Manager.
14. Further, she was required to perform her assignment over and above her duties as Project Manager for the Montagne Jacquot Sewerage Project.
15. She sought clarification regarding the said assignment and was informed that the allowance that she was offered for the assignment was a *responsibility* allowance which was less than the normal *acting* allowance.
16. Feeling aggrieved by the decision of the Authority, Mrs Moothoosamy by letter dated 27 August 2004 made representations to the Minister of Labour and Industrial Relations.
17. She also drew attention to the General Conditions of Service of the Authority mainly on the powers of the Authority, appointments, promotions and mode of recruitment.
18. At the conciliation meeting held at the Ministry, the Authority maintained its stand that Mrs Moothoosamy would not be considered for the post of Divisional Manager, but would instead be *assigned* the duties which the post entails.
19. Mrs Moothoosamy claims that:
 - (a) Having regard to the circumstances of the case, the Authority has acted unfairly and unreasonably (in the Wednesbury sense) in refusing to appoint her to the post of Divisional Manager in a substantive capacity.

- (b) The Tribunal ought to make an award on the dispute by declaring that the Authority has acted unfairly, unwarrantedly and unreasonably and the Authority ought to have nominated her to the post of Divisional Manager in a substantive capacity had it been minded to act fairly and reasonably in the exercise of its discretion in the selection procedure.

The Wastewater Management Authority in its Statement of case, avers that

1. Whereas Mrs Moothoosamy claims she has the qualifications, merit and experience, the respondent finds that she has the technical skill but lacked the necessary leadership and managerial experience to carry out the duties which the post of Divisional Manager requires. She did not convince the selection panel that she could lead a team and could complete works according to targets.
2. The WMA avers that there is no reason why Mrs Moothoosamy and/or other members of the staff should feel or be aggrieved of the decision *to open up* the posts of Divisional Manager and those of Works Manager to persons wishing to be employed on contract. The representations made by the technical personnel to the Authority were unwarranted.
3. The contractual employee appointed as Divisional Manager has the required experience for the post contrary to the statement of Mrs Moothoosamy that the said employee although a qualified engineer does not have any specific experience in wastewater management.
4. Seeking clarification regarding the *assignment* as Divisional Manager, the applicant was informed that the allowance she was offered for the assignment was a *responsibility* allowance which was less than the normal *acting* allowance. The WMA made it clear that the reason of same was her lack of experience/qualification.

5. Concerning the representations made to the Minister after the decision of the Authority, the latter found that the representations were not valid ones and found no reason why the applicant should feel aggrieved.
6. The respondent adds that all prescribed procedures were duly filled. In its selection, the Panel was guided by the duties and responsibilities which are required of Divisional Managers. Accordingly it evolved a set of criteria which would allow for a proper and objective assessment of the candidates. The criteria included:-
 - (a) relevance of the experience of the candidates
 - (b) awareness of the job requirements
 - (c) assertiveness
 - (d) ability to lead a team and motivate staff to meet deadlines
 - (e) management/monitoring of a portfolio of investment programme
 - (f) managerial and financial skills
 - (g) ability to work under pressure.
7. The statement set out in paragraph 3.3 of Mrs Moothoosamy's Statement of case which reads as follows:-

"At the conciliation meeting held at the Ministry, the WMA maintained its stand that Mrs Moothoosamy would not be considered for the post of Divisional Manager, but would instead be *assigned* the duties which the post entail"are denied in their form and tenor. Mrs Moothoosamy not being appointed to the post would not have all the powers which such post entails.
8. The respondent denies the submission in the concluding parts of the applicant's Statement of case .

9. In conclusion, the respondent avers that the decision of the selection panel was fully justified and that there is no merit in the application of the applicant which must be dismissed or alternatively set aside.

The Applicant testified to the effect that she ought to have been selected as the Divisional Manager for one of the two posts and her grievance is that the Authority has not appointed her on a permanent capacity to the post but has only assigned her since 16 July 2004 and still to date she is performing the duties of Divisional Manager on the basis of assignment. She does not agree that she was considered on a temporary capacity because she lacked managerial and leadership experience. She disagrees with this because since 1999 she was the Senior Engineer of the Authority and was acting as a counterpart to the EU technical assistance for the Head of Project Management Unit which is now restyled as Divisional Manager. When the counterpart left around 2002, she was promoted Works Manager – equivalent to Principal Engineer – and she continued with her duties. Invited to explain the difference in the duties of Principal Engineer and that of a Divisional Manager, she stated that it was the same duties that was continuing because there was no Divisional Manager as such in the WMA at that time.

She has been since 1999 working on various capital projects all funded by different funding agencies such as the World Bank, EIB and EU and she has been performing at the level of Project Manager and Project Co-ordinator. She disagrees that she lacked the managerial and leadership experience for she has to take decision on site if she has to manage a staff and to manage Capital Projects funded by different funding agencies, different contractors from different parts of the world. Furthermore she also disagrees (a) when the Authority is saying that she was given a responsibility allowance because of lack of experience and qualifications and (b) that the decision of the Authority was justified in not appointing her in a permanent capacity as Divisional Manager.

She further added that she agrees that the moving up from Works Manager to Divisional Manager is a promotion and the responsibilities of the latter are heavier and the Board has to assess the capacity of the various candidates who wanted to fill the post of Divisional Manager. She states that the Staff Committee is from the smaller committee of the WMA Board who look into the staff matters, recruitment among other things. She agrees that interview is done to ascertain the personality and generally the mettle of the interviewed person. She informed the Board in the interview panel that she had some staff working under her, that she was a counterpart to the Head of the PMU but the General Manager blankly pointed out to the committee saying that she had only one trainee Engineer working under her. She does not agree to the report of the Panel which found that "*she has the technical skill but lacked the necessary leadership and managerial experience to carry out the duties which the post of Divisional Manager requires*".

She realized that she *could be* or she *could not be* considered for the post of Divisional Manager after the decision of the Board which found that she needed further grooming. Since 2004 she has been acting as Divisional Manager and has been performing till to date. She accepted the job and signed the document of acceptance on 19 July 2004. She did ask the Management the duration of her assigned duties but she never got any reply but instead they reverted her back to the WMA Board's decision. She started complaining in a letter dated 27th of August 2004 after she noted in her salary slip that she got only 75% of the responsibility allowance which according to PRB is a lack of experience. That is why this took one month for her to go and reply to the Management.

The witness finally stated that she wanted to put conditions to her assignment but the Authority refused. Since July 2005, onwards there was no DGM Technical under which to work and so she was reporting directly to the General Manager until February 2006. She has not been made aware for how long that grooming will take and it is because of these *shady areas* that she thought it fit to come to the Tribunal. She is saying that she has no adverse report from impartial assessors coming from abroad including the World Bank and she has been handling projects worth billions of

rupees and there is nothing of personal lacking or personal lacking of leadership on her part.

Mr D Deepchand, Deputy General Manager, WMA gave evidence on behalf of the Respondent. He was one of the four members of the Selection Panel chaired by Mr Bikoo, the Chairman of the Staff Committee of the WMA, who interviewed Mrs Moothoosamy and the other candidates. There was also Mr Allybokus who is also a member of the Staff Committee as Mr Deepchand himself. Then of course there was the General Manager Mr Kerof who completed the four members of the Panel. He was one of the signatories of the report of the Selection Panel for the post of Divisional Manager dated the 26th of April 2004 and he maintains the facts that are stated in that report. He has been in the WMA since three weeks and as Deputy General Manager of the Authority. He was prior to that Director of the Water Resources Unit, a department of all management of water resources in Mauritius. They issued all water ground licenses and managed projects. The Midlands Dam project was one of the project which they managed all together with an Indian Expatriate. Mr Deepchand was in the Project Implementation Unit- managing the project and the Indian Expatriate at the head of the Water Resources Unit then. He worked at the Central Water Authority for about 20 years and managed many projects there. He was a Board member of the WMA for about 3 years and knew about all the tender committee papers, all the papers that were submitted and Mrs Moothoosamy was preparing the tender document for her project.

He is aware that Mrs Moothoosamy was managing several projects such as Plaines Wilhems Sewerage Project and Montagne Jacques Project. He states that the applicant was doing single projects and single projects does not make the task.

The panel was objective in its assessment and where the applicant failed was on the question of leadership quality and managerial skills.

The witness further averred that the Staff Committee is a sub-committee of the Board and was set up to make recommendations to staff matters. Mr Bikoo is now the Director, Technical Services, Ministry of Public Utilities – a representative of

the Ministry responsible for the subject of waste water and also the chairman of the Selection Panel in the WMA. At that time Mr Deepchand was the Director of Water Resources Unit, Ministry of Public Utilities – a representative of the Ministry responsible for the subject of water resources. Mr Allybocus was an Associate Professor, University of Mauritius, Faculty of Engineer, Member with wide experience in environmental matters and he was appointed by the Minister. The Board of the WMA approve the appointment of employees and determine conditions of services as provided in Section 14 and 15 of the Act. He was the Director Water Resources Unit since 13 March 2006 but has taken leave without pay to work as Deputy General Manager at the WMA since 13 March 2006. There are two posts of Divisional Manager vacant now. Before him there was another Deputy General Manager Technical in the name of Mr Auckle who was a contract officer and he has left since July 2005. Mr Deepchand does not know about the grooming.

In his submission, Counsel for the respondent did draw our attention to the Confidential Report of the Selection Panel. There were two posts of Divisional Manager. Mr Sonarane was appointed and Mrs Moothoosamy was selected to a certain extent and placed on a sort of grooming session at that post with a view to consider her candidature at a later stage. He added that the moment a dispute arises as in the present case the matter becomes *sub judice*. It freezes the situation and the employer cannot do anything as long as the Tribunal does not say anything or gives a ruling. He found it most abnormal that Mrs Moothoosamy has accepted the conditions of the offer of assignment and raised a dispute a month later about the refusal to appoint her. He also pointed out that attached to the Statement of case of the applicant is a letter dated 27 August 2004 addressed to the Minister of Labour & Industrial Relations at paragraph 13 which reads as follows:-

"In the meanwhile I have accepted the assigned duties of the Divisional Manager on the 19 July 2004 since I was not given any other choice, however I strongly feel that I am being penalized unduly, and am being a victim of a gender discrimination by the WMA".

He stated therefore it is only a question of seeing whether there is anything unreasonable that has occurred at the Selection Panel at that level.

He drew our attention that the WMA in a letter dated 16 July 2004 addressed to the applicant concerning Assignment of Duties. A list of duties to be performed was given to her at paragraph 3 and then paragraph 4 is extremely important:-

"You would be required to work according to the targets and the performance indicators set out under the loan/project agreements related to the projects, objectives/targets established by the Management and any other duties assigned to you"

And then:-

"Your performance will be measured against such objectives/targets on a quarterly basis".

He stated that there is a programme to see how the applicant performs, but the whole matter seems to have been frozen by this procedure then. In his re-submission, Counsel of the respondent replies to Counsel of the applicant. If indeed the *Wednesbury* principle has been infringed that the decision of the Selection Panel followed by that of the Board was so outrageous, that it verges on the nonsensical and the absurd, he states that the complainant could have – not only before the Tribunal – gone to the Supreme Court in a case of judicial review. Counsel is equally in the hands of the Tribunal to decide whether the Selection Panel has acted in an outrageous manner.

In his submission, Counsel for applicant conceded that the WMA is set up under the WMA Act and has a Board established under Section 8 and Section 14 which gives it the power to appoint employees. The Board of this parastatal organization is expected to act fairly and reasonably. The applicant has felt so aggrieved that she felt that there was no other recourse than to come to this Tribunal. Counsel expect the Tribunal to understand this and see to it that fairness and reasonableness prevail. The applicant has been employed in a particular section of project management since 1995. She has no adverse

report and when it comes to the post of Divisional Manager, she has not been found competent in a temporary capacity, as a counterpart to an *expatriate* – at the Project Management Unit and then as Principal Engineer but virtually doing the job of Divisional Manager was found good enough all these years. However, a panel of four people interviewed the applicant in just half an hour and decides, without any objective criteria according to Counsel, that she has no managerial and leadership skills and she has got to be groomed.

Counsel finds that there is no evidence whatsoever that she is lacking in skills to do a job which she has already been doing for years. She was forced to accept the appointment on a temporary capacity without any condition. She has a legitimate expectation to have the post of Divisional Manager but the panel acted unreasonably and have come to the conclusion that she lacks managerial and leadership skill.

He is of the view that the Panel, assuming that it was properly constituted of proper managers and leaders and decision makers, nevertheless has come to a conclusion that is unreasonable and irrational.

Moreover, he states that the decision was outrageous and the WMA has made a subjective appreciation of the employee who, without any adverse report, has been handling projects to the satisfaction of outside observers such as the World Bank of the European Union financing the projects. He leaves the matter in the hands of the Tribunal.

After considering all the documents, and testimonial evidence including the submissions of Counsel, the Tribunal finds that:-

1. The technical personnel of the WMA were feeling aggrieved by the decision of the Authority to *open up* the post of Divisional Manager and those of Works Manager. The Authority on its parts has acted as per The General Conditions of Service Chapter 1, Section 1.2.1 and paragraph (b) which reads as follows:-

In exercising its power in connection with the *appointment* and *promotion* of employees to any office of the Authority, the Board shall have regard to the maintenance of high standard of efficiency which is necessary at the Authority and shall:-

- where the office cannot be filled by the procedure detailed at (a), it shall either call for applications by *public advertisement* or enlist the services of Employment Agencies. Paragraph (a) reads as follows:
- The Authority shall give due considerations to qualified employees serving at the Authority, taking into account qualifications, experience and merit before seniority, unless specified otherwise.

2. Mrs Moothoosamy joined the Waste Water Authority in 1994 as a Civil Engineer and was promoted Senior Engineer in June 1999. She was appointed Works Manager in June 2003 w.e.f 15 January 2003, and from July 2004 to date she has been assigned the duties of Divisional Manager.

3. Two vacancies existed at the level of Divisional Manager and the post was advertised by way of Open Competition on 19 February 2004 in the local press. Fourteen candidates applied for the post and among them were two in-house candidates namely Mrs Moothoosamy and Mr S Sookhee. A shortlist of the 14 applications received was made. Three candidates were retained and they were:-

- (a) Mr Anoop Soonarane - Project Manager on contract
- (b) Mrs Moothoosamy - Works Manager
- (c) Mr S Sookhee - Works Manager

As a result of the interview which was held on the 26th of April 2004, Mr Anoop Soonarane was offered one of the two posts of Divisional Manager, while Mrs Moothoosamy and Mr Sookhee were not.

4. It goes without saying that Mrs Moothoosamy declared the dispute not being satisfied with the decision of the Board. She is unhappy with this decision because:-

- (a) Mr Soonarane not being an in-house candidate has been selected.
- (b) According to the applicant, Mr Soonarane, although a qualified engineer does not have any specific experience in the wastewater management.
- (c) Mrs Moothoosamy, being on the establishment of the WMA, had she been appointed to the said post would have been eligible to a monthly salary of Rs36,000 twice as less than that of the contractual employee.
- (d) Mrs Moothoosamy was not even appointed to the substantive post of Divisional Manager but was assigned the duties of Divisional Manager with a *responsibility* allowance which was less than the normal acting allowance. Moreover this *responsibility* allowance was paid to only 75% which according to the PRB report means lack of experience.

The complaint of Mrs Moothoosamy was that the Selection Panel in its report found that:-

- (a) *"she has the technical skill but lacked the necessary leadership and managerial experience to carry out the duties which the post of Divisional Manager requires"* and
- (b) The Panel found that she needed further "grooming" before she could be considered for the position.

She did ask for how long that *grooming* will take and did not get any reply directly. Although it is something that may materialize.

She was informed that her *assignment as Divisional Manager* should not give her any claim for appointment in the post.

5. The applicant's patience has finally been lost and she has placed a dispute *sub judice*. We understand that no appointment may be made until the decision of the Tribunal.

As regards the terms of reference, the Tribunal finds that there is no evidence *that the Board of the WMA acting on the recommendations of the Staff Committee of the said Authority has acted unfairly, unwarrantedly and unreasonably in refusing to appoint Mrs Uma Rani Moothoosamy to one of the two vacant posts of Divisional Manager presently on the establishment of the Authority, the more so that she is fully qualified for the said post, which the Board itself has entrusted to her in an acting capacity since 19 July 2004.*

The Selection Panel took note that the Scheme of Service for the post in the WMA under the section "Qualifications" stipulates the following :-

"by selection on the basis of experience and merit of Registered Engineers in the grade of Works Manager reckoning an aggregate of at least five years service in a substantive capacity in the grade or in the grade of Principal Engineer in the Public Sector."

However under Note thereof, the Scheme provides that:-

" In the absence of qualified candidates who are registered Professional Engineers (Civil Engineering) reckoning at least 10 years experience in the relevant field of engineering".

The applicant was a candidate under the second section because she lacked the five years experience as Works Manager. Had she satisfied the first section she would have probably got a better chance to have been selected.

The words unreasonable, irrational, outrageous and terms like “oppressive employer” and victim of *gender discrimination* have been used by applicant against the WMA. There is no evidence reliable to support same. The suspicion or apprehension are insufficient for the Tribunal to intervene. In the absence of being appointed Divisional Manager, the applicant has at least been **assigned** and selected to a certain extent.

*“It is true the discretion must be exercised reasonably, Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of a statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L. J. in **Short v Poole Corporation** (1) gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.” (ASSOCIATED PROVINCIAL PICTURE HOUSES, LIMITED v WEDNESBURY CORPORATION 1948 1 K B).*

Indeed, the Tribunal would have intervened in the present case if cogent evidence had been adduced that a ‘wrong’ has been committed. *“The Tribunal, however, being satisfied that a wrong was done to Mr Mootosamy as from that period, feels that a lump sum compensation for past service may afford some palliative in this respect. This Tribunal is not here to award damages, it must only see how, by using whatever wisdom and experience it may have, an employee who has had every reason of feeling frustrated, who, in this case, even had to put up a very courageous but trying and tiring battle, may relinquish his frustration, feel safe and relaxed in his employment, recover his dignity and at the same time recover also even if it is only part of what could have been payable to him over a certain period, had his case been*

given a consideration similar to that given to others. The Tribunal accordingly assesses at Rs 8,500 the lump sum past service compensation payable to Mr Mootosamy." (See Award S.P. Mootosamy & The Bank of Baroda RN 155 of 1984).

We have not been convinced of any discrimination, being it gender or otherwise, nor any unfair, unwarranted or unreasonable approach on behalf of the Respondent. True it is that the latter did not expatiate enough on the reasons for Applicant's grooming period and this leads to the perception of some subjective rather than objective decision having been reached. This indeed leaves much to be desired. But we would not go as far as saying that such lapses would amount to being unfair, unwarranted and unreasonable. In other words, we would not go as far as to presume bad faith. It is up to the Applicant to satisfy the Tribunal of same.

We invite the Waste Management Authority to define the grooming period, if it has not come to an end by now, and to consider Mrs Moothosamy's application for appointment should there be any vacancy arising. Needless to emphasise that it is the Respondent who recognize Applicant's technical skill.

. The Tribunal awards accordingly.

The dispute is otherwise set aside

Rashid Hossen

Ag President

Binnodh Ramburn

Member

Rajendranath Sumputh

Member

Date: 29 September 2006

