

# PERMANENT ARBITRATION TRIBUNAL

## AWARD

**RN 717**

**Before :**

**Rashid Hossen - Ag President**

**Binnodh Ramburn - Member**

**Masseelamanee Goinden - Member**

**In the matter of:-**

**1. Cyril Blackburn**

**2. Sylvio Pachetty**

**And**

**Cargo Handling Corporation Ltd**

This dispute has been referred by the Minister of Labour, Industrial Relations and Employment for compulsory arbitration by virtue of **Section 82 (1) (f) of the Industrial Relations Act 1973, as amended.**

The Terms of Reference read:-

**“Whether the Senior Supervisor Operations should have been considered for promotion to the grade of Assistant Terminal Superintendent instead of considering Supervisor Operations, or otherwise”.**

The Applicants, in their Statement of Case, aver that:-

1. They are both Senior Supervisor Operations at the Cargo Handling Corporation.

2. Their complaint is that promotion in the Company has always been done on the basis of seniority and that 2 employees of lower grade have been promoted from Supervisor Operations to Assistant Terminal Superintendent.
3. The principle of seniority in each case has not in the present matter been taken into consideration.

The Respondent, in its Statement of Case, avers that:-

1. The promotions were granted according to the different promotional routes for ship and shore activities and which promotions were carried out as was previously accepted by the Unions namely the PLHWDWU, the DAWSEA and the SAMSEA.
2. All criteria relating to the relevant promotional routes were abided to, including consideration for seniority.
3. The Applicants, being from shore activities promotional route were not entitled for promotion in relation to ship activities at the relevant period of time.

Mr Alain Hardy, the President of the DAWSEA, testified as follows:-

1. This case concerns 2 employees who were Senior Supervisor Operations (S.S.O) and who were not promoted to the post of Assistant Terminal Superintendent (A.T.S) although they were the senior most.
2. The applicants contest the fact that Mr Georges Agathe and Mr G Michaud were promoted to the grade of A.T.S on 1 July 1999 from the grade of Supervisor Operations (S.O) as opposed to Senior Supervisor Operations.
3. The job of A.T.S was usually meant for shore workers but it went to ship workers who were in the lower grade than the 2 employees who are contesting that decision.
4. On 5 March 2004 one of the applicants, Mr Blackburn, was finally promoted A.T.S w.e.f 1st March 2004.

5. In the S.R.C Report of 2002 there is the principle of merger from both categories of A.T.S and S.S.O. The contention of the Union and of the employees is that in the case of a merger the category of employees falling in the lowest level joins the first category and as such the seniority position should be those that were already in post.
6. The qualifications required to be appointed A.T.S reads “by promotion from the grade of S.S.O” only.
7. The promotion exercise was in 1999. However, the letter of complaint was addressed to the Minister only in 2002 because there were negotiations in the meantime which resulted into a deadlock.
8. There was a merger on Board and on Shore under the S.R.C Report of 2002.

In cross-examination the witness stated that:-

1. There was never any link between A.T.S and ship operations.
2. He agrees that in the C.H.C there are two types of employees – shore employees and board employees and there were 2 routes of promotion until July 2003.
3. The S.R.C Report of 1997 never mentioned the grade of A.T.S as a promotional avenue from board employees.
4. As at 2002 there was a restyling of posts.
5. He does not agree that the promotion of Mr Agathe and that of Mr Michaud was a board promotion.
6. Mr Blackburn was promoted A.T.S on shore on 1<sup>st</sup> March 2004 following a vacancy.
7. He agrees to the contents in the 2 documents prepared by the C.H.C.
8. He does not agree that the 2 persons who have been promoted A.T.S are working as A.T.S on board.

9. Basically the Union of SAMSEA represents workers working on board. Mr Agathe and Mr Michaud form part of that Union and they are not members of the union of DAWSEA.
10. Mr Agathe and Mr Michaud were appointed Head Clerk in 1994 and the post of Head Clerk was restyled as Supervisor Operations as per the S.R.C Report in June 1997.
11. He does not agree that when those two employees were appointed as A.T.S in 1999, the Union was consulted.
12. He also does not agree that all the criteria relating to the relevant promotion route were being taken care of with regard to those two persons appointed.

The witness further concedes that:-

- (a) From the year 1989 to the year 2003 he was the Secretary of the DAWSEA and the President was Mr Mahon.
- (b) The contention before the present Tribunal still has its "raison d'être" because any ruling in favour of the Appellant would benefit other employees.
- (c) He is not aware that the President of the Union of DAWSEA was being consulted by the Management of the C.H.C prior to Mr Agathe and Mr Michaud being promoted.
- (d) Mr Blackburn and Mr Pachetty have always worked and have always been promoted on shore.
- (e) He does not agree that on board also there is the post of A.T.S.
- (f) He agrees that if somebody has always worked on shore and if there is promotion on board and if that person is promoted he would not be able to do the job.

- (g) In most cases whenever there are promotions in the C.H.C Management consults the Union before it takes the decision.
- (h) As per agreement with the Docks, seniority is taken into account for promotion and merit comes in the second position.
- (i) As at 1999 he does not agree that there are different schemes of duties of A.T.S on shore and of A.T.S on board.
- (j) He agrees that the effective date of merger on board and on shore is July 2003.

Mr Dilraj Mohabirsingh, Personnel Manager of the C.H.C, affirms that:-

1. As at June 1997 the S.R.C recommended that the post of A.T.S includes that of Ship Supervisor. Being given that Mr Agathe and Mr Michaud were Ship Supervisors, the post of A.T.S which were vacant on board ship at that time were filled by them. These posts were filled for those on board and not for those on shore.
2. At that time, the duties were clearly delineated. Those who were performing ship operations had different duties from those on shore.
3. Mr Blackburn and Mr Pachetty were Senior Ship Supervisors, always working on shore. They did not have experience of ships duties and could not be promoted at that time.
4. When one vacancy occurred at the level of A.T.S in March 2004 on shore, Mr Blackburn was promoted and if there would be any vacancy of A.T.S on shore, Mr Pachetty will be promoted.
5. One of the factors that are taken for promotion is seniority. Merit and experience are also considered. Seniority is not the only criteria.

6. On 1 June 1997 four Ship Supervisors namely Gerard Bertrand, Louis P. Freyneau, Raoul Soupe and Teddy Rohan have been promoted A.T.S being given that there were vacancies at the level of A.T.S. (ship). These promotions had been effected upon consultation with the different unions – the Port Louis Harbour and Docks Workers' Union, the DAWSEA itself and the SAMSEA.
7. With regard to the promotions of Mr Agathe and of Mr Michaud, the union of DAWSEA was consulted and the union was agreeable to these promotions. These promotions have never been contested up to now.

The DAWSEA formed part of the front of trade unions and at that time Mr J.R. Mehon was the president and Mr Alain Hardy was the Secretary.

8. With the S.R.C 2002 there has been merger of S.O on board and S.S.O on shore. The merger had been effected at this level so that those who are senior most can be promoted for any further vacancy at the level of A.T.S. There has also been new posts with the introduction of IT, the navy system at the Mauritius Container Terminal and promotions at the level of A.T.S are also for the post of Planning Officer.

In cross-examination, the witness concedes that:-

As per the Scheme of Service following the S.R.C Report of 1996, it is from the grade of S.S.O that someone can be promoted to the post of A.T.S. However, being given that the Port duties are changing continuously, this one having been made in May 1997 and with the creation of the Mauritius Container Terminal as from 1999, there were negotiations that were conducted with the different unions to pinpoint in fact, towards the creation of the post of A.T.S for ship duties also and upon consultation with the front of Trade Unions including the DAWSEA. It was agreed that the post of A.T.S would also include those of ship duties and 4 posts had been created for A.T.S (ship).

Counsel for Respondent submitted:-

1. There are certain agreed facts in the present case such as:-

- (a) the fact that both Mr Blackburn and Mr Pachetty have worked on shore all the time.
  - (b) That Mr Blackburn has been promoted A.T.S in the year 2004 on shore itself.
  - (c) That as at 1997 there were two promotional routes – promotional route on shore and promotional route on board.
  - (d) That seniority is not the only criteria for promotion, merit and experience are also taken into consideration.
2. Mr Agathe and Mr Michaud have been working on board all the time and they have been promoted A.T.S because there were vacancies on board and not on shore. If there were vacancies on shore the applicants would have been promoted.
  3. The promotional route on shore and the promotional route on board are quite different in the sense that there is no post of S.S.O for example on board and it is stopped only at S.O and the next promotion is A.T.S as contrasted to the post of S.S.O which exists in the other side of the promotional route.
  4. When a question was put to Mr Hardy that there is no reason for this case to stand because Mr Blackburn has already been promoted A.T.S he answered that this case has to continue because other people are going to benefit from this particular Ruling. Yet, this case is not with regard to other people at the C.H.C if we look at the Terms of Reference.
  5. As regard Mr Pachetty, there is no live issue before this Tribunal to give a determination since this particular applicant is no more working in the C.H.C. Counsel for the applicant would be saying that this particular case is going to be used for his pension purposes. But nowhere is it stated in his item of dispute that in case he goes on retirement this will have an effect on his pension.

Counsel for Applicants submitted:-

1. From Document E of May 1997 which is the Scheme of Service of A.T.S we see that the qualifications required by the C.H.C for promotion to the post of A.T.S was :-

“ By promotion on the basis of experience and merit from the grade of Senior Supervisor Operations”.

2. The case of the Applicants are that Messrs Agathe and Michaud have been promoted to the post of A.T.S from the grade of S.O as apposed to them who have been on post as Senior Supervisor Operations. If there are 2 avenues of promotion surely the Scheme of Service should have made it clear that because there are no postings of S.S.O on ship, those who are only S.O could apply for the job of A.T.S. But that has not been the case.

Moreover Document E speaks of promotion on the basis of experience and merit and it is not correct to say that the Applicants did not meet the promotion criteria. In fact it is the other two persons, who were appointed, who did not meet the promotion criteria. Seniority was the most important factor and there is ample evidence that the two applicants were the seniors of those who have been appointed.

3. He does not agree with Counsel for Respondent who has stated that Mr Pachetty having retired, there is no need for the Tribunal to give a ruling because Mr Blackburn is still in post. Moreover, the pension of Mr Pachetty will depend on what his posting was at the time he retired. Therefore it is important that the Tribunal gives a determination as far as Mr Pachetty is concerned.
4. One should not forget that Mr Blackburn who – it was said – did not meet the criteria for promotion in the year 1999, as per the C.H.C, was promoted on 1<sup>st</sup> March 2004. We fail to see how in 1999, while he was S.S.O and was the most senior, he was not appointed and then in 2004 he was appointed. Suddenly he is more meritorious than others.
5. The Applicants have had a rough deal with the C.H.C and that the determination should go in their favour.

In reply Counsel for the Respondent stated that the Scheme of Service with regard to A.T.S talks about S.S.O but it depends upon which promotional route –shore or board. If it is on shore it is going to be S.S.O but if it is on board, it is going to be S.O and not S.S.O. So the Document “E” has not been overlooked by the Respondent. The document applies to people working on shore.

After going through all the documentary and testimonial evidence adduced, we find that:-

1. The applicants are not contesting the appointments of Mr Agathe and of Mr Michaud as such, but they aver that they are just going along the principle of



seniority. We refer to the cross-examination of Mr Hardy at the very start. We also note that in examination in chief Mr Mohabeersing stated that the Trade Union including the Union of the DAWSEA were agreeable to these promotions after long negotiations. He added that these promotions have not been contested up to now. This affirmation of Mr Mohabeersing has not been successfully challenged.

2. As at 1997 there were 2 promotional routes – on shore and on board. In 1999 there were vacancies of A.T.S on board and Mr Agathe and Mr Michaud having all the time worked on board, they were promoted. The applicants having worked on shore could not be promoted. It is true that the applicants were S.S.O and the two promoted employees were only S.O. However, the promotional route on shore and on board are quite different and this is not contested.
3. The applicants have laid great stress on seniority as an important criteria – if not the most important – for promotion. However, one should not forget that merit and experience are also taken into consideration. This is not disputed by the Applicants.
4. Mr Pachetty has retired in 2006 and there is no live issue before this Tribunal for a determination. *“We consider that the applicant not being presently employed and therefore the employer not being the current employer, the dispute initially declared no more satisfies the definition as per the Industrial Relations Act. We need to add that the very purpose of the Industrial Relations Act is the maintaining of good industrial relations between employers and employees. It goes without saying that anyone of them becoming inexistent in the sense that the contractual obligations can no more exist between them, the purpose of good industrial relations no longer stand. The Code of Practice annexed to the Industrial Relations Act clearly shows the very intention of the legislator which is that of good industrial relations between employers and employees”.* ( See Award **L. Ramsaha and SILWF RN 847 of 5<sup>th</sup> July 2007**).

It is apposite to quote also the following:-

*““Industrial dispute” means a dispute between an employee or a trade union of employees and an employer or a trade union of employers which relates wholly or mainly to –*

- (a) *a contract of employment or a procedure agreement.*
- (b) *An engagement or non-engagement, or termination or suspension of employment, of an employee or*

(c) *The allocation of work between employees or groups of employees”  
(the underlining is ours)*

It is quite clear from such a definition, that, as rightly submitted by Learned Counsel for the applicant, that the industrial dispute for the purpose of the Act can only refer to a dispute between a current employer and his present employees, not former ones who had been in retirement for a long time as is the case with the co-respondents”. (**Supreme Court Judgment No. 169 of 2004**)”.

The pension issue as ushered by Applicants’ Counsel is not part of the Terms of Reference.

5. As regard Mr Blackburn we understand that he has already been promoted A.T.S in 2004.

To conclude, we find that there is no merit in the application of the disputants.

The matter is set aside.

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**Rashid Hossen**

Ag President.

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**Binnodh Ramburn**

Member

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**Masseelamanee Goinden**

Member

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