

Permanent Arbitration Tribunal

AWARD

RN 728

Before

Rashid Hossen	-	Ag. President
Binnodh Ramburn	-	Member
Masseelamane Goinden	-	Member

In the matter of:-

Henri Le Merle

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 (i)(f) of the Industrial Relations Act 1973**, as amended.

The Terms of Reference read:-

“Whether, in the context of port reforms, Mr Henri Le Merle should have been promoted as Senior Operations Planner on the basis of seniority.

The Applicant, in his Statement of Case, avers that:

1. He is in the employ of the Cargo Handling Corporation along with Mr Fernand Jacques Fanor and Mr Jacques Alain Hardy since 15 January 1979.
2. It has been current practice that promotions be given on the basis of merit and seniority at the C.H.C Ltd.
3. In June 1997 Mr Jacques Fanor was promoted Senior Operations Planner (S.O.P).
4. As per the Salary Reconstruction Scheme several posts of Senior Operations Planner were created.
5. Only one Operation Planner was appointed namely Mr Jacques Fanor and following the appointment of Mr Fanor, he made several complaints to the C.H.C Ltd where at a certain point in time he was told that seniority and merit was the basis of the appointment of the post of S.O.P.
6. Through a letter dated 30 May 2002 he was informed that the criteria for appointment of Mr Fanor was seniority.
7. Through a note of meeting dated 3 September 2002 it was stated therein that no appraisal system had been implemented as at date and as such no appraisal of the merit of an employee could be done before any promotion.
8. His contention is whether he should not have been promoted as S.O.P on the basis of seniority as stipulated in his agreement in line with other sectors of the C.H.C Ltd.

In its Statement of Case, the Respondent avers that:-

1. At the time of the implementation of the Salaries Restructuring Committee Report 1996 on 1 June 1997, there were 5 Documentation Clerks, post restyled as Operations Planners.
2. The S.R.C Report of 1996 recommended for the creation of only one post of Senior Operation Planner to be appointed from Operation Planners who were formerly Documentation Clerks.
3. The report was duly endorsed by all Trade Unions at the Cargo Handling Corporation Ltd
4.
 - (i) With the agreement of the Docks and Wharves Staff Employees Association Management proceeded to fill the vacancy of S.O.P on the basis of seniority and merit.
 - (ii) It is for this reason that in a letter dated 30 May 2002 Mr Henri Le Merle was informed that seniority was the main criteria for the selection of the S.O.P.
5. As there were 3 Operations Planners namely Messrs. Fernand Fanor, Alain Hardy and Henri Le Merle, who joined service on the same date – 15 January 1979 – Management with the concurrence of the Union used the following criteria to select the right candidate:-
 - (a) Good attendance at work
 - (b) Punctuality
 - (c) Reliability
 - (d) Respect from colleagues
 - (e) Effective Communications

6. Based on the above criteria, Mr F Fanor was found to be the best candidate.
7. According to the new Salaries Restructuring Committee Report from Price Waterhouse Coopers of December 2002, the new appellations to the post of Senior Operations Planner and Operations Planner are Senior Data Officer and Data Officer respectively.

Mr Hardy testified to the effect that:-

1. He is presently the President of the Docks and Wharves Staff Employees Association and Mr Le Merle is a member of the said Union.
2. Three persons were qualified for the post of Senior Operation Planner (S.O.P) namely himself, Mr Le Merle and Mr Fanor and all of them joined the service on the same date – 15 January 1979.
3. When several employees joined the service on the same date, seniority is calculated as per the date of appointment in the grade. If the date of appointment in the grade is the same, it comes down to the age of employees.
4. He himself was born on 27 August 1957, Mr Le Merle on 17 March 1958 and Mr Fanor on 8 September 1958.
5. At the relevant time when appointments were made, representations were made to the C.H.C Ltd as to why Mr Fanor was chosen and not Mr Le Merle. Being the Secretary of the Union at that time, and believing that he could not be judge and party at the same time he did not make it an issue as to why he himself was not appointed. He therefore supported Mr Le Merle.
6. When Mr Le Merle made his complaints in 1997 after the appointment of Mr Fanor there was more than one post of S.O.P as per the S.R.C Report of 1996. The C.H.C Ltd went against the report – appointed only one S.O.P – the Union and Mr Le Merle protested.

7. If the promotion was done on seniority he ought to have been chosen because he is the oldest among the three candidates. As far as the element of merit is concerned this seems to be a subjective decision which was left to the Head of the Department and which was against all procedural and collective agreements between the C.H.C Ltd and the Union.
8. He denies paragraph 5 of the Employer's Statement of Case.
9. At no moment in 1997 and up to 2002 there has ever been any performance appraisal scheme. Any assessment made by any person or individual would have been biased.

Mr Hardy agreed in cross-examination that:-

1. In 1979 there were 3 Documentation Clerks namely himself, Mr Le Merle and Mr Fanor. In November of the same year there were additional Documentary Clerks recruited.
2. According to the S.R.C Report 1996, there should be more than one post of S.O.P.
3. Promotion is effected on merit and seniority right from the start and it has been thus all the time.
4. Nowhere it is mentioned in any document between the C.H.C Ltd and the Union that if ever there is more than one person who has joined service on the same date, it is the one who is older that is going to be promoted.
5. It would be bias if someone supervising the work of an officer makes an assessment on the same officer.
6. The Documentation Unit has been disbanded now as per the S.R.C Report 2003 and in the same year Mr Le Merle has been shifted to the Terminal Division as Senior Terminal Assistant equivalent to an Operation Planner. Now he is occupying the post of Senior Supervisor Operation.

7. He did not agree that there would be only one post of Senior Operation Planner.
8. He does not know if it is ridiculous to find two persons supervising the work of three persons but this is current at the C.H.C Ltd.

He concedes that he has never since 1997, been told of the criteria used for the selection of the right candidate at paragraph 5 of the Employer's Statement of Case. He adds that there were four contradictory statements concerning the criteria used. He refers to documents H, I and J.

Mr Henri Le Merle confirms everything Mr Hardy has said concerning his case. He also states that he has been promoted Senior Supervisor Operation since August 2006.

He agrees that:-

1. Nowhere it is mentioned that if there are three persons who have joined an organization, the one who is born first will be promoted.
2. Good attendance at work, punctuality, reliability and capacity to communicate are objective criteria, but are not necessarily the criteria that are to be taken into consideration for promotion.
3. The Documentation Unit does not exist anymore.
4. Merit and seniority have always been taken into consideration for promotion exercises.
5. In the case of Mr Fanor's promotion, he agrees with seniority but not as far as merit is concerned.

Mr Le Merle, in re-examination, confirms that regarding his academic qualifications he has French and Economics at G.C.E Advanced Level. He does not know the academic qualifications of Mr Fanor.

Mr Jacques Faustin, Deputy Managing Director at the Cargo Handling Corporation stated that:-

1. He joined the C.H.C Ltd in 1979 as Statistician and in 1986 he was posted to the Documentation Unit as Assistant Documentation Manager. Following the S.R.C Report of 1996 this unit was eventually known as Operations Planning Unit (O.P.U) and after the S.R.C. Report of 2003 the said unit was dismantled and does not exist anymore.
2. When he joined the O.P.U, there were five Documentation Clerks – known as Operations Planners after the S.R.C Report of 1996 – namely Messrs Le Merle, Hardy, Fanor, Labour and Harel.
3. The S.R.C Report of 1996 provided for only one post of S.O.P and he thinks that one person suffices to supervise the works of four persons.
4. For the post of S.O.P., the General Manager, Mr Lecordier, asked him to choose among the three employees who joined the Corporation on the same date and he recommended Mr Fanor on the basis of attendance, reliability, punctuality, effective communication and respect from colleagues.
5. The fact that being born first one has priority on others has never been the case at the C.H.C Ltd for promotion.
6. Together with seniority and merit – as criteria for promotion – the recommendation of the O.I.C of a unit is also sometimes needed.
7. “By merit” he means no adverse report and capacity to perform the job. Mr Fanor, in his view, was the best candidate. One has just to look in the personal files of these employees to determine these criterias. He always had a problem of punctuality with Mr Le Merle. As regard Mr Hardy, he was not reliable and did not work to his satisfaction.

8. Along with Mr Lecordier, he thinks he knows these employees better than anyone at the C.H.C. Ltd.

He agreed in cross-examination that:-

1. There has always been one post of S.O.P.
2. It is he who has set up the five criteria found at paragraph 5 of the Respondent's Statement of Case.
3. He is not aware of "Document D" (a letter dated 17 October 1997 signed by Mr Lecordier) where other criteria constituting merit has been mentioned such as academic qualifications, computer literacy, traits of leadership and analytical ability.
4. If another person or a panel was asked to do the assessment the decision could have been different regarding the promotion.
5. There was no proper system of appraisal until the year 2002.
6. He does not agree that his system of appraisal was not objective. According to him the right person was chosen following an objective appraisal.

During re-examination Mr Faustin stated that Messrs Le Merle, Hardy and Fanor having joined the Corporation on the same date, he was asked by Mr Lecordier to make a recommendation which he did on the criteria he had already explained to the Tribunal.

It is submitted on behalf of the Respondent that:-

1. Mr Le Merle is asking that he should have been appointed to the post of S.O.P in 1997 and now we are in 2007. Assuming that this Tribunal finds that Mr Le Merle should have been appointed instead of Mr Fanor, it will serve no purpose as this Documentation Unit does not even exist now.

2. Mr Faustin has worked in that Unit since 1996 and up to 2003 and he is the best person to assess anyone.
3. Mr Hardy wants this Tribunal to believe that in the document he produced, there should be more than one S.P.O. meaning that if there were 2 S.P.Os, 2 persons would supervise the work of 3 persons.
4. As per Mr Faustin there was only one post vacant and among the candidates there were three persons who were on the same seniority list, their appointment were effected on the same day. There was no better promotion exercise that could be carried out than to ask for a recommendation from the person who is responsible of the unit. Merit was to be taken into consideration and for Mr Faustin merit means that the person appointed can exercise his functions and can take higher responsibilities in senior post.
5. The promotion exercise has been done fairly and reasonably. Perhaps if Mr Le Merle had been working better than Mr Fanor or Mr Hardy had been a better candidate, he would have been occupying that post to-day.

It is submitted on behalf of the Applicant that:-

1. The post of SOP has been scrapped but the issue is that Mr Le Merle has been prejudiced in that if he was promoted he would now have been on a higher basis salary.
2. Promotion were supposed to be made on seniority and merit but in the absence of any system of appraisal, promotion ought to have been done on the basis of seniority alone. This is confirmed in document I from the General Manager who says that promotion up to 2002 were still being made on seniority.
3. The Respondent has stated in its Statement of Case that 5 criteria were used but this has been contradicted by Document D where it is stated that 4 other criteria are being used. This shows that there was no system of appraisal to assess the merit of each employee. This exercise has been left to one person, Mr Faustin

who has agreed that if it was someone else doing the assessment or a panel it would have been more objective in doing the assessment as to the merit of an employee to be promoted and the decision would have been different.

After considering the testimonial and documentary evidence adduced, this Tribunal notes that:

1. It has been the practice at the C.H.C. Ltd that promotions are effected on the basis of merit and seniority and both the Applicant and the Respondent agree to this.
2. The Applicant states that as per the Salary Reconstruction Scheme of 1996 several posts of S.O.Ps. were created, whereas the Respondent says that only one post of S.O.P. has been recommended.
3. Three persons namely Messrs Hardy, Le Merle and Fanor were on equal footing as regard to seniority in view of the promotion exercises for the post of S.O.P. Other criteria were also used.
4. The Operations Planning Unit after the S.R.C Report of 2003 has been dismantled and does not exist now.

Now regarding the issue of promotion in the present matter the Tribunal is concerned with the way this promotion has been effected. We find it strange as to why no proper appraisal system has been set up all that time to determine the merit of a candidate. In the present case assessment has been left to one person, the Documentation Manager. As per the testimony of Mr Hardy, at one time when they were discussing the issue of seniority, Mr Faustin told him he did not know how to proceed and may be he should do it by way of “un pain ti godon”. The Applicant is under the impression that there was no transparency, and he cannot be blamed for that. The selection was done by a one man show, Mr Jacques Faustin, imposing his own criteria and having fun with “un pain tigodon”. The least that can be expected from someone who occupies the post of Deputy Managing Director at the Cargo Handling Corporation is a display of professionalism.

The Applicant also contends that there should have been more than one S.O.P. which is denied by the Respondent. To support his assertion the Applicant has produced documents B and C but which are not dated and not signed. It appears unnecessary that two persons should supervise the work of three.

Counsel for the applicant stated that if the Tribunal finds that Mr Le Merle ought to have been promoted then his salary will have to be adjusted as the post of S.O.P. has been abolished and the Operation Planning Unit does not exist anymore. The Tribunal cannot follow this reasoning as this is outside the Terms of Reference. The Applicant is raising a new issue which has not been canvassed and is not part of the Terms of Reference.

We find therefore that the exercise of selection on the one hand suffers from many flaws. But on the other hand it has not been proved that Mr Le Merle was a more deserving candidate than Mr Fanor.

The Tribunal is invited to find whether the Applicant should have been promoted on the basis of seniority. We know that Messrs Fanor, Le Merle and Hardy joined service on the same date – 15 January 1979 – as Documentary Clerk afterwards known as Operation Planner. The Applicant claims that in such a situation the one who is older should be considered as senior. Seniority simply means being senior, and one is considered senior when one has joined service before all others in the same category. This is not the case as far as Mr Le Merle is concerned. Furthermore, there is no document between the Respondent and the Union to support Applicant's claim that being born first one is senior to others. We are not in presence of any evidence to justify the practice that the older becomes automatically senior.

In conclusion, the Tribunal finds that there is no merit in the Applicant's case.

The dispute is accordingly set aside.

Rashid Hossen

Ag. President

Binnodh Ramburn

Member

Masseelamanee Goinden

Member

Date: 12th September, 2007.