

- **The fact that an appeal is pending before the Tribunal does not mean that the Respondent cannot continue with its selection exercise as the administration cannot come to a standstill (Brunet vs PSC (1993))**

The Appellant is an Assistant DRT of the Ministry of He lodged an appeal at the Tribunal contesting the appointment by selection to the post of DRT (ECIF) in a temporary capacity of the Co-Respondents Nos 4, 5, 6. Originally there were two other Appellants in the case namely Mr ... and Mrs Later when two more officers were appointed he entered an appeal against them. One of them was

Mr ...having been appointed on..., withdrew his appeal.

Mrs ... also withdrew her appeal and, as at today, there is only one Appellant.

The cases were consolidated and were therefore heard together.

Appellant's Grounds of Appeal (GOA) in the first case are:

- "1. Because the decision of the Respondent is biased, unfair, unreasonable and irrational.*
- 2. Because the Respondent has failed to address its mind to relevant facts such as seniority, experience and clean record and on the issue of seniority and experience of Appellant is more equipped than Co-Respondents.*
- 3. Because Appellant in terms of hierarchy in the ministry is much higher than the Co-Respondents.*
- 4. Because the Appellant has not had a fair hearing in terms of the concept of natural justice, the interview accorded to him was just an eye wash and not done in a botched way and a mere colorable device.(sic)*
- 5. Because the Appellant who reckons some thirty years of experience in the ministry has been acting as DRT on several occasions and this element has not crossed the mind of Respondent."*

He expatiated those grounds in a Statement of Case by stating that

1. He had 30 years of service at the Ministry in various posts in several sections dealing with various sectors. He averred that he was senior to some Co-Respondents but also higher in terms of hierarchy.
2. He also averred that he had worked as Consultant for an international body.
3. He stated that in October ... he was appointed EST, in ... he was appointed BUDO, ... he was promoted to Senior BUDO and in ... he was appointed to the post of PREAT.
4. He stated that he was assigned the duties of Assistant DRT, FES in two different Ministries. In ... he was appointed Assistant DRT, FES which is one grade above that of PREAT. Under the PRB Report 2008, the post of PREAT and the posts of Assistant DRT were merged into the post of LAST.

He referred to the Errors, Omissions and Anomalies Committee Report of the PRB Report 2013 which “duly recognised the seniority of the grade of Assistant DRT by placing them above LAST and above Deputy Permanent Secretaries (DPS).

5. He stated that the interview which lasted 15 minutes was botched and was just an eyewash and that he had no adverse report.
6. On experience, the Appellant stated that he had acted as Director, ECIF on several occasions. He had also assumed responsibility of the Directorate for short durations. He further listed the various times when he represented the Government overseas and averred that he had been a member of several Boards and Committees.

He also stated that he had acted as Secretary to the Steering Committee spearheading the setting up of the FISEC in 2001 and had been serving as Secretary to the Board of the FISEC even though the Composition of the Board had changed on 5 occasions.

In his second Appeal, Appellant submitted the following GOA

“1. Because the Appellant has contested the appointments made in August 2015 to the post of DRT, ECIF at the Ministry of ...before the Public Bodies Appeal Tribunal and the matter has not been heard yet.

2. Because Respondent has caused no new call for applications for the posts of DRT, ECIF at the Ministry ... but has simply made a selection from the exercise carried out in 2015, that is one year ago, and which is still being contested at the Public Bodies Appeal Tribunal. No new opportunity has been given to the Appellant to be reassessed.”

The Grounds of Appeal made in the first case before the Tribunal were repeated.

In his SOC he prayed for

“(A) An order or certiorari ordering the Respondent to bring all recommendations, reports, letters, notes, written comments pertaining to its decision to appoint co-respondents in their respective posts and not to appoint Appellant to the post of Director, ECIF with a view to have the said decision quashed, reversed, set aside and/or dealt in such manner as this Honourable Tribunal shall deem it fit and proper in the circumstances;

And/or

(B) an Order declaring and decreeing that the aforesaid decisions of the Respondent be null and void;

And/or

(C) An Order of Mandamus directing the Respondent to promote the Appellant to the post of Director, ECIF.

And/or

(D) Such Order/s as the Honourable Tribunal may deem fit in the circumstances.”

At the Hearing of the case, Appellant’s Counsel agreed that the Tribunal had no jurisdiction for (A) and (C) and he withdrew these prayers.

Co-Respondents' Stand

Co-Respondents 1 to 4 filed their Statement of Defence and decided to conduct their own case.

Co-Respondent No.1 lodged a Statement of Defence in which he stated that he was the most senior among all candidates and had higher qualifications and more relevant experience than Appellant. Appellant did not contest his appointment.

Co-Respondent No.2 stated that his appointment had not been directly contested and just provided some information to assist the Tribunal.

Co-Respondent No.3 also understood that Appellant was not putting his appointment in question and averred that he was more senior, higher in the hierarchy and had also been acting as DRT on several occasions.

Co-Respondent No.4 averred that Appellant had failed to show that the Co-Respondent had less qualifications, experience and merit. He averred that he joined the public sector on ... and has "*aptly contributed to ... on a high level since, escalating his way to the top.*"

He gave a full picture of his profile in particular that he had been working closely with several international advisers and had been assigned the responsibility as SST for EYPUS. He has also provided direct assistance to the FNSY and has been member of several Boards. He alleged that the duration of the interview was adequate to assess any candidate and that "*Appellant failed to demonstrate that he has any qualification.*"

Co-Respondents Nos.5 and 6 decided to abide by the decision of the Tribunal.

Co-Respondent No.7 was not represented and did not submit a Statement of Defence.

Co-Respondent No.8 was represented by Counsel who stated that his client would abide by the decision of the Tribunal.

Respondent's Case

The Respondent denied the averments of Appellant under ground 1 and took note of certain statements included in the Statement of Case under that ground.

The Respondent averred that the post of Director (ECIF) is filled by selection from among officers listed in the Scheme of Service and that Appellant and Co-Respondents were all eligible for consideration. It stated that seniority is not an overriding criterion.

The Respondent stated that Co-Respondent No.6 was appointed LAST on ... and was eligible for consideration as he reckoned at least 10 years post degree experience.

The Appellant was appointed PREAT on ..., he was assigned duties of Assistant DRT since ...until his appointment as Assistant DRT on.... Assignment of duties is made for administrative convenience. Co-Respondent No.5 was appointed ... on ... (restyled LAST since).

Respondent averred that all qualifications and experience disclosed by Appellant in his application form were taken into consideration.

Respondent denied ground 2 of Grounds of Appeal. It gave a detailed chronology of the various appointments of Appellant and admitted that he never had any adverse report and had good relationships with all the heads with whom he worked.

Respondent however stated that Co-Respondents were also all favourably reported on in their Confidential Report and Performance Appraisal Forms for the last three years.

Respondent denied ground 3 regarding hierarchy and explained that

“(ii) on reaching salary point ...the LASTs, formerly the Assistant DRTs in post as at ...at the Ministry of ...and LASTs formerly Assistant DRTs, MAAB in post as at ..., should be known as Assistant DRT, ECIF;

(iii) Appellation of Assistant DRT, ECIF is not an established post but a designate position.

That the post of Assistant DRT, amongst others, has been restyled LAST. The recommendation at paragraph ... of the EOAC Report 2013 allows officers in the grade of LAST (those who were formerly in the grade of Assistant DRT in post as at...) to move incrementally up to the point of

Rs... in the master salary scale and is not to be construed as the top salary for the purpose of establishing seniority in accordance with the definition of seniority in the Public Service Commission Regulations; and

That the post of LASTs and Deputy Permanent Secretary carry the same salary scale and are therefore considered to be at par.

Avers that Appellant is known as Assistant DRT, ECIF when he started drawing the higher salary of Rs... with effect from....”

Respondent denied ground 4 regarding fair hearing and natural justice.

Respondent stated that there were 21 eligible candidates called for interview which lasted between 18 to 45 minutes. Appellant’s interview lasted 40 minutes.

Respondent denied ground 5 regarding actingship. Respondent averred that Appellant had been assigned duties of DRT (ECIF) several times just like Co-Respondents Nos.1, 2, 3 and 6.

Respondent finally averred that due consideration was given to the requirements of the post as set out in the Scheme of Service, the criteria of selection and the performance of the respective candidates at the interview and it acted in strict compliance with PSC Regulation.

It averred that the appeal had no merit and should be set aside.

Determination

The post of DRT (ECIF) was to be filled by selection based on the Scheme of Service of ... which provided that candidates should be

“A.officers who hold appointment in a substantive capacity in any of the following grades –

- (i) Deputy DRT (ECIF); and
- (ii) LAST who reckon at least 10 years’ post-degree experience.

B. Candidates should –

- (i) be fully conversant with ... policies of Government;

- (ii) *have a track record of solid achievement of clearly identifiable outputs;*
- (iii) *have an extensive understanding of specialised ... and the domestic and international ...;*
- (iv) *have personal credibility and integrity;*
- (v) *have excellent interpersonal, problem-solving, leadership and managerial skills; and*
- (vi) *have the ability to work effectively as a team leader and under time pressure.”*

The interview took place in ...and all those found eligible including Appellant and Co-Respondents were convened. Six candidates were selected in the first batch. Then on ... and on ..., the names of two candidates from the merit list following that same selection exercise were submitted for appointment which was made to Co-Respondents No.7 and 8 on....

The Appellant having lodged his appeal against Co-Respondents Nos. 4, 5 and 6, lodged a second appeal against Co-Respondents Nos 7 and 8. In fact Co-Respondent No.7 had originally been an Appellant along with one ... and the present Appellant. But both of them had withdrawn their appeal.

The cases were consolidated after all parties and their Counsel had agreed that only one Determination would be given as it concerns the same selection exercise.

He gave the same Grounds of Appeal in both cases but in the second case he averred that there should have been no appointment as his first Appeal was already before the Public Bodies Appeal Tribunal.

Let us first set this aside as the PSC has full powers to carry on with such an exercise, albeit at its risk and peril. The government machinery cannot be put at a standstill as was amply explained by Judge Lallah in Supreme Court Case “Brunet v Public Service Commission (1993 SCJ 330) “*what the applicant is seeking to achieve is that a particular administration should come to a standstill for several years until the dispute is resolved and that the PSC should be prevented as from now from performing*

its undoubted constitutional functions. As Judge in Chambers, I would without hesitation refuse to accede to this application.”

He cannot either contest the right of Respondent to choose new appointees from a merit list which was only a year old, as nothing much would have changed in this span of time for officers of such high standing office who are all fully qualified. Respondent's Representative explained during the Hearing that there were no more officers who were eligible for that post than the ones who applied. In any case the Respondent has exclusive power to decide on its method of recruitment by virtue of Regulation 17 of PSC Regulations.

The Tribunal has already had the opportunity to recommend however that waiting too long for a new selection exercise may give rise to a lot of frustration when officers who did not meet the criteria of qualification, or experience would have done so within a period of a year or two. This is not the case here.

Regarding the GOA of Appellant, we have to clear the following well established principles:

Seniority is not an overriding criterion and will only be applied if candidates are at par. Further it is now well established that assignment of duties to a higher post does not give the incumbent any priority over his other colleagues to be appointed to that post. Each time the Respondent explains this clearly in its letter to officers being assigned duties.

Regarding his averment that he was higher in hierarchy, Appellant has not proved that ground. In fact it is clear that Assistant DRT (ECIF) is not an established post as per the Civil Establishment Order. It is a designate position. Respondent did maintain that Appellant holds the post of LAST like all the other candidates.

Regarding his record, the Respondent agrees that Appellant and all candidates appointed did have a clean record.

Concerning the duration of the interview he said during cross examination that, though he said in his second appeal that it lasted for 40 minutes, in fact he did not time it. The Respondent did provide the Tribunal with details concerning the length of the interview for each candidate which varied between 30 to 45 minutes for those who were

appointed including Appellant. Whereas Appellant was under the impression that Co-Respondent No.6 had been interviewed for 10 minutes only, he was unable to state for how long he was interviewed, but we now have it confirmed that he was interviewed for 40 minutes and Co-Respondent No.6 for 30 minutes. But this issue keeps being raised by Appellants who feel that they did not get a chance to show their capacity in such a short time. The fact is that a lot of information is already available from the Application Form and the annexes regarding qualification and experience. Confidential Reports and Performance Appraisal Forms are also available, once applicants have been interviewed, to help the interview team as regards their suitability.

In this case qualification was not a criterion as every candidate was fully qualified. Candidates were judged on the following criteria: Relevant experience, Knowledge of relevant government policies, Achievement of clearly identifiable outputs, understanding of domestic and international..., interpersonal problem solving leadership and managerial skills, personality, aptitude.

The adviser also allotted marks, but an analysis of the mark sheets provided by the Respondent, under confidential cover, shows that these marks were not always more favourable than those allotted to candidates who were in fact selected. This means that the markings by the members of the PSC were as important as those of the adviser, if not more, on the different criteria. This comforts the Tribunal concerning any allegation of possible bias.

It is also obvious that all candidates were marked favourably and that, since there were only a few vacancies, those who “performed better at the interview” were selected. However they were followed closely by the others. There was little that demarcated the last appointee and the next in the merit list. Indeed in this case the two original Appellants were appointed from that list.

There is no evidence that the exercise was “*biased, unfair, unreasonable and irrational.*”

The appeal is set aside.