

## Det 38 of 2017

- **The Tribunal has no jurisdiction with regard to issues related to Schemes of Service.**
- **The Respondent is perfectly entitled to appoint officers who are on the merit list which can be used for one or two years at the choice of the Respondent.**

The Appellant, a SPA, is challenging the decision of the Respondent to appoint the Co-Respondents to the post of SPD. The Appellant lodged two appeals, the first one to challenge the appointment of the thirteen Co-Respondents following a notification dated ... and a second notification dated ... where Co-Respondents Nos ... to ... were again appointed. As the two appeals refer to the same selection exercise it was agreed that these two appeals be consolidated and one determination be given.

### **Appellant's case**

In her Grounds of Appeal, the Appellant averred that the Respondent failed to properly take into account the following criteria quoad her as compared to the other candidates for the post of SPD namely:

- (i) Qualifications
- (ii) Experience
- (iii) Merit
- (iv) Suitability for the post of SPD; and
- (v) Seniority

The Appellant averred that the appointment was made “on the basis of a report of the selection panel which is therefore irrelevant for purposes of this appointment exercise” as it is more than one year old.

According to the Appellant the Respondent chose to proceed with appointment based on a selection exercise as opposed to appointment based on seniority and merit

and by doing so the Respondent flouted the recommendations of para 11.20 (e) of the PRB Report 2016 relating to recruitment and promotion which was a binding contract between her employer and herself. The Respondent “did not even address its mind to this recommendation and there was no reason whatsoever on record to justify the decision of the Respondent to proceed by selection as opposed to proceeding on the basis of seniority and merit”. She prayed as follows:

1. To order the PSC to bring up the whole record in relation to the appointment exercise.
2. To examine the whole appointment process including the report of the Selection Board
3. To quash the decision of the PSC and to order it to proceed with a fresh exercise on the basis of seniority and merit.

In her Statement of Case the Appellant stated that she joined the civil service in ... and was appointed SPA in the administrative cadre in a substantive capacity in 2001.

She possessed the following qualifications:

- (1) Diploma in Management Studies- University of Mauritius (UOM)
- (2) BSc (Hons) Social Work – (UOM)
- (3) MSc Public Sector Management - University of Technology, Mauritius

She followed several professional and technical courses which made her familiar with modern trends and techniques in management related to the post.

She worked in 8 Ministries and was exposed to a wide range of subject matters thus increasing her knowledge and competencies in mainstreaming developmental issues in policies and programmes across sectors. She had discharged her duties with due diligence and she had no adverse reports. She gave a list of her activities, including that of PGM of the ENP Fund. The Co-Respondents Nos 9, 10 and 12 were appointed SPA after her. In spite of her qualities, the Respondent had failed to accurately and adequately assess her competencies and suitability for the post.

Under Ground 2 she stated that a merit list is valid for only one year. Extending the validity thereof to two years is unacceptable as Respondent had thus changed the rules and thereby rendered the appointment exercise utterly unfair. The Respondent has not acted in a transparent and fair manner.

Under ground 3 she stated that the Respondent should have finalized the proposed amended Scheme of Service for the post by ... as the Respondent was under the obligation to approve the proposed Scheme within four months as per paragraph ... and ... of the PRB Report 2016. But, instead, the Respondent did not address its mind to the recommendations of the PRB Report 2016 and accepted the request of the Head of the Civil Service to fill the vacancies reported to it based on the merit list which had its duration altered by the Respondent in a non-transparent and irrational manner. There was no justification whatsoever on record to justify the decision of the Respondent to proceed by selection as opposed to proceeding as per the recommendations of the PRB Report 2016.

In her second appeal the Appellant contested the second appointment of the Co-Respondents Nos 10 to 13 She did not accept that the Respondent could again appoint these Co-Respondents in a temporary capacity. When she was told that these Co-Respondents were first appointed in a “purely temporary capacity” she stated that it was not said in the first notification that this was so as the thirteen Co-Respondents were said to have been appointed in a “temporary capacity”. She contended that the two notifications were ambiguous, confusing, and misleading. The Respondent and the Responsible Officer should communicate the exact and concise details of appointments made. It was “grave” and “unacceptable” that the Respondent created confusion and misled the concerned persons through Notifications of Appointment, which were important documents in the recruitment and appointments process. The appointment “in a purely temporary capacity” brought a new element in the appointment exercise. It was not said in the advertisement to fill the vacancies that there would be appointments in a purely temporary capacity. This should have been communicated to the Appellant prior to the selection exercise. The Respondent had not only committed illegality by making appointments in a purely temporary capacity but it has acted in an unethical, non-transparent, irresponsible and unfair manner. Whether the purely temporary

appointment could be automatically followed by appointment in a temporary capacity was totally obscure.

The Appellant felt aggrieved and disturbed given that her chances for her career and promotion prospects after 15 years of service in the grade and 23 years in the public service had been jeopardized. She therefore moved that the decision of Respondent to appoint all Co-Respondents be quashed.

### **Co Respondents' Case**

The Co-Respondents decided to abide by the decision of the Tribunal.

### **Respondent's Case**

In its Statement of Defence the Respondent averred that the Appellant did disclose in her application form that she possessed the said qualifications and that she followed the various courses as averred by her. All the information disclosed by the Appellant in her application form relating to qualifications and work experience had been taken into consideration by the selection panel.

The post of SPD was filled by selection from among officers in the grade of SPA who reckoned at least eight years' service in a substantive capacity in the grade and who possessed a degree from a recognized institution or an equivalent qualification acceptable to the Public Service Commission as per the Scheme of service.

Vacancies in the post of SPD were advertised on ... by way of Circular Note No.... Appellant was eligible and was convened for interview. Following a selection exercise in ... among eligible candidates, a merit list was established. On ... the Responsible Officer (RO) reported 14 vacancies (nine permanent and five temporary) and recommended that:

- (i) Five SPAs be appointed SPD in a temporary capacity for a period of six months in the first instance, as from the date of their assumption of duty;
- (ii) The names of four suitable candidates from the merit list following the last selection exercise be submitted for appointment as SPD in a temporary

capacity for a period of six months in the first instance, as from the date of assumption of duty;

- (iii) The names of four other candidates from the same merit list be submitted for appointment as SPD in a purely temporary capacity.

On..., the names of nine SPA were submitted to the RO for appointment as SPD in a temporary capacity. The names of four other SPA were also submitted for appointment as SPD in a purely temporary capacity.

The Respondent stated that the Appellant as well as the Co-Respondents had no adverse reports.

The Respondent gave the record of assignment of duties of the Appellant from ... to ...

The Respondent however averred that assignments of duties were done for administrative convenience and did not give claim to appointment to the higher post. The Co-Respondents were also assigned the duties of SPD.

The Appellant and the Co-Respondents were fully qualified as per the Scheme of Service and they were all called for interview, following which the Co-Respondents were offered appointment. Seniority is not an overriding criterion in a selection exercise. The onus was for the Appellant to prove that she was suitable for the post.

The Respondent denied that the questions asked at the interview were not related to the criteria of assessment and averred that the questions were according to the provisions of the Scheme of Service and keeping in view the nature, responsibilities and complexities of the post. There had been no complaints received by the Appellant or other candidates as regards questions put at the interview.

As regards the point raised by the Appellant regarding the validity of the duration of the merit list, the Respondent averred that this was misconceived. Under the PSC Regulations, the Respondent would determine the procedure to be followed in dealing with applications for appointment to the public service, including the proceedings of any selection board appointed by the Respondent to interview

candidates. There was no prescribed rule that the merit list should be valid for one year. The practice was that the merit list would be valid for two years and this criterion had been applied in the present matter.

Also regarding the reference to the issue of amendment to the Scheme of Service and Appellant's challenge of the Scheme of Service on which the appointments were made, the Respondent stated that same should be purely and simply set aside as the Tribunal had no jurisdiction to review Schemes of Service. Even if considered on the merits this ground was misconceived inasmuch as the concluding paragraph ... of the PRB Report 2016 stated in no uncertain terms: " *This should not preclude selection at two successive levels where the need is felt*".

The Respondent averred that the appointment of SPD was done as per the Scheme of Service, the criteria of selection determined by the Respondent, performance at the interview and the provisions of regulation 14 of the PSC Regulations. Moreover, the Respondent had determined the suitability of each candidate for appointment as SPD.

Respondent stated that the four Co-Respondents appointed in a purely temporary capacity had been informed that such appointment would not give them a claim to permanent appointment as SPD.

Respondent further stated that as assignment of duty would have lasted more than six months, it was considered that it was "proper and fairer to appoint meritorious candidates from the merit list" but in a purely temporary capacity. However when on ... the Responsible Officer reported four vacancies, he recommended that the four Co-Respondents be appointed in a temporary capacity as SPD.

The Respondent moved that the appeal be set aside.

### **Determination**

In the first instance the Tribunal will address three issues, namely (1) seniority (2) Scheme of Service and (3) merit list.

The Appellant avers that she was senior to Co-Respondents Nos 9, 10 and 12 and they became SPA after her. However, seniority per se is not a determining factor in a selection exercise. Regulation 14(1)(c) of the PSC Regulations says that “ *in the case of officers in the public service, take into account qualifications, experience, merit and suitability for the office in question before seniority*”. Therefore, the Appellant cannot lean on seniority to claim that she should have been appointed.

Regarding the Scheme of Service it is obvious that selection has to be done according to the prescribed Scheme of Service valid at the time of the appointment. The claim of the Appellant that the appointment should have been by promotion as recommended by the PRB Report 2016 does not hold. The recommendation of the PRB, even if accepted by Government, must be given effect by amending the Scheme of Service and same must be duly prescribed. This has not been done and appointment must be by selection as per the existing Scheme of Service. As to why the Scheme of Service has not been amended, this is outside the jurisdiction of this Tribunal.

The Appellant has also questioned the validity of the merit list claiming that it was valid for one year but the Respondent had extended it to two years. The Respondent rebutted this averment and stated that nowhere is it said that the merit list was valid for one year. It maintains that this list was valid for two years. Regulation 17(1) of the PSC Regulations states clearly that “*The Commission shall determine the procedure to be followed in dealing with applications for appointment to the public service, including the proceedings of any selection board appointed by the Commission to interview candidates*”. The Tribunal cannot interfere with the powers given to the Respondent in this respect. The merit list was valid.

There is also the issue of Co-Respondents Nos 9 to 13 Who were initially “in a purely temporary capacity”. Appellant argued that this was not said in the advertisement and there was no indication that there would be appointment in a purely temporary capacity. This point does not hold as the Respondent can always appoint from the merit list or otherwise, candidates in a purely temporary capacity in anticipation of vacancies that would arise in the future. In so doing, the Respondent will be acting as per power of appointment given to it by the Constitution. There was no need for it to be mentioned in

the advertisement that there will also be appointment in a purely temporary capacity. The Appellant cannot say that she has been prejudiced in the process and the fact that the purely temporary appointment was converted into temporary appointment was in order when drawn for the merit list established by the selection exercise.

The Tribunal now turns to the specific grounds of the Appellant and for this the Tribunal sought information from the Respondent on the selection criteria, their respective weight and the markings. These were provided under confidential cover to the Tribunal.

The Tribunal finds that the selection panel has the following criteria for assessing candidates:

- (1) Personality
- (2) Experience and Knowledge of Work
- (3) Management, Leadership and Organising Skills
- (4) Analytical, Communication & Interpersonal Skills
- (5) Sense of Responsibility & Maturity
- (6) Awareness of Modern Trends and Techniques in Management Aptitude for the post.

The selection panel also included an advisor who gave marks.

The Tribunal notes that there was no criterion of “Additional Relevant qualifications” which sometimes appears in selection criteria in other appointment exercises by the Respondent. The Appellant claims that she was better qualified because she had a post-graduate degree. However, even if this criterion was there, it would not have given an edge to Appellant over eight of the Co-Respondents who were also holders of post-graduate degrees. Nothing compels the Respondent to include this criterion in its selection criteria. The Tribunal notes on the other hand that Co-Respondents Nos 7 and 11 did not possess a degree but only a Diploma in Administration and Management. The Respondent presumably had recourse to the Note in the Scheme of Service for the post which says that “*Consideration will also be given to SA in post as at ... although they do not possess a degree*”. The Tribunal finds that Co-Respondent No 7 became SA on ... while Co-Respondent No 11 joined that grade on.... They became eligible for consideration under the Note. By not having



Qualifications or Additional Relevant Qualifications as a criterion they were not penalized because they had only a Diploma. Without putting into question the sacrosanctity of the Scheme of Service, it can be asked whether it was fair to consider candidates under the Note and not having Qualifications/ Additional Relevant Qualifications as a criterion. This puts those who possess a degree and post-graduate degrees at par with those having only a Diploma.

The Tribunal comes back to the Scheme of Service which was amended to include the possession of a degree as a requirement for consideration for the post. It is a fact that there was a Note to allow those who became SPA before ... to be considered although they did not possess a degree. The Tribunal would like to make the difference between eligibility and suitability. The Note makes those without a degree eligible. However, the possession of a degree was found to be a necessary condition for the post, thus the inclusion in the revised Scheme of Service. Therefore, when it comes to suitability for the post the possession of a degree and possibly an additional relevant qualification should be an advantage. This will be in line with regulation 14 where qualifications is a key criterion. The Tribunal feels that it was not reasonable for the Respondent not to have considered qualifications and additional relevant qualifications as criteria for assessment by the selection panel.

Has this caused prejudice to the Appellant? The Tribunal does not think so. The difference in total marks between the Appellant and the Co-Respondents were such that even if "qualifications" was added as a criterion this would not have changed the respective rankings. The Co-Respondents would still have an edge over the Appellant.

The appeal is set aside.