

A Co-Respondent who has refrained from bringing important information at the time of an interview, and who concealed same from the tribunal, cannot be seen to have merit. The Respondent having also failed to provide information requested by the tribunal regarding criteria, weightage and markings does not leave the Tribunal with much choice than to conclude that the process was vitiated.

This case had been heard by another bench. Following a determination by the PBAT, Respondent had applied to the Supreme Court for a judicial review. The PBAT was not represented and agreed to abide by the decision of the Supreme Court.

The Supreme Court quashed the decision of the Tribunal and remitted the matter to be heard anew. It enjoined the Tribunal henceforth to call all appointees in all appeals as Co-Respondents, so that the *audi alteram partem* rule is respected. He whose interests are at stake must have an opportunity to be heard, the more so as the Tribunal must also respect the rule of natural justice which is a mandatory statutory obligation.

All pleadings exchanged were tendered afresh to the new bench, with the required amendments. The Appointee was called as a Co-Respondent and he had the opportunity to file his Statement of Defence and to be examined and cross-examined.

Appellant's case

The Appellant lodged an appeal before the Tribunal contesting the appointment of Co Respondent, on 27 July 2009, as Assistant Director of Audit (ADOA). She filed an Amended Statement of Case with 11 grounds of appeal, together with several annexes, and swore to the correctness of same.

Her appeal is based on the fact that, at the National Audit Office (NAO), she was the most senior and most experienced among the five applicants. She averred that she had been assigned the duties of ADOA for long periods since January 2008 and had performed all the duties of ADOA which she listed. The Co

Respondent had, for his part, only been assigned duties as ADOA from November 2008 and he had not performed all the said duties given that no audit assignments had been allocated to him.

She stated in her grounds of appeal that, despite the fact that the Co Respondent is not conversant with performance audit, he was unilaterally selected as one of the trainees of such performance audit.

She stated that, together with one chief examiner of accounts, she trained two batches of trainees on how to use WINIDEA, an audit-software. She said that Co Respondent never played an active role in training.

She stated further that Co Respondent took leave without pay on two occasions and that she never took any such leave. She also mentioned that Co Respondent was granted a sponsorship to follow a two years part-time Masters in Business Administration (MBA) course from 2004 to 2006. But in 2005 she was refused such leave.

She averred that the experience and profile of the candidates were never elicited from the candidates.

Finally she said that she had had no adverse reports.

Appellant stated before the Tribunal that she knows that seniority is not the main criterion for a selection process but she said that it means however that she had a lot of experience. She also said that, while Co Respondent had the right to be given leave without pay, while he was away for long periods, she was gaining more experience and skills in the office as team leader and Assistant Director. Regarding Appellant's leave to go to Canada, she said that this showed that he was not committed to the NAO.

Respondent's Case

The Respondent also solemnly affirmed to the correctness of its Amended Statement of Defence in which it gave the particulars of service of Appellant and Co Respondent and rebutted some of the averments of Appellants. This

Statement confirms that Appellant is the most senior officer but both parties were appointed Temporary Senior Auditor on 14 April 2000.

Respondent also confirms that Appellant was appointed to act as ADOA from January 2008 to May 2008 and then she was assigned duties of ADOA on the grounds of administrative convenience from 1 July 2008 for a period of three years.

Co Respondent, for his part, was assigned duties as ADOA from 17 November 2008 and this was extended to be valid until the filling of the vacancy.

Regarding the issue of leave without pay granted to Co Respondent, he was allowed to take such leave from January 1998 to take up employment as internal auditor at the National Transport Corporation. But he resigned from that post and resumed duty at the National Audit Office on 3 May 1999. Nothing was said about any other leave taken by him at the relevant time.

The Representative of the Respondent reminded us that Respondent relies on PSC Regulation 14, that is, it looks at merit, experience, qualification and also seniority and it is bound by the scheme of service. Emphasis was laid on the performance at the interview. In this case candidates needed to have strong financial reporting skills with conceptual and analytical skills, team spirit, leadership qualities, communication and also interpersonal skills.

Respondent also averred that “if somebody is on leave without pay, it is not counted as experience.”

All candidates are required to submit documentary evidence of all relevant experience and additional qualifications which they possess at the time of application.

It was stressed that assignment of duty does not give anyone a claim for any permanent employment and that the suitability of a candidate is the prerogative of the Respondent under PSC Regulation 19.

The Respondent gave offhand a list of the criteria used for the assessment of candidates, as follows: relevant additional qualifications, experience in the actual

post, management and leadership skills, personality, communication, interpersonal skills and aptitude for the post.

Co Respondent's Case

Co Respondent also solemnly affirmed to the correctness of his Statement of Defence. He stated therein that the post of ADOA was kept in abeyance for 5 years and that, on 9 January 2008, he was assigned the duties of ADOA. He explained that, as Appellant was senior in the hierarchy, other candidates, including himself, did not get an opportunity to carry out the task of ADOA as required by the Scheme of Service.

He averred that Appellant had the assistance of two officers to assist her while she was acting in the post of ADOA, which Appellant had denied during cross-examination.

He stated that he worked on a new assignment (new financial audit procedures and programmes) and that the duties performed then by him form part of the duties of ADOA.

He denied that he was not familiar with Performance Audit (PA) and that there had been no contention that he was not familiar or incompetent in PA.

He contested that Appellant in fact did training on audit plan. He strongly contested that "Winidea" is being used but agreed that there was still training on this software.

He said that while he was at the NTC, he had acquired leadership skills. Regarding his sponsorship for an MBA course, he explained that such sponsorship is proof that the course was relevant. He received an increment after obtaining the MBA.

On being cross-examined he agreed that he had tried to emigrate to Canada but that he is back now. His explanation was that he wanted to see how things were done elsewhere. Until then he had not revealed this to the Tribunal.

Determination

In order to give a fair determination in a case before the PBAT, it is important to see if the Appellant has proved his/her case as the onus of proof rests upon him/her as per section 7(3) of the PBAT Act. At the same time, it is important to see if the Respondent has duly followed the rules that govern it as regards appointments of public officers and if it has acted fairly in the Wednesbury sense of the term. In the judgement given by the Supreme Court in the first case cited above, the Judge said that “there is an unrestricted right of appeal which is not limited only to a review of the decision making process of the PSC but it (meaning the Tribunal) has full powers to enquire into the merits of the decision of the PSC.” (2011 SCJ 382)

At the outset, it must be underlined that Appellant’s averments that Respondent had been chosen to be a trainee for performance audit and that, unlike her, he had benefited from a sponsorship to follow an MBA, have no direct bearing on the appeal before the Tribunal. These relate to the NAO and not to the decision of the Respondent.

The Scheme of Service does not specifically require either an MBA or an ACCA but rather the selection is “among officers in the grade of –

(i) Head, Examiner of Accounts Cadre; and

(ii) Principal Auditor and Deputy Head, Examiner of Accounts Cadre who reckon at least two years service in a substantive capacity in their respective grades.....”

Both parties were Principal Auditors since July 2003. It has not been denied that the Appellant was the senior most audit officer among the applicants. But, as usual, the Respondent holds that seniority alone is not a prime criterion, though it counts. This is in fact the main difference between an exercise of promotion and that of selection. The general tendency now, for important posts with responsibility, is to recruit those qualified persons who are most suitable, who have experience and merit and show that they have leadership qualities.

The reasoning behind this is obvious since the public service must be upgraded and modernised. The number of years spent in a post, or even in the hierarchy, is not sufficient to guarantee that the person with such a record would be able to respond to the ever increasing challenges of modern times. This is therefore one criterion which obviously does not have the same weight as the other criteria mentioned by the Respondent. But Appellant maintains that she is not relying on her seniority, as such, but only as a measure of the amount of experience that she has acquired. In fact she harped on this several times when comparing herself to the Co Respondent who, according to her, did not show the same commitment as herself in the National Audit Office, as he had sought and obtained leave twice to work elsewhere. He even conceded that he had tried to emigrate to Canada, an information which had not been revealed in his Statement of Defence nor in examination but came out in cross-examination. However no dates were given.

On this issue, no one can contest the right of any officer to ask for leave without pay to try and improve his lot, whether in terms of acquiring experience or better conditions of work. The issue of emigration is however different as it does reveal the state of mind of the Co Respondent, who never told us why he did not finally emigrate. To acquire experience abroad, one does not have to start emigration procedures.

However we have the statement of Respondent who said that time taken as leave is not considered as experience for the purposes of the relevant job. But it was also said several times that experience is not part of the scheme of service, forgetting PSC regulation 14 which includes experience.

In view of the difficulty to understand fully the situation of both parties at the time of the interview, we felt duty bound to ask for the details concerning the interview of all applicants, that is, the criteria used, the most asked questions, the amount of time given to each interviewee as well as the weight given for each criterion. We also asked for the declaration made by both parties with regard to leave without pay to be communicated. We have requested Respondent to obtain from the NAO the details concerning the leave taken by the parties and the reasons therefore.

It appears that Appellant and Co Respondent did not declare any leave taken. Whereas we know for sure that Appellant never took any leave without pay, Co Respondent himself admitted to having taken leave at least twice. The information shared by the NAO relate to the leave taken by Co Respondent to go to Canada on study leave and not to emigrate as he said during the hearing of the case. No mention is made concerning his leave taken when he went to work for the NTC

We find this withholding of information both by the Co Respondent and the NAO quite disturbing. We can only conclude that the interviewing panel was not in presence of this very important piece of information and therefore their assessment of Co Respondent was based on erroneous facts. They cannot be said, in those circumstances, to have been fair to all candidates.

As regards Appellant, she has been straightforward in her deposition. It is undisputed that she has worked very hard throughout almost 30 years. Whereas Co Respondent was looking for greener pastures and came back to the NAO for reasons unknown.

In the absence of any strong detailed evidence, particularly on markings and weight attached to each criterion on the part of the Respondent and any specific evidence as to why it chose to appoint the Co-Respondent, the Appeal is allowed and the decision of Respondent is quashed and the matter is remitted back to it.

*** Exceptionally this case is not being treated confidentially as it has been the subject matter of two judicial reviews and all relevant information is now available at the Supreme Court where the proceedings are not in camera. Following the determination of the case by the present bench, summarised hereunder, the Appellant , Mrs Wong Chow Ming has now applied for judicial review against the PSC and in the presence of the PBAT. The matter is still pending before the Supreme Court**

