

- **Circular No. 5 of 2008 does not give Respondent any room to take on board exceptional circumstances concerning the effective date of appointment.**
- **The Tribunal has no jurisdiction to entertain appeals on humanitarian grounds.**

The Appellant appealed against the decision of Respondent to promote him with effect from ..., that is the date his assignment of duties started. The Appellant averred that he was appointed as ... on ... but the effective date of his appointment was earlier in the same year. He claimed that his appointment should have started as from ... when the post became vacant. According to Appellant, he had been unfairly treated as a result of an allegation made against him earlier. He was informed later that disciplinary action against him would not be pursued further.

In the meantime, his two junior colleagues had been promoted on two respective dates. As a result, the two officers were drawing more because they had got increments and further they would have more years in the position. This is important as the next post is that of ...which is opened to officers in the grade reckoning at least four years in the position. Appellant averred that he had lost his seniority placing and his chances of getting the next job had been reduced.

Appellant stated that this was a case of injustice done to him. The vacant post had been reserved for him but he could not access the post because of an allegation which was not upheld and which was abandoned by Respondent.

Respondent averred that Appellant was assigned the duties but earlier there was an allegation against Appellant which resulted in his assignment of duties being terminated in the same year. There had been a police inquiry on the allegation but the Director of Public Prosecution recommended that departmental action be instituted against those targeted by the allegation. Appellant was asked to give explanations, which he did. The Ministry, in the light of his explanations, decided not to pursue the matter further. In a letter to Appellant informing him of this decision, the Responsible

Officer said: “However, your attention is being drawn to the fact that as a public officer, you are expected to maintain high standards. You should be more careful and diligent in the performance of your duties and should comply with established rules and regulations governing the service”. It was not an outright disposal of the matter but Appellant was warned about his future performance of duties.

Respondent averred that up to a certain period, Appellant was still under report. Appellant was assigned the duties of ... up to his appointment with effect from the date his assignment of duties started. Respondent explained that if the allegation made against an employee did not involve fraud or dishonesty directly related to his duties, his assignment of duties need not cease.

Counsel for Respondent averred that Respondent has been guided by its own Circular No. 5 of 2008. Since the post became vacant on ... but his assignment of duties started later, the effective date of the promotion is the later date. If the Appellant’s first assignment of duties was not stopped, then his effective date of appointment would have been the date of vacancy.

The Appellant believed that his promotion should have been from the date the vacancy occurred. Respondent did not agree and maintained that the effective date could only be as from the assignment of duties. Since Appellant was given two periods of assignment of duties but there was a break in-between, the first assignment of duties was not relevant for the determination of the effective date.

The effective date for the filling of vacancies for grade to grade promotion is spelt out at Para 9.34 of the Pay research Bureau Report of 2008 and embodied in PSC Circular No 5 of 2008 which reads as follows:

“filling of vacancies in respect of grade-to-grade promotion should as from 1 January 2009 take effect from either (a) the date of assumption of duty; (b) the date the actingship/assignment of duties starts; or (c) the date of vacancy whichever is the latest, provided in the case of (c) there has been no gap between the actingship/assignment of duties and the date of offer of appointment”

The boundaries for effective date of promotion are clear from Circular No. 5 except that the Tribunal suspects that the (c) in the part “provided in the case of (c) there has been no gap ...” should be (b), to give sense to this proviso. However, since this had been lifted as is from the PRB Report, Respondent might have to make the necessary amendment, if the interpretation of the Tribunal is correct, to avoid confusion.

The content of Circular No. 5 of 2008 is a departure from Circular No. 3 of 1977 where the effective date of promotion in respect of a grade-to grade promotion is the date of occurrence of the vacancy, subject to the availability of funds. The reason for this change has been given in the PRB Report Volume One as follows:

“ 9.32 An officer who is promoted to a higher post following a promotion exercise is thus eligible to receive the salary of the new office as from the date the vacancy occurred, even if he is on leave of absence at the date of occurrence of the vacancy subject to the availability of funds. Thus, though an officer has not been performing the duties and shouldering the responsibilities pertaining to the higher post, he is being paid salaries for duties which he has, in fact, not performed...

9.33 Both the Ministry of Civil Service and Administrative Reform (MCSAR) and the Public Service Commission have submitted that this practice of backdating promotion-even if the officer has not performed the duties- is unreasonable and that post should be filled or actingship effected on the basis of operational needs and subject to the availability of funds.”

This led to Para 9.34 of the PRB Report and the PSC Circular No 5 of 2008 which was binding on Respondent. The Appellant himself conceded that the regulations did not give Respondent any room to take on board exceptional circumstances. The representative of Respondent agreed that there was no provision anywhere that allowed Respondent to do so. Appellant still could not understand the fact that the disciplinary action against him had been stopped and yet his rights not restored even on humanitarian grounds. Unfortunately, this Tribunal has no power to give determination on humanitarian grounds.

The Tribunal believed that there will be cases where the application of Circular No. 5 blindly may cause procedural unfairness to officers, one of which concerns officers under report. Such officers are not eligible for consideration for promotion. Thus, officers junior to them may be promoted, especially if appointment is by promotion and seniority is the key factor. If subsequently, the departmental action is stopped for whatever reason, these officers find that they have lost their seniority with the consequential loss in increments and put at a disadvantage for their career prospects. This will be still more unfair if allegations have been made maliciously just to handicap an officer for a forthcoming promotion exercise. Respondent must make allowance for such exceptional cases and ensure that the rights of such officers are preserved. The Tribunal directed Respondent to revisit its Circular No. 5 accordingly.

The appeal was otherwise set aside.