

PUBLIC BODIES APPEAL TRIBUNAL

No. D/01 of 2013

In the matter of:-

G. Heeramun (Appellant)

versus

The Public Service Commission (Respondent)

And

Mr Y.D. Panday & Ors (Co Respondents)

Determination

The Appellant, Mr Ghumanand Heeramun, an Educator (Secondary) at the Ministry of Education and Human Resources, had filed three appeals concerning the appointment of Deputy Rectors at the Ministry as follows:

- (1) An appeal against the appointment of 29 Deputy Directors as per Notification Circular of the Ministry dated 8 June 2010
- (2) A second appeal against the appointment of 25 Deputy Rectors as per the Ministry Notification Circular No 36 of 2011 dated 13 July 2011 and
- (3) A third appeal against the appointment of Mr R D Gooly as Deputy Rector as per the Notification Circular of 3 August 2011

Since all these appointments relate to the same selection exercise that was carried out in 2010, the three appeals have been consolidated and one determination is given for all three cases.

Appellant's Case

The Appellant averred that he was 57 years old and had 33 years of teaching experience in the Ministry of Education and Human Resources.

Over the years he had acquired higher qualifications which included a Post Graduate Certificate of Education from the Mauritius Institute of Education and an M.A. from the University of Brighton. He worked for the Mauritius Examination Syndicate as Examination Supervisor for S.C./H.S.C. Examinations. He formed part of the Senior Management Team of the schools where he was posted and acted as mentor to newly recruited educators. He was Head of Department since 1992 and this job was similar to that of Deputy Rector as the duties of the two positions were almost similar. Many of those appointed were never requested to perform such duties.

Appellant averred that, when the Rectors of the schools where he was posted were absent, he had to take charge of the duties of the incumbents which enhanced his experience in the management of schools.

Appellant did not agree that he could be assessed in an interview that lasted for some seven to eight minutes in which he was asked five questions on the school where he was working, the name of the Rector, whether there was a Deputy Rector there, whether he was involved in the preparation of time-tables and whether he prepared lesson plans. All this was done within that short time which also included the usual checking of documents and so on.

Appellant felt that the selection was unfair and his seniority and long experience had not been taken into account which led to his non-selection for the post of Deputy Rector on the three occasions.

Appellant referred to the case of one of the Co-Respondents and her close proximity with one member of the interview panel, leading to a perception of bias. He alleged that there was age discrimination as most of those selected joined the service in the years 1990 and 2000. Further, according to him, he never had any adverse report.

Respondent's Case

Respondent averred that appointment to the post of Deputy Director was by selection as per the Scheme of Service for the post that was prescribed and became effective as from 21 February 2005. Respondent further referred to PSC Circular no.8 of 2009 where the requirements for appointment to the post of Deputy Rector were clearly specified.

The vacancies for the first recruitment were advertised on 15 April 2009 among qualified officers in the grade of Educators (Secondary) as per the above circular. Respondent received 501 applications and 446 candidates, including the Appellant, were found eligible. They were convened for interview in January, February and April 2010. Following these interviews 29 candidates were offered appointment in June 2010. This led to the first appeal by the Appellant.

Subsequently, two more appointment exercises were carried out where Respondent drew from the merit list established from the interviews of early 2010. Appellant then filed his second and third appeals.

Respondent confirmed that all candidates meeting the requirements of the Scheme of Service were called for an interview. Appellant was also convened but he was not selected for the post.

Respondent averred that "Head of Department" was not an established post and had been instituted for administrative convenience, with an allowance and did not give any claim to promotion by any person performing such duties. As to the averment of Appellant that he took charge of the schools where he was posted whenever the Rectors were absent, Respondent did not deny that this could have been the case. However, the Appellant was not officially assigned the duties and this was done for administrative convenience.

Respondent further highlighted that the issue of possible conflict of interest in the case of one of the Co-Respondents did not arise as the Public Service Commission (PSC) member declared her interest and was not present when that particular candidate was interviewed. Indeed, documents were communicated to the Tribunal to show that she had declared her interest in several cases.

There was no question of age discrimination as no age specification was mentioned in the Scheme of Service.

Respondent conceded that Appellant did not have any adverse report but this was also the case of all those who were selected.

Respondent's Submission

Counsel for Respondent submitted that:

- Section 7(3) of Public Bodies Appeal Tribunal Act (PBAT) provides that the onus of proof rests with the Appellant.
- The Scheme of Service is vital and refers to PRB Report 2008 which highlighted the value of the Scheme of Service. Appellant cannot question the fact that the appointment was to be made by selection.
- Counsel for Respondent referred to the case of Brunet v. Public Service Commission, (1993 SCJ 330), in which late Judge Lallah refused to grant an injunction to put an administration to a standstill for several years. She also referred to Regulation 17(1) of PSC Regulations which states that the PSC will determine its own procedure.
- She found support in the case of Allear v. Public Service Commission (2002 SCJ 295) in which mention was made of PSC Regulation 14, and stressed on the fact that qualification, experience and merit are considered before seniority.
- She referred to two Supreme Court cases (Luchmun v. Mauritius Sugar Terminal Corporation (1990 SCJ 241) and Naidoo v. Public Service Commission (2007 SCJ 77)) to illustrate that the PSC is the sole body to decide on appointments in the public service. The role of the Tribunal is not to review the decision but only to see that the decision process has been adhered to. It must make sure that candidates have been given a fair treatment by the Commission but not to substitute itself for the Commission constituted by law. The decision to appoint rests with the PSC.

- The PSC has not acted perversely and has not been unreasonable.
- The Tribunal cannot quash the decision of the PSC.

Appellant's submission

Counsel for Appellant submitted as follows:

- He stressed on the fact that he did not want the PSC not to appoint but to carry on with another exercise and not rely on the merit list while his client's case was before the Tribunal.
- Most of the candidates selected have lesser qualifications than appellant even if they meet the minimum requirements.
- There is no evidence that the PSC member challenged herself as there was no record to that effect.
- Appellant has a longer term of service and performed duties of Head of Department which were almost similar to those of Deputy Rector.
- Appellant was most senior to all those selected and seniority should have been a predominant criterion.
- The decision of the PSC was most unjustified and unfair.
- He also laid emphasis on the five simple questions put to Appellant during the interview as being proof of unfairness.

Co-Respondents submission

Counsel for Co-Respondents submitted that:

- All candidates including Appellant were eligible for the post and that Appellant was not in fact contesting the appointment of Co-Respondents.
- There is nothing illegal about selecting persons from a merit list prepared previously for the same post, after interviews had been properly carried out.

- It is correct for the Respondent to endorse the recommendation of the Responsible Officer that the vacancies be filled following a previous selection carried out as this is normal practice.
- Appellant should have taken action to stop Respondent from using the merit list rather than come before this Tribunal for his second and third appeals.
- Regarding the issue raised that Respondent should not proceed with appointing the second and third batches because the appeal made the issue sub-judice, Counsel submitted that the education sector was a very sensitive sector and that it would have been unreasonable to wait for several years before proceeding with the appointments.
- Counsel for Co-Respondents maintained that, whether it was a class to class promotion or a grade to grade one, in any case it was by selection and seniority was not an important criterion. He referred to paragraph 9.23 of the PRB Report 2008.

Determination

The appeals relate to the appointment of Deputy Rectors. The Appellant feels aggrieved that he is nearly reaching the age of retirement and he has for more than 33 years been teaching only to find that his colleagues, who had less years of service as Educators, are promoted in three successive rounds of appointment and that he was not in any one of them. He, therefore, doubts the fairness in which the selection has been done, starting with the few minutes of the interview and the recourse to the merit list for the second and third rounds of appointment.

Appellant stated that the vacancies were “*advertised in April 2008 but for reasons best known to the PSC, the latter did not conduct any selection exercise*”. It is a fact that the post was advertised in 2008. In the advertisement for the post on 15 April 2009 (PSC Circular Note No 8 of 2009) there is a note saying that “*Candidates who had submitted an application in response to the Public Service Commission Circular Note No. 10 of 2008 dated 5 May 2008 should submit a fresh application*”. The reason for not proceeding with the interview is not known. However, the Tribunal notes that, from a document from the Ministry of Education

and Human Resources itself, one of the Co-Respondent joined as Educator on 16 January 2004. Had the Respondent maintained the advertisement of 2008 and proceeded with recruitment at that time, that Co-Respondent would not have completed the five years of teaching experience as Educator, as required for eligibility as per the Scheme of Service. When the post was re-advertised in April 2009, that Co-Respondent just fit in the five years eligibility criterion and he was appointed.

On a more general note, it is not disputed that the post of Deputy Rector is filled by selection. This is as per the Scheme of Service which has been prescribed on 21 February 2005 and is binding on all parties. As was pointed out by Respondent, when there is a selection then seniority stops being the decisive factor and gives way to qualifications, experience, merit and suitability for the post. Appellant cannot, therefore, rest his case on the fact that he has done more than 33 years of teaching and therefore has an edge over his colleagues, even though it is a fact that many of the Co-Respondents had less than ten years as Educator (Secondary) when they were appointed.

Counsel for Appellant and Counsel for Co-Respondents dwelt at length on the issue of grade to grade as compared to class to class appointments and drew a lot on what the Pay Research Bureau Report 2008 had to say on the issue. This Tribunal wishes to re-iterate its comment regarding the Pay Research Bureau which only makes recommendations. Such recommendations must be made effective. In the case of appointments, the recommendations must find their way in the appropriate Scheme of Service which becomes the official instrument for the filling of vacancies. In the present appeals the recruitment was done according to a Scheme of Service for Deputy Rector that was prescribed in February 2005, that is three years before the PRB Report came out. There was no amendment to the Scheme of Service following the PRB Report 2008. The Ministry of Civil Service and Administrative Reform had agreed in a letter dated 22 January 2009, to the Ministry of Education and Human Resource that :

“2. In view of the fact that there are no major changes in the PRB Report 2008 regarding amendments to the Scheme of Service for the post of Deputy Rector on the establishment of your Ministry, this Ministry has no

*objection to the filling of vacancies on the basis of the existing scheme of service for the post for **one last recruitment exercise only***”

As the Scheme of Service requires the post to be filled by selection, Appellant cannot dispute the fact that candidates were assessed by way of an interview. According to Regulation 17 (1) of the PSC Regulations “*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*”.

Appellant raises an interesting point about the way the interview was done. Out of the five questions asked to Appellant, only two can be seen to be useful for assessment, namely the questions relating to preparation of timetable and lesson plan. Appellant explained to the Tribunal that the duties of the Deputy Rector as listed in the Scheme of Service are so wide that these two questions cannot be grounds for a proper selection. The Tribunal finds that there were 12 criteria on which the interview panel gave marks to which the marks of the Advisor to the panel were then added. The criteria were: School Certificate, Higher School Certificate, first degree, second degree, additional relevant qualifications, experience in actual post, actingship as Deputy Director, personality, communications skills, school management and leadership skills and aptitude. One cannot but wonder how the interview panel can give marks on each of the 12 criteria when the candidate is in the interview room for a few minutes only. Of course, the Respondent has the information provided by each candidate in the application forms. It can also put questions to evaluate the personality or communication skills or even leadership skills of a candidate. But is this sufficient for the assessment exercise? And when the Respondent has to interview 446 candidates over a period of three months is there any guarantee that there will be consistency? These are questions which have to be answered if any recruitment exercise is to be seen to be transparent and fair to all the candidates. It is so easy for a perception of unfairness to creep in and cast doubts on a selection.

Again this Tribunal raises the issue of how the criterion of suitability in Regulation 14 is assessed. This Tribunal stressed on the following in previous determinations:

"The question remains as to how these selection criteria work in practice, and in particular how the "suitability for the office in question" part is brought in the assessment. In the Pay Research Bureau (PRB) of 2008, there has been suggestions on how to improve the assessment of candidates for higher positions. Section 9.14 and 9.15 are reproduced below :

"9.14 We recommend that to ensure that the most suitable and meritorious candidates are chosen,

- (a) Recruitment and selection procedures be supplemented with competency, personality and other psychometric tests, wherever desirable and particularly in strategic areas at the professional and managerial levels and for areas such as the disciplined services;**
- (b) The Public Service Commission be provided with the services of suitably trained professionals in the field of industrial occupational Psychology who would, after training, assist the Commission in determining the right type of tests to be carried out in respect of the relevant selection exercise and the way these tests could be incorporated in the selection process, based upon systems that have proved their validity elsewhere.**

9.15 To facilitate the process, Chief Executives of Organisations should ensure, as far as possible, that schemes of service are restructured to state explicitly the skills, competencies and attributes that are required in addition to or as part of academic qualification requirements for the different grades under their responsibility."

The Tribunal is not aware if the Ministries/Departments or the PSC have put in place such tools as recommended by the PRB. This applies as well to the LGSC and the local authorities. The Tribunal wonders how the

suitability of candidates is determined. True, there is most of the time one advisor, normally from the Ministry/Organisation, who can be of some assistance. But the advisor is not the immediate supervisor of the candidates and his knowledge of the candidates may be only what he can gather from the files. He may not be conversant with the intrinsic qualities which are required to make the candidate a likely candidate for the higher position. The recommendations of the PRB will certainly have corrected this lacuna but they have not been put in practice yet. The criterion of suitability for the office brings an element of subjectivity as it is, and can leave a perception that other considerations come into play. The appellants very often ask the question as to whether the interview panel can gauge a candidate in a fifteen minutes interview. While this is a debatable point, the new criterion of suitability blurs further the situation."

Respondent has to address this issue and the sooner the better. It is not enough for Respondent to say that it is acting in all fairness and adhering strictly to the Scheme of Service and the requirements of Regulation 14 of PSC Regulations 2010. This cannot suffice to allay the apprehension of an aggrieved officer that he had a fair deal in a selection exercise.

It is true that many of the Co-Respondents have less years of service as Educator than the Appellant. However, the averment of Appellant that he has higher qualifications than the Co-Respondents is not borne by the records. Most of the Co-Respondents had post first degree qualifications even if such higher qualifications were not pre-requisites for eligibility for the post.

The Tribunal had asked Respondent to provide certain information. It then had a cursory look at the criteria, weightage for each criterion and the markings given to Appellant. It is noted that Appellant scored high marks for his first degree and was awarded points for his additional relevant qualifications and his long years of service. However, Appellant did less well on the other criteria which led to his

non-selection. The Tribunal is satisfied that the relevant qualifications and experience of the Appellant has been taken into consideration and sees no reason to intervene. The other criteria which were taken into consideration all called for a degree of subjectivity and the interviewing panel was in a better position to assess.

Counsel for Appellant questioned whether it was in order for the Respondent to proceed with appointments from the merit list when the first batch of appointments had been challenged by the first appeal of the Appellant. The Tribunal does not consider that the fact that an Appellant has lodged an appeal makes the issue subjudice, thus precluding the Respondent from proceeding with any other nomination. Indeed this is a current practice. It also happens that Appellants, who are on the merit list, are appointed while their appeal is being heard. They then withdraw their appeal. To ask the Respondent not to nominate them would be absurd. As stated by Counsel for Respondent referring to the case of Brunet v. Public Service Commission, it is impossible to clog the whole machinery the more so as the aggrieved officer still has a right of appeal both before this Tribunal and a right to apply to the Supreme Court for a Judicial Review.

The appeals are set aside.

S. Aumeeruddy-Cziffra (Mrs)
Chairperson

G. Wong So
Member

P. Balgobin-Bhojru (Mrs)
Member

Date:

Note: This case is not being treated confidentially as there has been a motion for Judicial Review before the Supreme Court by the Appellant. All information relating to the case was made public as the Supreme Court, unlike the PBAT, does not deal with such motions in camera. The Supreme Court upheld the Determination of the Tribunal which has now become final.