

PUBLIC BODIES APPEAL TRIBUNAL

No. D/29 of 2013

In the matter of:-

Chuttrajee Kumar MAUNICK

(Appellant)

Versus

Local Government Service Commission

(Respondent)

- 1. Anwar SOODHUN**
- 2. Gerard Dominique EUSTASIE**

(Co-Respondents)

Determination

The Appellant, a Principal Health Inspector (PHI) at the District Council of Grand Port, is challenging the decision of the Respondent to appoint the two Co-Respondents to the post of Chief Health Inspector (CHI) at the District Council of Moka and the District Council of Grand Port respectively.

Appellant's Case

The Appellant averred that he joined the local government service on 6 December 1991 as Trainee Health Inspector at the Moka Flacq District Council. In January 1992, he was sponsored for a two-year full time course for a Diploma in Sanitary Science at the University of Mauritius. He successfully completed that course and was awarded the Diploma on 28 October 1993.

He was promoted to the post of Health Inspector and that of Senior Health Inspector on 16 November 1993 and 15 March 2002 respectively.

On 9 October 2006, the Appellant was appointed PHI at the Grand Port-Savanne District Council (now Grand Port District Council).

While he was at the Moka District Council, he followed three training programmes, one relating to middle level management skills and two relating to prosecution skills.

During the course of his deposition before the Tribunal, the Appellant stressed on the fact that he had been working for 23 years and that he had been in his post as Principal Health Inspector since 2006. He did not contest that all those appointed were senior to him. He maintained that the LGSC did not take into account qualifications, experience and merit before seniority when choosing those who were selected for the post of PHI. He firmly believed that the Commission relied solely on seniority when making the selection as, out of the 12 eligible candidates, the seniormost were selected. Having worked with them in the past, he stated that he was personally aware that they were not the best candidates and they were not more meritorious than him.

As PHI he was assigned the duties of CHI on four occasions. The Appellant averred that in these assignments of duties, he had acquired sound knowledge, skills and work experience required by a CHI to efficiently administer and manage the Health Department. He further averred that he was congratulated by the Grand Port District Council for his aptitude and management capabilities and abilities. He gave in his Statement of Case a number of activities in which he was involved. He stated that he also regularly attended the Management meetings and the Council's meetings as well as meetings in different ministries in relation to the administration of the Health Department, thus participating in the decision making process.

The Appellant re-iterated that the Respondent had made the appointment solely on the criterion of seniority. He stated that previously, the post of CHI was filled by promotion. However, the Scheme of Service for the post was amended and with effect from 23 February 2004, the post was filled by selection. He referred to LGSC Regulation 13 (1) (b) which states that in a selection exercise, the Respondent should "take into account qualifications, experience and merit before seniority in the Local Government Service". He further stated that he was given to understand that there was a seniority list for filling the post of CHI with

Respondent and the appointment of the Co-Respondents was made solely on the seniority list.

He insisted that if the Tribunal could have access to the personal files of the Co-Respondents, then the Tribunal would be able to take stock of the various disciplinary measures that had been taken against the Co-Respondents. The Appellant averred that Co-Respondent No1 was at the District Council of Grand Port as PHI from 27 December 2004 to 13 September 2006 and, upon the latter's request, he was transferred to the Municipal Council of Quatre Bornes for personal reasons. As PHI, Co-Respondent No 1 was in charge of the Mahebourg Market. During the period March 2006 and December 2006, one Health Inspector posted at Mahebourg Market was involved in a case of forgery and embezzlement which was uncovered by the Appellant on 26 December 2006, i.e two months after he joined the Grand Port District Council. The officer was found guilty and the money reimbursed.

The Appellant referred to the case of non-payment of an invoice which an Assistant Health Inspector had reported on 7 May 2013. He also referred to an erroneous and misleading report by Co-Respondent No.1 at the Permit and Business Monitoring Committee held on 5 April 2013; the report was taken up at the Grand Port District Council meeting of 18 April 2013.

The Appellant could not understand how the Respondent could find that Co-Respondent No.1 satisfied the requirements for the appointment to the post of CHI.

Under cross examination, Appellant conceded that the problems related to non-payment, occurred after Co-Respondent No.1's appointment to the post. He maintained however that, even after his appointment, there were instances where the Co-Respondent No.1 was still not up to the level.

The Appellant stated that he was given to understand that the Co-Respondent No.2 "does not have a clean record of service" without being more specific on the matter. Appellant explained that he did not disclose it before as he was under the impression that the Tribunal would find this information in the file of the Co-Respondent.

He averred that the Co-Respondents had “*no work experience in relation to the post of CHI as they were assigned the very minimum task to their previous posts which could have rendered them capable to shoulder the full responsibilities attached to the post of Chief Health Inspector at the respective councils effectively and efficiently*”.

It was put to the Appellant that no disciplinary actions were ever taken against Co-Respondents by the Commission and that they had a clean record.

Co-Respondents’ Case

The Co-Respondent No.1 denied the averments of the Appellant as regards the cases of forgery/embezzlement, non-payment of invoice and the erroneous report. Further, Co-Respondent No.1 stated that these matters were irrelevant to the appointment exercise and should not be canvassed in the present appeal. He also stated that he had been holding the post of Deputy Chief Health Inspector at the Municipality of Port Louis from 22 February 2011 to 25 February 2013. The post of Deputy CHI only existed in the Municipality of Port Louis and he was appointed to that post following a selection exercise. The post had additional and more complex responsibilities than that of PHI.

Co-Respondent No.2 did not depone and left the matter in the hands of the Tribunal.

Respondent’s Case

According to the Respondent, the post of CHI was filled by selection as per the Scheme of Service that was effective as from 23 February 2004.

The post was advertised on 9 March 2012 among serving officers in the grade of PHI of the Local Government Service. There were 12 candidates, including the Appellant, who were found eligible and they were called for interview on 25 May 2012. Following the interview three PHI, including the two Co-Respondents, were appointed CHI in a temporary capacity with effect from 25 February 2013.

The Co-Respondents possessed all the requirements as laid down in the Scheme of Service.

The Appellant had been assigned the duties of CHI as he averred but he was informed that such assignment of duties would not give him any claim for permanent employment as CHI. His application was duly considered but he was not selected for the post.

The Respondent stated that, whilst carrying out the selection exercise, it adhered to Regulation 13(1)(b) of the LGSC Regulations 1984 as Appellant himself had been stressing on.

The Respondent denied that Co-Respondent No.2 had been inflicted any punishment but was silent regarding Co-Respondent No.1.

Determination

The appeal rests on Appellant's averment that the appointment was based on seniority and that the Co-Respondents had cases against them which made them unfit for appointment. The Tribunal will address these two points in turn.

First, there is the perception of the Appellant that the Respondent relied on the seniority list and appointed the seniormost to the post without having a proper selection exercise. This perception arises from the fact that the Co-Respondents were first and second on the seniority list. The Appellant stated that he was given to understand that the Respondent had a seniority list which it used for the appointments. It is true that the Respondent has a seniority list and this applies for all grades of officers and not only for the present case of PHI. From there to extrapolate that the Respondent simply used that seniority list to appoint because of the coincidence that the Co-Respondents were the seniormost officers and they were appointed in the same order of seniority is not tenable. The Appellant has not shown where the Respondent has erred in its assessment of the candidates. Nor did he bring any evidence to prove that he is more meritorious.

Both the Respondent and the Appellant referred to the same provisions with regards the way the appointment of CHI should be made. They both referred to LGSC Regulation 13 which puts seniority after qualifications, experience and merit. The principle which is applied to a selection exercise is, therefore, not in dispute.

Second, the Appellant may have found it difficult to understand why the Co-Respondents have been appointed as he was under the impression that the Co-Respondents had bad records while he had no adverse report against him. However, these allegations have not been substantiated by the Appellant and were not borne out by the facts.

The Appellant has alleged that the Co-Respondent No.2 did not have a clean record. However, when he was challenged by Respondent to bring proof thereof, he was not able to do so. The Respondent, on the other hand, stated that according to records available, the Co-Respondent No.2 had not been inflicted any punishment.

Section 7 (3) of the Public Bodies Appeal Tribunal Act 2008 states clearly that the onus of proof shall rest with the Appellant.

As regards the Co-Respondent No.1 the situation is as follows:

- The interview for the post was carried out in May 2012
- The Co-Respondents were appointed in February 2013 and their appointment took effect as from 25 February 2013
- The case of non-payment of invoice was reported according to the Appellant himself on 7 May 2013
- The case of erroneous and misleading report by Co-Respondent No.1 to the Permit and Business Monitoring Committee was again, according to the Appellant in his Statement of Case, taken up at the Grand Port District Council on 18 April 2013
- As to the case of forgery and embezzlement, this was uncovered by the Appellant on 26 December 2006. However, at that time the Co-Respondent was no more at the District Council of Grand Port. According to the Appellant, the Co-Respondent had moved from the District Council of Grand Port to the Municipal Council of Quatre Bornes on 13 September 2006.

It is clear, therefore, that at the time of the interview and up to the appointment of the Co-Respondent No.1, there were no adverse reports against Co-Respondent No.1 that were to the knowledge of the Respondent and would have influenced its decision. The Co-Respondent is wrong to say that these cases are irrelevant to the appeal. They would have been highly relevant if they came up before the selection exercise and were proven to be

correct. However, the Tribunal has to take into account the facts as they were at the material time.

Nonetheless, the Tribunal has delved deeper into the issues raised in this appeal by asking the Respondent to provide additional information. The Respondent provided same under confidential cover.

The Tribunal finds that the Respondent gave an overall rating for the interview without giving individual marks for the criteria contained in LGSC Regulation 13 namely as regards qualifications, experience and merit, which would have allowed the Tribunal to have an opinion as to where the Co-Respondents were more meritorious or the Appellant less meritorious. The Tribunal finds that this way of proceeding is not transparent enough, the more so that the LGSC is aware that the PBAT may be called upon to review the selection exercise processes and procedures in case of appeal. It is noted that the difference in marks between the Appellant and the Co-Respondents was marginal.

The Tribunal notes also that the Appellant had good ratings in his Confidential Reports. These were much better than the reports of the two Co-Respondents. Granted that the Confidential Reports were signed by different reporting officers and Responsible Officers, but the assessment was more favourable for the Appellant. The Tribunal therefore sought information regarding Confidential Reports. The Respondent conceded that Co-Respondent No. 2 had bad ratings in one of his Confidential Reports. Respondent had pointed out to the R.O. that the attention of the incumbent had not been drawn to this state of affairs. However, for the two subsequent years, Co-Respondent No. 2 had shown improvement and had been more favourably marked by the same R.O who initially gave lower ratings to that Co-Respondent. The Respondent has explained to the Tribunal that Confidential Reports are consulted as a last resort just to have comfort on the performance of the officer and these can only be taken into consideration if there is consistently a major deviation from the average. The Confidential Reports are only used at the final stage of a competition as a tool by the Commission to have an idea of the actual performance of an officer but they are not a deciding factor to effect an appointment unless the Confidential Reports over the previous three years are below average.

The Appellant has not been able to convince the Tribunal on the reasons why he was more meritorious during his deposition before the Tribunal. Given the explanations of the LGSC on the use of the Confidential Reports and the chronology of events purporting to improper activities for which Co-Respondents were found out of cause, the Tribunal finds that the Appellant has not been able to substantiate his grounds of appeal.

The appeal is set aside.

S. Aumeeruddy-Cziffra (Mrs)
Chairperson

G. Wong So
Member

P. Balgobin-Bhoyrul (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.