

A Public Body cannot refuse to communicate to the Tribunal relevant information including the criteria used , the weight attached to each criteria and the individual markings of all candidates. But this must be for the eyes of the Tribunal only. It cannot be shared with anyone, even in a « confidentiality ring »

The Appellant, a ...Officer is challenging the decision of the Respondent to appoint the Co-Respondents to the post of Principal ...Officer

Appellant's Case

Appellant lodged Grounds of Appeal before the Public Bodies Appeal Tribunal, which read as follows:

- 1. The Selection exercise was tainted inasmuch as the panel started its interaction with Appellant on a hostile tone i.e. after Appellant was asked to show the originals of his documents, he simply showed them as he had been handed same by the officer who had checked same at the entrance, he was rebuked since the documents were not in the format expected by the panel.*
- 2. By not devoting equal time to all the interviewees, the selection panel and through it the Respondent acted in an arbitrary fashion, caused injustice and failed to carry out a meaningful interview.*
- 3. The use of words like "useless" and "impotent" by the panel was unwarranted and was designed to sap the Appellant's confidence, especially as those who were selected happen to be junior to him and who do not possess the same experience, competence, ability.*
- 4. The selection panel was wrong to have marked the scores in pencil.*

5. *The selection panel and the Respondent were wrong not to have indicated to the interviewees the areas on which the interview would be conducted and, by giving themselves a total discretion, they have failed to conduct a 'proper interview', in accordance with the principles and Regulations which govern the exercise of powers by the Respondent.*

6. *In order to appreciate the injustice of the panel when conducting the interview and in view of the fact there is no video recording, the only way for the PBAT to exercise the powers conferred upon it is to require that the marking sheets and all related material of the interview be communicated to it and any failure on the Respondent's part to comply with such a requirement would enure (sic) to the Appellant's benefit.*

7. *By failing to give due consideration to the track record of the Appellant, the panel has betrayed the trust placed upon it by the Respondent which, in turn, has reached a wrong decision regarding the Appellant.*

8. *By failing to take on board the relative length of service yet to be served, absent any special features, the Respondent was wrong not to have selected the Appellant.*

The Respondent filed its Grounds of Objection with a preliminary objection in law as follows:

"Respondent moves that the Grounds of Appeal Nos. 1 to 5 and Ground of Appeal No.7 be set aside in as much as they are frivolous and vexatious".

The Tribunal ruled in favour of the Appellant and the appeal was then heard on the merits.

On the day of hearing, Appellant solemnly affirmed as to the correctness of his Grounds of Appeal and Statement of Case and explained in what circumstances he was called “useless and impotent”. He explained that when he was asked during the interview whether the Government implemented the legislation and his recommendations, he replied that it did so only partly. When questioned as to his ability to ensure that Government complied, the Appellant explained that he could only make recommendations to management. At that stage, and in the light of his answer, he was then called “useless and impotent” by two members of the interview panel. He explained that one member of the panel said that he was “impuissant” and the other that he was “impotent”, which he found very humiliating.

He also explained that when he initially walked in the interviewing room, he was requested to hand over documents. He was then abruptly told that he should have known better than give photocopies together with original documents. Appellant explained that he had felt embarrassed and had been shocked by those words.

Under cross-examination, Appellant conceded that the post of Principal... Officer was by selection and that the post was filled by those who had good knowledge of the present laws and practices relating to the subject, those who have good communication, supervisory, organising and interpersonal skills and those who are able to motivate. Appellant also admitted that he was aware that the fact that he had been assigned the duties of Principal ...Officer in a temporary capacity did not give him any claim to a permanent appointment.

He, however, maintained that injustice was meted out to him because of the way the interview was carried out. It started in a hostile manner and therefore he could not perform well at the interview.

He also stated that he did not know why the panel treated him the way it did. Although the right procedure was generally followed by the Public Service Commission, he maintained that the interview was not carried out in a fair manner. He was also not asked any question about the responsibilities of a Principal ..Officer despite the fact that he had already occupied the post in a temporary capacity.

He explained that he was also asked how many schools there were in Mauritius and when he replied 150, a member of the panel took him to task. Finally, the Adviser from the Ministry of.., who sat on the panel, stated that the Appellant was in fact right.

He was also asked another question about another issue, and, before he had the time to reply, he was thanked and asked to leave.

He maintained that he had been treated in an unfair and humiliating manner and that they did call him useless and impotent.

Under cross-examination by Counsel of Co-Respondent, it came out that it was his second attempt as he had been unsuccessful at a previous interview for the same post. He also admitted that he was appointed at the same time as Co-Respondent No.1, but the latter was his senior and that Co-Respondent No.2 joined shortly after. Appellant and Co-Respondent No.3 were degree holders.

To a question put to him as to whether he protested, he said that he did not know that there was any procedure to protest.

Respondent's Case

The representative of the Public Service Commission, after having solemnly affirmed as to the correctness of the Statement of Defence of Respondent, explained to the Tribunal that the PSC did abide by all the relevant procedures and that the

Appellant was treated fairly and assessed on the basis of his qualifications, merit and experience.

According to the Statement of Defence, the Responsible Officer of the Ministry had reported three vacancies for the post of Principal ... Officer ... 2012. The vacancies were advertised among qualified officers as per PSC Circular No..of 2012. There were 15 candidates and five, including the Appellant, were found eligible. Those five candidates were called for interview.

The three Co-Respondents were appointed and they assumed duty on ...2012.

Respondent averred that the Co-Respondents and the Appellant were fully qualified for the post. The Appellant as well as Co-Respondents Nos.1 and 2 were assigned duties of the post but they were informed that the assignment of duties would not give them any claim for permanent appointment to the post.

As to the averment of the Appellant that he was not treated fairly by the interview panel, the representative of Respondent stated that she met the members of the interviewing panel and they had maintained that the words "impotent and useless" were never used at the time.

She also informed the Tribunal that the time taken for the interview was between 26 and 50 minutes. The Appellant was questioned for about 30 minutes.

The Respondent averred that the appeal had no merits and moved that it be set aside.

Under cross-examination, the representative was unable to answer most questions as to what happened during the interview as she was not present during the

interviewing process. She was also unable to substantiate some averments made in her Statement of Defence as she was not privy to anything that actually happened.

Co-Respondents' Case

Co-Respondent No.1 affirmed to the correctness of his Statement of Case. He deponed and explained that he was also questioned on the same grounds as the Appellant, that is, in relation to the implementation of recommendations of various departments and Ministries. He explained how the Civil Service was now more results-oriented and the question of implementation was, therefore, relevant. He also replied and narrated how a member of the panel told him "that is exactly what I am asking you, how will you go about it" or words to that effect. He then explained to the panel the many ways and means of achieving implementation.

He, therefore, stated that the question put to the Appellant by the panel was a legitimate one and that the successful candidate to the post applied for should be able to monitor compliance and achieve result. He added that communication skills were very important. He said that he held a Diploma in the related field, had prepared for a degree but had not finalised same.

Under cross-examination, he explained that the panel insisted on a few answers and that he was treated well at the interview. He also stated having been able to remedy more situations than other colleagues and that he was more meritorious than others.

The Co-Respondent averred that the appeal had no merits and moved that it be set aside.

Submission of Counsel for Appellant

Counsel submitted that the averments of the Appellant had not been rebutted by the Respondent. The Respondent could not say that it had given consideration to the requirements of the post, the criteria of the selection determined by the Respondent, the requirements of the Scheme of Service, performance at the interview and the provisions of PSC Regulation 14, and not substantiate these averments by leading evidence. The Respondent could have called in at least one member of the selection panel to give the lie to the Appellant. The averments of the Appellant stood unchallenged.

Counsel referred to the unfair treatment of Appellant at the interview, which led to a situation where his confidence was undermined by the attitude of the selection panel. The Appellant was convinced that the integrity of the selection panel was not unimpeachable. The Appellant did not agree that the interview was carried out in normal circumstances and that each candidate was treated on a level playing field and was tested on his own suitability for the post. Counsel concluded that the Respondent was an active participant in the appeal process and once the Appellant had discharged the legal burden that rested on him, the evidential burden shifted to the Respondent. However the latter did not adduce evidence in rebuttal, resulting in a situation that Appellant's evidence remained unchallenged and unaffected.

Submission of Counsel for Respondent

Counsel submitted that the Respondent had taken into account the qualifications and experience of the candidates as set out in their application forms, as well as the requirements for the post, as set out in the Scheme of Service. The selection was done in a fair manner and no injustice was caused to the Appellant as averred in his Statement of Case. The Appellant had not been able to establish the injustice allegedly caused to him. In its Statement of Defence the Respondent had

clearly indicated the manner in which the selection exercise was carried out by Respondent.

Counsel stated that the request of the Appellant that “*all the records and notes taken by the selection panel be scrutinised with a view to ascertaining whether there were valid reasons not to select him in priority to the others*” could not be granted as these documents were privileged under the Service Commissions Regulations.

Submission of Counsel for Co-Respondents

Counsel for Co-Respondents submitted that the three Co-Respondents were much more meritorious and suitable for the post and had been rightly selected and this had not been seriously disputed.

The Co-Respondents cannot comment on what happened during Appellant’s interview. They can only confirm that they had no ground for complaint. However, it was submitted that there was nothing to suggest that any member of the panel had “any hostile *animus* against Appellant and that he was therefore deliberately placed at a disadvantage vis-à-vis his other colleagues”. Counsel submitted that there was no reason to interfere with the exercise in so far as Co-Respondents were concerned.

Determination

The Scheme of Service for the post provides for the post to be filled:

“By selection from among officers in the grade of ...Officer/ Senior ...Officer who reckon at least four years’ service in a substantive capacity and who-

(i) Are conversant with current legislation and practices related to the job;

(ii) Have good communication, supervisory, organizing and interpersonal skills;

and

(iii) Are able to motivate and lead a team”

The fact that Respondent proceeded with a selection exercise is, therefore, not contested. Counsel for Appellant had previously asked that confidential information given to the Tribunal be made available to the Appellant for him to make his case. The Tribunal did not accede to his request and gave the reasons to that effect in a Ruling.

Counsel has now suggested that the Tribunal should explore the possibility of providing the confidential information to Counsel of all parties for their eyes only, referring to the so-called confidentiality ring i.e. a sharing of information with a limited number of persons, a concept which may have relevance when it comes to proceedings relating to protection of such things as commercial interest or intellectual property. But views are divided on this innovative approach. The Tribunal is not convinced that this will help the proceedings before the Tribunal and ensure more fairness to the Appellant. In the first place, the strength of the confidentiality ring will depend on its weakest link. There is no guarantee that such confidential information will not leak out of the ring, either knowingly or inadvertently. If so, it will defeat the purpose of this limited disclosure.

More fundamentally, however, is the usefulness of having such a confidentiality ring. Information made available to Counsel in the confidentiality ring will not be known to the Appellant and Counsel will not be able to discuss the matter with his client and know the latter's stand on the matter. Nor will Counsel be allowed to refer to such information during submissions. The Tribunal is not, therefore, certain that the interest of a party is better served with the introduction of the confidentiality ring.

It is true that the non-availability of such confidential information may disadvantage the Appellant but there needs to be a balance between public interest in the administration of justice and other public interests which preclude disclosure of all

relevant materials. The PBAT Act under its Section 7(8) gives the Tribunal the power to call for documents and “*adopt such procedures as may be necessary for the proper functioning of the Tribunal*”. The Constitution (Amendment) Act 2008 setting up the Tribunal provides at Section (9) (b) that the Tribunal “*shall not be bound to communicate to any other person the contents of any report, document or other material produced by any Commission or public body...*” The information provided by the Commission is “*privileged in that production may not be compelled in any legal proceedings unless the Chairman certifies that such production is not against the public interest*” under section 4 of the Service Commissions Regulations 1981. It is noted that “*public interest*” in PSC Regulations 1967 has been replaced by “*in the interest of the public service ...*” in PSC Regulations 2010. The information, which is of interest to Appellant, relates to the criteria for assessment, the weightage of the criteria and the mark sheets of candidates in a selection exercise. These are sensitive matters and may jeopardise the proper functioning of the public service if they are leaked even by inadvertence. It may also open the floodgate for requests for such information.

The Tribunal had to struggle hard to obtain such confidential information for its eyes only. Now that this principle has been established, and that public bodies are providing same, it should comfort all those who come to this Tribunal. It is not as good as open disclosure but this is the second best option for the Tribunal for it to give fair Determinations.

On the issue of time allocated for the interview there was no evidence of a great difference in time for each candidate.

On the issue of hostile treatment from the interview panel as averred by Appellant, the Tribunal was requested to call the members of the panel. The Tribunal has not pursued the matter further as presumably the members of the panel would have simply denied that there was an incident maintaining what was said by

Respondent's representative. Appellant's Counsel for his part decided not to call them as his witnesses as they would have had to be considered as hostile witnesses.

The Tribunal wants to say the following regarding such complaints which are often made in appeals. Applicants who go for interview must expect to be tested in different ways and must prepare themselves psychologically to reduce their stress in what is after all a competitive exercise which is naturally a little nerve racking. Interviewers of course have the duty to use appropriate language and remain neutral.

The Tribunal relied on the mark sheets shown to the Tribunal, under confidential cover, to see whether there had been any obvious bias against the Appellant.

The Tribunal has asked the Respondent for the criteria, weightage and markings of all applicants, which were made available. However, the markings of individual members of the panel, which were also requested, were not given. This is not limited to this appeal but to other selection exercises as well. This Tribunal would have liked to know how the interview panel worked out their consolidated markings such as whether they discuss among themselves before they give the overall marks or if and how they adjust their individual markings.

Be that as it may, after perusing the confidential information, it is noted that the Respondent assessed the candidate according to the following criteria:

- Relevant experience
- Personality
- Responsibilities of post
- Communication and interpersonal skills

- Knowledge of legislation and practice of the subject matter related to the job
- Leadership and organising skills and
- Aptitude

The Tribunal did not see, in the markings, any pattern which could show any bias as perceived by the Appellant by the allegedly hostile attitude of some members of the panel. The Appellant even scored higher marks than the Co-Respondents on the criterion of “relevant experience”. But overall, the Appellant scored less than the Co-Respondents, which led to his non selection.

No marks were given for additional qualifications but the Scheme of Service does not say that such additional qualifications will give an advantage for the holder. The Tribunal found that Respondent applied strictly the criteria mentioned in the Scheme of Service and the Tribunal does not find that Respondent erred by doing so.

There has been a selection exercise and the procedure for selection has been adhered to. There was nothing which would tend to show that Appellant had been penalised.

The appeal is, therefore, set aside.