

## Det 14 of 2014

PSC circular 5 of 2008 provides the “filling of vacancies in respect of grade-to-grade promotion should as from 1 January 2009 invariably take effect from either (a) the date of assumption of duty; or (b) the date 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 Appellant, a Senior AUR at the... Office is challenging the decision of the Respondent to change her seniority ranking when she was appointed Senior AUR.

### **Appellant's Case**

The Appellant was offered appointment as Senior AUR with effect from Prior to that, provision was made in the ... Programme Based Budget for the creation of 10 additional posts of Senior AUR. There were 10 AURs who were eligible and the Appellant was ranked 7<sup>th</sup>.

Towards the end of January 2013, the National Audit Office decided to assign duties of Senior AUR to nine AURs with effect from ..., pending the establishment of the posts in the Civil Establishment Order (C.E.O.) which was effected a few months later.

The Appellant was not given assignment of duties as she was on leave without pay at that time.

The Appellant averred that on the ..., the then Director of the office phoned her regarding assignment of the duties of Senior AUR and informed her that “*as long as Appellant did assume duty assigned to her within a period of two months, her seniority would be undisturbed as per PSC Circular ...*”.

The Appellant assumed duty on ... and she was offered promotion in the grade of Senior AUR by a letter dated ... as from the date of assumption of duty. She accepted the promotion.

On her appointment, the Appellant was informed verbally that her seniority had been adversely affected and her ranking had been displaced three places down from the ranking prior to the appointment exercise.

The Appellant claimed that the Respondent failed in its duty to preserve the seniority ranking as it was prior to the promotion exercise. This would have serious consequence for her future prospects inasmuch as all promotional exercises in the future would be based on seniority.

The Appellant asked the Tribunal to order the Respondent to restore her seniority ranking.

### **Respondent's Case**

The Respondent denied that the seniority ranking of the Appellant had been unlawfully disturbed and averred that the promotion of the Appellant was made in accordance with the provisions of PSC Circular No 5 of 2008. Her seniority had been disturbed because three junior officers had been assigned the duties of Senior AUR as she was on leave without pay and when they were promoted their appointment took effect as from the date they were assigned the duties of Senior AUR and as from the date the vacancies occurred.

The Respondent stated that Co-Respondents No1 and No 2 were assigned duties as from ..., while the other Co-Respondents were assigned duties of Senior AUR with effect from a later date. The Responsible Officer ... sought the covering approval of the Respondent and informed also the Respondent that the Appellant was on leave without pay and she would be recommended for promotion as from the date she would assume duty.

Subsequently, the C.E.O. was published in the Government Gazette and the 10 posts of Senior AUR were created with effect from

The Responsible Officer recommended that the Appellant be promoted Senior AUR as from the date on which she assumed duty and the Co-Respondents were appointed with effect from a date which was earlier.

The reason why the date of appointment of the Appellant was different was that she was on leave without pay for a period of 33 days, followed by an extension of such leave for a period of 56 days with effect from .... By letter dated, the Appellant was informed that the Public Service Commission proposed to assign her the duties of Senior AUR as from the date of assumption of duty and she would be recommended for promotion which would take effect as from the date she assumed

duties in the higher office as per PSC Circular No 5 of 2008. She accepted the assignment of duties and informed her Responsible Officer that she would assume duty on ....

The Respondent averred that when the Appellant was offered promotion in a substantive capacity the effective date could only be the date she assumed duty, i.e. ..., when she was assigned the duties of Senior AUR.

The Respondent moved that the appeal be set aside.

### **Determination**

In this appeal much has been said about PSC Circular No 5 of 2008 and PSC Circular No 2 of 2009 and how they are to be interpreted. The gist of these two circulars are reproduced below:

**Circular No 5 of 2008:** “ Reference is made to the recommendation at paragraph 9.34 of the Pay Research Bureau Report 2008 (Vol 1) to the effect that *“filling of vacancies in respect of grade-to-grade promotion should as from 1 January 2009 invariably take effect from either (a) the date of assumption of duty; or (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.”*

**Circular No 2 of 2009:** “As you are aware, following selection exercises carried out by the Commission, the order of merit of selected candidates is not disturbed if they assume duty on different dates but within the time limit prescribed by the Commission i.e two months. In line with that principle, it has been decided that, likewise, officers who are promoted with effect from the date of assumption of duty will retain their seniority placing in the next lower grade if they assume duty within two months from the date they are required to do so.”

From Circular No 5 of 2008, it is clear that the nine Co-Respondents who had been assigned the duties of Senior AUR without any break in their assignment of duties would have their appointment backdated. On the other hand, the Appellant was on leave without pay at the time of assignment of duties and cannot claim such backdating. Her appointment can only take effect as from the day she was assigned duties on her return from overseas.

The Appellant relied on Circular No 2 of 2009 to state that her seniority should not have been disturbed because she assumed duty less than two months after she was offered the assignment of duties. She also relied on what the then Director of the service had told her on the phone. However, the interpretation of Circular No 2 of 2009 is not correct. The reference to seniority list that cannot be disturbed relates to the one that was established following the appointment exercise where the Appellant ranked 10<sup>th</sup> and not the seniority list that existed prior to the appointment where the Appellant ranked 7<sup>th</sup>. To illustrate this we can take a hypothetical case where there is a number of appointees and their appointment takes place on assumption of duty. It may happen that one of the appointees may not for a valid reason assume duty at the same time as the other appointees. He will be allowed to assume duty at a later date, provided it does not exceed two months after the date of offer of appointment, and not lose his ranking. In other words, if he is first on the seniority list he will maintain this ranking even if his date of appointment is later than his colleagues.

The Appellant also leaned on Circular No 2 of 2009 to say that her seniority should not have been disturbed as assignment of duties does not give an officer any claim for appointment. It is a fact that when an officer is assigned duties to a higher post he gets a letter in which it is said clearly that he has no claim for the post when it is going to be filled. However, when it comes to the determination of the effective date for an appointment, the date of assignment becomes an important factor. In this present appeal, the Co-Respondents were appointed as from ... when they were all performing the duties of Senior AUR. However, Co-Respondents No 1 and No 2 were assigned duties as far back ..., but their appointment also took effect as from 1 January 2013 as the vacancies did not exist in 2012 and were created in the 2013 Budget. Had the three officers who were junior to Appellant not been assigned the duties of Senior AUR and were appointed at the same time as the Appellant, then the Appellant would have retained her seniority ranking even if she assumed later.

The Tribunal, therefore, finds that the Respondent has respected the procedures for filling the vacancies and its decision has complied with its Circular No 5 of 2008 and Circular No 2 of 2009.

The appeal is set aside.