

Even if a post has been merged with the one for which an applicant applied, the Tribunal can still adjucate on the appeal which was entered previous to the said merger. A determination may not be purely academic. The non appointment of the applicant can indeed have a bearing on his seniority and affect his chances of being chosen for assignment of duties or actingship and, theoretically, even for a promotion

The Appellant lodged an appeal against the Ministry of ...for not having selected him to the post of TO).

Rulings

Three rulings have been given in this case and we want to refer to these in the appropriate place in the present determination in order to give a complete picture of the case before us.

The case started before another bench and it started anew before this bench. It was during this period that the Tribunal had decided to call appointees as Co-Respondents following the judgement pronounced by the Supreme Court in the case of PSC V. PBAT in the presence of Mrs Wong Chow Ming (2011 SCJ 382).

Counsel in several cases, including the present case, debated on the need for the Tribunal to call appointees as Co Respondents and on who should in fact call such appointees. Counsel in this case argued that if this principle is applied, it would be impossible to meet the objective of this Tribunal set out in section 7(5), which provides that “the Tribunal shall endeavour to combine fairness to the parties with economy, informality and speed.”

First ruling

The Tribunal gave its ruling in all the cases and maintained that it was for the Tribunal to call appointees to respect the *audi alteram partem* rule of giving a right to be heard to all those concerned or who could be concerned by a decision. (see Website reference ER3 of 2012)

Parties were then invited to amend their statements to add in the title the names of the Co Respondents. The latter were summoned and were given several possibilities on how to proceed. They decided to abide by the decision of the Tribunal.

Appellant's Case:

Appellant's Grounds of Appeal are as follows:

1. The Respondent has acted irrationally, arbitrarily and in violation of the principles of fairness when it took the decision appealed against.
2. In view of the qualifications, merit, experience of all the candidates any reasonable body acting in the light of the provisions of Regulation 14 of the PSC Regulations ought to have come to a different decision.
3. The interview process was a sham in as much as it was not possible for any body acting reasonably taking into consideration factors which are relevant to have been able to make a 'selection' after an interview lasting about 5 minutes.
4. The process adopted by the Respondent is so haphazard, unreliable and against rules of good administrative governance as to make its decision unreasonable.
5. The Appellant will adduce evidence in supporting the above and further prays that the Public Bodies Appeal Tribunal calls for all relevant records, marking sheets for the totality of the selection exercise.

The Appellant solemnly affirmed to the correctness of the Grounds of Appeal and Statement of Case and explained that his appeal was in respect of the 2nd list of appointees. It was not against the first list as he did not receive a circular in time regarding that list and did not therefore appeal.

He listed 5 questions put to him during the interview. One being on a First Aid Circular of 1988 which he explained related to a new law which covered the Public Sector whereas previously only the private sector was involved. He stated having been unable to list the items for first aid but specified that this was in the second schedule of the relevant Act.

Counsel for Appellant questioned him as to whether the interview was video recorded, whether he was informed in advance about the line of questioning and the methodology proposed to be used by the interviewing panel. Appellant replied no to all the questions.

During cross examination, Appellant agreed that this was a selection exercise and that he had submitted all relevant information including his qualifications. But he maintained that all in all he was before the panel for about 7 minutes, part of which was used up to check his documents.

Respondent's Case

Respondent's representative solemnly affirmed to the correctness of the amended Statement of Defence, which referred to the Scheme of Service which prescribed that...

It was specified that 121 candidates applied and 118 were found eligible after an interview was spread over 8 days. 28 candidates were appointed, one of whom declined. As there were two other vacancies, the Responsible Officer (RO) recommended that the three vacancies be filled from the merit list. The Co-Respondents were then offered appointment on ... and assumed duty on the ... During cross-examination the representative of Respondent said that the time allotted to Appellant for the interview was 10 minutes according to her record. She later confirmed that for Co-Respondent No. 1, it took 9 minutes, for Co-Respondent No. 2, 6 minutes. Co-Respondent No. 3 himself said that it was about 10 minutes for him. She said that the criteria were additional relevant qualifications, Information and Computer Technology, relevant experience, personality, communications and interpersonal skills. She also mentioned monitoring, supervising and management of department and facilities, knowledge and implementation of Government policies and aptitude. She confirmed that the three Co-Respondents were chosen from a merit list drawn up after a first selection exercise.

During the proceedings, Counsel for the Appellant wanted to obtain certain information from Respondent which its representative could not give to the Tribunal, as she did not have same. It concerned the markings and ranking of candidates and the merit list which were considered as confidential information. In fact, the Representative of the Respondent was not able to answer several questions put by Counsel for the Appellant stating that she was not a member of the panel and did not have access to confidential information. She even stated that she did not have some information in her file which led Counsel for Appellant to say that this presumably means that this information does not exist. This was the case in particular for her answer to the

question regarding whether the list of criteria on which candidates were assessed had been communicated to the candidates prior to the interview.

When questioned on whether she had prepared the file for the preparation of the Statement of Defence, she replied in the negative. During cross examination counsel also put to her that the last day of interview was the ...and on the ..; (two days later) the decision to appoint had already been taken. He reminded the tribunal that there were 118 candidates and immediately the decision was communicated to the RO and on the next day the letters of appointment were issued.

Both parties were invited to argue on the issue of communication of information sought. Appellant's Counsel made a submission but Respondent's Counsel left the matter in the hands of the Tribunal. The Tribunal made a formal request for the merit list, the mark sheet, the time table of the interview, the frequently asked questions and the selection board's report which Respondent refused to give even for the eyes of the Tribunal only, invoking Regulation 4 of the Service Commission Regulations. It was only prepared to give the time allocated to appellant and Co Respondent. It also gave a list of the additional relevant qualifications. Regarding questions put, it gave a blanket reply which was not what the Tribunal wanted to know.

Second ruling

In a well motivated ruling ...(website reference ER 10/2012), the Tribunal stated that the Respondent had to provide all the information asked for by the Tribunal so that the Tribunal may give a fair determination. "When the Public Body clings too much to section 4 of the Service Commissions Regulations, it shrouds the action of the Public Body in opacity and generates a perception of suspicion."

On 30 October 2012, the Respondent finally agreed to communicate in full confidence the information sought "for the consideration of the Tribunal only". It also took note that under section 91 A (9) (b), the Tribunal may, where necessary, for the purpose of making its decision, make reference to the contents of any report/document produced by the Commission.

Counsel for the appellant wanted to have access to the confidential information but Respondent was only willing to share the information concerning the time allocated for the interview and the list of qualification and experience of each party concerned. As counsel insisted he was invited to argue on this motion.

Counsel for the Appellant also wanted to know whether the members of the panel had made disclosure regarding candidates who were known to them. The Tribunal decided to ask for this information from Respondent.

Third Ruling

“During the proceedings it became a moot point whether the appeal was lodged outside the delay of 21 days and whether the grounds of appeal failed the clear and precise test.” In fact, counsel for the Respondent declared that it was not proper for appellant to refer to the first exercise at all as he was outside the statutory delay of 21 days. She further added that the grounds of appeal must be precise and concise and that there was never any mention of the fact that members of the panel had not disclosed the fact that they knew some of the candidates.

The Tribunal gave a ruling (Website reference FR 12 of 2013) against Appellant on the issue of access to confidential documents communicated to the Tribunal for its own consumption. It also ruled, that any new grounds of appeal will not be entertained as regards the delay of 21 days. Appellant was however allowed to challenge the selection exercise which resulted in the merit list drawn for appointment to the post being challenged.

When the case came finally to be heard, Counsel for Respondent made a declaration to the effect of the Errors and Anomalies Committee Report finalized in March 2013, a recommendation has been made that the post that appellant held and that of TO be merged. The post of TO is therefore no longer in operation. Counsel for Appellant insisted that despite this, the acquired rights of the Appellant could not be overlooked as he must be able to keep his seniority for the future, because then it will be appointment by promotion and not selection. As there was no further cross examination of Respondent’s representative, the case was closed.

Counsel for Appellant submitted that the appeal should be allowed. He also stated that the Tribunal may find that Appellant ought to have been appointed to the post and all consequential actions be taken to restore to that position as though he had been appointed then.

Counsel for Respondent submitted that only members of the panel can say whether appellant was fit and suitable for the actual post. The Tribunal could not adjudicate on the issue of pension and other rights which had not been part of the

grounds of appeal and never been really canvassed before the Tribunal. She moved that the appeal be dismissed as the Appellant was now in the post which he had sought.

Determination

In this case, the Tribunal has given due consideration to all issues raised by both parties. It has decided to break new ground as regards the transparency of the recruitment exercise and fairness to all parties. It has finally examined confidential information provided to it by the Respondent. It has decided that such information cannot be shared with the Appellant, the moreso that the Respondent's representative and Counsel do not have access to such information. The tribunal therefore finds that parties are on a level playing field.

The issues which now need to be addressed are as follows:

The Appellant being now in the post, does the Tribunal need to give a determination which would be purely academic?

The answer is yes. The fact that the post which Appellant holds has been merged with that of TO and that the Appellant has subsequently become TO does not in any way cure any injustice that may have been caused to the Appellant in the initial appointment exercise. The Appellant did not withdraw his appeal, and rightly so because, had the outcome of the initial appointment exercise been different, he could have been appointed in lieu of the Co-Respondents and be senior to them. The effect of this lesser position in the seniority ranking may not be a serious factor to the extent that the higher posts in the Appellant's career path are filled either by way of competitive written examinations or by selection. However, he would be penalized if there are opportunities for assignment of duties or actingship in the future as same would be given to the Co-Respondents who are now his seniors.

The Appellant presumably feels further aggrieved that his post is almost similar to that of TO as pointed out in the Errors, Omissions and Anomalies Committee Report on the PRB Report 2013 and " ...that, in future, appointment in the grade of ...should be made by promotion,.....".The existing Scheme of Service says that appointment to the post of TO is by selection .

The Tribunal has, therefore, to give a determination in the appeal. It is only the Appellant on his own volition who can drop the appeal. He has chosen not to do so and he cannot be denied his inalienable right to the Tribunal adjudicating in this appeal.

The Tribunal has, therefore, to determine whether Appellant was treated fairly in this appointment exercise. As already explained the Respondent did finally provide the information sought, albeit for the eyes of the Tribunal only. The determination of the Tribunal is based mostly, therefore, on the confidential information.

It needs to be said again that the Tribunal cannot step into the shoes of the Respondent. The Constitution vests the power to appoint with the Respondent. The Tribunal only sees to it that the Respondent has taken on board the relevant facts and not taken into consideration matters which are not relevant to the appointment exercise. In other words, the Tribunal ensures that there has been no procedural impropriety.

From the information provided, it was clear that the selection of the candidates was done according to a long list of criteria which are :

- Additional relevant qualifications
- ICT
- Relevant experience
- Personality
- Communications and interpersonal skills
- Monitoring/supervision/Management skills
- Knowledge and Implementation of Government Policies
- Aptitude

In addition the Advisor from the Ministry gave marks which were added to the overall markings.

With such a long list of criteria, the outcome of the exercise may be confusing for the candidates to the post. Each candidate may feel that he deserves appointment on criteria in which he feels he is strong but he is oblivious of other factors that come into play. From the information provided, the Tribunal found that the Appellant

scored high marks regarding relevant experience and he actually scored better than the Co-Respondents. But, on the other criteria, he was not as good or better than them. Thus, even if the Appellant feels that he had been in his post for a longer period and had acquired more relevant experience, he fell short in the other criteria to justify his appointment.

It has always been said before this Tribunal that the interview is too short to conveniently assess the candidates. However, what matters more is not so much the duration of the interview but the way the interview is carried out. The Respondent has other sources of information, such as the Confidential Reports, to assist it in its decision making. It is unfortunate that the list of criteria is too long and the candidates are not aware in advance of the criteria which will be relevant and the importance of each criterion. The candidates feel aggrieved of the outcome of the appointment exercise as they cannot figure out where they failed.

The Tribunal reiterates its recommendation to the Respondent to see how this process could be improved by learning from other institutions like the Canadian Public Service Staffing Tribunal which has a more transparent selection mechanism.

This being said, the Tribunal does not find where the Respondent has erred in the selection process.

As regards pension and other rights of the Appellant, these were not really the subject of the appeal and were never even mentioned by Appellant himself when he was giving evidence. In the light of these findings, the Tribunal does not therefore need to go any further on any of the issues raised which have not been the subject of the three rulings pronounced.

The Appeal is therefore set aside