

PUBLIC BODIES APPEAL TRIBUNAL

No. D/ 31 of 2014

In the matter of:-

1	Mrs. I. R. PUDARUTH	}	(Appellants)
2	Mrs. D. M. MATHUR-DABIDIN		
3	Mr. L. UJODHA		
4	Mr. P. BEEKAWOO		
Public Service Commission		Respondent	
1	Miss VALERE Marie Joelle Sandrine	}	(Co-Respondents)
2	Mrs JHOWRY Chandanee		
3	Mr. AUJEET Satydanand		
4	Mrs GUNESS-GOOLBAR Zeena Kaushar		
5	Mr BUNJUN Raj Kishore		
6	Mrs GUJADHUR-NOWBUTH Shakuntala Devi		
7	Mrs SAMYNADEN Sarvedi		
8	Mr RAMSAMY Marie Joseph		
9	Miss AULADIN Zahira Bibi		
10	Mr. GOPAUL Devendre		
11	Mrs PAWAN Anandee		
12	Mr POONYE Navindranath		
13	Mr MAWAH Parmanand		
14	Mr MUNBODH Youdhisteer		
15	Mrs COONJAN Jayanty		
16	Mr BOODHNA Veersingh		

17	Mrs LALLMAHOMED Zaheda Begum	} (Co-Respondents)
18	Mr PIRTHEE Prem	
19	Mr CONHYE Dhanraj	
20	Mrs RAJAHBALEE-CADER Bilkiss	
21	Mr BALGOBIN Kechan	
22	Mr PADARUTH Bhavindranath	
23	Mr. Premchand TEELOKU	
24	Mrs. Jeanne LAM HING PO	

DETERMINATION

Appellants appealed against the decision of Respondent to appoint 22 officers (Co-Respondents) as Principal Assistant Secretary in a temporary capacity. Four Appellants withdrew their appeals during the proceedings. Two of them, now Co-Respondents Nos. 23 and 24, were appointed as there were two more vacancies. The remaining four appeals were consolidated and only one Determination is being given for all four appeals.

Counsel appearing for Appellants 1, 3, 4 had requested that the Chairman of the PSC be called on personal answers to answer a list of questions that she had communicated to the Tribunal. She also moved for particulars of the Defence. The Tribunal issued guidelines regarding demand of particulars and explained how the production of information from the Public Body under Section 6 (4) (b) of the PBAT Act is made for the eyes of the Tribunal only.

Regarding particulars these would only be allowed in exceptional cases if a part of a Statement of Defence is unclear.

A Ruling was issued after hearing arguments on the need for Appellants to receive all information prior to proceeding with their case. The request of Appellants was refused and the case proceeded on the merits.

Appellants' Case

All Appellants solemnly affirmed to the correctness of their grounds of appeal and Statement of Case.

Appellant No. 1

The grounds of appeal of Appellant No. 1 were that “a fair number of them are junior to me and lack the required experience for promotion”; that Respondent had breached Regulation 14 of PSC Regulations “*which requires it to have regard to the maintenance of the highest standard of efficiency in the service, more particularly by taking into account qualifications, experience and merit before seniority in the public service.*”

The Appellant also based herself on the fact that she had acted as Principal Assistant Secretary “*on various occasions on an ad-hoc basis and also on a continuous basis for a continuous period of 16 months i.e. from 16 August 2011 to 19 December 2012.*”

She stated that she had not been adversely reported upon and that due weight should have been given to “*my experience, actingship in the promotional post and my track record.*”

She averred that she had been performing duties as Assistant Secretary for 14 years and Acting Principal Assistant Secretary during the last 16 months.

She listed her juniors who have been appointed as being Co-Respondents No.8, No.11, No.13, No.14, No.16, No.18, No.21, and No.22. She considered the selection exercise to have been unfair. She averred that Co-Respondent No. 22 who was posted at the LGSC had duties which were “*completely different from those incumbent at the Ministry and as such was not fully exposed to duties to be discharged by a Principal Assistant Secretary*” laying emphasis on the preparation of Cabinet papers and replies to Parliamentary Questions and giving assistance to high-level ministerial committees. She stated that she had been posted to three different Ministries.

She also stated having more years of service than was required for the post.

In her Statement of Case she listed and annexed her qualifications as follows:

- (i) A joint degree in Biology and Environmental Science from the University of Mauritius
Award: Second Class second division;
- (ii) A Diploma in Administration and Management from the University of Technology, Mauritius
Award: Distinction
- (iii) A Masters in Business Administration from the University of Birmingham, United Kingdom;
Award: Merit

She also listed the relevant experience that she had gathered and a very long list of various projects which she had either initiated or contributed to. She had chaired several boards including selection boards. She listed her qualifications as compared to those of several Co-Respondents. This was over and above the requirements for the post. She also averred that she was more “versatile and adaptable to different work situations and conditions and had more experience than Co-Respondent No. 22”. She felt that she had a higher sense of responsibility and leadership for having worked in three different Ministries. She also stated that she was ranked 18th on the seniority list of Assistant Secretary. She compared her qualifications and experience to several Co-Respondents and concluded that Respondent had not ascribed the appropriate weight to qualifications, merit, suitability and seniority for the post of Principal Assistant Secretary thereby prejudicing her chance of being promoted.

Appellant No. 2

Appellant No. 2 based her appeal on the grounds of her qualifications, professional experience and merit and the fact that some Co-Respondents did not have such qualifications and experience. She also cited PSC Regulation 14. She said alternatively that the Respondent did not give the appropriate weightage to her qualifications, professional experience and merit. She had a Diploma in Public Administration and Management, a BSC (Hon) Management, an MSC E Business, a Post Graduate Diploma in Business Administration and several certificates.

Basing herself on the questions asked, which she listed, she thought that the decision of Respondent was unfair. She also listed the various sectors in which she had worked, acquired experience and initiated projects more especially ICT related ones. She was posted in five Ministries. She stated having constantly, and at her own expense, tried to improve her efficiency and competence at work. Whilst in employment she studied for more than 10 years.

In her Statement of Case, she expatiated on her relevant experience in various Ministries where she either initiated various projects or contributed to the formulation and implementation of policies and draft legislation.

She averred that:

- “(i) the interview was too short to reasonably allow for proper assessment of the Appellant so that it amounted to an improper assessment and arbitrary disregard for the application of the said Appellant.
- (ii) The Appellant was not allowed enough time to answer the questions and the Appellant’s interview lasted less than 15 minutes and amounted to insufficient exposure of her abilities and potential;
- (iii) The Appellant was not allowed to express herself about her vast experience, which was a relevant factor to be taken into consideration for appointment as PAS”.

She concluded that Respondent has “not acted with an independent, fair and objective mind”.

She prayed that:

- “(i) The Appellant be appointed to the post of PAS.*
- “(ii) The Tribunal make other such orders as are fit and necessary as justice and fairness demand, having regard to the circumstances of the present appeal;*
- “(iii) The appeal be allowed”.*

Counsel for Appellant No. 2 made a motion for disclosure of all materials which were before the interviewing panel, including the weightage and markings and asked that they be disclosed not just to the Tribunal but also be shared with counsel. He laid a lot of emphasis on the fact that questions put should relate to duties described in the Scheme of Service. He also submitted that there was a duty of disclosure and he relied on the following precedents:

- 1. Harel Freres Ltd vs. Minister of Housing, Lands and Town and Country Planning (1986 MR 74);*
- 2. Ramdin v The Public Service Commission (1990 MR 291)*
- 3. Soobrayen v The Public Service Commission (19990 SCJ 12)*
- 4. The White Book on Civil Procedure (2012 Vol I):-*
 - (i) Para 39.1.2*
 - (ii) Para 31.3.36*
 - (iii) Para 31.3.41*

Appellant No. 3

The grounds of appeal of Appellant No. 3 are:

The selection exercise has not been carried out in a transparent and fair manner or in a way to promote the principles and best practices of good employment relations.

The PSC did not come to its aforesaid decision in a procedurally fair manner. Proper weight was not given to factors which Respondent was under a duty to consider. Fair and just criteria were not used.

The decision of the Respondent was most unreasonable, irrational and unjust and it *“defies logic or acceptable normal standards.”*

The Respondent failed *“to take into account all relevant considerations and failed to give due weight to my qualifications, skills and experience”*.

The PSC “failed to give reason and/or at least inform me as to why I was not selected for the post of Principal Assistant Secretary”.

Appellant averred that *“some of the candidates who have been selected by the PSC for the post do not possess the experience, versatility and other skills that my 29 years in the service have given me”* and said that after having worked as acting PAS, he had a legitimate expectation to be offered the post of PAS and that Respondent had no *“valid and foreseeable reasons*” for not selecting him. He averred that he was third senior most Assistant Secretary and has been assigned duty as PAS on a continuous basis since October 2008 and has been performing the duties of the post for four years. He possessed the prescribed qualifications: He had a Diploma in Management with specialization in Public Administration and Management.

He averred that he had almost 30 years of experience and had been posted in 9 different Ministries and Government Departments and he listed the details of his years of service in the Administration Cadre.

He stated that he had not been adversely reported upon.

He challenged the fact that the 15 minutes interview could suffice to assess him and averred that it was *“abusive and arbitrary to conduct an interview in the given circumstances”*.

He prayed that the PBAT should quash the decision of the Public Service Commission which had failed to carry out the selection exercise in a fair and

transparent manner without due consideration to the principles of natural justice. He also prayed that the PBAT urges the Public Service Commission to redress this situation and select him for appointment to the post of Principal Assistant Secretary.

In his Statement of Case, he expatiated on his Grounds of Appeal in greater detail. He even put some questions which were later put in cross-examination of Respondent's Representative. He averred that *"it has been the regular and normal practice that the officer who is acting continuously in a higher capacity is promoted..."*.

Appellant No. 4

The grounds of appeal of Appellant No. 4 were as follows:

The selection exercise was not *"fair, equitable"*. *"The principle of natural justice, fairness and meritocracy has not been respected"*. Appellant put emphasis on lack of transparency and failure *"to promote the principles and best practices of good employment relations"*.

"The PSC did not come to its aforesaid decision in a procedurally fair manner". He also alleged that the *"PSC failed to use fair and just criteria"* and did not give *"proper weight to factors which it is under a duty to consider"*.

The decision was *"unreasonable, irrational and unjust"*, defied logic on accepted normal standards, *"It failed to take into account all relevant considerations and failed to give due weight to my qualifications, skills and experience"*.

No reasons were given for the non selection. *"Some of the candidates selected by the PSC do not possess the experience, versatility and other skills that my 29 years in the service have given me"*.

He averred that he has been working as acting Principal Assistant Secretary (PAS) for the past four years and said that he had a legitimate

expectation as this was for an uninterrupted period and was more than any of the Co-Respondents.

He had no adverse report. All Co-Respondents were his juniors. He was second in the merit list of Assistant Secretary (AS). Three of the Co-Respondents were not even in the first 30 on that list and one ranked 43. He was Assistant Secretary for nearly 21 years which was longer than any of the newly promoted PAS.

He listed his qualifications: MSC in Public Sector Management, a post-degree in Public Sector Administration and Management. He questioned the reasonableness of the 15-20 minutes interview.

He averred that *“experience and on-the-job training and additional qualifications in the relevant field should be taken into consideration and be the determining factors”* in the selection exercise. He emphasised that he had all relevant skills and a high sense of responsibility and maturity.

He specified the fact that he had worked in several Ministries and that this should have been considered. He questioned in particular the appointment of Co-Respondent No. 22 who had not worked in a Ministry but only at the Local Government Service Commission and that of Co-Respondent No. 10 who had served at the Prime Minister’s Office and another Ministry but had been on leave with no pay for long periods abroad.

His prayers were:

- (i) to quash the decision of the PSC; and
- (ii) to select him

In his Statement of Case in which he repeated his Grounds of Appeal he added that the:

“weight that was given to qualifications, experience, merit and suitability of the candidates for the office was not notified and neither was it made available to the candidates. No information or guidance at all has been given with regards to the rating of the various factors and methodology used in the selection exercise”.

He then expatiated on his grounds to recite the main duties performed by him during his career as AS and Acting PAS.

He mentioned the fact that two additional candidates were selected at a later stage and that both had performed as acting PAS in the past.

He analysed the qualifications of Co-Respondents, highlighting that some of the candidates did not have qualifications in the relevant fields specially public sector management.

He explained how it was important to be able to work in different working environments. He described the specificity of working in the Private Office (PO) of PMO and where he has worked continuously for nearly six years. This involves working under stress, outside normal office hours and meant that family life was sacrificed. He averred that Co-Respondent No. 11 and one Mrs Mary, who does not seem to be a Co-Respondent, who had been at the PO had to seek a transfer as they could not adapt to the pressure of work.

He specified that undue weight was given for the interview. Other factors like actingship, length of service in the grade of AS and in the administrative cadre, length of service in the civil service and additional qualifications had not been given due weight.

He held that Co-Respondent No. 22 was not medically fit for the post of PAS, that he attended the interview in a wheelchair and had to be brought in by two persons.

He stated that *“fairness and natural justice requires that those who have not been selected be told of the reasons.....”*

He said that the selection exercise was therefore not carried out fairly and in the interest of the public service.

Counsel for Appellant Nos.1,3,4 submitted that the powers of the PSC must be exercised judiciously. She submitted that the interview was a surplusage since Appellants had been acting in the post. She was under the

impression that there must have been other criteria than those already communicated to assess suitability.

Co-Respondents' Case

Co-Respondent No. 12 solemnly affirmed to the correctness of his Statement of Case in each of the Appeals. He was cross examined concerning the questions put to him during the interview. He said that they asked him about his leadership qualities, what were the duties that he was expected to perform as PAS. He was questioned about the traffic congestion in Mauritius since he was at one time posted at the Land Transport and Shipping Division and became Departmental Head. He was questioned on Rodrigues and on the way to improve communication in any Ministry or Department. He alleged having an IC3 Certificate. He was also cross examined by Counsel for Respondent and it was brought out that he misused the word supersession whereas he meant that his juniors were higher up in the list.

Co-Respondent No. 4 also spoke before the Tribunal. She explained that even though the nature of duties in different Ministries was very varied, the fact of having worked in the Ministry of Education and Human Resources and moved in its different departments would also give the same kind of experience. She said that she felt that the panel must have assessed the ability of each one to do the duties. She replied in cross examination that she was questioned on management techniques directly relevant to the duties. She emphasized that the onus was on candidates to convince the panel. She agreed that she voluntarily gave information for example regarding Parliamentary questions and Cabinet Memos. She replied that she was extremely conversant with ICT and that it was in her application form. Interestingly, concerning the issue of the time given during interview, Co-Respondent No 4 said that for her it was enough and that she did not attach much importance to the actual questions being put to her but seized each opportunity to show all her positive qualities/talent while replying. Pressed by Counsel for Appellant No. 2 to say whether the interviewing panel was independent, she replied that she had no reason to

believe that they were not. She maintained that they were able for being high level officers.

Respondent's Case

The representative of Respondent solemnly affirmed to the correctness of the Statement of Defence except with regard to paragraph 12 concerning Co-Respondent No. 8. It was stated that Co-Respondent No. 8 was the holder of a BA in Administration. He explained that an administrative mistake had crept in the Statement of Defence and that in fact it should read that he "holds a professional degree from the Institute of Chartered Secretaries and Administrators (ICSA) from UK, which qualification is a higher qualification than a first degree".

He also stated that every candidate who holds higher relevant qualifications were given marks according to the weightage of the Commission. However he did not personally know the weightage and the marks.

As regards actingship he stated that the Commission had given additional marks for those who had been acting in a higher capacity and this had been considered under the "experience criterion".

He explained that actingship was always temporary. Sometimes assignment of duties was made for administrative convenience, for short periods up to six months, but it could be renewed until vacancies were filled or until permanent vacancies occurred. To a question put by the Tribunal, he admitted that this could be for three, even four years.

He confirmed that qualifications, experience and merit were more important factors than seniority when there was a selection exercise.

He stated that in the Scheme of Service there was nothing concerning physical handicap as was the case for example for the police force. Co-Respondent No. 22 did not come in a wheelchair for the interview nor was he assisted as was averred. He explained the various steps following a vacancy circular. He laid emphasis on the fact that all those who applied, and who

satisfied the requirements of the Scheme of Service, were called for an interview and that at that stage they were at par. The others who did not meet the requirements, either in terms of the minimum number of years of experience or minimum qualifications, were not summoned for the interview.

He also stated that subsequently the Commission took into consideration Confidential and Special Reports. He confirmed that an Adviser who gave technical advice also sat on the panel and also assessed candidates.

According to him, the Respondent did not receive at any time any complaints regarding the selection exercise.

During cross examination, the representative of Respondent maintained that the criteria for selection did not necessarily cover the duties mentioned in the Scheme of Service because all candidates might not have had the opportunity to perform one of these specific tasks. He then agreed to give a list of criteria as follows:

Additional relevant qualification, experience, personality, management, analytical communication and personal skills, sense of responsibility and maturity, aptitude for post. Finally the adviser's assessment was taken into consideration.

When asked if ICT could be regarded as an item taken into account under the phrase "be familiar with modern trends, techniques and management" which appeared in Circular No. 28, he replied that it might be so. He however stated that Appellant No. 2 might have been rated for additional qualification in ICT. He then agreed to furnish a list of qualifications of all candidates but said that qualification in ICT was not a requirement for the post. He further replied to a question put regarding assessment of leadership, that applicants normally annexed to the application form all relevant experience which they had and which could show their leadership qualities.

He maintained that there was a weightage for experience and having worked in several Ministries *per se* was not necessarily an advantage. Posting was not a requirement. On the question of ability to draft legislation, he again

said that it was not a requirement as such but it might have been taken into account.

He refused to disclose specifically why a candidate was or was not appointed but maintained that the Tribunal would be able to scrutinize the markings of all candidates.

During cross examination, Respondent's representative said that he was the substantive holder of the position of Assistant Secretary to the Public and Disciplined Forces Service Commission, a departmental grade which he had held for four years and that he had been delegated by Respondent to represent it and answer in support of the Statement of Defence. He had worked for nearly 40 years at the Commission. He stated that he dealt with the scrutiny of applications to list those candidates who were qualified for interview. Out of 97 candidates, only 81 had been called for interview. He said that his assistant, who was present on the day of Hearing, had not been involved in the preliminaries of handling of application.

He explained that the Commission had the power to decide on the procedure and forms to be used. He stated that it was not the practice to inform the candidates of the methods that would be used to assess them. However, where there was an examination, candidates were informed of the subjects that they would be tested on.

He agreed that, on the website, the vision of the PSC was *"to be the benchmark for integrity, equity and efficiency in a dynamic public service"*. He also agreed that the objectives of the Commission was *"to identify and enlist persons of specified educational attainments with a drive and skills for efficient performance, to safeguard the impartiality and integrity of appointments, and promotion in the Civil Service and ensure that these are based on merits. To take disciplinary action with a view to maintain ethical standards and to safeguard public confidence in the service"*.

The core values were “*responsible attitude and efficiency, unrelenting and quality service and respect for human rights and valuing people; Integrity and independence; fairness and equity; innovativeness and improvement*”.

Regarding the note in the Scheme of Service “consideration will also be given to Assistant Secretaries in post as at 30 June 2003, although they do not possess a degree”, he explained that all such candidates had eight years service in their post. He also explained that, originally, candidates in the post who were already public officers had not been required to have a degree. This requirement came with PRB 2003.

He agreed that the purpose of the selection exercise was to assess the suitability of the candidates based on the criteria set out and not on anything else. There were three people on the panel including the adviser and they discussed among themselves on how to proceed prior to the interview.

Regarding the fact that Appellant No. 4 should have been acting instead of doing assignment of duty, the issue was not one of the Grounds of Appeal. Respondent reiterated the fact that assignment of duty was done for administrative convenience and those having had the chance to do so cannot be given more consideration. Otherwise this would disadvantage those who did not get this chance as in fact there are few vacancies.

Regarding Co-Respondent No. 22, whose appointment had been heavily contested, he replied that the incumbent had replaced the Secretary of the LGSC which post is higher than that of PAS.

He also said that none of the candidates had adverse reports.

Determination

This is an appeal concerning the appointment of 22 officers to the post of Principal Assistant Secretary (PAS) restyled Deputy Permanent Secretary. The two officers who were appointed later, and who withdrew their appeals before the PBAT, were also invited to attend as Co-Respondents. In view of the grade of the post in question and of the number of Co-Respondents, it is a very

voluminous file containing detailed information and addressing some very complex issues. Some of the information was irrelevant and contributed to cloud some of the important issues even in the Grounds of Appeal which are meant to be “concise and precise” as per Section 6 (1) (a) of the Public Bodies Appeal Tribunal Act 2008 (PBAT Act 2008) and the Tribunal gives some latitude to Appellants to expatiate on those Grounds in a Statement of Case which is meant to set the context.

The Tribunal has nonetheless given due consideration to all the information available, both in writing and given orally during the hearing, as well as confidential information given by Respondent including those that were for the eyes of the members of the Tribunal only.

Before dealing with the facts, it is important to address the issues relating to the calling for confidential information from Respondent and the sharing of same with the parties.

It must be said, at the outset, that the PBAT Act 2008 provides that the onus of proving his case lies on the Appellant. But as naturally Appellants cannot possibly have some crucial information which is only in the custody of the Respondent, the Tribunal has been struggling hard to obtain these. Without knowing at least what the criteria are, the weight attached to each criterion and the markings given to each candidate, it would be meaningless for the Tribunal to scrutinise a selection exercise.

In its Ruling (ER 10 of 2012 - accessible on the Tribunal’s Website), the PBAT held that it was set up specifically to scrutinize the selection exercise of Public Bodies and that the Supreme Court judgement *PSC v PBAT*, in the presence of Mrs Wong Chow Ming (2011 SCJ 382) stated clearly that the Tribunal had full powers to enquire into the merits of the decision of the PSC. It was ruled that such information submitted to the Supreme Court in the past cannot be denied to the Tribunal which has been set up to adjudicate on appeal.

Such information is now being shared by the Respondent but very rarely can these be shared with parties and/or their lawyers. The Tribunal has looked at the intention of the legislator by analyzing the speech of the Prime Minister when he introduced the relevant Bills in the National Assembly *“It is considered, Mr. Speaker, Sir, that markings should be held confidential and I will tell you why. It is felt that if you start by showing the marks and then publicizing them, it will lead automatically to all sorts of arguments as to whether the candidates’ marks should have been slightly higher or those of other candidates should be slightly lower. I understand there has even been pronouncement from the Privy Council confirming the need for confidentiality in such matters”*.

The PBAT has given another Ruling on this issue (FR 12 of 2013). It referred to Section 9 (b) of the Constitution (Amendment) Act 2008 that *“the Public Bodies Appeal Tribunal shall not be bound to communicate to any person the contents of any report, document or other material produced by any Commission or public body and, except where necessary for the purpose of making its decision, the Tribunal shall make no reference to the contents thereof in its decision”*. The Constitution gives the latitude to the Tribunal to decide whether to communicate or not communicate documents/information to a third party, even to the Appellant but this must be done with caution. In the Queen on the application of Seddar Mohammed v. the Secretary of State for Defence it was held that *“the practice of providing documents on a lawyer-only basis has now been ruled impermissible in the House of Lords in Somerville v. Scottish Ministers (2007/ WLR 2734)*.

However as times goes by, and with the experience of how the Tribunal is functioning, the Respondent has not only agreed to share information with the Tribunal, but it has also agreed in many cases to produce some information which may be referred to more openly in a spirit of greater transparency. Thus, in this case, a list of criteria used during the interview, as well as the qualifications of Appellants and Co-Respondents which they produced to the Interviewing Panel, have been produced during the Hearing.

The Respondent also produced the following information at the request of the Tribunal for its eyes only: The weightage, markings and the duration of the interview. However, it replied openly to some of the issues raised which are not considered confidential and which helped to supplement information obtained during the Hearing. There were no sub criteria/factors; questions put to candidates were standardized but adapted to experience acquired by each; seven eligible candidates convened for interview were posted at the PMO and five of them were selected (Co-Respondents Nos 1,3,11,20,21); the 23rd vacancy was reserved for a candidate who was on interdiction.

Special Reports on the skills and abilities of each candidate were considered as well as the Confidential Reports concerning adverse reports concerning work, conduct and attendance. These were considered before drawing the list of appointees.

The Selection Board's Report is valid for one year. A degree or other qualification for ICT 2 was not a requirement. As regards drafting, candidates were assessed during the interview on the experience they have acquired in their substantive appointment for drafting legislation and policy papers.

The Schemes of Service of 1990,1994,1996, 2000, 2006, 2010 concerning the post of Assistant Secretary (AS) were also produced since reference was constantly made to the post of AS.

The relevant Scheme of Service for the post of PAS, which is what concerns the Appeals before the Tribunal, reads as follows: "officers in the grade of Assistant Secretary who reckon at least eight years service in a substantive capacity in the grade and who possess a degree from a recognized institution or an equivalent qualification acceptable to the Public Service Commission".

It stated that candidates should:

- (i) possess leadership and organizing skills;
- (ii) be versatile and adaptable to different work situations and conditions;
- (iii) possess good analytical skills and be able to adopt a multi-disciplinary approach to problem solving;

- (iv) be familiar with modern trends and techniques in management; and
- (v) have a high sense of responsibility and maturity.

However there was a note as follows: "Consideration will also be given to Assistant Secretaries in post as at 30 June 2003 although they do not possess a degree".

The Appellants have grounded their cases on the fact that they were very qualified and experienced officers, all with experience as PAS for having been assigned duty continuously in the post for several years, that they had an excellent record both in terms of discipline and competence. They also showed that in the last selection exercise, which concerned the post of AS, they had performed very well and ranked higher than some of the Co-Respondents who were therefore their juniors. Producing the Scheme of Service for Assistant Secretary they averred that the duties of AS and PAS were similar though they conceded that for PAS one would have to assume higher responsibility.

In fact they were all still acting PAS, and they maintained that it could not just be for administrative convenience but had to be due to their merit and commitment. The Respondent on this score explained that the practice is to have recourse to the seniormost officers for assignment of duties. Appellant No. 2 did not agree that it was always the seniormost who was assigned duty. Letters have been produced and stated that such assignment of duty would not give them the right to be promoted to the post. The fact remains that this merely gave them a few more marks under experience. Presumably it would also have given them the maturity needed to respond to question during the interview.

A distinction has also been made between actingship and assignment of duty but in any case the Tribunal has no jurisdiction on why they were not 'acting'.

The Appellants have not questioned the appointment of all Co-Respondents but laid emphasis on some of them. In many instances it was based on seniority whereas it is now well established that this would only be a

factor to be considered if candidates are at par. PSC Regulation 14 puts qualifications, experience, merit and suitability before seniority.

The Tribunal notes that, though some Co-Respondents declared that they would defend themselves, some of them even producing a Statement of Defence, only two of them volunteered to come forward and speak under oath and respond to questions put in cross examination. Co-Respondents Nos 8,11, 13,14, 16,18, 21 and 22 had retained the services of Counsel who associated himself to the questions put by Counsel for the Respondent and was present throughout the Hearing.

True it is that Counsel for the Respondent normally indirectly defends the case of Co-Respondents as having been appointed by it and deserving such appointment. But when there is a direct challenge of the nomination of someone, a direct deposition and submission to cross examination would have largely helped the Tribunal. The Tribunal gives appointees the right to be heard following the Supreme Court judgment of PSC v. PBAT in the presence of Mrs Wan Chow Ming (2011 SCR 382). But it is the right of all those appointed to remain silent. No negative inference must be made because of that choice. The Tribunal routinely informs Co-Respondents that they may also leave the matter in its hands if they do not retain services of counsel or do not wish to defend themselves.

The Appellants considered that 15 to 20 minutes were far from being enough for them to show their vast experience and their merit. They also thought that the list of questions put was not always sufficient. Appellant No 1 and No 2 gave a list of the questions that they had to reply to.

The time issue and the appreciation of the kind of questions put are regularly raised before the Tribunal. It is difficult to imagine that long periods of interview would be possible specially when there are many applicants. Here there were 97 candidates, 81 were eligible and were interviewed and 22 were retained and later 2 were chosen from the merit list.

The Respondent answered this question under confidential cover. We cannot reveal the time allowed to each candidate but we can however give a general appreciation. It was 11 to 25 minutes and some of those appointed were questioned 11, 14 and 15 minutes only. Appellants were questioned for 15, 16, 20 and 14 minutes respectively. It is understandable that some candidates were frustrated as they felt that they had a lot to say. But clearly it is not the time spent before the panel that counts. Indeed if somebody has less time it could mean that the panel was satisfied and did not need to hear more.

As for the questions, Counsel for Appellants said that the questions should be the same for all candidates. But this is not an imperative as an interview is not an examination. Questions are not meant to assess the qualifications and experience of candidates either as these can be evaluated through the documents attached to the application form. Questions are specially designed to test the personality of a candidate his/her communication and analytical skills, his/her leadership qualities as well as his/her knowledge of work and sense of responsibility and maturity. Different questions are usually put to officers concerning their own work experience. The whole interview is often an occasion to assess how officers react to a slightly stressful situation. Sometimes it is not so much the actual replies that count but the way the officer deals with the question.

Further different members of the panel ask different questions which they prepare in advance. The interview is nonetheless a very subjective exercise and members of a panel are human beings with their own personal backgrounds and their poles of interest. The most important thing however is that the exercise must be fair and reasonable in the Wednesbury sense which means that it must not be perverse, absurd or irrational. By showing that it has taken all important factors into consideration, the Public Body cannot be taxed of having been unjust and unreasonable.

The question of why the criteria and weightage are not communicated to candidates beforehand has been raised once more before the Tribunal. True it is

that the Appellants, who had said that they themselves had been on panels interviewing other officers, replied in cross examination that they never communicated such criteria themselves because the candidates did not ask for same. But they did not ask for these either. They probably knew that this is not the practice in Mauritius.

Public Bodies must however move forward with this kind of practice in this day and age when transparency and equity are the main ingredients in terms of good governance. The Tribunal has made many recommendations to enjoin Respondents to adopt a more open and modern approach in order to show that it has nothing to hide and give applicants a better chance to prepare the interview as obtains for example in Canada.

In this case Respondent has, as explained, decided to go further than usual in its sharing of information afterwards. But, letting candidates know the criteria on which they will be assessed could go a long way to alleviate some of their frustration.

A close examination of the assessment sheet shows the following: No points were allotted for qualifications since all candidates were qualified and were thus at par to start with. Additional relevant qualification did not have a great weight. Appellants Nos 1, 2 and 4 did have marks under this head. Some of the Co-Respondents were not even marked under this criterion. Appellant No. 4 had excellent marks for experience. Of course the markings vary for each candidate under each criterion. But it is the final marking, which is the total for each candidate, which counts.

It is also interesting to note that the difference between the last Co-Respondent on the list and the Appellants is less than 1 point. In fact there is **0.13 point** between the last appointee and the Appellant who had the best results among the four. Between the first and last candidate appointed there are more than 8 points of difference for 24 appointees. This is often what the Tribunal finds in similar exercises. There are so many vacancies and, even if

several candidates have all done well, a slight difference of marking under one criterion will make the difference.

Surely this can be perceived as being harsh and even unjust. But what better system can avoid this feeling?

Further, while looking closely at the mark sheets, it is obvious that the adviser can give his personal appreciation. But he cannot favour anyone as the other two members of the Panel, who are members of the Commission, also give their own balanced markings for each candidate. One can say that there is a system of checks and balances which operates. This transpires in an analysis of the marks given by each member and the final result.

Having dealt with the grounds of appeal on qualifications, assignment of duty included in experience and seniority, it is now important to say that merit is assessed globally and under the criterion aptitude. There were no other sub criteria to assess suitability. The other grounds raised cannot however be entertained. The method of assessment which has been questioned by the Appellants, more specifically the weight to be attached to any criterion, is not to be dealt with by the Tribunal as this is the absolute prerogative of the Respondent under Regulations 17 which provides that

“(1) 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.

(2) The Commission shall determine the forms to be used in connection with the discharge of its functions”.

As for the fact that Appellants also challenged the Scheme of Service itself, and more specially note 1, which opened the door to any AS who did not have a degree but had been in post for the relevant number of years, this also cannot be dealt with before the Tribunal which has no jurisdiction to deal with issues relating to Schemes of Service. Once a Scheme of Service has

been prescribed, it is binding. Any challenge should have been made beforehand when consultations were being held at the level of the relevant Ministry.

Concerning Co-Respondent No. 22 who suffers from a handicap, a lot has been said about him which the Tribunal considers unacceptable. Mauritius is a signatory of the Convention on the Rights of Persons with Disabilities. No one can debar any candidate from acceding to a post merely because he is physically disabled, unless the job applied for requires some specific physical ability. The moreso as now such form of discrimination is prohibited by the Equal Opportunities Commission Act 2008.

Regarding the prayers of the Appellants, it is important to refer parties to Section 8 (4) of the PBAT Act 2008 which lists the powers given to the Tribunal when determining an Appeal. The power to appoint is exclusively that of Respondent under Section 89 of the Constitution. The Tribunal does not have the power to make any recommendations to the Respondent regarding who should be appointed.

As regards the precedents submitted by Counsel for Appellant 2, none of them are relevant. One deals with a rule of the Land Acquisition Rules 1974. The other two relate to disciplinary proceedings. There was unfortunately no case law regarding appointment exercises nor on the issue of disclosure of confidential material to parties.

As for the rules from the White Book on Civil Procedure (2012 Volume I): Paragraph 39.1.2 and Paragraph 31.3.36, however interesting they may be, related to Courts and not to our type of Tribunal. Para 31.3.41 in fact relates to the power to hold closed proceedings, which issue was never raised in this case. But at any rate it underlines the fact that it is for parliament to give this power, which is the case for the Tribunal. It is the “confidentiality” of the whole procedure which is relevant for understanding the need to keep certain information confidential and available for the eyes of the Tribunal only.

The Tribunal having analysed the mark sheets has found no flagrant favoritism, unfairness, unreasonableness. However much it is understandable that officers of the calibre of the Appellants can have high expectations, it is impossible to intervene, the moreso as they have all obtained very good marks. Unfortunately at this stage they miss the little extra fraction of a point to be amongst the list of the 22 nominees.

The Appeals are set aside

S. Aumeeruddy-Cziffra (Mrs)
Chairperson

G. Wong So
Member

P. Balgobin-Bhojrul (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.