

- 1. The Respondent is fully entitled to appoint candidates from a merit list drawn after a selection exercise during a reasonable period between one or two years.**
- 2. Even if a case is pending before the Tribunal the respondent may appoint candidates at its risk and peril**

The Appellant lodged an appeal before this Tribunal contesting the decision of the Respondent to appoint the nine Co-Respondents, former PAPAE, to the post of DAPAE

These appointments followed a previous selection exercise whereby 14 other PAPAE were appointed DAPAE. The Appellant had appealed against that decision and the Tribunal has given a separatedetermination in that appeal. The 14 DAPAE were called in the second appeal but it became clear as the case was heard that they were not really concerned with the outcome of the second appeal. Their names do not appear in the list of Co-Respondents above.

Appellant's Case

The Appellant's main averment is that the appointment was made contrary to the prescribed Scheme of service without vacancy circular being issued. His main contention is that

- 1. Pursuant to the selection exercise carried out by the PSC, all the 14 vacancies were filled on the ... This exercise concluded that the... applicants not selected were found unfit for promotion. All the vacancies reported by the Responsible Officer were therefore filled and the recruitment exercise was completed. As at date none of the 14 promotees have refused the offer of appointment. So the merit list of the PSC cannot be used for new offer of appointment which is contrary to the prescribed scheme of service.*
- 2. It has been practice that any vacancy arising as and when in the DAPAE grade are filled by assigning the duties to the senior most PAPAE until sufficient number of vacancies are reported to the PSC by the Responsible Officer and subsequently, filled after selection exercise and carried out as prescribed in the Scheme of Service.*
- 3. According to the Head of ..., a recommendation was made to the PSC for assigning the duties of DAPAE to PAPAE on the basis of seniority. However, the PSC advised the Responsible Officer that the vacancies in the grade of DAPAE*

Pebe filled from the merit list submitted by the PSC following the last recruitment exercise. Who asked for a merit list? How was the merit list drawn? According to the PSC, only 14 vacancies were reported and all the vacancies were filled, implying that the exercise was over and the Responsible Officer requested for filling of vacancies through selection completed. Since 71 applicants out of the 85 were not selected, it means that they did not achieve the required standards. Moreover, being given that applicants ranked 63 on the seniority list were selected, so the next potential candidates found fit for promotion, if we stand guided by the PSC standard should be after the 63 ranked PAPAE.

- 4. More so, the first selection exercise is challenged and a litigation pending at the level of the PBAT. Yet, the PSC proceeded with the filling of existing vacancies from a merit list drawn from the selection exercise. The vacancies were filled on a PURELY TEMPORARY basis. Such an appellation is not legally in order as vacancies are either filled on a temporary or substantive basis and the second recruitment exercise was done contrary to what has been prescribed in the Scheme of Service.*
- 5. This is a contempt to the PBAT. No respect to institutions set by statutory provisions.*
- 6. I pray to her Ladyship to simply quash the decision of the PSC for not respecting the recommendation made by the Responsible Officer and for filling vacancies not reported nor the method of filling the vacancies expressed but the Responsible Officer”.*

Clearly he submitted that the Respondent was wrong to use the merit list for this appointment and should have resorted to a fresh selection exercise. He contended that this appointment exercise was not as per the prescribed Scheme of Service for the post of DPS. He could not understand why the post was filled on a “purely temporary capacity” as per the notification issued by the Head of...on ...

Respondent’s Case

The Respondent explained that there was a Circular dated ... for the filling of 14 vacancies in the grade of DAPAE. There were 85 applicants and 67 of them were found eligible and were called for interview. Fourteen of them were appointed on ...and they assumed duty on ...

The Responsible Officer (RO) reported five temporary vacancies on On ..., he reported two further vacancies in the grade. The RO recommended that these seven vacancies be filled by assignment ‘of the higher duties’. The Respondent did not agree to this recommendation and requested the RO to submit names for appointment in a purely temporary capacity, against the temporary vacancies on the understanding that such appointment would automatically cease in

the event that the temporary vacancy would lapse. On ..., the RO reiterated his recommendation for assignment of duties on the basis of seniority, which request was again turned down by Respondent. On..., the RO made a request to the Respondent to submit the names of nine candidates from the merit list for appointment as DAPAE in a purely temporary capacity with effect from their dates of assumption of duty and until further notice.

On..., the Respondent informed the RO that it had found the nine Co-Respondents suitable for appointment to the post and they were offered appointment on the ...

The Respondent averred that it was perfectly in order to resort to the merit list. In so doing, the Respondent denied that the selection exercise in any way found the remaining 71 candidates not initially appointed to be unfit for appointment as DAPAE.

The Respondent stated that, according to the Scheme of Service, the post of DAPAE was filled by selection and not by promotion. It was the practice for the Respondent to establish a merit list at a selection exercise and this could be used for subsequent appointments in the grade. Such a merit list was now valid for two years. Previously it was valid for two years, then it was brought to one year but the Respondent had brought it back to two years.

The Respondent further averred that the vacancies were temporary and the appointment of the Co-Respondents could only be on a purely temporary basis. The Respondent had refused to agree to the recommendation of the RO to fill the vacancies by allocating assignment of duties as, when he made the recommendation, there had just been a selection exercise and the candidates had been listed in order of merit. Assignment of duties on the basis of seniority would not reflect the merit list.

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

Determination

The Appellant has grounded his appeal on the following points:

- (1) The Respondent cannot use a merit list
- (2) The appointment was not as per the Scheme of Service
- (3) The Respondent did not follow the recommendation of the RO to fill the vacancies on assignment of duties based on seniority
- (4) There was a case pending before the PBAT and the new appointments constituted a contempt of the PBAT.

On the first ground the Appellant is wrong. It is the practice for the Respondent to establish a merit list whenever it carries out a selection exercise. The Respondent has sole control on the procedure for appointment as per its regulation 17(1) which says that "*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". The Appellant who is aPAPAE and who aspires to becomeDAPAE should have known this. In this particular case, the Respondent rightly decided not to accept the recommendation of the RO to fill the vacancies on assignment of duties on seniority basis precisely as a selection exercise had been done shortly before. The Tribunal, however, noted at the hearing that the validity of the merit list had been brought back to two years and the Tribunal was never informed about this. The Tribunal regrets that the Respondent, even though it is acting under Regulation 17 (1), does not act in total transparency on this kind of change in policy. This has an impact on the determination of appeals lodged. The Tribunal is entitled to see if the Respondent is acting reasonably even though it has a prerogative.

On the second ground, the Scheme of Service is clear that the post of DAPAE is filled by selection and this is what the Respondent did in calling for applications and carrying out an interview. The selection was done on the basis of the Scheme of Service at the time of application. This cannot be contested by the Appellant. In his first appeal the Appellant had not contested that it was done according to the prescribed Scheme of Service. The second ground of appeal falls.

As regards the third ground of appeal, the Appellant should know that the RO can only make recommendations to the Respondent. The final decision rests with the Respondent under powers given to it by the Constitution. The Respondent clearly explained why it turned down the recommendation of the RO.

As for the issue of contempt, it has been argued that in the first appeal there had been no motion to stay any new appointments. Be that as it may, the Respondent of course takes a risk by proceeding with new appointments. But at the same time, the administration cannot be paralysed while there is an appeal. In any case, there is no provision in the PBAT Act 2008 to stay proceedings.

The Tribunal finds that the appeal is devoid of merits.

The appeal is set aside.