

# **PUBLIC BODIES APPEAL TRIBUNAL**

**No. D/05 of 2017**

**In the matter of:-**

**Cadrivel MUNISAMY**

**Appellant**

**v/s**

**Public Service Commission**

**Respondent**

**and**

- 1. RAMSAHA Sheela**
- 2. RAMSOORoop Ramsowar**
- 3. AROOMOOGON Tevani**
- 4. GOKHool Marie Elix Priscilla**
- 5. GUNGAH Mala**
- 6. ROOJEE Bibi Rosida**
- 7. RUMJEET Sandya**
- 8. SAFEE Beebee Badroon**
- 9. OOJAGEER Koresha Bano**

**Co-Respondents**

## **Determination**

This appeal concerns appointment to the post of Assistant Manager Human Resources (AMHR). It raises the issues of the appropriate dates of appointment as well as issues concerning assignment of duty when an officer is abroad.

### **Appellant's version**

The Appellant is aggrieved that, pending his motion for leave to apply for a Judicial Review of the Determination dated 6th November 2013 of the Public Bodies Appeal Tribunal (PBAT) setting aside his appeal regarding his effective date of promotion, the vacancies in the grade of Assistant Manager, Human Resources have been filled. The said case is still being pending before the Supreme Court of Mauritius.

Moreover, he considered that the promotion of 9 Senior Human Resource Executives was in breach of regulations 14, 17, 22 of the Public Service Commission (PSC) Regulations, PSC Circular No.2 of 2006, section 3 of the PBAT Act and PSC Circular No.5 of 2005 (which Appellant corrected later as being 2008).

He also considered that the promotion of Co-Respondent No.4 to the post of Assistant Manager, Human Resources was not in order and in breach of PSC Circular No.5 of 2008.

The promotion of Co-Respondents Nos. 8 and 9 to the post of Assistant Manager, Human Resources was also not in order and is in breach of regulation 2 of the PSC Regulations as they are his juniors.

He considers himself as being better qualified than all the officers who have been promoted to the post of Assistant Manager, Human Resources.

The decision of the High Powered Committee (HPC) approving the recommendation made at paragraph 39.18 of the 2013 PRB Report to be effective as from 01 January 2016 was not brought to the attention of the staff who are affected by it.

On the day of hearing, Appellant confirmed that he was not insisting on paragraph 24 of his statement of case regarding the powers of the Respondent to determine its own procedures as per Regulation 17 of its Regulations.

Appellant stated not being aware that for the appointment to the post of AMHR, at least 4 years service in a substantive capacity in the grade of Senior Human Resource Officer ("SHRO") (restyled Senior Human Resource Executive), is required by the Scheme of Service. The PRB Report 2013 simply mentioned that appointment to the grade should be made among officers possessing a degree. Appellant was not however contesting the Scheme of Service.

Appellant did not agree with the proposition that he was promoted to the post of Senior Human Resource Executive ("SHRE") on the 9<sup>th</sup> February 2012 and stated having a case pending before the Supreme Court regarding the date of his appointment. He had not however moved the Supreme Court for any stay pending the outcome of the Supreme

Court case of judicial review. He also denied that, as at 12<sup>th</sup> January 2016, he did not have 4 years service in the grade.

Appellant disagreed that it was the operation of the provisions of Circular No 5 of 2008 which resulted in his promotion to the grade of SHRE on the 9<sup>th</sup> February 2012, being the date of assignment of duty. He further stated that nowhere in the circular was it mentioned that if somebody had not been assigned duty, seniority would be disturbed. Moreover, he stated that the Circular No 5 of 2008 did not deal with assignment of duty and that it did not affect the date of promotion or the seniority position.

The Appellant was questioned whether or not he agreed that the present promotion exercise to the post of AMHR was made at a time when the Circular No 5 of 2008 was effective and applicable. Appellant again stated that this Circular related to the filling of vacancy and not the effective date of promotion. Therefore, he stated that it was not applicable in this case.

He further maintained that PSC Circular No.5 of 2008 did not deal with 'reduction in rank or seniority'. This was a disciplinary action dealt with under regulation 41 of the PSC Regulations 1967 and disciplinary action had never been taken against him under the said regulation. Furthermore, he stated having never been informed in writing that his seniority position had been disturbed. Therefore, the PSC had no legal right to disturb his seniority position without giving him the opportunity for defence under regulation 41.

He also maintained that PSC Circular No.5 of 2008 had not been applied in the case of his senior or junior colleagues when promoting them to the grade of SHRE as their effective date of promotion neither reflected the date of vacancy nor the date of their assignment of duty nor the date of assumption of duty. The same officers had recently been promoted to the grade of AMHR on seniority basis except him and this is against the Scheme of Service for the post of AMHR.

Appellant referred the Tribunal to section 118(1) of the Constitution to the effect that "*the Commission may by regulations make provision for regulating and facilitating the performance of its function*" and section 118(4) of the Constitution which provides that "*in the exercise of its functions under the Constitution, no such Commission shall be subject*

*to the direction or control of any other person or authority.*” He also stated that although the PSC had been vested with such powers to make its own regulations, it was still subject to the influence of the PRB as it had implemented the recommendations of the PRB in its circular ‘PSC Circular No. 5 of 2008’ which, according to him, was unconstitutional.

The Appellant claims that in the PRB Report 2013, there was a recommendation at its paragraph 39.18 that promotion to the grade of AMHR be from the grade of Human Resource Officer/SHRO who possess a degree. The Appellant stated that this should have been implemented.

Referring to PSC Circular No 2 of 2016, Appellant did not agree with the proposition that it was to take effect as from 1 April 2016. According to him, all recommendations made in the PRB Report should have been effective as from the 1 January 2016. Appellant stated that the Government had approved that the implementation of the PRB be effective as from 1 January 2016 and maintained that the PSC could not review the decision of the Government, taken by the Cabinet.

He maintained that there has been a breach of PSC Circular No.2 of 2006, paragraph 18.10.7 of PRB Report 2008, paragraph 18.10.6 of PRB Report 2013, paragraph 18.10.1 of PRB Report 2016, Regulation 14(1)(c), Regulation 22(4)(b) of the PSC Regulations 1967.

He also stated that, in a letter dated 9 February 2012, he was informed that he had been assigned the duties of SHRE with effect from the same date and paragraph 2 of the letter clearly stated that *“this assignment of duty will not give you claim to permanent appointment.”* Furthermore, paragraph 18.10.01 of the PRB 2016 Report (Volume 1) clearly states that *“An acting appointment, however, does not give right to the officer concerned to claim promotion to the higher position”*.

The above *per se* implied that assignment of duty and acting appointment did not give the right to any public officer who had been assigned the higher duties/appointed to act in a higher office to claim for promotion to the higher position. Therefore, when he was assigned the higher duties of SHRE on 9 February 2012, he, being the most senior officer, should have been assigned such higher duties, vice the vacancy against which a junior

colleague was assigned duties. Subsequently, that officer should have been assigned the higher duties vice the next immediate vacancy which occurred, that is all his juniors should have been reassigned the next higher duties vice the remaining vacancies which occurred on a seniority basis. If the PSC Circular No.2 of 2006 had been applied correctly, the question of him losing his seniority should not have arisen.

Appellant did not agree that he proceeded to India on study leave with pay from 1 February 2011 to 28 January 2012. He stated that when he went to India he was never granted any leave but was required to go officially to follow a training course and was therefore on duty. However, upon his return, the Ministry stated that although he was not granted study leave, it should be considered as study leave. Appellant disagreed.

Appellant disagreed that it was correct to say that he resumed duty on the 30 January 2012, as his letter stated that he resumed duty on the 29<sup>th</sup> January 2012. However, the PSC maintained that he resumed duty on the 30<sup>th</sup>, the 29<sup>th</sup> being a Sunday in any case.

Appellant agreed that he was assigned duty of SHRO on the 9<sup>th</sup> February 2012. He however stated that this was only because he fought for the assignment. Prior to that, he stated that it was a junior who was assigned the duty and that he should have been assigned the duty on the 31 January, but was not.

He further agreed that he was aware that the post of AMHR was filled by promotion but maintained that there were no conditions relating to the four years service attached to it. He did not agree that even if he had the 4 years, he would not have been ranked high enough to be promoted. It was put to Appellant that he was ranked 14<sup>th</sup> on the seniority list at the time and that the promotion was given to the 9 most senior SHREs. However, Appellant disagreed and maintained that he was ranked higher on the seniority list in the grade of Human Resource Executive. Furthermore, he averred that only under Regulation 41 of the PSC Regulations 1967 could reduction in rank of seniority happen.

Appellant did not agree that the present promotion exercise was made in accordance with the prevailing Scheme of Service and that the Respondent acted in all

fairness in accordance with the powers given to it and in accordance with the PSC Regulations.

### **Respondent's version**

Respondent maintained the averments of the Statement of Defence dated the 26 April 2016. Before the Tribunal, the representative of Respondent explained that the PSC Circular No 5 of 2008 related to the effective date of promotion and it was said that it emanated from the recommendation of the PRB Report 2008 and should take effect as from the January 2009. However, she did not agree with the Appellant that there was no effective date of promotion mentioned. In fact, the effective date was the date of assumption of duty or the date of actingship/assignment of duties or the date of vacancy, whichever was the latest.

Secondly, it was explained that the Circular did not relate to seniority because it was all about the effective date of promotion. In the case of the Appellant, when applying the circular, the fact that he was not in Mauritius when assignment of duties was given meant that he lost his seniority and his juniors were assigned duties and promoted before him.

The Appellant resumed duty on the 30 January 2012 and was then assigned duty on the 9 February 2012. However, the representative of the Respondent was not aware of the circumstances in which this happened as this was done at the level of the Responsible Officer of the Ministry of Civil Service.

The Appellant was assigned duties in relation to a vacancy that existed at the time he was assigned such duties.

In relation to Co-Respondent No.4, who was on study leave from 1 February 2014 to 27 January 2015 and resumed duty on 27 February 2015, Respondent was asked whether or not she was given assignment on the same date. It was confirmed that Co-Respondent No.4 was assigned duties of SHRE as from 28 February 2015.

Respondent agreed that appointment to the grade of AMHR was still by promotion from officers in the lower grade of SHRE and who reckoned 4 years service. Therefore, she agreed that the Appellant's seniority position was disturbed when promoted to SHRE. She further explained that this was because at the time the Appellant resumed duty on the 30 January 2012, his juniors had already been assigned duties of SHRE when he was not in Mauritius. This promotion exercise was made in line with Circular No 5 of 2008 and that was how Appellant lost his seniority when he was promoted.

To the question of Appellant's averment that on the day when he assumed duty, the assignment of duties of his junior officers should have been terminated and he should have been assigned the vacancy, Respondent again stated that it was up to the Responsible Officer to decide how to implement assignment of duties. Furthermore, for any assignment of duties, the Circular No 2 of 2006 applied. This Circular stated that assignment should be made with regards to seniority except for administrative convenience, where the most senior was not available and therefore a junior could be assigned the duties. It was further added that it was quite difficult when somebody resumed duty to stop a junior's assignment, as the smooth running of the organisation would have to be considered. Administrative convenience will thus prevail.

Co-Respondent No.4 was offered assignment of duty while she was abroad on study leave from 1 February 2014 to 27 January 2015. However, the case was different to the Appellant's case as when she was abroad, the juniors who were assigned duties were qualified for promotion to the grade of AMHR, which did not impact upon the seniority placing of Co-Respondent No.4. Therefore, there was no disturbance in the seniority placing. While Co-Respondent No.4 was abroad, she came back to take up assignment of duties but then she left to continue her studies so she did not perform her duties of AMHR and the assignment lapsed. When she had completed her course and resumed in January 2015, she was assigned the duties of SHRO.

When asked about Regulation 41, Respondent stated that this Regulation deals with disciplinary proceedings and one of the punishments was reduction in rank of seniority. However, in the case of the Appellant and as a result of the application of

Circular 5 of 2008, there was a reshuffle of officers due to a circumstantial situation and not as a result of a disciplinary action, so this section did not apply.

When asked to explain the difference between the terms acting appointment and assignment of duty, Respondent explained that the term acting appointment would be used when somebody from the lower grade satisfied all the criteria laid down in the Scheme of Service for that post and when he was in the Cadre. Whereas, if an officer in the lower grade did not satisfy the criteria as laid down in the Scheme of Service to perform the duties of the higher post, then he would merely be assigned the duties of the post.

Mrs Reega, representative of the Ministry of Civil Service and Administrative Reforms (MCSAR) also deponed before the Tribunal. She explained that assignment of duty could be effected on any basis and depending upon the operational needs of an organisation, not necessarily when a vacancy arose. It might be the case that there could be a need for more people in order for the organisation to function.

She also explained that as per the letter dated 4<sup>th</sup> March 2015, no person was assigned duties against the vacancy to which Co-Respondent No.4 was assigned after her resumption of duty, but rather internal arrangements were made for smooth running of the office. Regarding the fact that juniors superseded Appellant, she stated that in view of the fact that Appellant was studying abroad in India during the period 1<sup>st</sup> February 2011 to 28<sup>th</sup> January 2012, he signed a bond and this was why no assignment of duties was offered to him. It was subsequently pointed out that during his period of leave, nine vacancies occurred at the level of SHRE and HREs senior to him and other HREs junior to him were assigned duties at the level of SHRE. Further to those assignments of duties, promotion was made in a substantive capacity and the HRE senior and junior to him were promoted as SHRE on different dates, while he was still abroad. Therefore, the stepping down of the juniors could not arise as they had already been appointed in a substantive capacity. Moreover, one more vacancy occurred on 1<sup>st</sup> February 2011 but it was not assigned to Appellant. Although the officers were assigned duties on the 21 February 2011, the vacancies were only filled on the 7 July 2011, as they were not fully qualified during the first period, so the substantive appointments were only



as from July when they became fully qualified. In the PRB provisions, assignment is possible although they are not fully qualified. To be fully qualified they would have to complete four years of service. Before completing four years of service they could be assigned duties but could only be appointed once they had completed the four years of service which was on the 7 July 2011.

With regards to the fact that Appellant was bonded, it was explained that Co-Respondent No.4 was also bonded when she was abroad. It was pointed out that, when she was abroad, she was not assigned duties as the PSC, in accordance with the PSC Circular 5 of 2008, did not approve her assignment either. Her assignment of duties was only approved when she came back to Mauritius in January 2015. She was assigned duties, but only for one day as she left to continue her studies and her assignment of duties lapsed. Therefore, she did not get any advantage at the end of the day.

When an officer was on long leave, he could not be offered assignment of duties. In the case of appointment, this was different. An offer could be made and it would be up to the officer to accept or not.

It was put to Mrs Reega that Appellant assumed duty on the 30<sup>th</sup> January 2012 and was assigned duties as from 9<sup>th</sup> February 2012. No promotion was made until October 2012 but this was backdated. The effective date of substantive appointment of the HREs who were senior and junior to the Appellant took effect before the resumption of duty of the Appellant. It was explained that the offer was made afterwards and was backdated because of the date of the assignment of duties of the Co-Respondents. The Responsible Officer did try to make a case to restore the seniority of the Appellant but the PSC maintained its position because of the PSC circular No.5 of 2008. Moreover, she explained that, at that particular moment, there was a Court case for the higher level manager before the Supreme Court so they could not appoint anyone in a substantive capacity at that moment, thus creating a delay in appointing officers in the lower grades. Once the case was cleared, they could then appoint at different levels and backdating from 2008. Since appointment could not be made from the top to the lower levels and the provisions of the circular could not be fully applied.

As regards Appellant's averment that the PRB Report 2013 regarding the requirement of a degree for the post of AMHR should have been implemented as from January 2013, the Respondent pointed out that there were not enough SHRO with a degree at that time and it was decided to sponsor SHRO to follow a degree course at the University of Mauritius. The matter was also referred to the High Powered Committee and it was decided that the requirement of a degree be implemented as from 1 January 2016. Thus the appointment being contested was made under the existing Scheme of Service where a degree was not required.

### **Determination**

Two elements have to be made clear from the outset. Firstly, that the Appellant had not asked for a stay of execution at the level of the Supreme Court in the judicial review case and therefore the PSC could proceed with the appointment of its officers, albeit at its own risk. Secondly, the Appellant is not challenging the scheme of service and he would not be allowed to do so in any case, as has been amply stated by this Tribunal in previous cases. The Tribunal does not have jurisdiction to deal with scheme of service.

Having established the above, the PSC was free to appoint according to the scheme of service. Appointment to the grade of AMHR is by promotion from the grade of officers in the lower grade of SHRE and who reckon 4 years service. Appellant's seniority position was disturbed when promoted to SHRE because at the time the Appellant resumed duty on the 30 January 2012, his juniors were already assigned duties of SHRE when he was not in Mauritius.

Moreover, the PSC Circular No 5 of 2008 which was clearly in force at the time of the appointment exercise, relates to the effective date of promotion. Given that the Appellant was abroad and not assigned duties, he was not appointed. We find no fault in this. For any assignment of duties, the Circular No 2 of 2006 applies and states that assignment should be made with regards to seniority except for administrative convenience, where the most senior is not available. The Appellant was abroad and we cannot intervene in the administrative discretion of the RO to keep the juniors on

assignment or not until the Appellant's return as it concerns the smooth running of the service.

Appellant's stand is that nowhere in the circular is it mentioned that if somebody has not been assigned duty, the seniority of the appointment will be disturbed. Further, the circular mentions 'filling of vacancy' and not 'effective date of promotion'. Moreover, this recommendation was reviewed and in the PRB Report 2013, instead of 'filling of vacancies' it has been written the 'effective date of promotion'. Therefore, the Circular No 5 of 2008 does not deal with assignment of duty according to him and it does not affect the date of promotion, or the seniority position. This is not correct. Circular No.5 of 2008 gives the effective date of promotion which includes as one of the alternatives the date of assignment of duty.

With regards to the fact that Appellant was bonded, we accept the explanations of the Respondent's witness that Co-Respondent No.4 was also bonded when she was abroad and she was not assigned duty as the PSC, in accordance with the PSC Circular 5 of 2008, did not approve her assignment either. Co-Respondent No.4's acting assignment of duty was only approved when she came back to Mauritius in January 2015.

The post of Assistant Manager Human Resource (AMHR) is filled:

*"By promotion ,on the basis of experience and merit, of officers in the grade of Senior Human Resource Officer (SHRO) who reckon at least four years' service in a substantive capacity in the grade and who-*

- (i) Have sound knowledge of human resource policies and practice in the public sector and the latest trends in human resource management;*
- (ii) Have good communication and interpersonal skills; and*
- (iii) Have the ability to work effectively as a team leader."*

It is clear from the Scheme of Service that any officer aspiring to the post must have at least four years in the post of SHRO, which the Appellant definitely did not have. He was appointed SHRO with effect from 9 February 2012 and the appointment of AMHR took effect on 16 January 2016.

The Appellant told the Tribunal that he was not aware that he had to have four years experience in order to be eligible for promotion. This is something difficult to believe. An officer cannot claim that he is not aware of the requirements for promotion to the next grade to which he is eligible. The Appellant alleged that the Respondent waited for Co-Respondent No 2 to complete his four years in the post of SHRO before filling the post of AMHR. This is a serious allegation but Appellant did not bring any evidence to prove this.

The Appellant contested the decision not to implement the PRB recommendation regarding the requirement of a degree for the post of AMHR as the PSC and the HPC cannot stop a decision of the PRB whose report has been approved by Cabinet. This stand is ill-founded. The Respondent gave the reason why it could not be implemented. The Appellant also cannot contend that a new Scheme of Service be prescribed before filling the vacancies as this caused him prejudice as he already had a degree. Posts are filled on the basis of the Scheme of Service at the material time. The Respondent cannot be said to have acted illegally.

The Appellant has questioned the way the effective date of appointment is made and referred to some specific Co-Respondents. The Appellant cannot put in question Respondent's Circular No.5 of 2008 which says 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...*". In the present case, the Appellant was overseas following a course. He could not have been assigned the duties as he was not in the country. His appointment started after he came back and was assigned duties with effect as from 9 February 2012. When he was appointed SHRO, it was as from this date. He raised the point that he came back on 29 December 2008 and could not understand why his assignment of duties did not start as from that date. The Respondent replied that the 29 December was a Sunday. He still felt that his assignment of duties could have started as from 30 December 2008 and not 9 February 2009. The representative of the Respondent stated that the decision was that of the Responsible Officer of the Ministry. However, the rest of his arguments regarding the exact date when he in fact assumed duty has no bearing on the core of the appeal. It is noted that PSC

Circular No.5 of 2008 was replaced by Circular No 2 of 2016 which says that as from 1 April 2016 “*all promotions in respect of vacancies occurring on or after 1 April should be as from date of assumption of duty*”. This does not apply to the present appeal.

The Appellant highlighted the case of Co-Respondent No 4 who, like himself, was on study leave overseas but was granted assignment of duties while she was overseas. The Respondent explained that Co-Respondent No 4 had returned to the country for one day and she was given the assignment of duties but she immediately went back for her studies and the assignment lapsed. It was brought to the attention of the Tribunal that the RO had made a case for Co-Respondent No. 4 to continue her assignment of duties but this was not agreed by the Respondent and rightly so. This same facility would have been extended to the Appellant. The Appellant cannot argue that he should have been offered assignment of duties while he was abroad and given him the chance to come back and accept the offer or to refuse. Assignment of duties is done for administrative convenience and to officers in post and who are available. It is not offered to those on leave and the Appellant’s claim is not reasonable.

Regarding the Appellant’s case before the Supreme Court which was still pending, the Appellant’s statement that Respondent should not have proceeded with further filling of vacancies in the post of AMHR before finalisation of the Supreme Court case, does not hold. The Respondent cannot be debarred of its power of appointment given under the Constitution. In any case, the workings of the public service cannot be brought to a halt because of a case before this Tribunal or a judicial review before the Supreme Court. In the case of Brunet v the PSC (1993 SCJ 330) Lallah SPJ refused to accede to an applicant who is seeking to achieve “*that a particular administration should come to a standstill for several years until the dispute is resolved and that the PSC should be prevented as from now from performing its undoubted constitutional functions.*”

Given the above reasons, the Tribunal finds that the appeal has no merit and it is therefore set aside.

**S. Aumeeruddy-Cziffra (Mrs)**  
Chairperson

**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. Since the case was withdrawn, the Determination of the Tribunal stands good.**