

Det 35 of 2018

The Tribunal cannot direct the Respondent to appoint anyone as Respondent has the sole prerogative to appoint public officers by virtue of section 89 of the Constitution

The Appellant a DHSS at the Ministry of ... is challenging the decision of the Respondent to appoint the Co-Respondent to the post of Head NESRC.

Appellant's case

The Appellant solemnly affirmed to the correctness of her Grounds of Appeal (GOA) which were as follows:

- (i) *“Higher educational qualifications*
- (ii) *More experience in performing such duties*
- (iii) *Greater number of years of service*
- (iv) *More senior/clean record of service*
- (v) *Acting as Head NESRC*
- (vi) *Wider knowledge of the job”*

She also solemnly affirmed to the correctness of her Statement of Case which was as follows:

Appellant joined the service on as CLK and thereafter was enlisted as TTR. She underwent a two years training at the Specialised Institute and was appointed TTR/STTR on.... She was posted in different places while also performing the duties of RTTR, EDS, Deputy TMH and AHRC and she became Deputy TMH.

Appellant challenged and contested the appointment of the Co-Respondent on the ground that the selection process was *“wrong, unfair, unreasonable, irrational and in breach of natural justice”*. She had a post graduate diploma in EMT and a degree in CIN whereas the Co-Respondent highest qualifications was a Diploma in NES.

Appellant averred that she had over 31 years of public service, of which 27 years in the sector. She had been working in the NES sector for 14 years. Her length of service, years of experience, competency and loyalty in the relevant sector had equipped her (i) in being versatile and adaptable to different work situations and conditions, (ii) in acquiring multi-disciplinary approach in addressing problems and motivate staff and (iii) in displaying different management skills and competencies, such as planning, organizational and leadership skills.

She held the post of Acting Head NESRC since ... and during her actingship she had never been subject to a single complaint or her integrity put at stake. She had, therefore, more working experience, knowhow qualifications, merit and competence to work as full-fledged Head NESRC than the Co-Respondent.

Appellant averred that the interview was carried out in an unfair and arbitrary manner. She was not asked questions relating to the profile, qualifications, skills, abilities, aptitudes incumbent upon a Head NESRC. She alleged that the Chairperson of the selection panel was sarcastic towards her during the interview, which was not raised in her GOA. There was no consistency in the interview as different candidates were treated differently during the interview process. On cross-examination, the Appellant conceded that she was not aware how the other candidates performed at the interview.

The Appellant further averred that any reasonable and sensitive person would have come to the conclusion that she was the most suitable candidate to be promoted to the post of Head NESRC on account of her qualifications, experience, merit, suitability, seniority and dedication.

She requested the Tribunal (i) to declare the decision of the Respondent null and void and (ii) to direct Respondent to appoint her to the post of Head NESRC.

Respondent's Case

The Respondent's representative solemnly affirmed as to the correctness of the Statement of Defence (SOD) and averred that according to the Scheme of Service the post of Head NESRC was filled "*by selection from among officers in the grade of Deputy*

Head in the specialised sector who reckoned at least two years' service in a substantive capacity in the grade and who-

- (i) Possess sound communication and interpersonal skills;*
- (ii) Have the ability to lead and motivate teams of officers; and*
- (iii) Have a sense of responsibility and integrity.”*

The vacancy for the post was advertised on ... among qualified officers of the Ministry. There were four candidates and three of them, including the Appellant, were found eligible and were convened for interview on.... Following the interview the Co-Respondent was found more suitable and was offered appointment.

The Respondent gave the qualifications of the Appellant as appeared in her application form when she applied for the post.

The Respondent denied that the Appellant had a post graduate in EMT as she averred. The mere fact that Appellant was awarded a diploma in EMT after having obtained a degree did not entitle her to claim that she possessed a post graduate in EMT which was higher level. There was nothing on record to show that the Appellant had been awarded a post graduate diploma. On cross-examination the Appellant did not rebut this.

The qualifications of the Co-Respondent were also listed.

The Respondent gave the career paths of both Appellant and Co-Respondent. Appellant and the Co-Respondent became TMH on ... but the Appellant was made to act as Temporary Head of NESRC Centres from ...to date.

The Respondent stated that the vacancy for the post had been advertised on However, there was a representation by the Appellant that only one officer was at that time eligible for the post and requested that the selection exercise be stayed until two other candidates, including the Appellant, could complete the two years service as required. The selection exercise was cancelled and the vacancy was advertised anew on....

The Respondent averred that the Appellant was 2nd on the seniority list of TMH and was assigned the duties of Head NESRC and the officer who was 1st on the list was assigned the duties of Head in the specialised field. The two officers had subsequently continued to be assigned the duties of the respective posts. The assignment of duties of Appellant lapsed on ...as the vacancy in the grade of Head NESRC was filled on.... The Co-Respondent did not have the opportunity to be assigned the duties of Head NESRC as there was only one vacancy in that grade.

Both Appellant and Co-Respondent did not have adverse reports against them.

The Respondent rebutted the allegations of the Appellant regarding the attitude of members of the selection panel and averred that same was based on perception and personal opinion. The Appellant did not make any representation regarding the interview exercise/attitude of panel members and even the questions set at the interview. It was only through the present appeal that Appellant was raising these issues.

The Respondent averred that all candidates had been treated fairly and impartially as they had been given the same and equal opportunity to be selected by going through the interview process. All procedures had been followed in accordance with regulation 16 of the PSC Regulations and the interview was carried out on the basis of the Scheme of service for the post and the criteria of selection determined by the Respondent to assess the suitability of candidates as per regulation 14(1)(c) and 19(6) of the PSC Regulations.

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

Co-Respondent's Case

The Co-Respondent made solemn affirmation as to the correctness of her Statement of Defence. She listed her qualifications and the schools where she worked. She has performed duties as TTR/STR, NESED, Deputy TMH/Officer in Charge, Acting Head and Head NESR. She has been appointed as Deputy Head in the specialised field since. She has been assigned the duty as TMH – Officer in Charge at a specialised

centre and as Acting Head at the relevant institution. She averred that she had shown that she had professional and leadership skills. She had communicative and interpersonal skills; and she had the ability to lead and motivate teams and showed full proof of accountability and integrity in the performance of her duties during her period in office. She had the necessary experience for appointment to the post. She denied that the number of years in service could be a criterion for appointment and averred that no academic degree is required for the post.

Determination

The Appellant made two prayers. The second prayer asking the Tribunal to direct the Respondent to appoint her to the post is set aside. The Tribunal has no jurisdiction to do so as the power to appoint public officers is vested with the Respondent as per Section 89 of the Constitution.

Grounds (iii) and (iv) are not valid as seniority as pointed out by the Respondent is not a determining factor in a selection exercise. This is clear under regulation 14 (c) of the PSC Regulations which sets “*qualifications, experience, merit and suitability for the office in question before seniority*”. Further both the Appellant and the Co-Respondent had no adverse reports against them.

As regards ground (v) the fact that the Appellant had been assigned the duties of Head NESRC will not give the Appellant an advantage in a selection process. Such assignment of duties was done for administrative convenience. It is apposite to quote the Supreme Court on the matter in the case of **S. Ramparsad V The Public Service Commission (2009 SCJ 189)** where it is said that “*Likewise, the assignment of duties as an administrative expediency and for short periods, does not confer any right on the applicant to claim permanent appointment; nor, we may add, any other advantage over other candidates*”. The Supreme Court repeated the same stand in **Mahesh Ramjeeawon V The Public Service Commission (2013 SCJ 194)**.

The Tribunal will, therefore, consider how the Appellant and the Co-Respondent performed on the other criteria of selection with respect to the remaining grounds of appeal.

For this the Tribunal had sought from the Respondent the criteria for selection, the weights of the criteria and the marks given.

According to information provided to the Tribunal the criteria for selection were:

- (i) Relevant Qualifications & Experience > 2 years
- (ii) Communication and Inter-personal Skills
- (iii) Managerial and Leadership Skills
- (iv) Duties & Responsibilities of the post
- (v) Pedagogical Strategies for relevant Centres; and
- (vi) Knowledge of Administration and Annual Development Plan of NES centres.

There was an external assessor who also gave marks to the candidates.

The performance of the Appellant on the grounds of appeal was as follows:

Ground (i) and (ii) Higher Educational Qualifications and more experience. The Appellant had a degree and more years of experience and she obtained more marks under the criterion Qualification. The claim of Appellant that she had a postgraduate diploma was not retained by the selection panel and the Appellant did not press on this point at the hearing. She also scored more marks on the ground of wider knowledge of the job.

However, the Co-Respondent was found by the selection panel to be slightly better than the Appellant as regards the other criteria which tipped the balance marginally in favour of the Co-Respondent.

This said, the Tribunal finds that there has not been any unfairness done to the Appellant.

The appeal is set aside.