

- The fact that there are different divisions in a department, if there is a post to be filled by promotion,
- The candidate who is senior in that division will be appointed.
- The Tribunal cannot deal with issues concerning Schemes of Service

This is an appeal of a SOR of the Ministry of..., hereafter referred to as the Ministry, challenging the appointment in a substantive capacity of Co-Respondent as Senior SOR for the NOPE on ...

Appellant's Case

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

- (i) Seniority-based exercise not respected.
 - The post of Senior SOR is a promotional post.
 - Seniority is therefore a determining factor as per Part A of the Scheme of Service and the post is open to all SORs irrespective of the divisions to which they are posted, on the basis of experience and merit.
- (ii) The Division of the NOPE no longer exists.
 - Co-Respondent has been appointed Senior SOR in the division of the NOPE.
 - As per PRB 2016 paragraph ... *"The... Services would compose of **only three relevant Divisions namely ...**"*
 - Thus, a new Scheme of Service for SOR in the Ministry of ...became effective as from.... She produced the said Scheme of Service.

- The duties of SOR in the former ten divisions have been integrated into three new divisions.
- Each specific grade in the public service can have only one prescribed Scheme of Service and therefore all previous Scheme of Service of SOR are null and void.
- As from the prescribed date of the new Scheme of Service of SOR are no longer Division Specific but have become a standard cadre.
- Part B of the Scheme of Service of Senior SOR has become redundant.
- The promotion of Co-Respondent is procedurally wrong and incorrect as the NOPE no longer exists.

The Appellant requested the Tribunal to quash the appointment and to instruct the Public Service Commission (PSC) to proceed with a fresh promotional exercise for non observation of Regulation 14(4) and 19(3)(b) of the PSC Regulation, failure to follow the guidelines of the Handbook for the Drafting of Scheme of Service and, since she is more senior than Co-Respondent, and the appointment is in violation of the rules of fairness and equity and is procedurally wrong and improper.

The Appellant also solemnly affirmed to the correctness of her Statement of Case (SOC) in which she expatiated on her GOA as follows: she holds the post of SOR since ... following a selection exercise.

The post of Senior SOR is a promotional post as per its prescribed Scheme of Service under Regulation 15 of the PSC Regulations. The requirements for the post of Senior SOR consist of two limbs as follows:

Qualifications:

A. By promotion, on the basis of experience and merit, of officers who hold a substantive appointment in the grade of SOR and who –

- (a) possess good interpersonal and communication skills;
- (b) have the ability to work in teams; and
- (c) have technical knowledge and skills in the respective fields.

B. Candidates should possess at least four years' service in their respective Division.

Appellant averred that

- (i) there should be one seniority list for all SORs irrespective of the divisions in which they were posted as per the Scheme of Service of SSO;
- (ii) the post is therefore open to all SORs on the basis of merit and experience;
- (iii) Part A of the Scheme of Service clearly sets out that overall seniority in the grade of SOR is the determining factor for promotion to the post; and
- (iv) at no time does the Scheme of Service make mention at all of seniority within divisions; and
- (v) there are only... posts of Senior SOR as per the budget of the Ministry and the Civil Establishment Order (CEO). For example, four Senior SORs were appointed in the three different divisions (despite the existence of a vacancy at that time).

She further averred that the existing posts on the budget to the Ministry, PRB reports and Civil Service Establishment Order are only SOR and Senior SOR (She produced copy of the Budget Estimates).

The post of SOR (CA Division) and Senior SOR (CA Division) and the post of SOR (NOPE) and Senior SOR (NOPE) have never existed on the budget of the Ministry of..., in PRB reports and even that of CEO.

This can be contrasted with posts specifically marked. For example, the posts of OAP and the post of OAP (SV) in the Ministry. **This specificity has clearly been marked** on the budget of the Ministry, in PRB Reports and the CEO.

Appellant also averred that she was more senior than Co-Respondent as she was promoted to SOR in...; Co-Respondent was not then selected but was promoted to SOR five years later.

She has all the qualifications prescribed by the Scheme of Service which the Respondent has misinterpreted as seniority is the ONLY criteria and division is not a determining factor.

She then averred as follows:

“Therefore the decision of the PSC is wrong inasmuch as:

(i) The PSC has failed to follow their own Regulations.

(ii) The PSC should have proceeded by first considering the seniority position of eligible SOR as per para A of the Scheme of Service and then should have decided, as per para B of the scheme of service, the division to which the posting of the senior-most SOR identified by carrying out the exercise at A is to be allocated and not the other way round”.

She concluded by reiterating her GOA and adding that, “*when reviewing or framing the scheme of service for a particular post, the schemes of service for the other posts in the same cadre/structure should be reviewed simultaneously as this may have a bearing on posts at higher levels in the structure*”.

*A Scheme of Service should **not** be amended or reviewed in isolation. When reviewing a Scheme of Service for a post in a cadre, it is necessary to consider whether the Schemes of Service for other posts in the same cadre should be reviewed simultaneously or not*”.

Appellant’s Counsel produced an innumerable list of documents, some of which were not relevant to the case.

Respondent’s Case

Respondent’s representative solemnly affirmed to the correctness of the Respondent’s Statement of Defence (SOD) in which Respondent raised Preliminary Objections as follows:

“(i) The Tribunal has no jurisdiction to deal with issues of Schemes of Service which is the sole responsibility of Ministries concerned.

“(ii) The Appellant has no locus standi to appeal against the decision of Respondent for the promotion exercise.”

These were not discussed “*in limine litis*” but reserved to be discussed during the Hearing.

On the merits, the Respondent averred that the Scheme of Service presented on ... provides for the post of Senior SOR to be filled by promotion on the basis of experience and merit of officers who hold a substantive appointment in the grade of SOR and who:

- (i) possess the skills, ability and technical knowledge as laid down in the Scheme of Service; and
- (ii) reckon at least four years' service as SOR in the NOPE.

The Responsible Officer (RO) of the Ministry reported one vacancy in the grade of Senior SOR for the NOPE and recommended that Co-Respondent, the most senior SOR for the NOPE and who reckoned more than four years' service as SOR in the NOPE be promoted. He certified that Co-Respondent was fully competent and suitable in all aspects for promotion to the post.

Respondent produced a memo dated ... to confirm that the CAD/CDD/NOPE among other Divisions still exist within the relevant services.

The promotion has been made in accordance with Section 89 of the Constitution and PSC Circular Note No.2 of 2016

Respondent averred that

- “(a) seniority list is established in respect of the respective unit/division as laid down in the Scheme of Service for the post of SOR;*
- (b) the post of Senior SOR is promotional on the basis of experience and merit from SOs in the respective unit where the vacancy of Senior SOR exists as laid down in the Scheme of Service of Senior SOR;*
- (c) Part A of the Scheme of Service should be read in complement to part B;*
- (d) vacancies in the grade of SSO are filled within the unit/division where they occur and is promotional from the senior-most SORs in that respective unit/division;*

- (e) the Estimates 2018/2019 reflect the funded position for the post of Senior SOR but the funded vacancies occur within a specific unit/division when the substantive holder either retired or promoted to a higher post or additional funded post is allocated for a specific unit/division;*
- (f) in addition, it is also stipulated at part B (vii) of the Scheme of Service of Senior SOR that SORs reckoning at least ... years' service as SOR in the field of IA or AGID or NOPE or other divisions are eligible for promotion as Senior SOR to the IA AGID Divisions;*
- (g) in this respect it is to be pointed out that SORs irrespective of the specialist division in which they have been appointed to serve, are eligible for promotion to the Agricultural Information and IA and AGID Divisions;*
- (h) there are Schemes of Service for the posts of SOR (prescribed on ...) and Senior SOR (prescribed 4 years earlier) and posts are established in CEO 2018.*
- (i) the posts of SOR and Senior SORs appear in the Estimates 2018/2019, PRB Reports and CEO. The Schemes of Service for two posts elaborate on the specific unit/vacancies and the qualifications requirements;*
- (j) the Estimates 2018/2019 reflect the funded position for the post of Senior SOR but the funded vacancies occur within a specific unit/division when the substantive holder either retires or promoted to a higher post or additional funded post is allocated for a specific unit/division; and*
- (k) the post of OAP (SV) is specific as it is a requirement for officers in the specific cadre to be appointed whereas the post OAP is not specific as vacancies in this post are filled by selection from officers in the grades of PSO and PAER”.*

Respondent averred that Appellant was appointed SOR of the CAD in ...and ranks 2nd in that Division and according to the present Scheme of Service for the post of Senior SOR, she is not eligible for promotion in the NOPE. Co-Respondent was appointed SOR in the NOPE where she ranks 1st and has never been adversely reported upon. Respondent produced an extract of the Departmental Staff List for SOR for period ...to ... and for ... up to date, to support the averments regarding seniority.

Respondent avers that the PRB has at paragraph ... in its ... Report, stated that the Ministry has apprised *inter alia* that “one of the major components of the reorganisation exercise consists in the transfer of all ... activities of the relevant Services to a specialised Institution whilst all commercial and ... activities would gradually phase out. Consequently, the AGS would compose of only three Divisions namely: CP, ANFT and LSK and VTN as well as three stand alone specialised units including an EC, AGI, PPDT Section; a NAIP Regulatory Office and a CAD Unit”. It is to be noted that the PRB has not made any specific recommendation, as such. These are considered to be administrative issues, to be dealt at the level of the Ministry”.

Respondent maintained that the promotion of Co-Respondent has been made in accordance with the Scheme of Service for the post of Senior SOR prescribed on ..., which has not been reviewed. Same was produced by Respondent and it concerns the post in the Ministry and not in the NOPE. Respondent also produced an Organisation Chart showing the various divisions at the time of filling the post in.... The promotion exercise of Senior SOR was for the NOPE and does not concern the Scheme of Service of SOR, and Appellant is not eligible for promotion to the post of Senior SOR for the NOPE.

The onus to amend a Scheme of Service rests with the RO of the Ministry.

Respondent therefore moved that the appeal be set aside.

Respondent produced the relevant documents.

Co-Respondent's Case

Co-Respondent solemnly affirmed to the correctness of her SOD in which she averred that she held ... years service in the Ministry and had worked mostly at the NOPE as OT and Senior OT since ---, SOR and Senior SOR since....

She was called upon to shoulder core activities. She had a clear knowledge of all the related work and procedures, the legislative framework and the operation of the NOPE.

She was appointed SOR in ... on the basis of merit and work experience through a selection exercise.

Since then she has worked in the NOPE only and has thus proven experience at the NOPE, where she was the most senior SOR.

Following the PRB Report..., the Ministry has reorganised the relevant Services into three main divisions but it did not repeal the existence of the NOPE or any other existing division. Prior to the PRB Report all the existing divisions were integrated in the three major divisions; the NOPE has been included in the CP division.

The Appellant is SOR in the CAD which has been included in the ANFTD and is not SOR in the CP Division and she was not the most senior SOR in the Ministry.

Co-Respondent averred that Appellant and herself occupied the same grade but not the same class and the promotion was in the CP Division and Appellant is still working at the CAD in the ANFTD.

The CAD and NOPE are two real entities under two different umbrellas. She referred to the organigram which was produced by Respondent and the staff list.

The Appellant does not have the relevant work experience at NOPE.

She concluded that Respondent has respected the law and procedure as well as the principles of fairness and equity and its decision was a reasonable one.

Submissions of Appellant's Counsel

Appellant's Counsel reiterated all her arguments already developed in the Appellant's GOA and SOC. She outlined that both Appellant and Co-Respondent were in the grade SOR governed by the Scheme of Service of SOR of....

She added that Respondent was misinterpreting the Scheme of Service of Senior SOR by applying Part B first which is wrong and goes against the rules of fairness as a junior officer who joined service in the same grade might become senior to others simply because he/she is posted in the division where the vacancy occurred. She reiterated that the Scheme of Service of SSO is not division specific and that the Representative of the Ministry who deposed before the Tribunal failed to show where the Scheme of Service said that the vacancy arose division wise but the latter confirmed that in the ... there used to be Scheme of Service for divisions where now there is only one Scheme of Service which has been amended to make it a standard Scheme of Service for

the divisions. The Representative of the Ministry also confirmed that SORs could move and are not confined to any specific division.

She maintained that the only seniority list that can be used is that of ...to ...which she annexed. She further submitted that both Appellant and Co-Respondent had signed the option form agreeing to the new organisational structure of only three divisions. No weight should be attached to the organigram and memorandum produced by Respondent.

Submission of Respondent's Counsel

Respondent's Counsel referred to the Scheme of Service of ... which consisted of two parts. The second part refers to a requirement of four years' service as SOR for each department. Appellant does not have four years' experience in the department of NOPE where the vacancy occurred.

He then maintained that the NOPE still exists and referred to the letter of ... from the Responsible Officer which was produced.

Finally, he referred to a previous Determination which concerned a previous appeal entered by Appellant on similar facts and which was set aside by the Tribunal.

Submission of Co-Respondent's Counsel

Counsel referred to the Scheme of Service of ...and explained that the duties refer to Division in the singular form which means that the Senior SOR will have to perform those duties pertaining to his/her relevant Division.

The Scheme of Service also uses the term "relevant field" (also in the singular form).

He submitted that Appellant not being the most Senior Senior SOR in the CAD, she was not eligible for promotion and therefore had no *locus standi*.

Counsel referred to Part II of the Act which has created the NOPE.

Determination

Despite the fact that it is the second time that Appellant has seized the Tribunal on the same issues of seniority, the Tribunal has given her the chance to fully present her appeal in case new elements could be taken into consideration. After delving in the very heavy documentary evidence presented in the light of the GOA, SOC of Appellant and SOD of Respondent and of Co-Respondent, the Tribunal concluded that there were mainly three issues before it: (i) The issue of seniority of Senior SOR;(ii) the fact that the vacancy occurred in the NOPE; and (iii) whether the NOPE still exists.

The following facts are agreed upon by all parties:

- (a)The post of SSO is a promotional post.
- (b)The Scheme of Service for the post dates back to
- (c)The Scheme of Service for the post of SOR became effective on
on
....
- (d)There are now three main divisions in the services concerned.

The Appellant's case is based on two main legs:

1. Seniority is not division specific.
2. Appellant is senior to Co-Respondent as she was promoted to SOR in ...and Co-Respondent in....

However, Respondent averred that the seniority list is established in respect of specific divisions and the vacancy occurred in the NOPE,

which still exists. The Scheme of Service of ...has not been reviewed and it is for the RO to initiate proceedings to amend any Scheme of Service.

Co-Respondent is clearly the most senior SO in the NOPE. The Act which set up the NOPE has not been repealed and Appellant never brought any evidence to show the contrary. The NOPE is in the CP Division.

In the previous Determination Appellant had argued the same points concerning seniority with regard to the Scheme of Service of ... and the appeal had been set aside as there had been no supersession as averred by her.

She did not bring any new element to support her averments concerning seniority which should not be determined division wise. As she did not challenge that Determination by way of Judicial Review, the Determination is still applicable and the Tribunal cannot now change its findings.

The Tribunal has no jurisdiction regarding Schemes of Service and can merely interpret the prescribed Scheme of Service of ... which is crystal clear. Appellant is not seniormost in the NOPE or the CP Division where clearly the vacancy occurred. Co-Respondent, on the contrary, was first on the seniority list of the NOPE and had the required experience in that Division and deserved to be appointed.

The problem in this appointment exercise lies on the fact that the Scheme of Service for the post of SOR was amended and prescribed on ...

Unfortunately, as the Appellant pointed out, there was no simultaneous amendments made to the Scheme of Service for Senior SOR and the one prescribed on ... was still in force. In this Scheme of

Service provisions for appointment of Senior SORs are still made division-wise. It is apposite to note that in the earlier determination of the Tribunal referred to above, the Unions insisted that appointments should be made at the levels of the individual Divisions. As the vacancy occurred at the NOPE following the promotion of a previous incumbent, the vacant post was the one to be filled.

Consequently, only the Co-Respondent was eligible for appointment as she had the required minimum ... years' experience in a substantive capacity at the NOPE. This is notwithstanding the fact that Appellant was senior to her in the overall staffing of the Ministry for having been promoted SOR in ... whereas Co-Respondent was promoted SOR in....

The prescribed Scheme of Service is sacrosanct. The reference to the post of OAP is not relevant as that post is filled by selection.

The appeal is set aside and the decision of the Respondent is confirmed under Section 8(4)(a) of the Public Bodies Appeal Tribunal Act 2008.