

Det 35 of 2019

- **An appeal to the Tribunal must be made within 21 days of notification of the decision of the Public Body.**
- **The Tribunal cannot direct the Respondent to appoint anyone as the Public Body has the sole prerogative in matters of appointment**

The Appellant is challenging the decision of the Respondent to appoint the Co-Respondent to the grade of Principal WOR in the local area.

Appellant's Case

Appellant averred in his Grounds of Appeal (GOA) that he should be considered senior most than the Co-Respondent in as much as he was appointed WOR on ... and completed his degree in ... whereas the Co-Respondent joined the service as WOR on ... and completed his degree two years later. He contended that despite being senior, the Co-Respondent was promoted to the post of Senior WOR in ... and that he was promoted as Senior WOR two years later. He also stated that he had once again been victimised as the Co-Respondent had now been appointed as Principal WOR.

In his Statement of Case, he expatiated on the GOA and reiterated the points in dispute which were as follows:

- (a) whether the Appellant should have been promoted to the post of Senior WOR prior to the promotion of Co-Respondent in ..., or otherwise
- (b) whether Appellant should have been promoted to the post of Principal WOR prior to the promotion of Co-Respondent in ..., or otherwise. SIC

He described his career path in the local area and averred that he had never been adversely reported upon. He averred that the decision of the Respondent to appoint the Co-Respondent to the post of Principal WOR was irrational, arbitrary, unreasonable in the Wednesbury sense, discriminatory, and against the principle of fairness as it added insult to injury by creating a second injustice against him. He added that the decision of the Respondent failed to take into consideration the facts that:

- a. A gross anomaly in the hierarchy of seniority had been created by the Respondent itself in..., by promoting the Co-Respondent instead of promoting him;
- b. Based on this gross anomaly, the Co-Respondent was being wrongfully considered as more senior than him by the Respondent;
- c. The decision of Respondent to once again promote the Co-Respondent instead of him was in fact based on this gross anomaly.

He moved that the Respondent recognises him as being more senior than Co-Respondent and that he be promoted as Principal WOR with effect from the..., i.e. at the same time as the Co-Respondent.

Respondent's Case

The Respondent submitted a Statement of Defence (SOD) in reply to the GOA and SOC of Appellant. Respondent averred that the first point in dispute as averred by Appellant was time barred. Respondent confirmed the career path of Appellant as well as for the Co-Respondent with the exception that Appellant joined service in ... and not

Respondent explained that the post of Principal WOR was filled according to the Scheme of Service for the said post which reads as follows:

“By promotion on the basis of experience and merit of Senior WOR reckoning at least two years’ in the grade and possessing the Diploma in WSK from a local institution or alternative qualifications acceptable to the Commission.”

Candidates should also:

- (a) Have good communication and interpersonal skills;*
- (b) Possess organization skill; and*
- (c) Be able to lead and manage a team of officers.*

Respondent further averred that since the Co-Respondent ranked 1st in the Seniority placing in the grade of Senior WOR, and he was found to satisfy all the other

requirements as per the Scheme of service for the post of Principal WOR, he was duly promoted to the post of Principal WOR in a temporary capacity as from ...

Respondent moved that the appeal be set aside.

Co-Respondent's Case

The Co-Respondent filed a SOD in which he raised a preliminary objection which read as follows:

1. *Ex-facie the averments of the Appellant's SOC, the Co-Respondent averred that the Appellant was debarred from challenging and/or appealing against the promotion of the Co-Respondent in ... in as much as he was outside the prescribed delay to do so.*
2. *Ex facie the averments of Appellant's SOC, the Co-Respondent averred that the Appellant was not appealing against a decision of the Commission pertaining to the Co-Respondent's appointment to the post of Principal WOR.*

On the merits, Co-Respondent reiterated the points raised in the preliminary objection and explained that he was ranked 1st among the Senior WORs and he was therefore entitled to be promoted to the post of Principal WOR before the Appellant. He confirmed that he was appointed as Senior WOR in ... whereas the Appellant was appointed Senior WOR two years later. He also confirmed his career path in the local area and maintained that his appointment as Principal WOR was in order and moved that the appeal be set aside.

Argument

The Tribunal requested parties to argue on the point of law raised by Co-Respondent.

Counsel for Co-Respondent argued that according to the SOC, Appellant could not challenge the appointment of Co-Respondent as Senior WOR which was made in ... as it was time barred. Furthermore, he added that according to the SOC, Appellant was not challenging the decision of Respondent in appointing the Co-Respondent as Principal WOR but instead appealing to the Tribunal for an award to declare him as more senior

to Co-Respondent and appoint him as Principal WOR with effect from the same date of appointment of Co-Respondent.

Counsel for Respondent supported the submission and stated that she concurred with the views of Counsel for Co-Respondent.

The Appellant was represented by a Trade Union Representative. The latter, in reply to Counsel for Co-Respondent, stated that the Appellant was never made aware of the appointment of Co-Respondent to the post of Senior WOR in ... as the Specialised Board did not exist at that time. He further added that, in fact, Appellant was challenging the appointment of Co-Respondent to the post of Principal WOR.

As Appellant was not represented by Counsel, and in all fairness to all parties, the Appellant was called upon to solemnly affirm as to the correctness of his GOA and SOC. He was given the opportunity to explain about his grievances. On being questioned by the Tribunal, he confirmed that the Co-Respondent was appointed Senior WOR in ... whereas he was appointed Senior WOR in He also admitted that, according to the Scheme of Service for the post of Principal WOR, it should be filled by promotion from the grade of Senior WOR.

However, he maintained that the Co-Respondent should not have been more senior to him.

The representative of the Respondent was also called upon to solemnly affirm to the correctness of its SOD, which he did.

The points in law were then considered to have been argued on the merits.

Determination

Having given due consideration to the arguments of Counsel for Co-Respondent and to those in reply of the Trade Union Representative assisting the Appellant, the Tribunal has determined as follows:

The Grounds of Appeal do not stand. Appellant cannot be allowed to refer to a selection exercise which took place in ... as he is time-barred to raise this now as per section 3(2) of the PBAT Act 2008 which clearly provides that

“An appeal shall be made –

- (a) within 21 days of the notification to the officer of the decision referred to in subsection (1), or within 21 days of such public notification of the decision as may have been made, whichever is the earlier; and...”*

The argument that Appellant was not aware of the said appointment because of the fact that the Specialised Board did not exist at that time is in any case erroneous because appointments are made by the Commission and not by the Specialised Board. The system of notification of appointments was also in place at that time, following the setting up of the Tribunal in 2009. Further, it is irrelevant for the purposes of determining this appeal as the Tribunal cannot pronounce itself on the merits of such a case which dates back to There was no need to seek any evidence on that argument of the Appellant.

Further, as rightly pointed out by Counsel for the Co-Respondent, Appellant is not contesting the appointment of Co-Respondent but praying the Tribunal to ask the Respondent to appoint him on the same date as Co-Respondent.

The whole case of Appellant rests on the issue of seniority. There are no other grounds contesting the appointment. Appellant fails to understand that he is no longer senior to Co-Respondent since the selection exercise of ... which he can no longer challenge now, whatever be the merits of his point regarding that exercise.

In any case the Tribunal has no power to direct Respondent to appoint him, since this is the sole prerogative of Respondent.

The Tribunal therefore sets aside the present appeal.