

**This appeal was based on the ground that the technical advisor sitting in the panel should have been the Head of the Cadre and not someone from the Administrative Cadre.**

These appeals concern 14 Appellants who are contesting the appointment of some officers to the post of ARCS of the then Ministry of ... referred to as the "Ministry".

The Public Service Commission (PSC) appointed 5 officers in three batches and the Appellants contested some of the appointments. In all there were 25 appeals before the Public Bodies Appeal Tribunal hereafter referred to as "the Tribunal". Some Appellants entered 2 or 3 appeals with the same or similar grounds of appeal. All the appeals were consolidated and the Tribunal is issuing only one determination as agreed by all parties.

In the meantime, Appellant No 13 informed the Tribunal that she was withdrawing her appeal. It was confirmed that she had been appointed just the day before the Confinement was announced. In the circumstances, the Tribunal has decided to disregard her appeal in this case

Appellant No 4, has just informed the Tribunal that he is withdrawing his appeals as he has just been appointed. Likewise, the Tribunal has decided to disregard his appeals.

The Tribunal has decided not to amend the heading of the consolidated Appeal in order to avoid confusion

### **Appellants' Case**

All Appellants solemnly affirmed or swore to their Grounds of Appeal (GOA) and Statements of Case (SOC) in all their appeals.

Many of the GOA were similar, but one main ground was repeated in most of the appeals. It was on the issue of the absence of a technical person on the interview panel.

The other grounds of Appellant No 1 were based on the fact that he had more experience than Co-Respondents appointed in different batches. He had more experience than Co-Respondent No 2 in the relevant Branch. He averred that he had more experience in the local office as SSOP and in the relevant Branch than Co-Respondent No 1. He submitted a document on his career path.

He also averred in his GOA in the second appeal that *“it is not the procedure to appoint an officer where there is litigation against other officers in the same batch of appointment”*. He further averred that *“a communal approach has been used in the process of appointment”*

Concerning Co-Respondent No 5, he averred in his GOA that *“the officer had remained in a state of redundancy with the closure of the ... Branch and ... Unit since...”*.

During cross examination on a question put to him concerning postings he denied that it was the RCS who had the discretion to decide on same. He averred that it was done on a rotation basis but agreed that it was the RCS who decided on the rotation. He maintained that there were offices which were considered superior and there were hot spots which required more work.

Concerning the adviser on the selection panel, he maintained that she was from the administrative cadre involved in policy matters and was not supervising those of the technical cadre. He agreed that there was no RCS at that time and a DRCS who was merely one grade higher than a DRCS, was assigned duty as RCS. But he maintained that this did not matter as long as the officer knew the issues.

Appellant No 2 averred that he was the most qualified officer as he had qualifications relevant to the job. He also averred that he had been sponsored by the Ministry to follow courses at the University of Mauritius. His second ground was that he had worked in various divisions of the Ministry and acquired skills, experience and job knowledge because of his 15 years as SSOP and 4 years as Acting ARCS. According to him, his explanation had not been taken into consideration in the selection exercise. He had never been under report.

He also averred that the Tribunal allowed an appeal from him concerning a previous selection exercise for the same post.

In his second appeal against Co-Respondent No 4, he questioned the fact that his interview had lasted only eight minutes. He further requested the Tribunal to seek the markings.

In his third appeal against Co-Respondent No 5, he also questioned the fact that a vacancy was being filled while a case was pending before the Supreme Court regarding his previous appeal to the Tribunal concerning the same post.

On being cross examined, he agreed that even if his interview time was short, he did not get the feeling that he was prejudiced. He averred that around five questions were put to him.

Appellant No 3 averred that the PSC had failed to apply properly provisions of Regulation 14(i)(a), 14(i)(b) and 14(i)(c) of the Public Service Commission Regulations 2010 and failed to give due consideration to his application in spite of his qualifications, experience, merit and suitability. He averred having gained experience for having worked in different sections of the Ministry. He listed his qualifications.

Appellant No 5, who only appealed against the appointment of Co-Respondent No 1, raised in his GOA the issue of the absence of technical officer on the interview panel as well as the short interview time.

He averred that “*some officers*” had better qualification and experience than those “*promoted*”. He averred that he had “*the necessary requirements, merits and seniority*” and had no adverse report.

He averred that two SSOPs and himself were proceeding on retirement by the end of ... and only one of them “*was promoted*” despite not being the senior most.

Appellant No 6 repeated in both his appeals more or less the same grounds, as Appellant No 5 also referring to “*officers*” and “*some participants*” rather than to himself. He averred having the necessary requirements and no adverse report whereas a junior officer with less experience as SSOP had been selected”.

Appellant No 7 again repeated the same points as Appellants Nos 5 and 6 in his GOA against Co-Respondent No.1.

Appellant No 8 also repeated the same GOA as Appellants Nos 5, 6 and 7.

Appellant No 9, who was the only Appellant represented by Counsel, averred in her GOA in her three appeals that the PSC had erred and “*failed to give due consideration to the experience, knowledge, skills, record of service and aptitude of Appellant for the post...*”. She questioned the procedure adopted and requested the Tribunal to seek the markings.

Her Counsel cross-examined the Respondent’s Representative and made a submission.

Appellant No 10 averred that the appointment was against Regulation No 14 (i)(b) of PSC Regulation and questioned the absence of a technical officer on the interview panel.

Appellant No 11 was absent and his appeal was struck out.

Appellant No 12 had only one ground of appeal and referred to the case of S. B. Sunnyasi v The PSC and Anor (2006 SCJ 124). In his SOC, he averred that an ex Deputy Permanent Secretary, who later served as a responsible officer of the Ministry, was the Chairman and main interviewer of the Selection Board. He averred that such an officer could not make recommendations for appointment since the officers were serving under his responsibility.

Appellant No 14 contested the appointment of Co-Respondent No 5 on the grounds that he was better qualified, had been sponsored by the Ministry for a full-time course for an MSc in Social Protection Financing as well as his good performance appraisal. In his SOC, he listed his qualifications and averred that he had 40 years of experience and had worked in rotation in nearly all the main sections as well as in hot spots and even in Rodrigues.

### **Co-Respondents’ Case**

Co-Respondent No 1 solemnly affirmed to the correctness of his Statement of Defence (SOD) in all the cases against him in a consolidated fashion, and in which he gave his career path. This included 41½ years of service at the Ministry. Prior to being promoted as SSOP in a substantive capacity on..., he had been assigned duties of SSOP with effect from ....

He annexed the details of his statement of service and of his qualifications. He completed an intensive one-year postgraduate degree programme “*Executive MSc in Social Protection Financing*” in May 2011. He completed the Post Graduate Executive Diploma Course G20 Capacity Building and E-Learning Platform for Social Protection in December 2013. He was ranked first among 26 foreign participants in Turin, Italy.

He detailed all his other postings and his part time employment as lecturer at the University of Mauritius on the related subject.

He contested the averments of Appellants regarding posting of officers and gave a list of his postings. He averred that, in his Performance Management System (PMS) Reports, his overall performance was graded as excellent.

Concerning the absence of the RCS on the selection board, he averred that that post is not listed in Part I of the First Schedule of the PSC Regulations and this despite the judgement of Sunnysi referred to by the Appellant.

He further averred that, at the material time, there was no appointed Commissioner and that, for the PMS, the Appraiser must be two grades above an Appraisee. He averred that the post of ARC “*departs substantially from the purely technical aspects of the job*”. He averred that one of the RCS on the selection board had served the Ministry as a responsible officer for years, and together with the SPD, they had the required knowledge. The issue of the RCS of the PSC having been a former responsible officer and can be perceived as close to one or more candidates seemed to be an afterthought.

Co-Respondent No. 5 gave a SOD in very much the same terms as those of Co-Respondent No 1. He also gave his statement of service. He also averred that the Circular Note did not mention that higher qualifications would be an advantage or be given priority. He averred that he held a Diploma in Social Work from the University of Mauritius. He concluded that it was based on his qualifications, experience, merit and suitability that he was offered appointment.

Co-Respondents Nos 2, 3 and 4 had declared that they were abiding by the decision of the Tribunal.

## **Respondent's Case**

The Representative of the Respondent solemnly affirmed to the correctness of the SOD of Respondent in all the appeals. Concerning the selection panel, Respondent averred that the panel was duly constituted as per Regulation 16 of the PSC Regulations and was made up of a Deputy Chairman, a RCS of the PSC and a SPD of the Ministry and that the latter was "*highly apt in assisting the Selection Board as he took into account the management, planning and policy skills as well as the role, responsibilities and duties of the post*".

Respondent further averred that the SPD "*through her working experience, is well conversant with the mission, vision and objectives of the Ministry ...*".

Respondent averred that the "*Appellants failed to make any representation regarding the composition of the selection panel during or after the interview*".

Respondent annexed the statement of service of all parties and further averred that the postings of officers are at the discretion of the RCS, the volume of work depends on each posting centre, each being an important branch. It averred that the statement of the Appellant No 1 on this issue is subjective and personal.

Respondent averred that out of 48 candidates who applied for the post, 30 including Appellants were found eligible and were convened for interview. It acted in conformity with Regulations 16, 17 and 19(6) of the PSC Regulations by considering the requirement of the Scheme of Service, the criterion of selection, performance at the interview as well as the suitability of the selected candidates.

Respondent moved that the appeals be dismissed.

The Representative of the Respondent deposed and explained that experience was not a criterion as the applicants would have already been assessed on experience for their previous posting as SSOP or OSSS.

The criteria of selection were then provided and were as follows:

- (i) ICT,
- (ii) Planning and leadership skills,
- (iii) Organising and supervisory skills,

- (iv) Knowledge of relevant legislation; and
- (v) Communication and interpersonal skills.

Regulation 17(1) of the PSC Regulations provides that

*“17. (1) 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 Tribunal has always recommended that the Commission exercises this power judiciously. With regard to the choice of the selection criteria for an interview, the Tribunal has repeatedly drawn the attention of the Commission on the need to respect Regulation 14(c). Knowledge of the job and experience should be clearly included in the list of criteria.

Concerning the choice of the SPD to sit on the panel, she explained that the PSC requested the Ministry to give the names of those who could sit on the panel as adviser. The name of the SPD came in priority and that of a DRCS was also given. The Respondent decided that the SPD was qualified to act as adviser on the panel whereas the DRCS would have been too close to the candidates. She added that the role of the SPD was to advise the panel on the duties of the post as described in the Scheme of Service.

Counsel for Appellant No 9 cross-examined the Representative of the PSC. She agreed that following the judgement of *S. B. Sunnysasi v The PSC and Anor* (2006 SCJ 124), selection exercises took place and each time the Commissioner of the Ministry sat as adviser of the selection panel. Concerning the then DRCS, who is presently the RCS, she agreed that now he will be able to sit as adviser. She explained that the Ministry did not give his name at all when the PSC sought names to make a choice.

She did not agree that the post was a technical one as was clear from the criteria of selection and the scheme of duties. She maintained that the SPD would know the relevant legislation as she would be answerable for implementation.

To the question of Appellant No 4, as to why the name of the senior most DRCS was not proposed, she could not answer as that was the choice of the Ministry.

A Representative from the Ministry then deposed and explained that the role of the DPS was to be responsible for policy implementation and she also had to oversee many sections including Social Aid. She said that the SPD would for example prepare material for Parliamentary questions and check everything that the lower cadre would give her. She maintained that officers who move from one Ministry to another just have to learn and adapt. In the case of the SPD, she had in fact worked as Assistant Responsible Officer of the Ministry earlier on. She explained that, even though the post of RCS was vacant and the DRCS was fully qualified, he was not promoted but was assigned duty and was paid three increments.

To several questions put on the fact that the post was technical, she could not reply clearly and agreed that the SPD is an intermediary working with the RCS.

### **Submissions of Counsel**

Counsel for the Respondent submitted that the main grievance in the case of Sunnyasi was that questions put to candidates were of a general nature and were not at all related to the technical aspect of the post applied for. In this case this ground was never raised.

Counsel for Appellant No 9 submitted that the Representative having agreed that the Scheme of Service also related to technical duties (duty 3), the SPD would not have been able to put questions on such a duty. He submitted that the explanation given by the Respondent for not proceeding with the choice of a DRCS who was assigned duty as RCS, is unacceptable as the incumbent was more apt than the SPD for sitting on the selection panel. The Judgement of S. B. Sunnyasi v The PSC and Anor (2006 SCJ 124) paved the way for all future selection exercises concerning this Ministry.

### **Determination**

Since many of the grounds of appeal are the same, we will address them together. This was a promotion exercise by selection and not an ordinary promotion exercise. This means that seniority is not an overriding criterion and the same applies to all references to length of service. Regulation 14(1)(c) of the PSC Regulations clearly states that:

14 (1) In exercising its powers of appointment and promotion, including, subject to paragraph (5), promotion by selection, the Commission shall

- (c) in the case of officers serving in the public service, take into account qualifications, experience, merit and suitability for the office in question before seniority.

Seniority is only relevant if some candidates are at par, which did not transpire on an analysis of the markings.

The second point is assignment of duty which does not give any candidate an advantage even though it could reveal that he may in an objective manner, have gathered a lot of experience and knowledge of the assigned duties. But the general rules are that assignment of duty is given to the most senior officer who accepts and it is done for administrative convenience.

The fact of having followed courses sponsored by the Ministry cannot be a ground of Appeal. Even though such training is meant to allow officers to acquire knowledge which could be important for promotion. By itself it cannot count in a selection exercise when candidates must demonstrate their knowledge and experience when questioned under each criterion of selection.

Concerning the ground that it is not proper to continue appointing when there was a pending litigation concerning a first batch of appointment, this is not a valid ground. The Respondent has the prerogative of appointment of public officers by virtue of section 89 of the Constitution. In such cases it does so at its risk and peril. The case of Brunet v. Public Service Commission 1993 SCJ 330 is clear on this issue in which late Judge Lallah explained that an applicant is seeking 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*” with which he did not agree.

The ground of Appellant No 2 that he had won an appeal previously before the Tribunal for the same post is not acceptable as this was against another party. In any case there has been a judicial review in that case and a judgement is awaited from the Supreme Court. The same principle as in the case of Brunet cited above applies.

As for Appellant No 1's ground concerning "a communal approach", he did not bring any evidence to that effect and that ground fails. The Tribunal however drew the attention of the PSC to the need to ensure that none of the several communities of this country is discriminated in any way whatsoever. Failing which this Tribunal will quash any appointment(s), proved to have been made on a "communal" basis.

The main ground is the one based on the composition of the selection panel as many Appellants have challenged the choice of the adviser who was a SPD and did not have technical knowledge to make a proper assessment of the candidates. They based themselves on the judgement of *S. B. Sunnyasi v The PSC and Anor* (2006 SCJ 124).

The Respondent's explanation for departing from that judgement, which they had respected for three subsequent selection exercises, is based on the fact that there was no RCS but a DRCS who was assigned duty as RCS. It was considered that he was not two grades above the candidates and was therefore not appropriate.

The Respondent produced the exchange of correspondence with the Ministry and it is clear that they requested the names of three officers in order of priority. The profile described was that of officers who have "wide knowledge and are familiar with the duties" of the post. Only two names were submitted. The first in order of priority was the name of the SPD followed by that of a DRCS. The former had a Bsc in economics and an Msc in Human Resource. The latter had a Bsc in social work. But the DRCS who was in fact assigned the duty of RCS was not on that list. It is apposite to note that when the incumbent is assigned the duties of RCS he performs all the duties and has all the powers of the post.

The Respondent chose the SPD whereas it could have chosen the DRCS even though the one who was assigned duty as RCS was not on the list provided.

Respondent had stated that one of the Commissioners of the PSC who sat on that selection board had also worked at the Ministry previously as a Responsible Officer and that he also had knowledge of the duties and responsibilities of the post. None of the Appellants questioned this. One Appellant tried to infer, without any proof, that he would have been too close to the candidates to be impartial.

The issue of two grades higher averred by Respondent is related to those who do assessment for the Performance Management System. It may not be an appropriate argument to uphold the choice of Respondent.

There is also the point raised by Co-Respondent No 1 that the post of RCS does not appear in part 1 of the First Schedule of Regulations of the PSC. That also has been addressed by the Judges of the Supreme Court in the case of S. B. Sunnyasi v The PSC and Anor (2006 SCJ 124).

The Judges commented on the fact that the post of RCS was not in the 1<sup>st</sup> Schedule of the PSC Regulations and found that the legislation was therefore inadequate.

Was it procedurally wrong not to have co-opted the Deputy Commissioner who was assigned the duties of RCS or at least the other DRCS? That is the question which will determine these Appeals.

In the case of S. B. Sunnyasi v The PSC and Anor (2006 SCJ 124) the Hon. Judges wrote that “*where a promotion is made by selection, the Commissioner should normally be the officer who serves on the selection board... for a selection exercise to be meaningful...the candidates should be tested on their work knowledge and skills by knowledgeable interviewers and not on a line of generalities as applicants claimed their interview to have been carried out*”. (Underlining ours)

Regulation 16 authorises the Respondent “*in exercising its power in connection with an appointment or a promotion to an office in the public service to:*

- a) consult with any other person or persons; and*
- b) seek the advice of a selection board constituted by the Commission who may appoint to it and other persons who are not Commissioners.”*

They added that the Respondent had to respect the existing statutory provisions while “*being mindful that proper and meaningful recommendations can only be made by knowledgeable and competent and responsible officers*”. They then found that the selection exercise was flawed and allowed the applications and invited the Respondent to conduct a new selection exercise.

The Judges also found that the responsible officer, who was then the adviser on the selection board, was the main interviewer. But the Court did not have the criteria or markings. The Judges could not tell whether he actually marked the candidates or how he in fact gave his advice.

The Tribunal had the advantage in this case of knowing the criteria of selection and of being able to peruse the mark sheets provided to it for the eyes of its Members only. Advisers are allowed to put questions and are given a percentage of the markings which may or may not upset the markings of the other RC of the PSC sitting on the interview panel. The Appellants never averred that the SPD was chairing the panel or that she put questions on generalities. But they based themselves on the Supreme Court Judgement of S. B. Sunnyasi v The PSC and Anor (2006 SCJ 124) and must be understood to refer to the main issue in that case i.e, that the adviser must be a “knowledgeable interviewer”. In this case the adviser must have technical knowledge and not be from an administrative cadre.

The Tribunal now knows that it was a Commissioner of the PSC who chaired the Board. He had previously served as a responsible officer at the Ministry and there is no evidence of him having been biased in his markings. A cursory look at the markings showed that some of the Appellants in fact obtained good markings from the members of the panel and a few of them are in fact very high on the merit list and can be appointed if there is a vacancy. This is why there were appointments in so many batches, including the last appointment of Appellant No 13 who has now withdrawn her appeal.

The SPD did not fundamentally upset the overall markings and she did give good marks to some Appellants. There was no apparent discrimination with regard to any Appellant but the issue of her being a “*knowledgeable interviewer*” remains.

All the other grounds having failed, the Tribunal must now decide whether the Judgement of S. B. Sunnyasi v The PSC and Anor (2006 SCJ 124) is binding on Respondent in toto. The present case is not on all fours with that previous judgement as explained earlier. To become OSSS and SSOP they had already been judged on their experience. Experience should be assessed at the time of selection exercise, not before. As regards the criteria of selection they were mainly judged by the Commissioners of the PSC on ICT, their planning and leadership skills, knowledge of

relevant legislation, communication, organising and supervisory skills and interpersonal skills. But the External Assessor had the responsibility of advising the panel on the more technical aspects of the post. If we adhere to the Supreme Court Judgement of S. B. Sunnyasi v The PSC and Anor (2006 SCJ 124), she would not have had the knowledge needed to do that and the interview was therefore flawed.

The Tribunal therefore quashes the decision of the Respondent under section 8(4)(b) of the Public Bodies Appeal Tribunal Act 2008 and remits the matter back to it, inviting it to conduct a new selection exercise with a properly constituted interview panel in the light of our findings and in line with the judgement of the Supreme Court in the case of S. B. Sunnyasi v The PSC and Anor (2006 SCJ 124).