

This appeal relates to supersession of an officer who possess an equivalent qualification or other than prescribed in the scheme of service. The Appellants were not given the opportunity in time to obtain the required qualification before the appointment was made. As a matter of principle, Appellants cannot lose their original seniority placing.

The three Appellants are challenging the decision of the Respondent for having appointed the Co-Respondent to the Post of PCO in the ... Department, hereafter referred to as the post.

Appellants' Case

Appellants each solemnly affirmed to their respective Grounds of Appeal (GOA) which were formulated in the same way as follows:

“(1) Appointment for the post of PCO being based on, and in order of, seniority from eligible ... Officers, the purported appointment of the Co-Respondent as PCO on ... should be set aside, quashed, reversed and/or otherwise dealt with by the Tribunal inasmuch as the Appellant

(a) was eligible for appointment as PCO as at ...;

(b) is senior to the Co-Respondent;

(2) As at the date of appointment of the Co-Respondent as PCO, the Appellant was eligible for appointment to the said post, but verily believes that she has not even been considered for appointment.

(3) The purported appointment of the Co-Respondent, being junior to the Appellant, in effect reverses the order of seniority and accordingly unfairly entitles him to prior consideration for future promotions, and this to the detriment of the Appellant.

- (4) *The Appellant had a legitimate expectation that, although she was not yet eligible for the post as at the date of vacancy (for having not yet completed the Diploma in ... due to reasons beyond her control),*
- (a) *the filling of any vacancy for the post of PCO would, as is customary in the department, await her completion of the Diploma in ... so as to ensure that her rank in the order of seniority is preserved, and/or*
 - (b) *appointment to the post of PCO would be effected based on seniority and eligibility as at the date of appointment, and not as at the date the vacancy arose, and/or*
 - (c) *since she was already eligible for the post as at the date of appointment, she ought to have been considered for appointment as PCO prior to the Co-Respondent being considered for appointment as such”.*

Preliminary objections in law

The Respondent raised a preliminary objection in law (POL) to which its representative solemnly affirmed as to its correctness and which reads as follows:

- “1. the post of PCO is one filled by promotion, on the basis of experience and merit, of officers in the grade of SCO who reckon at least three years’ service in a substantive capacity in the grade and who possess –*
- (i) *a Diploma in ... from a recognized institution or an equivalent qualification acceptable to the Public Service Commission; and*
 - (ii) *good organising and supervisory skills”.*

The Co-Respondent also filed a notice of Preliminary Objection in law to which he solemnly affirmed as to its correctness and which reads as follows:

- “1. The present appeals have no raison d’être and are devoid of any merit inasmuch as the Respondent exercised its prerogative pursuant to its regulations, as from the date that the vacancy occurred, to appoint the*

Co-Respondent, and at which point in time, the Co-Respondent was the only one who was eligible for the said post.

2. The post of PCO is one filled by promotion, on the basis of experience and merit, of officers in the grade of SCO who reckon at least three years' service in a substantive capacity in the grade and who possess:-

a. A Diploma in ... from a recognised institution or an equivalent qualification acceptable to the Public Service Commission; and

b. Good organising and supervisory skills.

3. As stated by the Respondent, the vacancy to fill the post of PCO occurred on ... and as at that date, the Appellants were not eligible for promotion inasmuch as they did not have the required qualifications stated in Paragraph 2(a) above.

4. The decision of the Respondent is therefore fully in line with the aforementioned scheme of service, and cannot be said to be in breach of the legitimate expectations of the Appellants (which legitimate expectations are in any case denied and could not have arisen in the circumstances). The regulatory and/or statutory powers of the Respondent cannot be overridden by any notion of legitimate expectation which the Appellants may have held (albeit wrongly and unjustifiably held).

5. The Tribunal cannot therefore interfere in the powers vested with the Respondent in its balancing and weighing exercise of the various relevant considerations when reaching its decision to appoint the Co-Respondent as PCO.

6. In light of the above, the Co-Respondent reiterates the present appeals have no raison d'être, are devoid of any merit whatsoever and ought to be set aside/dismitted".

Determination

It is to be noted that appointment to the post of PCO is made by promotion on the basis of experience and merit from Officers in the grade of SCO who reckon at least three years' service in a substantive capacity in the grade and who possess a Diploma in ... from a recognised institution or an equivalent qualification acceptable to the Respondent.

The Tribunal heard arguments on the preliminary objections in law. The Tribunal then issued a Ruling to the effect that the case should continue on the merits as there was not enough evidence to determine the appeals. The Appellants as well as the Respondent and the Co-Respondent were invited to submit their Statements of Case (SOC) and Statements of Defence (SOD) respectively.

The Tribunal looked closely at the GOA and the SOC of the three Appellants as well as the SOD of Respondent and Co-Respondent and the various documents attached.

It was the contention of the Appellants that they were qualified to be promoted as PCO before the date the Co-Respondent was appointed to the Post of PCO. In fact, the Appellants were following the course *Diploma in...* at the University of ... when the vacancy occurred on.... They passed the examination duly approved by the Senate of the University of ... on the ... prior to the appointment of Co-Respondent on the.... However, the Appellants obtained their award of *Diploma in ...*

Respondent pointed out in their SOD that Co-Respondent did not possess the *Diploma in ...* but is a holder of a Degree in ...which was found to be an equivalent acceptable qualification. The post of PCO is a promotional post from the grade of SCO. The Co-Respondent was junior to the Appellants on the seniority placing. The Responsible Officer (RO) recommended that ten SCOS, including the Appellants, be superseded so that the Co-Respondent could be promoted to the post of PCO in a substantive capacity as from the date of assumption of duty. The RO also recommended that SCOS ranking 1st to 10th on the seniority list be superseded as they did not hold the required qualification as per the Scheme of Service.

In its SOD Respondent however averred that Appellant No 3 had already been promoted to the post with effect from..., date of her assuming duty. It further averred that a recommendation had already been made by the Responsible Officer to the Respondent for the promotion of Appellants Nos 1 and 2 to the post.

The Respondent informed the Tribunal before the Hearing that the two other Appellants had indeed been appointed as PCO taking effect as from the date of their assumption of duty on....

The Tribunal concluded that there is no necessity to proceed with the hearing as there was no live issue anymore. Under these circumstances, the Tribunal finds no reason to interfere in this appointment process. However, it deplores the hastiness with which the appointment of the Co-Respondent was made, when the Respondent knew fully well that the Appellants had passed their examination at the time appointment was to be offered to the Co-Respondent. It is also true that the RO could not have brought its administration to a standstill and paralysed it by waiting for the award of the Diploma to the Appellants. The Respondent, which is solely responsible for any appointment exercise, should have informed the RO to proceed with assignment of duties to the senior most SCO, with payment of allowance at a reduced rate pending the award of the Diploma to them, instead of accepting blindly the recommendation of the Responsible Officer. We must make it clear that the Appellants could not be blamed for not having their qualifications in time as this course from the University of ... was funded by the ... Department and the officers of the relevant Cadre were selected to follow the course on the basis of seniority.

In such a type of situation, it has always been the fair practice to wait for the senior most officer to be qualified before any appointment is made in a substantive capacity and if there was an urgency to fill the post, to opt for an assignment of duties. The Tribunal cannot close its eyes on the disturbing situation caused to the seniority placing. The Co-Respondent, having been promoted prior to the Appellants is now senior to them in the grade of PCO and this would have a considerable impact for future promotion to the grade of CCO.

The Tribunal has come across a case where the Respondent had considered repairing the prejudice caused to the most senior officer who had been superseded by junior officers who lacked qualification at the time of appointment. The seniority list was restored in that case. The Tribunal is of the view that, in this case too, it is imperative to restore the seniority list and that the Co-Respondent should be placed after the Appellants in the seniority placing for the grade of PCO.

The Tribunal is therefore remitting this case to the Respondent under Section 8(4)(c) of the Public Bodies Appeal Tribunal Act 2008 to take remedial action as appropriate.