

It is the policy of the management not to proceed with promotion of an officer if the latter is on leave prior to retirement. However, if the Responsible Officer has informed the officer at the time of taking his leave prior to retirement, it is up to the officer to decide whether to wait for the promotion and forego his entitlement to leave or proceed for his retirement.

The Appellant is a FAMO at the Ministry of He is challenging the decision of the Respondent not to appoint him as FOM whereas colleagues who were his juniors were appointed.

Appellant's Case

The Appellant solemnly affirmed to the correctness of his Grounds of Appeal (GOA)

His GOA were;

- (1) *Being senior most in rank, but denied consideration for appointment*
- (2) *Assignments were carried out in an unprofessional manner*
- (3) *A material breach in contract. Agreed terms do not tally*

He expatiated on his GOA in an addendum to his GOA and at the hearing before the Tribunal.

Appellant averred the he was the most senior in the grade of FAMO and he was not appointed. The post of FOM was filled by promotion and, as he was on pre-retirement leave, he could have resumed duty as the conditions of his retirement had not been fulfilled and considered cancelled by him.

He was denied assignments of duty as FOM on several occasions while junior officers were given such assignment of duty. In ..., he was given assignment of duty for the period ... to ... when he was on approved leave of ... days starting.... There was a possibility of assignment of duty for the period ... to ... but he was not considered eligible as he had applied for pre-retirement leave. He cancelled his application for pre-retirement leave and he was requested to report to the Ministry of ... as FAMO, while a junior officer was assigned the duty of FOM. He refused the posting and instead he applied for his vacation leave to be taken before his pre-

retirement leave. In the meantime, his junior colleagues were given assignment of duty and they were appointed FOM on.... He was informed in a letter dated ... that he was not eligible for appointment as it was the policy not to promote officers on leave prior to retirement, when this is not mentioned in the Human Resource Management Manual or the Pay Research Bureau Report (PRB).

He further averred that there was a material breach in contract as the terms and conditions in his application for retirement did not tally with the approved letter of the Ministry dated.... He could not enjoy his vacation leave as a result of Covid 19 confinement and his vacation leave was forfeited with no refund. He was asking that the Ministry reconsider his letter of retirement and to allow him to resume work on

On cross -examination it was put to the Appellant that he wrote his application for retirement ... and Respondent replied inter alia in a letter dated ... that *“I am also directed to inform you that, in accordance with existing policy, an officer who is on leave prior to retirement is NOT eligible for promotion”*. Appellant agreed but maintained that there was nothing in the Human Resource Management Manual or the PRB report to that effect. Respondent stated that this policy had been established since around ... and was an established practice.

Appellant was told that he was going on pre-retirement before the age of 65 and he could have waited for the appointment which he did not. It was later that he wrote to say that he could resume work as from ... but this was after appointment had been made on....

Appellant stated that he was fit for duty and wished to be promoted as FOM before retirement.

Respondent’s Case

The representative of the Respondent solemnly affirmed to the correctness of its Statement of Defence (SOD) in which Respondent averred that following the application of Appellant dated ... for vacation leave prior retirement w.e.f. ... he was granted ... days leave in a letter dated....

According to the Scheme of Service for the post of FOM, appointment was made by promotion from the grade of FAMO who reckoned at least three years’ service in a substantive capacity.

On..., the Responsible Officer (RO) of the Ministry reported six vacancies in the post of FOM and recommended that these be filled. The RO also recommended the supersession of the Appellant, who was senior to the Co-Respondents as he was on leave prior to retirement as from.... The Respondent agreed to the supersession of Appellant and appointed the six Co-Respondents. The offer of appointment was made to the Co-Respondents on ... and they assumed duty on Respondent averred that in a letter dated ... Appellant was informed that an officer on pre-retirement leave was not eligible for appointment. Respondent also indicated that this policy was established since ... but there was no regulation or circular to that effect.

Respondent also stated that Appellant retired from service on ... and was no longer a public officer. As such Appellant had no *locus standi* to challenge the appointment by promotion to the post of FOM.

Respondent moved that the appeal be set aside.

Co-Respondents' Case

The Co-Respondents decided to abide by the decision of the Tribunal.

Determination

It is agreed that appointment to the post of FOM was by promotion as this is stipulated in the Scheme of Service. It is not disputed that Appellant was the most senior among the FAMOs and would have been appointed barring any adverse report were it not for the special circumstances, notably that Appellant had gone on leave prior to retirement.

The Tribunal will deal with grounds 2 and 3 first as it can be easily explained why both grounds should be set aside.

Under Ground 1 the Appellant had raised issues about the forfeiture of part of his vacation leave and that he was denied assignments of duties. These are issues which are beyond the ambit of this Tribunal. It needs to be pointed out that no assignments were due to Appellant being on leave at the material time. In any case the fact that the junior officers were assigned the duties of FOM would have no impact on the appointment exercise. Further, the appointments were not backdated to the date they started their assignment of duties as was the case previously. PSC Circular No 2 of 2016 was clear that appointments invariably take effect as from the date of assumption of duty.

Under Ground 3 it is the contention of Appellant that the terms and conditions as indicated in his application for retirement dated ... with the agreed details do not tally with the approved Ministry's retirement letter dated Appellant was called upon to explain to the Tribunal how a breach of agreement occurred between the two letters produced by him. He was unable to do so. Hence this ground of appeal also fails.

The only issue which remains concerns Ground 1 relating to the policy that no officer on leave prior to retirement is eligible to promotion. Respondent conceded that there was no regulation or circular to that effect but it was an established practice which dates as far back as.... This was done for the efficiency of the service. The Appellant harped on this but it was pointed out that when he applied for leave on ..., the RO had drawn his attention on the matter in a letter dated He did not challenge the decision of the Respondent there and then.

The Tribunal considers, that it is fair that all public officers be made aware of this policy by way of an official communication.

It is a fact, however, that one vacancy for the post of FOM occurred on ... and had the RO acted immediately Appellant could have been given this promotion even if it would have been at the end of long service. This would have impacted on his lump sum and pension benefits.

Respondent stated that there is a procedure to follow to fill a vacancy and this had been hampered by the Covid19 confinement and the decision to freeze appointments. It was only after funds were released that those appointments could be made. In the meantime, the Appellant had applied for retirement and, when he refused a posting at the public body, he applied for vacation leave prior to pre-retirement leave, knowing that this would affect his chance for promotion.

This is an unfortunate case. The Tribunal cannot intervene as the decision to fill vacant posts rests with the RO and the policy not to appoint officers on leave prior to retirement dealt the final nail.

It is noted that the Appellant who was a Public Officer when he lodged his appeal, has finally confirmed that he had already retired and even received his lump sum.

In the circumstances the appeal is set aside.