

**Criterion “Experience” should normally carry higher as it is one of the three core criteria as per Regulation 14.**

The Appellant, a PRA at the NATO, is challenging the decision of the Respondent to appoint the Co-Respondents to the post of ASDA.

The post of ASDA is filled as per the Scheme of Service (SOS) prescribed.

### **Appellant’s Case**

The Appellant solemnly affirmed to the correctness of her Grounds of Appeal (GOA) and her Statement of Case (SOC).

The GOA of Appellant were:

- (1) *“The decision of the PSC (Public Service Commission) in not selecting me for the post of ASDA is unfair and not in order;*
- (2) *The PSC made abuse of its powers in selecting the two officers as I have all the necessary qualifications, more experience and merit. Therefore, I am most suitable for the post than the two officers mentioned here;*
- (3) *I hold the qualifications required for the post of ASDA as specified in the Scheme of Duties;*
- (4) *In terms of seniority, I am the most senior officer to be considered for the post of ASDA. Being most senior I have acquired more experience than the two candidates who were appointed following recommendations of the PSC;*
- (5) *I have been given assignment of duties as ASDA since May 2017 whereas Mrs. ... was given assignment for the same post as from October 2017 and Mr ... was **never** given such assignment. Hence my exposure to the job has given much more experience and knowledge to assume the responsibility of the post mentioned above”; and*
- (6) *I would like to know my markings allocated during the interview”. (SIC)*

In her SOC Appellant gave her career path from the time she joined the service as an officer in ... until her appointment as PRA in.... She pointed out that she was allocated the duties of ASDA in ... and was officially assigned the duties of ASDA for the period ...to.... The Appellant was surprised and disappointed when the post of ASDA was filled on ... and the Co-Respondents were appointed and she was not.

Appellant averred that she was qualified for the post of ASDA as she was a registered PRA and possessed the skills required in the SOS.

She reckoned more time spent on assignment of duties as ASDA than Co-Respondent No 1. She was called upon to perform the duties of ASDA since ... and was in charge of a Division. She was assigned the duties of ASDA in ... and the assignment was renewed continually until.... She never had any adverse report.

Co-Respondent No 1 was assigned the duties of ASDA at a later date while Co-Respondent No 2 was never assigned the duties of ASDA.

She performed her duties in a professional manner. These include all assignments in her portfolio whereas Co-Respondent No 1 completed only 87.5% of hers.

She repeated that she was in charge of a Division and was authorised to sign management letters and other correspondence as from ... and was also responsible for finalising audit reports.

She was appraised favourably and was executing the higher responsibility as a Head of Division while she was assigned the duties of ASDA. Her scores in her Performance Appraisal Form (PAF) were over 3 for the three consecutive periods. Her assignment of duties was continually renewed by Respondent on the recommendation of the relevant authority. She was attending management meetings as ASDA and implementing strategies decided by management. She was also handling staff matters.

Appellant averred that Co Respondent No 1 was given the responsibility to hold a Division from ... to .... However, she was working under the supervision of another Head of Division. Even after her appointment Co-Respondent No 1 was overseen by another Head of Division.

Co-respondent No 2 had not at any time performed the duties of ASDA. As PRA he was only a Team Leader working under the supervision of a Head of Division. Hence, he was not empowered to sign any management and other letters. He did not participate in drafting reports or reference sheets. Co-Respondent No 2 did not attend management meetings.

Appellant felt that she had all the merits for the post and she should have been appointed in lieu of the Co-Respondents. She moved that the appointment of Co-Respondents to the post of ASDA be quashed so that a new exercise be carried out.

On cross-examination, Appellant agreed that seniority was not an overriding factor but it brought her experience and, as most senior among the PRAs, she was assigned the duties of ASDA. When it was put to her that the SOS required other skills in addition to experience she replied that as she was assigned the duties of ASDA since ..., she acquired these skills. She agreed that in the letters given to her while she was assigned the duties of ASDA it was said that such assignment of duties would not give her any claim for permanent appointment to the post.

She agreed that Co-Respondent No. 2 had done both Regulatory and Performance Assignments. She had not done Performance Assignments as she was not given the opportunity as this was a management decision. If she had been asked to be trained in order to do so she would have accepted.

Appellant agreed that Co-Respondent No. 2 could have done some of the duties of ASDA but he was doing it at a lower level and he was doing it as a Team Leader of a Unit under the supervision of a Head of Division. Appellant also stated that the score obtained by the Co-Respondent in his PAF referred to work as PRA and not as ASDA.

She also agreed that Co-Respondent No 2 was drafting specific reports and Reference Reports but under the supervision of a Head of Division.

On the question of supervision of the Co-Respondents after their appointment as ASDA by a Head of Division, it was brought to the attention of Appellant that the Head of Division was also acting as Deputy Director of NATO. She replied that when someone

was appointed to a post that person should be able to work on his/her own and not be overseen by another officer. She averred that when she was assigned the duties of ASDA she was reporting directly to the DRA as was the case for all ASDAs.

The fact that the DRA had to oversee the work of the Co-Respondents was a management decision. She agreed that, according to that decision, even she had to be under the supervision of a Head of Division. She was asked to perform the duties of ASDA in ... but it was only in ... that she was officially assigned the duties of ASDA and the assignment was renewed continually on the recommendation of the NATO for two and a half years.

### **Respondent's Case**

The representative of the Respondent solemnly affirmed to the correctness of Respondent's Statement of Defence (SOD).

Respondent gave the career path of the Appellant, and her appointment to the post of PRA on ....

Respondent averred that the post of ASDA was filled by selection as per the SOS. There were ... candidates who applied for the filling of two vacancies, following an advertisement on.... Six of the applicants, including Appellant, were found eligible and were called for an interview. The two Co-Respondents were found more suitable at an interview on ... and were appointed. Appellant was not appointed.

All candidates who were called for interview, including Appellant and Co-Respondents were qualified for the post in accordance with the SOS. All relevant information as disclosed in their application forms were taken into consideration.

Respondent averred that assignment of duties were made on the ground of administrative convenience and did not give rise to a claim for permanent appointment in the higher post. Respondent gave particulars of assignment of duties for Appellant and Co-Respondent No 1. Co-Respondent No 2 was not assigned the duties of ASDA as he was not the most senior PRA.

Appellant was assigned the duties of ASDA on ground of administrative convenience from ... to ... under delegated powers and she continued to be assigned the duties from ... to ... and from ... to ... with Respondent's approval. Appellant was informed that such assignment of duties would not give her any claim for appointment in the higher grade.

Both Appellant and Co-Respondent No 1 were favourably reported upon during the period they were assigned the duties of ASDA.

Respondent averred that all officers of the NATO were expected to fulfil their duties in a professional manner and they did so. The completion of an assignment did not depend solely on the officer. It depended on other factors such as the time taken to respond to management letters and other information that might be required.

Additionally, it depended on whether examination of statements for prior years had been completed. Respondent could not react to the percentages of work by Appellant as there was no indication as to which date they related. Reports were finalized and signed by the DRA.

Both Appellant and the Co-Respondents were favourably reported upon their performance. They were rated good/excellent and were qualified for promotion. But Appellant was appraised as ASDA while Co-Respondent No 2 was only appraised as PA.

Respondent stated that, from information provided by the NATO, Appellant was responsible to manage a Division at the NATO.

Respondent also stated that the Head of Division to whom the Co-Respondents were reporting was acting as Deputy Director. The latter had been assigned the responsibility to oversee two Divisions (including one headed by Co-Respondent No 1) and two Units (including one headed by Appellant) in the context of the next annual report and that this was a temporary measure.

Co-Respondent No 2 was responsible to supervise the work of the Performance Unit, which is equivalent to a Division and he also reviewed performance reports worked out by the performance audit staff for onward transmission to the DPTR.

Management meetings were held with Heads of Divisions. As such Co-Respondent No. 2 was not required to attend such meetings prior to his appointment. However, he did attend technical meetings regarding performance audits chaired by the Director.

Respondent concluded by saying that appointment was made from among candidates as per the SOS and regulations 14 and 17(2) of the PSC Regulations. Also, Respondent was guided by regulation 19(6) to determine the suitability of candidates. It acted in all fairness and in conformity with powers vested upon it by section 89 of the Constitution and the provisions of the PSC Regulations.

Respondent reiterated that assignment of duties was done on the ground of administrative convenience and did not give rise to a claim for permanent appointment to the higher post. Further experience was not the sole criterion in a selection exercise. Nor was seniority an overriding criterion in a selection exercise in accordance with regulation 14(1)(c) of the PSC Regulations.

Respondent moved that the appeal be set aside.

At the Hearing before the Tribunal, it was put to the representative of Respondent that seniority was not a determining factor but that seniority would give experience. It was also put to the representative that assignment of duties would not give any claim for appointment but such assignment of duties would give the incumbent experience. She was not able to confirm as regards to seniority but said that it would depend on the nature of work that the officer had done or was given to do. As regards assignment of duties, she agreed that Appellant may have gained experience.

The representative of the NATO deponed. She was an ASDA but she was acting as Deputy Director of NATO. She agreed that when somebody is assigned the duties of a higher post that person would gain experience. She also explained that Appellant had gained full marks as she completed the accounts given to her but Co-Respondent No 1 only got less marks as she did not complete all.

She also agreed that Appellant performed the duties of ASDA for three and a half years but only two and a half years was on official assignment as was shown in Respondent's SOD. Appellant also had one and a half years more as assignment of duties as ASDA than Co-Respondent No1.

She also gave clarifications on the issue of the work of the two newly appointed ASDA's being overseen by a DPTR. This was an arrangement that was agreed at a management meeting that one of the DPTR s would oversee the two newly appointed ASDA's and two other units. One of the units was headed by Appellant and the other one by one Mr ....

She did not agree that someone who had done Performance and Regulatory Assignments would be more equipped to assume higher responsibilities; it would depend on what was expected from the officer.

### **Co-Respondents' case**

The Co-Respondents had been explained in writing what they could do to defend themselves and the implications of abiding by the decision of the Tribunal.

Co-Respondent No 1, after having been once more told that she was risking her appointment, reiterated her decision to abide by the decision of the Tribunal and she did not attend the two hearing sessions.

Co-Respondent No. 2 decided to defend his case with the assistance of Counsel and submitted a SOD.

He solemnly affirmed to the correctness of his SOD in which he averred that he was appointed PRA on 04 January 2011.

He questioned Ground (1) in Appellant's appeal and said that the decision not to appoint the Appellant was neither unfair nor not in order. Respondent had not made any abuse of power as Appellant was neither more experienced nor more meritorious. Appellant was not more suitable than Co-Respondent No 2. He stated that the post was filled by selection and the interview was a crucial part of the selection exercise.

Regarding the ground relating to experience he explained about the two types of assignments and said that he did both while Appellant was only doing Regulatory Assignments and had no experience in Performance Assignments. He also participated in drafting specific reports and reference sheets.

He said that Appellant was assigned the duties of ASDA but the tasks performed by her were limitative and as such the experience gathered was limited.

He averred that even though he was not assigned the duties of ASDA he was performing some of the duties falling under the duties of ASDA. He gave a list of the work that he did in support of his averment. He mentioned:

- “A            *Co-Respondent No 2 has been assisting the DPTR with respect to special assignments ...*
- B            (i)    *planned, supervised & monitored performance audit assignments;*
- (ii)    *performed quality control (one of the SPECIFIC report received the best prize in ... region bearing the testimony of the high quality standard of report produced); [See Annex A]*
- (i)    *was instructed to and did customize the Manual which was approved in June 2017;*
- (ii)    *was instructed to develop and implement several training programmes on the related field for new comers at NATO. At international level he facilitated training programmes/workshops on Performance ... for the participants from several Supreme ... Institutions in the ... region;*
- (iii)    *was instructed to represent the NATO in proving his contribution to produce a guideline for ... on “Guideline on Sustainable SAIs: Leading by Example and contributing to SDGs and Agenda 2063” (see page 32 of Guideline) The Appellant has not contributed to any guideline;*
- (iv)    *also participated in a development workshop on “Advanced Systems on Performance A... – Performance ... Flow software” at ... in..., with the objective to automate Performance Audit processes at NATO (page 29 of annual report on performance 2019) The Appellant has not participated in any development workshop;*



(v) *maintained professional standards as required by auditing standards and guidelines while performing the duties.*

C. (i) *contributed in printing and assisting the NATO in the binding of specific Reports;*

*(ii) collaborated in the organisation of workshops/trainings”.*

He averred that he had a higher score than the Appellant in their respective Performance Appraisal Forms. He supervised the team that produced a Performance Report that won the prize for Best Report ... within the Organisation for English speaking ...Institutions. Appellant nor any team supervised by her has ever achieved such a performance.

He agreed that Appellant held the required qualifications for the post but pointed out that this was a selection exercise. In a selection exercise seniority would come after qualifications, experience and merit.

He further stated that, even if Appellant had worked for more years as PRA than him, the experience of Appellant was limited as compared to him. He disputed the fact that Appellant had acquired more experience as she was assigned the duties of ASDA.

At the Hearing, Co-Respondent No. 2 said that he had to follow a training before he took over the Performance Audit work at the NATO. He had responded to an invitation to follow such a course and is now training new officers of the NATO on Performance ... Work.

### **Determination**

The Tribunal will address the GOA *seriatim*.

### **Ground (1)**

Appellant finds the decision of Respondent to be unfair and not in order. This Ground of Appeal is wide and the Tribunal must analyse all the criteria of selection to see if Respondent has erred somewhere which has led to the Appellant not being appointed. Only an analysis of the markings with regard to all the evidence adduced will enlighten the Tribunal.

### **Ground (2)**

Appellant avers that she is more meritorious as she has the necessary qualifications, more experience and merit. This again can be analysed from the markings given by the selection panel.

### **Ground (3)**

Appellant avers that she holds the qualifications required for the post of ASDA as per the SOS. This is not disputed. Both Appellant and Co-Respondents have the necessary qualifications. This ground does not stand as the qualification is an eligibility criterion and therefore this ground fails.

### **Ground (4)**

Appellant avers that she was more senior than the Co-Respondents and has acquired more experience. Respondent does not agree on the issue of seniority and refers to PSC regulation 14 which says that in an appointment exercise qualifications, experience and merit come before seniority.

It is a fact that seniority is not a determining factor in an appointment exercise. However, this Tribunal holds the view that seniority brings experience to an officer when he/she has long service. In this case Appellant and Co-Respondent No 1 have been a PRA since July ... while Co-Respondent No 2 became PRA in January .... The Appellant and the Co-Respondents do not have any adverse reports against them. Appellant and Co-Respondent No 2 referred to their respective Performance Appraisal Reports where they both scored good grades. However, it was pointed out that the PAF of Appellant referred to her work as ASDA while the PAF of Co-Respondent No. 2 was on his work as PRA which were not comparable.

It is reasonable, therefore, that the six years difference between Appellant and Co-Respondent No 2 during their tenure in the grade of PRA must show a margin in favour of the Appellant. The Tribunal will come back to this when the markings are discussed.

### **Ground (5)**

Appellant refers to her assignment of duties as ASDA which was not the case for Co-Respondent No. 2. Co-Respondent No.1 did assignment of duties of ASDA from April 2019 to September 2020.

Respondent states that assignment of duties does not give a claim for appointment to the higher position as this is done for administrative convenience and that this is made clear in the letter whenever an officer is assigned duties. This is the stand that Respondent invariably takes whenever Appellants refer to assignment of duties in appeals before this Tribunal.

It is a fact that when officers are given assignment of duties for short periods and not on a continuous basis, they have no claim for appointment. This is clear in the case of Ramparsad v Public Service Commission ipso Annauth (2013 SCJ 189) and Mahesh Ramjeeawon v Public Service Commission (2013 SCJ 194) where the Supreme Court citing the case of Ramparsad said “*the assignment of duties, as an administrative expediency and for short periods, does not confer any right on the applicant to claim permanent appointment; nor, we may add any advantage over other candidates*”. (emphasis ours). There is no problem on this.

This Tribunal always say that assignment of duties will impact on experience and knowledge of work for the higher post and this must be borne in mind and be given due consideration in a selection exercise. In a recent judgement in Local Government Service Commission v Public Bodies Appeal Tribunal ipso Bhageea and Ors (2021 SCJ 193), the Supreme Court said emphatically “*However, it is unquestionable that an officer who is assigned duties of a post, other than for short periods, gains experience in the post*” (emphasis ours).

The Tribunal expects that the selection panel would have given higher marks to Appellant and Co-Respondent No 1 on a criterion of knowledge of the job due to their long assignment of duty.

## **Ground (6)**

Appellant wants to know the markings she obtained at the interview. Appellant probably meant that she wanted the Tribunal to look at the markings. This cannot be considered as a ground and therefore the ground fails.

In section 91 A of the Constitution subsection 9(b) provides that

*“(b)the Public Bodies Appeal Tribunal shall not be bound to communicate to any other person the contents of any report, document or other material produced by any Commission or public body and, except where necessary for the purpose of making its decision, the Tribunal shall make no reference to the contents thereof in its decision”*. (emphasis ours)

The Tribunal did not have to provide the markings to Appellant but has the right to refer to same as per that subsection.

The Tribunal will now turn to the markings of Appellant and Co-Respondents in this selection exercise and will deal with grounds 1, 2, 4 and 5 together as they are interrelated.

The criteria upon which the candidates were assigned and marked were:

- (i) Experience as Head/ PRA and Deputy HAEC Cadre (>2 years);
- (ii) ... Reporting Skills;
- (iii) Knowledge of Duties and Responsibilities of the Post;
- (iv) Leadership and Supervisory Skills;
- (v) Training and Organising Skills; and
- (vi) Communication and Interpersonal Skills.

Marks were given by members of the selection panel under each criterion and an external assessor participated in the interview and gave separate marks not based on each criterion.

The Appellant obtained less marks than Co-Respondents under all the criteria, except Criterion (i) where Appellant and the Co-Respondents are at par.

It is noted that Criterion (i) “Experience” carries a very low weight whereas Experience must normally carry a higher weight given that it is one of the three core

criteria in a selection exercise as per PSC regulation 14. A reasonable person will find such a low weight to belittle the importance of experience, in particular in a post of PRA where ASDA's come from. On the marks given, the Tribunal finds that Appellant and Co-Respondents obtained full marks. There is no problem that Appellant and Co-Respondent No 1 obtained same marks as they have the same number of years as PA. However, the fact that Appellant has six years more than Co-Respondent No 2, and she has been reported favourably by the NATO, it is surprising that they both obtained the same marks. It appears that the selection panel has not been fair to Appellant on Criterion (i) which is Appellant's contention under ground 1 of her GOA.

On Criterion (iii) it is expected that Appellant who reckons some three and a half years performing the duties of ASDA while Co-Respondent No 2 did not do so, she would get higher marks on knowledge of duties and responsibilities of the post, meaning as ASDA. This was not the case. It has been made clear at the Tribunal that the assignment of duties to the Appellant had the blessings of Respondent as it had been renewed continually. The Representative of the NATO even acknowledged the fact that she had done one year unofficially and 2 and a half years officially. She also averred that someone doing both Regulatory and Performance Assignments would not be more equipped to assume higher responsibilities.

It is doubtful that the assignment of duties was done for administrative convenience for such a long period. The Respondent itself made it clear in its Circular No 2 of 2006 as follows:

*"The attention of Responsible officers is drawn to the fact that when an acting appointment/assignment of duties is likely to last for a long period, that is, more than six months, the most senior officer serving in the particular grade from which an appointment would normally be made, should be considered for such acting appointment or assignment of duties. In such circumstances, acting appointment/assignment of duties should not be made on administrative convenience.*

*The Commission has decided that acting appointment/assignment of duties made on the ground of administrative convenience should not be of a long duration and should as far as, be restricted to a period not exceeding six months*” (emphasis ours).

In the present case it must be stressed once more that the Appellant has been assigned the duties of ASDA for some three and a half years.

What is more surprising is that Co-Respondents obtained more marks on Knowledge of duties and responsibilities of the post of ASDA. This can be understandable for Co-Respondent No 1, who has been assigned the duties of ASDA, but not for Co-Respondent No 2.

The latter said that he did some of the duties of ASDA but it was pointed out that he was only assisting and doing so under the supervision of an ASDA.

Co-Respondent No 2 gave a few duties which he said come under the duties of an ASDA but when he includes “*contributed in printing and assisting the NATO in the binding of specific report*” it casts doubt as to his knowledge of the job and his understanding of the level of importance required for such duties.

As pointed out by the Supreme Court, assignment of duties brings experience and this includes knowing what the post implies.

Further clearly Co-Respondent No 2 has laid a lot of emphasis on his knowledge of the performance unit. However, he has not been able to prove that this new type of duty for which he was trained was at the core of the NATO as compared to Regulatory assignment.

The Tribunal finds that Respondent has not been fair to Appellant on Criteria (i) and (iii) and Co-Respondent No. 2 has been unjustly given an advantage over Appellant.

The Tribunal does not however find that Co-Respondent No 1 was not meritorious.

As explained above, Grounds of Appeal 1, 2, 4, 5 of the Appellant are upheld.

While the Tribunal is conscious that Respondent has the power to decide on procedures for an appointment exercise, the Tribunal's role is to ensure that it does so judiciously and does not cause prejudice to public officers in any appointment exercise.

The Tribunal, therefore, quashes the appointment of Co-Respondent No. 2. The appointment of Co-Respondent No 1 is maintained.