

**Appeal against the effective date of temporary appointment should be done within the prescribed delay**

The Appellant is challenging the decision of the Respondent to appoint him as SPR, CSS Department in a substantive capacity as from the 26<sup>th</sup> May 2018 in the Public Body while his two other colleagues who were junior in seniority ranking were promoted for the same post as from the 29<sup>th</sup> January 2018.

**Appellant's Case**

Appellant solemnly affirmed as to the correctness of his Grounds of Appeal (GOA) and his Statement of Case (SOC). His GOA were as follows:

- “1. ... , am the most senior, most experienced and most qualified officer among my two other colleagues who are posted at the CSS Department in the Public Body.
2. I joined the service as Temporary Supervisor in August 1998 whereas one of them joined in February 2001 and the other in October 2001 respectively.
3. I have worked alone as Supervisor as the head of department and managed the CSS Department at ... HTL for nearly thirteen years.
4. Whereas during their respective post as Supervisor the other two colleagues either used to work together in the same team at the same posting or were being accompanied by other Supervisors at different postings under the constant supervision of a SPR of a CSS Department.
5. I was awarded the Certificate in General Textile Technology in 1988, the Diploma in Textile Technology in 1993, the Diploma in Management Studies in 2012 and lastly the BSc (Hons) Degree in Management with specialization in Entrepreneurship in 2013 all four from the University of Mauritius.
6. I was always denied payment of actingship and responsibility allowance as SPR while working alone at ...HTL for nearly thirteen years whereas the two other colleagues who occasionally performed the duties of SPR were subsequently being paid acting and responsibility allowances, despite being junior, less experienced and less qualified than me.
7. After submitting my above mentioned grievance to the Equal Opportunities Commission I was then assigned the duties of SPR at the CS Department at ... HTL for nearly eight consecutive months as from 12<sup>th</sup> August 2013 followed by promotion to the temporary post of SPR for nearly forty six consecutive months as from 3<sup>rd</sup> April 2014 till 29<sup>th</sup> January 2018. I continued to be posted

*as Temporary SPR for another forty four consecutive months, till 22<sup>nd</sup> October 2021, at which date I was promoted as SPR on a substantive capacity effective as from 26<sup>th</sup> May 2018.*

8. *Both had been directly promoted from the post of Supervisor to the post of SPR on a **substantive** capacity **earlier** than me and as from 29<sup>th</sup> January 2018 without being posted on a temporary capacity.*
9. *This clearly demonstrates that I have been deliberately and highly discriminated, unjustly, unfairly and harshly penalized by the Public Body and the Public Service Commission by being reduced to a lower rank and seniority in my post of SPR on a substantive capacity effective as from 26 May 2018 compared to my other two colleagues.*
10. *Hence being harshly penalized to a lower rank and seniority I may consequently obtain a lower salary than what I would have obtained provided I had been promoted at an earlier date and also obtain a lower salary compared to my other two junior colleagues.*
11. *I, therefore, seek redress for not having been promoted directly to the substantive post of SPR earlier as from August 2013 where on the other hand both my colleagues who are comparatively junior, less experienced and less qualified than me have been promoted directly to the substantive post of SPR earlier than me and as from 29<sup>th</sup> January 2018". SIC*

In his SOC, he reiterated his GOA and expatiated on some of the GOA and provided a chronology of events which led to his appointment as SPR as from the 26<sup>th</sup> May 2018. He highlighted that:

He was offered assignment of duties for the post as SPR for a period of six months as from 12<sup>th</sup> August 2013;

The Responsible Officer (RO) submitted to the Respondent a list of police cases against him and informed that he was subjected to disciplinary actions for the preceding 10 years;

He was offered appointment as SPR on a temporary capacity on the 03<sup>rd</sup> April 2014 and he assumed duty on the same date;

On 29<sup>th</sup> October 2015, the RO informed the Respondent that the Director of Public Prosecution had advised no further action against him in the police case for a charge of "Threat" which occurred on the 26<sup>th</sup> February 2007 but there was still another charge of "*bearing offensive weapon*" which was ongoing;

He continued to serve as SPR in a temporary capacity pending the finalization of the said police case;

The RO was informed on 20<sup>th</sup> November 2017 that he was found guilty against the charge "*Bearing of Offensive Weapon*" and a connected case of "*Threat*" and he was sentenced to pay a fine of Rs 2,000 and Rs3,000 on each case. There were also two other cases mainly "*Assault*" and "*insult*" still under enquiry by the Police;

On 29<sup>th</sup> January 2018, two other colleagues who were junior in seniority ranking was promoted as SPR and they assumed duty on the same day. At the same time, the RO recommended disciplinary action against him;

On 25<sup>th</sup> May 2018, he was severely reprimanded and informed that his promotion as SPR in a substantive capacity would only be considered after finalization of the cases reported against him and subject to being favourably reported upon and recommended by the RO;

The case of "*Assault*" was subsequently dismissed by the Court and there was no further action from the Police concerning the case of "*insult*".

He, therefore, sought redress to have been deliberately and highly discriminated against, unjustly, unfairly and harshly penalised by the Public Body by the Respondent by being reduced to a lower rank and seniority and not been promoted directly to the substantive post of SPR earlier than as from 12<sup>th</sup> August 2013.

Under cross-examination, he admitted that he did not appeal against the disciplinary action imposed upon him by Respondent.

### **Case of Respondent**

The representative of the Respondent solemnly affirmed to the correctness of its Statement of Defence (SOD). Respondent averred that:

On 30<sup>th</sup> August 2013, the RO reported a vacancy in the grade of SPR, CSS Department and recommended that the vacancy be filled by promotion in a substantive capacity of Appellant, who ranked first in the seniority list of Supervisor, CSS Department. However, it was noted that the PSC Form 2 recommending Appellant for promotion was not properly filled in by the RO.;

On 26<sup>th</sup> November 2013, the RO submitted a fresh PSC Form 2 and informed the Respondent that Appellant had been subject to disciplinary actions during the preceding 10 years. The RO also submitted a list of Police Cases reported cases against Appellant;

On 3<sup>rd</sup> April 2014, Appellant was offered promotion as SPR, CSS Department in a temporary capacity and he assumed duty on the same date;

On the 29<sup>th</sup> October 2015, the RO recommended the Respondent to extend the temporary promotion of Appellant for a period of one year or pending the finalisation of a case of “Bearing Offensive Weapon” against the Appellant, whichever is earlier;

The Respondent extended the temporary promotion of Appellant as SPR until finalisation of the said police case;

On the 1<sup>st</sup> March 2018, the RO informed the Respondent that Appellant was fined by the District Court of Grand Port for the offences of “*Bearing Offensive Weapon*” and “*Threat*” and that Appellant was still involved in cases of “insult” and “Assault” which were ongoing. The RO recommended that Appellant be severely reprimanded. Consequently, Appellant received a severe reprimand on the 25<sup>th</sup> May 2018;

Respondent further averred that officers are promoted in a temporary capacity in case they are involved in police case(s) and pending the finalisation of these cases. Upon finalisation of the case(s) and in the event that they are inflicted punishment in accordance with the Public Service Commission Regulations, their substantive appointment becomes effective on a date subsequent to the date of the punishment, as per current practice;

Respondent also averred that on 26<sup>th</sup> October 2017, the RO reported 2 vacancies in the grade of SPR, CS Division and recommended that the two officers ranked 2<sup>nd</sup> and 3<sup>rd</sup> in the grade of supervisor be promoted. As both Officers were not under report, they were promoted as SPR in a substantive capacity with effect from the date of their assumption of duty. They consequently assumed duty on the 29<sup>th</sup> January 2018.

On 28<sup>th</sup> September 2021, Respondent was informed that no action would be taken against the Appellant in the alleged case of Insult and that the alleged case of Assault was dismissed by the District Court of ...;

On 18<sup>th</sup> October 2021, Appellant was offered appointed as SPR, CS Department in a substantive capacity as from the 26<sup>th</sup> May 2018, date after he was inflicted the severe reprimand.

Under cross-examination, the representative maintained that appointment in a substantive capacity is effected after a punishment inflicted by the Respondent, according to the current practice. Appellant was not promoted in a substantive capacity as he was under report as at 25<sup>th</sup> May 2018. She could not say under which regulation of the Public Service Regulation, the current practice which she mentioned came from. She agreed that the police cases in which the Appellant was involved are not directly related to his duty. She added that even if the police cases did not relate to appellant's duty and was not committed in the course of his employment, the Respondent found them of a serious nature.

### **Submission**

Counsel for Appellant insisted that there is no provision in the Public Service Commission Regulations which authorised the Respondent to appoint the Appellant in a substantive capacity a day after having inflicted a punishment. He submitted that the current practice that Respondent was putting forward to justify its decision is tainted with illegality. It is a system that has been adopted by the Respondent by using "current practice" and that it is time for this to be corrected. In the absence of such provision in the law, he moved that Respondent should not have applied such practice.

### **Determination**

The Tribunal has given careful consideration to the GOA, SOC and SOD as well as the submission of counsel for Appellant. The main issue to be thrashed out is the date of appointment of Appellant in a substantive capacity. It is not disputed that Appellant was appointed in a substantive capacity on 26 May 2018 as SPR, CS Department after his temporary appointment in the same post from 3<sup>rd</sup> April 2014 while two of his colleagues who were ranked after him on the seniority list were appointed SPR in the same Department as from 29<sup>th</sup> January 2018 in a substantive capacity. It is also not disputed that Appellant was severely reprimanded on 25<sup>th</sup> May 2018.

The reason adduced by Respondent to appoint Appellant a date after his severe reprimand was based on current practice as he was under report up to the 25<sup>th</sup> May 2018.

Appellant was of the view that there is nothing in the Public Service Regulations which authorised the Respondent to act on a current practice.

In fact, it is true that the Public Service Commission Regulations does not make provision for substantive appointment to be effected after a punishment was imposed on the officer concerned. The Respondent cannot raise current practice as a defence when it is bound to operate within its regulations. These current practices may give rise to a perception of opacity unless they are well established and well known to the Public Service pending their inclusion as amendments to the Regulations.

As regards the GOA, Grounds 1, 2, 3, 4, 5, 6, 7 have no relevance to determine upon the issue in the present matter and are, therefore, set aside.

Grounds 8, 9,10 and 11 have some relevance and will be dealt together. They relate to the appointment exercise as SPR in a substantive capacity for Appellant and the two other junior officers. Appellant expressed his concern and feeling about the effective date of his appointment in a substantive capacity as SPR.

Ground 11 expressly relates to the real issue which is the subject matter of this appeal. The Appellant contended that he should have been appointed as SPR in a substantive capacity as from August 2013. It is to be noted that he accepted an offer in the same post as from 3<sup>rd</sup> April 2014 which was in a temporary capacity. On 25<sup>th</sup> May 2018, he was made aware as averred by himself in his SOC, that the same appointment in a substantive capacity was subject to the finalisation of all police cases against him and also subject to being favourably reported upon and recommended by the RO.

He did not make any appeal against the effective date of his appointment in a temporary capacity at that particular time. It is now that he is doing so before this Tribunal. By requesting the Tribunal to order the Respondent to appoint him as from August 2013, implies that the present appeal is an appeal in a disguised way against the date of his temporary appointment which should have been made at that particular time and which is now time barred. Hence Grounds 8, 9,10 and 11 are set aside.

As such all grounds are devoid of any merits and the appeal is set aside accordingly.