

The Tribunal is empowered by law to request for any document. This power of the Tribunal has been recognised by the Supreme Court in several cases.

Appellant is challenging the decision of the Respondent to appoint the Co-Respondent to the post of PHI in the Local Government Service.

Appellant's Case

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

His GOA are as follows:

Grounds of the Appeal

- “1. *I was offer appointment as SHI in a temporary capacity on the 14 September 2006 and appointed in a substantive capacity as SHI on April 2007. Therefore as SHI I am most Senior than Co-Respondent.*
2. *I was assigned PHI from the 10 September to 31 December 2012. More than **three months assignment.***
3. *FRO, THE 1st January 2013 up to 6th September 2013 I was again assigned the post of PHI at the Council when all the Senior Officers refused to take the challenge. **Nine months assignment.***
4. *From the 19th May 2021 to August 2021 I was again assigned duty as PHI following refusal of my senior colleagues who was in post.*
5. *From the 27th of June 2022 up to the 4th January 2023 I was once again assigned the post of PHI at the District Council of I wish to draw the attention of the board that a letter was circulated to all eligible candidates who wish to assigned that post. However many officers refused the assignment even Co-Respondent under the pretext that it to far from their place of residence.*

6. *LDMC hold an important position at the level of Local Authorities. I took up the challenge to be assigned that post where all other colleagues refused. It was a great experienced for me. In fact I was assigned that post on three occasions:*

- i. From the 19th December to January 2020.*
- ii. From 19th November 2020 for a period of three months.*
- iii. From 19th February to 18th of May for a period 4 months.*

All the above assignment I have done it up to the level of satisfaction of the council and no shortcomings was noted during those periods. Following a judgement of the Supreme Court of Mauritius against Senior Health Inspector MrSaifJoomun, the court stressed that the assignment periods, should be taken into consideration when candidates postulate for the higher posts.

7. *Academically I am above the qualification of Co-Respondent since I have a BSc Hons in Public Health Engineering*

8. *On the 7th November 2019 I was selected by the Council of ... to attend a one month seminar on Environment Sanitation and Food Safety Department of Local Government in China.*

Based on the above I am of firm opinion that I am more qualified in terms of working experience and qualifications to be selected as Principal Health Inspector in the place of Co-Respondent ". SIC

In his SOC, he expatiated on the GOA and averred that he possesses a Diploma in Sanitary Science from the University of Mauritius and a BSc (Hons) in Public Health Engineering from the University of Technology. He added that he participated on a month seminar on Environmental Sanitation and Food Safety in China.

Under cross-examination, Appellant admitted that the Co-Respondent had more than two years' service in the grade of Senior Health Inspector as required by the Scheme of Service for the post of Principal Health Inspector. He also admitted that the appointment was made by selection and seniority does not automatically give him a better claim to the post. He agreed that assignment of duties as PHI carried between

27th June 2022 to the 4th of January 2023 as well as from 19th of May 2021 to 18th August 2021 were done after the closing date of the application which was 2nd March 2021. However, he explained that he gained experience from the assignment of duties to the post of PHI which he performed during the period 10th September 2012 to 31st December 2012 as well as for the period 1st January 2013 to 6th September 2013. He maintained that his past experience from the assignment of duties to the higher post has not been considered.

Respondent's case

The Representative of the Respondent solemnly affirmed as to the correctness of the Statement of Defence (SOD). Respondent averred that the closing date for the submission of applications for the post of PHI was fixed to 13 May 2021. 15 candidates responded to the advertisement and 11 of them including the Appellant were convened for interview. It also averred that the candidates were assessed on the following criteria namely, qualification, experience, interpersonal and communication skills, leadership and administrative skills, knowledge of environment matters and knowledge of the job. It added that all procedures have been followed and the appointment of the Co-Respondent was made on the basis of the Scheme of Service for the said post, her performance at the interview and in accordance with Regulation 13(1)(b) of the Local Government Service Commission Regulations 1984.

A statement of service of both the Appellant and the Co-Respondent was also mentioned which is as follows:

Appellant

- Assistant Health Inspector: 17/02/1997 to 23/11/2000
- Health Inspector: 24/11/2000 to 17/09/2006
- Senior Health Inspector: 18/09/2006 to date

Co-Respondent

- Assistant Health Inspector: 03/05/1996 to 10/06/2002

- Health Inspector: 11/06/2002 to 20/12/2015
- Senior Health Inspector: 21/12/2015 to 03/01/2023
- Principal Health Inspector; (temporary): 04/01/2023 to date

Respondent confirmed that Appellant had been assigned duties of PHI as mentioned by Appellant. However, it averred that assignment of duties does not give the Appellant claim to permanent appointment to the said post and the experience of Appellant had been duly taken into account.

Co-Respondent is abiding to the decision of the Tribunal.

Submission of Counsel

Counsel for Appellant requested the Tribunal to look at the marking. He also produced the Supreme Court judgement **Joomun v PBAT SCJ 247 2020** where it is stated that “*assignment of duties to a post does not give a person a claim to permanent employment; nonetheless, when an officer acts in a post it is undeniable that he gains experience and as a result he may have an edge over other officer who has not acted in the post or who has acted for an insignificant period of time.*”

Determination

The Tribunal has examined all the GOA and determined as follows:

Grounds 1, 6 and 8

These grounds relate to seniority and activities carried out by Appellant during his career as Health Inspector and Senior Inspector. There is no doubt that Appellant had been appointed Senior Health Inspector well before the Co-Respondent. The duties related to Local Disaster management as well as his opportunity to follow a course in China had no bearing whatsoever in the present appeal.

Grounds 2, 3, 4, 5 and 7

These grounds relate to qualification and experience. Respondent averred that Qualification and experience formed part of the list of criteria and that Qualification and

experience of Appellant were duly considered. The Respondent was ordered during hearing to produce the markings so as to verify whether due consideration was given to the qualification and experience of Appellant as averred by Respondent. However, surprisingly, Respondent did not provide the marking to the Tribunal despite several requests and even a request was made through the Senior State Counsel appearing for the Respondent, who communicated the request to the latter.

The Tribunal failed to understand the sudden refusal of the Respondent to provide it with such document when the Public Bodies Appeal Tribunal Act empowers it under **Section 6(4)(b)(ii) ‘to require the public body to produce any document or other material which, in the opinion of the Tribunal, relates to the grounds set out in the appeal’ and which is necessary for consideration of the appeal”**. The Supreme Court has in several Judgements recognised the powers of the Tribunal to that effect.

In the case of **Public Service Commission v the Public Bodies Appeal Tribunal 2011 SCJ 382**, it is stated: **“Sections 6 and 8(4) of the Act provide the Tribunal with a wide array of powers for it to function as a judicial body. It may, for instance, require the attendance of any person or witness and make orders for the production of articles or documents as it thinks necessary or expedient.....”**.

The present matter is identical to the case of **Saifuddin Saif Joomun v PBAT 2020 SCJ 247**, in which the Supreme Court had this to say: **“Given the facts of the present case and the grounds of appeal raised, the PBAT considered that, for it to ascertain whether the LGSC had properly determined the suitability of the candidates to the post of PHI, it should call for the weightage and markings which were used by the LGSC in selecting the candidates for the said post. The calling of the weightage and markings by the PBAT was clearly for the purpose of ascertaining whether the grounds of appeal which were specifically in relation to seniority and assignment of duties, were made out and we agree with learned Senior Counsel for the respondent that the PBAT was entitled by law to call for same.”**

Whereas in the case of **The Local Government Service Commission v/s The Public Bodies Appeal Tribunal 2021 SCJ 225**, it is mentioned: ***“The Tribunal had the power to call for documents....”***

This refusal of the Respondent is in breach of the provisions of the Public Bodies Appeal Tribunal Act and may constitute a criminal offence under Section 7(9)(b) of the same Act. The Tribunal has just been informed by the Respondent that it is seeking the advice of the State law Office as to whether to produce the document to the Tribunal or not, when the same document was already produced for the same selection exercise in the cases PBAT/LGSC/323 and PBAT/LGSC/324. It is reminded that the markings are meant for the eyes of the Tribunal only.

In such circumstances and in the absence of evidence to the contrary from the Respondent due to the refusal of Respondent as described above, the Appellant has proved its case. There was sufficient unrebutted evidence before the Tribunal that the Appellant is more qualified and had been assigned duties of PHI for period 10th September 2012 to 31st December 2012 and from 1st January 2013 to 6th September 2013 i.e nearly one continuous year. As regard to assignment of duties performed as described in Grounds 4 and 5 are disregarded as it were carried after the selection process.

Relying on the Supreme Court Case **Joomun v PBAT SCJ 247 2020** as stated above, it is undeniable that the Appellant has gained more experience than the Co-Respondent in view of the fact that Appellant performed the duties of PHI for a period of nearly one year whereas there is no evidence produced before the Tribunal that the Co-Respondent had carried out any assignment of duties to the post of PHI. Grounds 2, 3 and 7 had been proved.

Consequently, the Tribunal quashes the appointment of Co-Respondent and remit back the matter to the Respondent.