

Marks allocated under additional qualifications should be fair according to the additional qualification of each candidate.

The Appellant is challenging the decision of the Respondent to appoint the Co-Respondent to the post of DDSP at the Ministry.

Ruling on motion of disclosure

The Counsel for the Appellant, by way of a motion, moved for an order of disclosure, for the Tribunal to direct the Respondent to provide “such explanations as would allow the Applicant and her legal advisers to consider, as they are duly bound to whether there are sufficient grounds to continue with the appeal to assist the Tribunal in eventually deciding on the relevant issues”.

He moved specifically for the communication to the Tribunal and to the Appellant of all documents and/or information in possession of the Respondent relating to the selection and appointment process. The motion was argued and it was set aside. The case was subsequently heard on the merits.

Appellant’s Case

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

She has based her appeal on six grounds with factual substantiation.

There are reproduced, as hereunder:

“1. *The selection process was unfair, irrational, illegal and unreasonable in the Wednesbury sense inasmuch as:*

(a) The PSC failed to give due weight to the fact that I have more experience and higher relevant qualifications than the appointed candidate;

- (b) The PSC failed to give due weight to the fact that my skills, as evidenced by my past and current responsibilities at the Ministry, make me a more suitable candidate as per the scheme of service;*
 - (c) The PSC has given undue weight to obscure criteria and subjective assessment at the interview, at the expense of objective criteria such as qualifications, merit, skills and experience;*
 - (d) the PSC has failed to properly conclude that, in the absence of any adverse report against me, I am the most suitable candidate for the post;*
 - (e) The PSC has failed to follow its own regulations regarding the suitability and merit of candidates.*
- 2. The appointment was unreasonable, irrational, illegal and unfair because the PSC departed from its own criteria for assessment of candidates as compared to previous vacancies for the same post, without reasonable justification for its inconsistency.*
- 3. The selection process included an interview before a selection panel that was wrongly, illegally and unreasonable constituted inasmuch as:*
 - (a) It included no person knowledgeable or qualified in the relevant field, that is, management;*
 - (b)The role of adviser to the PSC on the panel was held by a professional, who is not qualified to be consulted by the PSC on relevant issues.*
- 4. The interview before the selection panel was unfair, inasmuch as:*
 - (a) A number of questions favoured the candidate who ended being appointed by the PSC and these questions were not directly relevant to the scheme of service;*
 - (b) A number of questions were clearly intended to unfairly destabilise me and/or put into question my professional competence.*
- 5. The illegality, unreasonableness and unfairness of the said selection exercise and appointment constitute discrimination against me as a woman....*

6. *The unfair, unreasonable, discriminatory and illegal nature of the said selection and appointment will be revealed by a proper examination by the Tribunal of all the documents pertaining to the appointment exercise, including those related to:*
- (a) the dates at which the post became vacant, the post was budgeted, duties of the post were assigned, the vacancy was advertised, and the appointment was made;*
 - (b) the persons at the Ministry who could reasonably have been involved in the selection at the different steps mentioned at (a) above;*
 - (c) the questions, marking, rankings, notes and points at the interview stage and at all other steps of the selection process for all candidates, including myself and the appointed person;*
 - (d) all the documents used by the PSC to assess the suitability of the candidates;*
 - (e) any other documents which may be necessary to examine following the present appeal”.*

She expatiated on her GOA in her SOC. She averred that she had more experience and was more qualified as per the requirements of the Scheme of Service, than the Co-Respondent.

She holds a Master of Science in the relevant field (5-year course) from the Sechenov First Moscow Medical Institute/The Sechenov First Moscow Medical Academy. In addition, she possesses a Certificate of Course Completion – Internet and Computing Core Certificate (IC3) Programme. She currently holds the post of Principal Pharmacist.

From 1997 to 2014, she had occupied the posts of PMST/SPMST, in charge of main Regional centres as well as Specialised centres. She was posted at the Headquarters on 14 August to assist the Registrar,Board from August 2019 till November 2021. She further averred that she was member of the following:

- (a) Trade and Therapeutics Committee;
- (b) Health Supplement Committee; and
- (c) Dangerous Chemical Control Board.

She considered that the experience that she has gathered in view of the responsibilities that she has assumed together with the fact that she has had no adverse report, made her a more suitable and meritorious candidate for the post.

She felt that that the Respondent has not given due consideration to her experience, qualifications, skills, merit in the selection exercise and has given undue weight to the subjective, irrelevant and/or arbitrary criterion in the selection process, which is also against law and consequently the Co-Respondent has been unduly favoured.

She also averred that successful occupation of the post of Registrar in the, relevant Board has always given an advantage to the incumbent for the appointment of DDSP. As regards the interview, process, she pointed out that the selection panel at the interview was wrongly constituted as it included no person knowledgeable and qualified in the management. In fact, a Professional who is not “qualified to be consulted by the PSC on relevant issues, acted as Adviser.

She also averred that a number of questions put at the interview by the panel were not directly relevant and were clearly intended to unfairly favour the Co-Respondent.

During re-examination/cross-examination, she agreed that the selection was carried out as per the requirement for the post and her competence was assessed by the Respondent during the interview. However, she felt that the interview was not fair and she was consequently penalized.

She also admitted that the post of Registrar can be filled by a PMST/SPMST, according to the Scheme of Service. She insisted that the performance of duties of Registrar of the Board is the normal career path for appointment to the post of DDSP. She explained that normally this post is assigned to the senior most officer. In the capacity of Registrar, she has gathered experience at the level of the relevant field, in view of her interaction with the DDSP and performing their duties when they are absent. However, she admitted that she has neither received an allowance nor a letter for occupying that position. She also pointed out that during the interview the questions put to her were of a general nature and not technical questions related to the scheme of duty.

Respondent's Case

The representative of the Respondent solemnly affirmed as to the correctness of the Statement of Defence (SOD). Respondent averred that the post of DDSP is filled by selection from among qualified officers who possess "the qualifications, skills and abilities" laid down in the Scheme of Service for the post. All the eleven eligible candidates were called for interview.

Both Appellant and the Co-Respondent were favourably reported upon in their Performance Appraisal Form for the last three years and Ad Hoc Reports. Experience is not the sole criterion in a selection exercise. Respondent has taken into consideration all relevant information relating to qualifications and experience, as disclosed by the Appellant in her application form and has carried out the selection exercise and determined the suitability of the selected candidate, in accordance with its powers under Regulation 19(6) of the PSC Regulations. The selection exercise was carried out in a "fair and impartial manner", the requirements for the post according to the Scheme of Service, the selection criteria determined by the Respondent and performance at the interview. Further, the Respondent has constituted the selection panel, determined the procedures to be followed to carry out the selection exercise and determined the suitability of the candidates for the post, in accordance with its powers under the Constitution and the relevant provisions of the PSC Regulations, namely Regulations 14(1), 16, 17(2) and 19(6).

During re-examination/cross-examination of the Respondent, she highlighted that the selection of the post of Deputy was carried out by the Respondent, according to the requirements of the Scheme of Service and based on performance at the interview. All information submitted by the candidates in their application form has been taken into consideration by Respondent for assessment of the suitability of the candidates under the various selection criteria (qualification, experience, skills, etc...) She also pointed out that experience is only one criterion of selection.

She explained that there was no provision in the Scheme of Service that candidates should act as Registrar but admitted that performance of duties as Registrar may provide some experience, but the assessment is carried out by the interview panel.

When questioned by the Counsel for the Appellant, she could not explain the reason for the long delay between the time/date this post was declared vacant (September 2020) and the date where it was advertised (May 2021).

In addition, the Senior Human Resource Executive Officer of the Ministry was called as witness. She explained that Appellant was appointed as Registrar from 26th August 2019 to 24 November 2021. However, she pointed out that the appointment was made by the Ministry, in accordance with the relevant Act that any Government PMST with 7 years' experience can be appointed under law. There is no requirement to be a Principal PMST. She also highlighted that the present Registrar is a PMST/SPMST. Furthermore, she explained that nobody was assigned the duties of Acting Deputy Director prior to filling of vacancy which occurred on 20 August 2020 until filling of vacancy on 10 November 2021. She stated, however, that she had no information regarding former Deputy Directors who have held the post of Registrar. She also pointed out that it was for the Respondent to give consideration in their assessment to the fact that the Appellant has occupied the post of Registrar.

Co-Respondent's Case

The Co-Respondent solemnly affirmed as to the correctness of his Statement of Defence (SOD).

In his SOD, he averred as follows: He holds a degree of Bachelor of ...from the Department of Services, Nagpur University, India in 1991. He then registered as PMST with the re Board in October 1992. He also possesses a Diploma in Sales in Marketing (1996) and a Master's in Business Administration (MBA) from the University of Mauritius. He worked for 7 years in the private sector as PMST and joined the Ministry in May 1999. He worked as PMST in charge at a hospital and different centres and Laboratory. In 2011, he was posted at the Division up to January 2019. In May 2019, he was posted at the National... Unit, with the additional duty of carrying out and organizing the inspection and was Member of Trade and Therapeutics ... Committee. In June 2020, he was given the responsibility of Head of Procurement Unit of the Ministry. He was then posted as Principal PMST at JN centre and was in charge of region 4, comprising of different centres and 26 sub centers from June 2021 to November 2021, date on which he was appointed as Acting ADDSP. He has also followed various training courses.

He put forward the fact that, contrary to him, the Appellant has neither worked at Central Division nor the Procurement Unit of the relevant Section, which, according to him, are two very crucial departments for the relevant Sector. He, therefore, considered that Appellant cannot pretend to be more experienced than him and concluded that the Grounds of Appeals are “unfounded and frivolous”.

During cross-examination, he admitted that he has never occupied the post of Registrar. He pointed out that the appointment of Registrar is not a prerequisite for appointment as DDSP. He explained that the former Registrar was appointed on the basis of seniority and that as per law the post can be occupied by a PMST/SPMST with seven years of experience. He added that the current Registrar holds the post of PMST/SPMST. He pointed out that the post of Deputy Director remained vacant during the period 2020 to 2021 because the Director did not want to fill the post since the work of his colleague (Appellant) was being carried out by the other colleagues.

Submission of Counsel for the Appellant

In his submission, the Counsel for the Appellant put forward that the averments of the Appellant that she was a more suitable person in view of ‘her better qualifications and experience’ have remained unrebutted. He moved that the Tribunal should ensure that the advantage of the Appellant under these “objective criteria” is reflected in the marks allocated to the Appellant by the Respondent, accordingly.

He further submitted that, in view of the undeniable objective advantage of the Appellant in terms of higher qualifications and superior experience, Respondent has failed to explain how Co-Respondent was found to be the best candidate through the interview process.

In conclusion, the Counsel for the Appellant moved that it was for the Tribunal to make an assessment given its “full powers to enquire into the merit of the decision of the PSC (**PSC v PBAT 2011 SCJ 382**) whether the selection by interview was fair by looking at the full proceedings and results/markings of the interview process and to determine if the Appellant’s superior experience and qualification was given the consideration it deserved by the PSC” and referred to the Supreme Court Judgement in the case of **Heeramun v PBAT 2015 SCJ 269**.

Submission of Counsel for Respondent

The Counsel for Respondent submitted that the post was filled through selection exercise. All eligible candidates were convened for interview and assessment of the suitability of the candidates was made on the basis of qualifications, experience and skills, in accordance with the scheme of service. She further submitted that there is no requirement to be a Registrar,Board to be appointed to the post. She highlighted that experience was not the sole criterion. She referred to the Determination of the Tribunal **No D/05 of 2022** to that effect. She put forward that all candidates were considered in a fair and impartial manner and that the selection panel was duly set up. She finally submitted that the Tribunal cannot substitute itself to the Respondent which has assessed the competencies of the candidates and determined their suitability through an interview.

Determination

Ground 1

With respect to the fact that Appellant has no adverse report, it is noted that Co-Respondent has no adverse report as well. As regards “experience” claimed by Appellant, focus has been laid on the fact that Appellant has carried out the duties of Registrar ... Board. However, the Tribunal notes that performing the duties of Registrar is incumbent to any PMST/SPMST having at least 7 years of experience.

Concerning qualifications, there is un rebutted evidence that Appellant who holds a Master of Science in Pharmacy possesses higher qualifications than the Co-Respondent who holds only a Bachelor of Science in Pharmacy in the field of Pharmacy. However, Co-Respondent also holds a Master in Business Administration and therefore both the Appellant and Co-Respondent possess a Master. On scrutiny of the mark sheet of the Respondent, it has in fact, been noted that Co-Respondent has scored some marks under “Additional qualifications’ whereas the Appellant, has not scored any mark in spite of the higher qualifications in the field of Pharmacy.

The Tribunal has, therefore, found that the above Ground has been proved. There is no necessity to probe into the other grounds and the Tribunal considered them as a matter of general remarks.

Grounds 2, 3, 4 and 6

The above grounds are interlinked and are related to the selection and interview process.

Respondent has acted in line with Regulations (16) and (17) of the PSC Regulations which empower the Respondent to constitute a Selection Panel and to determine the procedures to be followed, including proceedings adopted by Selection Panel to interview the candidates.

Grounds 5

As regards Ground 5, this ground does not fall within the purview of the Tribunal and was not canvassed by the parties.

In the light of the above findings, the Tribunal quashes the appointment of Co-Respondent as DDSP and remits the matter back to the Respondent.