

Respondent should not adopt strategies just to circumvent a previous determination of the Tribunal which may amount to a mockery of justice.

Appellant is challenging the decision of the Respondent to appoint the Co-Respondents to the post of EDC in the Local Government Service. Appellant filed two separate appeals against the two Co-Respondents and the Grounds of Appeal are identical in both cases. Both Appeals are consolidated and only one determination will be delivered.

Appellant's Case

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

His GOA are as follows:

- “(i) Qualifications: I am more qualified.*
- (ii) Experience: I have more experience as Acting EDC being given that I was assigned duties for an aggregate period of more than three years. I also have experience as EC.*
- (iii) Merit: I have never been subject to any disciplinary action or enquiry or investigation during my career.*

I have been rated Excellent Performance these last years by my superiors for the Performance Appraisal Forms/ Systems.
- (iv) Seniority: As per Regulations 13(2)(b), Part III of the LGSC Regulations 1984, seniority is the fourth criterion which the LGSC should consider.*

I was appointed Assistant EC in November 2005 while Co-Respondent No 1 and Co-Respondents No 2 were appointed in the year 2012 and 2017 respectively.

(v) Legitimate Expectation: I have an expectation to be appointed as EDC since I was better qualified and I was acting in the post for a long period of time without any adverse report. The principles of meritocracy should prevail.

(vi) Mockery of Justice: Determination No D/08 of 2023.

The PBAT has given a determination on 10th March 2023 in my favour. One would have expected that the LGSC takes corrective action and appoints me or a better qualified candidate in the next selection exercise. It is the opposite which happens. Mrs O.D. D. a most junior Assistant EC with less experience has been appointed.

This is a mockery of justice since the LGSC instead of giving justice to me is perpetuating the injustice caused to me". SIC

Appellant expatiated on his GOA in his SOC and averred that the appointment was made following an advertisement by way of vacancy circular note No ... of 2023 dated 23 March 2023. He averred that he was appointed as Assistant EC since 7th November 2005 and that he produced to the Respondent all written evidence of his qualification, experience, competence, periods of assignment of duties as EDC. He added that he was notified by public notification of the appointments of the Co-Respondents and he considered that Respondent had acted unfairly and unjustly in as much as both Co-Respondents have less experience and knowledge for the post of EDC than him. He further averred that during the last 17 years of service as Assistant EC, he has fulfilled his duties and responsibilities to the full satisfaction of all his superiors and that he has been assigned duties of EDC as follows:

- (i) 4th February 2014 to August 2015 (more than one and a half years)*
- (ii) 4th to 29th April 2016 (26 days)*
- (iii) 5th to 25th May 2018 (21 days)*

- (iv) 3rd August 2020 to 3rd February 2021(6 months)
- (v) 8th November 2021 to 8th May 2022 (6 months)
- (vi) 19th May 2022 to 19th November 2022 (6 months)
- (vii) 01 to 13 December 2022 (13 days)
- (viii) 17th November 2022 to 31 May 2023 (6th months).

He pointed out that he has more than 3½ years of experience as Acting EDC and that he has never been subject to any adverse report whereas Co-Respondents No 1 and 2 joined the cadre as Assistant EC in 2012 and 2017 respectively.

He concluded by mentioning that a previous appointment to the post of EDC was made to Co-Respondent No 1 in 2021 and that the said appointment was quashed by the Tribunal on 10th March 2023 (determination D/... of 2023).

Appellant was cross examined by Counsel for Respondent on the contents of the vacancy circular note No ... of 2023 dated 23rd March 2023 which was attached to the Statement of Defence (SOD). Appellant admitted that the post of EDC is filled in by selection from Assistant EC reckoning at least five years' service in the grade and that being more senior in rank would not mean being automatically appointed for the permanent post.

He also agreed that assignment of duties to the post would not be a sole criterion to claim permanent appointment to the post but he added that he gained experience in the job and that experience is very important. He was also informed that there are other requirements that should be taken on board by the interviewing panel. He did not deny that Co-Respondent No 1 has served for a period of 1½ years as Temporary EDC but stated that the appointment was quashed.

Respondent's case

The representative who is at present the Secretary of Respondent, solemnly affirmed as to the correctness of the SOD. Respondent averred that as per the Scheme of Service for the post of EDC, the said post is filled by selection from Assistant ECs in the Local Government Service reckoning at least five years' experience in the grade.

Following an advertisement dated 23rd March 2023 to fill the post issued by Respondent, copy of which was attached to the SOD, 23 applications were received and 17 candidates, including the Appellant and Co-Respondents were found eligible in accordance with the Scheme of Service. They were convened to an interview on the 2nd and 3rd May 2023.

Respondent also averred that the candidates were assessed on the following criteria:

- (a) Qualifications
- (b) Experience
- (c) Personality
- (d) Communication skills
- (e) Analytical skills
- (f) Multi-disciplinary approach to problem solving
- (g) Management skills
- (h) Knowledge of the job

and that the Co-Respondents were found more eligible for the posts and they assumed duty on the 5th May 2023. It was also averred that the selection panel took into consideration all the qualifications, experience and documentary evidence as disclosed in the applications of all candidates. A statement of service/ qualifications/ assignment was also attached to the SOD. Respondent admitted that Appellant is more senior than the Co-Respondents but averred that seniority is not an overriding criterion. Respondent confirmed the assignment of duties carried out by Appellant and that the latter had been remunerated accordingly.

Respondent admitted that following the determination of the Tribunal delivered on 10th March 2023 (D/... of 2023), Co-Respondent No 1 was reverted back to the post of Assistant EC with effect from 28th March 2023. She re-applied for the post of EDC and was found suitable for appointment.

The representative of the Respondent was cross examined and stated that he was not aware whether the criteria “qualifications and Experience” carried more marks than the other criteria. He added that it was for the Commissioners sitting on the panel to

decide on the weight to be attached to each criterion. He agreed that Co-Respondent No 2 is not in the higher rank in the seniority. He added that this has no bearing on a selection exercise. He also explained that the notes found in vacancy circular No ... of 2023 dated 23 March 2023 confirmed that there had a previous vacancy application by way of circular No ... of February 2023 and that all applicants were called upon to apply once again in accordance with circular No ... of 2023. He added that it was the Respondent who decided to cancel the previous vacancy notice and to readvertise the post and he was not aware of any reason for cancelling and re advertising the post.

Case of Co-Respondent No 1

Co-Respondent No 1 solemnly affirmed as to the correctness of her SOD. She denied all the averments of the Appellant in his SOC. She averred that she has 10 years' experience as Assistant EC and that in addition to the basic requirements for the post of EDC, she has the following additional qualifications:

- (i) BSC (Hons) in Management
- (ii) Commonwealth Executives Master in Public Administration
- (i) Master in Financial Management
- (ii) ACCA level II

Co-Respondent No 1 also averred that experience as EDC is not a requirement prescribed in the Scheme of Service for the post of EDC as per circular note No ... of 2023 and that assignment of duties does not give claim to permanent appointment to the post. She admitted that she was assigned the duties of EDC for only one month but she worked as Temporary EDC for nearly 1 ½ years.

Under cross examination, she maintained that she gained experience when she worked as EDC in a Temporary capacity for a period of 1 ½ years even though the said appointment was quashed. She also confirmed that her previous appointment was quashed and she was reverted back to the post of Assistant EC. She applied again following the second advertisement issued in March 2023.

Case of Respondent No 2

Co-Respondent No 2 solemnly affirmed as to the correctness of her SOD. She denied that any appeal was required with regards to her appointment to the post of EDC as she satisfies all criteria, conditions and pre requisites required for this post. She averred that she stands advised that, pursuant to Regulation 13 of the Local Government Service Commission Regulations, the Respondent must take into account qualifications, experience and merit before seniority. As such seniority is not a decisive nor a determining factor in her appointment. She also averred that she was fairly, legitimately and justly appointed to the post of EDC based on her qualifications, experience and merits.

Under cross examination, she did not agree that she is less qualified than the Appellant as she possessed the required qualifications. She admitted to have only 24 days' of actingship in the post. she agreed that qualifications and experience are the most relevant criteria for the selection as EDC.

Determination

The Tribunal wishes to put on record that Appellant made an appeal against the previous appointment of Co-Respondent No 1 to the post of Deputy of EC and that the said appointment was quashed on 10th March 2023 on the ground that Appellant had more experience but received less marks than the Appellant under the criterion experience. Co-Respondent No 1 reapplied for the same post and was appointed on 5th May 2023. Appellant is once more appealing against the decision of the Respondent to appoint Co-Respondents Nos 1 and 2 to the said posts.

The grounds of appeal were analysed and Respondent averred in its SOD that it has complied to Regulations 13(1)(b) of the Local Government Service Commission Regulations which reads as follows:

“(1) In exercising its powers in connexion with the appointment or promotion of officers in the local government service the Commission shall have regard to the maintenance of the high standard of efficiency necessary in the local government service and shall-

(a).....

(b) in the case of officers in the local government service, take into account qualifications, experience and merit before seniority in the local government service”.

It is to be noted that that qualification and experience are core objective criteria whereas merit is a subjective criterion.

The markings sheet along with the weightage of each criterion was submitted for the “eyes” of the Tribunal only. It was observed from the marking sheet that candidates were also assessed for other higher qualifications under criterion Qualification whereas the subjective criterion merit was subdivided into:

Personality

Communication Skills

Analytical Skills

Multi-Disciplinary Approach to Problem Solving

Management Skills

Knowledge of the Job

The Tribunal will deal with ground (iii) first as it relates to merit.

Under Ground (iii)

The weightage allocated to each of the above criteria falling under merit is so absurd and appears so unreasonable that it distorted the selection process itself. The rating of allocated marks was so inflated and disproportionate compared to the two objectives criteria that the Tribunal finds it necessary to record the comparison in as much as:

Marks under Personality carries more than 1 ½ times than Experience and is equal to Qualification and Experience together.

Marks under Communication skills carries more than 3 times than Experience and twice to Qualifications and Experience together

Marks under Analytical Skills carries 5 times more than Experience and 3 times to Qualifications and Experience together.

Marks under Multi Disciplinary Approach to Problem Solving carries 5 times more than Experience and 3 times to Qualifications and Experience together.

Marks under Management Skills carries more than 6 times than Experience and 4 times to Qualification and Experience together.

Marks under Knowledge of the Job carries more than 7 times than Experience and 5 times to Qualifications and Experience together.

It is a fact that only the Tribunal is in the presence of these disturbing facts in the allocation of marks. Neither the Appellant nor the Respondent as well as the Co-Respondents could not raise this issue before the Tribunal as they were not aware of it.

The Public Bodies Appeal Tribunal Act 2008 gives powers to the Tribunal to call for confidential documents. If when analysing these documents, the Tribunal finds something disturbing, is it fair for the Tribunal to close its eyes? Is it fair for the weight under Personality to be rated higher than experience?

The manner/basis adopted by the Respondent to determine the weight attached to each criterion in this case favours those candidates with lesser experience to the detriment of those having more experience in view of the fact that the subjective criterion merit carries 31 times more than the criterion Experience. It is worth highlighting that the weight attached to criterion merit is 19 times more than the weight attached to criteria 'Qualification and Experience' taken together.

Ground (i)

Qualification

It is observed that the markings were fairly allocated to the Appellant and Co-Respondents and that all of them were qualified for the post of EDC. This ground fails.

Ground (ii)

Experience

There is no doubt that the Appellant has more experience than the two Co-Respondents. The Appellant was appointed as Assistant EC since November 2005 and was assigned duties as EDC for more than three and a half years. Whereas Co-Respondent No 1 and Co-Respondent No 2 were appointed as Assistant EC in September 2012 and October 2017 respectively. Further Co-Respondent No 1 and Co-Respondent No 2 were also assigned duties as EDC for a few days only. However, as Co-Respondent No 1 was already appointed as EDC from September 2021 to March 2023, she claimed that she had 1 ½ years of experience even if her appointment was quashed by the Tribunal. It is reminded that the previous appointment of Co-Respondent No 1 was quashed on the reason that she was given more marks under “experience” than the Appellant as referred to in Determination D.../2023. The insignificant additional marks allocated to the Appellant on this criterion, just to counter the previous determination, were completely diluted and drowned in by the higher marks allocated to the Co-Respondents under the sub criteria falling under criterion ‘merit’ as explained above. The more so, Co-Respondent No 2 has merely 5 ½ years’ experience as Assistant EC when the required minimum number of years of experience as Assistant EC to be eligible to the post of EDC is 5 years compared to the 17 years of experience of the Appellant in the same position.

In this regard, the Tribunal refers to the case **G. Appadu v PSC & Harish Bundhoo 2003 SCJ 29** where the judges disagree with the contention that *“the proposed appointment as Senior Statistician was to be effected by selection from among officers in the grade of Statistician who reckoned at least four years’ service in a substantive capacity in the grade, the number of years in excess of those four years was not material”*.

“a submission that respondents nos 3 and 4, who reckoned some 8years’ experience at the time of the selection was made, should on that score be considered at par with applicants no 1 and 4 who, at the relevant time, reckoned 15 and 16 years of service respectively cannot “ex facie” be considered as a reasonable and fair proposition”.

Applying the case in the present matter, the Tribunal concludes that this ground of appeal has been proved against the appointment of Co-Respondent No 2.

Grounds (iii) and (iv)

Seniority and Legitimate Expectation

These two grounds are not relevant to the present matter even though the Appellant is more senior to the Co-Respondents in rank and the Appellant may have a legitimate expectation to be appointed as EDC. These grounds fail.

Ground (v)

Mockery of Justice

Under this ground, the sequence of events as described below was so glaring that it speaks for itself.

1. Appellant challenged the previous appointment of Co-Respondent No 1 as EDC. The Tribunal delivered its determination (D.../23) on 10th March 2023 quashing the appointment of Co-Respondent No 1 on the reason that she was allocated more marks on criterion Experience when it was proved that Appellant had more experience than her.
2. On 23rd March 2023, a new vacancy notice by way of Circular Note No ... of 2023 was issued for the post of EDC in the Local Government Service. A Note was inserted to read as follows:

Candidates who applied for the post in response to Circular Note No ... of 2023 dated 03 February 2023 should submit fresh applications.

The Secretary of the Respondent who appeared before the Tribunal as its Representative, explained that the Circular Note No ... of 2023 dated 03 February 2023 was cancelled and that he was not aware as to why it has been cancelled. He added that it was the Respondent (Local Government Service Commission) which took the decision to re-advertise the post.

3. The Co-Respondent was reverted to the post of Assistant EC on 28th March 2023 even though she had 21 days as from 10th March 2023 to decide whether she would challenge the determination of the Tribunal by way of Judicial Review. There was no explanation whatsoever as to why the

Respondent did not wait for the expiry of the 21 days delay before reverting back Co-Respondent No 1 to her previous post.

4. By reverting Co-Respondent No 1 to her previous post and having issued a new vacancy notice which was in force at the time of her reversion, an opportunity was open to her to apply again for the post of EDC.
5. The process of interview was carried on the 2nd and 3rd May 2023 and the Co-Respondent No 1 was subsequently appointed once again as EDC on the 5th May 2023.
6. The Appellant was given a significant mark on the criterion Experience than Co-Respondent No 1 so as to redress the findings of the Tribunal in Determination D/... of 2023 but at the same time Co-Respondent No 1 was given so many marks more than the Appellant on the sub criteria falling under merit that it defeats the purpose of assessing the experience of the Appellant.

In light of these strategies adopted by the Respondent in this particular matter, it is clear that this was meant to circumvent the decision of the Tribunal of its Determination D/... of 2023. The Tribunal finds no difficulty in concluding that this is a clear issue of Mockery of Justice.

Consequently, this ground has been proved against the appointment of Co-Respondent No 1.

The Tribunal therefore quashes the appointment of Co-Respondent No 1 under Ground No (v) and the appointment of Co-Respondent No 2 under Grounds (ii) and remit back the matter to the Respondent.