

Any circular introducing a new procedure with regards to appointment, promotion or disciplinary action cannot be with retrospective effect.

DETERMINATION

The Appellant is challenging the appointment of the Co-Respondent to the post of STBE in the Ministry. The Scheme of Service of the post provides that it is made by promotion from the grade of TBE who reckons at least five years' service in a substantive capacity in the grade and who possesses organising and interpersonal skills.

Case of Appellant

The Appellant solemnly affirmed as to the correctness of his grounds of appeal and his statement of case. The grounds of appeal are as follows:

1. *"Comparison Years of Service of Mr S. v/s D.*

The years of continuous service of Mr S. as at 15th June 2022 was 5 years, whereas the years of service of D as at December 2022 was 5 years. S has worked for longer period compared to D, and, as per the scheme of service of the STBE, "TBME who reckon at least 5 years' service in a substantive capacity." Therefore, S reckons 5 years of service well before D.

2. *Leave without pay v/s study leave*

D took leave without pay for a period of two years for the purposes of registration to the CRPE, but the registration purpose was for personal interest. The said study leave was not a course or training proposed and not provided by the Ministry and thus the study and registration will benefit directly only to D. As per the Assistant Manager Human Resource from the Ministry, the leave without pay is considered as study leave which is contradictory to HRM manual.

3. *Pension Contribution to determine Seniority.*

If this promotion is based on “Seniority” then the Ministry should indicate the total years of Pension contribution with cod:3072 and the CSFPS with code: 3075 for S v/s D against the amount contributed and determine seniority ranking.

4. *“Seniority” v/s “Promotion” -Definition*

The Ministry to indicate where is it written on the scheme of service of the STBE the word “seniority” and explain the wording “by promotion” and compare to the PSC regulations the two mentioned wordings.” SIC

The Appellant expatiated on the grounds of appeal and averred that at the time of vacancy, on 17 June 2022, the Co-Respondent was not eligible for promotion as the latter was on two years' leave without pay from 3rd April 2017 to 3rd April 2019 but he was fully eligible as he has already achieved on 15 June 2022 the required 5 years of service.

He requested the Tribunal to quash the appointment of the Co-Respondent and order a review of the ways promotion that is done at Ministry Level.

Under Cross Examination, he admitted that the appointment was made by promotion and not by selection. He did not agree that the Co-Respondent was qualified for the post as he did not reckon the 5 years' service in a substantive capacity in the post of TBE at the time the vacancy was reported as the latter was on two years' leave without pay from 3rd April 2017 to 3rd April 2019.

Case of Respondent

The representative of the Respondent solemnly affirmed as to the correctness of its Statement of Defence (SOD). Respondent averred that the post of STBE is filled by promotion on the basis of experience and merit, of officers in the grade of TBE who reckon at least five years' service in a substantive capacity in the grade and who possess organising and interpersonal skills.

Respondent also averred that the Appellant was appointed as TBE in a substantive capacity on the 15 June 2017 whereas the Co-Respondent was appointed in a substantive capacity on 8th December 2015 and was ranked 1st on the seniority list. It further averred that at the time the vacancy was reported on the 10th April 2023, both the Appellant and the Co-Respondent reckoned 5 years' service as TBE. Co-Respondent was, therefore, appointed STBE and he assumed duty on the 5 June 2023.

Respondent confirmed in its SOD that Co-Respondent was granted two years' leave without pay from 3rd April 2017 to 3rd April 2019 to allow him to undergo preregistration training as ET at the Board.

Respondent produced the following documents:

- (a) Public Service Commission Circular No 3 of 2024 dated 5th June 2024.
- (b) Departmental List Post of TBE as at 16 November 2022.
- (c) Scheme of Service of the STBE.

Under Cross Examination, the representative of Respondent stated that the seniority list is not affected by the granting of the leave without pay to the Co-Respondent and it was not study leave which was granted to the Co-Respondent. She did not agree that Co-Respondent was not eligible to be appointed as STBE. She did not produce the letter of appointment of neither the Appellant nor that of the Co-Respondent.

Respondent called the Deputy Human Resources Director from the Ministry of Public Service as witness. She stated that the Ministry of Public Service is the authority to decide on matters related to the Public Service. She stated that when a person is offered appointment for the first time in the Public Service, he is placed on a one-year probation and subject to being favourably reported by the Responsible officer of the Ministry concerned, that officer is confirmed in the appointment. She also stated that it was the practice that the probationary period is counted as service in a substantive capacity. But she added that this practice is not specifically mentioned neither in the Public Service Regulations nor in the Human Resources Manual or anywhere else. However, she admitted that the appointment of an officer may be terminated at any time during the probationary period while it is not the case when an officer is appointed in a substantive capacity. The officer is paid a fixed monthly salary and did not receive any increment while on probation.

Case of Co-Respondent

The Co-Respondent solemnly affirmed as to the correctness of his SOD as well as to the annexes which comprise of:

- a. His letters of appointment as TBE and as STBE.
- b. His confirmation letter as TBE.
- c. His approval for leave without pay.

He averred in his SOD that he is fully qualified for the post of STBE.

Determination

The Tribunal has analysed all the grounds of appeal of Appellant and has found that only grounds 1 and 2 which are relevant to the case.

Under Grounds 1 and 2

The Tribunal will deal with both grounds together as they both relate to the requirement of a minimum of 5 years' service in a substantive capacity in the grade. Ground 1 relates to the issue as to whether the Co-Respondent reckoned 5 years' service in a substantive capacity in the grade of TBE as at the date the vacancy was reported to the Respondent and ground 2 refers to the granting of two years leave without pay to the Co-Respondent before the vacancy was reported. It is not disputed that the Co-Respondent joined the public service as a TBE on 8th December 2015 with a salary at the rate of Rs 13,175 a month and that he was confirmed in this appointment on 8th December 2016. He was also granted two years leave without pay to enable him to undergo preregistration training as ET.

The appointment letter dated 1st December 2015 with ref MHE/APPT/BT V3 annexed to the SOD of Co-Respondent which the latter solemnly affirmed to be true and correct, clearly mentioned that the offer of appointment is subject to 12 months' probation and that the appointment will be terminated immediately in the event he is found medically unfit. Further, it may also be terminated at any time by giving one month's notice on either side. Hence, the Co-Respondent would only be confirmed to his appointment if he is favourably reported upon at the end of the probationary period.

The Tribunal also makes reference to the appointment letter of Co-Respondent to the post of STBE dated 2nd June 2023 bearing Ref MHE/APPT/SBT/V2 which offered the appointment in a substantive capacity with a salary scale and an annual increment in the salary scale without any terms and conditions of immediate termination of appointment. The two appointment letters clearly defined the different terms and conditions with regards to offer of appointment with probation and an appointment in a substantive capacity.

The representative of the Ministry of Public Service stated that it is a common practice that when an officer joins the Public Service for the first time with one-year probationary period, his service is counted as substantive capacity without producing any supporting evidence. Moreover, Respondent did not aver this as a defence in his SOD.

On the contrary, the Respondent averred in its SOD that the Co-Respondent was appointed in a substantive capacity as from 15th December 2015 but did not produce the appointment letter of the Co-Respondent nor any documentary evidence to support their averment which is in clear contradiction with the appointment letter produced by the Co-Respondent.

In addition, the representative of the Ministry of Public Service clearly confirmed that a first appointment in the Public Service with a probationary period is subject to termination at any time which is not the case when an appointment is made in a substantive capacity which is in contradiction to her statement to the effect that services during “probation” are counted as services in “substantive capacity”.

Taking into consideration that the Co-Respondent has been confirmed in his appointment on 8th December 2016 after one year probation which changed his conditions of service in that he was placed in a permanent and pensionable establishment with an annual increment in a salary scale as at date, the issue of immediate termination or termination at any time with one month’s notice does not arise any more as from the date of his confirmation in his appointment as TBE.

It, therefore, implies that substantive capacity in this particular case starts running as from the date of confirmation which is the 8th December 2016.

The Respondent has also produced Public Service Commission Circular no 3 of 2024 under ref PSC/GEN/24/36 dated 5th June 2024, addressed to all Responsible Officers under the seal “confidential” the relevant part of which is being reproduced:

“2. The Public Service Commission, in exercise of the power vested in it under section 89 of the Constitution and subject to the Public Service Commission Regulations and to such instructions as the Commission may from time-to-time issue, has decided that whenever reference is made to years of service in a substantive capacity, such service also includes the period served on probation.”

This circular dated 05 June 2024 has therefore no bearing whatsoever of the present matter as the vacancy was reported on 10th April 2023 – the more so, this decision cannot be applied retrospectively.

The Tribunal further observed that, it is an established principle that Conditions of Service of Public Officers are clearly spelt out in the Human Resource Manual so that these officers are overall provided with certainty about their obligations, rights and other fringe benefits. Consequently, the changes of any policy regarding these Conditions of Service should have been brought to the attention of all Public Officers by way of Circulars or Addendum to the Manual.

In this present matter, this has not been the case. As explained above, there is no documentary evidence as to the existence of such policy. On the contrary, the Respondent has never in the past made mention of that policy when the issue of ‘Substantive Capacity’ was the subject matter of hearing in connection with Appeals made to the Tribunal.

The Tribunal does not agree with the point made by Respondent that such policy reckoning “years of service in a substantive capacity” to include the period served on probation has always been in existence.

The Tribunal refers to determination D16 of 2020 wherein the same issue was canvassed. The Tribunal quashed the appointment of those appointees who did not reckon the required number of years in a substantive capacity to be eligible to the promotional post. The determination was challenged before the Supreme Court and the whole selection process was quashed on ground that it was not compliant to Public Service Commission Regulations 14(1)(c). Since this determination, the Tribunal has constantly applying the same principle in other cases with similar issues.

Having concluded that the time as substantive capacity starts running as from the date the Co-Respondent was confirmed which is the 8th December 2016 and stops on the day the vacancy was reported by the Responsible Officer to the Respondent i.e. 10th April 2023, it is clear that Co-Respondent did not reckon 5years' service in a substantive capacity as TBE as required by the Scheme of Service for the post of STBE.

The Tribunal, therefore, quashes the appointment of the Co Respondent to the post of STBE and remit back the matter to the Respondent by virtue of S. 8 (4) (b) of the Public Bodies Appeal Tribunal Act 2008.