

**The Tribunal “shall not be bound to communicate to any person the contents of any report, document or other material produced by any Commission or Public Body” (Section 9(b) of the Constitutional/Amendment) Act 2008. The Tribunal may choose to share nonsensitive information with parties in an appeal**

The Appellants are challenging the decision of Respondent to appoint the Co-Respondents as ... as they consider that Respondent has not taken into account their experience and qualifications.

During the course of the Hearing, Counsel for the Appellants moved that the Tribunal makes available to the Appellant the confidential information that the Respondent provides to the Tribunal under confidential cover. He argued that in proceedings before the Tribunal the parties should have equal access to information so that they can prepare their case on the same footing. He found it unfair that the Respondent and the Tribunal should share information behind the back of the Appellant(s) and that the Tribunal should give its determination without the Appellant having a chance to take cognisance of the information provided and being deprived of the opportunity to defend himself.

Counsel for Respondent objected to this motion and referred to Section 4 of the Service Commissions Regulations of 1981 which says:

*“Any report, statement or other communication, written or oral, or record of any meeting, inquiry or proceedings which a Commission may make in the exercise of its functions or any commissioner may take in performance of his duties, and any application form, report or other communication dispatched to a commission in connection with the exercise of its functions, and in the possession of a Commission shall be privileged in that its production may not be compelled in any legal proceedings unless the Chairman certifies that such production is not against the public interest”.*

Counsel for Respondent stated that the Public Service Commission by virtue of this provision of the Service Commissions Regulations could not allow the confidential information to be passed on to the Appellant.

It is a fact that the Public Service Commission has always been shielded by Section 4 of the Service Commissions Regulations and has refused systematically to divulge any of its confidential information to any party.

After the creation of this Tribunal, following an amendment to the Constitution in 2008, the situation changed legally. Under section 7 (8) of the Public Bodies Appeal Tribunal Act 2008, it is said that the Tribunal “*may make such orders for requiring the attendance of persons, and subject to section 6(4)(b) and (c), the production of articles or documents, as it thinks necessary or expedient*”. Counsel for Respondent remarked that this was a derogation to the Service Commissions Regulations to suit the needs of the Tribunal set up under the Constitution. However, even if the Tribunal is clearly empowered to call for documents, the Tribunal found it difficult in its initial years to get such confidential information, even if these were to be for the eyes of the Tribunal only. It was only on 11 October 2012 after the Tribunal gave a ruling on the matter, that the Public Service Commission started to make available the information sought.

The question, then, is whether confidential information now being provided to the Tribunal can be given to the Appellant. Section 9 (b) of the Constitution (Amendment) Act 2008 says clearly that:

*“the Public Bodies Appeal Tribunal shall not be bound to communicate to any person the contents of any report, document or other material produced by any Commission or public body and, except where necessary for the purpose of making its decision, the Tribunal shall make no reference to the contents thereof in its decision”*

The Constitution gives the latitude to the Tribunal to decide whether to communicate or not communicate documents/information to a third party, even to the Appellant. The Tribunal has, therefore, been giving information such as the list of criteria used by the PSC selection panel to the Appellant as well as the list of

comparable qualifications of all applicants. Such information was never known to those who applied for posts at the PSC before. However, the Tribunal has not found it fit to provide some sensitive information, like the weightage of each criterion and the markings of candidates. The reason is that, should the Tribunal start doing this, it would open the floodgate for all candidates to seek such information and confidentiality would not be guaranteed. The Public Service Commission handles thousands of applications for posts every year and disclosure of sensitive information could prejudice the effective working of this important constitutional public body.

It is clear that the intention of the legislator was to protect the confidentiality of the documents emanating from the Public Service Commission as well as any details regarding the selection process. This is why the proceedings of the Tribunal are to be held in camera, contrary to most courts and Tribunals which sit in public.

We are also comforted in our view when we consult Hansard to see what was the intention of the legislator. In his speech, the Prime Minister, while summing up the debate on the relevant Bills said:

*“Mr Speaker, Sir, there was another point raised on confidentiality of marks that I think other Members say: “Why don’t we show transparency and have the marks published?” It is considered, Mr Speaker, Sir, that markings should be held confidential and I will tell you why. It is felt that if you start by showing the marks and then publicizing them, it will lead automatically to all sorts of arguments as to whether the candidates’ marks should have been slightly higher or those of other candidates should be slightly lower. I understand there has even been pronouncement from the Privy Council confirming the need for confidentiality in such matters.”*

The second question which Counsel for Appellants raised is whether the Appellant will have a fair hearing in the absence of information which is crucial to the substantiation of his case.

There are limits to the broad principles of fair hearing, namely to the right to have access to information which may be adverse to one of the parties before the Tribunal. A limit may sometimes be implied to the statutory framework within which natural justice is

to operate. What is essential is substantial fairness to the person adversely affected. It is to be noted here that both parties are fully aware of the case they have to meet as well as the substance of the case since both parties are in presence of the Grounds of Appeal, Statement of Case of the Appellant and Statement of Defence of the Respondent.

The extent of the disclosure required by natural justice may have to be weighed against the prejudice to the scheme of the Act which disclosure may involve. In the leading case of *R.v. Gaming Board for Great Britain ex p. Benaim and Khaida* [1970] 2 QB 417 . Cf. *Ainsworth v. Criminal Justice Commission* (1991) 106 ALR 11), the Court of Appeal applied these considerations to the procedure of the Gaming Board in granting certificates of consent to persons wishing to operate gaming clubs. It was the Board's duty to investigate the credentials of applicants and to obtain information from the police and other confidential sources. Such sources, it was held, need not be divulged if there were objections properly based on public interest. The Board must, however, give the applicant an indication of the objections raised against him so that he can answer them, as fairness requires. This is the case before this Tribunal.

It is apposite to note that, during the hearing, the Appellants, the Co-Respondents, the officer representing the PSC and Counsel from all sides or any Trade Union Representatives assisting parties, are not in presence of the information regarding markings and other sensitive information which are given at a late stage to members of the Tribunal. At hearing, therefore, all parties are on a level playing field and no party can claim advantage of being privy to information that can play in its favour. The principle of a fair hearing in that sense is observed.

It may be appropriate at this stage to explain what the Tribunal does with the information provided to it under confidential cover.

What does the Tribunal look for when it gets these documents? The Tribunal, in the case of markings at the interview, for example, is not interested in the marks given to the candidates. If it starts doing this, it will mean that the Tribunal is stepping into the shoes of the PSC and going over the selection exercise again. This is not the Tribunal's

role. In doing that, the Tribunal would be usurping the role of the PSC. Section 89(1) of the Constitution is clear about this namely that:

*“Subject to this Constitution, power to appoint persons to hold or to act in any offices in the public service (including the power to confirm appointments), to exercise disciplinary control over persons holding or acting such offices and to remove such persons from office shall vest in the Public Service Commission”*

What the Tribunal does is only to check whether the PSC has taken into consideration matters which Appellant(s) have averred in their Grounds of Appeal and Statement of Case and when parties depone at the Hearing. The Tribunal also scrutinizes the process to see whether the PSC has taken into account matters which are extraneous or irrelevant to the appeal and either discriminated outrageously against any candidate, or blatantly favoured anyone or was unfair, unreasonable or arbitrary. By way of example, Appellants very often claim that they have additional relevant qualifications which according to them have not been taken into account by the PSC. The Tribunal will then go through the mark sheets provided by the PSC and ascertain that the candidates were given bonus marks for the additional relevant qualifications.

However, the Tribunal will not assess the marks given for the additional qualifications as this will mean that the Tribunal can gauge the level and relative relevance of different qualifications, which it definitely cannot. The PSC selection panel or the selection panel is at the level of the Ministry acting under delegated power. It has an advisor who is the best judge of such relevance and specially concerning experience and other qualities. If the selection panel is at the level of the Ministry, acting under delegated power, the question of the suitability of a candidate is well-known to the panel. Moreover, the panel receives the last three confidential reports of each candidate and sometimes even an *ad hoc* report. The PSC, in past appeals, had indicated to the Tribunal that in case of doubt it may seek the advice of the Tertiary Education Commission for the equivalence of qualifications.

Another example is when the selection panel set up at the level of a Ministry had used “physical fitness” as a criterion for assessment. None of the members of the panel was habilitated to assess this, not being in the medical profession themselves. The Tribunal questioned this and for this and for other reasons, the Tribunal gave a determination in favour of the Appellant.

The onus is for the Tribunal to make good use of the information showed to the Tribunal in full confidentiality. The Tribunal has gathered experience in the fine art of adjudication. It is capable of making reasonable and judicious use of such information and making itself comfortable in delivering determinations which are fair to parties. The Tribunal is lifting slowly but surely the shroud of perceived or real opacity in the decision making process of the PSC, or for that matter of the LGSC.

At this stage the Tribunal only hopes that the two public bodies will take advantage of the normative value of the Tribunal’s determinations to improve on the transparency of their decisions.

We are very mindful that the right balance has to be struck and that while the Appellants should be given the maximum information possible so that they can prepare their case, the confidentiality of sensitive documents belonging to the Public Service Commission should be respected.

For the reasons given, the motion is therefore set aside.