

PUBLIC BODIES APPEAL TRIBUNAL

No. R/04 of 2014

In the matter of:-

1	Mrs. I. PUDARUTH-RUCHAIA	}	<b>(Appellants)</b>
2	Mr. S. RAMLALLAH		
3	Mrs. D. M. MATHUR-DABIDIN		
4	Mr. L. UJODHA		
5	Mr. P. BEEKAWOO		
6	Mr. G.K.R. RAMREKHA		
	<b>Versus</b>		
	<b>Public Service Commission</b>		<b>(Respondent)</b>
	Miss VALERE Marie Joelle Sandrine	}	<b>(Co-Respondents)</b>
	Mrs GUNESS-GOOLBAR Z. Kaushar		
	Mr BUNJUN Raj Kishore		
	Mrs GUJADHUR-NOWBUTH Shakuntala Devi		
	Miss AULADIN Zahira Bibi		
	Mr. GOPAUL Devendre		
	Mr POONYE Navindranath		
	Mrs JHOWRY Chandanee		
	Mrs SAMYNADEN Sarvedi		
	Mrs LALLMOHAMED Z. Begum		
	Mr. GOPAUL Devendre		
	Mr RAMSAMY Marie Joseph		
	Mrs PAWAN Anandee		
	Mr MAWAH Parmanand		
	Mr MUNBODH Youdhisteer		
	Mr BOODHNA Veersingh		
	Mr PIRTHEE Prem		
	Mr BALGOBIN Kechan		
	Mr PADARUTH Bhavindranath		
	Mr. AUJEET Satydanand		
	Mrs RAJAHBALEE-CADER Bilkiss		
	Mrs COONJAN Jayanty		
	Mr CONHYE Dhanraj		
	Mr. Premchand TEELOKU		
	Mrs. Jeanne LAM HING PO		

## Ruling

Six Appellants have appealed before the Public Bodies Appeal Tribunal (PBAT) against the decision of the Public Service Commission (PSC) to select and appoint the Co Respondents as Principal Assistant Secretary (PAS) in a temporary capacity on the ground that many of them are junior to them and, according to the latter, lack the required experience to be appointed to the post.

Counsel, appearing for the Appellants Nos 1,4 and 5,thereinafter referred to as Appellants, has requested that the chairman of the PSC be called on personal answers to answer a list of questions that she has communicated to the Tribunal.

Following the above request of Counsel, the Tribunal has issued Guidelines which are as follows:

- 1. *“If the PBAT decides to entertain the appeal it can call for a report from the public body [Section 6 (4) (b) (i)] and 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 [Section 6 (4) (b) (ii)].*

*If the appeal is entertained, appellant is required to produce a Statement of Case to expatiate on the grounds of appeal, if he wishes, without adding new grounds. This Statement is sent to Respondent.*

*Respondent then files a Statement of Defence.*

*If other public officers are concerned with the appeal, they are summoned to appear as Co-Respondent. They may produce a Statement of Defence which is then sent to all parties concerned.*

*The PBAT Act provides that the Tribunal is not bound by the procedures or legal forms of a court of law, and rules of evidence [Section 7 (6)] and that the Tribunal may adopt such procedures as may be necessary for the proper functioning of the Tribunal [Section 7 (8) (d)].*

## 2. Demand of Particulars

*Demand of particulars will only be allowed in exceptional cases if a part of the Statement of Defence is unclear. Otherwise parties must proceed with examination and cross-examination in order to elucidate any matter contained in the Statements of each party.”*

### **SUBMISSIONS ON BEHALF OF APPELLANTS**

The main arguments of Counsel for Appellants can be summarised as follows:

- Appellants need to have all the available information before they can decide how to proceed with their case. Those answers should be provided in a spirit of fairness and equity to all parties as has been the practice in courts of law.
- Section 7(6) of the PBAT Act referred to at one point, by counsel for the Respondent is only being used as a shield in order for them not to provide the particulars sought. If the defence is prepared to answer the questions in cross-examination, there is no reason why they cannot answer them at the beginning of proceedings.
- Since the burden of proof lies on the Appellants, the latter should be allowed to use all means possible to get whatever information they need for the purposes of their case. Otherwise, the Appellants will find it hard to meet the burden of proof.

The following extract from the case of Public Service Commission v/s Public Bodies Appeal Tribunal in the presence of Mrs. Man Lan Wong Chow Ming (2011 SCI 382) was quoted:

*“The Tribunal is a statutory body which is bound to act in conformity with all the norms of natural justice. Not only had it been enjoined to do so by the statute which created it, but also by virtue of section 10(8) of the Constitution and by the operation of the common law in the discharge of its quasi-judicial duties...”*

It was submitted that these are the two main requirements of procedural fairness, and in that respect, it is therefore the right of Appellants to know the opponent’s case, especially as they know nothing about the other side’s case except for the averments in the Statement of Defence. It would be wrong, according to

Counsel, to rely only on the content of the Statement of Defence, given the general averments made therein. Even in a Court of Law, a party that does not have all the elements of information in their possession, is allowed to call the other party on personal answers.

## **RESPONDENT'S SUBMISSIONS**

Counsel for Respondent was of a different point of view. She stated that there was no evidence before the Tribunal to the effect that the Statement of Defence is unclear. Therefore, the issue of particulars should not arise unless Appellants expressly communicate to the Tribunal which part is unclear.

She referred to section 7(6) of the PBAT Act which states as follows:

*"In the hearing of an appeal, the Tribunal is not bound by the procedures or legal forms of a court of law, and rules of evidence..."* in performing its functions.

There are clear guidelines under Section 7(5): *"...the Tribunal shall endeavour to combine fairness to the parties with economy, informality and speed."*

And further, section 10 states: *"The Tribunal may make such rules for the purpose of instituting and conducting appeal proceedings as it deems fit."*

Therefore, Counsel considered that any rule emanating from the Tribunal as to the procedure to be adopted should be adhered to. She re-emphasised that the Tribunal has already stated that the demand of particulars is only allowed in exceptional cases, for example, when a part of the Statement of Defence is unclear. Otherwise, she submitted, parties must proceed with examination and cross-examination.

Furthermore, the practices and procedures before the PBAT should be distinguished with regards to the established practice before a court of law. The PBAT Act sets out that a Tribunal is not bound by the procedures of a court of law. Therefore, unless the Tribunal finds the Statement of Defence unclear, there is no reason to allow the motion made by the Appellants.

Reference was made by counsel to the case of **New Goodwill Co. Ltd v Mrs. Tan Yan [1977 MR 239]** where a distinction is made between giving personal answers *and interrogatoires, sur faits et articles*. She reminded the court that

examination on personal answers is under Section 36 of the Supreme Court Rules 2000, which states that, if a party intends to call the representative of a company to give his unsworn personal answers, he shall ex parte apply to the Master for an order summoning the person to come, and then the Rules set out the proper manner to do it. In normal practice, to call somebody on unsworn personal answers is to secure *un commencement de preuve en écrit*. In the present case, this is an appeal on documentary evidence. The *commencement de preuve en écrit* is therefore inapplicable.

Should the questions not amount to questions on personal answers, but *interrogatoires sur faits et articles*, Article 336 of the Code de Procédure Civile is relevant and states that ‘*Seront tenues les administrations d’établissements publics de nommer un administrateur ou agent pour répondre sur les faits et articles qui leur auront été communiqués; elles donneront, à cet effet, un pouvoir spécial dans lequel les réponses seront expliquées et affirmées véritables, sinon les faits pourront être tenus pour avérés, sans préjudice de faire interroger les administrateurs et agent sur les faits qui leur seront personnels, pour y avoir, par le tribunal tel égard que de raison.*’

In the case of **Bouvet v Mauritius Turf Club [1962 MR 213]**, the Court said that the procedure of *interrogatoires sur faits et articles* “*is provided by law in cases where a party to a suit is unable to supply adequate proof, whether written or verbal, of the averments made in the pleadings...*”

Counsel submitted that the questions set out such as ‘*Does the PSC have a website?*’ are irrelevant and are things Appellants could find out without resorting to questions on personal answers. Further, the Tribunal has the power to ask whatever questions they need to and further inquire, or to bring up whatever records, or to even give the Appellant an opportunity to re-question parties. The issue of summoning and calling the Chairperson on personal answers is therefore irrelevant and serves no purpose.

## **RULING**

We have listened to arguments of Counsel on all sides, including Counsel for Co Respondents who also insisted that transparency and fairness should be the prevalent criteria in guiding the Tribunal. There is no specific mention in the PBAT

Act about the modus operandi that the Tribunal has to adopt. Indeed, the only guidelines provided to the Tribunal are to the effect that the Tribunal should “*combine fairness to the parties with economy, informality and speed.*” The Tribunal has however, decided to give the parties the possibility to expatiate on their grounds of appeal through a statement of case and to rebut the averments of the statement of case in a statement of defence prepared by the Respondent and Co-Respondents. This not only enables the parties to explain fully their contentions but also allows the Tribunal to understand and narrow down issues in order to be able to deal with the case promptly and swiftly. It also enables all parties as well as the Tribunal to decide whether additional information is needed. In most cases, especially where there has been a selection exercise, the Tribunal requests confidential information from the PSC or LGSC regarding the marks obtained, the relevant criteria used in assessing a candidate, etc in order to see whether the actual selection process has been fair and if the post has been given to the best suited and highly marked candidate. Those confidential information are for the eyes of the Tribunal only. Whenever there has been the need to summon a Ministry or a Responsible Officer, the Tribunal has in the past done so if the need arises. However, this has been done when the Tribunal, during the course of a hearing, is faced with a situation that only the RO or someone else can shed light on. Until now, the Tribunal has never summoned any member of the PSC or LGSC or the interviewing panel.

In this particular case, counsel for Appellants has requested to call the Chairman of the PSC on personal answers. The guidelines of the Tribunal are clear. Unless the statement of defence is unclear and the other party has clearly explained why it is so, the Tribunal will not allow demand of particulars whether in the form of written questions sent to the other side or by way of questions on personal answers.

Counsel for Appellants has stated that the reason for calling the Chairman on personal answers would be to enable her to meet her case fully. It is a fact that the Appellant cannot travel outside her grounds of appeal. She has already elaborated on those grounds of appeal in the statement of case and the Respondent has also filed a Statement of Defence. The information in those pleadings, as well as the information she will gather during cross examination, should enable the Appellant to meet her case. Since Counsel has not started cross examining the representative of the Respondent nor has she heard her depone yet, it is premature to assume that

answers will not be given to the questions she has listed, when asked. In any case, should they not be answered later on, Counsel will still be free to reiterate her request.

This Tribunal has strived to operate in a fair manner. When answers are not forthcoming from the Respondent's side, the Tribunal makes sure that it requests for it and that it is provided with same. Indeed, many of the questions set out by Counsel for Appellant are information that the Tribunal usually requests for and which are provided under confidential cover for the eyes of the Tribunal only as they are confidential. A few examples of questions asked by the latter are:

- Did the PSC adopt a marking scheme for the rating of the candidates? If so what was that scheme and what were the marks that the PSC allocated to each selection criteria. Was that scheme disclosed to all the candidates prior to the selection process? If so how?
- Did the PSC allocate any marks for:
  - (a) Minimum qualifications
  - (b) Any Additional relevant qualifications
    - (i) Diploma, (ii) Degree, (iii) Postgraduate, (iv) Master or MBA,
    - (v) Number of years of service, (vi) Work experience, (vii) Actingship as PAS, (viii) Interview, (ix) other

If so what were the marks given to each of the above items.

- Were there any other items for which marks were given? If so what were they and give the marks allocated to each item.
- Were the marks allocated under each item disclosed to all candidates prior to the selection exercise?
- Name all the factors taken into consideration by the PSC to determine the performance of the selected candidates at the interview. Can you give the marks/percentage allocated by the PSC for each factor considered during the interview.

The questions above relate to confidential information that cannot be communicated to the parties, including the Respondent's representative and lawyers but should be provided to the Tribunal at its request.

The following is an extract from a previous determination given by the Tribunal.

*"The information, which is of interest to Appellant, relates to the criteria for assessment, the weightage of the criteria and the mark sheets of candidates in a selection criteria. These are sensitive matters and may jeopardize the proper functioning of the public service if they are leaked even by inadvertence. It may also open the floodgate for requests for such information.*

*The Tribunal had to struggle hard to obtain such confidential information for its eyes only. Now that this principle has been established, and that public bodies are providing same, it should comfort all those who come to this Tribunal. It is not as good as open disclosure but this is the second best opinion for the Tribunal for it to give fair Determinations."*

Further a cursory reading of the Prime Minister's speech when he was introducing the PBAT Bill (No. VII of 2008) in the National Assembly shows the clear intention of the legislator on this issue:

*"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 the 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. We have said the Tribunal can call for specific details and the Supreme Court does from time to time call for details".*

If we cast a look at the other questions asked, they are questions which are regularly put in cross examination to the Respondent in most cases. A few examples are:

- Regarding the carrying out of a selection process, does the PSC have any guidelines regarding how it should be conducted? If so, what are they?



- Do those guidelines figure on the website of the PSC? Produce a copy of those guidelines.
- Are prospective candidates made aware of those guidelines? If so when and how.
- Following the said examination for AS can the PSC please give the ranking of the three above Appellants.
- What were (i) the procedures (ii) selection process and (iii) stages of selection process determined and applied by the PSC for the selection exercise it carried out for the filling of the post of Principal Assistant Secretary it advertised in May 2012? Were these disclosed to all the candidates prior to the selection process? If so, how?
- Was any system put in place to ensure that the selection board/panel carry out the selection process in an open and transparent manner. If so please describe the system put in place.

Some of the answers to the questions listed by the Appellant can even be found in the Statement of Defence such as the question below:

Would it be correct to say that the candidates to the post of AS had to take a written examination after which they were called for an interview and were rated.

In the case of **Roopun v Elliot [2008] MRC 13**, the court referred to the following extract from **Odgers Principles of Pleading and Practice in Civil Actions in the High Court of Justice, p.152** where it is said that: “the object of particulars is to enable the party asking for them to know what case he has to meet at the trial and to save unnecessary expense and avoid allowing parties to be taken by surprise” and further at the same page: “If your opponent has worded his pleading so vaguely that you cannot be sure what his line of attack or defence will be at the trial, it is worthwhile to apply for particulars, even though you think you can make a shrewd guess at his meaning”. The court held that where the plaint is sufficiently particularised, no further particulars is required.

We are not convinced here that the statement of defence is so unclear that Appellants do not know what case to meet and that the list of questions provided by

counsel for Appellants need be answered at the outset. We also bear in mind that a few of the questions cannot be answered. This Tribunal has already given a determination, referred to earlier, explaining why confidential information emanating from the PSC are for the Tribunal's eyes only. Having decided that the request of Counsel for the Appellants cannot be favourably entertained at this stage, there is no need to dwell on the issue of whether the Chairman of the PSC can be called on personal answers or not.

For the reasons given above, the request of the Appellants is refused and the case is to proceed on the merits.

**S. Aumeeruddy-Cziffra (Mrs)**  
Chairperson

**G. Wong So**  
Member

**P. Balgobin-Bhojru (Mrs)**  
Member

**Date:** .....

**Note: This case is not being treated confidentially as there has been a motion for Judicial Review before the Supreme Court by the Appellant. All information relating to the case was made public as the Supreme Court, unlike the PBAT, does not deal with such motions in camera. The Supreme Court upheld the Determination of the Tribunal which has now become final.**