

Ruling 02 of 2015

The Tribunal has no jurisdiction to hear appeals concerning assignment of duties which is not an appointment exercise.

The Appellant is a Senior HMSE (formerly Senior HMSO) at the Ministry of ... (hereafter referred to as the Ministry). She is appealing against the decision of the Respondent, as contained in a letter dated ... from the Senior Chief Executive of the Ministry to Supervising Officers of Ministries/ Departments. Appellant's grievances relate to the fact that officers junior to her have been assigned the duties of ATGHC. The Appellant is requesting the Tribunal to remedy this situation.

The Respondent raised a point of law and moved "*that the present appeal be set aside as the Public Bodies Appeal Tribunal has no jurisdiction to hear the present matter as the appeal does not relate to any decision of the Respondent pertaining to an appointment exercise or to a disciplinary action taken against the Appellant*".

Composition of the Tribunal

Before addressing the issue raised by the Respondent, the Tribunal wants to deal with a point raised by Counsel for the Appellant as to whether the Tribunal can give a ruling on a point of law given the composition of its membership because one of its members is not a law practitioner. The Tribunal wishes to refer to Section 91A (4) of the Constitution, as amended in 2008 where the issue of the composition of the Tribunal is dealt with:

Section 91 A (4):*The Public Bodies Appeal Tribunal shall consist of –*

- (a) a Chairperson who is a barrister of not less than 10 years' standing;*
- (b) 2 other members who hold such qualifications as may be prescribed."*

Section 5 of the PBAT Act 2008, which provides for supplementary and ancillary matters pertaining to the Public Bodies Appeal Tribunal, specifies the qualification of the other two members as follows:

“5. Qualifications of members of Tribunal

The members of the Tribunal, other than the Chairperson, shall respectively be –

- (a) *a law practitioner of not less than 5 years’ standing; and*
- (b) *a former public officer who, on ceasing to be a public officer, had reached at least the level of a Permanent Secretary or other Supervising Officer, or a higher level in the public service.”*

The reason for establishing a three member Tribunal with two persons who have been or are legal practitioners is clear because the legislator knew that often legal issues would be raised. Indeed, in each appeal, the members of the Tribunal must ensure that they are respecting both Section 91A (4) of the Constitution, which was introduced in 2008, and the Public Bodies Appeal Tribunal Act 2008. Members must also address issues of law pertaining to the Public Service Commission and the Local Government Service Commission. But clearly also, as there are various issues pertaining to administration and practice in the public service, the third member had to have extensive experience in the public service in order to bring competence other than legal knowledge so that the Tribunal works with “collective intelligence”. Further, the Public Bodies Appeal Tribunal is not the only Tribunal which is set up on this model.

Counsel cited Section 3 of the Law Practitioners’ Act which merely provides that “no person shall practice law in Mauritius unless his name has been entered on the Roll. A law practitioner means a *“barrister, an attorney or a notary whose name has been entered on the Roll.”*

A member of the Tribunal does not practice law when acting as member. He or she merely uses his/her knowledge and experience to analyse all the issues raised in an appeal. Members discuss among themselves before giving a Ruling or

Determination. Legally section 8(3) of the Public Bodies Appeal Tribunal Act 2008 provides that even if only two members agreed “*the decision of the majority shall be the Determination of the Tribunal*”.

It is also important to state that Section 7(6) of the Public Bodies Appeal Tribunal Act 2008 provides that “*the Tribunal is not bound by procedures or legal forms of a Court of Law, and rules and evidence*” and section 7(8)(d) that the Tribunal adopts “*such procedures as may be necessary for the proper functioning of the Tribunal*”. The question raised by Counsel for the Appellant therefore does not apply to the Public Bodies Appeal Tribunal.

Assignment of duty

Counsel for Respondent submitted that the decision of the Respondent relates to the assignment of duties of the Co-Respondents and do not relate to an appointment which will give the Tribunal the jurisdiction to hear any appeal related thereto. According to section 3(1) of the PBAT Act 2008, the Tribunal can hear an appeal “*pertaining to an appointment exercise or to a disciplinary action taken against that officer*”. There was no appointment but only an assignment of duties as per regulation 22(4) of the PSC Regulations which reads as follows:

“Notwithstanding paragraph (3), a responsible officer may recommend that a public officer be assigned the duties of another office and the Commission may so assign such duties where

- (a) the public officer cannot be appointed to perform the functions of that other office in an acting capacity because the officer*
 - (i) does not hold the official qualifications applicable to that office, or*
 - (ii) is not the most senior officer serving in that particular class or grade from which an appointment in an acting capacity would normally be made; and*
- (b) such assignment of duties is considered to be in the interests of departmental efficiency and desirable on the ground of administrative convenience.”*

Assignment of duties is not an appointment as the Supreme Court pointed out in T. Khedul Sewgobind v/s The Public Service Commission (2010 SCJ 6 a Record No 89907): *“In any event, assignment of the duties of a higher post is not synonymous with appointment to a higher post”*.

Counsel for Respondent further referred to Ruling No 09 of 2014, of this Tribunal where the difference between actingship and assignment of duties had been explained.

Counsel stated that, since there is no appointment in this case, the Tribunal has no jurisdiction to entertain the present appeal.

Counsel for the Appellant referred to the definition of appointment in section 2(1) of the PSC Regulations which includes *“(f) the appointment of a public officer to act in any public office other than the office to which he is substantively appointed”*, which gives the Tribunal the power to hear the appeal and its jurisdiction is not ousted. The attention of the Appellant was drawn to the fact that this text speaks of appointment to act in a higher capacity which is completely different from assignment of duties.

This Tribunal has already given its ruling in a previous case (Ruling 09 of 2014) regarding the jurisdiction of the Tribunal on matters relating to assignment of duties to public officers. The relevant part of this ruling, which Counsel for Respondent made reference to, is reproduced below:

“...The crux of the matter is whether assignment of duties can be considered as part of an “appointment exercise” as envisaged by the legislator.

Appointment in the PSC Regulations also includes “the appointment of a public officer to act in any public office other than the office to which he is substantively appointed”.

In PSC Regulation 22 (4) it is specifically mentioned that assignment of duties is done in the interests of departmental efficiency and based on administrative convenience and does not give rise to any claim for a permanent post. Paragraph 18.10.3 of the Pay Research Bureau 2013 defines an acting appointment (and not an assignment of duties) as *“an assignment given to an officer deemed capable of*

performing the full duties and assuming the full responsibilities of a vacant position on the replacement of an employee who is on authorized leave of absence, including sick leave, maternity leave, leave without pay, pre-retirement leave or a vacancy arising until it is filled on a permanent basis". Paragraph 18.10.4 further reads "the Responsible/Supervising Officer seeks approval from the appropriate Service Commission or under delegated power appoints an officer from the immediate lower grade (generally the most senior one) in an acting capacity in a higher office". Paragraph 18.10.6 further states that "beneficiaries of actingship are, therefore, provided with an opportunity for advancement both in terms of reward and experience thus leading to enhanced career development. The acting appointment does not give any claim to permanent appointment to the higher post".

The PSC Circular no 1 of 2001 relates to delegation of power for acting appointment and assignment of duties and stipulates that the Responsible Officer is delegated the power to make acting appointment/assignment of duties in their respective Ministry/department and that the Responsible Officer should exercise this power personally in cases where, amongst other things, acting appointment/assignment of duties made on the basis of seniority and assignment of duties made on the basis of administrative convenience. It further stipulates that acting appointments/assignment of duties made on the basis of seniority should not be made on the basis of administrative convenience without the prior approval of the Commission. Further, acting appointment and assignments of duties should not be for a period not exceeding 120 days and it is also clearly stated that acting appointment/assignment of duties vice temporary vacancies which will become permanent, should as far as possible, not be made on ground of administrative convenience and, if this is unavoidable, the period of actingship/assignment should not go beyond the date on which the vacancy becomes permanent, without the approval of the Commission.

The PSC Circular no 2 of 2006 sheds more light on acting appointment and assignment of duties stating that the assignment should be made in accordance with Regulation 22 of the PSC Regulations and the PSC Circular no 1 of 2001. It is clearly stated that when an acting appointment/assignment of duties is likely to last for a long

period, that is, more than six months, the most senior officer serving in the particular grade from which an appointment would normally be made, should be considered for such acting appointment/assignment of duties. In such circumstances, acting appointment/ assignment of duties should not be made on the ground of administrative convenience and assignment done on that ground should not be for a period exceeding six months...”

The appeal before us relates to an assignment of duties which is done in the interests of departmental efficiency and based on administrative convenience and does not give rise to any claim for a permanent post. Therefore, the jurisdiction of the Tribunal is automatically ousted.

Having found that we have no jurisdiction, there is no need to consider any further issues.

It is noted that, while this appeal was being considered, the Respondent proceeded with the appointment of some of the Co-Respondents to the post of ATGHC in a substantive capacity. The Appellant has lodged a second appeal to this Tribunal and it will be heard on the merits shortly.

The appeal is set aside.