Ruling 03 of 2015

Grounds of appeal need to be concise and precise and will be considered acceptable if all parties have understood the gist of such grounds.

The Tribunal has the right to scrutinise the whole process of selection in detail to look for any flaw or bias.

The Appellant is an ATTD who appealed against the appointment of Co-Respondent as DTTD on.... His grounds of appeal on Form 1 dated ... is set out as follows:

"*The appointment was not done on ground of relevant qualification, experience and merit required for the post of DTTD*"

In an "addendum" to Form 1, he set out his other grounds in which he explained in great detail his own career path, the details regarding the selection exercise and his own self assessment amongst other details, which do not correspond to grounds of appeal except for the last three paragraphs as follows:

«*31. I should have been appointed to the post of DTTD by the mere fact that I have been doing the duties of the job for several years.*

32. I believe that the appointment of Mrs ... to the post of DTTD has not been done on ground of relevant qualifications, relevant experience required for the post of DTTD and merit and is most unfair to me.

33. I prayed (sic) that the decision of the PSC be set aside "in the interest of merit, principle, equity and justice" and the PSC would remedy the unfairness that had been caused to me since the date the post was declared vacant.»

He also filed a Statement of Case prepared by his counsel, which is dated ..., in which it is clearly stated at point 9 that the issue in dispute is

«9. *The appeal is in a gist based on the fact that the appointment exercise was unreasonable, most unfair and biased inasmuch as it was not done on the basis of relevant qualifications, experience, merit and suitability for the post of DTTD as required by the Public Service Commission Regulations 1961 ("PSC Regulations").*»

He further stated at point 12 (ii) and 12 (iii) as follows:

« 12(ii) The selection process was carried out by two differently constituted panel for the interview of the candidates such that there is doubt as to whether same weight was given to each of the criteria enumerated in Regulation 14 of the PSC Regulations by the two differently constituted panel; and

12(iii) The selection process was flawed by the participation of the TD in the interview inasmuch as she has prepared an ad hoc report on each candidate and submitted a PSC Form 22 in which she may have recommended one of the candidates prior to the interview»

Points in law

The Respondent raised two points in law in its Statement of Defence : At paragraph 4(i) «*the grounds that the appointment was allegedly unreasonable, most unfair and biased are new grounds which Appellant had not raised in his grounds of appeal, and Respondent moves that they be disregarded*;»

At paragraph 7, «*In relation to paragraphs 12 (ii) and 12(iii), Respondent avers that these are new grounds of objection which were not previously raised by the Appellant in his Grounds of Appeal and moves that they be disregarded.*»

These points are reiterated at paragraph 18 and 19 of the Statement of Defence.

The Co-Respondent, at its point 5 and 6 of her Statement of Case, raised a Preliminary Objection as follows:

«5. *Attention is drawn that the Appellant has raised, in his statement of case at paragraph 12 (ii) and (iii), new grounds of appeal, namely that (a) there were two*

differently constituted panels for the interview; and (b) the TD participated during the interview.

6. The two new grounds should be rejected inasmuch as (a) they were not raised in the ground of appeal set out in the Notice of appeal; and (b) in any event, they have been raised outside delay.»

Parties agreed that these points had to be argued in *limine litis* and submissions were made by Counsel for each party.

Counsel for Respondent relied on the Tribunal's Ruling, Website Number ER 11 of 2012, and argued that section 6(5) of the Public Bodies Appeal Tribunal (PBAT) Act 2008 clearly prohibits raising new grounds of appeal raised outside the delay of 21 days.

Counsel for the Co-Respondent also relied on the same section of the enabling legislation and referred to two previous rulings of the Tribunal namely Ruling ER 1 of 2012 and ER 11 of 2012. (abstract to be found on the Tribunal's Website). The first Ruling refers to section 6(5) of the PBAT Act 2008. The Tribunal had indeed refused to allow a representative of an Appellant to amend the grounds of appeal outside the legal delay. The second refers to section 6(1) of the PBAT Act 2008 which provides that:

«**6. Procedure and powers of Tribunal**

(1) Subject to subsection (5), an appeal made under section 3 –

(a) shall set out concisely and precisely the grounds on which the appellant seeks to have the decision of a public body quashed or dealt with otherwise; and

(b) shall be signed by the appellant.»

Counsel for Co-Respondent strongly objected to the content in the addendum and drew the attention of the Tribunal to the fact that there were many points raised which were not grounds of appeal and this, in breach of the provision of section 6(1) of the PBAT Act 2008. He then referred specifically to points 31, 32, and 33 of Appellant's Statement of Case which, although it mentioned the unfairness of the selection exercise, did not specifically state in what manner it was unfair.

He quoted paragraphs 27 to 30 of the Statement of Case of Appellant regarding the constitution of two different panels and that “there is no certainty as to the same weightage …” He then referred to paragraphs 31 to 33 “concerning the participation or at least the presence of the TD at the selection exercise.” Counsel for Co-Respondent also referred to the case of Appadoo & Société Mon Tracas (1979 MR 109) to explain the purpose of the grounds of appeal having to be drafted precisely and “distinctly”.

Counsel for Appellant further stated that the Addendum was an annex as the space provided in Form I is not sufficient and that it is herein specifically mentioned that a separate sheet may be attached. He also stated that the provision of section 6(1) was difficult to understand as to what exactly is «precise and concise»

He insisted that all elements cannot be stated in the grounds of appeal and that it is in the Statement of Case that one can give full details. He described the grounds as being “all encompassing” and that the “Statement of Case expatiates”.

He further stated:

> «The very fact that the Statement of Case is required of an Appellant, after having to state his grounds precisely and concisely, and not subsequently or not expansively is in my humble view, the reason why the Tribunal requests a Statement of Case in order to better know in which direction the Appellant is going. »

He also stated that with regard to his two points raised at point 12 (ii) and 12 (iii) that they could be taken *proprio motu* by the Tribunal “if we find that there is a fundamental flaw in the procedure adopted by the public body”. He spoke of “error on the face of the record or that it is a flagrant breach of natural justice…”

The Tribunal must therefore decide on (i) the importance of keeping grounds of appeal “concise and precise” by deciding how these terms should be interpreted and (ii) whether new grounds of appeal can be raised outside the delay of 21 days and (iii) whether Appellant did in fact raise new grounds outside the legal delay. The PBAT Act 2008, as quoted above, seems clear and the Tribunal has had many occasions to rule on both points.

Apart from the two Rulings cited on the issue of grounds of appeal being precise and concise, we may also refer to abstract of Ruling ER2 of 2012 posted on the Tribunal's Website and in which we emphasise that it must be clear what decision of Respondent is being challenged and those grounds will be deemed concise and precise "when Respondent and Co-Respondent have shown through their stand and/or pleadings that they have understood what the grounds were, that will be sufficient. What is important is for everyone to understand the grounds." May we add here that language, though important, is not to be interpreted too strictly.

In the case Appadoo v Société Mon Tracas (1979 MR 109) (1979 SCJ 204), the Judges of the Supreme Court wrote "*There are nine grounds of appeal, but they all question the findings of the magistrate on the facts. Indeed learned counsel for the appellant wanted to combine the first five grounds into a single ground. Although the Court has sometimes tolerated this loose practice, it should be remembered that the purpose of grounds of appeal is to inform the respondent and the Court precisely and distinctly of the issues which will be raised at the appeal. If several grounds covering various issues are, as it were, brought into hotchpot, so that it is no longer possible to say what are the precise grounds on which the judgment is criticised, there will be a tendency to introduce general arguments which are not covered by any of the grounds considered separately; the result will be that the issues will be unreasonably widened, and the respondent may be faced with submissions which could not be expected*."

Were the grounds of appeal precise and concise?

In fact, the Appellant, who was probably like most Appellants *inops concilii*, prepared the addendum as if it was a Statement of Case although on the verso of Form I, it is fully explained that the Grounds of Appeal must be concise and precise. Only his ground entered on Form 1 itself and his points 31, 32 and 33 can be considered as grounds. These were given within the legal delay of 21 days. The Tribunal asks for a Statement of Case to give the Appellant the opportunity to expatiate on his grounds of appeal, to recite his career path and give details on grounds of appeal very often related to, for example, qualifications, experience and merit. But the Tribunal clearly states in its letter of request for a Statement of Case that no new grounds can be added. The question which remains now is whether the Tribunal can accept points 9

and 12(ii) and (iii) in Appellant's Statement of Case or whether they are new grounds raised outside delay.

In its Ruling FR2 of 2013 posted on its Website in the form of an abstract, the Tribunal ruled that "the delay of 21 days is mandatory and there is no provision to extend this delay." In fact reference to the Hansard confirms what the intention of the legislator was on this point.

Regularly, Appellants introduce new grounds in their Statement of Case and the Tribunal refuses to accept these. In this case, it is clear that point 9 of the Statement of Case is only a rewriting of the main ground of appeal as any appellant who is aggrieved comes to the Tribunal because he feels that the appointment exercise is unreasonable, and unfair. The word "biased", which is used, was challenged by the Respondent. Even if that term was missing in the grounds of appeal, the Tribunal can always draw an inference of bias on examining the facts before it and the confidential information which it requests for and is now consistently given by Respondent.

We therefore consider that point 9 is acceptable.

As regards paragraph 12(ii), regarding the fact that there were two different panels, we do not consider this as a new ground. In fact, the Respondent in its Statement of Defence did not reveal this important fact. Up to now we are not aware why this happened and whether it did indeed have an impact on the marking of Appellant, who was the only candidate to have been questioned by a different panel.

This Tribunal in carrying out its functions has a duty to apply natural justice and is committed to encouraging transparency in selection exercises. Moreover, when requesting Respondent for the criteria, weightage, markings and any other relevant information concerning the selection exercise we would immediately see whether there was a flaw on the selection exercise or any bias.

However Section 12(iii), which relates to the participation of the TD, will not be considered by the Tribunal. The point raised herein is completely new and relates to a regular practice where the Responsible Officer acts as adviser in the selection panel for the filling of higher posts in the hierarchy. It raises the issue of bias on the part of the TD which, however interesting it may be, could have been raised as a proper ground of

appeal within the legal delay. It is therefore not going to be considered by the Tribunal as such, that is, the very participation of the TD on the selection panel cannot be questioned. Nor the fact that she may have given a Report on the applicants.

In any case, the Tribunal has the right to scrutinise the whole process in detail and look for any flaw or bias, after the hearing of the appeal, by examining all confidential information which Respondent will communicate to it for its eyes only. It will then draw any conclusion which can be done within the ambit of the PBAT Act 2008.

The appeal can be heard on the merits, bearing in mind the above ruling of the Tribunal.