

Ruling 06 of 2016

The Tribunal has no jurisdiction concerning Schemes of Service or the composition of an interview panel.

Appellants are precluded from challenging the appointment of officers in a previous selection exercise as this is time based.

The Appellant is a LDAY who lodged an appeal before the Tribunal as she was challenging the appointment of the Co-Respondents to the post of Director of a section. Respondent has raised a Preliminary Objection in Law (POL) in its Grounds of Appeal as follows:

“PRELIMINARY OBJECTION IN LAW:

Respondent moves that the following paragraphs of the Ground of Appeal (sic) dated ... be set aside for the reasons given below:

- (i) Paragraphs (i) (a) and (b) seek to challenge the Appointment made in ... to the post of HEAY which is time-barred;*
- (ii) Paragraphs (i) (c), (d) and (f), (iii), as the issues raised therein amount to challenging the Scheme of Service for the post of Director, and the Public Bodies Appeal Tribunal has no jurisdiction to entertain any challenge relating to Scheme of Service;*
- (iii) Paragraph (iv) as the issues raised therein do not fall within the jurisdiction of the Tribunal.”*

Counsel for Appellant and Respondent agreed to provide their submissions in writing on the said Preliminary Objection in Law.

Another Appellant who was also challenging the same appointment has now withdrawn his appeal. All reference to that appeal in the written submissions of Counsel will be disregarded.

Respondent's submission in law

She said that the POL relates to the following three main issues:

“(a) Time bar

(b) Challenge to the Scheme of Service

(c) Jurisdiction of Tribunal regarding representative of Ministry of ... on interview panel”

Regarding time bar she referred to paragraphs 1(a) and (b) of the Grounds of Appeal which essentially relate to the recruitment exercise carried out in ... to the post of LDAY. She averred that *“one candidate has been given certain opportunities (entrusted with responsibility of programme coordinator/given several missions and training overseas), which gave him an edge over other colleagues for the position of LDAY, and that this candidate was indeed promoted as LDAY in ...”*

Counsel also submitted that *“these grounds amount to challenging the appointment exercise of LDAY which took place in ..., and that such is time barred and cannot be entertained by this Tribunal.*

Any challenge to the appointment exercise to the post of LDAY should have been made within the time delay required under s 3(2) of the Public Bodies Appeal Tribunal (PBAT) Act.

Since, in the present matter, the decision challenged is the appointment exercise relating to post of Director, the Appellant is precluded from challenging the appropriateness or otherwise (how it was done, whether one candidate was given undue advantage, whether other candidates were given fair chance) of a previous appointment exercise which relates to a different post and which is, at any rate, time barred.”

Concerning challenge of the Scheme of Service, the issue relates to paragraph 1(c), (d), (f) and (iii) of the Grounds of Appeal. She averred that Appellant is stating that *“one candidate has been unduly favoured because he has benefitted from the new Scheme of Service for the post of Director, as the new Scheme of*

Service only requires 10 years' post degree experience, as opposed to the old Scheme of Service, which required that the 10 years post degree experience should include at least 3 years' experience in a senior position.

Appellant has further averred that one candidate wouldn't have been eligible for the post under the old Scheme of Service, as he had been promoted (to the post of LDAY) only 2 years back, and more importantly, he suggests that the amendment to the Scheme of Service has been specifically tailored to suit that candidate."

Counsel submitted that the Tribunal has no jurisdiction *"to probe into Schemes of Service and decide whether they are correct or fair. The jurisdiction of this Tribunal, in relation to Schemes of Service, is only limited to ensuring that appointments or promotions are made according to existing prescribed Schemes of Service.*

Hence the Appellant cannot, before this forum, raise questions as to why the Scheme of Service was amended, or make allegations that same was amended to favour any one candidate."

She submitted that *"Appellant has additionally averred that at the time of the Scheme of Service was amended, he did raise concern on that fact that experience as LDAY was not requested"*. Further she stated that at paragraph (iii) of this Ground of Appeal *"Appellant challenges the inclusion of one specific requirement in the new Scheme of Service. This relates to the condition of having a 'track record of solid achievement of clearly identifiable output'.*

Concerning her point (c) **"Jurisdiction of Tribunal regarding representative of Ministry of on interview panel"**, she referred to ground (iv) which reads *"The Ministry of ... has failed in its responsibility by not sending the right official to represent it in the interview panel"*. She submitted that the jurisdiction of the Tribunal is limited to hearing appeals against decision of the Public Service Commission and the Local Government Service Commission. She submitted that the Tribunal cannot find that a Ministry sent the wrong person on the interview panel unless it was shown, for example, that a candidate was related to member of the panel or the representative of the Ministry was changed during the exercise.

She moved that the grounds mentioned be set aside.

Appellant's submission in law

At the outset, Counsel for Appellant (in his part 1) stated in response to the POL that Appellant did not seek to challenge "*any appointment made in ... to the post of 'HEAY' " a post which, in any event, is not provided for in the Civil Establishment Order*". He submitted that this objection could not be upheld.

He then submitted that Appellant has set out five grounds "*which have rendered the whole selection process flawed and biased*".

He submitted that sub paragraphs under ground (i) must all add up to one ground, explanatory to the main ground and "*set out facts as to how one candidate has been unduly favoured*".

He further submitted at point 4 that "*the date mentioned at (i)(a), does not relate to the time of accrual for the present action and therefore renders the argument of time limitation completely redundant*" and that "*The date of accrual for the present action is the date on which the appointment in question was made, which is well within the prescribed time limit.*"

At his point 6, he submitted that "*Paragraphs (i) (c),(d) and (e) of the Grounds of Appeal do not amount to challenging the Scheme of Service per se. They, in fact, illustrate the circumstances and the way in which internal procedures were deployed in favour of one candidate to the detriment of the Respondent.*"

At his point 7, he agreed that challenging the legality of the Scheme of Service would in effect oust the jurisdiction of the PBAT. He however argues that it is the "*manipulation of the Scheme of Service to the sole benefit of the aforesaid favoured candidate*" which is being challenged.

At his point (8), he explains that the Tribunal is being asked "*to determine whether facts mentioned therein amount to 'unduly favouring' (under s.3 of the Public Bodies Tribunal Act) rather than determining the legality of the Scheme of Service in itself. The question of jurisdiction, therefore, does not arise.*"

At his point 9 relating to (iii), referred to in the POL, he merely referred to Section 3 of the PBAT Act.

At his point 10, referring to the interview panel, he submitted that it was not properly constituted and is a fundamental defect which taints the whole selection process.

At his point 11, he submitted that in section 3 of the PBAT Act, the term 'shall' simply means that the "*Tribunal is mandatorily required to hear and determine an appeal made by a public officer in relation to an appointment exercise.*"

He then submitted that the POL are devoid of any merits and that the Tribunal should hear the appeal on its facts.

Ruling

We will therefore concentrate on the three points raised by Counsel for Respondent.

On the issue of time bar: The Appellant could have challenged the appointment of the candidate mentioned in the grounds 1 (a) and (b) and raised all issues which were then relevant as regards any bias. This should indeed have been done within 21 days of the Appellant taking cognizance of such appointment as per section 3(2) of the PBAT Act 2008.

When Appellant's Counsel submitted that "*sub paragraphs under ground (i) all add up to one ground*" it is apposite to refer to the case of Appadoo v. Société Mon Tracas (1979 MR 109) (1979 SCJ 204), where 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.*"

The facts averred cannot now be used to illustrate any fact concerning the present appointment.

Concerning the challenge of the Scheme of Service, paragraph 1(c), (d), (f) and (iii) of the Grounds of Appeal, Counsel for Respondent submitted that the Tribunal has no jurisdiction with regard to Schemes of Service. That cannot be disputed. Counsel for Appellant however denied that it was in fact a challenge of the Scheme of Service. Reference is made to the fact that the relevant Scheme of Service was tailor-made, which is a direct challenge of the Scheme of Service which could have been made at the time of the adoption of such a Scheme of Service. Counsel for Appellant also referred to the “*manipulation of the Scheme of Service*”, which in fact boils down to a challenge of the new Scheme.

The procedure to amend a Scheme of Service is quite lengthy. Amongst other things, the Trade Unions are invited to send their comments on such amendments. Appellant could have raised her concern officially at the relevant time, before the Scheme of Service was prescribed.

Concerning the issue of “Jurisdiction of Tribunal regarding representative of Ministry of ... on interview panel”, Counsel for Respondent submitted that the Tribunal cannot find that the Ministry sent the wrong person to the interview panel except in specific circumstances.

Counsel for Appellant for his part submitted that the constitution of the interview panel amounts to a fundamental defect which taints the whole selection process.

The Tribunal is not empowered to decide on the constitution of an interview panel. It can find however that there was a serious problem on the facts. The Appellant has not however raised a ground which is specific to show that indeed the member of the panel did show bias and favoured one candidate.

The Tribunal will therefore hear the appeal on the merits without reference to the impugned paragraphs challenged by Respondent in its Preliminary Objection in Law.