

Amendments of Statement of Defence is allowed provided it do not prejudice the other party.

Appellant is challenging the decision of the Respondent to appoint the Co-Respondent to the post of DRD TDP in the Public Body.

Respondent filed a proposed amendment on 10th May 2023 to the original Statement of Defence (SOD) which was filed on 27th September 2021. It is to be noted that this matter could not be dealt earlier due to some unforeseen circumstances.

In effect, the Respondent proposed the following amendments –

(i) at paragraph 3 (iii) of its SOD to read as follows:

“The vacancies were advertised by way of PSC Circular Note No ... of 2019 and the closing date was 13 August 2019. Eight candidates applied for the post and only two candidates excluding Appellant, who does not possess a Master’s Degree in Economics or International Trade, but possesses a degree of Master of Science in International Business and Finance, were found eligible. The interview initially scheduled for 6th March 2020 had to be postponed as the two eligible candidates were out of the country. Appellant was listed as a reserved candidate and was given the opportunity to attend the interview in order to assess the module contents of her Master’s Degree which did not contain all the modules completed. Appellant was requested to submit equivalence of qualifications but same was not submitted on the day of interview.”

Instead of the existing averment which is as follows:

“The vacancies were advertised by way of Circular Note No .. of 2019 and the closing date was 13 August 2019. Eight candidates applied for the post and only three candidates including Appellant, were found eligible. The interview initially scheduled for 6th March 2020 had to be postponed as the three eligible candidates were out of the country.”

(ii) at Paragraph 4 (i) of the SOD to read as follows:

“only Co Respondent who was convened for the interview was fully eligible for the post of, DRD TPD and met the qualification requirements as per the scheme of service for the post. Appellant was not found eligible for the post as she did not meet the qualification requirement” .

The original averment reads as follows:

“all candidates who was convened for the interview were fully eligible for the post of DRD, TPD and met the qualification requirements as per the scheme of service for the post.”

The Appellant objected to the proposed amendments on the following grounds:

1. The proposed amendments which are substantial in nature and raise new issues will result in the introduction of a new case for the Respondent which is foreign to and inconsistent with the original case as set out in the original statement of defence of the Respondent.
2. The proposed amendments are been made more than 1 year and a half since the original statement of defence of Respondent was filed, without any explanation as to why the said amendments could not have been moved for earlier.
3. The proposed amendments flout basic principles of fairness and natural justice.
4. The proposed amendments are prejudicial to the Appellant in as much they flout the Appellant’s legitimate expectations.
5. The proposed amendments cannot be allowed as this would tantamount to the revocation of *“aveu judiciaire”* in the original statement of defence of the Respondent.

Counsel for Appellant argued that the proposed amendments reflect an entirely new case as they shift from a candidate being fully eligible to now a candidate who does not meet the qualification requirement which is the crucial point and inconsistent with

the original Statement of Defence. He added that no explanation was given as to why these proposed amendments are coming at a very late stage when this information was already available with the Respondent. Counsel also stated that the Appellant rightly had a legitimate expectation for being qualified as pointed out in the original Statement of Defence and that the averment constitute an “*aveu Judiciaire*” and cannot be revoked.

In her reply, Counsel for Respondent stated that the issue of qualification was already a live issue before the Tribunal in as much as Appellant herself gave details of her qualification in her Statement of Case and that the issue of legitimate expectation does not arise. She argued that the issue of whether or not the Appellant was qualified is fundamental to the determination of the present case because the Tribunal has to decide whether or not the Appellant has been rightly or wrongly denied appointment to the post of DRD, PTA. She was of the opinion that fairness still prevails as all parties will have the opportunity to examine and cross examine the witnesses. On the issue of “*aveu judiciaire*”, she responded that it is an error of fact and therefore amenable to be revoked.

Counsel for Co-Respondent stated that the proposed amendments go to the root of the case and it is bound to be taken into account in determining an appeal. The onus of proof shall rest with the Appellant and not with the Respondent or Co-Respondent. He informed the Tribunal that the Co-Respondent did make this issue a live issue by averring the required qualification which is the core qualification for the post of DRD, PTA. On the issue of delay, he also cited the authority of J. Seetahul & ors v/s Ragobur. He also cited the case of Novalis Interservices Ltd V/S Attorney General 2003SCJ 133 which refers to the issue of “*aveu judiciaire*” and that questions of law are eminently within the province of the Court and an admission of the law cannot constitute an “*aveu*”.

Ruling

All the grounds will be dealt together. It is evident that the proposed amendments refer to the eligibility criteria for the post of DRD, TDP which is governed by the Scheme

of Service for the post. In the original SOD, it was averred that Appellant was eligible for the post like the other candidates who were called for interview. With the proposed amendments, Respondent avers that the Appellant is not eligible for the post as she does not possess the required qualification. The Tribunal fails to understand how come the Respondent initially averred that the Appellant was eligible and later denies same. The Respondent was fully aware of the qualification of the Appellant well before the original SOD was filed. The issue of qualification is a matter of law as it is one of the core criteria to be satisfied in a selection exercise. Respondent is bound to follow its own Regulations mainly Regulation 14 (1) (c) which reads as follows:

(1) *“in exercising its powers in appointment and promotion, including subject to paragraph 5, promotion by selection, the Commission –*

(a).....

(b).....

(c) in the case of officers serving in the public service, take into account qualifications, experience, merit and suitability for the office in question before seniority”.

It is true that there is a long delay in bringing the proposed amendments but in this case the hearing has not yet started and therefore the issue of delay is minimised. In the case of **J. Seetahul and ors v/s Raghobur 1953 MR 55** which was referred to by counsel of Appellant and of the Co-Respondent, it is stated *“I do not consider the question of delay in moving for the amendment as fatal to the application. The motion could certainly have been made earlier, but the mere negligence of the applicants in not making it at an earlier stage should not debar them from proceeding further.....”.*

The Tribunal is also of the opinion that the Appellant could not have suffered any prejudice as it is an issue of qualification when she knows very well about her own qualification. Nor can she claim any legitimate expectation as there is no record that she has been promised that she is eligible for the post before the selection exercise and that she relied on same. The mere change of the line of defence of the Respondent does not give her a right to claim legitimate expectation.

As regards the issue of “*aveu judiciaire*” it should be noted that qualification is the core criterion which goes to the root of a selection exercise and should be compliant with Public Service Regulations mainly Regulation 14 (1) (c) as well as with the Scheme of Service as prescribed under Regulation 15 of the Public Service Commission Regulation. Therefore, it is matter of law and cannot constitute an “*aveu*”. The more so, Appellant commented about her qualifications as well as the required qualifications as set out in the circular in her Statement of Case.

The amendments, are therefore, allowed and the case to proceed under the merit.