



CSAC Appeal 017/2019 – Record of Decision

Appeal 017/2019 was received on 7 January 2020, from the Appellant's legal representative against the decision of the Respondent on 22 September 2017¹ to not to select the Appellant for a position during a recruitment exercise.

Following receipt of submissions from the Respondent an Appeal Hearing was held on 20 May 2020 by Zoom and by telephone. It is noted that Acting Chairman Olivaire Watler along with members Shomari Scott, Jennifer Skinner and Kimbert Solomon participated in the Appeal Hearing. Both parties having indicated their agreement by consent to have the above-captioned matter heard on paper submissions, neither party attended the hearing and both agreed for CSAC to decide the matter on the papers. CSAC subsequently considered the written submissions/evidence of both parties along with the relevant sections of the PSML.

Grounds

The Appellant sought as a remedy that CSAC audit the recruitment process for compliance with the PSML and the Personnel Regulations.

The Appellant submitted that the Respondent acted irrationally, unlawfully and unreasonably in the following respects:

1. Illegality

The Respondent acted unlawfully by failing to appoint the Appellant or any other Caymanian candidate that scored above the successful candidate to the position by failing to comply with the PSML, namely:

- a. he failed to apply the criteria set out by law that the appointment process should be based on qualifications, skills, knowledge and experience;

¹ This is the date that the Appellant submitted the original appeal which she subsequently sought leave to apply for judicial review of CSAC's initial decision. Following the Order made by Justice Williams on 9 December 2019, CSAC restarted the appeal process.

- b. he failed to employ a recruitment process that is open and fair to include failing to provide a fair process for a suitably qualified person to apply for the position, failing to ensure that all persons applying are considered for appointment in an unbiased manner; and failing to ensure that the person appointed, is the person whose qualifications, skills, knowledge experience and integrity make him the most suitable for the position, taking into account any requirement of the PSML to give preference to Caymanians;
- c. he failed to apply an interview process that follows the criteria set out by law namely:
 - (i) failing to “use a comparable interviewing approach”. Instead, the Respondent sought by his conduct to create a process that gave the successful candidate an unfair advantage. The successful candidate was acting in the Post for a period of seven (7) months and before that there is no evidence that he previously managed a large team or budget. Therefore, to use the fact that he has seven months experience managing a large team or budget as the sole basis against the Appellant who scored 4.5 points above and others that scored above the successful candidate is the use of an unfair basis. Further, the successful candidate scored the fourth highest out of five shortlisted candidates. The successful candidate was interviewed by a panel comprising the Respondent and (at that time) one clear subordinate of the successful candidate along with a lower ranked employee of a subordinate department. This presented whether actual or perceived a biased panel.
 - (ii) Failed to consider section 41(7) namely “after applying the criteria, two or more persons rank broadly at the same level, Caymanians shall be given preference”. The Appellant scored the highest and the only suggested excuse for not appointing her is the basis that the successful, non-Caymanian candidate, had experience with a large team, which was gained by the same acting in the open position for seven (7) months, during the time of the recruitment process. The experience gained in such circumstance should not be a relevant factor for consideration; it was an unfair advantage gained by an unfair process.

2. Procedural Unlawfulness

- a. That the actions by the Respondent to use a panel that, whether biased or not, but which was amenable to bias in the application process is procedurally unlawful.
- b. To apply a system by which one of the candidates is given the ability to act in the post to be filled for seven (7) months during the recruitment process and then this

becoming a relevant factor in the employ of a procedure that creates an unfair system liable to abuse and to be influenced by bias.

- c. The consideration of experience gained by the successful candidate whilst acting in the post is the consideration of an irrelevant matter. The same applies to whether the job was demanding or required the Appellant to work late at night.
- d. Failure to consider relevant matters including but not limited to: the significant experience of the Appellant, the Appellant's qualifications and the fact that the Appellant is Caymanian to which the PSML requires active steps to advance Caymanians. Also, the failure to give or give sufficient weight to the Appellant scoring higher than the Respondent; in fact, the Appellant scored the highest.

3. Irrationality/unreasonableness

The decision of the Respondent to hire the successful candidate despite scoring in the bottom percentile of the shortlisted candidates and the Appellant and two others, of which the Appellant and another are Caymanian scored higher on the interview; giving the successful candidate an unfair advantage by allowing the successful candidate to act in the prospective post and thereafter sought to rely on the same experience to dismiss the application of the Appellant and two others are irrational/unreasonable actions which no reasonable Chief Officer armed with the same information could have arrived at.

4. Breach of Natural Justice

The Respondent conducted an interview process that is not only in breach of the PSML but which was unfair and biased.

Relief Sought by Appellant

The Appellant submitted that CSAC should make the following Orders:

1. The Appellant be appointed to the position in the Ministry or position of equivalent seniority or higher;
2. There is no break in service and/or negative effect to related benefits;
3. The Appellant be awarded costs for this application and the previous Judicial Review application made;
4. The Appellant be awarded compensation for loss of salary and pension earnings from the time of appeal, being October 2017 to date;
5. The Appellant be awarded compensation for loss of congenial employment;

6. The Appellant be awarded compensation for damage to professional reputation; and
7. Any other order as CSAC deems fit.

Consideration of the Evidence

CSAC found that the Respondent applied the wrong legal test when determining whether the Appellant ranked broadly at the same level as the successful candidate. The Respondent refers to “experience, maturity and knowledge” whereas Section 41(7) of the PSML defines the relevant criteria as “qualifications, skills, knowledge and experience”. It further appears that the omission of “qualifications” and the addition of “maturity” was not due to an inadvertent formulation.

CSAC further found that the Respondent did breach the provisions of Section 41(5) of the PSML when conducting the short-listing process or, alternatively, acted unfairly by failing to apply mandatory requirements set out in the Job Description when conducting the short-listing process. Had that process been conducted in accordance with Section 41(5) of the PSML, then CSAC considers that the successful candidate would not have been short listed and that accordingly, he could not have been selected by the Interview Panel as the preferred applicant, and in consequence, he would not have been an applicant the Respondent could have appointed.

CSAC considers that whilst the Respondent may have to exercise discretion in the shortlisting process, he did not by virtue of Section 41(5) of the PSML have power to shortlist an applicant who clearly did not meet the requirements or “must have” criteria established for the position.

Section 41(6) of the PSML stipulates that:

“persons shall be placed on the shortlist **only** on the basis of their qualifications, skills, knowledge and experience (emphasis added).”

For the above reasons CSAC concludes that the recruitment process was not an “open and fair employment process” as required by the PSML.

In view of the fact that these matters constitute illegality and procedural impropriety so fundamental that it vitiated the entire process CSAC considers it unnecessary to consider the other grounds of appeal and the Respondent’s submissions in relation to them. The decision to appoint the successful candidate was unlawful.

However, among the Relief sought, the Appellant seeks to be appointed to the position in the Ministry or position of equivalent seniority or higher. This (together with items 2, 4 and 5 of the Relief sought which flow from this) is not within the powers of CSAC to grant. For CSAC to conclude that the Appellant was the person with the best mix of qualifications, skills knowledge and experience would

require it to substitute its own view as to who had the best mix of qualifications, skills, knowledge and experience for that of the Interview Panel. CSAC has no jurisdiction to engage in such an enquiry. CSAC notes that the fixed term contract of the successful candidate expired on 26 September 2019 and so there should be no need for an order terminating the contract of employment. CSAC does not consider it within its jurisdiction to grant costs for the Judicial Review application. In relation to item 6 of the Relief sought the Appellant adduced no evidence as to damage to her professional reputation and accordingly there is no basis on which such an Order could be given.

Decision

CSAC concluded that the appeal is allowed based on a finding of a breach of Section 41(5) and Section 41(6) of the PSML. CSAC finds that the successful candidate was not lawfully appointed to the position in the Ministry and that the recruitment process was invalid due to the breach of Section 41(6).

Orders

1. CSAC finds that the decision to appoint the successful candidate was unlawful and it is therefore quashed.
2. To the extent the position is still required, the Respondent re-commence the process to appoint a candidate to the position, by open recruitment.
3. To the extent the position is still required, that the Job Description for the position clearly specify the qualifications, skills, knowledge and experience, required or preferred for the position before any recruitment process is commenced.

Award

CSAC ordered that costs be awarded to the Appellant in the sum of CI\$5,000.00 for this application.

CSAC's decision was duly issued on 11 June 2020 to both the Appellant's and the Respondent's legal representatives.



Olivaire Watler
ACTING CHAIRMAN
CIVIL SERVICE APPEALS COMMISSION