



CSAC Appeal 004/2019 – Record of Decision

Appeal 004/2019 was received on 24 March 2019, from the Appellant’s legal representative against the decision of the Respondent to not appoint the Appellant to a post following an open recruitment process in which the Appellant was shortlisted and interviewed for the post (along with a number of other candidates). The Appellant was notified of the decision on 25 February 2019.

Following receipt of submissions from both parties an initial Appeal Hearing was held on 20 February 2020 at which time a request was made by the Appellant’s legal representative for an adjournment based on the late submission of a Supplemental Statement by the Respondent’s legal representative. The request was granted and a new hearing date was set for 24 March 2020. On 23 March 2020 the Appellant’s legal representative again requested an adjournment based on the COVID-19 situation. This request was denied based on the ability of the CSAC to comply with the then current protocols, the continuation of legal matters in Court, and the fact that at the time there had been no community spread of the virus. The Appellant and his legal representative were given the opportunity to attend the Hearing by video link however neither took up the offer to do so.

It is noted that Chairman Huw Moses along with members Stacey Vandeveld, Jennifer Skinner and Kimbert Solomon participated in both the Initial Appeal Hearing and the subsequent formal Appeal Hearing. CSAC subsequently considered the written submissions/evidence of both parties along with the relevant sections of the PSML. The Respondent was permitted to give sworn oral evidence at the Hearing. Neither the Appellant nor his legal representative were present to cross-examine the Respondent.

Jurisdiction

CSAC was satisfied that the Appeal fell within its jurisdiction under s.54 of the Public Service Management Law (the “PSML”).

Grounds

The appeal was brought on the grounds of the decision being biased, unfair, against the principles of natural justice, contrary to the provisions of the PSML, unjust, and unlawful.

Failure to short-list the Appellant for Post #1

The Appellant argued that the Respondent was biased in not short listing him for one of available positions. No further detail of the nature of the alleged bias is provided in the Appeal Form. The Appellant asserted that the Job Description for two of the three positions were “almost identical” and

therefore it was illogical he was not shortlisted for both positions. CSAC finds no evidence of bias on the part of the Respondent in determining who should be shortlisted for this post. CSAC finds that there were important differences in the job descriptions for these posts. The short-listing process used a points system to determine who should be short-listed. Five persons were selected for interview for each of the three vacant positions. The PSML only requires a short-list of two persons. The Appellant did not make it into the top five applicants for the above referenced post (scoring less than 5 points), in contrast he was the highest scoring applicant at the short-list stage for the post discussed below. The PSML requires that each short-listed person has “the qualifications, skills, knowledge and experience necessary for the position.” The Appointing Officer has a discretion to determine whether they consider this threshold is met.

The Appellant asserts that another applicant should not have been short-listed as he did not have the requisite experience required for the post. Even if that were correct and there was a breach of the PSML as a consequence, CSAC does not consider the error to be material enough to justify setting aside the appointment of the successful post holder.

The Appellant suggested that since he had acted as both the HoD and Deputy HoD in the past he was more qualified for the full-time post and accordingly should have been short-listed. CSAC does not consider that such acting appointments necessarily should mean that a person who has acted in a post should be regarded automatically as more qualified or experienced as an applicant than someone who has not. In any event the Appellant did not act as the Deputy in this specific post. The Appellant’s attorneys assert that the decision not to short-list “be deemed unfair, unjust and unlawful”. This appears to be based on the simple assertion that in the opinion of the Appellant he was more qualified for the post and had the same training and qualifications as the successful applicant. There is no evidence the Respondent or the Panel acted unfairly or in a bias way in preparing the short-list or in a manner inconsistent with the applicable part of the PSML. The burden of establishing bias etc. lies with the Appellant. No facts are asserted to support the allegation of bias. CSAC considers that the Appellant’s claim that he should have been short-listed for the post should be dismissed.

Failure to appoint the Appellant to Post #2

The Appellant asserted that the decision of the Panel to recommend the appointment of another applicant and the subsequent appointment of that applicant by the Chief Officer was defective in several respects including:

1. The external agency who administering the testing only recommended that 2 of the 10 candidates move forward to interviews. This recommendation did not include either the Appellant or the successful candidate. Nevertheless, the Respondent concluded that all applicants should proceed to interview. CSAC considers the Respondent was entitled to make that decision and indeed once short listed all applicants became entitled to go through the interview process. CSAC therefore considers that the fact that the successful candidate was not recommended by the external testing agency to proceed to the interview stage did not in any way invalidate his subsequent appointment by the Respondent or the Panel’s recommendation to the Respondent that he should be appointed.
2. Despite having the highest short-list score, at the end of the Interview process the Appellant ended up being ranked “3” out of the five applicants with the successful candidate ranked “1”. The Appellant makes several challenges related to the Panel process itself.

- a. That the Respondent's grade of the Appellant was lower than that of the other panelists; and
- b. That the Respondent changed his scoring of the Appellant in respect of certain questions during his interview process but did not change his scoring in respect of any other applicant.

The Appellant asserts this is evidence that the Chief Officer was biased in some way against the Appellant and supports the assertion (made by the Appellant) that the successful candidate was "pre-selected". CSAC considers that there is nothing unusual in one panel member grading an applicant materially lower than another panel member grading the same applicant. CSAC also considers there is no prohibition on a Member of the Panel (whether they are the Chief Officer or not) altering their scoring during the interview process. Indeed, the Respondent increased his initial scoring for one question. There is no suggestion that the Panel Members were sharing their thoughts on scoring during the interview process itself. The mere fact that one Member thought less of an applicant than another member is an inherent part of the scoring process, as is the fact that the same Member will ultimately score one applicant higher than another. There is no evidence of bias or pre-selection based merely on the scoring deployed by the Respondent. Indeed the scoring of the Appellant as the "first slot" on the short-list and the placing of the successful candidate in the "joint third slot" with two others suggests that the Appellant was the 'front runner' before the interview process started. The Appellant adduced no evidence to support these assertions but it would seem that the Appellant's views were not shared (if factually correct) by the Panel.

- c. That the Respondent hardly took any notes and was not engaged in the process, as evidence of bias or pre-judging the result. It is asserted that the successful candidate was "junior" to the Appellant and had not been active in the Department for many years.

The Respondent responded to the alleged lack of notetaking in his written response to the appeal. CSAC agrees that any lack of note taking does not of itself suggest a lack of engagement (as suggested) or worse, bias or pre-decision making, on the part of the Respondent. The Preferred Candidate was determined by the Panel not by the Chief Officer acting alone. The Appellant asserts prejudice, favoritism and cronyism yet no evidence is brought forward to support these serious allegations against the Respondent.

- d. That the composition of the Panel itself could be criticized as the Appellant asserted that then Acting Head of Department ("HoD") should have been on the Panel.

CSAC considers the Respondent did not act outside of his powers in his selection of the Panel. He was entitled, in his discretion, not to include the Acting HoD and to seek some external expertise in the appointment of such senior staff. The use of private sector experts is a common tool deployed when making senior appointments and it appears the Appellant welcomed his inclusion (as detailed in his written submission). The Appellant asserts that none of the Panel knew of any of the applicant's competences. If true, then this meant the Panel was objectively focused on the written applications, assessments by the external testing agency and the result of the interviews where each had an equal opportunity to show their capabilities to the Panel.

Other Matters

The Appellant has asserted that he did not receive information he was entitled to receive pursuant to a Freedom of Information ("FOI") Request. CSAC determined this was not a matter for it as the FOI process contains checks and balances and its own appeal process in the event that the requestor of information is not satisfied with an FOI response. The mere fact that CSAC declined further

extensions of time to the Appellant to file his Notice of Appeal did not prevent the Appellant from perusing FOI related redress after the Notice of Appeal was filed and before the hearing (which did not take place until a year later). At no time did the Appellant request that CSAC seek the disclosure of any specific documents from the Respondent. CSAC has the power, in its discretion, to order the disclosure of documents if it considers such disclosure is appropriate and necessary in the interests of justice. CSAC did not consider that the disclosure of further documents was required to determine this appeal.

Conclusion

CSAC concluded that there was no basis for establishing bias, unfairness or a breach of the provisions of the relevant part of the PSML during the recruitment process.

Decision

The appeal was dismissed.

Award

CSAC made no award and no order as to costs.

CSAC's decision was duly issued on 20 July 2020 to both the Appellant and the Respondent's legal representative.



Huw St. J. Moses OBE
CHAIRMAN
CIVIL SERVICE APPEALS COMMISSION