



REPUBLIC OF MALAWI

INQUIRY BY THE OMBUDSMAN

IN THE MATTER

BETWEEN

ABBASI A. BWANALI.....COMPLAINANT

AND

MINISTRY OF HEALTH & POPULATION1ST RESPONDENT

DEPARTMENT OF HUMAN RESOURCE MANAGEMENT AND DEVELOPMENT

.....2ND RESPONDENT

INQUIRY NO: 05/2019

FILE NUMBER - OMB-BT-C-125-07

DETERMINATION

CORAM

- | | | |
|-----------------------------|---|-------------------------------|
| Hon. Martha Chizuma | - | Ombudsman |
| Abbas Bwanali | - | Complainant |
| 1 st Respondent: | | |
| Bester Tuwanje | - | HRMO Queen Elizabeth Hospital |

Paul Chilemba	-	AHRMO District Health Office
Catherine Mungoni	-	PHRMO Queen Elizabeth Hospital
2 nd Respondent	-	Absent

DETERMINATION

1. The Complainant lodged his complaint with our office through a letter dated 2nd March, 2007 alleging that the Respondent delayed in effecting his promotion after he attained a certificate following completion of the foundation stage of the Institute of Chartered Secretaries and Administration (ICSA).
2. Investigations failed to resolve the matter and it was recommended for Public Inquiry which took place on 30th May, 2018. The Complainant represented himself and the 1st Respondent was represented by Mr. Bester Tuwanje, the Human Resource Management officer; Mr. Paul Chilemba, the Assistant Human Resources Management Officer and Ms Catherine Mungoni the Principal Human Resource Management Officer. The 2nd Respondent was not represented.
3. In his sworn evidence the Complainant stated that he was employed under the Department of Human Resource Management and Development (DHRMD) under Nsanje Rural Development Program under the Ministry of Agriculture.
4. He wanted to pursue a course at ICSA, which he enquired at DHRMD if the institute and the course were recognised and approved and they responded in the affirmative. Once he was awarded the certificate he sent it to DHRMD who informed him that his certificate was equivalent to a diploma and that his employer ought to consider promoting him. In light of this, in 1999 he gave his certificate to Ministry of Health at Queen Elizabeth Central Hospital (Queens). However, once he sent his certificates to his employers at Queens they referred the matter to DHRMD who in turn sent the matter back to Queens. This back and forth went on for some years between the two offices.
5. Currently, the Complainant is working as a Clerical Officer in Human Resources and Senior Clerical Officer Personal to Holder. He would like the Respondents to acknowledge his certificate and either promote him or give him an increment.
6. In cross examination, the Complainant further stated that when he submitted his certificates to 1st and 2nd Respondents the government policy prevailing

- then was that once an officer attained a recognised qualification he was due to be promoted as is evidenced by the various letters by both Respondents.
7. Mr Besten Tuwanje the Human Resource Management Officer at Queens stated that as far as they are concerned, the Complainant had satisfied conditions for promotion to Grade EO or Grade K upon obtaining the Diploma. Their office submitted the recommendation to DHRMD for the promotion to be effected in 2001 but up to date the Complainant has not been promoted.
 8. According to the 1st Respondent the government policy at that time provided for automatic promotion on obtaining higher qualification. This was in accordance with Part B MPSR 1:306(a), however, DHRMD did not respond to their submission.
 9. In cross examination the 1st Respondent stated that with the passage of time, DHRMD has probably not responded because the policy has now changed and it is no longer just about obtaining of a certificate but also the existence of a vacancy and going through an interview process.
 10. There have been several vacancies for the position of EO but it required that the Complainant should apply to the Civil Service Commission, the 1st Respondent could not promote him without him going through that process.
 11. When I enquired from the Complainant as to why he did not apply to the existing vacancies he stated that he had not been applying because he was still waiting for his automatic promotion.

ANALYSIS OF THE LAW AND FACTS

12. The primary function of an Ombudsman is to investigate complaints of maladministration. Maladministration has many facets but for us in Malawi, the first port of call to establish maladministration is section 123 of the Constitution and section 5 of the Ombudsman Act. Under these provisions, for maladministration to be proved, the complaint lodged has to allege either or several of the following instances: injustice; abuse of power; unfair treatment; manifest injustice or conduct qualifying as oppressive or unfair in an open and democratic society; and the exercise or performance of powers, duties and functions in an unreasonable, unjust or unfair way. As per section 5 (2) of the Ombudsman Act, this further includes decisions or recommendations made by or under the authority of any organ of Government or any act or omission of such organ that is unreasonable, unjust or unfair or based on any practice deemed as such and also that the powers, duties and functions which vest in any organ of Government are exercised in a manner which is unreasonable, unjust or unfair.

13. The claim herein is that the Respondent treated the Complainant unfairly by failing to promote him after he had completed his course at ICSA despite his being entitled to be promoted automatically upon successful completion of that course. The 1st Respondent agrees with the Complainant that he was due to be promoted by virtue of completion of the course and that they had sent all the necessary documentation to DHRMD, this according to the 1st Respondent was in line with Part B MPSR 1:306(a) of the MPSR.
14. I beg to differ with both the Complainant and the 1st Respondent. As of 1994 when the Public Service Act became operational there was no automatic entitlement to promotion upon completion of a course save if the employer specifically trains an employee for purposes of promotion. Section 4 of the Public Service Act cap. 1: of the Laws of Malawi requires that employees eligible for promotion should compete, it provides that:
- "entry and advancement within the public service shall be determined solely on the basis of merit, namely relative ability, knowledge, skill and aptitude after fair and open competition which assures that all citizens receive equal opportunity."
15. The responsibility to ensure suitability and competence of eligible officers for Promotions rests with the Civil Service Commission. Under regulation 13(1) of the Public Service Commission Regulations (PSCR) the Commission in exercising their powers in connection with the appointment and promotion of officers, also has to have regard to maintenance of high standard of efficiency necessary in the public service.
16. Promotions are therefore not an outright or automatic entitlement upon completion of a course. Once there is a vacant post the employee must meet suitability in terms of qualifications and experience required, then the employee must compete with other eligible and suitable candidates in order for the Civil Service Commission to choose the best candidate to be promoted. The only exception to this process would be where it can be shown that an employee was funded by the institution to attend a course with the specific intention that upon completion of the course they will be promoted to fill a certain vacant post.
17. These sentiments have been echoed before by this office in the matter of *Khumbolani P. Nkosi and Others v Ministry of Finance Inquiry No. 149 of 2005*. In the said matter it was stated that:

"While it is appreciated that public servants should upgrade their academic and professional qualification, it should always be borne in mind that this does not create a contractual agreement on the part of the employer to promote them after excelling in examinations. The position is different where an employer specifically trains an employee for purposes of promotion. Such an employee would have legitimate expectation that he or she would be promoted upon completion of the course."

18. The Complainant in this case identified the course by himself and pursued it by himself and not through his employer. DHRMD in a letter dated 9th February, 1999 merely confirmed that the course and the institution are recognised by the government as such the Complaint could proceed with the course. Once he completed the course he therefore, was not entitled to be promoted directly. Part B regulation 1:306(a) of the MPSR which was cited by the 1st Respondent does not support that the Complainant was entitled to an automatic promotion. Even if that was the case, section 4 of the Public Service Act which came later than the provisions in the MPSR would have superseded this provision.
19. Both the Complainant and the 1st Respondent further stated that the government policy changed after the Complainant submitted his certificate to Ministry of Health and DHRMD. As stated as soon as the Public Service Act became operational that was the government position on promotions. The circulars which were issued later on this issue for example that of 8th September, 2006 were not changing government policy. They were a reminder of the government position, namely that it is the Civil Service Commission which is empowered to independently interview or test applicants for higher position. Possession of an approved entry qualification to a particular position therefore do not constitute the sole basis for promotion decisions. I therefore, find that the Respondent did not fail to promote the Complainant as he was not entitled to be automatically promoted.
20. The Respondents however, had a responsibility to provide the correct advice to the Complainant and to respond to his correspondences timely. According to De Smith and R. Braize, **Constitutional and Administrative Law**, 6th Edition at page 649, Public institutions have a duty not to mislead a member of public as to his rights and they must properly notify him of this and explain the reasons for a decision. In addition, public institutions also have a duty to

respond to any correspondences or queries within a reasonable time. Failure to do any of this constitutes maladministration.

21. I, therefore, find the 1st Respondent guilty of maladministration for failing to provide the correct advice to the Complainant on the process of promotion within the civil service. It is imperative that as Human Resource Officers they must be well conversant with Laws and regulations affecting Public and Civil Servants.
22. I further find the 2nd Respondent guilty of maladministration for failing to respond to the Complainant's letters requesting to be promoted and even those of their colleagues from Queens. This is an issue which DHRMD could have easily sorted out had they not been shying away from doing their job.
23. Despite the two incidents of maladministration that I have identified, I am of the view however, that these acts were not detrimental to the Complainant as he had several opportunities to apply for the vacant EO grades that came up from time to time but he failed to do so. The Complainant had a responsibility to mitigate his loss but instead he let opportunities pass by whilst waiting for the automatic promotion. He therefore, ought to have applied for those vacant posts whilst he was waiting for his matter to be sorted out. He cannot be awarded for failing to be diligent.
24. In view of this and by the powers vested in me under the Constitution and the Ombudsman Act, I hereby dismiss the Complainant's claim for lack of merit. The Respondents are advised to ensure that they are conversant with the laws and process pertaining to their employees and to ensure that they respond timely to correspondences.

RIGHT OF REVIEW

25. Any party dissatisfied with this determination and with sufficient interest in the matter is at liberty to apply for review to the High Court in accordance with section 123(2) of the Constitution within 90 days from the date of this determination.

Dated this 23rd Day of April, 2019



Martha Chizuma

OMBUDSMAN