



**JUDICIARY**

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**MISCELLANEOUS CIVIL CAUSE NO. 217 OF 2007**

**BETWEEN:**

**IN THE MATTER FOR JUDICIAL REVIEW**

**THE STATE**

**THE OMBUDSMAN .....1<sup>ST</sup>**  
**RESPONDENT**

**THE SECRETARY FOR HUMAN RESOUCE**  
**MANAGEMENT AND DEVELOPMENT .....2<sup>ND</sup>**  
**RESPONDENT**

**THE SECRETARY FOR HEALTH .....3<sup>RD</sup>**  
**RESPONDENT**

**- AND -**

**EX – PARTE: THOMAS R. G. MWAFONGO.....APPLICANT**

**CORAM: THE HONOURABLE JUSTICE E B TWEA**  
Nyimba, of Counsel for the Applicant  
Chiwala Chipeta, SSA for Respondent  
Mrs Malani – Court Clerk

---

## J U D G M E N T

**Twea, J**

The applicant obtained leave to move for judicial review against the Ombudsman, the Secretary for Human Resource Management and Development and the Secretary for Health, on 14<sup>th</sup> July, 2007.

The facts of the matter put briefly were that the applicant was employed in the Public Service at the grade of Clerical Officer. Later, he was promoted to the grade of Assistant Human Resource Management Officer, an executive officer grade.

In June, 2002 the applicant successfully completed a management course with the University of Malawi. He was awarded a Postgraduate Diploma. The applicant however does not hold any university degree.

In September, 2003, the applicant wrote to the Secretary for Health seeking a promotion to an appropriate grade following his academic qualification. The Secretary for Health referred the request to the Secretary for Human Resource Management and Development. In his reply the Secretary for Human Resource Management and Development said as follows:

“A post graduate Diploma normally is awarded to someone with a Degree, it is a Diploma that one gets after the 1st degree however it does not mean that a post graduate Diploma is above a degree. Since you are already as EO grade what you may be awarded are only incremental credits not a promotion which this office did because your

certificate will be treated like any other diploma.”

The applicant took issue with treating his post graduate Diploma “like any other Diploma”. It was his contention that the awarding authority; the University of Malawi, had indicated that a “Post graduate Diploma in management is higher than the ordinary Diploma but certainly not equivalent to a Degree”. For this reason he referred the case to the Ombudsman.

The Ombudsman after the inquiry made the following findings and directions:

***Findings:***

1. The complainant claims to have been denied promotion without justification.

The respondent has undertaken to refer the matter to Department of Human Resource Management and Development for action.

***Directions:***

“Pursuant to Sections 126(a) of the Constitution and 8(b) of the Ombudsman Act, I direct the respondent to refer the matter to Department of Human Resource Management and Development for consideration within three months from the date hereunder. Once this is done the Ombudsman should be notified in writing.

Any dissatisfied party is entitled to apply for review of this determination in the High Court within 3 months from the date hereof pursuant to Section 123(2) of the Constitution.”

The direction given by the Ombudsman on 12<sup>th</sup> August 2006 were not complied with immediately. However, the Secretary for Human Resource

Management and Development did respond by his letter of 12<sup>th</sup> March 2007. The gist of the letter read as follows:

“In our consultation with the University of Malawi, where Mr Mwafongo obtained his postgraduate Diploma, we have been advised explicitly in their letter dated 19<sup>th</sup> January, 2007 that the Postgraduate Diploma is not equivalent to a degree qualification despite being higher than an ordinary Diploma.

In view of the foregoing, I wish to advise that Mr Mwafongo does not qualify for promotion to the PO/CEO (grade I) position. Therefore we cannot promote him to the above grade at the moment unless he acquires a degree status.”

The Secretary for Human Resource Management and Development, in the same letter advised the applicant as follows:

“By copy of this letter, I wish to advise Mr Mwafongo that the letter on the case of Mr Mawaya to which he had referred had been erroneously issued by Mr Chikalira without the authority of this Department and as such it did not carry the Departments official position or views. However, our official position as stated above is that a Postgraduate Diploma is not equivalent to a Degree.”

On the basis of this response the Ombudsman wrote the applicant on 30<sup>th</sup> May 2007 advising him that, according to his determination, relevant action had been taken and that the matter would be closed.

It is on the basis of this decision of the Ombudsman to close the file that the applicant now applies for Judicial Review that:

1) the decision of the Ombudsman for closure of the matter relating to the applicant that complained of unfair denial of promotion to CTO/CEO grade;

the decision of the Secretary for Human Resource Management and Development is unfair and wrongful refusing to promote the applicant to CTO/CEO grade;

the decision of the Secretary for Health for implementing the wrongful decision of Department of Human Resource Management and Development.

These are the facts.

I bear in mind that at the hearing, during reply to the submissions of the respondents, Counsel sought to amend the pleadings. It was submitted that none of the respondents had power to promote, which power lies with the Civil Service Commission, or relevant Service Commission. The applicant thus applied that the pleading be amended to “failure to recommend him for promotions.” No objection was taken and so the pleading were so amended.

I have carefully considered this application. In my judgment it must fail.

I will begin with Ex T12 filed by the applicant. This is an extract of, presumably, the Malawi Public Service Regulations. It had Reg 1:306 Part B (2) on qualifications and condition for Entry for Grade of Chief Executive Officer (CEO), Senior Executive Officer (SEO) and Executive Officer (EO).

This subrule has notes. Note (c) provides four segments of salary scale for executive officers. Those appointed (i) without training, (ii) with one year training (iii) with two years training and (iv) with three years training. The training in issue is training approved by the responsible office. The

applicant did not disclose in which category he was as Executive Officer. What is clear however, is that the Executive Officers grade is the entry point for those holding ordinary diplomas. However, one can also get to this grade by way of promotion, as the applicant did, or transfer.

I already found that the applicant does not hold a degree and it would appear, from the evidence, that he had no other diploma. He was promoted from a clerical officer. There is no evidence that he has any other training for this grade. I would find that he was, ordinarily, at the lower rank of this grade: that of not having any training. This being the case, the award of Postgraduate Diploma enhanced his status to the other relevant grade. In this respect therefore the Secretary for Human Resource Management and Development; Ex T4, was correct; that being, already, at Executive Officer grade he was entitled to “incremental credits and not a promotion.”

Secondly, I noted that through out his argument the applicant has relied on a circular that was exhibited as EXT5 in respect of “Civil Servants with a Higher National Diploma (HND).” This circular was issued on 27<sup>th</sup> July 1993 to address an anomaly that existed in respect of holders of Higher National Diplomas. It directed that all such officers be promoted to the grade of CTO/CEO with effect from 1<sup>st</sup> August 1993.

The applicant has sought to equate his Postgraduate Diploma to the Higher National Diploma. There is no evidence as to the issues that caused the Department of Human Resource Management and Development (DHRMD) to investigate the status of the Higher National Diploma, nor is there any evidence as to the status of the Higher National Diploma as against the

Postgraduate Diploma from the respective institutions that award them. Their comparison and equation are, but the opinion or wish of the applicant. I would be very slow to endorse the opinion or wish of the applicant as a legal basis for determining the status of the Postgraduate Diploma as against the Higher National Diploma.

Further, it is pertinent to note that the circular in issue was issued almost 9 years before the applicant received his award. It cannot be argued that in all these years the applicant was the only one who has received such an award so as to create an anomaly in the Civil Service career progression.

Thirdly, let me consider the argument on discrimination. The applicant has argued that he had a legitimate expectation to be recommended for promotion. In this respect he submitted EXT13, an advert for the post of Management Analyst at the Grade of P8. There was no specific evidence in respect of this save the arguments made before the Ombudsman.

It was argued that some officers had been equally promoted. These promotions however, were disclaimed by the Secretary for the Department of Human Resource Management and Development. Again the cited cases were not in respect of holders of Postgraduate Diplomas who did not have first degrees like the applicant. The comparison was, yet again, at large. In the case of **Khrishna Vishnu Patel and Kama Vishnu Patel Vs The State and Minister of Home Affairs Misc Civil Cause No. 24 of 2001**, this court held, following the case of **Council of Civil Service Union Vs Minister of Civil Service (1985) A.C. 374 @ 404**, that “legitimate or reasonable expectations may arise from the existence of a regular practice which the claimant can reasonably expect to have” Such practice however, must not be

illegal or gratuitous: **G. B. Chirwa Vs Tea Association of Malawi Civil Cause 1806 of 2007.**

In this present case the cases cited were isolated and have been disclaimed. They cannot be construed to form a practice. In any case, as I found earlier, they did concern nor were they connected to Postgraduate Diplomas. I do not find that it was, in the circumstances, reasonable for the applicant to expect to complete for a post of the grade of P8. I also do not find that there is any discrimination.

In the present case, the evidence and the facts show clearly that the applicant, upon receipt of his award, approached his responsible officer with a view to be considered for relevant promotion. The responsible officer took proper administration action and referred the issue to the controlling officer. The controlling officer made the necessary enquiry and decided that the application was entitled to incremental credits and not a promotion. The applicant disagreed and made a case to the Ombudsman. The Ombudsman directed that action be taken, which was. Again the decision making authorities followed the proper procedure and made a decision. The Ombudsman was satisfied with the administrative action taken and sought to close the case.

I find that all the relevant authorities acted procedurally and within their powers. I find no merit in the argument that the post in issue should have been of CTO/CEO and not of PO/CEO grade. The process would have been no different. It is not the duty of this court to substitute its authority or decision for that of the authority vested by Parliament with the power to make the decision: **Lefa Chinsima Vs. Minister of Lands and Housing**



**Civil Cause 165 of 2001.**

I therefore dismiss the case in its entirety with costs to the respondents.

***Pronounced in Open Court*** this 28<sup>th</sup> day of November 2001 at Blantyre.

E. B. Twea  
**JUDGE**