

ABEYSINGHE AND 3 OTHERS

V.

CENTRAL ENGINEERING CONSULTANCY BUREAU AND 6 OTHERS

SUPREME COURT
FERNANDO J.
GOONEWARDANE, J.
WADUGODAPITIYA J.
S.C. 356/93 (FR)
MARCH 1, 1994.

Fundamental Rights – Constitution, Article 12 (1) – Eligibility – Apportionment of Marks – Suitability to a Post – Interview process was it flawed.

The four Petitioners allege that the 1st Respondent has violated their fundamental rights under Article 12 (1) by the appointment of the 5th Respondent as DGM (Projects) for two reasons (i) that he was not eligible (ii) that the interview process was flawed.

Held:

(1) The documents show that soon after the 5th Respondent became a member of the Institution of Mining upon nomination by that institution, the Council approved his registration on 5.11.1980, and that he was formally registered as a Chartered Engineer on 24.3.81, and that a certificate is not issued unless applied for and the date which appears on a certificate is the date on which such application was received, and that, the 5th Respondent's application for a Certificate of Registration had been received on 19.2.82.

These documents therefore indicate that the 5th Respondent had obtained full membership not later than 24.3.81. He thus satisfied the requirements as to professional qualifications and 11 years experience thereafter.

(2) As to the question whether the Leningrad Diploma, which the 5th Respondent holds could not be regarded as being a Degree in Engineering or its Equivalent- it was a matter for the 1st Respondent and the Interview Board and as long as their decision was not perverse or unreasonable or tainted by procedural error, court would not seek to substitute its views. The 1st Respondent and the Interview Board, in the circumstances could reasonably have concluded that the Leningrad Diploma was the equivalent of "a degree in Engineering from a Recognised University."

(3) As regards the submission that the 5th Respondent did not work "in the field" and did not have any practical experience. Rule 19 of the Institution's Rules for Professional Review, prescribe as one of the requirements for election as a Chartered Engineer (applying as a research candidate). Not less than four years 'practical experience', and goes on to provide that this may include upto 3 years on research for the award of a higher Degree.

Per Fernando, J.

"If such periods are accepted as satisfying the requirement of Engineering experience, no distinction can properly be made on this basis, apart from that, it does not seem in any way unreasonable to treat appropriate experience gained in the course of post graduate research studies in Engineering as being "Engineering Experience."

(4) It is apparent that the job descriptions and the marking scheme to be applied at the interview was not made known to the candidates prior to the interview despite numerous requests. While it is desirable that criteria for selection and the relative weightage be disclosed in advance, particularly where the scheme of promotion is complex, in the present case the non disclosure of the marking scheme in advance to all the candidates was not per se discriminatory or a fatal irregularity. The apportionment of marks could not be characterised as illegal or unreasonable, and the scheme itself was therefore not improper.

(5) There was an unsatisfactory feature of the interview process, the concealment of the job description and the marking scheme had left room for doubt and suspicion, but the Petitioners had not shown that this affected their performance at the interview, and there is nothing to suggest that the Petitioners would have performed any better had this information been disclosed. All candidates were equally disadvantaged in this respect.

Per Fernando, J.

"The principle of promotion by reference to seniority and merit does not mean that the needs of the institution and the Public or the demands of the post in question must be ignored. Even if he had been given high marks nevertheless the decision not to appoint him, to a post for which he was considered unsuitable cannot be considered unlawful, unfair or unreasonable."

AN APPLICATION under Article 126 for infringement of Article 12 (1).

Cases referred to:

Perera v Ranatunga, S.C. 121/92, SCM 27.5.92. 1993-1SLR 39.

R.K.W. Goonesekera with L.C.M. Swarnadhipathy for Petitioners.

Sathya Hettige S.S.C. for 1,2,3,4,5,6, Respondents.

E.D. Wikremanayake with Dr. Jayampathy Wickremeratne and Ms Anandhi Cooray for 5th Respondent.

May 03, 1995.

FERNANDO, J.

Cur. adv. vult.

The four Petitioners allege that the 1st Respondent Bureau has violated their fundamental rights under Article 12(1) by the appointment of the 5th Respondent as Deputy General Manager, Projects, for two reasons : that the 5th Respondent was not eligible, and that the interview process was flawed.

The Petitioners, the 5th Respondent, and five others-holding the posts of Project Manager or Specialist Engineer, which were in the same grade- were invited to attend an interview on 24.11.92, to select two persons for appointment as Deputy General Manager ("DGM"), and another for appointment as Acting DGM. On 16.3.93 two persons were appointed as DGM, Buildings, and Acting DGM, Contracts; the Petitioners make no complaint in respect of these appointments. On 6.7.93 the 5th Respondent was appointed as DGM, Projects.

The candidates were aware of the following requirements of the scheme of recruitment:

**SCHEME OF RECRUITMENT FOR ENGINEERS CIVIL/ELECTRICAL/
MECHANICAL/GEOTECHNICAL**

Designation of Post : Deputy General Manager

Salary Scale (Rupees) : 7,800 - 8 x 400 - 11,000

Qualifications

and Experience : A degree in Engineering from a recognized University or equivalent and

full membership of a recognized Institution of Engineers
and
18 years engineering experience after graduation, of which 11 years should be after full membership.

Method of Selection : Interview.

It is common ground that the Petitioners were eligible. Learned Counsel appearing for them subjected the 5th Respondent's qualifications and experience to minute scrutiny. He was admitted in 1968 to the Leningrad Institute of Mining in the U.S.S.R.: after following a five-year course in Hydrogeology and Engineering Geology, he was conferred a "Diploma with Honours" which recited that he was conferred the degree of Master of Geological and Mineralogical Sciences: in 1973 he was awarded a bursary by the Department of Engineering Geology of that Institute to pursue research studies leading to the Ph.D. in Geology and Mineralogy, which he obtained in June 1977; he also followed a six-month postgraduate advanced training course in Engineering Geology in the same Department from September 1976 to March 1977; and from March 1977 to March 1978 he was employed as a Research Engineer in the same Department. He joined the 1st Respondent in April 1978 as a Geologist; in 1980, at his request, he was re-designated as "Engineering Geologist." He was elected a Member of the (U.K) Institution of Mining and Metallurgy ("the Institution of Mining") on 21.10.1980. Thereafter he was registered by the (U.K.) Council of Engineering Institutions ("the Council") as a Chartered Engineer; while the Petitioners accept that this constituted "full membership of a recognized Institution of Engineers", they dispute the effective date of his registration. In September 1983, Engineering Geologists and Geologists employed by the 1st Respondent, who were members of the Institution of Mining and were registered by the Council as Chartered Engineers, successfully made representations to the 1st Respondent to change their designation to "Geotechnical Engineers".

The Petitioners contend that:

1. as at November 1992, the 5th Respondent did not have eleven years experience after "full membership" because the effective date of such membership was February, 1982;

2. the 5th Respondent did not have eighteen years "engineering experience" after graduation, because -

(a) "graduation" meant obtaining a "degree in Engineering or equivalent" and the 1973 Leningrad Diploma did not satisfy this requirement;

(b) until 1983, when the 1st Respondent for the first time treated Geologists as being Engineers, the 5th Respondent's work or service could not be regarded as "engineering" experience; and

(c) in any event, the 5th Respondent's experience from 1973 to March 1978 should have been excluded as it was academic in nature; and

3. The interview process was fatally flawed because -

(a) the 1st Respondent, and the 2nd Respondent (its Chairman), did not disclose to the candidates the job descriptions of the vacant posts, and the intended scheme of marking at the interview; and

(b) the Interview Board did not correctly compute the marks due to candidates in respect of seniority.

1. Learned Counsel for the Petitioners justifiably commented on the 5th Respondent's failure to produce his certificate of registration as a Chartered Engineer; and that is a document which the 1st Respondent and the Interview Board ought to have called for and examined. However, the 5th Respondent produced two letters received by him from the Council and the Institution of Mining (though issued only in September 1993, after this petition was filed), the authenticity of which the Petitioners do not challenge. These documents show that soon after the 5th Respondent became a member of the Institution of Mining, upon nomination by that Institution, the Council approved his registration on 5.11.80; that he was formally registered as a Chartered Engineer on 24.3.81; that a certificate is not issued unless applied for; that the date which appears on a certificate is the date on which such application was received; and that the 5th Respondent's application for a certificate of registration had been received on 19.2.82. Thus whatever date the formal certificate bears, these documents establish that

the 5th Respondent had obtained "full membership" not later than 24.3.81, and not in February 1982 as the Petitioners contend. He thus satisfied the requirements as to professional qualifications and eleven years experience thereafter.

2. It was strenuously contended that the 5th Respondent's first degree was not in "Engineering"; that he was employed by the 1st Respondent as a Geologist, and not as an Engineer, until his designation was changed in 1983; and that therefore his work, service and experience prior to 1983 could not be described as "engineering" experience. This submission depended on two assumptions- firstly, that "a degree in Engineering" meant a degree in Engineering as commonly understood in Sri Lanka, and included only a degree obtained after a course of studies similar to a local course, and secondly, that the nomenclature adopted by the 1st Respondent in classifying its staff conclusively determined whether an employee was an "Engineer" or engaged in "engineering" work. Both these assumptions may well have been valid, for the purposes of this case, if the scheme of recruitment and other relevant documents had expressly incorporated such restrictions; but they did not. The heading of the scheme of recruitment made it clear that "Geotechnical" Engineers were included; necessarily, therefore, "Engineering" and "engineering experience" included "Geotechnical" Engineers and "Geotechnical" engineering experience; and there was no indication that this was effective only from and after 1983. While it would be rash for me to attempt an exhaustive definition of "Engineering", especially now that it is usual to speak of Bio-engineering, Genetic Engineering, Nuclear Engineering, Aerospace Engineering, etc., I must observe that the discipline of Engineering is neither diminishing nor static in scope. The Encyclopaedia Britannica describes "Engineering" in these terms:

". The application of scientific principles to the optimal conversion of natural resources into structures, machines, products, systems, and processes for the benefit of mankind There are traditionally four primary engineering disciplines, namely civil, mechanical, electrical and chemical engineering, each of them having several distinct specialized branches. Other important and distinct engineering disciplines are concerned with mining, nuclear technology, and environmental, control Between these diverse fields of

engineering there is inevitably some overlap of interest and expertise. It is, however, common to all branches of engineering that academic training must begin with a thorough grounding in the fundamental principles of science, particularly mathematics and physics. Education may then be continued in general engineering subjects, including draftsmanship. There is naturally a differing emphasis in these subjects according to the branch of engineering selected by the student."

"Engineering Geology" is described as the scientific discipline concerned with the application of geological knowledge to engineering problems - e.g. to reservoir design and location, determination of slope stability for construction purposes, and determination of earthquake, flood or subsidence damage in areas considered for roads, pipelines or other engineering works.

Nowadays, for practical reasons, a degree course necessarily requires specialization in some particular department, whether described as "Civil", "Mechanical", "Electrical", or otherwise. A degree in Engineering would therefore include a degree in any area of specialization.

Learned Counsel for the Petitioners submitted that the 5th Respondent's Leningrad Diploma could not be regarded as being a degree in Engineering, or its equivalent, as it was a qualification in Geology, and not in **Engineering** as understood in Sri Lanka. The Respondents produced details of the subjects offered for that Diploma, and Counsel submitted that these could not be considered equivalent to those prescribed for a local degree in Engineering. It is not for us to determine, on the merits, whether the Diploma conferred by the Leningrad Institute of Mining was the equivalent of a degree in Engineering from a recognized University; that was a matter for the 1st Respondent and the Interview Board, and as long as their decision was not perverse or unreasonable, or tainted by procedural error, this Court would not seek to substitute its views. Further, this submission assumes an undue narrowness in the field of Engineering which is not true even locally. Thus the University Grants Commission's rules for admission to courses for 1990/91 refers to "Mining and Minerals Engineering" as a recognized field of specialization in Engineering at the University of Moratuwa. Given the emphasis on the construction of dams for irrigation and power in Sri Lanka, in the absence of compelling reasons it would be unrea-

sonable to exclude "Hydrogeology and Engineering Geology" from the discipline of Engineering - particularly in a country proud of its ancient hydraulic civilization. The Petitioners have averred (and the Respondents have not denied) that the purposes for which the 1st Respondent Bureau was established included:

(i) the preparation of feasibility reports, plans, designs and estimates of single and multipurpose irrigation, flood control and power projects, highway projects, water supply and sewerage projects and similar engineering projects.

(ii) carrying out investigations, studies and research required for the preparation of feasibility reports and plans, designs and estimates on such projects.

It is also significant that the Institution of Engineers, Sri Lanka, has confirmed that the engineering content of the 5th Respondent's degree course has been accepted as satisfying the academic component for Associate Membership of that Institution. According to the minutes of the Council of that Institution, produced by the Petitioners, the Council approved the guideline that "the academic component of a candidate's qualifications should have a substantial engineering content". The fact that the 1st Respondent initially appointed the 5th Respondent as a Geologist does not mean either that he was not an Engineer or that his work was not in the field of Engineering. The Respondents have produced details of the work done by him from April 1978; this includes foundation investigations for major irrigation and power projects, the preparation of reports on geotechnical investigations, and the supervision of the construction of dams. There is nothing to suggest that it was unreasonable to treat all this as engineering experience.

I am of the view that the 1st Respondent and the Interview Board could reasonably have concluded that the Leningrad Diploma was the equivalent of "a degree in Engineering from a recognized University"; that the 5th Respondent graduated in 1973; that, whatever the designation given by the 1st Respondent to his post, the work done by the 5th Respondent from April 1978 fell within the description of "engineering experience".

It was then submitted that from 1973 to March 1978 the 5th Respondent did not work "in the field", and did not have any "practical" experience; that work done for postgraduate studies, research or training was academic in nature, and could not be considered as "engineering experience". It appears, however, that the 1st Respondent has not interpreted this requirement in this strict manner; thus spells of administrative work, such as running and maintaining a site office and quarters, administration of staff attached to the site office, and public relations activities, as well as periods of postgraduate study abroad, have been accepted (in regard to the 1st, 3rd and 4th Petitioners), as satisfying this requirement. Learned Counsel for the Petitioners explained this as being a concession made by the 1st Respondent in respect of periods of work or study **while** in its service, and not for similar periods **before** joining the 1st Respondent; and that this concession was made, not on account of the substance of their studies, but because they continued to be employed by the 1st Respondent as Engineers. If such periods are accepted as satisfying the requirement of engineering experience, no distinction can properly be made on this basis. Apart from that, it does not seem in any way unreasonable to treat appropriate experience gained in the course of postgraduate research studies in Engineering as being "engineering experience". Thus the Institution of Engineers, Sri Lanka, prescribes as one of the requirements for election as a Chartered Engineer (applying as a research candidate) not less than four years "practical" experience, and goes on to provide that this may include "up to three years on research for the award of a higher degree" (see Rule 19 of the Institution's Rules for Professional Review). I hold that the 1st Respondent and the Interview Board were entitled to take the view that the 5th Respondent had the required period of experience.

3. The Petitioners state that neither the job descriptions nor the marking scheme to be applied at the interview was made known to the candidates prior to the interview despite numerous requests. The 2nd Respondent did not deny this, and explained that the posts of DGM were basically managerial posts, that the duties involved changed from time to time, and that therefore he decided that the exact job descriptions could not be given. He produced two circulars issued in 1990 which, he claimed, indicated how the allocation of duties had previously been made. Those circulars referred to three DGMs, designated

as DGM (E & M) DGM (II) and DGM (III), and also indicated the specific projects and functions allocated to each. However this would have been of little assistance to the candidates, and might even have been misleading, because the allocation of duties made immediately after the appointment of the 5th Respondent was quite different. As for the marking scheme, the 2nd Respondent says he decided that this should be determined by the Interview Board, and that "the Interview Board initially deliberated and decided on the marking scheme". He also says that the Board applied the principle of merit and seniority, and that candidates were interviewed as regards their past work experience, to identify their special aptitudes, and to ascertain their performance and suitability. That marking scheme was as follows:

Seniority	-	50
Engineering Experience	-	20
Qualifications & experience in the relevant field	-	10
Qualifications & experience in a connected field	-	05
Performance at the interview	-	15
Total	-	100

(Seniority - 30 marks proportionately for the first 4 years and 2 marks for each additional year).

Learned Counsel for the Petitioners justifiably criticised the 2nd Respondent's explanation for the failure to disclose the job descriptions, correctly pointing out that the Interview Board obviously knew for what specific posts they were interviewing the candidates. Thus, in regard to two candidates (one of whom was the 2nd Petitioner), the Interview Board decided that each was "good, but does not fit the posts **available**"; again, the Board recommended appointments to three specific posts - DGM Buildings, DGM **Projects**, and Acting DGM **Contracts**, and hence obviously it was considering candidates for those three posts; and finally, the Board adopted the criterion "qualifications and experience in **the relevant field**", showing that from the outset it was looking for candidates in particular "fields" and not others.

While it is desirable that criteria for selection and the active weightage be disclosed in advance, particularly where the scheme of promotion is complex, in the present case the non-disclosure of the

marking scheme in advance to all the candidates was not *per se* discriminatory or a fatal irregularity. Counsel conceded that the apportionment of marks, among the selected Criteria, could not be characterised as illegal or unreasonable the scheme itself was therefore not improper. He submitted, however, that the assessment of seniority was not properly done, as the 1st, 2nd and 4th Petitioners 14 or 15 years of service were each given 30 marks, while the 3rd Petitioner with 16 years was given only eight marks for seniority. However, it turned out that it was not seniority in overall service with the 1st Respondent, but seniority **in the grade** (i.e. of Project Managers and Specialist Engineers) which had been taken into account. It was not unreasonable or improper to allocate marks for seniority on that basis, and there was no complaint of any error in computation on that basis.

The Petitioners also complain that the marks actually given to each candidate for "engineering experience" should have been allocated strictly in proportion to the length of experience and not with reference to its quality. In my view, the Interview Board was entitled to consider both aspects. Even if this contention of the Petitioners is correct the additional marks which they would have obtained could not have affected the result. They have made no complaint in respect of any other aspect of the allocation of marks.

There is no allegation of *mala fides* in regard to the interview or the selection.

The net result is that the 5th Respondent was eligible for appointment but there was an unsatisfactory feature of the interview process, in that the 1st Respondent, the 2nd Respondent and the Interview Board though aware which posts had to be filled, and the requirements thereof, withheld this information from the candidates. Such concealment was unnecessary, and left room for doubt and suspicion. However the petitioners have not shown that this affected their performance at the interview; and there is nothing to suggest that the Petitioners would have performed any better had this information been disclosed. All candidates were equally disadvantaged in this respect.

The Interview Board did not record, in the form of marks its assessment of the 2nd Petitioner's performance: this itself is not an ir-

regularity, because if, for some valid reasons a candidate is considered unsuitable, it is not essential to go through the exercise of recording the allocation of marks because of the fact that he was invited for the interview does suggest that he was, *prima facie*, suitable, but that is not inconsistent with a later decision, after the interview, that he was not suitable for the available posts. The principle of promotion by reference to seniority and merit does not mean that the needs of the Institution and the public, or the demands of the post in question, must be ignored (see *Perera v Ranatunga* ⁽¹⁾.) Hence even if he had been given high marks, nevertheless the decision not to appoint him, to a post for which he was considered unsuitable, cannot be considered unlawful, unfair or unreasonable.

It was unnecessary secrecy about the interview process and the scheme of marking that led to doubt and suspicion in the minds of the Petitioners. However, the Petitioners have not succeeded in establishing, on a balance of probability, that this resulted in any fundamental defect causing a denial of equality, I therefore hold that an infringement of Article 12 (1) has not been proved, and dismiss the application without costs.

GOONEWARDENE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Application dismissed.