**Det 18 of 2017**

**A severe sanction given to an officer who had long years of service without any blame may be considered to be too harsh depending on the circumstances.**

The Appellant is a Consultant in Charge (PDTC) at a unit. He lodged an appeal before this Tribunal against the decision of the Respondent to approve the severe reprimand given to him by the Acting Senior Chief Executive (the RO) of the Ministry.

The matter concerned an incident which occurred on the … when a Cyclone Warning Class I was in force. Preparations were on to deal with cyclone exigencies. The Acting. RLHD, … , had convened a meeting of the Heads of the different Units for the same day at 10.00 a.m. and the Appellant did not attend the meeting.

**Appellant's Case**

The Appellant averred that by way of a letter dated… , the Ag. RLHD requested him to submit his explanations in relation to his alleged absence at a cyclone emergency meeting which took place on the same day. It was averred that the Appellant uttered vulgar words to the address of the Ag. RLHD when the latter called him in relation to the said meeting.

Appellant stated that on … he communicated his written explanations to the Ag. RLHD wherein he explained that:

*"(a) he had never uttered any vulgar word nor used any foul/aggressive/abusive language against Mr X.*

*(b) he had to give priority to the persons in the Unit on the … and had already made the necessary work arrangements with the other persons under his supervision for the smooth running of the Unit and informed Mr X of same;*

*(c) he duly attended the said meeting at the convened time, at 10.00 but Mr X was not present;*

*(d) he had always diligently attended management meetings. However, on that day, he had to leave the conference room in order to attend to the persons in the specialised room as his presence in the …Unit was a priority given the absence of Mr Y on the said day;*

*(e) he had informed Mr X of his need to be present in the specialised room and he had deputed Mr Z to represent him at the said meeting and to report to him afterwards about the outcome of the said meeting;*

*(f) Mr Y was rude and spoke to him in a hand-handed (sic) manner;*

*(g) whenever he tried to voice his concerns about the staffing issues in the Unit as Consultant in Charge at the Unit. Mr X was always dismissive and utterly disregarded same*

*(h) he has good reasons to deem that he is being victimized by Mr X"*

On … he was informed by the RO that it was proposed to initiate disciplinary action against him for failing to comply with the instructions of the Ag. RLHD and misbehaving with the Ag. RLHD using foul language. He was requested to give explanations which he did on….

By way of a letter dated…, he was informed by the RO that his explanations had not been found satisfactory and he was informed in the same letter that he was being "severely reprimanded".

On…, the Appellant appealed to the Respondent against the decision of the RO to inflict a severe reprimand to him.

In a letter dated… , the Appellant was informed by the RO that the Respondent had decided "to reject the appeal and approve the punishment".

The Appellant was challenging the decision of the Respondent on the following grounds:

*"(1) Because the decision of the Respondent a year and a month after Appellant appealed against the decision to inflict a severe reprimand is:*

*(a) A violation of the principle of a fair trial within a reasonable time*

*(b) A violation of the principle of natural justice inasmuch as the Appellant was not given a fair hearing by an impartial tribunal as both the first sanction and the appeal were decided in a most opaque manner*

*2. Because the Respondent failed to give any reason (a) why it rejected the written explanations of the Appellant which were annexed to his grounds of appeal and (b) why it did not accept the grounds of appeal of the Appellant*

*3. Because having regard to all the circumstances of the case, the decision to severely reprimand the Appellant is flawed, unjustifiable and arbitrary".*

The Appellant referred to Section 10(8) of the Constitution and the requirement of "a fair hearing within a reasonable time" and the need for substantive and procedural fairness in dealing with his case. He also stated that there had been a delay of more than one year which was unreasonable as the case was not a complex one. Such delay caused prejudice to him given his long years of service and his professional status. The Appellant was given only one clear day to give his explanations to the Ag. RLHD in reply to the latter's letter of…

The Appellant was not given any reasons why the Respondent had maintained the decision of the RO to inflict a severe reprimand to him. He should have been given the reasons, the more so as the Respondent took so long to give a decision.

He wanted to know why his explanations had been rejected, despite the fact that the Respondent was informed that he felt victimized by the Ag. RLHD.

The Appellant felt that the decision to inflict a disciplinary action against him had already been taken given the tenor of the first letter sent to him by the RO.

The Appellant further stated that he was still in the dark as to the reasons relied upon to inflict upon him a severe reprimand and to maintain it.

The Appellant submitted that the decision of the Respondent should be quashed, set aside or reversed or otherwise in the interests of justice.

During cross examination Appellant maintained that

(i) He went to the meeting room and there was no one at the higher table and Mr X was not there.

(ii) He then saw persons in the specialised room himself and not anyone else and in between he did his paper work.

(iii) That after talking to Mr X on the phone, it was agreed that he would send Mr Z to the meeting, which he did.

(iv) There were many persons registered in the specialised room as can be confirmed by the Occurrence Book.

Counsel for Appellant in his submission asked whether the words spoken on the phone on a cyclonic day, in an emergency situation, were of such a nature as to warrant an investigation which resulted in a severe reprimand being maintained against Appellant. He referred to Section 10(8) of the Constitution regarding the need for impartiality whereas Mr X was himself the accuser (*nemo judex in causa sua*).

He maintained that the Public Service Commission should have highlighted the flaws and explained why they had maintained the severe reprimand.

He made a distinction between his case and that of R. Boodhun v LGSC (2016 SCJ 511) cited by Counsel for Respondent. In the latter case the Appellant did not raise Section 10(8) of the Constitution.

**Respondent's Case**

The Respondent agreed as to the sequence of the exchange of correspondence between the Appellant and the Ag. RLHD, the RO and the Respondent.

The Respondent averred that disciplinary action was taken against the Appellant under PSC regulation 42 (1) (a) (iv) and there was no need for the Appellant to be given a hearing. The Respondent on receipt of the appeal from the Appellant considered the case on the basis of the RO's report and also whether there were new arguments

brought by the Appellant. The Respondent took into consideration the fact that the Higher Records Clerk had stated that Mr Y had been replaced by Mr Z on the … contrary to what Appellant had stated.

The Respondent denied that there had been inordinate delay in dealing with the Appellant's appeal. The Respondent received the appeal on … 2015 and the Appellant had not raised new grounds to rebut the shortcomings reported against him. On the…, the Respondent requested the RO to provide his comments on the points raised by the Appellant in his appeal. The RO submitted her comments on … and recommended that the sanction be maintained. On …, the RO was informed that the decision to administer a severe reprimand had been maintained. The RO communicated same to the Appellant on … .

The Respondent averred that it does not communicate with public officers directly but through the RO.

The Respondent averred that it had followed all the procedures in accordance with powers granted to it by the Constitution and the PSC Regulations.

The Respondent considered that, based on the facts and circumstances of the case before it, the nature of the conduct of the Appellant was serious as he had failed to comply with instructions given to him on … when he was requested to attend an emergency meeting regarding cyclone Bansi.

On being cross examined the Representative of Respondent explained that the investigation required under Regulation 42(1)(a) of the Public Service Commission was in fact to seek explanations from Appellant based on the letter of Mr X the records received from Mr HA and a list of the Special Department. The Representative of Respondent agreed that Appellant had a clean record after having worked since …, i.e. for 30 years.

Counsel for Respondent submitted that it was impossible to explain why there was a 13-month delay between the time that the Ministry communicated to the Public Service Commission and the time that Appellant was informed. Admittedly, the fact that Appellant did not route his appeal to the PSC though his RO did contribute to the delay.

On the issue of motivating its decision, Counsel referred to the case of R. Boodhun (2016 SCJ 511) and stated that there was no statutory duty on the Commission to provide reasons.

The Respondent averred that the appeal had no merits and moved that it be set aside.

**Witnesses**

(i) Mr Y, who was called by Appellant's Counsel, confirmed that he was on call on that day but that he had to attend a special cyclone meeting for the Unit with Appellant. In fact at around 9.45 he saw the Consultant in Charge who asked him to stay because there was a cyclone. He considered that he already had the gist of what would have been said in a meeting. He understood that Appellant was going to the meeting called by Mr X. He said that he never saw Mr Z anywhere.

(ii) Mr HA, the Higher Records Clerk, was summoned by the Tribunal. He stated that the name of Mr Z appeared on the list as he was the one scheduled to replace Mr Y but he also confirmed that the Appellant was doing specialised work on that day. He did not remove the name of Mr Z to replace it by that of the Appellant.

He was shown the Register of the specialised room. He confirmed that out of 22 persons scheduled to attend only 4 actually did so. His office is in that room and he was aware that the Appellant would attend the specialised room on that day.

On being cross examined, he confirmed that Mr B saw the persons but if needed, Mr Z would also have had a look as Mr B was not a Specialist. He said that in specialised room everyone comes and goes.

It is to be noted that:

In the Register of the specialised room there were four persons who attended. The last one was registered at 9.35 and it is impossible to see the exact time of the appointment.

The letter from Mr HA mentions that the four persons were seen by Mr B. It was also mentioned that Appellant (Consultant in Charge) had asked him to put his name on the list as he was present on that day, which he did without erasing the name of Mr Z. On the list the names of the three (Mr Z, Mr Y and Mr B) also appeared.

(iii) The Ag. RLHD, Mr Y was also summoned by the Tribunal. He stated that at around 9 a.m he issued a circular to all Heads of Units for a cyclone emergency meeting scheduled for 10.00 a.m. Given the short notice this was followed up by phone calls by his secretary to all the Heads. The Ag. RLHD admitted that he came about 10 minutes late to the conference room. As the Appellant was not there, he asked for him and spoke to him on the phone in front of all those present. He said that he asked the Appellant why he was not at the meeting and asked him to come to the conference room. The Appellant had said that the Ag. RLHD was rude with him on the phone but the Ag. RLHD denied this and conceded that he might have used an authoritative tone. The Ag. RLHD stated that the Appellant swore at him and said "*Mo piss are toi. Mo pas pou vini. Guété ki to pou fair*e". This was contained in the letter which the Ag. RLHD wrote to the Appellant on the same day. The Appellant was requested to submit explanations by 15.30 hrs on … at the latest.

On being cross-examined, Mr X said that there were many complaints in the Ministry … and some people got warnings, some got severe reprimands.

He agreed that for each cyclone, he had to call a meeting and the protocol was the same and was circulated to the Consultants who had to prepare a roster for 2 to 3 days.

He also agreed that he told Appellant to send a representative who, actually, did attend the meeting.

(iv) Mr SAT, Manager of the Human Resource Department of the Ministry, represented the said Ministry. He confirmed that there was no "investigation" proper but just the letter of Mr X reporting the case, the explanations of Appellant and annexures including the document produced by the Higher Records Clerk. He confirmed that Appellant's record was clean but that afterwards Mr Y sent them two complaints. He also confirmed that employees usually engage in mutual recriminations.

**Determination**

First, we turn to the incident of …. It is a fact that on that day there was a cyclone warning Class 1.

The conversation between the Appellant and the Ag. RLHD was on the phone. What the Ag. RLHD said was in front of those present in the conference room and somebody could have testified as to his tone but it would have been embarrassing for a junior officer to do so. On the other hand the Appellant was presumably alone in his office and there was no witness. The Tribunal is, unfortunately, not an investigatory body. Proceedings before the Tribunal are adversarial and not inquisitorial. The onus of proof rests with the Appellant. The Tribunal is left with the words of the Appellant against those of the Ag. RLHD. The Tribunal cannot go further on this in the absence of evidence.

The question remains as to whether the Appellant could or should have attended the cyclone emergency meeting. There is a written protocol on how to deal with cyclone emergency situations. However, the Ag. RLHD must ensure what is actually being done, hence the emergency meeting. The Tribunal cannot understand why the Appellant turned his back when he did not find the Ag. RLHD in the conference room when he went there at 10.00 a.m. He claimed that he had urgent business at specialised room. However, this was contradicted by the Higher Records Clerk who produced the list. Out of 22 persons who were scheduled for that day only four came.

The last one came at 9.35 a.m. The Appellant was free for the meeting and he in fact went to the conference room at the scheduled time but did not see Mr X there. When later he received the phone call from the Ag. RLHD, he still refused to attend and it was then that he delegated his junior colleague to attend. He claimed he had to give priority to the persons waiting but no one was there. That could look like a dereliction of duty on the part of the Appellant. On the other hand, the remaining 18 persons could have turned up.

Second, the Tribunal must address the issue of substantive and procedural fairness.

In this case action was taken against the Appellant under PSC regulations.

Regulation 42(1) "*a responsible officer may without reference to the Commission-*

*(a) after investigation (which will be recorded) and after seeking the explanations of the public officer in writing, inflict upon him any of the following punishments, on grounds of unsatisfactory service or conduct-*

*(i) stoppage of increment for a period not exceeding one year*

*(ii) deferment of increment nor a period not exceeding one year;*

*(iii) suspension from work without pay for a period of not less than one day and not more than four days;*

*(iv) severe reprimand*

*(v) reprimand.*"

Regulation 42 B (1) (a) "*A public officer aggrieved by the decision of a responsible officer to inflict him a punishment under regulation 38(14) or 42 (1) (a), or by a decision of the Secretary to the Cabinet and Head of the Civil Service to inflict upon him a punishment other than dismissal or retirement in the interest of the public service pursuant to regulation 42 A, may appeal to the Commission*

(b) *The Commission may approve, vary or remit the punishment provided that the appeal is so made in writing within 21 days of the notification of the punishment.*"

The Appellant is arguing that there has been no substantive and procedural fairness. In the first instance the Appellant claims that it was not in order for the Appellant to give explanations to the Ag. RLHD on a matter which involved the latter himself. It should have been done by an independent person. This argument is not tenable. The Ag. RLHD needs to give a chance to the Appellant to exculpate himself or to explain his act before he refers the matter to the Ministry. Had he gone straight to the Ministry and reported the case, he would have been flouting the principle of natural justice.

The next point raised by Appellant was that there was no investigation. This is a restricted interpretation of investigation which does not necessarily imply a hearing. The RO wrote to the Appellant and asked for explanations. The Appellant replied and was given the chance to do so. This exchange of correspondence amounts to an investigation on which the RO took the decision to inflict the penalty.

Again, the Appellant believed that there should have been a hearing before the Respondent took the decision to maintain the decision of the RO. The Appellant did not adduce additional evidence to support his appeal and only submitted to the Respondent the same materials which he submitted to the RO. There was nothing new which the Respondent could consider in order to vary or decide otherwise.

As regards the delay for the Respondent to decide, the Respondent conceded that there was some delay which was partly due to the fact that the Appellant lodged his appeal directly to the Respondent and he did not go through his RO. This was not in order and the appeal had to be reprocessed. The delay is not fatal.

Regarding the issue of whether the Respondent should have given reasons for its decision, Counsel for Appellant referred to the case of Ganesh v the National Transport Authority and Anor (2005 SCJ 2). In that case it was held that "*this Court, in exercising its jurisdiction as Reviewing Authority of an administrative decision and in the exercise of its statutory duty under section 10(8) of the Constitution which requires that it ensures a fair hearing in determining the existence or extent of any civil right or obligation, must be in a position to assess whether any questioned decision that is being appealed from has not been so reached* as a result of wrong or irrelevant

considerations. This position can exist only where reasons for having reached a decision are given by any deciding authority, albeit in a few words."

He also referred to the case of GFA Insurance Ltd v Motor Vehicle Insurance Arbitration Committee (2011 SCJ 173) which addressed the issue of whether there is a duty to give reasons.

The Judges analysed the conventional view which is that there **is** no general duty to give reasons and how this has evolved towards a general duty to give reasons:

"*The particular facts which may dictate the giving of reasons by an administrative body for its decisions may relate to the nature of the interest concerned and the impact of the decision on that interest, and all other relevant considerations such as (a) to enable an applicant to exercise properly his right of appeal; (b) to explain an otherwise aberrant outcome; (c) to demonstrate that issues had been properly addressed; (d) to promote transparency in the decision-making process etc."*

The judges also held that the "*whole objective is that parties to the proceedings and the courts should be able to see what matters have been taken into consideration and what view has been formed by the adjudicating body on the points of fact and law in controversy between the parties in dispute".*

But in the recent case of R. Boodhun v LGSC (2016 SCJ 511) the Judges ruled differently. This again shows that each case should be considered on its own merits. In the case where a decision involves a loss of some valuable interest the whole panoply of natural justice should be involved, otherwise, there is only a duty to act fairly.

As to whether the disciplinary action of a severe reprimand is harsh in the circumstances, it must be borne in mind that to disobey a superior officer's lawful instructions is viewed with great concern in the public service. The circumstances of the case did not warrant the Appellant taking extra precaution to look after, admittedly a very sensitive specialised room, in as much as it transpired at the Hearing that out of twenty two expected persons, only four attended. The team available in the specialised room was sufficient to spare the Appellant for at most one hour at the emergency meeting.

But the evidence adduced by the Appellant at the hearing was that during his long career of some 30 years he had never been adversely reported and he had always attended cyclone and other meetings, chaired by the RLHD. This was not rebutted.

The Tribunal had the clear impression that there was some bad blood between the Appellant and the Acting RLHD which had been allowed to subsist.

Confidential information was provided to the Tribunal by the Ministry of … and showed:

(i) There are no records of attendance for the cyclone meeting of … so that it is impossible to know if Appellant was the only one who did not attend.

(ii) The notes of meeting did not reveal anything which someone delegated by his Consultant in charge to attend, could not have taken note and reported to the latter.

(iii) According to records available for the past 10 years in the Department only two officers have been severely reprimanded. One suffered a reduction in seniority placing.

This speaks for itself in view of what everyone said regarding bad relations in this sector generally.

The incident, the subject of this appeal, is a regrettable one and could have been handled by a superior administrative officer without reference to the Public Service Commission or this Tribunal. A severe reprimand almost at the end of a professional career may jeopardise chances of promotion within the service.

The Tribunal finds the decision harsh, given the circumstances, and, under the power given to the Tribunal, quashes the decision of the Respondent under Section 8(4)(b) of the PBAT Act 2008 and remits the case to Respondent for it to review its decision.