Det 19 of 2017

- **The Respondent must apply the same sentencing policy towards its officers who have committed the same or similar offences. That sentence must be proportional.**

- **Dismissal may be too harsh for minor offences and when the officer has an otherwise unblemished record.**

The Appellant was a RECR at the Municipal Council of. He has appealed to this Tribunal against his dismissal by the Respondent after his conviction in Court for "*possession of cannabis*".

Appellant's Case

The Appellant averred that he was employed as LAER by the Respondent in a temporary capacity in the year…. He was appointed RECR on a substantive basis in…. Since his employment he had been an exemplary employee and had even acted as FRM on several occasions. He had always performed his duties diligently and had never been engaged in any case of misconduct at work, nor received any warning or other disciplinary measure.

On … at about … hours, while being off-duty, Appellant was arrested for "*possession of cannabis*"(about 0.3 gm)… whilst he was in the company of friends at…. He was provisionally charged with the offence of … but due to inordinate delay in lodging the main case, the provisional charge was struck out on …. Later, in the year…, a case of "*possession of cannabis*" was lodged against the Appellant based on the same incident of … to which Appellant pleaded guilty. He was sentenced and had to pay a fine of Rs1500 plus Rs100… as costs on ....

On …, Appellant was convened by the Municipal Council of … to a Hearing Committee scheduled for … in view of the sentence referred above. He attended but was not assisted by a legal or Trade Union Representative.

About two months later, Appellant was informed by the … Council that the Respondent had decided to dismiss him.

In his Grounds of Appeal, Appellant laid emphasis on his good conduct and the fact that the offence was not committed on his work site. He also found it unacceptable that he should lose his job after 24 years of service.

Since his arrest referred at paragraph 2 above until his dismissal three years later, the Appellant had been in the continuous employment of the Respondent and had in no way disrupted the proper running of his work place.

In his Statement of Case the Appellant found his dismissal unreasonable, *ultra vires* and disproportionate. He claimed that he was not given the opportunity to show cause why he should not have been dismissed from service and why other more appropriate disciplinary measures were not resorted to in his particular case. The Respondent failed to take into consideration other relevant matters before reaching its decision. The offence for which the Appellant had been convicted was an out of hour offence and was not connected to the Appellant's job as RECR. The Respondent had failed to demonstrate in what way the Appellant's conviction would be an obstacle to the performance of his duty as a RECR. The Respondent had also failed to demonstrate in what way the continuous employment of the Appellant after his conviction had brought his employer into disrepute and disrupted the proper running of his workplace.

The Appellant, on being cross-examined stated that when he was called for a hearing at the Municipal Council he was not told that he risked losing his job as a result of his conviction. He further said that at the hearing he only told the Hearing Committee that he pleaded guilty in Court and tendered his apologies. He did not realise that his act would have had such effect on his employment. He did not advance mitigating circumstances before the Hearing Committee

Counsel for Appellant produced Court judgments in support of the fact that the Appellant did not get a fair hearing and that the offence was not related to his employment before his dismissal, viz Rungasamy v PSC (1985) MR35, Bissonauth v Sugar Insurance Fund Bond (2005) PRV 68(sic), Matadeen v Pamplemousses- R. du

Rempart DC (2013) SCJ 496, Deelawar v LGSC & Ors (1989) SCJ 320, Public Employment Office Department of AG & Justice (Corrective Services New South Wales) vs Silling (2012) NSWIR Comm 118 and Jolicoeur v PBAT (2015 SCJ 73). The Tribunal will come back on these.

Respondent's Case

The Respondent conceded that the Appellant had no adverse report against him during his period of employment at the Municipal Council. However, the Respondent had no record of Appellant being assigned the duties of FRM.

The Respondent averred that in accordance with LGSC Circular Note No 9 of 2008, Appellant was convened before a Hearing Committee on … and he was informed that he might be assisted by a legal representative or a union representative before the disciplinary committee. Appellant was not accompanied by any legal or trade union representative when he appeared before the said committee. Appellant's attention was drawn to the fact that he might be dismissed. Appellant informed the committee about the offence and he accepted the charge.

The Respondent averred that action was taken against the Appellant under Regulation 36 of the LGSC Regulations (1984) and Appellant was given adequate opportunity to show cause why he should not be dismissed before the Hearing Committee.

Respondent averred that the Appellant had pleaded guilty to the offence and had to pay a fine.

Respondent moved that the appeal be set aside.

Determination

It is a fact that the Appellant pleaded guilty of the offence before the District Court of …and he was fined. Subsequent to this conviction he was dismissed from his employment as RECR by the Respondent.

The Tribunal has to adjudicate on two points:

(1) Whether the Appellant was given a fair hearing before his dismissal and

(2) Whether his dismissal was reasonable and proportionate to the offence committed

On the issue of the need for a hearing, Counsel for Appellant was adamant that the Appellant should have been given a hearing before he was dismissed as a dismissal is a serious decision which deprives a person of his means of livelihood and the person must be able to show cause why he should not lose his job. He produced the judgments mentioned above where it is said that a hearing is required. However, these judgments relied on the Labour Act 1975 and in particular to its section 32 (2) which read as follows:

"(a) No employer shall dismiss a worker unless he has afforded the worker an opportunity to answer any charges made against him and any dismissal made in contravention of this paragraph shall be deemed to be unjustified dismissal "

The Labour Act 1975 has now been repealed by the Employment Rights Act 2008 (ERA) in which the need for a hearing appears again under section 38(2) "Protection against Termination of agreement" which provides that:

"No employer shall terminate a worker's agreement-

(a) For reasons related to the worker's misconduct , unless-

(i) He cannot in good faith take any other course of action;

(ii) The worker has been afforded an opportunity to answer any charge against him in relation to his misconduct;

(iii) *………."*

However, the ERA does not apply to a public officer or a local government officer save for a few sections which are not relevant to this present case.

Counsel for Respondent made it clear that the provisions of the Labour Act and the ERA cannot be imported in our public law. The Local Government Service Commission is governed by the LGSC ACT 1983 and the LGSC Regulations 1984.

The Supreme Court reminds us in Matadeen v Pamplemousses- R. du Rempart DC (2013) SCJ 496 that:

> *"Indeed one has to differentiate between the provisions under the now repealed Labour Act, where a private employer dismisses his employee following the latter's conviction of a criminal offence, from those of the Local Government Regulations which govern the dismissal of a local government officer in the same situation*".

In the present case, the Respondent acted under the LGSC regulation 36 which reads as follows:

> *"36 (1) Where a local government officer is found guilty of a criminal charge likely to warrant disciplinary proceedings, the responsible officer shall forthwith forward to the Secretary a copy of the charge and the proceedings relating thereto together with his own recommendation.*
>
> *(2) The Commission shall determine whether an officer to whom paragraph (1) relates should be dismissed or subjected to some disciplinary punishment other than dismissal or whether his service should be terminated in the public interest if the proceedings disclose grounds for doing so, without any of the proceedings prescribed in regulation 37, 38 or 39 being instituted.*
>
> *(3) Disciplinary proceedings subsequently to a conviction shall not normally be taken in respect of minor offences under the Road Traffic Act, and of minor offences not entailing fraud or dishonesty and not related to an officer's employment."*

Regulation 36 does not provide a hearing for officers found guilty in Court. A full-fledged hearing is given under regulation 37 and regulation 36 excludes recourse to regulation 37. In Rungasamy v PSC (1985) MR35, the Court found that the officer, a Trainee Probation Officer, was given a traineeship but he was found guilty of inflicting wounds and blows to another person. His traineeship was terminated. He appealed

against this decision on the ground that he was not given a hearing. The Court rejected his appeal as action was taken under PSC regulation 36 which is the same as regulation 36 of the LGSC Regulations as no hearing was required and the offence related to his employment.

However, the Respondent's Secretary issued a Circular Letter No 9 of 2008 to Responsible Officers of the Local Authorities, quoting Regulation 36, which reads as follows:

"1 ….

2 I am directed by the Local Government Service Commission to inform you that the Commission has decided that Responsible Officers be advised that henceforth they should give a hearing to employees who have been convicted by a court of law before making a recommendation as regards the punishment to be inflicted upon them in accordance with regulation 36 of the LGSC Regulations 1984

3 Responsible Officers are therefore advised to abide to the above and ensure that henceforth all recommendations under regulation 36 be accompanied by a certified true copy of the hearing"

It is noted that the letter is couched in loose terms and the Respondent is only advised to give an officer a hearing without giving clear guidelines on how it is to be done.

Be that as it may, since then there has been the practice of a hearing after Court conviction before the matter is referred to the Respondent for further action.

In the present case, the Appellant was called before a Hearing Committee but it was not a Disciplinary Committee as said in the Statement of Case of Appellant and also in the Statement of Defence of the Respondent which would have been the case on other disciplinary actions by Respondent. The Appellant denied that he was told that he might lose his job when he came before the Hearing Committee. The Respondent affirmed that he was told so. From the record of the Hearing Committee which was

shown to the Tribunal under confidential cover, the Tribunal is satisfied that the Appellant was told that he might be dismissed from employment.

It is also accepted that the Appellant was told that he could be assisted at the meeting with the Hearing Committee by a Trade Union or legal representative but he appeared *inops concilii*.

At the …Committee, the Appellant conceded that he only spoke of the offence, the conviction and apologized for what he did. He did not invoke the circumstances nor gave reasons in mitigation as to why he should not be dismissed.

The Appellant cannot, therefore, claim that he was not given a fair hearing and show cause why he should not be dismissed. The Tribunal will not retain this ground of appeal.

As to whether the dismissal is reasonable and proportionate, the Tribunal wants to state outright that the offence is very serious for the Mauritian society and cannot be condoned. However, the penalty needs to be in relation to the gravity of the offence and its particular circumstance. In this case, there is a dismissal from employment which is a cause of serious hardship. The question then is whether the offence is serious enough to merit dismissal. The Respondent has justified its action on the basis that the offence is detrimental to the reputation of the employer. There is no doubt that this offence if left unpunished may have a noxious demonstration effect on other employees in the local authorities. In the case of judicial review re LGSC v PBAT ipo R. Boodhun (2016 *SCJ 511) where Boodhun was found guilty of "cultivating cannabis" and "smoking* cannabis" in breach of the Dangerous Drugs Act the Supreme Court had this to say :

> *"It is useful to refer to the provisions of the relevant legislation, i.e. the Dangerous Drugs Act, in order to gauge the seriousness of any particular drug offence. The Act draws a clear distinction between drug-dealing offences and offences involving the use or consumption of drugs only. Thus whilst it is likely that an offence of "smoking" cannabis would fall within the category of "minor offences", the same cannot be said for drug-offence of cultivation of cannabis for which Boodhun was convicted*".

Can this *possession of cannabis* be considered as a minor offence? It is apposite to note that sentences for such offences range from simple fines to heavy prison sentence. In this case the Appellant had been inflicted a relatively small fine for the offence. Further, the Responsible Officer of the Appellant who is well aware of the situation at the local authority where Appellant is posted, had recommended a Reprimand to the Respondent. This is the penultimate penalty among the eight punishments under LGSC regulation 41. But the Respondent decided to opt for the top penalty which is dismissal in spite of the fact that the Respondent itself conceded that the Appellant had an unblemished career at the Municipal Council.

While the Respondent is the sole body to decide on disciplinary actions as per the LGSC Regulations, the Respondent must exercise this power judiciously and the Tribunal's duty is to ensure that it does so.

The Tribunal, in the light of the above observations finds that the decision to dismiss the Appellant is harsh the more so that the Respondent has not been consistent as natural justice requires, in its decision reporting officers found guilty in Court of the same offence. From information provided to the Tribunal by the Respondent itself concerning previous appeals, the Tribunal is aware of cases where such officers were given a "severe reprimand" and were not dismissed.

The Tribunal quashes the decision to dismiss Appellant under section 8(4) of the Public Bodies Appeal Tribunal Act and remits the matter back to Respondent inviting it to review its decision to meet the ends of justice and in conformity with this Determination.