

Det 30 of 2017

- **A sanction cannot be humiliating, disproportionate and several years late and in the absence of any adverse report for 30 years.**
- **When there is a law concerning professional negligence or misconduct and several bodies are set up to enquire, the law must be respected STRICTLY including by the PSC itself.**

This is an appeal from a Consultant, OGY in the Ministry of ... against a disciplinary sanction of reduction in seniority placing from 4th to 9th in the grade of Specialist/Senior Specialist (OGY).

Appellant's Case

Appellant based her case on the following Grounds of Appeal (GOA):

- (i) Failure of Disciplinary Body (DB) to communicate to me the decision of the Specialised Tribunal (ST) in line with the provisions of relevant Act. Hence, I have been deprived of my right to appeal against decision of ST;
- (ii) Bias and “vice de procedure” at level of initial investigations of case by DB and Ministry of ... (hereafter called “the Ministry”);
- (iii) Verdict given despite no submissions made by appointed lawyer ...

Appellant also added more information in an Annex to her GOA as follows:

- The Public Service Commission's decision was based on a verdict reached by the ST on alleged charges against her.
- The complaint was received by the DB and was then referred to the Ministry.
- Mr N, another consultant who was also following the client privately carried out the preliminary investigation and he had a “bias attitude” towards her.(sic)
- The DB referred the case to the ST where she was assisted by a lawyer.
- The Chairperson of the ST stated that Mr R's reports would be discarded.

- She had to make a submission herself as her lawyer could not be contacted.
- She was not notified of the determination of the ST by the DB which is against the relevant Act.
- She acted in a professional manner and her conscience is clear.
- The sanction taken by the PSC will be prejudicial for progression in her career path and “*severely harm my professional integrity*”.
- She had no case of negligence during her 30 years of career.
- She has not “*benefited from a fair treatment at all levels*” and moves that the Public Bodies Appeal Tribunal reviews her case and reverses the decision of the DB and of the Public Service Commission.

Appellant also submitted a Statement of Case in which she described her career path and stated that, at the material time, she was posted at XY Department in ... and she was responsible for the specialised unit once a week. She also described the history of Mrs W, giving names of those who attended her and when.

She averred that Mrs W herself disclosed that she had been looked after privately by Mr N.

She explained that Mrs W. attended her department on ... and a profound analysis confirmed that her case was already beyond any attention.

She further averred that on ... an investigation was set up by the Ministry and was conducted by Mr N and three other persons and an Assistant Secretary of the Ministry. The report of the said panel of investigation, dated ... and signed on..., recommended that Disciplinary action under PSC regulations for gross negligence to be taken against her and one of her assistants.

On ... the Appellant was informed by the DB that it would conduct a “preliminary investigation” and the Appellant was invited to submit her written explanations, which she did on....

On ... she was convened before the Investigation Committee (IC) which she attended on ... and she explained in detail what happened and the said IC submitted its Report on

On ... the DB informed her that it was of the opinion that she had been negligent in the management of Mrs W and was going to refer the matter to the ST. She was asked "to show cause in writing" why she disagreed and to provide the grounds on which she would rely to exculpate herself.

The disciplinary charges were sent to her reproaching her of having mismanaged the case of Mrs W

By letter of ... she provided her explanations. By letter of ... the DB informed her that it was referring the matter to the ST.

The case was scheduled for Hearing on ... and She was summoned on ... to attend on ... even without her Counsel as the latter could not be contacted. She was therefore unrepresented except on.... Her Counsel failed to represent her on several occasions and specially when submissions had to be made. The ST told her to submit herself.

On ... Appellant submitted her written submissions to the ST.

In ... her new Counsel applied to the ST for the case to be reopened but she was informed that all documents had already been submitted to the DB and the case could not be reopened.

On ... the Ministry informed her that the Respondent had considered the report of the ST which had found the charge proved. She was informed that the punishment was a reduction in seniority placing from 4 to 9th in the grade of Specialist/Senior Specialist (OGY).

Appellant then expatiated on each of her GOA. She averred that Mr N had referred to an alleged protocol for ... which had not been followed but that at the

hearing upon being asked for the said protocol he averred that no such protocol exists. She also maintained that her request for another Counsel to defend her was turned down whereas the right to retain Counsel is a constitutionally entrenched right. Appellant averred that the punishment inflicted upon her is “*manifestly disproportionate and excessive and not in line with earlier decisions of the respondent*”. She listed a series of allegedly more serious cases of which she was aware.

Respondent’s Case

Respondent in its Statement of Defence (SOD) took note of most of the averments of Appellant and averred that the case of ... was referred to the DB on ... by the Responsible Officer of the Ministry for investigation and any disciplinary action deemed appropriate.

It averred that the DB conducted a preliminary investigation in accordance with section 13(1) of the relevant Act.

It confirms the chronology of events as described by Appellant.

It averred that the ST concluded that Appellant had failed to manage Mrs W. On ... the ST forwarded its report and copy of proceedings including relevant documents to the DB, which in turn, after considering the contents of the ST report and documents on ... determined that in its opinion the charge against Appellant had been proved.

On ... the Registrar of the DB “*submitted a recommendation to the Respondent for disciplinary action to be initiated against Appellant in accordance with Regulation 46E(5) b(iii) – (viii) of the Public Service Regulations.*” (sic)

On..., Respondent informed the Responsible Officer of the Ministry that having considered the report of the ST, which enquired into the charge preferred against Appellant, it was satisfied that the charge had been proved against the Appellant.”

Under the heading GOA, the Respondent averred “that section 17(2) of the relevant Act only requires that the Tribunal shall, after conducting the enquiry, forward to the Council its report and a copy of the proceedings including any

document or exhibit produced, not later than 14 days after the completion of the proceedings.

The Respondent, in reply to the other cases referred to by Appellant, averred *“that each case has to be considered according to its own merits.”*

Submissions of Appellant’s Counsel

Counsel laid emphasis on section 17(6) of the relevant Act which provides: A decision of the DB under sub section (4) or (5) shall be communicated to the registered person not later than 14 days from the date of the decision” but this has not been done and instead after discussion the DB decided to refer the matter to the PSC for any sanction as being appropriate.

Counsel also submitted that the PSC ought to have given an opportunity to the Appellant to comment upon that decision of the DB and for her to make representation on her own behalf before the sanction was imposed.

He explained that there was a very long process which starts with the Ministry then it goes to the DB, DB must appoint a Committee which is going to deal with the preliminary investigation then it goes back to the DB, the DB then refers the matter to the ST, the ST looks into it and then submits a report. The report of the ST is not a juridical document. It is only a factual report for what it states and the decision has got to be eventually taken by the PSC in so far as the sanction is concerned.

Counsel also submitted that:

A lot of time has elapsed from ... down the line until we reached the decision being communicated in ...with the initial process itself when it was Mr N who had chaired the first committee which resulted in a report and which triggered the matter being referred to the DB.

There is something absolutely wrong at the very basis that Mr N who had seen this person ought to have said so, he should have come forward.

Submission of Respondent’s Counsel

Counsel drew the attention of the Tribunal that Section 17 of the Act refers to the public officers and also private persons. He submitted that the decision in the

particular case is the sanction because the decision of the DB is not a final decision. Then he examined PSC Regulation 46E and submitted that we should interpret it in a sense that we cannot leave it in absurdity...It could have been better drafted but if you read it you can see that it is only applicable in the case of private persons and not in the case of public officers.

He submitted with regard to the fact that Mr N had seen Mrs W and was in a situation of conflict. He brushed this aside and stated that "*Mrs ... was a Chairperson legally qualified, not a sitting judge, but all these at any rate they come to a conclusion based on finding of facts.*"

Determination

The DB is empowered under Section 13(1) of the DB Act to "*investigate any complaint of professional misconduct, malpractice, fraud, dishonesty or negligence or of a breach of the Code of Practice against a registered person, including a public officer in respect of whom it holds a delegated power.*"

The DB, under Section 13(2),

- "(a) shall notify the person whose conduct, act or omission is under investigation, of the nature of the complaint;*
- (b) may summon and hear the person;*
- (c) may summon and hear witnesses; and*
- (d) may call for relevant documents and make copies of them."*

Under Section 13(4) "*for the purposes of an investigation under subsection (1), the Council may appoint an investigating committee consisting of not less than 3 members*".

On..., the Acting..., Mr N of ..., conducted an enquiry along with three other members who were all from different Units. He wrote to the Senior Chief Executive of the Ministry on ... by sending his report.

By letter of..., the Council informed Appellant that it was initiating a preliminary investigation in the management of the case of a person and asked her to submit her explanations, which she did on....

Appellant had the opportunity to give her version directly to the Investigation Committee (IC), chaired by Mr L. Following a report of the said IC the DB informed Appellant that it was referring the matter to the ST and she was again given the opportunity to show cause why the matter should not be so referred. Not satisfied with her explanations, the DB informed her that it was referring the matter to the ST.

The relevant Act provides as follows:

“17. Disciplinary measures

- (1) Where the DB . decides to institute disciplinary proceedings against a registered person and prefers charges against him, it shall require the Tribunal to inquire into the charges on its behalf into the matter.*
- (2) The Tribunal shall, after conducting the enquiry, forward to the DB its report and a copy of the proceedings including any document or exhibit produced, not later than 14 days after the completion of the proceedings.*
- (3) The DB shall, after considering the contents of the documents referred to in subsection (2), determine whether or not, in its opinion-*
 - (a) the charges against the registered person have been proved; and*
 - (b) there is any circumstance that aggravates or alleviates the charges (underlining ours).*
- (4) The DB shall, where it determines that the charges against a registered person have been proved-*
 - (a) in the case of a public officer in respect of whom it holds a delegated power, forward its report on the matter to the Public Service Commission; and*
 - (b) in every other case, impose on the registered person such disciplinary measures as it thinks fit, namely-*
 - (i) a warning or a severe warning;*
 - (ii) a reprimand or a severe reprimand;*
 - (iii) a suspension from ... practice for a period not exceeding 12 months;*
or
 - (iv) the removal of the registered person's name from the register.*
- (5) Where the punishment inflicted by the Public Service Commission on a public officer is dismissal or retirement from the public service, the Council*

shall determine whether or not the person's name should be removed from the register.

(6) A decision of the Council under subsection (4) or (5) shall be communicated to the registered person not later than 14 days from the date of the decision."

The Report of the ST was communicated to the PBAT. It shows that the ST listened to several relevant officers, to the Registrar of the DB, the Chief POM Officer, Mr W a ... and the Appellant. It also heard Mr L, the Chairperson of the investigation Committee set up by the DB.

The ST held 12 Hearings and was in presence of several documents namely the case files of the persons concerned, all letters of explanation of Appellant, a copy of the Report of Mr N dated..., the report of the IC, the minutes of proceedings of the DB and all the relevant correspondence exchanged.

The Tribunal cannot substitute itself for the ST which was properly constituted under a Chairperson who has legal expertise and two officers who had no conflicting interests.

What the Tribunal must decide is:

1. Whether the fact that Mr N having chaired the first committee, and having also seen the persons concerned, should have challenged himself. In the absence of such challenge, can the process be considered flawed altogether?
2. Whether the absence of Appellant's lawyer impacted negatively on her case before the ST?
3. Whether the DB did not communicate its decision to Appellant "*not less than 14 days from the date of the decision.*" If so whether this is fatal?
4. Whether the PSC should have referred to the decision of the DB and not the ST?

5. Whether the PSC ought to have given an opportunity to Appellant to make a representation before imposing the sanction?
6. Whether the fact that the process was very lengthy constituted unreasonableness or unfairness with regard to Appellant.

On point 1, even though the ST received Mr N's report, it cannot be said that this was in fact what tipped the balance. Another IC was set up and later the ST heard everyone concerned.

On point 2, as regards the absence of Appellant's lawyer: Appellant's lawyer did assist Appellant throughout the proceedings but he was absent for submission. The hearing was postponed on six occasions between ... to..., to allow Appellant's Counsel to attend. The ST did try to contact Appellant's lawyer in vain. It must be remembered that the hearing was merely on fact and that no issues of law were involved at that stage. From a reading of Appellant's explanations, it appears that she knew her version very well and stuck to it throughout the proceedings, after having been communicated with the whole proceedings. The Tribunal feels that she could have retained the services of another Counsel in due time. When she did so, it was too late.

On point 3, as regards the issue of communication of the report of the DB, a reading of Section 17(4) of the DB Act is important. Section 17(4) provides that:

- (a) In the case of a public officer, the DB must forward its report to the PSC.
- (b) In every other case, it can impose such disciplinary measures as it thinks fit.

Section 17(6) refers to subsection 4 and does not specify if it is 4(a) or (b). Counsel for Respondent submitted that in fact it relates to subsection 4(b). What use would the communication of its report be to Appellant if the DB must send it to the PSC? The Appellant has already had several occasions to give her version concerning the charge preferred against her and why a ST should not enquire into the case. But one can argue that she would have had the possibility to give her

version to the DB on the findings of the ST as in fact it is the DB which must be satisfied that the charges have been proved.

Once the ST had made its report, the DB purely and simply accepted this report in toto and forwarded its report to the PSC for any sanction deemed appropriate.

On point 3 and 4, it is important to refer to Part (IV) A of the PSC Regulations

Regulation 46A of PSC Regulations provides that:

- (1) *Where the Commission, in pursuance of section 89(2)(b)(i) of the Constitution, delegates its powers to enquire and report, in the case of any professional misconduct or negligence committed by a public officer in the performance of his duties, to any appropriate statutory disciplinary body, such delegation shall be subject to the conditions set out in this Part.*
- (2) *The statutory disciplinary body, to which the Commission has delegated its powers, shall forthwith inform the Commission and, where the relevant responsible officer has not himself so informed the statutory disciplinary body, the relevant responsible officer, of any prima facie act of professional misconduct, malpractice, fraud, dishonesty, negligence or act constituting a breach of any applicable code of practice or ethics.(underlining ours)*

“Regulations 46E(1) provides that:

- (1) *The statutory disciplinary body, having inquired into the charges, shall forward its report to the Commission together with the record of the charges preferred, the evidence led, the defence and other proceedings relevant to the inquiry.*

Regulations 46E(2) provides that:

- (2) *The report of the statutory disciplinary body shall include*

(a) a statement, as to whether, in the opinion of the statutory disciplinary body, the accused officer has or has not committed the offence or offences and a brief statement of the reasons for its opinion.

(b) details of any matter which, in the opinion of the statutory disciplinary body, aggravates or alleviates the gravity of the case; and

(c) a summing up and such comments as will indicate clearly the opinion of the statutory disciplinary body on the matter under inquiry.

(underlining ours)

Only then can the Commission determine the punishment.

Clearly these Regulations were not respected and Respondent never referred to the report of the DB but to that of the ST.

On point 5 Appellant avers that she had worked for 30 years with an unblemished record. This was never rebutted. The DB did not respect Regulation 46E(2). It relied totally on the ST report and did not give any appreciation of same. It did not say anything on any aggravating circumstances or any alleviating ones either as is also provided for in Section 17(3)(b) of the DB Act which reiterates Regulation 46E(2). For example nothing seems to have been said on the record of Appellant. This is why probably Appellant feels that she should have been given a chance to be heard by Respondent if only in mitigation before being sanctioned.

The fact that Respondent never in fact referred to the Report to the DB but to that of the ST shows that Respondent was oblivious of the duty of the DB before the law and of its own duty with respect to Appellant's rights.

On point 6 The Tribunal notes that the subject matter of the investigation which led to the sanction dates as early as ... It was only in ...that she was informed that the Respondent had considered that the charge against her was proved and had sanctioned her. This happened six years later. All this time she was "*under investigation*" which in itself is a punishment. It is noted that the DB did not go under Section 14(2)(a) of the DB Act against the Appellant to suspend her practice of During these six years she was still practising and it is only in ... 2016 that Respondent inflicted the sanction and requested the Ministry to monitor her work and

conduct closely and to report to Respondent after one year. This was confirmed in ... 2016 because there had been a change concerning her actual ranking.

We have on record that several documents were missing and that Respondent had to seek same more than once from the Ministry, which partly explains the fact that matters dragged on.

Of course there was a tragic loss for Mrs W. But the Tribunal must stay clear of this as it cannot get involved with the facts of the case which was before the ST.

At any rate, a sanction cannot be humiliating, disproportionate and several years late if only for the sake of the service itself. It certainly cannot be given in the absence of any adverse report on the practitioner's overall record over 30 years. Justice delayed is justice denied.

In view of the total disrespect of the law and Regulations concerned and the non-respect of its statutory duty by the DB, the Tribunal therefore, under Section 8(4)(b) of the Public Bodies Appeal Tribunal Act 2008, quashes the decision of Respondent to reduce Appellant's ranking and remits the matter back to Respondent.