Det 29 of 2012 P.E.D'Emmerez de Charmoy v.LGSC *

> **When applying a sanction against an officer, the Public Body must bear in mind his overall record and the gravity of the offence allegedly committed .It must also see if the offence was done deliberately. It must show that all employees are treated in the same manner. Otherwise the Tribunal will not see the exercice as being fair and reasonable.**

The Appellant, Mr. Paul Evanor D'Emmerez de Charmoy, is a Human Resource Management Officer (HRMO) at the Grand Port Savanne District Council. He is appealing against the decision of Respondent to suspend him "from work without pay for a period of three (3) working days from 1 June to 3 June 2011, both days inclusive". This decision was communicated to him by Mr S. Teeluck, the Ag Chief Executive of the District Council, (hereafter referred to as the RO) in a letter dated 31 May 2011.

It all started on 12 July 2010 when the RO informed Appellant that disciplinary proceedings would be initiated against him under Regulation 37 (misconduct justifying dismissal) of the Local Government Service Commission Regulations on grounds of insubordination and misconduct as follows:

(1) Misbehaving in the office of the Responsible Officer;

(2) Having impertinently addressed letters to the Responsible Officer or to the Respondent;

(3) Having unreasonably resisted to the decision of the Responsible Officer to transfer Mr Lufor, Clerical Officer/Higher Clerical Officer to the Human Resource Section;

(4) Having recently adopted a negative attitude to work with the result that several important matters had not been dealt with in time;

(5) Having willfully failed to give effect to a letter dated 13 May 2010 of the Respondent with regard to disciplinary proceedings against Mr. P. Pothunnah, Senior Health Inspector; and

(6) Working as a Clerical Officer/Higher Clerical Office when his work as Human Resource Management Officer was lagging behind.

Appellant was requested to submit his explanations which he did in a letter dated 23 July 2010.

Following the letter from Appellant, the RO wrote back to Appellant on 1 October 2010 asking him for his explanations as to why disciplinary proceedings should not be instituted against him under Regulation 38 of the LGSC Regulations on the following charges:

Charge 1 : Misbehaviour in the office of the Ag. Chief Executive

Charge 2 : Having impertinently addressed letters to the Ag Chief Executive or the Local Government Service Commission

Charge 3 : Having adopted a negative attitude to work with the result that several important matters were not dealt with in time

Charge 4 : Having willfully failed to give effect to the letter dated 13 May 2010 from the Local Government Service Commission with regard to disciplinary proceedings against Mr. P. Pothunnah

On 15 October 2010, Appellant stated that his explanations in respect of these charges were the same as contained in his letter of 23 July 2010.

Since the RO was not satisfied with this answer from Appellant, he referred the matter to the Respondent for disciplinary action to be initiated under Regulation 38 (misconduct not justifying dismissal) of the LGSC Regulations. A Commission of Inquiry was set up and sittings were held on 28 January,18 March and 25 March 2011 where Appellant was represented by Counsel.

The Commission of Inquiry found that Charge 2 and Charge 4 against Appellant were proved. Appellant was given the benefit of doubt on Charge 1 and Charge 3 was not proved.

Respondent decided that Appellant should be suspended from work without pay for a period of three working days on the basis of the two charges.

It is this disciplinary action which triggered the appeal.

Appellant's Case

Appellant averred that he had forty years of service and had, throughout his career, enjoyed an unblemished record.

Appellant challenged the two charges leveled against him as follows:

Charge 2 : Having impertinently addressed letters to the RO or the Local Government Service Commission

At a time when there were only two officers in the section, the RO had replaced Miss Bungaroo, Clerical Officer/Higher Clerical Officer, by Mr Lufor, even though the former had more experience in working in the Human Resource Department. The RO had explained that this was part of the rotation principle so as to give them the opportunity to acquire experience and competence in the various fields of activities as recommended by Respondent in a letter to Responsible Officers. However, Appellant did not believe those were the real reasons that motivated the transfer of Miss Bungaroo by the RO. For Appellant, the transfer was motivated by the request of the Head of Planning Department to transfer Mr Lufor from her department and not for him to gain experience and competence in the various fields.

Mr Lufor was transferred to the Human Resource Department on the 10 May 2010 up to the 31 May 2010. He only worked for four days and did so in a haphazard manner and very often made mistakes. Mr Lufor was not replaced immediately on his transfer. Appellant was left with only one member of staff as the other member was on vacation leave. When the officer resumed work after her vacation leave, the other officer was assigned the duties of Executive Officer, which meant that Appellant still had to manage with only one officer.

Appellant, had to do clerical duties in addition to his duties of HRMO, though this was not his personal choice.

The RO had, prior to the change in staffing, assured the Appellant that no member of his staff would be transferred.

Appellant averred that it had never been proved that he acted with impertinence towards the RO.

Charge 4: Having willfully failed to give effect to the letter dated 13 May 2010 from the local Government Service Commission with regard to disciplinary proceedings against Mr P. Pothunnah, Senior Health Inspector.

Appellant submitted that the Grand Port Savanne District Council had failed to adduce evidence whatsoever that he acted "willfully", inasmuch as the RO himself had conceded that the Appellant had committed a mistake in failing to give effect to the letter. Appellant could not be said to have acted deliberately and with the intention not to implement the decision. Appellant therefore thought that he had no case to answer in respect of this charge.

Appellant prayed that the two charges against him be quashed or alternatively the suspension itself be quashed and a reprimand be substituted therefore.

Respondent's Case

Respondent averred that the Appellant was treated fairly and was given the opportunity to defend himself when action was initiated against him under the LGSC Regulations. He was represented by Counsel when he appeared before the Commission of Inquiry.

Respondent affirmed that the change in posting in the Human Resource Department was part of a normal rotation in the local government service. Respondent did not admit that Miss Bungaroo had more experience in the Human Resource Department. The officer had been working in that department for about five years and had to be rotated to another section for her to acquire competence in other fields of activities. It was further averred that the transfer of Mr Lufor to the Human Resource Department had the twin objective of enabling Miss Bungaroo to obtain more experience elsewhere and of solving a problem which had arisen at the Planning Department where the Head of that Department had made a request because of Mr. Lufor's misconduct.

Respondent claimed that the letters which Appellant sent to the RO were false, malicious, impertinent and calculated to bring the RO in disrepute.

Respondent averred that the Human Resource Department was functioning smoothly even with one Clerical Officer.

As regards the letter of 18 May from Respondent to inflict a reprimand on Mr. Pothunnah, Respondent averred that it was on 26 May 2010 when the RO went in the office of Appellant that he found that the letter had not been processed. Appellant had therefore failed to discharge his duties diligently.

Respondent considered the Appellant's suspension from work without pay for three days was fair and reasonable given the charges levelled against him.

Rulings

Prior to the hearing of the appeal on merits, Respondent had raised a point of law "that prayer 4(1) be set aside as the present Tribunal does not have jurisdiction to entertain any appeal against findings of a Disciplinary Commission". The Tribunal gave a ruling (No. 11 of 2012) as follows:

> *It is clear that this Tribunal is concerned with decisions of public bodies and not any Committee or organ which reports to the public body. The latter must be able to assume full responsibility for any decision it makes, even though this is based on a finding of fact of an enquiring officer or Committee nominated to look into the matter. The public body does not remain completely neutral nor accept a report without question. Further, since Appellant states clearly that in fact he is asking the Tribunal to quash the decision of the LGSC, we find that he may do so and he will get full leeway to cross-examine Respondent on the issue as long as he does not question the actual working and findings of the enquiry committee. Therefore he cannot rely on prayer 4.1 which is based on his first ground of appeal.*

Subsequently, Respondent raised an objection that Grand Port Savanne District Council was made a Co-Respondent on the basis that the PBAT Act provides that an appeal should be directed against the LGSC or the PSC only. The ruling (No. 28 of 2012) of the Tribunal on this issue was:

After having given careful consideration to submissions made by both parties, the Tribunal finds that the LGSC is the proper party against which the Appellant should appeal and against which it has in fact appealed in this case. Section 3 is in fact very clear and determines the limited jurisdiction of the Tribunal to these two Commissions only. The Tribunal also bears in mind that the decision to sanction the Appellant has been ultimately made by the LGSC, even if it was taken after recommendation by the Council. The LGSC is the sole authority empowered to do so. True it is that the Council recommends but the LGSC is free to discard the recommendation of the Council, or alter the sanction once a recommendation has been made by the Council and the latter does not have a say in the matter anymore. We, therefore, see no reason why the Council should be made a party to the case. Of course, the Appellant is free to call the representative of the Council to depone as witness. If the Appellant cannot secure its presence, the Tribunal can always intervene to summon the Council if it deems it necessary as per section 7(8)(a) of the PBAT Act.

Determination

This is a case of disciplinary proceedings under LGSC Regulations. Initially, there were six charges against the Appellant under Regulation 37 of the Local Government Service Commission Regulations. After the Appellant gave his explanations, the Respondent dropped two of the charges and retained four of them. Under Regulation 38 of the Local Government Service Commission Regulations, these were submitted to a Commission of Inquiry. That Commission retained two of the charges as proven and the disciplinary action of Respondent was based on these two charges.

The Tribunal has been able to understand what went on in this case on the basis of documents filed by the parties, the points raised at Hearing. The Tribunal also benefited from documents which Respondent agreed to submit to the Tribunal for its sole perusal. The Tribunal would like to place on record its appreciation of Respondent making available sensitive documents to the Tribunal whenever requested to do so.

It is obvious that the District Council had some inherent management hurdles, one of which was the behavior of one of its staff, namely Mr Lufor who appeared to be causing problems. The matter worsened following an incident on 30 April 2010 when the RO asked Mr Lufor why he was not in the office, and Mr Lufor arrogantly replied to him:

"Mo pas pou alle' guette' ki ou pou faire. Mo pou alle' une heure. Moi aussi mo conne attrape pavillon".

If the Tribunal reads it well, Mr Lufor probably implied that he benefits from some occult leverage. One of the five reasons mentioned in the letter of 7 May 2010 which the Head of Planning sent to the RO to request the removal of Mr. Lufor from her department was that *"Several times he stated that it is Ministers who take decision and he does not care about the Chief Executive".*

What makes it worse is that, a few days later, Appellant told the RO "*ou habitue provoke li"* (meaning Mr Lufor). Since then the Tribunal was told that the RO was no more on good terms with the Appellant.

On 7 May 2010, the Head of the Planning Department sent an office memorandum to the RO giving five reasons as to why Mr. Lufor should be removed from the Planning Department. The RO gave instructions to the Appellant on the memo itself on the same day "*Please arrange for the immediate transfer of Mr Lufor to your department and Miss Bungaroo to the Registry. Also initiate disciplinary action against Mr Lufor".*

Clearly the RO found a good way to solve the problem of the Head of Planning Department and make Appellant "inherit" Mr Lufor, in a situation where the Human Resource Department was already short of staff.

Appellant was not happy with the way things worked out. He was deprived of a good officer in Miss Bungaroo and in return got in his Department someone considered as a seemingly trouble-maker. Appellant had drawn the attention of the RO to his staffing problem. A few weeks before the incident, the RO had even promised the Appellant that nobody would be removed from his Department.

The change in posting that occurred was probably ill-timed, and appeared to Appellant to be a retaliation because of the comments he made to the RO about his frequent provocation of Mr. Lufor. It has been brought to the attention of the Tribunal that Mr Lufor had been posted at the Human Resource Department before and he was taken away from that Department. In fact on 16 December 2009, Miss Bungaroo wrote to the RO complaining about Mr Lufor. Her letter started with the self-explanatory sentence "*It is with utmost dissatisfaction that I am writing you this letter to express my utter disgust and helplessness against one of our colleagues, Mr Vikramsingh Lufor working here*" (meaning the Human Resource Department).

The posting of Mr Lufor at the HR Department cannot be considered as part of that rotation exercise which the RO refers to. And the fact that it affects only the HR Department falling under the Appellant does not seem to be a coincidence. The RO took the decision unilaterally and, in the spur of the moment, following the receipt of the request from the Head of Planning. The Appellant was not consulted and the decision was imposed on him. Appellant may have experienced an emotional response when he got the sudden instruction which was not in any way to his liking.

The reason why the Tribunal is elaborating on the background to this sad state of affairs is because the state of mind of the Appellant and the RO have to be borne in mind in order to understand the way things eventually turned out. It was not contested that the HR Department was understaffed. The Respondent has averred that the department was performing smoothly even with one Clerical Officer. It may also be because the Appellant was doing clerical duties in addition to his duties as HRMO. Incidentally, Appellant had been reproached by Respondent for doing clerical duties and "his work as Human Resource Management Officer was lagging behind". This was one of the original grounds evoked, on which he had to provide written explanations.

Here is a case of an officer with an unblemished career who suddenly finds himself in a turmoil because of circumstances which are beyond his control and not of his making. The letters he sent to the RO may appear to be impolite and unethical. Did Appellant act in desperation when he found that his Department was inheriting a time-bomb that would inevitably explode in his face while he was on the

way to retirement? Was Appellant committing an offence when he wrote to the Respondent on 10 May 2010 for a transfer to another local authority? That letter was sent through the RO who had put his initials on the letter. In other words it was not done behind the back of his RO. In any case writing to the Respondent was probably his last resort to get out of a deadlock situation.

Appellant seems to have acted under pressure and despair which can attenuate the extent of the offence. This does not imply that the Tribunal does not find the strong language in Appellant's letters to the RO unacceptable.

Mr Lufor defied the authority of the RO and he only got a change of posting. Respondent must be consistent in sanctions taken vis-a-vis all officers so that there is no perception of a two-track approach when it comes to disciplinary actions.

As regards Charge 4, that Appellant willfully failed to give effect to a letter from the Respondent, it seems that the charge has been wrongly framed. There was no evidence from Respondent that Appellant had acted deliberately in not giving effect to the letter. The RO himself simply said that *"it was a mistake by the HRMO for not having implemented the decision of the Local Government Service Commission*". While the RO conceded that it was a mistake, he did not elaborate on the willful intention side. Appellant explained to the Tribunal in what circumstances he had to be away from work and take a sick leave and, as he was not aware of any urgency to issue the letter, he had the intention of doing so after he returned from his sick leave, as he had an eye problem. Whether the mistake of not sending the letter in a more timely manner was serious enough to warrant a suspension is a moot point. Nonetheless the Respondent did not bring any evidence that there was deliberate intention on the part of the Appellant not do so. Neither did Respondent elaborate on the urgency or real harm that had been caused by Appellant failing to do so.

On the whole, the Tribunal finds that there are attenuating circumstances in favour of Appellant. The Appellant has 40 years of unblemished service and is being disciplined for the first time. A disciplinary action should as far as possible be corrective and not punitive. It must also not sour continued employment relationship. Above all, the Respondent must be seen to be consistent in meting out sanctions to

its employees. The way the Appellant and Mr. Lufor have been dealt with in respect of their attitude to the RO does not bear this out. This does not however absolve Appellant from a disciplinary action. The report of the Disciplinary Committee itself concluded that due consideration should be given to the long unblemished career of Mr E. D'Emmerez while deciding on the punishment to be inflicted upon him.

The prayer of the Appellant to quash Charge 2 against him is not allowed. The Tribunal is conscious of the circumstances under which the Appellant wrote the letters to the Chief Executive. However, the Tribunal cannot condone the improper language used by the Appellant when addressing his Chief Executive.

As regards Charge 4, this has not been adequately substantiated by Respondent. The Appellant explained the reason why he did not issue the letter of reprimand but the Respondent did not query the Chief Executive regarding the fact that he did not explain to Appellant the urgency for issuing the letter and the harm caused in its late issue. This was clearly not properly dealt with at the level of the Committee of Enquiry. Respondent has also not demonstrated that Appellant's *inaction was intentional*.

In view of the mitigating circumstances, the Tribunal is of the opinion that the decision of Respondent to suspend Appellant is harsh and not consistent with the way Mr Lufor was treated. After all the latter was the one who really challenged the authority of the RO. And he did so in more than unacceptable terms.

The Tribunal remits the case to Respondent and directs Respondent to review the penalty inflicted on Appellant accordingly and to report to the Tribunal within three months.

- *This determination has been reproduced without deleting the identity of parties and other confidential information since Respondent had made a motion for judicial Review before the Supreme Court All relevant information is now accessible since the Supreme Court does not hear such matters in camera. The case has been withdrawn and the determination therefore stands good**