

The Respondent must be consistent in dealing with similar cases. A sanction must be proportionate. Depriving someone of his livelihood is a sanction of last resort and would be acceptable only if the offence is very serious and the offender has created problems in his workplace and is likely to become a recidivist.

The Appellant, a REC at the Municipal Council of ... , has lodged an appeal to this Tribunal against the decision of the Respondent to retire him in the public interest.

Appellant's Case

The grounds of appeal of the Appellant were that:

- “(1) The decision is disproportionate*
- (2) The decision is not consistent with other similar cases*
- (3) Failure to give the appellant the opportunity to show cause as to why he should not be retired in public interest*
- (4) Failure to show how the decision is preserving welfare and well being of the public”*

The Appellant averred that he was employed as LAR by the Respondent on a temporary basis in the year ... In the year..., he was appointed as REC on a substantive basis. Since his employment with the Respondent he always performed his duties diligently and had never been engaged in any misconduct at work, nor has he received any warning nor been disciplined for same.

On ... at about ... hours, whilst being off-duty, he was arrested by ADSU for possession of cannabis (about 0.3 grams) whilst he was in the company of his friends. Appellant was provisionally charged with the offence of “possession of cannabis”, but due to 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. Appellant was convicted on ... and was sentenced to pay a fine of Rs 1,500 plus Rs 100 as costs.

On ..., Appellant was convened by the Council to a Hearing Committee scheduled for the ...in view of the sentence dated ... On ..., Appellant was informed by

the Council that the Respondent had decided to dismiss him following his court conviction.

Since his arrest on ... until his dismissal in ... (almost three years), Appellant had been in the continuous employment of the Respondent and had in no way disrupted the proper running of his work place.

Following the decision of the Respondent to dismiss him, Appellant had appealed to this Tribunal and in a Determination dated ..., the Tribunal quashed the decision of the Respondent to dismiss him and the matter was remitted back to the Respondent "inviting it to review its decision to meet the ends of justice and in conformity with this Determination"

On the ... Respondent informed the Appellant that the Respondent had reviewed its decision to dismiss him and had instead decided that Appellant be retired from the Local Government Service in the public interest.

The Appellant averred that the decision of the Respondent to retire him from service based on public interest, was unreasonable, *ultra vires* and disproportionate for the following reasons:

- "1 The Appellant was not given an opportunity to show cause why he should not be retired from the service in public interest and why other disciplinary measures could have been more appropriate in his particular case*
- 2. Respondent has failed to show what public interest element is served by retiring Appellant the more so that, since his arrest in the year ... until his dismissal in ...,the Appellant has been in the continuous employment of the Respondent and has in no way disrupted the proper running of his work place nor tarnished the reputation of the Respondent*
- 3. The decision of the Respondent is not in line with previous decision taken by the Respondent in similar situations*
- 4. The offense for which the Appellant has been convicted is an out of hour offense and is not connected to the Appellant's job.*
- 5. The Respondent has failed to demonstrate in what way the continuous employment of the Appellant after his conviction will bring his employer into disrepute and will disrupt the proper running of his workplace*
- 6. The Respondent decision will cause undue hardship for the Appellant since at his age (52 years old) it will be difficult for the Appellant to secure another employment".*

The Appellant requested the Tribunal to quash the decision of the Respondent on the ground that the decision was unreasonable, disproportionate and *ultra vires* and order that the Appellant be reinstated.

Appellant's Counsel submitted that that he has done some research but not found a clear definition for the term public interest. The concept evolves with time. He submitted that this term is being used as a smokescreen behind which Respondent takes its decision whereas Respondent could justify what they mean. "Are we upholding public interest by depriving somebody of his livelihood because he has been found in possession of Rs200 worth of cannabis?" He submitted that the punishment was disproportionate, specially as Appellant has no history of a drug offence before or after.

Respondent's Case

The Respondent confirmed that the Appellant was appointed LAR on ...and REC on ... There was no adverse report against the Appellant but there was no record that the Appellant performed the duties of FOM.

The Respondent stated that in accordance with Circular Note No 9 of 2008, the Appellant was convened before the Hearing Committee on ...and he was informed that he could "*be assisted by a Trade Union representative or a legal representative before the disciplinary committee*". The Appellant was not accompanied by any legal advisor or Trade Union representative when he appeared before the said committee on the said date. During the hearing Appellant was informed that he might be dismissed. Appellant informed the Committee that he was found to be in possession of cellophane wrapping containing a certain quantity of cannabis while he was with some friends and had accepted the charge before the District Court of Port Louis. He did not imagine that the matter would go that far. Appellant tendered his apologies for his act.

The Respondent denied the preamble under the heading Grounds of Appeal and referred to the admissions contained in Appellant's Statement of Case. Appellant was given adequate opportunity to show cause before the Hearing Committee.

During cross examination Respondent's Representative agreed that

- Appellant did not have any other problem of discipline before and after the present case.
- It is true that in the past there were several employees who had similar cases but they were not dismissed nor were they retired in the public interest. She explained that now the Commission had new members with a new policy.

The Respondent had acted in compliance with Regulation 36 (2) of the Local Government Service Commission, 1984. He had pleaded guilty to possession of cannabis and paid a fine. Respondent considered that the Appellant was not a fit and proper person to remain in the service of a public institution. Following his retirement, the Appellant would be paid relevant retiring benefits.

The Respondent moved that the appeal be set aside.

Determination

The Appellant had lodged an appeal for the same matter and the Tribunal had quashed the decision to dismiss the Appellant and remitted the matter back to Respondent inviting it to review its decision (vide this Tribunal's determination Website reference Det 19 of 2017). Following that decision the Respondent decided to retire the Appellant on the grounds of public interest. As already determined in the previous case: *“As to whether the dismissal is reasonable and proportionate, the Tribunal wants to state outright that drug use/abuse is a scourge 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 main ground of the Appellant relates to his retirement in the public interest and the reasons of this decision.

Regulation 41 (2) of the Local Government Service Regulations reads as follows:

“41(2) Nothing in this regulation shall limit the powers conferred by these regulations to require a local government officer to retire from the office on the grounds of public interest”.

The LGSC Regulations are therefore clear. The Respondent has the power to retire an officer on the grounds of public interest. However, it is nowhere said what is encompassed by this broad appellation of public interest. More often public interest relates to the immunity of the authorities to disclosure of confidential papers or information to protect precisely the national interest or security matters. For a common person this may be given such a wide interpretation that the local government officer may find himself retired on any point of public interest. This may lead the Respondent using Regulation 41(2) as a sledgehammer to crack a nut.

The Tribunal has given its views on the issue of drug addiction and the possession of cannabis in its previous Determination. It cited the Supreme Court in the case of the judicial review of LGSC v/s PBAT ipo R Boodhun (2016 SCJ 511) which quoted the Dangerous Drug Act to say that while smoking cannabis may be a minor offence "*the same cannot be said for a drug-dealing offence, which includes the offence of cultivation of cannabis*". The offence committed by the Appellant is serious but does it deserve the harsh punishment imposed for a first conviction for which the Criminal Court was not so harsh. He was fined Rs1500 whereas the penalty for such offence is a maximum fine of Rs50,000 and two years' imprisonment. The Tribunal has said in its previous Determination that dismissal was too harsh, specially that the Respondent has not been consistent in similar cases as natural justice requires.

It is noted that the Appellant, aged 50, had been in service in the Council for some 24 years and had an otherwise unblemished record. It has been submitted that the Appellant was arrested in ... and up to the time disciplinary action was taken against him three years later, it has not been shown that his conviction has impacted on society or the welfare of the employer during this three year period. The Responsible Officer, who has day to day dealings with the workers, had recommended that a reprimand be inflicted on the Appellant.

This brings us back to Regulation 41(2). Has it a *raison d'être*? Is it not too wide and a threat to local government officers? This in no way must be construed that the Tribunal will come to the rescue of officers who commit offences which require their retirement or dismissal from the service. The point is that public interest issues must be clearly delimited so that the Respondent does not go overboard. As we say a sledgehammer must be used for the hard nuts and not any nut.

It is apposite to note that the Public Service Commission has been sensitive to the issue and has revised its own regulations to replace “*in the public interest*” by “*in the interest of the public service*”. The Respondent may seriously consider amending its Regulations and replace public service by “*interest of the local government service*”. This will be fairer to the local government officers and facilitate the Respondent in its dealings when disciplinary actions are required.

Given the remarks concerning the public interest implications, and the fact that the Respondent has not been consistent in dealing with similar cases, the Tribunal quashes the decision of Respondent and remits the appeal back to the Respondent under section 8 (4) (b) of the Public Bodies Appeal Tribunal Act 2008.