# PUBLIC BODIES APPEAL TRIBUNAL

**No. D/26 of 2018**

**In the matter of:-**

**Daneswar BUROSAH** **Appellant**

**v/s**

**Local Government Service Commission** **Respondent**

## Determination

The Appellant, Driver at the Heavy Mechanical Unit of the District Council of Flacq (hereafter referred to as District Council), has lodged an appeal against the decision of the Respondent to dismiss him from the local government service following his conviction in court for driving motor vehicle with alcohol concentration above prescribed limit (blood test).

**Appellant's Case**

The grounds of appeal were as follows:

*"1. That the decision of the Respondent to dismiss the Appellant in the circumstances of this matter is manifestly harsh and excessive*

*2. That the Respondent was wrong to dismiss the Appellant in respect of the particular charge against him and that such decision is against the principle of proportionality*

3. *That the Respondent in reaching its decision failed to properly weigh in the balance the many years of unblemished service of the Appellant. The overall record of the Appellant was not given its due weight*
4. *That the Respondent failed to appreciate the fact that at the end of the day the offence charged was one which was under the Road Traffic Act and did not involve fraud or dishonesty*
5. *That in the circumstances, dismissal was not the only decision that could have been taken by the Respondent*"

In his Statement of Case the Appellant averred that he was convened to attend a hearing under regulation 36 of the Local Government Service Commission (LGSC) Regulations by way of a letter dated 6 October 2017 from the District Council. He stated that this was not a Disciplinary Committee and there was no charge against him when he was convened to the said hearing. He cited Det 1 of 2015 of the Tribunal which referred to the LGSC Circular letter No 9 of 2008 which said that "*The Commission has decided that Responsible Officers should give a hearing to employees who have been convicted by a Court of Law before making recommendations as regards the punishment to be inflicted upon them in accordance with regulation 36"*.

He averred that the Hearing was held on 23 October 2017 and he was dismissed from the service forthwith.

The Appellant had been sentenced before the District Court of Flacq to pay a fine of RS 10,000 plus Rs 100 costs for the offence and he was disqualified to hold/obtain a driving licence for all types of vehicles for 8 months and his driving licence had been endorsed**.**

The 8 months disqualification was one day short of being elapsed. When he was finally dismissed by the letter dated 4 December 2017, the whole disqualification period had long been over. The Appellant averred that the very reason of his dismissal was because of the sentence meted out to him.

The Appellant highlighted the following:

(i) The offence was not related to his job

(ii) The offence was committed on a Sunday when he was not working

(iii) The charge of driving motor vehicle with alcohol concentration above the prescribed limit, at the materials time provided for a fine not less than Rs10,000/- nor more than Rs25,000/- and to imprisonment for a term not exceeding 6 months.

(iv) In case of a second or subsequent conviction the minimum fine is increased to not less than Rs20,000/- nor more than Rs50,000/- **together with** imprisonment for a term of not less than 6 months nor more than 12 months.

(v) It was his first offence in respect of the above charge and "*even though it was within the discretion of the Learned magistrate to inflict a prison sentence as well to the Appellant he did not choose to do so because it had been the practice of the District Court not to inflict custodial sentence to first time offenders in respect of the above charge save for very serious cases. To inflict a custodial sentence for first time offenders would be considered in general to be manifestly harsh and excessive*".

(vi) The District Court dealt with the particular case in a more lenient manner than the Commission did. The Appellant referred to one of the Tribunal's determination (Det 1 of 2015) which stated that *"He has already been punished and cannot be punished twice and more severely by withdrawing his source of revenue, which can only be a recourse of last resort"*

(vii) "*The charge of driving with alcohol above the prescribed limit has more serious repercussions when committed a second time by an offender as this time, the District Court would have no option but to inflict a custodial sentence along with a heavy fine and a longer disqualification period*".

The Appellant also averred that dismissing him in the present matter was not in accordance with the principles of natural justice in view of his unblemished record. The decision to dismiss him was totally unfair and was not the only decision that could be taken by the Respondent and he could have been subjected to some lesser disciplinary punishment.

When he was cross examined, the Appellant admitted that according to the blood test there were 158 mg of alcohol in his blood, and also that it was more than three times the limit accepted by law.

He also admitted that he worked on the next day and started to drive at 4.30/5.00 a.m. and that there were five workers in his vehicle. He agreed that it was dangerous to do so but asked to be forgiven. He also agreed that he did not inform his employer that he had been disqualified to hold a licence for 8 months and that he drove for several days but later asked another employee to replace him. He also admitted having applied for vacation leave and for extension of same. In the second case he stated that he was going to India. He admitted having lied because he was scared.

He finally admitted that at the hearing he understood that he could be represented by a Trade Union or Legal Representative but was not. He understood everything and specially that he could be dismissed. He explained that he was scared.

**Respondent's Case**

The Representative of Respondent solemnly affirmed to the truth of the Statement of Defence which was as follows:

The Respondent averred as follows:

a) on 11 June 2015, Appellant was stopped by officers of the ERS at La Chapelle, Beau Champ. Appellant was driving a motor cycle
b) on being asked, Appellant admitted having consumed alcoholic drinks, but refused to conduct the alcohol test,
c) Appellant was then taken to Flacq Hospital for blood test and thereafter to the Bel Air Police Station for his statement
d) on 23 February 2017, Appellant attended the District Court of Flacq where he was informed that the blood test conducted on 11 June 2017 has indicated that the proportion of alcohol in his blood exceeded the prescribed limit and he was charged with the offence of "Driving Motor Vehicle with alcohol

concentration above prescribed limit (blood test)". He had 158 mg of alcohol in 100 ml of his blood, when the prescribed limit was 50 mg in 100ml of blood,

e) Appellant pleaded guilty and was sentenced on the 23 February 2017 to pay a fine of Rs 10,000 plus Rs 100 costs. Appellant was also disqualified to hold a driving licence for all types of vehicles for 8 months and his driving licence was endorsed,

f) Appellant was on casual leave on 28 February 2017 and attended duty from 1st to 4th March 2017

g) Appellant proceeded on vacation leave on 6 March 2017

h) Before going on leave Appellant failed to report to his Responsible Officer (RO) about his court conviction

i) Appellant requested an extension of his vacation leave from 5 May to 1 October 2017 for treatment in India but he never proceeded to India. Appellant was not the holder of a passport. It is only on 2 October 2017 when he resumed duty, that he informed his immediate supervisor of the offence

j) On 5 October 2017 Appellant was convened to a preliminary meeting by the District Council where he informed his RO of the Police case and the sentence.

k) By a letter dated 6 October 2017 Appellant was convened to attend a Hearing. This was in accordance to LGSC Circular No 9 of 2008. The purpose of the Hearing was to give Appellant the opportunity to explain the circumstances of the case and whether he had mitigating elements before the decision was taken to inflict a penalty to him. During the Hearing Appellant was told that this was not a retrial and he was explained that he might be dismissed from the Local Government service.

l) Following the Hearing, the RO submitted the report of the Hearing Committee to the Respondent and recommended his dismissal. The RO also submitted the proceedings, and the judgment of the District Court. The Respondent took into consideration all the documents. It also looked at the seriousness of the offence and the excessive amount of alcohol consumed and also that, although the offence was not committed during the course of Appellant's

employment , it impacted directly on his suitability to work as a driver in the Local Government Service

m) Respondent informed the RO of its decision on 29 October 2017 and Appellant was informed accordingly on 4 December 2017

n) The Hearing could not be held earlier as Appellant had concealed to his RO his involvement in a police case and his subsequent sentence

o) The Respondent harped on the objectionable conduct of the Appellant who knowingly and deliberately concealed the offence and his subsequent sentence from his RO

p) The Respondent averred that while the offence was not committed during office hours it had a bearing on Appellant's job as a Driver of the HMU which undeniably impacted on his suitability for the post

q) For these reasons, the Respondent stated that its action was justified and moved that the appeal be set aside

**Submission of Counsel**

Counsel for Appellant submitted that the Appellant was not denying the seriousness of the offence but relying on the fact that in the letter to him the Respondent referred only on the sentence by the Court and not the other elements brought forward by the Respondent in its Statement of Defence. He was of the view that the Respondent had not taken into account the fact that this was a first offence committed by the Appellant who had an otherwise unblemished record. Counsel conceded that had this been a second or third offence a more serious sanction would have been appropriate. Counsel reacted to what Counsel for the Respondent said concerning the fact that the Appellant drove the next day after he was found driving under heavy influence of alcohol. Counsel said that only a doctor could have certified whether the Appellant was fit to drive on that day. When he was asked by the Chairperson whether he had brought a doctor as witness, Counsel said no. Counsel said that the Appellant lied several times for fear of losing his job, with the implications for him and his family. The Respondent could have resorted to a less severe penalty as there were other penalties that could be imposed for such offence. The decision of the

Respondent was disproportionate. The Magistrate could have sentenced the Appellant to imprisonment but he chose not to do so. Counsel referred to this Tribunal's determinations (Det 1 of 2015 and Det 21 of 2015 on the Tribunal's website) where the Tribunal had found the decisions concerning the offence of driving under the influence of alcohol harsh. He submitted that a severe reprimand would have done justice to this matter .

Counsel for Respondent did not dispute the fact that the offence which was committed by the Appellant was committed outside his office hours. It was not contested also that the Appellant had no adverse report against him and his offence was not one of fraud or dishonesty. However, Counsel submitted that there were circumstances which had to be taken into account to assess the gravity of the offence. Driving with such a high alcohol content in the blood which was three times the prescribed limit was a serious offence. Counsel referred inter alia to the case of Gunputh v/s the State in 2007. Counsel also referred to the amendments that were made to the Road Traffic Act in 2003 with the introduction of section 123 (F) where it was said that such a conduct was reprehensible and such a conduct needed to be discouraged. Even if the offence falls under the Road Traffic Act, it did not make it a minor offence. This was relevant for the purposes of regulation 36 (3) of the LGSC Regulations It was not necessary to show that the offence was not related to Appellant's employment or that it involved fraud or dishonesty. The fact that the Appellant had a clean record would not help the Appellant given the seriousness of the offence implying driving with alcohol three times the prescribed level. Counsel drew the attention of the Tribunal to the fact that Appellant started work at 5 a.m. the next day after being found with such high alcohol content in his blood. The Appellant had deliberately engineered to conceal the fact of the accident and the Court sentence from his employer for such a long time clearly impacted on the suitability of the Appellant to work as a Driver. The Respondent had taken all these into account before taking its decision and the decision could not be seen as disproportionate.

**Determination**

This is a case where the Appellant was found guilty and sentenced by a Court of Law. He was dismissed under regulation 36 of the LGSC Regulations

Regulation 36 reads as follows:

"*36. Procedure on criminal conviction*

*(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."*

While under regulation 36, the Respondent is dispensed of instituting a Disciplinary Committee it still requested the Responsible officers of the Local Authorities to give a hearing to officers who have been convicted in Court in its Circular No 9 of 2008. The Appellant clearly understands the difference between a Disciplinary Committee and a Hearing Committee as he explained the nuance in his Statement of Case. The Respondent also explained that the Hearing Committee was only to give a chance to Appellant to explain the circumstances of the case and to state whether he had elements in mitigation. The Respondent also confirmed that Appellant was told at the Hearing Committee that he may be dismissed and Appellant admitted that this was so.

The Appellant contends that the offence falls under the Road Traffic Act, was outside the place of work and not within working hours and that that it was a first offence in an otherwise unblemished career at the District Council. He found the penalty harsh and submitted that a severe reprimand would have been more appropriate.

The Respondent brought many elements which aggravate the situation of the Appellant:

(i) The Appellant did not report the offence to his RO until he resumed work on 2 October 2017 when the offence was committed on 11 June 2015 and the sentence by the District Court was inflicted on 23 February 2017

(ii) The Appellant applied for leave to be spent overseas from 5 May 2017 to 1 October 2017 but he did not proceed overseas. He was not even the holder of a passport. He lied to his RO.

(iii) Between 24 February and 27 February 2017 he drove the lorry of the District Council while his driving licence was suspended on 23 February 2017. The Respondent found it serious that on the 24 February at 5 a.m. he started work and drove the lorry when on the eve he was found drunk with an alcohol content three times the limit in his blood and putting his life and that of other people in danger. Between 1 and 4 March 2017 he worked, but knowing that he was disqualified to hold a driving licence for all types of vehicles and his driving licence was endorsed, he asked a colleague in his team to drive in his place. He had no authority to give such instructions; such instructions could only be given by his immediate superior.

The case of Appellant is, therefore, not a simple offence under the Road Traffic Act but this offence was compounded by the irregularities which the Respondent laid before the Tribunal.

Had it been the fact that the Appellant was driving under the influence of alcohol and, given that this was a first offence, the punishment of dismissal may have appeared harsh. The Tribunal does not believe at all that the Appellant did not understand the

implications of driving without a proper licence, driving under the influence of alcohol on the next day or even concealing every aspect of his problem to his employer. He has himself to blame for his reprehensible conduct. In the circumstances it cannot be said that the punishment is disproportionate.

As regards the claim that action against him was taken after eight months, it is adding insult to injury since the delay is totally due to his unreasonable behaviour.

The Tribunal finds no merit in this appeal.

The appeal is set aside.

**S. Aumeeruddy-Cziffra (Mrs)**
Chairperson

**G. Wong So**
Member

**S. Tirvassen**
Member

**Date: ……**

**<u>Note</u>: This case is not being treated confidentially as there has been a motion for Judicial Review before the Supreme Court by the Appellant. All information relating to the case was made public as the Supreme Court, unlike the PBAT, does not deal with such motions in camera. The Supreme Court upheld the Determination of the Tribunal which has now become final.**