Det 30 of 2018

When Respondent decides to impose the highest sanction which deprives an Appellant of his livelihood, reasons must be given.

If an offence is committed "out of hours", even if it is serious, the test should be what impact would it have on the officer's employment and his working environment.

The Appellant is appealing against the decision of the Respondent to dismiss him from the service following a conviction by the District Court of … on the … on a charge of Involuntary Homicide by Imprudence.

Appellant's Case

Appellant filed a notice and Grounds of Appeal (GOA) on the … followed by an additional ground filed on the…. The Tribunal noted that the additional ground of appeal had been filed within delay.

He considered the decision to dismiss him as being harsh as

"(a) The offence was committed before I joined the public service.
(b) I have not been sentenced to a term of imprisonment; and
(c) The offence is not directly related to job in which I have been appointed in the public service.
*(d) The punishment inflicted by the Public Service Commission is tantamount to a second sentence being inflicted upon me***". *(SIC)***

And the additional ground reads as follows:

"No disciplinary proceedings were instituted against the Appellant and the latter was not given the opportunity to make representations against the decision of the Public Service Commission".

He was appealing *"against the punishment" which he considered "too severe and is having a negative impact on my personal and family life in as much as I am married and father of a child"*

He swore as to the correctness of his GOA and of his Statement of Case (SOC) in which he averred that he joined the public service as a casual GWR on the…. He was subsequently placed on the Permanent and Pensionable Establishment with effect from the…. He was posted at the … for ....

Appellant further averred that: -

(a) Prior to joining the public service, more precisely on the …, he was involved in a road accident and was charged with Involuntary Homicide by Imprudence;

(b) By virtue of a judgement delivered by the Court on the …, he was found guilty as charged and sentenced to pay a fine of Rs 60,000 and was disqualified from driving all types of vehicles, holding or obtaining a licence for all types of vehicles for a period of 2 years. His driving licence was endorsed.

(c) Following the above and pursuant to a letter dated …, he was informed that the Respondent took cognizance of the judgement together with the punishment inflicted on him and it was decided that he should be dismissed from the public service forthwith.

During cross examination, Appellant maintained that the sentence imposed upon him by the Magistrate had no bearing or incidence on his job as GWR and that he was not working as driver in the Public Service.

Case of Respondent

The Respondent confirmed in its Statement of Defence that Appellant was appointed GWR on a casual basis under delegated power on the … and thereafter

appointed GWR on the Permanent and Pensionable Establishment with effect from the …

In reply to paragraph 3 (d) to (f) of the Statement of Case of Appellant, Respondent averred as follows:

(i) *On 04 October 2017, the Responsible Officer (RO) informed Respondent that:*

a) *The Police Force has informed that Appellant was involved in a case of "Road Accident"';*

b) *After completion of the enquiry, the case was sent to the office of the Director of Public Prosecutions who advised prosecution against Appellant for the offence of "Involuntary Homicide by Imprudence."*

On…, a case was filed by the Police;

c) *On…, Appellant was found guilty and sentenced to pay a fine of Rs 60,000 + Rs. 500 as cost by the District Magistrate;*

d) *As a result, thereof, the RO recommended that Appellant be reprimanded in accordance with Regulations 36 (i) of the Public Service Commission Regulations. He enclosed a copy of the judgment and court proceedings and Statements.*

(ii) *On… , the Responsible Officer was informed that Respondent, in the light of the Appellant's conviction by the District Magistrate on a charge for "Involuntary Homicide by Imprudence" in breach of section 239 (1) of the Criminal Code coupled with section 133 (1) and 52 to 2nd Schedule of the Road Traffic Act, has decided that Appellant be dismissed forthwith from the service. (SIC)*

As regards the grounds of appeal filed by Appellant, the Respondent averred that

(i) *irrespective of whether the offence was committed before Appellant joined public service, the offence of "Involuntary Homicide" was still a serious offence;*

(ii) *The offence of involuntary homicide as provided for by section 239 (1) of the Criminal Code provides for the offence to be punishable by imprisonment and a fine not exceeding Rs. 150,000;*

(iii) *In the present case, the District Magistrate took into account the fact that quality of driving displayed by Appellant was one of not only momentary inattention or misjudgment but also that of bad driving since he drove at a high speed and was unable to stop at the appropriate time to avoid the accident. However, the*

District Magistrate did find mitigating factors in the accident and as a result of which, custodial sentence was not given. A heavy fine and a disqualification to hold licences for all types of vehicles was given in view of the excessive speed and the force of impact which the excessive speed occasioned;

(iv) in determining the punishment to be meted out upon Appellant, Respondent took into account the judgment of the District Magistrate, the proceedings of the case, statements of Appellant and the seriousness of the offence (the fact that the offence of "Involuntary Homicide by Imprudence" coupled with section 133 (1) and 52 to 2nd Schedule of the Road Traffic Act was not minor offence) which resulted in the death of a person, albeit involuntarily; and

(v) in view of the seriousness of the offence, the punishment meted out upon the Appellant was proportionate". ***(SIC)***

During cross examination, the representative of the Respondent admitted that the Appellant was dismissed under Regulations 36 of the PSC Regulations. She also admitted that it was the Responsible Officer who reported the criminal conviction of the Appellant to the Respondent and that for the Regulations 36 (2) to apply, it should be a criminal charge likely to warrant Disciplinary Proceedings. However, she was unable to say whether a Disciplinary Proceedings is warranted in the event a criminal charge occurred before the Appellant took employment but agreed that the Respondent should look into the court proceedings as well as the judgement before reaching a determination.

At this stage, a copy of the court proceedings and the judgement were produced by the Respondent. Counsel for Appellant drew the attention of the representative of the Respondent that the Honourable Magistrate noted in her judgement that there was no independent version from witnesses in relation to the accident apart from the version of the Appellant. Counsel further put to the Representative of Respondent the fact that the judgement of the Magistrate did not give any insight of the character of the Appellant which would have allowed the Respondent to determine whether the Appellant was able to continue to serve in the Public Service before depriving the latter and his family of their livelihood. But the representative of the Respondent could not give any reply. However, she admitted that the Responsible Officer recommended that a reprimand be issued to Appellant. She also informed the Tribunal that the Appellant did not fill in an

application form seeking employment where he could have the possibility to inform the Respondent of the criminal proceeding instituted against him.

Submissions by Counsel

It was the contention of Counsel for Appellant that Regulations 36 did not apply in the present matter as there was no likelihood that a disciplinary proceeding was warranted in the light of the circumstances of the case. However, he admitted that as a general practice, no hearing is required when Regulation 36 is applied. But he added that at least an opportunity should have been given to the appellant to show cause why a sanction should not be taken against him as natural justice demands. He also laid emphasis on the large disparity in applying the sanction which was between the reprimand as recommended by the Responsible Officer and dismissal of Appellant by Respondent. The more so, no reason was mentioned in the letter of dismissal addressed to the Appellant. He produced a bundle of case laws including a case law from the Industrial Relations Commission of the New South Wales namely *Public Employment Office Department of Attorney General and Justice(Corrective Services NSW) v Silling (2012) NSWIRComm 118.* He opined that the Respondent could not make a decision which affected someone's livelihood unless reasons were given for doing so.

Counsel for Respondent viewed that the Respondent was right to apply Regulation 36 in as much as the Court had already heard the version of the Appellant lengthily and that there was no need to give the Appellant any hearing in whatever form or manner. She relied on the case of Rungasamy v PSC 1985 MR 35 to support her submission. She also stated that whether the offence was committed before or after the Appellant took employment, did not matter, as the offence was a serious one. As regards the disparity in the sanction applied in this case between the recommendation of the Responsible Officer and the decision of the Respondent, she maintained that the Respondent was not bound to follow the recommendation of the Responsible Officer.

Determination

In the present matter, the whole issue was the application of Regulation 36 compared to the principles of natural justice as the Tribunal is under an obligation to observe these principles. We reproduce the relevant Regulation 36 for ease of reference.

36 (1) (a) Where a public officer is adjudged guilty in any court a criminal charge likely to warrant disciplinary proceedings, the responsible officer shall forthwith forward to the Secretary a copy of the charge and of the judgment and of the proceedings of the court if they are available, and his own recommendation.

(b) The Commission shall determine whether the officer should be dismissed or retired in the interest of the public service or subjected to some lesser disciplinary punishment if the proceedings disclose grounds for doing so, without any of the proceedings prescribed in regulation 37, 38 or 39 being instituted.

(2) (a) Disciplinary proceedings subsequent to a conviction in a court of law should normally ne confined to cases in which the conviction was in respect of an offence under any law where a prison sentence may be imposed other than in default of payment of a fine.

(b) Disciplinary proceedings subsequent to a conviction should not normally be instituted 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.

At first sight, a literal reading of the Regulation 36, did not prevent the Respondent from proceeding with disciplinary action against the Appellant without adopting any form of hearing. However, when applying the principles of natural justice, we can see that there is nothing which would prevent the Respondent from at least informing the Appellant of the proposed sanction that it intended to take against him, the more so as the Appellant had not had the opportunity to inform the Respondent about the criminal proceedings instituted against him before the Court as no application form was filled by Appellant. A parallel is drawn with Regulation 36 of the Local Government Service Commission Regulations 1984 where the same method is prescribed but the

Local Government Service Commission had adopted a more lenient attitude by allowing all employees who were convicted by a criminal court of law to get an opportunity to express themselves before a hearing committee by issuing a circular to all local Authorities to that effect. It is in the light of the proceedings of the hearing committee, that the commission decides upon the proportionate sanction. The Tribunal is of the view that in all fairness, the Respondent should also adopt the same procedures so as to put public officers and local government officers on the same playing field.

We shall now move on to the sanction taken against the Appellant. The Appellant joined the service as GWR at the department on the … and confirmed on the Permanent and Pensionable Establishment on the… . He was dismissed on the…. It was the contention of the Appellant that the dismissal is too harsh and had seriously affected his livelihood. The Tribunal took note that dismissal is not the only sanction prescribed under Regulation 36 but the officer may also be retired in the interest of the public or any other lesser disciplinary punishment. In Rungasamy V PSC, it is clearly stated as follows:

> *"the question still remains as to the extent to which the Commission's assessment of the gravity of the Applicant's misconduct should be subject to judicial review. There is no doubt that it is not every conviction by a Court of Law that is meant to warrant dismissal or some lesser sanction. Paragraph (2) of Regulation 36 does limit the kind of offences in respect of which disciplinary proceedings may be taken. And we have no doubt that in an appropriate case the courts would intervene so as to pronounce the legality of the Commission's decision in terms of limitations and criteria contained in the Regulation 36 (2)*".

The case of Rungasamy could be distinguished from the present case as in the case of Rungasamy, the misconduct had a bearing on his employment whereas, in our present case, there is no relationship between the conviction and the work of the Appellant as a GWR. Any citizen of any level, status or position of the society may face such type of criminal cases at any time. Though the Appellant was charged under the criminal code, the offence for which the Appellant was charged did not carry any criminal intent. It is true that it is a fatal road accident but the involuntariness of the act

of the Appellant should be construed in favour of the Appellant. Counsel for Appellant favoured the Tribunal with the case of Public Employment Office Department of Attorney General and Justice v Silling (2012) from the Industrial Relations Commission of New South Wales which we agree is not authoritative but the elements and reasoning of the case are very persuasive as regard to dismissal for "out of hours" conduct and need to be quoted:

"*It is clear that in certain circumstances an employee's employment may be validly terminated because of "out of hours" conduct. But such circumstances are limited:*

1. *The conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or*
2. *The conduct damages the employer's interest; or*
3. *The conduct is incompatible with the employee's duties as an employee.*

In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee".

The Tribunal finds that none of the reasonable and fair elements as cited above are present in this case. Further there has been no evidence advanced as to the reasons why it was considered by Respondent that dismissal was the appropriate penalty to be imposed given the range of alternative penalties available under Regulation 41. The Tribunal viewed that the Respondent failed to address its mind properly on the harshness of its decision, even though dismissal is one of the sanctions that it was entitled to impose. The Tribunal concludes that the dismissal of the Appellant was disproportionate to the gravity of the conduct, the more so since the Responsible Officer who was in a better position to know whether the Appellant could serve the Public service in the capacity of GWR or not recommended a reprimand. Depriving the livelihood of a worker of the lowest rank is unfair, unreasonable and too harsh for such a type of offence in the present circumstances.

Therefore, the Tribunal quashes the decision of the Respondent to dismiss the Appellant and remits back the case to the Respondent for redress.