Det 40 of 2018

When Respondent admits that one appointee in fact was not eligible as per the necessary qualification required in the Scheme of Service, the whole selection exercise cannot be cancelled. The Respondent must cancel the appointment of that officer only.

Respondent must also respect the terms of the contract of employment of appointees and not revert them to their previous post if they are not a fault.

This is an appeal from two MMS/Senior MMSP against the decision of Respondent to revert them from the post of POSR at the PGD to their previous position as MM/Senior MMP.

Appellants' case

Appellant No. 1 swore to the correctness of his Grounds of Appeal (GOA) and Statement of Case (SOC). His grounds were as follows:

"*1. Reasons given by PSC for reversion do not concern me but another appointee.*

2. I possess the necessary academic and technical qualifications as laid down in relevant

3. I have completed the probation period without any adverse report.

4. I have moved up in the salary scale and the reversion causes me financial and moral prejudice".

In his Statement of Case he averred as follows:

He averred that he joined the GPD on…. In … he applied for two posts namely PSOR and PM/FOR following the relevant advertisement.

He was called for interview for both posts on…. For POSR it was scheduled at 9.30 a.m and for PM/FOR at 11.30 a.m. but that in fact he was interviewed for both posts at one and the same sitting.

He was fully eligible for both posts.

On … he was offered appointment to the post of POSR in a temporary capacity for six months, at the end of which if favourably reported upon,

consideration would be given to his appointment in a substantive capacity in the post.

He explained that one Mr N. was also appointed as POSR as well as one Mr S. The latter was also appointed as PM/FOR which is the post that he chose. The next person on the merit list, Appellant No 2, was then appointed POSR. His salary as MM/Senior MMP was Rs16,025 and he moved up in the salary scale to Rs19,200. He had no adverse report and had a satisfactory Performance Management System (PMS) Report.

On … he was informed that he was reverted to his substantive appointment of MM/Senior MMSP as the Public Service Commission had been informed by the Mauritius Qualifications Authority (MQA) that Mr N's qualification did not conform to the required eligibility qualification for the post of POSR. Consequently the whole exercise for the post was cancelled. It was explained to him that, following an appeal entered before the Tribunal by one Ms R. the Respondent received information from the MQA regarding the fact that Mr N. was not eligible for the post of POSR.

He averred that only Mr N. was concerned and that the Respondent's decision was wrong, unfair and discriminatory as it did not concern the appointees of PM/FOR who had not been reverted, though interview for both posts was carried out together.

He further averred that he was not under adverse report for incompetence, misconduct or insubordination as was clearly stated in his appointment letter.

Appellant No. 2 solemnly affirmed to the correctness of his GOA and SOC. His GOA were that he was not involved in the appeal which Mrs R. lodged at the Tribunal and was therefore not duly represented and unable to defend his interests.

He averred that the decision to revert him to his substantive post of MM/Senior MMSP was against the terms of the appointment letter which mentioned incompetence, misconduct or insubordination as grounds to terminate his appointment.

He averred that the appeal of Mrs R. directed against Mr N. was related purely on the ineligibility of the latter and not on the overall conduct of the interview process.

He averred that termination of his appointment was "*premature, unjustified and against the principles of fairness and natural justice*".

In his SOC Appellant No 2 averred that he was a MM/Senior MMSP from … to…. He applied for the post of POSR, was fully qualified and attended the interview. On … he received an offer of appointment in a temporary capacity for 6 months for the post and if favourably reported upon he was to be appointed in a substantive capacity.

On … he received a letter of termination of his employment as PSO and reverting him to this post of MM/Senior MMSP following the appeal of Mrs R to the Tribunal.

On …he wrote to the Ag. Head of GDP, copied to the Respondent and the Public Bodies Appeal Tribunal (PBAT), to voice out his disagreement and requested Respondent to put in abeyance its decision pending a final ruling of the PBAT in the appeal of Ms R. He received no reply.

He averred that Respondent was in breach of his terms of employment as he was never informed of any shortcomings by Respondent.

He prayed the Tribunal to order Respondent to reinstate him to the position of POSR and compensate him for financial loss.

Both Appellants produced their appointment letters.

Respondent's Case

The Respondent raised a *plea in limine litis* as follows:

"*Respondent moves that the present appeal be set aside in as much as the Tribunal has no jurisdiction to entertain the present appeal which concerns the termination of the temporary offer of appointment to the post of POSR following a decision of the Respondent to cancel the selection exercise for that post, and does not in any way concern an appointment or a disciplinary exercise*".

On the merits Respondent averred that

(i) according to the Scheme of Service, the post of POSR is filled by selection among serving officers of the Department reckoning at least five years' service in a substantive capacity and possessing:.

A. a Cambridge School Certificate or Passes obtained on one Certificate at the General Certificate of Education "Ordinary level" either (i) in five subjects including English Language with at least Grade C in any two subjects or (ii) in six subjects including English Language with at least Grade C in any one subject; and

B. (i) the National … Certificate (Level 3) in PRN issued jointly by the Mauritius Examination Syndicate and the Industrial and Vocational Training Board

<u>or</u>

(ii) a Record of Unit Credit (formerly a Record of Achievement) issued by the Mauritius Examination Syndicate in LA or in PRS.

<u>OR</u>

Equivalent qualifications to A and B above acceptable to the Public Service Commission.

C. Certificates from a recognised institution in any two of the softwares related to PRN…

<u>Note</u>

POSR should possess the National …Certificate (Level 3) in …or a Record of Unit Credit in LA or in PRS in order to progress beyond the Qualification Bar (QB) provided in the Salary scale."

Respondent further averred that on… , the Responsible Officer (RO) reported seven vacancies and recommended that only 3 funded vacancies be filled. The post was advertised and 7 eligible candidates were convened for interview on….

Three candidates were found suitable and were offered appointment. Mr S. declined.

The RO recommended that another candidate from the merit list be offered appointment and Appellant No 2 was offered the appointment which he accepted.

Respondent further admitted that, as averred by Appellant, there was also an advertisement for the post of PM/FOR and that the interview for both posts was carried out on the same day by the same Selection Panel.

Respondent explained how it had to seek the relevant equivalence as regards Mr N's qualifications to the Mauritius Qualifications Authority which explained that the National … Certificate Level 3 in PF and BB possessed by the candidate was not equivalent to the National … Certificate Level 3 in PRS which was a requirement of the Scheme of Service.

Respondent admitted that a candidate who was not qualified had been offered appointment and that it decided *"as the selection exercise for the post of POSR was tainted and flawed*" to cancel the whole selection exercise for that post and to revert Appellants and Mr N.to their previous posts and to request the RO to initiate action for the post to be re advertised. It explained that after reviewing the decision making process for the post of PM/FOR, it found no similar problem and therefore did not cancel the exercise.

Respondent averred that Appellant No. 2 did write to it but that as it had already cancelled the selection exercise and Appellant was informed of same, there was no need to reply.

Respondent also averred that the Tribunal had no jurisdiction to make any order for compensation for any alleged financial loss.

It averred that the appeals had no merit and should be set aside.

The Tribunal requested written submission on the following issues:

(a) Under what law the Respondent has the power to cancel the selection exercise and revert the Appellants?
(b) Why the Public Bodies Appeal Tribunal had no jurisdiction to hear the appeal?

Submissions of Respondent:

In answer to the first question put by the Tribunal, Respondent referred to Section 28 of the Interpretation and General Clauses Act (IGCA) which provides that:

"(I) Where an enactment confers a power or imposes a duty to make an appointment or to constitute or establish any board, tribunal, commission, committee or similar body, the person having the power or duty may also –

(a) *Remove, suspend, dismiss or revoke the appointment of, and re-appoint or reinstate, any person appointed in exercise of the power or duty*".

It also referred to Section 89 of the Constitution which gave it "power to

"(1) ….appoint persons to hold or act in any offices in the public service (including power to confirm appointments), to exercise disciplinary control over persons holding or acting in such offices and to remove such persons from office shall vest in the Public Service Commission".

It further cited Part III of the PSC Regulation which provides for the

"…appointments, promotions, confirmation of appointments and termination of appointments (otherwise than by disciplinary proceedings)".

It also cited Regulation 51 of the PSC Regulations which provides that *"<u>any case not covered by these regulations shall be dealt with in accordance with such instructions as the Commission may issue</u>".*

In answer to the second question put by the Tribunal, Respondent referred to section 3(i) of the Public Bodies Appeal Tribunal (PBAT) Act which provides that:

"*(1) Subject to subsections (2) and (3), the Tribunal shall hear and determine an appeal made by any public officer, or any local government officer, against any decision of the Public Service Commission or the Local Government Service Commission, as the case may be, pertaining to an <u>appointment exercise</u> or to a <u>disciplinary action</u> taken against that officer*".

Respondent submitted that the issue before the Tribunal is solely in relation to termination and not in relation to the recruitment process.

The question is whether the termination of an appointment is an appointment exercise as per section 3(1) of the PBAT Act.

The Respondent further submitted that an "*appointment exercise"* is not an ongoing process. It "*starts with the advertisement of the post and comes to an end with the appointment of the eligible /successful candidates*" and stated that therefore, the Appellant's termination after the appointment exercise was complete, was not an "*appointment exercise*".

It also submitted that the termination of Appellants' appointment did not pertain to a disciplinary action but was the result of the cancellation of the whole exercise.

Respondent submitted that the said termination being neither an appointment exercise nor a disciplinary action, the Tribunal had no jurisdiction to hear the appeal.

The Respondent referred to the Supreme Court Judgement of Jolicoeur v Public Bodies Appeal Tribunal (2015) SCJ 73 and the endorsement of that judgement in the case bearing reference Det 32 of 2016.

Submissions of Counsel for Appellants

Counsel for both Appellants followed the same line of reasoning**.** Counsel for Appellant No 1 submitted that:

> "*Under the IGCA s28, it is clear that the power to appoint includes a power to terminate. However, such termination should be done within established legal boundaries*".

He further added that

> *"Thus if the IGCA is rightly interpreted, the decision of the Respondent to cancel the whole exercise and terminate the temporary appointment of the Appellants, amounts to an appointment exercise"*.

He also submitted that Respondent

"*failed to provide the Tribunal with any such statute, regulation or otherwise which empowers it to cancel a whole appointment exercise, especially of those people who have been duly appointed and possess all the required qualifications*.

Such appointment of the Appellants could have been terminated for the reason of misconduct, insubordination or incompetence as stated in the letter of appointment and not by such arbitrary, seemingly illegal and unreasonable manner as the Respondent has presently done.

It is therefore submitted that such a decision of the Respondent is unreasonable, should be quashed and that the Appellant should be reinstated in his post as POSR".

Counsel for Appellant No 2 submitted on the issue of jurisdiction, that Respondent argues that "*the termination of the appointment of each Appellant is to be considered as a stand-alone decision unconnected with the appointment exercise which the Respondent further submits is not completed*".

However Respondent *"itself concedes at paragraphs 24 and 25 of its submissions that the termination of the appointment of each Appellant does not pertain to a disciplinary exercise"*.

He submitted further that "*the decision under appeal is the Respondent's decision to cancel the appointment exercise*".

The question is whether "<u>any decision</u> … pertaining to an appointment exercise" (Section 3(1) of the PBAT Act 2008) includes the decision to cancel the appointment exercise. (Underlining ours)

Counsel submitted that there is nothing in law to justify limiting the ordinary meaning of those words "*any decision*" so as to exclude a decision to cancel an appointment exercise and that Respondent never addressed the meaning of the words "*any decision*".

Counsel referred to "*Halsbury's Laws of England, Statutes (Volume 44(I) (Reissue))/5 on Statutory Interpretation*" which provides at 1467:

"*It is a principle of legal policy that the rights of a person in relation to legal remedies and legal proceedings should be protected […] the principle cover the right not […] to be denied a remedy, or to be deprived of a right of appeal or hindered in one's appeal*".

He added that

"*If, as the Respondent itself admits and submits, the powers pertaining to an appointment exercise includes the power to cancel the said appointment exercise, surely the Tribunal which has a supervisory jurisdiction over the powers pertaining to an appointment exercise would also have jurisdiction over the cancellation of the said appointment exercise*".

He concluded that there is no merit in the objection of Respondent that the Tribunal cannot exercise its jurisdiction in this appeal.

On the merits, Counsel submitted that "*whatever be its powers, it is trite law that the Respondent, as a public body, is required to act fairly, rationally, evidence-based, by taking all relevant considerations into account, including the terms and conditions of the Appellant's appointment, as well as to act in accordance* with the legitimate expectation of the Appellants and in a way that is proportionate".

He further added that Appellant's appointment was never challenged "*nor are there grounds to challenge Appellant's appointment*".

The appointment exercise was not flawed and Appellants' appointment can only be terminated on the terms provided for in their respective letters of appointment. Only the appointment of Mr M. H. N. has been challenged on the ground that Respondent failed to correctly assess his qualification. The fault lies squarely with the Respondent.

"There is no law or policy requiring the Respondent to cancel a whole appointment exercise where one appointment alone is found to be flawed. In fact, the cursus in such cases involving the Respondent, whether before the Tribunal or the Supreme Court in judicial review cases, is that the flawed appointment is simply quashed, whilst other appointments remain unaffected. There is simply no rational basis here for the Respondent to depart from this cursus".

Determination

When deciding on the issue of the jurisdiction of the Tribunal, section 3(1) of the PBAT Act 2008 is the most relevant consideration. However it is the interpretation of the concepts described in that section which may give rise to different interpretation.

The Tribunal has considered the points raised by Counsel for Respondent and for Appellants Nos 1 and 2 on this issue.

The Tribunal has held several times that it is a wide interpretation of the terms appointment and disciplinary action which is preferred. By trying to restrict the jurisdiction of the Tribunal, the Respondent is going against the very reason why the Tribunal was set up in 2009. The PBAT must retain its role of scrutinising the decisions of Public Bodies to ensure that the rights of officers are not thwarted by unreasonable, unjust and unfair decisions.

Appointment is defined in Regulation 2 of the PSC Regulations and means amongst other:

> *"(aa) the conferment upon a public officer, following a selection exercise, of a public office other than the office to which the public officer is substantively appointed"*;

The issue of whether termination of an appointment is within the jurisdiction of the Tribunal or not has been raised by the Public Bodies as Respondents in several appeals lodged before the Tribunal. Regularly the case of Jolicoeur (Record No.109262 of 5/03/15) is cited to support the point in law concerning jurisdiction raised by Respondents. In this case the Respondent also cites a Determination given by the Tribunal based on that case (Web-site reference Det 32 of 2016).

However these cases are not on all fours with the present appeal. The first case concerned Rodriguan workers who were in employment on a month to month basis and it was stipulated that their employment was "*liable to termination by one month notice on either side and would not give rise to any claim to a permanent appointment in the Government Service".*

In the second case, the worker was employed in a temporary capacity and on a day to day basis. Respondent had stated in the letter of appointment that his appointment would not give him any claim for permanent employment in the local government service and that his appointment could be terminated without notice or compensation in lieu of notice. He had accepted the appointment on the terms and conditions of the letter of appointment.

Here the Appellants had an offer of employment dated…, in a temporary capacity which provided clearly the terms of termination namely in case of incompetence or misconduct or insubordination.

Further it was also stipulated that if the appellants were favourably reported upon, consideration would be given to their being appointed in a substantive capacity. This shows clearly that their appointment was not at all comparable to the cases cited by Respondent. Indeed their temporary appointment was the first step in the appointment exercise which was a continuous process. The Respondent cannot, in those circumstances, decide to cancel the selection exercise and revert the appointees to their previous substantive posts. The Appellants were not at fault. They had not been found to be incompetent or been guilty of misconduct or insubordination. The Respondent did not at any time draw their attention to their shortcomings. The Tribunal therefore holds that it has jurisdiction to hear the appeal. Let us say however that the Tribunal is not empowered to grant any financial compensation.

On the merits concerning the right of Respondent to cancel the selection exercise and revert the Appellants, the argument that the Respondent has the right to terminate their employment by virtue of Section 28 of the Interpretation and General Clauses Act or Section 89 of the Constitution does not hold. Of course the principle of the one who hires can also fire is well known and accepted. By virtue of the said sections**,** Respondent does have the power to terminate appointments but it must do so for good cause by respecting its own regulations and the law. Neither of these sections gives the power to Respondent to cancel its own selection exercise and revert appointees in the way that was done in this case. It is Wednesbury unreasonable to cancel a selection exercise because it had itself made a mistake. The more so as that mistake could be cured by cancelling the appointment of the

appointee who was found not to have the qualifications needed to be eligible, and the next candidate who was on the merit list be appointed.

In fact, following the same selection exercise when a candidate to whom an offer had been made declined the offer**,** which happens all the time, the Respondent did appoint the next officer on the merit list, namely in this case Appellant No 2. Furthermore, the Tribunal is of the opinion that if Section 28 of the IGCA is applied in this case purely and simply as contended by the Respondent, then there would be no use for the Supreme Court to entertain any judicial review application nor would there be any need for the very existence of this Tribunal for the reviewing of the decision of the Respondent. The Respondent would find itself in a very privileged position to quash, revoke, revert, dismiss or take any disciplinary action against any public officer without following any procedures as laid down in its regulations.

The Tribunal is of the view that the Respondent is bound to operate within the parameters of its Regulations and cannot rely on any other law to depart from it, as any law referred to must be read together with the PSC Regulations.

The Respondent did not deny that, in the same department, it had faced a similar problem previously and the whole exercise was not cancelled.

This relates to the case of seven MM appointed by the Respondent in…. Subsequently one appointee was found not meeting the qualification requirements of the post and was removed from the list of appointees. The appointment of the other officers was maintained. An appeal was lodged in this Tribunal by the officer who was reverted to his former post but the appeal was withdrawn. The Respondent has confirmed in writing to the Tribunal that it did indeed merely remove the appointee who "*did not possess the National … Certificate (level 3) in…*" but the appointment of the other officers was maintained.

A policy decision cannot be applied in one case and not in another. This is a form of discrimination. Natural justice requires that the public body acts consistently in its decisions.

In an appointment exercise, if there are flaws in the selection of candidates it does not follow that the whole exercise should be quashed. This is clear in the case of G. Appadu v/s PSC (2003 SCJ 29) where there were four appointees, and the

Supreme Court quashed the appointment of two of them but maintained the decision to appoint the two officers.

In the circumstances, under section 8(4)(d) of the Public Bodies Appeal Tribunal Act 2008, the Tribunal quashes the decision of Respondent to cancel its selection exercise and to revert Appellant Nos 1 and 2 and refers the matter back to it to maintain its original decision to appoint the Appellants.