

Det 01 of 2019

The Tribunal cannot substitute itself to a Disciplinary Committee to decide whether charges were proved or not. It must see to it that all procedures were properly followed and it can discuss the issue of proportionality of the sanction.

The Appellant is challenging the decision of the Respondent to stop his next increment for a period of two years following the decision of a Disciplinary Committee made up of a panel of public officers appointed to inquire into two charges preferred against him which concluded that the two charges were proved. Appellant filed a notice of appeal stating his Grounds of Appeal (GOA) followed by a written submission on behalf of Appellant rather than a statement of case as was requested by the Tribunal. Respondent, in its Statement of Defence raised a preliminary objection in law which read as follows:

1. *“Respondent moves that the first limb of the particulars of the decision against which Appellant is appealing be set aside in as much as:
 - (i) the Tribunal has no jurisdiction in relation to the decision to set up disciplinary proceedings under Regulations 38 of the Public Service Commission, as well as the conduct of the disciplinary committee, the constitution of the panel and findings of the Panel;
 - (ii) Should the Tribunal have jurisdiction, Appellant is time barred to challenge Respondent’s decision under Section 3 (2) of the Public Bodies Appeal Tribunal Act.*

2. *Respondent further avers that the Appellant is seeking to challenge the constitutionality of Regulation 38 of the Public Service Commission Regulations. The Tribunal is not habilitated as per the Public Bodies*

Appeal Tribunal Act to pronounce itself on the constitutionality of Regulation 38 of the Public Service Commission Regulations”.

In a ruling delivered on the ..., the Tribunal pointed out that it has no power to question the decision of the Respondent to institute disciplinary proceedings. However, the Tribunal has to ensure that when the Respondent exercises its disciplinary powers, it does so in a judicious manner from the time it sets up any disciplinary committee. In other words, all will depend on the circumstances of the case which can only be elucidated when the case is heard on the merits. The Tribunal further ruled that the Appellant should expunge all reference to the constitutionality of Regulation 38 from his grounds of appeal.

In the light of this ruling, the case was heard on the merits and, on the day of hearing, Counsel for Appellant moved to expunge all related parts in the grounds of Appeal as well as in the statement of case which referred to the constitutionality of Regulations 38 of the Public Service Commission Regulations. Counsel for Appellant also moved that the proceedings of the Disciplinary Committee be made available to the Appellant so as to conduct his case properly. Counsel for the Respondent objected to this motion as the proceedings were privy to the Respondent. However, Counsel for Appellant informed the Tribunal that this motion would not be argued and there was no need for a ruling. After some discussion on the issue, it was decided that the matter be started on its merits and if the need for the disciplinary proceedings was felt, a ruling would be delivered by the Tribunal.

Appellant’s Case

The Appellant solemnly affirmed as to the correctness of his grounds of appeal (GOA) as amended.

The Grounds of Appeal of Appellant as amended were as follows:

Unfairness, Unreasonable, Irrational (SIC) and it also took the form of questions as follows:

- (i) *Whether as per Regulations 38(1) the Statement of charge or charges was duly served?*
- (ii) *Whether as per Regulation 38 (2), the Responsible Officer acted fairly and in an unbiased manner?*
- (iii) *Whether Regulations 38 (3) infringes the principle of Natural Justice?*
- (iv) *Whether Regulation 38 (4) has been flouted as no justification was given regarding the reasoning behind the constitution of the panel?*
- (v) *Whether as per Regulation 38(5) the constitution of the panel was defined at the stage of the proceedings?*
- (vi) *Whether as per Regulation 38(6) I was entitled to know the whole case against me?*
- (vii) *Whether as per Regulation 38(8) the hearing was unfair as the documents tendered to me therein did not seem to tally with those that were being referred to during the hearings?*
- (viii) *Whether Regulation 38(9) is perverse.*
- (ix) *Whether as per the Regulation 38(15), the Responsible Officer had unfettered discretion and has acted unfairly?*
- (x) *Whether there were serious irregularities?*

In the statement of case, Appellant averred that he was asked explanations on shortcomings which implied that the alleged acts of which he was being reproached were of lower seriousness than a misconduct. He further added that opportunities should have been given to him to improve. He informed the Supervising Officer that he had eye problems and was following medical treatment and that his father also underwent surgery on two occasions. He also produced medical certificates from the Ministry to show that he was genuinely ill.

He deplored the long delay of nearly 16 months before the Respondent took the decision to initiate disciplinary action against him which showed that the Respondent did not attribute any serious gravity to the shortcomings but yet the punishment was most

brutal, harsh, excessive and disproportionate. He mentioned that the manner in which the attendance was taken at the University, was unreliable as an initial could be put against the name of a student who was absent by another student. Moreover, the start time and the end time of lectures were frequently different from what was indicated on the attendance sheet. With regards to the attendance sheet for the Law Practitioner's Vocational Course (LPVC) at the University of Mauritius, no matter how late the student entered the lecture room he could always sign in, so that this sheet could be hardly a confirmation of the fact that the student was present in the class for the whole duration of the lecture. He also pointed out that despite the reproaches made against him for shortcomings committed in four consecutive years, he had never failed in the performance of his duties and had never received any adverse report from his immediate superior in this regard. He contended that the Chairman of the Disciplinary Committee was apparently a SPD in the same Ministry as the body where he worked and was therefore in breach of Regulation 38 (5) of the Public Service Commission Regulations.

He moved that the punishment inflicted against him be struck out in the name of fairness and in line with the rule of natural justice.

Under cross examination, Appellant stated that he was not aware that the CTR made a report against him to the Ministry about his being irregular in attendance at work since he joined the ... TNA on.... However, he admitted having been asked explanations on this specific issue to which he replied on the He further stated that part of the time that he was absent, he was on leave, either casual leave, sick leave, vacation leave or leave without pay for private purposes in order to cover his absences.

He denied that an investigation was carried out by the TNA which revealed that he was attending full time course leading to a BSc (Hons) at the University since He stated that he informed the TNA that he intended to follow the course and that he had two classes that would fall during working hours. He took it for granted that he had been authorised to follow the course as he was made to believe that Public Officers

were allowed two half day leaves per week to attend classes. He admitted having enrolled for the course but he had hardly attended the course. It was also put to him that no release was granted to Public Officers to follow full time course, to which he replied to be still in confusion.

Counsel for Respondent further put to the Appellant that he was also enrolled in a full time course at the University to follow the relevant Course from ...to ... and he had a 100% attendance. He admitted having been enrolled for the course but denied that he had the 100% attendance. He added that he had classmates who might have signed for him though he had not asked them to do so, just on humanitarian ground. He was also confronted with Regulation 38 of the Public Service Commission Regulations which allows the Respondent to initiate disciplinary action against him.

Respondent's Case

The representative of Respondent solemnly affirmed as to the correctness of the Statement of Defence (SOD) in reply to the GOA and SOC of Appellant.

In the SOD, which is being reproduced extensively in view of the complexity of the case, Respondent averred as follows-

"1. As regards paragraph 1 of the "Grounds of Appeal", hereinafter referred to as "GOA", dated... , Respondent avers as follows-

(i) Appellant is the holder of a substantive post as SMO, formerly posted at the TNA. Appellant is now posted at the Ministry;

(ii) on..., the Supervising Officer reported to the Ministry:

(a) Appellant has been irregular in attendance since joining the TNA (hereinafter referred to as...) on Appellant was continuously absent from duty since ... and has been applying for all types of leave, viz sick leave, casual leave, vacation leave, leave without pay for private purposes and leave for examination purposes in order to cover for his absences;

(b) *Appellant was even convened before a Medical Board to assess his fitness for further services. However, Appellant sent an email to state that as he had received the convocation on ... in the afternoon, he could not attend the Medical Board;*

(c) *An investigation carried out by the TNA revealed that Appellant was attending a full-time course leading to a BSc (Hons) at the University since ... and that Appellant was also enrolled on a full time course at the University of Mauritius to follow the Course from February to August...;*

(d) *the matter was referred to the Ministry for urgent and immediate disciplinary action to be taken against Appellant.*

(iii) *on..., the Supervising Officer -*

(a) *requested Appellant to submit his explanations on his regular absences from work, and his explanation on the fact that Appellant was enrolled on a full time course at the University of Mauritius since ... and also at the University of Technology since..., when Appellant should have been aware that as a public officer he was not allowed to follow a full time course whilst at the same time drawing his monthly salary;*

(b) *informed Appellant that his explanations should be submitted by ... and that Appellant should also give reasons why disciplinary action should not be taken against him”.*

(iv) Respondent denied that the word “shortcomings” was used in the letter dated.... Appellant was even requested in the same letter to give reasons why disciplinary action should not be taken against him;

(v) The explanations provided by a letter dated ... by Appellant were found to be unsatisfactory by the Supervising Officer and on..., he again referred

the matter to the Ministry for appropriate disciplinary action to be taken against Appellant.

- (vi) Another issue regarding Appellant's change of address and overpayment of travelling expenses to Appellant had cropped up and the Supervising Officer requested Appellant to provide his explanations ... which were accepted;
- (vii) On... , the Ministry requested the Supervising Officer to confirm whether Appellant was issued with a full-time TNA Student Identity Card. By letter dated ..., the Supervising Officer confirmed that a Student Identity Card was processed in the name of Appellant for the period ... to ... and that Student Identity Cards are issued to full time students only;
- (viii) On..., the University having been approached by the Ministry confirmed that Appellant was still following the course leading to BSc (Hons)...;
- (ix) the Ministry thereafter initiated disciplinary action under regulation 38 of the Public Service Commission Regulations on ground of misconduct against Appellant on the following two charges:

Charge 1

“That you, Mr..., SMO, while on duty at the TNA, attended courses leading to the BSc (Hons) ... at the University during official working hours in the years..., ... and ... as set out in the attached statement of attendance, when in fact you ought to have been working at the office of the TNA where you inserted your times of arrival and departure in the Attendance Registers kept at that office”.

Charge 2

“That you Mr, SMO, in spite of being informed on..., by the Supervising Officer that release to attend full time course is not allowed in the Public

Service, you enrolled on the full time Course from ... to ... at the University where you scored 100 % attendance as reported by that University and had covered your absence from work during that period by submitting applications for different types of leave”.

- (x) *“on ..., Appellant was requested to show cause in writing, within 14 days of the receipt of that letter, why disciplinary action under regulation 38 should not be initiated against him. Appellant took cognizance of the letter on On ..., Appellant intimated that he was not in a position to submit his explanations as he was on sick leave due to injuries to his right ankle and requested for a delay to reply;*
- (x) *on ..., Appellant was exceptionally granted a delay of 10 days from the date of his resumption of duty to submit his explanations. Appellant resumed duty on ... and was on ... again requested to provide his explanations on the two charges preferred against him. On..., Appellant requested for documents/information to build up his defence. On ..., Appellant was provided with the requested information and was requested to submit his explanations within 14 days of the receipt of the letter, failing which it would be assumed that he had no explanations to offer and action would proceed in accordance with regulation 38 of the Public Service Commission Regulations;*
- (xi) *Appellant failed to provide any explanation after the prescribed time limit and a Disciplinary Committee was set up under regulation 38 to enquire into the matter”;*
- (xii) Respondent also averred that-
- Charges were preferred against Appellant in letter dated ... and not before that date;

- The latter was convened before a Medical Board on ... and the Board found that he was suffering from neck pain and low back pain.
- Appellant was aware since far back as ... that disciplinary action could be taken against him.

Respondent also averred that, as per regulation 38 of the Public Service Commission Regulations, Appellant was provided with all the necessary documents for the conduct of his case.

“Respondent avers that the Responsible Officer has followed regulation 38 (1) of the Public Service Commission Regulations which specifically provides that the Responsible Officer shall forward to the officer a statement of the charge or charges against him and shall call upon him to state in writing before a date specified any grounds on which he relies to exculpate himself;

Regulation 38 (2) of the Public Service Commission Regulations provides that where such officer does not furnish a reply to the charge or charges preferred against him, which was the case of the Appellant, or does not, in the opinion of the Responsible Officer, exculpate himself, the Responsible Officer shall appoint a disciplinary committee to inquire into the matter;

Respondent avers that Appellant was informed that disciplinary proceedings against him were envisaged and was given an opportunity to provide reasons to exculpate himself, which was only fair towards Appellant and within the spirit of the law. However, Appellant failed to seize this opportunity to provide explanations”.

Respondent further averred *“that Appellant’s increment could not have been stopped prior to disciplinary proceedings having been completed against the latter. It is only upon the completion of the disciplinary proceedings that Appellant’s increment could be stopped”.*

Respondent averred that the Disciplinary Committee (D.C.) appointed by the Ministry was composed of:

- (a) A Deputy Permanent Secretary as Chairperson;
- (b) A Senior State Counsel as Member;
- (c) An Assistant Manager, Human Resources as Member;
- (d) and a Secretary.

It explained that no member of the D.C. served in the same department as that of the Appellant, i.e at the TNA, during the five years preceding the alleged misconduct of Appellant.

Respondent also averred

“that the Disciplinary Committee held its first sitting on ... due to unavailability of its members, unavailability of Appellant himself and partly due to the ... end of year period;

that on..., when the Disciplinary Committee started its proceedings, the Appellant formally requested for a postponement on the ground that he was not in presence of the charges. The latter was granted a postponement of a fortnight;

that the Disciplinary Committee held four sittings between ... and ... and all witnesses were heard during that period;

denies that the Ministry almost put the matter aside and did not consider it serious enough to warrant imminent and urgent attention”.

Respondent averred that:

“regulation 38 of the Public Service Commission Regulations provides for an accused officer to defend himself personally or be represented by another public officer. Appellant was informed of same in the letter dated

... convening him to the disciplinary committee and again on the ... by the Chairperson”

Respondent averred that:

“the Disciplinary Committee submitted its report to the Responsible Officer of the Ministry of Civil Service and Administrative Reforms on ... with the finding that both charges against Appellant were proved and that there was an aggravating circumstance in the whole incident;

in view of the finding of the Disciplinary Committee and taking into consideration the gravity of the offences, the Responsible Officer by letter dated ... sought the approval of the Respondent to inflict a stoppage of Appellant’s increment for a period of two years, in accordance with regulation 38 (15) of the Public Service Commission Regulations;

Respondent gave approval for the above punishment on ... and Appellant was informed of same on...”.

Respondent also averred as follows-

“as per regulation 42 B (2) of the Public Service Commission Regulations, a public officer aggrieved by the decision of the Commission to inflict upon him a punishment under regulation 37, 38 (15) or 39 may appeal to the Commission for a review of its decision provided this is done within 21 days of the notification of the punishment and new arguments are put forward to support his appeal;

in the present matter, Appellant failed to appeal to the Respondent against the decision to stop his increment for two years. Respondent therefore avers that the decision to stop Appellant’s increment for two years cannot be reviewed by the Public Bodies Appeal Tribunal and the appeal should be set aside given that the Appellant has failed to exhaust all available modes of appeal prior to coming before the Tribunal”.

Respondent moved that the Appeal be set aside.

The representative of Respondent was then tendered for cross examination. Counsel for Appellant put to her that the Appellant was not continuously absent from ... to ... as he was on approved leaves, but she maintained that it was so. She admitted that medical certificates were produced by the Appellant but the latter was requested to submit original ones and not certified copies which he failed to do. She also stated that the delay of ... months between the date when Appellant offered his explanation and the time when the Disciplinary Committee was set up, was due to several issues which cropped up and which had been duly explained in the SOD.

Counsel further put to her that the letter requesting the Appellant's explanation referred to "Shortcoming" whereas the letter of charges made reference to "misconduct". She replied that it did not matter whether it was shortcoming or misconduct but the fact remained that he was absent from work to attend courses at the Universities.

The representative of the Respondent confirmed that there existed two different senior officers. It was not the same Officer who was working at the Ministry who presided the Disciplinary Committee.

The representative of the University was called as witness to produce the attendance of the Appellant while he was attending courses leading to a BSc Hons. She took the oath and confirmed that Appellant was a registered student at the University of Technology as from ... following a full-time course in the abovementioned degree course. She produced the attendance sheet with the signature or initial of Appellant. She also stated that it was imperative for a student to follow the course and must have a percentage of attendance before he was allowed to sit for the examination. Further more she said that it is not permissible for a student to sign the attendance of another student. She added that the Appellant was awarded a Certificate and that the Appellant

was present at the Graduation Ceremony held on.... She produced a document certifying that Appellant had stated that he would attend the ceremony.

Counsel for Appellant asked her under cross examination whether the document that she produced was signed by her. She stated that she had been deputed to depone on behalf of the University and was duly authorised to produce any document requested by the Tribunal.

The representative of the University was also called to depose before the Tribunal in connection with the attendance of the Appellant at the University. She confirmed that in fact the appellant was enrolled on a full time LPVC Barrister program from ... to.... She produced a document emanating from the University of Mauritius to that effect.

Counsel for Appellant put to her that the document produced did not reveal the Appellant was present during the lectures. She replied that the Appellant was the only one to have a 100 % attendance which was based on the record of attendance submitted by the lecturers. She also confirmed, following a question from Counsel, that the course is a full time course.

A representative of the Passport and Immigration Office confirmed upon oath that Appellant travelled to ... from ... to

Determination

The Tribunal had scrutinised all the evidence brought before it during the hearing and found that the documentary evidence produced by the representatives of the University and by the representatives of the other University had not been rebutted. Both of them stood unshaken during cross-examination. The documents produced, clearly confirmed that in fact, Appellant followed the two full time courses as mentioned above. This was clearly an act which is not permissible in the Public Service. The Tribunal was of the opinion, that the Appellant was fully aware that he was committing a

misconduct. The replies given by Appellant under cross examination was unconvincing and evasive. This left lots of doubts as to the credibility of the Appellant.

The second issue that the Tribunal looked at was to see whether all procedures were properly followed to initiate the Disciplinary Committee under Regulation 38 of the Public Service Commission Regulations. The Tribunal found no flaws in the application of the said regulation and was satisfied that all procedures, as laid down, had been followed. The Tribunal feels that it must comment on the fact that in his GOA Appellant questioned Regulation 38(3) and 38(9) which are qualified as being against natural justice and perverse respectively. Appellant clearly does not understand that it is not for the PBAT to question the PSC Regulations but only to see that it is applied.

The Statement of Defence filed by Respondent was clearly supported by documentary evidence. The only point raised by Appellant which could have some relevance to his case was that the Chairman of the Disciplinary Committee worked in the Ministry during the last five years preceding the institution of the committee. This had been cleared in one shot as all parties agreed that there had been confusion as there are two Public officers bearing the same appellation but their names were written differently. The Chairman of the Committee was not the one who worked at the TNA

The Tribunal cannot substitute itself to the Disciplinary Committee to decide whether the charges levelled against Appellant was rightly proved or not but it may discuss the proportionality of the punishment imposed by Respondent on the Appellant. The Tribunal considered that the reprehensible act of the Appellant must not be condoned and need to be severely dealt with. In all fairness, the Tribunal is of the view that the punishment imposed upon Appellant is justified. If at all, the Respondent had

been lenient in this case. Stoppage of increment is the fourth form of punishment which is provided for in Regulation 41 (1) after (a) dismissal, (b) retirement in the interest of the Public Service and (c) reduction in rank or seniority. And Respondent did not opt for any of these but nonetheless sanctioned Appellant. Otherwise, it would have been sending a wrong signal to the Public Service. Public Officers are reminded that they have to abide strictly to the rules, procedures and regulations governing the Public Service. The Tribunal has been set up to look into grievances of Public Officers but will not condone misbehaviour or misconduct on their part.

The appeal is therefore set aside.