

The Certificate of Character Act 2012 provides in section 5 (c) that a person would be certified that he had never been convicted of a crime or misdemeanour in Mauritius if he has “*more than 5 years before making the application, been convicted of a crime or misdemeanour, other than an offence specified in the Second Schedule, and been —*

(i) given only a fine of up to 5,000 rupees; or

(ii) made the subject of a probation order only, and has complied with the terms and conditions of the order ...”

The Appellant is challenging the decision of the Respondent to terminate her employment at the Ministry as GWR in a temporary capacity.

Appellant’s Case

The Appellant who was assisted by his Trade Union representatives solemnly affirmed as to the correctness of her grounds of appeal. She did not submit a Statement of Case.

The grounds of appeal were:

- (i) I don’t have any adverse report for the last 5-6 years when employed by the relevant Association (APT) since 1 December in 2012*
- (ii) Since 1 February 2013 to 30 December 2017, I was also cleaning the yard and I was also cleaning the toilets*
- (iii) I am the only person eaning (sic) in my family*
- (iv) No disciplinary commity (sic) was held*
- (v) Fine was paid in 2006 for conviction for “wound and blow” and “Assaults” (SIC)*

The Appellant had produced a Certificate of Character from the Director of Public Prosecution dated ... which stated that the Appellant had as at ...“*never been convicted*

of any crime or misdemeanour in Mauritius". She relied on this to say that she had a clean record.

On being crossexamined Appellant conceded that she was made to sign many papers in the past. As she was illiterate, she was not aware of the content of these documents. She said that she signed one document without knowing that it was said therein that she was not convicted by any court during the past ten years.

She did not deny that all her colleagues who were absorbed on the establishment of the Ministry as GWR were explained the conditions of their new employment before and after the letter offering them employment was issued. Appellant stated that, at one of the meetings after she had received the said letter at the relevant office she mentioned to a lady from the Ministry that she had "problems ménages" which had gone to Court. But the latter had told her that this did not matter. Several times she said that she was a victim of domestic violence.

In cross examination, Counsel for Respondent referred to a letter from the Commissioner of Police dated... to the effect that the Appellant was fined on ...for Assault before the District Court. Appellant said she could not recall being fined in.... However, at the Hearing she was asked to show her National ID card and the ID number tallied with that mentioned by the Police.

On a question put by Counsel for Respondent, she said that she worked for several years with children and there had never been any adverse reports against her. She did not agree that the fact that she had been fined for assault should play against her as she had to work with children. She also explained that even in ... she had been advised to plead guilty to avoid getting more problems.

Respondent's Case

The representative of the Respondent solemnly affirmed as to the correctness of Respondent's Statement of Defence.

Respondent averred that in the year..., the Ministry had agreed that this category of workers would be enlisted by the APT for the cleaning of toilets instead of renewing

the contract of a private contractor. Their wages would be paid by the APT and same would be refunded by the Ministry. Consequently on..., the APT had recourse to the services of such workers. They were not employees of the Ministry.

In... there were ...such workers employed by the APTs, out of whom 209 were below the age of 53. Government decided on ...that the 209 candidates who were below the age of 48 as at ... be recruited on the establishment of the Ministry, subject to necessary clearance.

There were difficulties to recruit them as CNL as the post was not provided for in the Civil Establishment Order and there was no Scheme of Service for such post. Finally it was agreed that they be recruited as GWR subject *inter alia* that police clearance was obtained. The Ministry was granted delegation of powers to recruit them as GWR. Out of 209 who were eligible, five had left her job and one had passed away. Consequently, 194 of them were offered employment as GWR “*on a purely temporary month to month basis and their employment was liable to termination with immediate effect in the event of any adverse Police reports regarding their involvement in or conviction for any criminal offence of serious nature*”. In this respect, on their assumption of duty, they were required to fill a declaration form to the effect that:

- I they have never been convicted for any offence before a Court of Law during the last 10 years; and*
- II they have not been involved in any criminal case under enquiry by Police or any other Law Enforcement Authority nor is there any case pending against them before any Court of Law”.*

In view of this, the Responsible Officer (RO) requested that Police clearance be sought for the 194 Temporary GWR, which was done on ... and....

On ..., the Commissioner of Police informed the Respondent that according to records there were ... persons involved and for Appellant the record was as follows:

- “(i) on..., sentenced to pay a fine of Rs .../- for “Wounds and Blows” before ... District Court (Cause No...);*

(ii) on 06 September 2006:-

- sentenced to pay a fine of Rs.../- on each count and Rs ../- as costs for “Wounds and Blows” (2 counts) before ... District Court (Cause No...);
and
- sentenced to pay fine of Rs.../- and Rs... as costs for “Assault” before ... District Court (Cause No...)”.

In the same letter the Commissioner of Police said that one JM was fined on ... for Assault before the ... District Court (Cause No...). It was later confirmed that this referred to the Appellant.

The Respondent averred that the Appellant was not found suitable for further employment in the Government Service. She had shown a tendency to recidivate. In the interest of children she could not be allowed to continue to work in the special environment. In a letter dated..., the Appellant was informed that her employment as GWR was terminated forthwith.

In a letter to the Respondent, the Commissioner of Police had explained that a Certificate of Character had a coverage of ... years for such types of offences. As the fines were paid in ... and February ...,the Certificate of Morality would not make mention of same as the Certificate of Character was issued on

A representative of the Ministry deposed before the Tribunal. She explained that the ... workers were convened to a meeting before the letter of appointment was given to them and the conditions of the offer were made clear to them. After they received their letters they were asked to sign a Declaration Form which included the issue of conviction in a Court of Law for the past ... years. The Appellant signed hers in the presence of the Head Master on.... However, the Ministry was not satisfied with the way the Declaration Forms were filled and decided to call the workers to a meeting and get them to fill the Declaration Form again. Again, the Appellant signed on... without referring to her conviction in Court.

The representative of the Ministry who happened to be the officer to whom the Appellant spoke to at the meeting held in Port Louis was adamant that she could not

have told the Appellant that the Court convictions were not important as this was the main condition for the employment of these workers as GWRs. She said that she could have told her that this would be taken into consideration after the Police clearance would be obtained.

The Respondent moved that the appeal be dismissed.

Determination

The Appellant was offered employment in a temporary capacity as GWR on.... On..., she received a letter from the Ministry informing her of her conviction for “Wounds and Blows” and “Assault” and terminating her employment at the Ministry forthwith.

The whole issue revolves around the condition for appointment. It had been made clear to the workers that their recruitment by the Ministry was subject to a Police clearance that they had no conviction in a Court of Law. This was explained to them prior to the offer letter being issued and again after they obtained their letters as explained by Respondent. Appellant did not have a clean slate and failed to divulge this in her Declaration Form on two occasions as shown.

The Appellant later produced the Certificate of Character referred to above to say that she had no conviction. This misunderstanding was cleared by the Commissioner of Police who explained the coverage of 5 years of a Certificate of Character. It did not suit the Respondent’s requirement that a person must have a clean slate for a period of 10 years. It was clear in the Declaration Form which Appellant had to fill that she should have reported same to the Respondent.

On this count, therefore, Appellant had a history of conviction in a Court of Law which she had not found fit to declare.

One may ask the question as to why she did not state this in her Declaration Form. Is this because she was illiterate and did not know what she was signing? Is this because she misunderstood the officer of the Ministry at the meeting in Port Louis...? Since she had obtained the Certificate of Character where it was said that she had never been convicted in Mauritius did that comfort her in her stand? It is difficult to go

behind the mindset of somebody who it seemed had gone through difficult times and eked out a living to sustain the needs of her two children. She seemed totally unempowered and incapable of getting out of the vicious circle of her condition.

While this Tribunal is not mandated to adjudicate on the scourge of our society, this case deserves attention by those taking decisions on the poorer segments of the population and the circumstances of their life.

This brings us to the need for a public officer to report any conviction by a Court of Law within a period of ten years. There is nothing which indicates as to the seriousness of the offence that needs to be declared in general, though in this case it was said that the conviction must be *“for any criminal offence of serious nature”*. This leaves, therefore, an officer in a grey area as to the nature of conviction under reference. In this case the last conviction was in 2012, that is, more than five years before the date of appointment. Under the Certificate of Character Act 2012, it is provided at section 5 (c) that a person would be certified that he had never been convicted of a crime or misdemeanour in Mauritius if he has

“(c) more than 5 years before making the application, been convicted of a crime or misdemeanour, other than an offence specified in the Second Schedule, and been —

(i) given only a fine of up to 5,000 rupees; or

(ii) made the subject of a probation order only, and has complied with the terms and conditions of the order ...”

This explains the Certificate of Character issued in the name of the Appellant giving her a clean slate.

The Respondent, however, requires the Appellant to have a clean slate for the past ten years. Is this fair? Should the Appellant be nailed down for what she did and for which she paid a small fine in...? In the letter that was given to her and her other colleagues offering them employment as GWR, it was said that the employment could be terminated in case of “any adverse Police reports regarding their involvement in or

conviction for any criminal offence of a serious nature". (Emphasis ours) Any reasonable person would not consider the offence committed by Appellant to be of a serious nature as the Court had fined the Appellant only Rs 500 which is far from the limit of Rs 5000 required in the Certificate of Character Act. The Court would probably have taken into account the circumstances of the act of assault.

The matter has been complicated by the fact that the police report was requested after the offer of employment was made. Had this been done prior to the offer of employment it would have been less dramatic. However, the Tribunal understands the circumstances in which these persons were brought on the establishment of the Ministry.

Further the Appellant had already worked with children for several years when she worked with the APT and she did not have any record of violence against children.

In the circumstances, the Tribunal finds that the decision to terminate the employment of the Appellant was harsh. It was not a criminal offence of a serious nature as laid out in the letter of offer to the Appellant. Conviction in a Court of Law must not lead automatically to a termination of employment. The absence of a conviction in a Court must not be a mandatory requirement for one to be in the public service. The Respondent has the power of discretion which it can use judiciously and its action must be geared by a spirit of proportionality. This is crucial when one person's source of livelihood is at stake. Without substituting itself for the Respondent, the Tribunal feels that Appellant's employment could have been maintained on strict terms and conditions.

The Tribunal, acting under section 8 (4) (b) of the Public Bodies Appeal Tribunal Act 2008, quashes the decision of the Respondent and remits the case back to the Respondent.