

**If a letter of appointment stipulates that appointees on a casual basis would be eligible to be on the Permanent and Pensionable Establishment (PPE) after one year, subject to certain conditions, it is clear that they would not automatically be transferred to the PPE.**

The Appellants are challenging the decision of the Respondent to terminate their employment as GWR with payment of one month salary as compensation. They filed their appeal forms along with their Grounds of Appeals (GOA).

On the day fixed for hearing, Appellants Nos 3, 4, 5, 6 and 10 left default and Counsel representing all appellants moved that their appeals be struck out. Motion was granted.

Appellants Nos 1, 2, 7, 8 and 9 swore to the correctness of the GOA in their respective appeals as well as their Statements of Case (SOC). All the Appellants present agreed that Appellant No 1 would depone on their behalf. At that stage, it was agreed by all parties that all appeals be consolidated and only one determination would be delivered and a copy of same would be filed in each appeal case file.

Respondent filed a preliminary objection in law which read as follows:

*“1. The Tribunal has no jurisdiction to hear the present matters being given that:-*

- (a) they relate to termination of Appellants’ temporary employment;  
and*
- (b) they do not pertain to an appointment exercise or to disciplinary action against the Appellants within the meaning of Section 3(1) of the Public Bodies Appeal Tribunal (PBAT) Act.*

*2. Appellants’ employment was lawfully terminated without recourse to disciplinary action, inasmuch as they were employed on a casual basis and*

*had not been confirmed in a substantive capacity as holders of a public office on the Civil Establishment”.*

Respondent agreed to take the plea *in limine* on the merits.

### **Appellants’ Case**

All appellants had the same GOA and had filed identical SOC. The GOA read as follows:

*“Termination of employment was unjustified and for causes not related to the Appellant and is therefore unlawful”. SIC*

Appellants expatiated their only ground of appeal in the SOC and averred that they were offered employment as GWR on a casual basis by the relevant administration on the ... They were eligible for transfer to the Permanent and Pensionable Establishment (PPE) on completion of one year’s service.

They also averred that prior to them completing one year of service, by letter dated..., they were informed that their employment was being terminated with effect from ... and that one month salary would be paid.

Appellants further averred that the termination of their employment by the letter dated ... was unjustified and was for causes not related to the Appellant’s unsatisfactory service, incompetence, misconduct or insubordination and it is in breach of the laws, rules and regulations governing the Public Service of Mauritius.

They moved that the decision of the Respondent be quashed/reversed/or set aside.

Appellant No 1 was called and cross examined. He agreed that the letter of employment contained several terms and that he agreed to the terms before assuming duty. He also stated that he was not aware of the reasons of the termination of his employment.

## **Respondent's Case**

The Representative of Respondent solemnly affirmed to the correctness of its Statement of Defence (SOD) filed in all appeal cases. Respondent averred that:

- (a) the power of appointment by selection to the post of GWR was delegated to the Responsible Officer (RO).
- (b) In..., a request was made by the RO to the Departmental Head to submit a list of 400 job seekers who were registered. with the Employment Information Centre as per requirements below:-
  - (i) 200 males and 130 female candidates holding at least a basic certificate;
  - (ii) 70 candidates holding a Technical Certificate;
  - (iii) Who have not reached 48 years of age; and
  - (iv) on the basis of priority of registration as unemployed with the Employment Information Centre.
- (c) this list formed the pool of candidates from which the recruitment process would proceed, and from which, after the selection process, the appointments would be made;
- (d) two selection boards were appointed, one for the interview of male candidates and the other for the interview of female candidates;
- (e) information was sought from the Commissioner of Police as to the criminal records, if any, of the candidates which were being considered;
- (f) the interview exercise for female candidates were carried out from ..., to which 155 candidates were convened;
- (g) the interview exercise for male candidates were carried out from ..., to which 244 candidates were convened;
- (h) the selection panels submitted their reports as follows:-

- (1) on ... for female candidates; and
  - (2) on ... for male candidates,
- (i) 62 candidates (56 male and 6 female) were borne on police record and the RO decided on a candidate-by-candidate basis whether these candidates should be eliminated in light of guidelines from the Public Service Commission as follows:-
- the nature of the duties attached to the post to be occupied by the candidate;
  - the nature of the offences and the court sentence (if any);
  - the number, the recurrence/frequency of the offences; and
  - The time that has lapsed since the offence(s) has/have been committed.
- (j) the RO eventually approved the issuing of offers of employment to 190 male candidates and 75 female candidates, following which letters of offer were sent on....
- (k) In ...the Independent Commission Against Corruption informed the RO that it was investigating into an alleged act of corruption pertaining to recruitment exercise of GWRs in the sector.
- (l) a departmental enquiry, set up to investigate the alleged irregularities in the recruitment process, concluded in ... that: -
- (i) the list of job seekers from the Employment Information Centre had been tampered with, and a new master list has been fraudulently prepared;
  - (ii) the names of 19 candidates which were submitted by the Employment Information Centre were not included in the master list whilst 30 new names were added, which names did not appear in the original list from the Employment Information Centre;

- (iii) consequently, 23 job seekers whose names were not initially provided by the Employment Information Centre have been offered employment;
  - (iv) appointment letters were sent to candidates despite that they were not eligible for appointment as per the rating of the interview panel;
  - (v) consequently, candidates who had obtained lower marks during the interview exercise and whose names are borne on Police records have superseded other meritorious candidates;
  - (vi) 198 offers employment were issued to male candidates instead of the 190 approved by the RO; and
  - (vii) 78 offers of employment were issued to female candidates instead of the 75 approved by the RO;
- (m) ICAC and police investigations are still presently ongoing with respect to the above.
- (n) given that the recruitment exercise was tainted with fraud and irregularities, on..., the RO informed the Respondent that he recommended that the employment of all the 268 persons recruited in ... as GWR on a casual basis in the relevant administration be terminated and that they be paid one month salary in lieu of one month notice, in accordance with their terms of employment;
- (o) respondent approved the recommendation for termination of employment of these 268 workers, and the RO thereafter issued letters to all 268 workers informing them that their employment will be terminated with effect from..., and that one month salary in lieu of notice would be paid to them. This was in accordance with their contractual terms.

Respondent further averred that Appellants would have, on completion of one year's satisfactory service, been eligible for transfer to the Permanent and Pensionable Establishment (PPE), subject that they were found medically fit at a medical

examination. However, it is the contention of Respondent that the Appellants did not qualify to be eligible for transfer to PPE in as much as they assumed duty on the ... and their termination was effective before the expiration of one year. The Appellants were paid one month salary in lieu of notice in accordance with the terms and condition of their employment as GWR on a casual basis.

Respondent moved that the appeals be set aside.

Under cross examination, the representative of the Respondent agreed that the letters of termination of employment did not mention any reason for the termination and that there was an enquiry of ICAC going on. He also agreed that 4 of the Appellants were recruited recently following a new selection exercise but he denied that they were recruited because they appealed against the decision of Respondent to terminate their employment. He could not say whether the termination of employment was justified or not. He accepted that if the Appellants would have been found medically fit after one year's satisfactory service, they would have been transferred to the PPE.

### **Submission of Counsel for Appellant**

Counsel for Appellant addressed the Tribunal as to whether it has jurisdiction to hear the present appeal following the plea *in limine* raised by the Respondent. Counsel made a clear distinction of the present appeal from the case of Jolicoeur v. PBAT (2015 SCJ 73). He explained that, in that case, the employees were employed on a month-to-month basis for a period of up to 12 months and their employment was liable to termination by either side with one month notice and that their employment would not give rise to permanent appointment in the public service.

Whereas in the case of the employment of the Appellants, it is clearly stipulated at paragraph 3 of their letters of appointment that they would be eligible for transfer to PPE on completion of one year's satisfactory service and they would be paid on a salary scale. He did not agree with the reply of the representative of the Respondent that the transfer was not automatic. He submitted that the Tribunal was perfectly entitled to hear the appeal and produced extract of the rulings of the Tribunal bearing ref: JR 06 of 2017 and KR 02 of 2018.

As regards the merits of the case, he submitted that paragraph 4 of the letters of appointment of Appellants was composed of two limbs. The first limb clearly spelt out that the termination of employment could be made by either side by one month notice. Counsel for Appellant humbly submitted that the termination was done in a most arbitrary manner as much as first of all the letters gave no reason whatsoever when the principles of natural justice would require the Respondent to furnish the reasons of termination regardless of the fact that the contract provides one month notice on either side.

He made reference to the case of *Bhadain v ICAC Ors* (2005 SCJ 132) which provided that *“In English law, a probation period today is a meaningful period and no longer serves as an employer’s charter for easy and ready firing way.”* He was of the opinion that it was not open to the Respondent to use the temporary period as a handy device to arbitrarily put an end to the contract of employment. He was also of the opinion that the Respondent should have waited for the completion of the enquiry before terminating the employment of the Appellants. He also mentioned that there was no provision in the offer of employment for payment of one month’s salary in lieu of one month notice.

### **Submission of Counsel of Respondent**

Counsel for Respondent reiterated the preliminary objection and maintained that the Tribunal did not have jurisdiction to hear the case in as much as it was similar to the case of *Jolicoeur v PBAT* (2015 SCJ 73). He submitted that there is no distinction between the words *“temporary employment (...) on a month to month basis”* and *“employment (...) on a casual basis”* in as much as in both cases the *“employees were liable to termination by one month notice on either side.”* He further submitted that if one becomes “eligible” for transfer to PPE, then one fits the criteria so as to be considered for transfer. The appointment did not state *“You will be transferred”* (...) but instead stated *“You will be eligible for transfer”*. According to him, the former phrase would have given rise to an automatic claim to a permanent appointment whereas in the latter case, it gave rise only to a chance of being considered for permanent appointment which chance would have been subjected to a number of other considerations and which, in

any event, would have been conditional upon the completion of at least one year's service, which is not the case in the present matter.

He referred to Ruling KR 02 of 2018 and JR 06 of 2017 cited by counsel of Appellants. He was of the opinion that Ruling KR 02 of 2018 is irrelevant for the purpose of this case as the appeal related to Appellant's conviction in respect of an offence. As regards Ruling JR 06 of 2017, he submitted that it should not be followed as it purported to carve out an exception to the rule of Jolicoeur, which exceptionally rests on a considerably strained reading of the "*appointment exercise*". He was of the opinion that if JR 06 of 2017 was followed, then it would mean that the entirety of the process both before the offer of temporary appointment (call for candidatures, interview, marking, etc) and after the assumption of duty in a temporary capacity would qualify as appointment exercise. According to him, this interpretation was clearly misconceived in as much as the right of appeal against any decision pertaining to an appointment exercise under Section 3(1) of the PBAT Act 2008, could only be exercised if an appointment was in fact effected and the Tribunal had jurisdiction to hear and determine appeals against "final decisions" only. He therefore submitted that the Tribunal did not have jurisdiction to hear the case.

He added that in the event that the Tribunal ruled that it had jurisdiction to hear the case, he submitted that the present appeal was similar to the case of Soomatee and Ors v Permanent Secretary, Ministry of Health and Quality of Life and Public Service Commission (2007) PRV 84, 2008 MR 350. In that case the appointment letters of Soomatee and Ors stated that their appointment was "*on a purely temporary month to month basis and liable to termination by one month's notice on either side*". The Privy Council ruled in favour of the Respondent.

He further submitted that it was for causes not related to the Appellants. He made it clear that the decision to terminate was not disciplinary in nature, and therefore not subject to PSC Regulations or to the jurisdiction of the Tribunal in respect of disciplinary actions.



As regards the decision of Respondent not to provide any reason for the termination of employment, he contended that this did not form part of the grounds of appeal and therefore could not be raised before the Tribunal. He cited the case of PSC v PBAT i.p.o (1) Khadun (2) Reesaul (2019 SCJ 137) to that effect. Likewise, he added that the GOA did not mention that compensation in lieu of notice was paid and therefore could not be entertained by the Tribunal. He opined that the mere averment that the termination was “unjustified” in the GOA did not suffice to rope in the point in question.

### **Determination**

This case raised three main issues upon which the Tribunal should deal with starting from the preliminary objection which raised the issue of jurisdiction. Respondent agreed to take the objections on the merits. Both parties relied on the case of Jolicoeur v PBAT (2015 SCJ 73) to substantiate their arguments. The Tribunal draws a distinction between the present appeal and the facts of case of Jolicoeur. In the case of Jolicoeur, the Appellants were offered employment as GWR on a month to month basis and their employment was liable to termination by one month’s notice on either side and would not have given rise to any claim to a permanent appointment in the Government Service. In the present appeal, the offer of appointment made to the Appellants which were produced before the Tribunal stated that they were offered employment as GWR on a casual basis and that they would be eligible for transfer to PPE on completion of one year’s satisfactory service and will then be paid on a monthly salary scale. The case of Jolicoeur can be clearly distinguished in as much as in Jolicoeur, the employees would not have been entitled to permanent employment whereas, in this appeal, the Appellants would have been eligible to permanent employment subject to conditions. Under these circumstances, once the Appellant assumed duty, they fell within the definition of Public Officer as this was part of the appointment process.

The Tribunal stands by its Ruling JR 06 of 2017 and KR 02 of 2018 and rules that it has jurisdiction to hear the case.

The second issue is for the Tribunal to determine whether the Respondent had a duty to give reasons for the termination of employment of the Appellants. The Tribunal does not agree with counsel for Respondent that this issue was not on the GOA. It is equally true that natural justice demands that reasons should be provided before taking any action against an individual. But in this case, the GOA reads *“for causes not related to Appellants”* which clearly implies that the Appellants were aware of the causes but it was their contention that these causes were not related to them. Therefore, this argument cannot hold.

The third issue to be determined is whether the payment of one month salary in lieu of notice to the Appellants was in order or whether it breached terms 3 and 4 of the offer of employment made to the Appellants. For clarity purposes, paragraphs 3 and 4 are reproduced:

*“3. You will be eligible for transfer to the Permanent and Pensionable Establishment on completion of one year’s satisfactory service and will then be paid a monthly salary in the scale of (.....).”*

*“4. Your employment is liable to termination by one month notice on either side.”*

An analysis of paragraph 4 shows that the employment of the Appellants is liable to be terminated by one month notice and that no mention is made for payment of one month salary in lieu of notice. A simple interpretation of this clause is that one-month notice should be provided and the employee is bound to work during the period of notice. In the event the Respondent would have terminated their employment with immediate effect, the Appellant would have a claim of one month salary as compensation. The Respondent having decided to pay the Appellants one month salary did not make the Appellants financially worse off and therefore no prejudice had been caused.

This brings us to another important point to be determined which appeared to be the crux of this appeal. The Appellants assumed duty on the ... and their termination of employment took effect as from the.... It was the contention of Appellants that had they not been paid the one month salary and had they been allowed to work during the one

month notice period, they would have completed one year's service by the.... Counsel for Respondent submitted that this issue did not form part of the GOA and should not be taken into consideration. The Tribunal finds it strange that the Respondent did not object at any point in time and on the contrary its representative replied to several questions on this issue in cross examination.

However, when analysing paragraph 3 in the letter of appointment as mentioned above, it reveals that the Appellants would be eligible for PPE after one year subject to conditions, one of which is having a satisfactory service. Another condition is that the Appellants should be found medically fit, otherwise their employment would be terminated immediately as stipulated in paragraph 2 of their letters of employment. The Tribunal concludes that the transfer to PPE after one year's service is not automatic. As long as the Appellants did not satisfy these conditions, their employment would have continued to be on a temporary basis. Hence this argument of Appellants did not stand.

The termination of employment of the Appellants was definitely not for causes related to them. The other part of the GOA fails in the circumstances.

The Tribunal therefore sets aside all the appeals. Copies of this Determination to be filed in all appeal cases.