Ruling 01 of 2016

Dismissal under Regulation 36 of the PSC regulations falls squarely within the ambit of section 3(1) of the PBAT Act 2008 and the Tribunal has jurisdiction to deal with such a disciplinary measure.

The Appellant, a HCCF entered an appeal to contest the decision of the Respondent to dismiss her from the service with effect from....

Her grounds of appeal are as follows:

"*1*. *The decision of the Public Service Commission to dismiss me on ..., after my conviction by the Intermediate Court, contravenes Section 10(5) of the Constitution.*

2. *The decision of the Public Service Commission, without giving me a right of hearing has deprived me of my constitutional right as guaranteed by Section10(8) of the Constitution.*

3. *The decision of the Public Service Commission which has been communicated to me, more than 4 months, after the judgment of the Court, after the completion of the terms of the Community Service Order made by the Court, in lieu and instead of imprisonment, is most unfair and contravenes Section 10(8) of the Constitution.*

4. *(a) I aver that I was wrongly prosecuted for an offence unknown in law, and that my conviction is accordingly not justified.*

(b) I did not appeal to the Supreme Court against the judgement, because the term of imprisonment was converted into community service which I accepted, as, at that point in time, the state of law, as interpreted by the Supreme court, was such that no appeal was available to a convicted person, whose sentence of imprisonment was converted into community service.

5. *The decision of the Public Service commission to dismiss me on the findings and inference for the Court, contravenes the principle laid down by the Judicial Committee in the case of* SIP HENG WONG AND NG PING MAN V/S R-1985 MR 42*, and which principle has since been consistently followed by our Courts of Law.*

6. *My dismissal is not justified either on the facts or in law.*

7. *My dismissal by Respondent amounts to an inhuman treatment, and contravenes Section 7(1) of the Constitution, being given that I was never interdicted during the whole of the enquiry and trial, and was allowed to stay in office for more than 4 months, after my conviction, aroused in me a legitimate expectation that no further action would be taken against me, after having satisfactorily served the Community Service imposed upon me by the Court.*

8. *The decision of the Public Service Commission is wrong in principle, harsh and oppressive, being given that I am being punished twice in respect of the same set of facts, and the 2nd punishment is of a far more reaching character, as it carries with it, besides a life long stigma, a more severe punishment in the form of depriving me of the benefits of ... years of loyal, dedicated and unblemished service at the Ministry of ....*"

The Respondent had sent her a letter on ... to inform her of her dismissal in accordance with section 36 of the Public Service Commission Regulations following her conviction

by the Intermediate Court on ... on a charge of "*Public Official using her position for gratification*".

The Respondent raised a Preliminary Objection in law as follows:

"*Respondent moves that the present appeal be dismissed in as much as the Appellant is seeking Constitutional Reliefs which should have been made by way of Plaint with Summons and not before the Public Bodies Appeal Tribunal. The Public Bodies Appeal Tribunal has no jurisdiction to decide on Constitutional issues*."

On the insistence of Counsel for Appellant, Respondent's Counsel filed a Statement of Defence also on the merits of the case. When the case came for arguments, Respondent proposed to raise another point in law to the effect that Appellant was no longer a public officer and the Tribunal therefore had no jurisdiction to hear the case as per section 3(1) of the Public Bodies Appeal Tribunal Act 2008 (PBAT Act 2008).

The Tribunal allowed the new point of law and invited Counsel for both parties to argue the points immediately, which they did.

Counsel for Respondent referred to Section 3(1) of the PBAT Act 2008 and stated that disciplinary action would mean if she had been reprimanded or given a warning but was still maintained in her post in the public service. He maintained that, as she has been dismissed, she was no longer a public officer and should have gone before the Supreme Court by way of Judicial Review. He cited the case of Jolicoeur v/s Public Bodies Appeal Tribunal ipo the Public Service Commission (2015 SCJ 73).

Regarding the right of hearing based on section 10(8) of the Constitution raised by Appellant, Counsel for Respondent stated that the fact that Appellant was not given a hearing is not fatal as what could be a better hearing than a hearing given by a Court of Law. He referred to the several precedents:

Rungasamy v Public Service Commission (1985 MR 35)

Bacsoo v Local Government Service Commission and Municipal Council of Port Louis (1990 MR 1) and (1990 SCJ 23)

Matadeen v the Pamplemousses-Riviere d Rempart District Council (2013 SCJ 496)

Counsel emphasised on the need for constitutional redress and stated that Appellant should seize the Supreme Court based on the Constitutional Rules.

Counsel for Appellant stated that the reference to Section 10(8) forms part of the merits of the case. If the point *in limine* is based on the merits, then Counsel must assume that that particular point is true in order to argue *in limine litis*. He referred to the case of Emtel v ICTA and Ors (2009 SCJ 63) "…*it is settled practice of this Court when dealing with preliminary objections to act on the basis that the Defendant accepts all the averments in the plaint…*" (citing SOC United Docks v Government of Mauritius 1981 MR 500). Further he referred to Section 3 of the PBAT Act 2008 stating that nowhere does it exclude a complaint about any constitutional right having been contravened.

He further stated that he was not asking the Tribunal to interpret the Constitution but to apply the Constitution as it is. He referred to section 17(1)

> *"(1) Where any person alleges that any of sections 3 to 16 has been, is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the Supreme Court for redress.*"

and section 17(2)

> *"Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."*

He explained that to use section 17, one must have exhausted all other remedies.

On the issue of whether Appellant was a public officer or not he said that the decision taken was a disciplinary action and the letter informed her of same while she was still a public officer.

Regarding the issue of fair hearing, Counsel for Appellant stated that the fact that "a person has been convicted of an offence is not evidence in a Civil Court: Each case must be decided on its own evidence and not on that adduced in any other jurisdiction". He referred to the case of Soogun v UBS (1973 SCJ 59).

He also referred to a Privy Council Judgement in the case of Sip Heng Wong Ng and Np Ping Man v R (1985 MR 142)

> "*The evaluation of oral evidence depends not only on what is said but how it is said. Evidence that may ultimately read well in a transcript may have carried no conviction at all when it was being given. Those charged with returning a verdict in a criminal case have the duty cast upon them to assess and determine the reliability and veracity of witnesses who give oral evidence, and it is upon this assessment that this verdict will ultimately depend. If they had not the opportunity to carry out this vital part of their function as judges of the facts, they are disqualified from returning a verdict, and any verdict they purport to return must be quashed.*"

Ruling

We will first of all deal with the issue of whether Appellant was a public officer or not. Our attention was drawn to the case of Jolicoeur v PBAT (Record No.109262) in which the Supreme Court ruled that "the termination of the temporary appointment of Applicants did not pertain to an appointment exercise or to a disciplinary action". In fact the relevant case to be referred to should have been the Ruling (Website Ref FR13 of 2013) which had been given by the Tribunal in the original case which came before us in which we found that section 111 of the Constitution defines public office and public officer as follows:-

> "*public office" means, subject to section 112, an office of emolument in the public service;*

"public Officer" means the holder of an public office and includes a person appointed to act in any public office.

The Appellants in that case were in fact public officers even though they were employed on contract.

The case of Jolicoeur v/s PBAT is not relevant here as it concerned a mere termination of a temporary contract whereas in the present case it concerns a termination under Regulation 36 of the Public Service Commission Regulations i.e. disciplinary proceedings after an appellant has been convicted by a Criminal Court.

The Appellants in that case were in fact public officers even though they were employed on contract.

The Appellant in this case was a public officer at the time of the sanction before being dismissed. She is contesting the dismissal which is a disciplinary measure and falls squarely under Section 3(1) of the PBAT Act 2008. That section does not mention any exception. In fact nowhere in Section 91A of the Constitution or the PBAT Act does the legislator exclude such a category whereas clearly other categories are excluded specifically (Section 91A (3) of the Constitution and 3(3) of the PBAT Act).

The legislator could not have intended to deprive the PBAT of the jurisdiction in such cases as otherwise if would mean that the Tribunal can deal with all disciplinary action except dismissal or termination of contract. It would also imply that the Public Bodies can decide to choose the highest sanction thus ousting the jurisdiction of the Tribunal, even though that sanction is unreasonable. This also means that all aggrieved parties who have thus been dismissed would have to go to the Supreme Court whereas the legislator has set up the PBAT precisely to hear such cases "with economy, informality and speed" (section 7(5)).

It would be so unreasonable to expect the Tribunal to hear appeals regarding minor sanctions but not the highest sanction.

On the issue of constitutional relief, the Tribunal holds that Appellant is of course free to seek constitutional redress elsewhere. However, the Tribunal will not consider

grounds of Appeal 1,2,3,4,5,7. The Tribunal will therefore proceed solely on ground 6 which relates to whether the dismissal is justified or not.

Of course, when an Appellant comes before this Tribunal, he is perfectly entitled to state that he did not get a fair hearing, without even referring to the Constitution.

The Tribunal therefore rules that it has full jurisdiction to hear this case.

The Tribunal will therefore hear this appeal on its merits before pronouncing its determination.