

## **Ruling 05 of 2016**

**In order to decide whether a termination of appointment was related to the appointment exercise or was in fact a disciplinary measure, the Tribunal must hear the case on the merits.**

The Appellant, a former ADTO of the Ministry of ..., hereinafter referred to as the Ministry, lodged an appeal as her appointment was terminated.

The Respondent raised a Preliminary Objection in law (POL) to the effect that the ground of appeal is not within the jurisdiction of the Tribunal. On being pressed for details, the State Attorney stated in a second Preliminary Objection in law that the appeal is against the decision to terminate Appellant's appointment. "*There is no decision pertaining to an appointment exercise or to a disciplinary action as set out under section 3(1) of the Public Bodies Appeal Tribunal Act.*" (PBAT Act)

(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 appointment exercise or to a disciplinary action taken against that officer.*** (emphasis ours)

Counsel for Appellant stated that this objection cannot be dealt with *in limine* because it is very much related to the facts of the case.

He submitted the case of Rama v Vacoas Transport Ltd, (1958 MR 184) which deals with the cases where an objection is based on disputed facts.

He reminded the Tribunal that "*there is a presumption for the purposes of argument that everything that I have said in my appeal is admitted*". Counsel referred to Regulation 21 (3) (c) and (d).

He said that Appellant should be able to depone to show that “*the termination is in fact a disciplinary measure.*”

Counsel for Respondent produced the letter of temporary appointment dated ... which refers to a 12 months probationary period. At the end of that period, if favourably reported upon, she would be confirmed and be put on the permanent and pensionable establishment. In the letter it is also stated that “*while on probation, appointment may be terminated at any time by giving one month’s notice on either side*” and that “*appointment will be subject to the laws, rules and regulations governing the Public Service of Mauritius and to the Public Service Commission Regulations...*”

Counsel referred to the case of Jolicoeur versus the PBAT (Record No.109262) in which the Supreme Court decided that the Tribunal had no jurisdiction to hear the appeal as it relates to the termination of a temporary appointment as is the case in the present appeal.

In reply, Counsel for the Appellant referred to the Grounds of appeal and submitted that Appellant had been appointed for ... months at ..., which is under the aegis of the Ministry, and that she had received a letter of termination on ..., without any notice. He stated that the appointment is subject to the PSC regulations and he cited PSC Regulation 2(1) where the definition of ‘Appointment’ is wide enough to include termination.

He also cited section 21(3) of PSC Regulations under Part III of the Regulations which deals with appointments, promotions, confirmation of appointments and termination of appointments (otherwise than by disciplinary proceedings). He submitted that, where an officer is appointed on probation, the probation should either be extended to give the officer the opportunity of improvement or the appointment be terminated. Counsel maintained that the appointment exercise starts when she is first appointed on a temporary basis and goes on until she is confirmed.

Counsel then further referred to the second limb of the appeal, that is that the termination is akin to a disciplinary measure. He then referred to Regulation 25(5) of Part IV of the PSC Regulations, and to Regulation 41(1) which gives a list of

punishment that may be inflicted, dismissal being one possibility. Counsel pointed out that in the case of *Jolicoeur v. PBAT*, the employees in *Rodrigues* were employed on a day to day basis, which is not the case here. Counsel invited the Tribunal to see whether there are sufficient elements for her not to have been confirmed.

He concluded that the Respondent had the discretion to confirm Appellant or not and they had to exercise this discretion judiciously, which is why he insists that the letters of reply of Appellant should be taken in consideration and therefore the case should be heard on the merits.

In reply, Counsel for Respondent maintained that it is only Regulation 21(3) which applies and not Part IV and maintained that the judgement of *Jolicoeur v. PBAT* applies and the Tribunal does not have jurisdiction.

### **Determination**

The Appellant's Counsel is basing his argument on two limbs to show that the Tribunal has jurisdiction. The first is that the appeal concerns a case of appointment as, until there is a termination, the different moves of the Respondent regarding the Appellant would tend to show that it was still within the appointment process. Regulation 2 provides:-

*"2. (1) In these regulations –*

*"appointment" means –*

*(a) the conferment of an office of emolument in the public service, whether or not subject to subsequent confirmation, upon a person not in the public service;"*

The second limb is that in fact the termination was a disciplinary measure and that, to understand that argument, the Tribunal should hear the Appellant and not decide "*in limine litis*".

He cited Section 25(5) of Part IV of PSC Regulations which provides:

*“(5) The Commission may take disciplinary action under Part IV of these regulations against a public officer on temporary transfer to any body, organisation or institution referred to in paragraph (4), where –*

- (a) he is dismissed from the service of the institution for any reason involving fraud, dishonesty, willful mismanagement or misbehaviour;*
- (b) he is convicted of an offence involving fraud or dishonesty.”*

Regulation 21(3) under Part III was also referred to by Counsel for Respondent and provides that:

*“(3) Where a public officer has been appointed on probation, the responsible officer shall, six months after the commencement of the probationary period, inform the Commission if he considers the work or conduct of the public officer to be unsatisfactory, and not less than one month before the expiration of the probationary period the responsible officer shall inform the Commission whether in his opinion-*

- (a) the public officer should be confirmed in his office.*
- (b) The probationary period should be extended so as to afford the public officer further opportunity to pass any examination, the passing of which is a condition for confirmation, his service otherwise being satisfactory.*
- (c) The probationary period should be extended to afford the public officer the opportunity of improvement in any respect in which his work or conduct has been adversely reported on; or*
- (d) The public officer’s appointment should be terminated”.*

*(4) (a) The responsible officer shall not recommend the extension or termination of an appointment under paragraph 3(c) or (d) unless he has first, by letter, informed the public officer of his intention and of the right of the public officer to make representations thereon within a period to be specified in such letter.”*

Both Appellant and Respondent had filed letters relevant to the appointment and termination of appointment of Appellant, including the letter of explanation sent by Appellant to the Permanent Secretary of the Ministry through the Director of .... The Tribunal cannot go into the disputed parts of these letters unless the case is heard on the merits. The Tribunal cannot find that there was no disciplinary action taken by the Respondent in this case either as it has not yet had the benefit of hearing the parties on that issue.

The Tribunal will therefore hear the appeal on the merits and consider the circumstances that led to the termination of the Appellant's employment.