

- The Tribunal has jurisdiction to hear an appeal lodged by an officer who holds a temporary appointment concerning the termination of such appointment.
- The fact that his appointment was made following a call for application by public advertisement is irrelevant as the appeal did NOT concern his appointment.

This is a case of a former GER of the Municipality of ...concerning the termination of his employment on....

Appellant considered that such termination was:

- “(i) *Unfair and unreasonable*
- (ii) *Abusive and prejudicial*
- (iii) *Inhuman, harsh and discriminatory against my constitutional rights and human rights to be treated equally and my right to employment*”

He averred that “*the condition referred to underlying my termination of service dates as far as back as... , hence almost 12 years ago. Since then, I have not re-offended and I have been living a stable family life. I was not made aware at any point in time that this conviction was an issue, in as much as I presume that I would not have been employed at all in the first place if such was the case*”.

He averred that he had no adverse report since his appointment and he further explained that he had appealed to the “*President of the Republic of Mauritius to exercise her Powers of Prerogative of mercy in light of the old and not so serious conviction.*

*By letter dated..., I was granted a free pardon. As such the question that my employment be terminated on the grounds of my aforesaid conviction is unreasonable, unjust, unfair, prejudicial and is in bridge of my constitutional rights*”. (SIC)

He annexed the following documents:

1. Letter of dismissal
2. Antecedents
3. Application for Prerogative of Mercy to the President + Certificate of Character

4. Letter of Prerogative of Mercy ... from the President.
5. New Certificate of Character.

### **Respondent's objection in law**

Respondent raised a point in law followed by a second point in law. Both were finally contained in an amendment which read as follows:

#### ***"RESPONDENT'S PROPOSED AMENDED PRELIMINARY OBJECTIONS IN LAW***

*Respondent moves that the present appeal be set aside in as much as the Tribunal has no jurisdiction to entertain the present appeal given that:*

- (i) ***the post of General Worker was filled following a call for application by Public Advertisement ...;***
- (ii) *the decision against which Appellant is appealing relates to the termination of Appellant's temporary appointment as GER on a temporary day-to-day basis, and does not in any way pertain to an appointment exercise nor to a disciplinary action taken against him".*

Counsel for Appellant raised a point of order as to whether Respondent could raise its points of law for Appellant piecemeal and at any time of the proceedings which amounts to pleading by instalments.

It was clear that it is not a practice to be encouraged and that Preliminary Points in law should be raised as preliminary points *in limine litis* only when these can be thrashed out without any evidence being adduced.

The Tribunal is not working in a straight jacket. Section 7(6) provides that

*"(6) In the hearing of an appeal, the Tribunal is not bound by the procedures or legal forms of a court of law, and rules of evidence, but shall –*

- (a) *observe the principles of natural justice;"*

The Tribunal will accept Preliminary Objections in Law from Respondent, Co-Respondent or even Appellant if the need arises. These can be raised at any time of the proceedings as long as they do not unnecessarily delay proceedings as Section 7(5) provides: *"In performing its functions, the Tribunal shall endeavour to combine fairness to the parties with economy, informality and speed"*.

Further Counsel for Appellant submitted that if the Respondent chooses not to provide its Statement of Defence but merely its Preliminary Objection in Law as

preliminary points in *limine litis*, it will not be able to adduce any evidence at preliminary stage.

Respondent's Representative produced the letter of appointment of Appellant without any objection from Appellant's Counsel.

## **Arguments**

### **On point 1**

Respondent's Counsel argued that the appeal before the Tribunal was in relation to an appointment which had been made following a public advertisement and which was not yet substantive and it therefore excludes the jurisdiction of the Tribunal (Section 3(3) of the Public Bodies Appeal Tribunal Act 2008) (PBAT Act 2008). He referred to the case of *Jolicoeur v PBAT* (2015 SCJ 73).

Appellant's Counsel replied that the appeal did not concern an appointment but a disciplinary action as was evident from the letter of dismissal which refers to the disciplinary powers vested in it by section 4(1) (b) of the Local Government Service Commission Act (LGSC Act).

He referred to Section 5(5) of the Interpretation and General Clauses Act 1974 which provides that "or", "other" and "otherwise" shall be construed disjunctively, and not as implying similarity unless the word "similar" or other word of like meaning is added.

The Tribunal can therefore hear an appeal pertaining to a disciplinary action even if the Tribunal could not hear an appeal pertaining to an appointment of the officer concerned.

Section 4(1) (b) of the LGSC Act provides that the Commission has the power to "exercise disciplinary control".

Section 2 of the LGSC Regulation 1984 defines disciplinary control in so far as it relates to dismissal.

### **On point 2**

Respondent's Counsel merely reiterated the point raised under Section 3(1) of the PBAT Act and stated that the appointment is on a day today basis and the Respondent had the right to terminate it without notice. He also submitted that there

was a difference between a Local Government Officer and a worker as per the LGSC Act.

Appellant's Counsel referred to Section 2 of the LGSC Act regarding the definition of "local government officer" which means

*"local government officer" means a person who holds, or acts in a local government office"*

*"local government office" means an office of emolument in the service of a local authority and includes service of a temporary nature and contract appointments."*

*"Appointment" means –*

*(a) the designation of a person not in the service of a local authority to an office of emolument in the service of a local authority, including a designation in a temporary or an acting capacity or subject to subsequent confirmation [...]"*

He highlighted the fact that this definition includes an office of "temporary nature" and submitted that the Tribunal has jurisdiction to hear the appeal.

He distinguished the appeal from that of Jolicoeur and Ors v/s PBAT (2015 SCJ 73) which concerned 240 workers who were offered temporary employment as General Workers in the Rodrigues Regional Assembly. The terms of employment expressly provided that the employment was liable to termination by one month's notice on either side. The Supreme Court held that the appeal related neither to an appointment exercise nor to a disciplinary action.

He submitted that if the employment of Appellant in this case was terminated purely and simply by the exercise of the powers of Respondent the Tribunal would have been bound by the precedent of Jolicoeur as cited above.

In the present appeal the Respondent clearly indicated in the letter dated 24 October 2017 that it was exercising its disciplinary powers, because in 2005 Appellant had been fined Rs1000 for possession of cannabis.

Ruling No.1 of 2016 of the PBAT was cited which concerned a termination of temporary contract under Regulation 36 of the Public Service Commission Regulations.

Counsel concluded by saying that since Respondent did not raise any objection on the merit, the appeal should be allowed and the Appellant reinstated in his post as GER.

### **Ruling**

On the first point of law Section 3(3) of the PBAT Act 2008 provides that

*“3) No appeal shall lie to the Public Bodies Appeal Tribunal where the appeal relates to an appointment made following a call for application for an office by public advertisement”.*

Clearly this section refers to an “appointment” and the appeal before the Tribunal is not in relation to an appointment but to the termination of employment of the Appellant which has been done in exercise of the powers vested in the LGSC by section 4(1) (b) of the LGSC Act 1975”, as was clearly stated in the letter of termination dated 24 October 2017. Even if the recruitment of the Appellant was done following a public advertisement it is not the appointment which is in question before the Tribunal. The debates in the National Assembly, as reproduced in the HANSARD, clearly shows that the intention of the legislator was to avoid opening a floodgate as large number of citizens normally apply for such posts. It could not have been its intention to oust the jurisdiction of the Tribunal on disciplinary actions which concern those who have already been recruited.

On the second preliminary objection in law which relates to Section 3(1) of the PBAT Act, the same argument holds i.e it concerns a disciplinary action as clearly admitted by Respondent itself.

The definition of Local Government Officer does relate to the Appellant as he holds and acts in a local government office and such service includes service of a temporary nature (Section 2 of the LGSC Act). The definition of worker is “a local government officer who performs duties other than administrative or technical duties and who is employed at daily rates”.

The Tribunal cannot merely allow the appeal at this stage. The practice has been for Respondent to reserve its right to file its Statement of Defence if need be after a Ruling of the Tribunal in favour of the Appellant.

Appellant is clearly a Local Government Officer and the decision to terminate his employment was final. He could therefore appeal to the Tribunal which has

jurisdiction to hear his grounds of appeal and any Statement of case which he may wish to file at the Tribunal and call the Respondent for its Statement of Defence on these grounds

The Tribunal therefore rules that the points in law raised by Respondent do not hold and that the Tribunal has jurisdiction and will hear the appeal on its merits.