

KR 03 of 2018

Section 91(A) of the Constitution provides that the Tribunal has jurisdiction to hear and determine appeals by public officers against such final decision of a Commission.

The Appellant lodged an appeal before the Tribunal concerning the decision of the Public Service Commission not to consider his appointment in a substantive capacity as Deputy Director, EVL Department “at this stage”.

His grounds of appeal are:

- “1. *The Commission’s decision dated ... is in breach of appellant’s letter of appointment dated...*
2. *The responsible officer has not recommended any extension under regulation 21 on the contrary he has strongly recommended appellant’s confirmation.*
3. *Further or alternatively the appellant had a legitimate expectation to be appointed upon being favourably reported upon.*
4. *The Commission has failed to provide any reasons for its decision”.*

In his Statement of Case (SOC) he averred that:

- “1. *Two vacancies for the post of Deputy Director, ... (to be restyled Deputy Director, EVL) of the Ministry of ...were advertised on ... by respondent’s Circular ...*
2. *Appellant applied for the post. There were other applicants. Five applicants were called for interview, including the appellant.*
3. *At Section 14 (a) of his application form (P.S.C Form 7) appellant did disclose to the respondent that he had been prosecuted before the*

Intermediate Court under Count III of an Information and that the proceedings were still ongoing...

4. On ... following an interview and selection exercise conducted by the respondent appellant was offered appointment as one of the two Deputy Directors, (to be restyled Deputy Director, EVL Department) in a temporary capacity.

5. The terms and conditions of appellant's appointment included the following ***"appointment will take effect from the date of assumption of duty and, in the first instance will be in a temporary capacity for a period of six months, at the end of which, if you are favourably reported upon consideration will be given to your appointment as Deputy Director (to be restyled Deputy Director, EVL Department) in a substantive capacity."***

6. On ... Appellant accepted the aforesaid offer and he assumed duty on the same day.

7. After 6 months of assumption of duty as Deputy Director in a temporary capacity appellant has been favourably reported upon and consideration should therefore have been given by the respondent to his appointment in a substantive capacity".

8. He made written representations to the Responsible Officer for his appointment to be made in a substantive capacity. The Financial Secretary informed him by a letter dated ... *"that the Commission has informed this Ministry that the Commission has decided that your appointment as Deputy Director, EVL in a substantive capacity cannot be considered at this stage"*.

9. In the meantime he has been assigned additional duties and responsibilities.

10. He added that his *"colleague Mr K.J., who is his junior, who was also appointed as Deputy Director in a temporary capacity on ..., has already been appointed in a substantive capacity after 6 months i.e, in or about..., but with retrospective effect as from ... and is thus drawing a higher salary since that date"*.

11. *As a consequence, appellant is still drawing the salary of a LGVR” and he is not drawing any increments and benefits which should have accrued to him and in respect of which he had a legitimate expectation.*

12. *Appellant will turn 65 on ... and bearing in mind his pre-retirement leave he should normally proceed on pre-retirement leave with effect i.e.by the end of ... after some 42 years service.*

13. *Respondent’s decision will have a considerable negative impact on appellant’s lump sum and his pension benefits”.*

He moved that the Tribunal should quash the Respondent’s decision of ...and remit the matter back to the Respondent with such other order as the Tribunal may deem appropriate.

Respondent’s Stand

Respondent filed a notice of preliminary objection stating that the present appeal be set aside as the Grounds of Appeal do not fall within the purview of Section 3 of the Public Bodies Appeal Tribunal (PBAT) Act 2008. The case was fixed for arguments and the Tribunal invited Counsel on both sides to send submissions in writing.

Respondent’s Submissions

The terms and conditions of appointment of Appellant clearly stipulated that *“appointment will take effect from the date of assumption of duty and, in the first instance will be in a temporary capacity for a period of six months, at the end of which, if you are favourably reported upon, consideration will be given to your appointment as Deputy Director EVL Department in a substantive capacity”.*

The Appellant accepted the offer and assumed duty.

The Respondent agreed that it had informed the Ministry that his appointment as Deputy Director EVL Department in a substantive capacity cannot be considered *“at this stage”*

Respondent submitted that this was not a final decision and therefore cannot be the subject matter of an appeal before the PBAT.

Respondent cited Section 3 of the PBAT Act and submitted that it is not a final decision and does not fall within the purview of a disciplinary action nor an appointment exercise.

Respondent submitted that at most this kind of grievance could be by way of an industrial dispute.

Respondent referred to the case of JOLICOEUR v PBAT 2015 SCJ 75.

Appellant's submissions

Appellant's Counsel referred to Section 91 A (1) of the Constitution which is not replicated in the PBAT Act 2008.

The question is "what is the test of finality"? Citing *Médine Mosque Wadf Society v Médine Mosque Society* (1972 MR 97) the late Carrioché SPJ and Ramphul J. citing from *Salter Rex v Ghosh* (1971) 2 All ER 865 reproduced a statement of Lord Denning M.R.

"This question of 'final' or 'interlocutory' is so uncertain, that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way"

Counsel reminded the Tribunal that Appellant was on the eve of retiring and if he was not confirmed "*his retiring benefits in terms of lump sum and pension will be much lesser and will be based on his previous substantive post*".

Counsel drew the attention of the Tribunal on the fact that, apart from the Grounds of Appeal that Respondent's decision is in breach of the instrument of appointment dated 22 August 2016, the Responsible Officer has not either recommended for an extension under Regulation 21.

Counsel holds that the breach of the instrument of appointment is a final decision.

Further Appellant has now been in his temporary post for 21 months with the inevitable loss of earnings.

He stated that the case of Jolicoeur does not apply in this case.

Ruling

The only issue which the Tribunal must decide is whether the letter of 22 March 2018 contains a final decision which is appealable before the PBAT.

Section 91 A (1) of the Constitution provides clearly that the Public Bodies Appeal Tribunal has jurisdiction *“to hear and determine appeals made by public officers against such final decision of such commission established under this Constitution, as may be prescribed..”* (underlining ours)

Having given due consideration to the written submissions of Counsel for Appellant and Respondent, we are of the view that there is no final decision yet concerning Appellant. Whatever procedures should have been used, including under Regulation 21 of the Public Service Commission Regulations, do not concern us at this point in time. Appellant is still in post and will be able to seize the Tribunal when a final decision is taken concerning his appointment if ever he is still aggrieved. The Tribunal has no jurisdiction to hear the case now.

The Appeal is therefore set aside.