

KR 04 of 2018

- Appeals against the Constitutionality of a PSC Regulation cannot be dealt with by the Tribunal but be brought before the Supreme Court.
- However, the Tribunal may look at the fairness and reasonableness of a Disciplinary Committee when the case is heard on the merits.

The Appellant is challenging the decision of the Respondent to deny him increments for two years and is praying the Tribunal to declare the findings of the Disciplinary Committee null and void as being wrong in law. His grounds of appeal are as follows: “*unfairness, unreasonable, irrational, unconstitutional*”. **(SIC)**

He states clearly in an annex to his Grounds of Appeal that the basis of this appeal is to challenge:

- “(i) Constitutionality of PSC regulation 38*
- (ii) Whether the conduct of Disciplinary Committee held under PSC reg 38 is in breach of natural justice*
- (iii) Whether the Disciplinary Committee so conducted under PSC reg 38 is ultra vires and wrong in law and*
- (iv) Whether the findings of the Disciplinary Committee should be declared Null and Void”*

Then he proceeds in detail on the grounds to be thrashed out on the merits.

The Respondent has raised a preliminary objection in law to the effect that;

“1. Respondent moves that the first limb of the particulars of the decision against which Appellant is appealing be set aside in as much as:

(i) the Tribunal has no jurisdiction in relation to the decision to set up disciplinary proceedings under Regulation 38 of the Public Service Commission, as well as the conduct of the disciplinary committee, the constitution of the panel and findings of the Panel;

(ii) Should the Tribunal have jurisdiction, Appellant is time barred to challenge Respondent’s decision under Section 3 (2) of the Public Bodies Appeal Tribunal.

2. Respondent further avers that the Appellant is seeking to challenge the constitutionality of Regulation 38 of the Public Service Commission regulations. The Tribunal is not habilitated as per the Public Bodies Appeal Tribunal Act to pronounce itself on the constitutionality of Regulation 38 of the Public Service Commission Regulations. “

The Respondent moves that these grounds of appeal be set aside.

The Tribunal requested Counsel for Respondent and Counsel for Appellant to give written submissions on the points of law

Submission of Counsel for Respondent

Counsel for Respondent submitted on the preliminary objection as follows:

“On ground 1 (i)

The jurisdiction of the Tribunal is well set out at section 3(1) of the Public Bodies Appeal Tribunal Act which clearly states, inter alia, that the Tribunal shall hear and determine an appeal made by any public officer against any decision of the PSC pertaining to an appointment exercise or to a disciplinary action taken against that officer. This section does not empower the Tribunal to question the decision to set up disciplinary proceedings as obtained under Regulation 38 of the PSC Regulations or the conduct of same or the constitution of the panel and findings of the panel. What the Tribunal is empowered to hear is the appeal against the disciplinary action taken by the PSC.

On grounds 1 (ii)

At any rate, even if the Tribunal had had jurisdiction, Appellant would have been time-barred to challenge the PSC’s decision under section 3(2) of the Public Bodies Appeal Tribunal Act as an appeal should be made within 21 days. In any case, the Appellant should have challenged the Constitution of the panel as and when it was set up.

On ground 2

*As per section 3 of the Public Bodies Appeal Tribunal Act, the Appellant cannot seek to challenge the constitutionality of Regulation 38 of the PSC Regulations. As pointed out in the case of **Societe de la Crecerelle & Anor v The District Council of Black River & Anor 2007 SCJ 162**, it is a cardinal principle that there is a presumption in favour of the constitutionality of an enactment which has been duly passed by Parliament. Consequently, such enactment can only be challenged on constitutional grounds before the Supreme Court as per the prescribed procedure. The Constitution has itself prescribed the procedure in respect of applications for constitutional relief which are governed by sections 17 and 83 and the Supreme Court (Constitutional Relief) Rules 2000. These rules provided for an action to be entered by way of *Plaint with Summons* which would enable the aggrieved party to obtain redress from the Supreme Court through the full exercise of its original constitutional jurisdiction and where all issues can be fully canvassed and the respective contentions of parties tested contradictorily. Hence, it is humbly submitted that one cannot use an appeal before the Public Bodies Appeal Tribunal which is restricted to appeals against an appointment exercise or a disciplinary action to challenge the constitutionality of a law.”*

Submission of Counsel for Appellant

Counsel for Appellant first of all sent submissions in writing on the merits of the case. Then after receiving the submissions of Counsel for Respondent he submitted as follows: -

On ground 1 (i)

“1. As per Section 3(1) of the Public Bodies Appeal Tribunal (PBAT) Act the Tribunal is empowered to hear and determine an appeal made by any public officer against any decision of the Public Service Commission or...., pertaining to a disciplinary taken against that officer.

2. It is submitted that a disciplinary action against a public officer includes the setting up of the Disciplinary Committee (DC) and of its proceedings. The decision of the DC is not independent of the setting up of the DC panel and of its proceedings. If an appellant could appeal against intermediate stages decision of Courts then this would make the operation of the Court of Appeal hectic and burdensome. The same applies to the Tribunal. The appellant appeals at the end of the disciplinary action and not at intermediate stages as in Court cases. The Appellant is fully habilitated to appeal against the illegally set up Disciplinary Committee panel to the Tribunal and the latter is equally habilitated to hear the appeal. It would be wrong to suggest that the Tribunal is not empowered to or has no jurisdiction to in relation to the decision to set up disciplinary proceedings under Regulations 38 of the Public Service Commission Regulations as the Tribunal is empowered to hear an appeal under the whole of Section 38. It appears that the Respondent is also suggesting that the Appellant should have appealed at the stage of setting up of the Disciplinary Committee panel against its constitution. This would make the operation of the Tribunal awkward as an appeal is generally made at the end of the decision and not at intermediate stages.

On ground 1(ii)

3. Respondent has raised preliminary objection in law that the Appellant would have been time-barred to challenge the PSC's decision under section 3(2) of the Public Bodies Appeal Tribunal Act because as per the Respondent the Appellant should have challenged the Constitution of the DC panel as and when it was set up as an appeal should be made within 21 days.

4. As mentioned in Paragraph 2 above it is submitted that an appeal is generally made at the end of a decision and not at intermediate stages. Assuming however that the Appellant should have made the appeal against the constitution of the DC panel, then the Responsible officer or the PSC should have informed the Appellant, as per basic rules of fairness and natural justice that he could appeal against the constitution of the DC panel especially as the PBAT Act does not stipulate this and the Appellant was not legally represented then.

5. *In the event the Appellant has appealed outside delay against the constitution of the DC panel then it is submitted that on the authority of **S Ramtohul v The State 1996 SCJ 356** the Tribunal allows this appeal to be heard.*

6. *In **S Ramtohul v The State 1996 SCJ 356** Court surveyed English cases which revealed that ultimately the Court's discretion is not fettered by any stringent rule and that Court's practice over the years is to serve only as guide and not considered in any way as binding.*

Court accordingly viewed that under our law, as under English law-

- 1) *this Court has a discretion to allow an appeal to proceed or not outside delay;*
- 2) *the guiding principle, in procedures governing appeals is, as wisely summed up in *Lagesse v C.I.T.* {1991 MR 46}, that "at some stage the finality of judicial decisions should be certain and procedural requirements governing appeals from those decisions should not be disregarded so as to prolong uncertainty and the holding up of the execution of a judgment Unless.... non-compliance is shown not to be due to acts or more frequently, the omissions of the appellant or his legal advisers.*
- 3) *there are, however, no closed categories of cases for the exercise of the Court's discretion, and the Court may exceptionally allow an applicant who has appealed outside delay due to his own laches or that of his attorney where there is, in the Court's view, sufficient justification for such exercise of discretion. We totally endorse, in this connection, the wise words of the learned Judges (Glover ACJ and Espitalier Noel J) in *Carpenen v Lakhabhay* {1986 MR 176} that "Time limits prescribed in procedural matters are not always mandatory to the point of thwarting the course of justice";*
- 4) *the court, in its discretion, may consider where appropriate the circumstances giving rise to the proposed grounds of appeal and consider whether, having regards to their arguability, it should allow the appeal to be entertained out of time, whilst guarding itself, of course, from making any pronouncements, in advance, on any ground of appeals.*

On ground 2

7. *Respondent has averred that Appellant is seeking to challenge the constitutionality of regulation 38 of the Public Service Commission Regulations. It is humbly submitted that the Appellant is challenging that:*

- (i) *He was deprived of his constitutional right to be legally represented as he was not informed that he could be duly legally represented before the DC by an Attorney or a Barrister. Moreover the Appellant raised the crucial need that he required legal representation as he was medically unfit to conduct his case on his own on the.... However the PSC did not attend to his request. The question that*

arises under the circumstances is whether section 38 of PSC Regulations allows legal representation. If it does not this would amount a breach of the Appellant constitutional right to be legally represented at the DC. This calls for an interpretation of Regulation 38(9) of PSC Regulations by the Supreme Court under section 84 of the Constitution before the PBAT can rule on the matter;

(ii) One member of the DC panel in breach of Section 38(5) of the PSC Regulations as he had served during the previous five years preceding the alleged misconduct in the Appellant Ministry or Department. This has deprived the Appellant to be heard by a legally constituted DC panel. It is submitted that the onus is all the time on the Respondent to ensure that the DC panel is legally constituted in line with Section 38(5) of the PSC Regulations;

(iii) On the..., the Appellant raised legality issues regarding the proceedings of the Disciplinary Committee to the effect that the applicant was deprived of the chance to reply the charges. However the DC did not consider his concerns;

(iv) Documentary evidence were used against the Appellant at the DC although he had never been supplied with a copy of same or given access to it in breach of Section 38(8) of the PSC Regulations;

(v) As per Sections 38(14) & 38(15) of the PSC Regulations it is the p Officer who determines the punishment to be inflicted on the officer and the PSC approves same. In the case of the Appellant the PSC had decided the punishment to be inflicted on him in breach of the above-mentioned Regulations as per the letter dated ...(sic), signed by Mr P. and addressed to the Appellant.

Under the circumstances it is the humble submission of the Appellant that the preliminary objections be set aside.”

Ruling

The Tribunal has given due consideration to the submissions of parties.

The Tribunal will address the points of law seriatim.

On ground 1 (i)

Section 89(1) of the Constitution says clearly “power to appoint persons to hold or to act in any offices in the public service (including power to confirm appointments), to exercise disciplinary control over persons holding or acting such offices and to remove such persons from office shall vest in the Public Service Commission”. It cannot be denied that the power to exercise disciplinary action rests solely and squarely on the Respondent. For the exercise of its function the Respondent is guided by the provisions of the Public

Service Commission Regulations as subsequently amended and the procedures for taking disciplinary actions are contained under its Part IV Discipline.

This Tribunal has no power to question the decision of the Respondent to institute disciplinary proceedings under any of the sections of Part IV of the PSC Regulations.

However, the Tribunal has to ensure that when the Respondent exercises its disciplinary powers, it does so in a judicious manner from the time it sets up any disciplinary committee. Sometimes the Tribunal may have to look at the constitution of the panel, the proceedings of the disciplinary committee to see if they were fair and correspond to Regulations of Respondent. Respondent must not act or be seen to act in conflict with the principles of natural justice. For example, the Tribunal cannot question the Respondent on the setting up of a disciplinary committee but the Tribunal will be perfectly in order to question the presence of an advisor on the panel if the advisor may be in conflict of interest and did not challenge himself.

In other words, all will depend on the circumstances of the case which can only be elucidated when the case is heard on its merits.

Therefore, it cannot be said outright that the Tribunal has no jurisdiction on the setting up of a disciplinary committee.

The Tribunal may also examine to see if each member of the panel was appropriate for the case before the Commission.

On ground 1 (ii)

The issue of whether Appellant is time-barred to challenge Respondent's decision under section 3(2) of the Public Bodies Appeal Tribunal Act is a moot point. Respondent has time and again argued before this Tribunal that when an officer is not satisfied about the composition of a selection panel or a disciplinary committee the officer must protest there and then or immediately after the event. If the officer has not done so, Respondent avers that the officer is protesting only after he has not been selected or the disciplinary committee has not been in his favour. However when asked as to the procedure for lodging any protest, the Respondent has never been able to give a clear answer. One can therefore imagine the sense of confusion of employees in such circumstances. This applies in particular to officers in the lower grades or who are illiterate.

However there is always the possibility of appealing to the Respondent itself in which case time will start running as from the final decision of the respondent after that appeal. But Respondent must ensure that Applicants are aware of this possibility.

There are cases where officers have protested and long exchange of correspondence ensued that goes on for months with no outcome when the officer comes before the Tribunal. The matter follows its course. It is unfair that the officer is time barred to raise such issues before the Tribunal.

Section 91 A (1) of the Constitution provides that the PBAT has "*jurisdiction to hear and determine appeals made by public officers against such final decisions of such Commission ...*". The delay of 21 days to lodge an appeal is mandatory in the Public Bodies Appeal Tribunal (PBAT) Act 2008 and cannot be lifted unlike for the Supreme Court. It must be underlined that the Tribunal was set up in order to provide justice "with economy, informality and speed" (Section 7(5) of the PBAT Act 2008). However, there are peripheral issues linked to appointments/disciplinary actions which can be raised at any time as long as the appeal itself is within the statutory delay. Natural justice requires that it be so. This is in the spirit of the opinion expressed by Glover ACJ and Noel J in the cases cited by Appellant's Counsel.

On ground 2

It cannot be contested that the Tribunal, a quasi-judicial institution, cannot decide on the constitutionality of a legislation or on established rules and regulations. The Tribunal can only adjudicate on the law and the regulations of the public bodies. The issue of constitutionality can only be thrashed out at the level of the Supreme Court. This said, the Tribunal may flag an issue to the Respondent for any action it may deem necessary at its end.

Appellant cannot contest the constitutionality of regulation 38 and any reference to it must be expunged from his grounds of appeal.

In the present case, it seems that the Appellant is more concerned on the application of PSC regulation 38, as Appellant refers to him being refused to be assisted by a legal person or that documents were not given to him at the disciplinary committee

meeting. Such issues can be thrashed out before the Tribunal when the case comes for Hearing.

The appeal will be heard on its merits, bearing in mind the Tribunal's ruling.