LR 09 of 2019

If the Representative of the Respondent declares before the Tribunal that it would no longer resist the appeal, it cannot thereafter change its stand as this amounts to an "*aveu judiciaire*" under article 1536 of the Civil Code. It cannot be retracted unless there has been a mistake based on facts.

The Appellant who is employed as MAMI in the GG Department, was challenging the decision of the Respondent to take disciplinary action against him under Regulation 42(1)(a)(i) of the Public Service Commission (PSC) Regulations 1967, as subsequently amended, for stoppage of his next increment for a period not exceeding one year. It is to be noted that it was the Head of the GG who administered the disciplinary action against the Appellant acting under delegated powers.

He denied all charges levelled against him by the Respondent in his Grounds of Appeal. The case was called proforma for the first time on the…. The State Attorney representing the Respondent stated before the Tribunal that the Respondent would no longer resist the Appeal.

Consequently, the Tribunal invited the Respondent to liaise with the Head of the GG so that necessary steps to review their decision would be taken and that the Appellant would not be subjected to any disciplinary action failing which the Tribunal would allow the Appeal.

On the 4th September 2019, a representative of the Head of the GG, stated before the Tribunal that the Head of the GG would maintain its decision despite the fact that the Respondent had signified its intention not to resist the Appeal in the previous proceedings. Attorney appearing for Respondent then stated that she would resist the Appeal and that she would file a Statement of Defence on behalf of the Respondent. Attorney appearing for the Appellant objected to the stand of the Respondent on the ground that the previous admission of the Respondent was tantamount to an "*aveu judiciaire*". The matter was subsequently fixed for Argument.

Attorney representing the Appellant, relied on Article 1356 of the Civil Code which provides as follows:

> "*L'aveu judiciaire est la déclaration que fait en justice la partie ou son fondé de pouvoir spécial.*
>
> *Il fait pleine foi contre celui qui l'a fait.*
>
> *Il ne peut être divisé contre lui.*
>
> *Il ne peut être révoqué, à moins qu'on ne prouve qu'il a été la suite d'une erreur de fait. Il ne pourrait être révoqué sous prétexte d'une erreur de droit.*"

He supported his arguments by producing to the Tribunal a detailed definition of Article 1356 as explained in *Encyclopedie Dalloz* referring to *Preuve* at para 101 which reads as follows:

"*L'aveu judiciaire consiste en une déclaration faite par une partie ou son représentant devant le juge compétent. Cet aveu peut se réaliser par une partie lors de sa comparution personnel devant le juge, ou par son avocat dans ses écritures lorsque la procédure est écrite, ou lors des plaidoiries, seulement lorsque la procédure est orale".* "*Cet aveu n'est pas susceptible de division, c'est-à-dire que son contenu ne peut pas être partiellement évincé*".

He argued that the admission of the Respondent cannot be revoked except if there had been an error of fact. He relied on the following Case Law where the issue of "*aveu judiciaire*" were dealt with namely **Caudan Development Limited V Gooljaury D. 2017 SCJ 205**, in which the Supreme Court confirms that such an *aveu* can only be retracted if they were made as a result of a mistake; **Moutou A.A.L. V Mooneeram A. 2017 SCJ 196** when the Supreme Court confirmed the principle of the only possibility to revoke an *aveu* if there has been an "*erreur de fait*"; **Jamodhee S.S V Jharia D.K 2013 SCJ 148** which confirms that *an aveu* is "*conclusive evidence against the maker*"; **A.N. Boodhoo V Lamco International Insurance Ltd 2015 SCJ 13**. In this case it was held that an *aveu judiciaire should not be one in a general sense*" but "*be clear and unequivocal*" and **Beeharry V Dilmahomed 1987 MR 118** again confirming the principle of "*error of fact*".

He also stated that once an admission is made it cannot be retracted and that the Respondent had retracted its admission just to change its defence.

Counsel for Respondent argued that the admission cannot constitute an "*aveu judiciaire*" as no Statement of Defence (SOD) was filed and that it was made as a stand at proforma stage. She produced two case laws namely **Beresford Trust & Corporate Services Limited v Graham Dalton SCR 103542**. In that case the Supreme Court held that "*To constitute an "aveu*"… *it should be an admission of fact averred by its opponent which the plaintiff would be conceding to or expressing agreement with*" and **Dharnabalen Annasamy v Ashish Mulloo 2014 SCJ 214** in which the Supreme Court again confirmed the principle of "*erreur de fait*". She added that the "*aveu judiciaire*" would have been constituted if there had been a motion to amend the SOD, which was not the case in the present matter.

In reply to Counsel for Respondent's submission, Attorney for Appellant submitted that the Respondent had not shown that the change in its stand was due to an error of fact and therefore Article 1356 should be applied. The Tribunal requested further clarification on this issue from Counsel for Respondent but the latter preferred to leave it to the representative of Respondent to provide the required information. The representative of the Respondent said under oath that Respondent wrote to the Head of the GG requesting her to take remedial action but instead the she decided to maintain the sanction against the Appellant. This reply was in line with the statement made by the representative of the Head of the GG before the Tribunal at the previous sitting.

The Tribunal noted that the stand of the Head of the GG was very disturbing in that she should be aware that only the Respondent can take disciplinary action and delegating its power to her did not imply that she could go against the decision of the Respondent. In any case, the appeal was against the Respondent and she was merely a witness before the Tribunal. As regards the objections raised by the Appellant, the Tribunal rules that it was properly taken and that the Respondent had not shown that the admission was due to an error of fact which is the only reason to retract an admission. The fact that it was made while Respondent was giving its stand to the Tribunal, and not in a SOD, is irrelevant as it was made by a legal representative of Respondent during proceedings

before the Tribunal. The Tribunal could have allowed the appeal there and then but preferred to use its powers conferred upon it under S. 8(4)(c) of the Public Bodies Appeal Tribunal Act 2008 in order to ensure that the rights of the Appellant were safeguarded. Section 8(4)(c) is being reproduced for ease of reference:

Section 8(4)(c) provides that: "*where appropriate, remit the matter, subject to such conditions as it may determine, to the parties for further consideration by them with a view to settling the matter; or…"*

The Respondent, having failed to do so and instead having decided to change its stand, the Tribunal agrees that there was an "*aveu judiciaire*" which could not be retracted as it was not based on an "*erreur de fait*". It was merely a change of mind of the Head of the GG and not even of Respondent itself in truth and in fact.

The Tribunal therefore, allows the appeal and quashes the decision of Respondent to impose the sanction against the Appellant.