PUBLIC SERVICE APPEALS BOARD
YAREN

Appeal No 1/2019

IN THE MATTER of the Public Service Act 2016

AND IN THE MATTER of an Appeal to the Public Service Appeals Board pursuant to Section 108 of the Public Service Act, 2016

BETWEEN: RENATA BERNICKE **APPELLANT**

AND: CHIEF SECRETARY **RESPONDENT**

Coram : **F Jitoko CJ (Chair), E Capelle and C Reiyetsi**
For the Appellant: **David Aingimea**
For the Respondent: **Bhavna Narayan**
Date of Hearing: **6 March 2020**

CATCHWORDS:

Appeal against disciplinary action – Public Service Act 2016 – Disciplinary offences –Right and Grounds of Appeal - Section 108 Public Service Act 2016 – Regulations 16 and 7 and Schedule of Public Service (Disciplinary Procedures) Regulations 2016 – Regulation 12 Serious misconduct – Penalties – Public Service Values and Code of Conduct – Sections 7 and 8 of the Act

DECISION

On 23th July 2018, the appellant was formally charged by the then acting Secretary for Justice and Border Control, Sasikumar Paravanoor, with three (3) counts of serious misconduct contrary to regulation 7 and the Schedule of the Public Service (Disciplinary Procedures) Regulations 2016 (the Regulations). The particulars of the charges were as follows:

"Count 1

RENATA BERNICKE, being a person employed by the Immigration Section, Department of Justice & Border Control, on 22nd July, 2018 at the Nauru Airport Building, committed the offence of serious misconduct by harassing your work colleagues and boarding passengers by use of abusive and indecent words or conduct.

Count 2

RENATA BERNICKE, being a person employed by the Immigration Section, Department of Justice & Border Control, on 22th July, 2018 at the Nauru Airport Building, committed the offence of serious misconduct by attending to work without uniform and under the influence of alcohol.

Count 3

RENATA BERNICKE, being a person employed by the Immigration Section, Department of Justice & Border Control, on 22nd July, 2018, at the Nauru Airport Building, committed the offence of serious misconduct by slamming the door on Mrs Pauline Oppenheimer and assaulting her."

The acting Secretary for Justice, in accordance with regulation 7(4), having determined that the appellant had committed acts that amounted to serious misconducts under the Schedule to the Regulations, referred the matter to the Chief Secretary together with the charges and the report, including the complaints of the Director of Immigration and his officers as well as witness statements.

The appellant was served with the alleged breaches and the charges on the same day, 23rd July 2018. On 27th July 2018 the appellant denied all the charges in her letter addressed to the Chief Secretary. This response is in accordance with regulation 8(5).

Although the acting Secretary for Justice had purported to suspend the appellant in his Notice of the charges of 23rd July, the power to suspend is vested solely with the Chief Secretary under regulation 11, which powers he duly exercised on 27th July 2018. The Chief Secretary's suspension notice stated that the appellant was "suspended without pay for one (1) month." However, on 16th August, the Chief Secretary further directed that the appellant be suspended "without pay pending the final decision of the Committee."

The Chief Secretary, pursuant to his powers under regulation 8(1), convened the Committee on 14th August 2018. On 16th August, the Chief Secretary, on behalf of the Committee, decided that the charges against the appellant be amended, specifically in respect of Charge 3,

and the appellant was informed accordingly. The appellant gave her written reply to the Committee disputing the charges, on 22nd August 2018.

The Committee duly met on 24th August, and deliberated on all the three (3) charged laid against the appellant, and its findings read to the appellant, and later conveyed in its Decision of 5th of September 2018 are as follows:

"Finding

36. The Committee finds Renata:-

(1) guilty of having committed a serious misconduct on 22nd July, 2018 in the form of *harassment of her work colleagues and boarding passengers by the use of abusive or indecent words or conduct.*

(2) guilty of having committed a serious misconduct on 22nd July, 2018 by attending to work while under the influence of alcohol and without uniform.

(3) guilty of having committed a serious misconduct on 22nd July, 2018 by slamming the door on Mrs Pauline Oppenheimer and assaulting her."

In a letter dated 7th September 2018 the Chief Secretary on behalf of the Committee, informed the appellant of the penalty imposed by the Committee. In accordance with regulation 12(h) the appellant had five (5) days from the receipt of the letter, to voluntarily resign from the Immigration Section of the Department of Justice and Border Control. The appellant was served on the same day and acknowledged in writing by the appellant, and the 5 days expired on 12th September.

On 11th September.2018 the appellant formally filed her Notice of Appeal in a letter addressed to the Chief Secretary setting out six (6) grounds of appeal.

A Penalty Notice was again issued from the office of the Chief Secretary on 12th September following mitigation, with the Decision of the Committee at paragraph 7 as follows:

(1) You are to resign from your employment at the immigration section of the Department of Justice and Border Control (DJBC).
(2) You are to tender your resignation letter within five days after your penalty was delivered to you.
(3) If you failed to tender your resignation after the five days, your employment at the immigration section of the DJBC shall be terminated forthwith."

In the Board's view, this Notice was redundant as it merely restated the earlier decision made by the Committee conveyed to and acknowledged by, the appellant.
On 12 September, after the expiry of the 5 days deadline for the appellant to voluntarily resign, the Chief Secretary by letter, terminated the appellant's employment with the Immigration Section of the Department of Justice and Border Control.

Background

On Sunday 22nd July 2018, Immigration Officers (IO) Elvin Brechtefeld, Amuson Bernicke and Stanton Dame were on duty in the arrival area of the Nauru International airport, awaiting the disembarkation of passengers from an arriving Air Nauru flight.

At around 12.20pm the appellant, Senior Immigration Officer Renata Bernicke, already late for work, arrived and entered the arrival area. According to the three IOs, the appellant was improperly dressed in that she was not in her work uniform, she was without shoes, without her Immigration Department ID, and in their collective view, she was "under the influence of alcohol" and/or "clearly intoxicated".

In the arrival area, according to the three IOs, the appellant began to rail against IO Stanton, and in the process used obscene language directed at him, uttering the words such as "asshole" and "dicks". When IO Stanton told her, she should not issue the official stamp because of her condition, she replied, "You are not my superior". The appellant then turned to IO Elvin and told him that IO Stanton was not fit to be an immigration officer; that he was not to be trusted and did not deserve any respect.

Upon the arrival of an Air Nauru flight, the appellant went upstairs to the departure area, where two other IOs were stationed namely, OI Jeziel and IO Greg. There are no direct evidence from the two IOs as to the conduct of the appellant in the departure area, but according to IO Elvin, when he called IO Greg upstairs to come down to arrival to help out, he was told that the appellant had reassured him that everything was under control downstairs. This was not correct for according to IO Elvin, he had to double around doing work for two people. Later IO Greg confirmed to IO Elvin that the appellant had caused trouble with an airport security personnel, "swearing" at him as he tried to reason with her.

According to the Report by IO Elvin, IOs Greg and Jeziel told him that the appellant had "physically assaulted" one Mrs Pauline Oppenheimer who, the appellant had determined, had arrived late for the preparation for the boarding time for the Brisbane flight. IO Stanton said that he witnessed the appellant assaulting Mrs Oppenheimer and also insulting another fellow traveller Brian Denitage who was a part of Minister Shadlog Benicke's travelling entourage. IO Amuson was told by one of the security guards that the appellant "assaulted Mrs Oppenheimer by pushing her chest by pushing her chest to drive her out as she slammed the door shut in her face."

It was left to Mrs Oppenheimer herself to explain the incident in her letter to the Secretary for Justice and Border Control, dated 10 August 2018.

In her letter, which the Board accepts as relevant and direct evidence, Mrs Oppenheimer said she checked in at the Air Nauru counter for her flight to Brisbane at around 11 am on Sunday 22nd July 2018. The airline attendant at the counter confirmed that all passengers were required to be ready to board by 1.35pm. The time refers to when all passengers are ensconced in the departure lounge, waiting for boarding call all having passed through immigration and border control scrutinies.

According to Mrs Oppenheimer, she reported upstairs and joined a somewhat long queue to immigration and border control check points and when she finally arrived at the immigration desk, the appellant who was attending asked where she was going. She replied, "Brisbane" to which the appellant replied, "Sorry Brisbane flight is closed." Mrs Oppenheimer added:

"I started to tell her that I was not late, and I was told that "upstairs" will be closed at 135pm at the time. She then said, "Brisbane flight is closed" and abruptly closed the door on me."

Mrs Oppenheimer then returned downstairs in the company of Brian Denitage, and both were asked by the airlines staff to surrender their boarding passes for their luggage to be unloaded.

However, following some frantic phone calls and contacts with Government senior officials, Mrs Oppenheimer and the rest of the airline passengers, were allowed to board the aircraft using the VIP lounge and access downstairs, the upstairs access having been closed by the appellant earlier.

According to the reports filed by IO Elvin and IO Amuson and confirmed by Mrs Oppenheimer, all the remaining passengers who were shut out by the action of the appellant upstairs, were finally allowed to embark the plane through the VIP lounge access downstairs.

Public Service Disciplinary Procedures

Upon being informed of the appellant's alleged misconduct through the Report filed by IO Elvin, Rajeev Keerthiyil, Director of Immigration on 23rd July 2018, submitted the Report, with his views, to acting Secretary for Justice and Boarder Control, Sasikumar Paravanoor. In the opinion of the Director, the appellant's alleged misconduct amounted to a case of serious misconduct under Regulation 7 and recommended that the acting Secretary, after reviewing the Report may wish to refer the matter to the Chief Secretary for his decision.

On the same day, 23rd July acting Secretary for Justice under cover of his Memorandum, submitted both the IO Elvin's and the Director of Immigration's Reports to the Chief Secretary. Also sent by the acting Secretary on even date, were the charges of three counts of serious misconduct as set out above, in accordance with regulation 7(4).

In the Board's view, all the procedural requirements set out under both the Act and the Regulations before the Committee was convened by the Chief Secretary under regulation 8 were followed and its deliberations were in accordance with the law.

It is the conclusion of the Committee, which is encapsulated in its Decision of 12th September, that is the subject of this appeal by the appellant.

Appellant's Grounds of Appeal

These are set out in the appellant's letter to the Chief Secretary dated 11 September 2018 and may be summarised as follows:

(1) That the Committee's decision of 5 September 2018 in finding the appellant guilty of 3 counts of serious misconduct was wrong in principle and in law
(2) That the Committee erred in fact and in law by failing to take into consideration the powers of the appellant under the immigration law to stop any person from entry when entry is closed
(3) That the Committee erred in fact and in law in failing to take into account the absence of police report or statements who attended the scene
(4) That the Committee erred in fact and in law when it found the appellant was under the influence of alcohol without proof of proper test including the breathalyser test
(5) That the penalty imposed on the appellant by the Committee was harsh and excessive

Counsel for the appellant withdrew ground (2) when he began his submission.

In respect of the other grounds, counsel emphasised the following matters:

(i) Allegation of the appellant being intoxicated or drunk are unsubstantiated as there are no police reports but reliance only on opinions of colleagues

(ii) Equally the allegation of assault in the report by IO Elvin is as reported to him by others and only IO Stanton said he "witnessed" the assault on Mrs Oppenheimer

(iii) Mrs Oppenheimer's own testimony in her letter to the Secretary for Justice clarified that the appellant had not physically assaulted her neither was she felt threatened by the appellant's actions

(iv) The police had attended to the incident and yet no report is produced before the Committee in its deliberation

(v) The penalty is harsh and excessive given the following mitigating factors:
   (a) That this was the first time the appellant as a public servant was charged with offences under the Regulations
   (b) That the appellant had served for 25 years with the Government, beginning when she was only 15 years old
   (c) That the appellant holds a senior position in the Department as a Senior Immigration Officer
   (d) That in 2016 the appellant was named as the Department's Employee of the Year signifying her worth and role in the public service
   (e) The appellant has a young child to support
   (f) The appellant had apologised for her misconduct.

Respondents Arguments

Counsel for the respondent's reply to the grounds of appeal submitted by the appellant maybe summarised as follows:

As to ground (1), counsel submitted the ground is too general, vague and ambiguous. There are no references and in the particulars as to why the decision of the Committee was wrong in principle or in law. On the contrary, the Committee had in its procedures and deliberations complied fully with the rules of natural justice.

As to ground (3) the respondent submitted that the absence of any police report or statements was because there was no official report or complaint filed or made to the police by the Department. In any case, counsel submitted that this was a misconduct within the workplace and the witnesses were work colleagues and some members of the public. It was not a criminal matter that warranted the intervention of the police but something that easily could be handled by internal Department disciplinary action(s).

On ground (4), the absence of proof such as breathalyser test of the appellant being under the influence of alcohol while at work, counsel contended that the Committee was not bound by any legal requirement for breathalyser test or police intervention for alleged intoxication with alcohol of an employee in workplace. Breathalyser tests are specifically for offences under the Motor traffic Act 2014.

Whether the appellant was under the influence of alcohol while reporting for work on 22 July 2018 is a matter which the Committee can safely rely upon, without the strict requirements of the rule of evidence, on the observations and conclusion of witnesses to the events and actions of the appellant. The Committee was entitled in this regard to rely for guidance as

what amounts to intoxication by alcohol, to case law as it did, referring to *R v Ormsby [1954] NZLR 109.*

Finally ground (5) on the appellant's submission that the penalty imposed was "harsh and excessive" Respondent counsel argued that the nature and the circumstances from which the charges arose were very serious and taken together with the senior position the appellant occupied via a vis her colleagues, the sanctions imposed, were appropriate and within the range of penalties that may be imposed under the Act and the Regulations. The penalty of the appellant's termination of employment with the Immigration Section of the Department for Justice and Border Control was therefore not manifestly excessive.

As to the alleged assault on Mrs Oppenheimer, counsel referred to the Committee's amendment to the related charge to reflect the evidence given by Mrs Oppenheimer in that the appellant had not touched her or physically threatened her but merely slammed the door at her face. However, for someone to be charged in law for common assault, no physical contact is necessary. Just a threatening behaviour is enough.

Board's Consideration

The appellant's right to appeal is recognised in regulation 16 and provides as follows:

"16 Appeals

(1) Subject to the provision of the Act, an employee has the right to appeal to the Public Service Appeals Board against any decision of the Committee or the Chief Secretary made under these Regulations.
(2) The procedure for appeal is provided in the Act."

The grounds of appeal are set out under section 108(1)(b), (c) and (d) (iii) of the Act. The provision read:

"108. Grounds of appeal

(1) Subject to this Act, a public service employee is entitled to appeal against any of the following decisions:

(a) ...,

(b) a decision under this Act or regulations that the employee has committed any misconduct;

(c) any penalty imposed on the employee under this Act or regulations;

(d) a decision to:

(i) ...

(ii)...

(iii) terminate the employment of the employee. "

There is no question that the appellant has the right to appeal the decision of the Committee on the grounds exemplified in section 108 above.

The Board will examine each of the charges separately and in the light of the submissions by counsel.

The Committee as the respondent in this appeal considered the three (3) charges as offences deemed *serious misconducts* and identified in the Schedule to the Regulations as follows:

(i) *Harassment,* in respect of Count 1;
(ii) *While on duty being under the influence of an intoxicating, illegal, or unauthorised stupefying* drug, *including alcohol,* in respect of Count 2; and
(iii) *Assaulting or attempting to assault or threatening to assault another employee or other person while on duty,* in respect of Count 3.

Harassment

In respect of Count 1, the Committee deemed that the alleged use by the appellant of indecent and abusive language or words and her conduct to her colleagues and others, including "boarding passengers" if proven, constituted the offence of harassment under the Schedule.

The appellant, in both her responses in her letters of 27 July and 22 August to the Chief Secretary, denied her use of indecent words, language or conduct towards her work colleague IO Stanton and others including security officer Rickson and Jesco and passenger Mrs Pauline Oppenheimer. She however does admit that she used indecent language in her conversation with another female colleague and even then, it was not directed at her, but only as part of their conversation.

The Committee, after having considered the explanation and versions of the incident(s) from the appellant as well as the IOs Elvin, Amuson, and Stanton, believed the evidence of the three IOs in that the appellant had used indecent language or words and conduct towards her work colleague IO Stanton. Equally, the Committee found that the appellant was abusive in her conduct towards Rickson and Jesco and Mrs Oppenheimer.

In all, the Committee found the appellant's behaviour and conduct constitute the serious misconduct of harassment under the Schedule.

The Board has carefully considered the evidence before it. The evidence in the first Report by IO Elvin and co-signed by IOs Amuson and Stanton and then later independently collaborated by the filing of their own reports go into details, including words deemed abusive that were uttered by the appellant. Such details of what took place and actual words used, in the Board's view, could not have been fabricated by the three IOs.

In the circumstances, the Board is satisfied that the appellant, on the day in question, had used indecent languages or words towards IO Stanton and that furthermore she had made disparaging remarks belittling IO Stanton in her comments to IO Elvin.

The Board does not however agree with the Committee's finding of similar behaviour and use of abusive or indecent language or action allegedly perpetrated by the appellant against Mrs Oppenheimer nor against security officer Rickson or Jesco. It is clear from both the appellant's and Mrs Oppenheimer's evidence that the exchange between them were, while curt and somewhat abrupt, the Board did not find any evidence on use of indecent or abusive language or action on the part of the appellant against Mrs Oppenheimer. As for the kind and

colour of language that the appellant may have used against Rickson or Jesco, the Board will not rely on hearsay evidence to prove it or otherwise.

Does the use of indecent language or words by the appellant against IO Stanton as found by the Committee and confirmed by the Board, constitute harassment under the Schedule to the Regulations? What type of harassment amounts to serious misconduct? Neither the Act nor the Regulations define the term "harassment" and in the circumstance, it should be given its ordinary meaning.

In the ordinary meaning of the word, "harassment" is the act of systematic and or unwanted and annoying action or, using threatening or abusing or insulting words within the hearing of another person. Meriam-Webster dictionary defines "harassment" as an act "to create an unpleasant or hostile situation for especially by uninvited and unwelcome verbal or physical conduct."

In some jurisdictions, while harassment is not defined it nevertheless is a statutory offence as in the case under the Public Order Act 1986 of the United Kingdom. Section 5 provides:

"(1) A person is guilty of an offence if he/she:

(a) Uses threatening [or abusive] words or behaviour, or disorderly behaviour, or
(b) *Displays any writing, sign or any other visible representation which is threatening [or abusive],*

within the hearing or sight of a person likely to be caused harassment, alarm or distress."

In this case, did the behaviour of the appellant by using indecent language and obscene words such as "ass hole" and "dicks" against IO Stanton in the presence of other persons, and then belittling him by telling his colleague IO Elvin that IO Stanton was not to be trusted and respected, amount to harassment? It is in the Board's considered opinion, the actions of the appellant as described was abusive, insulting and distressing to IO Stanton especially within the hearing and sight of his colleagues and members of the public, amounted to harassment.

The Board concurs with the finding of the Committee in respect of Count 1, but only as it applies to the appellant's conduct towards IO Stanton.

On Duty and under the influence of Alcohol and without Uniform

The appellant conceded that she had turned up for work on 22 July 2018, without her uniform.

The issue of whether the appellant was under the influence of alcohol when she arrived at work is a question of fact.

The appellant, in both her 27 July and 22 August responses to the allegation of drunkenness, denied it saying that she did not drink on the day before coming to work, but had drank the day before and the fact that she woke up late for work near mid-day on Sunday 22 July, and rushed straight to work, she may have appeared dishevelled and could have made her looked like she was under the influence of liquor or alcohol. In support of the contention, the appellant referred to the police officers' reaction who arrived to impound the appellant's vehicle probably after someone had reported the disturbance to them. According to the

appellant, the officers were satisfied that she was not drunk, but they agreed that the appellant was "nursing a slight hangover."

All the three(3) IOs, Elvin, Stanton and Amuson in their reports, were in no doubt that, when the appellant arrived at work around 12.20pm on Sunday 22 July, 2018 at the arrival area of the Nauru International airport, she was under the influence of alcohol. She was not dressed properly, that is, not in her Immigration Department's uniform; she was not wearing any shoes; and she had only a pink T-shirt on. She did not wear her Department's Identity Card. According to the three IOs, as soon as the appellant entered the arrival area, she began abusing them and in particular IO Stanton after the latter had informed her that she was not allowed to "issue official stamps while in her condition." IO Elvin also agreed that no sooner had the appellant reached them at the arrival area, she "started to discriminate Officer Stanton using obscene languages and calling Officer Stanton unappropriate names in wording such as ass hole, dicks and many names." IO Amuson version is the same in that the appellant "behaved unprofessionally...accuse fellow colleague Stanton saying he is not fit to be an Immigration Officer and she called him names using vile and despicable languages."

Mrs Oppenheimer's reference in her letter to the Secretary for Justice of 10 August, on the appellant being under the influence of alcohol was only relating what was told to her by others and the Board will not give it weight.

The Committee in determining that influence of alcohol was the same as to be intoxicated by the same substance, relied on the test in the case of ***R v Ormsby [1945] NZLR 109*** in which the court said:

"A man is in a state of intoxication...when as a result of his consumption of intoxicating liquor, his physical and mental facilities, or his judgment, are appreciably and materially impaired in the conduct of the ordinary affairs or acts of daily life."

The Committee referred to the appellant's offensive and abusive conduct including the use of obscene and indecent language and words to her fellow workers and her abrupt and rude behaviour to the members of the public including Mrs Oppenheimer, that is sufficient proof that the appellant was not acting in a normal and sober manner. The Committee believed that the appellant was still intoxicated, notwithstanding that she said she had consumed alcohol the day before. Her conduct was still very much impaired by the effect and influence of alcohol.

The Board agrees with the Committee's conclusion that the appellant was still in a state of intoxication when she reported to work on 22 July. All the evidence from her co-workers and other witnesses point to someone who was acting erratically and abnormally in her behaviour and action. The only plausible explanation before the Board is the unanimous belief of her colleagues that the appellant was under the influence of liquor. The appellant herself concedes that she was carrying a "hangover", which is a jargon to describe the unpleasant physical and psychological symptom occurring when the intoxicating effect of alcohol begins to wear off in the morning following a night of heavy drinking. In the ordinary understanding of the term "under the influence of alcohol" is often used to describe a state of intoxication by alcohol that is often manifested itself in boisterous and offensive conduct.

The submission by the appellant of the absence of a police report and equally the absence of alcohol test or breathalyser test is not a legal requirement in these proceedings.

The appellant's explanation for her not appearing in her uniform is not an acceptable reason or excuse. Equally, the absence of her ID card and shoes cannot be condoned as acceptable behaviour from someone who is a senior employee of the Department.

The Board concurs with the finding of the Committee that the appellant was under the influence of alcohol when she arrived and started her work at 12.20pm on Sunday 22 July 2018. The appellant is guilty of Count 2 of the charge of serious misconduct.

Assault or attempting to assault or threatening to assault

The charge under Count 3 is that the appellant had committed an offence of misconduct by slamming the door on Mrs Oppenheimer and assaulting her." The Committee relied firstly the evidence of IO Stanton who alleges that he witnessed the appellant pushing Mrs Oppenheimer in the chest and slamming the door shut on her. IOs Amuson and Elvin only related the "assault" by the appellant on Mrs Oppenheimer, as told to them by others.

The appellant denies ever touching Mrs Oppenheimer, let alone pushing her in the chest. She also denied "slamming the door" on her. She merely closed the door in her face.

Mrs Oppenheimer's letter to the Secretary for Justice dated 10 August 2018 described her meeting with the appellant as very brief with exchange of words and ended with the appellant closing the door on her. In her follow up email communication of 17 August to the Justice Department, Mrs Oppenheimer clarified that:

"Ms Renata did not touch me push me or assault me in any way. At the time I was very shaken up as you can imagine. It could have been that I said that I felt like I was "pushed"out, as that was the feeling I got when Ms Bernicke abruptly shut the door on me. Yes she was rude to me because as I was trying to talk to her she did not want to listen to me and showed no compassion at all."

It is clear from Mrs Oppenheimer's two statements that the appellant at no time, pushed Mrs Oppenheimer in her chest out before she closed the door on her. This is notwithstanding the statements by IOs Stanton, Elvin and Amuson.

However, as the Committee has correctly pointed out, there need not be actual physical contact between the perpetrator and the victim for an assault to be committed. The Committee was guided in this regard by the case of ***Edwards v Police (SA) (1998) 71 SASR 493***.All that is required is the fear raised in the mind of the victim of immediate violence against him/her and the fear of unlawful physical contact.

Section 78 of our Crimes Act 2016 defines "common assault" in the similar fashion, as in ***Edwards*** case. Section 78 states:

78 Common assault

(1) A person (the defendant) commits an offence if:

(a) the defendant intentionally:

(i) engages in conduct that results in a direct or indirect application of force to another person; or

(ii) makes physical contact (directly or indirectly) with another person knowing that the person might reasonably object to the contact in the circumstances (whether or not the person was aware of the contact at that time); or

(iii)makes a threat to another person of a direct or indirect application of force that:

(A) the defendant intends the other person to apprehend; and
(B) the other person believes on reasonable grounds is able to be carried out by the defendant; and
(c) the other person does not consent, or consents because of a dishonest representation by the defendant, to the conduct, contact or threat. "

The Board can, as indeed the Committee should, take cognizance of the law including case law to help in the interpretation of any form of activities and/or actions that are being examined or assessed as acts of misconduct in the ordinary course of one's daily activities.

There was no physical contact between the appellant and Mrs Oppenheimer. The issue then is whether or not the appellant had acted or behaved in such a way as to reasonably cause anxiety and apprehension to Mrs Oppenheimer that some physical force was going to be carried out by the appellant to her. There must be a reasonable ground for Mrs Oppenheimer to believe that some physical contact was going to ensue directly resulting from the verbal altercation between her and the appellant.

The Board having considered the clarification submitted by Mrs Oppenheimer in her email communication to the Department of Justice of 17 August 2018, as reproduced above, is unanimously of the view that the appellant did not assault Mrs Oppenheimer. The verbal exchange between them and resulted in the appellant shutting or slamming the door in Mrs Oppenheimer's face, whilst it caused dismay to her that the appellant was plainly being rude, she did not at any time believe that she was in danger of being assaulted by the appellant. Mrs Oppenheimer herself admitted that the appellant "did not touch me, push me or assault me in any way."

Even if the appellant had slammed the door in Mrs Oppenheimer's face, which the appellant denies, there is no evidence that that single act had caused fear and anxiety to Mrs Oppenheimer that some threat of force or physical contact was going to be made by the appellant.

In all the circumstances, the Board finds that the appellant is not guilty on Count 3 of the charge of assault or attempted assault or threat to assault.

Deemed Resignation or Termination

At the outset of his submission, counsel for the appellant argued that his client, as at the day of the hearing, was still employed by the Government, notwithstanding the notices of termination by the letters of the Chief Secretary dated 7th and 12th September 2018 respectively. The 7th September letter gave the appellant 5 days to resign failing which, her services will be terminated. The 12th September letter informed the appellant that her employment has been terminated after she had failed to tender her voluntary resignation within the 5 days demanded.

In the appellant counsel's view, the fact that the appellant had not resigned as demanded by the Committee pursuant to regulation 12 (h) presumes that she is still in the employment of government. If her service was terminated, then the requirements of section 100 (2) of the Act has to be complied with. This was not done making the termination letter invalid.

Counsel for the respondent argued that the Chief Secretary's letter of 7th September was very clear on the issue that is, if the resignation letter was not received within 5 days, " the Chief Secretary will terminate your employment from the Immigration Section of the Department of Justice...."Counsel submitted that this provision is what is normally referred to as the "deemed resignation" provision in an employment agreement or contract. If the appellant, in this case, failed to give her voluntary resignation letter within the 5 days given, she is deemed to have resigned from the service. The Chief Secretary's 12 September letter of notice of termination was in pursuance of the deemed resignation of the appellant.

The Board has carefully considered the submissions of both counsel and while it is clear that voluntary resignation is also defined as a form of termination of employment under section 82 of the Act, the Committee had, the Board concedes, acted properly in terminating the appellant's employment. For the avoidance of doubt however, it would be advisable for the Committee, in a similar circumstance as of the appellant's, to terminate the service of an employee pursuant to section 82(a) of the Act rather than face the confusion it is likely to create if it purports to act under section 82(f).

Conclusion

In the light of the Board's careful examination of the charges laid against the appellant, and taking into account the deliberation of the Committee on the charges with the evidence available to it and, its findings and decision, the Board, having heard the submissions by both counsel, and in its own deliberation, finds in respect of the grounds of appeal filed by the appellant, as follows:

Ground 1 – That the decision of the Committee was wrong in principle and in law

The Board agrees with the respondent that this ground is vague, lacking in its particulars and lacking in its substance.

This ground is dismissed.

Ground 2 – The appellant had powers under the immigration laws to act as she did

This Ground was withdrawn by the appellant.

Ground 3 – The absence of any police report or statements of the incident

There was no evidence produced to prove that the police had been called by a member of the Immigration Section for the police to intervene. There was only a passing reference of the police being on the scene, but not at the instigation of the Department. There is no police report simply because the police were not involved.

This ground is dismissed.

Ground 4 – The absence of a formal proof of the appellant's intoxication by alcohol while on duty

The Board agrees with the respondent's submission that there was no legal requirement for the appellant to be tested with the use of breathalyser, to ascertain whether the appellant was intoxicated or under the influence of alcohol while on duty. For the purposes of disciplinary proceedings under the Act for misconduct in workplace including being intoxicated with alcohol or under the influence of alcohol, the Committee is entitled to rely on evidence of witnesses who observed the appellant's conduct and behaviour.

This ground is dismissed.

Ground 5 – The penalty imposed was harsh and excessive

The Board agrees with Counsel for the appellant that the punishment was harsh and excessive for the following reasons.

The Board has already, in respect of the 3 Counts of the charges determined:

1. On the amended Count 1, the appellant is guilty of harassment but only in respect of the appellant's action and behaviour to IO Stanton. There is insufficient evidence to support the same charge against the appellant in her behaviour to either Mrs Oppenheimer or Mr Brian Denitage.
2. On Count 2, the Board finds the appellant guilty of being under the influence of liquor while on duty or at work.
3. On Count 3, the Board finds the appellant not guilty of assaulting or attempting to assault or threatening to assault another person while she was on duty.

Given that the appellant is only guilty of two counts instead of three and that the charge of harassment was found only in respect of IO Stanton, the Board agrees that the termination of the appellant's employment for committing the two serious misconducts was in the circumstances unduly harsh. This is especially so given the extenuating factors that counsel for the appellant submitted in mitigation.

Important mitigating considerations are as follows. First, the appellant had been in in the Government of Nauru's public service from aged 15 and has continuously served it for 25 years. During the 25 years of service, the appellant has not once been charged with any misconducts that would have resulted in disciplinary proceedings brought against her. The appellant was, at the time of termination, serving as Senior Immigration Officer, in recognition of her seniority and experience. In 2016, she was named the Employee of the Year for Immigration Section of the Department of Justice and Border Control, a much vaunted award, acknowledging her valuable contribution to the Section, the Department and the country. The appellant has a young child to look after. Finally, the appellant had apologised for her misconducts before the Committee.

In all the circumstances as discussed above, the Board is unanimously of the view that the termination of the appellant's employment as punishment for her misconducts was not only harsh but manifestly excessive.

Public Service Values and Code of Conduct

Finally, it is worth noting and perhaps needs emphasising for the benefit of the Secretaries and Heads of Departments, that the Schedule to the Regulations that classifies offences that may be deemed either a Misconduct or constitutes a Serious Misconduct are not exhaustive. Regulation 4(1) specifically stipulates that the different classifications in the Schedule are not limited to those in the list. Regulation 4 (2) is important in this regard, and to be born in mind when one is framing charges under misconducts. It states:

"(2) An employee who breaches the Code of Conduct in the Act will be dealt with under these Regulations."

The Code of Conduct under the Act is set out in section 8 and is all-embracing in scope and reach in prescribing the acceptable standard of conduct, action and /or behaviour expected of a Nauru public servant. For example, in respect of the types of misconduct alleged to have been committed by the appellant in this instance, would it not have been more appropriate to include or add the requirements of section **8(c)** requiring every public employee to ***"treat everyone with respect and courtesy...."***, or section **8(l)** that the public employee, ***"at all times behave in a way that upholds the public service values and integrity and good reputation of the public service?"***

The Code of Conduct in section 8 in effect is the manifestation of the Public Service Values that are defined under section 7 of the Act. Both these sections are intended to work *in tandem* for the provision of good and acceptable public service conduct to the people of Nauru by its public servants.

Counsel for the respondent referred to both these provisions in her submission and agreed with the Board that the Code would have assisted the Committee in broadening the frames of the charges.

Decision of the Board

1. The appeal is allowed
2. The Committee's decision to terminate the employment of the appellant, Ms Renata Bernicke, is set aside
3. The appellant is hereby reinstated with effect from today 13th March 2020, in the position of Senior Immigration Officer but with loss of seniority, in accordance with section 113(2) of the Public Service Act 2016
4. In accordance with section 113(3) of the Act, the appellant is deemed to have been on leave without pay from the date of termination, 12 September 2018, until the date of reinstatement
5. Pursuant to section 114(2) of the Act, the Board orders that the appellant be paid six (6) months' salary in compensation for the loss of her salary.

Orders

1. The appellant writes a letter, within 7 days, addressed to IO Stanton, apologising for her behaviour including her use of foul and indecent words and language against him on the day the offences were committed
2. That the appellant likewise within 7 days, writes individual letters to Mrs Pauline Oppenheimer and Mr Brian Denitage, apologising for her discourteous behaviour in her actions against them on 22 July 2018, which actions the Board found unbecoming and contrary to the public service Code of Conduct
3. The appellant is to serve copies of all three letters to the Offices of the Chief Secretary, the Secretary for Justice and Border Control, the Director of Immigration and the Secretary of the Public Service Appeals Board.

The Board makes no orders as to costs.

Dated this 13th day of March 2020.

Elkana Capelle
Member

Filimone Jitoko
Chief Justice
Chair, Public Service
Appeals Board

Camalus Reiyetsi
Member