

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-04582

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER THE PROVISIONS OF THE JUDICIAL REVIEW ACT CHAP. 7:08

AND

IN THE MATTER OF THE FAILURE OF THE DEFENDANT TO RE-INSTATE THE CLAIMANT TO HER SUBSTANTIVE POST OF CHIEF EXECUTIVE OFFICER OF THE SANGRE GRANDE REGIONAL CORPORATION AND THE APPOINTMENT OF AN INVESTIGATING OFFICER BY THE DEFENDANT DATED THE 27TH DAY OF SEPTEMBER, 2017 TO INVESTIGATE ALLEGATIONS OF MISCONDUCT AGAINST THE CLAIMANT IN BREACH OF THE RULES OF NATURAL JUSTICE

BETWEEN

ANGELA GUERRA

Claimant

AND

PUBLIC SERVICE COMMISSION

Defendant

Before The Honourable Madam Justice Margaret Y. Mohammed

Dated the 16th July, 2018

APPEARANCES:

Mr. Kemrajh Harrikisson S.C. and Ms. Giselle Ganness Attorneys at law for the Claimant.

Ms. Tinuke Gibbons-Glenn; Ms. Sasha Sukhram instructed by Ms. Svetlana Dass and Ms. Amrita Ramsook Attorneys at law for the Defendant.

JUDGMENT

1. This judicial review matter concerns the ability of the Defendant, the Public Service Commission (“the PSC”) to deal with acts of misconduct or indiscipline of public officers where it has delegated its powers to do so.

2. The role of the Court in judicial review matters is well settled. The courts have the responsibility of ensuring that the public authority in question does not misuse its powers or exceed its limits. The extent of the courts’ responsibility in relation to a particular exercise of power by a public authority depends on the particular circumstances, including the nature of the public authority in question, the type of power being exercised, the process by which it is exercised and the extent which the power of the public authority has limits or purposes which the courts can identify and adjudicate on¹. It is a supervisory and not an appellate jurisdiction. Michael Fordham in **Fordham’s Judicial Review Handbook (3rd edition)** paragraph 13.7 describes the approach to be taken by the Court as:

“In general, the Court looks at the matter under review from the point of view of the decision-maker whose approach is sought to be impugned. This means that judicial review is normally directed solely to that material which was before the decision-maker.”

3. The basis when the Court can intervene in judicial review matters was described in **R Crown Court at Manchester ex p. Mc Donald**² as:

“It is important to remember always that this is judicial review of and not an appeal against the judge’s decision. We can only intervene if persuaded that his decision was perverse, or that there was some failure to have regard to material considerations or that account was taken of immaterial consideration... Still less can we be persuaded by arguments that the judge should have reached a different conclusion because he should have attached more weight to one rather than another factor.”

¹ AXA General Insurance Ltd. v. HM Advocate [2011] UKSC 46

² [1999] 1 WLR 841

4. The facts in this matter are contained in the affidavits of Ms. Angela Guerra filed on the 18th January 2018 and her supplemental affidavit filed on the 2nd March 2018 on her behalf. On behalf of the PSC are the affidavits of Coomarie Gooblasingh, the Acting Deputy Director of Personnel Administration, Service Commissions Department filed on the 28th March 2018 (“the principal Gooblasingh affidavit”), the affidavit of Marcia London-McKellar also filed on the 28th March 2018 (“the London-McKellar affidavit”) and the supplemental affidavit of Coomarie Gooblasingh filed on the 16th April 2018 (“the supplemental Gooblasingh affidavit”).

The Undisputed Facts

5. It was common ground that at the material time the Claimant (“Ms. Guerra”) was the Chief Executive Officer (“the CEO”) of the Sangre Grande Regional Corporation (“the SGRC”). By letters dated 28th June 2017 and 30th June 2017 Ms. Guerra was notified of allegations of misconduct made against her and that the PSC had appointed Ms. London-Mc Kellar as the Investigating Officer (“the Investigating Officer”) to inquire into said allegations. The letter dated the 28th June 2017 outlined the three allegations made against her, the Statement of Charge and the Particulars of each Allegation. The three allegations of misconduct made against Ms. Guerra concerned her conduct associated with the use of a Government vehicle to transport her to and from her residence to her workplace and vice versa without the approval of the Permanent Secretary and the misuse of Government funds for the payment of overtime and allowance of a daily rated driver. Ms. Guerra was also suspended pending the determination of the investigation.
6. By letter dated 27th September 2017 Ms. Guerra was informed that the appointment of the Investigating Officer was erroneously made pursuant to Regulation 84(B) of the **Public Service Commission Regulations** (“the PSCR”) and therefore, it cancelled the Investigating Officer’s appointment made on the 28th June 2017. However, the PSC re-appointed Ms. London-McKellar as the Investigating Officer pursuant to Regulation 87.
7. By letter dated 12th October 2017, Ms. Guerra was called upon to submit in writing to the Investigating Officer an explanation concerning the allegations made against her.

Ms. Guerra's case

8. According to Ms. Guerra she was not contacted by the Investigating Officer for three (3) months after the letter dated 28th June 2017. She made a request on the 18th day of September, 2017 to the PSC pursuant to section 13 of the **Freedom of Information Act**³ (“the FOIA request”) for access to the report of the Investigating Officer, statements and relevant documents forwarded to it by the Investigating Officer. The FOIA request was acknowledged by letter dated the 20th day of September, 2017 but she did not receive a substantive response.
9. After Ms. Guerra was invited by the Investigating Officer to submit to her in writing an explanation concerning the allegations of misconduct or indiscipline against her, Ms. Guerra's attorney at law wrote to the Investigating Officer on the 16th day of October, 2017 requesting disclosure of statements, documents and reports which were forwarded to the PSC by the Investigating Officer. The Investigating Officer responded by letter dated the 31st day of October, 2017 indicating that she was not in a position to disclose the information requested. Ms. Guerra's attorney at law also wrote to the PSC on the 23rd October 2017 seeking disclosure of the name and rank of the officer and/or person from whom the allegations of misconduct were made against her. Ms. Guerra's attorney at law again wrote the PSC on the 3rd day of November, 2017, requesting disclosure of Minutes of its meeting where it formed the opinion that Ms. Guerra should be suspended pursuant to Regulation 88(1) of the PSCR and the Minutes where it determined the manner in which the case against her is to be dealt with. The PSC did not disclose the information requested. However the PSC replied on the 22nd day of November, 2017 providing a Statement of Allegations of Misconduct against Ms. Guerra.
10. Based on these facts Ms. Guerra instituted the instant action seeking the following orders:
 - (a) A declaration that the appointment of the Investigating Officer by the PSC in the second letter dated the 27th September 2017 to investigate allegations of misconduct against Ms. Guerra is illegal, null and void and contrary to the principles of natural justice and in excess of jurisdiction.

³ Chapter 22:02

- (b) A declaration that the PSC acted with bad faith and was biased in appointing the Investigating Officer on the 27th day of September, 2017 to investigate allegations of misconduct against Ms. Guerra
- (c) An order for Certiorari to quash the decision of the PSC to appoint the Investigating Officer by virtue of appointment dated the 27th day of September, 2017 to investigate allegations of misconduct against Ms. Guerra.
- (d) A declaration that the suspension of Ms. Guerra from the 28th day of June, 2017 and continuing is illegal, null and void.
- (e) A declaration that the initial decision by the PSC to suspend Ms. Guerra from the 28th day of June, 2017 with the corresponding appointment of an Investigating Officer was and is a nullity and was made without jurisdiction.
- (f) A declaration that Ms. Guerra is entitled to the minutes of the meeting of the PSC where it formed the opinion that she should be suspended pursuant to Regulation 88(1) of the PSCR.
- (g) A declaration that Ms. Guerra is entitled to the Minutes of meeting of the PSC where it determined the manner in which the case against Ms. Guerra is to be dealt with.
- (h) A declaration that Ms. Guerra is entitled to a copy of entries in her Confidential Personal File relative to the alleged act of indiscipline.
- (i) An order that the PSC do supply to Ms. Guerra:
 - (a) Minutes of meeting of the PSC where it formed the opinion that Ms. Guerra should be suspended pursuant to Regulation 88(1) of the PSCR or any of the Regulations;
 - (b) Minutes of meeting of the PSC where it determined the manner in which the case against Ms. Guerra is to be dealt with.
 - (c) Copies of entries in Ms. Guerra's Confidential Personal File relative to the alleged act of indiscipline.
- (j) An order that the suspension of Ms. Guerra be lifted and that she be reinstated to her substantive post.
- (k) Damages.
- (l) Costs.
- (m) Interest.

(n) Such further and/or other reliefs as may be just in the circumstances.

11. Ms. Guerra's case is that the PSC acted illegally when it appointed the Investigating Officer since the allegations are to be determined in accordance with Regulation 85. She also contends that the PSC acted in contravention of the rules of natural justice since she was suspended without being afforded the opportunity to be heard. Her position is the PSC intends to arbitrarily exercise the powers conferred upon it by virtue of Regulation 87 which amounts to an abuse of power since the Regulation makes no reference to allegations of indiscipline and misconduct. Ms. Guerra further claims that she is unaware of any investigations undertaken by the Investigating Officer and that she was not called upon to offer an explanation to refute the allegations made against her. She requested documents and statements obtained by the Investigating Officer but has received none thus far. Ms. Guerra also requested Minutes from the meeting where the decision by the PSC was made to suspend her but has not received same. As such Ms. Guerra's position is that the PSC acted ultra vires by appointing the Investigating Officer, suspending her and failing to lift the suspension.

The PSC's response

12. The PSC opposes the claim. The PSC's position was that by memorandum dated 22nd March 2017 the Permanent Secretary, Ministry of Rural Development and Local Government ("the Permanent Secretary") informed it that an allegation of misconduct had been made to her against Ms. Guerra. The allegation concerned the use of the SGRC vehicle, contrary to the provisions outlined in Circular Memorandum OPM 16/3/10 dated 25th November, 2015. The Permanent Secretary recommended that the PSC appoint an investigating officer to enquire into the allegations made against Ms. Guerra.

13. The PSC at its statutory meeting on the 2nd day of May, 2017 considered the action which should be taken into the allegations of misconduct made against Ms. Guerra. It decided that:

- (a) The Permanent Secretary is to draft the allegation(s) of misconduct against Ms. Guerra and submit it to the PSC within seven (7) days of receipt of the PSC's decision;
- (b) Ms. Guerra was to be informed that the PSC noted the allegation of misconduct; and in light of the repute of the public service and the public interest, directed Ms. Guerra to

- cease to report for duty in accordance with the provision of Regulation 88 of the PSCR with effect from the date of receipt of notification of its decision, until further notice; and
- (c) Mrs. Marcia London-McKellar, Ag. Deputy Permanent Secretary, Ministry of Labour be appointed the Investigating Officer to enquire into the allegations of misconduct which were made against Ms. Guerra, in accordance with the provisions of Regulation 84(B) of the PSCR; and
- (d) The Permanent Secretary to the Prime Minister be informed of its decision at (a) and (c) above.
14. By letters dated the 22nd May, 2017, the Permanent Secretary and the Permanent Secretary to the Prime Minister were informed of the PSC's decision. By memorandum dated the 13th June, 2017, the Permanent Secretary submitted the draft allegations of misconduct to the PSC as directed.
15. According to the PSC, Ms. Guerra acknowledged receipt of the letter dated 28th June 2017 on the 6th July 2017. By letter dated 28th June, 2017, the Investigating Officer was informed of her appointment in the matter. On 7th September, 2017, the Investigating Officer wrote to the PSC requesting an extension of time to submit her report. However, before the PSC met to consider this request, Ms. Guerra through her attorney at law, made the FOIA request which was acknowledged on 20th September, 2017.
16. By letters dated 22nd November, 2017 and 19th January, 2018⁴ Ms. Guerra's attorney at law was informed that the FOIA request was granted in part and the Statement of Allegation of Misconduct was provided. Ms. Guerra's attorney at law was also informed that the Investigating Officer's Report was considered an internal working document and that it would be contrary to public interest to divulge it in accordance with section 27 (1) (a) and (b) of the Freedom of Information Act. The PSC also informed Ms. Guerra's attorney at law that since the disciplinary proceedings are ongoing the other documents requested could not be provided since it would be contrary to the public interest.

⁴ "CG 6" and "CG 7" of the principal Gooblasingh affidavit

17. At its meeting on 19th September, 2017 the PSC considered the Investigating Officer's request for an extension and decided to cancel her appointment as Investigating Officer since it had been erroneously made under Regulation 84(B) of the PSCR. Instead, she was appointed as Investigating Officer under Regulation 87 of the PSCR and given thirty (30) more days (upon receipt of the notification) to complete her investigation. By letter dated 27th September 2017, the Investigating Officer was notified of the PSC's decision. Prior to the cancellation of the initial appointment of the Investigating Officer, no action had been taken by her.
18. Ms. Guerra was informed of the reappointment of an Investigating Officer by letter dated 27th September, 2017.
19. On 11th October, 2017, the Investigating Officer contacted the Permanent Secretary, informing her that she had been appointed as Investigating Officer in the matter and she requested access to relevant personnel in the Ministry as she proceeded in this matter.
20. By letters, the Investigating Officer contacted three (3) witnesses who, based on her investigations, had direct knowledge of the alleged breaches. They were Mr. Sewak Baran, Police Inspector, Municipal Police Service, SGRC, Mr. Alvin Ramnanan, daily-rated driver, and the Permanent Secretary. They each were given timelines of seven (7) days by which written responses were to be submitted to the Investigating Officer and they each submitted responses. The Human Resources Officers in the Ministry provided the Investigating Officer with a letter dated 10th March, 2017 from Mr. Baran to the Permanent Secretary, copies of Pay Record Cards, Authority for overtime forms and vehicle logs relating to the investigation.
21. By letter dated 12th October, 2017 the Investigating Officer wrote to Ms. Guerra requesting her to submit in writing an explanation concerning the allegations brought against her. This explanation was due on or before the 19th October, 2017.
22. Ms. Guerra's attorneys responded to the Investigating Officer by letter dated 16th October, 2017 requesting an extension of twenty eight (28) days and disclosure of the name and rank of the person/officer who made the allegation against Ms. Guerra. The letter also complained of the PSC's non-compliance with the FOIA request.

23. The Investigating Officer responded to Ms. Guerra by letter dated 31st October 2017. On 9th November, 2017 the Investigating Officer submitted her Report to the PSC, which was the date it was due. On the following day, 10th November, 2017 the Investigating Officer forwarded to the PSC Ms. Guerra's explanation in response to the allegations of misconduct, for the PSC's consideration. The Investigating Officer indicated that Ms. Guerra's response was provided on the 10th November, 2017.
24. At the PSC's meeting on 16th January, 2018, it considered the Investigating Officer's Report and decided that disciplinary charges should be preferred against Ms. Guerra. The PSC also appointed Members on the Standing Panel Members of the Disciplinary Tribunal to hear the evidence and find the facts with respect to the disciplinary charged preferred.
25. The PSC's decision to prefer charges was issued to Ms. Guerra on the 27th March, 2018. She was also invited to submit any representations regarding the admission or denial of the disciplinary charges and any proposed interdiction from duty. According to the principal Gooblasingh affidavit, the delay in issuing the PSC's decision arose due to Ms. Guerra's file being used by various Units in their department in dealing with her FOIA request and in responding to the allegations she raised. The principal Gooblasingh affidavit also stated that once Ms. Guerra responds with her representations, the appointed Disciplinary Tribunal will hear the evidence and make its findings relating to the disciplinary charges.
26. Based on the aforesaid facts the PSC's position is that its decision to suspend Ms. Guerra was pursuant to Regulation 88 and it is not affected by the appointment of the Investigating Officer. Further, the Investigating Officer did not submit any report on the allegations of misconduct before she was re-appointed under Regulation 87. The PSC is entitled to correct errors of procedure which was done.
27. The PSC also contends that it was not correct that Ms. Guerra was never called upon to explain or refute the allegations of misconduct since Ms. Guerra admitted that she was asked by the Investigating Officer to submit her explanation to the allegations and she did so to the Investigating Officer on 10th November 2017, one day after the Investigating Officer had submitted her Report to the PSC.

28. The issues which arise for determination are:
- (a) Was the appointment of the Investigating Officer illegal, null and void?
 - (b) Was the appointment of the Investigating Officer contrary to the principles of natural justice?
 - (c) Did the PSC act with bad faith in appointing the Investigating Officer?
 - (d) Was the Investigating Officer biased when she conducted the investigation?
 - (e) Is Ms. Guerra's suspension illegal, null and void?
 - (f) Has the PSC breached its duty of candour?

Was the appointment of the Investigating Officer illegal, null and void?

29. The communication which the Permanent Secretary sent to the PSC dated the 22nd March 2017⁵ stated the following:

“An allegation of misconduct has been made against Ms Angela Guerra, Chief Executive Officer (Range 67) assigned to the Sangre Grande Regional Corporation.

It is alleged that Ms. Guerra is using the Corporation's vehicle contrary to the Circular Memorandum OPM 16/3/10 dated November 25, 2015 issued by the Permanent Secretary to the Prime Minister and Head of the Public Service.

The officer has disregarded the under-mentioned section of the Civil Service Regulations:

149 (2) Without prejudice to the generality of subregulation (1) an officer who-

- (b) willfully disobeys or disregards any lawful order made or given by any person having authority to make or give the order, commits an act of misconduct.

Ms. Guerra hold the office of Chief Executive Officer (Range 67) and as such it is recommended that your Department appoint an Investigating Officer to enquire into the allegation made against her. The relevant documents are attached.”

30. Ms. Guerra contends that the allegations of misconduct against her are contrary to Regulation 149 (1) (c), 149(2) (b) and 149(2) (g) of the Civil Service (Amendment) Regulations 1996. By Legal Notice No. 60

⁵ Exhibit “CG 1” of the principal Gooblasingh affidavit

of 1999 and the Public Service Commission (Delegation of Powers) (Amendment) Order of 2006 (“the 2006 Legal Notice”) the PSC delegated to Permanent Secretaries and Heads of Departments the power to hear and determine specified acts of misconduct and indiscipline in accordance with Regulation 85 of the PSCR. The delegation of this power is in accordance with section 127 of the Constitution⁶. Therefore the allegations of misconduct against Ms. Guerra must be dealt with the procedure stipulated in Regulation 85 of the PSCR. As such, she argues that the PSC had no jurisdiction to appoint an Investigating Officer under Regulation 84 (B) or Regulation 87 to appoint an Investigating Officer. Therefore the appointment was null and void.

31. The PSC’s position was that due to the seriousness of an allegation of misconduct made against a public officer the PSC reserved the right to deal with it in accordance with the relevant Regulation. In the instant case the relevant regulation was Regulation 87 which was followed because the Permanent Secretary was not involved in the investigation. It was also submitted that Regulation 85 pertains to minor infractions of the Civil Service Regulations which were outlined under the Second Schedule of the 2006 Legal Notice⁷. Ms. Guerra was charged with breach of Regulation 149 (2) (g) of the Civil Service Regulations⁸ and there is no mention of this regulation under the Second Schedule of the 2006 Legal Notice. It was also argued that the issue of overtime, use of the vehicle and the alleged abuse of authority/ financial authority brought the matter under Regulation 87.
32. The determination of this issue depends on whether the PSC retained a concurrent jurisdiction to deal with the allegations of misconduct as set out in the 2006 Legal Notice or whether the 2006 Legal Notice divested this power from the PSC and placed it *only* in the Permanent Secretary or Head of Department to the exclusion of the PSC.
33. If I am to agree with the position advocated by Ms. Guerra, it would mean that the PSC cannot exercise any function with respect to any allegation of misconduct or indiscipline against a public officer once it falls within the 2006 Legal Notice since this would only lie with the Permanent Secretary or the Head of Department.

⁶ The Constitution of the Republic of Trinidad and Tobago Chapter 1:01

⁷See the document annexed as ‘C.G.9’ in the principal Goolabsingh’s affidavit

⁸ See ‘C.G.12’ of the Supplemental Goolabsingh affidavit

34. I cannot agree with this position for the following reasons.

35. In **Joanne Bailey-Clarke v the Ombudsman of Trinidad and Tobago and the Public Service Commission**⁹ Kokaram J summarized the principles of Nelson J. A. in **Rodwell Murray v PSC**¹⁰ on the approach the Court is to take in examining the validity of the PSC's actions in judicial review matters. At paragraph 85 Kokaram J stated:

“85. Specifically dealing with the Service Commission Regulations, Nelson JA in the **Police Service Commission v Rodwell Murray** CA CIV 143/1994 laid down the following propositions:

- Failure to follow the regulation does not mean that the relevant Service Commission had acted illegally and also outside its jurisdiction.
- The real question to be asked is, what was the particular regulation designed to achieve.
- Was there substantial compliance given the objective of the regulations, whether all or any of the breaches were minor, whether any prejudice to the officer outweighed by the public interest.
- Even when there are breaches of the regulation the discretion vested by the Constitution in the Commission is not exorcised. A Commission's departure from or breach of the regulations does not by itself mean that the Commission acted without jurisdiction or in excess of jurisdiction. The Commission's powers are entirely discretionary and it may take into considerations the breaches when exercising its discretion.
- The Court will have regard to the importance and materiality of the regulation breached. Breach of a mandatory regulation did not automatically mean that the decision of the Commission was invalidated. That would be so only if there had been a breach of natural justice.”

36. The PSC is an autonomous body in the Constitution which is charged with the responsibility of inter alia the exercise of disciplinary control over members of the public service. In **Public Services Association of Trinidad and Tobago v The Permanent Secretary Ministry of Energy and Energy Industries**¹¹ Kokaram J referring to Lord Diplock in **Endell Thomas v The AG** stated at paragraph 42:

⁹ CV 2016-01809

¹⁰ CA Civ 143/1994

¹¹ CV2017-02934

“42. The autonomous nature of the Public Service Commission was underscored by the Privy Council in **Endell Thomas v The Attorney General** [1982] AC 113. Lord Diplock’s observation is pertinent and deserves repeating:

“The whole purpose of chapter VIII of the Constitution which bears the rubric "The Public Service" is to insulate members of the civil service, the teaching service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the government of the day. The means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service. These autonomous commissions, although public authorities, are excluded by section 105 (4) (c) from forming part of the service of the Crown. Subject to the approval of the Prime Minister they may delegate any of their powers to any of their members or to a person holding some public office (limited in the case of the Police Service Commission to an officer of the police force); but the right to delegate, though its exercise requires the approval of the Prime Minister, is theirs alone and any power so delegated is exercised under the control of the Commission and on its behalf and not on behalf of the Crown or of any other person or authority ... In respect of each of these autonomous commissions the Constitution contains provisions to secure its independence from both the executive and the legislature.”¹²

37. Therefore, any power the PSC delegates in this regard is exercised on its behalf and it ultimately retains control of.

38. What is the object of the 2006 Legal Notice? The Second Schedule of the 2006 Legal Notice states: “*For the purpose of regulation 85 of the Regulations, an act of misconduct or indiscipline which the Permanent Secretary or Head of Department has jurisdiction to hear and determine under that regulation is an act of misconduct or indiscipline described in Column 1 of the following Table being a breach of a regulation: (a) in respect of officers in the Civil Service, in Chapter XI of the Civil Service Regulations:*”

¹² Endell Thomas v The AG [1982] 113 at page 124 C-G

39. It sets out the acts of misconduct or indiscipline which the Permanent Secretary or Head of Department can hear and determine with respect to officers in the Civil Service as:

COLUMN 1 Description of Misconduct	COLUMN 2 CIVIL SERVICE Reference to Regulation of Civil Service Regulations
Failure to attend to matters promptly within scope of office	Regulation 135(1)
Lack of courtesy to a member of the public or member of the (a) Civil Service; (b) Fire Service; (c) Prison Service	Regulation 135(2)
Willful failure to perform duties	Regulation 135(3)
Absence without leave or reasonable excuse	Regulation 136(1)
Failure to report absence from country	Regulation 136(2)
Failure to disclose activities outside Service	Regulation 137(2)
Breach of rules relating to broadcast	Regulation 140
Act of indebtedness to the extent it impairs efficiency, etc.	Regulation 141
Failure to notify of bankruptcy proceedings	Regulation 142
Failure to perform duty in a proper manner	Regulation 149(1)(a)
Contravention of the: (a) Civil Service Regulations and other written law; (b) Fire Service (Terms and Conditions of Employment) Regulations 1998 and other written law; (c) Prison Service (Code of Conduct) Regulations, 1990	Regulation 149(1)(b) Regulation 149(1)(c)

Act that is prejudicial to, or discredits reputation of the Service	Regulation 149(1)(d)
Disobedience to orders	Regulation 149(2)(b)
Neglect of duty	Regulations 149(2)(d) and (f)
Unlawful or unnecessary exercise of duty	Regulation 149(2)(g)
Malingering	Regulation 149(2)(a)
Absence without leave or being late for duty	Regulation 149(2)(a)
Persistently unpunctual	
Damage of clothing supplied	
Unfit for duty through drunkenness	Regulation 149(2)(c)
Drinking on duty or soliciting drink	
Entering licensed premises	

40. Regulation 85 provides:

- (1) Where an officer is alleged to have committed an act of misconduct or indiscipline which is a breach of a regulation that is the subject of a delegation to the Permanent Secretary or Head of Department, such act of misconduct or indiscipline shall be referred to an officer senior in office to the officer against whom the report or allegation has been made.
- (2) The senior officer referred to in sub regulation (1) may charge the officer against whom the report or allegation has been made and refer the charge to the Permanent Secretary or Head of Department.
- (3) Where a charge is referred to the Permanent Secretary or Head of Department under sub regulation (2), the Permanent Secretary or Head of Department shall act as a disciplinary tribunal, or appoint, in writing as a

disciplinary tribunal, an officer in his Ministry or Department, as the Commission directs, holding or performing the duties of a senior officer who is senior in office to the person charged.

- (4) The disciplinary tribunal referred to in sub regulation (3) comprising—
 - (a) the Permanent Secretary or Head of Department may impose in respect of a charge any of the penalties prescribed in regulation 110(1)(c) to (g); or;
 - (b) an officer appointed as such under sub regulation (3) may impose in respect of a charge any of the penalties prescribed in regulation 110(1) (f) or (g).
- (5) A fine imposed by a disciplinary tribunal, other than the Permanent Secretary or Head of Department, under sub regulation (4) shall not exceed an amount calculated on four days pay to be deducted from the salary of the officer in no more than two instalments.
- (6) Where a disciplinary tribunal, other than a Permanent Secretary or Head of Department, finds the officer guilty and is of the opinion that, owing to the special circumstances of the case (including the previous record of the offender), the penalty that could be imposed by it is inadequate it may so certify and refer the matter to the Permanent Secretary or Head of Department.
- (7) The Permanent Secretary or Head of Department on receipt of a certificate made under sub regulation (6) may impose a penalty prescribed in regulation 110(1) (c) to (g) inclusive.
- (8) A fine imposed by the Permanent Secretary or Head of Department under sub regulation (4) shall not exceed an amount calculated on four (4) days pay per month to a maximum of three months.

- (9) Where the Permanent Secretary or Head of Department is the person making the allegation or report he shall not exercise any power as a disciplinary tribunal but refer it to the Commission to determine as if it were a matter to which regulation 90 applies.
- (10) Where a disciplinary tribunal during the course of hearing a matter to which this regulation refers is of the opinion that the matter is such that the officer has been inadequately charged with an offence to which sub regulation (1) applies, it may so certify and refer the matter to the Permanent Secretary or Head of Department.
- (11) The Permanent Secretary or Head of Department shall, no later than three days after receipt of a certificate referred to him in accordance with sub regulation (10), refer the matter to an investigating officer to deal with under regulation 90 as if it were a report or allegation of indiscipline or misconduct to which regulation 90 applies.
- (12) Regulations 94, 96, 97, 98, 99, 100(1) and 106(2) and (3) apply mutatis mutandis in respect of the hearing of a charge to which this regulation applies.
41. In my opinion, the object of the 2006 Legal Notice was for Permanent Secretaries and Heads of Departments to be vested with the power to discipline public officers who were in breach of certain Regulations of the Civil Service Regulations.
42. Was it the PSC's intention to divest itself of its disciplinary powers listed for the breach of the Civil Service Regulations in the 2006 Legal Notice?
43. In **Judicial Review Principles and Procedures** by Auburn, Moffett and Sharland¹³, at paragraph 13.54 the authors examined the issue of the recovery of powers by the delegator. It states:

¹³ 2013

“It has been said that, where a public body delegates a power, it will ordinarily have divested itself of the relevant power and cannot then exercise that power itself, unless it either expressly or implicitly retains the ability to exercise that power. However it is questionable whether this can be taken to be a rule of general application; much is likely to turn on the relevant statutory context. In many cases, it will be unlikely that Parliament will have intended that the public body it has entrusted with a power should not have the ability to recover that power to itself. This is particularly so given that a contrary conclusion may lead to a public body permanently abdicating the relevant power.” (Emphasis added)

44. In the instant case the 2006 Legal Notice was not made by Parliament but by the PSC with the approval of the Prime Minister pursuant to section 127 of the Constitution.
45. The case law on how the Courts have interpreted regulations which have delegated functions to another party depends on the statutory provision.
46. In **Huth v Clarke**¹⁴ Coleridge CJ stated the following on the effect of delegation at page 394:

“But delegation does not imply a denudation of power and authority; the 6th schedule of the Act [that is the Act with which he was dealing] provides that the delegation may be revoked or altered and the powers resumed by the executive committee. The word "delegation" implies that powers are committed to another person or body which are as a rule always subject to resumption by the power delegating, and many examples of this might be given.”
47. In the same case Wills J said at p 395:

“Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself.”
48. In **Blackpool Corporation v Locker**¹⁵ the municipal corporation, Blackpool Corporation, purporting to act under the powers delegated by the Minister of Health for the provision of

¹⁴ (1890) 25 QBD 391

¹⁵ [1948] 1. K.B 349

accommodation for the inadequately housed, took possession of the dwelling house of the Defendant, by serving a notice on the agent of the Defendant and obtaining the keys from the agent under the threat that new locks would be placed on the door. Thereafter, the town's clerk assistant was informed that the Defendant wanted to use the house for his own occupation and he entered into occupation of same. The Defendant asked for the terms of the circular but the Corporation and the Ministry of Health refused to provide the information. By letter of August 20th, in response to the Defendant's solicitor that the original requisition by the town clerk was in excess of its delegated powers, the senior regional officer stated:

“I am directed by the Minister of Health to refer to your letter of the 9th August in connexion with No. 131, Squires Gate Lane, Blackpool and to say that after full consideration of the matter the Minister is satisfied that the property was properly requisitioned on June 20th, 1946, by the town clerk of Blackpool in the exercise of powers duly delegated to him by the Minister. Your client's entry on the premises at a subsequent date was, therefore, unauthorized and illegal.

I am accordingly to request that your client will take immediate steps to vacate the house, and I am to add that the town clerk of Blackpool has been instructed that he is to take all possible action as from August 31, 1946, to recover vacant possession.

When your client has complied with this request, the town clerk of Blackpool will be willing to consider any reasonable claim your client may wish to make to occupy part of the house on licence.”

49. Paragraph 5 of regulation 51 of the Defence (General) Regulations 1939 provided:

“(5) A competent authority may, to such extent and subject to such restrictions as it thinks proper, delegate all or any of its functions under paras. (1) to (3) of this regulation to any specified persons or class of persons.”

For the purpose of this regulation by sub-s. 1 of reg. 49 the Minister of Health is a competent authority.....”

50. The County Court held inter alia that even though the requisition of the house by the Corporation was invalid, that by letters of 29th July, 20th August and 28th November 1946, the Minister of Health had made a requisition of the house himself and as principal he had ratified the act of his agent, the corporation, done in excess of authority. On appeal, Scott LJ, disagreed with the County Court judge. He stated at pages 377-378:

“...the circulars contained (together with much explanatory matter) ministerial legislation with statutory force, transferring to the local authorities concerned the Minister's legal power to override the common law rights of individual members of the public, for the purposes defined in the circulars, and limited by their conditions. In any area of local government, where the Minister had by his legislation transferred such powers to the local authority, he, for the time being, divested himself of those powers, and, out of the extremely wide executive powers, which the primary delegated legislation contained in reg. 51, para. 1 had conferred on him to be exercised at his discretion, retained only those powers which in his sub-delegated legislation he had expressly or impliedly reserved for himself. The constitutional justification for the delegation permitted by para. 5 was obviously that local needs and opportunities relevant to the housing problem would necessarily be infinitely more within the local knowledge of the local authorities than in the Ministry whether central or regional.” (Emphasis added)

51. In **Manton v Brighton Corporation**¹⁶ a standing order of the Defendant provided that standing committees were to be appointed annually in May *"for the ensuing year to perform such duties as shall be then delegated to them by the council"* of the Corporation. The Plaintiff was appointed to serve on three standing committees by a resolution of the council of the Corporation appointing the committees for *"the period ending with the next annual meetings of the council"*. Thereafter the council appointed an ad hoc committee to inquire into certain alleged conduct of the plaintiff, and the committee recommended that the plaintiff should no longer serve on any committee of the Corporation. Their recommendation was adopted at a meeting of the council who treated the plaintiff as having been removed from each of the three committees on which he had been previously appointed to serve.

¹⁶ [1951] 2 KB 393

52. The Plaintiff sought an interlocutory injunction to restrain the Corporation from interfering with the exercise by him of his rights and privileges as a member of all committees to which he had been appointed until his term of office should expire. It was held, inter alia, that the Corporation as a delegating authority could not only at any time resume their own authority with which they never parted but could revoke that authority even arbitrarily or capriciously. Slade J noted at page 404 that:

“I look at the nature of the delegation in this case. I have already referred, for example, to the powers and duties entrusted to the land and works committee set out in the corporation's manual. One cannot divest oneself of one's statutory duties. One can get another to perform them, and if he perform them properly, well and good; if he do not, one will still have to perform them oneself, and therefore one cannot divest oneself of those duties. I was told that, whereas most of the functions of the standing committees were to make recommendations to the council, there were also in some cases entrusted to the standing committees the exercise of executive powers. In so far as they merely make recommendations, the remedy of the appointing authority is easy: they may merely refrain from adopting the recommendations when they do not like them. In so far as the delegation is of executive powers, it seems to me it must be the case that the appointor can determine the authority of the appointee. If there is power to revoke the authority of a committee as a whole, in my judgment there must be a power to revoke the authority of any single member, which in some cases will include, of course, the authority of a person who is not a member of the council. In the result, therefore, I hold that this action fails. (Emphasis added).

53. In **Department for Environment, Food and Rural Affairs v Robertson and ors**¹⁷ the responsibility for pay bargaining for civil servants was delegated from the Treasury to individual government departments by virtue of a series of enactments between 1992 and 1996. The male civil servants employed by the appellants sought equality of pay pursuant to section 1 of the Equal Pay Act 1970 with female civil servants working in other government departments contending that their work was equivalent to their female counterparts. The respondents appealed, inter alia, the tribunals ruling that the Treasury on behalf of the Crown still retained ultimate control over the pay and conditions of employment of civil servants so that it was such a common source. The

¹⁷ [2004] ICR 1289

appeal was allowed on the basis that the delegation of powers to department ministers was a divestment of the powers delegated unless there was an express or implied retention of some or all of the powers.

54. Historically the Court examined a statutory provision by looking at the words “may” and “shall” to determine if the duty was mandatory or directory. The modern approach is that postulated by Lord Steyn in **R v Soneji**¹⁸ where he stated the following approach:

“Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in AG Ref (No 3 of 1999), the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly to have intended total invalidity.”

55. From the language of Regulation 85, it is clear that it was the intention of the PSC to reserve powers of discipline since at regulation 85(3) it retains the power to direct the Permanent Secretary who to appoint as the disciplinary tribunal after charges are laid against the officer against whom the allegation of misconduct was laid. It also retains the power to deal with any allegation of misconduct which falls with the Second Schedule of the 2006 Legal Notice if the Permanent Secretary is the party making the allegation. Further, if the Permanent Secretary receives a certificate from the tribunal that the officer has been inadequately charged he may refer it to an investigating officer under regulation 90 as if it was a report of an allegation under Regulation 90.

56. In my opinion the language of the Second Schedule of the 2006 Legal Notice does not impose a duty on the delegate, in this case the Permanent Secretary to the exclusion of the PSC. Neither does it expressly reserve the same power vested in the delegate to the delegator, the PSC. In such circumstances, it reasonable to imply that such power was reserved to the PSC since to do otherwise would be absurd.

57. It could not have been the PSC’s intention in drafting the 2006 Legal Notice that it was no longer vested concurrently with the power to deal with allegations of misconduct under the Second Schedule to the 2006 Legal Notice. The purpose of delegated legislation is to assist the delegator, in the instant case the PSC,

¹⁸ [2005] 4 All ER 321 at paragraph 23

with the performance of its functions. One of its functions is to deal with disciplinary matters of public officers. In my opinion it would be absurd to accept that only with respect to certain allegations of misconduct and indiscipline the PSC has abdicated its responsibilities and vested it in the Permanent Secretary or Head of Department. If for example a Permanent Secretary or Head of Department is in receipt of several allegations of misconduct and he/ she refuses to act, but it is brought to the attention of the PSC, does it mean that the PSC, the delegator cannot take action since only the Permanent Secretary has the power? I do not think so.

58. In the instant case there was no danger of both the Permanent Secretary and the PSC invoking its disciplinary process concurrently since it was the Permanent Secretary who had referred the matter to the PSC. Indeed it would have been absurd for the delegator, the PSC to refer the matter back to the delegate, the Permanent Secretary on the basis of the 2006 Legal Notice since the original power is vested in the delegator.
59. In any event, it cannot be said that the process adopted by the PSC with respect to the appointment of the Investigating Officer is null and void.
60. Under Regulation 85 where an allegation of misconduct is made against an officer to the Permanent Secretary, as in in this case, the Permanent Secretary can invoke the disciplinary process with limited jurisdiction. The Permanent Secretary must refer the act of misconduct to an officer senior than the officer against whom the complaint was made. The senior officer may charge the officer against whom the report of misconduct was made and refer the charge to the Permanent Secretary. Where there is a charge the Permanent Secretary can act as the disciplinary tribunal or appoint an officer in his Ministry or Department as the PSC directs who is senior to the officer against whom the allegation of misconduct was made. The tribunal has the power to impose a fine not exceeding four (4) days' pay to be deducted from the salary of the officer or if it is of the view that the penalty it could impose is inadequate, it can so certify and refer it to the Permanent Secretary who can impose a penalty of between four (4) days' pay per month to a maximum of three months.
61. Regulation 87 provides that:

“The Permanent Secretary or Head of Department shall report any case not covered by these Regulations to the Director and the Commission may issue instructions as to how the case shall be dealt with and the case shall be dealt with accordingly.”

62. In my opinion, Regulation 87 gives the PSC the discretion on the steps to deal with the allegation. As a public body the PSC had a duty to act fairly in accordance with natural justice principles, to act within its rules and to not act with bias. In the instant case the Permanent Secretary reported the allegation of misconduct against Ms. Guerra to the PSC in accordance with her duty under Regulation 90. The PSC took a decision to invoke a procedure where it appointed an Investigating Officer to determine whether any charges should be made against Ms. Guerra. The Investigating Officer called upon Ms. Guerra to respond to the allegations before she provided her report to the PSC. After the PSC received the report from the Investigating Officer it then took the decision to lay the charges against Ms. Guerra and to set up the disciplinary tribunal.
63. In my opinion, the PSC acted within its powers when it took steps to deal with the allegations of misconduct against Ms. Guerra when it was brought to its attention by the Permanent Secretary. The 2006 Legal Notice did not preclude it from acting under regulation 87. There was no danger that the PSC and the Permanent Secretary acted concurrently with respect to the said allegation of misconduct since it was the Permanent Secretary who had brought it to the PSC’s attention and called upon it to act. Further, the PSC cannot be faulted for correcting its initial error of appointing the Investigating Officer pursuant to Regulation 84 (B) and on the 27th September 2017 cancelling her previous appointment and re-appointing her under Regulation 85. The PSC acted lawfully by ensuring that the error in the initial appointment was rectified when it realized the error and it took steps to rectify it. By taking the steps to rectify the error, the PSC’s appointment of the Investigating Officer had rectified any blunder. Therefore the PSC’s appointment of the Investigating Officer on the 27th September 2017 was legal.

Was the PSC’s appointment of the Investigating Officer contrary to the principles of natural justice?

64. In Michael Fordham’s text **Judicial Review Handbook**, at page 626, paragraph 60.2.3 the learned author explained the meaning of fairness in the context of the principles of natural justice and cited

with approval the *dicta* of Mustill LJ in **R v Secretary of State for the Home Department ex p Doody**¹⁹:-

“Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to procuring a favourable result or after it is taken, with a view to procuring its modification; or both.”²⁰

65. It is also a fundamental principle of fairness at common law that a party should have access to the evidence on which the case against him is based and an opportunity to comment on it and if appropriate, challenge it²¹. A party should also be aware who is investigating any allegations against him, the specific details of the allegations and the reasons for the outcome.
66. In the Privy Council judgment of **Manning v Ramjohn**²² Lord Browne observed that it is trite law that the requirement of fairness in any given case depend crucially upon the particular circumstances²³.
67. It was argued on behalf of the PSC that the appointment of the Investigating Officer was not contrary to the rules of natural justice since it was necessary to ensure a proper investigation into the allegations against Ms. Guerra and it was mandated by law. To do otherwise would mean that any decision taken by the PSC to lay charges would be arbitrary.
68. In my opinion, the appointment of the Investigating Officer was the initial step in the process set out by Regulation 87 to ascertain if there is any charge arising from the allegation made against Ms. Guerra at that stage. In my opinion, there was no need for Ms. Guerra to be given an opportunity to be heard *before* the appointment of the Investigating Officer. In the particular circumstances of this case it cannot be said that the PSC acted unfairly and in breach of natural justice principles since the appointment of the Investigating Officer was the first step in the process.

¹⁹ [1994] 1 AC 531

²⁰ 560D-G

²¹ R v Secretary of State for Home Department ex p Q [2000]UK HRR 386, 391E

²² [2011] UKPC 20

²³ See also Lord Mustill’s judgment in **ex p Doody** [1997] 1 AC 531 at 568D.

Did the PSC act with bad faith in appointing the Investigating Officer?

69. In **Judicial Review Principles and Procedure** by Jonathan Auburn, Jonathan Moffett and Andrew Sharland at page 379, bad faith was described as follows:
- “A public body may not exercise its powers in bad faith. In this context, acting in bad faith means more than simply acting unlawfully. It connotes intentional wrongdoing, such as acting in a way that is fraudulent, dishonest, vindictive, or malicious.”
70. According to Michael Fordham in his text **Judicial Review Handbook**²⁴, the assertion that a decision maker has acted in bad faith is not one which is lightly to be alleged and which is difficult to prove. Further, there is a need to particularize and prove bad faith, with clear and cogent evidence.
71. It was submitted on behalf of the PSC that Ms. Guerra failed to adduce any evidence that the PSC acted with vindictiveness, dishonesty or maliciousness when it took the decision to appoint the Investigating Officer.
72. The only evidence before the Court concerning the appointment of the Investigating Officer by the PSC was that it took the decision to do so after the Permanent Secretary had communicated the allegations of misconduct made against Ms. Guerra. It communicated the Investigating Officer’s appointment on the 28th June 2017. It cancelled the Investigating Officer’s appointment and re-appointed her again as the Investigating Officer under Regulation 87 on the 27th September 2017. It informed Ms. Guerra promptly of the cancellation and the re-appointment and the responsibility of the Investigating Officer under her new appointment. In my opinion the actions by the PSC cannot be seen to be dishonest, malicious or vindictive.

²⁴ (5th Edition 2008), at paragraph 52.1

Was the Investigating Officer biased when she conducted the investigation?

73. The test for apparent bias is described by Lord Hope in **Porter v Magill**²⁵ as “the question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”
74. It was submitted on behalf of Ms. Guerra that there is the real possibility that the Investigating Officer, having been appointed in the first instance already formed an opinion of the allegations against Ms. Guerra without having the benefit of a statement from her and that she was not invited in the first instance to make any representations on her behalf. Furthermore, the Investigating Officer was likely to enter upon the second inquiry pursuant to her second appointment with pre-conceived notions about the Claimant which demonstrated a real possibility of bias.
75. The evidence from the PSC is that the Investigating Officer did not take any steps in conducting the investigation after her initial appointment in June 2017²⁶. There has been no evidence from Ms. Guerra to dispute this or to show otherwise. In my opinion, the argument by Ms. Guerra that there was a real possibility that the Investigating Officer was tainted with bias since she may have formed an opinion before she conducted the inquiry is entirely without merit and absolutely baseless.

Is Ms. Guerra’s suspension illegal, null and void?

76. It was argued on behalf of Ms. Guerra that the PSC’s suspension of her is null and void since its decision to appoint the Investigating Officer pursuant to Regulation 84(B) on the 28th June 2017 was illegal and therefore its decision to suspend her was also null and void. It was also argued that the failure by the PSC to deal with the allegations of misconduct against her in accordance with Regulation 85 meant that the entire procedure used by the PSC including her suspension is illegal, null and void and that the PSC breached the principle of natural justice by failing to give her an opportunity to be heard before it suspended her.

²⁵ [2001] UKHL 67

²⁶ See paragraph 29 of the principal Gooblasingh affidavit

77. The PSC's position is that it acted within the parameters of the law in suspending Ms. Guerra pending the determination of the investigation and disciplinary hearing.
78. According to the principal Gooblasingh's affidavit the PSC suspended Ms. Guerra pursuant to Regulation 88 and that the Investigating Officer did not submit any report on the allegations of misconduct against Ms. Guerra before she was reappointed under Regulation 87.
79. Regulation 88 states that:
- (1) When the Commission becomes aware of any act of indiscipline or misconduct and the Commission is of the opinion that the public interest or the repute of the public service requires it, the Commission may direct the officer in writing to cease to report for duty until further notice from the Commission, and an officer so directed shall cease to perform the functions of his office forthwith.
 - (2) An officer directed to cease to perform the duties of his office in accordance with sub regulation (1) shall continue to draw full salary until notice is given to him by the Commission under regulation 89.
80. In the letter dated 28th June 2017 the PSC indicated to Ms. Guerra that pursuant to Regulation 88 it had taken the decision to suspend her pending the outcome of the allegations of misconduct which had been made against her. The letter also stated that the appointment of the Investigating Officer was pursuant to Regulation 84(B) of the PSCR which it later cancelled and remedied by its letter dated the 27th September 2017.
81. In my opinion, the submission on behalf of Ms. Guerra is flawed. The PSC decisions to suspend Ms. Guerra and to appoint the Investigating Officer were grounded on two separate and independent Regulations in the PSCR. Regulation 88 bestows the power on the PSC to suspend a public officer once it is satisfied that it is in "*the public interest or the repute of the public service requires it*". These are the only factors which the PSC are to contemplate when making this decision under Regulation 88. There was no evidence presented that the PSC failed to act in the public interest or failed to consider the repute of the public service when it took the decision to suspend Ms. Guerra. The evidence which was before the PSC

when it took the decision to suspend Ms. Guerra under Regulation 88 was that Ms. Guerra was the CEO of the SGRC and she had allegedly breached Regulation 149 (2) (b) which concerned willful disobedience or disregard of an order by using the SGRC vehicle contrary to a circular dated 25th November 2015 . Further, there is no provision in Regulation 88 for the PSC to give Ms. Guerra the opportunity to be heard before appointing the Investigating Officer. Therefore, the PSC did not breach the principles of natural justice when it took the decision to suspend Ms. Guerra by not giving her an opportunity to be heard prior to its decision to appoint the Investigating Officer. Further, the PSC's initial decision to suspend Ms. Guerra did not prejudice her since she was suspended with full pay pending the outcome of the PSC's investigations.

Has the PSC breached its duty of candour?

82. It was submitted on behalf of Ms. Guerra that the PSC has breached its duty of candour by failing to disclose Minutes of its meeting, copies of entries in her personal file with respect to the PSC's decision.
83. The PSC argued that there was no breach of its duty of candour since Ms. Guerra was provided with certain information which she requested and certain documents were refused since they qualified as internal working documents which were exempt under section 27(1) of the Freedom of Information Act. Further, Ms. Guerra made no formal application for disclosure but she requested certain documents prior to advancing her claim, under the FOIA request which is the basis for seeking a declaration for the PSC to supply her with them.
84. According to the principal Gooblasingh affidavit the PSC provided a substantive response to the FOIA requests. The PSC provided the Statement of Allegation of Misconduct and it indicated to Ms. Guerra's attorney at law that the Investigating Officer's Report was considered an internal working document and that it would be contrary to public interest to divulge it in accordance with section 27 (1) (a) and (b) of the Freedom of Information Act. The PSC also informed Ms. Guerra's attorney at law that as the disciplinary proceedings are ongoing the other documents requested could not be provided since it would be contrary to the public interest.
85. Section 27 (1) of the **Freedom of Information Act** provides:

“Subject to this section, a document is an exempt document if it is a document the disclosure of

which under this Act-

- (a) Would disclose matter in the nature of opinion, advice or recommendation prepared by an official or minister of government or consultation or deliberation that has taken place between officers, Ministers of Government, or an officer and a Minister of Government in the course of, or for the purpose of, the deliberative process involved in the functions of a public authority:
- (b) Would be contrary to the public interest.”

86. In my opinion there was no breach of the duty of candour by the PSC since it provided the documents it could have which was the Statement of Allegations of Misconduct. It also provided an explanation why certain of the documents which she requested were not disclosed as they concerned the ongoing investigation into allegations against Ms. Guerra.

Conclusion

87. The object of the 2006 Legal Notice was for Permanent Secretaries and Heads of Departments to be vested with the power to discipline public officers who were in breach of certain Regulations of the Civil Service Regulations. From the language of Regulation 85, it is clear that it was the intention of the PSC to reserve powers of discipline. It could not have been the PSC’s intention in drafting the 2006 Legal Notice that it was no longer vested concurrently with the power to deal with allegations of misconduct under the Second Schedule of the 2006 Legal Notice.

88. The process adopted by the PSC with respect to the appointment of the Investigating Officer is not null and void. Regulation 87 gives the PSC the discretion on the steps to deal with the allegation. The PSC acted within its powers when it took steps to deal with the allegation of misconduct against Ms. Guerra when it was brought to its attention by the Permanent Secretary.

89. The PSC did not act unfairly and in breach of the natural justice principles in the appointment of the Investigating Officer since it was the first step in the process set out by Regulation 87 to ascertain if there was any charge arising from the allegation made against Ms. Guerra.

90. Ms. Guerra failed to adduce any evidence that the PSC acted with vindictiveness, dishonesty or maliciousness when it took the decision to appoint the Investigating Officer.

91. The Investigating Officer was not tainted with bias when she conducted the investigation.
92. There was no evidence that the PSC failed to act in the public interest or failed to consider the repute of the public service when it took the decision to suspend Ms. Guerra. There is no provision in Regulation 88 for the PSC to give Ms. Guerra the opportunity to be heard before appointing the Investigating Officer. Therefore, her suspension was not illegal, null and void.
93. Finally, there was no breach of the duty of candour by the PSC in failing to disclose certain documents since it provided an explanation as to why certain documents were not disclosed.

Order

94. The Claimant's Fixed Date Claim filed on the 18th January 2018 is dismissed.
95. The Claimant to pay the Defendant's its costs. I will hear the parties on quantum.

**Margaret Y Mohammed
Judge**