

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P 002/2016

Claim No. HCA No. 3835 of 2002

IN THE MATTER OF THE JUDICIAL REVIEW ACT NO. 60 OF 2000

AND

IN THE MATTER OF AN APPLICATION BY HAROLD CHANG FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF THE DECISION AND/OR ACTION OF THE HOSPITAL ADMINISTRATOR, PORT OF SPAIN GENERAL HOSPITAL, MADE ON THE 9TH DAY OF SEPTEMBER, 2002 AND COMMUNICATED TO THE APPLICANT ON THE 13TH DAY OF SEPTEMBER, 2002, WHICH DECISION IS CONTAINED IN THE APPLICANT'S SALARY PAY SLIP FOR THE MONTH OF SEPTEMBER, 2002, TO STOP PAYING SALARY TO THE APPLICANT WITH EFFECT FROM THE 10TH DAY OF SEPTEMBER, 2002, TO WHICH SALARY THE APPLICANT IS ENTITLED BY VIRTUE OF HIS HOLDING PUBLIC OFFICE AS A SPECIALIST MEDICAL OFFICER IN THE MINISTRY OF HEALTH.

AND

THE CONTINUING REFUSAL BY THE HOSPITAL ADMINISTRATOR, PORT OF SPAIN GENERAL HOSPITAL TO PAY TO THE APPLICANT SALARY DUE AND PAYABLE TO HIM BY VIRTUE OF HIS HOLDING PUBLIC OFFICE AS A SPECIALIST MEDICAL OFFICER IN THE MINISTRY OF HEALTH.

AND

**THE CONTINUING REFUSAL BY THE PERMANENT SECRETARY IN THE MINISTRY
OF HEALTH TO RECONSIDER AND REVOKE THE MATTERS AT PARAGRAPHS (1)
AND (2) ABOVE, DESPITE HAVING BEEN REQUESTED TO DO SO BY LETTERS
DATED 22ND OCTOBER AND 21ST NOVEMBER 2002.**

BETWEEN

HAROLD CHANG

Appellant/Applicant

AND

THE HOSPITAL ADMINISTRATOR PORT OF SPAIN GENERAL HOSPITAL

Respondent /First Defendant

AND

THE PERMANENT SECRETARY MINISTRY OF HEALTH

Respondent / Second Defendant

Panel:

A. Mendonça, J.A.

V. Kokaram, J.A.

R. Boodoosingh, J.A.

Appearances:

Mr Hendrickson Seunath SC leading Mr Khristendath Neebar instructed by Mr Haresh Ramnath for the Appellant/Applicant

Mr Elton Prescott SC leading Ms Tinuke Gibbons instructed by Ms Sharon Sharma for the Respondents/Defendants

Date of Delivery: 27 July 2021

JUDGMENT

1. The appellant, Dr Harold Chang, was appointed by the Public Service Commission and employed in the Public Service in 1979 as a medical doctor. He was promoted to the post of Specialist Medical Officer in the Ministry of Health in 1981. He worked at the Port of Spain General Hospital. In the 1990s, there was a transition to a system of Regional Health Authorities managing the public health system. During that transition period, public officers had the option to remain in the Public Service under the Ministry of Health or to transfer as an employee of one of the Regional Health Authorities. Dr Chang chose to remain in the Public Service. Issues arose between him and the Medical Chief of Staff in respect of him being rostered to work supervising doctors employed by the Regional Health Authority and treating patients of the Regional Health Authority. Some of those issues were

litigated and there are judgments and orders of the court in respect of those matters.

2. It is not necessary for the purposes of this appeal to go into those matters. Suffice it to say, Dr Chang decided to call it a day and to exercise an option to retire early from the Public Service. He submitted an application for early retirement to the Public Service Commission (the Commission) in April 2002. When he sent in his application to retire, the Hospital Administrator and the Office of the Permanent Secretary of the Ministry of Health began processing his application. The Hospital Administrator ceased paying him a salary from 10 September 2002.

3. Shortly after this, Dr Chang purported to withdraw his application for early retirement by writing a withdrawal letter to the Commission. Dr Chang wrote letters in October and November 2002 taking issue with the cessation of his salary having regard to his withdrawal letter. By the time of the October and November letters, it appears, unknown to Dr Chang, that the Commission had retired Dr Chang, notwithstanding his withdrawal letter. After these letters bore no fruit, he began this claim for judicial review on 5 December 2002 challenging the Hospital Administrator's decision to cease payment of his salary with effect from 10 September 2002 and the Permanent Secretary's refusal to revoke the decision of the Hospital Administrator. He sought the following relief in the claim:

- i. A declaration that the decision and/or action of the Hospital Administrator made on 9 September, 2002 and communicated to Dr Chang on 13 September, 2002, which decision was contained in his salary pay slip for the month of September 2002 to stop paying salary to him with effect from 10 September, 2002 was unlawful, illegal, null and void and of no effect;
- ii. An order of certiorari to quash the decision and/or action referred to in paragraph i above;
- iii. A declaration that the continuing refusal by the Hospital Administrator to pay the salary due and payable to him as a Specialist Medical Officer in the Ministry of Health was unlawful and accordingly illegal, null and void and of no effect;
- iv. An order of certiorari to quash the decision and/or action referred to in paragraph iii above;
- v. A declaration that the continuing refusal by the Permanent Secretary to reconsider and revoke the decisions and/or actions mentioned in paragraphs i and iii above, despite having been requested to do so by Dr Chang by letters dated 22 October 2002 and 21 November 2002, was unlawful and accordingly illegal, null and void and of no effect;
- vi. An order of certiorari to quash the decision and/or action referred to in paragraph v above;
- vii. A declaration that Dr Chang has continued since 1 December 1981, the date of promotion by the Public Service Commission to the substantive post of Specialist Medical Officer

(Anaesthetics) (Range 64) in the Ministry of Health, to be the holder of public office in the said substantive post;

- viii. Alternatively to vii above, an order reinstating Dr Chang in the substantive post of Specialist Medical Officer (Anaesthetics) (Range 64) in the Ministry of Health with effect from 10 September 2002;
- ix. A declaration that Dr Chang was entitled to be paid all salary due to him as a Specialist Medical Officer in the Ministry of Health as and when same became due and payable;
- x. An order that Dr Chang be paid all salary due to him as a Specialist Medical Officer as and when it became due and payable;
- xi. An order that Dr Chang be paid all salary due to him as a Specialist Medical Officer since 10 September, 2002;
- xii. Damages;
- xiii. Costs; and
- xiv. That all other necessary and consequential directions be given.

4. Dr Chang's application for leave to file judicial review proceedings was initially refused by Hosein J. in July 2008. He appealed this decision and the appeal was allowed by the Court of Appeal in October 2012. The trial of this matter took place in April 2015 before Rampersad J, some 13 years after the leave application was filed. By December 2009, at latest, the Commission's decision to retire Dr Chang had come to his knowledge.

5. The trial judge found that the decision of the Hospital Administrator to cease payment of Dr Chang's salary was illegal for a period of time, but he did not grant all of the remedies sought by Dr Chang. The trial judge determined that the Commission's decision was not effectively challenged because the Commission was not a party to the proceedings. As such, the judge made orders in respect of the payment of salary after 10 September 2002 for a limited period of time, but not beyond the period when Dr Chang's retirement would have taken effect as a consequence of the Commission's approval of his early retirement request. The trial judge made the following orders:

1. A declaration that the decision and/or action of the Hospital Administrator made on 9 September, 2002 and communicated to Dr Chang on 13 September 2002, which decision is contained in his salary pay slip for the month of September 2002 to stop paying his salary with effect from 10 September, 2002 was unlawful, illegal, null and void and of no effect;
2. A declaration that the continuing refusal by the Permanent Secretary to reconsider the decisions and/or actions mentioned in 1 above despite having been requested to do so by Dr Chang by letters dated 22 October and 21 November 2002, was unlawful and accordingly illegal, null and void and of no effect;

3. A declaration that Dr Chang was entitled to be paid all salary due to him by virtue of his vacation leave, specifically 90 days, having been forfeited;
 4. An order that Dr Chang be paid all salary due to him by virtue of his vacation leave having been forfeited, specifically 90 days salary, together with interest thereon at the rate of 3% per annum from 9 September 2002;
 5. Costs, to be taxed in default of agreement.
6. Dr Chang has appealed the decision of the trial judge not to grant the further relief sought in his claim. This has resulted in the following consequences of the judge's decision:
 - i. The stoppage of payment of the Appellant's salary by 1 December 2002 was lawful.
 - ii. Dr Chang's withdrawal of his application for permission to retire early by letter dated 16 September 2002 received by the Commission on 23 September 2002 was ineffective.
 - iii. The decision of the Commission contained in its letter dated 13 October 2009 to the effect that Dr Chang was retired from the public service with effect from 9 September 2002 was valid.

- iv. The Commission was vested with the power, duty and/or responsibility to consider and approve/reject Dr Chang's application for permission to retire at the age of 52 years.
- v. The presumption of regularity applies to the decision of the Commission to retire Dr Chang from the Public Service.
- vi. The failure of the Court to hold that the Permanent Secretary was the proper body to consider and approve/reject Dr Chang's application for permission to retire after having attained 52 years was correct.
- vii. The decision of the Commission to approve Dr Chang's application for permission to retire early touched and concerned the decision of the Hospital Administrator to cease payment of his salary.
- viii. The refusal of the court to declare that Dr Chang continued to be a Specialist Medical Officer in the Ministry of Health was correct.
- ix. The refusal of the court to order that Dr Chang be reinstated in the said post was correct.

7. Essentially, the appeal involved the following issues:

- i. Whether certain correspondence generated after the payment of Dr Chang's salary ceased, which were admitted into evidence by the judge at the trial, were relevant to be considered by the

judge and/or whether any reliance placed on such evidence by the judge was appropriate;

- ii. Whether the judge was wrong to hold that no relief should be granted which touched upon the decision of the Public Service Commission;
- iii. Whether the judge was wrong to invoke and rely on the presumption of regularity of decisions of public bodies, when he decided that the decision of the Commission to retire Dr Chang should stand;
- iv. To what extent the grant of the remedies sought by Dr Chang which touched upon the decision of the Commission, would have been detrimental to good administration;
- v. Whether the trial judge was wrong when he refused to hold that Dr Chang was entitled to be paid salary beyond the date when Dr Chang's vacation leave expired on 1 December 2002.

8. The first issue can properly be dealt with as one issue and the other four issues can conveniently be considered together.

Issue i: Consideration of Correspondence Generated After Salary Payments Ceased

9. Dr Chang's attorneys on appeal challenged the reliance on or use by the judge of correspondence passing among Dr Chang, the Permanent Secretary and the

Commission which were generated after the salary payments ceased. Dr Chang contended that the court ought to have focused only on what materials or documents were before the decision makers at the time of the decisions. The decision makers in question were the Hospital Administrator and the Permanent Secretary. A written submission by Dr Chang's attorneys that the correspondence was only admitted *de bene esse* by the judge was not pursued at the oral hearing of the appeal when it became clear that the judge had admitted the correspondence into evidence.

10. The starting point to resolving this is to note that it was the application of Dr Chang's attorneys on 4 March 2015 to place the correspondence sent to and received from the Commission before the court. This was done by a written application made to the judge on the basis that the documents were relevant. The judge ruled that they were admissible. Dr Chang's attorneys before this court submitted that the purpose of putting into evidence those documents was to show the irregular conduct of the Respondents and the Commission.

11. Between the filing of the claim in 2002 and the trial in 2015 correspondence had been received by Dr Chang from the Commission and a Memorandum passing between the Director of Personnel Administration and the Permanent Secretary had come to light through the affidavit of Ms Belle, Clerk IV, at the Port of Spain Hospital filed on behalf of the Respondents. Dr Chang had himself written to the Commission in response to one of the letters received. These correspondence revealed that the Commission had exercised a power that either affected or had

the potential to affect Dr Chang by making the decision to retire him with effect from 9 September 2002.

12. Dr Chang's attorneys were therefore quite right to put before the judge all the documents which had been received by him and sent by him to the various bodies. First, there was a duty of full disclosure on him as a person who had applied for judicial review. An applicant has a continuing duty to provide the court with all the evidence which may be relevant to interrogating the decision making process. This duty continues throughout the hearing of the matter. Dr Chang's attorneys having applied to put these bits of evidence before the court and the judge having ruled they were admissible, what use the judge made of the documents was a matter for him after hearing submissions from the parties in that regard. Second, judicial review is a discretionary remedy and the court makes the decision whether to grant relief based on all the circumstances existing. The full picture must therefore be seen up to the time the court is giving its decision. Third, a key factor the court considers is whether it is in the interests of good administration to make particular orders. Up to date information that potentially impacts on good administration is accordingly relevant. Fourth, Dr Chang had himself written to the Commission "ufs" (through) his head of department and had brought the Commission into the picture. His application had been addressed to the Commission. As such, correspondence sent to the Commission and received by him must have had some relevance to the overall claim. It would be too narrow a view to suggest that because the Hospital Administrator had stopped the salary and the Permanent Secretary had not reviewed that decision that the court could not go beyond that. A relevant question was why was the salary stopped? What

was the context in which the decision was made? Fifth, certain of the correspondence may have explained why a decision had been taken to stop the payment of Dr Chang's salary on 9 September 2002. Sixth, when the judgment is read as a whole, it is clear that the only reliance placed on the correspondence by the judge was to identify what the letters and memorandum stated. There was no dispute that these correspondence passed or what they meant. In reality the Commission had sent a letter referring to a decision they had taken. There was no dispute that they had in fact taken such a decision.

13. The court, having those documents put before it, would have been hard pressed to ignore, disregard or to not consider the effect of the documents in the mix. The Commission's letters, even though sent as late as October 2009 and January 2010, spoke directly to Dr Chang's entitlement to continue in office beyond the expiration of his vacation leave. They were therefore highly relevant and identified the decision maker in this instance. Dr Chang had not sought to make the Commission a party to the proceedings, even though, on its face, what the Commission did had the potential to impact on the decision making process of the Permanent Secretary and the Hospital Administrator. Put another way, the judge hearing the case in 2015, could not ignore the content of the letters in making a determination whether the court should afford Dr Chang relief beyond the period when his vacation leave ended.

14. Accordingly, the judge was right to admit the documents into evidence and to make the use which he did of them. I will now turn to the other substantive four issues identified in paragraph 7 above.

Issues ii to v: The Factual Background

15. The factual background can be gleaned from a consideration of both the correspondence passing among the key persons and entities (beginning with Dr Chang's application for early retirement in 2002 and continuing right up to 2011) and the affidavit evidence placed before the court by the parties. They tell the story of what occurred, and some detailed reference is therefore necessary. They are also important to a proper analysis of the judge's decision and to consider the context of the judge's decision.

Correspondence

16. The process started with Dr Chang's 26 April 2002 letter addressed to the Commission "ufs" the Permanent Secretary, Ministry of Health and the Medical Chief of Staff, Port of Spain General Hospital, where Dr Chang was assigned. In that letter Dr Chang stated he spoke with Dr Mahabir, Medical Chief of Staff, Port of Spain General Hospital on 24 April 2002 and Dr Mahabir indicated that his application for early retirement would receive favourable consideration by the office of the Permanent Secretary, Ministry of Health. Dr Chang stated he was

applying under section 51 (1) (c) of the Public Service Regulations to the Commission for consideration of early retirement. He noted his reasons as:

- “1. I qualify to apply by reason of my birthdate December 14, 1949;
2. My peace of mind has been disturbed by events which affect serving medical officers in the Public Service over the past few years;
3. My two children have reached the age where I must earn sufficient income to be able to educate them and the salary in the Public Service will not allow me to provide adequately for their tertiary education.”

This letter was copied to the Director of Personnel Administration.

17. Promptly on 26 April 2002, the Medical Chief of Staff, Dr Mahabir, wrote to the Permanent Secretary in the following terms:

“I am forwarding to you an application from Dr. H. Chang who has applied for early retirement from the Public Service. I discussed this matter with you, two days ago, and I agree that Dr Chang should be allowed early retirement. The alternative is a merry go round similar to the one which occurred with Dr Chang over the last two – three years, and I would strongly recommend that his application for early retirement be approved as soon as possible.”

18. On 1 May 2002, Dr Chang sent another letter to the Commission “ufs” the Permanent Secretary and the Medical Chief of Staff as before. He noted that he was advised by the Medical Chief of Staff that his application for early retirement must include a date from which it would take effect. He stated he was asked to re-submit the application. He put the effective date as 1 May 2002. Therefore, his application was to be retired from 1 May 2002. The letter was otherwise on the same terms as his previous letter.

19. On 14 May 2002 a letter was sent on behalf of the Permanent Secretary to the Hospital Administrator of the Port of Spain General Hospital stating that Dr Chang had submitted his letter for early retirement with effect from 1 May 2002. It was noted that before consideration could be given to this request the following information had to be submitted: the officer’s last working day, statement of indebtedness and compensatory and vacation leave eligibility.

20. On 27 May 2002, a memorandum from the Hospital Administrator went to the Permanent Secretary stating Dr Chang’s last working day was 16 April 2002, the sum of his indebtedness, and that his vacation leave eligibility as of 30 April 2002 was 90 days and compensatory leave was nil.

21. On 12 June 2002, a letter was addressed to Dr Chang from the Permanent Secretary, Ministry of Health, through the Hospital Administrator. This letter acknowledged Dr Chang’s letter dated 1 May 2002 seeking early retirement and

stated that in order to facilitate the timely processing of his retirement benefits, he was to submit certain listed documents including his birth certificate, copy of letter of his first appointment, copy of his letter from the Director of Personnel Administration confirming his appointment, his NIS number, Income Tax File Number, his address and phone number.

22. Of some significance, Dr Chang submitted a resumption of duty form dated 17 June 2002 from “vacation leave” which he had taken to travel out of the country.

23. Other correspondence passed in June, July and August 2002 concerning other issues about which Dr Chang had been engaging various officials. These included legal letters from his attorneys. There were also other legal proceedings occurring involving Dr Chang, the Ministry of Health, the Regional Authority and officer holders of same.

24. Dr Chang apparently wrote on 20 June 2002 concerning his retirement. A letter dated 21 August 2002 was sent to him from the Permanent Secretary referring to that letter and requesting Dr Chang, in order to facilitate the timely processing of his retirement benefits, to submit his original birth certificate together with an original statutory declaration. It was noted in the letter that the requested documents could be submitted through the Medical Chief of Staff.

25. On 10 September 2002, Dr R. Mahabir, the Ag. Medical Chief of Staff, wrote to the Permanent Secretary asking for an update on the progress of Dr Chang's application to retire. In that letter it was stated: "As you are aware Dr Chang has not been rostered to work in this hospital since he was asked to resume duty following his suspension, as he has refused to supervise North West Regional health Authority Officer" (sic).
26. Dr Chang wrote on 16 September 2002 again to the Public Service Commission "ufs" the Permanent Secretary and the Medical Chief of Staff. He referred to his previous letters dated 26 April 2002 and 1 May 2002 applying for early retirement. He stated that having regard to all of the circumstances (he did not specify what these were) he had decided with immediate effect to withdraw his application for early retirement with immediate effect. This letter was copied to the Director of Personnel Administration.
27. On 22 October 2002, Dr Chang wrote to the Director of Personnel Administration "ufs" the Permanent Secretary and the Medical Chief of Staff referring to his letter of 16 September 2002 and stating: "I was therefore quite taken aback to find that my salary slip for September 2002 indicates that my salary was stopped with effect from September 10, 2002." He further noted that he had taken legal advice and requested that steps be taken to ensure that he receives all salary and emoluments due to him as a Specialist Medical Officer.

28. On 21 November 2002 Dr Chang wrote separate similar letters to the Director of Personnel Administration, the Permanent Secretary and the Medical Chief of Staff referring to his 22 October 2002 letter and stating his intention to take legal action if within 7 days the payments of his salary and outstanding salary were not made.
29. These were the key correspondence relating to Dr Chang's retirement application until the leave application for judicial review was filed on 5 December 2002.
30. As noted above, after the initial refusal of leave and the appeals process, the trial took place in 2015. By that time, additional correspondence came to light and these were put before the judge. These will now be summarised.
31. On 8 November 2002 the Director of Personnel Administration sent a memorandum to the Permanent Secretary, Ministry of Health requesting comments / recommendations on an attached letter from Dr Chang. An urgent response was requested. The letter attached appears to be the 16 September 2002 letter Dr Chang had sent to the Commission purporting to withdraw his early retirement application.
32. On 11 March 2003 the Permanent Secretary sent a memorandum to the Director of Personnel Administration. Correspondence on the subject matter of Dr Chang's application to retire ending with the DPA's Memo of 16 January 2003 (which was

not before us) were referenced. It was stated that Dr Chang was granted all the vacation leave for which he was eligible from 1 May 2002 to 9 September 2002 “and he has not resumed duty”. A copy of a memorandum received from the Medical Chief of Staff dated 6 March 2003 was annexed to that memorandum (but this was not before us). The memorandum concluded: “The officer should therefore be regarded as having relinquished his appointment with effect from September 10, 2002 without prejudice to his indebtedness to government (motor vehicle purchase loan).”

33. Some six years later, on 13 October 2009, the Director of Personnel Administration wrote to Dr Chang “ufs” the Permanent Secretary, stating:

“Your letter dated 16th September 2002, refers.

Public Service Commission has noted that you had requested to withdraw your application for early retirement from the Public Service.

However by that date the Commission had already retired you from the Public Service with effect from 9th September, 2002, after having attained the age of fifty-two years.”

34. On 21 December 2009, Dr Chang responded to this letter stating:

“It would be appreciated if you would kindly inform me the date on which your said decision (to retire me) was made. Your early reply would be appreciated.”

35. The Director of Personnel Administration responded by letter dated 26 January 2010 referring to Dr Chang’s 21 December 2002 letter. The letter stated:

“The Public Service Commission at its meeting on 1st October 2002, decided that you should be granted permission to retire from the Public Service with effect from 9th September, 2002 after having attained the age of fifty-two years.”

36. On 28 July 2011, the Permanent Secretary wrote to Dr Chang noting that the Service Commission Department retired him from the Public Service with effect from 9 September 2002. The letter dated 13 October 2009 was referenced. He was told further that at the time of retirement he held a pensionable office and qualified for retirement benefits which were preserved when they became due on his attaining the age of 55 years. He was requested to furnish certain documents to process his retirement benefits.

Affidavit Evidence

37. I turn now to the affidavit evidence. Dr Chang provided affidavit evidence on his behalf and Ms Shirley Belle, Ag. Clerk IV at the Port of Spain General Hospital from 1999, provided evidence for the respondents in the matter. A few highlights are of relevance.

38. Dr Chang in his affidavit filed 5 December 2002 stated at paragraph 17:

“The settled practice, from what I have seen during my 23 years as a public officer, is that where an application for early retirement is made, approval of the application is formally given by the PSC through the DPA to the applicant and the Permanent Secretary and the successful applicant will be apprised formally of all salary and benefits due to him, which will take into account all vacation and other leave still due to him.”

39. At paragraphs 21 and 22 he referred to speaking to Ms Belle about a car loan application and she referred him to another officer about requirements for processing a car loan application. He noted he had received no correspondence about his retirement other than what he had referred to previously and he was therefore bewildered by the cessation of payment of his salary.

40. Ms Belle filed an affidavit on 11 August 2006. She stated, among other matters, that the application for retirement was submitted on 7 May 2002 to the Commission for consideration. She said she spoke to Dr Chang on 17 June 2002 and told him of the need to submit certain documents in pursuance of his retirement application and he promised to submit them as soon as possible.

41. She stated at paragraph 19 that having requested the applicant to submit his original birth certificate, she was informed by another officer that he never did so and “so his application for early retirement was not processed by the Ministry of Health Personnel Department and was not granted / approved”.

42. She noted that she had seen letters showing that the Acting Medical Chief of Staff had stopped rostering Dr Chang to work at the Port of Spain General Hospital because of his continued refusal to carry out assigned duties. She challenged his assertion at paragraph 17 where Dr Chang deposed to the settled practice. At paragraph 21 she stated: “The said assertion is false. The proper and current practice is set out in a Circular dated 5th December, 2000 under the hand of the Director of Personnel Administrator”. This Circular was annexed.

43. This Circular was from the Director of Personnel Administration to All Permanent Secretaries and Heads of Departments. It stated:

“Section 121 of the Constitution of the Republic of Trinidad and Tobago gives the Public Service Commission the power to appoint persons to hold or act in offices to which this section applies, including power to make appointments on promotion and transfer and to confirm appointments, and to remove and exercise disciplinary control over persons holding or acting in such offices.

The Public Service Commission has affirmed that in keeping with its constitutional functions, it is not empowered to deal with resignations and retirements, which are voluntary acts on the part of an officer. The Commission’s power to remove officers refers only to all methods of termination of officers’ appointments against their will.

In *Endell Thomas v Attorney General* (1982) Act (sic) 113, Lord Diplock explained what is meant by ‘remove’ in section 99(1) of the 1962 Constitution which related to the powers of the Police Service Commission and is similar in wording to section 121 (1) of the present Constitution. At page 126 he said:

“To “remove” from office in the police force in the context of section 99(1), in their Lordships’ view, embraces every means by which a police officer’s contract of employment (not being a

contract for a specified period) is terminated against his own free will, by whatever euphemism the termination may be described, as, for example, being required to accept early requirement”.

All matters, which fall under Regulation 48 and 51 of the Public Service Commission Regulations should therefore be dealt with by your office. These include:-

- Acceptance of resignations
- Noting compulsory and voluntary retirements
- Granting of permission to retire

From an administrative perspective, the Commission would wish to be kept updated on all resignations and retirements of officers from Public Service, since it is the Commissions’ responsibility to fill vacancies in this Service. The details of the process by which this would be done will be worked out between officers of your Ministry/Department and my Department.

Please ensure that this circular receives the widest circulation.

Director of Personnel Administration (Ag.)”

44. Ms Belle further stated that as of 9 September 2002 no decision had been taken in respect of Dr Chang's application for early retirement but it was being processed as seen from the 21 August 2002 letter.
45. Ms Belle noted that having sent in the withdrawal letter, Dr Chang did not report for nor did he resume duty (para 24). She noted that Dr Chang not having submitted a resumption of duty form, he was not entitled to payment of salary after 9 September 2002, when any vacation leave retirement had expired.
46. She stated that the Ministry had not written to Dr Chang indicating the status of his application for early retirement as he was "deemed to have voluntarily / unilaterally relinquished his post by his persistent, continuous refusal to report for duty". Given that Dr Chang wished to proceed on early retirement with immediate effect on 1 May 2002, he was presumed to have immediately proceeded on leave.
47. On 29 November 2006 Dr Chang filed an affidavit stating he had not relinquished his post and if his employer was of that view, the practice was that the Permanent Secretary would communicate the intention to make a request to the Commission to make a declaration that he had abandoned the job (para 16). In a further affidavit dated 4 March 2015 filed in support of a motion to adduce fresh evidence at the trial as being relevant to the determination of the case, Dr Chang exhibited the further correspondence received from the Service Commission referred to above.

The Judgment

48. The judge, as noted above, made certain declarations regarding the salary of Dr Chang that the decision to cease paying him his salary from 10 September 2002 was unlawful and further that the continued refusal of the Permanent Secretary to reconsider the decision to cease paying salary to Dr Chang with effect from 10 September, 2002 was unlawful. The applicant was also to be paid all salary due to him by virtue of his vacation leave having been forfeited.

49. In a postscript, the judge noted that no issues arose that Dr Chang had abandoned his post. At paragraph 71 he stated:

“No issue arises in relation to allegations that the applicant has abandoned his post as that decision could only properly be made by the PSC pursuant to regulation 49 of the Public Service Regulations and no such decision was taken because a decision was made instead to retire the applicant pursuant to regulation 51 (1) (c).”

50. In deciding the case the judge made certain key findings of fact. It is noteworthy that there has been no challenge by the Respondents to the judge’s decision nor to any findings of fact made by him.

51. A key fact found by the judge was that Dr Chang had submitted a resumption of duty form on 17 June 2002. The judge noted there was a need for official correspondence that Dr Chang was to proceed on pre-retirement leave. This would have told Dr Chang what his leave eligibility was and that his absence was being considered as pre-retirement leave. This having not been done, the judge found this failure to notify Dr Chang impacted on the effective date of retirement. Thus, the nub of the judge's decision concerned the failure to pay the applicant after 9 September 2002, given that he had resumed duty on 17 June 2002 and that this period was counted as part of his pre-retirement leave.

52. The judge further noted the "established practice" referred to by Ms Belle pursuant to the Director of Personnel Administration's 5 December 2000 Circular had not been followed since the application had been sent to the Public Service Commission for consideration. He also noted that there was no suggestion that Dr Chang had relied on this established practice "so its application is not in issue in these proceedings and has not been questioned" (para 56).

53. Two paragraphs of the judgment address pointedly why the judge considered he could not interfere with the decision made by the Commission.

54. At paragraph 65 the judge stated:

“65. The decision challenged is the decision to cease the payment of the applicant’s salary with effect from September 10th 2002. Some of the remedies pursued by the applicant touch and concern the decision of the PSC to approve the applicant’s applicant (sic) for early retirement. However, there was no application to have the PSC be made a party to these proceedings. Further, the applicant has not sought to initiate judicial review proceedings against the PSC in relation to that decision which is contained in [the] letter dated October 13th 2009.”

55. It should be noted that Dr Chang was aware of this decision by the Commission at latest by December 2009 since he responded to the letter from the Director of Personnel Administration then.

56. After citing cases relating to making declaratory orders in the absence of the official decision maker and on the need to take account of the interests of good administration when making judicial review orders, the judge concluded at paragraph 69:

“69. Despite the inconsistencies in the correspondence and the suspicious timelines for such, given that the PSC has not been joined to answer the allegations against it and the presumption of regularity in relation to public bodies, the court is not minded to

grant some of the reliefs sought which touch upon the decision made by the PSC, specifically, the reinstatement of the applicant or any declaration that he continued to hold the specified office or enjoy those benefits from September 10th 2002 to date. Consequently, the decision to retire the applicant stands because it has not been effectively challenged at all. This obviously affected the applicant's relief for reinstatement negatively."

Discussion and Analysis

57. In written submissions made by Dr Chang's attorneys to the judge the point was made that the 5 December 2000 Circular was not utilised by the Permanent Secretary in respect of Dr Chang's case. This was notwithstanding that Ms Belle had referred to this as the "established process". This court is mindful that the Commission is not represented here. Other Service Commissions may also have a view on this Circular. At the same time, this Circular was disseminated in December 2000 and Dr Chang's application was in 2002.

58. Regulation 51 provides as follows:

51. (1) Subject to subregulation (2), an officer—

(1) shall be required to retire on attaining the age of sixty years; or
(2) may retire voluntarily at the age of fifty-five years; or
(3) may at any time after he attains the age of fifty years and before attaining the age of fifty-five years, apply to the Commission for permission to retire pursuant to section 15(1) of the Pensions Act and shall in his application state the grounds on which it is based.

59. Section 15 (1) of the **Pensions Act Chap 23:52** states:

“15. (1) Subject to section 16 and except in the cases hereinafter provided, no pension, gratuity, or other allowance shall be granted to any officer who has not attained the age of fifty-five years (in special cases fifty years), unless on medical evidence to the satisfaction of the President that he is incapable, by reason of some infirmity of mind or body, of discharging the duties of his office, and that the infirmity is likely to be permanent, except that the consent of the Minister shall be obtained in respect of—

an officer recruited from the United Kingdom;

an officer who is a member of a unified branch of the service;

an officer occupying any other post, appointment to which requires the approval of the Minister.

60. The combined effect of Regulation 51 and Section 15 (1) of the **Pensions Act** appears to be inconsistent with the 5 December 2000 Circular. The power to retire a person early from the Public Service in the circumstances referred to in section 15 (1) appears from the clear reading of that section to reside with the Commission. The Circular also suggests that the effect of the Privy Council's decision in **Endell Thomas v The Attorney General [1982] AC 113** supported its advice. However, it would not be appropriate for this court to make any definitive conclusion on this issue without first hearing and receiving the benefit of submissions from the Commission.

61. What is of more significance to this case, however, is that Dr Chang was clearly unaware of the practice as set out in the 5 December 2000 Circular. He made his application to the Commission. The application was forwarded to the Commission. His withdrawal letter was also addressed to the Commission. He, therefore, treated the Commission as the correct entity to make the decision under Regulation 51 (1) (c). Communication passed between the Permanent Secretary and the Director of Personnel Administration. The Commission's letter of 26 January 2010 stated that the decision to retire Dr Chang was deliberated upon on 1 October 2002. The 28 July 2011 letter which the Permanent Secretary wrote to Dr Chang accepted the Commission's decision to retire Dr Chang since by this letter the Permanent Secretary was seeking to advance the processing of his retirement benefits. As such, even if the December 2000 Circular from the Commission had established a new practice, the Permanent Secretary had deferred to the Commission on this occasion or adopted its decision. If, as Dr Chang appeared to be contending that the Commission could make no such

decision, when in fact it had purported to do so, it was open to him and necessary for him to challenge the decision of the Commission when he became aware that it had made such a decision. He could not simply say it was a nullity and therefore had no effect. It had to be declared so and it could only be declared so if the proper party was before the court. As noted he was aware of the Commission's decision long before the trial of this claim took place before the judge. The judge noted that no application was made to join the Commission to the claim.

62. In the written submissions of Dr Chang's attorneys before this court it was submitted that Dr Chang claimed no relief against the Commission at the time of filing so it would have been improper to have the Commission as a party. It was also submitted that no application to amend the grounds of the application was made so joinder of another party would be to make a claim outside of what was permitted by the leave application. All that was challenged was the cessation of payment of salary by the Hospital Administrator and the failure of the Permanent Secretary to revoke that decision. The judge, Dr Chang contended, had not identified a nexus between the Commission's decision and the matters the court was called to adjudicate upon.

63. This view, with respect, is far too narrow a perspective of the claim by the time the matter was tried. Much more was known by that time, specifically the involvement of the Commission. The Permanent Secretary had by then, at the very least, adopted the decision of the Commission or, more accurately, accepted

that the Commission had made a decision on retirement under **Regulation 51 (1) (c)**.

64. Dr Chang's case was framed as a challenge to the decision to cease his salary payment. That was understandable when the application was filed in December 2002 since the decision of the Commission was not known to him at that time. However, relief claimed such as reinstatement or a declaration that he continued to be employed with the Ministry of Health until the normal retirement age could not be sustained after he learnt of the Commission's decision without a direct challenge to that decision. These remedies would directly impeach the decision made by the Commission.

65. Having submitted that there was no relief against the Commission and there was no need for Dr Chang to apply to join the Commission in the proceedings, at paragraph 63 of their Speaking Note, Dr Chang's attorneys seemed to suggest that if the judge had concluded the Commission's decision was central to the reliefs claimed, the court ought to have, of its own volition, invited the Commission's participation. This appears to shift the obligation to conduct Dr Chang's case from his attorneys to the judge. There were remedies that the judge could and did grant against the Respondents based on the case filed. There were also remedies which he could not properly grant because an important party was not before the court. It is worth recalling that the Commission is an independent body established under the Constitution with its responsibilities and duties set out by the Constitution and other laws. It is required to act independently of any governmental department

or Ministry and its processes and decisions are subject to challenge and review by the court. The consequence of not making the Commission a party when they obviously ought to be cannot easily be side-stepped.

66. The judge was correct to conclude that he ought not to make any order which touched on the Commission's decision without the Commission being brought before the court to answer it. In doing so, the judge expressly noted what he described as the "inconsistent correspondence" and "suspicious timelines". However, he would have been right not to make any orders or findings against the Commission in the absence of hearing from the Commission.

67. In these circumstances, the three principles identified by the judge of: (1) not making declarations against non-parties, (2) considering the interests of good administration and (3) the principle of regularity of decisions made by public bodies were relevant in different ways. The core rationale for the judge's order was that relief could not be granted in respect of the decision of the Public Service Commission in the absence of a specific challenge to the decision.

68. In support of the first principle the judge cited this well-known passage of Bernard JA from the case of **Wadinambiaratchi v Hakeem Ahmad And Others (1985) 35 WIR 325 at 337:**

“The power to grant a declaratory relief is discretionary. The discretion should be exercised with due care and caution and judicially with regard to all the circumstances of the case. Hence, it is necessary that the proper parties should be before the court. The law on the point is succinctly stated in *de Smith's Judicial Review of Administrative Action* (4th Edn) page 510. There the author in reliance upon the cases cited in the appropriate footnotes state:

“Not only must there be a plaintiff whose legal interests are affected sufficiently to enable him to sue; the defendant must be one whose legal interests are sufficiently affected by the plaintiff's claim (or whose conduct could be sufficiently affected by judgment in the plaintiff's favour) to render him a competent party to defend the action. And even if a competent defendant is before the court, the court will, save in exceptional circumstances, decline to make a declaration affecting the interests of persons who are not before it; all those whose interests are liable to be affected should be made parties to the action.”

[See in this connection *Land Commissioner v Pillai* [1960] AC 854, 882; *Powell v Evan Jones & Co* [1905] 1 KB 11, 24; *Re Carnavon* [1937] Ch 745; *Re Barnato* [1949] Ch 258; *Malone v Metropolitan Police Commissioner* [1979] 2 WLR 700, 735; *London Passenger Transport Board v Moscrop* [1942] AC 332, 345; *Gregory v Camden London Borough Council* [1966] 1 WLR 899. See also Young: Declaratory Orders, pages 49 to 51, paragraphs 607 and 608; Zamir: Declaratory Judgments, page 282].

69. The principles of good administration and the presumption of regularity were subsidiary to the point about the absence of the Commission in the case. The way the remedies Dr Chang sought were stated impacted on the Commission's decision without saying so. Dr Chang could not continue to receive salary beyond his forfeited vacation entitlement if he had been validly retired. When the post December 2002 correspondence emerged, an amendment to the judicial review application or the need to join the Commission became apparent. A declaration of Dr Chang's entitlement to payment of salary beyond the expiration of his vacation leave would have effectively treated the Commission's decision to retire him as a nullity or without any legal effect without hearing from them.

70. Additionally, several years had passed. The judge went as far as he could do. He would have been hard pressed to require the participation of the Commission in the case in the absence of an application by Dr Chang to do so. Further, in respect of the relief claimed, no issue of reinstatement could arise since Dr Chang had passed the maximum retirement age in any event.

71. According to Ms Belle, which was not specifically denied, Dr Chang had not submitted a resumption of duty form nor had he reported for duty after 16 September 2002 (see para 24 of her affidavit, filed 11 August 2006). Dr Chang's response in his 29 November 2006 affidavit at paragraph 12 was: "In response to Paragraph 24, I resumed duty on June 17th, 2006 and was again never rostered. If I am not rostered, then there is no place for me to report to work." At paragraph 14 he stated he believed that "the Permanent Secretary and / or the Hospital

Administrator expected me to resume duties on September 10th, 2002 because they seem to claim that I was on leave, but I did not know that I was on leave". He specifically did not state that he turned up for work after purportedly withdrawing his retirement application. While, as the judge found, this could not have led to a determination that Dr Chang had abandoned his job unless certain processes involving the Commission had taken place, it could not be in the interests of good administration that Dr Chang was being paid but was not turning up for work.

72. Further, it must be considered that early retirement is a voluntary process. Dr Chang initiated the process articulating reasons for his decision to seek early retirement. He sent this to the Commission. He was aware that steps were being taken to process his application. He had been written to. It was only after his salary payment was stopped that he attempted to reverse his decision without articulating reasons for doing so. There was no follow up with the Commission save for one letter to the Director of Personnel Administration before filing his claim. All of these matters, taken together, were relevant in the circumstances to the way the judge's order was framed.

73. While both parties addressed this Court on the assumption that the judge did not grant relief touching on the decision of the Commission as it would be detrimental to good administration, the judge in his judgment did not specifically make any findings nor state reasons why relief would not be granted on this basis. Mindful that relief in a judicial review application is discretionary, it is important to state the reasons why the discretion will not be exercised in favour of an applicant. The

judge highlighted Lord Goff's comments on the interest of good administration in **Caswell v Dairy Produce Quota Tribunal for England and Wales [1990] 2 WLR 1320** without specifically stating the reasons why, on this basis, relief ought not to be granted. The discretion of the judicial review court is a broad one to be exercised having regard to all the circumstances. The detriment to good administration features both as a discretionary bar to relief as well as in the circumstances expressed in cases of delay in section 11(2) of the Judicial Review Act: See *R v Brent LBC O' Malley* (1997) 10 Admin LR 265 (Nichol) v *Gateshead MBC* (1998) 87 LGR 435 and *Sahadeo Maharaj v TSC* (affirmed in PC) Civ App. 26 of 2003.

74. As noted, the judge did not provide his reasons why it was not in the interest of good administration to grant relief against the Commission. However, it is clear from an overall consideration of the circumstances of this case why it could not be in the interest of good administration to grant any further relief to Dr Chang for the reasons set out above and which impinge upon the legality of the decision of the Commission to retire him, which was not under challenge.

75. While Lord Goff's decision in *Caswell* on the Court's discretion not being exercised in favour of the applicant in the interest of good administration was in the context of delay, the reasoning is still applicable to Dr Chang. The Court must be concerned with the "regular flow of consistent decisions made and published with reasonable dispatch in citizens knowing where they stand and how they can order their affairs in the light of relevant decision. Matters of particular importance, apart from the

length of time itself, will be the extent of the relevant decision and the impact which would be felt if it were to be re-opened (pages 1328 to 1329).”

76. In this case the decision of the Commission to approve Dr Chang’s application for early retirement was not challenged. To re-open that question in the absence of the Commission and evidence as to the circumstances in which they made and communicated such a decision cannot be in the interest of good administration.

77. The presumption of regularity was also relevant to an extent. In **Mohanlal Bhagwandeem v The Attorney General of Trinidad and Tobago [2004] UKPC 21** Lord Carswell articulated the principle this way:

“22. The presumption of regularity comes into play in this context when there is no evidence either way whether a public authority or official has taken into account the correct considerations in reaching an administrative decision. In such case the decider is entitled to the benefit of the presumption of regularity and is not obliged to adduce evidence to establish that he took only the correct factors into account. In consequence, in the absence of contrary evidence the application for judicial review will fail.”

78. In the present case there was a clearly stated decision of the Commission. On its face there was statutory authority for the power to make the decision under Regulation 51. This decision had been communicated, albeit extremely late, to Dr Chang. The reasons for the decision or its late communication are not before us because the Commission was not a party. The court had no information on what factors were considered by the Commission to grant Dr Chang's to retire him early and why the Commission had decided not to re-consider its decision after the withdrawal letter was sent. Moreso, these decisions were not formally challenged. Even Dr Chang's letter of 21 December 2009 only queried the date on which the decision was made; it did not question the authority of the Commission to make the decision. Thus both the Hospital Administrator and the Permanent Secretary by the time of the trial could not be faulted for having relied on the retirement by the Commission as evidenced by their 28 July 2011 communication to Dr Chang. It is in this context that the judge said at paragraph 69 of his judgment that "the decision to retire the applicant stands because it has not been effectively challenged".

79. As an aside, it should be noted that the letter of the Commission stated that Dr Chang was granted permission to retire at age fifty-two years. This has implications for the calculation of his pension since Section 15 of the Pensions Act allows the payment of a pension before the age of attaining fifty-five years in appropriate circumstances. The wording of the Commission's letter accepted his retirement at age fifty-two. The presumption of regularity attaches to this too.

80. The result is that we conclude that the judge was careful and justified in coming to the decision he made and in making the limited orders that he did. These orders were fashioned to meet what was before the judge and what he could legitimately do to grant relief to Dr Chang. This appeal is therefore dismissed. We will hear the parties on costs.

Allan Mendonça
Justice of Appeal

Vasheist Kokaram
Justice of Appeal

Ronnie Boodoosingh
Justice of Appeal