THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. S063 of 2017
Claim No. CV2015-03021

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 AN APPLICATION TO QUASH THE DECISION OF THE SECOND RESPONDENT TO APPOINT THE FIRST RESPONDENT TO HEAR AND DETERMINE TWO CHARGES OF INDISCIPLINE AGAINST THE APPLICANT LAID UNDER THE CIVIL SERVICE (AMENDMENT) REGULATIONS 149(1)(d) WHICH HAS NO RELEVANCE TO THE MUNICIPAL POLICE SERVICE AND NO STATUTORY ENDORSEMENT TO THAT EFFECT

BETWEEN

DAVE BRIJMOHAN

APPELLANT

AND

DISCIPLINARY TRIBUNAL
(comprising of Allister James, Selwyn Mohammed (Chairman), Hatim Gardiner)

FIRST RESPONDENT

AND

PUBLIC SERVICE COMMISSION

SECOND RESPONDENT

PANEL:
G. SMITH J.A.
P. RAJKUMAR J.A.
M. HOLDIP J.A.

Date of Delivery: 30 June, 2021

APPEARANCES:
Mr. K. Harrikissoon SC, Mr. N. Harrikissoon and Mr. A. Sinanan instructed by Ms. A. Harrikissoon appeared on behalf of the Appellant.

Mr. R. Martineau SC and Ms. D. Boxill instructed by Ms. M. Benjamin appeared on behalf of the Respondents.

I have read the judgment of Smith J.A. I agree with it and have nothing to add.

……

P. Rajkumar

Justice of Appeal

I too, agree.

……..

M. Holdip

Justice of Appeal

JUDGMENT

Delivered by G. Smith J.A.

INTRODUCTION

1. The Second Respondent (the Public Service Commission) appointed the First Respondent (the Tribunal) to deal with two charges of disreputable conduct made against the Appellant.

2. The Appellant was a Police Inspector in the Municipal Police Service of the Couva/Tabaquite/Talparo Regional Corporation.

3. The Appellant challenged the decision of the Public Service Commission (the PSC) by way of judicial review. The judicial review application was heard by Devindra Rampersad J. and he dismissed it.

4. The Appellant now appeals that decision.

5. In this appeal, the Appellant raised five issues in his written submissions, eight issues in his response to the Respondents' submissions, and two novel issues in his Speaking Note and address to the Court of Appeal.

6. Many of these "issues" overlapped with each other. Further, it would not be productive to deal with each one (and the responses to them) individually. Rather, I have identified two seminal issues which strike at the heart of this appeal. They are:
    A. Did the PSC have the jurisdiction to proceed with disciplinary action against the Appellant?
    B. If so, could the PSC and/or the Tribunal properly proceed to deal with the specific allegations of disreputable conduct made against the Appellant?

7. I have concluded "yes" to both of these issues and I would therefore dismiss this appeal.

BASIC BACKGROUND FACTS

8. The material facts were not disputed. The Respondents filed no affidavit in response and the Appellant was not cross-examined.

9. The Appellant was informed by a letter dated 17th April, 2014 that the PSC had preferred two charges against him, namely:

> "**Charge 1:**
> Statement of Charge
> "Disreputable conduct" contrary to regulation 149(1)(d) of the Civil Service (Amendment) Regulations, 1996.
> PARTICULARS OF CHARGE
> That you, Dave Brijmohan, Police Inspector...without reasonable excuse conducted yourself in a manner likely to bring the Service into disrepute when, while you were on duty on October 22, 2010, you hugged and repeatedly kissed a woman in the charge room of the Couva Municipal Police Station.
>
> **Charge 2:**
> Statement of Charge
> "Disreputable conduct" contrary to regulation 149(1)(d) of the Civil Service (Amendment) Regulations, 1996.
> PARTICULARS OF CHARGE
> That you, Dave Brijmohan, Police Inspector...without reasonable excuse conducted yourself in a manner likely to bring the Service into disrepute when, on October 23, 2010 at the Couva Municipal Police Station, you, together with an unidentified woman, walked about the said Station while you were both completely naked."

10. At the time of the alleged disreputable conduct (22nd and 23rd October, 2010), the Appellant was employed as a Corporal of the Municipal Police Force of the

Couva/Tabaquite/Talparo Regional Corporation (CTTR Corporation). By the date of the charges (17 April, 2014), the Appellant had been promoted to the post of Police Inspector of the CTTR Corporation. The Appellant was, at all relevant times, employed with the Municipal Police Service under the Ministry of Local Government. All of the relevant letters of promotion in respect of the applicant were issued by the PSC.[1]

11. The PSC appointed the Tribunal to hear and determine the charges against the Appellant.

ANALYSIS

Issue I: Did the PSC have the jurisdiction to proceed with disciplinary charges against the Appellant?

12. The Respondents correctly relied on the natural meaning of the relevant statutory provisions and the relevant case law to conclude that the PSC had the jurisdiction to exercise disciplinary control over the Appellant and hence to prefer and proceed with the charges against the Appellant.

    The Appellant unsuccessfully sought to rely on what was alleged to be the intention and the history of the relevant legislation to suggest that it was another body, namely, the Statutory Authorities' Service Commission (the SASC) which had the power to exercise disciplinary control over the Appellant.

The natural meaning of the governing statutory provision

13. It is necessary to set out the relevant legislation which both parties rely on. Section 35 of the Municipal Corporations Act, Ch. 25:04 provides that:

> "**35. The Statutory Authorities' Service Commission established under the Statutory Authorities Act shall appoint, remove, transfer and exercise disciplinary control over the officers of the Corporations mentioned in the First Schedule, and the Public**

[1] See paragraphs 4 to 6 of the Appellant's affidavit dated 10 September, 2015.

> **Service Commission established under section 120 of the Constitution shall appoint, remove, transfer and exercise disciplinary control over the officers of the Corporations mentioned in the Second Schedule.**" (my emphasis)

In this matter, the CTTR Corporation fell under the Second Schedule. The Respondents therefore contended that on a plain reading of the Municipal Corporations Act (MCA), the PSC was the proper body to "remove" and to "exercise disciplinary control over" the Appellant.

14. Section 60 of the MCA provides that the SASC:

> "**may make Regulations...providing generally for the discipline, good order and government of the Municipal Police Services and until such Regulations are made hereunder, Regulations made under the Police Service Act, insofar as the Commission deems them applicable to any matter concerning Municipal Police Services or Municipal Police Officers, shall apply mutatis mutandis**." (my emphasis)

15. It is not disputed that at the date that the disciplinary charges were brought by the PSC against the Appellant (17 April, 2014), the SASC had not made Regulations to provide for the "discipline" of any of the Municipal Police Services; neither had the SASC deemed any Regulations under the Police Service Act to be applicable to any Municipal Police Services.

16. However, on a plain reading of the MCA, the power to make Regulations for the discipline of the Municipal Police Services was simply what it was stated to be, namely, a power given to the SASC to make Regulations for the discipline of these Municipal Police Services.

    This was to be distinguished from the power to remove and to exercise disciplinary control over these Municipal Police Services, which in the case of the Appellant (who was employed at the CTTR Corporation) was vested in the PSC.

Precedent

17. The Respondents cited authority to confirm that this was the proper interpretation to be given to the sections of the MCA quoted above.

18. In **Thomas v the Attorney General of Trinidad and Tobago (1981) 35 WIR 375**, the Privy Council had to construe the meaning of the phrase "to remove and exercise disciplinary control over (certain) persons" that was given to the Police Service Commission under section 99(1) of the 1962 Constitution of the Republic of Trinidad and Tobago. At page 390 Lord Diplock stated:

> "**...what is inherent in the grant itself of powers "to remove and exercise disciplinary control over" members of the Police Service quite apart from any Regulations that may be made under section 102(1) and (2) of the Constitution. Their Lordships have already explained why "remove" must be construed as meaning remove for what in the judgment of the commission constitutes reasonable cause. Reasonable cause is not confined to wilful misconduct; it would embrace reasons such as ill-health or unsuitability of temperament or even some personal characteristic, any one of which, through no fault of his own, had rendered a particular officer unfitted to perform with reasonable efficiency the duties of a policeman. Removal for causes such as these is included among the functions of the commission to decide what causes justify removal even though it is not carried out in the exercise of the commission's powers of disciplinary control.**
>
> **Removal from the service in the exercise of disciplinary control is what is directly attacked in the instant case; but "disciplinary control" covers the infliction of lesser penalties than dismissal. It is for the commission to determine what are the kinds of penalties that may be inflicted, as well as deciding which of them is appropriate for the particular form of misconduct committed by**

> **the police officer in each individual case. It is inherent in this function that the commission should be entitled to publish in a form calculated to bring it to the attention of all members of the Police Service an indication of the various kinds of misconduct which in its opinion are capable of justifying disciplinary proceedings, and of the various kinds of penalties that such misconduct may incur; and in their Lordships' view it is in the interests of justice and open government alike that the commission should do so**." (my emphasis)

19. Similarly, in the present matter, the PSC was given the power, inter alia, to "remove" and to "exercise disciplinary control over" the Appellant by section 35 of the MCA. It therefore had the jurisdiction to proceed with the disciplinary charges against the Appellant.

20. Further, in **Thomas v The Attorney General**, the Privy Council also considered by contrast, the powers of the Parliament and the then Governor General on behalf of the executive to make Regulations for the discipline of the Police Service. Lord Diplock stated at page 386a:

> "**Discipline" in this context means the code of conduct which a police officer is under a duty to observe: what he is required to do and not to do, whether the particular requirement is imposed upon him by legislation, primary or subordinate, or by the express or implied terms of his contract of employment. In discussing, as their Lordships must, the division of functions between the Governor-General and the Police Service Commission in relation to what in the Constitution is called the "police force" but is now known as the "Police Service", they will find it conducive to clarity to use the expression "code of conduct" instead of "discipline" and to speak of "misconduct" rather than "an offence against discipline"**." (my emphasis)

Lord Diplock went on to distinguish the power of the Police Service Commission to remove and to exercise disciplinary control over officers compared to the power to lay down terms of discipline in regulations (a code of conduct). He stated at page 386c:

> "**The functions of the Police Service Commission fall into two classes: (1) to appoint officers to the Police Service, including their transfer and promotion and confirmation in appointments; and (2) to remove and exercise disciplinary control over them. It has no power to lay down terms of service for police officers; this is for the legislature and, in respect of any matters not dealt with by legislation (whether primary or subordinate) it is for the executive to deal with in its contract of employment with the individual police officer. Terms of service include such matters as (a) the duration of the contract of employment, eg for a fixed period, for a period ending on attaining retiring age, or for a probationary period as is envisaged by the reference to "confirmation of appointments" in section 99(1); (b) remuneration and pensions; and (c) what their Lordships have called the "code of conduct" that the police officer is under a duty to observe.**" (my emphasis)

21. Similarly, in the present matter, by section 35 of the MCA, the PSC was given the power to remove and to exercise disciplinary control over the Appellant. Section 60 of the MCA, which gave the SASC the power to make regulations for the discipline of Municipal Police, only authorised the SASC to make Regulations (a code of conduct) for these officers but not to exercise disciplinary control over them.

22. Inherent in the power to exercise disciplinary control over the Appellant, the PSC was entitled to begin and follow its processes that could lead to the removal or infliction of lesser penalties in respect of the Appellant's alleged conduct on the 22nd and 23rd October, 2010.

23. As seen from the quotations above, the **Thomas v The Attorney General** case also addressed a "dilemma" that seemed to concern the Appellant, namely, the fact that

it was the PSC which was a body created under the Constitution of the Republic of Trinidad and Tobago, that was to exercise disciplinary control over the Appellant, while another body, the SASC was empowered to make regulations for the discipline of the Municipal Police Force.

I repeat the quote above:

> "**The functions of the Police Service Commission fall into two classes: (1) to appoint officers to the Police Service, including their transfer and promotion and confirmation in appointments; and (2) to remove and exercise disciplinary control over them. It has no power to lay down terms of service for police officers; this is for the legislature and, in respect of any matters not dealt with by legislation (whether primary or subordinate) it is for the executive to deal with in its contract of employment with the individual police officer**." (my emphasis)

24. Similarly, in the more recent case of **Surratt and others v The Attorney General of Trinidad and Tobago [2007] UKPC 55**, the Privy Council affirmed the power of a statute to confer extra-constitutional powers on a constitutional body (like the PSC) (see paragraphs 31 and 58 of that case).

25. Therefore, there was no illegality or impropriety in having the PSC exercise powers of disciplinary control over the Appellant while the SASC may have had power to make regulations ("a code of conduct") for the discipline of the Appellant.

The alleged statutory intention

26. The Appellant alleged that the statutory intention to be gleaned from the provisions in Part III of the MCA (sections 48-61) was to create a unified Police Service which was to be under the control of the SASC.

    However, as will be demonstrated in the discussion that follows, none of these provisions divested the PSC of its powers over the Second Schedule Corporations (like the CTTR Corporation) under section 35 of the MCA (which was contained in Part II of the MCA). In fact, the only intention that was constant, was an intention to preserve

the powers of the PSC under section 35 of the MCA, and specifically, the power to exercise disciplinary control over the officers like the Appellant.

27. The main provisions that the Appellant relied on are sections 48(4) of the MCA and Legal Notice 194 of 1996.

28. Section 48(4) of the MCA provides that: "**Except where expressly applied thereto by Order of the President, this Part does not apply to any Corporation mentioned in the Second Part of the Second Schedule**."

    The CTTR Corporation, in whose service the Appellant functioned, came under this second part of the Second Schedule.

29. By Legal Notice 194 of 1996, Parts III and V of the MCA were extended to apply to the Corporations like the CTTR Corporation which were listed in the Second part of the Second Schedule.

30. The Appellant submitted that by virtue of this Legal Notice, any separation that existed between First Schedule and Second Schedule Corporations came to an end. Therefore, (and I quote from the Appellant's submissions in response) "the Municipal Police Service were (sic) to now function as one unit and be governed and regulated as same."[2]

    Further, the Appellant submitted that the distinction in section 35 between First Schedule Corporations (under the domain of the SASC) and Second Schedule Corporations (under the domain of the PSC) was now obliterated and all Police Services under the MCA were now intended to fall under the domain of the SASC.[3]

31. However, the submission lacked merit. Legal Notice 194 of 1996 only applied to Parts III and V of the MCA. The provisions of Part II, in which section 35 was contained, were not affected by this Legal Notice. Therefore, any inferences about the effect or intention of unifying the Municipal Police Service did not apply to the powers of the PSC under section 35 of the MCA.

[2] See paragraph 1.11 of the Appellant's Submissions in Response filed 20th April, 2021.
[3] See paragraph 1.10 of the Appellant's Submissions in Response filed 20th April, 2021.

32. In fact, the only reasonable inference to be gleaned from this limitation of Legal Notice 194 of 1996 to Parts III and V of the MCA was that the legislature and the executive intended to preserve the distinction between First Schedule and Second Schedule Corporations in section 35 of the MCA which was contained in Part II of the MCA. This in effect preserved the distinction between the powers of the PSC (inter alia) to exercise disciplinary control over the Municipal Police Forces in the Second Schedule like the CTTR Corporations, and the power of the SASC to make regulations (or a code of conduct) for these officers under section 60 of the MCA.

33. The second set of statutory provisions that the Appellant relied on was sections 48 (1) and (2) of the MCA which he alleged created the position of Municipal Police Officer. Section 48(1) provides:

> "**There shall be established for each Municipality a Municipal Police Service for service in connection with the duties of the Corporation and the Commission may in consultation with the Commissioner of Police appoint for that purpose a sufficient number of commissioned officers, subordinate police officers and constables**."

Section 48(2) creates a definition of a commissioned officer and a subordinate police officer.

The Appellant submitted that the intent of these provisions was to create the position of Municipal Police Officer which was to be distinguished from an Officer of a Municipal Corporation.

The Appellant's submissions continued and I quote:

> "These are two separate and distinct positions and the Second Respondent's authority under section 35 of the MCA (supra) to discipline officers of a municipal corporation is limited to those officers defined by section 2 of the MCA (supra) and not municipal police officers."[4]

[4] See paragraph 36 of the Appellant's submissions filed 28 January, 2021.

Under section 2 of the MCA, "officer" was defined (inter alia) as **"(a) the Chief Officers of a Corporation mentioned in section 36; and**" (my emphasis)

Under section 36(1) of the MCA, "the Chief Officers of a Corporation" shall be:

> **"(a) the Chief Executive Officer;**
>
> **(b) the Corporation Secretary;**
>
> **(c) the Treasurer;**
>
> **(d) the Engineer;**
>
> **(e) the Medical Officer of Health.**"

The Police Officers of Municipal Corporations did not fall within this part of the definition of "officer" of a Corporation.

Thus, the Appellant contended that the power of the PSC to exercise disciplinary control over "officers of the Corporations mentioned in the Second Schedule" was not intended to extend to Municipal Police Officers like the Appellant.

34. However, a proper reading of the definition of officer in section 2 of the MCA nullifies such a faulty interpretation of a statutory intention as was contended for by the Appellant.

    The definition of officer in section 2 of the MCA continued after the word "**and**" to include: "**(b) every other person appointed to hold or to act in a pensionable officer in the service of a Corporation and whose remuneration is paid on a monthly basis.**"

35. The Appellant conceded that Municipal Police Officers fell within the latter part (part (b)) of the definition of "officer" in Section 2 of the MCA,[5] and specifically that the Appellant fell within this definition of "officer".[6] That being the case, the Appellant was an "officer" of a Corporation falling under the disciplinary control of the PSC as catered for in section 35 of the MCA.

36. In any event, there was nothing incongruous in being both an officer of a Corporation and an officer in the Police Service of a Municipal Corporation. The Corporations

[5] See page 22 of the Appellant's Submissions in Response at conclusion #4.

[6] See page 7, lines 19-39, and page 9 lines 46 to 50 of the Transcript of the Court of Appeal hearing dated Wednesday 28th April, 2021.

provided many services to its residents such as construction works, cleaning services and market and slaughterhouse services; and the Police Service was just one of these. The various other "officers" of the Corporations also provided the wide variety of services to the Corporations, and similarly, the nomenclature and preception of Municipal Police Officers did not change the fact that they could also be officers of a Corporation.

37. Therefore, there was no specific or gleaned intention to remove the Appellant from the disciplinary control of the PSC under section 35 of the MCA.

38. The Appellant next sought to rely on the maxim of interpretation which states that specific provisions in legislation override the general ones.
The Appellant submitted that section 35 of the MCA was a general provision dealing with the general exercise of powers over all officers of Corporations, whereas section 62 of the MCA was a specific provision dealing with the powers of the SASC over police officers of the Municipal Corporations.
This submission is ill-conceived.

39. For the maxim to apply, the statutory provisions must deal with the same subject matter. To quote from the Appellant's own citation of the Court of Appeal decision in **Civ. App. No. 161 of 2017 Devant Maharaj v The Attorney General**, at paragraph 39:[7]

> "**For the maxim to be applied therefore, there must be a general provision which covers a situation for which specific provision is made by some other provision in the Act. The maxim therefore does not apply where instead of a specific provision and a general provision there are simply different provisions concerned with overlapping aims and applications (see Cusack v Harrow London Borrow Council [2013] UKSC 40(at para 61))**."

In my view that is the position here. This is not the situation in the present case. As I have previously stated, the natural meaning of the provisions and the applicable case

[7] See paragraph 3.2 at page 9 of the Appellant's submissions in reply.

law demonstrate that the subject matter of section 35 of the MCA is (inter alia) the exercise of disciplinary control over officers of the relevant corporations. This is quite a different subject matter from section 60 which deals with the making of regulations (a code of conduct) for Municipal Police Officers. Therefore, the maxim which states that specific provisions override general ones, does not apply here.

40. Another way of viewing this situation is that section 35 and section 60 deal with distinct subject matters. There is no general provision to be overridden by a specific provision.

41. The Appellant also sought to rely on the Privy Council decision in **Oswald Alleyne v The Attorney General of Trinidad and Tobago [2015] UKPC 3**. Although the arguments relating to the **Alleyne** case were more focused on the second issue raised, namely, the legality or propriety of the charges against the Appellant, the Appellant also submitted that the **Alleyne** case "establishes that the Second Respondent (the PSC) had no jurisdiction to charge the Appellant for the alleged offences..."[8]

42. This submission lacked merit.

    The **Alleyne** case, so far as it is relevant, decided that in the absence of regulations made under section 60 of the MCA, Municipal Police Officers were denied the right to equality before the law and the protection of the law under section 4(b) of the Constitution of Trinidad and Tobago. The lack of regulations pursuant to section 60 left the Municipal Police Officers in a disadvantageous position with respect to their functioning. This left them in what was described as a "regulatory limbo", especially compared to the elaborate regulations that existed for regular Police Officers.

43. The **Alleyne** case did not deal with section 35 of the MCA nor the power of the PSC to exercise disciplinary control over officers in the Second Schedule Corporations (like this Appellant). The **Alleyne** case (so far as it is relevant) dealt with the consequences

[8] See paragraph 4.4 of the Appellant's submissions in reply.

which flowed from the failure of the SASC to promulgate regulations under section 60 of the MCA.

The case is of no assistance is deciding on the scope or breadth of the power of the PSC to exercise disciplinary control over the Appellant as opposed to the power of the SASC to make regulations for discipline (a code of conduct). The case does not further the Appellant's arguments on the intention of the legislation nor does it derogate from the plain and ordinary meaning of sections 35 and 60 of the MCA as confirmed by precedent of **Thomas v The Attorney General**.

The historical context of the legislation

44. This submission was first raised on the morning of the hearing before us at the Court of Appeal. The Appellant set it out in a Speaking Note of twelve pages filed sometime in the afternoon of the day before the hearing. Counsel also expanded upon the Speaking Note at the hearing.

45. Counsel submitted that the history of the legislation that dealt with the Municipal Police Force indicated an intention for these forces to be under the full control of the SASC. Therefore, the MCA should be interpreted in a way that would give effect to this intention. However, this submission lacked any merit.

46. The Appellant cited various pieces of legislation from as far back as 1914 which applied to what he called the "city" and "borough" constabularies. Traditionally, the city or borough corporations were the authorities which exercised disciplinary or any control over their individual and separate constabularies. In 1966, with the commencement of the Statutory Authorities Act, the SASC was the body which was authorised to exercise (inter alia) disciplinary control over these former police constabularies.

    However, under the MCA, these traditional city and borough authorities came under the First Schedule of the MCA. It will be remembered that under section 35 of the MCA, these First Schedule Corporations continued under the control of the SASC.

    The history of the legislation properly continued the SASC as the body to exercise (inter alia) disciplinary control over the former city and borough corporations.

47. However, the former county councils (like the one that would have predated the CTTR Corporation) never had their own police forces. They relied on the regular national police force for their policing services.[9]

    Importantly, with the commencement of the MCA, these former county councils became corporations under the Second Schedule of the MCA.[10] Further, by section 35 of the MCA, the Parliament enacted that the PSC was now to be responsible for the exercise of (inter alia) disciplinary control over the officers of these corporations, such as the Appellant.

48. There was no historical context for any Police Services for Second Schedule Corporations. A novel service was being provided for them, and Parliament, in its wisdom, intentionally vested the disciplinary control over the officers of these police services in the PSC by virtue of section 35 of the MCA.

49. In fact, the Appellant himself recognised the "tradition" or context of the power of the PSC over officers like himself who were operating in Second Schedule Corporations.

    At paragraph 16 of his uncontested affidavit in support of this judicial review application, he stated, "I do not dispute the fact that the Second Respondent, Public Service Commission has disciplinary control over us."

50. Further, at paragraphs 4 to 6 of that same affidavit, he deposed that the PSC had promoted him through the ranks to the post of Police Inspector. The validity of these promotions by the PSC had never been called into question by the Appellant. (It will be remembered that the power to appoint "officers of the corporations mentioned in the Second Schedule" was vested in the PSC by section 35 of the MCA.)

51. Given these statements from the Appellant whereby he accepted the powers that the PSC exercised over him over at least ten years, it is difficult to conceive how he could

[9] See paragraphs 9 and 23 of the Appellant's Speaking Note.
[10] See paragraph 23 of the Appellant's Speaking Note.

contend that there was any historical or traditional context whereby the SASC should be recognised as the proper authority to exercise disciplinary control over him.

ISSUE 2: Could the PSC and/or the Tribunal proceed to deal with the specific allegations of disreputable conduct made against the Appellant?

52. The Appellant's case on this issue was based on the fact that the PSC purported to charge the Appellant with disreputable conduct pursuant to Regulation 149(1)(d) of the Civil Service (Amendment) Regulations 1996.

53. The Appellant alleged that he was not a civil servant to whom these Regulations applied and therefore, he could not be charged with offences under those Regulations.

    Further, at the time of these offences (22nd and 23rd October, 2010), there were no Regulations made to govern his conduct or for his discipline. Therefore, neither the PSC nor the Tribunal could lawfully proceed to charge him for any disciplinary offences.

54. However, the Appellant's own submission on this point continued (and I quote), "Where, however, the legislature has not dealt with such matters by way of legislation, the issue of discipline is one which must be dealt with by way of reference to the Municipal Police Officer's contract of employment. This is supported by **Endell Thomas**."[11]

55. In fact, this was the position that the trial judge adopted in his judgment. The trial judge recognised that: (i) the Civil Service Regulations could not be applied;[12] and (ii) there was no disputing that Regulations pursuant to section 60 of the MCA were not made with respect to the "discipline" of Municipal Police forces.[13]

[11] See paragraphs 69 and 70 of the Appellant's Submissions filed 28 January, 2021.
[12] See paragraph 42 of the trial judge's judgment.
[13] See paragraph 37 of the trial judge's judgment.

The trial judge therefore adopted the approach suggested in the **Endell Thomas** case to see whether the conduct of the Appellant could be dealt with under his contract of employment and concluded that they could so proceed. I quote the trial judge:

> "**43. However, even if regulation 149 of the Civil Service Regulations does not apply, there is no reason why the approach adopted in Endell Thomas should not apply instead. The charges preferred against the applicant, and set out above, seem sufficiently serious in relation to bringing the Municipal Police Service into disrepute under an obvious implied term of his employment to warrant an investigation and a hearing before a suitably appointed tribunal**."

56. I accept that the trial judge's analysis was correct.

57. For completeness, I will now refer to the relevant parts of the **Endell Thomas** case.

58. In the **Endell Thomas** case (cited in the preceding section of this judgment), the plaintiff (claimant), who was a police officer, had been charged with the disciplinary offences of neglect of duty and a failure to carry out the instructions of a senior officer contrary to Regulation 74 of the Police Services Commission Regulations 1966.
However, it had been decided that Regulation 74 was ultra vires and there were no other Regulations or code of conduct which could be applied to the plaintiff. With respect to the situation, Lord Diplock opined at pages 391-2:

> "**The result is that, in absence of any comprehensive code of conduct embodied in the Police Service Act 1965, or in ultra vires regulations made under it, the only misconduct with which the plaintiff could be charged was wilful neglect or breach of duties imposed upon him by the implied terms of his contract of employment as a police officer. This the particulars of offence under each of the three charges brought against him manifestly disclosed. Regulation 74, although its inclusion in Regulations purporting to be made under section 102 of the Constitution was**

ultra vires, contained material which the commission might properly and helpfully have published in the form of a notice. The references to it in the charges can in no way have misled the plaintiff. Their Lordships agree with Sir Isaac Hyatali CJ that, in view of the particulars of the offences set out in the charges, the references to regulation 74 may be treated as surplusage and as in no way invalidating the commission's imposition of the penalty of removing him from the Police Service..."

59. Similarly, in the present matter in the absence of any applicable Regulations or code of conduct with respect to matters of discipline, the Appellant could only be disciplined under the implied terms of his contract as a Municipal Police Officer. The citation of section 149(1)(d) of the Civil Service Regulations was mere surplusage and could not have misled the Appellant about the allegations of disreputable conduct that were being made against him. These references to section 149(1)(d) of the Civil Service Regulations in no way invalidated the proceedings against the Appellant.

60. The Appellant submitted that the trial judge was wrong to weigh the seriousness of the offences alleged against the Appellant in the absence of Regulations. However, this was an unfounded criticism of the trial judge. Consideration of the decision to charge the Appellant necessarily required consideration as to whether the charges against him could have constituted a breach of his contract of employment.

    The trial judge was entitled, and in fact required, to look at the alleged conduct to determine whether it could rationally and reasonably be implied into the Appellant's contract of employment. If not, the Appellant would have succeeded. If, as he rightly concluded, it could, then the decision of the PSC to proceed with disciplinary procedures against the Appellant would be neither illegal, irrational, nor (Wednesbury) unreasonable.

61. A point which was not frontally pursued by the Appellant in this appeal, but which was addressed by the trial judge and the Respondents, was whether the Tribunal had the jurisdiction to hear and determine the charges against the Appellant.

At paragraphs 35 to 39 of his judgment, the trial judge ruled that the PSC could use its processes to determine the allegations of disreputable conduct against the Appellant. The Tribunal process was one of these.

The Respondents referred to section 45(2) of the Interpretation Act, Chap. 3:01, which provides: "**Where a written law empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to do that act or thing**."

The Respondents submitted that the Tribunal procedure was a fair and accepted procedure that was reasonably necessary to enable the PSC to proceed with the disciplinary action against the Appellant.

62. I accept the correctness of the arguments of both the trial judge and the Respondents on this point.

63. In response, the Appellant merely submitted that section 45(2) of the Interpretation Act could not apply because section 45(2) only applied where a written law empowered the action and since there was no "written law" enabling the PSC to proceed with disciplinary action against the Appellant, it could not do so.

However, having regard to my finding in Section I of this analysis, namely that, section 35 of the MCA which was a "written law" that empowered the PSC to proceed with this disciplinary action, the Appellant's response fell by the wayside.

An "addendum" belatedly raised by the Appellant

64. In his Speaking Note to the Court of Appeal which had been filed sometime in the afternoon before the hearing of this appeal, Counsel for the Appellant raised a point in what he termed an "addendum".

65. Counsel alleged that on that very same day (27 April, 2021) at some unspecified time, a letter was written on behalf of the Appellant to the Attorneys-at-Law for the Respondents, seeking to get a letter of appointment of the Appellant from the SASC which allegedly had been written "in or around June, 1992".

66. The Respondents' Attorneys allegedly indicated to Counsel for the Appellant that they were "not in possession of the authority to request same from the SASC since the SASC was not a party hereto."[14]

67. Counsel for the Appellant went on in the Speaking Note to submit that the Respondents were in breach of their duty of candour. He then went on to submit in his oral address to the Court that he needed the document to prove how the PSC had been usurping the authority of the SASC.

68. The Respondents forcefully denied these allegations but given the very short space of time between the request and the hearing, they were unable to entertain the request in any way.

69. This request and the submissions of the Appellant are both misconceived for the following three reasons.

70. First, we have not seen any of the documents of request or response (if they exist). Nevertheless, assuming that the information in Counsel's Speaking Note is correct, the response of the Respondents cannot be faulted.

    This is a request for the production of a document that was made by the SASC which is an independent tribunal and is not a party to this litigation. Without more, there is no reason why the Respondents would have, much less, could produce any such document to the court.

71. Second, this was technically a request to adduce fresh evidence on appeal which was made at the close of submissions. Counsel failed to use the processes of both the High Court and the Court of Appeal to properly bring this evidence before the Court. This request seemed like an afterthought to try to put forward a new issue at the close of the hearing of this appeal.

[14] See paragraph 31 of the Appellant's Speaking Note.

72. Third, the Appellant's case in the High Court and on Appeal, had always been one where the decision of the Respondents to exercise disciplinary control over him had been attacked. The Appellant never contested his appointments or promotions. In fact, as stated before, he accepted these matters.[15]

    This seemed like a naked attempt to litigate an issue which had never been raised at a time when it must be remembered: (i) this matter proceeded on the uncontested evidence of the Appellant; (ii) the Respondents never had the opportunity to verify or oppose any evidence; (iii) this was an application for judicial review where time was critical (see the general three month time bar for action) and to raise issues that went back to 1992 would probably run afoul of these time bars; and (iv) the relevance and/or veracity of the information had not and could not now be tested.

73. To suggest a breach of an alleged duty of candour in these circumstances is seriously misconceived.

CONCLUSION

74. The appeal is dismissed. We will hear the parties on the issue of costs.

.....

G. Smith
Justice of Appeal

[15] See paragraphs 41 to 51 above.