IN THE COURT OF APPEAL

OF

TRINIDAD AND TOBAGO

CA S NO. 409 OF 2017

THE PUBLIC SERVICE COMMISSION

APPELLANT

AND

CERON RICHARDS

RESPONDENT

PANEL: G. Smith J.A

P. Moosai J.A

P.A. Rajkumar J.A

APPEARANCES:

Mr. R. Martineau S.C, Ms R. Hinds, instructed by Ms K. Mark

on behalf of the Appellant

Mr. R. L. Maharaj S.C, Mr. K. Walesby

on behalf of the Respondent

DATE OF DELIVERY: 11th June 2019

I have read the judgment of Rajkumar JA. I agree with it and have nothing to add.

……

G. Smith

Justice of Appeal

I have read the judgment of Rajkumar JA. I also agree with it and have nothing to add.

……..

P. Moosai

Justice of Appeal

Table of Contents

Judgment

Delivered by Rajkumar J.A

Background

1. The appellant is a Commission established by section 120 of the Constitution in which is vested jurisdiction over, inter alia, prison officers in relation to matters of discipline[1]. The respondent is a prison officer.

2. On 11th March 2016 he reported that the firearm which had been issued to him for his protection had been stolen. By letter dated 28th June 2016 the Commissioner of Prisons (C.O.P) wrote to him and informed him that an investigating officer (I.O.) had been appointed pursuant to regulation 90 of the Public Service Regulations (PSC regulations) to inquire into allegations of misconduct.

3. The allegations were that he acted in breach of regulations 20 (2) (a) (i) and 20 (2) (f) of the Prison Service (Code of Conduct) regulations 1990. The first allegation was of discreditable conduct in failing to adequately secure the firearm, ammunition, and holster, (the items), which had been issued to him. The second allegation concerned his failing to account for these items when he reported them stolen.

4. The I.O by letter dated 11th July 2016 wrote to the respondent and requested that he submit a statement in relation to the allegations. The respondent replied by letter dated 19th July 2016 in which he stated, inter alia, that his firearm, ammunition and holster had been adequately secured in a safe at his locked residence which had been broken into, that those items were stolen,

[1] Section 121 (1) and 121 (7)

that he immediately reported the theft to the police and prison service, and that he acted in accordance with the Firearms Act.

5. In addition, the respondent's attorney at law also sent a letter to the appellant dated 19th July 2016 which allegedly included a copy of a statement by the respondent. He requested particulars of the regulations allegedly breached. Submissions were also made therein that the respondent was a victim of theft and was not negligent, and that it would be, inter alia, unreasonable to prefer any disciplinary charge against the respondent in relation to the theft of his firearm. However, that letter was not before the Commission at the time it took the decision to suspend him as it had been directed to another section within the Commission.

6. By letter dated August 2nd 2016 the investigator informed the appellant of his appointment. On August 23rd 2016, before the report of the investigator, had been submitted to the appellant it decided to suspend the respondent and directed him to cease to report for duty pending the outcome of the investigation into the allegations against him in accordance with regulation 88 of the P.S.C Regulations. The allegations were the same as those in the letter dated 28th June 2016 from the C.O.P.

7. By letter dated August 30th 2016 (received by him on September 5th 2016), the appellant so informed the respondent. The investigator's report was subsequently submitted to the appellant on September 9th 2016.

8. The respondent challenges the decision to suspend him. The trial judge found:

i. That the charge of failing to account was itself ultra vires because it was self-contradictory. He considered in effect that there could be no failure to

account for the items when the allegation itself specified that the items had been reported stolen, thus indicating they had been accounted for by the respondent in accordance with regulation 5 of the Firearms Regulations.

ii. That although there was no general right to a hearing prior to suspension, in this case fairness required that the appellant should have granted him an opportunity to be heard or for his representations to be considered before suspending him. The availability of the respondent's response and respondent attorney's response - albeit that they were not actually before the commission - required them to be taken into account.

Issues

9. At issue is:

i. whether the allegation of failing to account was actually ultra vires.

ii. whether in the circumstances of this case fairness required a right to a hearing before suspension.

Conclusion

10. i. The allegation of failing to account was not ultra vires. Although **an** account of the items had been provided by the response that it had been reported stolen, the veracity and bona fides of that response were properly the subject of further investigation. It could not be assumed, simply on the assertion of the respondent, and without further investigation, that the **report** of the larceny of the firearm and other items was true, or that they had actually been stolen. There were other persons who had testimony to provide on this issue, such as the Prisons Armorer, before a conclusion could be arrived at that the firearm and the other items had been properly accounted for. The mere assertion that they had been reported stolen was not an account of the items. The trial judge therefore fell into error when he assumed otherwise.

ii. Natural justice did not require providing the respondent with an opportunity to be heard prior to a decision to suspend him. The P.S.C regulations provide a comprehensive statutory code which includes timely opportunities to be heard:-

a. in relation to allegations being investigated, by providing a written explanation to the investigating officer within ten days (regulation 90) of his appointment;

b. by providing a written explanation to the commission or disciplinary tribunal when the officer is actually charged (regulation 92 (1)).

c. By providing a full opportunity for the officer to defend himself at the hearing of the charge (regulation 98 (1) (a)).

Regulation 88 does not provide for an additional implied hearing prior to suspension in addition to those express opportunities. The Court of Appeal so decided in the case of ***Murray.***

iii. The decision of the Court of Appeal in ***Murray*** was not distinguishable either:

a. on the basis that the allegation of failing to account was ultra vires (because it was not); or

b. that there existed, independent of a **right** to a hearing prior to suspension, **a duty of fairness** in the circumstances of this case to consider either the representations of the respondent and his attorney at law, or a preliminary report of the investigating officer.

There was no reason for the trial judge to distinguish ***Murray*** on the instant facts.

iv. Given that there is no **right** to be heard at the suspension stage in this case, no such **separate duty of fairness** applicable at the suspension stage is discernible. The omission by the appellant to consider any such material from the respondent or his attorney at law could not therefore be in breach of any such right of the respondent, nor in breach of any duty of the appellant. The appellant was only

required to consider the matters prescribed by regulation 88, namely the public interest or the repute of the public service. The evidence is that it did so.

Order

11. The appeal is allowed and the orders of the trial judge are set aside.

Analysis

12. By regulation 20 (1) of the Prison Service (Code of Conduct) Regulations, an officer who commits an act of misconduct is liable to such punishment as is prescribed by regulation 110 (1) of the **Public Service Commission Regulations**. Specific acts of misconduct are enumerated at regulation 20 (2) (a) and 20 (2) (f) as set out hereunder. Breaches of those regulations are therefore subject to the disciplinary process set out in the Public Service Commission Regulations as the punishment and penalties provided for by regulation 110 (1) are "penalties that may be imposed by the (Public Service) Commission by **disciplinary proceedings** brought against an officer".

The allegations

13. *"That you, Prisons Officer II #2295 Ceron Richards was (sic) Discreditable in your conduct when on March 10, 2016 you left unattended at your residence for an approximate twenty four (24) hour period, your Prison issued one (1) H&K Compact 9mm pistol, Serial #27-054485, along with two (2) H&K Magazines with twenty six (26) rounds of Sellier and Belliot 9mm Ammunition and a Holster, which was issued to him for his protection, your failure to adequately secure these items culminated in the said items being reported stolen by you sometime between March 10, 2016 and March 11, 2016". Contrary to Regulation 20 (2) (a) (i) of the Prison Service (Code of Conduct) Regulations 1990.* (The allegation of discreditable conduct) (exhibit CR4)

14. Regulation 20 (2) (a) (i) of the Prison Service (Code of Conduct) Regulations 1990 provides as follow:-

20 (2) (a) (i)

20. (2) Without prejudice to the generality of subregulation (1) an officer commits an act of **misconduct** and is liable to such punishment as is prescribed by regulation 110 (1) of the Public Service Commission Regulations if he is guilty of any of the following:

(a) ***Discreditable conduct,*** that is to say, if he—

(i) While on or off duty acts in a disorderly manner or any manner prejudicial to discipline or likely to bring discredit on the Service.

15. The second allegation was:

"That you, Prisons Officer II #2295 Ceron Richards having been issued one (1) H&K Compact 9mm pistol, Serial #27-054485, along with two (2) H&K Magazines with twenty six (26) rounds of Sellier and Belliot 9mm Ammunition and a Holster for your protection, have failed to account for the said items, when you reported that they were stolen from your residence sometime between March 10, 2016 and March 11, 2016". Contrary to Regulation 20 (2) (f) of the Prison Service (Code of Conduct) Regulations 1990. (The allegation of failing to account)

16. The allegation of failing to account was based upon regulation 20 (2) (f) of Prison Service (Code of Conduct) Regulations which provides as follows (all emphasis added):

> *(f) Failure to account…that is to say, if he fails to account for, or to make a prompt or **true return** of any money or **property** for which he is responsible whether in connection with his duties as a prison officer or with any club or fund connected with the prison or the staff of the Service;*

(The trial judge also referred to a second set of allegations but considered that they were not relevant to the instant claim).

Orders of trial judge

17. The orders of the trial judge included the following (all emphasis added):

a. A declaration that the allegation of failing to account was **illegal.**

b. A declaration that the allegation of failing to account was **irrational.**

c. He declared that the **decision** of the first defendant made the 23rd day of August 2016, directing that the claimant do cease to report for duty until further notice pending the outcome of both allegations made against him attached to letter dated the 30th August 2016, (the said decision) breached the principles of procedural fairness and natural justice.

Analysis – Issue i

18. The first two declarations set out above were based upon the trial judge's conclusion that the allegation against the respondent in relation to failure to account for the firearm and other items was ultra vires Regulation 20 (2)(f) of the Prison Service (Code of Conduct) Regulations. Upon closer examination, the trial judge's reasoning with regard to the rationality or ultra vires nature of that charge cannot be supported.

Whether the second allegation was illogical or irrational

19. He construed the second allegation as meaning that when the respondent reported the items stolen (in keeping with the law as set out in Regulation 5 of the Firearm Regulations) he nevertheless failed to account for the property, (the second allegation).

20. The trial judge considered (at paragraph 63) that according to that allegation the fact that the respondent obeyed the law was a ground on which he was being accused of misconduct. He therefore accepted and concluded that on its face the allegation appeared to be internally and inherently inconsistent both with the law and common sense, bearing in mind the natural meaning of the word *'account'* and the duty in law to report the theft. He therefore held that the decision to suspend based on the allegation of failure to account was irrational in the strict sense of that term. In relation to that finding the trial judge erred.

Whether allegation contradictory

21. The respondent's response on the charge of failing to account was in effect, that he had accounted for the firearm and other items by the assertion that these had been properly secured, but notwithstanding this they had been stolen, and that this had been reported to the police. Regulation 20 (2) (f) of the Prison Service (Code of Conduct) Regulations required a prompt or true return of property for which the respondent was responsible. The property had not been returned. The trial judge accepted as true the account of the respondent without recognizing that that account remained to be verified and could not therefore be determined at that stage to be a proper account or true return.

22. Whether the respondent's account was a true account or a true return remained a matter for investigation and verification. This was so regardless of the assertion that the firearm had been **reported** as stolen. Whether or not that was a sufficient account of the whereabouts of the firearm was properly a matter that remained to be investigated. By way of one example, the firearm was to be presented to the Prison Armourer who was required to inspect it monthly, and the timing of and compliance with those inspections in January, February, and March 2016, were proper subjects of investigation given the report that the firearm had been stolen in April 2016.

23. It was only if the response of the respondent had been accepted as true that it could be said that he had in fact accounted for the firearm and the items. It was only in that case that the allegation could be said to be inherently contradictory or ultra vires the regulations. However if the truth of his response remained to be established then the allegation could not be considered to be illogical simply because it could not at that stage be concluded that the respondent had properly accounted for the firearm and the other items.

24. The trial judge in effect assumed the truth of the respondent's response without recognising that there remained the issue of the veracity of that response which required investigation.

25. The fallacy in any approach which adopted the position of one party or another was identified in the case of **The Police Service Commission v Murray Civil Appeal No. 143 of 1994**. He fell into error in accepting the truth of the unverified response of the respondent that he had reported that a firearm had been stolen on 11th March 2016. He ignored the further allegations of the respondent that he had not reported for monthly inspections of the firearm in January and February 2016. He therefore fell into error in his finding that *"according to the allegation, the fact that Richards obeyed the law was a ground on which he could be accused of misconduct"*. His further reasoning at paragraph 63 of the judgement *"that the court accepts on the face the allegation appears to be internally and inherently consistent both with the law and common sense bearing in mind the natural and ordinary meaning of the word "account" and the duty in law to report the theft. The decision to suspend based on the allegation is therefore **irrational** in the strict sense of that term…"*

26. It was on this basis that he concluded that the charge of failing to account was unreasonable in the Wednesbury sense or ultra vires the regulations. This in

turn impacted upon his further reasoning that, despite the authority of **The Police Service Commission v Murray Civil Appeal No. 143 of 1994**, (binding upon him), in the circumstances of this case fairness required that the respondent be afforded an opportunity to be heard prior to his suspension.

Issue ii - Whether natural justice requires an opportunity to be heard prior to suspension

27. The disciplinary powers of the appellant (Public Service Commission) are contained in the Public Service Commission Regulations (P.S.C regulations). These set out the procedure to be followed from inception to conclusion when an allegation is made against an officer. The issue in this case is whether a right to be heard prior to the exercise of the discretion to suspend can be implied into that procedure, and in particular into Regulation 88.

Public Service Regulations

28. Because the appellants contend that the PSC regulations provide a sufficiently comprehensive code of disciplinary procedure such that there is no need to read anything into regulation 88, it is necessary to examine the relevant regulations. Accordingly, they are set out in extenso hereunder (all emphasis added):

> **88.** (1) When the Commission **becomes aware** of any act of indiscipline or misconduct and the Commission is of the opinion that **the public interest** or the **repute** of the public service **requires it**, the Commission may direct the officer in writing to cease to report for duty until further notice from the Commission, and an officer so directed shall cease to perform the functions of his office forthwith**.**
>
> (2) An officer directed to cease to perform the duties of his office in accordance with subregulation (1) shall continue to draw full salary until notice is given to him by the Commission under regulation 89.

89. (1) Where there have been or are about to be instituted against an officer—

disciplinary proceedings for his dismissal; or criminal proceedings, and where the Commission is of opinion that the public interest requires that that officer should forthwith cease to perform the functions of his office, the Commission shall interdict him from such performance.

(2) The effective date of interdiction shall be—

where an officer has continued to perform the duties of his office, the date of receipt by him of the notification of his interdiction;

where, in accordance with regulation 88, an officer has ceased to perform the duties of his office, such date as the Commission may direct.

(3) An officer so interdicted shall, subject to the provisions of regulation 114, be permitted to receive such proportion of the pay of his office, not being less than one-half, as the Commission may determine, after taking into consideration the amounts being deducted per month from the pay of the officer.

(4) If disciplinary proceedings against any such officer result in his exoneration, he shall be entitled to the full amount of the remuneration which he would have received if he had not been interdicted, but if the proceedings result in any punishment other than dismissal, the officer shall be allowed such pay as the Commission may in the circumstances determine.

(5) ***(Revoked by LN 28/1991).***

90. (1) Where a report or allegation of indiscipline or misconduct by an officer is received other than a report or allegation of indiscipline to which regulation 85 applies, the Permanent Secretary or Head of Department shall **report the matter to the Director** for the attention of the Commission and **concurrently warn the officer in writing** of the report or **allegation** of indiscipline or misconduct.

(2) An investigating officer shall be appointed by the Director from the Public Service Investigations Unit to investigate the report or allegation.

(2A) **An investigating officer** may also be **appointed** by a Permanent Secretary or Head of Department of the Ministry or Department to which the officer is assigned and shall hold an office in a grade higher than that of the officer.

(3) The investigating officer shall, **within three days of his appointment**, give the officer a written notice specifying the time, not exceeding **seven days** from the date of the **receipt of such notice**, within which he may, **in writing, give an explanation** concerning the report or allegation **to the investigating officer**.

(4) The investigating officer shall require those persons who have direct knowledge of the alleged indiscipline or misconduct to make written statements **within seven days** for the information of the Commission.

(5) The investigating officer shall with all possible dispatch but **not later than thirty (30) days** from the date of his appointment, **forward to** the Director of Personnel Administration for the information of the **Commission** an investigating officer's **report** consisting of the original statements and all relevant documents together with his own report on the particular act.

(5A) Where the Commission considers that the circumstances before it warrants **an extension of time**, the period referred to in subregulation (5) may be extended by a period not **extending** (sic) thirty days.

(6) **The Commission**, after considering the report of the investigating officer and **any explanation given under subregulation (3)**, shall decide whether the officer should be charged with an offence, and if the Commission decides that the officer should be so charged, the Commission shall, as soon as possible, cause the officer to be informed in writing of the charge together with such particulars as will leave the officer under no misapprehension as to the precise nature of the allegations on which the charge is based.

(7) Where, in the explanations given under subregulation (3), the officer makes an admission of guilt, the Commission may determine the penalty to be awarded without further inquiry.

(8) Where the Commission, under section 127 of the Constitution, has delegated to an officer its duty of deciding under subregulation (6) whether an officer shall be charged and of charging such officer with an offence, the reference in subregulations (4), (5), (6) and (7) to the Commission shall be construed as a reference to that officer.

(It appears that the version of the regulations referred to by the trial judge was a different version from that in effect in August 2016 but nothing turns upon this and the aspects of the regulations highlighted above are common to both).

91. Where an officer is charged with an alleged act of indiscipline or misconduct he shall, as soon as possible, be given a copy of any written explanation he may have made under regulation 90(3).

92. (1) Where an officer is **charged** with indiscipline or misconduct the officer shall be **requested** to **state in writing** within a specified period whether he admits or denies the charge and shall be allowed to give **to the disciplinary tribunal or the Commission** any **explanation** he may wish.

(2) Where an officer admits the charge under subregulation (1), he shall be allowed to include in his explanation any extenuating circumstances in mitigation.

29. The regulations provide for:-

i. an opportunity to respond to the investigator at the investigation stage (Regulation 90 (3).

ii. an opportunity for that response to be considered by the Commission prior to deciding whether the officer should be charged (Regulation (90(6).

iii. an opportunity to provide a written explanation to the Commission or disciplinary tribunal when the officer is actually charged (Regulation 92 (1)).

iv. a full opportunity for the officer to defend himself at the hearing of the charge (Regulation 98 (1) a).

That hearing itself has inbuilt safeguards provided. These include, for example,

(a) an opportunity to make a no case submission (Regulation 98 (1) c, and 98(2)),

(b) an opportunity to be represented by another person and to cross examine witnesses (Regulation 98 (1) d)

(c) a copy of the record being made and available to the officer in the event of an appeal (Regulation 98 (1) e),

(d) an opportunity to have access to all documentary evidence intended to be used (Regulation 101(3)),

(e) Under Regulation 101, an opportunity to address any additional matters that the tribunal itself proposes to take into account. (Regulation 101 (2))

(f) A right of appeal and the right to be informed thereof. (Regulation 107 (2))

30. The regulations do not also contemplate a right to an additional hearing prior to a decision to suspend. Unless such a **right** is demonstrated to be vested in the respondent there cannot be its converse, **a duty** on the part of the appellant, whether based on fairness or natural justice, to afford him a hearing prior to a decision to suspend him. The regulations provide a comprehensive statutory disciplinary code with inbuilt safeguards of the **opportunity to be heard** at several stages. The code also provides for **expedition** i. by the investigator investigating a charge[2]. ii. by any disciplinary tribunal appointed to hear the evidence in relation to any charge[3].

31. Further Regulation 88 provides that if the discretion to suspend is exercised that it is to be on full salary until a decision is made to interdict the officer under regulation 89. An additional opportunity to be heard, apart from those already expressly provided for would add an additional layer of delay to the expeditious process envisaged under the comprehensive code of the regulations. In fact it could render the disciplinary scheme uncertain, burdensome, and even unworkable.

[2] Public Service Regulation 90 (3), 90 (5), 90 (5A)
[3]Public Service Regulation 96

32. Regulation 88 does provide for a discretion to be exercised by the Commission in determining whether to suspend an officer. It may consider material that is placed before it in exercising its discretion. However this is not the same as saying that it **must** do so, or further, that it must seek to ascertain whether any representations have been made by the officer on his behalf. The regulations certainly do not provide that the Commission seek to obtain any preliminary report from the investigator. In fact the regulations do not contemplate any additional material coming before the Commission at the suspension stage.

Requirements under regulation 88

33. The appellant contends that Regulation 88 permits the Commission to suspend if two conditions are satisfied namely:

i. that the Commission becomes aware of any act of indiscipline or misconduct and;

ii. that the Commission is of the opinion that the public interest or the repute of the Public Service (which includes the Prison Service – see section 121 of the Constitution) requires the Commission to suspend the officer[4].

34. In relation to the second requirement the appellant contends that it is entirely a matter for the Commission to determine whether it is of the opinion that the public interest or repute of the Public Service requires suspension. The appellant contends therefore that on the uncontested evidence those conditions were satisfied and that accordingly the jurisdiction and the discretion of the Commission were triggered which permitted it to direct the respondent to cease to report for duty until further notice.

[4] It is probable that "act of indiscipline or misconduct" actually refers to "allegation of indiscipline or misconduct" as in regulation 84 (b).

35. The trial judge considered that the Commission erred in not having considered either:

I. a preliminary report from the Investigating Officer; or

II. the respondent's own explanation,

before deciding to suspend him.

36. The appellant contends however that:

a) there is no preliminary report required or provided for under Regulation 88 or any other P.S.C. Regulation; and

b) that the opportunities for supplying an explanation by the respondent are those expressly provided for under the P.S.C Regulations.

37. The trial judge found that the letter from the respondent's attorney at law was available to the Commission, and should have been considered before taking a decision to suspend him. However on the evidence it was not actually before the Commission, having been misdirected within the Commission.

38. Further, and more importantly, the P.S.C Regulations did not contemplate that the Commission itself, prior to a decision to suspend, **must** take into account any matters other than those provided for in Regulation 88 itself (namely, (a) its becoming aware of an act of misconduct and (b) its being of the opinion that the public interest or the repute of the service requires suspension).

39. The P.S.C regulations simply do not provide that any response of the respondent, or by someone on his behalf such as his Attorney at Law, is to be considered by the Commission before it receives the Investigator's report. That report would include any statement from the respondent himself. Further there is no basis on the wording of the regulations to infer or impose a duty on the Commission (i) to seek to ascertain whether any such material existed, (ii) to delay

its decision to suspend until it had considered any such material unearthed upon enquiry.

40. In fact the appellant contends that Regulation 88 does not contemplate that the decision to suspend should be based upon the merits of any defence being considered at that stage. An officer like the respondent would have, under the regulations, up to 10 days to furnish his response to the investigator. A construction of regulation 88 which required providing an opportunity to be heard even before the officer's response was due would negate the possibility of an earlier interim suspension in urgent cases. That could effectively stultify the exercise of the appellant's discretion to suspend.

41. The rationale of the trial judge in imputing such a requirement in the circumstances of this case, was a duty of fairness. The circumstances which he considered required such a hearing included his conclusion that one allegation – failure to account – was inherently contradictory, irrational and therefore ultra vires. However, as demonstrated previously, this was not so.

42. The respondent alleges that the fact that the Commission had been written to by attorney at law, meant that there existed material which it could have considered prior to deciding to suspend. However fairness would only require that such material be searched for and taken into consideration if the procedure under regulation 88, within the context of the entirety of the regulations, either (i) expressly required it or (ii) was itself unfair.

43. If it were not unfair there would be no justification for reading additional requirements into the comprehensive statutory code provided for under those regulations and effectively re-writing regulation 88. However regulation 88 cannot be said to be unfair where the regulations and the statutory disciplinary code

provided thereunder provided for multiple opportunities to be heard as described previously.

44. The case of ***Murray*** (infra) directly addressed the issue of the fairness of the equivalent of Regulation 88 in the Police Service Regulations, and confirmed the absence of a right to be heard prior to suspension. It was therefore binding on the trial judge unless it was distinguishable or had ceased to apply because of a change in the legislative framework. Accordingly it is necessary to revisit the case and consider it in detail.

Issue iii – Revisiting The Police Service Commission v Murray Civil Appeal No. 143 of 1994

45. In ***Murray*** an allegation of discreditable conduct in relation to a WPC had been made against a senior police officer. Unlike in the instant case he provided no response to the allegation. As in the instant case he was suspended pending investigation of the allegation pursuant to the Police Service Commission Regulations, (similar in all material respects to the Public Service Commission Regulations).

46. The Court of Appeal in ***Murray*** in the judgment by the Honourable Nelson JA held that, apart from construction of the regulation, there was no right to a hearing prior to suspension because the regulations provided a comprehensive statutory code with inbuilt safeguards for an opportunity for hearing at further stages post suspension.

47. He held that the case of **Rees v Crane [1994] 2 A.C. 173**, which decided that in the case of a Judge there was a right to be heard before suspension, was distinguishable because, unlike under the Police Service Commission Regulations,

the constitutional provisions which provided for the disciplinary procedure for Judges, did not provide a similar comprehensive code of procedure.

48. In ***Murray*** Nelson JA noted[5] that the statutory code of discipline in the Police Service Commission Regulations and in particular Regulation 79 thereof (equivalent to Regulation 88 of the Public Service Commission Regulations) – *"does not expressly provide for hearing at the suspension stage."* He found as a matter of construction that there was no implied right in Regulation 79 that the police officer in that case be heard prior to suspension.

49. He considered that the requirements of Regulation 79 were that i) the Commission's becoming aware of an offence by reason of the report in Regulation 77 (1) by the Police Commissioner that a police officer may have committed an offence and ii) the Commission's forming the opinion that the public interest or the repute of the police service (in that case) required that the officer cease to report for duty until further notice. He expressly rejected the argument that the Commission could only suspend an officer after becoming aware of an offence and that such awareness could only come after it had considered the **report** of the Investigating Officer pursuant to Regulation 81 and the **explanation** given under Regulation 84 and after the Commission had **decided to charge** the officer with an offence.

50. In considering that argument he held that Regulation 79 contemplated a stage where the Commission had received the Commissioner's report that an offence may have been committed but had not considered whether to embark on disciplinary proceedings. He noted (emphasis added) "*this stage of the process is not to be confused with the stage where the Commission has considered the report of the Investigating Officer and has* ***decided to lay a charge*** *against the police*

[5] at page 14

officer. This is the interdiction stage which is way beyond the mere ***awareness*** *stage applicable to Regulation 79"*. He therefore rejected the construction placed on the phrase *"becomes aware"* by Counsel for the respondent in that case.

51. The structure of the Police Service Commission Regulations considered in ***Murray*** is the same as the structure of the P. S. C. Regulations in the instant matter in that, like the Police Service Regulations being considered in the case of ***Murray***, the P. S. C. Regulations in the instant case provide:

i. An awareness stage in the equivalent of Regulation 79 (that is, Regulation 88);

ii. Thereafter a detailed disciplinary procedure including the laying of charges and the provision of opportunities to be heard at various stages as described previously.

Public Interest

52. In ***Murray*** Nelson JA held at page 17 that the Commission's determination of what was in the public interest was a policy decision for the Commission alone. It was not for the Court *"to substitute its own opinion as to what is fair in the context of regulation 79"*. It was not for the courts to question the correctness of the policy decision to suspend at that stage. Further, quoting Lord Brightman in **Chief Constable of the North Wales Police v Evans [1982] 1 W.L.R. 1155 at 1174 - 1175**…nor was it desirable that evidence should be called before the Court of the implication of such policy.

53. Nelson JA considered that the courts in this jurisdiction had been consistently interpreting Regulation 79 (of the Police Service Commission Regulations – the equivalent of regulation 88 of the Public Service Commission Regulations) so as not to require at the awareness stage a prior right to a hearing. For example he noted in the case of **Rudolph Steele v Police Service Commission** High Court Action #1780 of 1987 Edoo J expressly rejected a submission that the suspension of police officers without a hearing pending enquiries into allegations

of misconduct arising from the report of a Commission of Enquiry into the drug trade, amounted to a breach of natural justice. This case was followed by Razack J in ***Joseph v A.G*** HCA 571 of 1991 in relation to suspension by the Tourism Development Authority under a regulation identical to regulation 79. Also in H.C.A 1916 of 1982 ***Douglas v P.S.C*** Warner J had held that the scheme of the **Public Service Commission Regulations** did not envisage a right to be heard prior to the Commission's taking action under the equivalent of regulation 79 of the Police Service Commission Regulations that he was considering.

Comprehensive Disciplinary Code

54. In ***Murray*** it was also held, as in the case of **Furnell v Whangarei** [1973] A.C. 660, that the Police Service Commission Regulations constituted a comprehensive disciplinary code for police officers. In the case of ***Furnell*** the Privy Council held that the regulations governing disciplinary proceedings *"prescribed comprehensively the procedure to be followed, and in those circumstances it was not lightly to be assumed that the regulation in question was unfair, or that it was the function of the court to redraft the code".*

55. In ***Murray*** the court also addressed the distinction between the case of *Rees v Crane* where a right to be heard was required prior to what was in effect an indefinite suspension. That case was distinguished in the following way at page 20 *"by contrast in Rees v Crane the Privy Council found that the three tier process set up by Section 137 of the Constitution was silent as to the procedure to be followed at each stage. Accordingly the section is not to be construed as necessarily excluding a right to be informed and heard at the first stage."*

56. In effect therefore the Privy Council found that in the case of the disciplinary procedure in relation to judges there was no comprehensive statutory code prescribed. However, under the P.S.C Regulations, at the time that

suspension was being considered the respondent would have been aware of the allegation being made against him. That is because under regulation 90, when the report of misconduct is received the matter is reported to the Commission and the officer **concurrently** warned in writing of the report or allegation of indiscipline or misconduct. In the case of ***Rees v Crane*** however the Judge in that case was not informed of a. what was the specific charge that he had to meet and b. the fact that material relating to his performance had been presented to the Commission or even c. that representations were being made to the President for his removal.

57. Unlike in the case of police officers and public officers, where the comprehensive code expressly provided for information on the allegation to be made available to the officer, and expressly required the Commission to form an opinion and act in the public interest and to protect the repute of the service, there existed no comprehensive code in the case of a judge that either a. stipulated what was required of the JLSC in such a situation or b. even provided for the judge to know what was being alleged against him at that stage. Because the Constitution was silent in the absence of such a comprehensive statutory code the right of the judge to be informed and heard at the first awareness stage had to be implied and therefore was implied in the interest a. of the good administration of justice and b. the court system as a whole.

58. In the case of the Public Service Commission Regulations however they are not silent on this matter. They provide a comprehensive code, and the opportunity to be heard at various and critical stages of the disciplinary process as set out hereunder.

Opportunities to be heard under the Public Service Commission Regulations

59. The first opportunity to be heard is afforded to the officer, who is the subject of complaint, by the Investigating Officer (IO). The I.O shall within three days of his appointment, give the subject of complaint the opportunity to provide in writing within a seven day period, an explanation concerning the report or allegation, to him [6], (**the first opportunity**). A further opportunity is provided to that officer at the stage where the Commission, after considering the report of the Investigating Officer decides that the officer should be charged with an offence (regulation 90 (6). In that case the Commission has before it the officer's explanation included with the report of the I.O (**the second opportunity**). Further under Regulation 92 when an officer is charged the officer shall be requested to state in writing within a specified period whether he admits or denies the charge and shall be allowed to give to the tribunal or the Commission any explanation that he may wish. (**the third opportunity**). These opportunities all arise even before the opportunity to defend himself at the hearing of the charge under regulation 98.

60. Nelson JA referred to the case of Rees vs Crane where Lord Slynn affirmed the principle that *"there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question"*[7]. He continued "of the examples of such situations the one most relevant to this case is that "the **statutory scheme properly construed** excludes such a right to know and to reply at the earlier stage". He therefore concluded that in the case of a police officer, unlike in the case of a judge, "…the scheme of the statutory disciplinary code

[6] Regulation 90 (3)
[7] page 23 of Murray

contained in Regulation 75 to 108 of the Commission's Regulations does not require that a police officer be heard before suspension".

61. In the instant case that statutory code under the P.S.C. regulations like the Police Service Commission regulations, provides for a right to be heard at a later stage. It is not the function of the court to redraft that code.

Whether removal of ouster clause affects the reasoning in *Murray*

62. All of the reasoning of Nelson JA by which he concluded that there was no right to a hearing prior to suspension omitted any reference to the then existing ouster clause in Section 129 subsection 3 of the Constitution.

63. The basis of his reasoning was the construction of Regulation 79 and the statutory scheme itself. Given the comprehensive statutory code that the regulations provided, there was no basis for imputing, contrary to the express statutory language, a further right to be heard prior to suspension when Regulation 79 expressly provided for the matters that the Commission needed to take into account prior to suspension. Those matters did not include the right to be heard by the officer at that time.

64. At the time that ***Murray*** was decided (section 129 (3) - the ouster clause) of the Constitution was applicable. Based thereon decisions of service commissions could not be inquired into. This was always subject to exceptions, for example in the case where a service commission had acted in excess of jurisdiction or breach of natural justice.

65. The removal of the ouster clause was subsequently effected by Act No. 43 of 2000. However the reasoning upon which the Court of Appeal in ***Murray*** unanimously held that there was no right to a hearing prior to a suspension of a

police officer, (the first argument), was not dependent on the existence of that ouster clause.

66. The ouster clause was relevant to the argument in that case that the regulations were mandatory, acting in breach thereof was outside the commission's jurisdiction, (see page 29 of ***Murray***) and that breach of the regulations of which several were there alleged, was illegal (the second argument). In that case it was a separate basis for challenging the Commission's decision to interdict the officer. As to that aspect the court there held that the very justification for an ouster clause was to avoid argument over breaches, (possibly inconsequential) of the regulations. It was made clear that it was only where such breaches themselves gave rise to constitutional breach or had the effect of breach of natural justice that they could have this effect. Accordingly Justice of Appeal Nelson concluded (at page 30) that alleged breaches of the PSC Regulations did not have the effect of *"stripping the Commission of the protection of the ouster clause".*

67. However, the second argument was a different issue entirely from the issue of whether or not a **right to be heard prior to suspension** could be implied in the comprehensive disciplinary code of the Police Service Commission Regulations. All members of the court agreed it did not.

68. The removal of an ouster clause therefore cannot be a point that distinguishes ***Murray*** or causes it to cease to be applicable. It remains applicable and relevant to the issue of whether there exists a right to be heard prior to suspension under regulation 88. For the reasons set out therein there is no such right.

69. In fact the trial judge accepted that ***Murray*** applied (see paragraph 69 of the judgment). However he expressed the view that a strict application of principle

may *"result in unfairness to this particular claimant"*. The trial judge fell into error in failing to appreciate inter alia that the construction in ***Murray*** of the equivalent to regulation 79 Police Service Commission, namely regulation 88 Public Service Commission Regulations remained applicable. The issue that remains to be considered is whether distinguishing features in the instant case would permit an exception to the construction of regulation 88, based on a duty of fairness.

Issue iv- Fairness

Whether fairness required the appellant to consider the letters from the respondent and his Attorney at Law

70. The Trial judge found that *the letter from the respondent's Attorney-at-Law to the Commission* went beyond the statement that had been provided by the respondent himself. He found that the letter also asked for particulars of the allegations that had been made against the respondent and that it requested an opportunity to respond.

Structure of the P.S.C Regulations

71. The structure of Regulation 88 does not contemplate such an opportunity to be heard at a stage prior to receipt of the report of the I.O. His report together with the statement of the respondent, is to be forwarded to the Commission when it would consider whether to prefer charges based thereon. Consideration of that letter prior to the receipt by the Commission of the Investigator's Report would have been premature because at that point the Commission would have been hearing only the respondent's side of the matter.

72. As set out in that regulation the matters to be considered in deciding whether to suspend or not are i. the Commission's becoming aware of the allegation being made and ii. its determination that it is in the interest of the Public Service or the repute of the public service that suspension take place at that stage.

Under the regulations suspension is an interim measure. If an opportunity to be heard had to be provided prior to suspension this would necessarily mean either a. only the respondent's representations would be taken into account or b.no suspension could take place as an interim measure despite any public interest in this occurring, unless or until the report of the I.O is received. Such a construction would stultify the application of the regulation and the disciplinary procedure, and effectively neutralize the respondent's power to suspend pending investigation. Further, the concept of an **interim** report of the I.O does not exist under the P.S.C regulations. Any implication that despite this an interim report must be considered before suspension, would have the same effect.

Whether basis for an implied duty of fairness - Reasoning of trial judge

73. Having correctly identified the principle established in ***Murray***, (albeit that the trial judge referred to them as comments), he went on to make the further statement at paragraph 69 of his judgment *"however the court is of the view that such a strict application of the principle may in fact result in* ***unfairness*** *to this particular claimant".* The court found that, the report of the Investigating Officer was not before the Commission. Neither was the statement of the respondent nor the letter from the respondent's Attorney-at-Law. It was open to the trial judge to make those findings on the evidence.

74. He found that on the day that the decision to suspend was taken the only material before the appellant was the bare allegation and nothing else. However while the PSC did have the bare allegations before it, it also had to consider whether those bare allegations triggered its discretion to suspend based upon the Regulation 88 factors that it was required to take into account. The Trial judge correctly concluded that there existed no entitlement to be heard at that early stage of the process and therefore that in the face of such an allegation the decision of the PSC, that the interest of the public and the repute of the Prison

Service required suspension, was essentially an **administrative** policy decision which it was entitled to make. (See paragraph 60)

75. The trial judge however added the caveat "*provided of course the allegations themselves make legal sense and are not illogical*". (Paragraph 60 of the Trial judge's judgment). That exception, if such an exception existed, was based upon a misconception of the effect of the allegations. As demonstrated hereunder the trial judge fell into error in considering that the allegations did not make legal sense or were illogical.

Whether allegation of discreditable conduct was illogical or irrational

76. The court recognized at paragraph 65 of the judgment that the appellant's decision in relation to the first allegation, discreditable conduct, was not irrational and so there was no basis to set aside the decision to suspend on that ground.

Whether the second allegation was illogical or irrational

77. For the reasons previously explained it was not.

78. The trial judge reasoned that the rules of natural justice required that the decision maker approach the decision making process with fairness and that what is fair in relation to a particular case may differ (paragraph 70 of the judgment).

79. The interpretation of the equivalent of regulation 88 was a matter that had been decided by the Court of Appeal in the case of ***Murray.*** The conclusion that fairness required an opportunity to be heard prior to suspension necessitated ignoring the reasoning in ***Murray***. Fairness to the respondent was already provided by the structure of the Regulations and the several opportunities to be heard at the subsequent stages of the comprehensive statutory disciplinary code, without the implication of a further right to be heard prior to suspension.

80. The exception that the trial judge sought to carve out to the principle that there existed no entitlement to be heard at that early stage of the process prior to a decision being made to suspend, was based on the allegedly ultra vires nature of the second allegation. That purported exception could not apply when the allegation was not in fact ultra vires.

81. In relation to the allegation of failure to account, he made a "suitable declaration". That declaration needs to be set aside, based as it was on the error identified above.

Fairness - Reasoning of the trial judge in relation to an opportunity to be heard prior to suspension

82. The Trial judge at paragraph 73 reasoned that the appellant ought to have been receptive to the respondent's representations as a matter of fairness especially in this case for the following reasons:

i. The first was that the PSC made a decision to suspend although aware that an investigation was being conducted but *"proceeded to do so without at least a preliminary report from the Investigating Officer"*. However the Regulations do not provide for any preliminary report from the I.O. Neither do they provide for any hearing prior to suspension at that stage, although they do provide for further opportunities to be heard at later stages of the disciplinary process.

ii. Further, if such a right to be heard were to be introduced prior to suspension that right would require the appellant commission to be precluded from even considering suspension until the report of the I.O is received. The alternative would necessarily be that the appellant make a determination of what was in the public interest based simply upon the

version of the events put forward by the officer alone. Fairness could not **require** that the appellant consider **only** the explanation from the officer concerned, prior to the suspension. Such a construction would effectively involve redrafting of the comprehensive disciplinary code provided by the regulations.

83. His second reason was that the appellant was unaware that the respondent had provided an explanation in person to the Investigating Officer and so they failed to consider that explanation, not as to the truth of its content, but to make a determination of whether, having regard to the contentions by the respondent that he had properly secured the firearm and that a third party had broken into his home and stolen it, that it was nevertheless in the public interest to suspend such an officer.

84. However, the regulations do not provide for the officer's explanation coming before the Commission before the report of the I.O. The Regulations contemplate that an explanation would be provided to an investigator within ten days of his appointment. The investigator had informed the Commission of his appointment on the 2nd of August. Under the structure of the Regulations the Commission would have been aware that within ten days of that date of appointment a response of the respondent, if any had been provided, would have been provided by that time. However nowhere in the Regulations does it require that the Commission seek to obtain that response from the Investigator **prior** to taking a decision to suspend. Neither does it provide or stipulate that this is one of the matters that is to be taken into account by the Commission prior to taking a decision to suspend. Further, the regulations do not impose any requirement on the appellant to inquire as to the existence of such material at the suspension stage or to locate it and take it into account prior to suspension. The PSC could not therefore be faulted in failing to take that explanation into account.

85. The trial judge's third reason was that the appellant had received a letter from the respondent's Attorney-at-Law which provided the respondent's statement and additionally sought clarification of the allegations so that a full response could be forthcoming. The trial judge referred to the fact that the letter had erroneously been directed to another department. He held that it meant that the appellant did not consider the contents of the letter prior to making its decision as to suspension. He concluded that the consequence of that was that the appellant would have made its decision strictly on the bare allegations without specific consideration being given to representations made twice by the respondent.

86. In fact however it would have made no difference whether the information that the PSC omitted to consider was the response of the officer or that of his attorney if the regulations do not provide for such material to be taken into account at that stage. Under the regulations, the Commission itself had not received the investigator's report. The investigator's report, is the mechanism by which it is contemplated that the Commission receives the response of the officer. The Regulations do not contemplate a direct approach and direct representation being made to the Commission at any stage prior to suspension. Regulation 88 therefore must permit consideration as to whether suspension takes place prior to receipt by the Commission of the investigator's report, as in this case. The matters that require consideration are its awareness of an allegation being made, and its determination that it was in the public interest or the interest of the repute of the public service that pending investigation, suspension was appropriate. Nowhere in that structure is it provided that the officer would be able to make representation directly to the Commission prior to suspension. The Commission therefore, being unaware of the response from the respondent or the letter from the respondent's attorney-at-law could not be faulted as the regulation does not

provide for any such letter to be submitted to it, far less considered by it. Its decision to suspend in the absence of such letters could not be faulted. Further the regulations do not contemplate any submission to it of the respondent's response save for its inclusion in the report by the investigator.

87. In the absence of a duty by the Commission to consider such material it cannot be a breach of procedural fairness if the Commission acts in the absence of, or in ignorance of, such materials in making a decision to suspend. Apart from that obligation not existing in the Regulations, to impute such an obligation would unnecessarily burden the comprehensive disciplinary process set out in the Regulations.

88. Fairness could not require the redrafting of regulation 88 to impose an additional obligation on the PSC at that stage to ascertain the existence of such material and then take it into account.

89. Further this would be inconsistent with the judge's acceptance earlier of the authority of ***Murray***. Failing to take into account the attorney's letter and the officer's response were matters that the trial judge found went towards fairness. However this could not be a breach of procedural fairness if in fact, as he accepted, under Regulation 88 there was **no right to a hearing** prior to suspension. The fact that such material existed, that was not taken into account cannot render the decision to suspend unfair if there is no right to have this material considered in the first place. The argument that fairness requires a right to be heard in the circumstances of this case when the regulations themselves did not require such a hearing prior to suspension, is therefore inherently contradictory.

90. The fourth reason given by the trial judge, that the Commission would have made its decision based strictly on bare allegations without any specific

consideration being given to representations made twice by Richards, is the same argument in a different format. However many representations had been made by the respondent or on his behalf, the fact is the Commission could not be said to have fallen into error in not considering those representations if there was no requirement under the regulations for it to have so considered them.

91. His fifth reason on the issue of fairness was that the decision appeared to be one based on general policy rather than a decision that was made on a case by case basis depending on the circumstance of each case. That being so, he concluded that the decision making process was on its own unfair.

92. As explained at paragraph 48 it was a matter for the Commission's discretion whether it was in the public interest to suspend an officer against whom such an allegation had been made. In fact this appears to have been accepted by the trial judge at paragraph 60 of his judgment in relation to suspension on the basis of the allegation of **discreditable conduct**. There is no reason for any distinction in relation to suspension on the basis of the allegation of **failing to account** for the firearm.

93. That matter of discretion exercisable by the appellant is not readily reviewable by a trial court. If a Service Commission, such as the appellant has concluded, as a matter of discretion, that it was in the public interest to suspend an officer against whom it was alleged that he failed to account for and secure, inter alia, his firearm and ammunition then there is no basis for a court to condemn that process as unfair. It certainly was not unfair on its face given that the Regulation itself provides precisely for those matters to be considered by the Commission.

94. The trial judge further reasoned that the fact that the respondent may have another opportunity to answer the allegations is not a sufficient basis to justify the non-reception and consideration of his position. He concluded that the authorities were clear on this point. However the authority that was most clear on this point, and which was binding on him, was ***Murray***. The Trial judge's conclusion, that the fact that the respondent may have had another opportunity to answer the allegations was not a sufficient basis to justify the non-reception and (non) consideration of his position, ignored the authority binding upon him that this is precisely what Regulation 88 contemplated. To introduce a further opportunity to be heard would place an additional burden on the entire comprehensive disciplinary code provided for in the Regulations.

95. Further the trial judge considered it relevant[8] that the respondent's statement and the letter were available at the time of making of the decision. The fact is that their availability could be of no relevance in the absence of a requirement being demonstrated that such material be considered under a right to be heard prior to suspension.

96. The criticism by the trial judge[9] that the Commission appellant *"led not an iota of evidence in respect of the criteria and basis for its decision save and except to say that a decision was taken which in itself is an issue in this case"* would not be a fair one. This is because it was not open to the court to second guess the exercise of a discretion by the Commission that it would be appropriate to suspend an officer, charged with a specific type of offence, in the interest of the repute of the public service and the interest of the public.

[8] at paragraph 73
[9] At paragraph 74 of the judgement

97. That is a decision for the Commission in exercising its administrative responsibility constitutionally entrusted to it and not for a court[10]. The Trial judge indicated that the decisions of the PSC were subject to review and could be challenged. However, there is no dispute that is so and has long been so. What is not an appropriate criticism was his conclusion at paragraph 74 that *"the duty lay with the PSC to demonstrate its reasons for taking a particular decision and it has failed to do so".* See ***Murray*** on this point as follows:

> In any event where Parliament has entrusted to the Commission and not the courts the determination of what is in the **public interest that is a matter for the Commission alone**. It is well to remember the words of Lord Brightman in Chief Constable of the North Wales Police v Evans (1982) 1 WLR 1155 at 1174-5: "The court cannot be expected to possess knowledge of the reasons of policy which lie behind the administrative decision nor is it desirable that evidence should be called before the court of the implication of such a policy."

98. In relation to a temporary interim decision to suspend, the PSC's obligation is to consider the public interest and/or the repute of the public service, matters upon which it exercises a wide and sole discretion. The undisputed evidence is that it did so.

99. In those circumstances the several matters set out by the trial judge as being matters that justified **a separate duty of fairness** are all based upon the assumption that there was a duty on the part of the appellant to consider them. The Court's conclusion at paragraph 74 therefore (all emphasis added) was that "*in the courts view although there may be **no right to be heard** at this early stage the question becomes one of whether in the circumstance of this particular case*

[10] Page 16 of ***Murray***

fairness *demanded that Richards be heard prior to the PSC taking the decision to suspend".*

100. However it is clear that once it is recognized that in this case there is no right to be heard at the early stage of the disciplinary process prior to suspension none of the matters considered by the trial judge as justifying or requiring an additional duty of fairness in the peculiar circumstances of this case actually had that effect. There were therefore no peculiar factors in this particular case that required a deviation from the construction of Regulation 88 or its equivalent as decided in ***Murray***.

Conclusion

101. i. The allegation of failing to account was not ultra vires. Although **an** account of the items had been provided by the response that it had been reported stolen, the veracity and bona fides of that response were properly the subject of further investigation. It could not be assumed, simply on the assertion of the respondent, and without further investigation, that the **report** of the larceny of the firearm and other items was true, or that they had actually been stolen. There were other persons who had testimony to provide on this issue, such as the Prisons Armorer, before a conclusion could be arrived at that the firearm had been properly accounted for. The mere assertion that it had been reported stolen was not an account of the items. The trial judge therefore fell into error when he assumed otherwise.

ii. Natural justice did not require providing the respondent with an opportunity to be heard prior to a decision to suspend him. The P.S.C regulations provide a comprehensive statutory code which includes timely opportunities to be heard:-

a. in relation to allegations being investigated, by providing a written explanation to the investigating officer within ten days (regulation 90) of his appointment;

b. by providing a written explanation to the commission or disciplinary tribunal when the officer is actually charged (regulation 92 (1)).

c. By providing a full opportunity for the officer to defend himself at the hearing of the charge (regulation 98 (1) (a)).

Regulation 88 does not provide for an additional implied hearing prior to suspension in addition to those express opportunities. The Court of Appeal so decided in the case of ***Murray.***

iii. The decision of the Court of Appeal in ***Murray*** was not distinguishable either:

a. on the basis that the allegation of failing to account was ultra vires (because it was not); or

b. that there existed, independent of a **right** to a hearing prior to suspension, **a duty of fairness** in the circumstances of this case to consider either the representations of the respondent and his attorney at law, or a preliminary report of the investigating officer.

There was no reason for the trial judge to distinguish ***Murray*** on the instant facts.

iv. Given that there is no **right** to be heard at the suspension stage in this case, no such **separate duty of fairness** applicable at the suspension stage is discernible. The omission by the appellant to consider any such material from the respondent or his attorney at law could not therefore be in breach of any such right of the respondent, nor in breach of any duty of the appellant. The appellant was only **required** to consider the matters prescribed by regulation 88, namely the public interest or the repute of the public service. The evidence is that it did so.

102. The appeal is allowed and the orders of the trial judge are set aside.

Peter A. Rajkumar

Justice of Appeal