[2009] CA (Bda) 16 Civ

# The Court of Appeal for Bermuda

Civil Appeal
2009: No 8

**Before :**

**THE HONOURABLE JUSTICE ZACCA,**
**PRESIDENT**
**THE HONOURABLE JUSTICE WARD J.A.**
**and**
**THE HONOURABLE JUSTICE AULD J.A.**

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**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF AN ARBITRATION AWARD BY THE PERMANENT POLICE TRIBUNAL**

**BETWEEN:**

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|---|---|
| **REGINA** | **Appellant** |
| **-and-** | |
| **THE PERMANENT POLICE TRIBUNAL** | **Respondent** |
| **and** | |
| **THE BERMUDA POLICE ASSOCIATION** | **Party Affected** |

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Dates of Hearing: 8th and 9th June 2009
Date of Judgment: 13 November 2009

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Ms Anesta Weekes QC for the Appellant
Mr Paul Harshaw for the Respondent
Mr Alan Dunch JP for the Party Affected

**JUDGMENTS**

**AULD JA:**

**Introduction**

1. The issue in this appeal is whether the Respondent, the Permanent Police Tribunal (the Tribunal"), a statutory body, exceeded its authority in making an award by way of report on 11th June 2008 in resolution of disputes between the Affected Party, the Bermuda Police Association ("the BPA") and the Appellant, the Crown, as to certain terms of service of the Bermuda Police over the previous two or more years. The award, which resulted from a reference to the Tribunal by the Minister of Public Safety and Housing, included a determination that a payment by way of a non-pensionable allowance, known as the "combined allowance", set at 10% of salary, should become a "salary supplement" and thereby pensionable for 2005-2006 and 2006-2007 and thereafter. The Crown, by these proceedings, maintains that the award in that respect is contrary to statutory provisions that prohibit the Tribunal from making any award concerning a question of pension, and is therefore unlawful and *ultra vires*.

2. The first and main prohibition is in Part VA of the Police Act 1974 ("the 1974 Act") under the heading of "Police Conditions of Service". Part VA establishes machinery for determination of such conditions where there is no collective agreement between the BPA and the Government for them or where there is such an agreement and the BPA seeks to negotiate changes. The machinery provided is for, successively, negotiation (section 29), failing agreement through negotiation, settlement by conciliation (section 29B), and failing settlement by conciliation, by arbitration on a reference to the Tribunal under section 29C - F. By whatever of those three means any dispute as to conditions of service is resolved, it is confined by section 29A(5) to an agreement or, in default of such agreement, an award by the Tribunal:

> "... providing for any one or more of the following matters in relation to the Service, that is, to say, pay, extra duty pay, allowances, hours of work, leave and any other condition of service, *but not any question of* retirement or *pension* or discipline or of command or contract of members of the Service." [my italics]

3. The issue arises for determination in this appeal in the following circumstances.

4. By an amended application of 24th October 2008, the Minister sought an order of *Certiorari* and *Mandamus* in respect of the Tribunal's award. By his application, the Minister maintained that the decision was wrong in law in that it was outside the powers of the Tribunal, having regard to the provisions of section of 29A(5) of the 1974 Act, since it concerned a question of pension, and/or was irrational.

5. The matter came before Kawaley J. On 17th February 2009 he held that the Tribunal, in the terms in which it had expressed its decision, had exceeded its powers by intruding into the prohibited area of pensionability. However, by applying what he called "the blue pencil" test, he re-stated the Tribunal's decision so as, in his view, lawfully to achieve the same result by describing the combined allowance as an addition to salary, thereby making it pensionable.

6. The Crown, now substituted for the Minister, appeals the Judge's decision, on the ground that he went wrong in law in re-stating the Tribunal's award in that way so as to achieve the same result as its unlawful award.

7. The 1974 Act, as subsequently amended, has provided for many years in Part VA for a statutory scheme for the making and amending of collective agreements between the Government and the BPA. As I have said, it consisted of three stages, the first, under section 29A, was one of negotiation to be initiated by the BPA by notice to the Commissioner of the Bermuda Police of the BPA's wish to enter into negotiations with the Government for the making of such an agreement, but not one concerning "any question of ... pension"

8. The second stage, provided by section 29B, only arose if negotiations failed to secure agreement on any matter. Either party could then invoke the conciliation procedure provided by the section.

9. If conciliation failed to achieve a settlement, the third stage was arbitration by the Tribunal, for which statutory provision was made in sections 29C to 29H.

10. Section 29H provided that an agreement secured under stage 1 or 2 had effect for two years or such period as determined by the parties, and could be retroactive. As to stage 3, it provided that its duration was a matter for the Tribunal's determination, save that it remained in force until replaced by a new agreement or award, and it too could be retroactive if the Tribunal so determined.

**The combined allowance**

11. I should start the story by saying something about the history and nature of the combined allowance in the pay structure of the Bermuda Police Force. I take it from a written submission of Police Sergeant Stephen Cosham to the Tribunal in this matter on behalf of the BPA, Negotiations between the BPA and the Government in 1989, the first of their kind,

culminated in the introduction by the Tribunal in 1990 for all ranks of a combined allowance consisting of specified sums in addition to their salaries ("the Gregory Award"). A product of subsequent negotiations was an amalgamation of other allowances into the combined allowance, which was sometimes referred to as "the combined premium". In 1996, the Tribunal, in what was known as "the Mowbray Award", increased the combined allowance so as to set it at 10% of pay for constables and sergeants and 6% of pay for inspectors of certain seniority and above. Since then the combined allowance has been paid to all officers, whether on duty or on leave, and its payment is not conditional on any special duty or task, unlike some other allowances not part of it. The Government, when seeking recruits for the Police Force, advertises the combined allowance as part of the salary package. I understand that the four officers holding the rank of Commissioner in the Force now receive their combined allowance as part of their salary.

12. In the papers before the Court there is a memorandum of agreement between the BPA and the Government dated 25th January 2006, which seemingly was entirely retrospective, relating to the years 2001 to 2005. The memorandum described the agreement as the result of "negotiation and mediation", presumably a reference to stages 1 and 2 of the 1974 Act process. It set out many changes in conditions of service from what appears to have been a different regime under the Police (Conditions of Service) Order 2002, including increases in police salaries, which, it is common ground, would have had the effect of increasing pension entitlements. The agreement also made provision for various additional payments, but expressly recorded a failure to agree on issues as to the combined allowance. I understand the unresolved issues to have been the BPA's concern to have the allowance treated as part of the salary of all officers in order to secure it as part of their salary entitlement and also thereby to make it pensionable.

13. In the negotiations, for which the first stage of Part VA of the 1974 Act provided, leading to the present dispute between the BPA and the Government, the BPA again sought the Government's agreement to treat the combined allowance as part of police officers' salaries, thereby making it pensionable. The negotiations failed to lead to achieve such agreement. The parties then moved to the second statutory stage, conciliation. That too failed to produce agreement on the matter. Accordingly, the matter moved to the third statutory stage, reference by the responsible Minister, to arbitration by the Tribunal under section 29F of the 1974 Act. Pursuant to section 29C(2), it was for the Minister, at that time, the Minister of Public Safety and Housing, in consultation with the Minister of Finance, to determine the terms of reference for the Tribunal and, pursuant to section 29F(1) and (3), for the Tribunal to make an award "in strict accordance with" those terms.

**The Reference**

14. By letter of of 23rd November 2007 the Minister wrote to the Chairman of the Tribunal, Mr Arthur Hodgson, notifying him of the matters referred to the Tribunal for arbitration, the first of which was:

> "Whether the combined allowance should be added to their pay, which would make it pensionable."

15. It was common ground between the parties, and the Tribunal so directed, that it would adjudicate on the BPA's claims covering the period from 1st October 2005 to 30th September 2007, that is, make a retrospective award. However, any award would, pursuant to s 29H(5) of the 1974 Act, remain in force until replaced by a new agreement or award.

16. Before the Tribunal, the BPA urged that the combined allowance had, for some time, amounted to a *de facto* salary, and that it should be incorporated into police officers' salaries and rendered pensionable. This is how they put their case in a skeleton argument presented to the Tribunal:

> "For too long, a percentage of a police officer's salary has been paid out in the form of something called a combined allowance. There can be no serious dispute over the fact that this is not in reality an allowance, but rather, part of an officer's total pay package. However, it is not taken into account when calculating the officer's entitlement to a pension, even though payroll tax is payable on it. There is no justification for this and the very notion of the combined allowance is today a historical anachronism. It should be done away with, the amount should be incorporated into salary and the total amount should be pensionable with appropriate contributions being paid into the superannuation fund."

17. The Government, in its "Outline Position" presented to the Tribunal, while recording that it had offered the BPA salary increases of over 4% in 2005-06 and 2006-07, opposed the addition of the combined allowance to salary. It maintained that it was different in kind from salary in two respects. First it could be unilaterally withdrawn by Government, and secondly, it was not pensionable. This is how it stated its position in a series of bullet points:

> "As a matter of principle, the combined allowance must not be added into pay.
>
> This is an allowance designed to compensate officers for expenses incurred in the conduct of their duties and not a salary supplement. It could be withdrawn at any time. Combined allowance is not pensionable, was never intended to ever become pensionable and must remain separate from pay.
>
> It would cost $7 million (approximately), and the money just isn't there.
>
> The effect of allowing this change would prejudice the Government's position in relation to other groups of workers who received allowances in addition to their salaries."

**The Tribunal's Award**

18. By letter of 11th June 2008, the Chairman of the Tribunal delivered its Report, describing its procedures in the arbitration, of which no complaint was or is made, and recommended that the combined allowance should be "redefined" as a "salary supplement" and "as such ... be pensionable in the same way as salary". The Tribunal's Report expressed its reasons shortly as follows:

> "The payment of the combined allowance, historically, represents a combination of previous premiums which compensated for the special requirements of Police Officers.
>
> In today's terms the amount involved is a standard rate which is payable in the same way as salary. The Tribunal accepts that there continues to be valid reasons for an additional payment to be made to Police Officers to reflect the special requirements of the Police Service. We propose to redefine this payment as a Salary Supplement on the same percentage basis as at present and award that as such it be pensionable in the same way as salary.
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> Concern was expressed that if the combined allowance was treated as salary it would used as a basis for awards in other sectors of employment thereby causing '**Wage Inflation'**. The Tribunal was anxious that its award, given because of the special circumstances of Police Officers, would not be used in this manner. Government should resist any attempt to do so."

19. The Chairman of the Tribunal, in an affidavit sworn on its behalf in the judicial review proceedings, further explained the Tribunal's reasoning:

> "*Salary Supplemnt*
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> ...
>
> 17. ... We decided to redefine the combined allowance, amounting to some 10% of a police officer's pay, as a salary supplement so that it could not be unilaterally withdrawn by the Government (as suggested in its Outline Position). The evidence to the Tribunal was that the combined allowance amounted to *de facto* salary immediately before the arbitration had commenced. As an incident of that decision, the salary supplement became pensionable and we declared so. ... We were keen to preserve police pay as it was, including the combined allowance, and for our award to build on what pay police officers were actually receiving immediately prior to our award.
>
> *Pensions*
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> 18. Whether or not the award of [the] Tribunal was contrary to section 29A of the Police Act 1974 is a matter for the court to decide. Clearly, the Tribunal does not take that view.

> 19. ... the Government never suggested to the Tribunal, that I can recall, that we could not make an award that affected police officers' pensions. ...
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> 20. I am not aware that the attention of the Tribunal was ever drawn to section 29A of the Police Act 1974 and even if it was, that section appears to me to relate to consensual agreement, not a binding award by the Tribunal pursuant to section 29F of Police Act 1974. My view in this regard is reinforced by the provisions of section 29H of the Police Act 1974, which makes separate provisions for an 'agreement' and an 'award'.
>
> 21. In any event, the award of the Tribunal is manifestly not a decision in respect of pensions, in our view. Insofar as pensions are concerned at all, the award is a decision in relation to pay that happens to affect pensions, as any award in relation to pay is bound to do under the current legislation in Bermuda because pension contributions are a proportion of one's pay."
>
> ...
>
> 37. .... Had Government made its concerns known, at an earlier date, the Tribunal might well have been minded to alter its award if persuaded that the Government's objections were well founded."

20. Thus, the Tribunal, as it expressed itself in its award, and as further explained by its Chairman, explicitly acknowledged that both a purpose and a consequence of its decision would be to render pensionable the combined allowance in a new guise of a salary supplement.

21. The Minister applied for judicial review of the Tribunal's decision in relation to this and other matters. He did so on the ground that "the Tribunal acted beyond its powers in redefining the combined allowance as a salary supplement and thereby [purportedly] making it pensionable ...". His argument was that such an award concerned a question of pension, and was, therefore, outside the Tribunal's jurisdiction by virtue of the definition of "agreement" in section 29A(5) of the 1974 Act.

**Kawaley J's Judgment**

22. As I have indicated, Kawaley J ruled that the Tribunal's award, in the way it had been expressed, was outside the Tribunal's jurisdiction as confined by section 29A(5), thereby rendering the award, as drawn, unlawful. However, he rescued it by crediting the Tribunal with what he considered it must have intended, namely to add the combined allowance to salary, and by re-wording the award to that effect.

23. In paragraph 38 of Kawaley J's judgment, he stated that the answer to the question before him turned on the statutory construction of the prohibition. In paragraph 40 he rightly recognised that the prohibition applied to the whole of the machinery provided by Part VA of the 1974

Act for the resolution of disputes as to police conditions of service, whether by agreement, conciliation, or failing either of those, by arbitration before the Tribunal. Conciliation and arbitration can only arise under these provisions if there has been failure to negotiate an agreement at the first stage.

> 40. ... a pension matter is obviously a pension matter for the purposes of the prohibition on negotiating contained in section 29A(5) when the matter requires legislative action. In other words the parties cannot enter into a valid agreement which requires an alteration of any statutory provision, nor can the Tribunal validly determine to modify a statutory regime.

24. Kawaley J concluded, in paragraphs 42 and 43 of his judgment, that the Tribunal's award, as it stood, breached the statutory prohibition because it purported to re-name the combined allowance as a salary supplement so as to bring it within pensionable salary. In paragraph 42, he said:

> "42 it is unarguably clear that 'salary' for pension purposes is very narrowly defined, and excludes any form of benefit which is paid in addition to wages or pay. ... the Tribunal's strict terms of reference did not entitle it to go further than simply answering the question posed, in effect 'yes' or 'no', and to give supporting reasons for such decision if it saw fit. So to the extent that the Tribunal purported to redefine the combined allowance as a special and distinct yet pensionable element of police officers' salary, the Tribunal erred in law and its decision is potentially liable to be quashed.
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> 43 For the foregoing reasons, I am bound to accept the following propositions set out in the Applicant's Skeleton Submissions:
>
> > '... In purporting to re-name the "combined allowance" as a salary supplement with the intention of bringing the "combined allowance" into the definition of salary upon which the pension contribution is calculated the Permanent Police Tribunal usurped the power of the legislature and therefore acted *ultra vires*."

25. In paragraph 41 he indicated that he found support for such a conclusion in the *Public Service Superannuation Act 1981* "the 1981 Act", which governs pension contributions and payment rights of police officers, in particular its definition section, section 2, which states that allowances are not salary for the purpose of calculating pension contributions or entitlements:

> "'salary' includes wages, whether paid weekly or otherwise, and wages paid for mandatory overtime service but does not include any other form of over-time payment, personal allowance, duty allowance, entertainment allowance, or any other allowance or award;"

26. However, Kawaley J went on, under the heading of "Discretion to grant relief/scope of relief appropriate", to consider: 1) the enjoinder in section 29F of the 1974 Act that the Tribunal

should resolve the dispute "in strict accordance with [the] terms of the reference"; and 2) by what mechanism, if any, it could have *added* the combined allowance to pay so as to render it pensionable. With the interest of good public administration in mind, he found an answer by resort to the so-called *blue pencil test* which enables severance of unlawful parts from lawful parts of an order or other document so as to give effect to the lawful parts on their own where that is practicable. In doing so, he referred to and relied on extensive passages from the judgment of Dillon LJ, agreeing with Stephenson and Dunn LJJ, in *Thames Water Authority v Elmbridge DC* [1983] 1 QB 570, at 583-584, an authority not cited before him in argument. Unfortunately, he did not articulate quite how the test, as considered and applied by Dillon LJ in the wholly distinguishable facts of that case could apply in this case. He proceeded, in paragraph 49 of his judgment, straight from citation of Dillon LJ's words, to the following proposition:

> "49. Accordingly, I would grant the application for *certiorari* to quash the award of the Tribunal by excising that portion of the decision which purports to redefine the combined allowance (a) as a 'salary supplement' and (b) calculated as a percentage of the relevant officers' salary. The lawful answer to the first issue referred to the Tribunal ('Whether the Combined allowance be added to their pay, which would make it pensionable") was yes and there is no need to quash this core aspect of the award."

Kawaley J would have been better served if he had considered the test as adumbrated by Lord Bridge in *DPP v Hutchinson* [1990] 2 AC 783, at 811F-G in the sense of a valid text being independent of and unaffected by an invalid text.

27. From that starting point he reasoned that the Tribunal's terms of reference, would have been, or would be, to require it to give an affirmative answer to the question as put to it in the reference, but to do so by adding the combined allowance to police officers' pay, so as make it part of their pay. He suggested that there was such an implied affirmative answer in its award, which he could reasonably articulate as a lawful decision. In effect, he dispensed with part of the award as made, namely the reference to turning the combined allowance into *salary supplement,* and, in substitution for it, converted his understanding of the implication of the award into the notion of *adding* the allowance to salary. This is how he put it in paragraphs 50, 51 and 54 of his judgment:

> 51. It flows by necessary implication from the affirmative answer to that question that the Tribunal was required to resolve that the combined allowance be added to "pay" so that, henceforth, it becomes an indistinguishable part of the "salary" element of the remuneration package. The BPA case simply sought to achieve this result; and the Government case simply sought to maintain the *status quo.*
>
> 52. The award would accordingly be modified to delete the words in brackets and to add the underlined words, along the lines set out below:

> "... We propose to [redefine this payment as a Salary Supplement on the same percentage basis as at present and] award that this allowance should now simply be added to salary [as such it be pensionable in the same way as salary.
>
> Concern was expressed that if the Combined allowance was [treated as] added to salary it would be used as a basis for awards in other sectors of employment thereby causing '**Wage** Inflation'. The Tribunal was anxious that its award, given because of the special circumstances of the police, would not be used as a basis for awards in other sectors of employment thereby encouraging a spiral of wage inflation. Government should resist any attempt to do so"

28. Stopping there for a moment, it is plain from the second of those two passages from the award that Kawaley J's attribution to the Tribunal of an implied intention to make the combined allowance part of salary when opting for a salary supplement instead of an addition to salary was misconceived. The very thing that the Tribunal had sought to avoid in formulating its award was *not* to give its transformation of the combined allowance into a *salary supplement* any semblance of making part of salary, because, in that form, it could become a basis for increased salary awards in other sectors.

29. Finally, in paragraph 54 of his judgment, the Judge returned to his conclusion on this issue, in reliance on the same misconception:

> 54. In summary, the Crown's application for an order of *certiorari* to quash the Tribunal's award on the grounds of *ultra vires* is allowed in part as regards those portions of the award which purported to retain the combined allowance as a distinct element of salary rather than simply merging the allowance into salary altogether. This went beyond the Tribunal's strict terms of reference and their statutory mandate as well. But the main element of the award, namely that the allowance should be incorporated into salary with the result that it becomes pensionable was validly made."

**Submissions on the Appeal**

30. The Government, by this appeal, attacks the second, but not the first of the two conclusions of the Kawaley J. It maintains that he correctly found that the Tribunal's award was unlawful and, therefore, *ultra vires*, but attacks his re-wording of the award so as attribute to it transformation of combined allowance to salary instead of salary supplement.

31. As to the lawfulness or otherwise of the award as made by the Tribunal, the Government argues that the terms of the reference to it were unlawful in expressly presupposing that addition of the combined allowance to pay would make it pensionable, but that, in any event, its award was unlawful. The matter was already governed by statute in the provisions of the 1974 and 1981 Acts, which were to the contrary. Ms Anesta Weekes, QC, on behalf of the

Government, supplemented those grounds on the hearing of the appeal in the following submissions. She emphasised the centrality of section 2 of the 1981 Act to this appeal, in its express exclusion of any form of allowance or award, as to what, as a matter of law, is and is capable of becoming salary,. It was the Tribunal's duty, as a "statutory judicial tribunal" to apply the law, not change or waive it on an *ad hoc* basis. Kawaley J was, therefore, correct, in the first part of his ruling that the Tribunal had gone wrong in law, so that its award was *ultra vires.*

32. Ms Weekes maintained, however, that Kawaley J went wrong in seeking to make good the Tribunal's error by rephrasing its award to do what statute does not permit it to do, change payment other than salary into salary prospectively or, as also in this case, retrospectively. Such an exercise, she maintained is not one of severability in the articulation of an order, but of treating or purporting to make lawful that which is unlawful. In short, she submitted that there was no basis in the circumstances of this case for the Judge to have recourse to textual severance when considering what remedy to order. She added that it was not, in any event, the exercise that he undertook. Instead, he re-worded the Tribunal's award, purportedly to give it the same effect as he concluded it had intended, namely adding the combined allowance to salary, which was just as unlawful as the Tribunal's recourse to salary supplement in articulating its award. Accordingly, Kawaley J should have quashed the award and have exercised his discretionary power to remit the matter to the Tribunal directing reconsideration in accordance with the law in the relevant provisions in the 1974 and 1981 Acts.

33. The Tribunal has not sought to challenge by way of cross-appeal the Judge's first conclusion as to unlawfulness of the award as made. Its case on the appeal, as developed before the Court in the submissions of Mr Paul Harshaw, consisted of a mix of points, none of which materially assisted its case on the law. He suggested that the reference was valid and that there was only one answer and, therefore, no issue for the Tribunal to resolve. Alternatively, he maintained that, if the reference was invalid, the challenge should have been to the reference, not the Tribunal's award. Neither argument, in my view, can assist the Tribunal if it acted in loyalty to the reference, but nevertheless unlawfully. The second, somewhat surprising, submission was that the Tribunal in articulating its award, did not intend to use the word "salary" in any technical sense i.e. as in section 2 of the *1981 Act*, a suggestion that sits ill with the Tribunal's failure to challenge, by way of cross-appeal the Judge's first conclusion as to unlawfulness. His third and fourth arguments ran together, namely that there was no conflict between the Judge's conclusion of unlawfulness, expressed in paragraphs 40 to 43 of his judgment, and that in paragraph 54, as to how he went about exercising a discretion as a means of overcoming that unlawfulness. He submitted that the apparent contradiction disappeared or was "bridged" by a need in the public interest to make the award "workable", and by reference to the following passage in paragraph 45 of the judgment:

> "I find that the Tribunal (a) answered the question actually referred to it in the affirmative, but (b) formulated its decision in a manner which was unlawful because it was inconsistent with the statutory pensions scheme and beyond the scope of its terms of reference, strictly construed. Mr Richardson [counsel for the Government] was unable to advance any convincing reason in the public interest as to why the entirety of the award should be set aside, absent a finding that the entire award was vitiated by the excess of jurisdiction established."

34. Mr Harshaw maintained that, regardless of the authority on which the Judge relied, his resort to textual severability accorded with the test of the House of Lords *DPP v Hutchinson* [1990] 2AC 783 of the valid text being independent of and unaffected by the invalid text. In my view, there are not two independent texts or lines of reasoning in the Tribunal's award, as made, capable of severance and each with a life of its own. There is only the Tribunal's unlawful expression of its answer to the reference and its recourse to the notion of a "salary supplement" coupled with the Judge's substitution for the latter of an equally unlawful formulation. However, unattractive the Judge found the Government's stance to be in pursuing the application before him, in my view it could not serve as an agent of reconciliation of paragraphs 40 to 43 as to unlawfulness with his perpetuation of that unlawfulness in the following words in paragraph 54:

> "... the main element of the award, namely that the allowance should be incorporated into salary with the result that it becomes pensionable was validly made."

35. The BPA also have not sought to cross-appeal the Judge's first conclusion as to unlawfulness of the award as made by the Tribunal, in paragraphs 40 to 43 of his judgment. But, through the submissions of Mr Alan Dunch on their behalf has sought nevertheless to unseat it – "We have difficulty with Justice Kawaley's conclusions in paragraph 42 ...". He put at the forefront of his submissions the proposition that section 2 of the 1981 Act, in its definition of "salary", is irrelevant to the issues raised in this case, and that, therefore, the Judge had wrongly relied on it in his conclusions as to the unlawfulness of the award as made. He maintained that the provision did not prevent the Government and the BPA from negotiating agreements that did not match its definition of "salary". He emphasised that the combined allowance had been treated and regarded since its inception as a fixed part of a police officer's wage package. However, in my view, that assertion did not reflect the views of both sides to the dispute. It clearly sat ill with his mention that the parties had been in dispute for some 15 years as to whether it should be treated as part of police officers' pay - "the focus", as he put it, "of much disquiet and dispute". He sought to downplay the pensionability aspect, and with it the relevance and effect of section 2 of the 1981 Act, by suggesting that the issue was not about the statutory mechanics and entitlements under the police officers' pension scheme, a suggestion which is not supported by the history of the dispute put before the Court or indeed the terms of the reference itself. He also maintained that section 29A(5) of the 1974 Act could not have that effect because any issue as to salary has a knock-on effect

as to pension. But, in my view, that is true only if the issue is about salary. Even then it is not a "*question* of ... pension" under section 29A(5) of the 1974 Act in its own right; it is an *answer* that automatically follows any raising or lowering of salary.

36. In short, Mr Dunch maintained that, in answering the referenced question in the affirmative, "the Tribunal effectively eradicated the combined allowance and subsumed its value into the over-all figure for salary, which it was entitled to do." He submitted that the fact that the Tribunal may have expressed its award erroneously did not remove its overriding intention to merge the value of the combined allowance into salary, and that, however the Judge went about giving effect to it, he achieved the right outcome.

**Conclusions**

37. Section 29A(5) of the 1974 Act expressly differentiates matters in relation to pay and allowances etc from questions of pension, which it excludes from, inter alia, the jurisdiction of the Tribunal. In a similar way, section 2 of the 1981 Act clearly differentiates between salary and any form of "allowance or "award" in the calculation of pension contributions and benefits, expressly excluding the latter two from its definition of pensionable "salary". The combined effect of the two provisions in the circumstances of this case is, as Kawaley J concluded, to render the Tribunal's award, as made by it, unlawful and, therefore, *ultra vires.* To the extent that it was necessary for his decision on the first issue of lawfulness of the award, as made, the Judge was, in my view, clearly correct to regard it as unlawful, not least because the Tribunal had purported to transform the combined allowance into *salary supplement,* a notion that it clearly regarded as distinct from salary, and thereby pensionable. But it was also unlawful on a much wider basis regardless of the Tribunal's manner of expressing its decision. As Ms Weekes submitted, it cannot have been intended by the Legislature that negotiation between the Government and the BPA could have the effect of disapplying those statutory provisions, and thus drive a coach and horses through them whenever they felt like it or, at the arbitration stage, of conferring on the Tribunal a jurisdiction, akin to so-called jury equity in criminal cases, of dispensing with the law in matters referred to it. Such dispensing jurisdiction would have had the astonishing effect in this and other cases coming before the Tribunal of operating retrospectively as well as prospectively, enabling it to undo statutorily established pension contributions and entitlement regimes over previous years. In any event, although counsel for the Tribunal and BPA cavilled as to the relevance of section 2 to the issue, it is not open to them to challenge it before this Court, having failed to cross-appeal that part of the Judge's ruling.

38. In the result the only effective question for determination on the appeal is whether Kawaley J was entitled to overcome the unlawfulness of the award, as made, by resorting to *textual severability* to retain some lawful aspect of it by severing away that which was unlawful. To do so, he had to sever the unlawful, the Tribunal's redefinition of the combined allowance as "salary supplement", and "as such ... pensionable in the same way as salary",

from his interpretation of its affirmative answer to the question in the reference. Secondly, he had to conclude that the Tribunal, in giving that affirmative answer, did so lawfully in that it intended to make the combined allowance part of salary. What he could not do, in granting relief, was lawfully exercise his discretion so as to enable the Tribunal to achieve that end if it was just as unlawful as the part of the award he had severed away.

39. The reality is that the Judge undertook a re-naming exercise on behalf of the Tribunal which did not accord with the law, however much he may have considered it to have been the true intention of the Tribunal and in the public interest. The fact that the Tribunal's affirmative answer to the reference was an answer to the question posed in it cannot make it lawful if the reference was wrongly and/or unlawfully drawn and the Tribunal's reasoning faulty. As I have said, the Judge's own reasoning on the matter is, with respect, also faulty. His conclusion, in paragraph 54 of his judgment, that the main element of the award, as made by the Tribunal, namely that the allowance should be made part of salary and, as a result become pensionable, "was validly made", is misconceived in two respects, either of which, in my view, necessitates allowance of the appeal. The first misconception is that the Tribunal, however it expressed itself, intended that the combined allowance should become part of salary, when, as I have said, it sought to avoid all semblance of that in its resort to the notion of *salary supplement.* Secondly, even if it had intended that the allowance should become part of salary and treated as such, that intention, if given effect in the Judge's re-wording of the award, would have been unlawful and its award *ultra vires* on that account.

40. I would, therefore, accept the submissions of Miss Weekes on this issue. The exercise undertaken by the Judge was not one of severability of good and bad in the Tribunal's award. It was of identification of bad and bad, one of removing the combined allowance in the guise of salary supplement, and, two, of putting it back in again as part of salary, effectively an unlawful *ad hoc* amendment or waiver of the governing statutory provisions with retrospective as well as prospective effect if upheld. In my view, and contrary to Mr Harshaw's and Mr Dunch's submissions, that was not something he was entitled to do.

41. I should not conclude this judgment without making two observations about the history of the matter, which, to say the least, is unfortunate. First the form of the Government's question, in its pre-supposition that the Tribunal could lawfully add the combined allowance to police pay, thereby making it pensionable, effectively invited, if not on the face of it, required, the Tribunal to exceed its powers by disregarding primary legislation, *a fortiori* where an award, as in this case, is in large part retrospective. Secondly, it is an irony that, having thus set the matter in train in that way, the Government has now come before the Courts to undo the unlawful award that it engendered. Kawaley J was understandably concerned about the effect on police morale and its knock-on effect on the public interest in effective law enforcement, and the further harm in the form of delay that would result from simply quashing the award and directing the Tribunal to reconsider it with proper regard to its jurisdictional constraints. However, such considerations cannot, as a matter of law and

good governance, permit a court to uphold an unlawful decision made in excess of jurisdiction in defiance of clearly expressed primary legislation.

42. I would, therefore, allow the appeal and quash the award.

*Signed*

**AULD JA**

**WARD JA:**

43. I have had the advantage of reading in draft the Judgment of Auld J.A. and I agree that the appeal should be allowed for the reason that the trial judge could not lawfully rephrase the Tribunal's Award so as to enable it to do what the statutory regime does not permit it to do.

44. The Tribunal was constrained by two statutory provisions namely section 29A(5) of the Police Act 1974 and section 2 of the Public Service Superannuation Act 1981 which placed matters of pension outside the jurisdictional competence of the Tribunal and restricted the meaning of salary to the exclusion of an allowance. The Tribunal's Award was therefore, ultra vires and the trial judge could not lawfully validate it.

45. I would not remit the matter to the Tribunal for reconsideration. From a perusal of the Draft Award and the Final Award, the answer given by the Tribunal to the lawful part of the question referred to it by the Minister, namely, whether the Combined Allowance should be added to their pay was clearly in the affirmative. There can be no doubt of the intention of the Tribunal in making the Award. The Tribunal attempted to give the combined allowance a degree of permanence so that it could no longer be unilaterally withdrawn by Government.

46. Government should note what the Tribunal attempted to do and, when appropriate, take the necessary legislative action.

*Signed*

**WARD JA**

**ZACCA P:**

47. I agree that the appeal should be allowed on the basis that the award of the Tribunal in transforming the combined allowance into a salary supplement and making it pensionable was unlawful. A salary supplement cannot in my view be the same as salary.

48. Kawaley J was therefore in error in re-wording the award "we propose to award that this allowance should now simply be added to salary".

49. I would however, remit the matter to the Police Tribunal for reconsideration. I do not accept that the reference to the Tribunal was unlawful because it contained the words "which would make it pensionable". If the combined allowance is added to salary, it became salary. It would therefore be pensionable because salary is pensionable and not because the Tribunal said it would be pensionable.

50. It was unnecessary for the Minister to add those words in his reference to the Tribunal. It may be that the Minister was advising the Tribunal that if they answered the question in the affirmative, it would be pensionable. This they would take into consideration in coming to their conclusion. There was concern on the part of the government as to the costs involved.

51. It is in my view clear that the reference to the Tribunal required an answer either in the affirmative or in the negative. If it was in the affirmative, the combined allowance would now be salary and it would be unnecessary for the Tribunal to say that it was pensionable. Once it has become salary, it is pensionable.

52. In its draft award the Tribunal under the heading "Wage Inflation" stated:

> "We therefore recognize that the combined allowance be considered a part of police salary and thereby be made pensionable. And in the event that Government considered that it needs a special prop to differentiate it from salaries in other areas of employment it could be called a salary supplement or some other such name that clearly identified it as part of salary."

53. Following upon this draft report, a letter dated April 17, 2008 was sent to the Chairman of the Tribunal. IT was signed by Mr. Huw Shepheard on behalf of the Attorney General. It stated in part:

> "I am grateful for the copy of the Tribunal's Terms of Reference. I note that the Tribunal was asked to "hear arguments from both parties and to determine:
>
> (i) whether the combined allowance should be added to their pay, which would make it pensionable."…
> "As I understand the Tribunal's proposed determination, then the six points will be answered as follows:-
> 1. "Yes".

54. In my opinion it is clear that the intention of the Tribunal was to answer "yes" to the reference posed for their consideration. If the answer had been "yes", then I would hold that the award would have been lawful.

55. The Tribunal was required to answer "yes" or "no" and not having answered the question correctly, I would remit the matter to the Tribunal for them to re-consider whether their answer had been "yes" and for them to say so.

56. It is to be noted that before the Tribunal and the Supreme Court, the Crown did not submit that the reference was unlawful. For the first time, the issue was raised before this Court.

57. I wish to add a few words in relation to question 4—"the percentage of wage increase in each year of the new Collective Bargaining Agreement and to make a binding award. It appears that the Government was prepared to offer a salary increase to B.P.A. at the rate of 4.5% for year 2005 – 2006 and 4% increase for year 2006 – 2007. The Tribunal accepted these figures and made the award in those terms. The Tribunal also awarded an increase in salary at the rate of 4.25% per year 2007 – 2008. These increases are clearly retroactive.

58. Section 29 (H) (4) of the Police Act 1974 provides:

> "A Tribunal award shall have such retroactive effect as the Tribunal may determine."

In its award the addition of the combined allowance to salary was not stated to be retroactive. The combined allowance presumably has been paid as such over the years. When the combined allowance is added as salary and becomes salary, then the pensionable aspect of the award can only commence at the earliest, on the date of the award.

59. Having held that the intention of the Tribunal was to answer the question in the affirmative, the Government may wish to consider whether it would be prepared to add the combined allowance to salary, making it salary. This would make it unnecessary to have the matter remitted for a rehearing.

*Signed*

**ZACCA, PRESIDENT**