IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION

2014: No. 300

PATRICK GLENN LAKE

Applicant

-v-

THE PUBLIC SERVICE COMMISSION

Respondent

JUDGMENT
(in Court)[1]

Judicial Review – certiorari to quash demotion of public officer- Public Service Commission Regulations-disciplinary proceedings-gross misconduct-inefficiency- elements of offence-alternative appeal remedy-disciplinary penalty imposed in excess of jurisdiction void

Date of hearing: March 29, 2016
Date of Ruling: April 8, 2016

Mr. Mark Diel, Marshall Diel & Myers Limited, for the Applicant
Mr Michael Taylor, Attorney-General's Chambers, for the Respondent

Introductory

1. The Applicant was found guilty of gross misconduct by a person appointed to hear the disciplinary complaint ("the Adjudicator") based solely on allegations of inefficiency on July 22, 2013. A penalty of demotion subject to finding an appropriate new post within the next three months was provisionally imposed. The final penalty was communicated to the Applicant after the Adjudicator had retired by the Head of the Civil Service ("HOCS") on January 3, 2014. That decision was appealed by the Applicant to the Public Service Commission ("PSC") who affirmed the decision on June 23, 2014 ("the PSC Decision").

2. The Applicant, initially acting in person, applied for judicial review of the PSC Decision, on December 9, 2014. On January 21, 2015, Hellman J granted leave to

[1] This judgment was circulated without a hearing to formally hand it down.

pursue only one ground of complaint, namely the assertion that the PSC Decision to uphold the penalty was unreasonable. By an Originating Notice of Motion dated March 25, 2015, the by now legally represented Applicant sought to challenge the validity of both the 'conviction' and the 'sentence' on the following principal grounds:

(1) the offence of gross misconduct was not made out because the relevant charge was not, as was legally required, laid on the basis of an opinion from the HOCS that the acts of inefficiency complained of were so grave as to constitute gross misconduct;

(2) the only offences proved amounted to simple misconduct for which the penalty imposed was inherently unreasonable;

(3) the penalty was imposed by the HOCS, not the Adjudicator, in breach of the Applicant's fair hearing rights.

3. The Respondent filed two Affidavits in answer in April 2015 before directions were ordered. The Applicant filed his First Affidavit on March 20, 2015. By a Consent Order dated May 3, 2015, directions were given for the filing of further evidence. The matter was listed for substantive hearing on December 1, 2015. The Respondent filed two further Affidavits in November, 2015 and, after obtaining leave from the Court on November 30, 2015, filed a third further Affidavit on December 1, 2015. The November 30, 2015 order also adjourned the hearing to a date to be fixed, again effectively by consent. A fresh hearing was fixed for March 29, 2016.

4. On March 28, 2016, the day before the rescheduled hearing of the Notice of Motion issued on March 25, 2015, the Respondent for the first time objected to the Applicant seeking to challenge the 'liability' aspect of the disciplinary offence, or the 'conviction', on the grounds that leave to pursue such complaint had not been obtained. Having heard the preliminary objection, I decided to grant leave to the Applicant to pursue all his pleaded grounds, without prejudice to the Respondent's right to contend that no relief should be granted in respect of any otherwise meritorious complaint because he had failed to pursue an alternative remedy, having filed and withdrawn an appeal against the Adjudicator's July 22, 2014 decision on liability.

5. It was ultimately understandable why the Respondent's counsel belatedly raised this technical objection. When the key elements Applicant's central complaint were carefully analysed, Mr Taylor was bound to concede that the merits of this complaint could not be disputed.

The disciplinary scheme

6. The sole gross misconduct charge was based on the following provisions of the Conditions of Employment and Code of Conduct (for the Civil Service[2]) 2001 ("the Code of Conduct"). It is helpful to look at paragraph 7.4.2 (d), the offence with which

[2] This term is used in the Code of Conduct although the Bermuda Constitution creates a "Public Service" rather than a "Civil Service"-hence the Public Service Commission Regulations.

the Applicant was charged, in the context of the definition of gross misconduct as a whole:

> "***7.4.2 Gross Misconduct***
> *An officer is guilty of* ***gross misconduct*** *if the officer:*
> *(a) Assaults another officer or member of the public while on duty.*
> *(b) Is unfit for duty as a result of being under the influence of alcohol or drugs.*
> *(c) Acts fraudulently or dishonestly, or is involved in theft or failure to account for Government funds or monies or property belonging to Government.*
> *(d) Commits a series of acts of misconduct or a single act of misconduct of such gravity that in the opinion of the Head of the Civil Service it warrants being treated as gross misconduct.*
> *(e) Acts in a manner that is in the opinion of the Head of the Civil Service likely to bring the Civil Service into disrepute.*" [Emphasis added]

7. Mr Diel rightly submitted that making out a charge of contravening paragraph 7.4.2 (d) of the Code of Conduct necessarily required proof two essential elements:

   (1) a series of acts of misconduct or a single act of misconduct; and

   (2) the opinion of the Head of the Civil Service that the act or acts were of sufficient gravity to warrant being treated as gross misconduct.

8. The scheme of the disciplinary code clearly envisages a clean distinction between simple misconduct and gross misconduct. The Applicant's counsel in this regard also pointed to the wholly separate procedural code for (a) 'prosecuting' ordinary misconduct and gross misconduct offences, and (b) punishing offences which have been proved. The procedure is dealt with by the Public Service Commission Regulations ("the Regulations") while the Code of Conduct prescribes disciplinary penalties.

9. The First Schedule, pursuant to regulation 24(1), governs simple misconduct procedure. The Second Schedule, pursuant to regulation 24(2), governs gross misconduct procedure. The former is, to use Mr Diel's apt moniker, "conciliatory". The gross misconduct procedure is more formal with fair hearing requirements.

10. The separate penalty regime is reflected in the following provisions of the Code of Conduct:

> *"**7.5.1 Misconduct Penalties***
> *These are imposed by line managers or by Permanent Secretaries or Heads of Department:*
>
> *(a) Oral and written warnings.*
> *(b) Formal warnings conveyed in writing to the officer with a copy placed on the officer's personal file.*

(c) The Head of Department may determine that restitution would be appropriate, and may, with the agreement of the offender direct that the offender make restitution for any loss or damages caused by the offender.

7.5.2 Gross Misconduct Penalties
These are imposed only by the Head of the Civil Service:
(a) Suspension with partial loss of pay.
(b) Suspension with full loss of pay.
(c) Surcharge levied to compensate for any loss incurred by Government as specified in Financial Instructions.
(d) Reduction in rank, demotion to an office attracting a lesser salary.
(e) Dismissal." [Emphasis added]

11. As the Applicant had received a penalty only applicable for a gross misconduct offence, whether or not a gross misconduct offence had been properly made out against him was of substantive consequence. It also seems self-evident that where a charge under paragraph 7.4.2(d) (or (e)) is involved, the HOCS opinion must be either:

    (a) a precondition for the charge being 'laid'; or

    (b) An essential element of the material relied upon in the disciplinary hearing to support the relevant disciplinary charge.

The disciplinary proceedings and the validity of the decision that the gross misconduct charge had been proved

12. The Second Schedule to the Regulations provides for the following steps in relation to an offence of gross misconduct:

    - The Head of Department ("HOD") gives a statement of offence to the officer charged;
    - The HOD affords the officer an opportunity to respond to the charge;
    - Unless the HOD decides to dismiss the charge, the charge is referred to the HOCS for a hearing;
    - The HOCS can delegate any of his Second Schedule functions to an Assistant Cabinet Secretary.

13. In the Applicant's case, he was served with a statement of the alleged offences on or about August 17, 2012. He then met with the HOD on September 4, 2012. By letter dated November 14, 2012, the charge and supporting materials were sent to the then HOCS by the HOD "*for your consideration*". An Adjudicator heard the charge and found it proved on July 22, 2013, the penalty of demotion was imposed by the HOCS by letter dated January 3, 2014. The Public Service Commission ("PSC") dismissed the Applicant's appeal against the penalty on June 23, 2014.

14. Although no point was taken on the need for an opinion from the HOCS as a precondition for laying or as an essential element for proving the paragraph 7.4.2 (d) charge before the present proceedings were commenced in December 2014, it is common ground that the requisite opinion was not placed before either:

    (a) the Applicant before the matter was referred to the Adjudicator for hearing (2012);

    (b) the Adjudicator when the charge was substantively heard (2013);

    (c) the PSC for the Applicant's appeal (2014); or

    (d) this Court between the date when the 'no opinion' point was first raised (March 25, 2015) and the date of the effective hearing of the present judicial review application (March 29, 2016).

15. Mr Taylor, surprisingly, appeared to suggest in the course of argument that the requisite opinion might well exist. That submission was beside the point. What was crucial for the purposes of the present application was that the relevant opinion had clearly not been relied upon in the disciplinary process which resulted in the charge being 'proved'. That meant that in legal terms it was clear beyond argument that:

    (1) an essential element of the disciplinary offence in question had never been proved; and

    (2) there was no sufficient legal basis for imposing the gross misconduct penalty of a demotion.

16. It is important to note that the absence of an opinion was not a mere technical and practically inconsequential procedural defect. It is far from clear on what basis, absent a rational opinion from the HOCS the conduct complained of could amount to gross misconduct as generally understood. The HOD's August 17, 2012 Memorandum to the Applicant:

    (a) bore the subject heading "*Gross Misconduct-Allegations*";

    (b) gave feedback on previous meetings about underperformance earlier that year some of which was positive;

    (c) cited CECC 7.4.2 (d) and 7.4.3 of the Code of Conduct;

    (d) summarised the allegations as follows: "*Mr Lake continues not to respond to clients on a timely basis or to my instructions to do so*";

    (e) listed examples of underperformance without any mention of any or any specific remedial training opportunities being offered to the Applicant to enhance his case management skills.

17. It is easy to understand why the HOD, commendably seeking to ensure quality service delivery by the Labour Relations Department, wanted to resolve a seemingly persistent underperformance problem through robust disciplinary action. But the HOCS, taking a higher level objective view, is required by the disciplinary scheme to decide when acts of misconduct add up to gross misconduct. His judgment, no doubt, would take into account the extent to which the disciplined officer's managers have provided the officer with adequate professional development support. It is not self-evident in this case what view the HOCS would have formed, had he applied his mind to formulating an opinion on this issue.

18. Accordingly, the absence of the opinion is a substantive deficiency in the case against the Appellant, not a mere procedural technicality. However an important procedural nuance not addressed in the course of argument should be noted. The power conferred by paragraph 9 of the Second Schedule to the Regulations enabling the HOCS to delegate his hearing functions to an Assistant Cabinet Secretary may have to be deployed to ensure fairness in any case where the HOCS is involved in the investigative phase of disciplinary proceedings. In charges under paragraph 7.4.2(d) of the Code of Conduct, for instance, there would very obviously be a manifest appearance of bias if the HOCS were to both:

    (a) opine that the series of acts of simple misconduct complained of amount to gross misconduct for the purposes of instituting gross misconduct proceedings; and

    (b) adjudicate a hearing of the relevant charge, whether at the liability or penalty stage.

19. In these circumstances I see no need to fully explore the other procedural defects which Mr Diel's other grounds of attack on the impugned decision sought to illumine. However, his submission that the rules of natural justice prohibited a disciplinary penalty being imposed by the HOCS following a hearing conducted by a designated Adjudicator appeared to me to be irresistible. Certainly, Mr Taylor was unable to rebut the point on coherent grounds. The argument was supported by Bermudian Court of Appeal authority (by which this Court is bound) which is also cited with approval in Supperstone, Goudie and Walker, '*Judicial Review*' (at paragraph 10.52.6:

> "*In Telco-v- Telecom*[3]*, Bermuda Court of Appeal, a decision of the Regulatory Authority refusing the company's application to raise its prices was set aside when members who took the decision included some who had been absent on the occasion when the company presented its case orally and had no sufficient record of what took place. Telford Georges J said:*

[3] [1991] 43 WLR 90; [1991] Bda LR 23, a case in which Mr Diel appeared with Michael Beloff QC for the successful appellant.

> *'The principle that a decision maker should have available for consideration all the facts and submissions put forward by a party to a dispute which is being adjudicated is crucial. The records of the Commission should make that clear. They do not…*"

20. I also see no need to make any formal findings on the unreasonableness of the penalty complaint. The PSC finding on this issue was, at first blush, difficult to fault. If gross misconduct had indeed been proved, the Applicant was fortunate to be demoted rather than being dismissed outright.

Alternative remedies

21. Mr Taylor's only real ground for opposing the present application was to contend that it is not open to the Applicant to challenge the 'conviction' limb of the disciplinary proceedings because he filed and abandoned an appeal before the penalty phase. This was a superficially attractive argument but did not withstand careful scrutiny.

22. However, Crown Counsel relied on the well-known principle that relief by way of judicial review will generally be refused if the applicant had a right of appeal which he should have pursued but did not pursue. The Applicant's counsel responded that even if an appeal was available and had not been pursued, the points of law relied upon in the present application were not appropriate for adjudication through the appeal process in any event. There was no need to cite authority for these propositions and judicial support for the principles is abundant[4]. As Bell J (as he then was) stated in *Stoneham and Fleming-v-Attorney-General et al* [2008] Bda LR 14:

> "*14. It is well established that judicial review is a remedy of last resort, so that where a suitable statutory appeal is available, the Court will exercise its discretion in all but exceptional cases by declining to entertain an application for judicial review; see, for instance, the judgment of Sedley LJ in R (on the application of Lim and another) v Secretary of State for the Home Department [2007] EWCA Civ 773 (paragraph 13). This is perhaps but one of the latest in a long line of judicial pronouncements to the same effect, and I do not see that any useful purpose would be served by setting out extracts from judgments other than the one to which I have referred above, all of which repeat the principle in the same or similar terms.*"

23. The principles are also helpfully illustrated in terms of a more recent judicial articulation by the Caymanian Grand Court decision in *Aitkin-v-Immigration Appeal Tribunal* [2015] (1) CILR 27, where Smellie CJ stated:

[4] The authorities placed before the Court by the Respondent's counsel, which were only indirectly relevant to this issue, were cases concerning the statutory discretionary power found in the Bermudian and similar Commonwealth constitutions to decline relief if alternative redress has or does exist.

"*4.Judicial review is not normally available where there is an alternative remedy by way of appeal. While the court retains a discretion, even where there is an alternative remedy, to entertain an application by way of judicial review, it will do so only exceptionally: see Kirk Freeport Plaza Ltd. v. Immigration Bd. (6). In that case, the Court of Appeal (1997 CILR at 515) adopted the settled principle that an application for judicial review may be entertained "where the alternative . . . remedy [of appeal] is 'nowhere near so convenient, beneficial and effectual' or 'where there is no other equally effective and convenient remedy.'" The principle has often been followed and applied in subsequent cases; see, for example Proprietors, Strata Plan No. 103 v. Development Advisory Bd. (8) and Ford v. Immigration Appeals Tribunal (5).*"

24. It was common ground that the Appellant, then represented by Mr Philip Perinchief, abandoned an initial appeal prior to the penalty phase for reasons which are unclear and, ultimately, unimportant. This is because either (a) the Applicant had no right to appeal the 'conviction' at all, or (b) because his right of appeal only had to be exercised after a penalty had been imposed, and/or (c) because it was reasonable in all the circumstances for him to exhaust his appeal rights before pursuing judicial review as a last option. The relevant appeal provisions in the Regulations are as follows:

"28 (1) *Where—*

(a) the disciplinary powers vested in the Governor by section 82 of the Constitution have been delegated to an empowered person under the Public Service (Delegation of Powers) Regulations 2001; and

(b) a disciplinary award of a gross misconduct penalty has been made by the empowered person,

any officer who is aggrieved by the disciplinary award may, within fourteen days of receiving notice of the disciplinary award, appeal to the Commission by giving notice in writing to the Commission and to the person who made the disciplinary award.

(2)The officer may include with the notice referred to in paragraph (1) any representations he wishes to bring to the attention of the Commission but, unless the Commission otherwise orders, neither the officer nor the empowered person who made the disciplinary award shall be entitled to appear before the Commission.

(3)The Commission may call for a report from the empowered person who made the disciplinary award and shall at a meeting determine the appeal.

(4)The Commission may—

(a) affirm, reverse or vary any disciplinary penalty imposed by the disciplinary award; or

(b) remit the matter for determination on rehearing by the empowered person with or without any observations the Commission thinks fit to make.

(5)The decision of the Commission on an appeal shall be final." [Emphasis added]

25. Regulation 28 is somewhat difficult to digest in two respects. Firstly it uses the terms "*disciplinary award*". The term "award" is generally a term of art for the decision rendered by an arbitral tribunal. However, the term "*disciplinary award*" is defined in regulation 2(1) of the Regulations as follows:

> "'*disciplinary award' means a determination, by a person or body having power to adjudicate in disciplinary proceedings, disposing of one or more issues in those proceedings, whether or not that disposal is subject to affirmation or may be quashed or varied by some other person or body…*"

26. The statutory definition clearly embraces decisions on both 'guilt' and penalty. However regulation 28(4)(a) only explicitly empowers the PSC to "*affirm, reverse or vary any disciplinary penalty*". At first blush, this seems to exclude any power to affirm, reverse or vary a finding that a charge has been proved as opposed to the penalty imposed. This logical starting assumption is confirmed by the way in which regulation 2(1) defines "*disciplinary penalty*":

> "'*disciplinary penalty' means a penalty for a disciplinary offence and the respective penalties for misconduct and gross misconduct are set out in the Code…*"

27. The literal meaning of regulation 28 is that a finding of guilt can be appealed but the PSC cannot "*affirm, reverse or vary*" such a finding under paragraph 4(a). The PSC can only remit the matter for rehearing 28(4)(b), which is not restricted to disciplinary penalties. Such an interpretation would lead to absurd results and necessitate a construction which allows the dominant provision creating the substantive right of appeal (in 28(1)) to be controlled by the inconsistently worded and supplementary procedural provision defining the scope of relief (28(4)(a)). *Bennion*, Sixth edition, Section 160 states:

> "*(1) Where…the literal meaning of the enactment under inquiry is inconsistent with the literal meaning of one or more other enactments in the same Act, the combined meaning of the enactments is to be arrived at.*"

28. In effect, the Court should seek to make sense of a provision which, literally read, would be nonsensical. A more purposive meaning is that the PSC can adjudicate the merits of both the disciplinary penalty and the foundational finding that the charge has been proved. Or, to put it another way, the PSC can adjudicate the merits of the disciplinary penalty by reference to both whether or not the charge was validly proved and/or whether or not the penalty is appropriate. This is not a very strained meaning to assign to the words of the Regulation which do not explicitly restrict the grounds upon which the penalty can be reviewed at all. After all, regulation 28(1) in creating a right of appeal uses language consistent with viewing the "*disciplinary award*" and the "*disciplinary penalty*" as inextricably intertwined:

> "28(1) *Where—*
>
> *(a) ….; and*
>
> *(b) a disciplinary award of a gross misconduct penalty has been made by the empowered person*…"

29. I accordingly find that:

(1) public officers found guilty of offences of gross misconduct have a right of appeal against both findings that a charge has been proved and the resultant disciplinary penalty;

(2) where a finding that a charge has been proved is made before the penalty has been imposed, the public officer "*may*" appeal before the penalty is imposed but is not obliged to do so. The most efficient approach (in most cases) would be to wait for the penalty to be imposed before appealing in terms of avoiding unnecessary delays;

(3) regulation 28(4)(a) should be read as empowering the PSC to "*affirm, reverse or vary any disciplinary penalty imposed by a disciplinary award*" having regard to:

(a) the merits of the disciplinary award as a whole; and/or

(b) the merits of the disciplinary penalty alone.

30. The main thrust of Mr Taylor's submission was that the Applicant could have and should have actively pursued an appeal against the finding that the charge was proved and that he had clearly abandoned any challenge to the finding of guilt when the abandonment of appeal letter is viewed in conjunction with his personally signed January 17, 2014 letter of appeal to the PSC. The Applicant, it is true, only explicitly appealed to the PSC on grounds that attacked the penalty as opposed to the finding that the charge had been proved at all. The Applicant both:

(a) described his letter as "*his formal appeal pursuant to section 28(1)(b)…in respect of a penalty award…dated July 22, 2013….which was confirmed by letter dated January 3, 2014*"; and

(b) challenged both the validity and the merits of the disciplinary penalty.

31. In my judgment the disciplinary scheme cannot equated to criminal court proceedings where there is a clear dividing line between appeals against conviction and appeals against sentence. The Applicant did enough in that initial appeal letter to preserve his right to pursue an appeal against both the finding of guilt and the penalty. Despite only mentioning 28(1)(b), he appealed under regulation 28(1) of the Regulations which confers a right of appeal in respect of a "*disciplinary award*" without limitation to findings of guilt or penalty. The imposition of a disciplinary penalty for a gross misconduct offence is the only material precondition for exercising the right of appeal.

32. In a May 18, 2014 letter which he wrote by way of submission to the PSC, the Applicant did expressly challenge the validity of the finding by the Adjudicator that the charge had been proved. This was principally on the ground that irrelevant matters had been taken into account, not that an essential element of the charge had not been proved. That the PSC itself appreciated that both 'conviction and sentence' were under appeal is reflected in their decision:

> "*Based on the information that was submitted, the Commission agreed that the actions constituted gross misconduct.*"

33. Against this background, I am bound to reject the submission that the Applicant failed to pursue an appropriate alternative remedy by abandoning his initial appeal against the July 22, 2013 disciplinary award on September 16, 2013. On the evidence, he never waived his right to challenge the legality of the finding that he was guilty of gross misconduct as charged.

34. Moreover, although Mr Diel doubted that the appeal route was an appropriate alternative remedy for the legal and jurisdictional complaints which the Applicant advanced in the present proceedings, this Court might well have declined to entertain the present application had the Applicant sought to bypass the appeal route altogether. In my judgment the Applicant was right to exhaust his appeal rights first, before seeking judicial review as a last resort. As May LJ observed in *R-v-Chief Constable of the Merseyside Police, ex parte Calveley* [1985] EWCA J-1127-1[5] (at page 18)

> "*…I think that one must guard against granting judicial review in cases where there is an alternative appeal route, merely because it may be more effective and convenient to do so…*"

[5] [1986] QB 424.

35. To the extent that the Applicant wished to assert that the gross misconduct charge was not proved in either factual or legal terms, in my judgment that issue was very arguably one which the PSC was competent to deal with. The Applicant did pursue just such a ground. To the extent that the Applicant sought to challenge, as he did, whether the HOCS had jurisdiction to impose the impugned gross misconduct penalty, it is possible to construe the PSC appeal regime as limited to adjudicating appeals where the decision appealed against is a valid one. As regards this jurisdictional point at least, Mr Diel aptly relied upon *Bermuda Telephone Company Ltd. –v- The Telecommunications Commission* [1999] Bda LR 30 (at page 3) where Mitchell J stated**:**

> "*In my view the statutory appeal procedures are not apt to deal with the applicant's allegations. Implicit in the language of section 25 is the assumption that the decision appealed against is a valid one. The appellant may well be aggrieved by it and seek its variation but he is not seeking to say that the Commission had no power to make it or that it was fatally flawed,—as the applicant contends in this case. If the applicant is right and the respondent has acted unlawfully—and as I say I believe that it has a stateable case—then that is something that it is entitled to bring before the courts immediately if it so chooses. It is entitled to the most expeditious remedy against an illegal act. (R v Hillingdon Borough Council ex p. Royco Homes Ltd [1974] 1 QB 720). I do not believe that it should be obliged to await the Minister's decision and then, if still unsatisfied, seek to have the question of legality determined.*"

36. On the facts of the present case, it is not necessary to formally determine the adequacy of the appeal remedy. The Applicant did not come to Court first and seek to bypass it. He exhausted his appeal rights before pursuing the last resort discretionary remedy of judicial review. In so doing he challenged both the findings that the charge was proved and the legality and appropriateness of the penalty element of the disciplinary award. It is enough to record that the evidence before this Court supports a clear finding that the Applicant in exercising his appeal rights did not waive the right to challenge before this Court the legality of the 'conviction' element of the impugned disciplinary award.

Relief

37. Mr Taylor advised that the Respondent had filled the Applicant's original post. As I indicated in the course of the hearing, it is always a matter of judgment for public authorities facing judicial review proceedings (absent a stay) whether or not they choose to maintain the status quo or not. Mr Diel rightly submitted that the Applicant was entitled to an Order of Certiorari quashing the disciplinary award which was void *ab initio*. Mr Diel referred the Court in support of this incontrovertible submission to *McLaughlin-v- Governor of the Cayman Islands* [2007] 1 WLR 2839 (PC). Lord Bingham in that case opined as follows:

"14. *It is a settled principle of law that if a public authority purports to dismiss the holder of a public office in excess of its powers, or in breach of natural justice, or unlawfully (categories which overlap), the dismissal is, as between the public authority and the office-holder, null, void and without legal effect, at any rate once a court of competent jurisdiction so declares or orders. Thus the office-holder remains in office, entitled to the remuneration attaching to such office, so long as he remains ready, willing and able to render the service required of him, until his tenure of office is lawfully brought to an end by resignation or lawful dismissal. These propositions are vouched by a large body of high authority which includes Wood v Woad (1874) 9 Ex 190, at 198 (Kelly CB) and 204 (Amphlett B); Vine v National Dock Labour Board [1956] 1 QB 658 at 675-676 (Jenkins LJ) and [1957] AC 488 at 500 (Viscount Kilmuir LC), 503-504 (Lord Morton of Henryton), 506-507 (Lord Cohen); Ridge v Baldwin [1964] AC 40, 80-81 (Lord Reid), 139-140 (Lord Devlin); Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147, 170-171 (Lord Reid), 195-196 (Lord Pearce), 207 (Lord Wilberforce); Malloch v Aberdeen Corporation [1971] 1 WLR 1578, 1584 (Lord Reid), 1598-1599 (Lord Wilberforce); F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry [1975] AC 295, 365 (Lord Diplock); Calvin v Carr [1980] AC 574, 589-590 (Lord Wilberforce for the Board); Zainal bin Hashim v Government of Malaysia [1980] AC 734, 740 (Viscount Dilhorne for the Board); Boddington v British Transport Police [1999] 2 AC 143, 154-156 (Lord Irvine of Lairg LC); Wade and Forsyth, Administrative Law, 9th ed (2004), pp 300-301.*

15.Mr Lynch pointed out that distinguished judges had expressed unease at the use of terms such as "void", "voidable", "null" and "nullity" in this context and had recognised problems arising in the period between an invalid act and a declaration of invalidity, particularly where steps have been taken and third party rights acquired during this period. This is so. Examples may be found in Hoffmann-La Roche, above, 366 (Lord Diplock); Calvin v Carr, above, 589 (Lord Wilberforce); Percy v Hall [1997] QB 924, 950-952 (Schiemann LJ); Boddington, above, 157-158 (Lord Irvine) and 164 (Lord Browne-Wilkinson); Palacegate Properties Ltd v Camden London Borough Council (2000) 4 PLR 59, 80 (Laws LJ). There is, however, no decision which throws doubt on the correctness of the authorities cited in the last paragraph; different modes of expression do not indicate differences of opinion as to the substantial outcome…"

38. It follows from my finding that the gross misconduct offence was not proved that there was no jurisdiction to impose a punishment (demotion) only available for a gross misconduct offence. Quashing the disciplinary award has the legal result that the Applicant has never been validly demoted from his former post. Whether the Applicant is actually restored to his original position or negotiates some alternate resolution is a matter for the parties.

Conclusion

39. An essential element of the gross misconduct offence with which the Applicant was charged (contravening paragraph 7.4.2 (d) of the Code of Conduct) in disciplinary proceedings brought under the Regulations was not proved. The disciplinary penalty of demotion purportedly imposed by the HOCS and affirmed by the PSC for that gross misconduct offence was made in excess of the decision-makers' lawful jurisdiction. The Applicant is accordingly entitled to an order of certiorari quashing the impugned disciplinary award.

40. Unless either party applies within 21 days by letter to the Registrar to be heard as to costs, the Applicant shall be awarded his costs of the present application to be taxed if not agreed. The parties shall have liberty to apply in relation to any consequential matters arising from the present Judgment.

Dated this 8th day of April, 2016 _____

IAN RC KAWALEY CJ