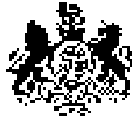
[2009] SC (Bda) 16 Civ



IN THE SUPREME COURT BERMUDA
CIVIL JURISDICTION
2008: No.171

IN THE MATTER OF THE POLICE ACT 1974
AND IN THE MATTER OF AN ARBITRATION
AWARD BY THE PERMANENT POLICE TRIBUNAL

REGINA

Applicant

-v-

THE PERMANENT POLICE TRIBUNAL

Respondent

-and-

THE BERMUDA POLICE ASSOCIATION

Affected Party

JUDGMENT

Date of Hearing: February 9, 2009
Date of Judgment: February 17, 2009

Mr. Charles Richardson and Mr. Philip Parry,
Juris Law Chambers, for the Applicant
Mr. Paul Harshaw, Harshaw & Co.,
for the Respondent
Mr. Alan Dunch, Mello Jones & Martin,
for the Affected Party

Introductory

1. The present application for judicial review was initially made by the Minister on July 3, 2008. Leave was granted by this Court (Greaves J) on July 9, 2008. The primary ground of complaint was that the Permanent Police Tribunal ("the Tribunal") in its June 11, 2008 decision had unlawfully decided that the Combined Allowance should be included in the salaries of police officers below the rank of Chief Inspector for the purposes of years 2005-2006, 2006-2007 and 2008-2009. This complaint was somewhat surprising because this was precisely the issue the Tribunal was requested to adjudicate.

2. The Tribunal is tasked under the Act with resolving contract disputes which have not been resolved by agreement. The statutory breach originally complained of was a breach of section 29A (5) of the Police Act 1974 *simpliciter*. Since the Minister under the Police Act was responsible for settling the terms of reference which the Tribunal was required to "strictly" follow, I ruled on November 28, 2008 that the Minister lacked the standing to advance the first ground of the original application. The legal argument sought to be advanced implicitly required a finding that the Minister had acted unlawfully in referring a legally prohibited issue to the Tribunal and requiring them to determine it.

3. Mr. Huw Shepheard of the Attorney-General's Chambers had appeared for the Applicant up to that point, as well as before the Tribunal. On January 22, 2009, Juris Law Chambers filed a Notice of Change of Attorney on behalf of the Applicant. On February 5, 2009, the Applicant's new outside counsel issued a Summons making the anticipated application to replace the Minister as applicant but making a somewhat surprising application that appeared on its face to change the entire legal basis of the main ground of the application, less than two working days before a hearing fixed by Notice of Hearing dated November 6, 2008.

4. At the commencement of the hearing the Crown was substituted for the Minister of Labour Home Affairs and Housing ("the Minister") as the Applicant on an unopposed basis. The Crown also applied to amend the first ground of review to read as follows:

   > "*That the Tribunal erred in law and acted beyond its powers when it redefined the 'combined allowance' as a 'salary supplement' as such 'redefinition' is contrary to the statutory definition of 'salary' contained in the Public Service Superannuation Act 1981 and as such is a usurpation of the Sovereignty of Parliament.*"

5. This aspect of the application was, unsurprisingly, opposed. As it was not obvious to me that the new ground, wholly detached from its original anchor to

section 29A of the Police Act, could be fairly dealt with in the context of the present case, I refused the application on the explicit terms that the Crown could in any event deploy its new argument in support of the original ground 1. The Respondent and party affected had come to Court prepared to meet the argument that the award was invalid by virtue of exceeding the Tribunal's statutory powers, and it would be unfair to them to permit an entirely new case to be argued at such a late stage. It also seemed doubtful that if the determination complained of contravened the 1981 Act, such contravention did not of necessity involve a concurrent exceeding of the jurisdiction conferred by section 29A(5) of the 1974 Act.

6. That original ground was the only issue which the Court was required to determine and now read for practical purposes as follows:

> "*In reaching its decision on whether the Combined Allowance paid to police officers of or below the rank of Chief Inspector for the years 2005-2006, 2006-2007 and 2007-2008 should be included in officers' salaries and be made pensionable, the Permanent Police Tribunal erred in law and acted beyond its powers in that section 29A(5) of the Police Act 1974 specifically excludes questions of pensions from the ambit of an agreement under Part VA of the Act* [*as far as any modification of the statutory pension scheme contained in the Public Service Superannuation Act 1981is concerned*][1]."

7. Although the Applicant's counsel contended that the error of law complained of was sufficient to justify quashing the entirety of the Tribunal's decision, assuming it was made out, the proceedings before the Tribunal need to be considered in some detail to clearly understand the terms and effect of the impugned decision. This flows from a factual dispute as to the precise scope of the Tribunal's decision, which is highly relevant to the scope of relief to which the Applicant would be entitled if the application succeeds.

Factual findings: the dispute before the Tribunal relating to the Combined Allowance

<u>History of the combined allowance dispute</u>

8. Mr. Dunch referred the Court to Exhibit "DS 1" to the First Affidavit of Darrin Simons, sworn on September 11, 2008 on behalf of the Bermuda Police Association ("BPA") and filed on behalf of the Respondent. Inspector Simons was responsible for negotiating on the BPA's behalf.

9. A Witness Statement by Sergeant Stephen Cosham dated February 7, 2008 was placed before the Tribunal. This explained that the BPA started collective

[1] The bracketed words have been inserted to reflect the Court's understanding of the essence of the Applicant's case.

bargaining in 1989 and that in January 1990 the Gregory Award introduced the Combined Allowance for the first time. This was a fixed monthly amount payable to all ranks, which was increased by the "1996 Mowbray Award"[2]. The 1999 Mowbray Report fixed what was referred to as a Combined Premium at 10% of salary. The most recent pay award was dated October 1, 2004 when the Combined Allowance was continued as a 10% fixed allowance. I will return to the specific submission made to the Tribunal in the present case later.

10. The precursor to the Tribunal was apparently the Police Pay and Conditions of Service Review Board chaired by Louis Mowbray, whose January 5, 1999 Report is reproduced in Exhibit "DS 1" to the First Simons Affidavit. The Mowbray Report (at page 4) confirms that the issue of converting the Combined Allowance into salary was first raised over 10 years ago:

> "*It has been proposed to the Board that this Combined Premium should be added to basic salaries and supplemented to create higher salary levels. However, in the past, differences in salary have been quickly taken up by other groups, who have the right to strike, and have tended to disappear.*"

11. It should be noted that the Review Board's name and delivery of a "report" suggests that its role was more administrative than judicial, and that it functioned in a somewhat different manner than the Tribunal. The same Affidavit also exhibits the Minutes of the BPA/Bermuda Government 2007 negotiations, led by Inspector Simons and Major Allan Wayne Smith, respectively. At the first meeting on February 20, 2007, the parties agreed to negotiate with "*mutual respect, good business and moral ethics*" and "*in an honest and fair manner*". Major Smith is recorded as being disappointed that the BPA had been functioning without an agreement since 2005 and stating: "*We are looking for a reasonable deal for both parties in a timely manner.*" At the March 13, 2007 meeting, Inspector Simons is recorded as stating that the Combined Allowance was "*clear payment for doing your job; therefore it should be viewed as salary…it was previous GVT's attempt to hide the uplift to other organizations. That this could no longer be the case because it was now public knowledge. The time had now come for Police Officers to be paid there* [sic] *wages up front*."

12. Clearly the BPA were asking for an existing allowance which was in substance part of salary to be properly treated as such. Clearly both sides understood that the change of treatment sought would result in the additional salary being subject to the pension regime. At the April 10, 2007 meeting, M. Darlington "*explained that the cost to GVT on this submission which is $176,000 pa that must go to pension based on past payments to superannuation fund. He stated more time was needed for the more complex calculations.*" In the Minutes for April 17, 2007, the following entry appears:

[2] It seems this was in fact intended to be a reference to the 1999 Mowbray Report.

> "**Item C: Combined Allowance**
> *W. Smith stated that the GVT team supported this and had made submissions to the Ministry of Finance*."

13. On May 1, 2007, however, it was clear that this apparent support for the BPA proposal was only conditional, because the Government team is recorded as having confirmed that they did not support it. It was decided that the next meeting would be "*based around what arbitration looks like.*" A similar commitment was made at the May 22, 2007 meeting, which is the last set of minutes before this Court. In addition, the BPA requested that the matters in dispute be referred to a conciliator because no progress was being made. According to the First Smith Affidavit sworn on July 3, 2008 in support of the present application, the dispute was referred to conciliation which did not resolve matters.

14. Although it is somewhat unclear precisely how the terms of reference for the Tribunal came to be formulated, on a balance of probabilities I am satisfied that the two parties to the dispute must have had some input in defining the scope of the reference. I am also satisfied the Combined Allowance issue throughout was a clear-cut controversy with the BPA contending that the allowance should be added to salary with the Government side (eventually) contending that it should not.

<u>The scope of the reference to and the hearing before the Tribunal</u>

15. On November 23, 2007, the Acting Minister wrote the Tribunal Chairman Mr. Arthur Hodgson referring six issues for his determination, the very first of which was the Combined Allowance issue:

> "*It has been determined by the conciliator that items resented to him for settlement can not be settled, therefore, in accordance with the Police Act 1974 section 29F (1) I hereby refer the matter to the Permanent Police Tribunal.*
>
> *The Tribunal shall hear the arguments from both parties and determine:*
>
> *1.* **Whether the Combined Allowance should be added to their pay, which would make it pensionable.**" [emphasis added]

16. The first issue referred to the Tribunal was, against the background summarised above, a question which could have yielded a "yes" or "no" answer. The BPA sought to have the Combined Allowance added to pay, and the Government sought to have it remain an allowance. It was common ground that the main consequence of the re-characterisation of the allowance as part of pay would be that the relevant portion of the total remuneration package would become

pensionable in the sense that it would attract additional pension deductions in the short term and additional pension payments in the long term. This was the only evident reason why the words "*which would make it pensionable*" appeared in the terms of reference at all. This analysis of the scope of the issue referred is supported by reference to the evidence adduced and the submissions made before the Tribunal itself, by which stage Crown Counsel was representing the Government and Mr. Dunch the BPA.

17. The Cosham statement, referred to above, in addition to describing the history of the Combined Allowance contained a summary of the BPA's case. This was that (a) the allowance was paid like a salary; (b) it was treated as salary in the context of recruitment information which described the allowance as "definite"(by way of contrast with shift differential and overtime); (c) a precedent for conversion had already been set by rolling the allowance into salary for commissioners; (d) the characterisation of the allowance as such was artificial based on historical reasons which no longer had validity; and (e) the issue had been important to the Police and raised before many times. The issue's importance was highlighted by the fact that Government contended that as an allowance the Combined Allowance could be unilaterally withdrawn at any time.

18. The Government produced as "evidence" a financial consultant's letter dated February 7, 2008 which stated that the BPA proposal would cost an additional $6,481,000 (past costs-because the last agreement expired on September 30, 2005), and $796,000 annually (future costs). Curiously, this letter was first introduced to the Tribunal by Crown Counsel not as a document prepared as part of the Government's own case, but as a document prepared by way of response to a December 14, 2007 Request for Information from the BPA[3]. The letter was described as an "Actuarial Report" although the firm that produced it did not hold itself out as having actuarial expertise and the document itself did not purport to be an actuarial report.

19. Mr. Dunch, opening his submissions for the BPA, on February 11, 2008, defined the first issue as follows:

> "*…whether, what is referred to as the combined allowance should be added to Police Officers' pay and made pension-able*[sic] *and, whilst Mr. Soares and Mr. Mowbray will be well versed with what combined allowance is Mr. Chairman, in very short summary: In the case of a Police Constable, ten per cent of his annual salary is in fact often referred to as being a combined allowance as opposed to using the word salary.*"

20. This was a distillation of the following submission set out in his client's written Skeleton Argument:

[3] See: Exhibit "AWBS/1 to the First Smith Affidavit, at page 46.

> "*For far 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.*"[4]

21. Mr. Shepheard did not make an opening statement, but the Government's Outline Position on the Combined Allowance issue was as follows:

"

- *As a matter of principle, the combined allowance must not be added to 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 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 receive allowances in addition to their salaries.*"

22. So the Government asserted three reasons for keeping the Combined Allowance "*separate from pay*": (a) it was in fact an allowance and "*not a salary supplement*"; (b) funds to meet the pension-related costs did not exist; and (c) the change would prejudice Government's position in relation to other workers. In cross-examination of Inspector Simons, the so-called Actuarial Report was put to the BPA but the witness said the underlying assumptions in the Report were unclear. This witness was not otherwise apparently questioned on the Combined Allowance issue. The Government does not appear to have adduced concrete evidence in support of point (b), and the overwhelming majority of the arbitration proceeding apparently concerned issues unrelated to the Combined Allowance. This is reflected in the fact that Mr. Shepheard's closing submissions fill some 3 ½ pages of the transcript; the portion of his address which deals with the Combined Allowance is only ½ page, or 1/7th :

[4] See: Exhibit "ADOH-1" page 13, Affidavit of Arthur David Outerbridge Hodgson.

"*On the matter of putting the combined allowance into pay, it's clear from the history of the combined allowance that, whilst it began life as an amalgamation of allowances, it's been used to increase the take home pay of police officers. But at its heart, it is an allowance and it's therefore not pension-able* [sic] *under the terms of the Public Service Superannuation Act. Government's basis position is that it would be contrary to principle to make it pension-able [sic] and, again, it raises the issue of the total cost to Government of doing this , and I appreciate that the Tribunal has indicated that affordability is not something that they should really be taking into account, but it's the Government's submission that the impact of the overall package which the Tribunal comes up with should be something that the Tribunal ought to consider in reaching its decision.*"

23. Mr. Shepheard's closing submission very fairly concedes that the Combined Allowance has in practice been used "*to increase the take home pay of police officers*". The suggestion that "*it would be wrong in principle*" to make it pensionable must have rung somewhat hollow to the Tribunal in light of that concession. In essence, the only point which appears to have been left to the Tribunal to seriously decide was the "*impact*" of adding the Combined Allowance to salary on the "*overall package*". The impact referred to by counsel no doubt included the impact of the global award on other Government negotiations.

24. The hearing took place over 5 days during the period February 11-15, 2008. But in light of the way the parties put their respective cases on the Combined Allowance issue, the dispute remained within the parameters of the first item in the Tribunal's terms of reference: *should the Combined Allowance be added to police officers' pay, which would make it pensionable, or not*?

The Tribunal's decision on the Combined Allowance issue

25. The Tribunal did not simply proceed to hand down its award. At a hearing on April 11, 2008, the parties were given an indication of the purport of the proposed decision and an opportunity to make further submissions on the legality thereof. Mr. Shepheard wrote to the Chairman of the Tribunal on April 17, 2008, in salient part as follows:

"*At the hearing last Friday 11 April 2008, I undertook to let the tribunal know whether, in the Government's view, the course of action the Tribunal suggested that it might be minded to adopt, was within the Terms of Reference of this Arbitration…[the terms of section 29F(1) of the Police Act 1974 and the Tribunal's terms of reference were set out]…*

As I understand the Tribunal's proposed determination, these 6 points will be answered as follows:

1. ***Yes….***

The Government expresses no view on item…1…and expressly reserves its position in relation to [it]… " [emphasis added]

26. This letter, written by the Government's own lawyer, is very powerful evidence that the Combined Allowance issue was indeed amenable to a yes/no answer. The April 17, 2008 letter made representations as to why the proposed decision on issue 5 was outside of the Tribunal's terms of reference, but simply reserved the Governments position on the Combined Allowance issue. It is unclear what this reservation of rights signified, bearing in mind that Crown Counsel had dealt with the issue on its merits without raising any jurisdictional points.

27. Mr. Dunch also pointed out that the Government was given an additional opportunity to comment on a draft of the final award which the BPA was not. In a communication that should have been made to the lawyers for the parties but which instead was directed by email from the Tribunal Chair to the Premier and three Cabinet Ministers, the following draft decision wording was set out:

> "*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.*
>
> *At least part of the rational* [sic] *for the Combined Allowance was to recognize that the Police Service endured special hardships which were not present in other areas of service. It is the intention of the Tribunal in its award to recognize that the police face special conditions on a routine basis that other services face only intermittently.*
>
> **We therefore recognise 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 be called a Salary Supplement or some other such name that clearly identifies it as part of salary.*" [emphasis added]

28. The email correspondence relating to the draft award was very properly exhibited to the Hodgson Affidavit. Obviously seeking Government's input was appropriate, but the proper line of communication for a judicial tribunal was through Crown Counsel and the BPA's counsel as well. It is unclear precisely

what feedback the Tribunal received on the draft award[5]. The openness with which this email correspondence took place makes it obvious, however, that the Chairman was acting in good faith; this conclusion is particularly justified as the statutory framework (discussed below) expressly requires that the Tribunal award be delivered to the Minister rather than the parties. This may be a legacy of the old Pay Review Board "report" regime.

29. However, what the BPA's counsel extracts from the draft award is the unequivocal evidence of a decision to answer the question referred in the affirmative. And, as formulated in the draft award, this decision is clearly severable from that portion of the award said to be inconsistent with the Tribunal's jurisdiction under the Act. As formulated in the draft award, it does not appear to be part of the operative decision at all. Rather, it is the sort of advice that one might find in an advisory tribunal's report: "*in the event that Government considered that it needs a special prop to differentiate it from salaries in other areas of employment it be called a Salary Supplement…*" it is, in effect, recommended.

30. The final award dated June 11, 2008, regretfully, lacks the clarity of wording found in the draft. It provided in relevant part 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.*
>
> *Concern was expressed that if the Combined Allowance was treated as 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.*"

31. It seems obvious that the final decision, looked at in the wider context described above, essentially (a) implicitly answers the first item of the terms of reference

[5] One Minister responded supporting the proposed Combined Allowance decision. The Minister responsible for Labour correctly declined to comment on the grounds that the communication was inappropriate.

affirmatively, (b) is drafted in a manner which suggests an undue preoccupation with Government's concerns about the impact of the award on other negotiations, in that the question referred is not even explicitly answered as it was in the draft award, and (c) at least arguably goes beyond the strict terms of reference by (i) redefining the Combined Allowance as a "Salary Supplement" and (ii) retaining the separate identity of the allowance through maintaining the percentage basis of calculating the supplement, in a manner which is inconsistent with the statutory pension regime. It is simply not arguable that the Tribunal failed to decide the Combined Allowance should be added to salary at all.

Legal findings: is the impugned decision a public law decision amenable to judicial review?

32. Mr. Harshaw acting for the Tribunal indicated that his role in the proceedings was to assist the Court. He invited the Court to consider whether or not the subject matter of the challenged decision was indeed a public law matter and therefore subject to judicial review at all. While the terms and conditions of individual police officers' contracts of employment are perhaps primarily matters of private law to be resolved in ordinary civil proceedings, I find that the question of whether a statutory arbitration tribunal has exceeded its statutory powers is a public law question properly the subject of judicial review proceedings.

33. In *Regina v. National Joint Council for the Craft of Dental Technicians (Disputes Committee)* [1953] 1QB 704 at 708, which counsel placed before the Court, Lord Goddard explained that judicial review was available in respect of statutory arbitrations in the following terms:

> "*Certiorari lies to bring up the decision or record of the inferior court to this court with a view to it being quashed. It is granted and directed to one of the inferior courts such as the magistrates' courts and the county courts, and it has been extended to the various bodies which have been entrusted by Parliament with duties partly of an administrative character and partly of a judicial character in some cases, but cases in which subjects may be affected by their decisions. There is no instance of which I know in the books where certiorari or prohibition has gone to an arbitrator except a statutory arbitrator, and a statutory arbitrator is a person to whom the by statute the parties must resort.*"

34. The Tribunal in the present case is not only established by statute; it is a body to which the Government and the BPA must refer unresolved contractual disputes, for binding and final determination without any right of appeal in respect of the merits of the decision. The Tribunal is essentially a statutory judicial tribunal and if any party to its proceedings contends that it has exceeded its statutory jurisdiction, in circumstances where no obvious private law remedies exist, this Court must potentially be able to grant remedies by way of judicial review.

Legal findings: did the Tribunal exceed its jurisdiction and, if so, to what extent?

35. Section 29A(1) of the Police Act 1974 provides that where there "*is no agreement in being, the Bermuda Police Association ("the Association") may at any time give notice in writing to the Commissioner of the Association's wish to enter negotiations with the Government for the making of such an agreement.*" Section 29B provides for settlement of any issues unresolved after negotiations under section 29A, and the conciliator must report his determinations to the Minister. Sections 29C-29E: (a) create the Permanent Police Tribunal, (b) provide for its members to be appointed by the Governor (after consultation with the Minister), and (c) empowers the Tribunal to regulate its own proceedings. Under section 29 F, the Minister is obliged to refer any disputes not resolved by conciliation to the Tribunal, the decision of which is final under section 29G.

36. The jurisdiction of the Tribunal is defined by section 29F, which provides as follows:

> "*(1) Subject to subsection (2),* **where the conciliator has reported under subsection (4) of section 29B that a matter referred to him under that section has not been settled by conciliation, the Minister shall within fourteen days refer the matter to the Tribunal for arbitration in strict accordance with terms of reference provided by him**.
>
> *(2) The Minister shall provide the Minister of Finance with a copy of he terms of reference in draft, and shall consult the Minister generally about the terms of reference provided by him.*
>
> *(3) The Tribunal shall-*
>
> *(a) within 30 days of the reference commence proceedings for settling a matter referred to it under subsection (1); and*
> (b) *deliver the award granted by it ("the Tribunal award") to the Minister within sixty days after the commencement of those proceedings.*
>
> *(4) The Minister shall transmit the Tribunal award to the parties as soon as he receives it."* [emphasis added]

37. Section 29F(1) defines the Tribunal's jurisdiction in two ways. Firstly, and fundamentally, the Minister is only empowered to refer to arbitration a matter referred to a conciliator under section 29B; and under section 29B(1), a

conciliator may only be referred by the parties "*a matter which has been the subject of negotiations under section 29A*". Accordingly, and this was essentially common ground, the jurisdictional content of matters which can be referred to arbitration is defined by section 29A, which defines the subject-matter scope of what matters may from the subject of an "*agreement*". Section 29A(5) defines "*agreement*" as follows:

> " *'agreement' means an agreement in writing between the Government and the Association providing for any one or more of the following matters in relation to the Service, that is to say, 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 control of members of the Service.*" [emphasis added]

38. The key question raised by the present application as a matter of statutory construction is the following: when does a matter fall on the wrong side of the pension prohibition line? However, the present application, as refined by Mr. Richardson, also brings into play the jurisdictional breadth of the Tribunal's competence, assuming a matter is within its jurisdiction in content or subject-matter terms. The Tribunal must, according section 29F(1), resolve a referred dispute "*in strict accordance with* [the] *terms of reference provided*". This is because the Applicant effectively complains that the Tribunal was not lawfully entitled to both (a) answer the question referred ("*Whether the Combined Allowance should be added to their pay, which would make it pensionable*") in the affirmative or negative, and also (b) having answered the question in the affirmative, proceed to determine the administrative mechanism by which the addition of the former allowance to salary should take place.

39. This of course is my reformulation of how the Crown's legitimate complaint should be understood. Mr. Richardson, however, sought to launch a rather blunter assault on the entire award. Nevertheless, with admirable analytical clarity, he abandoned any suggestion that the Tribunal could not validly determine the Combined Allowance issue at all. Instead, he focussed attention on the previously obscured point that the breadth of the decision very arguably contravened the statutory pension scheme contained in the Public Service Superannuation Act 1981. This in turn helps to shed light on the legal parameters of the subject-matter jurisdictional scope of matters which can be negotiated and arbitrated within the definition of "*agreement*" in section 29A(5) of the Police Act.

40. In my judgment 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.

41. In his oral submissions, Mr. Richardson also fairly conceded that the Tribunal could determine to convert an allowance into salary, as long as it did not retain its former existential identity as an allowance. However, he contended that what the Tribunal ordered in the present case did not achieve this effect. A "Salary Supplement" calculated on the same percentage basis as the existing Combined Allowance was manifestly distinct from salary. The award was a nullity, counsel submitted, because it contravened certain provisions of the Superannuation Act. It was common ground that this Act regulates the pension contributions and payment rights of police officers, providing for contributions to be deducted from "*salary*" and entitlements to be based on "*salary*" (sections 12, 33). This crucial term is defined in section 2 of the 1981 Act as follows:

> "*'salary' includes wages whether paid weekly or otherwise and, 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...*"

42. In my judgment 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 Crown's complaint that the award purports to modify this statutory scheme by its purported decision to redefine the Combined Allowance 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*" is more than a technicality, and is fundamentally sound. Further and in any event, 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.

43. For the foregoing reasons[6], I am bound to accept the following propositions set out in the Applicant's Skeleton Submissions:

> "*14. 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….*"

44. Mr. Harshaw invited the Court, if it reached the conclusion that the Tribunal had exceeded its jurisdiction to apply the "blue pencil" test. Mr. Dunch focussed his submissions on persuading the Court that the Tribunal had clearly answered the

[6] The complaint that the award was invalid for contravening the Police (Conditions of Service) Order 2002 was tacitly abandoned by the Applicant's counsel as that Order was clearly only intended to have the force of law until the next agreement and/or Tribunal award: Police Act 1984, section 32(1A).

narrow question referred to it in the affirmative so that no question of quashing the award in its entirety arose. It remains to consider whether and, if so, to what extent, the order of certiorari the Crown seeks should be granted.

Discretion to grant relief/scope of relief appropriate

45. I find that 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 pension scheme and beyond the scope of its terms of reference, strictly construed. Mr. Richardson 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.

46. The statutory scheme for negotiating, conciliating and arbitrating has tight time limits. These are clearly intended to avoid police officers, who cannot strike and yet who perform a uniquely important role in protecting the internal security of our community, having their contractual terms and conditions up in the air for an undue period of time, potentially compromising their ability to perform their duties un-distracted by work-related grievances. The last agreement expired on or about September 30, 2005; negotiations commenced in 2007, the arbitration took place in 2008, and the Crown challenged an award in favour of the BPA in mid-2008, further delaying the resolution of the matter. Most issues still in dispute were, commendably, resolved before the end of last year.

47. The purpose of judicial review proceedings is to improve public administration and not to reconsider the merits of a public law decision by a statutory tribunal charged with that task. In these circumstances, quashing the entire decision and remitting the matter back to the Tribunal for reconsideration must be considered as a last resort option. And in the present case there is no basis on which this Court could properly conclude that if the Tribunal had directed itself correctly as to the scope of its jurisdiction, a different decision might have been reached. Equally, I can see no justification for leaving the impugned elements of the award intact, in effect requiring the parties (who are bound by the Tribunal's award) to act otherwise than in accordance with the provisions of both the 1974 and 1981 Acts.

48. Can the Court (a) apply the blue-pencil test in respect of a decision which on its face does not clearly distinguish the lawful and unlawful elements which it implicitly contains, as Mr. Harshaw contended, and (b) look outside the decision (at, in particular, the draft award and the indication given to the parties that the question posed reference the Combined Allowance issue would be answered "yes") to discern the essential terms and effect of the Tribunal's decision, as Mr. Dunch contended? The following passage from the judgment of Dillon LJ in a case not referred to in argument provides cogent support for the affirmative answer which is otherwise supported by common sense and general principle:

"*The resolution of the old Walton and Weybridge Urban District Council of 17 July 1973 to appropriate the blue land for planning purposes raises no difficulty on its face. To realise that there is anything wrong with it, it is necessary to look outside the terms of the resolution and to consider the terms of the council's powers of appropriation and the underlying facts. It is then apparent, firstly, that the council's power of appropriation, conferred on it by s 163 of the Local Government Act 1933, is only exercisable in respect of land which is no longer required for the purpose for which it was originally acquired, or has since been appropriated, and, secondly, that part of the blue land, namely the green land, was at the time of the resolution, and still is, required by the council for the sewage disposal purposes for which it was originally acquired.* **It is apparent, therefore, that the council's resolution represents an excessive exercise of the council's power of appropriation. But examination of the underlying facts shows also that there is no difficulty at all in identifying the extent of the excess. The green land is shown by green boundary lines on the agreed plan B, and its precise area is given to four points of decimals of a hectare in the agreed statement of facts.**

In private law the effect of excessive exercise of a power is not in doubt. As Maugham J said in Re Turner, Hudson v Turner [1932] 1 Ch 31 at 37, [1931] All ER Rep 782 at 785:

'When the donee of a power of appointment has purported to exercise the power for an amount greater than that over which it was given, the appointment is good with regard to the correct amount.'

Nearly two hundred years before, Clarke MR had adopted much the same approach when he said in Alexander v Alexander (1755) 2 Ves Sen 640 at 644, 28 ER 408 at 411: 'If the court can see the boundaries it will be good for the execution of the power, and void as to the excess.' This is the sensible approach and I see no reason why there should not be a similar approach in public law.

None the less, counsel for the water authority submits that there is in public law, though not in private law, an overriding requirement that an excessive exercise of a power will be wholly void, and not merely void as to the excess, unless the document exercising the power is so worded as to include words describing the permitted exercise of the power as well as further words describing the excess in such a way that the excess can be excised by the use of a blue pencil, leaving unaltered the wording in the document expressly covering the permitted exercise of the power. I fail to see the sense or logic of such a requirement.

Any excessive exercise of a power, whether in public or private law, is likely to be the result of a mistake on the part of the person exercising the

power, i e an erroneous belief that the power extends further than it in truth does. But it is in the highest degree unlikely that that person will realise that he is making such a mistake and yet will not correct it. Therefore it is unlikely to happen, and if it does happen it will be purely fortuitous, that the wording of the exercise of the power will describe in express terms the extent of the permitted exercise of the power as part of the wording used to achieve a wider, and in truth excessive, execution of it. Therefore, if counsel for the water authority's overriding blue pencil requirement is in truth a requirement of public law, it would depend on chance, and not on any actual or presumed intention of the person exercising the power, or on any rational process of construction of the relevant document, whether the purported exercise of the power is wholly void or pro tanto valid.

In the next place, the blue pencil test is sought to be introduced into public law from that field of private law which is concerned with the enforcement of contracts, in particular of contracts in restraint of trade. Rather special considerations in the field of public policy apply, however, to the enforcement of contracts in restraint of trade, and it is these considerations which are the justification of the blue pencil test they have no relevance to the exercise, or excessive exercise, of powers by local authorities or other public authorities. The only link between these two fields of law is that the word 'severance' may in practice be used, whether correctly or not, in both. But it is not used to describe the same process. In the field of contract it is used to describe the process of construction of the contract to determine whether one provision of the contract can stand and be enforced despite the invalidity for extrinsic reasons of some other provision of the contract. But in the context with which we are concerned the term 'severance' is used merely to determine the extent to which the extrinsic reasons invalidate a provision of the document. The two processes are by no means necessarily the same.

Quite apart from the lack of logic or sense to support it, counsel for the water authority's supposed overriding requirement is inconsistent, in my judgment, with the approach adopted by the Divisional Court in Dunkley v Evans [1981] 3 All ER 285 at 288, [1981] 1 WLR 1522 at 1525. That was a case of excessive exercise of a power. Ministers had by a statutory instrument purported to impose fishery restrictions over a large area of sea, described only by reference to its overall boundary lines which in truth exceeded the area over which they were, by the relevant statute, empowered to impose restrictions. There Ormrod LJ said:

'We can see no reason why the powers of the court to sever the invalid portion of a piece of subordinate legislation from the valid should be

restricted to cases where the text of the legislation lends itself to judicial surgery or textual emendation by excision.' "[7] [emphasis added]

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 should 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.

50. It flows by necessary implication from the affirmative answer to the 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.

51. The award would accordingly be modified to delete the words in brackets and to add the underlined words, along the lines set out below :

> "*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 <u>that this allowance should now simply be added to salary</u> [as such it be pensionable in the same way as salary].*
>
> *Concern was expressed that if the Combined Allowance was [treated as] <u>added to</u> 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.*"

52. It is unfortunate that the draft award was not seemingly forwarded to the counsel appearing for the parties for comments, if any further input was felt desirable. The rules of natural justice, and constitutional fair trial rights, would appear to demand

[7] *Thames Water Authority-v-Elmbridge DC* [1983] 1 QB 570 at 583-584 (CA).

that the parties' representatives, if anyone, be consulted before an award is finalised, even though the Act itself requires the award to be forwarded by the Tribunal to the Minister rather than the parties[8]. This somewhat curious procedural provision is arguably permissive rather than mandatory, as the dominant features of the statutory regime appear to emphasise the Tribunal's status as an independent quasi-judicial tribunal. Courts of law in civil cases never finalise the terms of an order to give effect to their decisions without seeking input from the parties, although input is rarely sought on the merits of a draft decision itself after the close of final arguments. Had that occurred in the present case, it is quite possible that that the jurisdictional point could have been promptly raised without recourse to this Court. But hindsight is always perfect.

53. The Tribunal can hardly be criticised for excessive concern about the public purse. And is hoped that the combination of the award and this Judgment makes it clear that the conversion of the Combined Allowance into salary which was approved was based on the unique history applicable to the Police. The allowance has for many years been in reality an element of salary inaptly treated as being a mere allowance; the Tribunal's award in substance merely regularised the position.

Summary

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.

55. I will hear counsel on the terms of the Order to be drawn up to give effect to this Judgment, and as to costs. My provisional view is that since the present application was ultimately brought in the public interest and that the BPA have essentially succeeded in upholding the decision in material part, the Crown should pay their costs in any event on the standard basis to be taxed if not agreed. To the extent that the Crown has already undertaken to pay the Tribunal's costs, no further order as to costs appears to be required.

Dated this 17th day of February, 2009 _________________________

KAWALEY J

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[8] Section 29F(4).