In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 083

IN THE MATTER OF ORDER 53, RULE 3(2)(B) OF THE RULES OF THE SUPREME COURT 1985

BETWEEN:

JOSHUA BODEN

Plaintiff

-and-

(1) THE GOVERNOR OF BERMUDA
(2) THE COMMISSIONER OF POLICE

Defendants

CIVIL JURISDICTION

2019: No. 084

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW AND IN THE MATTER OF THE POLICE CONDUCT ORDERS 2016

BETWEEN:

PC 2360 OSWIN PEREIRA

Plaintiff

-and-

(1) HIS EXCELLENCY, THE GOVERNOR
(2) THE ASSISTANT COMMISSIONER OF POLICE

Defendants

Before: **Hon. Chief Justice Hargun**

Appearances:	**Mr Allan Doughty, Beesmont Law Limited, for Joshua Boden**
	Mr Marc Daniels, Marc Geoffrey Limited, for PC 2360 Oswin Pereira
	Mr Brian Myrie, Attorney General's Chambers, for The Governor and The Commissioner of Police
Date of Hearing:	**24 July 2019**
Date of Judgment:	**19 August 2019**

JUDGMENT

Introduction

1. These are judicial review proceedings commenced by Police Constable 2445 Joshua Boden ("PC Boden"), and Police Constable 2360 Oswin Perera ("PC Pereira") (collectively referred to as the "Applicants"). The Applicants face internal disciplinary charges arising under the Police (Conduct) Orders 2016 (the "Orders"), arising out of an alleged assault on a suspect which purportedly took place during the course of an arrest. By these proceedings the Applicants complain of the decision of the Governor, the First Respondent, to refuse to withdraw the Orders and the decision of the Commissioner of Police (the "Commissioner"), the Second Respondent, to refuse to withdraw the charges against the Applicants. The Applicants contended that the scheme of the Orders is such that they will not afford them a fair hearing before an impartial tribunal, and in so doing, violates their common law rights.

2. In these proceedings the Applicants seek the following relief:

   (i) A *declaration* that the current structure of the prosecution and adjudication of disciplinary offences as prescribed by the Orders violates the rules of natural justice;

   (ii) An order of *Mandamus* compelling the First Respondent to withdraw the Orders; and

   (iii) An order of *Certiorari* quashing the decision of the Second Respondent to proceed with an internal disciplinary prosecution of the Respondents.

3. The Applicants' case, as set out in the written submissions and as argued at the hearing, raise two principal issues:

   (i) Whether Order 24(5)(c) is in breach of the rules of natural justice by requiring that one of the members of the disciplinary tribunal (the "Tribunal") be a police officer who is selected by the prosecuting

authority, and remains under the direct command of the prosecuting authority for the duration of the proceedings; and

(ii) Whether the alleged breaches of the rules of natural justice identified by the Applicants are in fact rectified through the appeal process as prescribed by Order 38.

4. The Applicants also raise the issue whether the Orders are in breach of the rules of natural justice on account of their failure to empower the Tribunal to prohibit abuse of process; and whether Order 24(5)(c) is unreasonable in the *Wednesbury* sense by requiring that one of the Tribunal members be a police officer, and who remains under the command of the prosecution authority during the proceedings. However, these additional grounds do not appear to add anything of substance to the principal legal issue identified in paragraph 2(i) above, the determination of which would appear to be decisive either way.

5. In passing it should be noted that the Applicants do not expressly rely upon section 6(8) of the Bermuda Constitution 1968 given that section 16(2) excludes the jurisdiction of section 6(8) from the "disciplinary law" which regulates the Bermuda Police Service.

Factual background

6. The controversy between the parties is largely based upon purely legal contentions and the actual incident giving rise to these proceedings is largely irrelevant. However, briefly, the background facts are as follows. According to PC Boden, on 13 May 2017, PC Pereira was involved in a high-speed pursuit of a suspect, later determined to be a Mr Tulundae Grant who was riding a motorcycle. PC Boden responded to PC Pereira's request for assistance. PC Boden observed PC Pereira enter a heavily wooded area, on foot, by Eastdale Lane in Southampton Parish. PC Boden also entered that wooded area and eventually saw PC Pereira attempting to subdue the suspect by means of a TASER stun gun. PC Boden moved to assist PC Pereira and attempted to place handcuffs on the suspect, who offered resistance as PC Boden attempted to subdue him. While attempting to place the handcuffs on the suspect, PC Boden observed a swinging motion in his peripheral vision and later observed that PC Pereira was holding a police issued ASP baton.

7. On 26 October 2017, the applicants were notified that they were being investigated in relation to this incident with the possibility of being charged pursuant to the Orders. On 31 October 2017, the Applicants were served with a fully particularised notice of the potential charges for which they were being investigated. In the notices, it was alleged that PC Pereira used excessive force during the arrest of the suspect and further alleged that PC Boden had failed to conduct himself with honesty and integrity, had abused his powers and failed to

report PC Pereira's alleged misconduct to his superiors. On 7 September 2018, the Applicants were served with notices that the investigation of the disciplinary offences, which there were alleged to have committed, would continue. On 27 December 2018, they were served with notices that they would be prosecuted for Gross Misconduct before a Tribunal.

The Legal Framework

8. The principal legal issue as argued at the hearing is whether the constitution of the Tribunal established under Order 24(5) is legally objectionable on the ground of appearance of bias on the part of one of its members. The objection is based upon the statutory provisions relating to the investigation of complaints and any resulting prosecution. The relevant statutory provisions are as follows:

9. Order 5(1) provides that these Orders apply where an allegation comes to the attention of an appropriate authority which indicates that the conduct of a police officer may amount to misconduct or gross misconduct. Appropriate authority means, other than where the police officer is a Commissioner or Deputy Commissioner, the Commissioner.

10. Order 11(3)(a) provides that where the appropriate authority assesses that the conduct, if proved, would amount to misconduct, it must determine whether or not it is necessary for the matter to be investigated. Where the appropriate authority determines that the conduct, if proved, would amount to gross misconduct, the matter must be investigated (Order 11(4)).

11. Where the matter is to be investigated, the appropriate authority must appoint a person to investigate that matter (Order 12(2)).

12. Order 12(3) provides that a person must not be appointed to investigate the matter (a) unless he has an appropriate level of knowledge, skill and experience to plan and manage the investigation; (b) if he is an interested party; or (c) if he works, directly or indirectly, under the management of the police officer concerned. Interested party is defined as a person whose appointment could reasonably give rise to a concern as to whether he could act impartially under the Orders.

13. Order 13 provides that the purpose of the investigation is to (a) gather evidence to establish the facts and circumstances of the alleged misconduct or gross misconduct; and (b) assist the appropriate authority to establish whether there is a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer.

14. Order 18(1) provides that on receipt of the investigator's written report the appropriate authority must, as soon as practicable, determine whether the police officer concerned has a case to answer respect of gross misconduct or whether there is no case to answer.

15. Order 24(4) provides that where the case is referred to a misconduct hearing, the misconduct proceedings must be conducted by the panel of persons appointed by the appropriate authority. Those persons are (a) a chair who has qualified as a barrister; (b) a lay person; and (c) a police officer of a higher rank than the police officer concerned selected by the appropriate authority who is not an interested party (Order 24(5)).

The core legal argument

16. The core legal argument, as set out in the Applicants written submissions, is that a reasonable observer, fully informed of the relevant facts would have concern of bias based on the fact that a serving member of the Tribunal is appointed by the prosecuting authority and will be under the direct command of the prosecuting authority while acting as a judge during the course of the proceeding. It is said that if the third member of the Tribunal must be under the command of the prosecuting authority, it follows that the third member will, by definition, always be an "interested party" and will always be prohibited from serving on the tribunal *ab initio.* The Applicants argue that this means that the constitution of the Tribunal, as prescribed by the Orders, is unworkable on the face of the Orders in that the Tribunal cannot hear any case that is brought before it.

17. In his oral submissions Mr Doughty made it clear that the objection is not based on the proposition that the prosecuting authority (which he equates to the appropriate authority, being the Commissioner) and the adjudicating Tribunal are one and the same and thereby lack independence. The objection is based on the appearance of bias on the part of the adjudicating Tribunal based on the fact that the appropriate authority (the Commissioner) appoints a member of the Police Service to be a member of the adjudicating Tribunal whilst that police officer remains part of the command structure.

The test of apparent bias

18. It is common ground that the test of apparent bias is that as set out by Lord Hope in *Porter v Magill* [2002] 2 AC 357 at [103], "*The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".* The fair-minded and informed observer is expected to have ascertained all the circumstances which have a bearing on the suggestion that a particular member of the tribunal was biased.

19. In *Director of Public Prosecutions v Cindy Clarke* (Civil Appeal No. 5 of 2019), the Court of Appeal has held that in relation to disciplinary proceedings, it is not always possible to require the same standard of purity that apply in courts and tribunals. The Court of Appeal (Kay JA) relied upon *R v Chief Constable of Merseyside Police ex parte Bennion* [2001] IRLR 442, where it was held that the

Chief Constable could retain his role in the determination of the disciplinary proceedings, even though the police officer who was charged with misconduct was pursuing the Merseyside Police, represented by the Chief Constable, in unrelated proceedings. In the *Bennion* case Hale LJ said:

> *"[44] The essential question therefore is whether the position of the Chief Constable can be distinguished from that of the hypothetical judge described in my example. The immediate difference stems from the operational responsibilities of the office of Chief Constable. Notwithstanding his general interest in the outcome of every disciplinary hearing, reg 13.1 is unequivocal. It is normally appropriate, and thought to be in the best interests of the Force as a whole, for the Chief Constable to adjudicate in disciplinary matters. No such assumption or operational considerations apply to a judge.*
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> *[45] These considerations lead me to the conclusion that care must be taken not to assume that requirements which would be understood to apply to any judge, inexorably apply to a Chief Constable conducting disciplinary proceedings in accordance with his operational responsibilities.*
>
> *[50] … The rules of natural justice have to be applied in a way which is appropriate to the particular decision-making process in question: what is appropriate for a court or independent tribunal cannot be appropriate for an internal disciplinary enquiry. The Chief Constable is personally responsible for the good order and discipline of his Force. He is also responsible, on an analogy of an employer, for taking such steps as are reasonably practicable to prevent those in his Force from engaging in sex (or other prohibited) discrimination or victimisation. He should, in my view, regard each of these as important aspects of his overall responsibility for the maintenance of proper standards of behaviour in those under his command. But unless he has a personal involvement or other interest in a particular case which is closer and this, he cannot be regarded as automatically disqualified from discharging his duty to deal with the matter."*

20. It is noteworthy that the concept of "*personal interest"* also appears in the Orders and also disqualifies a police officer from being a member of the adjudicating Tribunal (Order 24(5)).

21. Cases dealing with complaints against professional individuals show that in principle there can be no objection to a member of the professional body governing the profession from hearing of misconduct complaints against another member of the same profession. Indeed, it has been said that it may be desirable that at least one member of the disciplinary tribunal have the relevant professional

experience and qualifications. *In re S. (A Barrister)* [1981] QB 683 Vinelott J said at 690:

> *"There is nothing in the passage from the late Professor de Smith's work which has been cited or elsewhere in that work, nor is there anything in any decided case, which supports the proposition that professional men who are members of the governing body of their profession are incapable of hearing impartially a complaint of professional misconduct against a member of their own profession. Indeed, it has always been accepted that professional men are peculiarly well fitted from their knowledge of the reasons which led to the acceptance by the profession of a code of conduct and from their experience of the difficulties which may confront both the practitioner in observing and the profession in enforcing proper standards of conduct to determine whether there has been a breach of the code of conduct governing the profession and to judge the gravity of it if it is proven. Of course, as Professor de Smith observes, the administration of the internal discipline of a profession does present special problems and it is no doubt wise that those charged with the proper regulation of a profession should be careful in framing the constitution of the governing body and of its disciplinary tribunals to ensure that the task of investigating and presenting a complaint and the task of adjudication upon it and, if it is proved, determining the appropriate sentence are in different hands. We have already drawn attention to the provisions of the Senate regulations designed to achieve this separation of function.*
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> *It has also been increasingly recognised in recent years that the public has an interest in ensuring that those charged with the regulation of the affairs of a profession should investigate and, in appropriate cases determine, charges of professional misconduct in a fair and impartial way. It is for this reason that regulation 20 provides that every disciplinary tribunal must include a lay representative. That was done in this case. But the suggestion that the regulations, if they are to accord with the standards of natural justice and ensure the confidence of the public in the proper regulation of the affairs of a profession, must go further and provide for complaints of professional misconduct to be heard by a tribunal the majority of the members of which are not members of the profession is, in our opinion, inconsistent with principle and authority."*

22. In *Meerabux v The Attorney General of Belize* [2005] UKPC 12, the Privy Council considered whether there was an automatic objection to a member of the complainant professional body being on the adjudicating tribunal or whether such membership necessarily gave an appearance of bias. In that case a judge was removed from office, on account of misbehaviour, by the Governor of Belize on the advice of the Belize Advisory Council ("BAC"). The judge claimed bias on

the part of the BAC and argued that the chairman of the BAC was a member of the Bar Association of Belize ("BAB"). As most of the complaints laid against the judge originated with the BAB, the judge argued that the chairman should have been automatically disqualified from taking part in those proceedings. The Privy Council rejected this argument. The Privy Council also considered whether the fact of membership gave rise to an appearance of bias on the part of the chairman and again held that having regard to the relevant facts it did not do so. The reasoning of the Privy Council is set out at [24]-[25]:

> *"24. The question is whether it can be said, simply because of his membership of the Bar Association, that Mr Arnold could be identified in some way with the prosecution of the complaints that the Association was presenting to the tribunal so that it could be said that he was in effect acting as a judge in his own cause. Only if that proposition could be made good could it be said, on this highly technical ground, that he was automatically disqualified. Their Lordships are not persuaded that the facts lead to this conclusion. Leaving the bare fact of his membership on one side, it is clear that Mr Arnold's detachment from the cause that the Bar Association was seeking to promote was complete. He had taken no part in the decisions which had led to the making of the complaints, and he had no power to influence the decision either way as to whether or not they should be brought. In that situation his membership of the Bar Association was in reality of no consequence. It did not connect him in any substantial or meaningful way with the issues that the tribunal had to decide. As Professor David Feldman has observed, the normal approach to automatic disqualification is that mere membership of an association by which proceedings are brought does not disqualify, but active involvement in the institution of the particular proceedings does: English Public Law (2004), para 15-76, citing Leeson v Council of Medical Education and Registration (1889) 43 Ch D 366, where mere membership of the Medical Defence Union was held not to be sufficient to disqualify and Allinson v General Council of Medical Education and Registration [1894] 1 QB 750, where mere ex officio membership of the committee of the Medical Defence Union too was held to be insufficient. The same contrast between active involvement in the affairs of an association and mere membership is drawn by Shetreet, Judges on Trial (1976), p 310. Their Lordships are of the opinion that the principle of automatic disqualification does not apply in this case.*
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> *25. The issue of apparent bias having been raised, it is nevertheless right that it should be thoroughly and carefully tested. Now that law on this issue has been settled, the appropriate way of doing this in a case such as this, where there is no suggestion that there was a personal or pecuniary*

interest, is to apply the Porter v Magill test. The question is what the fair-minded and informed observer would think. The man in the street, or those assembled on Battlefield Park to adopt Blackman J's analogy, must be assumed to possess these qualities. The observer would of course consider all the facts which put Mr Arnold's membership of the Bar Association into its proper context. But the facts which he would take into account go further than those described in the previous paragraph. They include the nature and composition of the tribunal, the qualifications which a person must possess to be appointed Chairman, the fact that the first proviso to section 54(11) of the Constitution directs the Chairman to preside where the BAC is convened to discharge its duties under section 98 and the fact that this direction is subject only to the special provision which the second proviso makes for what is to happen if the BAC is convened to consider the Chairman's removal. Their Lordships are inclined to agree with Carey JA that, if he had taken these facts into account, the fair-minded and informed observer would not have concluded that Mr Arnold was biased."

23. Mr Doughty on behalf of PC Boden acknowledges the force of the *Meerabux* decision but argues that it can be distinguished from the present case. He argues that unlike the chairman in the *Meerabux* case the third member in the present case is a police officer who is under the command of the Commissioner. Mr Doughty argues that, as a member of the Bermuda Police Service he was under section 5 of the Police Act 1974, "*bound to discharge any of the duty imposed on police officers by or under any statutory provision*". Mr Doughty also relies upon section 6 of the 1974 Act which requires every "*member"* to obey all lawful orders of his superior officers.

24. The command structure of the Bermuda Police Service is set out in section 3 of the Police Act 1974 which provides that the Service shall be under the command of the Commissioner, who, subject only to such general directions of policy with respect to the maintenance of public safety and public order as the Governor may give him, shall determine the use and control the operations of the Service, and shall be responsible subject to such directions as the Governor may give him, for the administration of the Service. Section 33(a) gives the Commissioner the authority to issue administrative instructions, to be called Service Standing Instructions, not inconsistent with this Act or any order made thereunder, for the general control, direction and information of the Service and Reserve Police, and any such instructions may in particular relate to organisation, administration, enlistment, training and discipline.

25. In this context the Court was referred to two cases before the European Court of Human Rights ("ECHR") dealing with the issue of independence of a disciplinary tribunal where officers within the command structure were members of a disciplinary tribunal. The two cases are: *Morris v The United Kingdom*

(Application no. 38784/97); and *Cooper v The United Kingdom* [2004] 39 EHRR 8.

26. In the *Cooper* case the applicant, then a serving member of the Royal Air Force, was convicted of theft by an Air Force District Court Martial ("DCM"). The DCM comprised a permanent president, two other officers lower in rank and the judge advocate. The permanent president was on his last posting prior to retirement and had ceased to be the subject of appraisal reports. The two ordinary members had attended a course in 1993 which included training in disciplinary matters. The applicant complained to the ECHR that he had been denied a fair and public hearing by an independent and impartial tribunal established by law.

27. The ECHR held that there was nothing in the provision of article 6 of the European Convention on Human Rights which would, in principle, exclude the determination by service tribunals of criminal charges against service personnel. The question to be answered in each case, the court held, was whether the individual's doubts about the independence and impartiality of a particular court martial can be considered to be objectively justified and, in particular, whether there was sufficient guarantee exclude any such legitimate doubts [110].

28. The applicant argued, *inter-alia*, that the ordinary members of the Courts' martial should not be considered either as independent or impartial because there were inadequate safeguards from the risk of outside pressure on them. The court examined the position of the members of the court martial having regard to the manner of their appointment, the existence of guarantees against outside pressures and whether the court martial presents an appearance of independence. The court concluded that the court martial was indeed independent and impartial. In relation to the ordinary members the court concluded that there was no reason to doubt the independence of the ordinary members by reason of the position of the role of the Court Administration Officers ("CAO") or because of the manner in which the CAO appointed them.

29. The ECHR also noted the role of the legally qualified and experienced Judge Advocate, whose directions the ordinary members would be careful to respect. In such circumstances, the Court considered that the independence of the ordinary members was not undermined by their lack of legal qualifications.

30. The issue of the relevance of the command structure within the Armed Forces in support of an argument of an appearance of bias on the part of the members of a disciplinary tribunal was considered by the House of Lords in *R v Boyd* [2003] 1 AC 734, a decision cited by ECHR in *Cooper*. The House of Lords did not consider that the mere existence of the command structure gave rise to an inference of appearance of bias. In this regard Lord Bingham explained at [12]:

> *"It is also true that junior officers sitting on courts-martial remain subject to army discipline and reports. But there is nothing to suggest that any report ever is or ever has been made on any junior officer's decision-making as a member of a court-martial, and it is hard to see how any such report could be made given the prohibition on disclosure of the deliberations of the tribunal in the oath taken by the members. There is nothing to suggest that they remain subject to service discipline in relation to their judicial decision-making, and again it is hard to see how they could. It is true that there is no statutory bar on an officer being made subject to external army influence when sitting on the case. Any person seeking to influence the decision of a sitting member of a court-martial otherwise than at the hearing would, however, be at risk of prosecution either for perverting or attempting to pervert the course of justice or under section 69 of the Army Act.*
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> *14…In the absence of any evidence at all to support it, I could not accept the suggestion that any modern officer would, despite the oath he has taken, exercise his judgment otherwise than independently and impartially or be thought by any reasonable and informed observer to be at risk of doing so."*

31. Lord Rodgers, in the other reasoned judgment, also concluded that there was no reason to suppose that the members of the court martial are any less faithful to their oath or any less diligent in applying the directions by the judge advocate then would be members of the jury. Indeed, it was argued that as members of the Armed Forces trust and obedience to commands are particularly important, would be even more likely than civilian jurors to be true to their oath and follow the directions given to them. Lord Rodgers explained at [67]-[68]:

> *"67. It is true that, apart from any permanent president, the officers selected to serve on courts-martial are appointed only ad hoc. As the European Court points out, that is not in itself sufficient to make the court incompatible with the independence requirements of article 6(1). Indeed, in performing the role only occasionally, the members of a court-martial resemble jurors and should bring to the task the freshness of approach which is one of the benefits of the jury system. Of course, as individuals and as officers in the armed forces, those asked to sit on a court-martial may well have certain prejudices. Jurors too have prejudices and, as McIntyre J rightly pointed out in MacKay v The Queen (1980) 114 DLR (3d) 393, 420-421, quoted above at paragraph [52], the same can be said of those appointed to judicial office in civilian society. In the light of their experience of jury trial, however, courts in countries which operate with juries have concluded that the safeguards of the oath and the judge's directions are generally sufficient to ensure that jurors put aside their*

prejudices and reach a just verdict on the evidence. Indeed, as Lord Hope of Craighead observed in Montgomery v HM Advocate [2001] 2 WLR 779, 810D, the entire system of trial by jury is based on the assumption that the jury will follow the instructions which they receive from the trial judge and that they will return a true verdict according to the evidence. The European Court too has recognised that the jurors' oath, to faithfully try the case and to give a true verdict according to the evidence, and their obligation to have regard to the directions given by the presiding judge will generally be sufficient to safeguard their independence and impartiality. This is so even in cases where there is reason to believe that one or more members of the jury may actually be prejudiced against the accused. I refer to the well-known decisions in Pullar v United Kingdom (1996) 22 EHRR 391, 405, para 40 and Gregory v United Kingdom (1997) 25 EHRR 577, 593-595, paras 43-48.

68. In the cases under appeal these particular safeguards were present. The oath taken by the members of the court required them to well and truly try the accused "according to the evidence" and to do justice according to the relevant 1955 Act "without partiality, favour or affection". In addition the judge advocate gave the other members of the court-martial directions of the same kind as would have been given to a jury if the case had been tried in a civil court. There is no reason to suppose that the members of the court-martial would be any less faithful to their oath or any less diligent in applying the directions given by the judge advocate than would the members of a jury. Indeed it is at the very least arguable that the officers on a court-martial, as members of the armed forces for whom trust and obedience to commands are particularly important, would be even more likely than civilian jurors to be true to their oath and to follow the directions given to them."

32. The cases reviewed above provide, in my judgment, support for the following propositions.

33. First, there is no objection in principle to a member of the Bermuda Police Service to serving on a tribunal adjudicating disciplinary matters against other members of the Bermuda Police Service. Indeed, given their familiarity to issues relating to the Police Service in Bermuda, it may be desirable to have a member of the Police Service serve on such a tribunal (See *In re S. (A Barrister)* [1981] 1 QB 683, 691H; *Meerabux v Attorney General of Belize* [2005] UKPC 12, [24], [25]; *Cooper v United Kingdom* [2004] 39 EHRR 8, [110], [118-120], [123]; and *R v Boyd* [2003] 1 AC 734, [12], [14], [67-68]).

34. Second, ordinarily the mere fact of membership of the Bermuda Police Service would not disqualify an officer from adjudicating in relation to a disciplinary

matter against another member of the Service. The officer would only be disqualified if he had a personal interest in the matter (See: *Director of Public Prosecutions v Clarke* (Civil Appeal No. 5 of 2019), [30],[33]; *R v Chief Constable of Merseyside Police, ex parte Bennion* [2001] EWCA 638, [50]; and Order 24(5)(c).

35. Third, the mere fact that an officer of the Bermuda Police Service, who has been appointed as a member of the adjudicating tribunal, is part of the command structure and obliged to follow lawful orders of his superior officers does not in itself (a) result in automatic disqualification from serving on the tribunal; or (b) give rise to an appearance of bias (See: *Cooper*, [110], [119], [123]; and *Boyd*, [12], [14], [55-57], [66-68]).

36. Having regard to the above authorities and propositions, I turn to consider the facts and circumstances in this case which are relevant to the issue whether there is an appearance of bias on part of the adjudicating tribunal.

37. Firstly, Order 24(5)(c) requires that the officer appointed to serve on a disciplinary tribunal must not be an *interested party*. The term *interested party* is defined as a person whose appointment could reasonably give rise to a concern as to whether it would act impartially as a member the tribunal. This prohibition itself makes it clear that an officer serving on a tribunal considering disciplinary matters is expected to retain his independence and must decide the complaint as an impartial adjudicator.

38. Secondly, Order 24(5)(a) provides that the chair of the tribunal must be a person who is qualified as a barrister. Accordingly, the Orders provide for a legally qualified chairman who has no connection with the Bermuda Police Service.

39. Thirdly, Order 24(5)(b) provides that third member of the tribunal must be a lay person who would again have no connection with the Bermuda Police Service. Accordingly, the Orders provide that the majority of the members of the adjudicating tribunal should have no connection with the Bermuda Police Service. It should be noted that under the repealed Orders all disciplinary proceedings were adjudicated upon solely by a member of the Bermuda Police Service.

40. Fourthly, the Schedule to the Orders sets out Standards of Professional Behaviour which, all officers of the Bermuda Police Service are required to comply with. The Schedule provides, inter alia, that (i) Police officers are honest, act with integrity and do not compromise or abuse their position; (ii) Police officers only give and carry out lawful orders and instructions and they abide by police orders, police codes of practice, Service policies and lawful orders; and (iii) Police officer's report, challenge or take action against the conduct of colleagues which has fallen below the Standards of Professional Behaviour.

41. Fifthly, as noted in *Boyd* at [12] any person seeking to influence the decision of a sitting member of a tribunal otherwise than at the hearing, would be at risk of prosecution for perverting the course of justice. Likewise here, any attempt by a superior officer to influence a sitting member of the disciplinary tribunal constituted under Order 24(5), would potentially expose that officer to similar criminal liability. As the House of Lords in *Boyd* makes clear the working assumption should be that Police Officers will execute their duty (including sitting as a member of the disciplinary tribunal) in a lawful manner.

42. In the circumstances I have come to the conclusion that it cannot seriously be suggested that the mere fact a Police Officer is a member of the disciplinary tribunal constituted under Order 24(5), necessarily means that the tribunal can no longer be considered as independent. Furthermore, the mere fact an officer is part of the command structure within the Bermuda Police Service does not disqualify that officer from serving on a disciplinary tribunal determining complaints made against other officers of the Service. Finally, the mere fact that a Police Officer is a member of the tribunal constituted under Order 24(5) does not necessarily give rise to an appearance of bias. Accordingly, the main ground advanced by the Applicants in support of the contention that the tribunal constituted pursuant to Order 24(5) is in breach of the common law rules of natural justice necessarily fails.

Issue of right of appeal

43. The Respondents have argued that if, contrary to their primary case, the Court concludes that the composition of the tribunal constituted under Order 24(5) gives rise to an appearance of bias, then any such breach is cured given that the Applicants have a right of appeal to the Public Service Commission (the "Commission") which involves, at the option of the Applicants, a full hearing of the complaint.

44. As I have concluded that there is no breach of the rules of natural justice arising from the composition of the tribunal under Order 24(5), it is unnecessary to decide this particular contention. However, as the issue has been fully argued, I will briefly set out my views on the matter.

45. In *Priess v General Dental Council* [2001] 1 WLR 1926, the Privy Council was of the view that the disciplinary proceedings before the General Dental Council did raise the appearance of bias and the tribunal lacked the necessary appearance of impartiality but also held that the "*points taken under article 6(1) cannot succeed if the Board is itself prepared to conduct a complete rehearing of the case, including a full reconsideration the facts and the question whether the facts found amount to serious professional misconduct. Their Lordships consider that the position is no different under the common law rule of natural justice applicable to proceeding before domestic tribunal."*

46. In *Faye and Payne v The Governor and The Bermuda Dental Board* [2006] Bda LR 65, Kawaley J stated at [35] that the Privy Council decision in *Priess* *"illustrates the well recognised principle that complaints about non-compliance with fundamental fair hearing rights which occur before a statutory tribunal (other than a court) which is not itself sufficiently independent or impartial can be cured where a right of appeal to a constitutionally compliant tribunal exists"*

47. The real issue in this context is whether the potential appeal available to the Applicants does indeed allow them to present a complete rehearing of the case to the Commission. The relevant right of appeal is set out in Order 37(2) which provides:

> *"(2) The only grounds of appeal under this order are that—*
>
> *(a) the finding or disciplinary action imposed was unreasonable;*
>
> *(b) there is evidence that could not reasonably have been considered at the misconduct proceeding which could have materially affected the finding or decision on disciplinary action; or*
>
> *(c) there was a serious breach of the procedures set out in these Orders or other unfairness which could have materially affected the finding or decision on disciplinary action."*

48. Mr Doughty argues that given the wording of Order 37(2) a police officer does not have a full right of appeal, but rather a qualified right of appeal to the Commission, which is similar to that of seeking leave to issue Judicial Review proceedings.

49. The initial impression given by the wording "*the only grounds of appeal*" is that Order 37(2) seeks to provide appeal only in respect of limited grounds. However, when one analyses the three sub paragraphs it becomes clear that in substance the provision does indeed provide full right of appeal. Subparagraph (a) provides right of appeal in respect of the "*finding"* of guilt or the penalty imposed by the tribunal. It is true that the right of appeal is on the basis that the finding or disciplinary action imposed was unreasonable. However, it is difficult to see how the Applicants can justifiably complain unless the "*finding*" or the disciplinary action was unreasonable. Subparagraph (b) provides a right of appeal based upon the discovery of fresh evidence which could have materially affected the finding or the penalty imposed. Subparagraph (c) provides a right of appeal in respect of breach of procedures set out in the Order or other unfairness which could have materially affected the finding or the penalty imposed. The "*other unfairness*" would include an appeal based upon alleged breach of rules of natural justice.

50. The terms of Order 37(2) are reproduced in regulation 28(1)(d) Public Service Commission Regulations 2001 (the "Regulations"). Regulation 28(4) sets out the power of the Commission on the hearing of an appeal and provides:

"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."

51. Mr Doughty argues that the terms in Regulation 28(4) are limited to the Commission interfering with the penalty imposed by the tribunal appealed from and in particular does not relate to the *"finding*" of guilt. However, the underlying scheme of Regulation 28 must be gathered by reading the entirety of Regulation 28. As noted above Regulation 28(1)(d)(i) expressly provides that a member Bermuda Police Service may appeal on the ground that "*the finding or disciplinary action was unreasonable".* Having provided an appeal against the finding in express terms it would be wholly inexplicable that the legislature should provide no remedy in relation to the appeal against the same finding. Dealing with the jurisdiction of statutory tribunals Kawaley CJ said in *Andreas Battiston v Pernell Grant* [2016] (Bda) 58 (Appellate Jurisdiction) said:

> *"37. Clearly a statutory tribunal does not possess the same inherent jurisdiction which is enjoyed by a superior court of record. However, a statutory tribunal must, by necessary implication, be conferred the essential jurisdictional competencies for the adjudication of complaints. It is far easier to imply the existence of a power designed to fulfil the statutory object of protecting and enforcing human rights than it is to imply a power to dismiss a complaint before it is heard (the type of power rejected in Burrows).*
>
> *38. The Board in the present case correctly concluded that it possessed the general power to decide the Complaints on grounds that were not originally "pleaded". It rightly appreciated that human rights legislation should be construed in a broad way so as to give effect to the goal of human rights protection."*

52. In the circumstances Regulation 28(4) must be construed so as to include a power on the part of the Commission to affirm, reverse or vary any finding as well as any disciplinary penalty imposed by the Tribunal.

53. Carlita O'Brien, Secretary for the Commission, gave evidence, to the effect that prior to the implementation of the Orders, the Commission has indeed heard appeals from members of the Bermuda Police Service and that the conduct of the hearings for members of the Police Service have been full of hearings, notwithstanding Regulation 28(2). She confirmed that the Commission has granted a full rehearing, including representation by legal counsel, direct and

cross examination of witnesses, and submissions orally and in writing, if requested by the member of Counsel. She also stated that in this specific matter, should the Applicants appeal to the Commission following a decision related to their disciplinary hearing, the Commission will allow the appeal on a full rehearing basis.

54. In the circumstances had it been necessary I would have held, given that the Appellants are entitled to a full rehearing on the facts and the law before the Commission, that any breach of the rule of natural justice in the proceedings before the tribunal constituted under Order 24(5) was capable of being cured as a result of the appeal proceedings.

Conclusion

55. Having regard to my conclusion expressed in paragraph 42 above, holding that the mere fact an officer is part of the command structure within the Bermuda Police Service does not disqualify that officer from serving on a disciplinary tribunal or that his membership gives rise to an appearance of bias, I refuse to make:

    (i) A *declaration* that the Orders as passed by the Governor are in breach of natural justice;

    (ii) An order of *Mandamus* requiring the Governor to withdraw the Orders until such time as they may be replaced with the disciplinary code which complies with the rules of natural justice; and

    (iii) An order of *Certiorari* quashing the decision of the Commissioner to prosecute the Applicants on charges of gross misconduct.

56. I will hear counsel in relation to the issue of costs.

Dated 19 August 2019

NARINDER K HARGUN
CHIEF JUSTICE