

EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
CIVIL DIVISION

ANUHCV2018/0202

IN THE MATTER OF AN APPLICATION
BY WENDELL GLENROY ROINSON
FOR JUDICIAL REVIEW

AND IN THE MATTER OF PART 56 OF
THE CIVIL PROCEDURE RULES, 2000

AND IN THE MATTER OF THE POLICE
ACT CAP 330 OF THE LAWS OF
ANTIGUA AND BARBUDA

BETWEEN:

WENDELL GLENROY ROBINSON

Claimant

and

POLICE SERVICE COMMISSION
ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Respondents

APPEARANCES:

Dr. Richard Cheltenham, Ms. Shelly-Ann Seecharan and Mr. Cosbert
Cumberbatch for the Claimant

Dr. David Dorsett and Mr. Jarid Hewlett for the First Respondent

Mr. Anthony Astaphan SC and Ms. Carla Brooks-Harris for the Second
Respondent

2018: October 5th
October 26th

JUDGMENT

- [1] SMITH J: The Claimant, Mr. Wendell Robinson, is the Commissioner of Police of Antigua and Barbuda. He says the Police Services Commission of Antigua and Barbuda (“PSC”) unlawfully suspended him from office with effect from 5th April 2018. He seeks, among other relief, to have that decision quashed in these judicial review proceedings.
- [2] The PSC, for its part, says that it acted lawfully pursuant to section 16 of the Police (Discipline) Regulations (“the Regulations”) in suspending Mr. Robinson (“the Commissioner”) and has not acted *ultra vires*, in any respect, as it relates to that decision.
- [3] The Commissioner in his fixed date claim identified fourteen alleged procedural irregularities which he says “permeated the allegations against him”. In addition to this, there were sixteen diffuse grounds for judicial review and thirteen separate reliefs prayed. Every conceivable head of administrative wrongdoing appears to have been thrown into his fixed date claim.
- [4] However, by the time the Commissioner filed his written submissions on 31st August 2018, he had apparently distilled the issues he wanted the court to determine to the following:
- (a) “Whether the Police Service Commission had the discretion to suspend the Applicant without his first being charged with an offence.
 - (b) If the Commission did have such a discretion, was that discretion properly and lawfully exercised?
 - (c) **Is an appropriate, alternative remedy available?”**
- [5] To those issues, the court added another issue at the commencement of the hearing on 5th October 2018: whether or not the Regulations apply to the Commissioner. Neither side had addressed this issue in their written submissions and, consequently, each side was permitted to file supplementary post-hearing submissions on that single point. The hearing then proceeded. The court reserved

its judgment pending receipt of the parties' post-hearing submissions which were filed on 20th October 2018.

Issues

- [6] These are the issues that arise for the determination of this court: -
- (1) Do the Regulations apply to the Commissioner?
 - (2) Was the discretion to suspend the Claimant exercised rationally or lawfully?
 - (3) Did the PSC act in breach of the principles of natural justice in suspending the Claimant without first giving him an opportunity to be heard?
 - (4) Did the PSC act *ultra vires* section 37 of the Police Act ("**the Act**") in suspending the Claimant without first charging him or initiating an investigation?
 - (5) Is an appropriate, alternative relief available?

Preliminary Application

- [7] Before turning to the issues, I must dispose of a preliminary application that arose at the start of the hearing. The Second Respondent had filed an application on 28th June 2018 for an order that he be removed as a party to the proceedings. After some initial reluctance, the Claimant agreed to the removal of the Second Respondent as party and he was accordingly removed as a party.

The Decision under Review

- [8] **Since the PSC's decision lies at the heart of this case, it is perhaps** useful that the letter communicating that decision be set out in full: -

"5th April 2018

Mr. Wendell Robinson
Commissioner of Police
Police Headquarters
American Road
St. John's
Antigua

Dear Sir,

Ref: Suspension With Immediate Effect 5th April 2018

The attention of the Police Service Commission has been drawn to certain complaints made against you by members of the Constabulary namely:

No. 753 Constable Lynroy Durand
No. 605 Corporal Orel Michael Grigg
No. 59 Constable Cordwin Phillip
And Civilian Complainant:
Amad Bight

These complaints are deemed by the Commission so serious as to warrant consideration and action as they are inimical to the discipline and moral within the Royal Police Force of Antigua and Barbuda. Copies of the complaints are enclosed herewith for your attention in the interest of full disclosure and transparency and in the interest of sound administrative practice and Administrative law.

Acting in accordance with section 16(a) of the Police (Discipline) Regulations, Cap 330 Volume 12 of the Laws of Antigua and Barbuda Revised Edition 1992, you are hereby suspended with immediate effect as of 5th April 2018 from the Office of Commissioner of Police until the Commission decides otherwise.

You are immediately upon receipt of this letter ordered to hand over the command of the Royal Police Force of Antigua and Barbuda and the Fire Brigade and such articles and things under your control while serving as Commissioner of Police to Deputy Commissioner of Police Atlee Rodney.

During the period of your suspension you shall be paid a suspension allowance at the rate said under section 37 of the Police Act and in accordance with section 16(2) of the Regulations.

Please be guided accordingly.

Yours faithfully,
Kelvin John Esq
Chairman
Police **Service Commission**"

[9] The court makes the following observations on the suspension letter: -

(1) The decision to suspend was exercised in accordance with section 16(a) of the Regulations.

- (2) The decision to suspend was based on the complaints of certain named individuals and copies of those complaints were attached to the letter.
- (3) The PSC deemed the complaints so serious as to warrant consideration and action. The nature of the action warranted by the complaints is not stated.
- (4) The complaints are stated to be inimical to discipline and morale within the police force.
- (5) **The suspension is “until the Commission decides otherwise” and is therefore indefinite.**
- (6) No timeframes are given for any further action nor is the Commissioner asked to provide any response.

[10] I now turn to consider the statutory framework.

The Police Act

[11] Section 37 of the Police Act provides as follows: -

“37. (1) An Inspector, subordinate police officer or constable against whom any complaint or information for an offence punishable on summary conviction or on indictment is laid, or against whom a charge is made for breach of any disciplinary regulation made under this Act, may, pending, and until the final determination of such complaint, information or charge-

(a) be suspended from duty and placed on half-pay by the Commission; or

(b) if admitted to bail and not so suspended, be employed on full-time duty, in which case he shall receive fully pay, or if employed on part-time duty he shall receive a rate of pay (not being less than half-pay) as the Commissioner of Police thinks fit.

(2) If an Inspector or a subordinate police officer or constable is acquitted on any complaint or information, or obtains a decision in his favour on any charge, he shall be entitled to receive all pay which has been withheld from him; if he is convicted on such complaint or information or does not obtain a decision in his favour on such charge and is subsequently dismissed, he shall not be entitled to receive any pay so withheld.

(3) In the application of subsection (1), an Inspector, subordinate police officer or constable shall not be deprived of any part of the house and lodging allowance or the use of any free quarters to which he may be entitled.

The Police (Discipline) Regulations

- [12] The Regulations carry the following title: "THE POLICE (DISCIPLINE) REGULATIONS, DATED 22ND AUGUST 1967, MADE UNDER SECTION 34 OF THE POLICE ACT." (Underlining supplied). Those Regulations provide as follows:

"3. DISCIPLINARY OFFENCES. A member of the Force commits an offence against discipline if he commits one or more of the offences set out in the Schedule to these Regulations.

4. INVESTIGATION OF CHARGES. (1) When a report, allegation or complaint is received by the Commissioner of Police from which it appears that a member of the Force may have committed an offence, the matter shall be referred to an investigating officer who shall cause it to be investigated.

(2) Subject to paragraph (3) the investigating officer shall be such member of the Force of or above the rank of Sergeant as may be designated by the Commissioner of Police for the purpose.

(3) The investigating officer shall be a member of the Force other than the person to whom authority may be delegated to hear the charge.

5. FORMULATION OF CHARGE. (1) The investigating officer shall, as soon as is practicable (without prejudicing his or any other investigation of the matter), investigate the charge and shall decide whether the member of the Force shall be charged with an offence and, if he decides that the member shall be so charged, the Investigating Officer shall, as soon as possible, enter on a discipline form the offence with which the member is to be charged and such particulars as will leave no doubt as to the precise nature of the alleged offence...

6. DOCUMENTS TO BE SUPPLIED TO ACCUSED ...

7. WITNESSES ...

8. PROCEDURE AT HEARING ...

9. HEARING ...

10. ATTENDANCE OF COMPLAINANT AT HEARING ...

11. DECISION OF COMMISSIONER ...

12. REFERENCE TO ACCUSED'S PERSONAL RECORD IN CONSIDERING PUNISHMENT ...

13. LIMITATIONS ON PUNISHMENT ...

14. RIGHT OF APPEAL ...

15. REVIEW ...

16. SUSPENSION. (1) Where a report, allegation or complaint is received from which it appears that a member of the Force has committed a disciplinary or criminal offence, the Commission may suspend that member from membership of the Force and from his office, whether or not the matter has then been investigated and in such case he shall be suspended until –

(a) the Commission decides otherwise;

(b) it is decided that the member shall not be charged with a disciplinary offence; or

(c) the member has been so charged and either all the charges have been dismissed or a punishment has been imposed; whichever first occurs.

(2) a member of the Force suspended under this regulation shall, in respect of the period of suspension, be paid a suspension allowance at the rate prescribed under section 37 of the Act.

[13] Section 34 of the Act, under which the Regulations are made, provides that: -

“34 (1) the Commission may order the dismissal from the Force or reduction in rank of any Inspector who is convicted of a criminal offence or any breach of any disciplinary regulations made under this Act.

(2) The Commission may order the dismissal from the Force or reduction in rank of any subordinate police officer or constable who is convicted of a criminal offence or any breach of any disciplinary regulations made under this Act.

(3) Dismissal or reduction in rank under subsection (1) or subsection (2) may be ordered in addition to any punishment which may be imposed on conviction as aforesaid whether, in the case of a dismissal, a recommendation to that effect has or has not been made and without calling **on the offender to show cause why he should not be dismissed.**”

Issue 1: Do the Regulations apply to the Commissioner?

[14] **One of the PSC’s central argument is that the Commissioner’s claim**, that he had to have been first charged for a disciplinary offence before being suspended, must fail because section 37 of the Act is applicable only to police officers at the rank of inspector and below. The Regulations, under which the PSC suspended the Commissioner, are expressed to have been made under section 34 of the Act.

Section 34 of the Act clearly deals with the disciplining of officers at the rank of inspector and below “for breach of any disciplinary regulations made under this Act” (underlining supplied). Not only is there no ambiguity in this, but also it is consistent **with the PSC’s argument that section 37 of the Act (which is the section dealing with discipline)** applies only to officers at the rank of inspectors and below. It seems to this court that the whole tenor and scheme of the disciplinary regime, under both the Act and the Regulations, were meant to apply only to inspectors and subordinate officers. Dr. Dorsett deployed a number of arguments to support his contention that the Regulations are applicable to the Commissioner. I will examine each of these arguments in turn.

Typographical Error?

[15] His submitted that: (1) the reference to section 34 in the title to the Regulations was a typographical error that should have been a reference to section 35, which is the section of the Act that empowers the Minister to make regulations **“for the creation of offences against discipline in the case of all members of the Force”**; (2) section 34, while it makes reference to regulations made under the Act, does not empower the Minister to make regulations; (3) the title to the Regulations is a mere reference and does not form part of the Regulations.

[16] I accept that section 35 of the Act is indeed the section which empowers the Minister to make disciplinary regulations. The Minister, assuming this power, then makes regulations to regulate some area of the Act. There can be a number of different regulations regulating different subject matter of the same Act. Therefore, in promulgating a particular piece of regulation, the title, as a reference, states which section or area of the enabling Act it is meant to regulate. That the Regulations were indeed made to regulate matters set out at section 34 of the Act is borne out by the simple exercise of juxtaposing section 34 with the Regulations. The Regulations sets out a process for the disciplining of inspectors and subordinate officers. This is precisely the same subject matter of section 34 of the Act. I therefore do not consider that there was any typographical error in the title to the

Regulations. Put another way: section 34 provides that inspectors and subordinate officers may be disciplined. The Regulations provide the manner and process under which they may be disciplined. The interface between the section 34 of the Act and the Regulations is therefore logical, compatible and smooth.

Section 16 applies of all Police Officers?

- [17] Dr. Dorsett contended that: (1) section 16 of the Regulations expressly gives to the PSC the power to suspend any member of the Force if it appears to the PSC that that member has committed a disciplinary offence; and (2) the court should give effect to the plain, natural and ordinary meaning of those words.
- [18] Dr. Cheltenham makes the formidable argument that the Act gives to the Minister the power to make subordinate legislation. The Regulations, being subordinate, cannot exceed the scope and purpose of the enabling Act. He relied on Bennion on Statutory Interpretation, 5th Edition at page 244 for the proposition that delegated legislation cannot override any Act, and certainly not the enabling Act, unless the enabling Act so provides.
- [19] I think that, as a matter of first principles, this must be right. If the parent or enabling Act deals exclusively with the disciplining of inspectors and subordinate officers this must mean that any piece of subordinate legislation could only regulate the disciplining of inspectors and subordinate officers. The Minister could not arrogate unto himself the power to extend the scope of any such regulations. Section 16 cannot be given an interpretation that puts it into conflict with the clear tenor and scope of its enabling Act. This argument must therefore also fail.

Section 19 of the Act?

[20] Dr. Dorsett submits that, by virtue of section 19 of the Act, section 16 of the Regulations applies to the Commissioner. Section 19 provides that:

“Every police officer shall have all such rights, powers, authorities, privileges, and immunities and be liable to all such duties and responsibilities, as any constable duly appointed ...” (underlining supplied)

[21] The argument is that the Commissioner is a police officer and as such is liable to all **such duties and responsibilities as “any constable duly appointed”**. Such duties and responsibilities include that of being subject to and upholding the Regulations. I confess to having some difficulty understanding this argument.

[22] The court finds that the Commissioner has no duty or responsibility by virtue of section 19 of the Act to be subject to Regulations which are clearly not applicable to him.

The Constitutional Point

[23] Dr. Dorsett contends that: (1) Section 34 of the Act is only applicable to inspectors and subordinate officers; (2) section 34 is however subject to the Constitution of Antigua and Barbuda (**“the Constitution”**); (3) **section 2** of the Constitution provides that the Constitution is the supreme law and any law inconsistent with it shall, to the extent of the inconsistency be void; (iv) section 105(1) of the Constitution clearly gives to the PSC the power to exercise disciplinary control over offices in the Police Force; (v) section 34 which is limited to inspectors and subordinate officers is inconsistent with section 105 (1) of the Constitution (which gives to the PSC disciplinary control over all police officers including the Commissioner) and must, to the extent possible, be brought into conformity with the Constitution as directed by section 2(1) of Schedule 2 to the Antigua and Barbuda Constitution Order 1981 (**“the Constitution Order”**); (vi) **section 34 of the Act must therefore be read as applying to any police officer and not just inspectors and subordinate officers.**

- [24] The Constitution provides at section 2 as follows:
- “This Constitution is the supreme law of Antigua and Barbuda and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”**
- [25] And it provides at section 105 (1) that:
- “Subject to the provision of this section, the power to appoint persons to hold or act in offices in the Police Force (including appointments on promotion and transfer and the confirmation of appointments) and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Police Service Commission”
- [26] Section 2 (1) of Schedule 2 to the Constitution Order 1981 provides that:
- “The existing laws shall, as from 1st November 1981, be construed with such modifications, adaptations, qualifications, and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.”**
- [27] Section 105(1) of the Constitution does indeed confer on the PSC the power to exercise disciplinary control over all members of the police force including the Commissioner. The conjoint effect of Section 2 of the Constitution, read together with section 2(1) of Schedule 2 to the Constitution Order 1981 is that any law that is inconsistent with the Constitution shall to the extent of the inconsistency, be read with such modifications to bring it into conformity with the Constitution.
- [28] The difficulty with the **PSC’s argument** is this: if section 34 of the Act is modified and **adapted to read “all police officers” instead of being limited to inspectors** and subordinate officers, it would mean that the Regulations applied to all police officers as well. But the scheme of the Regulations is not designed to regulate all police officers. Under the Regulations, it is the Commissioner who receives complaints about other police officers, decides whether it should be investigated and then appoints another police officer to investigate the matter. The Regulations do not envisage the investigation of the Commissioner himself and has no provisions to deal with such an eventuality. To attempt to adapt the Regulations to include the

Commissioner would be to force it, like Cinderella's glass slipper, unto a foot that cannot fit into it.

- [29] Even using the broad powers given under section 2 (1) of Schedule 2 to the Constitution Order, this Court could not be expected to read into the Regulations a whole new scheme governing the process to be used when it is the Commissioner who is to be investigated. The details of such a procedure are clearly a matter for the sovereign legislature.
- [30] Further, it is not that section 34 of the Act is inconsistent with section 105 (1) of the Constitution. The Act does not oust, disapply or limit the power of the PSC. It is that that Act only applies to inspectors and subordinate officers. It could mean that the legislature intends a different regime for the disciplining of senior officers. It is also open to the PSC to promulgate regulations for the disciplining of police officers under its power to regulate its own procedure conferred by section 99 (12) read with section 104 (2) of the Constitution.
- [31] If I am wrong on this, and section 34 of the Act ought to be adopted and modified in the manner contended for by the PSC, then, to be consistent, it would follow that section 37 of the Act, which is also limited to inspectors and subordinate officers, should also be modified and adapted to be applicable to all police officers. Section 37 requires that a charge of breach of disciplinary regulations be placed on an inspector or subordinate officer before he is suspended. If section 37 is also equally modified to apply to all police officers, the consequence is that the Commissioner, against whom no disciplinary charge was brought at the time of his suspension, would clearly have been improperly suspended. Further, any charges brought against the Commissioner, *ex post facto*, after his suspension, would clearly not suffice. This would mean that the Commissioner would be entitled to an order of *certiorari* of the decision to suspend him without having first charged him.

[32] In conclusion, on the issue of whether the Regulations are applicable to the Commissioner, I conclude that, for the reasons stated in the preceding paragraphs, they are not. In the event I am wrong on this point, I go on to consider the remaining issues.

Issues 2 and 3: Whether Commissioner was Lawfully Suspended

[33] The Claimant claims that (a) any discretion or power vested in the PSC to suspend him was unlawfully exercised; and that (b) he was unlawfully suspended because he was not afforded an opportunity to be heard prior to his suspension. Both of these issues can conveniently be dealt with together. The answer to this issue turns on the proper interpretation to be given to section 16 of the Regulations.

[34] The PSC contends that: (1) the language and intendment of section 16 is plain that there is no need for any investigation prior to suspension or any need to consult with the Commissioner; (2) Regulation 16 expressly excludes the duty to act fairly in the sense of giving a police officer that is to be suspended an opportunity to be heard prior to suspension; (3) the court must pay due respect to the language and structure used by parliament, rather than to preconceptions of what its objectives could or should have been; (4) there is no requirement that the Applicant be accorded natural justice at the suspension stage when the PSC is responding to a situation that demands immediate action; (5) there is no implied right in the scheme of the Regulations and in section 16 that a police officer be heard prior to suspension; and (6) **the court's responsibility is to give effect to the intention of Parliament not to correct legislation to ensure that it is just and expedient.**

[35] In support of his argument, Dr. Dorsett placed much reliance on *The Police Service Commission v Murray*¹ in which Ramlogan J held that the suspension and interdiction of an assistant commissioner of police were illegal, null and void for breach of natural justice in that the Commission had failed to hear the assistant commissioner before suspending him.

¹ Republic of Trinidad and Tobago, Civil Appeal No. 143 of 1994

[36] On appeal, Nelson J.A., in considering the interpretation of section 79 of the Trinidad and Tobago Police Service Commission Regulations stated: -

“The statutory code of discipline in the Commission Regulations – in particular section 79 thereof – does not expressly provide for a hearing at the suspension stage. However, in arriving at a decision to suspend a police officer, the Commission must become aware of an offence.

The Commission becomes aware of an offence by reason of the report in regulation 77 (1) by the Commissioner that a police officer may have committed an offence. Up to this point there is no verification of the particulars of the allegation

The second requirement of regulation 79(1) is that the Commission would have formed the opinion that the public interest or the repute of the Police Service requires that the officer cease to report for duty until further notice. Significantly the Commission is not required to consider the personal feelings or the personal repute of the police officer in deciding to suspend. The only consideration prescribed are the wider interests of the public and the police force. In the absence of authority compelling me to a contrary conclusion, I would hold as a matter of construction that there is no implied right in regulation 79 that the police officer be heard prior to suspension.”

Regulation 79 of the Commission Regulations has been the subject of judicial interpretation in *Rudolph Steele v Police Service Commission* H.C.A. No 1780 of 1987 (unreported) where police officers were suspended pending inquiries after the Commission became aware of misconduct through the report of a commission of inquiry into the drug trade. Edo J. expressly rejected a submission that the suspension without a hearing amounted to a breach of natural justice. In *Douglas v Public Service Commission* H.C.A. No 1916 of 1982 (unreported) where provision in the Public Service Commission Regulations was virtually identical to regulation 79, Warner J, as she then was, held that the scheme of the Public Service Commission Regulations did not envisage a right to be heard prior to the Commission taking action under the equivalent of regulation 79. In *Selwyn Joseph v Attorney General* H.C.A. No. 571 of 1991 (unreported) where the suspension regulation was identical to regulation 79, Razack J followed the decision of Edo J in *Rudolph Steele v Police Service Commission* and held that an officer of the Tourism Development Authority had no right to be heard prior to his suspension.”

[37] Nelson J.A. concluded on this point that:

“What is clear is that in Trinidad and Tobago there is body of precedent on regulation 79 of the Commission Regulations which laid down that in the statutory disciplinary procedure applicable to police officers a right to be heard was not to be implied at the suspension stage.”

[38] In *Rees v Crane*,² on which both sides relied, the Privy Council upheld a majority decision of the Court of Appeal quashing the decision of a chief justice directing a judge not to preside in court until further notice as well as the decision of the Judicial and Legal Services Commission to represent to the president that the question of **the judge’s** removal from office ought to be investigated by a tribunal and the consequent appointment of the tribunal.

[39] The Privy Council, after reviewing a number of decisions from across the Commonwealth in which courts had held that a person might not be entitled to be heard at the very preliminary stages of an investigation and may be suspended without a hearing, concluded, at page 457 of the judgment by Lord Slynn of Hadley, as follows:

“It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the courts to this conclusion have included the fact that the investigation is purely preliminary, that there will be a full chance adequately to deal with the complaints later, that the making of the enquiry without observing the *Audi alteram partem* maxim is justified by urgency or administrative necessity, that no penalty or serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice, that the statutory scheme properly construed excludes such a right to know and to reply at the earlier stage.

But in their lordships view there is no absolute rule to this effect even if there is to be, under the procedure, an opportunity to answer the charges later.”
(underlining supplied).

² [1994] 43 WIR 444 at 457.

- [40] **The attractiveness of Lord Slynn's statement is that it offers a** kind of blueprint or guideline as to when a hearing will be required at a preliminary stage, namely:
- (1) Whether the investigation is purely preliminary;
 - (2) Whether there will be a full chance adequately to deal with the complaints later;
 - (3) Whether urgency or administrative necessity requires that there be no hearing prior to suspension;
 - (4) Whether any penalty or serious damage to reputation is inflicted by proceeding to suspension without hearing the person; and
 - (5) Whether the statutory scheme properly construed excludes the right to know and to reply at the earlier stage.
- [41] Nelson J.A. in *Murray* felt that the facts of *Murray* were sufficiently distinguishable from *Rees* and therefore he did not feel obliged to follow the *Rees* approach. He identified the following as the features that made *Murray* distinguishable from *Rees*:
- (1) In *Murray* the Commission Regulations constituted a comprehensive disciplinary code for police officers and in those circumstances it was not lightly to be assumed that the regulations in question was unfair, or that it was the function of the court to re-draft the Code. In contrast, in *Rees v Crane* the three-tier process was silent as to procedure to be followed at each stage and accordingly the section was not to be construed as necessarily excluding a right to be informed and heard at the first stage.
 - (2) In *Murray*, the Commission Regulations required the Commission to consider only the public interest and the reputation of the Police Service in deciding whether to suspend a police officer. On the other hand, in *Rees* since the Act was silent, the Privy Council decided a right to be heard at the preliminary stage was to be implied in the interests of good administration of justice and the court system as a whole.
 - (3) In *Rees*, the judge did not know at the time of receiving the (suspension) letter that the Commission was about to make representations to the President for his

removal, nor did he know that statistics and records relating to his performance were presented to the Commission. He was subsequently notified of this. In Murray, the police officer knew what the specific charge was at the time of suspension and was invited before interdiction to give an explanation. Instead of giving an explanation, the police officer sought particulars.

[42] The Commission Regulations in Murray constituted a comprehensive disciplinary code for police officers and therefore it was not lightly to be assumed that those regulations were unfair. In the instant case, assuming that the Regulations are applicable to the Commissioner, they cannot be considered as a comprehensive disciplinary code in relation to the Commissioner for the simple reason that it is the Commissioner who decides whether to initiate an investigation into another police officer and who is appointed to conduct that investigation. The Regulations are silent as to what the process should be where it is the Commissioner against whom a complaint is made. Clearly, a Commissioner against whom a complaint is made and who is to be suspended is entitled to know the process applicable to him. In this regard, the Regulations can hardly be characterized as a comprehensive code as it relates to the Commissioner.

[43] The Commissioner was informed of his suspension but would have had no idea of what was to come next and what procedure was to apply. This, I think, offends the most elemental requirements of fairness and is dispositive of this issue. Nevertheless, I will go further.

[44] In considering the question of whether the Commissioner was entitled to a hearing before he was suspended from office, I use as a guideline what Lord Slynn termed **as the “essential elements”** in Rees.

Was the Investigation Purely Preliminary?

[45] In Murray, Nelson J.A. compared the preliminary nature of the suspension in Rees and in Murray and stated:

“The JLSC [in Rees] makes no decision or determination. It finds no facts; it states no opinion. In the instant case [Murray] the Police Service Commission receives a report from the Commissioner that an offence may have been committed and has a discretion to suspend the officer without forming a judgment.”

[46] I consider that, in the instant case, the PSC formed an opinion and judgment when it stated in its letter of suspension of 5th April 2018:

“These complaints are deemed by the Commission so serious as to warrant its consideration and action as they are inimical to the discipline and moral within the Royal Police Force of Antigua and Barbuda.”

[47] The PSC then proceeded to suspend the Commissioner. He was never informed in that letter that there would be an investigation to determine whether or not he should be charged with an offence under the schedule of the regulations. I think it would have been a different matter if the PSC had informed the Commissioner that he was suspended based on the complaints until an investigation was concluded as to whether or not he should be charged with one of the offences enumerated in the schedule to the regulations.

Will there be a full Chance to deal with the Complaints Later?

[48] While it is expected that the Commissioner will be given a hearing if it is decided that he is to be charged with an offence, he was never informed of what the procedure would be or any timeframes for any such procedure. The failure to have given him any indication of what procedure would be adopted in his case is all the more acute since, under the Regulations, it is the Commissioner who receives complaints, refers them to an investigating officer, appoints a member of the police force to present the case against the accused. Clearly, this procedure would not be available for the Commissioner given the circumstances of this case where he is the accused. He ought therefore to have been informed of what that procedure would have been.

Urgency or Administrative Necessity Requiring no Hearing?

- [49] The Commissioner was not informed of any specific charge under the Regulations. He was not informed of any urgent consideration or administrative necessity which required that he be given no hearing prior to suspension. Indeed the complaints against him involved allegations of sexually inappropriate behavior dating, in most cases, several years back. It is difficult to see from the evidence before this court what urgency or administrative necessity existed which might have required that the Commissioner be given no hearing prior to suspension. Dr. Dorsett argued that given the nature of the allegations and its impact on the morale and stability of the Police Force the PSC was obliged to act with urgency. The court is satisfied however that, on the evidence, the allegations, which were several years old, had been generally known for some time. What urgency could have prevented the PSC from giving the Commissioner whose record, on the evidence, was outstanding, an opportunity to say something on his own behalf prior to taking a decision of whether or not to suspend him?

Penalty or Serious Damage to Reputation Inflicted by Absence of Hearing?

- [50] The Commissioner was initially suspended on half pay but this was quickly rectified and he was suspended with full pay. I do not think that there has been any financial penalty or loss inflicted. I do think, however, that the loss of office can be viewed as a penalty. While there is no actual evidence placed before the court of any serious damage to his reputation, I think the court can take judicial notice of the obvious fact that the case has attracted huge publicity nationally and has been regularly featured in the newspapers and on television news.

Do the Regulations, Properly Construed, Exclude the Right to be Heard at that stage?

- [51] In Murray, the police officer knew what the specific charge was at the time of suspension and was invited before interdiction to give an explanation. Instead of giving an explanation, he sought particulars. In the instant case, the Commissioner

was never informed of any charge that he breached disciplinary regulations. He was never invited before suspension to give any account or explanation.

[52] In *Furnell v Whangarei*,³ the question was whether a teacher was entitled to be heard prior to his suspension pending the determination of whether charges should be brought against him. In reviewing the regulations, the Privy Council observed that the intention of the preliminary investigation was that it should be the means of eliminating complaints which need never mature into charges. I consider it useful to compare the regulations under which the teacher was suspended with those under which the Commissioner was suspended.

[53] In *Furnell*, the regulations provided as follows:

“5. Procedure for alleged offences – (1) Where a board, after receiving a report on a complaint against a teacher in accordance with regulation 4 of these regulations, has reason to believe that the teacher may have committed an offence to which section 158 of the Act applies, the board shall forthwith advise the teacher in writing of the full details of the alleged offence, and may then suspend the teacher pending the determination of the matter in accordance with the following provisions of these regulations. (2) The teacher concerned shall, by notice in writing given by the board and **delivered to the teacher ...be required, within a reasonable time to be specified in the notice, to state in writing whether he admits or denies the truth of the charge, and to forward any explanation which he wishes to give relating to the charge.** (3) The board shall, in any notice forwarded to a teacher in accordance with sub-clause (2) of this regulation, inform the teacher that, if he so wishes, he may make a statement in person to the board conceding the alleged offences and that, on informing the board accordingly, he shall be heard at **a time to be specified by the board. ...”**

[54] The Regulations in the instant case differ from those in *Furnell* in that the Regulations in the instant case:

(1) Do not state the PSC may suspend the police officer “*pending the determination of the matter in accordance with the following provisions of these regulations.*”
Indeed the Regulations state the suspended officer shall be suspended until (a)

³ [1973] AC 660.

the Commission decides otherwise; (b) it is decided that the member shall not be charged with a disciplinary offence; or (c) the member has been so charged and either all the charges have been dismissed or a punishment has been imposed, whichever first occurs.

(2) Do not lay down the procedure to be followed after suspension.

[55] Lord Morris of Borth-y-Gest made the point in *Furnell* when he stated: -

“The scheme of the regulation is that if, following the receipt of a complaint, and after there has been a preliminary look at it either by a single person or by a sub-committee who will report on it, the board think that a teacher “may” have committed an offence they then write to the teacher and give him full details. The board then has a discretion as to whether to suspend the teacher. But if they do, that can only be “pending the determination of the matter.” Such determination will be according to the procedure laid down. Before there is any such “determination” a teacher will be heard.”
(underlining supplied)

[56] In *Lewis v Heffer*,⁴ Lord Denning stated: -

“Those words apply, no doubt, to suspensions which are inflicted by way of punishment: as for instance when a member of the Bar is suspended from practice for six months, or when a solicitor is suspended from practice. But they do not apply to suspensions which are made, as a holding pattern, pending inquiries. Very often irregularities are disclosed in a government department or in a business house: and a man may be suspended on full pay pending inquiries. Suspicion may rest on him: and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the office is being affected by rumours or suspicions. The others will not trust the man. In order to get back to proper work the man is suspended. At that stage the rules of natural justice do not apply: See *Furnell v Whangarei Schools Board* [1973] A.C. 660.”

[57] This court observes that, in the instant case, the factor that militates against the **Commissioner’s suspension being viewed as a “holding pattern”** is the fact that the suspension is effectively indefinite. While the Commissioner is receiving his full pay,

⁴ [1978] 1 WLR 1061

the indefinite nature of the suspension, with no information communicated to him at the time of his suspension of what is to take place next, makes it entirely reasonable to view it as the infliction of a punishment. The circumstances of the case do not require that something had to be done at once because the workplace was being affected. I do not think that it is open to the PSC to point to affidavits in these proceedings as sufficient information to the Commissioner as to what was to happen after his suspension. The Commissioner was entitled to be informed of this prior to his suspension or shortly thereafter and not via affidavits filed in these proceedings.

[58] Just as the Privy Council found in *Rees*, I think that the suspension in this case was of an indefinite nature. The scheme of the Regulations does not address the matter of the suspension being pending the determination of the question of whether the Commissioner should be charged. It is completely silent as to how long the determination may be for. In fact the Regulations appear to contemplate that it can be of an indefinite nature.

[59] Dr. Dorsett, citing *Campbell v Peter Gordon Joiners Ltd*,⁵ submitted that **faithful construction of the statutory text requires that** *“the court pay due respect to the language and structure used by Parliament, rather than to preconceptions of what its objectives could or should have been”*.

[60] I am however reminded of, and appropriate, the words of Byles J in *Cooper v Wandsworth Board of Works*⁶ when he said *“... although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.”* In this case, because the Regulations, even if applicable to the Commissioner, are so deficient as regards what procedure would apply to the Commissioner, it would be unacceptably unfair to the Commissioner.

⁵ [2016] UKSC 38

⁶ (1863) 14 C.B.N.S. 180

Issue 4: Was Suspension Ultra Vires Section 37 of the Police Act?

[61] Based on section 37 (set out at paragraph 10 above) the Commissioner contends **that (1) before the PSC’s discretion to suspend can be** exercised the officer must be first charged with an offence so that in suspending him without first charging him, the PSC acted ultra vires; (2) to the extent that section 37 ostensibly applies only to officers at the rank of inspector and below, the section should be read applying the *ejusdem generis* rule otherwise senior officers would be subject to unequal treatment of law and deprived of natural justice; (3) a declaration should therefore be granted that section 37 applies to all police officers irrespective of rank.

[62] I agree with Dr. Dorsett that the applicable principle of statutory interpretation in this regard is: *expressio unius exclusio alterius*. In *Salisbury Independent Living Ltd. v Wirral Metropolitan Borough Council*⁷, the court explained the maxim: -

“The principle of construction can be given the Latin tag “expressio unius exclusio alterius”, but it is equally simply explained by the ordinary proposition that when a legislative provision sets out who or what is within the meaning of an expression, it ordinarily means that no one else or nothing else is. If it wishes to say that its provisions are other than exhaustive, it usually says so, in terms such as: “without prejudice to the generality of the expression”, or “the following are included in” or “in construing the expression ...the court shall have regard to all the circumstances including.”

[63] I therefore have no hesitation in concluding that the language of section 37 is clear and cannot be said to be applicable to all police officers irrespective of rank.

Issue 5: Alternative relief available?

[64] The PSC, in its written submissions, contended that there was an alternative remedy which ought to have been exhausted first, namely an appeal to the Public Service Board of Appeal. I did not get the impression that Dr. Dorsett was placing much reliance on this point. Nevertheless, to the extent that he is, I think that it can be dealt with shortly. The claim involved the interpretation of statutes, the Constitution and the consideration of substantial matters of law. I do not think that an appeal to

⁷ [2012] EWCA Civ 84.

the Public Service Appeal Board would have provided an appropriate alternative relief, especially given the aspects of constitutional interpretation traditionally reserved for the high court.

Disposition

[65] For the reasons set out above, the court makes the following orders:

- (1) Certiorari is granted quashing the decision of First Respondent suspending the Claimant.
- (2) The Claimant is reinstated to his office as Commissioner of Police with immediate effect.
- (3) Prescribed costs are awarded to Claimant in accordance with CPR 2000.

Godfrey Smith
High Court Judge

By the Court

Registrar