PARTIES:	THE QUEEN AGAINST BRIAN CHARLES BATES THE COMMISSIONER OF POLICE EX PARTE: PAUL ANTHONY O'BRIEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	7 of 1997 (99700971)
DELIVERED:	21 July 1997
HEARING DATES:	3 and 15 July 1997
JUDGMENT OF:	Kearney J

CATCHWORDS

Administrative Law - Judicial review on grounds of ultra vires or defective exercise of powers - Whether Police Commissioner misconstrued his powers in "compulsory retirement" of member -

Police Administration Act 1979 (NT) - ss87, 88, 89(d).

Administrative Law - Judicial review on grounds of ultra vires or defective exercise of powers – Whether in purported exercise of powers in a "whole of career review" under Part V the Commissioner may take into account individual incidents in that career which have been the subject of previous disciplinary process under Part IV – Whether the doctrine of *functus officio* applies -

Police Administration Act 1979 (NT); Parts IV and V.

Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic (1989-90) 92 ALR 93, considered.

Administrative Law - Judicial review on grounds of ultra vires or defective exercise of powers - Whether exercise of powers in "whole of career review" under Part V subjects member to double jeopardy and double penalty where individual incidents have been the subject of previous disciplinary process under Part IV –Whether double jeopardy and double penalty principles operate outside the criminal law -

Police Administration Act 1979 (NT), Parts IV and V.

Walton v Gardiner (1992-93) 177 CLR 378, distinguished.

Administrative Law - Particular persons or tribunals - Police Commissioner - Whether combined effect of established breaches of discipline of member under Part IV can found a conclusion of "inability" pursuant to Part V -

Police Administration Act 1979 (NT), Parts IV and V.

Administrative Law - Particular persons or tribunals - Police Commissioner - Whether breaches of discipline by member can be dealt with pursuant to Part V as "inability", in the first instance – Whether Part V directed at non-intentional conduct and Part IV directed at intentional conduct.

Police Administration Act 1979 (NT), Parts IV and V.

REPRESENTATION:

Counsel:

Applicant:	J E Reeves
Respondent:	D S Lisson

Solicitors:

Applicant:	Mildrens
Respondent:	Solicitor for the Northern Territory

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kea97016

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 7 of 1997

THE QUEEN

AGAINST

BRIAN CHARLES BATES the Commissioner of Police

Respondent

EX PARTE
PAUL ANTHONY O'BRIEN

Applicant

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 21 July 1997)

The application

In this application under Order 56 of the *Supreme Court Rules* the applicant seeks a remedy in the nature of prohibition (alternatively, an injunction) to restrain the respondent from implementing his expressed

intention to retire the applicant from the Police Force, pursuant to s89(d) of the *Police Administration Act* (herein "the Act"). On 15 July I imposed the restraint sought; these are the reasons for that decision.

The background to the application

The applicant has been a member of the Force since 12 July 1987. On 12 March 1996 he received from the respondent a document entitled 'Notice of Inability to Discharge Duties', issued under s87 of the Act. Section 87 is contained in Part V. In that document the respondent states his opinion "on reasonable grounds" that the applicant is not "fit to discharge, suited to perform, or capable of efficiently performing" the duties he was "employed to perform" in the Force. The document, annexed to this judgment and marked with the letter "A", proceeds to itemize in 14 paragraphs the "grounds on which [the respondent] formed this opinion".

On or about 10 April 1996 the applicant gave the respondent a written response, consisting of 47 typewritten pages. In pars4 and 5 of his affidavit of 15 January 1997 filed in this proceeding he deposes:

> "4. In paragraph 8 of the said Notice of Inability to Discharge Duties there appears an incomplete series of particulars of the investigation referred to [into an incident allegedly involving the applicant discharging a firearm]. The allegation made in sub-paragraph 8.5 of that paragraph is inaccurate in that it does not reflect the fact that the continuation of the investigation had the final result of the evidence referred to in that sub-paragraph being discredited, and the incident was finalised without any censure of myself. The incident was concluded when Commander T Baker sent an internal memorandum to me which advised me that there was insufficient evidence to implicate me in the incident.

5. The matters and allegations contained in paragraphs 12 and 13 of the said Notice of Inability to Discharge Duties are the only matters or allegations that have not been the subject of investigation and or disciplinary action by or on behalf of the Defendant. The matters and allegations contained in paragraphs 12 and 13 aforesaid were first raised by the Defendant with me on 12 March 1996 in the said Notice of Inability to Discharge Duties."

None of the factual statements in pars4 or 5 have been sought to be controverted. It is clear that in his response the applicant did not agree with the respondent's opinion of 12 March, and that he sought to "explain in writing the matters referred to" by the respondent. In turn, the respondent was "not satisfied with that explanation" of 10 April, because on 1 May he arranged "for a review to be carried out" by Assistant Commissioner Valentin "to determine whether [his] opinion [of 12 March was] well founded, as provided for by s88 of the Act". Section 88 is also in Part V of the Act.

Assistant Commissioner Valentin conducted the review. On 15 August he notified the applicant that he had "completed [his] review", and provided him with a copy pursuant to ss88(5) of the Act, and "with an opportunity to supply written comments on [the] review within 21 days". The applicant did not avail himself of that opportunity. Although the review is not before me, various parts of it are set out in the applicant's affidavit of 15 January 1997. Assistant Commissioner Valentin is quoted as saying, at pp1 and 2 of his review:

> "Specifically, I note that my duties under Section 88 of the *Act* require of me that I must consider if your 'opinion is well founded' and whether Senior Constable P A O'Brien is 'fit to discharge, suited to perform or

capable of efficiently performing, the duties the member is employed to perform' in accordance with the provisions of Section 87 of the *Act*.

"I note the contentions of Senior Constable O'Brien that various grounds [listed in the Notice of Inability to Discharge Duties] cannot be relied upon by you under Section 87, given the existence and [proper] construction of Section 86 of the *Act*. I do not believe those contentions prohibit my consideration as to whether or not the 'Commissioner's opinion is well founded', as I am required by virtue of Section 88.

"Similarly, I do not believe that either of the contentions of Senior Constable O'Brien, that you should not be able to rely on various grounds by virtue of the principle of 'double jeopardy' or that, to be satisfied, 'the criminal standard of proof beyond reasonable doubt' must apply, prohibit me from discharging my duties in accordance with Section 88 of the *Act*."

The Assistant Commissioner is also quoted as saying at p16 of his review:

"It is my view that you are entitled to consider the totality of the circumstances which give rise to a review of the conduct of a member of the police force. *While taken in isolation, certain events may or may not amount to either disciplinary or criminal offences, nevertheless a consistent course of conduct by a member over an extended period of time should properly form the basis of a view as to the ability or otherwise of the member to discharge his duties*. The standard to be observed in any such review is, in my view, on the balance of probabilities and not to the criminal standard of 'beyond reasonable doubt.' The benefit of any such review must go to the organisation, the public and government served by that organisation." (emphasis added)

Neither of these passages is sought to be controverted. It is clear from the passage emphasized above that the Assistant Commissioner approached his task on the basis of a "whole of career" review, as did the respondent; see pars3-5 on p5. He concluded that the respondent's opinion of 12 March was "well founded".

The applicant underwent two medical examinations on 16 and 17 September. On 13 January 1997 he received from the respondent a document entitled "Notice of Intention to Retire Member", pursuant to s89(d) of the Act; a copy is annexed to this judgment and marked with the letter "B". Section 89 is also in Part V of the Act. The applicant's response to this document was to institute these proceedings on 15 January.

The materials relied on

In addition to the materials mentioned earlier, I was referred to pars1-5 of the respondent's affidavit of 12 February 1997 filed herein, viz:

> "1. I am the Commissioner of Police for the Northern Territory.
>
> 2. I consider that one of my most important duties is to recruit, train and maintain a police force of the highest possible standard of men and women, within the limits of resources available.
>
> 3. One aspect of that duty is to review, in appropriate cases, the whole of the career of members who, because of their conduct and service record, may be identified as unfit or unsuitable to continue as members of the Northern Territory Police at the standard required of a member. Such review may include disciplinary offences if those show a pattern of conduct over the years which reveals to me that the member is unfit or unsuitable.
>
> 4. In my view, it is absolutely necessary, if I am to properly discharge my functions and duties as outlined above, to have regard to past disciplinary matters of a member in a whole of career review and to consider such instances, if appropriate, in the exercise of my powers under Part V of the *Police Administration Act* ("the Act").
>
> 5. In the case of Senior Constable Paul O'Brien, my whole of career review, which included a number of disciplinary offences, revealed a pattern of alcohol abuse associated with irresponsible use of firearms, and a general pattern of immaturity, deceit and insubordination which did not meet the standard required of a

> member of the Northern Territory Police. I therefore invoked the process of Part V of the Act, which has proceeded to the point that I have foreshadowed [in the document of 13 January 1997] my intention to retire the member, and have invited submissions from him. The member has not provided further submissions and has not sought review in accordance with the appeal provisions of Part VI of the Act."

It is clear that the respondent reached his decision of 13 January 1997 annexure "B" on the basis of a "whole of career" review of the applicant; see par5 on p5.

The applicant's submissions

Mr Reeves of counsel for the applicant submitted that the respondent had no power to make his decision of 13 January 1997 "to retire" the applicant from the Force, for any or all of the following 3 reasons, viz:

(1) he was at the time *functus officio* in relation to all except the 2 grounds stated in pars12 and 13 of the document of 12 March 1996, annexure "A";

(2) by arriving at his decision of 13 January 1997 to retire the applicant on the basis of a 'whole of career' review, he was subjecting the applicant to both double jeopardy and double punishment, and thereby causing him substantial injustice and unfairness, since 11 of the 13 grounds "on which [he had] formed [his] opinion" of the applicant's unfitness had already been the subject of action against the applicant under the disciplinary provisions in Part IV of the Act; and

(3) he was not able to rely upon any of the matters stated in the Part V document of 13 January 1997, annexure "B", because the incidents which constituted the grounds for his opinion in the Part V document of 12 March 1996 involved conduct of a kind which could *only* be dealt with under Part IV of the Act, by way of disciplinary process; it could *not* be relied on to found an opinion as to inability to perform

duties under Part V, because the Act on its proper construction prohibited any such reliance.

It can be seen that these submissions respectively found on *functus officio*, double jeopardy and double penalty, and the proper construction of Parts IV and V of the Act, each said to vitiate the decision of the respondent to retire the applicant in the circumstances of the case. I now turn to each of these submissions.

(1) Was the respondent functus officio in relation to 11 of the grounds he relied on, in reaching his opinion of 12 March 1996?

Mr Reeves noted that the 7 incidents referred to in pars1-11 of the document of 12 March 1996, annexure "A", had already all been the subject of disciplinary action against the applicant under Part IV of the Act; see the detail in pars1-11 of annexure "A", par5 of the applicant's affidavit of 10 April 1996 (p3), and note the respondent's stress in pars3-5 of his affidavit of 12 February 1997 (p5) on his need to make a "whole of career review" of the applicant in which it was "absolutely necessary … to have regard to past disciplinary matters".

Mr Reeves submitted that once a decision had been made under Part IV of the Act in relation to an alleged breach of discipline, the respondent's power in relation to that particular incident was wholly spent; and for that reason, he could *not* later rely on that incident, or any part of it, as part of a foundation

for exercising power under Part V in the course of a 'whole of career review'. I note in passing that if this submission is correct, it strikes at the utility of conducting a 'whole of career review', because in practice a major element in any such review would be the member's history of breaches of discipline; see par4 on p5.

In support of this submission, Mr Reeves relied on *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1989-90) 92 ALR 93. In that case a Minister had ordered the deportation of Mr Kurtovic, a person convicted of manslaughter. On appeal, the Administrative Appeals Tribunal recommended that the order be revoked; the Minister acted accordingly. A year later, his successor made a further deportation order against Mr Kurtovic; this was set aside by a judge. The Minister's appeal was allowed, in part. It was held that he was not *functus officio*, when he made the deportation order. Dealing with the concept generally, Gummow J said at p112:

> "… in any given case, a discretionary power reposed by statute in the decision-maker may, upon a proper construction, be of such a character that it is not exercisable from time to time and it will be spent by the taking of the steps or the making of the statements or representations in question, treating them as a substantive exercise of the power. The result is that when the decision-maker attempts to resile from his earlier position, he is prevented from doing so, not from any doctrine of estoppel, but because his power to do so is spent and the proposed second decision would be *ultra vires. The matter is one of interpretation of the statute conferring the particular power in issue*." (emphasis added)

It can be seen that *Kurtovic* (supra) was a very different case to the present; it involved a re-exercise of precisely the same statutory power, whereas the respondent is *not* purporting to *re-exercise* the disciplinary powers under Part IV already exercised in respect of the incidents in pars1-11, but to exercise *other* powers, to be found in Part V.

The thrust of Mr Reeves' submission is that when, after the Part IV procedure for dealing with an alleged breach of discipline has been complied with, the respondent takes action under s84D, the statutory power to deal with the incident which constituted that alleged breach, is then exhausted. The respondent thereafter has no power to revisit the same incident to take it into account as part of any other process, such as a 'whole of career review' of the applicant. On this approach, the respondent was *functus officio* in relation to 11 of the 13 grounds relied on; since they had all already been dealt with by the disciplinary process under Part IV, they could not be taken into account again on a 'whole of career' review under Part V.

I consider that absent statutory authority to reconsider and revoke or vary his decision, an adjudicator (as the respondent is under Part IV) is *functus officio* when he has so performed his statutory function that nothing further remains to be done. This occurs in relation to breaches of discipline dealt with under Part IV when he takes action under the (now repealed) s83 or the current s84D. Having completely performed his authorised disciplinary

function he cannot reconsider the matter of the breach of discipline; even if new arguments or evidence are sought to be presented, he cannot go back to it. He cannot alter his perfected decision, except possibly to correct clerical mistakes or errors arising from an accidental slip or omission. His authority under the relevant statutory provision is exhausted and at an end; he is said to be *functus officio*, his duty discharged. Any variation to his decision can only be effected by way of appeal. Accordingly, any purported reopening of the issue under Part IV would be in excess of his authority under the statute, and would attract prohibition. As *Kurtovic* (supra) illustrates and makes clear, whether an adjudicator is *functus officio* or not depends upon the interpretation of the particular provision(s) of the Act under which he acted in making his decision.

In the present case it can be seen that the respondent is *not* purporting to act again under Part IV in relation to the incidents already dealt with under that disciplinary process. He is not purporting to re-visit the decisions on those matters, under Part IV. If he were, *functus officio* would apply; as he is not, it does not. As Mr Lisson of counsel for the respondent rightly pointed out, the *issue* in Part V is different from that in Part IV; it involves the question of fitness and suitability as a member, as opposed to questions of whether certain alleged misbehaviour occurred, and, if so, what is required by way of discipline. Whether the respondent can exercise the powers he has purported

to exercise under Part V in reliance, inter alia, on those incidents, involves a matter of statutory construction, addressed in Mr Reeves' third ground (p6).

In my opinion the doctrine of *functus officio* has no application, on the facts of this case.

(2) Does a 'whole of career review', in so far as it involves the further consideration of incidents already considered and dealt with under the disciplinary process in Part IV, subject the applicant to double jeopardy and double penalty?

As to the importance of the principle of double jeopardy, I note that over 2000 years ago Demosthenes argued that 'the laws forbid the same man to be tried twice on the same issue'. The principle is stated in Justinian's 'Corpus Juris'. Double jeopardy lay at the root of the dispute between Henry II and Thomas á Becket. It is enshrined in the Fifth Amendment to the Constitution of the United States, a constitutional guarantee. It is a fundamental principle and a vital rule of criminal procedure that a person should not be put in jeopardy twice, for one and the same offence; it resonates in the Territory in Division 5 of Part I of the *Criminal Code*. See generally *Davern v Messel* (1983-84) 155 CLR 21 at 62-3 per Murphy J, and at 67 per Deane J; *Cooke v Purcell* (1988) 14 NSWLR 51 at 54-56 per Kirby P; and *Broome v Chenoweth* (1946) 73 CLR 583 at 599 per Dixon J. Does the principle apply outside the criminal law?

Mr Reeves relied on *Walton v Gardiner* (1992-93) 177 CLR 378. In that case the hearing by a Medical Tribunal of certain complaints against medical practitioners had been stayed as an abuse of process, because of prolonged delay in laying complaints after the relevant facts became known. A Royal Commission later reported adversely on the practitioners. Fresh complaints were later laid against them, arising out of the same pattern of professional conduct as had given rise to the earlier complaints, and raising issues which substantially overlapped those which would have arisen under the earlier complaints. By majority (Mason C.J., Deane and Dawson JJ) the High Court held that the fresh complaints had been properly stayed as an abuse of process, the Court of Appeal (NSW) having power to stay, as part of its supervisory jurisdiction under s23 of the *Supreme Court Act* 1970 (NSW) with respect to "the administration of justice in New South Wales", if satisfied that the continuation of the proceedings before the Medical Tribunal would involve unacceptable injustice or unfairness. Their Honours also considered whether the proceedings ought to have been stayed on grounds *analogous* to double jeopardy. They noted at p389 that the Court of Appeal had taken account of the notions of fairness "which informed the principle against double jeopardy", and considered at p398 that it was "fully justified" in doing so. At p398 their Honours said:

> "It is true that the absence of an earlier hearing on the merits and the variations between personal complainants and the details of the complaints mean that, even if a strict rule against double jeopardy is applicable to proceedings in the Tribunal, the current proceedings would not fall within it. *The sense of injustice which inspires the doctrine*

> *against double jeopardy* was, however, plainly present in large measure. It *was*, as Mahoney J.A. pointed out (1991) 25 N.S.W.L.R., at p217) "*an important factor to be weighed in the balance*"". (emphasis added)

Brennan J (with whom Toohey J agreed), dissenting, considered that the Court of Appeal lacked jurisdiction to stay the proceedings in the Tribunal. At pp419-420 his Honour dealt with the double jeopardy aspect, viz:

> "One further point should be mentioned. Kirby P. favoured the making of a stay order because, inter alia, he regarded the proceedings on the [fresh] 1991 complaints as "a species of double jeopardy" (1991) 25 N.S.W.L.R., at pp206-207. In criminal proceedings, the general rule that there should be finality in litigation takes the form of a rule against double jeopardy *Mills v Cooper*, [1967] 2 Q.B. 459, at p.469, per Diplock L.J.. In this case, however, the respondents, far from having been put in jeopardy twice, have never been put in jeopardy at all: all disciplinary proceedings have been stayed. As Dixon J pointed out in *Broome v Chenoweth* (1946) 73 C.L.R. 583, at p.599, the rule against double jeopardy requires for its application a judgment or order in favour of the person in jeopardy which, if not amounting to a discharge or acquittal, at least implies "a failure upon the part of the prosecution to make out the charge or some ingredient therein or even a preliminary condition legally indispensable to a conviction, that is if the condition is of a kind that cannot be fulfilled after the failure of the earlier charge and before the laying of the later charge" (and see *Reg. v Dabhade,* [1993] Q.B. 329). In this case, the respondents have never been put in jeopardy of having a finding made on any of the disciplinary charges alleged against them."

I do not consider that what was said in *Walton v Gardiner* (supra) assists the applicant's argument. Double jeopardy, as such, did not apply in that case, on either the majority or minority approach. There is no question of the applicant being in double jeopardy in this case. Double jeopardy has no application on the facts of this case, even if that principle applies to the disciplinary process under Part IV of the Act.

Mr Reeves also submitted that in deciding to retire the applicant from the Force on the basis, inter alia, of the combined effect of the disciplinary offences for which the applicant had already been disciplined under Part IV, the respondent was in effect imposing a double *penalty* for those offences. He submitted that he lacked power to do so.

I consider that the rule against double jeopardy is a vital rule of fairness in the criminal law. I do not consider that it applies, in terms, in disciplinary proceedings; nor does the associated rule as to double punishment. For example, a decision by the respondent to dismiss a member under Part IV for a disciplinary offence will not bar a criminal prosecution of the member, based on the same facts. The rule is, however, merely the application in the criminal law of a more general principle of fairness, that a person should not be judged twice for the same act. I consider that Mr Reeves' submission in effect raises the question whether the Act on its true construction contemplates the applicant being judged again in relation to his accumulated past disciplinary offences, in the context of a new 'whole of career' review. This is raised for consideration by Mr Reeves' primary submission no.(3) at p6 and I deal with it below. I reject the submissions advanced in support of ground 2 on p6.

(3) Can a conclusion as to the combined effect of established breaches of discipline under Part IV be relied on, when considering 'inability' for the purposes of Part V of the Act?

Mr Reeves submitted that Parts IV and V of the Act vested in the respondent 2 quite separate and distinct sets of powers, in dealing with members of the Force. The disciplinary powers are to be found *exclusively* in Part IV. The 'inability' powers are to be found *exclusively* in Part V which comprises ss85-91, and is headed 'Inability of Member to Discharge Duties'.

Importantly, Mr Reeves noted that the former s86, repealed on 1 December 1996 by Act No.40 of 1996, had made it clear in so many words that Part V did "not apply to or in relation to breaches of discipline to which Part IV applies …"; see p23. He submitted that this meant that breaches of discipline established under Part IV simply were expressly excluded from consideration when the respondent exercised power under PartV; and matters which amounted to breaches of discipline within s76, *had* to be dealt with under Part IV. Mr Lisson submitted that s86 merely distinguished the *procedure* in Part V from the *procedure* (as opposed to the substance) in Part IV; it made it clear that *if* a matter was being dealt with as a breach of discipline under Part IV it could not also be dealt with under Part V. See also pp24-26, I accept Mr Reeves' submission on the proper construction of s86, to this extent; I consider that it is clear that, at least until 1 December 1996, the respondent had no power to institute 'inability' action under Part V founded in part on conduct which, if established, clearly amounted to breaches of discipline within s76, *which were not first dealt with under Part IV.* That conclusion is sufficient to dispose of this application, since the incidents

relied on by the respondent in pars12 and 13 of annexure "A" fell into that category. See p27. However, in deference to the other arguments put, I proceed to deal with them.

Mr Reeves submitted that the structure of the Act showed that the bifurcation of powers between Parts IV and V still clearly obtained after 1 December 1996, despite the repeal of s86. The consequence was that *both* before and after 1 December 1996 a member could *not* be dealt with under Part V for inability to discharge his duties, by relying as grounds for that inability on "breaches of discipline to which Part IV applies". Mr Reeves observed that in this case all but 2 of the grounds relied on in annexure "A" involved incidents which had already been the subject of charges (or investigation) for breaches of discipline, under Part IV. The other 2 grounds, set out in pars12 and 13 of that document, were in the nature of allegations of "breaches of discipline to which Part IV applies". They had never been dealt with under Part IV - the only Part by which they could lawfully be dealt with - but had been "first raised" with the applicant on 12 March 1996 in the document annexure "A" which had issued under Part V; as I have indicated, I accept this point, and the effect of it.

Section 87 in Part V provides:

"Where the Commissioner is of the opinion, on reasonable grounds, that a member -

(a) is not fit to discharge, suited to perform or capable of efficiently performing, the duties the member is employed to perform;

(b) because of circumstances beyond the member's control, is not performing those duties efficiently or satisfactorily; or

(c) is not qualified for the efficient and satisfactory performance of those duties,

the Commissioner shall, by notice in writing, advise the member of the Commissioner's opinion and the grounds on which the Commissioner has formed the opinion, and invite the member, within 14 days, to indicate in writing whether the member agrees with the Commissioner's opinion or to explain in writing any matter referred to in the notice."

Mr Reeves submitted that s87 is expressed in *non-intentional* or *non-volitional* terms, in the sense that all of the matters in pars (a), (b) and (c) of s87 involve some 'element of objective unsuitability' on the part of the member, *irrespective* of whether his particular conduct, the foundation of the respondent's opinion that one of pars (a) or (b) or (c) exists, was *intentional* or *deliberate*. Mr Reeves noted that Part IV of the Act, headed "Discipline", and formerly comprising ss75-84, had been substantially amended with effect from 1 December 1996, also by Act No.40 of 1996. What constitutes "breaches of discipline" is set out in s76(a)-(h); he submitted that in contrast to s87(a), (b) and (c), each of those 8 paragraphs involved some element of *intentional* conduct on the part of the member. The thrust of his submission was that Part V was directed solely at non-intentional or non-volitional matters, while Part IV was directed solely at intentional matters, and so they were quite separate and distinct, directed at different subject matter. I do not consider that s87 is restricted to cases of non-intentional or non-volitional conduct; fitness or

suitability may well turn on intentional or volitional conduct. Nor is s76 restricted to intentional conduct by a member.

In Mr Reeves' submission, s87 also contemplated medical incapacity as a basis for a conclusion in terms of pars (a) or (b) or (c), even though (the now-repealed) s86 had expressly excluded "medical incapacity" from Part V; see p23. This was because (despite s86) *s91 was in Part V,* and expressly contemplated medical incapacity as a ground for inability to "efficiently or satisfactorily perform … duties", and set out the procedure by which a conclusion as to total and permanent incapacity on medical grounds could lead to retirement "on the grounds of inability". Mr Reeves submitted that s91 was restricted to cases of total and permanent incapacity arising on medical grounds, while partial incapacity on medical grounds could be a basis for pars (a) or (b) or (c) in s87; however, I consider that such cases are expressly and exclusively provided for in s91(6). I consider that s91 is a wholly self-contained provision instituting a procedure for dealing with a member's medical incapacity. Although s86 provided that Part V did "not apply" to "medical incapacity", that appears to be a drafting error, the intention probably being that the procedure for dealing with non-medical 'inability' in s87, as set out in ss87-90, should not apply to a case of medical incapacity, the procedure for dealing with the latter being set out in s91.

Mr Reeves observed that in the process of retiring the applicant under Part V there had been no attempt to deal with him under Part IV in relation to the matters in pars12 and 13 of annexure "A". He submitted that those matters could only be dealt with under Part IV; see p16. He noted that Part IV sets out an extensive and detailed procedure for dealing with alleged breaches of discipline. He contrasted this with the procedure set out in Part V. The Part IV procedure gave the applicant a right to a hearing. I accept that there is a significant difference between the respective procedures set out in Part IV and Part V, and at least while s86 was in force a matter which fell within s76 *had* to be dealt with under Part IV.

Mr Reeves submitted, importantly, that the Act did not contemplate taking into account a *course* of established disciplinary misconduct (the incidents in pars1-11 already dealt with under Part IV), for the purposes of dealing with a member under Part V; see pp25-27. Further, he noted that on the materials before the court, as regards the alleged firearm incident set out in par8 of annexure "A", it had been found on investigation under Part IV that there was "insufficient evidence to implicate" the applicant; yet in par5 of the respondent's affidavit (p5) he said that he had relied on "a pattern of alcohol abuse associated with irresponsible use of firearms". Mr Reeves submitted that it *appeared* on the materials before the Court that the respondent had nevertheless relied in part on the incident described in par8, and ignored its outcome as set out in par4 on p2, in reaching his conclusion adverse to the

applicant on 13 January 1997. I observe that it would be clearly wrong to have done so; I note that the materials on which the respondent based his ultimate conclusion of 13 January 1997 as to the applicant's "pattern of conduct", are not before the court, and the point cannot be determined.

As noted at p16, Mr Reeves submitted that the 2 alleged incidents referred to in pars12 and 13 of annexure "A", were properly characterised as breaches of discipline in terms of s76, and therefore *had* to be dealt with under Part IV, and *not* Part V. They had not as yet been dealt with under Part IV. The applicant's first notice of these alleged incidents of 21 July 1995, and 25 July and 18 December 1995, was the Notice of Inability of 12 March 1996, some 8 months after they were alleged to have occurred. As to that lapse of time, Mr Reeves noted in passing that by an amendment which came into force on 1 December 1996 there was now a time limit of 6 months to institute action in relation to a disciplinary offence after it was discovered, "or such longer period as a magistrate allows"; see now s162(6). I note that prior to 1 December 1996 no such statutory time-limit existed.

Mr Reeves submitted that the reference to the applicant's "general pattern of … deceit" in par5 of the respondent's affidavit (at p5), led to the inference that the respondent had relied in part on the incidents in pars12 and 13 of annexure "A", when acting under Part V on 13 January 1997, there being no

suggestion to the contrary. It was not competent to so rely, for the reasons at pp16, 18. I consider that no such inference as that relied on could safely be drawn, in the absence of the necessary foundation materials.

Mr Reeves submitted that the Act drew a clear distinction between *dismissal* under Part IV from the Force for a disciplinary offence, and *retirement* for 'inability' under Part V for other matters, including medical matters. "Dismiss" and "retire" are defined in s4 of the Act as follows:

> ""Dismiss", in Parts IV, V and VI, in relation to a member, means to terminate the employment of the member because of a breach of discipline;
>
> "retire", in Parts IV, V and VI, in relation to a member, means to terminate the employment of the member otherwise than by dismissing the member."

I note that despite the reference in both these definitions to "Parts IV, V and VI" there is no reference to "retire" in Part IV, and none to "dismiss" in Part V. Clearly enough, the Act contemplates that a breach of discipline may result in a dismissal from the Force under Part IV, while an 'inability' under Part V may result in a compulsory retirement. Parts IV and V are directed at different issues, as Mr Lisson submitted.

Mr Reeves observed that in Part VI of the Act which provides for appeals, Division 2 provides that appeals from decisions under Parts IV and V are to be respectively dealt with by a Disciplinary Appeal Board and an Inability Appeal

Board. He submitted that this bifurcation in the appeal process supported the view that the Act intended that disciplinary matters in Part IV and 'inability' matters in Part V be treated as quite separate and distinct, throughout. I observe that the respective procedures, like the respective issues in those Parts, are clearly separate and distinct.

The respondent's submissions

Mr Lisson usefully reviewed the history of amendments to the Act, which led to the present Parts IV and V.

In the original Act, No.18 of 1979, s23 in Division 3 of Part I was directed to the same type of matters now dealt with in Part V, except s91; it gave power to the respondent, inter alia, to retire or dismiss. Section 24 dealt with retirement on health grounds, the same subject now dealt with by s91. In the 1979 Act disciplinary offences and the powers of the respondent in relation thereto were provided for by Divisions 2 and 3 of Part V, headed 'Discipline'. The Police Appeal Board, established under Part VI of the 1979 Act, heard and determined charges of disciplinary offences where the respondent decided that a finding of guilt should carry dismissal.

By Act No.74 of 1983, s23 was recast to some degree, to incorporate the 'medical unfitness' ground formerly dealt with in s24, and to limit the respondent to a power to 'retire', as the ultimate sanction under s23. The

disciplinary provisions were also recast, giving the respondent increased power, but maintaining the same general approach whereby the Police Appeal Board heard disciplinary charges where the respondent considered that a finding of guilt should carry dismissal.

By Act No.20 of 1994, s23 was repealed and a new Part V was introduced dealing with 'Inability of Member to Discharge Duties', very similar to the present Part V. Included in it was s86 which provided:

> "This Part does not apply to or in relation to breaches of discipline to which Part IV applies or in relation to medical incapacity."

It seems that the words 'or in relation to medical incapacity' were inserted in error, since s91 was in fact inserted in Part V. I indicated at p18 what was probably intended. At the same time a new Part IV was inserted in the Act, dealing with 'discipline'. It strengthened the power of the respondent further, giving him power to dismiss as the ultimate sanction for disciplinary offences. The Police Appeal Board disappeared. A new Part VI dealing with 'Appeals' was inserted, Division 2 of which provided for 'Inability and Disciplinary Appeals' to be heard by separate Appeals Boards.

Finally, by Act No.40 of 1996 which came into force on 1 December 1996, Divisions 2 and 3 of Part IV were recast, and s86 was repealed.

As to Part V Mr Lisson submitted that the matters raised by s87 (p16) must at all times be 'live' questions for the respondent, in the sense that he must *always* retain a continuing confidence in each member's fitness, suitability and capability to discharge his duties as a member of the Force. I accept that. The mechanism by which the respondent sought to carry out his function under Part V was what has been termed in these proceedings a 'whole of career review'. Mr Lisson also submitted that the appeal in Part VI involved a hearing de novo; however, I observe that whether an appeal is by way of a hearing de novo or not, is a discretionary matter for the Board under s95(3), and in any event arises only where "additional material" is admitted on appeal.

Mr Lisson did not concede that the respondent *had* to deal under Part IV with the incidents in pars12 and 13, if he dealt with them at all. He did not concede that they fell within the description of 'breaches of discipline' for the purposes of s76. He submitted that it was open for the respondent either to deal with them under Part IV as breaches of discipline, or to treat them (as he had in this case) as evidence of the member's character, which was the issue for the purposes of Part V. I do not accept that submission. As at 12 March 1996, s86 was in force. As I indicated at pp15-16, I consider that the matters in pars12 and 13 fell within the scope of s76 as breaches of discipline, and *had* to be dealt with under Part IV. Clearly, they were not; it was not competent to

ignore Part IV, and deal with them simply under Part V, as the respondent had proceeded to do on 12 March 1996.

As to the different procedures in Parts IV and V, Mr Lisson rightly pointed out that the *issues* involved in these Parts were different: in Part V the question was the fitness etc. of the member to continue to serve as a member of the Force. The ultimate sanctions under Parts IV and V were also different: dismissal under Part IV, and retirement under Part V. Despite the different procedures as between Parts IV and V, Mr Lisson submitted that the provisions in Parts V and VI were designed to ensure procedural fairness to members whose fitness or suitability to carry out their duties was under question. I accept that. He relied on the existence of these protective provisions to support his submission that the respondent should *not* be required to deal with incidents under the disciplinary process of Part IV, *before* relying on those incidents as a basis for action under Part V. However, I do not consider that the difference in the procedures under Parts IV and V can be ignored in this way; they are very real. The Part V procedure is *not* the same as the procedure in Part IV, particularly as regards the conduct of the hearing in the (now repealed) s82(1) and (the present) s84B. As Mr Reeves put it, there is an 'ex parte review' under Part V, as opposed to a hearing under Part IV, and this difference can have practical effects in the respective appeal processes. I consider that breaches of discipline must be dealt with in accordance with Part IV.

Mr Lisson submitted that the (repealed) s86 did not mean that when the respondent took action under Part V he was precluded from taking into account the background of the particular member, including his entire history of disciplinary offences, which bore on the separate 'inability' issue raised by Part V. That is to say, he submits that the procedure adopted by the respondent in this case was appropriate, in relation at least to taking into consideration under Part V the matters in pars1-11 of annexure "A". I have already indicated (p15) that I consider that s86 makes it clear that individual breaches of discipline are to be dealt with under Part IV, as matters quite apart and distinct from the 'inability' issues with which Part V is concerned. That does not address Mr Lisson's present submission, which raises the most important question in these proceedings, as far as the respondent is concerned.

Conclusions

I have already indicated my conclusions on the *functus officio* and double jeopardy grounds, at pp10-11, and 14.

I consider that matters which fall within the scope of s76 as breaches of discipline are required to be dealt with under Part IV of the Act. Such matters cannot be dealt with *in the first instance* as grounds for inability under Part V. Prior to 1 December 1996, s86 made this quite clear. Despite the repeal of that provision, in my opinion the structure of the Act makes it clear that this

position still holds: matters which are properly categorized as falling within s76 *must* be dealt with under Part IV.

In this case, the matters referred to in pars12 and 13 of annexure "A" fall within the scope of s76 and must be dealt with under Part IV, if dealt with at all. As this was not done in this case, the respondent could not properly rely on those matters in the course of dealing with the applicant under Part V, until they had been dealt with under Part IV, and established. It follows that the respondent wrongly took these matters into account in his opinion of 12 March 1996 annexure "A", and in his decision of 13 January 1997 annexure "B". This he was not entitled to do, and the error goes to his jurisdiction. In any event, an injunction should issue in light of the error.

On the general question - whether the respondent may take into account in a proceeding under Part V a member's history of disciplinary offences - I am inclined to accept Mr Lisson's submission. A 'whole of career' review is warranted, on that approach. In such a review, almost inevitably, a member's history of *established* disciplinary offences will be taken into account. The cumulative effect of a number of disciplinary offences may reveal a 'pattern of conduct' of the type to which the respondent referred at par3 on p5, warranting a conclusion under s87(a) of unfitness or unsuitability. Further, I incline to the view that in examining the history of disciplinary offences, the respondent may for the purposes of the Part V investigation, take account of facts

established or admitted in the Part IV enquiry, relevant to the fitness or suitability of the member, even if the eventual outcome of the Part IV enquiry resulted in the dismissal of the particular charge.

For the reasons set out in relation to the wrongful taking into account of the matters in pars12 and 13, as set out at p27, I imposed the restraint sought, on 15 July.

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