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LC Paper No. CB(2) 542/99-00(01)

HCAL92/97

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ADMINISTRATIVE LAW PROCEEDINGS

ACTION NO.92 OF 1997

IN THE MATTER OF an application by Ng Kam Chuen for leave to apply for Judicial Review (Order 53, Rule 3)

and

IN THE MATTER OF a decision of the Commissioner of Police dated 11th July 1997 dismissing Ng Kam Chuen's appeal and ordering his dismissal from 11th July 1997.

BETWEEN

NG KAM CHUEN　　Applicant

and

SECRETARY FOR JUSTICE for and on behalf of COMMISSIONER OF POLICE　　Respondent

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Coram : The Hon Mr Justice Stone in Court

Dates of Hearing : 8th July 1998, 4th January and 15th March 1999

Date of Handing Down Judgment : 1st April 1999

JUDGMENT

The Action

This is an application for judicial review consequent upon the dismissal from the Hong Kong Police Force, as from 11th July 1997, of the Applicant herein, Mr Ng Kam Chuen.

Leave to apply for judicial review was granted by Mr Justice Keith on 24th November 1997, such grant on terms being varied by the Court of Appeal on 6th February 1998, as a result of which the Applicant herein was permitted to argue the judicial review of the decisions and upon the grounds in respect of which leave had been sought.

The Circumstances Giving Rise to the Action

The Applicant, Ng Kam Chuen, was a police constable with over 17 years of service with the Hong Kong Police. He appears to have had a relatively successful career; indeed, he received a Commanding Officer's Commendation on 31st December 1980 arising from the performance of his duties with regard to a series of goldsmith robberies.

However, Mr Ng got into debt arising from investments in stocks and foreign exchange. In fact, by July 1996, the evidence is that he owed various banks and financial institutions a sum of in or around HK$435,000.

In due course, P.C. Ng disclosed his indebtedness to his superior officers, and notwithstanding assistance from the Police Welfare Officer in

A B C D E F G H I J K L M N O P Q R S T U

negotiating a restricted and extended payment schedule, on 7th January 1997 he was served with a Notice of Disciplinary Proceedings to be held on 15th January 1997. Two charges were involved: Charge A, namely absence from duty without leave or good cause, and Charge B, which was in the form of Contravention of Police Orders. This judicial review is not concerned in any way with Charge A, and focuses *solely* upon Charge B.

Charge B was framed as follows:-

"Charge: *Contravention of Police Orders*

Contrary to Regulation 3(2)(e) of the Police (Discipline) Regulation, Cap.232.

Particulars: *PC 21683, NG Kam-chuen, of the Royal Hong Kong Police Force, you are charged that in the period between 6 Feb 1996 to 4 Sept 1996 in Hong Kong, you did fail to be prudent in your financial affairs whereby your efficiency as a police officer was impaired, contrary to Police General Orders No.6-01 para (8)."*

The disciplinary proceedings were conducted by the Force Disciplinary Tribunal, and on 31st January 1997 the Applicant was found Guilty of the charge and awarded the sentence of compulsory resignation.

In accordance with the Police (Disciplinary) Regulations, the case was forwarded to the Police Discipline Officer for review. On 12th May 1997 the Force Discipline Officer confirmed the finding of Guilty, and subsequent to the Applicant making representations to show cause why the sentence should not be increased, on 21st May 1997 the Force Discipline Officer informed the Applicant that the sentence was increased to dismissal.

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A written appeal against both the Guilty finding and the award of dismissal was submitted to the Commissioner of Police, and on 7th July 1997 the Commissioner dismissed the appeal, thereby putting in train the review process which now finally has been completed. The five decisions in respect of which relief is sought are conveniently set out in the Notice of Application for Leave; as may be anticipated, the primary decision under attack is the initial decision of the Disciplinary Tribunal made on 15th January 1997 finding the Applicant Guilty of Charge B, which forms the root of the other four decisions 'up the line', so to speak, culminating in the decision of the Commissioner of Police to dismiss the Applicant's appeal and to order his dismissal from the Force.

The Focus of the Argument: PGO 6-01(8)

Police General Order 6-01(8) reads as follows:-

> *"A police officer shall be prudent in his financial affairs. Serious pecuniary embarrassment from whatever cause is regarded as a circumstance which impairs the efficiency of an officer."*

The principal submission of Miss Margaret Ng, who has appeared on behalf of the Applicant throughout these proceedings, was that the original Guilty finding made by the Adjudicating Officer was fundamentally in error. This, said Miss Ng, was because in terms of the charge as laid against her client the Adjudicating Officer had proceeded upon the false premise that upon proof of the fact of "serious pecuniary embarrassment", an *irrebuttable* presumption thereby arose as to the impairment of the Applicant's efficiency as a police officer. This approach, said Miss Ng, was exemplified by those passages in

A B C D E F G H I J K L M N O P Q R S T U

the judgment whereby the Adjudicating Officer noted (at page 65 of the Record):-

> "... By the second sentence [of the PGO], the CP declares that serious pecuniary embarrassment (on the part of the particular police officer) from whatever cause is regarded as a circumstance which impairs the efficiency of that officer.
>
> In other words, if it is proved that an officer has been imprudent in his financial affairs, and if it is proved that as a result of the imprudence, the officer suffers serious pecuniary embarrassment, the officer can be found guilty of having contravened PGO 6-01 para.(8)..."

And further (at page 67 of the Record):-

> "... The defaulter's efficiency as a police officer is deemed to have been impaired by what is contained in the second sentence of PGO 6-01(8), and my previous description on how the efficiency of a police officer is gauged. ..."

This approach, said Miss Ng, was fundamentally wrong. As a matter of construction impairment of efficiency remained a key element of the disciplinary offence, as was exemplified by the use of the word 'whereby' in the wording of the charge the subject of the conviction, and was a misconception which had led the Adjudicating Officer into irremediable error.

In response to this argument, Mr Whitehead for the Commissioner adopted a bold forensic tack. His submission was short. It was this. PGO 6-01(8) solely mandated financial prudence, so that if the Tribunal made (as it here clearly did) a specific finding of financial imprudence, that was the offence and the charge was thus made out. Moreover, Miss Ng was wrong in

A B C D E F G H I J K L M N O P Q R S T U

suggesting that to make the charge good the twin 'pillars' of imprudence and impairment must be established. To the contrary, the charge was made out with a specific finding in terms of the first 'pillar' only, namely imprudence, and an officer could be guilty of the offence even if he was *not* shown to fall foul of the second element, that is, impairment of efficiency; in fact, such impairment was a matter going to sentence only, and not to conviction.

If this construction be correct, submitted Mr Whitehead, no harm had been done in this case. Although on the face of the record the Adjudicating Officer had clearly proceeded upon the basis that the second 'pillar', namely impairment, had been satisfied by reason of what he clearly had regarded as a deeming provision, there was no doubt that he had unequivocally reached the first 'pillar', the financial imprudence conclusion. Accordingly it did not matter if upon analysis the Adjudicating Officer had turned out to be right for the wrong reason. On this analysis, said Mr Whitehead, one primary finding only was necessary, and the Tribunal had undoubtedly reached that conclusion. The rest of the charge as laid was "verbiage which can be discarded", unless such approach could be said to have prejudiced the Applicant's position, which was clearly not the case here. Reduced to the bare bones, therefore, Mr Whitehead's position, as he succinctly expressed it, was that it was "one pillar or nothing", so that if the charge were to be construed by the Court as containing two distinct elements, that is, both imprudence *and* impairment of efficiency, he could not sustain, and indeed would not seek to sustain, the conviction.

This submission was carefully and thoughtfully advanced. The problem, however, is that I have difficulty in persuading myself that it is correct.

A B C D E F G H I J K L M N O P Q R S T U

To the contrary, I think that it is wrong. Given the terminology of PGO 6-01(8), and the present charge based thereon, I am unable to adopt the singularity of construction urged by Mr Whitehead. I do not consider that the first ten words of PGO 6-01(8) provide the sole focus, nor that the words in the Particulars of the Charge, *viz.*, "whereby your efficiency as a police officer was impaired, contrary to Police General Order No.6-01 para.(8)" are of relevance to sentence only and constitute no more than "verbiage".

As to the true import of this particular General Order, Counsel are agreed that PGO 6-01(8) is not most happily framed. Indeed, in the interlocutory appeal in this case against the restriction upon the terms of the leave granted to the Applicant, wherein the Court of Appeal accepted Miss Ng's contention that the construction of the Order as containing other than an irrebuttable presumption was arguable, Nazareth JA made reference to the "lack of clarity in the provision", whilst Liu JA noted that it is "not an easy provision to apply" and Leong JA referred to the fact that the Order was "obscure" in terms of the relationship between the serious pecuniary embarrassment and the impairment of efficiency.

I am further told by Counsel in this case that so far as they are aware (and perhaps somewhat surprisingly) this Order has not yet been the subject of judicial scrutiny in the context of a fully argued case. At one stage early in this case it had been hoped that the issue would come squarely before the Court of Appeal in ***Ng Wai-sang v. Secretary for Justice***, Civil Appeal No.18 of 1998, but in the event this proved unnecessary by reason of the fact that the Applicant in that case had pleaded guilty at his disciplinary tribunal not only to serious pecuniary embarrassment but also to resulting impairment of his

efficiency as a police officer. So that in the event the issue did not arise for decision.

Be that as it may. The import of PGO 6-01(8) is now raised for consideration in this case. And, as I have earlier indicated, I reject Mr Whitehead's invitation to look at the terms of PGO 6-01(8), together with the charge based thereon, in narrow focus. In my judgment, this Applicant faced a 'two pillar' charge sounding both to financial imprudence and the consequent impairment of efficiency; were it otherwise, I am able to discern neither purpose nor relevance in the use of the phrase "whereby your efficiency as a police officer was impaired..." as this appears on the face of the charge upon which this Applicant now stands convicted.

Strictly speaking this is perhaps as far as this Court needs to go for the purpose of the particular decision in this case, given the Court's rejection of Mr Whitehead's "one pillar or nothing" approach, and the view I have expressed as to the twin requirements of the charge. And in terms of the element of impairment of efficiency, the debate as to whether such impairment is the subject of an irrebuttable presumption deriving from the wording of PGO 6-01(8) — "serious pecuniary embarrassment from whatever cause is regarded as a circumstance which impairs the efficiency of an officer" — or whether, as Miss Ng argued both in this Court and in the Court of Appeal, this should be construed as no more than raising a rebuttable presumption, is clearly a matter of considerable importance. Indeed, the gravamen of Miss Ng's criticism of what occurred in the Disciplinary Tribunal, with which I agree, was that the efficiency impairment issue was never properly addressed, the Administrative Officer expressly relying in this regard upon what he considered.

A B C D E F G H I J K L M N O P Q R S T U

to be a conclusive presumption, when such evidence as there was in fact pointed to the Applicant's efficiency as *not* having been impaired.

This is an issue which is clearly susceptible to disparate views. For example, in the context of this case, at the application for leave, the learned judge then observed that:-

> "The link between serious pecuniary embarrassment and impairment of an officer's efficiency is sufficiently obvious to justify the conclusive presumption that the former results in the latter ...",

whilst in ***Ng Wai-sang***, *op.cit.*, I note that counsel for the appellant in that case wished to advance the argument that PGO 6-01(8) raised an irrebuttable presumption which was irrational and in breach of Article 11(1) of the Hong Kong Bill of Rights.

With respect, I am unable to agree with this interpretation. In my judgment, a reasonable and purposive construction of the present charge based on PGO 6-01(8) is that the Force bears the ultimate legal burden of establishing *both* serious pecuniary embarrassment stemming from financial imprudence and consequent impairment of efficiency of the officer concerned, but that upon the demonstration of serious pecuniary embarrassment (in most instances, I should have thought, something which will be as plain as a pikestaff) the evidential burden then shifts to the accused officer to establish that his efficiency as an officer has *not* been impaired. Whether this be put in terms of responding to a rebuttable presumption or in terms of the shifting of the evidential burden does not seem to me to much matter; in disciplinary proceedings based on this Order (at least wherein the charge is framed in like

terms to that of the present), the Force is empowered to start from the premise that one state of affairs (serious pecuniary embarrassment) does in fact lead to the other (impairment of efficiency as an officer) without the necessity of leading evidence on the point, and the ball is then in the accused officer's court to displace the view expressed within this particular General Police Order. What in my judgment it does *not* do is to sanction an approach whereby the issue of impairment of efficiency is, in effect, simply discarded from consideration by reason of the perception that such is conclusively presumed within the terms of the Order.

I do not think that such a construction does violence either to the wording of PGO 6-01(8), nor to the clear policy underpinning it. Equally, it seems to me to promote an essentially fair trial of the issues raised in what must be widely varying personal circumstances which arise in the context of the charges laid in disciplinary proceedings pursuant to this Order. To take an extreme case : could it properly be thought that an outstanding officer who had won a series of Commission's Commendations at the same time as imprudently getting into serious debt had thereby necessarily impaired his efficiency as a police officer? One would have thought not, and yet upon the irrebuttable presumption construction this result must follow. Perhaps it was with similar considerations in mind when, in his judgment in the appeal as to the ambit of leave in this case, Nazareth JA observed:-

> "... To argue that it is not financial imprudence but impaired efficiency that ought to be avoided is facile. Yet it seems unarguable that even serious pecuniary embarrassment need not necessarily impair the efficiency of an officer. The lack of clarity in this provision, operated in this instance to such devastatingly penal effect, goes even further. Apparently it

A B C D E F G H I J K L M N O P Q R S T U

> is serious pecuniary embarrassment that is seen to be the mischief targeted because it impairs efficiency. Yet it is to be merely regarded as a circumstance which impairs efficiency. If that is to be the unequivocal equivalent of efficiency impaired to a significant degree (it could hardly be impairment to any lesser extent) should not that be unequivocally stated? Arguably, delegated powers to make orders have to be exercised in the same reasonable way that other delegated administrative and legislative powers are required to be exercised. It must follow that the reasonableness of a provision of such penal potential that deems serious pecuniary embarrassment to impair an officer's efficiency and likewise a construction to that effect, is plainly arguable. ..."

I further note that it was also Mr Whitehead's view that *if* he was wrong upon his analysis as to this being a 'one pillar' charge, and *if* there was a presumption at all, then in his view Miss Ng was correct, and it was a rebuttable presumption, whereas the learned Administrative Officer had in this instance clearly treated it as irrebuttable.

It is my view, therefore, for the reasons outlined above, that the primary decision of the Disciplinary Tribunal cannot be permitted to stand.

Other Grounds

During the course of her attractive submission, Miss Ng advanced a number of other grounds in support of her client's application. However, she has succeeded on her primary submission and accordingly there is no need to deal with these matters in any detail. For the sake of completeness, however, and if I have been wrong on the primary point, I merely observe that

A I should not have been minded to interfere with the decision below upon any other basis advanced.

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C **Order**

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It follows from the foregoing that I will allow *certiorari* to issue to call up the decisions in question and to quash them. The consequence will be that the matter must be reconsidered at the convenience of the Commissioner.

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I also make an Order *nisi* that the Applicant is to have his costs of this judicial review, such costs to be taxed, if not agreed, in accordance with the Legal Aid Regulations.

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If such be necessary, I give liberty to apply as to the precise terms of the Order.

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I thank both Counsel for their considerable assistance in what was regrettably an attenuated application.

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(William Stone)
Judge of the Court of First Instance

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Miss Margaret Ng, inst'd by M/s W.K. To & Co., for the Applicant

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Mr Robert Whitehead, inst'd by the Department of Justice, for the Respondent

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