IN THE SUPREME COURT OF NEW ZEALAND SC 57/2007

IN THE MATTER of a Civil Appeal

BETWEEN **MARK RAYMOND CREEDY**

Appellant

AND **COMMISSIONER OF POLICE**

Respondent

Hearing 10 March 2008

Court Elias CJ
Blanchard J
Tipping J
McGrath J
Wilson J

Counsel J A Hope, S A McKenna and M O Hope for Appellant
Solicitor-General, C C Inglis and C Curran-Tietjens for Respondent

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CIVIL APPEAL

10.00am

Elias CJ Thank you.

Hope May it please the Court, counsel's name is Hope and I appear for the appellant with Mr McKenna and Miss Hope.

Elias CJ Thank you Mr Hope, Mr McKenna, Miss Hope.

Solicitor Miss Inglis and Miss Curran-Tietjens appear with me for the respondent Your Honours.

Elias CJ Thank you Mr Solicitor, Miss Inglis and Miss Curran-Tietjens. Yes Mr Hope.

Hope Your Honours both limbs of this appeal are about statutory interpretation and in particular the relationships between the various Acts, and in respect of the s.114 leave to raise a grievance issue after 90 days, the consideration of the appeal relates not just to s.114 and s.115 of the Employment Relations Act, but also as to how those sections fit into the rest of the Act, the policy of the Act, and the trend in employment relations as exemplified through the Labour Relations Act 1987 and the various amendments; the Employment Contracts Act 1991 and then the Employment Relations Act 2000, and amendments to that Act. The second limb of the appeal, that being the jurisdiction of the Employment Relations Authority or the Court to examine the conduct of a s.12 Police Act Enquiry, which is colloquially referred to as a Tribunal, this limb of the appeal requires a close examination of the relationship between the Employment Relations Act on the one hand and the Police Act and regulations made under it on the other hand. It will also necessitate consideration of the development of the Police legislation from the first Civil Police Force from 1886 through to the present day, and in particular considering the development of the contra between the Crown and members of Police in 1886 and looking at how that has now arrived at today. The second limb of the appeal also involves consideration as to what extent Parliament has intended personal grievance jurisdiction to apply to the employment relationship between members of Police and the Crown, and on that point it's submitted that s.161 of the Employment Relations Act encompasses as part of part 9 of the Employment Relations Act all of the actions of the Police Commissioner as they relate to relations with sworn members of Police and in particular the conduct of the Tribunal appointed under s.12 of the Police Act. Now firstly Ma'am I'd like to turn to the s.114, the leave to raise a grievance out of time issue. It's helpful here I believe Your Honours to firstly look at the definition of an exceptional circumstance and that's set out in *Wilkins & Field v Fortune*. It's in volume 2 of the bundle, the appellant's bundle, and it's under tab 1. Now that's a decision of the Court of Appeal, and it's a decision given under the Employment Contracts Act and not the Employment Relations Act. It's relevant to note at this stage Your Honours that the wording of the Personal Grievance Provisions in s.114 is virtually identical to the wording in the Employment Contracts Act 1991, and in fact the wording in s.114(4) which is the leave provision, is identical except where the word 'authority' is used, in the current Act the word 'Employment Tribunal' was used under the former Act. In *Wilkins & Field*, at page 76 of the decision, lines 30 to 32, the Court said 'exceptional is a limiting adjective. Exceptional circumstances

are circumstances which are unusual, outside the common run, perhaps something more than special, and less than extraordinary'.

Elias CJ That's just a dictionary definition isn't it? It's not attributed, but I think that is a dictionary definition.

Hope It's the definition regardless Ma'am that is applied to this test and has been since this decision. In *MacDonald v Health Technology Ltd* under tab 6, Judge Travis of the Employment Court gave a slightly different definition, and I'm quoting here from the headnote and it's no.5 on the headnote and it's the second page in on tab 6 and the words 'exceptional circumstances in the context of s.33 of a liberal statute should be given an appropriately liberal interpretation reflecting contemporary attitudes to such matters. The circumstances must be shown to be out of the ordinary. Not factors which might affect all cases. The circumstances must be judged on the facts of each individual case'. So that's Judge Travis's take on exceptional circumstances. This decision pre-dates *Wilkins & Field*, and *Wilkins & Field* has

Elias CJ You're content with *Wilkins & Field?*

Hope Yes I am Ma'am, yes I am. Having looked at it I make this observation about the definition that lawyers and members of the public, lay people, will have a different view of what an exceptional circumstance is. Exceptional in the non-legal language implies a very high threshold, whereas a simple reading of the Court of Appeal's definition of exceptional circumstances in *Wilkins & Field* shows that it's not as high as perhaps a lay person may conceive it to be and it may not be as high as the way Courts have interpreted it as being. If the circumstances are unusual and outside the common run, it doesn't make it rare, and exceptional circumstances are not rare, but it's in my submission they're treated, this provision in the Employment Relations Act, is treated as if it's an extremely high threshold that requires something rare, and it doesn't in my submission. It's just something unusual and outside the common run and there's a little rider added to that. 'Perhaps something more than special, but less than extraordinary'. So it's not a huge barrier to get over. I'll come back to that Your Honours because what hasn't been looked at in *Wilkins & Field* or in more recent decisions is what the rationale for having an exceptional circumstance test is and how that should be interpreted. It's my submission Your Honours that although the wording of s.114(4) is identical to the equivalent provision in the Employment Contracts Act, that the exceptional circumstances test should be viewed differently and you may ask how I can say that where we're talking about an employment law statute relating to the same matters, personal grievances, relating to the same 90 day test and relating to a leave

application couched in identical terms, but it's necessary to view the meaning of the text from the whole context of the Act, and I'm

Elias CJ Isn't that really just application you're talking about rather than meaning? You're arguing aren't you for a contextual, well there has to be a contextual application. Are you really suggesting that the meaning of the language has changed?

Hope No Ma'am you're right, I am focusing more on the application and my submission is, and I'll develop the theme, that the test under the Employment Relations Act requires a less strict application than under the Employment Contracts Act. I refer Your Honours to s.5 of the Interpretation Act 1999 in the respondent's bundle of authorities under tab 1, and here the legislature assists with the interpretation of the meaning of 'legislation' by saying 'that the meaning of enactment must be ascertained from its text and in light of its purpose'.

Elias CJ Well that's really nothing new is it?

Hope No it's not, although it wasn't expressed so in those terms under the old Interpretation Act.

Blanchard J But where the same language has been carried forward, you really would think that the legislature was intending a similar application. Here all they've done is provide some examples in s.115.

Hope Except Sir the Act has significantly changed and perhaps I can take

Blanchard J Yes but if they were intending a different application they would surely have used different language.

Hope Well I would suggest not Sir, although the different language has been used in different sections of the Act which then help to define how that provision should be applied. So if you look at in the respondent's bundle of additional authorities under tab.5, decision of Justices Baragwanath and Courtney in *BDM Grange Limited*. Now this is a High Court decision but it was a jurisdictional argument as to certain causes of action whether the Employment Relations Authority had jurisdiction to deal with them or whether the High Court had jurisdiction. In this decision at page 359, Justice Baragwanath has very usefully set out a legislative background and he starts at para.18 of the decision, at the top of page 359, and he takes the Court through a very brief history of employment legislation

Elias CJ What proposition are you deriving from this case Mr Hope?

Hope That if you turn to para.23 on page 360, the objective of the ERA was to introduce a fresh approach to the resolution of disputes arising in the context of employment relations, with the emphasis on a new means of dispute resolution that would be efficient, prompt and cheap.

Tipping J Mr Hope is your whole argument dependent on there being some difference between meaning and application, and if it is could you elaborate?

Hope Really, well

Tipping J You agree with the Chief Justice that the meaning is the same

Hope Yes

Tipping J But you say the application should differ. For myself I would need some help to see how that works.

Hope Well it's my submission that the application under the Employment Relations Act should be less strict.

Tipping J But if there's the same strictness of meaning, why should the application be less strict?

Hope From a statutory interpretation point of view the Court's entitled to look at the context in which the term is used and so you have as comparing the Employment Contracts Act with the Employment Relations Act, you have a certain restriction of the availability of a personal grievance remedy so you have for instance a restriction in the overall time limit for raising a personal grievance application as between the two Acts -it drops from six years to three years. You have, and that's s.114(6) where the time limit for filing a personal grievance application assuming

Elias CJ Doesn't that suggest that, and indeed as this suggestion in para.23 of the judgment you are taking us to, emphasises that the new Act in fact underscores the need for speed?

Hope Yes it does and can I come back to that Your Honour because the new Act looks at speed at an initial stage and the focus is on mediation, so if you look at the combination of s.3 and 101, so you have the object provisions of the Act in s.3, and you'll find those in the appellant's bundle, volume 1, under tab 4 Your Honours, and the first two pages of that are the objects in s.3 and the objects in s.101, and if we can focus on s.3(a)v, Roman 5, promotion of mediation as the primary problem-solving mechanism, and then turning to s.101 which is the object's provision of part 9, and part 9 of the Act is specifically imported into Police Employment Provisions by a

section of the Police Act, and their 101(a), the focus is on mediation services, 101(a)(b), looking at quick resolution, and 101(b), facilitating the raising of personal grievances. Now there's an internal conflict in the Act. On the one hand it's looking at speeding up personal grievances, and it reduces the limitation period from six years to three years. It focuses on mediation as a way of resolving the dispute. It also pulls in as compared with the Employment Contracts Act more employment disputes into the personal grievance jurisdiction so you have s.114

Tipping J But if the general connotation is on speediness I don't understand how that assists in a more liberal application of the 90 day rule.

Hope Well I was just looking sir for the point about the common law claim of wrongful dismissal also being removed and being pulled into the personal grievance jurisdiction was another matter, but

Blanchard J But how does that throw any light on the current question?

Hope Because the nature of the grievance jurisdiction is changing and in some ways it gets tighter but there' a tension created in the Act.

Blanchard J Well it's putting everything into the same bag and requiring speed.

Hope Yes it is, but for mediation, because it doesn't require

Blanchard J What are you mediating?

Hope A dispute.

Blanchard J A grievance.

Hope Yes, but

Blanchard J So therefore you have to raise the grievance quickly in order that it can be mediated?

Hope Yes.

Blanchard J If you haven't raised a grievance you aren't mediating.

Hope No, but you can raise a grievance and choose not to mediate, and if the other party doesn't require you to you still have three years to then pursue your grievance in the Employment Relations Authority

Blanchard J But you have to raise the grievance quickly?

Hope Yes, yes.

Blanchard J And that's what the section we're concerned with is all about

Hope Yes.

Blanchard J And Parliament hasn't changed the language.

Hope No.

Blanchard J All they've done is put in some examples. Now you could look at the examples perhaps and say well from those examples you can see that a different approach is needed, but I really don't see that all the rest of this about the context of the Act is taking you very far given Parliament's significant decision not to change the language in 114.

Hope But what it did change was the emphasis on mediation and what has not been

Blanchard J But you're missing my point. You don't mediate anything unless a personal grievance is first raised. We're concerned with the earlier stage – the raising of the grievance.

Hope Yes Sir.

Blanchard J So the emphasis on mediation is irrelevant.

Hope Well I would suggest not irrelevant Sir

Blanchard J Well how can you mediate something that hasn't been raised?

Hope But if Your Honour would look at 114(4) which is the leave provision, it talks about giving leave subject to such conditions if any as it thinks fit, so for instance

Blanchard J That was in the original language.

Hope Yes it was Sir, yes it was, but it's a provision that I have not seen in any cases used, so if for instance the focus is on mediation but not on ultimately pulling back the whole of the limitation period to 90 days – so provided you raise your grievance, then technically you could sit on it for three years, if no one took exception and required you to go to mediation, you could sit on it and then go to the Employment Relations Authority with a claim. Now that could arguably be called a stale grievance and if you went to the Employment Relations Authority at that stage and said 'I

want to be reinstated' reinstatement's the primary remedy, well you would probably get short shrift, and

Tipping J But no question of conditions arises until you've satisfied the criteria for the grant of leave.

Hope Yes Sir.

Tipping J So with great respect I think your dog is rather biting its tail Mr Hope. You can't invoke the condition the part, are you saying as my brother has pointed out, was there anyway. I'm completely lost as to what this part imposed conditions does to strengthen your case.

Hope Well what I'm saying Sir, perhaps if I can turn to the rationale for the 90 day period. In the 1987 Labour Relations Act where the Personal Grievance Jurisdiction became wider then but was still restricted to collective employment agreements or awards, and I'm looking under tab 7 of the appellant's bundle, volume 1, and the s.210 and 215 and clause 2 of the 7th Schedule that have been included in there, and that will show that the wording of the grievance jurisdiction hasn't changed much, but what has happened is that there was no 90 day time limit, or no time limit whatever except for the normal limitation period of six years. If you then

McGrath J But the grievance have to be raised as soon as practical

Hope Yes it did. However if Your Honours will look under volume 3 of the appellant's bundle, under tab 7 there's a decision of the Court of Appeal and *New Zealand Workers' Industrial Union of Workers v Papunii Station* and that decision at the bottom of page 5 and the top of page 6 talks about delays and the strategies that the Court used for delayed grievance which were still within the time limit, so it begins about in the last quarter of the page 'it may well be of course that delay on the part of the worker in applying to join the Union will delay on the part of the Union in taking up its case', and that's simply because the background there is one had to be a member of the Union to raise a grievance, 'would have a significance effect on discretionary remedies under the statute. In particular it could well rule out any question of reinstatement and the extent of monetary relief which could appropriately be granted might well also be limited'.

Elias CJ What do you take from this Mr Hope? I'm getting lost in terms of the material you're reading to us. What's the proposition you're taking from this?

Hope Well the proposition is Ma'am that if there is an appropriate level of strictness applied to the exceptional circumstanced test to take into account the changes in employment legislation up to and including the

Employment Relations Act, then the Court has mechanisms available to it to ameliorate any unfairness that may effect either party by raising a grievance beyond the 90 day period, so the focus should be entirely on an exceptional circumstance test but it should look at the exceptional circumstance test at an appropriate level then look at conditions or look at whether it's just or not and if need be

Elias CJ But s.114 provides a gateway.

Hope Yes.

Elias CJ You've got to get through that gateway and the gateway is exceptional circumstances.

Hope Yes and in my submission it should be applied in a less strict manner than it currently is

Elias CJ Well how would you have it applied?

Tipping J As if it meant something else. That's back to my point.

Elias CJ Well I had thought you said Mr Hope you had accepted that you're happy with the way matters are expressed in *Wilkins & Field v Fortune*.

Hope Yes I am Ma'am, I have no difficulty with it, but it's the application of it that concerns me in that

Elias CJ Well then instead of talking about definition and ancient cases on other provisions, shouldn't we just close in on that, the application?

Hope Yes Ma'am.

McGrath J Really your better point is the way in 2000 Parliament ameliorated the situation when a lawyer had let the client down was s.115.

Hope Yes.

McGrath J That I suppose you'll be coming to shortly?

Hope Yes. The test should be applied in a way that takes into account the fact that on the one hand the statutes attempting to facilitate grievances so it shouldn't be a barrier automatically. What it requires is, and I accept what the Court of Appeal says in the decision under appeal, that it requires something more than a meritorious reason, so I forgot even if it was genuinely forgetting, is definitely not an exceptional circumstance, but if it is simply something that is beyond the common run, and I would submit

that *Wilkins & Field v Fortune* applied under the current legislation, is wrongly decided, would have been wrongly decided simply because the employee, the grievant or the potential grievant and his legal counsel, if they made a mistake that was beyond the common run of things which in my submission the circumstances in *Wilkins & Field v Fortune* demonstrate that under the current legislation that it is something beyond the common run, and solicitors don't usually make mistakes about time limits

Elias CJ But if they haven't we wouldn't be here would we, I mean the time limit has gone by. What's the feature in *Wilkins & Field v Fortune* that you say is beyond the common run of things, or should have been held to be beyond the common run of things?

Hope Well the feature is that they both believed that they had done enough to have raised a grievance.

Tipping J I thought I was that the barrister and his client were living under the same roof. Do you not rely on that as a

Hope I'm sorry Sir the question

Elias CJ No I was asking about *Wilkins & Field v Fortune*.

Tipping J Oh I'm awfully sorry, I'm awfully sorry

Hope Yes, yes.

Elias CJ Because the submission has been made that *Wilkins & Field v Fortune* is wrongly decided.

Hope If it was decided under the current legislation I would say it would be wrongly decided and it's been wrongly applied and can be distinguished, but

Tipping J Is that because of s.115(c)?

Hope Yes.

Tipping J Sorry, (b) is it?

Hope Yes, but

Elias CJ Well you're going further than that

Hope Yes Ma'am I am.

Elias CJ Yes.

Hope I'm saying that at page

Elias CJ That a mistake as to the time limit takes thing out of the common run, takes the matter out of the common run, is that what you're saying?

Hope If the mistake, taking into account the knowledge of the solicitor concerned, and or the knowledge of the grievant concerned was such that it was beyond the common run, yes, and I think the problem with *Wilkins & Field v Fortune* is that if makes a blanket statement about a mistake without considering the individual facts of that particular case, so in the current circumstance, in the decision under appeal, Mr Creedy, and the background shows that he was an employee of the Police from 1989, so his employment agreement did not have a 90 days period specified in it. The Police terms of employment are not set out in the same manner as an ordinary employment contract or agreement

Elias CJ I'm sorry, you're getting into the facts and I'm trying to understand the proposition that you're putting – go back to that, but you said to us that 'I forgot would not be enough'.

Hope Yes.

Elias CJ What in *Wilkins & Field v Fortune* makes it enough to get through the threshold? Is it that it's a mistake of law? What's the difference between 'I forgot' and the sort of mistake that was in *Wilkins & Field v Fortune*?

Hope Well what happened in *Wilkins & Field v Fortune* was that there was communication between the grievant and his employer and then the grievance representative and the former employer with a view to resolving matters, but the words 'personal grievance' hadn't been used and they didn't necessarily have to have been used but there was certainly early action taken with a view in the eyes of the parties to resolving the issues but because the Court found that the attempts, well the communications, didn't amount actually to the raising of a grievance, then they were left in the situation where there was no grievance raised and they were then outside of the 90 day period. Now in my submission that is beyond the common run of things. It is less than extraordinary but it's certainly applying the definition 'something that's exceptional'.

Elias CJ Well when you say that is beyond the common run of things, what is that? Is it the mistake that they thought they'd raised the grievance? What's the

Hope The 'that' is that they had been in communication on more than one occasion in writing with the employer and with a view to resolving the issue and that they believed that that was enough to have raised a grievance.

Elias CJ They made a mistake on the finding of law made by the Court of Appeal?

Hope Yes.

Elias CJ Yes.

McGrath J Do you say that s.115(b) is intended to override *Wilkins & Field v Fortune*?

Hope Well I can find no Parliamentary intent to say that.

McGrath J Well if a Parliamentary intent doesn't help you it's always quite useful to go back to the actual statutory language stage. Would you say that that is your argument that that points to an overruling of *Wilkins & Field v Fortune*

Hope No, I don't think it fits exactly and there's nothing in the *Wilkins & Field v Fortune v Fortune* decision that specifically says that Mr Fortune instructed his solicitor to raise a grievance and he unreasonably failed to do so.

Tipping J Well I think you're throwing away the one life-belt that's been given to you so far. I would have thought, although I'm not forecasting any view at all of the present case, that it is open to the view that a mistake by the agent, an unreasonable mistake by the agent, after having been told to file a grievance, will let you through, whereas on one reading of the *Wilkins* case, and I'm not sure it would be my reading, but on one reading that wouldn't let you through.

Hope Well I'm not throwing it away Sir, what I'm saying is that there are not that specific wording in there that says that he unreasonably didn't raise it when he was told to.

Tipping J Well I would have to agree with that but I think we have to look at it a bit more widely than that Mr Hope. I'm not sure it's going to help you in this individual case but I would have thought Parliament as they see it that if the grievant has made reasonable arrangements, i.e., saying to a lawyer please file my personal grievance, and the lawyer makes an unreasonable mistake thereby failing, that would arguably be within one of the examples of exceptional circumstances.

Hope Well I would agree that that would fall into 115(b). I misunderstood what you were asking Sir and I thought you were asking whether there was something specific in there. In general terms I agree that if he's instructed a solicitor and he's

Tipping J But you did say a little while ago that the Court of Appeal erred in *Wilkins & Field v Fortune* in ruling out all types of mistake, well I'm not sure that I would read it that way. They've simply ruled out as exceptional circumstances the two things that were relied on by the Chief Judge in the *Wilkins* case.

Hope Which is?

Tipping J Page 77, lines

Hope 17 and 18

Tipping J 10 and following.

Hope Yes.

Tipping J I think your characterisation of it as saying they pulled out all mistakes is with respect far too wide.

Hope Well mistakenly believed that they need take no further step at the time as has what's been said in there and it's my submission Sir that there will be circumstances where a party mistakenly believes that he or she needs take no further step at any time and that would be an exceptional circumstance and on other occasions it may not be, and it needs to be in context

Tipping J I agree with that, but I don't agree with the proposition that they've ruled out all mistakes.

Hope Oh no, if that's what you took from I said that wasn't intended.

Wilson J On your argument do the present facts come within s.115(b)?

Hope Yes I would say that they do.

Wilson J You say that the agent unreasonably failed to ensure the grievance was raised within the required time?

Hope Yes. It requires some analysis and that is that the agent says that he didn't ever tell the grievant that the 4 April grievance that was raised for a disadvantage was something that would go on in the future but

Wilson J But that's not the test is it? Doesn't the test require an assessment of the conduct of the agent?

Elias CJ On the basis of reasonable arrangements made by the employee.

Hope Yes.

Elias CJ And I'm not sure that you have findings of fact in your favour on the first leg have you?

Hope The employee says that he asked, and I'll need to find the Employment Court decision reference to that and perhaps I can come back to it Ma'am, but he asked whether his position was protected for the future and he interpreted the answer that he got – it was yes, and in my submission the Court can read into that that asking the question 'am I protected for the future' and what the employee meant was that – and he was asking his lawyer – that he was asking him to ensure that he was protected and that the answer he interpreted that he got was that he was and the unreasonable failure was the failure of the solicitor to properly communicate the appellant's position to him, and that's

Wilson J That can't comply with the second element of the 115(b) though can it?

Hope The unreasonable failure?

Wilson J Yes, it's not a matter of communication with the client that's the basis of that second element of 115(b) surely.

Hope I see no reason to why it couldn't be in those circumstances that if he was being asked a question and they both misunderstood the question, but the question from the appellant was clearly you know 'I want to know that I have something to protect me in the future and

McGrath J But the second limb is concerned with a failure to ensure the grievance was raised and so that's really a question of what he did is it not in relation to the Police?

Hope Yes.

McGrath J What the agent did in relation to the Police. So what is it that you say was unreasonable about the failure properly to raise the grievance, to raise a proper grievance?

Hope Well firstly he didn't raise it. Secondly the unreasonableness was that he didn't communicate properly with the appellant and that's referred to by Chief Judge Colgan in his decision where he says they talk past each other

and where he says that he failed to give important advices in writing to him.

McGrath J Can we just focus at the moment on the dealings with the Police that Mr Barrowclough had?

Hope Yes.

McGrath J Mr Barrowclough received a letter almost immediately did he not after his first effort to raise the grievance?

Hope Yes.

McGrath J And what was his response to that?

Hope Well he took no action whatsoever.

McGrath J Now is that something you rely on in relation to the second limb of s.115(b)?

Hope Only indirectly Sir because we're talking about two grievances. Now that grievance was a disadvantage grievance, the 4 April one, and that if you look in the appellant's, or the respondent's additional bundle under, no it's the case on appeal, volume 8, under tab.20, there is a 4 April letter raising a grievance for a disadvantage

Elias CJ Sorry, which tab was this?

Hope I'm sorry Ma'am, it's tab 20 in volume 8 of the case on appeal, and that's the late one that was one of the two late ones that was filed.

Elias CJ Case on appeal, volume 8?

Hope Yes.

Elias CJ Tab 20?

Hope Yes.

Elias CJ Is a brief.

McGrath J What is this letter?

Hope It's a personal grievance letter.

McGrath J This is the one that you

Hope Written by Paul Barrowclough, Barrister, and dated 4 April 2001.

Tipping J Yes well the Chief Justice's copy hasn't been properly compiled. I will enter my copy.

Hope Do you need a copy Your Honour?

Tipping J No, no.

Elias CJ No that's fine thank you.

Hope Now that letter sent on the 4 April on the following day Superintendent Cox replied saying you haven't done enough, but that's a grievance for a disadvantage not the dismissal. Now following that

Blanchard J Had the dismissal occurred by then?

Hope No it hadn't Sir.

Blanchard J No, I thought not.

Hope No. The employment ended on the 13 December that year.

Elias CJ I'm sorry, when you said if you haven't done enough my recollection, and I hadn't read these, but from the judgments was that the 'you haven't done enough' was that you haven't identified the grievance.

Hope Yes, yes, in that case.

Elias CJ So why did you say that was a performance issue?

Hope No

Elias CJ Oh I misunderstood you.

Hope No I'm sorry, the Court asked what had been unreasonable about counsel's actions and there was reference from the Court to this letter and so I'm just going back to that letter to then come forward Ma'am. So there was that letter

Tipping J Isn't the fundamental problem that on one perhaps you would say a literal view of it the employee never made any arrangements to have the grievance raised on his or her behalf, whether reasonable or not?

Hope Yes on one level, yes.

Tipping J Yes, well isn't that the end of it.

Elias CJ And in any event the matter hasn't been dealt with on that basis. You don't have any finding from the Employment Court that s.115 whatever it is is engaged?

Hope No, no it's not. I haven't raised

Elias CJ So why are we talking about it?

Hope Well because if the Court asked me about 115 Ma'am I wasn't

Elias CJ I think it might have been a non-leading question.

Blanchard J But the flipside is that s.115(b) isn't engaged because the employee didn't make reasonable arrangements to have the unjustifiable dismissal grievance raised and therefore the agent couldn't be said to have unreasonably failed to ensure that that grievance was raised.

Hope Well yes.

Blanchard J Isn't that what the Employment Court effectively fond?

Hope Yes, yes.

Blanchard J And isn't that right?

Hope I don't have any problems with that but the Court did ask me

Blanchard J But the problem you've got with it is that 115(b) gives an example of something that will be exceptional circumstances. Now if you have something that is close but falls outside that, because the employee didn't make reasonable arrangements, that's a pretty good pointer to it not being exceptional circumstances.

Hope Sir I'm not seeking to rely on 115(b).

Blanchard J I know.

Hope The Employment Court said that 115(b) didn't apply in this circumstance, and the Employment Court then referred to the multitude or innumerable possible

Blanchard J But if you don't qualify within 115(b) but you're close to it, isn't that an indicator that you don't have exceptional circumstances?

Hope No Sir, in my submission 115 is just simply examples

Blanchard J Yes, but if you come close to an example but you don't qualify, I would have thought that indicates that you haven't got an exceptional circumstance. If you had something said to be an exceptional circumstance which is not close to any of these at all. It's something completely different. Not of a type that Parliament has identified and attempted to pin down, then it could well be arguable that you do have an exceptional circumstance, but where you just fall outside it and you fall outside it particularly through your client's fault, I would have thought that isn't exceptional circumstance and Parliament's indicated it isn't intended to be.

Hope Well firstly Sir I don't accept that it's terribly close to 115(b), the circumstances, because here there was no instruction on the fact of it and no unreasonable failure on the face of the facts, but what happened was that there was a mistaken belief and that mistaken belief arose because of the level of reliance that the appellant had on his solicitor and the poor communication between the two and that's quite different in my submission to a 115(b) situation, and the Employment Court's distinguished the two. It's applied 115(b) to the 4 April letter, which is tab 20 in volume 8, but the Employment Court has then said that it's talking past each other and talks about the level of reliance

Tipping J Is your case really that this employee was not properly advised, therefore couldn't make the necessary reasonable arrangements to have the grievance raised and therefore couldn't be a failure by the agent and therefore that's far enough away from what is contemplated by (b) not to be caught by the close test with which I entirely agree if you're that sort of case and you nearly get there but don't, that's an indicator that you don't, but you have to show that it's sufficiently far removed and you can only do that by saying there was a failure to give proper advice from beginning to end here. I'm not saying that's my view but you have to argue that don't you?

Hope Yes.

Tipping J And that that is sufficiently exceptional and it's sufficiently removed from (b).

Hope Yes and just on that point if you look at the case on appeal volume 8 under tab.32, and there's the notes of evidence in the Employment Court, if you go to page 5 of that

Elias CJ Which tab is this? I'll just check whether I've

Hope Tab 32 Ma'am and it's notes of evidence of that hearing before the Employment Court.

Elias CJ Oh yes I have that thank you.

Hope And turn to page 5 of the notes of evidence Ma'am.

Elias CJ Thank you very much, I'll give you this one back.

Hope And to line 40. In the sentence beginning 'so I was particularly interested in what Paul said' and Paul is the Barrister who was representing the appellant at the time. What he did do was deny the proposition that I had put to him that he admitted, but he then he turned around and said that Mark, that's the appellant, was under a huge amount of pressure at the time and that he would not have understood or absorbed things that were said and he was aware of that.

Blanchard J Who is this speaking?

Hope It's me Sir. I gave evidence in the Employment Court.

Blanchard J And you're counsel in the case?

Hope I wasn't counsel in the Employment Court.

Blanchard J No but you're counsel now.

Hope Yes I am. This was only filed Sir last week. Up until then my evidence had nothing to do with this matter.

Wilson J Are you now relying on this passage?

Hope Well I simply refer to it. I'll withdraw it Your Honour but up until last week I didn't feature either in the Court of Appeal matter or in the current one. I didn't act in the Employment Court.

Elias CJ In this case the mistaken belief which is the basis you're putting forward for the exceptional circumstance is that the grievance had been sufficiently notified, that's what the mistaken belief was wasn't it?

Hope In *Wilkins & Field*?

Elias CJ No, no, in this case.

Hope No, the dismissal grievance had never been notified.

Tipping J It's just a complete failure to do it. It's as simple as that.

Hope Yes it is, it wasn't done at all. No communication whatsoever.

Tipping J And that's got to be and exceptional circumstance, a failure completely to do what your statute says you have to do.

Hope Yes.

Tipping J This is getting overlaid with a huge amount of sophistication but it struck me that that is the reality of this case from beginning to end, that they just didn't do it. The reason why they didn't do it, the fact of not doing it can't be exceptional can it, because you have to get over the facts, so it's the reason for not doing it that you have to concentrate on?

Hope Yes, and the reason is

Tipping J And the reason is that they talked past each other to adopt the language of the Judge.

Hope Yes.

Tipping J And is it as simple as that?

Hope Yes Sir

Tipping J That has to be an exceptional circumstance, the lawyer and client talk past each other, hence a complete failure to take a statutory in time and what is more another year nearly before it was taken.

Hope Talking past each other is simplifying it Sir. What happened was that the lawyer was living with

Elias CJ But talking past each other is a sort of weasel way of expressing it. What was the information that was not communicated, that it was necessary under the legislation to give notice of grievance?

Hope Yes, and that the grievance raised by the 4 April letter didn't have prospective effect.

Tipping J But it wasn't directed for the grievance that later emerged. It was not having prospective, it was agnostic.

Blanchard J How can he have thought it had prospective effect when the circumstances giving rise to the grievance had not occurred and weren't going to occur for months.

Hope Well his evidence was that he thought that that was a stake in the ground that secured his position and that's what he believed he was

Blanchard J Secured his position against any employment grievance coming up at any time in the future?

Hope Out of that set of facts, the charges against him and those circumstances. The charges, the disciplinary reaction, the hearing of it, the investigation and those things, he believed that was the case. He asked the Barrister, Mr Barrowclough, whether that was the case. He misunderstood the advice. The advice

Elias CJ I thought the grievance here was unjustified dismissal?

Hope Yes.

Elias CJ Well we're miles away from the point of unjustified dismissal here aren't we?

Hope In what way Ma'am?

Elias CJ Well we're not at the point.

Hope No, and that's the whole point. He didn't raise a grievance. He believed that the disadvantage a grievance raised on 4 April was a stake in the ground that secured his position into the future in relation to that whole set of circumstances which ended with him leaving

Tipping J He believed that because his lawyer wasn't sufficiently alive to what he should have been alive to.

Hope Yes.

Tipping J Is it any more complicated than that? – and didn't get the message through.

Hope No, and there was a particularly high level of reliance generated by the unusual circumstances that

Elias CJ Well I must say I find it very hard to believe that that lifts the level of reliance that people normally repose in legal advice, but he wasn't really seeking legal advice on the important issue.

Hope Well with respect Ma'am he was because on the 4 April when that grievance was raised, and the 5 April when Superintendent Cox's response arrived

Elias CJ Well it wasn't that grievance that was raised.

Hope No, but he was anticipating that if he was dismissed, and that was always on the cards, that he may well be dismissed as a result of all of those, whether his position was protected into the future.

Blanchard J But by raising the matter with his lawyer in such an obscure way so long in advance of actually being injured by any conduct of the employer, he surely did not make reasonable arrangements to have the grievance raised.

Hope No.

Blanchard J Either prospectively or at any time.

Hope Because he mistakenly believed on the advice he'd been given that he didn't have to take any steps because he mistakenly believed that the 4 April letter was sufficient to achieve that

Blanchard J But by raising it in such an ambiguous way he wasn't making reasonable arrangements.

Hope But we're not applying s.115(b) here Sir.

Blanchard J Yes but s.115(b) gives guidance. You can qualify to be within exceptional circumstances if you do make reasonable arrangements and then your advocate lets you down. Here he didn't make reasonable arrangements.

Hope The fact situation isn't related or it's not a species of s.115(b) Sir.

Elias CJ But it's a measure, that's what's being put to you.

Tipping J I think all you can say is his failure to make reasonable arrangements was because of the lawyer's fault in not telling him he had to.

Hope Yes.

Blanchard J But how could the lawyer be expected to tell him he had to if he raised it so ambiguously? He's got to take his share of the blame for this.

Elias CJ And the Judge does not say that it was all the lawyer's fault, that's why he says 'they talk past each other'.

Hope Yes. In my submission though Ma'am it's still an exceptional circumstance because it's not something in the common run that there is that very close and intense personal relationship where people are living together; one represents the other

Blanchard J I don't see that's got anything to do with it.

Tipping J No, I agree.

Blanchard J This could have happened in a law office setting. If your client raises the matter in such an ambiguous way, it's quite understandable that the lawyer won't for a moment think that the statement made by the client is going to be referable to an event which has yet to occur and will not occur for some months and which may never occur.

Hope Yes Sir and I accept that and I accept that what you say about there being fault on both sides and that's where the talking past each other issue comes, but surely it's exceptional to arrive at that situation and it's not even similar to 115(b) in that respect because

Blanchard J Alright, well you can just step outside 115(b) by saying well I might not have made reasonable arrangements but nevertheless it can be an exceptional circumstance even though what happened was that I tried to make arrangements but I didn't do it reasonably. It seems to defeat the purpose of 115(b).

Hope All exceptional circumstances are surely not coloured by 115(b) though. They are only exemplary

Blanchard J Well no obviously they're not, but those that are close to 115(b) are coloured. It seems to me that this is close to it. It's about the failure between client and lawyer, or the failure of the lawyer. We're in that area.

Hope Well it's about a mistake surely Sir, which is caused by the failure

Blanchard J Well 115(b) can be about a mistake too.

Hope It's about a mistake that was caused by communication issues between lawyer and counsel

Elias CJ Can you take us to what he said he asked his lawyer to do?

Hope If you go to volume 8 of the case on appeal, under tab 22, and then to para.37 onwards, 37 down to 40, and he says at para.39 part-way through it 'I did not realise that a separate grievance was required for each separate claim. I didn't realise it had to be notified within 90 days. I thought that

once a notification had been put in that was it'. And he believed that Paul Barrowclough had the same understanding. 'In later conversations with him we always referred to the April 2001 personal grievance as securing my position for all matters and all my claims against the Police'.

Tipping J Whether they had arisen by that time or not presumably?

Hope Yes.

Elias CJ He doesn't say does he the source of his belief that once a personal grievance was notified it enabled him to challenge all prior and future actions of the employer?

Tipping J All it says is he's relieved the lawyer had the same understanding but he doesn't say I gained my belief from what the lawyer told me.

Hope Well surely Sir if your lawyer is telling you that or agreeing with you then that has the same effect.

Elias CJ Does the lawyer say that was his belief?

Hope No he doesn't.

Elias CJ Oh.

Hope He challenges that. The appellant says at the bottom of para.39

Tipping J But he doesn't give any source for his belief that Paul had the same understanding either if one's going to be strict about it.

Elias CJ Which is perhaps why the Judge says there was a misunderstanding.

Hope The Chief Judge says at para.12 of the Employment Court decision that 'I am satisfied that it was on or about this occasion that Mr Creedy enquired whether his position was protected for the future and Mr Barrowclough responded that it was'. And he says for reasons set out in the judgment later however 'I am satisfied that Mr Creedy did not mean what Mr Barrowclough understood him to mean and vice versa'. It's appropriate here to note that Mr Barrowclough did not record in writing his advice to his client even in respect of important matters such as Mr Creedy's entitlement to address by recourse to litigation his plain and multifarious dissatisfaction with what was happening to him.

Tipping J So the Judge has found that the source of his belief was a mis-communication unspecified between the lawyer and the claimant.

Elias CJ Not a mis-communication, but a misunderstanding.

Tipping J Well yes.

Hope Yes although Ma'am it could well have been a mis-communication in the sense that it was talking past each other. They were saying different things and neither were getting the intended message about what was said so to that extent it was a mis-communication.

Elias CJ I cannot see that this could be characterised as a reasonable attempt to instruct and get within s.115(b), reasonable arrangements, to have the grievance notified, which is the point that's been put to you by Justice Blanchard.

Hope I'm not attempting to argue that Ma'am.

Elias CJ No I understand that but what's put to you is if this was an unreasonable attempt, surely s.115(b) indicates that Parliament didn't intend that to be a sufficient excuse.

Hope An attempt was made in writing to raise a grievance on 4 April and at about that time the appellant enquired of his lawyer

Elias CJ The appellant says that he saw the letter back from the Sergeant. That letter on its fact says that the grievance hasn't been properly notified because it isn't identified.

Hope Yes, and then if you look at tab 22 again, which is the appellant's brief, and para.39, in the last part of it he says 'the letter is

Elias CJ He laughed about it.

Hope Yes, laughed about it. 'I remember the conversation clearly as we were both laughing about it and I thought that Paul Barrowclough knew he was talking about and that Ted Cox did not. He was my lawyer. I was extremely vulnerable at the time and I took all my guidance from him'. And then he

Blanchard J Well Barrowclough was presumably right about that point because it's been held that

Hope No he was wrong.

Blanchard J Was it only held in exceptional circumstance

Hope Yes, yes, and the Commissioner of Police said that the grievance wasn't properly raised. The Court agreed with that but said there was an exceptional circumstance under 115(b) and that there was an unreasonable failure. It was after that, and based on that, that the appellant then believed that he was protected into the future by having put a stake in the ground about the circumstances relating to that grievance, the whole investigation, tribunal issue.

Elias CJ And just remind me again, where does he say that, he thought he was protected into the future? There was no cross-examination I suppose on this was there?

Hope Yes there was, yes.

Elias CJ I see it's para.39, yes you did take us to it.

Hope Yes, and the cross-examination begins under tab 32, page 21 of the Employment Court notes of evidence. Sorry, that's the examination. And then the cross-examination begins at page 26.

Tipping J Is there anything in the cross-examination directed to this state of mind of his Mr Hope, the source of it or the reasonableness of it or anything like that?

Elias CJ He's taken previous grievance claims before he acknowledges.

Hope Yes one previous claim which he said was through an advocate in Rotorua and he on that occasion wasn't aware of

Elias CJ He's had Mr Recordon and Dr Harrison.

Hope Only one previous grievance claim Ma'am.

Tipping J Is that a connotation in your argument Mr Hope that if the Court found that there were exceptional circumstances in relation to the unjustified action issue, the Court should have extended that into the other area because they're all sort of rolled up, is that part of your argument?

Hope No it's not Sir

Tipping J No, alright that's fine.

Hope No but I simply go back to the

Tipping J Once you see them as discrete issues, I have to say that I find it extraordinarily hard to see how anyone could have seen the stake in the

ground as covering other than this grievance, which is exactly what it says, are you the one that was live in April 01. I don't see how anyone could see it as covering possible future grievances unless you were to say that it all arose out of the same circumstances and thus on the sort of rolled up basis, it was reasonable for them to see it that way.

Hope Well that's what I've been saying Sir that he believed that it was a stake in the ground but then related to everything about the investigation; the stand-down; the Tribunal hearing, and whatever may come out of it.

Tipping J And whatever ultimate outcome there may be.

Hope Yes.

Blanchard J So that he was effectively notifying a grievance that he didn't at that moment have.

Hope Well he believed that it protected his position, yes, and that's what he was asking his solicitor and he believed he was getting an answer to the effect that that was the case.

Tipping J So if this is the crucial issue that he mistakenly believed that this stake covered his anything that happened in the future, are you saying that that is sufficiently far removed from what s.115(b) addresses that you're not caught if you like by the proximity of the para.(b) point that's been put at you.

Hope Yes.

Tipping J Does that have to be your argument that it's sufficiently far removed for that reason that it's a mistake

Hope Yes.

Tipping J As to being covered for the future and that that's really quite different from asking someone to do something and they fail to do it?

Hope Exactly that Sir, and the mistake was caused by the reliance and the talking past each other, and the Court of Appeal acknowledged that the high level of reliance was an exceptional circumstance, and that's acknowledged in para.25, but then the Court of Appeal went on to say well nevertheless it's not causative.

McGrath J It said it was no different to the circumstances in which a person is relying on a lawyer wasn't that it?

Hope Well

McGrath J Clients do rely on lawyers whether they're living with them or not

Hope Of course they do.

McGrath J Yes.

Hope Of course they do Sir but on the one hand there are difficulties with the Court of Appeal's argument there in para.25 because how can it be exceptional on the one hand but run of the mill on the other. The Court has said yes it was exceptional but I perceived what the Court of Appeal is saying there is that it's not relevant to the, and I can't remember the exact wording, is it the analysis that's required, and it would appear therefore to be causative. The issue is one of causation.

Tipping J Are you saying that the Court of Appeal thought that there was an exceptional circumstance in the proximity of the relationship between employee and lawyer but that that really had no sufficient bearing on what happened, is that what you're saying? I think that's probably getting fairly close to what they did say.

Hope It's in para.25 of the Court of Appeal's decision Sir, and that's under tab 3, volume 1, case on appeal, para.25. In there the Court's saying that in the present case, or perhaps I should go to the beginning. The point which the Court made in *Wilkins & Field* is that the test requires more than just a meritorious reason for not having raised the grievance in a timely way. The exceptional quality of the relevant circumstances must be in respects which are relevant to the value to the exercise in issue. In the present case the particular circumstances identified by the Chief Judge, primarily associated with the unusual and close professional relationship with Mr Barrowclough no doubt were exceptional as it is unusual for counsel to have only one client and to preside with the client. But the peculiarity of those circumstances was only relevant to the degree of reliance which Mr Creedy may have placed on Mr Barrowclough. Since clients normally rely on their legal advisors, the exceptionality of the legal and personal relationship between Messrs Creedy and Barrowclough is not material to the 114(4) exercise. And I read that last line as being a reference to the exceptional circumstance of the close relationship was not causative of the delay. Although they haven't said it I read that that's what they're saying, and that argument

Elias CJ Why would you read it like that? Doesn't it mean that it's not material to whether there are exceptional circumstances? It's not an exceptional circumstance this dependency.

Hope Well he said that it's exceptional. The Court has said that it's exceptional.

Elias CJ Well it's exceptional but he's not talking about the s.114(4) thing, he's

Hope Although the 114(4) exceptional circumstance is not an exceptional circumstance in a vacuum, it's an exceptional circumstance that is occasioned by, or the delay is occasioned by the exceptional circumstance, sorry Ma'am. So

Tipping J The exceptional circumstance must have something sufficiently to do with the delay

Hope Yes

Tipping J To be able to be said that it occasioned it.

Hope Yes.

Tipping J So you've got a causation or a contributing to cause element here. It's a question of the sufficiency

Hope Yes.

Tipping J I mean you can have all sorts of things leading to, but you say it is sufficient because what?

Hope Well I mean simply

Tipping J Because they wouldn't have talked past each other if they hadn't been living together.

Hope Well it's more than simply living together. It was the total reliance that's referred to in para.40 of the appellant's brief.

Tipping J Well like other members of the Court I am not very grabbed by the idea of degrees of reliance on your legal adviser. It has to be something outside that I would have thought. I mean everybody relies on their lawyer.

Elias CJ And that's what the Court of Appeal is saying in para.25.

Hope Yes. Degrees of reliance together with the failure to properly give the advice in writing which the Chief Judge was critical of

Tipping J Well that could be, that could be a window because that might derive from the fact they're living together

Hope Yes.

Tipping J That it's not the formal professional environment if you like – I'm not saying I'm with you, I'm just saying that just could be something that could take it as both causative and sufficiently out of the ordinary, although I'm not familiar as how much in the profession now people give written confirmation of early oral advice. I just don't know. It would be a point I'd need some help on as to whether it was sufficiently unusual that it wasn't followed up by written

Wilson J It's not infrequent for informal advice to be relied upon.

Tipping J Without any expectation of a written follow-up. Yes well I'm just signalling. I mean that could be something but at the moment I don't see it as necessarily assisting you.

Hope I think you can add to that Sir that there was not just the reliance in the normal sense of relying on the solicitor but there's the comment that the appellant may in his brief of evidence that, and I'm back to tab 22 in volume 8 again, that 'Paul was effectively running my life. In relation to the Police matter, he was living at my house with me and taking full control over Tribunal matters. I felt he was trying to protect me as I was under attack by management and he knew what he was doing and was acting in my best interests'.

Elias CJ Just remind me, when is it thought that the period ran out in terms of the grievance, when would it have been?

Hope February 2002. The 90 days would have begun on 13 December.

Elias CJ But he'd already been to about three or four other lawyers in that period.

Hope While he was still instructing Paul Barrowclough he went to Rob Towner for some one-off advice.

Elias CJ And he went to

Wilson J Advice relating to this matter with Mr Towner?

Hope Yes.

Elias CJ I thought he had also gone to a couple of other lawyers.

Hope He had gone to one other but that was after

Elias CJ Anna Fitzgibbon and Marie Dyhrberg.

Hope Well I don't think he ever instructed Marie Dyhrberg. Anna Fitzgibbon filed the first application in the Employment Relations Authority and it was after Anna Fitzgibbon that I was instructed Ma'am, and then I took a brief respite out while Gary Pollak took the matter over for the Employment Court proceeding and then it came back to me.

Blanchard J When did he consult Mr Towner?

Hope I think in about August 2001 which was after, it was twice yes, once in July, once in October.

Blanchard J That's before he was dismissed?

Hope Yes.

Blanchard J And he still claims despite having consulted another lawyer twice during that period to have had this exceptional degree of reliance on Mr Barrowclough?

Hope Yes when he spoke to Mr Towner the issue of time limits and those sorts of things didn't arise. Mr Towner gave evidence in the Employment Relations Authority

Wilson J Do we have a record of that?

Hope There'll be no record of the Authorities. The Authority doesn't keep a verbatim record Sir but the Authority's decision is in case on appeal, volume one

Blanchard J Tab 6.

Hope Tab 6, and the mention of Mr Towner is at the bottom of page 2 on the second to last paragraph there, but it doesn't go beyond that, and Mr Towner didn't give evidence in the Employment Court.

Wilson J Who called Mr Towner before the Authority?

Hope The Authority did.

Tipping J The Authority's view is a very sort of succinct one isn't it? The only thing that qualified was this mistaken belief that we've discussed this morning and that wasn't an exceptional circumstance. That's pretty close to the heart of the matter isn't it?

Hope Yes it is.

Elias CJ Would it be convenient to take the adjournment at this stage?

Hope Yes Ma'am.

Elias CJ Thank you.

11.33am Court Adjourned
11.51am Court Resumed

Elias CJ Thank you. Mr Hope is there any more you want to add on the first point?

Hope Just a couple of things Ma'am.

Elias CJ Yes.

Hope I was perceiving that we were getting to the end of argument in any case. Case on appeal, volume 8, tab 32, page 71, and page 71 sets out questions from the Court of Ralf Schnabel, who was a Psychologist who gave evidence in the Employment Court. At line 36

McGrath J Sorry, this is tab, case in appeal, volume?

Hope Volume 8 Sir, tab 32, which is the Employment Court

McGrath J Yes, yes, thanks.

Hope And page 71 of that.

McGrath J Right, thank you.

Hope And at line 36 Chief Judge Colgan askes Ralf Schnabel 'and I wonder if you can help me with your assessment about the degree of dependency that Mr Creedy may have had on professional advisors, lawyers in particular, as a result in what you have heard in the case'. And the answer is 'my impression is that he took great level of trust in his lawyers or professional advisors and delegated basically the whole thing to him and let them sort it out for them. That's the approach he took in the past and he has also – what my impression was from the evidence what he has taken in early 2001 regarding the Tribunal'. And then he goes on at line 49 to say 'I think he was initially very dependent on Mr Barrowclough'. Now just one decision I would like to refer the Court to and that is in the respondent's ..

Elias CJ You didn't go on to the re-examination which does slightly affect that impression, which seems to be taken really from observations of the evidence rather than anything else. Is that right?

Hope Yes although Mr Schnabel assessed him in late 2001 and then he sat through the entire hearing.

Elias CJ Yes.

Hope And that's addressed at line 27, where the Employment Court Judge says 'and I wonder if you can help me on the basis of having sat in Court throughout the hearing'.

Elias CJ Yes, yes.

Hope Now the appellant's, oh sorry, the respondent's bundle of additional authorities at tab 7, there is a House of Lords decision in the *Queen v Soneji and Another*. This case looks at the exceptional circumstances test in a proceeds of crime of the UK equivalent; proceeds of crime application, and there is much discussion about mandatory and directory provisions and what the effect of failure to comply was and in this case the decision of the Court regarding proceeds of crime was outside of a six month time limit which could only be exceeded if there were exceptional circumstances and the Court of Appeal had found that there were no exceptional circumstances and the House of Lords then looked at it and there was an analysis of what was the effect of failure to comply. There wasn't much direct analysis in this case of the exceptional circumstances test but it was more looking at what or how strictly that test should be applied. On page 329 of that decision Lord Steyn has at para.15 quotes from *London & Clydeside Estates v Aberdeen* where there is a fairly lengthy passage there regarding the legal consequences of non-compliance and looking at language like mandatory, directory, void, and voidable and nullity. Following that over the page at page 330 of the decision Lord Steyn says 'this was an important and influential dictum. I led to the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity'. So the test here moved away from being whether the provision was

Elias CJ Presumably this wasn't about

Hope It's not an employment case Ma'am.

Elias CJ No and it's not about a discretion, is it, is it about a

Hope Yes it is.

Elias CJ Oh it is about an exceptional circumstance test.

Hope Yes it is about a discretion, the exceptional circumstance test Ma'am, and what the effect of failing to comply with that was in the context of

Elias CJ No, I'm talking about *London & Clydeside Estates*. That wasn't was it?

Hope I'm not sure Ma'am, I haven't read that decision. My understanding of it is that the reference to that quote was looking at the older approach to these sorts of matters and making an assessment as to whether the language was mandatory or directory and based on that

McGrath J But you're not suggesting are you here that there could be any suggestion but that if there was failure to comply and it's not excused under the Act

Hope Oh no.

McGrath J There must be an ability, mustn't there?

Hope Yes, yes, and there must be an application of the exceptional circumstances test. I mean the statute clearly says that but really what the Court in *Soneji* is doing is looking at how that test should be applied, so if you go down to page 334 of the decision at para.c, the sentence beginning 'secondly, counsel argued that such an interpretation would render wholly ineffective the Parliamentary intent of providing for a specific time limit. I would not accept that this is correct. At the very least the Courts can, where necessary, vindicate the scheme adopted by Parliament by the abuse of process jurisdiction and perhaps in other ways'. So I see that as saying well the exception can be allowed and that the abuse of process jurisdiction and other ways which I would submit in the present context is the imposition of conditions, is a way of vindicating the scheme, namely the personal grievance jurisdiction which runs for three years during which time a notice can be filed provided there is an exceptional circumstance found. Then down to para.28 on the same page 334. 'An expression such as 'exceptional circumstances' must take its colour from the setting in which it appears. Bearing in mind the context I would not adopt a very strict approach to the meaning of exceptional circumstances'. And I Ma'am in reference to your question earlier, although the words there are I would not adopt a very strict approach to the meaning of 'exceptional circumstances'. I take that to mean the application of it rather than a change in the meaning. If you go on to page 337, at para.f Lord Rodger says 'one must ask why. Why in Parliament's view should the sequence be confiscation order followed by sentence and the answer is that the legislative scheme confiscation orders are to have primacy over fines and

other financial disposals which must tailored accordingly'. So there are reasons in there and the reasons are of course for the 90 day time limit can be found in part set out in the purposes of the Act in ss.3 an in 101 and usefully set out in *MacDonald*, which is the decision of Judge Travis in the Employment Court which is tab 6 I think in the volume 2 of the appellant's bundle. Yes. So if as Lord Steyn has said that there are ways of dealing with these matters by the use of process, Lord Rodger has said looking at abusive process and other ways, then if the Court was to apply a less strict application of an exceptional circumstance test it could address the issues of failing to attend mediation through costs because if a grievance could have been settled earlier and wasn't because there was a failure to raise a grievance early and go to mediation early, that could reflect in costs; it could reflect in remedies that are available, and at the same time a less strict approach could ensure that the legislative intent overall is complied with and that is facilitating the raising of grievances which is one of the purposes, and the use of mediation which is another, and there is a tension between the two that has to be addressed, because if the exceptional circumstance test is applied very strictly then grievances that perhaps should properly be run are not and there needs to be a balancing of those competing interests in tensions between the parties, and that can be addressed in ways that are suggested in the *Papunii* case and *MacDonald* and in those matters. And finally Your Honours in my submission 115(b) is a distraction. The real issue here is that there is a break-down in the solicitor client relationship caused by the talking past each other. The total reliance which has been addressed independently by a Psychologist, Ralf Schnabel, who gave that evidence, having sat through the Employment Court proceeding. It's a finding that the Employment Court has made having heard the evidence at first instance, and that the appellant himself has eluded to. The failure to raise the grievance was in part because of Mr Creedy's failure to give proper instructions – that's accepted. However the failure was also because he misunderstood completely what his solicitor had said to him. There was one grievance. He thought that that one covered them all so arguably he thought that that one grievance covered the whole lot and that he was protected into the future, and even that grievance wasn't raised properly, but he thought that that covered all circumstances into the future. And I would say from a causation point of view that although there are a couple of steps in there as an argument as to what may have caused the delay, the Court of Appeal seems to have said that the delay was not caused by the talking past each other but by a mistake which it found in *Wilkins & Field* was not an exceptional circumstance. But really the cause must go back to the communication issue and not the mistaken belief, and it's a bit like saying in a negligence action that the car crashed because the wheel fell off rather than saying that the car crashed because the mechanic didn't put the nuts properly on the wheel that then caused the wheel to fall off, and it seems that the Court of Appeal wasn't prepared to go back that step and say that the mistaken

beliefs and the talking past each other was really caused by the whole circumstances of the relationship between the solicitor and his client and I go beyond the words 'simply reliance' that reliance only addresses part of it. There are issues like reliance, lack of advice, and the appellant's mental state, being under stress. I'm not arguing that there was a clinical issue, but there's clear evidence that he was under stress, and the fact that the Police contract doesn't have a 90 day clause in it so the appellant had never worked under an employment relationship that required or gave him advice of 90 day time limits. Now turning to the issue of the jurisdiction of the employment institutions to look at the Tribunal - the second issue. The Court of Appeal has said that the Police Tribunal is independent and is not under the control of the Commissioner of Police and that there isn't an agency relationship. Now that's accepted but what my submission as essentially is that it is still the Commissioner's process and it is really the Crown's process with the Commissioner acting as a representative. The Commissioner is not strictly the employer in the same way that CEOs of other State organisations are, but the Commissioner has powers and they are set out in I think s.5 of the Police Act, which is under tab 1 in volume 1 of the appellant's bundle. Now my friend in his submissions has argued that a s.12 inquiry is independent of the Commissioner to the extent that the Commissioner can't expect it to have any control over the process. What hasn't been taken into account is firstly the appointment provision in s.12 which is under tab 1, and there where misconduct or neglect of duty is alleged against a sworn member of Police, the Commissioner may appoint one or more persons to inquire into the alleged misconduct. Now that's an employment matter. That reference to misconduct and neglect of duty are matters that are part of the employment process and essentially that was the finding in the Commissioner of Police and more where the Court held that

Tipping J That gives the Commissioner power to appoint a Tribunal.

Hope Yes.

Tipping J Can he come at it some other way?

Hope Can the Commissioner come at it some other way?

Tipping J Yes.

Hope No he can't. The only way

Tipping J So the only way you can do this is through this process?

Hope Yes, and the Court of Appeal has addressed that in *Moore* which is tab 18 in volume 2 of the bundle, and this was a matter where the issue was the

Commissioner's power to remove a Police Officer pursuant to s.5 of the Police Act, and the Court of Appeal held that the power of removal could not be lawfully exercised without there first being an inquiry under s.12 of the Act and the Commissioner having reasonable grounds for belief .

Elias CJ Sorry, I

Hope I'm sorry Ma'am.

Elias CJ I've had trouble finding the volume.

Hope I'm sorry. It's the appellant's bundle, volume 2, tab 18.

Elias CJ Is this based on a statutory provision other than s.12?

Hope No, no, the Commissioner can remove or impose penalties under s.5 but to do that he has to first hold an inquiry under s.12

Elias CJ Well is that in s.5?

Hope There is no reference in s.5 to s.12 but the Court of Appeal has held that

Elias CJ So there's no statutory linkage?

Hope No.

Elias CJ What about the provision in the Employment Legislation that refers to the Police Act? Can you just help me and tell me – you don't need to take us to it, but if you just give me the reference.

Hope Section 87, personal grievances. It's part 9 of the Employment Relations Act applies to personal grievances by sworn members of Police.

Tipping J But that's coming from that direction.

Hope Yes.

Tipping J Because the other one's coming from that direction isn't it, when the Commissioner thinks that there might be some misconduct or neglect of duty then the Commissioner is inquiring into the conduct of the member whereas a personal grievance that the member is raising a grievance if you like against the Commissioner?

Hope Yes, yes

Tipping J I mean you could have the two rolled up no doubt but conceptually they are coming from different directions aren't they?

Hope Yes they are. My only reference here Sir to that personal grievance jurisdiction was in response to a question from Her Honour.

Tipping J Yes I appreciate that but I just wanted to clear that issue out of my mind.

Hope In employment matters generally personal grievances can be raised in respect of substantive and procedural issues and I

Elias CJ So it's not s.87 is it?

Hope Yes 87 is the section that incorporates s.87 of the Police Act

Elias CJ Oh of the Police Act, I'm sorry.

Hope Sorry Ma'am, of the Police Act, incorporates part 9.

Elias CJ But do we have s.87 in the material we've got?

Hope Yes we do, it's under tab 1 Ma'am.

Elias CJ Thank you.

Hope 'Before and employer, and this includes the Commissioner, can take any disciplinary action against an employee, whether it be a dismissal or whether it be something less than a dismissal. If it's a formal action such as a warning or reduction in rank or fine, that can be given under s.5 or removal, there must be an inquiry under s.12, and that's consistent with the general law relating to employment matters.

Elias CJ For that authority you rely not on statute but on the decision of the Court of Appeal you just took us to is that right?

Hope Yes in *Moore*, yes.

Blanchard J It's actually an earlier decision isn't it, *Carrington*, which I think *Moore* just follows *Carrington*?

Hope I thought Sir that it was settled in *Moore*.

Blanchard J Well.

Hope Yes well I think *Carrington* doesn't go quite as far as *Moore* but it's certainly following *Carrington*, yes. It's necessary to just see very briefly

where the power in s.12 came from, so when the Police Act 1958 was first enacted it had a different s.12 type provision. If you go to volume 1 of the appellant's bundle at tab 14

Elias CJ I'm sorry isn't the

Hope Sorry, tab 15.

Elias CJ I'm just trying to work out the statutory chain. Just looking at *Moore*, it seems to me that s.5(a) provides the statutory linkage, that's why an inquiry under s.12 is required.

Hope Yes Ma'am, yes you're correct.

Tipping J In the whole legislative scheme while we're looking at it Mr Hope, isn't s.96 of the Police Act quite important too which basically says that the Employment Relations Act doesn't apply except where specifically provided. Isn't that a pretty good indicator of Parliament's approach to the Police?

Hope Yes, yes it is, and it's been incremental over the years and it's only since the enactment of the Employment Relations Act that personal grievances have come in.

Tipping J Yes, but they are the primary exception I take it are they?

Hope Yes, yes.

Tipping J But we're not dealing so much with a personal grievance here are we as with a Tribunal conclusion and as to what processes are available to challenge that conclusion?

Hope Yes that is the issue.

Tipping J That's the issue.

Elias CJ Are we dealing with removal and the grievance arising out of the process adopted for removal?

Hope Yes, yes.

Tipping J Yes.

Hope Yes, yes we are.

Tipping J But the essence of it is the structure that the legislation puts out for achieving if you like removals.

Hope Yes.

Tipping J You can't by making it a grievance to that procedure can you some how or other slant the statutory focus on the removal step being outside the Employment Relations Act?

Elias CJ Come again.

Tipping J I'm sorry others have found that rather elusive. What I'm wondering and this may be coming close to the heart of it, can you challenge a decision by the Commissioner to remove you based on one of these Tribunal findings? You may be able to challenge the punishment part of it but can you challenge the substantive part of it by a personal grievance because it would seem that that is the

Hope Well that's the issue Sir.

Tipping J Yes, but how can you if

Hope Well in my submission because Parliament intended that to be the case and these reasons. If you look at tab 15 these are repealed provisions of the Police Act 1958 and there are three sections in there – 33, 34 and 35.

Elias CJ Before you take us into those can you just tell me briefly why we're looking at this? What do they show?

Hope Well when the Police Act 1958 was originally enacted there was an inquiry section equivalent to s.12.

Elias CJ Yes.

Hope There was an appeal provision to that and that was in ss.34 and 46.

Elias CJ Yes.

Hope At the time the personal grievance jurisdiction became available to the Police, the appeal provisions were repealed

Elias CJ Oh, thank you.

Hope And so in my submission it was the intention of Parliament that the appeal would be replaced by the personal grievance as the way of challenging what went on in the Police Tribunal. My friend will say that the

appropriate way of challenging is by way of a re-hearing. The re-hearing was not a new provision, and the re-hearing is in, or was in the Regulations before the recent repeal. The power to request a re-hearing before the Tribunal existed prior to the repeal of ss.33, 34 and 46, and in essence that is what the argument is Ma'am.

Tipping J Was the previous appeal both law and fact?

Hope Yes.

Tipping J Was it a general appeal?

Hope Yes, it was. Any sworn member of Police who was dissatisfied with a decision of the inquiry

Tipping J Yes, I don't need any further help on that. And are you saying that the personal grievance jurisdiction has wholly replaced that appeal right?

Hope Yes.

Tipping J So you can actually have one of these formal Tribunals and then just simply go to the Relations Authority, the lowest level, and say would you please look at this from all points of view?

Hope Yes.

Tipping J Mr Hope

Hope I think you've inflated the formality of the Tribunal Sir, because it is very informal.

Tipping J Well whether I

McGrath J I notice the appeal right was to an Appeal Board.

Hope Yes it was.

McGrath J And I'm just trying to think back, but around about in the late 1980s with the State Sector Act coming in there were various Appeal Boards scattered around the public service I think were there not?

Hope Yes.

McGrath J Public Service Appeal Boards and things they have with it. At least to some of us they were still existing in practice at one stage. I'm just really wondering whether removing the right of appeal to the Appeal Board

might just simply have been part of a State Sector Reform removal of appeals to specialist Appeal Tribunals generally. In other words not necessarily because the personal grievance procedures were coming in and everything would head off to the Employment Relations Authority, but rather because there was a general statutory policy of doing away with the specialist Appeal Boards.

Hope Yes I think you're right Sir

McGrath J It's just a thought. I was just wondering about it, yes.

Hope But that general statutory trend towards consolidating if you like employment matters culminated in the Employment Relations Act where nearly everything is available to the personal grievance jurisdiction and I mean

McGrath J Certainly in the substantive public service if I can put it that way, the Employment Contracts Act regime in but it doesn't necessarily come in I suppose to the Police.

Hope And I've included in here under tab 17, the Public Service Act 1912 which has had numerous amendments to it right up until the most recent, well I think it was 1988 was it, the Public Service Reform, but

Elias CJ What was the path of repeal of these provisions? Was the Appeal Board abolished through the Employment Contracts Act or was it abolished through the State Sector Act or was it just done in an amendment to the Police Act, because it may

Hope I think it was an amendment to the Police Act Ma'am.

Blanchard J Well the insertion of s.87 into the Police Act certainly was done by the Police Amendment Act.

Hope Yes, and by that Act also Sir the personal grievance provisions which were initially by way of a schedule to the Police Act, so when the personal grievance provisions were first incorporated into the Police Act, they were not done through employment legislation.

Tipping J Was that at the same time as the appeal was got rid of? I mean was the personal grievance introduction contemporaneous with the abolition of the appeal?

Elias CJ The Part 9.

Tipping J Yes, yes.

Elias CJ It must have been.

Hope My understanding is

Blanchard J Well it's the same day.

Tipping J You can't get much more contemporaneous than that.

Hope What I was saying Your Honours is that when the personal grievance jurisdiction became available to policemen in 1989, it was by way of a schedule being added to the Police Act that was identical to the schedules to what became those clause 4 letters and schedules and things under the Employment Contracts Act, so under tab 14 you have the fifth schedule procedure in relation to personal grievances sworn members of the Police, and that sets out how you raise a grievance and the process.

Elias CJ Is that when s.5(a) comes in also?

Hope I'm not sure when 5(a) was enacted Ma'am.

Elias CJ Well it will be underneath it won't it?

Blanchard J No, it's five years later.

Elias CJ Alright. Oh but there was a grievance

Hope Yes that's the old

Elias CJ When did the fifth schedule get taken out?

Hope That was

Elias CJ Oh well don't worry, there's probably no point in taking the time at this stage, but the

Hope The fifth schedule was replaced in 1991 with a new fifth schedule that would have coincided with the enactment of the Employment Contracts Act.

Blanchard J Was there a fifth schedule or equivalent in the Labour Relations Act before that?

Hope Yes, no there wasn't. The Labour Relations Act schedules the closest to it was under tab 7, and you have two sections followed by – I've printed one clause from schedule 7 there about the submission of a grievance to an

employer and that's an extract from one of the Labour Relations Act schedules.

Blanchard J When did personal grievances first come in to the Labour Relations Act?

Hope 1987 when it was an Act.

Blanchard J And it had its own schedule and then we have the Police Act being amended to put in s.87 in 1989 and put in a schedule and you say that that schedule wasn't exactly the same as the schedule in the Labour Relations Act? Is that right?

Hope I'm not sure how similar or otherwise it is.

Blanchard J In any event as from 1991 were the two aligned?

Hope Yes, yes they were.

Tipping J People who can conduct these inquiries under s.12 do they need to possess any type of qualification or are limited in any way?

Hope No they don't.

Tipping J Literally anybody?

Hope Yes anybody, and it is useful here to just have a look at tab in volume 2, I'm sorry volume 1, tab 15, the repeal provisions. So you have a

Blanchard J Is there any

Hope I'm sorry Sir.

Blanchard J Is there any legislative history concerning s.14 of the Police Amendment Act 1989 that might help us?

Hope I don't have any Sir.

Blanchard J Have you looked?

Hope No.

Blanchard J Isn't that the logical place to look? Because that's when they first gave the members of the Police an ability to raise personal grievance.

Hope I have tracked through the Police Act and you have the various Police Acts. In volume 1 of the appellant's bundle

Blanchard J Yes but it's in 1989 that they were addressing this point directly.

Hope Yes.

Blanchard J After that you might not expect to find anything.

Elias CJ It's pretty key isn't it because if all of this was done to bring the thing into line with the employment legislation then you're much further advanced in the argument that you're contending for?

Hope Yes Ma'am. Unfortunately I don't have that legislative history.

Tipping J But the fact that they were done on the same day, the abolition of the appeal right, seems to be prima facie of some considerable significance.

Elias CJ Yes.

Hope Yes.

Tipping J It suggests at least prima facie that the one is being substituted for the other.

Hope And that's my submission Sir.

Tipping J But surely there must have been something said around that time by somebody in Parliament or in a report, but you're just not able to take that any further?

Hope No I can't, I do recall having in the past looked at the issue in relation to another Police matter I've dealt with and I wasn't able to find anything useful from Hansard. What is significant in the now repealed s.33 of the Police Act 1958, and that's under tab 15, is that prior to the current s.12, there was a hierarchy of inquiries depending on what rank you had as a Police Officer, so if you were below the rank of Chief Superintendent then were steps that could be taken and in sub.section 3 where misconduct or neglect as alleged against a Constable or a cadet or a recruit, then any commissioned Officer or any person not being a member of Police appointed in that behalf by the Commissioner may inquire into the charge and report to the Commissioner. And then subsection 2 relates to non-commissioned Officers, which is what Mr Creedy was, and the Commissioner may appoint any person, whether a member of Police or not, to inquire into the charge, and then of course if it was a Senior Officer then appoint two or more persons of whom only one shall be a member of Police. Now that was all conflated into s.12 where the Commissioner may appoint one or more persons or any sworn member of Police as an

allegation of misconduct. So it would be quite acceptable with that history to have any person conducting a s.12 inquiry on behalf of the Commissioner, and that sort of history tracks right back to 1886 where matters of fact were always determined by someone else appointed by the Commissioner, and in the Police Force Act 1886 the Commissioner would appoint another commissioned Officer to do it.

Wilson J You need to go beyond the plain words of 12(1) to establish that the appointed person may or may not be a member of the Police.

Hope No I don't Sir, but I just wanted to point out that 1886 that is what has been happening, that factual inquiries have to a large extent, particularly with lower ranks, been carried out by a delegate of the Commissioners who was a member of the Police. Then it opened up with the s.12 to be able to be anybody, but in the end it's still an inquiry into factual matters of misconduct. There's reference to the Commissions of Inquiry Act but

Elias CJ Are there, I can't remember, are there powers of contempt under the Commission of Inquiry Act?

Hope I don't think there are Ma'am, no there aren't, and that is a matter I have looked at Ma'am on another matter.

Elias CJ Yes. No, no I was just wondering how it came to be

Tipping J When the Commissioner gets the result of this inquiry it is clear to me from what I've read and I hope I'm right that he has a discretion as the penalty. He doesn't have to follow the recommendation

Hope No.

Tipping J But vis a vis factual determinations, there's no ability for either party, the Commissioner or the Policeman, to go behind those factual findings for the purposes of what the Commissioner then does.

Hope No, although the Commissioner can, I see no reason why the Commissioner can't, having heard submissions, decide that perhaps there are other matters that he can consider as long as he doesn't change the factual findings.

Tipping J Well he could obviously consider anything relevant to penalty.

Hope Yes, which may be factual matters.

Elias CJ The terms of s.5(a) do suggest that the Commissioner may have a determination to make. It's following an inquiry.

Hope The difficulty with all of this and the Tribunal is that the Tribunal's been elevated to acquire a status which historically it didn't ever have.

Elias CJ It was an investigatory mechanism.

Hope Yes, yes, and in the past it was a Superintendent of Police presumably sitting in a rather large room in a Police Station with witnesses coming in and out and questions being asked. It's now, well until very recently, February this year Ma'am the regulations were repealed, or that part of the regulations were relating to the s.12 inquiry, and there is now no longer a Tribunal as the regulations called it. It's called a, and I've enclosed some extracts from the provisions here in the bundle. Under tab 3, the new part 1(a) and are called disciplinary hearings, but they're still conducted under s.12, so they're still conducted by an appointee under s.12.

Tipping J What's the section that gives the Commissioner the power to decide what penalty is to be imposed and the recommendation of the Tribunal etc? Is that in front of us?

Hope I think that's 5.

Elias CJ Well removal is 5(a).

Hope Yes 5(a), and the penalties though are 5(7), which is

Tipping J Well I haven't got 5(7).

Hope That's 5, ss.7.

Elias CJ Oh yes you have.

Tipping J Oh I beg your pardon it's the page before.

Elias CJ It's not 5(7).

Hope Reduction in rank; reduction in seniority; reduction in pay; and a fine not exceeding $500.

Tipping J But where is the power to dismiss?

Elias CJ That's 5(a).

Hope 5(a), over the page Sir.

Tipping J But that says the Commissioner may institute the removal.

Hope Removal and dismissal are the same in that context.

Tipping J Yes I realise that and he can do so if he has reasonable grounds for believing that the member has done things, but what I'm looking for is where he gets the report back from the Tribunal and it says 'on receiving this report the Commissioner may accept the report or not accept the report or whatever'.

Hope Well the Tribunal under s.12 is required to report to the Commissioner on the matter, so 12(1)

Tipping J Yes, well that's fine.

Hope Yes.

Elias CJ What's institute the removal? Is there another provision which indicates what removal is or is it just too many words?

Hope Not that I'm aware of Ma'am. Yes I think it's an unusual wording

Tipping J But is all this left to implication that on receiving the report the Commissioner may act in terms of its factual findings and s.12 is deemed to include a power to dismiss?

Elias CJ No, no, it's s.5(a), and the cumulative provisions of paragraphs (a) and (b), which require him to form a judgment. The infelicity perhaps is in instituting the removal because it's not instituting, it's removing.

Blanchard J But plainly under 5(a) the Commissioner has to make an assessment. He gets a report which simply says

Elias CJ These are the facts

Blanchard J I the inquirer find that Bloggs did this, this and this.

Hope Yes.

Blanchard J And then the Commissioner has to decide whether that gives him, the Commissioner, reasonable grounds for belief that (a) and (b) are satisfied.

Hope Yes so there is still another step. If you read 5(a)(1), after an inquiry under s.12 the Commissioner has reasonable grounds for believing, so there's a residual discretion in that. He receives the report and that can be part of a basis for his reasonable grounds for believing. But he's still

Elias CJ It's a process for ascertaining the facts.

Hope Yes it is.

Elias CJ Yes.

Tipping J Yes, well sorry for being a bit slow Mr Hope. It's not very happily knitted but I can see now exactly how it all fits together.

Hope Unfortunately what's happened with this is that under the, and it may still end up being a little bit of an ongoing problem, but certainly less, under the old regulatory regime the Tribunal was directed to follow a – and we're looking at tab 2, the old Police Regulations – although they're still current except we're looking at Regulation 12, procedure preliminary to inquiry, and then there are steps or provisions set out here as to how the inquiry should proceed.

Tipping J Is it essentially your argument that the personal grievance system can challenge the Commissioner's determination that he has reasonable grounds for believing?

Hope Yes, and by looking at whether the inquiry was fair or not.

Tipping J Looking at all aspects of the matter that might ultimately bear on that ultimate question of reasonable grounds for believing.

Hope Yes, and the Chief Judge worded it, I think it's at about para.85. He's talked about the broad, I think is words were the broad examination of the conduct of the Tribunal and it's not a rehearing

Tipping J So is this really the same Mr Hope as any employer asserting a reasonable grounds for believing?

Hope Yes.

Tipping J And I know this is argument about employment relationship, but you saying this has been lined up for employment purposes with any employer who asserts reasonable grounds for believing one of these things can have that determination if you like examined under the Personal Grievance proceedings? It's as simple as that you say?

Hope Yes, and it's not an appeal and it's not a rehearing. No my friend in his submissions has said that no, it would be an abuse of process to re-litigate and call all of these witnesses. Let's recall them. My understanding is what's been suggested would happen in a personal grievance context, but it's not. The Authority or the Employment Court in a personal grievance

context looks at the fairness of the inquiry and it looks at the decisions that were made on the basis of the information that the employer had at the time the decision was made. So it's not an exercise of lining up every possible witness you can find to say that there wasn't this misconduct at all. It's a matter of looking at the decision as it was on the information that there was and saying has the decision that's been reached, has it been something that's fair in a procedural and substantive way.

Elias CJ In the application of part 9, is there modification of the powers of the Tribunal in relation to the Police? I'm thinking about outcome. Can the Tribunal order reinstatement?

Hope No.

Elias CJ Is that specifically withheld?

Hope When you're talking Tribunal, are you talking

Elias CJ The employment.

Hope Oh, sorry, the Authority Ma'am.

Elias CJ Sorry, the Authority, yes

Hope I thought you were referring to the Police Tribunal.

Elias CJ I find it very hard to remember all these names.

Hope No there was no limitation and in fact

Elias CJ There's no limitation?

Hope I can think of two matters where

Elias CJ So the assessment of the Commissioner that the removal is necessary to maintain good order and discipline and avoid bringing the Police into disrepute is something that the Authority can reconsider?

Hope Yes, or the Court. The two instances I'm aware of are *Redell v Commissioner of Police* and I can't give you a citation beyond that. It's unreported, but the Chief Judge reinstated a Policeman who had been dismissed, and in *Waugh v Commissioner of Police* Mr Waugh was reinstated by the Employment Court as well, and those both occurred under the current statutory regime, yes they did.

Tipping J But the significant point is that there is no statutory limitation in the context of Police to what the Authority or Court may do.

Hope No, part 9 of the Employment Relations Act applies in its entirety. I've included in volume 3 of the bundle of authorities

Elias CJ And the Authority, I'm sorry I'm not so familiar with this area of law, can the Authority be judicially reviewed?

Hope Yes, yes, but not by the

Elias CJ But the Court can't be?

Hope No. The Authority can be but not by the Employment Court.

Elias CJ No, that's fine, that's fine thanks.

Blanchard J The interesting thing is that the factor that seems to set this Tribunal up as a Tribunal is the regulations which invent the word 'Tribunal' and define it as a person or persons appointed under s.12 of the Act, and then provide for offences of misconduct or neglect of duty and a prosecutorial function and all the detail about how the inquiry is to proceed. None of that is apparent on the fact of s.12.

Hope No.

Blanchard J I assume that those regulations are justified under s.64 of the Act which I don't think we have.

Hope You do Sir. In the appellant's bundle volume 3 you have that under tab 1, and I was going to take

Blanchard J Tab 1

Hope Tab 1, volume 3 of the appellant's bundle. It's a very thin one Sir. And if you look at 64(2)(h), there is power to make regulations prescribing the procedure at and regulating the conduct of inquiries under this Act, including matters preliminary or incidental thereto and enabling the taking of evidence on commission for the purposes of any such appeal or inquiry.

Blanchard J Right.

Hope In my submission, and although it's not actually an appeal point, but it's simply an observation as to where the regulations have gone with this. It's my submission that 64(2)(h) doesn't give authority for the Tribunal, the Police Tribunal I'm talking about there, to make recommendations on

penalty which the regulations did do and in my submission the regulations can deal with factual matters and they can deal with matters preliminary or incidental thereto and incidental thereto should be coloured by the word 'preliminary', so post-decision issues such as making a recommendation as to penalty are ultra vires the statute in my view Ma'am.

Elias CJ Well where's the harm though in terms of the statute really if it's only recommendatory?

Hope Well it's the practical application in that the Commissioner has almost without exception followed the recommendations.

Blanchard J It is very strange isn't it that there is no longer any appeal right in relation to such important findings of fact which might strengthen your argument that the intention was to replace the appeal right with the personal grievance procedure. I'm not expressing a concluded view on that but I would be very interested in what the legislative history in 1989 might tell us.

Elias CJ It's very strange though that there's not a carve-out of the matters of Police discipline, it's odd.

Blanchard J Well it almost looks as though s.12 setting up a Fact Finding Body and suddenly under the Police Regulations that Fact Finding Body is given all sorts of trappings which you might not have expected just from s.12.

Hope I agree Sir.

McGrath J Mr Hope can I ask if as well as the Appeal Board, that right of appeal going, was there a right of appeal to the High Court that also went in this legislation?

Hope No there wasn't a right of appeal to the High Court.

McGrath J So any challenge to the old Police Appeal Board would have had to have been by judicial review?

Hope Yes. As far as independence goes, and it's an appropriate time to probably raise this, is that the Police Appeal Board was, if you're looking at independence, more truly independent than a s.12 inquiry because the Appeal Board

McGrath J Well it had a District Court Judge chairing it didn't it?

Hope Yes, and the members had tenure, whereas under s.12 an appointee didn't have tenure.

Tipping J I've actually appeared in front of a Police Appeal Board Mr Hope in the not distant past.

Hope Did you have tenure Sir? I think you would have. Presided over by Judge Murray and I think it had a very senior Police Officer and a lay person.

Hope Yes, and in s.46 of the 58 Act which is repealed sets out, and you've got that I think I said tab 15 in volume 1, sets out how that's made up. Now that's only a very recent invention and the Prime Minister, Peter Fraser, who was the Minister of Police in 1947, inserted that in the 1947 Police Act the Appeal Provision at the request of the members he said. The men have asked me and that's volume 1 – I've put an extract from Hansard there.

Tipping J It's more the way it went than where it came that we're concerned about.

Wilson J It may strengthen your argument that the members of the inquiry could be serving members of the Police.

Hope Yes, yes and that was my point earlier Sir, that they can be. I think unfortunately all tied up with this is the fact that the Tribunal was for a number of years in the Auckland region, it was Dame Augusta Wallace, a retired, well I think at times she even probably had a current warrant. She was appearing on the Waitangi Tribunal at times with a warrant there. She was what people regarded as the Tribunal, so you have the situation in *Smith v Attorney-General* case which is under tab 19 in volume 2 where the Employment Court refers to the Tribunal as the New Zealand Police Disciplinary Tribunal as if it's referring to the Law Practitioners Disciplinary Tribunal or the Medical Practitioners, and it's not. It's simply a statutory provision by which the Commissioner can investigate, separate from himself, but not separate necessarily from the Police.

McGrath J I'm interested that you say one person was regularly appointed but it would have to be an appointment for each occasion

Hope Yes it was Sir but it was almost

McGrath J And certainly in the late 1980s the practice was to appoint barristers ad hoc, one-off basis, to be this Tribunal, and that continues does it?

Hope And it's still done here. Kirsty MacDonald QC does that sort of work here and I'm not sure whether she's still appointed but last time I appeared before a Tribunal it was her.

Elias CJ Now I'm afraid I have a meeting at lunchtime so is it convenient to stop at this stage?

Hope Yes it is Ma'am, yes.

Elias CJ Thank you. We'll take the adjournment now.

1.03pm Court Adjourned
2.17pm Court Resumed

Elias CJ Thank you. Yes Mr Pope.

Hope I haven't got much more to say on this point Ma'am. I need to leave some time for my friend

Elias CJ Yes.

Hope But I have sought to ascertain something of the legislative history of that clause or schedule 5 and I have my junior coming from the Law Library now with some photocopies, but I can advise that the Police Amendment Act 1989 was passed on the 19th December 1989 and by that Act sections 33 to 36 of the original Act were repealed and 45 to 48. So includes the appeal provision and the appeal board provision. The fifth schedule was also inserted by s.17 of that Act so they were both dealt with if you like out of the same provision. As to the history of that, or the genesis if you like of the Police Amendment Act 1989, it began life as part of a conglomeration of provisions under the State Services Restructuring Bill ad it then was separated out I think after the second reading to become the Police Amendment Bill and was passed separately. Now I have copies of Hansard, the second reading, they are still coming from the Law Library on that matter.

Elias CJ Thank you.

Hope Now I have also compared the seventh schedule of the Labour Relations Act 1989 which contains the personal grievance provisions, how a grievance is raised etc, with the fifth schedule to the Police Amendment Act 1989 and they are effectively the same and I will provide you with copies of those in due course. So what is clear is that the inclusion of the personal grievance procedures into the Police Act by the Police Amendment Act 1989 replicated substantially the personal grievance provisions in the Labour Relations Act 1987, and that the appeal provisions were removed by the same Act that inserted the personal grievance provisions. I wasn't able to carry out a full analysis of what

happened in the State Sector Restructuring Act, however I wasn't able to glean from the second reading, the transcript in Hansard, that other appeal provisions in other State Sector Act were removed, and it seems to have been a sort of a bit of a hodge-potch deal with a whole lot of things although I must say I haven't been to each of the Acts that was affected by that and I'm only relying on what's in Hansard and often not much is said.

Elias CJ Thank you, that's helpful.

Blanchard J Have you seen anything in relation to the explanatory note on the introduction of the legislation?

Hope No, nothing that's helpful.

Blanchard J Have you looked at it?

Hope Yes. Just going to the case on appeal, volume 1 with the Police Regulations 1992 as they were prior to February this year, and it's under tab 2. The provisions relating to the Tribunal procedure. I just wanted to make the point that the procedure to be followed at the Tribunal is, according to the regulations, the procedure to be followed for District Court criminal proceedings where applicable. I'm just looking for the Regulation 24. 'Subject to the regulations the procedure at the hearing shall conform as far as practicable and with any necessary modifications to that followed in the District Courts and the summary criminal jurisdiction and in particular the provisions of s.43 relating to amendments shall apply'.

Blanchard J What was the position about regulations prior to these regulations. In other words between 1989 and 1992? I notice in schedule 2 there is a schedule of regulations revoked and they're the Police Regulations 1959 but there doesn't appear to have been an amendment in 1989.

Hope No there wasn't. Not that I'm aware of.

Blanchard J So would that have meant that the Tribunal simply carried on without any procedural requirements at this time?

Hope I'm not sure what the provisions were then Sir. I did look back at those regulations but only in respect of the rehearing provision and I noted that the rehearing provision was in the 1959 Regulations and continued on through into the 1992 ones, but I can't

Blanchard J What I'm getting at is the possibility that the 1989 amendment didn't envisage a Tribunal with all these trappings.

Hope Yes.

Blanchard J And that that was something which was grafted on by regulation in 1992. I mean I don't know whether that's the position or not. I'm curious about whether it might have been.

Hope I can't help you with that Sir unfortunately, but I must say that the way that Mr Creedy's tribunal, s.12 inquiry was conducted was very reminiscent of a criminal trial and unfortunately Regulation 24 has been interpreted in such a way as to encourage the parties to have a full blown criminal proceeding with a Crown Prosecutor hired, the laws of evidence being applied strictly as if it was a criminal proceeding, notwithstanding that it's neither a criminal nor a civil proceeding, it's simply an inquiry, an investigation. It's not a judicial proceeding, it's an investigation.

Elias CJ Well it's particularly odd if it then slots into the grievance provisions and reconsideration takes place on an entirely different basis. Does that happen? I mean is that

Hope Well so far it hasn't been subject to any evaluation by the Employment Tribunal or the Employment Relations Authority, not that I've been able to determine, so as far as I'm aware this is a novel issue as to what extent, or whether at all, it can be reviewed. And I use 'review' not in a strict administrative law sense, I'm using that word in the sense of can there be an evaluation of what happened to see whether the requirements of procedural fairness are met, and in my volume 3 bundle of authorities under tab 6, there's a decision of the Court of Appeal in *BW Bellis Ltd v Canterbury Hotel Industrial Union of Workers* and the issue here was whether or not procedural unfairness could ground a personal grievance. At page 145 of that decision, and it's got a dual report in this, there's the Arbitration Court judgments and the Employment Reports of New Zealand and I'm referring to page 145 of the Employment Reports of New Zealand judgment, which is page 3 of the case you have before you. In the last quarter, the third to last paragraph, part-way through it begins 'so that even when an issue has ended in the dismissal of the employee which itself is a lawful exercise of the employer's rights it will not have been handled in a way which will seem unjustifiable. It is quite likely that a dismissal which may be entirely lawful yet deserve at the same time the label "unjustifiable" will seem to be an elastic and novel concept for the lawyer. However we do not think it can sensibly be defined in any precise way as a straight-out matter of law'. So really the Court is affirming there that a dismissal that's procedurally unfair, even if it's lawful in a substantive sense, can be unjustifiable in an employment law sense. So if the s.12 inquiry was properly constituted and properly carried out then its recommendation which is relied upon by the Commissioner, or if the Commissioner independently makes a decision to dismiss without relying

on a recommendation, then the grievance can still be unjustified and the Employment Institutions can look at what is a lawful process carried out by the inquiry which may nevertheless be unfair in an employment law context. I have copies of the material here if you wish to have it handed up now.

Elias CJ Yes thank you.

Hope And you have Your Honours, you should have a copy of the seventh schedule of the Labour Relations Act. The fifth schedule of the Police Amendment Act 1989, and the second reading of the State Services Restructuring Bill. Of significance in the Hansard extract that you have on page 14156, which is about half-way through the bundle of pages, at the top of the page John Banks, who was in opposition then, has said 'I want people up and down the country, particularly Police Officers, to understand

Elias CJ I think really what we were after was anything from the Minister introducing this legislation or speaking at the second reading. There's no remarks that he makes is there in relation to this change?

Hope No.

Elias CJ No.

Hope 14142, the second page in, half-way down, the Minister simply says 'I outline the main features, the personnel provisions of the State Sector Act, including good employer and equal employment opportunity requirements and personal grievance provisions of the Labour Relations Act are applied to both non-sworn and to the extent practicable sworn Police. This application involves changes to the present appointment, promotion, and appeal procedures for sworn Police'. So there's mention there to appeal and that's in the bottom third of page 14142.

Elias CJ Thank you.

Blanchard J Well that's quite significant.

Tipping J It's not unhelpful. It might give a clue.

Blanchard J The personal grievance provisions of the Labour Relations Act were applied to both non-sworn and to the extent practicable sworn Police. This application involves changes to the present appointment, promotion, and appeal procedures for sworn Police, and then it goes on to pay fixing.

Hope Yes. Well in my submission it supports the argument that the appeal provisions were linked to the insertion of the personal grievance provisions, and those personal grievance provisions have been further enhanced or perhaps consolidated with mainstream employment law by the Employment Relations Act, so now s.87 of the Police Act incorporates part 9 of the Employment Relations Act rather than having a separate but parallel personal grievance provision.

Wilson J Have you looked at the Hansard for the first reading?

Hope No.

Wilson J So you don't know if there is anything relevant there or not?

Hope No we were getting this stuff

Wilson J Pretty busy lunch hour was it?

Hope Yes it was, there was no lunch Sir. There's not much further that I can take this issue but the point should be made that the Police Employment Provisions are not in my submission linked with the constabulary role of members of Police. Their employment and the somewhat unique nature of the employment is really because they are servants of the Crown and that shouldn't be overlooked and although the present proceedings are entitled *Creedy v Commissioner of Police*, in a true sense the Crown is the employer and Crown employees in the past have had a special and separate type of employment, or employment obligations, so in the decision of the Australian High Court in *Foley* and that will be in volume 2 of the appellant's bundle, *Ryder v Foley* under tab 8, you have here the High Court of Australia. I'm looking here at page 434 of the decision, about a third of the way down on the left-hand column where the Chief Justice Griffith's says 'I regard the section as having nothing to do with the tenure of office of the constable as between himself and the Crown. It is necessary therefore to consider the nature of the tenure of office of a constable irrespective of the section. With respect to the tenure of office of constables and officers in the Public Service, the general rule is stated in *Shenton v Smith* to be that in the absence of a special contract. Servants of the Crown hold their offices during the pleasure of the Crown, not by virtue of any prerogative of the Crown, but because such are the terms of their engagement as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law-suit, but by an appeal of an official or political kind', and then over on the next page, on the facing page to 435, 7th line down, 'all service under the Crown itself is public service and to my mind it is most likely that the doctrine which is said to be confined to military service applies to all public service under the Crown because all public

service under the Crown is for the public benefit'. Now mainstream employment law of course is taken off and diverged quite markedly from where the Police Act is however

Elias CJ Or where it came from.

Hope Or where it came from, yes Ma'am. But the Police Act is catching up. The Public Service Act 1913 is very very similar to Police provisions, where there are separate inquiries

Elias CJ I can't really think it's necessary to develop this at any length really Mr Hope.

Hope Well can I just say then referring to *Foley*, that the argument here was about s.6 of the Police Act 1963 in Queensland and the Court held

Blanchard J 1863 I think it was.

Hope 1863 I'm sorry Sir.

Elias CJ You do seem a long way back.

Hope It was two centuries ago and not one. The

Blanchard J I'm struggling to see the relevance in all this.

Tipping J We do need to hear the Solicitor General you know Mr Hope. You can't hope to close him right out.

Hope Yes Sir. Page 445 Sir. But the section is a check on hasty action by the depository of a delegated power and keeps the Government in a position to correct any such hasty action, and I was just really referring to that to put a s.12 inquiry into context, but it's not an independent inquiry it's separate from the Commissioner but not independent of the Commissioner, and the Commissioner has a role in investigating prior to the charges being laid; to prosecuting the charges; to appointing a Tribunal; to paying the Tribunal; to even providing a venue. Mr Creedy's proceeding took place

Blanchard J But isn't your best point the simple one and I think you made it this morning that there used to be a right of appeal. It's been replaced by a grievance procedure and that it can't have been intended to take away rights.

Hope Yes Sir, in the abundance of caution I was wanting to run other arguments.

Tipping J You've got two belts and two braces as far as I'm concerned Mr Hope.

Hope Thank you Sir. Those are my submissions on that point. I can summarise in the reply to the Solicitor General?

Elias CJ You'll have a right to reply.

Hope Thank you.

Elias CJ Yes Mr Solicitor.

Collins Thank you very much Your Honours. It might help if I start by stating where I agree with Mr Hope before embarking on the areas with which I disagree. I agree entirely that the definition of 'exceptional circumstances' as articulated in *Williams & Field* is appropriate and it need not be modified. I also agree with Mr Hope if as I understood him to be saying he was saying that s.115(b) is of no assistance to the appellant in the circumstances of this case. I do however disagree with Mr Hope's proposition that somehow the agreed test of exceptional circumstances can be applied in a way that may assist the appellant in this particular case. The application of the agreed legal test necessitates a brief excursion into the facts, but the end point that I will invite Your Honours to come to is that there is simply no factual finding that could assist Mr Creedy in his assertion that in this case there are exceptional circumstances within the meaning of s.114 of the Employment Relations Act. To assist the Court I've prepared a succinct chronology which I will invite the Court to examine now, and I've done that because, sorry Your Honour

Elias CJ No, carry on.

Collins I had done that because this morning some matters of a factual nature began to emerge and with respect only a very small part of the total picture emerged and I am not, and I emphasise this, am not in any way inviting the Court to make an investigation into the facts and indeed every factual matter that I'm going to draw to Your Honours' attention are facts that came from Mr Creedy, and are not matters that had been the subject of any dispute.

Elias CJ Mr Solicitor what do you say was the error of law that justified the Court of Appeal in differing from the Employment Court? Was it misinterpretation of, or the Courts view that *Wilkins & Field* was no longer good law or is it that there was a conclusion which is unsupportable?

Collins A combination of both Your Honour. With the greatest of respect to the Employment Court, it did err in the way in which it considered that *Wilkins & Field* no longer stated the position under the Employment

Relations Act and when it came to the application of that legal test there was clearly a misdirection by the Employment Court.

Tipping J Somehow or other the learned Judge in the Employment Court seemed to have thought that *Wilkins & Field* had become out of date, if not surpassed, and then there was not clear articulation as to how the new text if you like, or what the new text was under the new regime when applied to the facts justified the view that this was exceptional circumstances. It seems to me that that gave the Court of Appeal every right to intervene and then had to make the call on the facts in accordance with the correct *Wilkins & Field* test.

Collins Yes, I don't disagree at all, in fact I totally agree with Your Honour on that point. I am very hesitant to get into fact and I can assure the Court that I will be no more than ten minutes but I do think it will be very reassuring for the Court to have that brief analysis.

Blanchard J So you'd like us to keep quiet for ten minutes?

Collins Not at all Your Honour.

Elias CJ If you want it to be brief.

Collins It's merely an invitation Sir, and could I say Your Honours that although you've been given a very large case on appeal I respectively submit that you really only need volumes 1 and 8 to deal with this entire case. Volumes 2 to 7 I don't think you need to open, and I will run through these very very briefly because as I've said most of it is already in the record. The first is when the appellant became a Police Officer. The second point is that the appellant brought a personal grievance the Police relating to his removal from I think it was a Police Dog Squad in 1994, then in 1996 he was prosecuted and found not guilty. He brought proceedings in the High Court against the Police but the record shows that prior to those proceedings being brought consideration was clearly being given to a personal grievance because as Mr Creedy was cross-examined on these points in the Employment Court, the correspondence Mr Recordon to the Police clearly explains why they think that the 90 day rule isn't relevant because they're proposing to bring proceedings in the High Court as they were out of time. So as early as 1996, and I've given you the reference there as to where you can go to to find these parts in the transcript, as early as 1996 Mr Creedy had an awareness of the 90 day rule. In June of 1998 he's promoted to Sergeant, and then on the 15th September 2000 the first complaint is made about him. On the 22nd September he's stood down from internal investigation and then on the 4th December he's issued with a notice of an intention to charge. And then on the 16th December he's charged with 39 disciplinary offences. And on the 12th January he's

formally suspended from duty, and on the 20th February he gets what is called the bulk disclosure of evidence which is gathered for the disciplinary proceedings. On the 14th March there is the first appearance before the Police Disciplinary Tribunal. It think it was merely a date for procedural matters, and then on the 4th April we have the only letter from Mr Barrowclough giving notice of a personal grievance, and the letter clearly refers to an employment disadvantage in the way in which the Police had applied the disciplinary processes to the appellant and as the Court have fully appreciated cannot and could not have made any reference to the events which were to happen in 2001. And then on the 5th April the Police very promptly respond to Mr Barrowclough, pointing out that time is of the essence; that the alleged events giving rise to a personal grievance must already be known and there is no justification for waiting to give details of the personal grievance, the alleged personal grievance, said to have already occurred. Importantly the appellant acknowledges talking about this letter with Mr Barrowclough, and I've given you again the reference in the transcript to where that occurs. On the 14th May the substantive disciplinary hearing commences. It's important to know that at the outset two applications are brought. One is to have the Tribunal disqualify herself on the basis of bias, and at this point Mr Barrowclough is assisted by Mr Stapleton who argues that particular point for Mr Creedy. And the second application is that the charges be struck out for an abuse of process. Now both of these matters are subsequently stipulated in the notice of problem as part of the personal grievance that Mr Creedy wishes to bring against the Commissioner. In July 2001, and I've given you the citation again, Mr Creedy talks to Mr Tower, and Employment Law Specialist at Bell Gully Buddle Weir in Auckland. On the 29th August the Police Disciplinary Tribunal issues its decision finding 31 of the 39 charges proven. I don't intend to take Your Honours through those findings. They I think can be fairly categorised into four categories. Findings of verbal abusive behaviour of an overtly sexual nature. Findings of totally inappropriate conduct in using pepper spray against Police Officers. Findings of totally inappropriate behaviour of using a Police revolver in the presence of Police Officers and members of the public. There was also a finding that an order requiring him not to associate with witnesses had been breached, and there was one other finding which wasn't of a verbal sexual nature but was nevertheless a finding of physical misconduct when the appellant was found guilty of a disciplinary offence when he and a female Police Officer attended a domestic dispute and it was alleged and subsequently found that he had followed the Police Officer around the scene saying he wanted to bite her pony tail. Then on the 14th September we have the Tribunal's recommendation of dismissal forwarded to the Commissioner, and it is a recommendation of dismissal, although the Act says, the Regulation says that the Tribunal can only comment on a possible penalty. At the request of the appellant on the 18th September the Commissioner grants Mr Creedy 14 days to make

submissions on penalty and then in October 2001 the appellant has his second consultation with Mr Tower.

Tipping J I presume that's after he's made his submissions on penalty is it?

Collins Yes it would have been Your Honour. Entry 21, I just don't know the exact date this occurred and it is my supposition that it must have occurred before disengagement and after the Tribunal's decision had been made. But I thought very instructively Mr Barrowclough says to Mr Creedy 'you can't appeal the Tribunal's decision'. His remedy was in judicial review. Then on the 13th December the appellant disengages from the Police and he receives the Police employment – I've forgotten what PERF stands for. Rehabilitation fund payment of $190,000. In cross-examination the appellant confirmed that he didn't provide fresh instructions to Mr Barrowclough to commence a personal grievance when he disengaged. Instead his position, and it's always been his position, was that Mr Barrowclough had ensured him that the 4 April letter covered all events. Then in early 2002 the appellant consults my friend in some time in 2002, Ms Dyrberg. That consultation in early 2002 with my friend was found by the Employment Court to have probably been within 90 days of disengagement. Now from early 2002 to December 2002 you might wonder what it was that the appellant was doing, and there were three important matters that emerged about his conduct during this time. I'll invite Your Honours if you wouldn't mind to go to volume 8. If we go to tab 22, which is the appellant's affidavit before the Employment Court, para.74, and I'm not going to read this out Your Honours, you will see a very candid acknowledgement by Mr Creedy as to what he was doing after he received his $190,000. I think it's fair to say that for a number of reasons Mr Creedy was squandering both his money and his time. And then if we turn to tab 32 to pages 38 and 39. If we go to the foot at page 38 we will see that at some point in 2002 Mr Creedy whilst in the shower had a realisation that he really wanted to be a Police Officer, and his answer at the foot of page 38 and the top of 39 explains that realisation on his part that that's what he really wanted in life.

Tipping J He seemed to be associating getting better with rejoining the Police.

Collins Yes. And also on page 39 the only other thing that I noted of any interest was that he spoke to the media and that appears at line 35 on page 39. Then at the very end of 2002 the appellant consults Ms Fitzgibbon and then approximately one month later the statement of problem is filed and this is the first notification that the Police have that Mr Creedy has an issue relating to his disengagement from the Police, and that is, if I have added up the days correctly, 406 days after he left the Police. That's the first notification that's received by the Commissioner.

Tipping J If you were just as a hypothesis Mr Solicitor, if you were somehow or other to get reinstated, would you have to pay back your PERF money?

Collins I don't know, I just don't know. I haven't thought about it. I just really don't know. It would seem rather ironic that you could get a very substantial payment on the basis that you were leaving

Tipping J Spend it all and then ask to be reinstated.

Collins Exactly.

Elias CJ That was never run in this case was it, that he couldn't approbate and reprobate?

Collins No.

Elias CJ No, and maybe

Tipping J But it would be very relevant to an issue that arises in this jurisprudence that's not before us, ie, if all tests were satisfied it's still got to be just

Collins Exactly.

Tipping J That you get leave to extend.

Collins Yes, and justice I think would involve a very very wide range of issues in this particular circumstance, including the basis upon which the disengagement occurred; the findings that had been made; circumstances under which they have been made, and the time lapse.

Tipping J Because if we were of the view that there were causative exceptional circumstances it would have to go back wouldn't it for a finding of whether it was just?

Collins Yes, yes it would, yes because there's been no finding on that point in the Court of Appeal. Now I said that there was really no way in which s.115(b) was of assistance to the appellant and the reason is because when you go through that chronology and look at the facts as they were before the Employment Court, there is no evidence that Mr Barrowclough failed to act reasonably in relation to the alleged unjustified dismissal personal grievance because he received no instructions on that matter and indeed the relationship between Mr Barrowclough and Mr Creedy came to an end soon after the disengagement which was at about the same time that Mr Creedy first went to Mr Hope and then later in that year to Ms Fitzgibbon. So it is impossible for Mr Barrowclough to have acted unreasonably if he didn't receive instructions to issue personal grievance proceedings in

relation to the alleged unjustified dismissal, and that's the very reason why my friend fully recognising that doesn't rely upon s.115(b). So in summary the facts that we have in this case are that Mr Creedy, and only Mr Creedy, thought Mr Barrowclough's letter of the 4th April related to alleged constructive dismissal events which weren't to occur for another six to eight months. Mr Barrowclough did not and could not believe that his letter of the 4th April applied to the alleged constructive dismissal events of late 2001. Mr Creedy consulted and experienced and prominent Employment Law lawyer about the time of the alleged constructive dismissal events. He consulted another experienced Employment Law lawyer early in 2002, possibly within or at least very close to the expiration of the time for giving notice of a constructive dismissal claim, and instead waited a whole year before taking further steps to give notice of his constructive dismissal.

Wilson J So is your position that neither limb of 115(b) is complied with?

Collins Yes it is Your Honour, but I really emphasise the second half of it.

Wilson J Yes.

Tipping J Well if the first is not complied with the second necessarily cannot be.

Collins Yes, yes, and I emphasise the lack of reasonableness. So in my respectful submission there is simply no evidence that any of the lawyers consulted by Mr Creedy unreasonably failed to ensure that his constructive dismissal personal grievance was raised or was not raised within the 90 day time limit. So if s.115(b) is of no assistance, the only possible argument is whether or not it still nevertheless comes within s.114 and the first step in this exercise is to ask what is the purpose of the legislation. I arranged for that case of *Soneji*, the House of Lords judgment to be put before you, because I thought that it succinctly encapsulated modern jurisprudence in which Lord Steyn pulls together the threads saying that the focus is not on whether the legislation is mandatory or directory, but whether or not the consequences are the consequences which Parliament intended, and in doing so relied on a number of judgments including that of Your Honour Justice Tipping's in *Charles v Judicial and Legal Service Commission*

Tipping J Yes I thought I recognised that. Did I write the judgment in that case?

Collins You did and you were praised by Lord Steyn in *Soneji*.

Tipping J Oh really.

Blanchard J I was surprised that Mr Hope skipped over that. I thought there must be a reason.

Tipping J I was far too diffident which will surprise everyone in Court, because I wasn't 100% sure and I thought it would be most offensive.

Blanchard J It even identified you in case any reader didn't know who Justice Tipping was.

Tipping J Oh really. Should I read this case again?

Elias CJ Later.

Collins And as part of that purpose and intention, the Court's attention is drawn to what the real purpose of that 90 day rule is and it's set out in volume 1, tab 19 of the appellant's authorities - volume 1, tab 19. It's the report of the Department of Labour to Parliament's Employment and Accident Insurance Legislation Committee, which was the Committee that considered the Employment Relations Bill in 2000, and if I can just take Your Honours to that.

Blanchard J Could you give me that reference again please?

Collins Volume 1, tab 19 of the Appellant's volumes of Authority Your Honour. There are three of them and it's the first one.

Blanchard J Thank you.

Collins And it's page 125 of that document Roman 3, second to last paragraph on page 125. To summarise 'that 90 day limited is there so that employers are made aware of a grievance and are given the opportunity to do something about it'. Now I'm not going to go through the authorities because I just don't think I've got the time to be able to do so but can I leave this point relating to the first ground upon which leave to appeal has been granted by stressing to the Court that Mr Creedy's circumstances are far from deserving of the finding of exceptional circumstances for the following reason. Mr Creedy's belief that his position was protected by the letter of the 4th April was not a reasonable belief. We are after all dealing with a person who had attained the rank of a Sergeant of Police; who had experience of personal grievances; and a Court proceeding prior to the events in question. He acknowledged in cross-examination before the Employment Court that he was aware, his exact words were 'he had some knowledge of the 90 day limit'. That's again volume 8, tab 32, page 26, line 25. Actually it starts at line 20 and it finishes at line 30. I was just going through the reasons why

Tipping J What page is that?

Collins That Sir is page 26 of tab 32, volume 8.

Tipping J Yes, thank you.

Collins At lines 20 through to about 30 Sir. And just finishing off the list of factors which I urge upon Your Honours to consider as relevant in determining that this couldn't be a case of exceptional circumstances. Mr Creedy was well enough informed to seek advice from experienced Employment Law lawyers about the time of the events giving rise to the alleged constructive dismissal. A matter that I haven't mentioned so far is that Mr Creedy's father had experience of employment matters and he was concerned about time limits and the evidence for that can be found also in volume 8, tab 32, page 17. Mr Creedy was well enough informed to be able to contact Mr Hope possibly within 90 days of his employment concluding and against all of that background he didn't actually give notice of his alleged constructive dismissal until 406 days after the events in question, and the Court of Appeal was entirely correct when it concluded that Mr Creedy's asserted ignorance of the fact that Mr Barrowclough had given notice of his alleged constructive dismissal grievance did not constitute an exceptional circumstance. Almost all failings to comply with the 90 day time limit will be to some degree attributable to either ignorance of the law or a mis-understanding on the part of the employee. I respectively submit much more than this is required to satisfy the plain and ordinary meaning of exceptional circumstances. That's all I wish to say in relation to that first ground upon which leave to appeal has been granted Your Honours and unless I can assist you further on that point I'll move on to this jurisdictional point.

Elias CJ No, thank you.

Collins Thank you very much Your Honours. There are three main points I wish to make in relation to the jurisdiction point. The first concerns the current special employment status of Police Officers. The second concerns the independence of the Disciplinary Tribunal, and the third relates to the limited application of the Employment Relations Act to the Police. Now can I deal with the current special employment status of Police Officers very succinctly by suggesting that perhaps the best exposition of the employment status of Police Officers can be found in the judgment of His Honour Justice Hardie Boys in the Court of Appeal in the *Auckland Unemployed Workers Rights v Attorney-General* which is in the appellant's authorities, volume 2, tab 12. And can I commend to Your Honours that part of the judgment which commences on page 726 of the report under the heading *Liability of the Commissioner as an Employer* through to page 727, line 24? Now because of the constraints of time I'm not going to go through every point here but with respect Your Honours might find it extremely helpful to focus upon those paragraphs as a very

clear and well-reasoned exposition of the true status of Officers of the Crown, not as employees of the Commissioner.

Tipping J Is the key sentence in the whole of this paragraph perhaps at line 20 on 727?

Collins Yes, that's the bit I've got underlined, yes that really encapsulates it Your Honour. Now then without wishing to push this point too rapidly, in *Attorney-General v Benge*, which is in the same volume, tab 15, the Court of Appeal returned to the theme at page 440, and another passage which Your Honours might find particularly helpful is at the top of page 440, line 4 where the Court says 'the short point here is that on the spectrum of employment agreements in New Zealand, at one end are prerogative employees of the Crown (as to whose position we make no comment) through defence and associated personnel; on through the Police Force and thence onto what might be termed general employees, who do not enjoy a distinctively recognised status. For present purposes that signifies that the legislature did not place all employees in the same employment context, nor did it place all employees in New Zealand under the full umbrella of the ECA. The legislative scheme in New Zealand is that a statement of general application having been made in the ECA, some derogations have been made therefrom in specific employment contexts' and Police are one selected exception. And the same point was again made in the Court of Appeal in *Commissioner of Police v The New Zealand Police Association* which is under tab 17 of my friend's volumes of authority, and the relevant passage is at page 747, para.24. In summary Your Honours what these authorities very accurately say is that Police Officers have a unique constitutional status. They are Officers of the Crown and the Commissioner is not their employer. That's the first point I wanted to make in relation to this jurisdiction matter. Now the second, which is only relevant to the discussions that occurred before lunch and just after lunch with my friend, relate to the independence of the Disciplinary Tribunal and it is my submission that the Tribunal is indeed independent of the Commissioner. The Tribunal process is governed by the Police Act, the Police Regulations, and emerges as a consequence of a legislative framework, and there are parallels between the Police Disciplinary Tribunal and other independent professional Tribunals, and to illustrate that point I prepared a brief spreadsheet comparing the Police Disciplinary Tribunal with the Law Practitioners Disciplinary Tribunal and the Health Practitioners Disciplinary Tribunal - how they emerge and what their respective powers are, and it's just a one page document.

Tipping J Are you talking here Mr Solicitor about institutional independence or de facto independence?

Collins Both.

Tipping J Both.

Collins Yes.

Tipping J Yes, well you'll need to tell us, and I'm sure you're going to, as to where the institutional independence is derived from because it seems as though he can appoint anybody.

Collins Oh undoubtedly he can appoint anyone, but once appointed that person is independent of the Commissioner. Their powers do not then get derived from the Commissioner, they get derived from the Police Act in more detail the Police Regulations of 1992, so without the statutory existence of this Body, it would be an agent of the Commissioner, but it is not an agent of the Commissioner because it's existence is dependent upon a separate statutory provision which creates it.

Elias CJ It's not being argued that it's an agent. Mr Hope expressly disavowed that submission.

Collins Yes, well the Employment Court described the Tribunal as being, I think the words were 'akin to an agent', or words to that effect, and if that's not an issue that's causing you any concern I won't go on any further, but I just wanted to ensure that there was a clear distinction being made between the Police Disciplinary Tribunal and other situations in which an employer may engage a third party to conduct an inquiry or investigation and assume responsibility for it.

Elias CJ But there's no distinction in the sense it's all part of the one process isn't it? The Tribunal which is investigating the facts reports to the Commissioner for disciplinary determination.

Collins Your Honour is absolutely right and it's the Commissioner who ultimately has to make a decision.

Elias CJ Yes.

Collins But where I draw a very very clear line is this, that the Commissioner cannot be liable in an Employment Law context for the conduct of the independent Disciplinary Tribunal, so to make it very very graphically obvious, in this particular case two of the grounds that are alleged in the statement of problem in the Employment Relations Authority is that the Police Disciplinary Tribunal did not disqualify herself on the grounds of bias, and/or that she did not stay these charges on the grounds of an abusive process. Now Mr Barrowclough quite correctly told Mr Creedy in late 2001 that whilst he didn't have a statutory right of appeal, his only

remedy in relation to matters like this, although assuming it's in relation to these matters, could only be by way of judicial review.

Elias CJ But it might have been right at that stage. Before there was a grievance it may have been amenable to judicial review but why is it either/or you will have to persuade me of that?

Collins Yes and I look forward to doing so Your Honour.

Elias CJ Yes.

Collins I accept that the statutory, I'm sorry just before I go on to that point can I just very quickly scan over this document? It may not be of much assistance to you but I've gone through the key powers that exist for disciplinary bodies and tried to work out the extent to which they are common and you will see that almost all the powers that pertain to the New Zealand Law Practitioners Disciplinary Tribunal and the Health Disciplinary Tribunal apply to the Police Disciplinary Tribunal.

Blanchard J One thing I notice is that for the two Disciplinary Tribunals on the middle and right-hand column, they all come out of an Act with the so-called Police Disciplinary Tribunal more seem to come from Regulations.

Collins Yes the powers come more from Regulations but the entity in all three instances is created by statute, and in the more recent statutes the power are spelt out in the statute.

Tipping J I don't think the entity is created by statute Mr Solicitor. I think that the power to appoint a person is created by statute but I don't see that as creating an entity out of the statute. It could be anyone and it could differ from case to case.

Collins It could be anyone but nevertheless once appointed their appointment is based upon either the statute or the regulatory regime which governs the way in which the Tribunal is to conduct itself. So this is a vast way removed from a situation where an employer has a dispute with an employee and engages somebody else to conduct an inquiry and report to them on what they should or shouldn't do. Vastly different.

Tipping J Whether this takes us anywhere I don't know but the statute seems to me untutored to set up an inquisitorial process, but the Regulations seem to set up a very formal adversarial process and there is some degree of disharmony, at least at first blush, but I think what you'd think was contemplated by the statute and what is provided for in the Regulations. Now I haven't yet thought that through but I have to say that it does seem to me at least for the moment as being somewhat dissident.

Collins Well the two may not marry together as smoothly as one would like but that doesn't mean to say that the Tribunal is any less independent than say the New Zealand Law Practitioners Disciplinary Tribunal or the Health Practitioners Disciplinary Tribunal. Once

Tipping J Not on that account, no. If anything it would be the reverse.

Collins Indeed, indeed, and once created and process is commenced and the hearing of evidence is commenced it seems with the greatest of respect really stretching credibility to say that the Commissioner should be liable in an Employment Law context, or in any context, for the conduct of that Tribunal.

Elias CJ Isn't that over-personalising it though? If you have a system which plugs into the Employment Legislation, and it's a necessary step that you have an investigation of facts and the statute provides a basis for that to be done, why is it incongruous if the Commissioner who in substance makes the decision, I mean doesn't the Act say something about the Commissioner for the purposes of the Employment Act is the designated

Collins For the purposes of the State Sector Act

Elias CJ For the purposes of the State Sector Act is to be what the employer or the

Collins To have the powers and functions of an employer

Elias CJ Yes, yes.

Blanchard J And liabilities?

Elias CJ You say well the Commissioner shouldn't be responsible because the statute sets up this process, but he's responsible in a titular way.

Collins With respect I accept entirely that the Commissioner is responsible for his ultimate decision and that's not in dispute.

Elias CJ And the process by which it's arrived at.

Collins No, no, the Commissioner is responsible up to the point in time that a decision is made to lay the charges. Once the charges are laid it's in a separate jurisdiction, then when the report is received from the Tribunal and recommendations are received and submissions are received on penalty, at that point when the Commissioner is required to make a decision then the Commissioner is responsible.

Blanchard J But isn't

Collins Sorry Your Honour, I didn't mean to interrupt you.

Blanchard J Go ahead.

Collins But not for the quasi-judicial process that goes on between the laying of the charge and the recommendation to the Commissioner.

Blanchard J But isn't it rather odd that prior to 1989 if a Police Officer was being dealt with under the regime that then applied there would be an inquiry to establish fact and if the Police Officer felt that the inquiry had simply got the facts wrong, there was a general appeal to a Board. Now what is being said is that there is an inquiry to establish fact and no right of appeal, and no ability to challenge that except on administrative law grounds or by rehearing but Mr Hope pointed out that the rehearing procedure was already in the prior legislation. That does seem anomalous.

Collins The only explanation that can be given is this, and I'll take you to the Hansard reports including the Hansard report for the first reading and to the explanatory notes. Can I just summarise what they say? They say this, that when the State Sector Restructuring Bill was introduced, which included when it was first introduced, the provisions which ultimately became the amendments to the Police Act of 1989. The Appeal Board under the Police Act was removed. The Hansard debate and the explanatory note makes it very clear that non-sworn Police Officers, non-sworn the civilian members of the Police, were to become people who had the full benefit of the Employment Relations Legislation. Sworn Officers were only going to get the benefits of the Employment Relations Legislation to the extent that that was practicable and those words 'to the extent that it's practicable' is repeated twice in the Hansard debates and I think also in the explanatory note. Now why were sworn Police Officers not being placed in exactly the same position as non-sworn Police Officers in 1989? I ask that question respectively and rhetorically, and the answer is very very clear. It related to the special constitutional status that Police Officers had. They weren't ordinary employees. Now in 2008 things have moved on quite a way

Elias CJ If you're going to make that submission though don't you have to take us to the differences in the application of the employment legislation to sworn Officers?

Collins Yes I will do

Elias CJ You'll do that will you?

Collins Yes I will do all of that Your Honour but can I just finish off this particular aspect of the explanation? In 2008 a new Police Bill was introduced into Parliament. It was on the 19th February. It is the hope of the Government that it will be passed by the 30th June this year. One of the many changes that have been made in that legislation is the removal of the s.12 disciplinary process altogether and not being replaced with anything equivalent to it, and the merging of the sworn Police Officers into the same status as the non-sworn Police Officers under the current legislation. So the special status of Police Officers as employees will disappear.

Blanchard J Which means that it must have been recognised that there was no particular reason for dealing differently with them in this respect.

Collins No, in 1989 they recognised there was a need to deal with them differently because of their recognised different constitutional status.

Blanchard J Well what I'm suggesting is that that's actually a view perhaps taken in 1989 which was really nonsense. There was no need to make that distinction if indeed that's what they were doing.

Collins Well they were definitely making a distinction and the basis upon which that distinction was being made recognised that individual characteristic of sworn Police Officers as not being employees.

Blanchard J Well I don't really follow all of that. It seems to be totally illogical, particularly when the Commissioner is given all of the duties of an employer in respect of all members of the Police. So for constitutional reasons and historical reasons, yes Constables are different, but for employment purposes they're not.

Collins Well Sir Parliament didn't think that in 1989. It does think it now.

Blanchard J Well.

Tipping J Well that remains to be seen.

Blanchard J I'm not at all sure about that Mr Collins, and the fact that the Bill which I didn't know anything about is doing away with any attempt at a difference rather suggests to me that there was no need for any such distinction and that Parliament may in reality not have been directing its mind to the employment situation especially when those statement were being made.

Collins Well all I can do is take you to the Hansard debate, to the explanatory note, which makes it clear that in 1989 sworn Police Officers and non-sworn Police Officers were differentiated from - I'm sorry, non-sworn Police employees were being differentiated from sworn Police Officers.

Elias CJ Before you do that can you take us to where the statutes do differentiate employment matters between sworn and non-sworn?

Tipping J Yes, is this so far as practicable carried forward into the legislation?

Elias CJ Yes.

Tipping J Because that was a phrase that was used by Mr Rodger as I recall it in his

Elias CJ I think it's in the legislation.

Tipping J If it's in the legislation then it would get some traction.

Elias CJ Well if it translates into anything, yes.

Tipping J Well if it's not in the legislation. S.87 of the Police Act incorporates part 9 of the Employment Relations Act as to personal grievances. That's the note I have from Mr Hope. I don't know whether that helps Mr Solicitor.

Collins Yes well that was the part I was going to start with Your Honour.

Blanchard J And it doesn't appear to limit that.

Tipping J Subsection 2 seems to suggest that were it not for one of those (a) or (b) situations the Commissioner's Act might be unjustified without limit as to what that Act was. Because if you take the carve-outs as being the only ones that are carved out then the logical construction is that everything else is susceptible to personal grievance unjustifiabilities.

Collins Yes, well I don't know if I'm actually going to be able to assist you much further than that Your Honours. I have gone to the Hansard debates to the Bills to try and understand what the reason for it was. The explanation seemed obvious and logical to me.

Elias CJ Well the explanation might be but what did they do?

Tipping J They may not have followed through.

Collins Can I just pause for one second to see if there is anything further that can be added? Well can I just finish off on this point and that is this, that a grievance has to be with the employer and in this particular instance the matters that caused the Commissioner the most angst are actions of the Police Disciplinary Tribunal. The decisions which the Tribunal made; the fact that the Tribunal didn't stay proceedings; the fact that the Tribunal didn't disqualify herself on the basis of bias

Tipping J These may be all hugely unpersuasive on the face of it but we're dealing here with a jurisdictional issue aren't we so we have to contemplate both unpersuasive circumstances and persuasive circumstances. They'd equally be fenced out on your argument I take it Mr Solicitor?

Collins Well the bottom line is that the Tribunal when conducting themselves in the ways which are alleged to be wrong is not acting as the employer of Mr Creedy.

Blanchard J Well nor is the Commissioner on your argument.

Collins Well the Commissioner is acting as his employer when the Commissioner reaches a decision as to whether or not he's going to be fired or not and I accept that.

Blanchard J Well the Commissioner is given the powers and duties of an employer but isn't actually the employer, so we have an artificiality already.

Collins Yes.

Blanchard J Not a long step from there the same that the Commissioner also artificially has to take responsibility for what the Tribunal does given that there is no longer any right of appeal to an independent Board, and that the personal grievance regime has been applied to this situation without any apparent limitation in s.87 other than what is in subsection 2 for which my brother has referred, which isn't relevant here.

Collins Well with the greatest of respect I find it extraordinarily difficult to accept that when an independent quasi-judicial body conducts an inquiry of the kind that was conducted in this way, on the basis of at least a regulatory framework, that somehow that that body is acting as the employer of Mr Creedy at that point. That's with the greatest of respect.

Elias CJ Well somebody has to be.

Collins No somebody doesn't have to be at all, that's the nature of the status of

Blanchard J Well otherwise the Police Officers have had rights taken away from them - important rights of general appeal taken away from them in 1989.

Collins They had rights of appeal taken away in 1989 but what they did get was a far more rigorous and regulated disciplinary regime which introduced a whole lot more powers – in 1992 I accept there was a three year interregnum and I don't know what happened there, but in 1992 they got a comparatively modern structured disciplinary regime

Elias CJ Well they got part 9, that's what they got.

Blanchard J What has happened here is an instance of what we see all too frequently and that is an elderly statute being patched, which is why it's good to hear that the Police Act is going to be re-enacted, hopefully in a more coherent form.

Collins And which will place Police Officers in the same position as regular employees for the first time.

Elias CJ Well maybe not. Mr Solicitor it seems to me that s.87 strikes exactly the right distinction in preserving what is distinct about sworn Officers. It says you can't question operational decisions and it carves that out of the area that can end up before the Employment Authority.

Tipping J The other one.

Blanchard J The oath.

Tipping J The oath. If you're breaching your oath, yes it's the same sort of idea.

Elias CJ Yes, it's the same sort of idea.

Blanchard J Well that goes back to the constitutional statutes.

Elias CJ Yes, yes, but if there's no other carve-out then it seems to me that with respect to my brother Blanchard who perhaps is less appreciative of elderly statutes than I am, the whole system seems to work quite well. They come within the umbrella, like everybody else, of the Employment Legislation except for that carve-out that's necessary because of the constitutional status and the important operational requirements of the Police. So it seems that your submissions are directed, it's not fair really for the Commissioner to be placed in the position of having to carry responsibility for some errors that might have crept into the process, this independent process that the Statute envisages in fact-finding, but it seems to me you need to look at the whole system and it may well be that if a grievance gets before the Employment Authority which can look at the matter de novo, defects in procedure are not going to matter at all. They'll be over-taken by the fresh look at matters as is usually the case. I mean it may not be always the fact that I'm not sure whether a grievance can arise – it probably can – out of the method of dismissal. The method of inquiry may be an independent grievance, but is that so very bad?

Collins Well clearly Parliament today, well the Government of the day, would say no that's not a bad thing, that's why we're passing the law that we're

proposing to pass to try and make that very clear, and beyond all dispute. I just reiterate what I said earlier that in 1989 that wasn't the intention.

Wilson J Just as to that where do we find these references in the explanatory note in the first reading?

Collins They haven't been handed up to you yet Your Honour.

Elias CJ Can these explanations be explained by reference to the carve-out in s.87?

Collins No I don't think so.

Elias CJ Alright thank you.

Collins I don't think so Your Honour. We'll make the provisions of the Hansard first reading available to Your Honours and the explanatory note to the State Sector Restructuring Bill of 1988. Now in relating to the explanatory note provisions Your Honours it's page 7, the reference to s.13.

Elias CJ Sorry where do I find that?

Collins Roman page 7.

Tipping J VII.

Elias CJ Thank you. Section?

Collins Section 13, which is a particularly bland explanation and then the first reading of the Bill is found attached to the Hansard debates which have been made available to you at page 12,828. Now in my copy it's the last page, so I hope that if you're have been photocopied the same way that will be the same, 12,828, and it's the second full paragraph commencing 'the amendments made by the Bill to the Police Act 1958' through to about the mid-way point on that page.

Tipping J What is important about that perhaps Mr Solicitor is that there is signalled here an intent to have the personal grievance provisions apply. The difficulty is over this rather elusive to the extent practicable.

Collins Yes.

Tipping J And the only legislative clue to an extent practicable seems to be in this s.87.

Collins And the creation of the s.12 Independent Tribunal.

Elias CJ Which is not inconsistent with the application of part 9.

Collins Only if this Court is willing to hold that the Commissioner is going to be liable in an Employment Law context for all of the actions of a quasi-judicial body.

Tipping J But he's very reliant isn't he on the integrity and ability if you like of that person- calling them the Tribunal.

Collins Yes.

Tipping J And if he claims that he's got reasonable cause or whatever that section says then surely he can't have it both ways. He's got reasonable cause by acting on the face of the Tribunal's findings, but he's not vulnerable to the findings being otherwise impeached. He's in a very very privileged position then in Employment Law sense isn't he? He can say well look here it is, if that's what happened, oh I must get rid of him, but there's no means of getting behind that by the employee, the Policeman, other than by judicial review you would say and we all know the difficulties and limits of substantive procedural and all that dichotomy in judicial review. There's no substantive ability to get behind it.

Collins Yes, and my response to that is if the Commissioner has been in a unique position, and he has been in a unique position up until this year and it's a reflection of that unique status of Police Officers. With the privileges comes a lot of responsibilities and

Tipping J It would leave s.87 with very little reach of substance.

Collins To sworn Police Officers, yes.

Tipping J Yes.

Collins Not to non-sworn

Tipping J No, no, but I would think it's a bit of a smoke and mirrors job. If you say you're going to have all this personal grievance chaps, but actually you're not going to have it in (a) and (b) and in any case you can't really go behind a fact-finding exercise by this Tribunal.

Collins And I emphasise it's just the Tribunal because I have not put in issue the investigations conducted by the Police into Mr Creedy, nor would I put in issue if it ever got to this point the decision of the Commissioner.

Tipping J No.

Collins I suppose the Commissioner accepting the PERF might have been a decision.

Blanchard J Yes but that's to relate this point to the particular situation of Mr Creedy. We're engaged on a more general exercise of how does this all fit together.

Collins Well

Elias CJ Where it is impractical must be identified by the statute. The explanation is that the system is going to apply where practical to the sworn Officers but the statute has to identify the areas that are not practical and it has done so in s.87. There's another point too Mr Collins, if you're right in this and if there are errors in the process followed in the investigation and the fact-finding, then the people affected have no alternative but to go off and get judicial review with all the cost and this is against the background of legislation that was meant to make things cheap and speedy.

Collins For employees.

Elias CJ Well they are employees. The Act makes it clear they are employees.

Collins They're not all employees. Military people; other Officers of the Crown; Police Officers, they are all in a different category. They are all in a special category and with their status as I say comes certain obligations.

McGrath J Section 87(1) can really be read though as applying the personal grievance procedure without having any regard to whether or not they're employees.

Collins Well clearly to sworn members of the Police it doesn't refer to

McGrath J It only relates to sworn members of the Police. Un-sworn members of the Police are part of the ordinary Public Service and are dealt with that way, and then you have s.87(1) and just on the face of it it really is saying well the personal grievance will apply and that may well be implicitly whether or not they have the status as employees, whether or not the Commissioner is their employer, that the legislation is going to by-pass that and just say it will apply, personal grievances will apply to sworn members, unless the Act in someway takes it out as it may in (2) or as it may expressly or implicitly somewhere else.

Collins Yes, and on that interpretation Your Honour all I can do is reiterate that the Tribunal is not the employer of any Police Officer and the alleged shortcomings and failings of the Tribunal cannot be assessed in an employment context.

McGrath J But that debate may have been bypassed by s.1 which seems to apply the personal grievance procedure without regard to what the Police Act's providing in that respect.

Collins But a personal grievance can only be against an employer.

Elias CJ In respect of an unjustified dismissal or a constructive dismissal if part of the process in getting rid of somebody constitutes the grievance there must be a process for addressing it.

Collins Well

Elias CJ There would be a huge doughnut, or hole in the doughnut.

Collins Yes doughnuts do have holes. Can I just finish off by saying that although there isn't a legislative requirement that the Tribunal will be a retired Judge or a senior Barrister, the reality is that the convention for the last 15 years is that the Chairperson has either been a retired Judge or a senior Barrister and that just again as a matter of practice re-emphasises the true independence of that Tribunal.

Elias CJ Or it just might be good policy, good practice, safe practice.

Collins And an illustration of independence Your Honour.

Elias CJ Well I think you are into that area that Justice Tipping was exploring with you, the difference between institutional independence and personal independence.

Collins Yes, yes, and I say it's both. Now unless I can assist Your Honours further I am acutely aware of it being 4 o'clock.

Elias CJ Is there is anything more you want to add. Thank you Mr Solicitor.

Collins Thank you very much Your Honours.

Elias CJ Mr Hope are there any matters you want to raise in reply?

Hope Yes there are Ma'am. I don't want to labour the point about the s.12 inquiry but I feel I must make a couple of points in particular in relation to my friend's analysis where he sets out a comparative analysis between three disciplinary tribunals as he calls them and with the greatest of respect to my friend he has fallen into the trap that many fall into. He has called the Police Tribunal a Disciplinary Tribunal. It has no disciplinary function whatsoever, absolutely no disciplinary function whatsoever. It is, and I've used the term through my submissions, it's a s.12 inquiry, it's not a

Tribunal. It's a Tribunal with a small 't' if you like based on the regulations. The regulations don't even call it 'the Police Tribunal'. It has no disciplinary function. Secondly it's founded, well not founded, dependent on the employment relationship so the moment a Policeman resigns he is not subject to a s.12 inquiry, but if a solicitor happened to be working for my firm and committed misconduct and not employment misconduct, and the two can be distinguished, there will be occasions when perhaps professional misconduct may not be employment misconduct or perhaps one would survive an inquiry and the other wouldn't. If the solicitor left my employ that solicitor would still be liable to action while that solicitor still held a practising certificate. Of course if they relinquished a practising certificate then there would be the Law Practitioners Disciplinary Tribunal.

Blanchard J I don't think this is a point you need to labour.

Hope Well just on that comparison I do make the observation that in my view the regulations go beyond what the s.12 and s.64 empower it to do.

Elias CJ I'm sorry to go back to that but I just have a loose thread. I'm labouring it. Section 12 may be independent of an employment dispute, it may be a pure disciplinary inquiry which never gives rise to application to part 9 of the

Hope Yes, absolutely.

Elias CJ Yes.

Hope It may be that the Commissioner, oh well, if the finding of the inquiry is that there is no misconduct or neglect of duty then the matter ends there, unless the Commissioner is brave enough to exercise his residual discretion

Elias CJ But the Officer just might take whatever gets metered out anyway within the system, yes I see, sorry.

Hope Yes he might. I think Your Honours need to be careful of the convention issue when in fact it's quite within the Commissioner's power to appoint somebody to carry out an investigation who isn't a retired Judge, a current serving Judge, or a senior Barrister, and the inquiry should be seen for what the statute says it is, not for the way it's conducted at present where it seems to acquire a status that perhaps it shouldn't have. What's also relevant in all of this is the size of the Police as an organisation. It would be one of the biggest single employers in the country. It currently has, and there's an affidavit in the case on appeal, volume 1, an affidavit of Tracy Foster, and I think that refers to the number of employees.

Tipping J What's that got to do with it?

Hope Well the relevance of it is that delegating an employment inquiry to someone else to carry out a factual inquiry. It's the same, the State Services Commissioner doesn't interview every civil servant who has his finger in the till or doesn't come to work on time, and the same way the Commissioner of Police is the leader of an organisation that is nation-wide and

Tipping J Yes he needs the power to appoint someone but I don't think that he's got it and we've got to interpret it.

Hope Yes, yes he has and I don't think you need to go through an agency analysis or that sort of thing or even consider whether the Tribunal is the employer. It's clearly not. I don't rely on that at all. It's simply that it is the Commissioner's process. The Crown is the employer. I agree completely with my friend, the Crown is the employer, and the Commissioner simply is the figurehead or the titular. His position is titular as the Chief Justice pointed out earlier. Finally Policemen are employees employed under Employment Contracts or Employment Agreements or Contracts of Service or however you want to term it, and I take you to *Ryder v Foley* under tab 8 in volume 2 and it's page 440 of the decision. Justice Barton says 'they are clear that the contract is entirely a unilateral one', so it's an employment agreement, it's just a type of employment agreement. They are employees of the Crown. In 1906 it was a unilateral contract and a member of the Police is bound by it but the Commissioner wasn't bound by it as far as termination.

Wilson J Mr Hope can I just check. On your argument is the basis of the grievance the act or omission of the Tribunal or the acceptance by the Commissioner of that act or omission?

Hope Both.

Wilson J Both.

Hope The Commissioner had constructive knowledge of what went on and common practice is for the Commissioner to appoint a liaison officer who also happened to be a witness, who also happened to be the OC case in this matter, and that's the terminology used. Case on appeal, page 245 is the reference for that and that's I think probably volume 2 of the case on appeal, and case on appeal page 280, it will be the same volume again, that liaison officer was appointed by the Assistant Commissioner, so what happened at the hearing the Commissioner has constructive knowledge of. He appointed someone to be there to watch it. He not only appointed the

Tribunal but he appointed people to be there to take part in it and it's common practice and the reference is on case on appeal 245 and 280 that that is what took place. At 298 in the case on appeal the Tribunal in this matter observed that. She had no control over the Police liaison or OC case.

Wilson J Can I put it this way, do you say the Commissioner is precariously liable for everything the Tribunal does or doesn't do?

Hope I was thinking along those lines earlier, yes.

Wilson J It really comes down to that.

Hope Yes, that's probably the best analysis I can think. It's certainly not an agency one; it's not a contractual one. Vicarious liability, yes. Turning now Your Honours to, unless you have any further questions in relation to

Elias CJ Can you just point me at the Unjustified Dismissal Provision in the Employment Relations Act, what section it is?

Hope 103.

Elias CJ Thank you that's fine, carry on.

Hope Now in relation to raising the grievance out of time. My friend has said that the appellant's belief that he could rely on the first PG letter as a prospective raising of all his issues surrounding the investigating; the charging; the s.12 inquiry and whatever that he could rely and put a stake in the ground on the 4 April letter, my friend says that that's not a reasonable belief. The Employment Court found that he did have such a belief and the Employment Court had the opportunity of hearing the witnesses and hearing Mr Creedy give evidence and the Employment Court said, case on appeal, volume 1, tab 5, para.60, 'I turn next to the unjustified constructive dismissal grievance. As I have already found Mr Creedy believed that his Barrister had raised a personal grievance with his employer in early April 2001, so too did the Barrister, although I have already concluded that was an erroneous belief. I am satisfied that Mr Creedy honestly believed that having done so he thought it was unnecessary to raise any further personal grievance, including one related to a possible dismissal, within the 90 day period of which he was aware. In the event that the Commissioner's investigation of and prosecutions against him brought about his dismissal', and then he goes on in paras.61 and 62 to discuss the talking past issue. In 63 he says 'when Mr Creedy sought and took advice of other lawyers about his circumstances, I am satisfied that he did so on the basis that there was no question of his entitlement to bring a personal grievance relating to his prospective or

eventually actual dismissal. This was because the plaintiff was confident of what he understood to be Mr Barrowclough's advice that he could do so without more'. And then 64 he concludes by saying 'acting on reliance upon what he understood Mr Barrowclough had told him, Mr Creedy at all relevant times assumed that he did not need to raise a further grievance and had the statutory period of three years from 4 April within which to bring personal grievance proceedings against the Commissioner in the Employment Relations Authority. That conclusion establishes the necessary causative link between the exceptional circumstance and the failure to raise the grievance within the 90 day period'. Now my friend has referred you to volume 8 of the case on appeal and with respect some of the references are out of context or not fully explained. So under tab 32, page 26, he says at line 26 'he accepts he had some knowledge of the 90 day period and he's asked the question that you knew that you had to notify a grievance within 90 days of the action complained about

Tipping J You're really going a long way beyond. All the Solicitor General submitted was that he accepted he may have had a belief but said that it was unreasonable. So far you've cited nothing by way of findings. If you want to say why it was nevertheless reasonable in contradict distinction to the submission then that's fine, but wouldn't it be best in reply to concentrate on why you say that it was a reasonable belief? The Chief Judge didn't find it was a reasonable belief, he just said he believed it. I'm being a little testy because this is reply.

Hope Yes Sir.

Tipping J Now you're perfectly entitled to submit that it was a reasonable belief but let's hear why it was reasonable.

Hope Yes Sir. It was reasonable because firstly the Solicitor General's reference to the 90 day period is a distraction from what was happening. The reasonableness of his belief hinges around whether or not he believed properly what his solicitor said to him and his solicitor didn't discuss 90 day issues with him. His solicitor advised him so he believed that he need do nothing more, and he accepted that advice. What is reasonable about it is that he held to that advice consistently, consistently through seeing other solicitors who he told that that was his position, through to not raising a grievance but talking to

Tipping J Well it could have been consistently unreasonable.

Hope Well it could have.

Tipping J I mean with great respect the fact that he held to it through thick and thin doesn't take us anywhere.

Blanchard J Who were these solicitors who he told about the prior notification?

Hope Well the Employment Court refers to him speaking to solicitors, and I'm assuming that the reference there is Mr Towner, that he

Tipping J I don't think there are any findings that enable us to say with confidence whether this was a reasonable belief or an unreasonable belief quite frankly. He clearly held the belief, but all one's got is findings from which one would I think infer if one were the Tribunal of fact, that it wasn't a particularly reasonable belief because we got nothing from the solicitor that advised him, that gave him any credence for this belief, but I think you've got to be very focused on why you say this was a reasonable belief.

Hope It was a reasonable belief because firstly the pressure and stress that this man was under; the high level of reliance that he had on his solicitor, the clear blurrings of the personal relationship and the solicitor-client relationship through them living together and him being the only client. The evidence of Ralf Schnabel at the Employment Court hearing regarding reliance, and although that evidence was in relation to his observations of the proceeding – he was a Psychologist – and was called to give evidence about psychological matters and then you have the appellant's own evidence at para.39 and 40 of his brief of evidence where he said, and this was unchallenged 'Paul was effectively running my life in relation to the Police matter. He was living at my house with me and taking full control. I was extremely vulnerable at the time and looked to guidance at all times from him'. Now other matters were challenged but that wasn't challenged. It wasn't challenged in cross-examination; it wasn't by the evidence of Paul Barrowclough, and those Sir are my

Tipping J Yes well that's helpful, just that we've now got a catalogue of why it is you say it was reasonable.

Hope And his actions, and perhaps I can go back to where I was heading before in that his actions were consistent with someone who believed that he had a grievance secure and that would surely go to the reasonableness as well, and that was his

Tipping J If I'm consistent it doesn't mean I'm reasonable.

Hope I'm not saying, no Sir, but having laid down the foundation it's my submissions that he then behaved consistently which then not on its own would necessarily show that he's reasonable but it is a factor that the Court can take into account to find that it was a reasonable belief. On that issue the Employment Court did find that it was just to grant leave and that issue

wasn't challenged on appeal to the Court of Appeal or to this Court, so at para.66 through to 68 the issue of whether or not it was just

Tipping J But he misdirected himself in law, so any later decision on whether it was just surely it presumptively is tarnished by the misdirection.

Hope Misdirected himself in respect of?

Tipping J Of exceptional circumstances as the Court of Appeal found.

Hope If Your Honours, and I think it would useful to look at para.47 of the Employment Court decision because he does not reject *Wilkins & Field v Fortune*, and the Court of Appeal thought that he did but he didn't. He specifically says that he follows it, so if you look at the case on appeal, volume 1 at para.47, he starts off with what are exceptional circumstances, then he quotes *Wilkins & Field* and he footnotes it.

Wilson J What about 48 then.

Hope Yes I'm moving on to 48 Sir. He says 'although I consider the foregoing very general description of exceptional circumstances given by the Court of Appeal, and *Wilkins* is still applicable, it is clear that other aspects of its findings were intended by Parliament in enacting the Employment Relations Act to not apply to the current regime'. So as far as the test goes he is following *Wilkins & Field* and he applied the *Wilkins & Field* test. The problem we have here is that the Court of Appeal misunderstood what the Employment Court Judge was saying and then by repetition everyone then believes that the Employment Court Judge didn't follow it. He then, having defined the test, goes through and applies it to various arguments about whether there was exceptional circumstances and then at 56, sorry 60, para.60, he says 'I turn to the unjustified constructive dismissal grievance' and those are parts that I've already quoted to you Sir. So I don't read 47 and 48 as not following *Wilkins & Field*. I think the Employment Court Judge has specifically said 'yes that is the test and I do follow it'.

Wilson J 49 has changed.

Hope Yes in 49 though he's only referring to the 115(b) situation and he doesn't apply 115(b) to s.60, so he is in part saying that *Wilkins & Field* is no longer good law because it's overtaken by 115(b), but on his unjustified constructive dismissal claim, he doesn't rely on 115(b) at all.

Blanchard J Well isn't that in itself an error of law in that he really needed to look at what had been carved out in 115(b) and he needed to address whether what

occurred here was sufficiently close to 115(b), that it was affected by that carve-out.

Hope I'm not sure that he's come close enough.

Blanchard J We're going over ground we went over this morning.

Hope Yes, yes we are Sir. Your Honours if I can just simply summarise to say that what this matter is about is the breakdown of a relationship between solicitor and client as far as understanding each other goes and that the failure to raise the grievance, or failure to instruct his solicitor, was because he misinterpreted in the circumstances the advice that had been given to him and I won't labour Your Honours again with the list of matters that caused that, and as a result of that the grievance wasn't raised and in my submission that is an exceptional circumstance for a relationship to develop between a solicitor and client such as that they lived together, one as the other's only client, that one is totally in control of the other and clearly the personal and professional boundaries had become blurred. You have a man who's under stress, who's reliant upon his solicitor and he mistakenly believes as a result of those reliances and stress and the relationship generally, he mistakenly believes that the 4 April grievance is in fact something that will protect him in the future in relation to those issues and that is an exceptional circumstance Ma'am. One correction of what my friend said was that Mr Creedy wasn't found to have misused a revolver and I just wanted to correct that version. My friend has misread the Tribunal decision. I wouldn't want him to be accused of misusing a firearm with the other chapter of matters that were found proved against him. Those are my submissions.

Elias CJ Thank you Mr Hope. I'm afraid I have a question for the Solicitor General and if anything arises I'll ask you to respond. Mr Solicitor I'm bothered about the application of s.113 of the Employment Relations Act on your argument. Can you turn it up? It's the provision that says the only way to challenge a dismissal or any aspect of it in any Court is through the personal grievance provisions brought in the Authority. Now on your argument would it be the case that if a Commissioner acted on an investigation of the facts which was flawed, a dismissal based on that couldn't be challenged?

Collins The only option that would be available would be to challenge the decision but not the events which preceded the decision.

Elias CJ It's very difficult to separate out if you have a fundamentally flawed process and conclusions of fact which if accepted would justify dismissal.

Collins Well I think that the regime anticipates that if there is a fundamentally flawed process then the remedy is by way of judicial review.

Elias CJ Well then don't you run head-long into s.113?

Collins No with respect and I'm trying to catch the eye of Justice Wilson who tried to run this very argument about ten years ago and if I may say so respectively, unsuccessfully.

Wilson J I can't remember.

Blanchard J On his first day on the Court.

Collins Where a judicial review proceeding was brought against the *Royal Australasian College of Surgeons* for a report that it had prepared after being commissioned to do so by the employer of a Doctor and the argument was one that the judicial review proceeding couldn't be brought because s.113, or the equivalent under the previous legislation, gave exclusive jurisdiction to the Employment Institutions. That argument was not accepted.

Tipping J That case went to the Privy Council.

Collins It did but not on that point. I think His Honour didn't pursue that point. I don't think even in the Court of Appeal. Certainly it wasn't pursued in the Privy Council.

Wilson J The Solicitor is far too modest to point out that it was his submissions that succeeded against me.

Tipping J Are you making the distinction in **..**

Elias CJ Yes.

Tipping J Are you making the distinction between, a fairly astute distinction between the dismissal per se and the process leading up to it?

Collins Yes indeed.

Tipping J Yes, and you say that distinction is supported by Phipps

Collins Well only at the High Court because that was the only time that the point was raised.

Elias CJ But otherwise it would be the case that the findings of fact on which the Commissioner couldn't be challenged by the personal grievance procedure?

Collins Indeed, yes and I say that's what Parliament contemplated.

Elias CJ That would be a highly inconvenient result.

Collins That's what Parliament contemplated.

Elias CJ Yes. Yes thank you.

Collins Your Honours I don't want to detain you unnecessarily. There is a procedural matter which I just want to bring to your attention. The hearing in the Police Disciplinary Tribunal was conducted in private. You now have the transcripts and those transcripts might be available for inspection and I just want to bring Your Honours' attention to that point as to whether or not it might be appropriate for there to be some form of order that the Supreme Court's record, volumes 2 through to 7 inclusive, not be inspected without either leave or some form of notification to the parties.

Elias CJ I don't think they can be inspected without leave. There's no basis for

Tipping J Search of Court records.

Collins I would have thought in a Civil

Arnold Once judgment has been given the public are able to search the records.

Elias CJ It's not under our rules. Thank you, you might have brought something to our attention but I'm just wondering if we should probably make an order that volumes 2 to 7 should not be searched without leave of the Court.

Collins Right that would be sufficient Your Honour, yes.

Elias CJ Yes, thank you.

Hope I have no objection to that Ma'am, but while you've got a few minutes and you've looked at 113, I wonder whether you thought that 112 might be relevant to today's arguments and that is that in certain circumstances personal grievance matters can be dealt with outside of the Employment Relations Authority and by the Human Rights Commission and there is no 90 days period or anything that's applicable then.

Elias CJ Well I don't think the dispute in this matter would fall within the concerns of the Human Rights Commission, so it seems irrelevant.

Hope No, no, not in this matter Ma'am. Thank you Ma'am.

Elias CJ Thank you. Alright thank you very much counsel for your assistance. We'll reserve our decision in the matter.

4.37pm Court Adjourned