OUTER HOUSE, COURT OF SESSION

[2023] CSOH 90

P477/23

OPINION OF LADY DRUMMOND

In the Petition of

D

Petitioner

for

Judicial Review of the decision of Police Scotland to require a with cause drug sample

Petitioner: Dean of Faculty (Dunlop KC), Fraser, Advocate; MacRoberts LLP
Respondents: MacGregor KC, Byrne KC; Clyde & Co

12 December 2023

Summary of the issues and the court's decision:

[1] The petitioner is a serving police officer. Police Scotland began investigation proceedings against him alleging that he had taken controlled substances. As part of their investigation, Police Scotland required the officer to take a with cause drugs test. He refused to take the test. Without a test result, Police Scotland decided that the officer had no case to answer in respect of the allegation that he had taken controlled drugs. They instead began investigating him for failing to comply with a lawful order requiring him to take the test. In these proceedings the officer, referred to as D, challenges the decision to proceed with a misconduct investigation into his refusal to take the test on grounds that it is unfair and

irrational. Pending the outcome of these proceedings, Police Scotland suspended their investigation.

[2] The issues:

(1) is the petition premature and incompetent: should the misconduct investigations/proceedings be left to run their course before judicial review proceedings can be brought? The answer is "yes"; and

(2) if the petition is competent, are the misconduct investigations/proceedings unlawful? Since I have decided that the petition is premature and incompetent, it is not appropriate for me to answer this second question.

Background

[3] Police Scotland received confidential information on three occasions between 2017 and 2023 that D may have been involved in or connected with the taking of controlled drugs. An initial report was received on 5 December 2017. It stated that D had taken controlled substances on licensed premises. It was an anonymous report with no other supporting information. At that time Police Scotland decided the information did not warrant any investigations.

[4] On 1 July 2022 Police Scotland received a report that D had an association with an individual involved in the supply of controlled drugs. The report indicated D would give a warning in relation to a drugs warrant to the person involved in the supply of controlled drugs. As the report did not indicate that D himself was taking controlled drugs, again Police Scotland decided to take no investigatory action.

[5] On 14 February 2023, Police Scotland received further information that D was using cocaine on nights out. On reviewing all the information to date, Police Scotland decided that there was sufficient information to require the matter to be investigated.

[6] On 9 March 2023 Police Scotland served on D a notice of investigation under Regulation 11 of the Police Service of Scotland (Conduct) Regulations 2014. The terms of the notice are relevant to D's challenge in these proceedings for judicial review. It stated:

> "On or after 1 December 2017 at a location or locations as yet unknown, you did use controlled drugs, and your conduct in doing so was such as to discredit the Police Service or undermine public confidence in it".

[7] Police Scotland decided it was necessary to require D to take a with cause drugs test. With cause substance misuse testing may be carried out in terms of Police Scotland Operating Procedures, paragraph 6, where there is information or intelligence received regarding potential substance misuse. In terms of those procedures, consideration will be given to whether it is necessary to require an officer to provide a with cause sample where there is reason to suppose an officer is misusing, or has misused, a substance. The reason to suppose may arise from observations or reliable information and must be assessed on a case by case basis. Police Scotland decided on the basis of the information they held, that there was reason to suspect D was misusing controlled drugs and that it was necessary to require him to take a test. The test would determine whether D had been taking controlled drugs whilst holding the office of Police Constable.

[8] The rationale behind taking the test was explained to D. He signed a form acknowledging that he had been told that Police Scotland had reason to suppose he had been taking controlled drugs. He was advised that he was required to provide samples for testing. He had the opportunity to discuss matters with a representative of the Scottish Police Federation which he took up. He was advised of what would happen if a negative or

positive result was received. He was advised that any failure to take the test would likely be deemed a failure to follow a lawful order. D signed the record outlining the process that had been followed.

[9] D refused to provide a sample for a drugs test. When asked why, he stated "I'd rather not say". Police Scotland decided that without a test result there was no case to answer. They advised D that he had no case to answer on the drugs allegation by email on 27 March 2023. In the same email they explained that he would instead be investigated for failing to comply with a lawful order, namely to provide a sample for a drug test and a new investigation would begin in relation to that.

[10] Police Scotland served a second Regulation 11 investigation notice on D on 26 April 2023 which stated:

> "On 9 March 2023 at ……..having been served with a Notice of Misconduct Investigation Form in terms of Regulation 11 of the Police Service of Scotland (Conduct) Regulations 2014, alleging that you had used controlled drugs, and thereafter having been required by Inspector …..c/o Police Scotland to provide samples for analysis as outlined in the Police Service Substance Misuse Standing Operating Procedure, you did refuse to provide these samples without a reasonable excuse, and you did thereby fail to comply with a lawful order or instruction.".

[11] On 23 May 2023 he was served with a notice of misconduct interview which repeated the allegation of failing to comply with a lawful order. He was invited to interview on 7 June 2023 or at another time more suitable to him. The interview was cancelled when D raised these proceedings.

D's submissions

[12] D seeks orders:

(i) declaring that Police Scotland by requesting the sample acted in a manner incompatible with his rights under Articles 6 and 8 of the European Convention on Human Rights;

(ii) declaring that the acts of Police Scotland in requesting the sample were in any event unlawful and irrational and, separately, procedurally unfair;

(iii) declaring that the acts of Police Scotland in failing to provide adequate notice in the first Regulation 11 were unlawful and irrational and, separately, procedurally unfair;

(iv) declaring that the acts of Police Scotland in serving the second notice of investigation on 26 April 2023 were unlawful and irrational and, separately, procedurally unfair;

(v) interdicting Police Scotland from conducting any misconduct proceedings against him in respect of his failure to submit to a with cause drug test on 9 March including, but not limited to the interview scheduled for 7 June 2023;

(vi) suspension of the decision to proceed with a misconduct investigation in relation to his failure to submit to a with cause drug test on 9 March 2023;

(vii) the expenses of the petition.

[13] The Dean of Faculty identified the issues as being (i) whether the first notice was unlawful for want of fair notice and/or because it was misleading and/or for want of cause; and (ii) whether the second notice was unlawful and irrational.

[14] It was submitted that Police Scotland had failed to give fair notice of the basis for the first notice to D. There was a complete absence of specification within it. D was deprived of

the opportunity to properly consider the validity of the notice which was therefore unlawful and irrational.

[15] It was submitted that, although the allegation against D was not an allegation of dishonesty, it can be equated to that (*Salha* v *GMC* [2003] UK PC 80; *Strouhos* v *London Underground* [2004] EWCA Civ 402; *Yassin* v *GMC* [2015] EWHC 2955 (Admin)). The first notice was required to specify "the conduct forming the subject matter of the misconduct allegation" (Regulation 11 of the 2014 Regulations). The libel of the charge spanned approximately 6 years. No particular dates when drugs were alleged to have been taken, or locations where they were alleged to have been taken or particular drugs were specified. Police Scotland had information about the alleged dates, locations and substances but chose not to specify them. It was only after these proceedings were raised that Police Scotland admitted it knew these details at the time of the issuing of the first notice. The first notice suggested that such details were unknown to Police Scotland. It is not enough for the first notice to provide the gist of the supporting evidence. D's complaint is not that there has been any failure to disclose evidence, it is that there has been a fundamental lack of fair notice and that the notice was deliberately misleading.

[16] Because there was no fair notice, D could not assess whether there was cause to provide a sample and assess whether the order to comply with the drug test was a valid order. Police Scotland accepted within 2 weeks of serving the first notice that there was no case to answer. With cause drug testing is only appropriate "where there is reason to suppose that an officer is misusing or has misused a substance". The decision that D had no case to answer is inconsistent with the suggestion that the requirements for with cause testing were met.

[17] With cause testing is an interference with D's rights under Article 8 of the European Convention on Human Rights (respect for private and family life). Any such interference must be necessary in a democratic society and pursue a legitimate aim listed in Article 8(2). The interference must correspond with a pressing social need and be proportionate to the legitimate aim (*Silver* v *United Kingdom* (App 5947/92) (25 March 1983). D was not provided with details of the allegation which justified the interference with his Article 8 rights. Without such information an officer cannot make an assessment of the proportionality of the interference or decide whether it is validly made.

[18] Because the first notice was unlawful, the decision to proceed with the second notice, essentially for failure to comply with the first notice, was also unlawful.

[19] It was irrational to investigate D for failing to comply with a drugs test when Police Scotland had accepted that there had been no reason to suppose that D had been misusing a controlled substance. Police Scotland had not been entitled to require him to submit to the drugs test.

Competence/prematurity

[20] In response to the preliminary issue raised by Police Scotland, it was submitted that the petition was competent and not premature. The 2014 Regulations did not provide D with an effective remedy. The power for an officer to request an interview and further specification did not remove the requirement for fair notice. It would be unsatisfactory if D had to wait for the disciplinary proceedings and appeal to be exhausted before being able to mount a fundamental challenge to the process. Protection by the court against manipulation of a process would be inadequate if a person had to go through the laborious stages of appeal before the courts could vindicate his rights not to have to undergo an unjust hearing

at all (*R (On the application of Redgrave)* v *Metropolitan Police Commissioner* [2002] EWHC 1074 (Admin); R (*On the application of Wilkinson* v *Chief Constable of West Yorkshire Police* [2002] EWHC 2353 (Admin); *BC* v *The Chief Constable of the Police Service of Scotland & Others* 2018 SLT 1275). Such a situation would arise were this petition to be refused on the grounds of prematurity.

[21] If the misconduct proceedings in respect of the second notice are allowed to progress, there is no effective means by which D can challenge the lawfulness of the first notice under the 2014 Regulations (*BC* v *the Chief Constable of the Police Service of Scotland & Others*). The disciplinary proceedings would not provide a suitable mechanism for dealing with a challenge to the lawfulness of the first notice.

[22] To allow the disciplinary proceedings to progress would constitute an unjust manipulation of the misconduct process. It would shift the burden of proof onto D in respect of the cause underpinning the original notice. The responsibility for ensuring cause is present rests with Police Scotland and ought to be established prior to the issuing of the notice requiring the officer to submit to a test. A notice issued without such cause is unlawful.

Police Scotland's submissions

Competency/prematurity

[23] Mr MacGregor KC raised a preliminary point that the petition is incompetent and premature. The principle of prematurity, that recourse to the supervisory jurisdiction is a last resort, is cardinal and is rooted in the equitable jurisdiction of the Court of Session Lord Kames, *Historical Law Tracts* (4th edn 17787) at 228-9; *Erskine; An Institute of the Laws of Scotland* (8th edn), I.iii.23, cited in *West* v *Secretary of State for Scotland* 1992 SC 385 at p394). D

ought to proceed with the misconduct procedure rather than this petition. Separately, there is an adequate alternative remedy which he has not exhausted. It is incompetent to petition this court without first exhausting alternative remedies. Both the principles of common law and Rule of Court 58.3 require a petitioner to have exhausted any alternative ordinary or statutory remedy first (*McKenzie* v *The Scottish Ministers* 2004 SLT 1236, per Lord Carloway at paragraph 18; *McCue* v *Glasgow City Council* 2014 SLT 891, at paragraph 60).

[24] The investigation into the second notice is at a preliminary stage. D has been invited to a misconduct interview. He has the opportunity to explain to the investigator why there is no merit in the misconduct allegation regarding his failure to provide samples for testing. He has not taken that opportunity. There has been no concluded investigation, far less any determination that D has a case to answer.

[25] If the misconduct proceedings run their course, he can argue that the proceedings are an abuse of process. Where there exists in the course of a misconduct regime itself an opportunity to cure any unfairness or disadvantage caused by an allegedly defective decision, an individual should generally await the outcome of those proceedings before resorting to judicial review (*R (Aurangzeb)* v *Law Society* [2003] EWHC 1286 (Admin); *R (Aziz)* v *General Medical Council* [2004] EWHC 3325 (Admin); *Baker Tilley UK Audit LLP* v *Financial Reporting Council* 2015 EWHC 1398). The misconduct procedures should be allowed to take their course (*R (Mahfouz)* v *General Medical Council* 2004 EWCA Civ 23 at paragraph 44). He can make a submission to a misconduct hearing that the information does not support the allegation. He can seek a permanent sist on the grounds that the proceedings are an abuse of process (*Baker Tilley*, paragraph 148).

[26] Thereafter D has, if necessary, appellate remedies to appeal to the Police Appeals Tribunal under the 2014 Regulations. If he is dissatisfied with the Tribunal's decision he

may then seek judicial review. An appeal to the Tribunal is an appeal on the merits (*Norma Graham, Chief Constable, Fife Constabulary* v *William Crawford* [2012] CSIH 7). Unless and until D has exhausted these remedies this petition is incompetent and separately unnecessary and inappropriate.

The merits

[27] It was submitted that police officers are required to adhere to certain standards of behaviour when on and off duty. Schedule 1 to the 2014 Regulations sets out standards of behaviour and includes a requirement for officers to carry out only lawful orders and instructions and to behave in a manner that does not discredit the Police Service or undermine public confidence in it, whether on or off duty. Breach of the standards of professional behaviour for police officers could, without adequate explanation, amount to misconduct (see paragraph 3.6 of the Guidance to the 2014 Regulations).

[28] A lawful order can be given for a drugs test to be undertaken by an officer if there is cause to suspect that the officer is taking, or has in the past taken, controlled drugs (Substance Misuse - Standard Operating Procedures paragraphs 3 and 6). Cause can arise from a variety of situations, including confidential intelligence. Police Scotland received three separate items of confidential intelligence which were not incredible or unreliable. There was a clear and rational basis for D to be required to take the drugs test. The order was not unlawful or irrational. The purported grounds of challenge are no more than a disagreement with the discretionary judgment of the Deputy Chief Constable.

[29] An officer can refuse to take a drugs test, and avoid any adverse consequences, if they have a good reason for doing so. The Operating Procedures state that refusal to provide a sample when required without a reasonable excuse will be considered to be a

breach of standards of professional behaviour. Prior to the raising of the petition, D provided no reason to Police Scotland as to why he refused to take the test. A Regulation 12 interview had been arranged to allow him to explain that. It was cancelled when the petition was lodged. In the petition, D, for the first time, explains why he contends he was entitled to refuse to obey the order. The investigation into his refusal has not been concluded far less has there been any determination he has a case to answer.

[30] The argument that the first notice lacked specification is misconceived. It is entirely academic given that Police Scotland determined that there was no case to answer in relation to it. Police Scotland had a clear basis for requesting the drugs test be taken. There was nothing irrational about appointing an investigating officer to investigate failure to comply with that order. The notice specified the conduct forming the subject matter of the investigation and specified how it is alleged to have fallen below the standards of professional behaviour, in accordance with Regulation 11. The notice is an "initial notification" only (see paragraph 5.8.3 of the Guidance).

[31] The first notice provided adequate notification: it set out a time frame. It was not clear from the information on how many occasions D had taken drugs. Only a broad timeframe could be given. More specific dates could have been misleading. The notice did not specify places to ensure protection for the source of the information. There was no requirement to specify the type of controlled drug. A range of controlled drugs would be tested for in accordance with Operating Procedures. Further specification may be provided under Regulation 12 to enable an officer to prepare for interview. The Regulation 11 notice is the start of the investigating procedure. It is not the formal charge which is placed before a misconduct hearing.

[32] The order to take a drug test was not unlawful because the first notice was discontinued. There was (and continues to be) reason to suspect that D had taken controlled substances. It was logical and rational to withdraw the first notice when it was clear that D was not going to provide a sample and there could be no proof that he had taken controlled drugs. There is no contradiction between withdrawing the first notice and issuing the second notice. Withdrawal of the first notice does not mean that there was no reason to suspect. It was accordingly a lawful order regardless of whether the first notice was withdrawn or not.

[33] A failure to provide sufficient notice of the allegation may be unfair if the individual could not understand the allegation sufficiently to marshal evidence against it and rebut it (*R* v *Secretary of State ex parte Doody* [1994] 1 AC 530 at p560D). An officer should not take any controlled drug anywhere. Fairness did not require specific dates, places or drugs to be specified. D was provided with an opportunity to explain himself but chose not to do so. He could have taken the test to disprove the allegation. An officer ought not to be able to defeat an allegation by lack of cooperation. It is critical that these orders are effective and supported by a robust disciplinary process if refused.

[34] Specification as to the circumstances of the allegation must balance the need to maintain confidentiality of the source. There is no requirement to reveal the source of the information where that would put an informant in peril or be contrary to public interest. However, fairness requires sufficient indication of the allegation against the person to enable them to answer it (*R* v *Gaming Board for Great Britain ex p Benaim* [1970] 2 QB 417 at p431B-G). The person must be given a chance of answering the charge. D has been given the chance to answer the allegation. He could take the test. He could ask for further specification ahead of an interview.

[35] Any interference with D's Article 8 rights was justified, in accordance with law and proportionate. It is clearly in the public interest that officers do not take controlled drugs and that there is an adequate system in place to detect drug users. The European Court of Human Rights has recognised the obvious need to regulate unlawful drug use in sensitive professional settings and its compatibility with Article 8 (*Wretlund v Sweden* 46210/99 (2004) 39 EHRR SE5.)

This court's decision

Competency/prematurity

[36] The supervisory jurisdiction is an equitable jurisdiction which exists to provide a remedy where no other remedy is available. Both the principles of common law and RCS 58.3 require an applicant to have exhausted any alternative ordinary or statutory remedy before invoking the supervisory jurisdiction (*McKenzie* v *The Scottish Ministers*, per Lord Carloway at paragraph 18; *McCue* v *Glasgow City Council*, at paragraph 60).

[37] Nonetheless, the court has in exceptional circumstances allowed judicial review to proceed despite an alternative remedy being available. The Lord President in *MIAB* v *Secretary of State for the Home Department* 2016 SC 871 explained that the court may decline to exercise its supervisory jurisdiction if it appears that the petitioner has not exhausted a statutory remedy provided there are no exceptional circumstances, such as the alternative being an ineffective one. The court recognised that whilst it must be vigilant in ensuring that effective remedies are available to redress wrongs, it should also be wary of "trespassing on the jurisdiction of a tribunal which is competent to determine the matter at issue" (paragraph 73).

[38] An example of a case where the court held an alternative remedy not to be an

effective one is *BC*. Like this case, the petitioners were police officers who sought judicial review rather than proceed further under the misconduct regime in the 2014 Regulations. The police officers raised judicial review proceedings challenging the use of WhatsApp text messages as evidence in the misconduct proceedings. Lord Brailsford held that the question, whether the messages could be used in evidence, involved issues of confidentiality and privacy. Misconduct proceedings were not the appropriate forum within which to determine such an issue of fundamental right. It was unsatisfactory that the officer conducting the misconduct hearing would require to determine a difficult question of substantive law which was capable of determining the lawfulness of the proceedings. There was no provision in the Regulations permitting such a challenge. The confidential information had already been used, and, if the officers were correct that it had been used unlawfully, there had already been an infringement of a right, so that the argument on prematurity was not well founded (paragraphs 11 to 15).

[39] The English High Court allowed judicial review proceedings to be brought by a police officer facing misconduct proceedings in *Redgrave*. The officer argued that it was a manipulation of the police disciplinary process to bring charges after an unjustified lapse of a substantial period of time: the delays were so prejudicial as to undermine the possibility of a fair and just hearing. Moses J held that the court should intervene by judicial review to protect the claimant from such an injustice. To do otherwise would be to compel the claimant to go through laborious stages of appeal before the courts vindicate his right not to have undergone that process at all. The court would carefully consider an alternative remedy, and possibly the strength of the assertion of delay, before accepting, exceptionally, jurisdiction (paragraph 15). The court also recognised that there is no doubt that the disciplinary body had the power to dismiss disciplinary charges without hearing the merits

if it is unfair to the officer to continue (paragraph 26).

[40] A similar approach was followed by the High Court in judicial review proceedings raised by police officers in *R (on the application of Wilkinson* v *Chief Constable of West Yorkshire Police* [2002] EWHC 2353 (Admin). Davis J rejected an alternative remedy argument principally because what was being challenged was a preliminary ruling by the Chief Constable in a matter of some complexity where there had already been delay.

[41] However in *Aziz* Burnton J refused judicial review of a decision by a preliminary proceedings committee of the General Medical Council to refer a complaint to the Professional Conduct Committee. The claimant argued that the proceedings against him were an abuse, that he could not be fairly tried, and that there had been or would be a breach of his rights under Article 6. Burnton J held these were all matters which could be raised before the committee. He observed that it is far better for the complaints to be addressed by the committee, which is an expert body at least in the first instance (paragraph 24).

[42] In *Baker Tilley*, the claimants sought to challenge by judicial review the council's decision to make a complaint about them to a disciplinary tribunal. They argued there was no effective alternative remedy, it was an abuse of process to have made the complaint and that the council's approach was irrational. Singh J refused the application, deciding that the approach was not irrational and finding that as a matter of principle it was wrong for such cases to be brought by judicial review. The first port of call was the disciplinary tribunal which had the jurisdiction to stay proceedings on the ground of abuse of its own process (paragraphs 135 to 155).

[43] In assessing first whether the petition is premature, it is important to recognise the stage that D has reached in the context of the 2014 Regulations. The first stage is an

investigatory one under Part 2. It comprises an initial assessment of the alleged conduct under Regulation 10. If the Deputy Chief Constable assesses that the conduct may amount to misconduct, the DCC must then decide whether or not it is to be investigated. If it is to be investigated the DCC must appoint an investigator.

[44] Under Regulation 11, the investigator must as soon as reasonably practicable give written notice to the constable that he is subject to a misconduct investigation (a Regulation 11 notice). The notice must specify (i) the conduct forming the subject matter of the misconduct allegation; and (ii) how that conduct is alleged to fall below the standards of professional behaviour. It must also provide the constable with an opportunity to make written or oral representations. It must inform him of the right to seek advice from the constable's staff association and police representative.

[45] Under Regulation 12, the investigator may arrange an interview and must do so if the constable intimates an intention to make oral representations. The investigator must provide certain information to the constable in advance of the interview including details of the allegations made and (a) the dates on which (or approximate dates on which) and (b) the places at which, any misconduct or gross misconduct is alleged to have occurred.

[46] It is only after the conclusion of the misconduct investigation that the investigator must determine whether the constable has a case to answer (Regulation 13(1)). The investigator must submit a report on that to the DCC. It is for the DCC to determine whether the constable has a case to answer in respect of misconduct, gross misconduct or neither. If the DCC decides that there is a case to answer in respect of misconduct (and it is not a situation where there is a final warning in place) then the DCC must refer the misconduct allegation to a misconduct hearing (Regulation 14(3)).

[47] Part 3 of the Regulations deals with misconduct proceedings. The constable is given

the opportunity to make legal arguments and lead evidence at a hearing. After a determination is made, the constable has a right of appeal to a Police Appeals Tribunal. An appeal to the Tribunal is an appeal on its merits (*Norma Graham, Chief Constable, Fife Constabulary* v *William Crawford* [2012] CSIH 71).

[48] As is plain from an understanding of the statutory regime, D is not currently subject to misconduct proceedings. He may never be. His case is at an investigatory stage under Part 2 of the Regulations. No decision on whether he has a case to answer has been taken. He has been notified of an allegation, an investigator has been appointed and a date and time for interview proposed. It is not known whether or not he will face misconduct proceedings. In that respect this petition is premature. D is not at the same stage as the officers in *BC, Wilkinson* or *Redgrave*, where decisions had been taken that there was a case to answer and a misconduct hearing fixed or charges brought.

[49] D has an alternative effective remedy. An interview is not required under the Regulations, but D has the opportunity to intimate he intends to make oral representations ensuring that an interview will take place. An interview had been fixed before these proceedings were raised. The information made available ahead of an interview must include details of the allegations and the dates and places at which any misconduct is said to have occurred. If the investigatory proceedings are allowed to run their course, it may well be that D will be given that opportunity again and for further details of the allegations to be provided. In any event, he would be entitled to that opportunity if he seeks to make representations.

[50] If it is decided that there is a case to answer and a misconduct hearing held, D can argue at the hearing that he had a reasonable excuse for not complying with the order. He can argue that the procedure was unfair and irrational for the reasons he contends. If he

fails in all of that he can appeal. These are matters that Parliament has entrusted to the Police to first investigate and determine subject to statutory appeal. It would be trespassing on its territory for this court to intervene in that process in the circumstances of this case.

[51] The circumstances of this case, whilst also involving a police officer and the 2014 Regulations, are distinct from the cases cited on behalf of D. All of the cases cited involved officers who were already subject to misconduct proceedings. D is not in that position. *BC* raised an issue of fundamental right which arguably had already been infringed. The circumstances that arose in *Redgrave* and *Wilkinson* including significant delay and complex arguments do not arise in this case. This case raises matters of procedural irregularity or general unfairness (inadequate notice and want of cause) that can all be argued before any misconduct hearing that might follow. There is nothing unfair about letting the misconduct investigations and any consequent proceedings run their course. Any misconduct hearing can determine whether there was a reasonable excuse for not complying with the order, inadequate notice, want of cause, an abuse of process and consequent unfairness (*Redgrave; Baker Tilley; Aziz).*

[52] It is premature and incompetent for D to invoke the supervisory jurisdiction. He may never face a misconduct hearing. But assuming he does, he can make all the arguments he seeks to make in this petition before such a hearing and thereafter can rely on the appeal provisions.

[53] I leave the investigatory proceedings to take their course, to decide whether D has a case to answer and if so, for the misconduct proceedings to decide the outcome following evidence and argument. Given my decision, it would be inappropriate for me to comment on the substantive arguments made which are matters for any misconduct hearing.

Orders

[54] I dismiss the petition, sustain the respondents' 2nd, 3rd, 4th and 5th pleas-in-law. I repel the petitioner's pleas-in-law. Parties agreed at the hearing that if I dismissed the petition, expenses should follow success. I award the expenses in favour of the respondents.