[2024] JMSC Civ 135

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV05277

BETWEEN	**SANDRA DELAPENHA**	**1ST CLAIMANT**
AND	**THE BOARD OF MANAGEMENT OF BLACK RIVER HIGH SCHOOL**	**1ST DEFENDANT**
AND	**TEACHERS' APPEALS TRIBUNAL**	**2ND DEFENDANT**
AND	**THE MINISTER OF EDUCATION**	**3RD DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**4TH DEFENDANT**

IN OPEN COURT

Mr. André A. K. Earle, KC and Ms. Amarie Harris instructed by Earle and Wilson for the Claimant

Mr. Matthew Gabbadon instructed by the Director of State Proceedings for the Defendants

Heard: January 22, 23 & November 6, 2024

Judicial Review – Dismissal of Teacher – Allegation of failure to submit lesson plans – Fair Hearing – Breach of the Education Regulations – Procedural Impropriety – Bias – Whether right to Cross-Examine – Hearsay Evidence – Defects in the Application of the Rules of Natural Justice by an Inferior Tribunal can be Cured by a Subsequent Proceeding in an Appellate Court or Tribunal with Review Powers - Irrationality and Failure to Consider Breaches of Natural Justice in ruling of Teachers Appeal Tribunal - Statutory Interpretation

The Education Act, 1965, The Education Regulations, 1980, Part 56 of the Civil Procedure Rules

WINT- BLAIR, J

The Claim

[1] The claimant withdrew the claim against the Attorney General on the morning of trial. Both sides filed their bundles after the dates ordered by this court in case management, they were ordered to stand as filed.

[2] The amended fixed date claim[1] before the court concerns the termination of Mrs Sandra Delapenha, the claimant, who was at all material times a teacher duly employed by the Board of Management of the Black River High School. She has sought judicial review of the decision to terminate her inter alia and the following orders:

1. An Order of Certiorari against the 2nd Defendant, quashing the Tribunal's decision issued on October 12, 2021, to dismiss the Appeal brought by the Claimant against the decision of the 1st Defendant to terminate the employment and appointment of the Claimant.

2. An Order of Certiorari against the 1st Defendant, quashing the Board's decision of October 17, 2018, to terminate the employment and appointment of the Claimant to Black River High School.

3. An Order of Mandamus compelling the 1st Defendant to return the Claimant to her post as Teacher at the Black River High School in order to carry out her duties or alternatively, an Order pursuant to Civil Procedure Rules 56.16(2) that the 2nd Defendant reconsider its decision of October 12, 2021, relevant to the Claimant in accordance with the findings of the Court.

4. An Order that the Decision of the Teachers' Appeal Tribunal be set aside and by extension the Decision of the Board of Management of Black River High School to terminate the employment of Sandra Delapenha as a Teacher at the Black River High School.

[1] Filed on March 16, 2022

5. Additionally, the claimant will seek the following Declarations:

    a. A Declaration that the 2nd Defendant erred in law when it ruled at paragraph 29 of their Decision that the Applicant was not deprived of a fair hearing.

    b. A Declaration that the 2nd Defendant erred in its ruling that there was evidence to substantiate the charge of "Persistent failure to submit the required number of lesson plans to the designated supervisor over a considerable period of time from September 2016 to May 2018" as the required number of lesson plans to be submitted was stated as one hundred and thirty-six (136). whilst only half of that amount, sixty-eight (68) was in the evidence required.

    c. A Declaration that the 2nd Defendant erred in law in dismissing the ground that the Complainant failed to comply with Regulation 44(1) and the provisions set out in Schedule D of the Education Regulations 1980 for making a recommendation to the Board of Management regarding the dismissal of a teacher but only after warning the member of staff in writing, giving guidance and assistance, and allowing a reasonable time for improvement which was not afforded to the Claimant.

    d. A Declaration that the Personnel Committee of the 1st Defendant which comprised of a new member, Sabeenah Comrie, be considered a Second Personnel Committee which did not conduct the proceedings de novo thus depriving the Claimant of a fair hearing and prejudicing the Claimant rendering the Personnel Committee's recommendation of October 16, 2018, null and void and of no effect.

    e. A Declaration that the Decision of the Personnel Committee of the 1st Defendant is null and void as it was arrived at considering documentation given to it by the Principal to wit, from witnesses Valencia Honeyghan and Roderick Harley who were not called to authenticate their statements at the hearing and who the Claimant did not have the opportunity to cross-examine.

    f. A Declaration that evidence from former Principal Roderick Harley related to the period June 9-17, 2016, which pre-dated the period which was the subject of the charge (September 2016 - May 2018) rendering the recommendation of the Personnel Committee and decision of the 1st Defendant null, void and of no effect

    g. A Declaration that the Chairman, Vincent Guthrie, is guilty of apparent bias having regard to the comments made by him to the Claimant's representative Dr. Mark Nicely during the cross-examination of the Complainant on a document dated June 28, 2018, such as *"I have a duty to ensure that aspersions and false claims.."*(pg 16 of Exhibit SD4-A) thus rendering the proceedings before the Personnel Committee and the Decision of the 1st

Defendant null and void and of no effect.

h. A Declaration that Personnel Committee member Mr. Sean Brissett is guilty of apparent bias having regard to the comments made by him to the Claimant's representative Dr. Mark Nicely during the cross-examination of the Complainant on a document dated June 28, 2018, rendering the proceedings before the Personnel Committee and the Decision of the 1st Defendant null and void and of no effect.

i. A Declaration that the inconsistent evidence regarding the number of lesson plans required and/or submitted rendered the evidence inconclusive and unsafe for the Personnel Committee to make an appropriate recommendation thereby precluding the Board from making a proper decision.

j. A Declaration that the punishment to the Claimant was manifestly excessive and/or unreasonable having regard to the fact that this was the first complaint against the Claimant. As a Senior Teacher, she had been employed to the Black River High School for over twenty (20) years and a finding of professional misconduct would vitiate her chances of receiving a pension upon retirement.

6. Costs to the Claimant.

7. Damages

The Undisputed Facts

[3] The claimant was at all material times employed as a Teacher of English language, English Literature, Communication Studies, and Sociology at the Black River High School since September 1991. A written complaint was made on the 21st day of May 2018 by the acting principal, Mr. Theobold Fearon to Mr. Vincent Guthrie, chairman of the first defendant. The claimant was never the subject of any disciplinary enquiry, other than that which occurred on the dates mentioned hereafter.

[4] The Personnel Committee (“the committee”) met on July 6, July 25, August 24, September 21, October 2, October 10, and October 11, 2018, and found the claimant guilty of the charge of “persistent failure to submit the required number of lesson plans to the designated supervisor over a considerable period - from September 2016- May 2018.” The committee recommended that the claimant’s appointment be terminated.

[5] On July 6, 25 and August 24, 2018, the committee comprised Mr. Vincent Guthrie – chairman of the Board, Mr. Sean Brissett – member of the Board and Mr. Errol Bennett – Academic Staff Representative. Mr. Errol Bennett, Academic Staff Representative, tendered his resignation effective the 30th day of August 2018. Ms. Sabeenah Comrie was elected to replace Mr Errol Bennett as Academic Staff Representative on the first defendant on the 28th day of August 2018. Her appointment to the committee was ratified by the National Council on Education on the 18th day of September 2018.

[6] On the 21st day of September and the 2nd, 10th, and 11th days of October 2018, the committee included Ms. Sabeenah Comrie the new Academic Staff Representative. The Board met on the 17th day of October 2018 to consider and vote on the recommendation of the committee. The majority of Board members present voted in favour of the termination of the claimant's employment. The claimant was notified of her dismissal by way of a letter dated the 19th day of October 2018 and her termination took effect on the 31st day of October 2018. The claimant appealed to the Teachers Appeals Tribunal ("the tribunal") on the 1st day of November 2018.

The Regulatory Framework

[7] It is first necessary to give some indication of the regulatory framework within which the Board, the committee and the tribunal operate. The general scheme of these provisions is clear. Complaints of the commission of disciplinary offences are to be made in writing to the board. Upon receipt of a complaint, the board may refer the matter to the committee, of which the chairman of the board is a standing member, for consideration. If the committee considers the complaint to be trivial, it will report to the board accordingly.

[8] The starting point is regulation 85 of the Education Regulations, 1980, which deals with the establishment and composition of the committee:

"85 - *(1) The Board of Management of every public educational institution shall, for the purpose of facilitating inquiries into allegation of breaches of discipline by or against members of staff or students appoint a personnel committee to which the Board shall refer any such allegations, and such personnel committee shall consist of-*

(a) in the case of a government owned institution –

(i) the chairman of the Board.

(ii) one nominee of the Council.

(iii) subject to sub-paragraph (c), the representative on the Board of the category of accused personnel.

(b) in the case of an institution owned by a denomination or Trust –

(i) the chairman of the Board.

(ii) one nominee of the denomination or Trust or the Board.

(iii) subject to sub-paragraph (c), the representative on the Board of the category of accused personnel.

(c) where the accused personnel is the representative on the Board as described in sub-paragraphs (a) (iii) and (b) (iii), the category mentioned in those sub- paragraphs shall be entitled to nominate a representative for appointment to the committee.

(2) The quorum of the personnel committee shall be two, one of whom shall be the chairman or the vice chairman of the Board.

(3) Upon completion of its hearing into the alleged breach of discipline the committee shall submit a report to the Board for action."

[9] Regulation 55 lists the offences for which a teacher in a public educational institution may be disciplined: *"(a) improper conduct while in school; (b) neglect of duty; (c) inefficiency; (d) irregular attendance; (e) persistent unpunctuality; (f) lack of discipline; (g) such other conduct as may amount to professional misconduct."*

[10] Regulation 56 sets out the procedure to be followed by the board in response to a complaint as to the conduct of a teacher: *"Where the Board of a public educational institution receives a complaint in writing that the conduct of a teacher employed*

by the Board is of such that disciplinary action ought to be taken against the teacher, it shall, as soon as possible, refer the matter to its personnel committee for consideration pursuant to regulation 85."

[11] Regulation 57(1) sets out the procedure to be followed by the committee once it has considered such a complaint. If it finds that the complaint is trivial and that a hearing is unnecessary, the committee must *"report such finding to the Board forthwith"*.

[12] Should the committee find that a hearing should be held, it must notify the complainant in writing of the date, time and place of the hearing; and give not less than 14 days written notice to the person complained against; the charge or charges in respect of which the hearing is proposed to be held; the penalties that may be imposed under the regulations if the charges are proven against such person; and the right of the person complained against and a friend or his attorney to appear and make representations to the committee at the hearing.

[13] Regulation 57(5) provides that, not later than 14 days after the date of the enquiry, the committee shall report in writing to the board*:*

> *"(a) that the allegations against the teacher have not been proved;*
>
> *or (b) that the charges against the teacher have been proved and may recommend –*
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> *(i) that he be admonished or censured; or*
>
> *(ii) (ii) in the case of charges relating to a second or subsequent breach of discipline, that, subject to the approval of the Minister, a sum not exceeding fifty dollars be deducted from his salary; or*
>
> *(iii) (iii) that he be demoted if he holds a post of special responsibility; or (iv) that his appointment as a teacher with that public educational institution be terminated, and the Board shall act on the recommendation as received from the personnel committee, or as varied and agreed at the discretion of the Board."*

[14] Regulation 57(6) provides that the board, within 14 days after it has received the report of the committee, give written notice containing details of its decision to the Minister and the teacher, and regulation 61 provides that a teacher aggrieved by any action taken by the board under regulation 57(6) may appeal to the tribunal within 28 days. The tribunal is established under section 37(1) of the Act, for the purposes of, among other things, hearing appeals from disciplinary decisions by the board of any public educational institution.

[15] These provisions operate as Lord Carswell observed in **Easton Wilberforce Grant v The Teacher's Appeals Tribunal and The Attorney General**[2], as "a filter mechanism … *which obviates the need for the committee to spend time giving extended consideration to unfounded complaints".* If the committee determines that a hearing should be held, it will convene one, upon notice to the person against whom the complaint has been made specifying the charge/s. At the completion of the hearing, the committee shall make a written report to the board, which will, after further consideration of the matter, take a decision, of which it will notify the person complained against and to the ministry. Any person aggrieved by the decision of the board may appeal to the tribunal within 28 days.

The appeal to the tribunal

[16] All the identical grounds argued in this court were argued before the tribunal. It is my view that any defect in the proceedings before the committee was cured by the subsequent full hearing on appeal before the tribunal. There has been no complaint that the tribunal failed to abide by any of the principles of natural justice nor has it breached any of its statutory powers in its conduct of the hearing.

[17] On the authority of **James Ziadie v Jamaica Racing Commission,**[3] it was held that any defect in the application of the rules of natural justice by an inferior tribunal

[2] [2006] UKPC 59, para. 28
[3] (1981) 18 JLR 131, The Full Court of the Supreme Court (Ross, Campbell and Bingham JJ)

can be cured by a subsequent proceeding in an appellate court or tribunal which possesses a clear power of review of the entire case or matter.

[18] In the present case, section 37(4) of the Education Act provides that the tribunal may "*either confirm the decision appealed against or vary or quash that decision, and the Tribunal may from time to time return the proceedings to the person or authority concerned with the making of that decision for further information or for such other action as the Tribunal thinks just*".

[19] At the hearing of the claimant's appeal by the tribunal, the allegations made before this court were set out in more or less identical terms as have been set out in this court. The grounds were fully ventilated in argument by Mr Earle, KC, in the same terms as have been advanced here. In addition, and perhaps of greater significance, the tribunal was invited to and did go over in considerable detail the printed record of the evidence produced by the committee. The documentary evidence produced in the proceedings before the tribunal facilitated a full review of the evidence before the committee. Therefore, any deficiency in the proceedings before the committee would have been cured by the subsequent proceedings before the tribunal.

[20] This decision is confined to any complaint made by the claimant regarding the tribunal. The ruling of the tribunal was handed down on February 11, 2021. It indicated that the appellant's notice of application dated November 1, 2018, contained one ground of appeal, however an amended notice of appeal was filed on September 9, 2020, outlining thirteen grounds of appeal. It is to these grounds that I have referred in this decision as being fully ventilated.

[21] The defendants reproduced the identical arguments presented by counsel appearing for the board coupled with the findings of the tribunal as its submissions before this court. I have not reproduced all of these submissions as a consequence.

Ground 1: The Personnel Committee which made the recommendation as to the termination of the claimant's employment was wrongly constituted as it was not the same Personnel Committee that began hearing evidence in the matter, thus depriving the claimant of a fair hearing.

[22] It is the position of the claimant that the members of the committee which commenced hearing the disciplinary charge against the claimant were changed by the addition of Sabeenah Comrie for Errol Bennett by the time it concluded the hearing and came to a decision adverse to her. The claimant was not granted a fair hearing, as the panel which sat to make decisions on whether the charge against Mrs. Delapenha was proven was wrongly constituted. Committee No. 1 which began hearing the evidence in the matter was not the same as Committee No. 2 which made the recommendation to terminate Mrs. Delapenha's employment.

[23] In short, there were two different Personnel Committees in the matter of Mrs. Delapenha, a fact which was acknowledged by Mr. Vincent Guthrie in cross-examination. This prejudiced the claimant as not all the members of Committee No. 2 had the chance to observe and assess the credibility of all the witnesses.

[24] The Report on the Hearing of Charges against Mrs. Delapenha dated the 17th of October 2018 provided that the committee met for seven (7) days, and on days two and four, no witnesses were called, the dates are as follows:

> Day 1-July 6, 2018, this hearing was aborted
> Day 2-July 25, 2018
> Day 3-August 24, 2018, this hearing was also aborted
> Day 4- September 21, 2018
> Day 5- October 2, 2018
> Day 6-October 10, 2018
> Day 7-October 11, 2018.

[25] The taking of evidence commenced whilst Mr. Errol Bennett was still the Academic Representative on the Board of Management. Committee No. 1 consisted of Mr. Vincent Guthrie, Mr. Errol Bennett and Mr. Sean Brissett. Mr. Bennett subsequently sent in a letter of resignation which was received by the committee effective August 30, 2018. Personnel Committee No. 2 consisted of Mr. Vincent Guthrie, Mr. Sean Brissett, and the newly appointed Teacher Representative on Personnel Committee No. 2, Ms. Sabeenah Comrie. The latter had replaced Mr Bennett.

[26] Mr. Guthrie agreed with King's Counsel in cross-examination that being the chairman of Committee No. 2, he and Mr. Brissett had the ability to assess and observe the credibility of the complainant Mr Fearon on the dates he testified. These dates were the 6th of July 2018 and the 24th of August 2018.

[27] Ms. Comrie was present at the hearings on October 2, 10 and 11, 2018. She did not hear the viva voce evidence of the complainant, nor did she observe and assess his credibility, nor any of the witnesses previously called. On this basis, the hearing should have commenced de novo.

[28] The claimant relies on the case of **Samuels v Smithson**[4] in which the plaintiff claimed from the defendant a sum of money being rented in respect of land. The trial was begun by one Resident Magistrate who heard several witnesses. It was then adjourned to a later date, by which time the Resident Magistrate had left the parish and his place had been taken by another. At the request and with the consent of the solicitors for both parties, the new Resident Magistrate read the notes of his predecessor and continued the hearing from the point where it had been left off, eventually giving judgment in favour of the plaintiff.

[29] The Court of Appeal held that in the circumstances, the trial had in reality been no trial at all, it was a nullity and there must be a new trial. In the case at bar, it was

[4] (1939) 3 J.L.R 151

crucial to thoroughly observe and assess Mr. Fearon's evidence, and a mere perusal of the notes of evidence by Ms. Comrie would not suffice.

[30] In the Privy Council case of **Paul Beswick v the Queen**[5], see para 9 which applied **Samuels** (supra), their Lordships stated:

> *"…It is (sic) fundamental requirement that the fair administration of justice that those charged with returning a verdict in a criminal case be they judge, magistrates or jurors should have seen and heard all the witnesses. If they have not had the opportunity to evaluate the reliability and veracity of a witness by seeing and hearing him give evidence, they lack a part of the vital material upon which their verdict should be based."*

[31] Similarly, the same view was taken in the case of **Lewis v Lewis**[6] which is instructive on the point, where Lord Merrivale, P., indicated that only one of the four justices who had sat at the first hearing was present at the second hearing. The order for maintenance was, therefore, made under a misapprehension, and the proceedings were null and void.

[32] Downer J.A. in **Owen Vhandel v The Board of Management Guys Hill High School**,[7] cited **MacFoy v United Africa Co. Ltd.**[8] where it was noted that:

> *"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity."*

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[5] [1987] UKPC 22
[6] [1928] 72 Sol Jo 369
[7] SSCA 72/2000 (p. 25)
[8] [1961] 3 W.L.R. 1405 at 1409

[33] Accordingly, it is submitted that the first defendant's decision cannot stand as it is based on a decision of Committee No. 2 which is null and void.

[34] The claimant further relies on regulation 57 (4) of the Education Regulations, which states the:

> *"- 'Personnel Committee shall consider the complaint referred to it under regulation 56 and*
>
> *4) At the hearing-*
>
> *(a) Both parties shall be heard and be given opportunity to make representations."*

[35] The first defendant's erroneous decision has not only impacted the claimant's livelihood but also has the potential to affect her pension. Section 5(2) of the Pension (Teachers) Act provides that: "Where it is established that to the satisfaction of the Governor General that a teacher has been guilty of negligence, irregularity, or misconduct, the pension or gratuity may be reduced or altogether withheld."

[36] The claimant held a teaching position for over two decades at this institution. Given these circumstances, the panel members bore the responsibility of making a decision after thorough consideration and they should not have taken their role lightly.

[37] The defendant submitted that the committee convened on several dates to address the charge against the claimant and the proceedings were plagued by multiple delays. Ms. Delapenha's representative, Dr Nicely, objected to the suitability of the recording secretary who was a past student of the institution and the potential issue of a breach of privacy that may have arisen. It was also plagued by delays due to the absence of witnesses on two (2) days, and the absence of the newly appointed member of the committee, Ms. Comrie, on day four (4).

[38] On the fifth through to the seventh sitting, the complete panel (comprising Ms. Comrie) sat and heard the remaining witnesses. The panel comprising Mr. Bennett

heard the evidence of the complainant, and the panel comprising Ms. Comrie did not invite submissions from Mr. Fearon. The panel that made the decision and gave the recommendation to the Board was an inferior tribunal of three (3) members who heard a majority of the matter on the fifth through to the seventh sitting. The majority of the matter was heard in the latter sessions due to the delays.

[39] The hearing proceeded, the documents submitted as evidence were reviewed and the oral evidence of all witnesses were heard. The hearing was completed on October 11, 2018, and the committee unanimously found Ms. Delapenha guilty of the charge of neglect of duty. By way of a majority decision, they recommended that the Board terminate Ms. Delapenha's employment.

[40] The committee was at all material times properly constituted under regulation 85 (2), since it met the requirements for the quorum of members. Also, the Education Act, 1965, and the Education Regulations, 1980, do not prohibit a new panel member from being appointed to the committee after a hearing has been commenced**.**

[41] It was submitted by the defendant that the question is whether a disciplinary hearing sitting as a panel of three (3) may validly continue if one member of the panel is replaced during the course of the hearing without the witnesses being recalled to give evidence. In addressing a similar question, Seton, J. (Ag.), sitting in the Court of Appeal of Jamaica in **Samuels**[9] did not lay down any absolute rule where this was concerned and found that each case must be assessed on its merits.

[42] The facts of **Samuels** can be distinguished from this case. This is because the court in **Samuels** comprised of one resident magistrate who heard more than two-thirds of the evidence in the case while the decision was given by another who merely read the notes of evidence given before his predecessor and heard the balance of the witnesses. Whereas in the present case, the panel that made the

[9] (1939) 3 JLR 151 at p. 153

decision and gave the recommendation to the board is an inferior tribunal of three members who heard a majority of the matter on the fifth through to the seventh sitting. The majority of the matter was heard in the latter sessions because the proceedings at the beginning of the hearing were plagued by delays such as witnesses being absent and unnecessary questions and objections. The claimant was not deprived of a fair hearing.

Discussion

[43] The tribunal found that the committee met to hear and consider the charge on seven occasions. Mr Brissett was one of the members who presided over the matter on the first three sittings and resigned from the school between the third and fourth day of hearing. He was replaced by Ms Comrie. This is not the case.

[44] Mr Brissett did not resign but remained on the committee throughout, rather, it was Mr Bennett who had tendered his resignation from the school and could no longer sit. The tribunal did not correct this error in the evidence as set out in its ruling.

[45] Additionally, the tribunal failed to apply the law set out in the Court of Appeal cases cited by Mr Earle, KC to include the decisions in **Owen Vhandel** and **Samuels**. The tribunal distinguished **Samuels** on the basis that the Resident Magistrate in **Samuels** heard more than two-thirds of the evidence whereas the committee that made the decision and recommendation to the board is an inferior tribunal of three members who heard a majority of the matter on the fifth through seventh sitting. The majority of the hearing was plagued by delays, absent witnesses and unnecessary questions and objections.

[46] With respect, the issue raised on this ground concerns the jurisdiction of the committee that made the recommendation. That committee comprised Ms Comrie. The regulations[10] speak to a quorum when there are two members of the committee present. Arguably, the same two members who began the hearing were present throughout, however, the committee carried on without there being

[10] Regulation 85(2)

any discussion and determination about whether it would be reasonable or fair to continue with the hearing or to commence the hearing de novo Ms Comrie having joined the panel. The first two members of the committee had heard the evidence of the complainant while Ms Comrie did not.

[47] On appeal, the tribunal failed to consider that the complainant had given evidence before only two members of the committee and the importance of that evidence to the hearing before the committee. The tribunal did not determine the issue of fairness as the record shows that the committee continued the hearing without any demonstration that it determined whether it would be reasonable or fair to continue with the hearing or to commence the hearing de novo, and to invite submissions from the claimant's representative on this point. While the committee is an inferior tribunal, it is possessed of significant statutory powers and it is therefore not only required to act fairly but to demonstrate how it has done so.

[48] In the case of **Samuels**, the plaintiff had given evidence and called one witness. Both defendants gave evidence and then the case was adjourned. On the next date, three witnesses were called by the defendant, the case was then adjourned. On the continuation date, the Resident Magistrate was no longer the one who had commenced the trial, his place was taken by Mr Allen. Counsel consented that the notes of his predecessor be read and the trial continued where it had been left off. Mr Allen heard from three further witnesses for the defence which closed its case and he heard closing addresses. It was argued by Norman W. Manley, QC in the Court of Appeal that, despite more than two-thirds of the evidence having been heard by one Magistrate and the decision given by another who had read the notes of evidence and heard the balance of the witnesses, there could be no complaint of any irregularity by counsel as they had consented to that course.

[49] The Court of Appeal decided that it was a precedent which ought not to be followed, adopting and relying on the view of Scrutton, LJ in **Coleshill v Manchester Corporation**[11]:

> *"I doubt whether a judge has any jurisdiction to continue the hearing of a case in which witnesses have been called in Court in the course of a trial before the jury and another judge."*

[50] The Court of Appeal bore in mind that **Coleshill** was a jury trial and the jury had seen and heard all the witnesses even though the judge who had commenced the trial had died and made the distinction that the position was even stronger for a Magistrate sitting alone as both judge and jury. A new trial was ordered. **Samuels** ends with the words of Coleridge, J in **Reg v Bertrand**,[12] which I adopt:

> *"The most careful note must often fail to convey the evidence in some of its most important elements…It cannot give the look or manner of the witness, his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration…It is, in short, or it may be, the dead body of the evidence without its spirit which is supplied when given openly and orally by the ear and eye of those who receive it."*

[51] In **Paul Beswick v the Queen,**[13] the issue arose whether His Honour Mr Lopez had the jurisdiction to accept the plea of the appellant despite the evidence being previously heard by another judge. The Privy Council found that Mr Lopez had jurisdiction to accept the plea of guilty. The conviction he recorded and the sentence he passed were not a nullity. Once he had recorded the conviction and passed the sentence he had exhausted his jurisdiction to deal with the offence and was functus officio. In addressing the issue of jurisdiction Lord Griffith stated:

> *"[9] The expression "the magistrate had no jurisdiction" is however frequently used in a broader sense to cover case in which although there*

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[11] 97 L.J., N.S. 229
[12] 36 L.J., P.C. 51
[13] [1987] UKPC 22

was power to enter upon a hearing the decision should nevertheless be quashed because it would not be fair to allow it to stand, If, for example, the appellant had not changed his plea and Mr. Lopez had continued the trial without hearing the evidence of the prosecution witness who had previously given his evidence before Miss Francis his decision would have to be quashed because it is a fundamental requirement of the fair administration of justice that those charged with returning a verdict in a criminal case be they judge, magistrates or jurors should have seen and heard all the witnesses. If they have not had the opportunity to evaluate the reliability and veracity of a witness by seeing and hearing him give evidence, they lack a part of the vital material upon which their verdict should be based. It is perhaps unnecessary to cite authority for so self-evident a proposition but it is to be found in such decisions as Re Guerin (1888) 58 LJMC 42, Coleshill v. Manchester Corporation [1928) 1 KB. 776, Lewis v. Lewis [1928] 92 JP 88and Samuels v. Smithson (1939) 3 J.L.R. 151. In these cases, the Courts have referred to the judge or magistrates having no jurisdiction to continue a hearing when they have not heard the earlier evidence"

…

the interests of justice are not best served by adopting a rigid rule that a resident magistrate must in all circumstances retain exclusive jurisdiction over a case that she has begun. A magistrate who takes up the case on an adjourned hearing must consider whether he can, in fairness, both to the prosecution and the defence, continue the hearing: if he can he should do so, if he cannot then he must adjourn the case to be continued by the original magistrate."

[52] The word jurisdiction was discussed by Lord Reid in the well-known case of **Anisminic v Foreign Compensation Commission**[14]:

[14] [1968] UKHL 6

> "*It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."*

[53] The question is whether on the face of the record, the committee, as constituted when it reached its decision, had considered the question of fairness to both sides. There ought to be evidence before this court to show that the committee gave voice to this issue and deliberated upon it, before continuing with the hearing with Ms Comrie as a part of the committee.

[54] I have reviewed the evidence in the form of the minutes of the hearing date of October 2, 2018. This was the first date on which Ms Comrie first sat on the panel. The minutes which I do not intend to reproduce, disclose that the chair of the committee insisted over objections from her representative that the claimant be first questioned by the committee. The chairman interpreted the role and function

of the committee as having to hear from both sides. He said that a judgment can be arrived at in the absence of the accused person, this meant that the representative did not have to be there, and neither did the accused. Having decided to call the claimant, the chairman said based on her responses it would be decided whether other witnesses would be called.

[55] The procedure embarked on for this hearing date was curious, the claimant was not allowed to present her defence before the committee embarked on questioning her extensively. The chairman took over the presentation of the claimant's defence and she was not allowed to refer to the documents she had brought with which to present her defence.

[56] Most importantly, there was no demonstration on the record that the committee considered the question of the fairness of the hearing now that Ms Comrie was on the panel. The tribunal having misdirected itself; this ground succeeds.

Ground 2: There was a breach of the Education Regulations in that the complainant who was the Principal sat in on the Board meeting of May 24, 2018

[57] The claimant submits that the principal, being the complainant, sat at the board meeting on the 24th of May 2018, which referred the complaint to the committee. Mr. Guthrie, while being cross-examined agreed that the acting Principal, Mr Fearon attended the board meeting. There is no evidence that Mr. Fearon ever left the Board meeting. Mr. Fearon participated in the decision to send his own complaint to the committee as the decision was made 'unanimously'.

[58] There was a direct conflict of interest as the Principal did not withdraw from the process of deliberation at the meeting of the Board on the 24th day of May 2018 as required by the regulations. The complainant's presence and participation in the voting process of the proceedings amounted to procedural impropriety.

[59] In reliance on the case of **Barbados Turf Club v Melnyk**[15], it is submitted that the complainant did not withdraw from the meeting and his mere presence could influence the decision that would be made. The claimant also relies on the famous statement of the law from Lord Hewart CJ in the case of **R v Sussex Justices, ex parte McCarthy**[16] that "justice should not only be done but must manifestly and undoubtedly be seen to be done." Also the cases of **Hubert Smith v. The Board of Management of the Queen's School**[17] and **Owen Vhandel.** In light of these circumstances, the claimant submits that the decision of the Board to terminate the claimant is null and void.

[60] It was submitted by the defendant that the Principal was required to be present at the 1st defendant's meeting as he was a named member of the Board pursuant to regulation 71(1)(b). The Board meeting was held pursuant to regulation 56 which mandated it to refer complaints to the committee as soon as possible, where such complaints were in writing and concerned the conduct of a teacher employed by the said Board.

[61] Mr Gabbadon relied on **Junnet Lynch v Teachers' Appeal Tribunal, the Attorney General and the Board of Management of the Charlemont High School**[18] to submit that the Board at the referral stage of the disciplinary process was merely carrying out its statutorily mandated function of referring complaints to the committee. It was then the function of the committee to determine whether the complaint was serious and if so, hold a hearing.

[62] The meeting on May 24, 2018, was not a deliberation nor was there the need for a vote to be taken. The presence and participation of Mr Fearon did not result in a conflict of interest. The Board had no power or influence over the subsequent proceedings to be carried out by the committee which was the only body tasked with determining whether the complaint was serious and if so to hold a hearing.

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[15] [2011] CCJ 14 AJ at para 4
[16] [1924] 1 KB 256, at p.259
[17] 2016 JMCA Civ 51
[18] [2019] JMSC Civ. 80 at para. 14

Discussion

[63] The claimant argued that it was the Principal who triggered the disciplinary process which led to the committee hearing. However, it is regulations 55 and 56 which are applicable.

[64] The tribunal found that the board at the referral stage of the disciplinary process merely carries out its statutory function of referring the complaint to the committee for a determination as to whether the complaint is serious and requires a hearing. The tribunal applied **Junnet Lynch** stating that the board meeting was not a deliberation nor was there the need for a vote. There was no conflict of interest with the principal being present.

[65] It is the board which triggered the disciplinary process having received the complaint of the principal. The board was mandated by statute to refer the complaint if it fell within Regulation 55.[19]

[66] However, there is no evidence to show from the minutes that the presence of the principal improperly influenced any member of the board or swayed them to his view. It cannot be said that this has been established in the absence of any evidence as the other members of the board were free to give such weight to the

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[19] *Regulations 55:*
"A teacher in a public institution may have disciplinary action taken against him for-

(a) Improper conduct while in school;
(b) Neglect of duty;
(c) Inefficiency;
(d) Irregular attendance;
(e) Persistent unpunctuality;
(f) Lack of discipline;
(g) Such other conduct as may amount to professional misconduct;

Regulation 56:
"Where the Board of a public educational institution receives a complaint in writing that the conduct of a teacher employed by the Board is such that disciplinary action ought to be taken against the teacher, it shall, as soon as possible, refer the matter to its personnel committee for consideration pursuant to regulation 85."

letter of complaint as they thought fit before drawing their conclusions from the principal's presence and letter of complaint.

[67] The principal is a member of the Board. Regulations 71(1)(b), 88(8) and (9) of the Education Regulations, 1980 state:

> *"71(1) Every secondary educational institution owned by the Government shall be administered by a Board of not more than fifteen persons appointed by the Minister in the following manner –*
>
> *(b) the principal of the institution*
>
> *88(8) No member shall vote on any question in which he has a direct personal interest."*
>
> *(9) Where there is a conflict of interest, the member of the Board concerned shall declare his interest and shall not participate in the deliberations on the particular matter and he shall withdraw from the meeting during the period of the discussion on the matter.*

[68] The language used in these regulations is plain and unequivocal. The evidence is found in the minutes of meeting of May 24, 2018. The acting principal was Mr Theobald Fearon, who is noted as being present. It was at this meeting that Mr Fearon advised the Board that he was bringing a formal complaint against the claimant. He presented a letter dated May 21, 2018, to the chairman. The members of the board were unanimous that the letter be treated as a legitimate complaint on which disciplinary action should be taken and which should be sent to the committee for consideration under Regulation 85.

[69] Further, the issue is not that the principal should not have been present, the issue is that the principal did not withdraw during discussions concerning his written complaint as is required by regulation 88(9). The minutes said the members were unanimous, though there was no requirement for voting. It appears from the minutes and can be inferred from the word "unanimous" that there was a vote or

agreement amongst the members that the complaint be referred. Had Mr Fearon withdrawn and not been a party to that agreement, that fact should have been recorded in the minutes. It can be inferred that he did not withdraw at the time the board arrived at unanimity by whatever means, for the minutes do not say that he did. There is also no record of the chairman of the board indicating to the members that he was inviting Mr Fearon to withdraw or to consider or state whether he was in a position of conflict, there was no consideration of that situation at all.

[70] In **Owen Vhandel**, the appellant sought judicial review, claiming unfair treatment by the board due to the lack of a proper disciplinary hearing, the principal's participation in the board's deliberations despite being the accuser, and the denial of his right to defend himself. The principal, who had a direct personal interest, sat in the board meeting and participated in the unanimous decision to terminate the appellant's employment, in contravention of regulation 88 (8) and (9). It was held that the principles of natural justice were not satisfied as the principal, who made the complaint, should not have been part of the termination decision. The appellant was given no opportunity to respond to the charges, either in writing or orally, which breached natural justice principles. Consequently, the court found the board's decision flawed and invalid, granted the appellant's appeal, and issued a certiorari to quash the board's decision.

[71] Accordingly, the participation of Mr Fearon was a breach of regulation 88 rendering the hearing of the board flawed as also in breach of the principles of natural justice. The tribunal did not apply the law as set out in the Court of Appeal decisions of **Owen Vhandel.**

[72] In **Hubert Smith**, the Court of Appeal held that the relevant regulation is regulation 88(9), which deals with the procedure to be followed at meetings of a board of management of a school:

> *"88(9) Where there is a conflict of interest, the member of the Board concerned shall declare his interest and shall not participate in the*

> *deliberations on the particular matter and he shall withdraw from the meeting during the period of the discussion of the matter."*

"[38] To my mind, this regulation makes it clear that where there is an actual or potential conflict of interest involving a member of a board, there are three actions that are required on the part of that member; namely: (i) to declare that interest or conflict; (ii) not to participate in the meeting; and (iii) to withdraw from the meeting when the matter is being discussed.

[39] In the instant case, it is to be remembered that the proceedings against the appellant were commenced by the principal issuing a letter (dated 15 August 2012) to the respondent, in which she, inter alia, made the following request:

> *"In this regard I therefore seek the intervention of the Board as the school has been placed in disrepute having breached Regulation 6.2 of the CXC Policy."*

[40] Here the principal can clearly be seen to be the one who set the disciplinary process against the appellant in motion; and, in doing so, to be expressing a view or arriving at a conclusion that is one properly for a personnel committee appointed pursuant to regulation 85(1) "...for the purpose of facilitating inquiries into allegation[s] of breaches of discipline..." (emphasis added).

[41] To my mind, in this context the submissions of Mr Earle that the position of the principal could be regarded as potentially adverse to that of the appellant must be accepted. There is in these circumstances at the least a prima facie impression of a conflict of interest.

[42] In cases of this nature where there is the possibility of an outcome adverse to the person whose conduct is being investigated, it is appropriate to have regard to the overarching principle stated as long ago as 1924 by Lord Hewart, CJ in R v Sussex Justices, ex parte McCarthy [1924] 1 KB

256, 259, that: "...it is...of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

…

[45] Even if we were to accept the submissions of Mr Williams as to the minimal participation by the principal in the proceedings and the fact that she only participated to answer questions asked of her, the plain requirements of regulation 88(9) are there. Whilst the principal remained present during the respondent's deliberations, the appellant was absent throughout (except for briefly being allowed to make a plea after a decision had in fact been taken). He was, therefore, unavailable even to correct any error that the principal might have made in responding to the enquiries that were made of her. It seems to me that, even if her participation was only minimal, the regulation proscribes any participation at all; and, in fact required her withdrawal from the deliberations."

[73] In the CCJ decision of **Barbados Turf Club** in which a decision of the disciplinary committee of the turf club was overturned on appeal, primarily on the basis that when the disciplinary committee met to consider the question of the disqualification of a horse from a race, the lawyers for the applicant were present during the committee's deliberations. The CCJ found that the lawyers' presence during the deliberations of the disciplinary committee had the effect of raising the possibility of apparent bias.

[74] The tribunal failed to take the law into account as set down in these three decisions all of which had been cited to them and as a consequence, this ground succeeds.

Ground 3: The Principal being the Complainant, failed to comply with Regulation 44 (1) and the provisions set out in Schedule D of the Education Regulations, 1980, for making a recommendation to the Board regarding the dismissal of a teacher.

[75] The principal did not comply with Regulation 44 (1) of the Education Regulations, 1980 and Section 4 of Schedule D. Regulation 44 provides that:

> *44(1) Principals, vice-principals, heads of departments and teachers with special responsibility shall perform such functions as are stipulated in Schedule D and teachers shall perform such duties as are assigned to them.*
>
> *(2) In addition to regular teaching activities a teacher's duties shall include-*
>
> *(a) developing lesson plans on a regular basis;*

[76] Section 4 of Schedule D provides that:

> *(1) "A principal shall be responsible as professional head of the institution and chief executive officer of the Board of Management for-*
>
> > *(i) recommending to the Board the appointment and promotion of members of staff and the demotion or dismissal of such persons whose work or attitude is unsatisfactory, but only after warning the member of staff in writing, giving guidance and assistance, and allowing a reasonable time for improvement."*

[77] It is submitted that a principal bears the responsibility not only to propose to the board the appointment or promotion of a staff member, but to recommend the demotion or dismissal of a staff member only after warning the member of staff, giving guidance and assistance, and allowing a reasonable time for improvement

[78] Mr. Guthrie admitted in cross-examination that no written warning in relation to the non-submission of lesson plans was provided by Mr Fearon to the claimant. It is submitted that the only warning received by the claimant was in the form of a letter from Mrs. Moore, Head of the Language Department. There was no written warning to the claimant from the principal as professional head of the institution, neither is there evidence of the principal giving guidance and assistance, nor even an opportunity to improve upon this alleged unsatisfactory state of affairs within a reasonable time. The principal did not have the power to make a complaint or recommendation to the board as he did not satisfy regulation 44(1) and schedule D(4)(1)(i) of the regulations and as such, the decision to terminate the claimant ought to be rendered null, void and of no effect.

[79] The defendant submitted that in reliance on regulations 44(1) and 44(2) the principal indicated his expectations and objectives by way of a letter dated September 4, 2017, to the claimant. This included the preparation of the required number of lesson plans for submission to the designated supervisor in a timely manner. The claimant's head of department met and spoke to her in a private meeting and by way of a letter dated March 2, 2018. She was invited to meetings and failed to attend, and she was given an offer of assistance to write group lesson plans but declined the offer.

[80] The claimant had neglected to fulfil her duties under regulation 44 and the principal had done all he could do to assist her. None of these efforts as stated at the hearing were challenged by the claimant. There was overwhelming evidence of the claimant being warned and guided to improve her conduct through written letters and memoranda.

[81] The principal addressed a letter to the 1st defendant on May 21, 2018. The letter is titled "Re: complaint against Mrs. Sandra Delapenha - teacher, black river high school". The principal attached to it the lesson planning report forms for the academic years 2016/2017 and 2017/ 2018 that were prepared by the head of department, Mrs. Moore. He indicated that the reports evidenced the claimant's persistent lack of regard for and neglect of her duties and requested that the 1st defendant take disciplinary action against the claimant. It is submitted that this was not a recommendation to demote or to dismiss.

[82] It was submitted that the claimant was given an abundance of warning, guidance, and time to improve her conduct, however, the conduct persisted. It was also submitted that the mandatory duty to warn in writing, give guidance, and to allow a reasonable time for improvement under Schedule D of Paragraph 4(1)(i) of the regulations, was not triggered because the principal did not recommend to the board the demotion or dismissal of the claimant.

Discussion

[83] The tribunal found that there was no evidence that the principal made such a recommendation and alternatively that there was overwhelming evidence that the claimant received warnings and guidance to improve her conduct. Schedule D of Paragraph 4(1)(i) of the regulations, was not triggered because the principal did not recommend to the board that the claimant be demoted or dismissed. The letter from the principal to the board requested that disciplinary action be taken by it. The board had the option under the statute not to refer the complaint to the committee. This ground fails.

Ground 4: The Personnel Committee hearing was tainted by the bias or apparent bias of the Chairman and Mr. Sean Brissett, member of the Committee

[84] The committee was tainted by the bias or apparent bias of the chairman and Mr. Sean Brissett, as they gave evidence regarding a letter dated the 28th day of June 2018 from the Jamaica Teachers' Association's (JTA's) Mr. Doran Dixon to the chairman of the committee, which they would ultimately be assessing. Alternatively, the chairman and/ or Mr. Sean Brissett acted as judges in their own cause, as per the notes of evidence contained in 'Excerpt 2' of the Report on Hearing of Charges dated the 17th day of October 2018.

[85] It is contended by the claimant that a fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the tribunal was biased, and the actions of the chairman and Mr. Brissett are best described as descending into the arena. This completely eroded both members' impartiality and objectivity. Due process could not therefore be properly observed and therefore a fair and just result could not have been rendered.

[86] In arguing the issue of bias, counsel relied on the cases of **George Meerabux v the Attorney General of Belize**[20], and **Metropolitan Properties Co (FGC) Ltd v**

[20] (2005) 66 WIR 113

Lannon and Others,[21] and further submitted that during the cross-examination of Mr Fearon, Dr Nicely showed him a document that was sent to the school containing the list of witnesses that would be testifying (the principal was named as a witness in this document). He then asked the principal whether he was aware of the document and what was the extent of his interaction with this document. Mr Fearon indicated that he had seen and read the document.

[87] Dr Nicely continued questioning along this line until the chairman interjected, asking if Dr Nicely had further questions for the principal and noting that the document had been emailed to the school. Dr Nicely asked the chairman to refrain from "colouring the document". In response to this comment, the chairman asked Dr Nicely not to cast aspersions against him or to make false claims. Mr. Brissett commented that his view of their exchange is that Dr Nicely was attempting to implicitly communicate that the document was improperly given to the principal.

[88] It was submitted that there is no evidence that there was presumed, apparent or actual bias on the part of the committee. There is no evidence that a fair-minded and informed observer, considering the facts, would conclude that there is a real possibility that the committee was biased. The chairman of the committee and Mr. Brissett did not act as a judge in their own case but performed a statutory function as prescribed under law. The witness list was not privileged information and there was no evidence which shows that the principal's handling of the document impacted the committee's decision. The hearing of the committee was of an inferior tribunal which sat laymen, it was not uncommon or improper for the panel to interject and clarify any possible misconceptions.

Discussion

[89] The tribunal reviewed the minutes of the committee meetings and in particular excerpt 2 therefrom which concerned the cross-examination of the principal about a witness list sent to the school. The principal was asked whether he was aware

[21] [1968] 3 All ER 304 at page 310

of it and the extent of his interaction with that witness list. The principal said that he had seen and read the witness list. The tribunal found that there was no bias on the part of the committee. The panel applied the proper test of the fair-minded informed observer having considered the facts and concluded that there was no real possibility that the committee was biased. The tribunal stated the meaning of presumed bias, apparent bias and actual bias. The witness list was not privileged information and there was no evidence that the principal's handling of the document impacted the committee's decision. The committee was composed of lay persons and it was not uncommon or improper for the panel to interject and to clarify any possible misconceptions.

[90] The powers of the committee are set out in regulation 57(5). In the instant case, the complaint that there was apparent bias was with regard to the chairman and Mr Brissett whom it was said descended into the arena, and in so doing, eroded their ability to be impartial and objective. The test is what would the fair minded and informed observer think considering all the facts in their proper context.

[91] In **Metropolitan Properties Company (FGC) Limited v Lannon**[22] Lord Denning MR considered the test for apparent bias, and said:

> *"A man may be disqualified from sitting in a judicial capacity on one of two grounds. First, a "direct pecuniary interest" in the subject matter. Second, "bias" in favour of one side or against the other.*
>
> *So far as bias is concerned, it was acknowledged that there was no actual bias on the part of Mr. Lannon, and no want of good faith. But it was said that there was, albeit unconscious, a real likelihood of bias. This is a matter on which the law is not altogether clears but I start with the oft-repeated saying of Lord Hewart, Chief Justice, in Rex v. Sussex Justices (1924 1 KB 256):*

[22] [1968] 3 WLR 694

> *"It is not merely of some importance but is of fundamental importance that justice should not be done but should manifestly and undoubtedly be seen to be done."*
>
> *In Regina v. Barnsley Licensing Justices (1960 2 Q.B. 187) Lord Justice Devlin appears to have limited that principle considerably, but I would stand by it. It brings home this point: in considering whether there was a real likelihood of bias, the Court does not look at the mind of the Justice himself or at the mind of the Chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand, see The Queen v. Huggins (1895 1 QB 563); Rex v. Sunderland Justices (1901 2 K.B. 373) by Lord Justice Vaughan Williams. Nevertheless, there must appear to be a real likelihood of bias. Surmise, conjecture, or suspicion, is not enough, see Regina v. Camborne Justices (1955 1 Q.3. 41) at pages 58 to 51; Regina v. Nailsworth (1953 1 W.L.R. 1046). There must be circumstances from which a reasonable man would think it likely or probable that the Justice, or Chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidences and confidence is destroyed when right-minded people go away thinking: "The Judge was biased".*

[92] The common law requirements of procedural fairness are essentially two-fold: the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made or implemented, and he has the right to

an unbiased tribunal.[23] The entire proceedings as a whole has to be looked at in order to determine whether it was fair.

[93] In **Porter v Magill**[24] the test for bias was stated to be*: "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

[94] As Lord Kerr pointed out in **Belize Bank Ltd v Attorney General of Belize**[25]

> *"[t]he notional observer must be presumed to have two characteristics: full knowledge of the material facts and fair-mindedness". Lord Kerr went on to refer to Kirby J's remark in Johnson v Johnson (2000) 201 CLR 488, 509, that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious"; and, as regards the state of knowledge that the fair-minded observer should be presumed to have, to Lord Hope's statement in Gillies v Secretary of State for Work and Pensions (Scotland)[26], which reads:*
>
> > *"The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to those Matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny."*

[95] In **Helow (AP) v Secretary of State for the Home Department (Scotland) and another**[27], Lord Hope stated:

> *"1. The fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved*

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[23] George Meerabux v The Attorney General (2005) 66 WIR 113 at para 40
[24] [2002] 1 All ER 465, para. [103]
[25] [2011] UKPC 36, para. 36,
[26] [2006] UKHL 2, para 17
[27] [2008] UKHL 62 at paras 1-3

objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word 'he'), she has attributes which many of us might struggle to attain to.

2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

3. Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all Matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

[96] In **Henriques v Tyndall and Others**[28] Harris JA, after a review of the modern authorities, said:

> *"[53] Porter v Magill proposes that … the court should be guided by a dual step process. First, it should examine the evidentiary material on which the allegation is founded. Thereafter, it should determine whether, on a balance of probabilities, a fair-minded observer would conclude that there is a real possibility of bias on the part of any member of the tribunal whose right to sit on the tribunal has been challenged …*
>
> *[54] The test of apparent bias is an objective one. It presupposes that a decision-maker would be divorced from any semblance of partiality. The overall objective is fairness, since fairness is a highly relevant tool in the armoury of a decision-maker. Since fairness is the hallmark of the administration of justice, a duty is imposed on a decisionmaker, at all times, to guard against any perceived notion of bias."*

[97] The claimant complains about the way the proceedings were conducted. She has the duty to adduce evidence to show the circumstances from which a reasonable man would think it likely or probable that the chairman and Mr Brissett favoured one side unfairly at the expense of the other on an objective standard.

[98] She firstly, raises their descent into the arena as evidence of bias. Secondly, that they prevented the principal from giving evidence regarding a letter dated the 28th day of June 2018 from the JTA's Mr. Doran Dixon to the chairman of the committee, this letter was a witness list. Alternatively, that the chairman and/ or Mr. Sean Brissett acted as judges in their own cause by their multiple interjections and commented on the document which was to be considered by them.[29]

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[28] [2012] JMCA Civ 18,

[29] As per notes of evidence contained in 'Excerpt 2' of the Report on Hearing of Charges dated the 17th day of October 2018.

[99] The witness list was put to Mr Fearon. I have looked at the evidence before this court on this aspect of the hearing. There were exchanges between the chairman and Dr Nicely that were less than tasteful, however, the test for bias cannot been passed based on that.

[100] On a balance of probabilities, the fair-minded and informed observer, a person neither unduly complacent, sensitive nor suspicious, would not inevitably consider that neither the fact that the principal having seen the witness list emailed to the chairman could possibly give rise to an appearance of bias on the part of the committee. Even if I am wrong in this conclusion, I also consider that any defect in the proceedings before the committee was cured by the subsequent full hearing before the tribunal. The tribunal having guided itself by the law on bias after hearing submissions found that there was no bias on this ground.

[101] The tribunal did not consider whether the interruptions constituted bias in the committee. A disciplinary hearing is not a trial, the committee composed of lay persons was entitled to regulate its own procedure. There is nothing before this court which would lend itself to a finding that the committee is prevented from extensive or inquisitorial questioning.[30] The question is, did it prevent the claimant from fairly presenting her defence. There was a failure of the committee to allow Dr Nicely, the representative of the claimant, to properly conduct his cross-examination of the complainant. In so doing, the committee members undermined the claimant's ability to present her defence by intervening and questioning Dr Nicely rather than allowing the complainant to respond to questions put to him.

[102] In terms of fairness, the determining factor was the character of these interruptions. In **Peter Michel v The Queen[31]** , Lord Brown said:

> *"12. …Of altogether greater significance than the mere number and length of these interruptions was, however, their character. For the most part they amounted to cross examination, generally hostile. By his questioning the*

[30] See Junnet Lynch v Teachers Appeal Tribunal & Others [2019] JMSC Civ. 80 at [29] and [39]
[31] [2009] UKPC 41

Commissioner evinced not merely scepticism but sometimes downright incredulity as to the defence being advanced. Regrettably too, on occasion the questioning was variously sarcastic, mocking and patronising." The consideration for this court is whether, in view of the interruptions by the learned trial judge, in all the circumstances, the appellant had a fair trial."

[103] It cannot be said that given the many grievous exchanges with Dr Nicely that the interruptions of the committee rendered the hearing unfair as Dr Nicely was as responsible for many of the interruptions as were the two members of the committee largely also responsible. This ground fails.

Ground 5: The Personnel Committee erred in finding that the charge of "persistent failure to submit the required number of lesson plans to the designated supervisor over a considerable period from September 2016 - May 2018" was proven.

Ground 12: The Personnel Committee paid no or no sufficient regard to the Claimant's evidence, including the submission by the Claimant, that she submitted one hundred and five (105) lesson plans, which would be in excess of the required number of plans (68).

[104] These two grounds can more be easily disposed of together.

[105] It is submitted that the claimant submitted one hundred and five (105) lesson plans, which exceeded the required amount of 68 lesson plans. This position was also maintained by the claimant in cross-examination. Mr Earle, KC submitted that the charge of insufficient submission of lesson plans was not proven.

[106] It is the claimant's submission that the committee erred in relying on Mrs. Moore's documents as they were inaccurate. The inaccuracies throughout Mrs. Moore's documents were acknowledged by Mr. Guthrie in cross-examination. In her letter to Mrs. Delapenha dated March 2nd, 2018, Mrs Moore stated that two lesson plans were submitted by Mrs. Delapenha in October 2017 which contradicts her Lesson

Planning Submissions for October 2017 which stated that zero lesson plans had been submitted.

[107] The claimant submits that the required number of lesson plans due per month was four and not eight, contrary to the Lesson Plan Reporting Forms, making the total number of lesson plans due 68 instead of 136. This was acknowledged by Mr. Guthrie in cross-examination. Mr. Guthrie agreed with King's Counsel that the Lesson Plans were to be done fortnightly. He agreed that the claimant taught two classes at that time and that she was only required to submit two plans per fortnight. Mr. Guthrie further conceded that 'it looked like it should be 4 instead of 8'. The required number of lesson plans to be submitted was stated as one hundred and thirty-six (136), while only half of that amount, sixty-eight (68) was required.

[108] Additionally, the Black River Lesson Plan Policy which to date the 1st defendant cannot and has not proven was ever delivered to Mrs. Delapenha, states that 'Lesson Plan Supervisors shall develop a process for the review of their supervisees'…This review process shall include accurate documentation of each teacher's lesson plan submission compliance rate. The Lesson Plan Reporting Forms were grossly inaccurate. This information was never put to the claimant at the hearing. The committee never produced the alleged documents or the dispatch books with the records of staff members who collected and signed for documents distributed to them or the relevant pages thereof as admitted by Mr. Guthrie in cross-examination. The committee's reliance on such documents with material discrepancies proved fatal to the claimant and any decision stemming from it should be null and void.

[109] In the notes of evidence, the number of lesson plans that the claimant ought to have submitted over the mentioned period is stated as 136. This was outlined in the Heads of Departments' Lesson Planning and Reporting Forms. Notably, all four Lesson Planning Reporting Forms were signed and dated May 18, 2018, just one business day (a Friday) prior to the complaint on the 21st of May 2018 (a

Monday). The evidence shows that the number of lesson plans required to be submitted for the period was only sixty-eight (68) and that they were to be submitted on a fortnightly basis.

[110] It was contended by King's Counsel that while the chairman was being cross-examined, he agreed that the arrangement was for the lesson plans to be done fortnightly. He conceded that the claimant taught both grades 9 and 11 (September 2016- June 2017) and grades 9 and 10 (September 2017- May 2018) and agreed that it meant she would only be required to submit two lesson plans per fortnight and that would make it four lesson plans per month.

[111] Mr. Guthrie agreed that if the claimant taught only two classes, then she would only be required to submit four lesson plans per month. He agreed that the claimant was not in fact to submit eight lesson plans but four. He later hesitated and stated that he 'missed something'. In re-examination, Mr. Guthrie was unable to explain to the court what was missing**.**

[112] The charge of "persistent failure to submit the required number of lesson plans to the designated supervisor over a considerable period" was never proven. The claimant consistently asserted during cross-examination that she had submitted 105 lesson plans, which surpassed the stipulated requirement.

[113] It was submitted that at least forty-two copies of lesson plans were presented at the hearing on the 2nd of October 2018. This was, however, never mentioned in the Personnel Committee Report and was deliberately hidden from the Board. When asked by King's Counsel in cross-examination whether the claimant produced any copies at the hearing, Mr. Guthrie responded by saying that she "never produced a single copy." The evidence demonstrates that Mrs. Delapenha provided at least 42 copies and when the chairman was confronted about this in cross-examination, he could not provide a proper answer. The decision of the 1st defendant should be declared null and void, as it was influenced by strategic misinformation from the committee.

[114] Mr Gabbadon submits that the claimant taught two (2) classes and was required to submit a total of 8 lesson plans per month for the duration of the academic year (and not a calendar year). This is also seen on the lesson planning report forms for the academic years 2016/2017 and 2017/2018, and is the only logical conclusion that can be drawn.

[115] The fact that the lesson plans were to be submitted fortnightly would not have impacted that requirement. The claimant was well aware that this was her duty as evidenced in her oral statements during the hearings where she conceded that she was required to submit the lesson plans fortnightly/every two (2) weeks and asserted that she submitted 105 of the 136 lesson plans that were due.

[116] There was no material discrepancy between the letter from Mrs. Moore dated March 2, 2018, and the lesson planning report forms for October 2017, dated May 8, 2018, that would render the 1st defendant's decision null and void. This is because the claimant was charged with neglect of duty over the period of two (2) academic years and the committee found her guilty based on the overwhelming evidence mounted against her.

[117] One such piece of evidence was the lesson plan submission forms which shows that she submitted 5 of the 136 lesson plans that were required during the entire period under review. Another piece of evidence is that the claimant taught two (2) classes and was required to submit a total of 8 lesson plans per month as is also seen on the lesson planning report forms for the academic years 2016/2017 and 2017/2018.

[118] It is clear from the evidence that at the beginning of the period of review, the language department of the Black River High School had an informal system that mandated each teacher to submit the requisite lesson plans each academic year to the head of department by placing them on her desk. The head of department would add comments or corrections then the plans would be returned to the teacher.

[119] The evidence also shows that a more formal system was introduced in January 2018 where the head of department required teachers to sign to indicate that they have submitted the plans. This system was highlighted by Mrs. Moore in a board meeting held on May 17, 2018 (where the claimant was in attendance) to address a separate matter. The Lesson Plan Policy that was published on March 14, 2018, merely noted the importance of preparing the plans, highlighted that the duty to prepare and submit was statutory, and concretized the custom of submission that already obtained.

[120] The claimant has over 20 years of experience teaching at the institution and a majority of her witnesses at the hearing stated that they never had an issue with receiving proper lesson plans from her. Therefore, the claimant was fully aware of the informal procedure that was followed in submitting lesson plans.

Discussion

[121] The claimant gave no reason for failing to produce copies of the lesson plans to this court which she said in cross-examination were on her computer. The record shows that she had presented forty-two copies of lesson plans to the committee at the hearing.

[122] There is no evidence that the claimant was to submit lesson plans weekly. The regulation does not state this, there was no policy in place which sets out that the lesson plans were to be submitted each week. The only evidence was that the lesson plans could be submitted bi-weekly or fortnightly. Mr Guthrie in cross-examination had no idea of how it should be done, though he agreed with King's Counsel. In her evidence before the committee, the claimant said she was to submit lesson plans every two or three weeks. She said the regulation said she is to submit them every two weeks.

[123] The lesson plan reporting form indicates that each week a lesson plan is to be submitted. This does not accord with the oral evidence of either Mr Fearon or Mr Guthrie.

[124] The evidence from the minutes of meeting shows that the principal relied on the lesson plan log, the letter he instructed the head of department to write to the claimant, the letter he wrote about his expectations and sent out to each teacher, the memorandum from Mrs Claudene Williamson-Daley, vice principal taken from the claimant's personnel file, and the memorandum from former principal Roderick Harley, also from the personnel file. In his evidence before the committee, Mr Fearon defined the words regular basis in regulation 44 as meaning weekly or fortnightly.

[125] *Regulation 44(2) states:*

(2) In addition to regular teaching activities a teacher's duties shall include:

(a) ***developing lesson plans on a regular basis;***

(b) evaluating and testing students;

(c) keeping adequate records of students' progress;

(d) the fostering of students' development on the personal and social level

(e) performing such other duties as may be required by the principal or member or such member staff as may have been delegated responsibility by the principal.

[126] I do not accept the proposition that the words *developing lesson plans on a regular basis* in regulation 44(2)(a) means that, lesson plans are to be prepared but not submitted as that would lead to an absurdity. Neither can the claimant argue that the head of department was not in a position to supervise her with regard to her lesson plans; nor that the department head could not write bringing the issue of any failure to submit lesson plans to her attention.

[127] Regulation 44(2)(e) required the claimant to perform the duty set out in the letter from Mrs. Moore which would fall under "*such other duties*" even if subjectively the claimant did not believe she had to submit lesson plans but to develop lesson plans.

[128] On the evidence before this court, the lesson plan reporting form states on page twelve that for October 2017, Mrs. Moore said that she did not see any lesson plans from the claimant. On page thirty-six for the same period, Mrs. Moore reports that she saw two lesson plans. Both statements cannot be correct.

[129] The tribunal found that the claimant was required to submit a total of eight lesson plans per month as she taught two classes. This was based on the lesson planning report forms for the academic years 2016/2017 and 2017/2018. The fact that lesson plans were to be submitted fortnightly did not impact the requirement. The claimant was aware of her duty to submit them as she asserted that she had submitted one hundred and five lesson plans of the one hundred and thirty-six that were due.

[130] The evidence did not accord with that finding as there is no written policy in place. The evidence from Mrs. Moore, Mr. Guthrie and Mr. Fearon that lesson plans are required fortnightly is distinct from saying one lesson plan is to be written every week for each class. There was evidence from Mrs Robertson who was a teacher at the school. Her evidence was crucial and the chairman interrupted this questioning:

"Dr Nicely:	*Thank you. How many lesson plans do you do*
Ms. Robertson:	*I teach grades 9, 10 and sixth form. So, I write a plan for grade 9 and a plan for grade 10, each plan goes for two weeks and I submit it.*
Chairman:	*You submit every week?*
Ms Robertson:	*The plan runs for 2 weeks. When I submit this Friday that set of plans runs for 2 weeks and someone else submit the next week, then the other the other week."*

[131] The witness went on to say the lesson plan runs for two weeks and she did lesson plans for two other teachers who taught grade 9 as it was a collaborative process. This was the context in which the evidence of the claimant was being given. The reason given by Ms Robertson was the heavy workload of teachers. They agreed that they would help each other to plan for their various year groups. There was

no written policy. They kept abreast of each other's plans so that when tests were administered all the teachers would be teaching at the same pace.

[132] Any evidence of the submission of lesson plans was important in the proof of the charge. On this line of questioning, there were constant interruptions from the chairman most of which were unnecessary. Dr Nicely expressed frustration at not being able to put questions in the way he wished or at all. The chairman performed a quasi-prosecutorial function in the manner of his cross-examination of witnesses for the claimant, and his derogatory comments about Dr Nicely in his presentation, so much so that the well-informed observer could reasonably have come to the view that the deck was stacked against the claimant. In so doing, the committee failed in the course of the enquiry to comply with the requirements of natural justice on what was crucial evidence in the determination of proof of the charge.

[133] Further, the hearing as conducted did not lead to a thorough investigation of whether or not the charge was made out. The evidence does not disclose that the lesson plan was due weekly nor does it disclose that the process of collaboration as described by Ms Robertson did not exist. The claimant contended that she had submitted 105 lesson plans and that they were removed from her desk after she had received them from the head of department. She produced forty-two copies from her computer to the committee at the hearing. This evidence was not weighed by the committee neither were inconsistent positions raised on the lesson plan reporting form regarding the claimant's submissions addressed.

[134] There is no agreement on the evidence as to what the required number of lesson plans ought to have been. Therefore, the charge of persistent failure to submit the required number of lesson plans to the designated supervisor over a considerable period of time from September 2016 to May 2018 was not made out. These grounds succeed.

Ground 6: The Complaint and viva voce evidence of the complainant at the hearing were based on hearsay, as he had no personal knowledge of the

alleged failure to submit lesson plans, as the alleged breaches by the Claimant related to a period before his tenure as Acting Principal.

Ground 7: The Personnel Committee erred in relying upon the written evidence of former Principals Roderick Harley and M. Valencia Honeyghan, which was submitted by the Complainant, who failed to call them as witnesses, thus depriving the Claimant of the opportunity to cross examine them.

Ground 10: The Personnel Committee erred in considering the Affidavit of Mr. Roderick Harley, dated the 25th day of July 2018, which referred to irrelevant Matters allegedly occurring prior to the period in the complaint

[135] These grounds were dealt with together by the tribunal. The tribunal cited the cases of **Junnet Lynch** and **R v Sang**[32] and ruled that the committee was holding a disciplinary enquiry which was not a trial. It was not bound by the rules of evidence as a court and was therefore not in breach of the rules of evidence and procedure.

[136] The principal began his testimony by detailing the difficulties he experienced encouraging the claimant to fulfill her statutory duties as a teacher at the institution. He explained that he would organize workshops with experts for the academic staff, he wrote privately to the claimant, he wrote to her concerning her conduct, and he presented a list of nine documents to support his claim that the claimant had been negligent in her duties. Comments included the affidavit from two former principals and their lesson planning report forms for the academic years 2016 to 2017 and 2017 to 2018. These documents showed that the claimant was persistently neglectful. The tribunal also found that the board reviewed the committee's report of the hearing and their recommendation. The board accepted that the claimant had received appropriate warnings and time to improve her conduct and by way of a majority, they made the decision to terminate the

[32] [1979] 2 All E.R. 122

claimant's employment on this finding. Therefore, the board had the right to terminate her employment.

[137] The tribunal ruled that rregulation 57, which concerns the conduct of the enquiry, does not expressly establish a right to cross-examination. They relied on the **Bank of Jamaica v The Industrial Disputes Tribunal and the Bustamante Industrial Trade Union**[33] for the finding that the claimant had no general right to cross-examine the former principals Roderick Harley and Valencia Honeyghan in that their affidavits did not depart materially from the content of the notice of hearing dated November 21, 2018 detailing the charge against the claimant nor the allegations put to the claimant and discussed throughout the hearing. Also, the claimant responded to these affidavits in her own affidavit dated October 9, 2018 denying their claims and asserting that she always submitted her lesson plans in a timely manner.

[138] It was submitted by the claimant that Mr Fearon produced two affidavits from former principals, Roderick Harley and Ms. Valencia Honeyghan for the committee to consider in support of his testimony. Those affiants were not called as witnesses on behalf of the complainant. She was never afforded the opportunity to cross-examine these former principals as a result. This was a denial of the right to due process.

[139] It was submitted further that the committee placed improper reliance on these affidavits. This was evident in the chairman's viva voce evidence recorded in the Minutes of the hearing held on October 2, 2018, where the chairman explicitly stated to Mrs. Delapenha: *"…Do you think we would take your word over the words of all these persons, what is it to make us believe your word over? … Mrs Delapenha, let me ask you what you will have to convince me to take your word over the word of successive principals?"* This clearly indicates (and it was also confirmed in cross-examination of Mr. Guthrie) that the chairman accepted the affidavits of the former principals at face value solely based on their title as former

[33] [017] JMSC Civ 73 at [50]

principals, overlooking the need for a more discerning and comprehensive evaluation of their untested affidavits.

[140] The regulations, state "any party may call witnesses and produce documents in support of his case," it means therefore that the complainant had the opportunity to call the previous principals to give viva voce evidence in the same way he called Mrs. Moore and Mrs. Delapenha called six witnesses.[34] It is submitted that the committee saw the need to examine Mr Fearon in keeping with the principles of natural justice and so should not have accepted the affidavits of the former principals at face value.

[141] The claimant submitted that the defendant relied on the case of **Bank of Jamaica v the Industrial Disputes Tribunal and the Bustamante Industrial Trade Union[35]** where Evan Brown, J. (as he then was) cited the case of **Khanum v Mid-Glamorgan Health Authority[36]**. In that case, it was accepted that: *"In some circumstances it may amount to a breach of natural justice either to refuse the right to, or not afford the opportunity to cross-examine."*

[142] Evan Brown, J, cited the case of **Bentley Engineering Co v Mistry[37]** which states: "*In as much as a fair opportunity to state one's case encompasses the opportunity to know in sufficient detail the case one has to meet, a refusal of a right to cross examine may be regarded as a breach of natural justice.*" The case of The **University of Ceylon v E.F.W. Fernando[38]** was also cited and states: *"The question, therefore, is whether the requirements of natural justice have been fulfilled by the disciplinary procedure adopted can only be answered with reference to facts and circumstances of the particular case."*

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[34] (i.e Miss Susan Robertson, Mr. Errol Reid, Miss Erica Harze, Miss Fanamalee Morrel, Mr. Delroy Nish, Mr. Oliver Taylor.

[35] [2017] JMSC Civ. 173 at para 50
[36] [1979] ICR 40, para [121]
[37] [1979] I.C.R. 47
[38] [1960] 1 WLR 223 para 120

[143] It should be noted that these cases are at best persuasive and not binding as we have moved away from the archaic view which does not give parties the right to cross-examine. To support this, the claimant relies on the case of **Village Resorts Limited v The Industrial Disputes Tribunal and Others**[39] also cited in **Bank of Jamaica**.

[144] This statement of the law was most recently approved by the Privy Council in the **University of Technology v Industrial Disputes Tribunal and Others**[40] which is binding. Our courts have moved away from the old position which no longer reflects our employer-employee climate in Jamaica to the radically changed position in **Village Resorts** based on a new regime in a dynamic social environment captured by our Labour Relations Code.

[145] Counsel for the defendant in his submissions relied on **Junnet Lynch**[41] to submit that the hearing before the personnel committee was not bound by rules of evidence. Therefore, hearsay evidence if any could have been accepted by it.

[146] Also, the evidence given by the claimant's witnesses at the hearing mostly spoke to her conduct prior to the period under review. It also did not address in any meaningful way the alleged breach of conduct while being supervised by Mrs. Moore and the clear evidence that supported the breach.

[147] The report on the hearings from the committee dated October 17, 2018, clearly illustrates that the personnel committee considered:

a. the oral evidence of all the witnesses;
b. the lesson planning report forms for the academic years 2016/2017 and 2017/ 2018;
c. the claimant's inability to produce the lesson plans at the hearing;
d. the written correspondence to the claimant urging her to prepare and submit lesson plans; and

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[39] (1998) 35. JLR 293, at page 299
[40] [2017] UKPC 22
[41] [2019] JMSC Civ. 80 at para. 29

e. all other documents relevant to the case.

[148] After its review, the committee unanimously found the claimant guilty of the charge of neglect of duty by way of a majority decision and recommended that the 1st defendant terminate the claimant's employment. It was submitted that it is patently clear that the claimant did not produce one hundred and five lesson plans. Further, the veracity of the documents produced at the hearing was not challenged which showed clearly that she had only submitted five.

Discussion

[149] Pursuant to the section 31E of the Evidence Act the affiants Mr Harley and Ms Honeyghan would have been required to attend the hearing of the committee to give evidence, as none of the exceptions set out in the Evidence Act would have been applicable to them, so as to permit these affidavits to have been used in their absence.

[150] It is a fundamental rule of the common law that hearsay evidence is inadmissible and any former statement of any person, whether or not as a witness in the proceedings, may not be given in evidence if the purpose is to tender the statement as evidence of the truth of the matters asserted in them. This is equally applicable in civil and criminal proceedings.

[151] The regulations, which contemplate that evidence before the committee shall be given orally, make no provision for evidence to be given on affidavit and even where evidence is allowed on affidavit in such proceedings, it is subject to the right of the opposing party to cross-examine the maker of the affidavit.

[152] There was no proof that the former principals were unavailable to give viva voce evidence for any of the reasons laid down in section 31D (for instance, that the witness was dead, absent from Jamaica, could not be found despite reasonable steps or was being kept away by threats). The claimant was given no notice of Mr Fearon's intention to put these affidavits in evidence, the committee could not in these circumstances exercise the right to call the person who made the affidavit

as a witness for cross-examination. It means that if the affiants could not be called, even more so, for these reasons the affidavits should therefore not have been allowed in evidence.

[153] Sections 31D and 31E of the Evidence Act provide exceptions to the rule against hearsay. So, as the affidavits noted above relied on by the committee were not admissible under either of these sections, it seems to me that they offered purely hearsay evidence, and were incapable of proving the truth of anything which they contained. On this basis, it is my view that both the committee and the tribunal were incorrect in their determination that the affidavits should be admitted in evidence.

[154] I accept that, the strict rules of evidence do not have to be followed in administrative proceedings.[42] But it seems to me that in this situation, it would have been important for the claimant to have been allowed to cross-examine on any material introduced as a result of any relaxation of the rules of evidence. These were all matters for the tribunal to consider and take into account in determining the admissibility of the affidavits. In my view, the tribunal erred in finding that the committee should have been admitted these affidavits in evidence as well as in failing to allow cross-examination on them having admitted them.

[155] This failure to allow cross-examination also breached Regulation 57 (4) of the Education Regulations which state: - *'Personnel Committee shall consider the complaint referred to it under regulation 56 and*

> *4) At the hearing-*
>
> > *(a) Both parties shall be heard and be given opportunity to make representations.*

[156] These grounds succeed.

Ground 8: The Personnel Committee failed to realise that material discrepancies existed between documents upon which the Complainant

[42] Administrative Law, Paul Craig, 6thedn, para. 12-031

relied, as produced by Mrs. Sandra Dean Moore, and erred in relying on said documents, to wit: i. The contradiction between the letter dated the 2nd day of March 2018 from Mrs. Sandra- Dean Moore to the Claimant and Lesson Plan Submission Form for October 2017, dated the 18th day of May 2018; and ii. The correct number of lesson plans due per month was four (4) in contrast to the Lesson Plan Reporting Form which states the monthly requirement as eight (8).

Ground 9: The Personnel Committee relied on evidence which was not cogent regarding non-submission of lesson plans, in that there was no or no proper system for submission and receival of lesson plans, undisputed evidence of which shows was only implemented in September 2018.

Ground 11: The Personnel Committee paid no or no sufficient regard to the evidence of several of the Claimant's witnesses regarding the submission of lesson plans and hence the Complainant's evidence was not proven, on a balance of probabilities.

[157] These grounds will be dealt with together. On ground eight, the tribunal found that there was no material discrepancy between the letter dated March 2, 2018, and the lesson plan reporting form for October 2017. The claimant was charged with neglect of duty over the period of two academic years. The committee found her guilty on the overwhelming evidence against her, one such piece of evidence being the lesson plan submission form which shows she submitted only five of the required one hundred and thirty-six during the entire period under review.

[158] On ground nine, the tribunal found that it was clear on the facts that at the beginning of the period of review, the language department had an informal system that mandated each teacher to submit the requisite lesson plans each academic year to the head of department by placing them on her desk. The head of the department would add comments or corrections then the plans would be returned to the teacher. A more formal system was introduced in January 2018 where the head of department required teachers to sign to indicate that they had submitted

the plans. The lesson plan policy published on March 14, 2018, merely noted the importance of preparing the plans highlighted, the duty to prepare and submit to a statutory, and concretized the custom of submission that was already obtained. The claimant had over 20 years of teaching experience at the institution and a majority of her witnesses at the hearing stated that they never had an issue with receiving proper lesson plans from her. Therefore, the claimant was fully aware of the informal procedure that was followed in submitting lesson plans. The claimant argued on ground twelve that she had prepared and submitted in excess of the requisite lesson plans, that is, 105 plans, but has argued that there was no proper system of submission and receipt of the plans.

[159] On ground nine, the claimant submitted that she was charged with "persistent failure to submit the required number of lesson plans to the designated supervisor over a considerable period of time - from September 2016 to May 2018. The complainant relied on The Black River Lesson Plan Policy as evidence that the claimant was in breach of the school's regulation as to lesson plan submissions. There is no requirement under the Education Regulations, 1980 to submit lesson plans. All that is required by the regulations is to develop lesson plans on a regular basis. (see para 44 (2) (a) of the Education Regulations**.)** Mrs. Delapenha's evidence is that she developed at least 105 lesson plans and a minimum of 42 were produced at the hearing.

[160] It is evident that the Black River High School had no proper system for documenting the submission or receipt of lesson plans. There was at all material times an informal system of leaving plans on the head of department's desk. Furthermore, the evidence shows that a formal system of signing for lesson plans was not introduced until September 2018. Mr Guthrie agreed in cross-examination that the formal system of signing for lesson plans was introduced in September 2023. Mrs. Susan Robertson, Mr. Errol Reid, Ms. Erica Harze, and Mr. Delroy Nish gave evidence that the Lesson Plan Policy was largely unheard of. The only evidence of a Lesson Plan System was given by Ms. Harze who stated that the policy was implemented in September 2018 long after charges herein were

preferred against Mrs. Delapenha. Therefore, as a system for the submission of lesson plans did not exist, no reliance should have been placed on evidence regarding the non-submission of lesson plans.

[161] The defendant submits in the same terms recorded by the tribunal as its findings on these grounds.

Discussion

[162] On grounds eight and nine, the inconsistency in the lesson plan reporting form was never explained at the hearing, nor addressed by the committee in its questioning of the witnesses. The letter dated March 2, 2018, from Mrs. Moore to the claimant says that she had submitted two lesson plans in October 2017, this letter was copied to the principal. To the contrary the Lesson Plan Reporting form for September to December 2017 states that there were no submissions for the month of October 2017 from the claimant. These are divergent positions on the principal's case. He did not explain the inconsistency.

[163] The tribunal accepted this material inconsistency, finding that there was no material discrepancy between the two documents such that it would render the board's decision null and void. This was based on the finding that the claimant had been charged with neglect of duty over the period of two academic years and the committee found her guilty on overwhelming evidence mounted against her, one such piece of evidence was the lesson planning form which shows that she merely submitted 5 of the 136 lesson plans due for the entire period under review. The tribunal therefore accepted evidence without examining it or resolving which statement it accepted and which it rejected as both statements could not be true. This constitutes a failure to take into account a relevant consideration which existed on the record before it and which existed on the evidence before the committee.

[164] This court may review the decision of the tribunal on the basis of whether irrelevant considerations were taken into account or a relevant consideration was not taken

into account or that the reasoning of the tribunal was so irrational that it amounts to irrationality. Ground eight succeeds.

[165] On ground eleven, the tribunal found that the lesson planning report form was the most cogent evidence before it. The appellant's inability to produce at the hearing, the lesson plans she claimed were prepared and submitted to Mrs. Moore, and the numerous correspondence addressed to her urging her to prepare and submit the plans were the basis of its findings. They noted that the evidence given by her witnesses at the hearing mostly spoke to her conduct prior to the period under review and did not address in any meaningful way the alleged breach of conduct while under the supervision of Mrs. Moore and the clear evidence that supported that claim.

[166] The claimant has always maintained that she submitted lesson plans. Miss Fanamalee Morrell attested that she too packaged the claimant's lesson plans and placed them on the desk of the Head of Department, Mrs. Moore. Miss Erica Harze, former Head of Department for the same department had never experienced problems with the claimant. Mr. Errol Reid, Head of Department for the Science and Agriculture Department in his evidence stated that the claimant submits the lesson plans by placing them on the desk of Mrs. Moore. On this overwhelming evidence, no reliance was placed and the complainant's case was not proven on a balance of probabilities thus, the decision should be rendered null and void.

[167] As has been indicated in other grounds, there was no consideration given to the evidence that the claimant took to the hearing 42 lesson plans which she said had been taken from her computer and which had been submitted. There was no accounting for the evidence of the witnesses for the claimant regarding the system for the submission of lesson plans. The documentary evidence relied on by the tribunal included an indication that the claimant was part of a board meeting on May 17, 2018. There is no evidence in the record before me of the claimant attending a board meeting on that date, this is a consideration of irrelevant material. These grounds succeed.

Ground 13: The Board of Management and the Personnel Committee erred in its handling of the hearing of the Claimant in that procedures outlined in paragraph 57 of the Education's Regulations, 1980 were not followed.

[168] The complainant's tenure as principal of Black River High School commenced in September 2017. The complainant however references a period outside the scope of his tenure at the institution (i.e. September 2016- June 2017.) Evidence given prior to the complainant acting as principal (i.e. September 2016- June 2017) was based on pure allegations which were never substantiated and which the principal could not have known.

[169] This ground was withdrawn before the tribunal and need not be dealt with here.

The Assessment of Witnesses

[170] In analysing the evidence conflicts between the evidence of Mrs. Delapenha and Mr. Guthrie, were resolved in favour of the claimant as her credibility remained unshaken. Her calm and composed demeanour during cross-examination indicated a genuine commitment to truthfulness. She consistently maintained her evidence and readily answered all questions posed by the defendants' counsel. The claimant's evidence was notably candid and demonstrated recall of all relevant facts concerning her tenure at the Black River High School and the disciplinary hearing. This enhanced the reliability and veracity of her statements as the evidence was easily corroborated by documentary evidence which solidified her standing as a trustworthy and credible witness.

[171] The claimant gave as the reason that lesson plans she had presented to the committee were not presented to this court as that she never received them from the committee having handed them in at the disciplinary hearing. However, she had copies of all those lesson plans typed up and on her computer. It was not put to her in this trial that she had not attached as exhibits to her second affidavit copies of any of the lesson plans she said she had turned over to the committee. She gave no reason why copies of those lesson plans would not have been placed

before this court and in reexamination the claimant said that it was the head of department's method of calculation that came up with the figure from her record as to how many lesson plans should be submitted.

[172] Mrs. Sharon Hunt, representing the Secretariat of the 2nd defendant, provided purely formal evidence. She could only testify about the convening of the appeal before the teacher’s appeal tribunal and the verbatim notes of the proceedings. She was not present during the appeal hearing and could not specify which documents were produced at the hearing.

[173] Mr. Guthrie, the key witness for the 1st defendant, presented evidence fraught with contradictions and conflicting statements. He was hesitant and uneasy during cross-examination, often needing to be reminded to speak loudly. His attempts to change his responses when asked to repeat caused multiple delays during the trial. During re-examination, the defendants' counsel suggested that Mr. Guthrie was giving conflicting evidence indicating a potential lack of sincerity or truthfulness in his recollection. This casts serious doubt on the reliability and cogency of his evidence.

[174] The ruling of the tribunal contained errors regarding the identity of individuals involved in the proceedings, such as mistaking 'Mr. Errol Brissett' for 'Mr. Errol Bennett' as the Academic Staff Representative. Secondly, the defendants' submissions suggest actions or events without providing supporting evidence, such as the alleged withdrawal of the principal from a meeting and the existence of handwritten notes to substantiate this claim which are not in the record before this court.

[175] Additionally, references to the claimant's appraisal by the Ministry of Education lacked evidence and relevance to the case and the assertions about the introduction of a formal system in January 2018 are contradicted by the claimant's denial and witness testimonies indicating a later introduction in September 2018. The purported Board meeting on May 17, 2018, was not relevant to the disciplinary proceedings involving the claimant.

Judicial Review

[176] The heads of judicial review as set in **the Council of Civil Service Unions and others v Minister for the Civil Service** (**CCSU** case),[43] which needs no introduction, are as follows:

> *"The process of judicial review is the basis on which courts exercise supervisory jurisdiction in relation to inferior bodies or tribunals exercising judicial or quasi-judicial functions or making administrative decisions affecting the public. It is trite that judicial review is concerned only with the decision making process of a tribunal and not with the decision itself. Lord Hailsham of St. Marylebone L.C. expressed in Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155 at page 1161a that the purpose is to ensure that the individual receives fair treatment and not to ensure that the authority which is authorised by law to decide for itself reaches a conclusion which is correct in the eyes of the court. Lord Diplock in Council of Civil Service Unions v Minister for the Civil Services [1985] AC 374 at page 410 F-H, discussed the principle of judicial review in relation to decision making powers and spoke to three heads -- illegality, irrationality and procedural impropriety:*
>
> > *By illegality as a ground for judicial review, I mean that the decision–maker must understand correctly the law that regulates his decision–making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*
> >
> > *By irrationality I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of*

[43] [1984] 3 All ER 935

accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it...

I have described the third head as —procedural impropriety rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

The balancing and weighing of relevant considerations is primarily a matter for the public authority, not the courts (per Lord Green MR in Wednesbury, at page 231; and per Lord Hailsham in Chief Constable of the North Wales Police at page 1160 H). However, if there has been an improper exercise of power, it will be viewed as unreasonable, irrational or an abuse."

[177] In **Chief Constable of The North Wales Police v Evans**[44] at page 1160 paragraphs F-G, Lord Hailsham of St. Marylebone L.C opined as follows:

"But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the Matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law."

[44] [1982] 1 WLR 1155

[178] In addition, our Court of Appeal has now added the grounds of unconstitutionality and proportionality as heads of judicial review. (See **Latoya Harriott v University of Technology**) [45] These additional grounds were not argued in this claim.

[179] The approach of the court in determining this claim is in the exercise of its supervisory jurisdiction. The role of the court is to review the decision-making process and not to decide whether the decision is correct or not. It is not for this court to substitute its views on the merits of the decision made or to make a decision.

[180] The Court of Appeal in the case of **Owen Vhandel v The Board of Management Guys Hill High School**[46] pronounced that section 1(9) of the Constitution of Jamaica (Order in Council) enshrines the principle of judicial review and it provides:

> *"(9) No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law...*
>
> *…The Constitutional provision and the evolving principles of judicial review demonstrate the interplay between constitutional provisions and the common law."*

Conclusion

[181] This court is not being asked to decide the facts of whether the claimant was guilty of the stated charge, but whether as a matter of law, the principles of natural justice had been breached by the committee in arriving at their decision. This court has reviewed the entirety of the proceedings which took place in both inferior tribunals, while not reproducing that which went before those bodies. On the record before

[45] [2022] JMCA Civ 2 at para [47]
[46] SCCA No. 72/2000; June 7, 2001, at page 18

this court, there are breaches of the principles of natural justice, procedural impropriety, and irrationality in the findings of the tribunal.

[182] The decision of the tribunal is set aside as null and void. For the foregoing reasons, this court will make the orders set out below. Costs will follow the event unless counsel files submissions no later than seven days of the date of these orders, in which case the decision will be considered on paper.

[183] Orders:

1. Judgment for the claimant.

2. An Order of Certiorari is granted against the 2nd defendant, quashing the Tribunal's decision issued on October 12, 2021, to dismiss the Appeal brought by the claimant against the decision of the 1st defendant to terminate the employment and appointment of the claimant.

3. An Order of Certiorari is granted against the 1st defendant, quashing the Board's decision of October 17, 2018, to terminate the employment and appointment of the claimant to Black River High School.

4. The court declares that the termination of the Claimant was manifestly excessive having regard to the fact that this was the first complaint against the claimant employed to the Black River High School for over twenty (20) years and that the finding of professional misconduct shall not vitiate her chances of receiving a pension upon retirement.

5. Costs to the claimant.

6. Liberty to apply.

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Wint-Blair, J