[2024] JMCA Civ 43

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2021CV00110

BETWEEN	**ALFRED GRAYSON**	**APPELLANT**
AND	**THE BOARD OF MANAGEMENT OF HOPEWELL HIGH SCHOOL**	**RESPONDENT**

Hugh Wildman instructed by Hugh Wildman & Company for the appellant

Miss Tessa Simpson instructed by Knight Junor & Samuels for the respondent

8 February 2023 and 20 December 2024

Administrative law - Judicial review - Procedural fairness - Natural justice - Whether refusal of application to call a witness is fatal to proceedings where the facts to which the witness was expected to speak are not in dispute - Rule 56 of the Civil Procedure Rules - Sections 57(1) and (4) of the Education Regulations

EDWARDS JA

[1] I have read in draft the judgment of Simmons JA and agree with her reasoning and conclusion. There is nothing I wish to add.

SIMMONS JA

[2] This is an appeal from the judgment of Nembhard J ('the learned judge') who, on 8 December 2021, refused the appellant's claim for judicial review following the termination of his employment by the respondent.

Background

[3] The appellant was the Dean of Discipline at the Hopewell High School ('the school'), having been appointed to that post on 1 January 2018. Issues arose surrounding his lack of punctuality, absences from the school's campus without permission during work hours and the non-submission of reports required by the Ministry of Education.

[4] These complaints were the subject of several letters and memoranda between the school's principal ('the principal') and the appellant. For clarity, I have provided a summary of the correspondence. By letter dated 12 January 2018, the principal informed the appellant that he had exceeded his allotted casual leave by seven days. This was followed by a memorandum dated 17 January 2018, in which the appellant was reminded that he had not submitted the monthly reports required by the Ministry of Education since September 2017 and the suspension and expulsion report for 2016 – 2017. Another memorandum, issued on 17 January 2018, reminded the appellant of the need for punctuality and that his irregular attendance would not be tolerated.

[5] By memorandum dated 10 January 2019, the principal informed the appellant that issue was being taken with his lack of punctuality and absences from the school's campus during working hours without permission. That memorandum detailed 44 days out of 68 days, between 10 September and 13 December 2018, when it was said that the appellant was late for work. This, it was stated, represented a loss of 1445 minutes or 24 hours and five minutes to the school. The principal, in that memorandum, reminded the appellant of the hours of work and "encouraged" him to "make adjustments on [his] punctuality pattern and stop leaving the campus during working hours to attend to other duties elsewhere".

[6] On 11 January 2019, the appellant, in his oral response to the allegation, indicated to the principal that his lack of punctuality was due to his "sending the students to school which was a part of [his] job description".

[7] This was followed by a memorandum from the principal, dated 12 February 2019, which indicated that for the period 7 January 2019 to 12 February 2019, the appellant was late on 24 occasions which resulted in a loss of 425 minutes or seven hours and five minutes to the institution. In another memorandum bearing the date, the appellant was informed thus:

> "Our records indicate that you consistently leave the campus without permission during contact hours leaving your duties unattended.
>
> We only realized that you left the campus upon searching for you and you cannot be [sic] found to deal with incidents. This normally led us to having to check the gate log which would indicate that you have left.
>
> This type of behaviour is unbecoming and will not be tolerated. You have been spoken to on several occasions by the Principal, Mr Byron Grant and the Vice Principal, Mr Leroy Gordon but this type of behaviour continues without you showing any regard."

[8] The memorandum included a table documenting the appellant's alleged absences from the school's campus without permission between 4 September 2018 to 12 February 2019.

[9] This culminated in a letter dated 27 March 2019, from the respondent's chairman, informing the appellant that he was charged with: (i) neglect of duties (unauthorized absences from the school's campus); (ii) inefficiency (failure to submit reports); and (iii) persistent unpunctuality and professional misconduct. The letter set out in tabular form details of the instances of the appellant's alleged unpunctuality and absences from the school's campus without permission. The appellant was also informed that a hearing was scheduled before the personnel committee ('the committee') and that a friend or an attorney-at-law could accompany him. The letter further stated that his employment

could be terminated and that if he failed to attend the hearing, it could proceed in his absence.

[10] At the hearing, when questioned about his absences from the school's campus on the relevant dates, the appellant indicated that the principal had given him permission. The principal denied this. The appellant acknowledged that he had received memoranda from the principal regarding same and had not responded to them. When asked why, his response was, "no specific reason". When asked if he had gone to a construction site that he was supervising when he was required to be on duty at the school, the appellant refused to answer. The appellant agreed that the principal had spoken to him about the issue on several occasions and had also written to him.

[11] He did, however, assert that on two of those occasions complained of, he had left the campus in the company of the school's nurse to transport a sick child to the hospital. He indicated that she could be called to substantiate his evidence. The committee's chairman, in response, stated that there was no need to call the nurse as a witness as the committee had accepted that aspect of the appellant's evidence.

[12] Regarding the other occasions on which the appellant had left the school's campus, the appellant indicated that he had gone "on travelling" albeit without the principal's knowledge. He also asserted that he had received payments for travelling. It was, however, pointed out that those sums were paid for commuted allowance and not for travelling. This was buttressed by the bursar's confirmation that no claim for travelling expenses had been submitted by the appellant and that the payment made to the appellant was for retroactive commuted allowance.

[13] Evidence was also presented of the appellant's refusal to hand over the keys to his office when his employment was suspended. It was reported that the appellant, when asked for the keys, stated that the lock on the door belonged to him. The appellant

indicated that he had refused to hand over the keys because the vice principal had a key. The vice principal denied being in possession of a key for the appellant's office. Evidence was also given of occasions on which the air conditioning unit was left on for the entire weekend as a result of the appellant's refusal to hand over the keys to his office. The appellant agreed that this happened on a few occasions.

[14] In addition, evidence was given that the appellant was seen several times during school hours at a construction site that he was supervising. Where the charge of his lack of punctuality was concerned, the appellant asserted that he was ensuring that the students got transportation to school and that he had made a note in the attendance register. The principal's evidence was that those notations were made by the appellant after he had received a memorandum from him. Further, they were all made on the same date and related to one month. The appellant did not answer when asked why he had not responded to any of the memoranda to explain his lack of punctuality and his failure to make notes in the attendance register for more than one month.

[15] Where his failure to submit certain reports required by the Ministry of Education was concerned, the appellant's explanation was that his job was hectic and he needed a computer. He also asserted that the principal had refused to provide a secretary for him. The reports were then "submitted" to the committee.

[16] When asked if he had anything else to say, the appellant stated that he did not. There is no indication on the record that the appellant had signalled any intention to call any students as witnesses.

[17] The committee found that the appellant was guilty of the charges and recommended to the respondent that the appellant be dismissed.

Proceedings in the court below

[18] The appellant applied for leave to apply for judicial review and the application was granted. The grounds on which the application was based are summarised below:

> (1) The appellant was denied the opportunity of calling witnesses to support his defence against the charges as his application to do so was refused by the personnel committee;
>
> (2) The application by the appellant to call students as witnesses to verify that he was engaged in the school's business on the occasions that he was accused of unpunctuality was refused;
>
> (3) The decision of the personnel committee breached section 57(1)(b) of the Education Regulations, which guarantees the appellant's right to be heard and includes the right to call witnesses; and
>
> (4) That as a result of the said breach the respondent's decision to terminate the appellant's employment is illegal, null and void and of no effect.

[19] The affidavit in support of the application was sworn to by the appellant, who deposed that he was appointed to the post of Dean of Discipline of the school in January 2018. In January 2019, the principal accused the appellant of unpunctuality. The appellant responded to the vice principal orally, indicating that his lateness resulted from him carrying out his duty to send the students to school. He also complied with the directive of the vice principal to note the reasons in the school's logbook. Charges were laid against him in March 2019 and the appellant was invited to a disciplinary hearing. He was advised that a friend or an attorney-at-law could accompany him to the hearing.

[20] The affidavit also states that the appellant had intended to call the school's nurse to support his assertion that on the occasions that he was off campus, he was engaged in the school's business. The appellant further stated that he had intended to call students as witnesses to support his assertion that he was engaged in sending them to school in the mornings. Those requests, he asserted, were refused by the committee. In the circumstances, the appellant asserted that his right to a fair hearing had been breached.

[21] A fixed date claim form was subsequently filed seeking the following relief:

> i) "A declaration that the respondent did not comply with sections 57(1) and 57(4) of the Education Regulations, 1980 in terminating the services of the [appellant] as Dean of Discipline of the School rendering the said termination illegal, null and void and of no effect.
>
> ii) A declaration that under sections 57(1) and 57(4) of the Education Regulations, 1980 the [appellant] is entitled to be heard before any decision can be made by the respondent to terminate his services as Dean of Discipline of the School.
>
> iii) A declaration that in affording the [appellant] a right to be heard under sections 57(1) and 57(4) of the Education Regulations, 1980 the respondent ought to afford the [appellant] the right to call witnesses as part of his defence, before any decision can be made by the respondent to terminate his services as Dean of Discipline of the School.
>
> iv) An order of certiorari quashing the decision of the respondent as contained in letter dated 17 April 2019 purporting to terminate the [appellant's] services as Dean of Discipline of the School."

[22] The appellant also applied for a stay of the respondent's decision to terminate his services and damages.

[23] The claim, based on the supporting affidavit of the appellant, raised the issue of whether he was denied the opportunity to call witnesses in support of his defence in breach of the Education Regulations, 1980 and his constitutional rights.

[24] The respondent relied on the affidavit of Byron Grant, who was the principal of the school. Mr Grant deposed that he wrote to the appellant regarding his unpunctuality, professional misconduct, and refusal to complete his monthly reports for submission to the Ministry of Education. He stated that the appellant had indicated his desire to call the school's nurse to prove that he had accompanied her to the hospital with sick students on two of the occasions that he was absent. The personnel committee accepted the appellant's evidence on this issue and, as such, there was no need to call the nurse.

[25] Mr Grant also stated that the appellant's application to call the vice principal as a witness was granted and no application was made to call any other witnesses.

[26] Where the appellant's assertion that he was engaged in sending the students to school in the mornings is concerned, Mr Grant stated that this was not part of the appellant's job description. A copy of the appellant's job description was exhibited to the affidavit.

[27] The claim for judicial review was refused. The learned judge found that although the respondent erred in not allowing the appellant to call the school's nurse as a witness, based on "the uncontradicted evidence of his unprofessional conduct … any tribunal which reheard the matter would, in all likelihood…" arrive at the same conclusion as the respondent.

[28] The appellant, who is aggrieved by the learned judge's decision, filed a notice of appeal on 16 December 2021 in which he challenged various findings of fact and law. The grounds of appeal are as follows:

> "a. The Learned Trial Judge erred in law by failing to appreciate that the Appellant was entitled to the protection guaranteed to him under **Section 57(4)(b)** of the **Education Regulations 1980**, which provides for him to be afforded the opportunity to call witnesses at the hearing of the Personnel Committee in his defence, that he was not

guilty of unpunctuality or professional misconduct. It is submitted that the failure to afford the Appellant the opportunity to call his witnesses, which is a statutorily protected right, was fatal to the proceedings and renders the findings of the Personnel Committee, illegal, null and void and of no effect.

b. The Learned Trial Judge erred in law by failing to appreciate that if the Appellant had been allowed to call his witnesses as he had requested to do, it would have shed some light on his defence and negative the allegations made against him at the hearing of the Personnel Committee, that he was not guilty of unpunctuality and professional misconduct as alleged.

c. That the Learned Judge erred in law by failing to appreciate that Her [sic] exercise of the discretion to deny the Appellant the relief sought in his claim against the Respondent for illegally terminating his services as the Dean of discipline of [the school], was based on allegations which the Appellant had sought to refute by calling his witnesses.

d. That the Learned Judge erred in law when, having quite rightly stated that the purpose of judicial review was not to determine the merits of the decision itself but the manner in which it was arrived at, embarked on an exercise to undo that principle by allowing Herself [sic] to be influenced by the allegations against the Appellant and to conclude that those allegations were factual, in denying the Appellant the relief sought in his claim against the Respondent.

e. The Learned Judge erred in law by embarking on a frolic by conducting a mini-trial to determine whether the allegations made against the Appellant were so egregious, instead of determining whether the Respondent had breached the Appellant's right, as guaranteed under **Section 57(4)** of the **Education Regulations 1980**, in denying the Appellant the relief sought in his claim against the Appellant.

f. The learned Judge erred in law by improperly exercising Her [sic] discretion to deny the Appellant the relief sought in his claim against the Respondent, having rightly concluded that the Respondent had breached his right guaranteed under

> **Section 57(4)(b)** of the **Education Regulations 1980**, by failing to afford him the opportunity to call witnesses to rebut the allegations made against him, that he was guilty of unpunctuality and professional misconduct." (Emphasis as in original)

[29] On 30 December 2021, a counter notice of appeal was filed by the respondent on the basis that an alternative form of redress was available to the appellant, which ought to have been utilised before making an application for judicial review.

Issues

[30] The grounds of appeal raise two issues. The first is whether the learned judge, having found that the tribunal was wrong to have denied the appellant the opportunity to call the school's nurse as a witness, erred when she found that the appellant had not suffered any injustice. The second is whether the learned judge erred when she considered the evidence of the appellant's conduct in her determination of his application for judicial review.

[31] The appellant has taken issue with the learned judge's exercise of her discretion. The approach of an appellate court in matters involving the exercise of a judge's discretion is well-settled. This court will not disturb such a decision unless, in the exercise of that discretion, the learned judge erred on a point of law or her interpretation of the facts (see **Hadmor Productions Ltd v Hamilton and others** [1982] 1 All ER 1042 ('**Hadmor**') and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 ('**John Mackay'**)). In **John Mackay**, Morrison JA (as he then was) stated at paras. [19] and [20]:

> "[19] ...It follows from this that the proposed appeal will naturally attract Lord Diplock's well-known caution in ***Hadmor Productions Ltd v Hamilton*** [1982] 1 All ER 1042, 1046 …:

> '[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.'
>
> [20] This court will therefore only set aside the exercise of discretion by a judge … on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

The denial of the appellant's request to call the school's nurse as a witness (grounds a, b and c)

Submissions

For the appellant

[32] Mr Wildman stated that whilst the appellant was given the opportunity to be heard, he was not allowed to call any witnesses to support his defence. In particular, the appellant was denied the opportunity to call students as well as the school's nurse who Mr Wildman described as a "key witness". This, it was submitted, breached regulation 57 (4)(b) of the Education Regulations.

[33] Counsel argued that the right to call witnesses is part of the right to due process, is not dependent on either the strength or weakness of the appellant's case and is guaranteed at common law, under statute and by the Constitution. Reference was made to **Regina v Board of Visitors of Hull Prison, Ex parte St Germain and others (No. 2)** [1979] 1 WLR 1401 ('**St Germain**'), **Regina v Board of Visitors of Gartree Prison, ex parte Mealy** [1981] TLR 14 November 1981, **General Council of Medical**

Education and Registration of the United Kingdom v Spackman [1943] 2 All ER 337, **Malloch v Aberdeen Corporation** [1971] 2 All ER 1278 and **Anisminic Ltd v Foreign Compensation Commission and others** [1969] 2 AC 147.

[34] Mr Wildman stated that the evidence before the personnel committee was that on some occasions when it was alleged that the appellant was absent from school, he had taken the school's nurse with a sick child to the hospital. The appellant, he said, indicated that there were two such occasions and invited the committee to question the nurse. It was submitted that, although the committee indicated its acceptance of the appellant's evidence pertaining to the two occasions, the nurse ought to have been called as "no one knew what would have emerged to assist the Appellant". The calling of the nurse was, therefore, "critical to the Appellant's case". It was submitted further that the appellant, as a layperson, was unfamiliar with the "rudiments of a trial" and that the committee had a duty to ensure that his defence was fully ventilated before an adverse finding could be made against him.

[35] Counsel submitted that the situation in the present case is similar to that which obtained in **St Germain**, which rendered the proceedings null and void and of no effect. In that case, Lord Lane at page 1406 stated thus:

> "In our judgment the chairman's discretion is necessary as part of a proper procedure for dealing with alleged offences against discipline by prisoners.
>
> However, that discretion has to be exercised reasonably, in good faith and on proper grounds. It would clearly be wrong if, as has been alleged in one instance before us, the basis for refusal to allow a prisoner to call witnesses was that the chairman considered that there was ample evidence against the accused. It would equally be an improper exercise of the discretion if the refusal was based upon an erroneous understanding of the prisoner's defence — that an alibi did

> not cover the material time or day, whereas in truth and in fact it did."

[36] Reference was also made to **Ridge v Baldwin and others** [1964] AC 40 and **Naraynsingh v Commissioner of Police (Trinidad and Tobago)** [2004] UKPC 20 in support of that submission. It was submitted that the learned judge, by her refusal of the application for judicial review, failed to uphold the appellant's statutory right to due process.

For the respondent

[37] Miss Simpson acknowledged that section 57(4) of the Education Regulations gave the appellant the right to be heard, call witnesses and produce documents in support of his case. She, however, submitted that the issue of whether the personnel committee breached the principles of natural justice is to be assessed in light of the facts of the case. Where the school's nurse is concerned, counsel submitted that there was no breach as witnesses are usually called by an accused to assist with his defence and the personnel committee had accepted the appellant's evidence that he had accompanied her to the hospital on two of the occasions on which he was absent. Counsel reminded the court that the appellant had stated that on the many other occasions on which he was absent, he went on traveling without the principal's knowledge or consent. Reference was made to **De Verteuil v Knaggs and anor** [1918] AC 557 in which Lord Parmoor, who delivered the decision of the Board, stated at pages 560-561:

> "Their Lordships are of opinion that in making such an inquiry there is, apart from special circumstances, a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice. It must, however, be borne in mind that there may be special circumstances which would justify a Governor, acting in good faith, to take action even if he did not give an

> opportunity to the person affected to make any relevant statement, or to correct or controvert any relevant statement brought forward to his prejudice. For instance, a decision may have to be given on an emergency, when promptitude is of great importance; or there might be obstructive conduct on the part of the person affected."

Counsel suggested that a fourth example is where, as in this case, the evidence that the witness is being called to give is not in dispute.

[38] Reference was also made to **Doody v Secretary of State for the Home Department; and other appeals** [1993] 3 All ER 92 (**Doody**'), in which Lord Mustill, who delivered the judgment of the court, discussed the concept of fairness.

[39] Counsel also referred to **Grant v Teacher's Appeal Tribunal and another** [2006] UKPC 59 and **Byrne v Kinematograph Renters Society Ltd and ors** [1958] 2 All ER 579. It was submitted that the appellant was not prejudiced by the personnel committee's ruling on the application to call the school's nurse as a witness, as her evidence would have been given on a fact that had already been accepted as being true.

[40] Where the assertion that the appellant was not allowed to call students as witnesses is concerned, counsel indicated that no application had been made. She stated that although the appellant, in his affidavit filed on 8 August 2019, had expressed that it had been his intention to call 10 students as his witnesses, they were never named. Further, the appellant did not provide any evidence that the students' testimonies were required to rebut the assertion that he was guilty of unpunctuality or professional misconduct. In addition, the appellant did not declare in his defence that he was not guilty of the charges, nor did he present any evidence to refute the charges laid against him.

[41] Counsel also submitted that the proceedings before the personnel committee were required to be fair and that the learned judge considered the facts carefully in her

examination of what constitutes fairness. That approach, it was stated, is supported by the decision of the Court of Appeal of Trinidad and Tobago in **In the application of Bickram Ramnanan** Civil Appeal No 149 of 1993.

Analysis

[42] Judicial review is a discretionary remedy and is a process by which the legality of an administrative decision is reviewed by the court. It is not, however, in the nature of an appeal and is not concerned with the merit of the decision (see **Chief Constable of the North Wales Police v Evans** [1982] 3 All ER 141 at 155 per Lord Brightman). Rather, a claim for judicial review seeks a review of the manner in which the decision was made. In **Council of Civil Service Unions and others v Minister for the Civil Service** [1984] 3 All ER 935 Roskill LJ, in addressing the scope of judicial review, stated thus, at pages 953-954:

> "… executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, Wednesbury principles (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice'. As to this last, the use of this phrase is no doubt hallowed by time and much judicial repetition, but it is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting-place and be better replaced by speaking of a duty to act fairly. But that latter phrase must not in its turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have

> been taken and the extent of the duty to act fairly will vary greatly from case to case as, indeed, the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken."

[43] Lord Diplock, in his judgment, stated that administrative decisions may be subject to judicial review on three bases: illegality, irrationality and procedural impropriety. At page 951, he explained why, in his view, it was more desirable to consider the issue of whether the proceedings were conducted fairly under the rubric of procedural impropriety. He stated thus:

> "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."

That classification found favour with Roskill LJ, who stated, at page 954, that it had "the great advantage of making clear the differences between each ground".

[44] There is no dispute that the respondent had the power to dismiss the appellant once certain conditions were satisfied. The appellant has, however, taken issue with the learned judge's exercise of her discretion to refuse the application for judicial review in circumstances where she found that the personnel committee had breached regulation 57(4)(b) of the Education Regulations. Regulation 57(4) states:

> "(4) At the hearing-
>
> (a) both parties shall be heard and be given [the] opportunity to make representations;

(b) any party may call witnesses and produce documents in support of his case;

(c) the committee may, at the instance of any party or, if it sees fit, order that any documents in the possession of the other party be produced for the information of the committee;

(d) notes shall be taken of such representations as may be made or such evidence as may be given."

[45] The appellant was informed of the disciplinary charges against him by letter, dated 27 March 2019, from Mr Jeremiah Dehaney, the chairman of the respondent's board. In brief, the charges are as follows:

> "1. Neglect of duties in that [he] left the campus without permission or the knowledge of the Principal on numerous occasions…
>
> 2. Inefficiency: Refusal to complete all relevant reports to be submitted to the Ministry of Education, Youth and Information in a timely manner.
>
> 3. Persistent unpunctuality despite several warmings….
>
> 4. Professional misconduct in that [he] left [his] job unattended as [he] left the campus without permission on numerous occasions."

[46] The committee found that the charges were proved and recommended that the appellant be dismissed. This was communicated to the appellant by letter, dated 17 April 2019, from the chairman of the school's board.

[47] The learned judge, in treating with the appellant's right to call witnesses in support of his defence, stated:

> "[55] Undoubtedly, Mr Grayson had a right to be heard and to call witnesses in his own behalf, at the hearing before the Committee. Indeed, there can be no doubt

> that the Board fell into error when it did not allow Mr Grayson the opportunity to call his witness, in the person of the school nurse. Nor is it within the purview of the Board to predetermine or prejudge the cogency of any evidence to be adduced and the potential value of that evidence. Notwithstanding the fact that the members of the Committee had clearly formed the view that the evidence to be elicited from the school nurse would have added no value to the proceedings before it, for the reason that her evidence concerned matters on which the members of the Committee already believed Mr Grayson, the Committee ought properly to have afforded him the opportunity to call her as a witness in his own behalf.
>
> [56] The Court is, however, unable to agree with the submission that the Committee also failed to allow Mr Grayson to call as witnesses, some ten (10) students of Hopewell High School. A careful review of Mr Grayson's affidavit evidence reveals an indication that he intended to call these students as witnesses in his own behalf. It falls short of stating that he had ever acted on that intention or that he had ever identified any of those ten (10) students. In the circumstances, it cannot tenably be argued that the Committee failed to allow Mr Grayson to call these unidentified students as witnesses in his own behalf.
>
> …
>
> [61] As a consequence, this Court is of the view that the relief and Declarations sought in the Fixed Date Claim Form, filed on 8 August 2019, ought properly to be refused and the Fixed Date Claim Form dismissed."

[48] In the instant case, there is no dispute that the committee refused the appellant's request to call the school's nurse to give evidence on his behalf. The appellant has asserted that this was fatal to the proceedings before the committee and that the learned judge erred in not granting the orders sought in his claim for judicial review. He has also asserted that his request to call students as witnesses was denied. However, the notes

of the proceedings do not reveal that such an application was made, and their accuracy has not been challenged. Additionally, the appellant's affidavits do not provide the names of the students, nor do they state whether their parents had given permission for them to give evidence before the personnel committee.

[49] The learned judge, at para. [24] of her judgment, stated that the main issue before her was whether the respondent acted lawfully when it dismissed the appellant and, if not, what was the appropriate remedy. In determining that issue, the learned judge identified the following sub-issues at para. [25]:

> "[25] In order to determine that issue, the following sub-issues must also be resolved: -
>
> (i) Whether there was a statutory basis for the action of the Board;
>
> (ii) Whether the Board terminated Mr Grayson's employment in a manner that was in accordance with The Education Regulations, 1980 and in accordance with the principles of natural justice; and
>
> (iii) Whether, if there were a procedural error on the part of the Board, that procedural error would render the Board's decision invalid."

[50] The learned judge, in the exercise of her discretion, considered all the evidence and concluded that, despite the breach of regulation 57(4)(b) of the regulations, in light of the appellant's "…gross dereliction of his duties; and his responses at the hearing before the Committee, dismissal was the only just result".

[51] To determine whether this court has any basis for interfering with her decision, the evidence relating to charges one and four must be considered against the background of the applicable principles. Those charges relate to the appellant's absences from the school's campus without permission. The expressed purpose of calling the nurse was to

corroborate his evidence concerning two of those occasions. Having accepted his evidence, the committee saw no need for the nurse to be called as a witness. The appellant admitted that he was absent without permission on the other occasions, and the committee found that the charges had been proved.

[52] The appellant has relied on the case of **St Germain** to ground his assertion that the failure of the committee to accede to his request to call the school's nurse as a witness was a fatal error. It was submitted that the learned judge ought, in those circumstances, to have granted the reliefs sought.

[53] Respectfully, that case does not assist the appellant. In **St Germain**, disciplinary proceedings were brought against the prisoners who were allegedly involved in a riot that broke out among the prisoners at a prison, which caused serious damage. Charges were laid against seven of them under the Prison Rules 1964, and the matter brought before the prison's board of visitors. Rule 49(2) of the Prison Rules provided that, at such an inquiry, the prisoner should be given the opportunity to hear what was alleged against him and to present his case. The prison governor, who was present at the hearing before the board of visitors, gave evidence from a dossier containing the accounts of prison officers pertaining to the role played by the applicants in the riot. The board acted on those statements, and the applicants were found guilty.

[54] The applicants subsequently applied to the Divisional Court for orders of *certiorari* to quash the findings of guilt made against them. The application was refused on the basis that *certiorari* could not lie against a board of visitors. That decision was reversed by the Court of Appeal, and the applications remitted to the Divisional Court for hearing and determination. The matter was appealed to the House of Lords which considered the question of whether the proceedings were conducted in a manner contrary to the rules of natural justice. Six of the seven applications were granted. The headnote for the case articulated the findings as being:

> "(1) that, since the applicants had been charged with serious disciplinary offences which, if established, would result in a substantial loss of liberty, the rules of natural justice required that they should have the opportunity of calling evidence which was likely to assist in establishing the vital facts at issue (post, p. *1408E*); that the chairman of the board had a discretion to disallow witnesses to be called but that discretion had to be exercised reasonably and in good faith and, therefore, a discretion exercised on the basis that there was ample evidence against a prisoner or on a mistaken understanding of the prisoner's defence or on the basis of considerable administrative inconvenience would be an improper exercise of the discretion and contrary to the rules of natural justice (post, p. *1406D–F*); and that, in the case of one applicant, the chairman's ruling had been based on a misunderstanding of the defence and, therefore, that finding of guilt would be quashed.
>
> (2) That the technical rules of evidence were not applicable to proceedings before the board of visitors but the admission of hearsay evidence was subject to the overriding obligation to provide the prisoner with a fair hearing and a fair opportunity to controvert the charge; that where a prisoner wished to dispute the hearsay evidence and there were insuperable or very grave difficulties in arranging for the attendance of the prison officer, the board should have refused to admit the evidence or, if it had already come to their notice, they should have expressly dismissed it from their consideration (post, pp. *1408H–1409B*, *D–E*, *H–1410A*); and that since, in some cases, the applicants had not been given an opportunity to deal with the hearsay evidence and where necessary to cross-examine the witness, those findings of guilt would be quashed."

[55] The facts in the instant case are not similar. The committee did not act on hearsay evidence or any evidence that was in dispute. The appellant had proposed to call the school's nurse to substantiate his assertion that he had gone on the school's business on two occasions when he was absent from the school's campus. The chairman had indicated to the appellant that, "there is no need to call the nurse since we are not doubting that

you took her to the hospital twice". There was, therefore, no dispute concerning those two occasions. The proposed evidence of the school's nurse was to corroborate facts that were not in issue and which, by effect, could not in any way exonerate the appellant or provide any explanation for his absences on the numerous occasions for which he provided no answer.

[56] That is not similar to what occurred in **St Germain,** where the applicants had indicated that they wished to challenge the hearsay evidence that was ultimately used against them and were denied that opportunity. The appellant's case was not prejudiced by the ruling of the committee as his evidence was accepted. In fact, when questioned about the other occasions on which he was absent, he stated that he "went on travelling" without the principal's knowledge. Based on the records, there were approximately 76 such occasions between September 2018 and February 2019.

[57] In **St Germain,** Lord Lane, at page 1410, stated:

> "So far as the refusal to allow the applicants to call witnesses is concerned, this presents little difficulty, except in the case of Cotterill. All the other cases are covered by the statement in the affidavit of the chairman of the board of visitors to the following effect:
>
> > 'Furthermore and in any event, we took the view that the calling of witnesses would be of limited value unless it was clear that the witnesses would be of real value in a specific case. If it had ever been apparent to us that it was essential to the course of justice that a witness be called, I would have allowed a prisoner to do so, if necessary by adjourning the adjudication'."

[58] In the instant case, the appellant clearly stated the purpose for which he proposed to call the nurse as a witness. His absence without permission on numerous other occasions was admitted, and there was no indication that her evidence could have

assisted the appellant save for the two occasions mentioned above. Her evidence, in the words of Lord Lane, would have been of "limited value" to the issues in dispute.

[59] The question is whether evidence from the school's nurse would have affected the decision of the committee. It must, however, be borne in mind that where the rules of natural justice have been breached, the court must be cautious in upholding the decision in question on the basis that the result would have been the same. In **R v Ealing Magistrates' Court ex p Fanneran** (1996) 8 Admin LR 351 at 365E), Staughton LJ stated the principle in the following terms:

> "I must say at once that the notion that when the rules of natural justice have not been observed, one can still uphold the result because it would not have made any difference, is to be treated with great caution. Down that slippery slope lies the way to dictatorship. On the other hand, if it is a case where it is demonstrable beyond doubt that it would have made no difference, the court may, if it thinks fit, uphold a conviction even if natural justice had not been done."

[60] In **R v Rochester Upon Medway City Council, ex parte Williams** [1994] Lexis Citation 3184, the court refused the remedy on the basis that the information that was before the council when the decision was made would be maintained as there was no new material to place before the court. In its reasoning, the court emphasised that, based on the information that was placed before the council, it would not be useful to have it reconsider the matter as it would arrive at the same conclusion.

[61] The circumstances in which such an approach should be adopted were described by Bingham LJ as being of "great rarity" (see **R v Chief Constable of the Thames Valley Police, ex parte Cotton** (1990) IRLR 344 at 352). In the instant case, there is no dispute that the appellant was absent from the school's campus without permission on numerous occasions. Of the 76 such occasions stated in the letter from the respondent's chairman, only two of them were deemed justified by the personnel

committee, the same two which would have been covered by the nurse's evidence in corroboration.

[62] It must also be noted that the appellant did not deny that he had failed to submit the reports required by the Ministry (charge two). Where his unpunctuality (charge three) is concerned, the personnel committee rejected his explanation on the basis that it was not part of his job description to usher the students to school. In **Doody**, Lord Mustill, who delivered the judgment of the court, stated at page 106:

> "(2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. ... (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both."

[63] The learned judge determined that the committee had breached regulation 57 by refusing the appellant's application to call the nurse as a witness. She also considered whether that ruling affected the fairness of the proceedings and concluded that, based on the circumstances, it did not. The learned judge, at para. [54], stated:

> "It is on the preponderance of this evidence, which has not been challenged by [the appellant] in any respect, that the Court is asked to refuse to exercise its discretion in favour of granting the relief sought, in light of his unprofessional conduct."

[64] In this regard, it must be borne in mind that judicial review is a remedy of purpose. As such, the court's discretion ought not be exercised in an applicant's favour where the effect of the order would serve no useful purpose. The appellant did not refute most of

the allegations, and the learned judge concluded that if the committee's decision was set aside and the matter re-heard, the result "would in all likelihood" be the same. The learned judge clearly appreciated the requirements of natural justice and applied the relevant principles. Grounds a, b and c, therefore, fail.

The learned judge's consideration of evidence pertaining to the appellant's conduct (grounds d, e and f)

Submissions

For the appellant

[65] Counsel submitted that the learned judge, having found that the committee breached regulation 57, erred when she took into account what she described as the "egregious" conduct of the appellant in the exercise of her discretion to refuse the appellant's claim. This breach, it was argued, could not be cured.

For the respondent

[66] Counsel submitted that judicial review is a discretionary remedy, and an appellate court can only interfere with the exercise of the learned judge's discretion if it was 'demonstrably wrong'. On this premise, it was submitted that this court can only disturb the findings of the learned judge where she acted under a mistake of law or a misapprehension of facts. Reference was made to **The Attorney General of Jamaica and anor v Machel Smith** [2020] JMCA Civ 67 and the decision of the Court of Appeal of Trinidad and Tobago in **Chandresh Sharma v The Attorney General** CA No 115 of 2003 in support of that submission.

[67] Counsel submitted further that the learned judge exercised her discretion correctly based on the circumstances of the case. In this regard, she relied on **Auburn Court Ltd v The Kingston & St Andrew Corporation and ors** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 99/1997, judgment delivered 31 July 2001

('**Auburn Court**') and **Easton Wilberforce Grant v The Teachers' Appeal Tribunal & The Attorney General** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 29/2003, judgment delivered 1 February 2005, in which Bingham JA noted at page 21:

> "In the result apart from the facts in the matter under review being distinguishable the behaviour of the appellant was such as to have prompted the learned judge to remark that:
>
> > 'Before departing from this application, perhaps I should add that the remedy of certiorari is discretionary. In this matter the behaviour of the applicant was so unmeritorious, that even if there had been a failing in any aspect of the proceedings I doubt that I would grant the relief sought. See **R. v. Secretary of State for Home Department ex parte Hosenbull** [1977] I WLR 766'."

[68] It was submitted that the learned judge properly considered the "egregious conduct" of the appellant especially in light of his position as a Dean of Discipline. This evidence, counsel said, was uncontradicted and appropriately guided the learned judge in her decision to refuse to grant judicial review. She stated that the concept of natural justice is not fixed and is dependent on the demands of justice in the particular case. In this regard, reference was made to the case of **Karine Martin v Chairman Board of Management Edith Dalton James High School and ors** (unreported), Supreme Court, Jamaica, Suit No M02/2001, judgment delivered 6 April 2001, in which the court considered the conduct of the applicant in the exercise of the discretion whether to grant the relief sought. In light of the 'egregious conduct' of the appellant in this case, it was submitted that the learned trial judge correctly exercised her discretion.

Analysis

[69] The appellants have taken issue with the learned judge's consideration of the appellant's conduct in arriving at her decision. Her findings were based on the affidavits

that were presented to the court. As stated above, for the most part, there is no dispute as to the facts that formed the basis of the charges against the appellant.

[70] On this issue, the learned judge considered the following evidence which is repeated below:

> "[53] The uncontradicted evidence before this Court reveals that during the period 29 September 2016 to 7 June 2017, Mr Grayson was absent from work on forty-eight (48) occasions. In this instance, he exceeded the number of days on which he was permitted to be absent from work, by a total of seven (7) days. The unchallenged evidence before this Court also reveals that, during the period 4 September 2017 to 28 February 2018, Mr Grayson was late for work on forty-eight (48) occasions. The uncontested evidence before this Court reveals that Mr Grayson failed to complete and submit monthly reports, required by the Ministry of Education, Youth and Information since September 2017 and that, at the time of the hearing of this claim, those reports had neither been completed nor submitted by Mr Grayson."

[71] Her findings are contained in paras. [57] to [60] of the judgment. They are as follows:

> "[57] The Court accepts and adopts the submissions of Ms Simpson that it ought properly to refuse to exercise its discretion, in favour of granting the relief Mr Grayson seeks, in light of his unprofessional conduct.
>
> [58] The Court accepts that the position of Dean of Discipline is a specialized position that was established with the specific purpose of arresting the increasing incidence of indiscipline and acts of violence perpetrated by some of the nation's students in its institutions of learning. The unchallenged evidence before the Court is that Mr Grayson was directly responsible for developing and implementing plans and programmes to promote positive behaviour among the 16 students. He was also responsible for providing intervention and support for

> the enhancement and resolution of students' disciplinary and behavioural issues. Against that factual background, the Court finds Mr Grayson's conduct unacceptable, unbecoming and grossly unprofessional.
>
> [59] Given the fact of Mr Grayson's position as Dean of Discipline; the uncontradicted evidence of his unprofessional conduct; the unchallenged evidence of his absence on more than one occasion when he was required to attend to incidents of indiscipline among the student population; and his responses at the hearing before the Committee, this Court is of the view that any tribunal which reheard the matter would, in all likelihood, also come to the same result as did the Committee.
>
> [60] The Court finds that no injustice had been done to Mr Grayson, as, given his position; his gross dereliction of his duties; and his responses at the hearing before the Committee, dismissal was the only just result."

[72] In **Auburn Court** Harrison JA (as he then was) stated at page 78:

> "Authorities, bodies and committees which function in the public sphere have a duty to observe the rules of natural justice, and therefore are subject to judicial review. Simply put, such entities must act fairly. One of the principal instances of the demonstration of such fairness is the rule that an individual who may be adversely affected by the decision of such a public body acting judicially, quasi-judicially or even performing administrative functions, must be given the opportunity to be heard prior to the making of the decision."

[73] That duty, whilst described as being "a flexible principle", is inextricably linked to the fact that the person affected by the decision should not suffer any prejudice as a result. In **Auburn Court**, the appellant sought to set aside the order of the Full Court refusing orders of *certiorari* and prohibition against the Kingston & St Andrew Corporation and its Building Surveyor, the Town and Country Planning Authority, and its Town Planner. At pages 45-46 of the judgment, reference was made to the following passage from the judgment of the Full Court:

"The orders sought to wit, Certiorari and Prohibition are discretionary remedies. Even where a person may be awarded certiorari ex debito justitiae **the Court retains a discretion to refuse his application, if his conduct has been such as to disentitle him to relief. The Court is entitled to have regard generally to the conduct of the applicant and to the special circumstances of the case in deciding whether to grant him the remedy he seeks.**

In the instant case the applicant was served a notice to cease building in that he had no permission so to do. He deliberately refused to obey the lawful order of the prescribed authorities. His conduct, if I may borrow the words of **Singleton L.J. in Ex parte Fry** [1954] 1 W.L.R. (CA) 730 at p. 735—

'was extra-ordinarily foolish.'

The discretion of the Court ought not to be exercised in the favour of one who has behaved so unreasonably. This type of conduct militates against the development of a well organized society and makes governance extremely difficult.

Persons who flout the law so flagrantly must not expect the Court to come to their aid. The Court takes judicial notice of the number of persons prosecuted in the Courts of the island for erecting buildings without first obtaining permission so to do.

This kind of disregard for the law has had the effect of ruining many neighbourhoods causing extensive economic loss to owners of property." (Emphasis supplied)

[74] The learned judge of appeal, at page 96, stated thus:

"**The appellant's conduct was one of a persistent disregard for the law**. It commenced and continued construction of the building on South Avenue knowingly without permission. It defiantly continued construction even after it was instructed to cease. **Such conduct cannot be ignored by a court. The Full Court recognised its discretionary powers exercisable in consideration of**

> **the grant of the orders of certiorari and prohibition and declined to favour the appellant. This approach of the Full Court cannot be faulted**." (Emphasis supplied)

[75] As indicated the appellant has taken issue with the learned judge's exercise of her discretion. The approach of an appellate court in matters involving the exercise of a judge's discretion is well-settled. This court will not disturb such a decision unless, in the exercise of that discretion, the learned judge erred on a point of law or her interpretation of the facts (see **Hadmor** and **John Mackay**).

[76] The learned judge, in her consideration of the fairness of the proceedings, was permitted to consider all the relevant facts. She pointed out that the evidence presented to the committee was, for the most part, uncontradicted. Based on the affidavit evidence placed before this court and the court below, it cannot be said that her decision was based on any misunderstanding of that evidence. The learned judge concluded at para. [60] that no injustice had been done to the appellant as, "given his position; his gross dereliction of his duties; and his responses at the hearing before the committee, dismissal was the only just result". Her approach cannot be faulted. In the circumstances, grounds d, e and f also fail.

The counter-notice of appeal

[77] Mr Wildman submitted that the counter-notice is misconceived as the question of whether an alternative remedy was available to the appellant is now otiose. That issue, he stated, ought to have been raised when the application for leave was being heard. Reliance was placed on **Regina v Falmouth and Truro Port Health Authority Ex parte South West Water Ltd** [2001] QB 445 and **R v Essex County Council, ex parte EB** [1997] ELR 327.

[78] Miss Simpson agreed that the issue of the availability of an alternative remedy was not raised when the application for leave was being heard. She, however, submitted that

it could be raised at any stage of the proceedings. In the circumstances, it was argued that the appeal should be dismissed based on the appellant's failure to avail himself of the alternative remedy.

Analysis

[79] Judicial review has been described as a remedy of last resort. As such, an applicant is expected to have exhausted any alternative remedy that would have provided adequate relief for the wrong allegedly done to him. This principle is recognised by rule 56.3(d) of the Civil Procedure Rules 2002, which requires an applicant for leave to state whether "an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued".

[80] Rule 2.3 of the Court of Appeal Rules states that a counter-notice may be filed by a respondent who wishes to affirm the court's decision below on grounds other than those relied on by that court. That rule, in my view, pre-supposes that the issue raised in those grounds was placed before the court below but did not form the basis of the judge's decision. In the instant case, the issue of whether an alternative remedy exists was not raised when the application for leave was being made nor at the substantive hearing. Therefore, the issue regarding the availability of an alternative remedy, having not been raised in the proceedings below, it, cannot be utilised to ground a counter-notice.

Disposal

[81] Having found no basis on which to interfere with the learned judge's exercise of her discretion, the appeal should be dismissed with costs to the respondent. This is in keeping with the principle that costs follow the event. The counter-notice was misconceived and should also be dismissed with costs to the appellant.

V HARRIS JA

[82] I have read the draft judgment of Simmons JA. I agree with her reasoning and conclusion and have nothing to add.

EDWARDS JA

ORDER

(1) The appeal and counter-notice of appeal are dismissed.

(2) Costs of the appeal are awarded to the respondent to be agreed or taxed.

(3) Costs of the counter-notice of appeal to the appellant to be agreed or taxed.