IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2010 HCV 03706

BETWEEN	ARETHA LAWRENCE	CLAIMANT
AND	BOARD OF KNOX COLLEGE	1ST DEFENDANT
AND	THE PRINCIPAL KNOX COLLEGE	2ND DEFENDANT
AND	THE MINISTRY OF EDUCATION & YOUTH	3RD DEFENDANT
AND	THE ATTORNEY GENERAL	4TH DEFENDANT

Ms. Alicia McIntosh instructed by Director of State Proceedings for the claimant.

Mr. Ravil Golding instructed by Lyn-Cook, Golding & Company for the defendants.

Heard 16th, 25th, 30th April 2012 and 15th June 2012

Judicial Review – Public Educational Institution – Board of Management Meeting - Applicant's waiver of Opportunity to Attend Hearing – Ex parte Application - Full and Frank Disclosure – Educational Regulations 30.4 – Fair Hearing Requirements

Campbell, Q C, J.

[1] The applicant, a probationer officer, is the mother of RL, a student at the 1st defendant's educational institution. RL, a fourth form student, was born on the 23rd September 1994; he is a day student at the institution. Knox College is a Church School, for the purposes of Regulation 2, of the Education Regulations (The Regulations), owned and operated by the Moravian Church and is situated in Spauldings, in the parish of Clarendon. It's a co-educational boarding institution, a part of its student population are day students. Regulation 70, provide for the administration of the institution, and the appointment of its members.

[2] The applicant states that she received a telephone call from the principal, Rev. Dr. Cowan, summoning her to a meeting at the school. She was advised at the meeting that two days earlier, her son had ñfacilitated and abetted the exit from the school of three female students, two of whom were boarders.ò There was a further allegation that the students had proceeded to a private residence in Mandeville where the applicantós son had engaged in sexual intercourse with one of the boarders, AW. The applicant was advised by the principal that he was obliged to report the matter to the police, in keeping with his understanding of The Child Care and Protection Act. The applicant took her son to the Spauldings police station, AW and RL both denied that sexual intercourse had taken place between them. A medical examination of AW, found nothing to support the allegation that AW had recently engaged in sexual intercourse.

[3] The claimant alleges, nonetheless, that the principal insisted that her son be withdrawn from the school. On the 21st June 2010, a meeting was held by the principal at which the applicant and RL attended. The applicant admitted that she had instructed her son not to answer questions being posed by the principal concerning allegations of what had taken place whilst the students were at the house in Mandeville. The applicant was subsequently handed a letter of suspension of her son from the school.

[4] On the 24th June 2010, the claimant was invited to attend a meeting of the schools Board of Management; there was some dispute as to whether she was told that it was in respect of the allegations made against her son. She denied that she was so told by the principalôs secretary. The meeting was scheduled for the 28th June 2010 at 1:00 pm. The claimant states that she arrived for the meeting and she informed the secretary of her presence. She said she sat there ñtotally ignored until after 2:00pm ñwhen I left as I had to return to Court to fulfill my duties as a Probation Officer.ò The applicantôs account of her reception on arrival at the Board meeting diverged sharply from the principalôs secretaryôs account. For reasons I shall explain later, I preferred the testimony of the

secretary. The applicant states that she received, on the 7th July 2010, a registered letter dated the 29th July 2010, advising her as follows:

> *"As you are aware, the Knox College School Board held a hearing on Monday 28th instant into a matter alleging misconduct of your child. His right to appear with you was apparently waived. The Board found that the infraction was sufficiently grave to have detrimental effect on the discipline of the school and warrants his permanent exclusion.*
>
> *The principal has been directed to exclude permanently with immediate effect R L from attending Knox College and the Minister has been informed."*

[5] The principal states that he became aware of the allegations made against RL, on the 18th June 2010. He states he was informed by two of the female boarding students AW, and TB, that RL aided and abetted them in leaving the school with him. There was no disagreement that it is a rule of Knox College that boarders are not to leave the school except in the company of an adult in whose custody the boarder has been released. Also, there was no disagreement that the School Rules and disciplinary processes were communicated to both RL and his mother on the occasion of his admission as a student. The principal states that he was told by another girl, who was a member of the group, that they were taken to a house in Mandeville, where AW engaged in sexual intercourse with RL. The principal said he spoke to all the female students involved and had written reports from them. He said he felt duty bound, based on his understanding of the Child Care and Protection Act, to report the matter to the police. The principal said he advised the applicant that he wished to speak to her son and ask that he visit on the 21st June 2010, he said he informed the claimant that he had to report the matter to the Board of Management of the school.

[6] On the 21st June 2010, the applicant attended at the school in the company of her son. According to the principal, she inquired of him what he intended to do now that the police have said there is no criminal case against her son, RL. He indicated that there were serious allegations against RL, in respect of school

discipline. The principal conducted an interview with RL that same day, concerning the incident, RL had started to relate the incident when his mother intervened and ñdisallowedò him from answering any further questions. The interview ended at that point. The principal then issued a notice of suspension dated 21st June 2010, suspending RL, for a period of eight days. All the students involved were given notices of suspension.

[7] On the 21st June 2010, according to Mrs. Hermae Campbell, secretary to the principal, she called the applicant by telephone and invited her and her son RL, to the meeting of the Board. She states that the applicant attended without her son. Mrs. Campbell testified that, when the applicant arrived at the school, she was invited to have a seat, this was refused. Mrs. Campbell said the applicant appeared angry. She further testified that she then advised the Board of the applicantôs arrival, then communicated with the applicant that the Board would soon see her. The secretary said she left the claimant for ten minutes, on her return, the claimant had left. Later, on the 28th June 2010, the principal was informed by the Board that a decision had been taken to permanently exclude RL, of whom the Board had written reports of being engaged in sexual intercourse with AW, on the 16th June 2010. The principal states he did not participate in the Boardôs decision to permanently exclude RL from the school.

[8] Counsel for the applicant, by letter dated the 14th July 2010, lodged an appeal against the Boardôs decision to permanently exclude the applicantôs son. The appeal was made to the Minister of Education, as provided for by the Regulations. The appeal alleged that, on the 28th June 2010, Mrs. Lawrence arrived for the meeting before the appointed time and sat there until after 2:00 pm, but was totally ignored. Being a Probation Officer, who had to be in court, she left after 2:00 p.m. The appeal asserted, ñthat means that neither Mrs. Lawrence nor Master RL was given an opportunity to be heard by the Board.ò The Ministerôs ruling dated the 5th November 2011, noted that having heard counsel for both parties on the 5th and 6th May 2011, the appellants had not filed their written submissions by the agreed date of the 17th June 2011, nor anytime

after, despite a written reminder dated the 18th July 2011. However, the transcripts of the proceedings are clear that Mr. Golding had indicated that he had no further submission.

[9] On the 27th July 2010, an application for leave to apply for judicial review was filed. The applicant sought the following orders:

(1) Leave to apply for Judicial review for:

(a) An Order for Certiorari to quash the decision of the Board of Knox College made on the 29th June 2010 by the Board of Knox College and its principal to permanently exclude RL from Knox College.

(b) An Order of Mandamus directed to the 1st and 2nd Defendants /Respondents to reinstate RL as a student of Knox College.

The grounds on which such relief is sought are as follows:

(1) The 1st and 2nd defendants/respondents acted improperly, unlawfully and in breach of the rules of natural justice and Regulations 30 of the Education Code.

(2) The 1st and 2nd defendants/respondents did not act with procedural fairness in carrying out their duties.

(3) An appeal has been made to the 3rd defendant/respondent but he has not responded.

(4) There is no alternative form of redress available.

[10] An *ex parte* notice of application was filed on the 27th July 2011 for leave to apply for judicial review. The applicant stated she had appealed to the Minister of Education but had not obtained a response. On the 28th October 2011, the applicant filed an Amended Fixed Date Claim Form, in which she sought, *inter* alia, certiorari, to quash the decision of the Board of Knox College, made on the 28th June 2010. Mandamus, to compel the defendants to reinstate RL, a declaration that the decision of the Minister, and by extension the Board, is null and void. An order to quash the decision of the Minister of Education made on the 5th and 6th May 2011.

[11] The decision of the Minister was not made until the 5th November 2011, and the Minister on the 18th July 2011, some nine days before the ex parte notice was filed had written requesting the written submissions of the appellant/applicant, which was never forthcoming. Mr. Golding had, however, indicated he had no further submission. It was therefore premature and incorrect to state in the ex parte application filed on the 27th July 2011, that the Minister had made a decision on the 5th and 6th May 2011. It would be most unusual to have a decision made over a period of two days. The 5th and 6th May 2011, represent the days over which oral arguments were heard. The *ex parte* application therefore preceded the conclusion of the statutory right of appeal to the Minister.

Waiver of the opportunity to be heard

[12] The applicant contends a breach of natural justice, and Regulation 30 (4), which provides;

> *"At any hearing by the Board into the conduct of a student who has been suspended, the student and parent or guardian shall have the right to be present, and, if the student is aggrieved by a decision of the Board, he may appeal to the Minister."*

[13] Counsel for the defendants argued that the absence of a hearing was as a result of the deliberate actions of the applicant, who cannot now complain that there has been no hearing. Is there a breach of natural justice when there is no hearing, as a result of the action/default of the applicant? Can an applicant waive his right to a hearing, by his action that precludes the holding of a hearing? The defendants relied on the case of **Al-Mehdawi v Secretary of State for the Home Department [1990] 1A.C 876 HL**, where the House of Lords held:

> *". . . a litigant, who had been deprived of the opportunity of having his case heard because of the default of his own advisers to whom he had entrusted the conduct of his case, had no ground of complaint in law that he had been the victim of procedural impropriety or that natural justice had been denied him; that that principle applied equally to a case where the issue was one of public law where the decision taken was one of an administrative*

character as it did where the dispute raised issues of private law between citizens that accordingly in the circumstances the decision of the adjudicator affirming the deportation order should be restored."

[14] In **Robinson v R (1985) 32 WIR 330**, the accused, was charged with the capital offence of murder. The Privy Council, after recognizing the constitutional right of the accused to legal representation, enunciated the principle that the accused in a criminal trial may waive his right to legal representation. Their Lordshipsô Board upheld the decision of the trial judge, Parnel, J., to proceed with the trial, where the accused had not taken steps to ensure that his legal representatives were present at the trial. Some ten years later, Downer, JA, in the Court of Appeal in the case of **Berry v Director of Public Prosecutions (1995) 48 WIR 193**, quoted with approval the comments of Lord Roskill, at page 338 of the judgment:

"In the present case, the absence of legal representation was due not only to the conduct of the counsel but to the failure of the appellant, after his decision not to seek legal aid, to ensure that those by whom he wished to be represented were put in funds in a reasonable time before the trial or, if such funds were not forthcoming, to apply in advance for legal aid. If the defendant faced with a trial for murder (of the date of which the appellant had had ample notice) does not take reasonable steps to ensure that he is represented at the trial, whether on legal aid or otherwise, he cannot reasonably claim that the lack of legal representation resulted from a deprivation of his constitutional rights."

[15] In **Berry's** case, Downer J, was of the view that the decision in **Robinson** (supra) constituted a waiver of the defendantôs constitutional rights, although it was not necessary to found his decision on that principle, Downer JA, thought it pertinent whether the counsel who had drafted the appeal and argued the case, can complain of apparent bias, without having raised the objection before the commencement of the trial. Before this court, Counsel for the applicant did not question whether the applicant could waive her rights by a failure to wait for the hearing. The thrust of Mr. Goldingôs submissions was that by attending, the applicant demonstrated she was willing to participate in the hearing, but the

defendants, by their conduct, frustrated her participation, by totally ignoring her. See also the comments of their Lordships Board in the Privy Council, in **Herbert Bell v Director of Public Prosecutions** (1985) UKPC 13, on the need for an applicant to assert his right as a factor in determining whether, that applicant has been deprived of those rights. The principle to be extracted from these cases is that rights, including public law rights, even constitutionally guaranteed, may be lost to the person entitled to them, if he sleeps on those rights, or through inaction fail to prosecute those rights or deliberately elects not to assert or participate in the exercise of those rights.

[16] Was the applicant totally ignored on the occasion of her visit to the Board of Management meeting, as she claimed? Or did she by absenting herself fail to assert those rights, of which she now complains she has been deprived. Mrs. Campbell, secretary to the Board, in her witness statement dated the 13th January 2011, stated at paragraph 8, ñAfter Mrs. Lawrence arrived at the office; I informed the members of the Board of Management that she was present but that Master RL was not with her. They informed me that they would call her shortly and I communicated same to her.ò The minutes of the meeting recorded that the parents of both AW and RL attended without their children and both were not available when summoned by the Board. The inference being they were told of both the arrival and departure of the persons. The claimantôs first affidavit, filed on the same day as the Fixed Date Claim Form, alleged, that on attendance of the Board Meeting, ñI arrived before the scheduled time of 1:00 pm, I informed the secretary of my presence, I sat there ***totally ignored*** until after 2:00 pm, when I left. This allegation of being ñtotally ignoredò is repeated as a ground of appeal in her letter of appeal to the Minister of Education. Mrs. Campbellôs affidavit indicates that she informed the claimant that the Board would see her shortly, and she was invited to sit, an invitation which the applicant denied. However, in cross-examination, the claimant admitted that the principalôs secretary spoke to her twice. That she was told to wait, and they would let her know when they were ready for her. She said when she was leaving, ñ*it was going on to two,"* which is in contradiction to her earlier statement in her first

affidavit that she ñsat there *totally ignored until after 2:00 p.m*. In cross-examination, she said she had understood from what the secretary communicated to her from the Board that ñshe (Mrs. Campbell) would let me know when I would be called in the meeting.ò After waiting for less than an hour on her testimony, she left. It is clear that based on her sworn testimony, it was grossly incorrect to say she was ñtotally ignored.òI find that she was told to wait, but elected to leave.

[17] It would not be unreasonable to expect that having been given adequate notice of the meeting; she would make the necessary arrangements with her employers to facilitate her proper attendance. Other parents, along with their children were in attendance that day. In any court in this country, witnesses are summoned for a particular time, but the vagaries of the courtroom may well make it neigh impossible to give an accurate forecast of when any particular person whether witness, attorney, or the person who is to answer, will be required in the hearing. The applicant as someone who admittedly is not a stranger to court proceedings, would be aware, in the system of justice that maintains in this country, witnesses are required to wait until they are called. There is no assigned officer to advise a witness when they are likely to be called. In order to obtain such information, the waiting witness would have to launch an inquiry on her own volition. There was nothing exceptional in the circumstances of the Board meeting held on the 28th July 2010, which the applicant attended. I find that the applicant was spoken to and she understood she would be called in due course, in the circumstances, by leaving, she waived her right to a hearing, and having done so, the authorities are settled that she cannot complain that her natural justice rights have been breached.

Ex Parte application requires full and frank disclosure.

[18] The claimantôs statement that she was ñtotally ignored,òin her affidavit in support of her application, I found to be less than frank and that there was not the requisite full and frank disclosure of all material facts within the knowledge of the applicant. It was material that she had been spoken to and told ñthat the

secretary would let her know when she would be called into the meeting.ò The essence of the challenge to the Boardôs decision was the infringement of the rules of natural justice for a failure to provide the claimant with a fair hearing, or any hearing at all. The defendants were contending that the claimant had been deprived of the opportunity of a hearing through her own default. Whether the claimant had been ñtotally ignoredò on her attendance or had been told to wait until she was summoned was a material fact, in determining whether the applicant had waived her right to a hearing. It was a matter which was material for the consideration of the court, whatever view the court may make of it.

[19] In **Rex v General Income Tax Commissioners for Kensington; Ex parte Polignac,** Vol 116 [1917] LTR 136, a princess obtained a rule nisi directed at the tax commissioners prohibiting them from proceeding upon an assessment that she was a resident in the United Kingdom. The Commissioners had identified a certain house as being her own, or in which she had a lease, and in which she, for a period of time, actually resided. The lady had alleged, in an affidavit in support of her application, that she spent time with friends at the identified house, which was that of her brother. If that were so, she was not resident, and could not be properly assessed. The trial court found her statement as to the ownership of the house, untrue. Lord Reading, C.J, at pg, 136:

> *"I think it is desirable to state that when this court comes to the conclusion that on an application ex parte made for a rule nisi, or for any grant of process of this court, the affidavit placed before it was not candid and did not fairly state the facts, but stated them in such a way as to mislead the court as to the true facts, this court ought, for its own protection and in order to prevent its process being abused in any way to refuse to proceed any further with the examination of the application made by the person who had put forward. It's a jurisdiction inherent in the court to protect itself."*

Lord Reading cautions that there is a requirement of careful consideration before the court comes to such a conclusion. I heed that caution. I think it relevant that at no time before the claimant took the witness box at the trial, was there any mention of any conversation with the secretary, that was not initiated by the

applicant. Such an admission was material, and not true. Where the court finds that full and frank disclosure has been lacking, the court will refuse to consider the matter on the merits. See the Court of Appeal decision, **in ex parte Polignac**, where the decision of the learned Chief Justice was upheld, Warmington LJ, says at page 142:

> *"It is perfectly well settled that a person who makes an ex parte application to the court – that is to say – in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it."*

[20] I find that the applicant did not make full and frank disclosure on the affidavits presented in support of the ex parte application and the appeal. It is noteworthy that although the secretary did deny the applicantôs assertions, the applicant has never responded to those denials. The application fails on this finding. However, both counsel had strong opposing views on what are the essentials for natural justice as required by Regulation 30 (4); for that reason, I shall examine the regulation.

The requirements of natural justice, for the purposes of Regulations 30 (4)

[21] What constitutes a fair hearing for the purposes of Regulation 30 (4) of the Education Regulations, 1980? Counsel for the applicant attempted to elicit through cross-examination of the Chairman of the Board, the principal and his secretary, the procedures adopted by the Board at the hearing on the 28th July 2010, and from that, launched his argument that the rules of natural justice had been breached. Mr. Golding submitted that the proceedings were quasi-judicial, and there was a requirement for adequate notice to be given. That the applicant should be provided with all the evidence to be taken into account and that the tribunal should allow the questioning of witnesses. Mr. Golding further submitted

that the notice should be in writing. He charged that the allegation that RL was involved in ñrisky businessòwas too vague.

[22] The authorities are settled that the requirements of natural justice are contextual in nature, they rests heavily on the regulatory framework and the factual backdrop that gives rise to the application. Would fairness be assisted by presenting the parties with all of the written statements, large parts of which may not be relevant to the matter at hand? Administrative bodies whose decisions may affect adversely the rights of other persons are presumed to act fairly by persons who are to be affected by their decisions. See **R v Commissioner for Racial Equality, 3 ex.p. Hillingdon London Borough Council** [1982] AC779 per Lord Diplock at page 787F). The applicant would have been bound by the regulatory scheme for public education institutions, particularly Regulation 30 (4) and could not insist in the adoption of any particular procedure other than what the Regulation expressly or by necessary implication requires, (see **Ceylon University v Fernando** [1960] 1 WLR 223).

[23] The Education Regulations, 30 deal with procedure to be followed on the suspension of a student of a public educational institution. In respect of the institution, Knox College, the students range in age from 11 years to 18 years. The school is co-educational, and consists of day and boarding students. The school has its guidelines governing studentsôconduct, which are brought to the attention of the parents and students at the commencement of his term at the institution. Regulation 30 (4), enshrines the right of the parent and student to be present at a hearing by the Board. The regulation is silent on the requirement for notice, the questioning of witnesses, and the provision of all the evidence on which the Board may rely. Fairness in these circumstances must take into account the age of persons who are likely to attend upon it, the fact that the Board comprises representatives of all the sectors in the public educational institution. That representatives of both the Parents Teachers Association and Student Council, are members of the Board. It must also recognize that an appeal lies from the Board to the Minister of Education, who is empowered in the

circumstance, where a childôs behaviour is reported as abnormal, to take steps to ensure that specialist attention and treatment is obtained for the child. In **Board of Education v Rice** [1911] AC179 at p.182, Lord Loreburn:

> *"They must act in good faith and fairly listen to both sides. For that is the duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."*

I respectfully adopt those views as being relevant for decisions taken by Board of Management, particularly pursuant to Regulation 30 (4).

[24] The allegations in this case concerns allegations of students engaging in sexual intercourse, boarders exiting the campus without permission in clear breach of the schools rules and travelling by public transport to the home of a relative of the applicantôs son. Would fairness be enhanced if questions were permitted of a female student by the male with whom she is alleged to have been engaged in sexual activity? In ***Doody v Secretary of State for the Home Department*** [1994] 1 AC 531, Lord Mustil oft-quoted comments illustrate the importance of the context in which the decision was taken, at p.560 of the judgment he says:

> *"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name to, or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (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. (4) An essential feature of the context is the statute which creates the discretion, as regards both its*

language and the shape of the legal and administrative system within which the decision is taken. (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. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the ***gist of the case*** *which he has to answer*.ò

[25] **Doody** was quoted with approval, in **Ali v Belfast Health Social Care Trust,** [2008] NIQB 143 where the plaintiff, a consultant cardiac surgeon, had charges of misconduct brought against him by his employer, the defendant. He sought to have legal representation of his choice at his impending disciplinary hearing, sought to have details of the witnesses to be called to give evidence and to properly identify the allegations. The court rejected the plaintiffôs claim that he is entitled to representation by a qualified practicing lawyer of his choice, to vindicate his common law right to a fair hearing, although his contract of employment gave him a right to have a companion with him, who may very well be an attorney. See the comments of Mc. Closky J, at paragraph 68 and at paragraph 69, inter alia:

"Domestic disciplinary proceedings in an employment context belong to a special category. They are not to be compared, or confused, with formal legal proceedings. They are not designed to be invested with the trappings and formalities of the latter. The golden rule which they must observe at every stage of the process is that of fairness. How this rule is duly observed will depend upon the individual context. Informality and flexibility, each of which is an intrinsically contextual value, are well equipped to ensure that the requirements of fairness are fully observed in any given case. In the present case, I have found that the plaintiff enjoys a contractual right to legal representation. However, the forum of domestic disciplinary proceedings is probably not well suited, in most cases, to intrusion by lawyers. . . . Lord Bridges' in ***Lloyd and Others v McMahon*** *[1987] 1 All ER 1118 at p. 1161 letter e."*

[26] The constitution of the board, the age and status of the participants, the nature of the matters before the Board, the intimate knowledge of the constitutions of the Board with the particular educational institution are important factors in assessing the context within which the decisions of the board are to be taken. The most severe sanction that the Board can apply to any student, permanent exclusion from the institution, has to be assessed against the background that, the student may on a confidential report being submitted on the circumstances of his exclusion, be admitted to another public educational institution. (See Regulation 30 (5)). The proceedings are not to be confused with formal legal proceedings. The context in which they operate does not lend itself to the trappings and procedures of the more formalized procedures. Fairness is not likely to be enhanced by a requirement for the provision of all the statements collected from ñwitnesses.ò There is a need for the students to be aware of what the allegations against them are, and to be told the ñgistòof those allegations. The application is dismissed costs to the defendant to be agreed or taxed.