JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 72/2000

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN: **OWEN VHANDEL** **APPELLANT**

A N D **THE BOARD OF MANAGEMENT GUYS HILL HIGH SCHOOL** **RESPONDENT**

Owen Vhandel in person

Nicole Foster-Pusey, Assistant Attorney-General and Cheryl Lewis, Crown Counsel for the respondent Instructed by the Director of State Proceedings

January 31, February 1,April 4, and June 7, 2001

DOWNER, J.A.

Mr. Vhandel, a trained teacher , he being a graduate of Mico Teachers College, moves this court to set aside the order made by Harris J. refusing his application for certiorari and mandamus in the Supreme Court. Mr. Vhandel formerly taught at Rusea's High, Garvey Maceo Comprehensive, Vere Technical High and Immaculate Conception High School.

The order of the learned judge reads:

> "**UPON** THE originating Notice of Motion dated 13th day of January, 2000 coming on for hearing this day and after hearing Mr. Owen Vhandel appearing in person and Mrs. Cheryl Lewis and Mrs. Susan Reid-Jones, Attorneys-at-Law, instructed by the Director of State Proceedings, Attorney-at-Law for the Respondent, **IT IS HEREBY ORDERED** that:-

1. The Motion be dismissed."

Her Ladyship's reasons are set out succinctly and were as follows:

> "The employment of a teacher who holds temporary appointment may be terminated by one month's notice given by the board with reasons for such notice stated.
>
> In your case your appointment was temporary and by letter dated 22nd March, 1999 under the hand of the Chairman of the Board you were given the requisite notice terminating your employment, the letter of 15th March, 1999 having been withdrawn.
>
> A statement contained in the letter of the 22nd March, 1999 clearly shows that a reason was given for the termination of your employment. There is nothing to show any illegality or impropriety on the part of the School Board.
>
> The motion is dismissed."

Mr. Vhandel has sought to challenge this Order on appeal. In addition to her reasons the notes of evidence were adduced. They will be referred to later. Of special importance was the pertinent exchange between the appellant and the bench in the Court below which will be referred to later.

A good starting point of an inquiry into the relevant facts of this case is the letter dated 22nd March 1999, from the Board of Management of Guy's Hill High School (the "Board"). It reads thus:

> "Mr. Owen Vhandell
> Guy's Hill High School
> Guy's Hill P.O.
> ST. CATHERINE
>
> Dear Mr. Vhandell
>
> The Board of Governors wishes to withdraw the letter sent to you dated March 19, 1999.

> Please be advised however, that because of your continuous non-performance and other matters that the Principal and the general Administration of the school have discussed with you on several occasions – the Board is left with no option but to terminate your temporary appointment effective April 30, 1999.
>
> You will receive April's salary at the Ministry of Education, National Heroes Circle, Kingston. Please note here however, that you are not expected to perform any further duties at this school.
>
> Yours truly
>
> Clive Mason
> Chairman
>
> c.c. Ministry of Education"

This is the letter which it is contended ought to be quashed.

Prior to that, seven days before, the Principal wrote a long letter dated March 15, 1999 to Mr. Vhandell (the "appellant") listing his misdemeanours There are eleven such instances. The letter began thus:

> "Dear Mr. Vhandell
>
> Since you joined the staff in October 1998, it has been an uphill task in re-tooling and re-orienting you to operate orderly and effectively at the school.
>
> You experienced serious difficulties in performing within the boundaries of the organization and in associating peacefully and professionally with your colleagues and administration. You also found it difficult if not impossible to teach your classes without telling all sorts of rude sex jokes.
>
> Please be reminded of the catalogue of events leading up to and including your outburst and calumnious attack on me in the office in front of Teachers, parents and Students on the ... 11th of March 1999.

Then these eleven incidents are particularized and I will give one and eleven as examples at this stage:

> 1. November 4, 1998 you had an altercation with Mrs. Hamilton Head of English Department, and it was subsequently reported to my office that you were most disrespectful and rude to her. The Acting Vice-Principal and I met with you and discussed the expectations of the school community and the level of professionalism we expect from you. You did not recant.
>
> ...
>
> 11. On March 11, 1999 the Vice-principal brought me a copy of a letter that you have been circulating, seeking parental consent for a trip to Kingston scheduled for that day. I advised you to withdraw the letter and also not to remove the students off campus. By then, a number of students were milling expectantly at the front of the school. It is during this time that you exploded before the Guidance Counselor, Parents, Teachers and students in a barrage of negatives traducing me in a most disgraceful manner. You also repeated several times "I am not an easy man, you don't know me".
>
> Please be informed that this behaviour cannot be allowed to continue.
>
> In closing please be reminded that your report of the student who suffered the broken leg because of your indiscretion and your further attempt in covering it up is not yet in this office. Please act speedily as the student's parents are extremely angry at your carelessness and awaiting our investigation."

There was a meeting of the Board of Governors on March 17, 1999, and the minutes are of importance. The caption reads:

> "MINUTES OF MEETING OF GUY'S HILL HIGH SCHOOL BOARD OF GOVERNORS CONVENED ON MARCH 17, 1999 IN THE HOME ECONOMICS CENTRE COMMENCING AT 3:50 P.M.
>
> Present were: Chairman - Clive Mason
> Principal - Timothy Bailey

Admin.Staff rep.	-	Sylviana Garriques
Ancillary Staff rep.	-	Oswald McCormack
Student Council rep.	-	Hubert Lushington
Board member	-	Herbert Gariques
	-	Lloyd M. Hay
P.T.A. rep.	-	Franklyn Brown
Education Officer	-	Valerie Clarke-Ellis
Secretary	-	Paulette A. Walker"

The relevant parts of the minutes read as follows:

> "Chairman's Welcome: The Chairman welcomed all members present. Special recognition was extended to Mrs. Ellis, who was attending from the Ministry of Education at Special request by the Board, in order to give expert advice on two special disciplinary matters."

Then comes the relevant section pertaining to the appellant:

> "Special Disciplinary Matters:
>
> 1. Mr. Owen Vhandel – teacher, temporary/acting
>
> 2. Mr. Ainsworth Forsythe – teacher
>
> a) The Principal gave an official report of the indiscipline of Mr. Vhandel. The matter was deliberated at length. As a consequence of Mr. Vhandel's non-performance and other matters, a unanimous decision was taken to dismiss with immediate effect and that he be advised to collect his April 1999 Salary in lieu of one month's notice at the Ministry of Education – Head Office.
>
> At this point – 4:25 p.m. the chairman on behalf of the Board thanked Mrs. Ellis for her assistance. She left the meeting. Mr. F. Brown also left."

As regard non-performance, item 2 of the letter of March 15, 1999 reads:

> "2. it was also brought out in the same meeting that you refused from handing in lesson plans even though they were requested of you repeatedly."

Then item 9 of the same letter reads:

> "9. On February, 1999 Miss J. Davis – Acting Head of English Department experienced a severe "tongue lashing" from you because of your refusal to follow departmental procedure. The matter of your inability and refusal to do acceptable lesson planning was also resurfaced. There is an on-going battle to get you to accept the authority of your Department and conform to basic school rules – e.g. not taking students off campus without permission from parents."

Three other charges made by the Principal in the letter of March 15, 1999, are being mentioned to show the seriousness of the allegations being made against the appellant which caused the strained relations between the Principal and staff on one hand and the appellant on the other:

> "4. On December 2, 1998 Mrs. M. Thomas – head of Art and Craft and Grade Seven Co-ordinator reported to me that she was verbally abused and humiliated by you. During the vituperations you referred to her as "wrenk" and as a "gal". You did this because she spoke to you while you were removing books from the library without authority or documentation. Please note that it was after school when the library was being cleaned when you entered and surreptitiously removed these books. In our meeting on this matter you were non-apologetic and said that it was Mrs. Thomas who provoked you and said that you were not a thief and you were going to return the books. You also said that because you were new all the Senior Teachers were picking on you. I allayed this fear and offered further help on your professional development.
>
> 5. On December 9, 1998 you orchestrated an outburst in the staff room hurling abuses at Mr. C. Stewart – Head of the Social Studies department and accused him of being incompetent and inept. The entire staff was hurt because of your insult and lack of respect

shown to a senior member of our organization. On another occasion there was an altercation with Mr. H. Garriques past teacher, now Vice-Chairman of the Board in which you openly and repeatedly referred to him as an "ass-hole." In a subsequent meeting on this matter you were non-repentant and saw nothing wrong with the use of the curse word 'as there is no other adjective you can find to describe some people.' I warned you of your behaviour and counseled you accordingly.

...

8. On February 4, 1999, I spoke to you in my office regarding a telephone call from the mother of one of your ten (10) grade female students. The mother complained that she did not like the way you conducted yourself while you were teaching her daughter. She further reported that you told the class that you 'were not looking any of the girls' and that you were not afraid of 'draping up any 'f'ing gal'. You further went on to identify a particular student and said 'look at her she is a big woman, she has a baby and she has respect for me.' Please note that the latter point is of serious breach of confidentiality as whenever our school, through the Guidance Department and the Women's Centre accommodate a teenage mother it is done in strict confidence involving only the Guidance counselor, Principal and sometimes the Grade Co-ordinator. You breached that trust.

In our meeting you agreed making that statement but you felt that the girl's motherhood was public knowledge in the class, therefore your action was quite in order. I disagreed and offered you for further Guidance."

Two other instances are sufficient to show the range of complaints which were made against the appellant:

"3. Towards the end of the month – November 26, 1998 the Acting Vice-Principal informed me that you were operating private evening

classes unknown to your Head of Department or general administration of the school. Again, we met with you and the Acting Vice-Principal discussed at length the proper course of action that you should have followed. In the meeting you were annoyed and said that the matter was petty. I insisted though that you respect and follow the line of command.

...

6. On January 22, 1999 the Head of Physical Education Department brought me a copy of a letter that you have been circulating requesting a number of boys to bring Five to Eight Hundred Dollars to purchase football gears. You wrote that the letter came from the school yet no one in authority here knew of it. In our meeting on this matter I advised that the letter be withdrawn, the cash refunded and I warned you of this practice."

The following letter was sent to the Chairman of the Board of Governors.

It reads thus:

"March 15, 1999

Mr. Clive A. Mason
Chairman
Guy's Hill High School
Board of Governors
Guy's Hill P.O.
ST. CATHERINE

Dear Sir,

Kindly look at enclosed addressed to Mr. O. Vhandell.

I apologize for the length but it still has not fully covered his conduct at school.

Please be informed also that there is need for an immediate action.

Yours respectfully

T. Bailey – Mr.
Principal"

This appellant has exhibited a letter addressed to the Board of Governors dated February 19, 1999, where he made serious criticisms of the Principal's conduct regarding the Schools Challenge Quiz Competition. He also exhibited an undated letter he sent to the Secretary and President of the Past Parent Teachers Association. It is sufficient to cite only the closing paragraph of this letter.

> "Sirs/Mesdames, these complaints are but a part of a litany of grouses against the shoddy governance of the present principal; such grouses having been persistently voiced by staff, students, parents and the community of Guys Hill.
>
> Do investigate."

The grounds of Appeal

It should be pointed out that the appellant dispensed with the services of an able counsel, Mr. Leroy Equiano from the Kingston Legal Aid Clinic and chose to present his case in person. This Court has always been aware of its duty in the interests of justice to assist an unrepresented appellant. Similarly, counsel who appeared from the Attorney-General's chambers were also aware of their duty to point out authorities which may be of assistance to the Court although contrary to their submissions. In response to the directions of this Court, they have prepared an additional record and further secured all the documents and statutory instruments which the appellant rightly sought to rely on so that his case could be fully presented. The conduct of counsel for the Crown was exemplary.

It must not be thought that the appellant was accorded any special favours. He was entitled to apply for discovery of documents, to administer

interrogatories and to cross-examine in interlocutory proceedings pursuant to Sec. 564H(1) of the amendment to the Civil Procedure Code Law (the "Code") amended by the Judicature (Civil Procedure Code) (Amendment) Judicial Rules 1998, made pursuant to the Judicature (Rules of Court) Act. See Proclamations Rules and Regulations, **The Jamaica Gazette Supplement** dated Wednesday, August 5, 1998. This amendment brought into play Sections 273 to 292 and 405 of the Code dealing with interlocutory proceedings and they are now relevant to proceedings by way of Judicial Review.

The appellant presented his case with skill, although not being a lawyer. He however, accorded the Court below and this Court with somewhat wider powers than we had when exercising judicial review. He assumed that we could deal with the merits of his case, when in fact we were only empowered to decide whether the procedures which led to his dismissal and punishment were in accordance with the law, and the Constitution.

It is against this background that it is appropriate to cite Lord Diplock's formulation **in Council of Civil Service Unions v Minister of Civil Service** 1983 A.C. 374 at 410-411. It runs thus:

> "By illegality ... I mean the decision-maker must understand correctly the law that regulates his decision making power and give effect to it ... . By irrationality I mean what can now be succintly referred to as 'Wednesbury unreasonableness.' It applies to a decision which is so outrageous in its defiances of logic or 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 as 'procedural impropriety' rather than 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 level covers also failure by an administrative tribunal to observe procedural rules laid down by legislative instrument by which its jurisdiction is conferred even where such failure does not include any denial of natural justice."

This notable statement can be regarded as a gloss on Chapter I Section 1(9) of the Constitution. Lord Diplock also envisaged that proportionality might become one of the features of judicial review and his judgment on this issue has been correct.

Six grounds of complaint are to be inferred from the appellant's presentation. They are as follows:

(I) That the letter of dismissal was a breach of the Education Regulations 1980 (The "Regulations")

(II) That he was denied a hearing by the Board which was mandatory either at common law or as a necessary implication from the words of regulation 54(1)(a)

(III) That the Principal as his accuser was present and participated in the deliberations of the Board when he was dismissed contrary to the intendment of the Regulations . Also present was Mr. Herbert Garriques who it seems was a complainant according to item 3 in the particulars of complaint in the letter of 15th March.

(IV) That the learned judge below did not have the minutes of the Board which recorded the proceedings which led to his dismissal.

(V) That the reasons given in his letter were not in accordance with law.

(VI) Even if the reasons were issued by a Board properly constituted, on the basis of **ex parte Hook** [1976] 1 W.L.R. 1052 the punishment of dismissal could be challenged on the ground of proportionality .

Here is how the appellant stated his complaint in this Court

> "AND TAKE FURTHER NOTICE THAT GROUNDS OF APPEAL ARE:
>
> i) That the learned judge was unable to be given proper opportunity and occasion to fully hear the application as documentary evidence essential to the applicant's affidavit was withheld and prevented by the respondent, the Board of Management of Guys Hill High School."

Then in the Court below his complaint so far as is relevant reads:

> "That the Board of Management of the Guys Hill High School acted without fairness and, ultra vires, in breach of natural justice
>
> That Codal Regulations of the Education Act were not given due regard and even breached.
>
> That the Board had repeatedly acted underhandedly and in breach of Section 20 etc. of the Constitution of Jamaica."

Before considering these issues it is necessary to set out the appellant's status in law. Here is the appellant's letter of appointment:

> "Mr. Owen Vhandel
> 45A Trinidad Road
> Waterhouse
> Kingston 11.
>
> Dear Mr. Vhandel
>
> I am pleased to inform you that the Board of Governors has favourably considered your application for the post of English Language/Literature in the above-named institution with effect as of October 1, 1998 at 8:00 a.m.
>
> Please reply immediately confirming your acceptance.
>
> Yours truly

Timothy Bailey
.....
Principal

N.B. This is a temporary position (acting)"

Be it noted that no period is specified as to when the temporary appointment would be terminated as Paragraph 3(2) of Schedule A (headed *"Temporary appointments")* requires. The exhibit, Confirmation of Teachers' Appointment, confirmed that the appellant's appointment was an "acting" one. Regulation 43(1) and (2) stipulates that:

> "43.-(1) The appointment of every teacher in a public educational institution shall be made by the Board of Management of that institution after consultation with the principal of the institution and shall be subject to confirmation by the Minister.
>
> (2) Every appointment shall be in accordance with one of the categories of teachers and one of the types of appointments stipulated in Schedule A."

The appellant complained that his was an acting appointment, not a temporary one and relied on Paragraph 4 in Schedule A of the Regulations (headed "Acting appointments"). The rules pertaining to Acting appointments read as follows:

> "4. Acting appointments
>
> (1) A Board of Management may make an acting appointment to replace a principal or a teacher who is on leave or on secondment or is for any other reason absent with approval for a specified period.
>
> (2) An acting appointment made in accordance with paragraph (1) shall not exceed three years unless the Board in any particular case otherwise recommends.

> (3) A principal or teacher who holds an acting appointment shall enjoy the privileges and benefits, except increments, for which he would be eligible if he were employed permanently in the post; and the period of such acting appointment shall be computed for the purposes of vacation and other leave, increment, pension, promotion, benefit and allowance which he would normally have received in his substantive post."

As the appellant did not then hold a substantive post his appointment however described was not then an acting one within the meaning of Schedule A, paragraph 4 (supra).

Turning to paragraph 3 in Schedule A it reads:

> "3. Temporary appointments.
> (1) A principal or a teacher may be appointed temporarily to the staff of a public educational institution -
> (a) If he does not have the qualification or experience to be offered appointment to that particular post on a permanent basis; or
> (b) to fill a vacancy for which there is no substantive holder;
>
> (2) A temporary appointment shall be for a specified period not exceeding three terms unless the Board of the institution at the end of that period has agreed to extend the period of such appointment.
>
> (3) Temporary appointments shall take effect on the day that the teacher assumes duty, but where a teacher is expected to assume duty on the first working day of a term, the appointment shall take effect at the beginning of the term."

The records show that his appointment (and on confirmation) has been described as Temporary as well as an acting appointment.

Other exhibits show that the reason for the appellant's appointment was that the holder of the permanent post, Maureen Gibson, was on study

leave for the period September 1998 to August 31st 2001. As Regulation 54 (1) will show nothing turns on the description temporary (acting) as regards the provision for dismissal. The key description in the appellant's case was that his appointment was temporary. However, let it be stated that although the letter of appointment described the position as temporary (acting) it is disclosed (see the exhibit) that the spaces of acting and temporary are ticked. The confirmation by the Ministry of Education, Youth and Culture, the appellant's paymaster however, reads as follows:

"6 TO BE COMPLETED BY TEACHER

I SUBSCRIBE TO THE STATEMENTS AT sections 1 to 4 and agree to accept appointment as proposed, provided it is sanctioned by the Ministry of Education, Youth and Culture.

Signature O. Vhandel Date 1/10/1981

7 TO BE COMPLETED BY PRINCIPAL AND CHAIRMAN OF SCHOOL BOARD

We hereby request the Ministry to confirm the appointment of Owen Vhandel details of whom are set out overleaf

Principal's Signature Date 12/10/98

Chairman's Signature Date 14/10/98

8. TO BE COMPLETED BY MINISTRY OF EDUCATION,YOUTH AND CULTURE

I hereby confirm the acting appointment of the above mentioned teacher in the post proposed at a salary of $247,207.

Signature..... Date 9/11/98

For Permanent Secretary"

This confirmation supports the appellant's contention that he held an acting appointment.

As to ground (1)

Regulation 54 of the 1980 Regulations reads:

> "54.-(1) Subject to paragraph (2), the employment of a teacher in a public educational institution may be terminated –
>
> (a) in the case of a teacher who holds a temporary, acting or provisional appointment, by one month's notice given by either the teacher or the Board and, where the employment is terminated by the Board, stating the reasons for the termination, or by a payment to the teacher of a sum equal to one month's salary in lieu of notice by the Board and such payment shall be accompanied by a statement by the Board of the reasons for the termination; and
>
> (b) in any other case by three month's notice given by either the teacher or the Board or by the payment to the teacher of a sum equal to three month's salary in lieu of notice by the Board.
>
> (2) Where the Board of any public educational institution intends to terminate the employment of any teacher in that institution other than a teacher employed on a provisional, temporary or acting basis for less than one year, the termination shall not have effect unless the procedure set out in regulations 56 to 59 are followed:"

It is clear that the Board opted for the alternative of 'by a payment to the teacher of a sum equal to one months salary in lieu of notice by the Board and such payment shall be accompanied by a statement by the Board of the reasons for the termination'. As a matter of form, the Board followed the law.

There was no breach in this respect if the Board which heard the complaints and dismissal had been properly constituted and had accorded him a hearing.

As to ground (11)

The Regulations have specific provisions for holding an enquiry for teachers other than those classified as provisional or acting, or temporary. To reiterate Regulation 54(2) reads:

> "(2) Where the Board of any public educational institution intends to terminate the employment of any teacher in that institution other than a teacher employed on a provisional, temporary or acting basis for less than one year, the termination shall not have effect unless the procedure set out in regulations 56 to 59 are followed." (Emphasis supplied)

So it may be if, the appellant must be reinstated, the provisions of Regulations 56, 59 and 85 which entail a full scale enquiry must be applied to him before dismissal on grounds of breach of discipline. His employment commenced October, 1998. He was improperly dismissed as from April 30, 1999. If he is reinstated he will be in continuous employment from October 1998 to June 2001 at least.

The detailed provision regulating the statutory enquiry are provided for in Regulations 57 to 62 and 85. These Regulations pertaining to the statutory enquiry do not apply to a temporary or acting teacher appointed for less than a year who can be dismissed with a month's salary together with reasons given by the Board. The fact that the statutory enquiry does not apply to the appellant as a temporary (acting) teacher employed for less than a year does not mean that the common law right to a hearing is excluded. Such a hearing

may be quite informal, for instance the appellant could be asked to comment in writing on the allegations made by the principal.

In fact, the wording of the Regulation implies that there is a right to a hearing. It obliges the Board to give reasons coupled with the payment of one month's salary or a month's notice. The necessary implication from the obligation to give reasons is that a hearing from both sides is mandatory. If this were not so, why is the delivery of reasons obligatory? The appellant, although 'a temporary (acting)'teacher holds an office recognized by statute and the principle of natural justice, is the essential ingredient of judicial review. Further, judicial review is enshrined in the Constitution Sec. 1(9) of Chapter 1 reads:

> "(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."

This provision in the Constitution brings into play Lord Diplock's classic summary of judicial review on procedural fairness referred to earlier. The Constitutional provision and the evolving principles of judicial review demonstrate the interplay between constitutional provisions and the common law.

On this aspect the appellant is right and he is entitled to redress. The redress is to quash the decision of the Board as it was null and void. Once there is this declaration the appellant's status has been altered significantly.

As to grounds (111) and (IV)

In this regard, the appellant made a powerful submission. Had he not dispensed with his lawyer, he would have realized that it would have been prudent to join the Ministry of Education as a party to these proceedings. He made this complaint:

> "That the Board has not provided requested Minutes of Meeting, nor verify that its decision was taken upon vote as stipulated by the Code."

Further the appellant grasped the essentials of his case as can be seen from the following exchange which must be cited in full. Be it noted that the appellant raised it in his opening submission in this Court and also he made them in the Court below. This Court sought the assistance of counsel for the Crown to secure the minutes from the Ministry of Education and all the proceedings in the Court below relevant to the appeal. The minutes were like Pandora's box. When made available, the presence of the Principal and Herbert Garriques at the Board meeting became known. Here are the relevant parts of the notes of proceedings in the Court below.

> **"Miss Lewis objects:** We have been patient with Mr. Vhandel however he has gone way beyond his grounds as set out in his Statement. The dismissal of a teacher who is temporarily employed is governed By Regulation 54(1)(a).
>
> **Learned Judge:** Mr. Vhandel, look at Regulation 54 (1) it deals with the termination of employment of teachers by notice. Regulation 54(1) (a) tells how to deal with a teacher who holds a temporary appointment. The question is whether the Board failed to comply with Regulation 54(1) in relation to you. You got more than a

month's notice. The letter dated March 15, 1999 was withdrawn but in the letter dated March 22, 1999 they gave you enough reason.

Mr. Vhandel responds:

The reasons should be true not lies and what they have said is a provable lie example, non-performance which is not true.

Learned Judge: I can't go behind Regulation 54(1)(a). I am just doing a judicial review to see if the Board complied with the Regulations.

Mr. Vhandel responds:

The decision of the Board was it by a majority? No party at the dispute should be at the meeting. There was a breach because the Chairman and Vice Chairman were there.

Learned Judge: There is no evidence from you regarding the Board acting improperly.

Mr. Vhandel points out that in his Statement he said that the Code was breached.

Learned Judge: I'm sorry but I'll have to dismiss your motion.
Motion Dismissed."

Before Ms. Lewis objected, the following passages from the appellant's address to the learned judge below are worthy of note. The first reads:

"...The purpose of typing the letters was obviously to bring it to the attention of the Chairman. The board meeting was attended and participated in by parties to the dispute. The accused was never informed, notified or invited to the meeting. There were serious difficulties but no professional failings. This is why principals do management courses. I deny allegation of serious difficulties. Was it a specially convened meeting, the meeting on the March 17. There is no evidence it was scheduled. The meeting may be in response to letters."

The second reads:

> "These allegations, why were they not included in the letters of termination. The Board had made no reference to charges listed here. From the advent of employment the Applicant had gained the express appreciation of all but within a couple of weeks my chalkboard duster went missing about a month. I only had it once. No one admitted to taking my chalk board duster.
>
> The secretary to the Principal is the wife of the Chairman. She sought to malice me about the comment 'ass hole'."

We should point out that even before the recent amendment to the Judicature (Civil Procedure Code) Law of August 5, 1998, which provided for discovery of documents in Judicial Review Proceedings, the court on its own motion secured the production of documents vital to the outcome of a case.

In **Reg. v. Barnsley Council, Ex. parte Hook** [1976] 1 WLR 1052, the headnote reads:

> "...
>
> On the applicant's appeal, the court received further evidence, including the Barnsley Corporation Act 1969 and byelaws made under the Act which contained no express provisions about, inter alia, the determination or revocation of a stallholder's licence or the terms on which it was held. The court of its own motion inquires into the common law rights of the public in an ancient market and into the evidence, which showed that the market manager had been present throughout the two appeal proceedings: -
>
> HELD...".

This Court is empowered to ask for further evidence because the issue goes to jurisdiction.

Turning now to regulation 88 of the Regulations it reads in part:

> "88.-(1) Every Board of Management shall in each school year meet at least once in every term and at such other times as may be necessary for the transaction of business.
>
> (2) Meetings of the Board shall be held at such places as the Board may determine.
>
> (3) Subject to paragraph (4), prior notice of ordinary meeting shall be given not less than ten clear days before the date of the meeting.
>
> (4) Notice of special meeting shall be delivered by hand to each member of the Board or to his known address not less than forty-eight hours before the time arranged for the meeting.
>
> (5) Notice of all special meetings shall be given to every member and to every person whom the Board knows to be authorized by the Minister to represent him at such meetings.
>
> (6) The chairman of the Board shall preside at the meetings of the Board at which he is present; in the case of his temporary absence, the vice-chairman shall preside. If both chairman and vice-chairman are absent, the members present and voting and forming a quorum shall elect one from among their number to preside at the meeting."

Dates are important. The charges against Mr. Vhandel were forwarded to him in a letter dated 15th March 1999, and it was copied to the Chairman of the Board. The Board Meeting was held on 17th March, two days after the letter was forwarded to the appellant. There was no indication that this was a special meeting, so if the notices were sent out ten days or less before the meeting the issue of proceedings against the appellant was not likely to have been on the agenda.

The telling point made by the appellant below and repeated here is that his accuser, the Principal, attended the Board meeting and voted on this issue. This would be stigmatized at common law. Further, paragraphs (8), (9)and (10) of Regulation 88 are pertinent . They read as follows:

> "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.
>
> (10) The decisions of a Board shall be by a majority of votes of members present and voting and, in addition to an original vote, the chairman or person presiding at a meeting shall have a casting vote in any case in which the voting is equal."

Further paragraph(7)of this Regulation reads:

> "(7) The Minister may be represented at any meeting of a Board by such person or persons as he may authorize to represent him at such meeting and any such person or persons may take part in the proceedings of the Board at the meeting but shall not vote on any matter."

There is no evidence that Mrs. Ellis the representative of the Ministry voted but the minutes should have made it clear that she did not. She was entitled to be present. At the time of voting she should have withdrawn. The minutes made it clear that the decision was unanimous and having regard to the presence and participation in the deliberations and voting of the Principal, there was a breach of the above Regulations.

To demonstrate the scope of the Regulations to promote the good administration of the school and to protect members of staff, even temporary (acting) ones the following provisions of Regulation 88 are recited:

> "88(10) The decisions of a Board shall be by a majority of votes of members present and voting and, in addition to an original vote, the chairman or person presiding at a meeting shall have a casting vote in any case in which the voting is equal.
>
> (11) The minutes of the meetings of every Board shall be open to inspection by the Minister or by any person duly authorized by him for that purpose and shall be made available by the Board on the request of the Minister or such authorized person.
>
> (12) The Board shall keep in proper form the minutes of all meetings of the Board and its committees and of any hearing or inquiry conducted by or on behalf of the Board or of any committee of the Board.
>
> (13) A copy of the minutes of each meeting of the Board shall be sent to the Minister."

As regards the requirement at (13) of this Regulation had the appellant requested the minutes of the Minister or if counsel from the Chambers of the Attorney-General had supplied the minutes, this unfortunate situation may have been settled without recourse to proceedings in court. In any event, the learned judge below would certainly have considered this aspect of the case had the minutes been exhibited.

Yet another pertinent regulation must be cited. Regulation 89 in part reads:

> "89.-(1) The Board of Management is responsible to the Minister for the administration of the institution for which it has been appointed and in discharging its responsibilities the Board shall be responsible for-
>
> ...

> (e) appointing in consultation with the principal, the academic staff, the bursar, secretary-accountants and such other administrative and ancillary staff as are approved for the establishment of the institution; and such members of staff shall be paid such salary and other allowances as the Minister may approve and shall be eligible for such leave and other fringe benefits as may be determined by the Minister, and the appointment and termination of appointment of such members of staff shall be on such terms and conditions as may be approved by the Minister;
> ..."

And Regulation 89(4) reads:

> "(4) In the event of any irregularity in the operation of any educational institution, the Board of Management shall take such steps to correct the irregularity as it deems fit and shall in any case inform the Minister promptly of the irregularity."

The upshot of all this is that the participation of the Principal in the deliberations of the Board made its decision to terminate the appointment null and void. It is a somewhat similar situation in **R v Sussex Justices** [1924] 1 KB 256, at 259 where Lord Hewart made the celebrated statement "that it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

As to ground V

The gist of this ground is that the Board as constituted was not capable of giving valid reasons. In **MacFoy v. United Africa Co. Ltd.** [1961] 3 W.L.R. 1405 at 1409:

> "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."

This formulation is pertinent to any aspect of nullity. For instance, a Resident Magistrate who failed to sign an order for indictment would rend the subsequent trial a nullity. See **R v Monica Stewart** (1971) 17 W.I.R. 381. Also where a watch committee dismissed a Chief Constable without a hearing the dismissal was void. He had to go to the House of Lords for the correct decision. See **Ridge v Baldwin** [1964] A.C. 40. Similarly, a default judgment obtained against a defendant who was out of the jurisdiction and not served, was held to be null and void in **Frankson v. Longmore** unreported Court of Appeal judgment on SCCA Motion No. 13 of 1999 delivered 31st July 2000.

Also a judge at first instance who after an assessment of damages sets aside the verdict of a judge and jury on the basis that the default judgment on liability, which preceded it could still be set aside, is wrong as, the default judgment is merged with the assessment resulting in a final judgment. The order of the judge of first instance was null and void as the assessment determined the rights of the parties and could only be challenged on appeal. Additionally, the order was null and void because a retrial was ordered and that was prohibited by Sec. 42 of the Judicature Supreme Court Act which entrusts that issue to this Court. See **Broad v. Port Services Ltd.** (1986) 25 J.L.R. 275, followed in the minority decision in **Leymon Strachan v The Gleaner Co. Ltd.** (unreported) SCCA. 133 of 1999, delivered 6th April 2001. It should be noted that the same

court which made the void order could also set it aside. In **Chief Kofi v Barima Kwabena Seifah** [1958] 1 All E.R. 289 at 290, the Privy Council ruled as follows:

> "A court had inherent power to set aside a judgment which it had delivered without jurisdiction. LORD GREENE, M.R., in **Craig v. Kanssen** ([1943] 1 All E.R. 108 at p. 113) after referring to several decisions, had said:
>
> > 'Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary'.
>
> Their Lordships were of the same opinion. Assuming that the judge had no power on June 29, 1949, to review his judgment of May 10, 1949, he nevertheless had power to declare it a nullity and proceed to give a fresh judgment. This, in fact, he had done, and the only criticism of the proceedings of June 29 that could be made was that, on a question of procedure, he attributed the authority to do the thing he did to a source from which it did not flow. But, although the source named was, on the assumption made, incorrect, he undoubetedly had had power to do the thing he had done. No other error could be said to have been committed. Such an error did not, in their Lordships' opinion, vitiate the act done. It followed that the judgment of June 29, 1949, was not a nullity."

The importance of this passage is that this Court is empowered to set aside its own judgment if on the face of it the judgment complained of is null and void. Where the void order emanates from the highest Court there is bound to be recourse to that Court. See **R v. Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet** (No. 3) [2000] 1 A.C. 147 or **Times Newspaper** 25 March 1999.

The record of appeal reveals that the appellant's original lawyers from the Kingston Legal Aid Clinic wrote to the Board on May 10, 1999, and September 20th of the same year, seeking a reconsideration of the matter. Those pleas were unsuccessful.

It is necessary to cite the previous passage from the **Chief Kofi case** as there are still doubts in this jurisdiction that a tribunal of first instance or this Court is empowered to set aside an order which on the face of it is a nullity. That an order being a nullity can be raised at any stage of the proceedings, see **Chief Kwame Asante v Chief Kwame Tawia** 1949 Weekly Notes 40 at 41 where Lord Simonds said:

> "If it appeared to an appellate court that an order against which an appeal was brought had been made without jurisdiction it could never be too late to admit and give effect to the pleas that the order was a nullity."

Equally, the Court can and should deal with the issue on its own motion. See **Norwich Corporation v Norwich Electric Tramways Ltd.** [1906] 2 K.B. 119 and **Westminister Bank Ltd. v. Edwards** [1942]A.C. 529, as well as **Benson v. Northern Ireland Road Transport Board** [1942] A.C. 520.

All these authorities with respect to the **Strachan case** (supra) are cited against the background of Section 42 of the Judicature (Supreme Court) Act which prohibits the Supreme Court from ordering new trials, and in combination with Sec. 9 of the Judicature (Appellate Jurisdiction) Act and Rule 19 of the Court of Appeal Rules, 1962 which vest the Court of Appeal with the exclusive jurisdiction to order new trials.

As to VI

The issue of proportionality will be addressed in the conclusion. Here is how it was dealt with by Lord Denning, in **Reg. v. Barnsley Council Ex parte Hook** (supra). At 1057:

> "But when the committee discussed the case and came to their decision, the market manager was there all the time. His presence at all their deliberations is enough to vitiate the proceedings. It is contrary to natural justice that one who is in the position of a prosecutor should be present at the deliberations of the adjudicating committee. That is shown by **Reg.. v.London County Council, Ex parte Akkersdyk**, [1892] 1 Q.B. 190 and **Cooper v. Wilson** [1937] 2 K.B. 309.
>
> But there is one further matter: and that is that the punishment was too severe. It appears that there had been other cases where men had urinated in a side street near the market and no such punishment had been inflicted."

Conclusion

The Principal's letter to the accused copied to the Chairman of the Board makes out that Mr. Vhandel was an 'awkward customer'. That was not our concern in this Court, but it was for the Board properly constituted to have decided. And to decide now in the face of the appellant's reinstatement is a much more involved matter. As it is, the appellant has made a clear and compelling case that the Board of Management which dismissed him was not properly constituted, as the Principal, himself the accuser, was present and took part in the decision to dismiss him.

The decision to dismiss him was also invalid because the Board of Management gave him no opportunity to make representation on the charges in the letter. At least he should be asked to make written comments or better

that he be given an oral hearing. Even if he were thought to be guilty he ought to be given a chance to make a plea in mitigation. Natural justice has been described as 'fairplay in action' and it cannot be said that the appellant was treated fairly by the Board of management. By enshrining judicial review in Section 1(9) of the Constitution, Mr. Vhandel can insist that he be treated fairly and this Court will accord him redress.

In the light of the foregoing, **Lloyd v McMahon**[1987] 1 All E.R. 1118 at 1161is appropriate where Lord Bridge said:

> "My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

No reasons which flowed from the Board's decision could have any validity. The Board of Management should also have realised that its obligation to give reasons means that even if the reasons were validly issued, they can be challenged to ascertain if the punishment is proportionate to the breach of discipline. See **R v. Barnsley Council Ex parte Hook** (supra) where the disproportionate punishment of taking away the licence of a street trader was set aside. The trader had urinated in public and used offensive language to the

manager of the market because the market was closed, and so were the toilets.

So certiorari must be issued to quash the decision embodied in the letter of March 22nd, 1999. So the result is that the appellant is reinstated as from 22nd March 1999. To dismiss him might bring into play Regulation 54 (1)(b) which means three months' notice or three months' salary in lieu of notice, in addition to his salary and emoluments during the period of his wrongful dismissal. If the desire is to dismiss for breach of discipline then Regulations 56 to 59 might be applicable. It ought not to be necessary to issue mandamus to compel the School Board to do its duty in accordance with law regarding reinstatement of the appellant as declared by this Court. If however, the Board resists, liberty to apply is being provided, for this and for other reasons in the order proposed.

In the event, the order should be that the appeal is allowed. Certiorari is to be issued forthwith so as to quash the decision of 22nd March 1999, and there is liberty to apply. The appellant should have his costs both here and below. The Ministry of Education and Board of Management would be well advised to seek the guidance of the Law Officers of the Crown before they take the next step in this difficult matter.

HARRISON, J.A:

This is an appeal from the order of Mrs Hazel Harris, J. on 15th June 2000, dismissing the motion of the appellant Owen Vhandel, a trained school teacher, for orders of certiorari and mandamus to issue to the respondent Board of Management of the Guy's Hill High School, in respect of a letter from the respondent dismissing him from such employment.

The appellant was employed as a teacher " ... temporary ... acting," by the respondent on 1st October 1998, in place of a Miss/Mrs Marva Gobern, who had been granted study leave, vide letter of appointment dated 1st October 1998, which reads, inter alia:

> "I am pleased to inform you that the Board of Governors has favourably considered your application for the post of English Language/Literature in the above-named institution with effect as of October 1, 1998 at 8:00 a.m.
> Please reply immediately confirming your acceptance."

The form of "Confirmation of Teacher's Appointment" was signed by the appellant on 1st October 1998, and by the principal and chairman on 12th October 1998, and 14th October 1998, respectively, seeking confirmation by the Ministry of Education of the said appointment. The "acting appointment" was confirmed by the said Ministry on 9th November 1998.

A letter dated 9th March 2001, reiterating the terms of the said appointment subsequently sent by the principal to the Attorney General's Office, reads:

> "Mr. Owen Vhandel was employed in September 1998 to act in a temporary position.
>
> He worked for Miss Marva Gobern who is on Study Leave - September 1998 - August 31, 2001."

On the 15th of March 1999, the principal of the school sent a letter to the appellant copied to the Chairman of the Board of Governors and the Ministry, detailing a series of acts of alleged misconduct of the appellant as a teacher at the school over a period from 4th November 1998, to the 11th March 1999.

The Board met on 17th March 1999, and discussed the question of the appellant's conduct. By letter dated 19th March 1999, from the Chairman of the Board to the appellant, the latter's "acting tenure ..." was " ... hereby terminated."

By letter dated 22nd March 1999, to the appellant the said chairman purported to withdraw the letter "sent to you dated March 19 1999," which advised the appellant of the termination of "your temporary appointment effective April 30, 1999" and advised him that the reason for his dismissal was due to " ... your continuous non-performance and other matters ..."

The appellant sought to quash the latter decision. The ground of appeal filed by the appellant reads:

> "That the learned judge was unable to be given proper opportunity and occasion to fully hear the application as documentary evidence essential to the appellant's affidavit was withheld and prevented by the respondent, the Board of Management of Guy's Hill High School."

A copy of the minutes of the Board meeting on 17th March 1999, was made available to this Court. The said minutes were not before Mrs Justice Harris.

The appellant in an expansion of his ground, argued that the principal who filed the complaint against him was present at the hearing by the Board, that he was not given an opportunity to be present and to answer the charges and that the minutes of the 17th March 1999, were improperly not available to Mrs Justice Harris in the court below. In addition, he refuted the majority of the allegations in the said complaint.

Counsel for the respondent submitted that the appellant was properly dismissed by the Board and being a temporary, acting teacher, he was governed by regulation 54 (1)(a) and therefore was not entitled to a hearing as provided by regulations 56 to 59 made under the Education Act.

The Education Regulations, 1980, (the "Regulations") made under the provisions of section 43 of the Education Act governs, inter alia, the employment and dismissal of teachers in public educational institutions.

The appointment of a teacher is made by the Board of Management of the institution (regulation 43 (1)), and such appointment must stipulate the type of appointment as stated in Schedule A of the said Regulations. Paragraph 4 of Schedule A reads:

> **"4. Acting Appointments**
>
> **(1)** A Board of Management may make an acting appointment to replace a principal or a teacher who is on leave or on secondment or is for any other reason absent with approval for a specified period

> **(2)** An acting appointment made in accordance with paragraph (1) shall not exceed three years unless the Board in any particular case otherwise recommends.
>
> **(3)** A principal or teacher who holds an acting appointment shall enjoy the privileges and benefits, except increments, for which he would be eligible if he were employed permanently in the post; and the period of such acting appointment shall be computed for the purposes of vacation and other leave, increment, pension, promotion, benefit and allowance which he would normally have received in his substantive post."

A temporary appointment is also another type of appointment permissible under Schedule A.

The termination of employment of a teacher is dealt with in regulation 54. It reads:

> **"54 (1)** Subject to paragraph (2), the employment of a teacher in a public educational institution may be terminated -
>
> > **(a)** in the case of a teacher who holds a temporary acting or provisional appointment, by one month's notice given by either the teacher or the Board and, where the employment is terminated by the Board, stating the reasons for the termination, or by a payment to the teacher of a sum equal to one month's salary in lieu of notice by the Board and such payment shall be accompanied by a statement by the Board of the reasons for the termination." (Emphasis supplied)

The qualification to the procedure of dismissal, contemplated in sub-paragraph (1) of regulation 54 by the use of words "subject to ...", is stated in sub-paragraph (2).

It reads:

> **(2)** "Where the Board of any public educational institution intends to terminate the employment of any teacher in that institution other than a teacher employed on a provisional, temporary or acting basis for less than one year, the termination shall not have effect unless the procedure set out in regulations 56 to 59 are followed." (Emphasis added)

Regulations 56 to 59 deal with the procedure to be employed whenever a complaint is made in respect of the conduct of a teacher, namely, the complaint in writing to be referred to the personnel committee - (regulation 56, the composition of the said committee determined by regulation 85); the hearing of the complaint, if necessary, by the committee preceded by notification in writing to the teacher complained of, of the latter's right to be represented and be heard; report to the Board, which reports to the Minister and the teacher (regulation 57); the lapse of the complaint due to delay (regulation 58), and the duties of the Board if termination is contemplated (regulation 59).

As a necessary safeguard, the regulations specifically guard against any conflict of interest or any degree of lack of fairness. Regulation 88 (9) reads:

> "**(9)** Where there is 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."

The appellant complains, by way of judicial review, that he was unfairly treated by the Board, in that no proper disciplinary hearing was held, that his accuser, the principal participated in the deliberations of the Board and he the appellant was not heard in his defence.

The principles of natural justice are recognized by the common law as an entitlement of every citizen. Any tribunal or institution purporting to conduct disciplinary proceedings must do so acting judicially and not in breach of natural justice. Natural justice embraces, inter alia, the right to be heard in defence of a charge, as also a prohibition against an accuser being an adjudicator in the same cause. The right to be heard was recognized quite long ago, in the case of ***Cooper*** v ***Wandsworth Board of Works*** (1863) 14 CB (NS) 180 where the board of works demolished a house without notice to a builder, despite the fact that the latter had erected a building in breach of the clear prohibition of a statute. Willes, J. agreeing with Erle, CJ. and Byles, J. said:

> " ... a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds and that the rule is of universal application, and founded on the plainest principles of justice."

This doctrine was re-inforced in ***Ridge*** v ***Baldwin*** [1964] AC 40, where the House of Lords, by a majority confirmed the principles stated in ***Cooper*** v ***Wandsworth*** (supra). Lord Reid in his speech, gave recognition to the universal right to a fair hearing, whether the case concerned property or tenure of office.

to get you to accept the authority of your Department and conform to basic school rules - eg. Not taking students off campus without permission from parents.

(10) On March 9, 1999 you took four girls from school to Spanish Town again without the knowledge of the school. In a meeting with the Vice - principal and I on the 10th of March, 1999 you were very abusive and rude and maintained firmly that I knew of your plans to take the students away.

(11) On March 11, 1999 the Vice-principal brought me a copy of a letter that you have been circulating, seeking parental consent for a trip to Kingston scheduled for that same day. I advised you to withdraw the letter and also not to remove the students off campus. By then, a number of students were milling expectantly at the front of the school. It is during this time that you exploded before the Guidance Counsellor, Parents, Teachers and students in a barrage of negatives, traducing me in a most disgraceful manner. You also repeated several times " I am not an easy man, you don't know me".

Please be informed that this behaviour cannot be allowed to continue.

In closing please be reminded that your report of the student who suffered the broken leg because of your indiscretion and your further attempt in covering it up is not yet in this office. Please act speedily as the student's parents are extremely angry at your carelessness and awaiting our investigation.

Yours truly

T. Bailey
Principal

c.c. The Chairman
The Ministry

The Board at its scheduled meeting on the 17th March 1999 discussed the matter and decided that the appellant should be released from the temporary appointment. As a result, the appellant was informed by letter dated March 22, 1999. For clarity this letter is stated as follows:

> "Dear Mr. Vhandell
>
> The Board of Governors wishes to withdraw the letter sent to you dated March 19, 1999.
>
> Please be advised however, that because of your continuous non-performance and other matters that the Principal and the general administration of the school have discussed with you on several occasions – the Board is left with no option but to terminate your temporary appointment effective April 30, 1999.
>
> You will receive April's salary at the Ministry of Education at National Heroes Circle, Kingston. Please note here however, that you are not expected to perform any further duties at this school.
>
> Yours truly
>
> Chairman
>
> c.c. Ministry of Education

The appellant then filed a Notice of Motion for certiorari and mandamus to the Supreme Court to quash the termination of his employment by the Board of Management of the Guys Hill High School. Mrs. Justice Harris, after hearing the application inter-partes on June 15, 2000, dismissed the Motion and refused to grant him leave. An appeal was however, lodged, on behalf of the appellant against the dismissal of the Motion.

The single ground of appeal is stated as under:

> "That the learned judge was unable to be given proper opportunity and occasion to fully hear the application as documentary evidence essential to the applicant's affidavit was withheld and prevented by the respondent party, the Board Management of Guys Hill High School".

At the hearing of this appeal, we had the benefit of the minutes of the board meeting at which the decision was taken to terminate the appellant's employment where they were not available in the trial below. We asked Ms. Lewis, Crown Counsel appearing for the respondent, to address us on whether the termination of employment was justified in law.

She submitted that the Chairman of the Board acted within the statutory framework of the relevant legislation and exercised the power which it had by terminating the employment of the temporary teacher. The Board gave one month's notice or pay in lieu thereof. The provisions laid down in section 56 to 59 of the Education Regulations do not apply to the appellant. Ms. Lewis therefore asked that the appeal be dismissed.

This court is concerned with the legality of the decision of the Board and not its merits.

The relevant provisions of the legislation and contractual arrangements are:

(1) Regulation 54 of the Education Regulations 1980 [the "Regulations"] provides for the termination of employment of teachers by notice. As under:

> **"54.—** (1)Subject to paragraph (2), the employment of a teacher in a public educational institution may be terminated –

(a) in the case of a teacher who holds a temporary, acting or provisional appointment, by one month's notice given by either the teacher or the Board and, where the employment is terminated by the Board, stating the reasons for the termination, or by a payment to the teacher of a sum equal to one month's salary in lieu of notice by the Board and such payment shall be accompanied by a statement by the Board of the reasons for the termination; and

(b) in any other case by three months' notice given by either the teacher or the Board or by the payment to the teacher of a sum equal to three months' salary in lieu of notice by the Board.

(2) Where the Board of any public educational institution intends to terminate the employment of any teacher in that institution other than a teacher employed on a provisional, temporary or acting basis for less than one year, the termination shall not have effect unless the procedure set out in regulations 56 to 59 are followed."

(II) Regulation 43 provides:

"**43** – (1) The appointment of every teacher in a public educational institution shall be made by the Board of Management of that institution after consultation with the principal of the institution and shall be subject to confirmation by the Minister.

(2) Every appointment shall be in accordance with <u>one</u> of the categories of teachers and <u>one</u> of the types of appointments stipulated in Schedule A."(emphasis mine)

(III) By paragraph 3 (2) of Schedule A temporary appointment is defined:

> "A temporary appointment shall be for a specified period not exceeding three terms unless the Board of the institution at the end of that period has agreed to extend the period of such appointment".

(IV) Letter of appointment clearly stated that the appellant was appointed both as temporary and an acting teacher.

(V) Letter of termination of employment dated March 22, 1999. The essential part of the letter giving the reasons for the termination as well as notice coupled with salary is as follows:

> "Please be advised however, that because of your continuous non-performance and other matters that the Principal and the general administration of the school have discussed with you on several occasions - the Board is left with no option but to terminate your temporary appointment effective, April 30, 1999.
>
> You will receive April's salary..."

(VI) Regulations 56 to 59 set out an elaborate procedure in respect of the dismissal of a teacher who is <u>not</u> temporary, provisional or acting and the conduct of the enquiry.

(VII) Regulation 88 at (8) and (9) provides:

> "(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 of the matter".

<u>THE ISSUE:</u>

This appeal is concerned with a challenge by way of judicial review. It is contended, by the appellant, that the chairman of the Board in terminating

his services acted unlawfully. The attack has concentrated essentially on the manner of exercise of the Board's discretion to dismiss. It cannot be gainsaid that the Board in exercising its powers under Regulation 54 of the Education Regulations 1980 has a wide discretion. The issue must therefore be whether in terminating the appellant's temporary or acting employment, the Board exceeded its discretionary powers by acting with procedural impropriety and therefore unlawfully. The schedule attached to the appellant's letter of appointment described his post as both temporary and acting. The appellant relied on regulation 43(2) to support the proposition that the appointment must be one or the other i.e. temporary or acting and not both. The point is however not significant since both appointments are terminated according to regulation 54(1)(a) which the Board clearly complied with.

It is observed that a letter was addressed to the appellant by the Principal on the 15th March, 1999 complaining of the appellant's conduct. The letter was copied to the Chairman of the Board as well as the Ministry of Education. In the notes of evidence it is indicated that the appellant did not receive his copy until the 17th March, 1999. Yet it was on that very day that the Board dealt with the complaint. The Principal of the school who had a direct personal interest in the matter, sat in the Board meeting and participated in the unanimous decision of the Board to terminate the appellant's employment contrary to Regulation 88 (8) and (9).

To take away a man's livelihood can be a serious matter and the rules

of natural justice require that an opportunity should have been provided to the appellant to oppose the termination of his services.

In ***Lloyd v McMahon*** [1987] 1 All E.R. 1118,1161 Lord Bridge said:

> "...it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the court will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

A fair hearing does not mean a hearing according to what would obtain in a court of law. Basically, it is an opportunity to put one's side of a case before a decision is reached. It is nothing more than a basic duty of fairness.

In the circumstances of this case an oral hearing may not be necessary but the appellant ought to have been given an opportunity to make representation in writing. Further, the Principal of the school who had made the complaint should not have been a part of the decision to terminate the appellant's employment. The principles of natural justice remain unsatisfied.

Accordingly, I would allow the appeal and order that certiorari should go with costs to the appellant both here and in the court below to be agreed or taxed.

DOWNER, J.A.:

Appeal allowed. Certiorari issued to quash the decision of the School Board of 22nd March, 1999. Liberty to apply.

Costs of the appeal and in the court below to the appellant to be taxed if not agreed.

The letter of the 15th March 1999, detailing the alleged charges against the appellant were so grave that if proven, would entitle the board of a school to consider seriously the propriety of the appellant continuing to be involved in the instruction, guidance and the development of its students.

The appellant should, at least have been given the opportunity to respond to the charges.

The purported letter of termination is therefore null and void. The appellant remains employed.

The presumption of a right to be heard can properly be denied in some circumstances, for example in instances of urgency, where the hearing is granted later in the appeal process. See ***Century National Merchant Bank Limited et al*** v ***Davies et al.*** Privy Council Appeal No. 52/97 delivered 16th March 1998, where after the assumption of control of malfunctioning financial institutions, a hearing was granted in later proceedings; and ***R.*** v ***Birmingham C.C. ex p. Ferrero Ltd.*** (1991) 3 Admin L.R. 613 where dangerous toys were prohibited from sale to the public. Justice would thereby be achieved. No such situation exists in the instant case.

Furthermore, I am of the view that the nature of the appellant's appointment entitles him under the provisions of the statute to the right to be heard. Regulation 54(2) stipulates that in respect of the termination of the employment of a teacher:

> " ... the termination shall not have effect unless the procedure set out in regulations 56 to 59 are followed."

except where such a teacher is:

> " ... employed on a provisional, temporary or acting basis for less than one year ..." (Emphasis added)

The appellant was employed " ... for Miss Marva Gobern who is on study leave - September 1998 - August 31, 2001." It cannot be properly construed that he was employed "for less than one year." Regulations 56 to 59 therefore apply to the appellant, entitling him to the procedure set out therein. He was entitled to be heard in his defence.

I agree with the conclusion of my brethren Downer and Langrin, JJA., as to the impropriety of the principal being in attendance and participating in the hearing of the charges, which he himself presented, at the sitting of the Board which returned the unanimous vote to dismiss the appellant, in breach of regulation 88. That hearing of the Board was therefore flawed.

There were clear breaches of the principles of natural justice. I agree that this appeal should be allowed and certiorari should issue.

LANGRIN, J.A:

The appellant, a teacher by profession, was employed by the Board of Governors of the Guy's Hill High School, St. Catherine in a temporary capacity effective October 1, 1998. He was required to teach English Language and Literature in place of a teacher who was on study leave.

On the 15th March, 1999 the principal of the school forwarded a written memorandum to the appellant. A copy of the memorandum was also sent to the Chairman of the Board. The full terms of the memorandum are set out below:

> "Dear Mr. Vhandell
>
> Since you joined the staff in October 1998, it has been an uphill task in re-tooling and re-orienting you to operate orderly and effectively at the school.
>
> You experience serious difficulties in performing within the boundaries of the organization and in associating peacefully and professionally with your colleagues and administration. You also found it difficult if not impossible to teach your classes without telling all sorts of rude sex jokes.
>
> Please be reminded of the catalogue of events leading up to and including your outburst and calumnious attack on me in the office in front of Teachers, Parents and Students on the 11th of March , 1999.
>
> (1) November 4, 1998 you had an altercation with Mrs. L. Hamilton Head of English Department, and it was subsequently reported to my office that you were most disrespectful and rude to her. The Acting Vice-Principal and I met with you and discussed the expectation of the school community and the level of professionalism we expect from you. You did not recant.

(2) It was also brought out in the same meeting that you refused from handing in lesson plans even though they were requested of you repeatedly.

(3) Towards the end of the month - November 26, 1998 the Acting Vice President informed me that you were operating private evening classes unknown to your Head of Department or general administration of the school. Again, we met with you and the Acting Vice-Principal discussed at length the proper course of action that you should have followed. In the meeting you were annoyed and said that the matter was petty. I insisted though that you respect and follow the line of command.

(4) On December 2, 1998, Mrs. M. Thomas - Head of Art and Craft and Grade Seven Co-ordinator reported to me that she was verbally abused and insulted by you. During the vituperations you referred to her as "wrenk" and as a "gal". You did this because she spoke to you while you were removing books from the library without authority or documentation. Please note that it was after school when the library was being cleaned when you entered and surreptitiously removed these books. In our meeting on this mater you were non-apologetic and said it was Mrs. Thomas who provoked you and said you were not a thief and were going to return the books. You also said that because you were new all the Senior Teachers were picking on you. I allay this fear and offered further help on your professional development.

(5) On December 9, 1998 you orchestrated an outburst in the staff room hurling abuses at Mr. C Stewart - Head of the Social Studies department and accused him of being incompetent and inept. The entire staff was hurt because of your insult and lack of respect shown to senior member of our organization. On another occasion there was

an altercation with Mr. G. Garrique past teacher, now Vice-chairman of the Board in which you openly and repeatedly referred to him as an "ass-hole". In a subsequent meeting on this matter you were non-repentant and saw nothing wrong with the use of the curse word "as there is no other adjective you can find to describe some people". I warned you of your behaviour and counselled you accordingly.

On January 13, 1998, you invited three (3) school girls to accompany you to Kingston unknown to Principal and Vice-Principal. The school learned of this when a furious parent called on January 14, 1999 to investigate the where-abouts of his daughter. The missing student subsequently turned up seemingly unharmed. I warned you of this practice.

(6) On January 18, 1999 Miss S. Warren – Head of Home Economics and Grade Co-ordinator for Grade Ten was informed by some students of 10G4 that you sent them out of the class. When she came to you to investigate the matter she told you that you were responsible for the students as long as you were time-tabled for them. She further instructed you that you should not send them out of class leaving them to wander around the compound. You informed her that she had no right to disturbing you at that point when you were in your class. "Who are you to be telling me about my professional conduct? Take it to the principal, I cannot deal with you at this level". You shouted this before the very students of the Grade Ten Co-ordinator. The matter was reported to me. During the meeting your conduct was simply disgraceful. You exploded several times using the words - "Madam you are a liar, I did not ask you to take the matter to the Principal". You went on to report about what the students did and your reasons for sending them out of the class.

(7) On January 22, 1999 the Head of Physical Education Department brought me a copy of a letter that you have been circulating requesting a number of boys to bring Five to Eight Hundred Dollars to purchase football gears. You wrote that the letter came from the school yet no one in authority here knew of it. In our meeting on this matter I advised that the letters be withdrawn, the cash refunded and I warned you of this practice.

(8) On February 4, 1999, I spoke to you in my office regarding a telephone call from the mother of one of your ten (10) grade female students. The mother complained that she did not like the way you conducted yourself while you were teaching her daughter. She further reported that you told the class that you were not looking any of the girls" and that you were not afraid of "draping up any "f" ing gal". You further went on to identify a particular student and said "look at her she in big woman, she has a baby and she has respect for me". Please note that the latter point is of serious breach of confidentiality as whenever our school, through the Guidance Department and the Women's Centre accommodates a teenage mother it is done in strict confidence involving only the Guidance Counsellor, Principal and sometimes the Grade Coordinator. You breached that trust.

In our meeting you agreed making that statement but felt that the girl's motherhood was public knowledge in the class, therefore your action was quite in order. I disagreed and offered you for further Guidance.

(9) On February, 1999 Miss J. Davis - Acting Head of English Department experienced a severe " tongue lashing" from you because of your refusal to follow departmental procedure. The matter of your inability and refusal to do acceptable lesson planning was also resurfaced. There is an on-going battle