[2017] JMSC Civ 173

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015 HCV 06134

BETWEEN	**THE BANK OF JAMAICA**	**CLAIMANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**1ST DEFENDANT**
AND	**THE BUSTEMANTE INDUSTRAIL TRADE UNION**	**2ND DEFENDANT**

Mr. Patrick Foster QC and Miss Ayana Thomas instructed by Nunes, Scholefied, DeLeon and Co for the claimant.
Miss Carla Thomas and Miss Christine McNeil instructed by the Director of State Proceedings for the 1st defendant.

Judicial Review– Application for order of certiorari - Whether Industrial DisputesTribunal erred in ordering re-instatement of dismissed worker - Natural justice - whether disciplinary procedure adopted by employer was fair.

17th and 18th July and 10th November, 2017.

EVAN BROWN, J

Introduction

[1] On the 15th March, 2016, the claimant was granted leave to apply for Judicial Review of the award made by the first defendant on the 30th September, 2015. The 2nd defendant was served but did not participate in the hearing. Pursuant to the grant of leave, the claimant filed a Fixed Date Claim Form (FDCF) on the 24th March, 2016 setting out the orders it seeks. Principally, the claimant seeks an order of certiorari quashing the award made by the first defendant that: (a) the company reinstate Mr. Frank Johnson on or before October 19, 2015 or (b)

failure to reinstate Mr. Johnson as stipulated in (a) above, the company shall pay him compensation in the amount of nine (9) months normal salary as relief.

Background

[2] The claimant, the Bank of Jamaica (the BOJ), is the Central Bank of Jamaica and is responsible for the regulation of the country's financial sector. Its main objective is to issue and redeem notes and coins, to keep and administer the reserves of Jamaica and to act as the bank for the Government of Jamaica.

[3] The claim for judicial review has its genesis in a decision taken by the BOJ to terminate the employment of Mr. Frank Johnson by letter dated 23rd July, 2013, effective 25th July, 2013. Mr. Johnson was employed to the BOJ as a Training Technology Specialist (Level 14). He held the position of Assistant Director of the Training Institute at the BOJ until the date of his termination.

[4] These are the circumstances which led to Mr. Johnson's termination. The BOJ had a telephone system through which members of staff made calls in connection with their duties as well as personal calls. By way of control and to facilitate the recovery of the cost of personal calls, the BOJ gave each employee an authorized access code to make telephone calls. This allowed the BOJ to collate the telephone bills for each extension on a monthly basis which, in turn, facilitated employees identifying their personal calls and remitting the appropriate payment.

[5] In December 2012 the BOJ conducted a routine internal audit of the Telecommunications Systems Department. The audit disclosed that an access code in the name of Sabrina Lewis (the Sabrina Lewis access code) was used to make calls and the personal calls so made were not being paid for. That led to an internal investigation in January 2013.

[6] The investigation revealed that the BOJ never employed a Sabrina Lewis. The investigative exercise disclosed that the calls made with the Sabrina Lewis

access code originated from Mr. Frank Johnson's extension. Mr. Johnson subsequently admitted the use of the Sabrina Lewis access code.

[7] Formal notification of the investigation and review of delinquency reports for the period January to September 2012 was given to Mr. Frank Johnson by memorandum dated 24th April, 2013. The memorandum referenced his admission in the use of the Sabrina Lewis access code and requested a written report from him. Mr. Johnson duly provided the report. He admitted in the report that subsequent to the disconnection of his officially assigned access code he continued to make calls, using the Sabrina Lewis access code. He disclosed that the Sabrina Lewis access code had been given to him by a Jamaica Telephone Company/Cable & Wireless technician while his extension was being repaired.

[8] Mrs. Novelette Panton, Senior Director of Human Resources, Pension Policy and Training Institute Manager, requested reports from the persons who appeared to be concerned with the issue. She afterwards determined that a disciplinary hearing should be held. Accordingly, she invited Mr. Johnson to a disciplinary hearing on the 9th May, 2013 at 2:00 PM, by letter dated 7th May, 2013. A memorandum, with several reports of the internal auditor's investigations attached, was also sent to the Chief Union Delegate of the Bustamante Industrial Trade Union (BITU), notifying her of the disciplinary hearing. Mr. Johnson was a member of the BITU.

[9] The hearing was held on the 9th and 10th May, 2013. It was conducted by a disciplinary panel, comprising Mrs. Novelette Panton, Chairman, Miss Avlana Johnson, legal counsel, Miss Arlene Tomlinson, Director of Human Resources, Mr. Norbert Bryan, Director of Currency and Mr. Maurice McFarlane, Director of Property Office Services.

[10] Over the passage of these two days several witnesses were called. Mr. Johnson made three admissions before the disciplinary panel. Firstly, he admitted using the Sabrina Lewis access code several years after it was given to him by the

telephone technician for temporary use. Secondly, he confessed to using the Sabrina Lewis access code to make personal calls after the disconnection of his assigned access code for non-payment of bills. Thirdly, he admitted that he did not inform the accounts department of the use of the Sabrina Lewis access code and no account was made for personal calls made by him using the Sabrina Lewis access code before the audit revealed the use of the code.

[11] At the end of the hearing the disciplinary panel produced a report. The disciplinary panel found Mr. Johnson and another employee in breach of the BOJ's policies. The disciplinary panel recommended the suspension of both persons for a period of thirty days without pay. It appears the BOJ's grievance procedure required the submission of the disciplinary panel's report to the Committee of Administration (COA), an intermediate review panel. The members of the COA were, Division Chiefs, Senior Deputy Governor, Deputy Governors and General Counsel.

[12] The COA examined the report received from the disciplinary panel and concluded that it should be returned to the disciplinary panel with a request that they reconvene and reconsider the matter in respect of Mr. Johnson. The disciplinary panel duly reconvened and made a fresh recommendation that Mr. Johnson's employment should be terminated. The disciplinary panel rested its latter recommendation on the lack of remorse shown by Mr. Johnson and his insistence that he had not done anything wrong. The disciplinary panel also felt that as a member of the bank's management team, the deceit and dishonesty displayed by Mr. Johnson had irretrievably broken the bonds of confidence and trust between himself and the bank. The report, with an addendum, was again submitted to the COA.

[13] The COA in turn submitted the recommendation for the termination of Mr. Johnson's employment to the Management Committee (MC), in accordance with the BOJ's grievance procedure. The MC is the decision-making body. The persons who sat on the MC were the Governor, Senior Deputy Governor, Deputy

Governors and the General Counsel. The MC accepted the recommendation of termination after deliberations. Mr. Johnson was called to a meeting and informed of the decision to terminate his employment. Formal notification was given to him by letter dated 23rd July, 2013, making his dismissal effective 25th July, 2013.

[14] By letter of the 25th July, 2013, the BITU wrote to the BOJ demanding the immediate reinstatement of Mr. Johnson. The BITU also indicated through that medium that it was making itself available for an appeal. The BOJ responded that all stages of its grievance procedure had been completed, all senior managers having been involved in the disciplinary process. The BITU referred the matter to the Ministry of Labour. The Ministry of Labour in turn referred the matter to the Industrial Disputes Tribunal (IDT) by letter dated 5th December, 2013.

[15] In its referral to the IDT, the Ministry of Labour set out the terms of reference, in accordance with section 11A (1) (a) (i) of the ***Labour Relations and Industrial Disputes Act*** of 1975 (***LRIDA***). The IDT was charged to:

> *"To determine and settle the dispute between The Bustamante Industrial Trade Union on the one hand and the Bank of Jamaica on the other hand over the termination of the employ of Mr. Frank Johnson."*

[16] The IDT, by a majority, found:

(i) The composition of the MC comprising 83.33% or 5 of 6 members of the COA displayed a lack of transparency and gave rise to accusations of victimization, discrimination, bias and unfair treatment. It also gave support to the union's substantive claim that the process that terminated the services of Mr. Johnson was an unwarranted overturn of the recommendation of the disciplinary panel by a COA that substantially reported to itself, rendering the termination in breach of procedural fairness.

(ii) By virtue of Mr. Johnson's actions, he violated the bank's human resources manual and the sanction for those violations was either suspension or dismissal. His actions were deceitful as well as dishonest.

(iii) It appeared evident and reasonable to assume that but for the audit results, these practices of deception and dishonesty of non-payment for personal calls would have continued ad infinitum; and for those reasons, Mr. Johnson's actions contributed significantly to his dismissal. The bank therefore had cogent reasons for terminating his service.

(iv) Mrs. Panton participated in the groundwork investigations, conducted interviews, requested and reviewed the various reports and being the person to decide if there was a matter to be heard was also the chairperson of the disciplinary panel. The bank sought to have convened a dual meeting of both a hearing into the conduct of Mr. Johnson and a general fact finding enquiry. Mrs. Panton's multiple roles were a fundamental breach of the rules of natural justice.

(v) There was no evidence to contradict the contention of the union that the bank failed to observe the provisions of the ***Labour Relations Code*** (***LRC***) as set out in section 22 when Mr. Johnson's employment was terminated without the right to be represented at all material times, neither was he provided the right to appeal. The bank could have arranged for an external agent to provide that level of support, including the Ministry of Labour.

(vi) Having examined the evidence and taking into account all the circumstances the bank did not follow the proper procedure in dismissing Mr. Johnson and therefore the tribunal could not ignore the plethora of procedural blemishes attributable to the bank in the handling of the matter. Consequently, the dismissal was unjustified.

[17] The chairman authored the minority report. He found that whatever blemishes and/or breaches took place on the way to the bank's conclusions were not in disregard of the rules of natural justice and the requirements of the ***LRC***. He

noted that Mr. Johnson was well represented at the hearing before the IDT where he had every opportunity of addressing such blemishes or breaches but Mr. Johnson sat throughout the hearing and chose not to give any evidence.

The Grounds for Judicial Review

[18] The application for judicial review is supported by five grounds. Ground A, the majority members of the 1st defendant erred in law in holding that the composition of the membership of the BOJ's Committee of Administration (COA) and the Management Committee (MC) displayed a lack of transparency and gave rise to accusations of victimization, discrimination, bias and unfair treatment and rendered the termination of Frank Johnson in breach of procedural fairness.

[19] Ground B, the majority members of the 1st defendant erred in law in not holding (as the minority member correctly held) that whatever "blemishes" and or "breaches" took place by the members of the BOJ in arriving at their decision to terminate Frank Johnson, these were not in disregard of the rules of natural justice and the requirements of the Labour Code.

[20] Ground C, the majority members of the 1st defendant erred in law in holding that Mrs Panton, the Senior Director of Human Resources and Pension and Chairman of the disciplinary panel had multiple roles which were a fundamental breach of the rules of natural justice. This finding is unreasonable as it is not supported by the evidence or law.

[21] Ground D, the majority members of the 1st defendant erred in law in holding that the BOJ failed to observe the provisions of section 22 of the ***LRC*** by terminating Mr. Johnson's contract without the right to be represented at all material times.

[22] Ground E, the majority members of the 1st defendant erred in law in holding that the BOJ failed to observe section 22 of the ***LRC*** by terminating Mr. Johnson's contract of employment without providing him with the right of appeal. On any reasonable interpretation of the ***LRC*** the 1st defendant's right of appeal was not

absolute and was only available, where practicable, to a level of management not previously involved in the disciplinary process and on the evidence at the hearing all levels of management were involved in the said process. Further, the majority members also erred in its finding that the BOJ could have arranged for an external agent to provide that level of support, including the Ministry of Labour.

Submissions

Ground A

[23] On ground one (A), learned Queen's Counsel for the claimant submitted that the test for apparent bias is that refined by Lord Hope in [2002] 2AC 357 ***Porter v Magill*** :

> *"The question is whether the fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the tribunal was biased."*

This test, he submitted, was applied in a number of cases, notably ***Pinochet NO.2***; ***Re Medicaments and Related Classes of Goods (No.2)*** [2001] 1 WLR 700 and ***Tibbetts v The Attorney General of the Cayman Islands (Cayman Islands)*** 2010 UKPC 8 delivered 24th March, 2010. The fair-minded and informed observer "must adopt a balanced approach and is to be taken as a reasonable member of the public, neither unduly complacent or naive nor unduly cynical or suspicious": ***R v Abdroikof*** [2007] UKHL 37, [2007] 1 WLR 2679 per Lord Bingham at para 15.

[24] The submission continued, the test for apparent bias underscores the principle that a man must not be a judge in his own cause (***Henriques v Tyndall, Hylton, Davies, et al*** [2012] JMCA Civ 18 para 40). This principle was previously reaffirmed by the House of Lords in ***R v Bow Street Metropolitan Stipendiary and Others ex parte Pinochet Ugarte (No. 2)*** [1991] 1 All ER 577. It was there declared that the rule was not restricted to pecuniary and proprietary interests but extends to a limited class of non-financial interests.

[25] There must be reasonable evidence to show bias: ***Barrington Earl Frankson v The General Legal Council*** [2012] JMCA Civ 52 (***Frankson v The GLC***). The submission went on, "reasonable suspicion may amount to bias. However, surmise or conjecture is insufficient: ***R v Cambore Justices ex parte Pearce*** [1954] 2 All ER 850 and ***R v Nailsworth Licensing Justices ex parte Bird*** [1953] 2 All ER 652. Similarly, vague suspicion or the mere possibility of bias on the part of an impulsive or irrational person is insufficient: ***Locabail (UK) Ltd v Bayfield Properties Ltd*** [2000] QB 451.

[26] That was the springboard from which it was submitted that the finding of the IDT that the composition of the COA and the MC is a source of concern as it gives rise to accusations of victimization, discrimination, bias and unfair treatment, is unreasonable having regard to the evidence. That submission had two premises. First, none of the members of the COA or the MC were members of the disciplinary panel which made the recommendations concerning sanction. The COA and MC merely reviewed the recommended sanctions and ratified them. Consequently, it was concluded, the fair-minded observer could not conclude that the COA or the MC was biased having regard to these circumstances.

[27] Secondly, there was no allegation by the BITU nor any evidence led before the IDT that any member of the COA or the MC was biased, discriminated against Frank Johnson, victimized him in any way or subjected him to unfair treatment. Neither was there any evidence that any member of the COA or MC had an interest, pecuniary or otherwise, in the sanction imposed on Frank Johnson. The IDT's comments of bias, discrimination and victimization therefore constitutes mere conjecture which was entirely unsupported by the evidence.

[28] It was thereafter contended that the fact that some members of the COA were also members of the MC cannot of itself give rise to an implication of bias, victimization and discrimination without more. ***Slater v Leicestershire Health***

Authority [1989] IRLR 16 and ***Frankson v The GLC***, *supra*, were cited in support. The IDT, therefore, misdirected itself on the legal principles of bias.

[29] It was further submitted that the composition of the COA and MC was an irrelevant consideration which the IDT took into account. The structure of the COA and MC was designed to be a check and balance of the recommendations of the disciplinary panel, it was argued. That check and balance, it was submitted, is in keeping with the requirement of section 22 (a) of the ***LRC*** which requires the disciplinary procedures to "specify who has the authority to take various forms of disciplinary action and ensure that supervisors do not have the power to dismiss without reference to more senior management".

[30] Furthermore, it was urged, the IDT's use of the words "unwarranted overturn of the recommendation of the Disciplinary Panel" was inconsistent with its findings of fact that the BOJ had cogent reasons to dismiss Frank Johnson. That inconsistency is also evident upon the evidence led before the tribunal namely, the recommendations of the disciplinary panel were not "overturned by the COA and MC". The evidence was that the COA requested the disciplinary panel to review the evidence and impose a sanction which was commensurate with its findings. The disciplinary panel was also requested to reconsider all the issues which could impact its recommended disciplinary action. The COA did not suggest any particular sanction. It was the disciplinary panel which recommended dismissal after its review.

1st Defendant's reply to Ground A

[31] In response, learned counsel for the 1st defendant submitted that the IDT considered the composition of the COA and MC in the context of the overall fairness of the dismissal, evidenced by their conclusion that there was procedural unfairness. This is the context in which the statement of bias was made. Viewed in that context, it was argued, the term "bias" was therefore used in the wider ambit of their determination concerning the result of the lack of transparency,

caused by the composition of the COA and the MC, and how that impacted the fairness of the termination.

[32] The IDT was entitled to take this approach in keeping with their statutory remit to consider whether the dismissal was unfair, the 1st defendant's counsel urged. Since it was their statutory mandate, they could adopt this approach whether or not the union raised it as an issue. The IDT's entitlement to take this approach was rooted in their terms of reference to determine the dispute between the parties over the termination of Mr. Johnson's employment. Consequently, they could take into their consideration all factors deemed necessary in evaluating what was fair and ultimately, whether the dismissal was unjustified, counsel concluded.

[33] The submission continued, that the finding that the composition of the COA and MC resulted in a lack of transparency is supported by the evidence. Firstly, the COA reported to the MC. Secondly, five of the seven members of the MC also sat on the COA. Thirdly, Mrs. Panton testified that having received the recommendation from the disciplinary panel, the COA would deliberate on the findings and recommendation to ensure that the process was followed, the rights of the worker had been respected and the bank's interest would be protected. If the COA found the recommendation of the disciplinary panel justifiable, it would endorse the recommendation and transmit its decision to the MC.

[34] It was submitted that the role of the MC was merely to act as a rubber stamp of the decision of the COA. That was anchored in the inability of Mr. Calvin Brown, a division chief, to articulate the separate mandates of the COA and MC in the disciplinary proceedings, although he was expressly asked to do so.

[35] Following on that, it was submitted that even if the IDT's treatment of bias is to be interpreted in the sense of connoting actual or apparent bias, they were correct in finding that the overlap in membership of the COA and MC led to a lack of transparency which resulted in bias, in the sense that a fair-minded and informed

observer would conclude that there was a real possibility of bias on the part of the MC. ***Georgiou v Enfield London Borough Council*** [2004] All ER (D) 135 was cited in support.

[36] It was said that in the case at bar, the members of the COA would have already deliberated and voted on the disciplinary panel's recommendation for the termination of Mr. Johnson's employment. In fact, the COA was the actual protagonist for the sanction of termination to be imposed, evidenced by the disagreement with the disciplinary panel's initial recommendation of suspension and remittal of the decision for the disciplinary panel's reconsideration. The COA having decided to accept the recommendation for termination that it encouraged, the members of the COA would then have had an interest in seeing that their endorsed recommendation was adopted by the MC. Faced with that scenario, the fair-minded observer would have concluded that there was a real possibility of bias. The appearance of bias is underscored by the absence of clearly defined roles of each body in the disciplinary process.

Ground B – This ground will be discussed below.

[37] Learned Queen's Counsel for the BOJ submitted that the finding that Mrs. Panton had multiple roles which were a fundamental breach of natural justice is unsupported by the evidence and legal principles of natural justice. He referenced the IDT's summary of Mrs. Panton's role then encapsulated her evidence before the IDT. In his submission, Mrs. Panton received the report of the internal audit in her capacity as Senior Director of Human Resources, Pension and Training. She requested reports or statements from the persons named in the report, including Mr. Johnson. Additionally, she reviewed the reports and determined whether or not a disciplinary hearing should be held and scheduled the disciplinary hearing for Mr. Frank Johnson and Mr. Norbert Brown.

[38] Counsel contended that Mrs. Panton did not conduct "investigations". There was no evidence that Mrs. Panton interviewed any of the witnesses before the IDT. There was no evidence that Mrs. Panton prejudged the hearing or formed any prejudicial view of Mr. Johnson prior to the hearing. All the materials she received prior to the hearing were disseminated to the Union Delegates before the hearing and were referred to in the hearing and all parties acknowledged receiving same. At the hearing, Mr. Johnson was given an opportunity to respond to all the statements he had received, in particular those of Norbert Brown and Joy Hermit.

[39] Counsel continued, that there was no evidence before the tribunal that Mrs. Panton was in possession of any extraneous material which would have prejudiced her mind and caused her to form a particular view of Mr. Johnson. Neither was this suggested to Mrs. Panton who was called as a witness on behalf of the BOJ at the disciplinary hearing or before the IDT. Indeed, neither Mr. Johnson nor his representative objected to Mrs. Panton being the chairman of the disciplinary committee at the disciplinary hearing.

[40] It was submitted that, having regard to all the circumstances, the fair-minded observer could not have concluded that by merely receiving reports used in the hearing and determining that there should be a disciplinary hearing, Mrs. Panton was biased or a judge in her own cause. That submission was anchored by ***Slater v Leicestershire Health Authority*** [1989] IRLR 16 and ***Frankson v The GLC,*** *supra*. Also prayed in aid of this submission was ***Panton and Panton v Minister of Finance No. 2*** (2001) 59 WIR 418, [2001] UKPC 33.

[41] Learned Queen's Counsel concluded, having regard to the authorities cited, the IDT's finding that Mrs. Panton being the chairman of the disciplinary committee was a breach of natural justice was an error of law, as it was unsupported by the evidence and the legal principles, and no reasonable tribunal properly guided by law would have arrived at that conclusion.

Defendants' reply to Ground C

[42] Miss Thomas submitted that there was ample evidence to support the IDT's finding that the multiple roles played by Mrs. Panton were in breach of the rules of natural justice. The evidence demonstrated that she was investigator, prosecutor and judge in her own cause. It was further submitted that in carrying out her various roles she formed a view of Mr. Johnson's culpability. The following extract of Mrs. Panton's evidence was relied on in support of the latter contention:

> *"Okay, I read through all the reports, I met with my team which we normally do, the HR director and the Industrial Relations Officer and at that point I was thinking what comes next? Having read all the reports my guiding principle at the time: Was there sufficient evidence that would warrant at the end of the day any consideration for any sanction of anybody? In doing that I looked at it and I said there was an issue that somebody indicated that, yes, I did, something happened. We didn't know the 'how', as I said how this could have happened. We didn't know the how, but I felt that at the end of the day there was sufficient that would warrant us to find out more. Having done that, the recommendation that I put on the table was that we would have to have a hearing to ascertain the issue to do with the fact that Mr. Johnson had this phone and also the concern that came into my head from the audit report."*

The cases of ***Byrne v BOC Ltd*** [1992] IRLR 505 and ***National Commercial Bank v Industrial Disputes Tribunal and Jennings*** [2016] JMCA Civ 24 were cited in support.

Grounds B, D and E

[43] These grounds concerned alleged infringement of section 22 (1) of the ***Labour Relations Code*** which provides:

> *"Disciplinary procedures should be agreed between management and worker representatives and should ensure that fair and effective arrangements exist for dealing with disciplinary matters. The procedures should be in writing and should -*
>
> *(a) specify who has the authority to take various forms of disciplinary action, and ensure that supervisors do not have the power to dismiss without reference to more senior management;*

> *(b) indicate that the matter giving rise to the disciplinary action be clearly specified and communicated in writing to the relevant parties;*
>
> *(c) give the worker the opportunity to state his case and the right to be accompanied by his representatives;*
>
> *(d) provide for a right of appeal. Wherever practicable to a level of management not previously involved;*
>
> *(e) be simple and rapid in operation."*

[44] According to learned Queen's Counsel, taking first ground D (section 22 (1) (c) of the ***LRC***), the complaint of the BITU was that Mr. Frank Johnson was not presented or represented at all times as the hearing was over two days and Mr. Johnson was not present when all witnesses were giving evidence before the enquiry/disciplinary hearing. The IDT's award, at page 7, was excerpted:

> *"The evidence provided, indicates that the hearing was scheduled for over two (2) days May 9 and 10, 2013 to which Mr. Johnson was invited to attend on May 9th, but actually testified on May 10th. Mrs. Panton submitted the names of the persons who gave evidence at the hearing and explained that apart from Mr. Johnson and Mr. Norbert Brown, the others spoke to their reports and their knowledge about the Bank's Telecommunications System, the accounting/collection procedures and the part they played in the investigation of the breaches. None provided accusations or evidence for or against Mr. Johnson.*" (Counsel's emphasis)

[45] It was then submitted that the IDT erred in its conclusion that the failure of Mr. Johnson to be present on both days of the enquiry/hearing was a breach of the ***LRC*** as it failed to have regard to eight factors. First, the hearing on the two days served two purposes namely an enquiry into the bank's telephone system and a disciplinary hearing. Second, Mr. Johnson in his written report admitted to using the code in the fictitious name of Sabrina Lewis and accordingly the hearing was merely to determine the circumstances in which he came into possession and use of the code.

[46] Third, the persons who gave evidence on the 9th of May did not accuse Mr. Johnson of anything nor did they give evidence for or against Mr. Johnson. Fourth, Mr. Johnson was given the option of choosing a representative of his

choice and he was present at the hearing with his representatives from the union on the 10th of May. Fifth, the ***LRC*** only requires that the worker be given an opportunity to state his case and be accompanied by a representative. It does not give the worker the unequivocal right to be present when all the witnesses give evidence and to cross-examine them.

[47] Sixth, the statements of the witnesses who made statements concerning Mr. Johnson namely Joy Hermit and Norbert Brown were provided to him and he was specifically referred to the statements to comment on areas in dispute when he gave evidence on the 10th of May and he was represented on this occasion. He had ample opportunity to state his case and was accompanied by his representative when he did so. Mr. Johnson's response to the statements did not vary materially from the account of the witnesses in their statements and oral evidence. Seventh, Mr. Johnson declined to cross-examine Norbert Brown though he was invited by the panel to do so.

[48] Eighth, it is well established law that the principles of natural justice do not mean that the evidence of all the witnesses must be tested by cross-examination or that the employee must be present when they give evidence. A plethora of authorities, it was submitted, have settled the principle that natural justice only means that the tribunal must give the other side a fair opportunity of commenting on evidence and of contradicting any relevant evidence to his prejudice. (Counsel's emphasis).

[49] Several authorities were cited: ***Board of Education v Rice*** [1911-13] All E.R. Rep. 36, ***University of Ceylon v E.F. Fernando*** [1960] 1 W.L.R. 223, ***T.A. Miller Ltd v Minister of Housing and Local Government and Another*** [1968] 2 All E.R. 663, ***Khanum v Mid-Glamorgan Area Health Authority*** [1979] I.C.R. 40, ***Bentley Engineering Co. Ltd v Mistry*** [1979] I.C.R. 47, ***Leonore Santamera v Express Cargo Forwarding T/a IEC Limited*** [2003] IRLR 273.

[50] Three principles were distilled from the authorities. Firstly, there is no rule of law which renders it incumbent on an employer, when dismissing an employee for misconduct, to arrange a hearing which gives the employee who is liable to be dismissed the opportunity to cross-examine the person making the complaint. Secondly, the failure to afford the opportunity for cross-examination is not a failure to follow the rules of natural justice and does not invalidate the proceedings or render the decision to dismiss unreasonable. Thirdly, natural justice requires that a fair opportunity be given to the employee to correct or contradict any relevant statement to his prejudice. Accordingly, it may be that what is said against the employee can be communicated to him in writing or in an appropriate case, matters which have been said by others can be put orally in sufficient detail to him as an adequate satisfaction of the requirements of natural justice.

[51] Consequently, it was submitted, having regard to all the circumstances, the BOJ complied with the requirements of the ***LRC*** as Mr. Johnson was given an opportunity to be heard on all the allegations against him and he was accompanied by his representatives of choice. The IDT therefore erred in law in finding that the BOJ breached section 22 of the ***LRC***, counsel concluded.

[52] Grounds E and B were argued together. These grounds related to section 22 (1) (d) of the ***LRC***. The submission ran as follows. On any reasonable interpretation of the ***LRC***, a worker's right of appeal is not absolute and is only available, where practicable, to a level of management not previously involved in the disciplinary process. This means that the right of appeal is therefore circumscribed by the practical consideration of whether there is any level of management within the organizational structure which is available and can objectively and fairly hear an appeal from a decision of a disciplinary panel. This right of appeal as contained in the ***LRC***, on any generous interpretation, is to a level of management not previously involved in the disciplinary process if it is practicable.

[53] It was submitted that the undisputed evidence of the BOJ's witnesses before the IDT was that all levels of management were involved in the disciplinary hearing which culminated with the final decision to terminate the services of Mr. Johnson. The practice of the BOJ when conducting disciplinary hearings, in the interest of fairness and transparency, was to include all levels of management, including the Governor. This practice, it was submitted, had been accepted by all the stakeholders.

[54] Against that background, it was submitted that the IDT erred in finding that the BOJ should have arranged for an external agent, including the Ministry of Labour, to provide a basis for an appeal by Mr. Johnson. That error has two bases. First, the ***LRC*** does not impose on the employer the obligation to provide a right of appeal beyond the level of management within the organizational structure. Second, to imply that the Governor of the BOJ could have been involved in an appeal process because the panel members "were never made aware if he was personally involved in this matter" is unsupported by the evidence. All the evidence indicated that the Governor of the BOJ participated in the matter and was involved in the final decision that led to the determination of Mr. Johnson's services. He, therefore, could not have served in an appellate role, the submission concluded.

Defendants' Reply to grounds B, D and E

[55] The defendants dealt with ground B separately. In their submission, this ground does not raise an issue which relates to an error of law as the challenge is to what weight the majority members gave to the breaches and blemishes. While the question of whether the IDT was correct in finding that there were breaches of natural justice may involve an error of law, the question of the effects of those findings does not, it was argued.

[56] It was submitted that a breach of the principles of natural justice will inevitably lead to a dismissal being adjudged unfair, having regard to the importance of

those principles to the concept of fairness. In any event, it was solely within the remit of the IDT to decide on the effect of this breach. Section 3 (4) of the ***LRIDA*** was cited and the dictum of Sykes J in ***National Commercial Bank Jamaica Ltd v IDT & Jennings***. He was quoted as saying, "no court can tell the IDT what weight to give to any fact or inference drawn from a fact".

[57] Turning to grounds D and E, it was submitted that section 22 of the ***LRC*** requires the employer to afford the employee the right to be accompanied by his representatives and the right of appeal. Taking first the right to representation, it was submitted that the IDT did not err in its interpretation of the provision. Since the IDT correctly interpreted the provision, its finding that the relevant facts amounted to a breach can only be disturbed if there is no evidence to support the findings of fact. Reliance was placed on the opinion of Harris JA in ***Holiday Inn Sunspree Resort v the Industrial Disputes Tribunal, the Ministry of Labour and Social Security and the National Workers Union*** [2010] JMCA Civ 9, "it is not for the court to substitute its own findings for the IDT or for the court to find that if it had the particular set of facts which the IDT had before it, it would have come to a different conclusion".

It was submitted that the evidence showed that Mr. Johnson was represented by Mr. Ruel Hinds. That much can be gleaned from the minutes of the disciplinary hearing. It was so stated on the first page of the minutes and by Mr. Moodie, one of the two other union representatives who were present. Mr. Moodie told the disciplinary committee that he and Mr. Dave Dillon, the other union representative, were there to represent all the others while Mr. Hinds would be attending in respect of Mr. Johnson. That evidence contrasted with the contrary assertion by the BOJ's witnesses before the IDT that Mr. Johnson was represented by Messrs Dillon and Moodie, counsel said.

[58] Additionally, the submission went on, the evidence disclosed that neither Mr. Johnson nor Mr. Hinds was present at the start of the enquiry. They were not allowed to attend until the second day of the hearing and only for the duration of

Mr. Johnson's examination. Although the BOJ sought to justify this with the explanation that this was a dual purpose enquiry at which Mr. Johnson would be allowed to be present only when the evidence touched and concerned him, Mr. Hinds' evidence was that he was never given an opportunity to express any views on this procedure.

[59] Although that was the procedure adopted, neither Mr. Johnson nor Mr. Hinds was present when Mr. Norbert Brown and Mrs. Joy Hermitt testified. It was urged that these were material times at which both Mr. Johnson and Mr. Hinds should have been present as both witnesses gave evidence of an admission made by Mr. Johnson to using the Sabrina Lewis code.

[60] This, it was argued, was more than ample evidence that Mr. Johnson was not represented at all material times. Counsel concluded, whether these circumstances amounted to a breach and the effect of this breach upon the dismissal was for the IDT to decide. Therefore, the award should not be disturbed on this basis.

[61] As it concerned the right of appeal, the submission was that the meaning of the provision is clear. That is, the worker ought to be afforded the right of appeal, without qualification. It was within the remit of the IDT to consider what weight should be given to this breach in its determination of whether the dismissal of Mr. Johnson was unfair. For the award to be disturbed on this basis, it would have to be shown that the finding was not supported by the facts. And, in light of the evidence, that is an insurmountable hurdle, it was contended.

[62] With respect to the comment/statement that the bank could have resorted to an external agent to ensure compliance with the provision, the submission was that it would have to be shown that this 'finding' was unreasonable in the ***Wednesbury (Associated Picture Houses v Wednesbury*** [1948] 1 KB 223) sense.

The applicable law

[63] It is settled law that the awards of the IDT are unimpeachable, save on a point of law: ***Othneil Dawes and Robert Crooks v Ministry of Labour and Social Security*** [2013] JMSC Civ. 64, at paragraph 45. There is, therefore, a partial ouster of the court's supervisory jurisdiction of this inferior tribunal. This much is clear from section 12(4)(c) of the ***LRIDA***.

[64] Having said that, the High Court has always declared itself to be inhered with a supervisory jurisdiction over inferior tribunals. According to Denning L.J. (as he then was) in ***R. v. Northumberland Compensation Appeal Tribunal Ex. Parte Shaw*** (1) [1952] 1 All E.R. at pp. 127,128:

> *"The statutory tribunals, like the one in question here, are often made the judges of both fact and law, with no appeal to the High Court. If, then, the King's Bench should interfere when a tribunal makes a mistake of law, the King's Bench may well be said to be exceeding its own jurisdiction. It would be usurping to itself an appellate jurisdiction which has not been given to it. The answer to this argument, however, is that the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the King's Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which it does not belong to it. It is only exercising a jurisdiction which it has always had."*

Issue for determination

[65] Broadly, although the IDT agreed that the BOJ had substantial reasons to terminate the services of Mr. Frank Johnson, it parted company with the BOJ on the question of the procedural fairness of the termination. The IDT therefore struck down the termination not because Mr. Frank Johnson was guiltless. The IDT stigmatized Mr. Johnson's dismissal as unfair because it found the grievance procedure adopted by the BOJ to separate Mr. Johnson from his job fatally

flawed. The issue for my determination, therefore, is whether the IDT fell into error in holding that the BOJ breached the rules of natural justice.

[66] I will first examine ground A which, compendiously stated, raises the issue of apparent bias.

Ground A

[67] For convenience, ground A is again recited. The majority members of the 1st defendant erred in law in holding that the composition of the members of the Bank's Committee of Administration (COA) and Management Committee (MC) displayed a lack of transparency and gives rise to accusations of victimization, discrimination, bias and unfair treatment and rendered the termination of Frank Johnson in breach of procedural fairness.

[68] As was said above, ground A raises the question of apparent bias. According to the learned authors of ***Judicial Review Principles and Procedure***, at para 8.38, apparent bias is chiefly concerned with nonfinancial or personal interest. The cardinal reason undergirding the rule against apparent bias is that justice must not only be done but must be seen to be done. The time-honoured exposition of the rule is captured in ***R v Sussex Justices, ex p McCarthy*** [1924] 1 K.B. 256. At page 259 Lord Hewart C.J. declared:

> *"A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".*

[69] Whenever the issue of apparent bias is raised, the pivotal consideration is not "what actually was done but what might appear to be done" (***R v Sussex Justices ex p McCarthy***, *supra*). The scrutiny is directed at the appearance that the facts which are generally known may give rise to, not what was in the head of the particular member or members of the tribunal: ***Gillies (AP) v Secretary of State for Work and Pensions*** [2006] UKHL 2. There is, therefore, a justifiable anxiety to shield justice from public opprobrium. Why is the perception of justice

having been done raised on such a lofty pedestal? The short answer is the preservation of public confidence in the integrity of the administration of justice: ***Gillies (AP) v Secretary of State for Work and Pensions***, *supra*, at para 23.

[70] The test for apparent bias was laid down by the House of Lords in ***Porter v Magill Weeks v Magill*** [2002] 2 AC 357 (***Porter v Magill***). Extracting from the headnote, it was held:

> *"that the appropriate test in determining an issue of apparent bias was whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased".*

Two things flow from the application of this test. First, a decision-maker's protestations that he was unbiased are irrelevant to the question: ***Porter v Magill*** at page 495. Second, a necessary corollary of the first, while the complainer's fear of bias is relevant at the initial stage of the investigation, what is decisive is whether those fears can be objectively justified: ***Porter v Magill***.

[71] The test propounded in ***Porter v Magill*** replaced the previous test formulated in ***R v Gough*** [1993] AC 646, at page 670, by Lord Goff of Chieveley. He preferred to "state the test in terms of real danger rather than real likelihood". Lord Goff's preference for 'real danger' was "to ensure that the court is thinking in terms of possibility rather than probability of bias". It has been said that "a 'real possibility' requires a slightly lower degree of likelihood than a 'real danger': ***Judicial Review Principles and Procedure***, at para 8.46. That was a pointed criticism of Lord Phillips MR in ***Re Medicaments and Related Classes of Goods (No 2)*** [2001] ICR 564, at page 591. Lord Phillips MR reduced the question to whether the ascertained circumstances of alleged apparent bias "would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased". (Emphasis supplied)

[72] When Lord Hope of Craighead invited the House of Lords to "approve the modest adjustment of the test in ***R v Gough***", as formulated by Lord Pillips MR in ***Re Medicaments and Related Classes of Goods (No 2),*** he also suggested that "a real danger" be deleted: ***Porter v Magill,*** *supra*, at page 494. The removal of "a real danger" was predicated upon two reasons. The words were adjudged to be otiose and without expression in the Strasbourg jurisprudence. The objective test used by the Strasbourg court spoke to a reasonable apprehension of bias.

[73] It is apparent that what Lord Hope meant was that "a real danger" was superfluous in the same sentence as "a real possibility". It is reasonable to assume that if Lord Hope understood "a real danger" to conceptually whittle away the rigours of "a real possibility", he would have said so. It appears Lord Hope appreciated the phrases as synonyms and, consequently, each was equally sufficient to set the required standard. The preference for "a real possibility" appears to be its harmony with Strasbourg jurisprudence.

[74] Indeed, Lord Goff appears to have understood "a real danger" and "a real possibility" to have been synonymous in both their meaning and effect. He expressed himself thus, "I prefer to state the test in terms of a real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than the probability of bias": ***R v Gough***, *supra*, at page 670. In fact, Lord Goff saw "no practical distinction between the test as [he stated it] and a test which requires a real danger of bias": ***R v Gough***, *supra*, at page 668. Therefore, Lord Phillips MR commands much sympathy in saying both phrases are the same.

[75] The gravamen of the criticism of Lord Phillips MR is, however, that the test of "a real possibility" has set a very low threshold to establish apparent bias. The standard appears to be below the civil standard of proof on a balance of probabilities. On his way to pronouncing the test of "a real possibility", Lord Goff expressed the opinion that a test articulated in terms of "likely or probable" was

"too rigorous a test": ***R v Gough,*** *supra*, at page 668. Although the preference is for a less rigorous test, the modifier 'real' takes the analysis out of the realms of the fanciful and clothes the test with contemplative substance.

[76] That takes me to the characteristics of the fair-minded and informed observer. These are encapsulated in ***Judicial Review Principles and Procedures***, para 8.49:

> *"The fair-minded observer does not take the complainant's view but an objective view. He or she takes a balanced approach and always reserves judgment on every point until he or she has seen and fully understand both sides of the argument. The fair-minded observer is not unduly sensitive or suspicious. However, neither is he or she naive or complacent. The fair-minded observer knows that fairness requires that a decision-maker must be, and must be seen to be, unbiased. He or she knows that decision-makers, like everyone else, have their weaknesses.*
>
> *"The fair-minded observer is not an insider (eg a member of a decision-making body) otherwise he or she would run the risk of having an insider's blindness. He or she is able to distinguish between what is relevant and irrelevant and is able, when exercising his or her judgment, to decide what weight should be given to the facts that are relevant".*

[77] Likewise, the informed observer's access to the facts is synonymous with that of the general public. So that, the facts attributable to the informed observer includes not only that which was generally and contemporaneously available at the time the decision was taken, but also includes that which came to light subsequently as a result of further investigation. If there is information from the decision-maker in the form of an explanation concerning his knowledge or appreciation of the circumstances which gave rise to the charge of apparent bias, that too forms part of the corpus of knowledge of the fair-minded informed observer. (See ***Judicial Review Principles and Procedure*** para 8.51)

[78] So then, would the fair-minded and informed observer, having considered the composition of the COA and MC, conclude that justice did not appear to be done in the case of Frank Johnson? To answer that question, the fair-minded and informed observer would have to look beyond the fact of the composition of the COA and MC. In other words, the real question is whether it could fairly be said

that the members of the COA, when sitting on the MC, were judges in their own cause. That is, did the members of the COA conduct themselves in a manner which gave rise to a suspicion that they were not impartial when they sat on the MC. This, therefore, calls for an assessment of the evidence that was before the IDT concerning the role the members of the COA played in the BOJ's grievance procedure before they came to sit on the MC. That is to say, the circumstances surrounding the COA's participation in the decision to dismiss Frank Johnson must be examined to see whether there was a real danger of bias on the part of the COA members of the MC, when sitting on the MC.

[79] The issue has been so distilled because this is not the classic case of bias. As was submitted by learned Queen's Counsel, there was neither evidence nor allegation that any member of the COA, or the MC for that matter, was personally biased against Mr. Frank Johnson; there was no suggestion of any animosity between Mr. Johnson and any member of the COA or MC. Equally, evidence that any member of the COA or the MC had any pecuniary interest which would disqualify him or her from adjudicating on the matter was conspicuous by its absence. The allegation of bias is rooted in the overlap of the COA and MC and the likely impact of that overlap on the decision-making process. I must now turn my attention to the BOJ's grievance and disciplinary procedure.

[80] The BOJ published a document entitled, "Grievance and Disciplinary Procedure". At section 2.0 the relevant supervisor is required to first establish the facts, where appropriate by the collection of statements. Before any decision is reached or disciplinary action taken, a disciplinary hearing must be held. There are four preparatory steps to be taken before any disciplinary hearing is held (see section 3.0). Firstly, a written complaint is lodged against the member of staff. Secondly, the written report is examined by the Human Resource Administration Department (HRA Department) to establish its merits. Thirdly, if merit is established to the satisfaction of the HRA Department the union is notified and the staffer is requested to provide a written report through his head of department. Fourthly, if the complaint is devoid of merit the case is dismissed.

[81] A disciplinary panel is established under section 4.0. The staff member is informed of the complaint made against him and where possible all relevant evidence is given to him before the hearing. The usual rights to state his case and make submissions avail the staffer at the hearing. "When the case is fully heard, the panel deliberates, records its findings and makes a recommendation to the Management Council for the decision" (see 4.3). The Management Council was changed to the Management Committee, Mrs Panton told the IDT. Under 4.5, "the staffer shall have the right of appeal against the decision".

[82] The published grievance and disciplinary procedure contemplates the involvement of the three entities: the HRA Department, disciplinary panel and Management Council. The HRA Department's role is to gather the facts and assess whether there is a case fit to warrant a hearing; in the old language, to see if there is a *prima facie* case against the staffer. The disciplinary panel's function is to hear evidence and submissions, deliberate, record findings and make a recommendation to the Management Council. The Management Council makes the decision, which is communicated to the union and staffer concerned. There is a conspicuous absence of any appellate body although the right to appeal is recognized.

[83] Also conspicuous by its absence is any mention of the COA in the published grievance and disciplinary procedure. The evidence before the IDT confirms that when the Management Council existed there was no COA. The Management Council was replaced by the present arrangement or, subdivided into the COA and MC.

[84] The COA was an intermediate body comprising Deputy Governors and Division Chiefs. They received the findings and recommendation for sanction from the disciplinary committee. They not only reviewed the recommendation but could, and in fact interrogated the person or persons who presented the report of the disciplinary panel. The disciplinary panel had to justify its recommendation before the COA. In that reviewing role it seems to have been within their remit to

disagree with the recommended sanction of the disciplinary committee. Accordingly, the COA had previously sent back reports for a greater or lesser sanction to be recommended.

[85] According to Mr. Calvin Brown, Division Chief of Administration and Mrs. Panton's supervisor, upon the receipt of the report from the disciplinary panel, the COA would have its own deliberation based on the findings and recommendations of the disciplinary panel. The COA's deliberation was to ensure three things. First, that the process was followed. Second, that the rights of the employee had been respected. Third, that the interests of the BOJ had been protected. If satisfied that all the issues were considered the recommendation of the disciplinary panel would then be endorsed for presentation to the MC.

[86] In the instant case, according Mrs. Panton, upon receipt of the disciplinary committee's recommendation of suspension for thirty days, "the COA sent back a response indicating that in view of the evidence and the report that was provided by the Panel the sanction was not commensurate with what we put in our report" (their findings). The COA asked the disciplinary committee if they had carefully looked at all the issues. The disciplinary panel was asked, among other things, whether they had given due consideration to the seniority of Mr. Johnson and if he had accepted that what was done was wrong. The response was that he had not accepted any wrongdoing. Questions were asked also concerning his demeanour although the specific responses were not recalled before the IDT. The upshot of the interrogation of the presenters of the disciplinary panel's report was a recommendation and request by the COA for the disciplinary panel to look back at all the issues and make a determination whether or not it was standing by its recommendation.

[87] The main difference in the two sets of deliberations of the disciplinary panel was the placing of "much emphasis on Mr. Johnson being in the management cadre at the Bank". No new evidence was received. In the end, the disciplinary

committee reversed itself and recommended dismissal. The reason for that reversal in recommendation was because the COA asked it to take another look at it. The COA accepted that recommendation and sent it on to the MC.

[88] The full composition of the MC seems to have been fluid but, in any event, five members of the COA helped to make up its full compliment. The MC would deliberate on the recommendation and arrive at its decision in a democratic manner.

[89] The BOJ contended that the fact of this intermingling of membership, with the consequence that the five COA members were called upon to deliberate upon the same matter twice, cannot of itself give rise to an implication of bias. ***Slater v Leicestershire Health Authority*** [1989] IRLR 16 (***Slater***), was the first of two case cited in support. In ***Slater*** the issue was whether the Industrial Tribunal and Employment Appeals Tribunal erred in holding that a staff nurse's dismissal was not rendered unfair by the fact that the manager who carried out preliminary investigations also conducted the disciplinary hearing and made the decision to dismiss.

[90] It was argued, before the English Court of Appeal, that on general principles, a person who holds an inquiry must be seen to be impartial, that justice must not only be done but must be seen to be done, and if an observer with full knowledge of the facts would conclude that the hearing might not be impartial, that is enough. The Court of Appeal accepted the general rule that a person who has been a witness should not hold the inquiry. It also accepted that there are exceptions to this general rule, for example the case of a one-man firm.

[91] The facts were that the manager received a complaint that the nurse had slapped a patient on the buttocks. The nurse denied striking the patient on the buttocks but said he had occasion to restrain the patient by holding him down at the region of the hips. The manager observed a red mark on the patient's buttock

and, along with a doctor, concluded that it was more consistent with a slap than being restrained. At the disciplinary hearing the issue was credibility.

[92] While opining that it was "ill-advised" for the manager to have conducted the disciplinary hearing, it was felt that his observation of the red mark, which was not in dispute was insufficient to disqualify him. Neither was his conclusion that the red mark was more consistent with a slap was sufficient disqualifying factor.

[93] Two principles are extracted from ***Slater***. First, a decision-maker will not be disqualified from conducting a disciplinary hearing where he had conducted preliminary investigations into the subject matter of the hearing. Second, the chairmanship or conduct of an enquiry will not be impugned because the chairman had seen evidence to be tendered before the inquiry and arrived at a conclusion which was adverse to the accused.

[94] Respectfully, ***Slater*** is inapt to the situation of the COA and MC. While there can be no dispute that when the five members of the COA went on to sit on the MC their role was adjudicative, it played no investigative role. In my opinion, the COA's role upon receipt of the disciplinary panel's report cannot fairly be characterised as investigative. The COA was not involved in the gathering of information. It functioned as a review tribunal, which made its role at least quasi-judicial.

[95] In the same vein, again with all due deference to learned Queen's Counsel, the local Court of Appeal decision in ***Frankson v The GLC*** is equally unhelpful. The complaint in ***Frankson v The GLC*** was that two members of the panel which heard the complaint also sat on the committee which decided that the hearing should take place. It was contended that that made the entire process unfair. In giving that argument short shrift, it was held that a member of a panel which presides over a preliminary hearing arising from a complaint by an aggrieved party does not act as a judge in his own cause if he subsequently sits on the substantial hearing (at para 89).

[96] However, to borrow a phrase, the devil is in the details. The proceedings before the committee were described as inquisitorial. The committee looked at no evidence but merely sifted the allegations and decided which would go forward depending on the seriousness of the allegations. That scenario is distinguishable from the role the COA played in this case. When the disciplinary panel's report is presented to the COA, a full hearing would have already taken place, findings of fact distilled from the evidence heard and a recommendation made for sanction.

[97] So, it was the results of a completed hearing that were presented to the COA for its imprimatur, which it either gave or withheld, depending on whether or not it was satisfied with the findings and recommendation. The evidence was that the COA had to be satisfied that the disciplinary panel's recommendation was supported by its findings before the COA endorsed the recommendation for transmission to the MC. Therefore, at this stage of the grievance procedure it could never be said that a preliminary hearing was taking place before the COA, in the meaning conveyed in ***Frankson v The GLC***. To borrow an imperfect analogy from the courtroom, the trial had already taken place, in the sense that all the evidence from both sides was in, a decision adverse to the accused worker had been arrived at and a sanction considered. The word 'preliminary' could only be used to describe the COA's hearing in a lexically correct way if all that is meant is that its hearing came before the MC's.

[98] It is by this stage superfluous to say, but by the same token, the stage of a prima facie case had long been assailed by the conclusion of the matter. That was the stage in the adversarial proceedings before the disciplinary panel where all the evidence sufficient to support the case against Mr. Johnson had been tendered. The conclusion that the COA was not conducting a preliminary hearing is irresistible. Its role was, as was earlier, was that of a review tribunal. The clear evidence of Calvin Brown was that the COA deliberated on the findings and recommendation of the disciplinary panel.

[99] Having deliberated, according to the chairman of the disciplinary panel, the COA sent back a response indicating that in view of the evidence and the report that was provided, the sanction was not commensurate with what they put in the report. For the COA to have made reference to the evidence, it must have had some idea what the evidence was, however that was communicated to it. Calvin Brown's evidence was to the effect that the COA gave consideration only to issues "for which there was clear evidence". As earlier indicated, the COA was concerned with matters such as the demeanour of Mr. Johnson and whether he admitted culpability.

[100] Further, in saying that the sanction was not commensurate with the report, the COA was intimating a dissatisfaction with the choice of the disciplinary panel. While it did not tell the panel what sanction to recommend upon reconsideration and, technically, as was submitted by learned Queen's Counsel, the disciplinary panel could have re-submitted the same sanction, with a choice of alternatives it was unsurprising that dismissal, the only other choice, was returned. In my opinion the COA judicially considered the matter in its review capacity. That, therefore, made its hearing a substantial one in every sense of the word. Therefore, the preliminary hearing, substantial hearing dichotomy cannot be applied to the COA's and MC's roles in the grievance procedure. The case of ***Frankson v The GLC*** is, therefore, clearly distinguishable from the instant case.

[101] What happened here was that the COA considered the distilled facts of the case and, upon the second presentation of the disciplinary panel's report, endorsed it and sent it on to the MC. Five of the members of the COA then went on to sit on the MC to again deliberate on the matter. Those five, it was accepted, constituted the majority membership of the MC. Decisions at the MC were arrived at democratically. So that, whether the decision of the MC was unanimous or by ordinary majority, the decision of the five overlapping members of the COA would have carried the day. Although Calvin Brown was at pains to point out that the two bodies had different mandates, the five overlapping members, when sitting on the MC, would have been called upon to review themselves. The question is

whether a fair-minded and informed observer, seized of the facts, would conclude that there was a real possibility of bias on the part of the MC or its five overlapping members.

[102] In ***Georgiou v Enfield London Borough Council*** [2004] All ER (D)135 (***Georgiou v Enfield LBC***), a decision of the English Administrative Court, the decision of the local planning authority was challenged on the ground of bias. The relevant facts are that proposals for planning permission went before a committee, charged with advising the planning committee on proposals for development which raised conservation issues. This committee gave unqualified support to the proposals. Four members of that committee were also members of the planning committee. When the planning committee met to consider the matter, three of those four members were present. It was there decided that a fair-minded and informed observer would conclude that there was a real possibility of bias. That real possibility of bias was expressed to be in the sense of the decisions being approached with closed minds and without impartial consideration of all the planning issues.

[103] As in ***Georgiou v Enfield LBC***, the COA gave unqualified support to the report of the disciplinary panel, evidenced by its endorsement, then five of its members took their seats on the MC and participated in the final decision to dismiss Frank Johnson. Those five overlapping members may well have been able to put their earlier positions aside and consider the matter afresh but it is the real possibility of approaching the matter with a closed mind that impugns their decision.

[104] In this regard, the observations of Lord Clyde in ***Donald Panton and Janet Panton v Minister of Finance and The Attorney General*** (2001) 59 WIR 418 (***Panton v The AG***) are rather apposite. At page 425 Lord Clyde opined:

> *"where the issue involves the ascertainment of facts, the assessment of evidence, the credibility of witnesses or the drawing of conclusions or inferences from the facts found, or the exercise of a discretion it may be more difficult for a person who has made a decision on such matters to appear independent and impartial if he is called upon on another*

> *occasion to adjudicate where the same factual matters are in issue or the same persons involved as witnesses".*

The Privy Council was here contrasting the position of a decision-maker who had previously expressed a legal opinion on the subject matter of the decision.

[105] The COA was not called upon to make pronouncements in law. The COA's review of the disciplinary panel's report and its interrogation of the presenter was an entirely factual exercise. Its endorsement of the report is ample evidence of its support of the position taken by the disciplinary panel. That was the same position the five overlapping members of the COA were called upon to independently and impartially assess when sitting on the MC. In my opinion, a fair-minded and informed observer would conclude that there was a real possibility of bias on the part of the MC or the five overlapping members. Consequently, the composition of the COA and MC was a relevant consideration for the IDT. Accordingly, the IDT's finding that the composition of the COA and MC was source of concern as it gives rise to accusations of victimization, discrimination, bias and unfair treatment is supported by the evidence. The IDT was saying, viewed from the vantage point of the fair-minded and informed observer, the composition of the COA and MC gave rise to these charges. In light of the evidence, that was a reasonable finding which the IDT was entitled to make.

Ground C

[106] For ease of reference ground C is repeated below:

> *"The majority members of the 1st defendant erred in law in holding that Mrs. Panton, the Senior Director of Human Resources and Pension and Chairman of the Disciplinary Committee had multiple roles which were a fundamental breach of the rules of natural justice. This finding is unreasonable as it is unsupported by the evidence or law".*

[107] The issue of fact here is, what was the evidence before the IDT concerning the involvement of Mrs. Panton? What other role did she play apart from chairman of the disciplinary panel? The evidence discloses that she was made aware of an

investigation in relation to Frank Johnson, in respect of an alleged use of an unauthorized code through an internal audit report. That audit report was sent to her by Mr. Calvin Brown. The auditors' report was sent to her for review to see whether or not there was any implication for any disciplinary matter. After that review she was expected to speak to Mr. Brown to see where next the matter would be taken.

[108] Consequently, Mrs. Panton read through the auditors' report. The report disclosed that the BOJ's telecommunications system was being accessed by a code in the name of Sabrina Lewis from an extension assigned to Frank Johnson in the Training Institute, without "any commensurate payment". The auditors' report also indicated "that what they are seeing may be more pervasive than what they have investigated so far".

[109] Having looked at the auditors' report, Mrs. Panton said, "I indicated to my team let us start by looking at an investigation for us to see what will be the next step". According to her, "in doing so" she immediately requested reports from the persons named in the auditors' report, including Frank Johnson. Mr. Johnson was informed orally, then a memorandum was sent to him, copied to his supervisor. After receiving the reports, Mrs. Panton read through them and met with her team. After receiving and perusing the reports her guiding principle was, "was there sufficient evidence in this investigation based on all the reports? Was there sufficient evidence that would warrant at the end of the day any consideration for any sanction of anybody".

[110] From there, Mrs. Panton went on to recommend that a hearing be held. In pursuance of that, she sent a letter to Frank Johnson which, among other things, advised him that HRD deemed it necessary to convene a disciplinary hearing, set out the terms of reference of the hearing; advised him of his right to be accompanied by a union representative or an employee of his choice. One and two of the terms of reference were said to be the charges Frank Johnson was required to answer to.

[111] From the foregoing, it is plain that Mrs. Panton understood her role to be investigative after she reviewed the auditors' report. She twice used the word 'investigation' to describe the activity she was either about to embark upon, or in assessing the reports that came to her hand. Further, Mrs. Panton told the IDT that she wrote the charges that were levelled at Frank Johnson. The crafting or laying of charges is prosecutorial in nature. This, then, was material upon which it was competent for the IDT to find as a fact that Mrs. Panton played multiple roles. The remaining question is, did the IDT fall into error in its conclusion that the multiple roles resulted in a breach of natural justice?

[112] The issue of a disciplinary hearing being conducted by the persons who were "a part of the institution which is making the accusation or bringing the charges was considered in ***National Commercial Bank Jamaica Ltd v The Industrial Disputes Tribunal and Peter Jennings*** [2016] JMCA Civ 24 (***NCB v The IDT***), which was relied on by the defence. Among the complaints before the IDT was the fact that the same person both laid the charges and presided over the disciplinary hearing. The local Court of Appeal accepted the position that although domestic enquiries ought not to be equated with the formalities of criminal trials, the principles of natural justice are not excluded; in particular, the principle that a man should not be judge in his own cause. The Court of Appeal held that it was not perverse for the IDT to find that:

> *"the procedure should show impartiality and be presided over and/or managed by persons who will be fair and objective, and certainly not a part of the institution which is making the accusation or bringing the charges against the accused".*

[113] ***Slater***, *supra*, was cited in ***NCB v The IDT*** to support the contention that signing the letter which contained the disciplinary charges should not, by that same token, result in automatic disqualification from presiding at the disciplinary hearing. The Court of Appeal was of the opinion that that reliance was misplaced. In the words of Sinclair-Haynes JA:

> *"It is pellucid from the authorities, that whether an internal hearing can be presided over by persons from the organization, is dependent on the peculiar facts and circumstances of each case and ultimately whether the procedure was fair".*

[114] The Court of Appeal appears to be saying that it is a question for the IDT whether the procedure followed in the particular circumstances was impartial and, to that end, could have been fairly presided over by someone who played multiple roles. If it was not perverse to have held that the person bringing the charge was disqualified from presiding, it most certainly was not perverse to hold that the multiple roles of investigator, prosecutor and chairman breached the principles of natural justice.

[115] ***Byrne v BOC Ltd*** [1992] IRLR 505, cited by Miss Thomas, is authority for saying that a person in the position of Mrs. Panton is a judge in her own cause. In that case the person who heard and decided the appeal of the accused worker played a significant part in the investigations before the disciplinary inquiry, in the decision that there should be a disciplinary interview and the decision of the appropriate penalty to be imposed. It was argued that disqualification would only result it that person had either been involved in the events leading to dismissal or had taken part in the decision to dismiss.

[116] That argument was rejected by the English Employment Appeals Tribunal. Justice Knox, who spoke for the majority, said:

> *"it seems to us entirely possible that a person who investigates an alleged disciplinary breach may well become so involved in the matter that it realistically becomes his cause so as to disentitle him from being a person who can conduct a fair appeal from a decision at the disciplinary hearing in which he plays no part".*

In the case at bar, Mrs. Panton led the investigation which followed her receipt of the auditors' report. Even if the requesting of reports from the persons named in the auditors' report could be seen as 'doing [her] homework', as was submitted in ***Byrne v BOC Ltd***, she was the person who, whether solely or together with her team, decided that there should be a disciplinary hearing and wrote the charges.

[117] All of that activity distinguishes what Mrs. Panton did from what occurred in ***Frankson v The GLC***, *supra*. The committee in ***Frankson v The GLC*** was concerned only with the gravity of complaint received. The complaint there is analogous to the auditors' report Mrs. Panton received for review. Unlike the committee, she did not stop at an assessment of the allegations contained in the auditors' report. As Mrs. Panton said, she indicated to her team "let us start by looking at an investigation".

[118] So then, there was material before the IDT which entitled it to find that the multiple roles played by Mrs. Panton ran afoul of the rules of natural justice. The evidence disclosed the multiple roles and the IDT was competent, by virtue of its terms of reference, to evaluate the impact of those multiple roles on the overall fairness of the disciplinary procedure.

Grounds B, D and E

[119] Under section 22 (1) (c) of the ***LRC***, disciplinary procedure adopted by an employer should "give the worker the opportunity to state his case and the right to be accompanied by his representative". I will now consider the cases relied on by learned Queen's Counsel. In ***Board of Education v Rice*** [1911-13] All E.R. Rep. 36, it was said that the applicable principles are that parties to the controversy should be given a fair opportunity to correct or contradict any relevant statement prejudicial to their view. ***Board of Education v Rice*** was among the cases considered in ***University of Ceylon v E.F.W. Fernando*** [1960] 1 W.L.R. 223. The essence of the complaint in the latter case was that the evidence of the witnesses was taken in the absence of the accused student. The Privy Council approved the dictum of Harman J in ***Byrne v Kinematograph Renters Society Ltd*** [1958] 1 W.L.R. 762, at page 784, where he said:

> *"What then are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and, thirdly, of course, that the tribunal should act in good faith. I do not myself think there is anything more".*

Adapting Lord Loreburn's words in ***Board of Education v Rice***, *supra*, the Privy Council held that the Vice-Chancellor was not bound to treat the matter as a trial, he had no power to administer an oath and need not examine the witnesses.

[120] So, although disciplinary hearings are not to be treated as a trial, the rules of natural justice apply. But therein lies the rub. The requirements of natural justice or fairness are not cast in stone to be superimposed on every tribunal whatever their rules, circumstances and subject-matter of the inquiry. Those are all matters which exert a direct impact on the requirements of natural justice. The question, therefore, is whether the requirements of natural justice have been fulfilled by the disciplinary procedure adopted can only be answered with reference to facts and circumstances of the particular case: ***Ceylon University v Fernando***.

[121] What, then, does it mean to give the worker a fair opportunity to state his case, at common law? To properly state his case he must know sufficiently what is being said against him: ***Bentley Engineering Co v Mistry*** [1979] I.C.R. 47. According to the learning in ***Board of Education v Rice,*** *supra*, it includes a fair opportunity to correct and contradict any relevant statement to the accused worker's prejudice. The opportunity to correct and contradict prejudicial statements, generally does not include a right to face one's accusers (see ***University of Ceylon v Fernando***). Neither does it include a right, generally, to traverse the accusations by cross-examination: ***T.A. Miller, Ltd. v Minister of Housing and Local Government and Another*** [1968] 2 All ER 633, applying ***Board of Education v Rice***. It was accepted in ***Khanum v Mid-Glamorgan Health Authority*** [1979] ICR 40, that in some circumstances it may amount to a breach of natural justice either to refuse the right to, or not to afford the opportunity to cross-examine.

[122] In as much as a fair opportunity to state one's case encompasses the opportunity to know in sufficient detail the case one has to meet, a refusal of a right to cross-examine may be regarded as a breach of natural justice: ***Bentley Engineering Co v Mistry***, *supra*. In that case the employee was never given the

statements of the witnesses and had neither opportunity of listening to the other protagonist nor questioning him. ***Santamera v Express Cargo Forwarding t/a IEC Ltd*** [2003] IRLR 273 expressly considered the question whether, how far, if at all, an ability to see and hear one's accusers is ordinarily to be regarded as an essential part of a fair disciplinary hearing. It was held that there is no rule of law which renders it incumbent on an employer, when dismissing an employee for misconduct, to arrange a hearing which gives the accused employee the opportunity to cross-examine the complainant.

[123] It is transparently clear that a disciplinary hearing is not to be equated with a trial. The lodestar of the employer in conducting a disciplinary hearing is fairness. It is not a requirement of fairness that the employer engages in a forensic or quasi-judicial investigation: ***Santamera***, *supra*. That is the rationale behind cross-examination being the exception rather than the rule at disciplinary hearings.

[124] All the cases cited by learned Queen's Counsel declared the position at common law. ***University of Ceylon v Fernando***, *supra*, is a judgment of the Privy Council, our highest court. Therefore, under the principle of stare decisis all courts below in the hierarchy are bound by it but it antedates the passage of the **LRIDA**, under which the **LRC** was made, by at least a decade. ***Santamera***, which was decided under section 98 (4) of the English ***Employment Rights Act 1996***, also followed that line of cases; ***Khanum v Mid-Glamorgan Area Health Authority***, *supra*, was among the authorities cited. It is therefore clear that none of the cases relied on purported to interpret legislation similar to the provisions of the ***LRC***. Indeed, a cursory read of the ***Employment Rights Act 1996*** does not disclose any provision treating with matters such as those contained in the ***LRC***. These authorities are therefore at best, persuasive.

[125] In the oft cited judgment of the local Court of Appeal, ***Village Resorts Limited v The Industrial Disputes Tribunal and Others*** (1998) 35 JLR 293, at page 299, (***Village Resorts Ltd v The IDT***) it was said that the ***LRIDA***, ***LRC*** and Regulations "provide the comprehensive and discrete regime for the settlement

of industrial disputes in Jamaica". The learned President went on to declare, at page 300, that:

> *"The Labour Relations and Industrial Disputes Act is not a consolidation of existing common law principles in the field of employment. It creates a new regime with new rights, obligations and remedies in a dynamic social environment radically changed, particularly with respect to the employer/employee relationship at the workplace, from the pre-industrial context of the common law".*

This statement of the law was most recently approved by the Privy Council in ***University of Technology v Industrial Disputes Tribunal and others*** [2017] UKPC 22.

[126] In this new dispensation the IDT, the specialized body set up under the ***LRIDA***, must be allowed to set the standard of what is fair in the conduct of a disciplinary hearing. In the IDT's interpretation of the LRC, fairness required the attendance of the accused employee and his representative at the disciplinary hearing for its entire duration. If the submissions of learned Queen's Counsel were to be accepted, the principles of fairness established by the common law would hold sway over the decisions of the IDT. With all due respect, that would be a quantum leap backwards into a time and space that the new employment law regime made a decisive break with.

[127] In this case, the common law would say Mr. Frank Johnson need not have been present at the hearing at all, except when stating his case. Mrs. Panton's evidence before the IDT was to the effect that the disciplinary panel's sitting over two days was a hybrid exercise, part fact-finding and part disciplinary. However, in the so-called fact-finding section evidence prejudicial to Mr. Johnson was elicited. Coupled with that, the evidence of Mr. Ruel Hinds before the IDT was that he was allowed to be in the room only when Mr. Johnson was asked to sit in. It is apparent that, in so far as the disciplinary panel had the principle of fairness in mind, what it contemplated was a right to know what was being alleged and an opportunity to state his case.

[128] The IDT was therefore clearly of the view that that was insufficient and that Mr. Johnson and his representative should have been present for the full duration of the sitting of the disciplinary panel, hybrid hearing or not. There was ample evidence before the IDT for it to have rejected the much vaunted hybrid or dichotomous nature of the hearing. By way of example, Norbert Brown testified on the first day of the hearing and his evidence bore directly on the allegations against Mr. Johnson. In all the circumstances the position the IDT took was one any sensible and reasonable tribunal would have taken.

[129] Attention is now turned to section 22 (1) (d) of the ***Labour Relations Code***. Under that section employers are enjoined to establish procedures which, apart from being in writing, should "provide a right of a appeal, wherever practicable to a level of management not previously involved". It appears to mean that the right to appeal is absolute, as was submitted by counsel for the 1st defendant. The BOJ's published “Grievance and Disciplinary Procedure” seems to recognize the right to appeal without any qualification. Section 4.5 says, "the staff member shall have the right of appeal against the decision".

[130] The interpretation for which the BOJ argued is one in which the right is circumscribed by the practical realities of the employer's undertaking. So that, where, as here, the disciplinary procedures adopted involved all levels of management there would be no right of appeal. In my opinion, the section contains two ideas. The first speaks to the right and the second speaks to the composition of the forum. The ideal, is that the appeal should be to a level of management not previously seized of the matter. If, however, the employer's disciplinary procedures involved all levels of management, then, unhappily, the appeal would be heard by a level of management which was previously involved.

[131] If that interpretation is acceptable, then the IDT cannot be said to have fallen into error in saying that the right to appeal was not given. And, having regard to the undesirability of the appeal being heard by a level of management previously involved in the disciplinary process, it was not unreasonable for the IDT to have

commented as it did. That is, it was not unreasonable for the IDT to have stated that the BOJ could have resorted to an external agent to ensure compliance with the provision.

Conclusion

[132] So then, in my opinion the IDT was entitled to find that the BOJ breached the rules of natural justice in the procedure that it adopted in dismissing Frank Johnson. That is, the IDT's finding that the bank did not follow proper procedure in dismissing Mr. Johnson cannot be said to be perverse, in the technical sense of the word. Consequently, the application for an order for certiorari to quash the decision of the IDT made on the 30th September 2015 is refused. Costs are awarded to the 1st defendant against the claimant, to be taxed if not agreed.