[2018] JMSC Civ 93

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV 03056

BETWEEN	**PAUL THOMPSON**	**APPLICANT**
AND	**INDUSTRIAL DISPUTES TRIBUNAL**	**1st RESPONDENT**
AND	**UNIVERSITY COLLEGE OF THE CARIBBEAN**	**2nd RESPONDENT**

IN CHAMBERS

Mr. Hugh Wildman for the Applicant

Mrs. Shawn Wilkinson instructed by the Director of State Proceedings for the 1st Respondent

Mr. Adrian Cottrell instructed by Myers, Fletcher & Gordon for the 2nd Respondent

Heard: 5th October, and 19th December 2018

Judicial Review – Application for leave– Arguable ground having a realistic prospect of success – Considerations by court – Part 56 Civil Procedure Rules, Part 56

DUNBAR-GREEN J

Background

[1] The Applicant was appointed Vice-President for Academic and Student Affairs at the University College of the Caribbean (UCC), effective 1st September 2015. He reported to the then President of UCC, Dr. Troy McGrath.

[2] The UCC alleged that subsequent to Dr. McGrath's separation from the institution, the Applicant maintained communication with him and disclosed confidential information concerning the UCC. He had also allegedly maligned the leadership of UCC in email correspondence with Dr. McGrath and had agreed to write a reference for Dr. McGrath which would have misrepresented their reporting relations whilst Dr. McGrath served as President.

[3] Consequent on those allegations, the UCC held a meeting with the Applicant and conducted a hearing. At the conclusion of those proceedings he was found guilty of gross misconduct, divulging information to a non-staff, breach of the confidentiality clause and failure to live up to his responsibilities as Vice President.

[4] The Applicant unsuccessfully appealed the decision, and the matter was thereafter referred to the Industrial Disputes Tribunal (IDT) by the Ministry of Labour and Social Security, in accordance with section 11A (1) (a) (i) of the **Labour Relations and Industrial Disputes Act** (LRIDA).

Decision of the IDT

[5] The substantive findings of the IDT are set out below.

I. The case was solely based on emails sent to and from Dr. Paul Thompson and Dr. Troy McGrath and after Dr. McGrath left the employment of the UCC.

II. At the time of his dismissal in August 8, 2016, Dr. Paul Thompson was the Vice President for UCC reporting to the Board Chairman, Dr. Adams.

III. By Dr. Thompson's own admission to having sent the recommendation to Dr. McGrath, he would have been responding to a request made via the emails in question. The Tribunal accepted that he did, in fact, see the emails prior to UCC bringing them to his attention.

IV. Dr. Thompson had not rejected the request to provide a fraudulent reference, altering the reporting relationship between himself and Dr. McGrath, (on June 10, 2016). He replied: "I would be most delighted to speak with anyone who calls or send emails. I hope such contact will be a precursor to your securing a job in which your skills will be appreciated".

V. *An email dated July 13, 2016, from Dr. Paul Thompson stated: "the recommendation that I wrote in your favour and sent to the Provost in St Petersburg…." (Exhibit 2).*

VI. *The recommendation tendered into evidence by the Applicant was not addressed to the Provost in St. Petersburg but instead, "To whom it may concern" (Exhibit 9).*

VII. *The recommendation was dated June 27, 2016, a date prior to Dr. Thompson being called to a meeting by the UCC on July 18, 2016.*

VIII. *Dr. McGrath thought that he was corresponding with Dr. Paul Thompson in the emails.*

IX. *The Tribunal deduced from the emails sent to Dr. McGrath, that some of the contents related directly to events and functions peculiar to Dr. Thompson's position.*

X. *The Tribunal opined that only Dr. Thompson would be privileged to some of the information conveyed via email to Dr. McGrath.*

XI. *The Tribunal found that Dr. Paul Thompson's first meeting was in fact with his accusers, Mrs. Adams and Mrs. Lorna Baxter, who were maligned in the emails presented. They could not be present during the disciplinary process but Dr. Thompson or his representative could have requested that they be summoned to give evidence. During the entire process the UCC was represented by its attorneys, Mr. Gavin Goffe and Mr. Adrian Cotterell.*

XII. *A disciplinary hearing was held, chaired by Mr. David Wan, a member of the UCC Board. Dr. Paul Thompson was present and represented by his attorney, Mr. Leroy Equiano. The UCC was represented by its attorneys.*

XIII. *At the end of the disciplinary hearing and after being terminated, Dr. Thompson appealed. The appeal process was conducted by Attorney-at-Law, Ms. Yvonne Joy Crawford, who dismissed the Appeal (Exhibit 7).*

XIV. *Dr. Thompson had stated that his email had been compromised but did not bring any evidence to prove this. In fact, Ms. Crawford had sent her first mail, in error, to pbenjamint@gmail.com and it was received and acknowledged by Dr. Thompson (Exhibit 8).*

XV. *Ms. Crawford confirmed that UCC had given her a cell phone containing emails to and from Paul Thompson. The cell phone, however, was not presented to the Tribunal. Some of the emails were printed.*

XVI. There were breaches of confidentiality by Dr. Thompson and the leadership of the UCC was maligned by him.

XVII. The Grievance Procedure was in keeping with the Labour Relations Code : meeting held, charges laid, hearing held, representative attended and the Appeal process was utilized.

XVIII. In view of the above, UCC had justifiable reasons to dismiss Dr. Paul Thompson in 2016.

The Application

[6] By Notice of Application filed 14th August 2018, the Applicant applied for leave to apply for judicial review to quash the IDT's decision. The application is governed by Part 56 of the Civil Procedures Rules (CPR). There was no issue as to compliance with the requirements of the relevant rules.

[7] The application, so far as material, is set out below.

The Applicant …seeks leave to apply for judicial review to quash the decision of the 1st Respondent when it ruled on June 8, 2018, that the 2nd Respondent had justifiable reasons to terminate the employment of the Applicant from the employment of the 2nd Respondent:

…

FOR THE FOLLOWING RELIEF: -

1) That leave be granted to the Applicant to apply for Judicial Review by way of:

a) A Declaration that the decision of the 1st Respondent dated June 8, 2018, that the 2nd Respondent had justifiably terminated the Applicant from its employment is irrational, null and void and of no effect, in that the 1st Respondent in coming to its conclusion that the 2nd Respondent had justifiably terminated the employment of the Applicant was based on findings that are not supported by the evidence, and failure to consider relevant evidence that was presented before it , and in particular that:-

i) The 1st Respondent found that the Applicant had sent emails concerning the 2nd Respondent, but there was no evidence adduced at the hearing to support that finding.

ii) The 1st Respondent found that the Applicant admitted to misrepresenting his reporting relationship with the former President of the 2nd Respondent in

email dated June 10, 2016, when there was no such evidence to support that finding.

iii) The 1st Respondent found that the allegations of maligning persons of the 2nd Respondent was made by the Applicant before the meeting of July 15, 2016, but there was no such evidence to support it.

iv) The 1st Respondent found that the Applicant was confronted by his accusers at a disciplinary hearing convened by the 2nd Respondent on the 18th July 2016, when there was no such evidence to support it.

v)The 1st Respondent failed to consider the mandatory provisions of the grievance procedure2nd of the Respondent, which indicates the manner in which persons such as the Applicant can be terminated from the employment of the 2nd Respondent.

2) *A Declaration that the 1st Respondent's finding that the 2nd Respondent had justifiably terminated the Applicant's employment on the basis of the disciplinary hearing convened by the 2nd Respondent to determine whether the Applicant should be dismissed , is irrational, on the basis that the disciplinary hearing convened by the 2nd Respondent , to determine whether the Applicant should be dismissed by the 2nd Respondent , was not conducted by the Human Resource manager as mandated by the Grievance Procedure of the 2nd Respondent.*

3) *Declaration that the 1st Respondent's finding that the 2nd Respondent had justifiably terminated the Applicant's employment is irrational, on the basis that the determination of the Applicant's employment by the 2nd Respondent was not effected by the President of the 2nd Respondent as mandated by the Grievance Procedure of the 2nd Respondent.*

4) *An order of certiorari quashing the decision of the 1st Respondent dated June 8, 2018, in which the 1st Respondent ruled that the 2nd Respondent had justifiably terminated the employment of the Applicant.*

5) *A Stay of the decision of the 1st Respondent in which it ruled that the 2nd Respondent had justifiably terminated the employment of the Applicant.*

In Summary, the grounds on which the Applicant is seeking these orders are as follows:

1.The findings of the 1st Respondent that the 2nd Respondent had justifiably terminated the employment of the Applicant as Vice President for Academic and Student Affairs was based on findings that are not supported by the

evidence; and failure to consider relevant evidence that was led before the 1st Respondent.

2. The evidence before the 1st Respondent clearly shows that based on the charges before the 2nd Respondent concerning the conduct of the Applicant, only the Human Resource Manager could have convened a disciplinary hearing to determine whether the Applicant should be dismissed from his employment with the 2nd Respondent.

3. The Respondent failed to consider that based on the evidence before it only the President of the 2nd Respondent could properly take the decision to dismiss the Applicant from his employment with the 2nd Respondent.

THE DETAILED GROUNDS ON WHICH THE APPLICATION IS MADE ARE AS FOLLOWS.

1. *The Applicant was duly appointed to the post of Vice President of Academic and Student Affairs with the 2nd Respondent on September 1, 2015.*

2. *On July 15, 2016, the Applicant received an email from the Deputy Executive Chairman of the 2nd Respondent inviting the Applicant to a meeting with herself and the Executive Chairman on Monday July 18, 201 at 9:00 am. The meeting was convened at11:15a.m. on the said date.*

3. *The meeting was convened and present at the meeting were the Executive Chairman, the Deputy Executive Chairman and the Human Resource Manager:*

4. *At that meeting the Deputy Executive Chairman raised three concerns with the Applicant: - Gross misconduct in agreeing to misrepresent his reporting relationship with the former President, divulging confidential information to persons outside the employment of the 2nd Respondent and having conversations with persons in which the Applicant maligned the 2nd Respondent and its owners. The allegations were denied by the Applicant.*

5. *Later that day, the Applicant was given a letter by the Human Resource Manager of the 2nd Respondent, stating that the Applicant's response to the allegations raised in the meeting that day were unsatisfactory and that the Applicant was invited to a hearing regarding the charges of gross misconduct, maligning the 2nd Respondent, its owners and directors, breach of confidentiality and failure to live up to the responsibilities of the Applicant. The meeting was set for July 25, 2016, but did not convene until*

August 5, 2016 in the Conference room of the 2nd Respondent. This date was indicated in a letter from the Attorney –at –Law for the 2nd Respondent dated August 3, 2016.

6. *At that meeting on August 5, 2016, the Applicant's accusers were not present, only the Board member of the 2nd Respondent who conducted the hearing and the Attorney for the 2nd Respondent.*

7. *At that meeting on August 5, 2016, no mention was made of the Applicant maligning any member of the 2nd Respondent. That allegation was not before the meeting and no witnesses were called for the Applicant to confront.*

8. *On the 9th August 2016, the Applicant received a letter dated August 8,2016 from the said Board member who conducted the hearing that he had found allegations against the Applicant proved and that he had recommended that the Applicant's employment be terminated with immediate effect and that it was accepted by the Board. The letter also indicated that the Applicant could appeal within 5 days.*

9. *The Applicant exercised his right of Appeal and it was convened September 23, 2016. The Applicant was accompanied at the appeal by his brother.*

10. *At the appeal which was chaired by an Attorney-at-Law, the 2nd Respondent introduced evidence in the form of a cellular phone, which evidence was not brought before the Disciplinary hearing of August 5 ,2016. The Applicant protested.*

11. *The 1st Respondent sought to rely on email from that cellular phone which was in the custody of the 2nd Respondent to allege that the email correspondence maligning the 2nd Respondent had come from the Applicant through the said cellular phone. There was no evidence before the 1st Respondent identifying the Applicant as the person responsible for the email.*

12. *The Respondent made findings that the Applicant was confronted by his accusers at the meeting convened by the 2nd Respondent on 18th July 2016.*

13. *The 1st Respondent made findings that there were allegations that the Applicant maligned members of the 2nd Respondent at the meeting of August 5, 2016 and there was no such evidence to support it.*

14. *The 1st Respondent also found that the Applicant had admitted to agreeing to misrepresent his reporting relationship with Dr. McGrath, the former President of the 2nd Respondent, when there was no such evidence led before the 1st Respondent.*

15. *Further, the evidence before the 1st Respondent showed that the 1st Respondent failed to appreciate that at the meeting of July 18, 2016, reference was made to maligning the 2nd Respondent by the Applicant. In support of that the 2nd Respondent relied on an email dated August 2, 2016. Such email would have been generated long after the meeting of July 18, 2016.*

16. *The 1st Respondent placed reliance on this email to find in their findings that the Applicant had maligned the 2nd Respondent.*

17. *The evidence before the 1st Respondent also reveals that the 2nd Respondent did not comply with its own Grievance Procedure in terminating the employment of the Applicant, namely:*

    i. *Only the Human Resource Manager of the 2nd Respondent could have convened a Disciplinary Hearing to determine whether the Applicant be dismissed from the employment of the 2nd Respondent.*
    ii. *Only the President of the 2nd Respondent could have taken the decision to dismiss the Applicant from the employment of the 2nd Respondent.*

18. *The Grievance Procedure of the 2nd Respondent was tendered into evidence before the 1st Respondent. The 1st Respondent ignored these provisions of the Grievance Procedure of the 2nd Respondent.*

Accordingly, the remedy of Judicial Review is essential and appropriate and is sought, as the decision of the 1st Respondent in confirming the decision of the 2nd Respondent to terminate the employment of the Applicant from the 2nd Respondent, is irrational, null and void and of no effect.

The Applicant has made this application promptly and there is no other remedy available to the Applicant to challenge the decision of the 1st Respondent.

[8] The Notice of Application was supported by the Applicant's Affidavit in Support filed on 14th August 2018 and Affidavit in Response filed 27th September 2018. The Respondents, for their part, relied on Affidavit of Winston Adams filed 22nd August 2018.

Applicant's Submissions

[9] I have sought to distill the main arguments from counsel's extensive and daedalian oral submissions.

[10] It was contended that the IDT's findings were not supported by the evidence and therefore irrational. Counsel cited as an example, the finding that Mrs. Baxter and Mrs. Adams could not have been at the hearing because they were maligned in the emails. He went on to say that because the Applicant was not able to face his accusers that, in itself, was sufficient to vitiate the decision of the board chairman. It was also a grave error on the part of the IDT not to have appreciated that what transpired on 5th August 2016, was not a hearing as no witnesses were called on behalf of the UCC, the accusers were absent, and authorship of emails was not established.

[11] Counsel took issue with the Appeal process. He asserted that the Applicant could not call witnesses to support his position and that the cellular phone had been tendered for the first time and relied on, despite the Applicant's objection. This, counsel submitted, was a denial of the Applicant's right to a fair hearing.

[12] With reference to the 2nd Respondent's Grievance Procedure, counsel submitted that the disciplinary hearing was not conducted by the Human Resource Manager, as mandated by it. He said further, that the Manual refers to an 'office' and not a 'person', in which case a deputy could have chaired the hearing instead of an arbitrary board member. He also said that the Grievance Procedure required that all dismissals be made by the President or someone occupying that office but this was not the case. Accordingly, the IDT had failed to consider that the 2nd Respondent had not complied with its own Grievance Procedure.

[13] In summary, he submitted, that the basis for quashing the IDT's decision was that the UCC had failed to hold a hearing, the IDT's findings were without evidence in support, and the IDT had failed to consider that the UCC's Grievance Procedure had not been followed.

[14] Counsel referred the Court to the following cases: ***Branch Developments Limited t/a Iberostar v Industrial Disputes Tribunal et al*** [2015] JMCA Civ 48 (in particular, paragraph 60); ***University of Technology, Jamaica v Industrial Disputes Tribunal*** [2017] UKPC 22***; The Attorney General for Jamaica v The Jamaica Civil Service Association*** JM 2003 CA 58; ***The King v Carson Roberts*** *[1908] 1 KB 407****; General Council of Medical Education and Registration of the United Kingdom v Spackman*** [1943] 2 All ER 337.

1ST Respondent's Submissions

[15] Counsel submitted that the allegations relate to findings of facts on the part of the Tribunal and do not amount to errors of law. She said that the IDT's award was final and conclusive except on a point of law. In support of that position, she cited section 12(4) of the LRIDA, ***University of Technology***, supra, ***Village Resorts Limited v Industrial Disputes Tribunal and Others*** [1998] 35 JLR 292, and ***Jamaica Flour Mills Limited v Industrial Disputes Tribunal and National Workers Union (Intervenor)*** PC Appeal No 69 of 2003 (delivered 23rd March, 2005).

[16] Even if, which is not conceded, the Tribunal made any of the findings alleged there would have been evidential support for doing so, she submitted.

[17] Regarding the complaint that the IDT had failed to have regard to the UCC's Grievance Procedure, counsel contended that the IDT's role was to determine whether there was compliance with the provisions of the **Labour Relations Code**, and whether the process utilized by the UCC was fair, rather than to ensure rigid conformity with the Grievance Procedure, especially where to do so would be a breach of the rules of natural justice. In support of her argument she referenced ***University of Technology***, supra.

[18] In relation to the complaint that the Applicant was not allowed to face his accusers, counsel said that, technically, there were no accusers. The evidence relied on were the emails which had been disclosed to the Applicant ahead of the hearing.

[19] In response to the submission that the UCC could have appointed a deputy Human Resource Manager to chair the disciplinary hearing instead of Mrs. Baxter, counsel said that the Grievance Procedure referred specifically to HR Manager and that there was no evidence of their being any other HR personnel. In those circumstances, the UCC's utilization of a board member would not amount to unfairness. It would have been unfair for the HR Manager to have conducted the proceedings as she would have been a judge in her own cause.

[20] It was also submitted that the failure of the President to terminate the services of the Applicant was of no moment since Dr. McGrath had vacated office in April, 2016 and there was no evidence that any other person had been appointed as President.

[21] Regarding the submission that the Tribunal mistook the meeting of the 18th July, 2016 for a hearing, counsel submitted the Tribunal's award made a clear distinction between the meeting of 18th July and the hearing of 5th August. Further, it was not irrational for the Tribunal to have treated the proceeding on 5th August as a hearing.

[22] Counsel urged the court to disregard the Application for Stay on the basis that under Rule 56.4 (9) of the CPR a stay could only be granted on an application for certiorari or prohibition. She also relied on ***Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies*** [1991] 4 All ER 65. Further, counsel submitted that no stay could be granted as there were no proceedings to stay.

2nd Respondent's Submissions

[23] Counsel submitted that the Applicant's grounds must show a high probability of the IDT falling into an error of law and that leave ought to be refused as the Applicant's grounds did not disclose an arguable case with a reasonable prospect of success. The court was referred to ***Sharma v Brown-Antoine*** (2006) 69 WIR 379 (PC), ***National Commercial Bank Jamaica Limited v Industrial Disputes Tribunal & Peter Jennings*** [2015] JMSC Civ 105, and ***Clayton***

Powell v Industrial Disputes Tribunal & Montego Bay Marine Park Trust [2014] JMSC Civ196.

[24] It was further submitted that the IDT had ample evidence in support of its finding that the Applicant had sent emails in question, viz:

> *(i) emails emanated from the Applicant's email address pbenjamint@gmail.com;*
> *(ii) numerous actual factual events described in the emails could either be known only by the Applicant or a very small number of people, sent from pbenjamint@gmail.com;*
> *(iii) there was no doubt on Dr. McGrath's part that he was corresponding with the Applicant;*
> *(iv) subsequent to his appeal, the Applicant acknowledged and replied to an email sent by Mrs. Joy Crawford to pbenjamint@gmail.com; and*
> *(v) There was no credible explanation from the Applicant as to how so many emails could be sent from and received in his email account without his knowledge.*

[25] Counsel disagreed that the IDT had found that the Applicant admitted to misrepresenting his reporting relationship with Dr. McGrath in email dated June 10, 2016. Rather, the IDT's finding, he submitted, was that the Applicant had agreed to provide a fraudulent reference to Dr. McGrath. There was clear evidence for that finding as the Applicant had responded to the request when he replied: "I would be most delighted to speak with anyone who calls or sends emails…" This was after Dr. McGrath disclosed that he had listed the Applicant as his most recent supervisor "in case anyone [called or emailed]".

[26] Counsel also disagreed that the IDT had found that all the allegations of maligning persons had been made by the Applicant before the meeting of July 15, 2016. The IDT made no such finding, he submitted. Instead, the IDT found that Dr. and Mrs. Adams and Mrs. Baxter were the Applicant's accusers, "who were all maligned in the emails sent…and the leadership of the UCC was maligned by [the Applicant]." Counsel also said that the IDT had made no reference to the dates of the emails in making its finding.

[27] In reference to the Charge Letter dated August 3, 2016, counsel said it included reference to maligning the leadership and relevant emails were disclosed to the Applicant prior to the hearing. Therefore, there was no basis for the Applicant's argument that there was no evidence to support the finding that allegations of maligning were not made at the disciplinary hearing on August 5, 2016.

[28] Counsel took issue with the Applicant's statement that the IDT had found that he had confronted his accusers at a disciplinary hearing convened on July 18, 2016. This, counsel said, was a misrepresentation of the actual finding of the IDT which was that July 18 was the "first meeting…*with his accusers."*

[29] On the question of whether the IDT failed to consider the disciplinary procedure of the UCC, he contended that the Applicant's argument emanated from the false premise that the IDT was obliged to take into account the Disciplinary Procedure. The IDT's obligation was to consider the **Labour Relations and Industrial Disputes Act**, the **Labour Relations Code** and the contract of employment, not the employer's procedure. Nevertheless, the IDT found that the *"grievance procedure was in keeping with the **Labour Relation Code** i.e. meeting held, charges laid, hearing held, representative attended and the appeal process was utilized.*" Those findings, he submitted, could not be made if the IDT had ignored the Disciplinary Procedure of UCC.

[30] Counsel submitted that it was not irrational for the IDT to have found that a proper hearing was held although the procedure was not conducted as mandated in the UCC's Disciplinary Procedure, as it related to the roles of Human Resource Manager and President. He said that if the Applicant's arguments were taken to their logical conclusion it would mean that the IDT should have found that Mrs. Baxter, who was called "conniving" by the Applicant, and Dr. Adams who was described as "evil" and a person engaging in "machinations", should have been judges in their own cause. This would have deprived the Applicant of his right to a fair hearing. It would also be antithetical to the **Labour Relations Code** and result in an absurdity.

[31] Accordingly, counsel submitted that the IDT's findings of fact could not be disturbed or substituted by the court. Those findings were clearly supported by evidence which could not be said to be slender and the "Sharma threshold" for granting leave had not been met.

ANALYSIS

Principles

[32] At the stage of considering an application for leave for judicial review of an award from the IDT, the court should be guided by principles that are well established in law. The *first* is that the decision of the IDT is to be treated as "final and conclusive" except for questions of law (Section 12 (4) (c) LRID; ***University of Technology,*** supra). On the basis of the decision in ***The King v Carson Roberts***, supra, I would also say that questions of law extend to an error in point of facts. The *second* is that the Applicant must demonstrate that he has "*an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy…*" (***Sharma v Browne–Antoine***, supra). This means that the judge should only grant leave *"… if [she] is clear that there is a point fit for further investigation on a full inter partes basis…" (per Lord Donaldson MR in R* ***v Secretary of State for the Home Department ex parte Rukshanda Begum*** [1990] COD 107,108*; applied in* ***Clayton Powell v Industrial Disputes Tribunal & Montego Bay Marine Park Trust*** *[2014] JMSC Civ.196) supra.*

[33] Brooks JA, expounded the *first* principle in ***Industrial Dispute Tribunal v University of Technology Jamaica and Another***, supra, a judgment which received high approval from the Privy Council in ***University of Technology***, supra. His Lordship said, *inter-alia "…The IDT was carrying out its own enquiry. It was not an appellate body, it was not a review body, but had its own original jurisdiction where it was a finder of fact"* (para 34). In performing that function, the IDT "*is entitled to take a fully objective view of the entire circumstances of the case before it, rather than concentrate on the reasons given by the employer. It is*

to consider matters that existed at the time of dismissal, even if those matters were not considered by, or even known to, the employer at that time" (para 40).

[34] This court is not expected to review the IDT's decision in any great detail. As Lord Diplock observed in **Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Limited [**1981] 2 All E.R. 93 at 106, *"...the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage*." The court need only satisfy itself that the Applicant has established some minimum quality that his challenge has a realistic chance to succeed.

[35] I will now enquire into whether the IDT made findings without evidence to support them, took into consideration matters which it should not have done or ignored matters that it ought to have considered.

[36] I have set out the issues under convenient sub-heads.

Reliance on Cellular Phone

[37] The Applicant contended that it was unfair for the cellular phone to have been admitted into evidence, for the first time, at the Appeal stage of the proceedings.

[38] In his Affidavit, Mr. Adams deposed that the phone was tendered "…to allow the Applicant to see the emails in the state they were first discovered, which he did" (para 21).

[39] At page 4 of her letter to the Applicant, giving her report on his Appeal, Mrs. Crawford stated:

> *Mr. Goffe tendered into evidence a cellular phone which, he said was the source of the emails. This, he advised, was the UCC's phone that had been assigned to Dr. McGrath which was returned by him on his termination of services with the UCC. All the enlarged screen shots of the emails proffered had come from the Windows phone assigned to Dr. McGrath by the UCC on which he had made and received private emails to his personal email address,*

> *troymcgrath@yahoo.com. I had the opportunity to inspect the phone and was able to see, inter alia, an email from Dr. McGrath dated July 25, 2016 sent to Paul Thompson. This was not a part of the bundle, but had been part of the emails provided to your Attorney at the Hearing and which was brought to the Appeal. You also inspected the phone and confirmed your email address as being pbenjamint@gmail.com and that I could communicate with you at that address*.

[40] She continued at page 5:

> *With regard to the evidence that the purported emails that been crafted by you or that you had sent them: You admitted that the email address was yours but you never asked how the UCC had come into possession of the emails. It is my considered opinion that that situation begged the question, as a reasonable inference could have been drawn and was, in fact, so drawn that you were the author of the emails emanating from your account, based on the intimate details provided of the UCC's operations and the description of the characters of its personnel. Please refer to Page 12 of the Bundle which, inter alia, states "The big man has asked me to request a meeting with the UCJ re: the accreditation matters …" and Pages 21 to 22, "I am aware of how evil they are and Mrs. Baxter's conniving ways are legendary. My trust in God is unwavering and I firmly believe that justice will win in the long run. What is interesting is that many persons inside and outside of UCC are fully aware of the machinations of the Adams'. Their luck will soon run out…" The email communication has other instances which impugn person's characters or paint them in a not-so complimentary light. There is clear evidence of 'bad- mouthing' some of the UCC's personnel* (exhibit 9).

[41] At paragraph 28 of his Affidavit in Response, the Applicant stated that he did not see any emails on the phone. However, at paragraph 14 he deposed that his lawyer had received emails among the documents provided by the UCC. By this response, it is clear that the Applicant was not denying that the emails were produced to him, nor was he saying that when the phone was produced it had disclosed new emails or anything of the sort.

[42] Provision for an appeal is found in paragraph 41.4.7 of the UCC's Disciplinary Procedure, which provides, inter-alia: "…The hearing should not be a re-hearing

but a review of the case to consider appropriate new documentation, the evidence recorded and the decision of the disciplinary hearing."

[43] The Appeal was part of UCC's disciplinary proceedings and could not be treated as a court hearing with strict rules of evidence and procedure, other than those required for natural justice. It was therefore open to the IDT to accept or reject the evidence as presented because it has a wide scope from which to take evidence. As stated by the learned authors of Harvey on Industrial Relations and Employment Law, Butterworths, May 1994), "…*it seems that a tribunal, unlike a court, may glean the evidence from whatever source it sees fit: from its own knowledge, from eyewitnesses, by hearsay;…What is however vital is that any material point which is adverse to the accused should be put to him and he should be afforded an opportunity to explain, and to contradict or correct any statement prejudicial to his interests..*" (para 3013).

[44] The IDT had the emails to look at for itself as well as the accounts of Mr. David Wan who conducted the hearing and Mrs. Yvonne-Joy Crawford who conducted the Appeal.

[45] **I**t is clear from a reading of the IDT award that the Tribunal accepted that the emails had been produced to Applicant. At page 10, the IDT stated,"The Tribunal accepts that he did, in fact, see the emails prior to UCC bringing it (sic) to his attention."

[46] The IDT continued, at page 12, "The Tribunal found that Ms. Joy Crawford confirmed that she had been given a cell-phone by the university which had emails to and from Paul Thompson some of which were printed and some of which were not."

[47] The Applicant has not established any unfairness in relation to the cellular phone having been produced at the Appeal stage. I therefore find that this aspect of the IDT's Award does not disclose any matter for judicial review.

Unsupported finding that emails sent by the Applicant

[48] With regard to authorship of the emails, it is a question of fact whether they were the Applicant's. There was no witness to their composition. The evidence was in the emails themselves.

[49] The Tribunal had the benefit of seeing the emails as well as hearing from Mr. Wan, Mrs. Yvonne Joy Crawford and Dr. and Mrs. Adams. The UCC had found, as a fact, that it was the Applicant's email address which was used and that he was one of few persons with the information he had given in the emails. The Tribunal was entitled to explore this evidence and make its own determination that it was reasonable to so conclude.

No evidence to support finding Applicant was confronted by his Accusers at Hearing on 18th July 2016

[50] It was the Applicant's contention that there was no evidence to support the IDT's finding that he was confronted by his accusers at the disciplinary hearing on 18th July 2016.

[51] As it relates to what transpired on the 18th, there is no reference in the Award to it being a hearing. Neither is there any reference to the Applicant being "confronted" by his accusers. Rather, the Tribunal found that the Applicant's first meeting was in fact with his accusers, Mrs. Adams and Mrs. Lorna Baxter (p.11). The Award, therefore, does not disclose the findings that are being impugned.

Unsupported finding that allegations of maligning made at the meeting of August 5, 2016

[52] The Tribunal made no reference to any meeting being held on August 5. The only meeting referred to in the Award was that held on July 18, 2016 (page 11). The other aspects of the disciplinary proceedings were the hearing chaired by Mr. David Wan, which was convened on August 5, 2016 (see para. 15 of Applicant's Affidavit in Support) and the subsequent Appeal which was chaired by Mrs. Crawford.

[53] It is apparent that the Applicant has used "meeting' and 'hearing' interchangeably, in relation to the proceeding on August 5, 2016 (see, for

example, paras 5-7 of the Detailed Grounds). The Tribunal also fell into similar error. In the background to its Award, the July 18 proceeding was referred to as a formal hearing, yet in the findings it was characterized as a meeting.

[54] In relation to the complaint that there was no evidence to support the finding that there were allegations of maligning at the meeting of August 5, 2016, I have perused the Award and found nothing of the sort.

[55] At page 4 of the Award, the IDT stated that it heard evidence from Mrs. Adams that by letter dated August 3, 2016 the Applicant was invited to attend a hearing on August 5, 2016 to answer to allegations, one of which was that there were several emails in which he maligned the university and the reputation of its leadership. The IDT's findings on the matter of maligning are set out at pages 11 and 12, viz**:**

> *The Tribunal found that Dr. Paul Thompson's first meeting was in fact with his accusers Mrs. Adams and Mrs. Lorna, Manager of Human Resource, who were all maligned in said emails presented… the leadership of the UCC was maligned by him"* (my emphasis).

[56] The IDT had before it the emails, evidence in relation to the charges, and the evidence of Mr. Wan. It could therefore confirm or refute the evidence of Dr. Thompson. These being issues of fact for the Tribunal, they cannot be reviewed by this court, as there was no unreasonableness or error in law established in relation to the evidence before the IDT and the findings it reached.

Unsupported finding that Applicant admitted to agreeing to misrepresent his reporting relationship

[57] The Applicant complained that there was no evidence to support the IDT's finding that he had admitted to agreeing to misrepresent his reporting relationship. The Tribunal did not make such a finding. It said that the Applicant did not reject the request to misrepresent the reporting relations and that his response disclosed awareness of the request and agreement to accede to it (p. 11, infra).

[58] The Tribunal had the benefit of Mrs. Yvonne Crawford's report in which she stated, at page 5:

> *With regard to the agreement to provide a fraudulent reference for Dr. McGrath: I find that there is sufficient evidence contained in the Bundle, highlighted by Mr. Gavin Goffe, from pages 11 to 13. On Friday, June 10, 2016 at b 6.19 am, Dr. McGrath wrote, "In my applications, I list you as my most recent supervisor, as Chair of the Academic and Student Services Committee… in case anyone calls or emails ..." On Page 11, on 10/06 at 08:38, a response signed by Paul stated, inter alia, "I would be most delighted to speak to anyone who calls or sends emails. I hope such contact will be the precursor to your securing a job in which your skills will be appreciated…." It is reasonable to infer collusion. There was no attempt by you to disagree with or admonish Dr. McGrath for the obvious, deliberate misrepresentation of your working relationship.*

[59] The Tribunal stated, at page 10:

> *…that by Dr. Thompson's own admission to have sent the recommendation to Dr. McGrath he responded to a request made via the emails in question. The Tribunal accepts that he did, in fact, see the emails prior to UCC bringing it (sic).*

[60] It continued on page 11:

> *The Tribunal found that the request to provide a fraudulent reference altering the reporting relationship between Dr. Thompson and Dr. McGrath (on June 10, 2016) was not rejected by Dr. Thompson as a response, but he (Dr. Thompson) replied:*
>
> > *I would most be delighted to speak with anyone who calls or send emails. I hope such contact will be a precursor to your securing a job in which your skills will be appreciated.*
>
> *The Tribunal found that an email dated July 13, 2016, from Dr. Paul Thompson states:*
> > *" the recommendation that I wrote in your favour and sent to the Provost in St Petersburg…." (Exhibit 2)*
>
> *The tribunal notes that the recommendation tendered into evidence (Exhibit 9) was not only dated June 27, 2016 (a date prior to Dr.*

Thompson being called to a meeting by UCC on July 18, 2016) but is addressed to:

"To whom it may concern" and not to the "Provost in St Petersburg."

The Tribunal found that Dr. McGrath thought that he was corresponding with Dr. Paul Thompson in the emails."

[61] I understand the Tribunal's finding to be that by admitting to having sent the recommendation to Dr. McGrath, he did in fact see the emails involving Dr. McGrath prior to being confronted by the allegations at the meeting of July 18. In other words, the Tribunal was saying that the emails did not take the Applicant by surprise, as he had written them.

[62] It is a matter entirely for the Tribunal what to make of the emails. It considered the evidence before it and made a finding of fact that the email exchange between Dr. McGrath and the Applicant disclosed the agreement for misrepresentation by the Applicant of his reporting relationship with the former President. This was not a baseless conclusion and it gives rise to no justification for the court's interference.

IDT relied on an email of August 2, 2016 to find evidence of maligning and that maligning had been referenced at the July 18, 2016 meeting

[63] It is clearly the case that a number of emails between June and August 2016, reckoned in the matter. In his Affidavit in Support, the Applicant exhibited emails which he said had been provided by the UCC prior to the hearing on August 5 (para 14). He also deposed that at the meeting of July 18, 2016 he was told that the concerns included the maligning of UCC and its owners.

[64] At page 4 of the Award, the Tribunal stated:

"Mrs. Adams further testified that the phone was reassigned to another member of staff who discovered email correspondence between Dr. McGrath and Dr. Thompson during the period June – August 2016 and bought (sic) the

> *content of said emails to the attention of Mrs. Adams. The emails alluded to were accepted as evidence (Exhibit 2).* ***As a result of the contents of the emails*** *Dr. Paul Thompson was asked to attend a meeting on July 18, 2018…" (my emphasis).*

[65] The phrase "As a result of the contents of the emails" is a broad one and could not be accurate. As counsel for the Applicant rightly pointed out, emails of August, 2016 could not have been a basis for or referenced at a meeting of July 18, 2016.

[66] However, the pertinent issue is whether at the time of the meeting of July 18, there were emails which the Tribunal could consider as containing maligning statements attributable to the Applicant. This is answered in the affirmative on page 11 of the Award:

> *"The Tribunal found that Dr. Paul Thompson's first meeting was in fact with his accusers, Mrs. Adams and Mrs. Lorna Baxter, Manager of Human Resource, who were all maligned* ***in said emails presented****"(my emphasis).*

[67] It was an error for the Tribunal to have implicated all the emails as justification for the meeting of July 18, 2016 but that was not fatal to the determination as to whether at the meeting of July 18 the Applicant was aware of the allegation that he had authored maligning emails. The error was inconsequential and does not rise to the level of being prejudicial to the Applicant or to make the Tribunal's findings unreasonable or irrational.

UCC did not comply with its own Grievance Procedure and this was ignored by the IDT

[68] The responsibility for conducting a disciplinary hearing is that of the Human Resource Manager but it was done by a board member. For this reason, the Applicant complained that the UCC did not follow its Grievance Procedure and that the IDT should have taken account of this.

[69] In arriving at its determination, the IDT was not obligated to take account of the UCC's internal procedures. This was established in **University of Technology,**

supra. Having said that, it is apparent that the Tribunal did take account of the UCC's procedure. It found that the procedure was in compliance with the **Labour Relations Code** (p. 12).

[70] At pages 11-12, the Tribunal found that the HR Manager could not be present "in the process of disciplining Dr. Thompson" because she was one of his 'accusers'. By that, I understand the Tribunal to be saying that she could not be present in the capacity of Chair, as stipulated at paragraph 41.4.5 of the Disciplinary Procedure, because she was conflicted.

[71] The Applicant also complained that it was the President who should have terminated his service, as stipulated in the Grievance Procedure. However, the evidence was that Dr. McGrath had been dismissed as President and there was no indication of a replacement having being appointed.

[72] ***Halsbury on Employment Law*** states that ultimately, the overall fairness of the dismissal, including any procedural matter, remains a question of fact for the employment Tribunal (p.483. Section 22(1) of the **Labour Relations Code** also requires that the disciplinary procedure should *"ensure fair and effective arrangements" and "be simple and rapid in its operation" (Section 22(1) (e).*

[73] In considering whether the dismissal was justifiable, the Tribunal ought not to be pedantic and formulaic. It did not have to hinge the decision on the fact that the disciplinary hearing had not been conducted by the 'conflicted' HR Manager and that the dismissal letter had not been signed by 'an absent' President. This was its own hearing and it was not constrained by the UCC's disciplinary procedures. It was therefore within the IDT's purview to have found that the disciplinary procedure was in conformity with the **Code**, having considered the facts and circumstances as they were for the UCC. Nothing about that decision invites review by this court.

Right to Face Accusers

[74] The Applicant also contended that he was not allowed to confront his accusers, which violated the right to a fair hearing.

[75] The court was referred to two cases decided by the IDT, in support of this argument. The IDT rulings were exhibited to paragraph 31 of the Applicant's Affidavit in Support (P11 - Courtney Wilson, decided 9th November 2016, and P12 - Levi Stone, decided 7th June 2017). Both of them involved persons who alleged that they heard or saw the accused person do the things for which they were called to account. In both cases, the IDT ruled that the dismissals were unjustified as the applicants had not been allowed to face their accusers.

[76] In Mr. Wilson's case he was allegedly insubordinate and had used expletives, as reported by several persons. In the case of Mr. Stone, a customer had reported that he had left the customer's premises with some of the concrete mixture he was to have supplied. The Tribunal correctly deemed these as fitting circumstances in which the accused persons ought to have had the opportunity to face their accusers as the evidence against them would have emanated from their reports.

[77] These cases are not determinative of the questions whether there is a right to face one's accusers. It all depends on the circumstances and whether the IDT finds it necessary to do so.

[78] As the learned authors of ***Harvey on Industrial Relations and Employment Law*** point out, there is no absolute right in the accused to be allowed to question or cross-examine witnesses (*para* 3013; *Vol 2, Issue 107).* **The Labour Relations Code** bears out this point. It states, inter-alia, that the disciplinary procedure should "*give the worker the opportunity to state his case and the right to be accompanied by his representatives (22. (i)(c).* Nothing in the **Code** requires that accusers be faced.

[79] It would have been an error in law were the IDT to have found that the dismissal was unjustifiable simply because the Appellant had not faced his accusers. I find

support for this position from the Northern Ireland Court of Appeal which decided similarly in ***Ulsterbus Ltd v. Henderson*** [1989] IRLR 251.

APPLICATION FOR STAY

[80] I agree with counsel for the Respondents that a stay of proceedings would not be appropriate in this case, for the reasons advanced.

CONCLUSION

[81] None of the IDT's findings which were challenged disclosed errors in law to justify a review by this court. The Applicant has therefore failed to advance arguments of a strength and quality for me to find that he has an arguable case with a reasonable prospect of success. In particular, he has not established that the IDT's findings were irrational, in the sense that no reasonable tribunal could have come to the same conclusions.

DECISION

[82] The Application for leave for judicial review is denied. The Application for Stay is also denied.

[83] No submissions were made in relation to costs. No order as to costs.

[84] Leave to Appeal granted.