



[2012]JMSC Civil 74

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. HCV 5423 of 2009**

<b>BETWEEN</b>	<b>PAUL THOMPSON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>THE BOARD OF MANAGEMENT BETHLEHEM MORAVIAN COLLEGE</b>	<b>2<sup>ND</sup> DEFENDANT</b>

Mr. Leroy Equiano instructed by Kingston Legal Aid Clinic for Claimant.

Mr. C. Cochrane instructed by the Director of State Proceedings for 1<sup>st</sup> Defendant

Miss Symone M. Mayhew for 2<sup>nd</sup> Defendant

**Heard: March 10, 11, 2011 & May 25, 2012**

**APPLICATION FOR JUDICIAL REVIEW – DISMISSAL OF PRINCIPAL OF COLLEGE – SECTIONS 56, 57, 58, 60 (1), 85 (1), 89 (4) THE EDUCATION REGULATION 1980 – BREACH OF NATURAL JUSTICE – APPARENT BIAS – STANDARD OF PROOF**

**DAYE J,**

[1] Dr. Paul Thompson was in 2003 appointed Provisional Principal of Bethlehem Moravian College at Malvern, St. Elizabeth. This appointment was confirmed in 2005. This is a public tertiary educational institution owned by the Moravian Church of Jamaica.

[2] Concerns developed about the Principal's administration of and management of the school's affairs, particularly the financial affairs. Further,

there were rumors that he was engaged in inappropriate sexual relationship with female students of the college.

[3] As a result of this the chairman of the Board of Management of the College in 2007, Mr. Lowell Morgan, an Attorney-at-Law, initiated investigation into these matters. He was proactive in his duties to ensure the proper management, supervision and efficient operation of the institution.

[4] Arising from these concerns and investigations instituted a complaint to the Board of Management by Mr. Lowell Morgan on 26<sup>th</sup> March 2008 about Dr. Paul Thompson's conduct.

[5] The Board referred the complaint to its Personnel Committee pursuant to section 56 of the Education Code, 1980. Under this section of the said code the Personnel Committee determined on 26<sup>th</sup> March 2008 that a disciplinary hearing was required and the Principal should be charged for several breaches of discipline. Charges were laid against Dr. Paul Thompson and a hearing was held. He was found guilty on all charges and the Board accepted the recommendations of the Personnel Committee and terminated the appointment of Dr. Paul Thompson as principal on December 12, 2008.

[6] Dr. Paul Thompson challenged this decision of the Board and appealed to the Teacher's Appeal Tribunal on seven grounds. On the 1<sup>st</sup> September 2009 the Tribunal dismissed four of the grounds and allowed three of them. In effect the Tribunal accepted only one of the seven charges was proved which was that Dr. Paul Thompson committed professional misconduct by engaging in sexual relationship with a female student Andrea Miranda. They upheld the Board's decision to terminate Dr. Paul Thompson's appointment as Principal.

#### **JURISDICTION**

[7] Dr. Paul Thompson now applies to the Supreme Court for an Order of Certiorari to quash this decision. He is invoking the inherent supervisory

jurisdiction of the court over all administrative and quasi-judicial bodies which pronounce on the rights of an individual. This court's function is to determine whether the Board and its Personnel Committee adopted or followed the proper procedure at common law and by the Education Regulation 1980 to afford Dr. Paul Thompson a fair hearing. The court will not determine whether the Personnel Committee came to the right decision. The court reminds itself that the principles that matter are the credit of a witness, finding of primary facts and inferences to be drawn from primary facts these are the sole province of the tribunal i.e. the Personnel Committee, and not the Court exercising its supervisory jurisdiction on review.

[8] The range of factors that ought to guide a review court of an administrative authority decision were set out in Lord Reid's judgment in **Anisminic Ltd. v. Foreign Compensation Commission** [1969] 2 A.C. 147 at p. 171 – B-D1. He discussed the factors in this manner:

*“...‘But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.’*

[9] The Claimant contends that the Board failed to take into account the procedural safeguards imposed on the Board for his protection under Sec. 58 and section 57 of the Education Regulation, 1980 governing disciplinary hearing. Also, he contends the Board failed to follow natural justice in their duty to act fairly to him in the disciplinary hearing on the ground of bias. Thus, he invites the court to hold the decision to dismiss him as Principal was a nullity and quash it.

#### **LIMITATION PERIOD**

[10] The first complaint he raised is what I conveniently term as the decision is time barred under Sec. 58 of the Code. The section read as follows:

*"56. Where the Board of a public educational institution receives a complaint in writing that the conduct of a teacher employed by the Board is of such that disciplinary action ought to be taken against the teacher, it shall, as soon as possible, refer the matter to its personnel committee for consideration to its personnel committee.*

*58. If a complaint about a teacher's conduct is not heard and a decision handed down within nine months of the lodging the complaint the matter of the complaint shall lapse at the expiration of the period of nine months."*

[11] Mr. Equiano submitted that the decision to terminate Dr. Paul Thompson's appointment as Principal was handed down some eleven (11) months after the complaint was lodged against him and not within the nine (9) months. It appears that the policy of the code places a high premium on speedy resolution of issues within education bodies. This it seems is to ensure an orderly and stable environment for the provisions and the delivery and receiving of education.

[12] It is necessary to look at the time line of the steps leading to the Board's decision to dismiss Dr. Paul Thompson from the College. They are as follows:-

- (a) *On the 27<sup>th</sup> December, 2007 the Board suspended Dr. Paul Thompson as also the Plant Manager for 3 months with pay to facilitate investigation into allegations of irregularities in the financial operations of the college. It wanted to facilitate investigation into allegations of inappropriate behaviour with female students of the College. (Minutes of Board meeting dated 27<sup>th</sup> December 2007 pp. 4 – 5).*
- (b) *On 26<sup>th</sup> March, 2008 the Chairman of the Board Mr. Lowell Morgan circulated two reports to the Board members titled “Professional Misconduct Dr. Paul Thompson – the sequence of events” and the factors which influenced the decision to send the Principal and Plant Manager on leave with pay.*
- (c) *The Board at its Board meeting on the 26<sup>th</sup> March 2008 agreed and referred the allegations against Dr. Paul Thompson to its Personnel Committee.*
- (d) *On the 26<sup>th</sup> March, 2008 the Board reconstituted its Personnel Committee to select Mrs. Heather Murray as Chairperson and Dr. Kofi Nikrumah – Young and Steve Allen as its members. When this reorganization was done, by Mr. Lowell Morgan, the Chairman and Dr. Paul Gardner, the vice Chairman declined membership of the committee as they were involved in aspects of the investigation of the allegations against Dr. Paul Thompson and were potential witnesses of the proposed hearing.*
- (e) *On the 26<sup>th</sup> March 2008 the Personnel Committee decided that disciplinary hearing was warranted due to the nature of the allegations against Dr. Paul Thompson.*
- (f) *On the 27<sup>th</sup> March 2007 Mr. Lowell Morgan wrote to Dr. Paul Thompson that the Board had referred a written complaint against him to the Personnel Committee. The Board advised*

*Dr. Paul Thompson that he would be suspended with  $\frac{3}{4}$  pay effective May 1, 2008 until the matter was determined.*

- (g) On July 9, 2008 the Personnel Committee advised Dr. Paul Thompson by letter that a disciplinary hearing is required into the allegations against him and that six charges were included in this letter.*
- (h) A hearing was conducted between September 17, 2008 and December 18, 2008.*
- (i) On the 17<sup>th</sup> December 2008 the Personnel Committee reported to the Board that all six charges were proved. It recommended a dismissal of Dr. Paul Thompson immediately.*

[13] Mr. Equiano submitted the disciplinary process commenced on the 27<sup>th</sup> December 2007 when Dr. Paul Thompson was first suspended by the Board. On the other hand Mr. Cochrane and Miss Mayhew submitted the disciplinary proceeding was first commenced when Dr. Paul Thompson was suspended on the 27<sup>th</sup> March 2008 and the Personnel Committee constituted. Hence the Board's decision of the 12<sup>th</sup> December 2008 satisfied the nine-month time limitation of Section 58 of Education Regulation of 1980.

[14] I accept that the first suspension of Dr. Paul Thompson was to facilitate investigation into financial irregularity by Dr. Paul Thompson of the College's affairs. I agree that Section 89 (4) of the Education Regulation gives the Board a discretion to suspend a teacher pending investigation.

[15] This discretionary power to suspend is different from the power to suspend a teacher pending the hearing of the Personnel Committee under Sec 60(1) of the Regulation. Therefore I hold that time begins to run for the Board's decision from March 26, 2008. That the decision to terminate the Principal's appointment was handed down within the nine-month period. The regulatory

procedure at this time was satisfied and the Board's decision cannot be quashed on this ground.

**WRITTEN COMPLAINT REQUIREMENT UNDER SECTION 56 OF REGULATION**

[16] Mr. Equiano submits no written complaint was made to the Board within Sec. 56 of the Regulation to set in motion the disciplinary hearing. He says the two reports circulated by Mr. Lowell Morgan to the Board members on the 26<sup>th</sup> March 2008 were not written complaints. This was a breach of the regulation procedure, he argued, that was to safe-guard a fair hearing for Dr. Paul Thompson. Both Mr. Cochrane and Miss Mayhew submitted the reports were written complaints. They submitted that the regulation did not specify any particular form to make a written report.

[17] A similar argument was raised by a teacher and was rejected by the Privy Council on an appeal from Jamaica in **Eustace Wilberforce Grant v. The Teacher's Tribunal and the Attorney General** [2006] UK PC 59 at paragraph 28 and 29. There the applicant whose employment was terminated by the Board of Management of the Montego Bay Community College for unprofessional conduct, neglect of duty and insubordination argued Sec. 57 and Sec. 56 was breached because no written complaint was received by the Board to send to the Personnel Committee.

[18] The Chairman after a properly reconstituted board was convened wrote the applicant and informed him the Board would recommence hearing the charges against him which was referred to in a letter sent to the Board about his conduct.

[19] The Privy Council found that copies of the three letters that the principal wrote to the Applicant detailing his conduct and which she sent to the Board:

*"... could quite properly be used in .... 1999 as documents specifying the matter, the substance of the complaint made by the principal and which the new board proposed to consider."*

The court held the principal's letters did constitute sufficient information about the charges brought.

[20] The Court commented that the provision that the Personnel Committee under Sec. 57(1) was to consider whether a complaint is trivial or whether a hearing is necessary was

*"... a provision designed as a filter mechanism, not uncommonly found in disciplinary codes, which obviates the need for the committee to spend time giving extended consideration to unfounded complaints."*

[21] This means the submissions of Mr. Cochrane and Miss Mayhew is supported by authority. I hold the Reports circulated by the Chairman of the Board to the members constituted written complaint to the Board about the conduct of the principal which was referred to the Personnel Committee. It contained sufficient information about the charges to be brought against Dr. Paul Thompson.

[22] A part of the argument advanced for Dr. Paul Thompson is that he did not have notice of the charges brought against him before the hearing. Thus there was a breach of that aspect of the *audi alteram partem* rule, that is, a person has a right to know of the charges brought against him and to be heard in response to such charge. I do not find that this fundamental rule was infringed and render the hearing a nullity on this ground. The reason I hold so is that a letter was sent on the 9<sup>th</sup> July, 2008 to Dr. Paul Thompson from the Personnel Committee informing him that there would be a hearing and the charges were enclosed. There was no challenge of this specific fact on the evidence. Another letter was written to Dr. Paul Thompson informing him that his Attorney-at-Law could not attend the first date fixed for the hearing but they challenged the constitution of its Personnel Committee. There was no dispute or challenge then that they did not know what charge their client was required to defend. Therefore I find there was no breach of the procedure under Sec 57 (1) and The Appeal Tribunal's



decision about the ground was correct. Mr. Cochrane submitted all the requirement of notice and opportunity to make representation was followed as in the case of **R v. Commissioner of Police, ex parte**. Keith A. Pickering (1995) 32 J.L.R. 123 (p. 7 – 8 Transcript of Submission). I agree with this submission.

#### **APPARENT BIAS**

[23] There still remains the complaint of bias raised by Dr. Paul Thompson about the Personnel Committee's. I understand Mr. Equiano's argument to be that the Personnel Committee decision was affected by bias on two grounds, viz.

- a. *The chairman's two reports circulated to the Board on the 26<sup>th</sup> March, 2008 contained prejudicial material which the Personnel Committee was exposed to before they even decided the preliminary issue that the allegations were trivial or serious; and*
- b. *Pre-hearing prejudicial material was e-mailed to one member of the Board by the Chairman. Thus Dr. Paul Thompson could not get a fair hearing.*

#### **THE TEST**

[24] The test of apparent bias was laid down in **R v. Gough** [1993] A.C. 646. The court stated the test was "whether there was a real danger of bias, having regard to the circumstances, on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour or unfavour, the case of a party to the issue under consideration by him." The same test that governs judges applies to a jury and arbitrators (**Gough, supra**).

[25] In an appeal to the Privy Council from Belize, **George Meerabux v. The Attorney General of Belize**, Privy Council Appeal No. 9 of 2003, Lord Hope of Craighead pointed out that there was an adjustment to the Gough test in **Re Medicaments and Related Cases of Goods** [No. 2] [2001] 1 WLR 2000 and that "laid the basis for the final stage in the formulation of the objective test which

is set out in **Porter v. Magill**, paragraph 10: “whether the fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased.” The court reemphasized that “public perception of the possibility of unconscious bias is the key.”

[26] The characteristics of the fair minded and informed observer were described and referred to in **Joseph Lennox Holmes v. Royal College of Veterinary Surgeons** [2011] U.K. P.C. 48 at paragraph 24. There Lord Wilson said Lord Hope in **Helow v. Secretary of State for the Home Department** [2008] UK HL 62 gave the following description:

*“[1] The fair-minded and informed observer is a relative new comer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively...”*

*[2] The observer who is fair minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unlikely sensitive or suspicious... Her approach must not be confused with that of the person who has brought the complaint. The “real possibility” test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer centers. They can be justified objectively. But she is not complacent either. She honours that judges, like anybody else have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they may love said or done or association that they have formed may make it difficult from them to judge the case before them impartially.*

*[3] Then there is the attribute that the observer is informed. It makes the point that, before she takes a balanced approach to any information she is given, she will take that trouble to inform herself on all matters that are relevant. She is the sort of person who takes*

*the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographic context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment”*

[27] Applying the test to the facts of **Meerabux** the Privy Council agreed that a fair-minded and informed observer who knew the facts that the chairman of the Belize Advisory Council, an Attorney-at-Law of the Belize Bar Association, that had to investigate allegations of misconduct of a judge would not find that there was a real danger he was biased. The Bar Association had made one of the complaints the advisory council had to investigate. However, the Chairman's membership in the Bar Association was automatic. The Chairman did not take part in the resolution that was moved to complain against the judge. He did not hold any senior position in the organization. The court concluded he was not a judge in his own cause and there was no apparent bias, or automatic disqualification (see **R v. Bow Street Metropolitan Court, ex parte, Pinochet Ugarte (No. 2)** [1999] 1 All ER 577).

[28] The Privy Council had to consider the matter of apparent bias as a feature of the structure of disciplinary procedure in **Joseph Lennox Holmes v. The Disciplinary Committee of the Royal College of Veterinary Surgeons** [2011] UK 68. The appellant appealed the direction of the Disciplinary Committee (DC) that his name be removed from the register of Veterinary Surgeons. The charges against the appellant was referred to the DC by a Preliminary Investigating Committee (PIC) that decided there was a real chance that the applicant could be found guilty of professional misconduct. The PIC members were the President and two (2) Vice Presidents of the college and three (3) other council members. The DC members were a Chairman and eleven (11) council members. This structure led to a situation that the body that was making the charge referred it to members of the same body in which it holds membership.

[29] The appellant contended, the role of the preliminary screener (PIC) was prosecutorial and the DC would institute a charge in the name of the college. The DC takes into account policy guidelines made by council on professional conduct to determine if a charge is proved.

[30] The complaint was that those who performed a judicial role may have previously performed the role of prosecuting a charge (PIC) against a doctor and this was an appearance of bias.

[31] The Privy Council held that the role of the PIC was a preliminary screener and this was not prosecutorial. It was more akin to the role of examining justices or a judge ruling on a submission of no case to answer.

[32] The court observed that the Chairman's role as a preliminary screener was objectionable not because it was itself prosecutorial but because it sets in train the process which led to the prosecution and raised concern that, in that role, he made a decision, though limited, which might colour his later approach to the case as Chairman of the hearing committee.

[33] The court further observed there was a preponderance of membership of council members of the college who could serve on the committee of the council which had different functions and that could lead to the appearance of bias, and result in an unfair hearing to a person facing disciplinary hearing.

[34] This feature described bears similarity with functions of the personnel committee under the Education Regulation, 1980. I believe this is at the heart of Mr. Equiano's submission of apparent bias or the real danger of bias against Dr. Paul Thompson during the hearing against him and the decision that his employment should be terminated from the college.

[35] The court applied in **Joseph Lennox Holmes** (*supra*) the test whether a fair-minded and informed observer would hold there was the real danger of bias by the Disciplinary Committee. It found that the fair-minded and informed observer possessed of the facts that if the rules of the council and college prevented a member of the PIC to sit on the DC, the college had formulated a convention to eliminate conterminous membership of PIC and DC, membership of a policy-making committee that formulate professional standard and conduct and membership in an adjudicating committee did not give rise to a real danger of bias on that ground alone.

[36] I am unable therefore to agree with Miss Mayhew's submission that since the Personnel Committee would be privy to allegations against the Principal by the statutory structure of the Board there cannot be any bias. She did advise changes to the personnel committee to avoid bias and prejudice. (See p. 38 – 41 of the Transcript of Submission).

[37] In the instant case the Board of Management was advised by counsel on the composition of the Personnel Committee. They formulated a convention or protocol where the Chairman and Vice Chairman who would be members of this committee by the code were recused and other members nominated to the committee. The reason for this was that both the Chairman and Vice Chairman were potential witnesses for the disciplinary hearing. The objective of this step was in the interest of a fair hearing to Dr. Paul Thompson. This is a factor that the fair-minded and informed observer must take into account in the complaint of bias.

[38] There remains still the complaint that even with this protocol or convention the Chairman Mr. Lowell Morgan circulated the two documents to the Board on the 26<sup>th</sup> March 2008 from which the Personnel Committee was selected.

[39] The Report captioned Professional Misconduct – Dr. Thompson – the sequence consisted of 18 paragraphs and certain explicit and graphic details of alleged sexual impropriety of Dr. Thompson (paragraph 14 and 17 of Report). The other Report captioned “the factors which influenced the decision to send both the principal and the plant manager on leave with pay” consisted of 38 paragraphs and certain details of allegations of alleged financial irregularity against the Principal. At the end of Dr. Paul Thompson’s appeal to the Appeal Tribunal none of the charges on financial irregularity was found proved. Only the charge relating to sexual misconduct was found proved. These prehearing statements that the Personnel Committee was exposed to contained more prejudicial than probative matters.

[40] Prejudicial pretrial statement and information can lead to bias in the minds of a decision-maker on a decision-making tribunal. Any decision which flows from such a person or tribunal would not be fair to an affected person.

[41] The possible exposure of a decision-maker or tribunal to information through any source outside of the hearing can cause contamination and bias. This may be cured by a warning to members of the tribunal to disregard extraneous information or material. Such a situation arose when a female juror was seen speaking to her fiancé during an adjournment. He was seen in court at the sittings even when the jury was withdrawn **Jody Ann Blackwell and Neil Adams** [1995] 2 Cr. App. 621.

[42] Sometimes a warning cannot isolate or neutralize the contamination. This was illustrated in **John Paul Thomas and Others** [1991] Cr. A-R 239. During the course of the trial by jury of some persons on charges related to terrorist activity in Northern Ireland, the BBC released a television and radio broadcast by the Secretary of State, Northern Ireland that the government intended to abolish an accused right to silence and gave reasons that suggested the accused persons on trial were guilty if they maintain silence in the face of the charges.

[43] The court found that there may be a risk of prejudice to the course of justice arising from discussion of public affairs and other matters of general public interest.

[44] The court found further that the definite impression that the impact which the statements in the television interviews may well have in the fairness of the trial could not be overcome by a direction to the jury. The trial judge should have discharged the jury.

[45] In **Ramachondra Subramanian v The General Medical Council** P.C. App. 16 of 2002 the doctor was found guilty of serious professional misconduct by the Professional Conduct Committee arising from a child who died from meningitis and whose mother took her to him for consultation. During the hearing of the charge a national newspaper published an article that the applicant was convicted by the medical council some 20 years before the hearing. Dealing with the claim of bias the court held that there was no danger of any prejudice to the doctor as it was a well-established quasi-professional tribunal which had been directed in plain terms to pay no attention to the previous conviction (paragraph 21).

[46] The Committee hearing the complaint against Dr. Paul Thompson was exposed to pre-hearing prejudicial material, namely, the Chairman's Report. In addition, one of their members Revd. Dr. Nkrumah Young was exposed to a prejudicial e-mail dated 5<sup>th</sup> December, 2007 from the Chairman, about Dr. Paul Thompson.

[47] This e-mail concluded that Dr. Paul Thompson's judgment could not be trusted. It was a pre-judgment from a potential witness. This was made in a context about question concerning financial and administrative decision about priority of repairs to damaged building, post-Hurricane Dean in August 2007. It was sent 5<sup>th</sup> December 2007 sometime before the disciplinary hearing of

September 2008. Nonetheless it related to the subject matter of five of the charges against the Principal. Revd. Dr. Nkrumah Young a member of the Personnel Committee was privy to this e-mail.

[48] Miss Mayhew submitted that that e-mail was sent at the investigative stage and not at the time of the disciplinary hearing. That made a difference she contended. Also she submitted that any reasonable interpretation of the e-mail did not point to bias against the Principal. The e-mail went to the issue of credibility. Credibility was vital to the charge of sexual misconduct which was the only charge proved and left standing at the end of The Appeal Tribunal Hearing. (See **Locabail Ltd v. Bayfield Properties** [2000] 1 All ER 65, 77 at paragraph (j) and page 78, paragraph a – b).

[49] The Personnel Committee did not receive any warning or direction how to treat these pre-hearing statements. Their decision would have to be measured against the test whether there was a real danger of bias in their minds toward the Principal. This test more so would be relevant to Revd. Dr. Nkrumah Young. He was also exposed to allegations of sexual misconduct of the Principal from 2004. The Appeals Tribunal did not appear to address this aspect of bias and thus the ultimate issue whether the principal had a fair hearing.

#### **RULE OF EVIDENCE AND FAIR HEARING**

[50] The matter of a fair hearing does not stop there. There was an objection to the admissibility of the Affidavit of Andrea Miranda which arose during the cross-examination of Reverend Dr. Paul Gardner, the President of the Moravian church. The Personnel Committee disallowed this affidavit evidence. It was relevant to the sexual misconduct charge.

[51] The rules of evidence at a hearing is related to the procedure of that hearing. The application or misapplication of any of the rule is something that can vitiate a proceeding as numerated in **Anisminic** (*supra*).



[52] Before I go on to look closer at the Miranda Affidavit I take account of Lord Hope of Craighead dicta in paragraph 40 of **Meerabux**:

*“The question whether the proceedings are fair must be determined by looking at the proceedings as a whole.”*

[53] I look at the disciplinary hearing and I find that only one of the six charges against the Principal was found proved by the Teacher’s Appeal Tribunal. It was charge number 5 of Professional Misconduct. These are the particulars:

*“There was professional misconduct on your part, Reverend Dr. Paul Thompson, in relation to your intimate relationship with female students of the college, the particulars being that –*

1. *You had intimate sexual intercourse with female students at Bethlehem Moravian College including one Miss Andrea Miranda.”*

[54] The nature of the evidence in proof of this charge which the Personnel Committee and the Teachers’ Appeal Tribunal accepted was the Reverend Dr. Paul Gardner’s testimony of the words used by Dr. Paul Thompson in the presence Miss Andrea Miranda after he was confronted about this female student’s allegation. The words were “guilty as charged”. These words were held to be an admission or confession. They were put forward as evidence in proof of the facts in the charge.

[55] It is a settled rule that it was admissible as evidence what a person say in response to the allegation of another. If the person accepts the allegation then this admission is proof of the charge. It was not disputed that Dr. Paul Thompson used the words “guilty as charged” but his defence is the words were used in response to other complaints in the meeting (p. 89 – 99 of Transcript 3<sup>rd</sup> December 2008). The Personnel committee found Reverend Dr. Paul Gardner a credible witness and Reverend Dr. Paul Thompson was not a credible witness and therefore they found the charge proved.

[56] Credibility was a live issue. There was also the issue of reliability as to issues that were discussed in the meeting with Reverend Dr. Paul Gardner. One person who could assist the tribunal was Miss Andrea Miranda. Her evidence and affidavit was excluded. The rules of evidence under section 31D and section 31E do not permit the reception of affidavit evidence in criminal and civil proceeding respectively unless certain conditions were established. For example, it must be established that a person whose affidavit you intend to rely on is:

- (i) *dead, or unable to attend proceeding due to physical or mental illness; or*
- (ii) *is out of Jamaica and it is not practical to secure the person's attendance; or*
- (iii) *the person cannot be found after all reasonable steps have been taken to find the person or the person is kept away by threats.*

Miss Andrea Miranda's Affidavit did not meet any of these conditions. Further notice must be given by the person who intend to put in the statement to all other parties (section 31E (1) (2)). This was not done in the case of the Board and so it could not exercise the right to call the person who made the Affidavit as a witness for cross-examination (section 31D (1) (3)).

[57] Based on these provisions which counsel for the Board relied in his successful objection at the hearing, the Teachers' Appeal Tribunal found the Personnel Committee did not wrongly apply its discretion to exclude the Affidavit evidence of Miss Andrea Miranda.

[58] Miss Andrea Miranda's evidence was relevant in the interest of a fair hearing on charges of sexual misconduct where she was named as a party. She was available though may be unwilling due to the personal nature of the charge. An adjournment could be taken to secure her attendance by summons and to give time to the Board who got no notice. If she fails to attend then the statement due to its vital importance should be admitted and a direction given to the tribunal

how to treat an untested statement where the maker was not cross-examined. Her statement was more probative than prejudicial and should have been received looking at fairness of the proceeding as a whole. This course would not have infringed either that letter or the spirit of the law governing the rule of evidence. To allow the tribunal to be exposed to material which is more prejudicial than probative and then disallow a statement which is more probative than prejudicial breached the requirement of fairness. The Principal was deprived of the opportunity, by the exclusion of the affidavit, to rely on some material to show his innocence. The ruling of the Personnel Committee and the decision by the Teacher's Appeal Tribunal cannot be sustained.

#### **STANDARD OF PROOF**

[59] All parties agreed that the charge of sexual misconduct was serious. In an appeal by a lawyer from the Court of Appeal to the Privy Council where he was found guilty of professional misconduct by the Attorney-at-Law Disciplinary Committee, the court laid down what was the correct standard of proof on charges of professional misconduct before disciplinary hearings: **Winston Campbell v. Davidu Hamlet (as executrix of Simon Alexander)** [2005] UKPC 19. The court held the criminal standard of proof, that is, proof beyond reasonable doubt or so that the tribunal feel sure of the charge is the correct standard of proof (paragraph 15 *ibid*). The Privy Council thus overruled its previous decision of **Bhandari v. Advocate Commerce** [1956] 1 WLR 1442 which established that the standard of proof in disciplinary hearings was somewhere between a criminal and civil standard.

[60] The Privy Council found that the reasoning of the disciplinary committee showed they applied a criminal standard before they reached their decision.

[61] The ruling of the Teacher's Appeals Tribunal on the ground of appeal does not disclose that the Tribunal consider the application of the criminal standard of proof in this disciplinary hearing. This omission is material. The charge is

serious and there is no clear indication that the Principal had the benefit of this rule of procedure that exists to ensure him a fair hearing on a serious charge of professional misconduct.

[62] Just to say briefly that I accept the submissions of counsel Mr. Cochrane and Miss Mayhew that there was sufficient evidence to draw the inference that Miss Andrea Miranda was a student at the college at the relevant time (see Reverend Dr. Paul Gardner's evidence (p. 60 – 62 of Transcript 3<sup>rd</sup> December 2008, and cross-examination of Dr. Paul Thompson, p. 40 – 42, Transcript December 4, 2008)).

[63] Now I apply the test of a fair-minded and informed observer who would consider that there was a real danger or possible bias in the minds of the Personnel Committee in the sense that it may favour or disfavour either the Board of Management or the Principal.

I hold that the fair-minded or informed observer having knowledge of the facts hereunder:

- (a) *The rules mandate the Personnel Committee of the Board under Education Regulation to hear disciplinary charges of professional misconduct against a teacher.*
- (b) *The relationship between the Personnel Committee and the Board can expose members of the committee to prejudicial material before a hearing.*
- (c) *That steps can be taken by the Board to exclude a member exposed to prejudice or expose to investigation from sitting on the Committee.*
- (d) *That the Board took steps to constitute the Personnel Committee so that the Chairman and Vice Chairman who were potential witnesses did not sit on the hearing.*
- (e) *That prejudicial reports about its Principal was presented to the Personnel Committee.*

- (f) *There was no direction and explanation how to treat this prejudicial material.*
- (g) *One member of the Committee was exposed to and took part in a prior meeting with the Principal about allegations which were the subject matter of the sexual misconduct charge.*
- (h) *The Principal was deprived of the opportunity of putting the evidence of Miss Andrea Miranda to the Committee on the vital issue of credibility.*

would conclude that there was a real danger or possibility of bias in the minds of the members of the Personnel Committee of the Board of Management against the Principal.

#### **CONCLUSION**

[64] Therefore the disciplinary proceedings against Dr. Paul Thompson as a whole was not fair. The order of certiorari is granted. The decision of the Board of Management of the Bethlehem Moravian College to terminate the appointment of Dr. Paul Thompson as Principal of the college on the 12<sup>th</sup> December is quashed.

[65] Having regard to the importance of the resolution of the issue of the allegation of sexual misconduct against the Principal, Dr. Paul Thompson, to the Ministry of Education, the Board of Management, the school and local community and the Moravian Church, it would have been good that the decision of the Judicial Review Court produce a final resolution. However, a decision that serve the ends of justice is better even though it is not final on the truth of the allegations brought against the Principal.

[66] Stay of Execution of Order for 42 days.