[2013] JMCA Civ 21

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 87/2007

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**DERRICK WILSON**	**APPELLANT**
A N D	**THE BOARD OF MANAGEMENT OF MALDON HIGH SCHOOL**	**1ST RESPONDENT**
A N D	**THE MINISTRY OF EDUCATION**	**2ND RESPONDENT**

Hugh Wilson instructed by Wilson Franklyn Barnes for the appellant

Curtis Cochrane the Director of State Proceedings for the respondents

28, 29 February 2012 and 3 June 2013

HARRIS JA

[1] The appellant was the provisional principal of Maldon High School, he being appointed to that post for the academic year 1 September 2004 to 31 August 2005. On 18 May 2005, Mr Devon Ruddock, a Senior Education Officer, wrote to the Board, informing it of confirmation by the 2nd respondent that the appellant's tenure as provisional principal be extended and that he be assessed for consideration as to permanent appointment. On 23 June 2005, the Board wrote to the appellant informing

him that his provisional appointment would be extended for the academic year 2005 to 2006. Accordingly, his appointment in that capacity was renewed for the period June 2005 to September 2006.

[2] On 8 February 2006, Miss Jennifer Francis, an education officer, assigned to the 2nd respondent's regional four office, visited the school and discussed, with the appellant, a performance assessment done in respect of him for the period September 2004 to January 2005, a Performance Assessment Form for 2004 to 2005 having been prepared by her. Some of the ratings on the form did not meet the appellant's approval. On 1 May 2006, Mr Ruddock and Miss Francis met with the appellant at the regional office in Montego Bay and discussed his assessment. He again objected to several ratings on the Performance Assessment Form. Miss Francis, on 2 May 2006, revisited the school to inquire into the objections. Following this, a Performance Assessment Form for the period 2005 to 2006 was prepared by her.

[3] In an affidavit filed by Miss Francis, she averred that on 2 June 2006, Mr Ruddock and her met with the appellant at the regional office in Montego Bay and the appellant was requested to sign the Performance Evaluation Form but he, having again raised objections to some of its contents, declined to do so.

[4] On 2 June 2006, a meeting was held by the Board at which it was decided that the appellant would not be recommended for permanent appointment as a principal. A further meeting was convened by the Board on 31 July 2006, on which occasion it met to discuss a letter dated 26 July 2006, from the Teachers' Services Commission (the

Commission). By letter dated 31 August 2006, the appellant was informed by the Board of its inability to recommend him for permanent appointment and that a decision had been taken to terminate his appointment as provisional principal. The letter reads:

> "August 31, 2006
>
> Mr Derrick Wilson
> C/O Maldon High School
> Summerhilll
> Point P.O.
> St James
>
> Re: Permanent Appointment - Maldon High School
>
> Dear Mr Wilson
>
> With reference to letter dated 26 July 2006 from the Teachers' Services Commission, It [sic] is with regret that I write to advise you that we are unable to recommend your appointment to the post of Principal - Maldon High School.
>
> This decision was made after careful consideration and was largely based on the following reasons:
>
> 1) Failure to comply with Board instructions, (Acting contrary to decisions made by the Board)
>
> 2) A composite evaluation by personnels (sic) from the Ministry of Education, Youth and Culture Region 4
>
> 3) Failure to improve despite several counseling sessions.
>
> Please note that your Provisional Appointment was extended for one year with the expectation that improvements would have been made. To date we have seen no significant improvement, and as such your services are terminated with effect August 31, 2006.
>
> The following Remuneration Package will be made available as stipulated.
>
> Gross payment One Hundred and Eighteen Thousand, Four Hundred and Ninety Dollars ($118,490) broken down as follows:-

Salary -	$103,490.00
Upkeep	$ 15,000.00
	$118,490.00

The Board will be willing to meet with you in an exit interview and to provide guidance for future endeavours.

We wish you all the best in the future.

G Harris B.H. (M) J.P.
Chairman"

[5] It has been observed, from the tenor of the Board's letter, that it made a recommendation that the appellant should not be appointed to the post as principal of Maldon High School but it also appears that it had made a decision to terminate his service. In the Board's letter, reference has been made to a letter of 26 July from the Commission to the Board. This is a letter from the Commission to the Chairman of the Board informing him of the Commission's decision to advise the Minster that the appellant should not be confirmed in the post of principal. An affidavit of Ms Adrienne Hawthorne, a director of the School's Personnel and Administration Services of the Ministry of Education, shows that a decision was taken by the Minister not to appoint the appellant principal and this had been communicated to the Commission. By letter of 26 July 2006, the Commission transmitted information to the Board regarding its support of the Board's recommendation and of the Minister of Education and Youth's decision not to appoint the appellant the principal of the school.

[6] A letter of 8 August 2006, from the Jamaica Teachers' Association, under the hand of its Senior Secretary of its Members Services Unit, was sent to the Board informing it

of a request by the appellant for the association's intervention in the matter. Paragraph three of the letter states:

> "…
>
> Kindly observe the following:
>
> i) Your notice is in contravention of Regulation 54 (2);
>
> ii) Your Board must provide documentary evidence of the Principal's failure to comply with directives from the Board (eg Board Minutes, memoranda or letters to Principal from the Board.
>
> iii) in order to determine that there was no improvement at least two (2) sets of evaluations must have been done and to which Mr Wilson would have had sign off on;
>
> iv) Your letter extending his probationary period must indicate:-
>
> the areas of perceived weakness, and expected improvements
>
> It would be on these specifics that his performance would have to be judged.
>
> …"

[7] On 16 August 2006, the appellant's attorneys-at-law wrote to the Board informing it, among other things, that the procedure adopted by it in the matter concerning the appellant is invalid. No response having been received from the Board, the appellant, by way of judicial review, sought relief under a fixed date claim form for the following:

"1 An order of Mandamus directing the 1st and 2nd defendants to reinstate the Applicant as principal of Maldon High School and to confirm him in his post as principal.

2. An Order of Certiorari to remove into this Honourable Court and to quash the decision contained in letter dated August 31, 2006 to terminate the Applicant's appointment as provisional principal of Maldon High School aforesaid and or the decision of the 2nd defendant not to confirm the Applicant's in his post as principal.

3. Such further or other relief as may be just.

4. Cost."

[8] The claim was subsequently heard by Marva McIntosh J, who on 31 July 2007 made the following order:

> "The claimant's application for Order of Mandamus and Order of Certiorari is refused. Costs to the Defendants to be agreed or taxed."

[9] The appellant, being dissatisfied with the outcome of his claim, has now appealed. His grounds of appeal are couched in the following terms:

> "(a) The learned trial judge erred in law and in fact by refusing and or neglecting and or failing to determine whether or not the Board of Management of Maldon High School (the Board) was under a duty to act fairly in relation to the Appellant/Claimant in that he should have been given the opportunity to make representations to the Board, either in writing or orally, at its June 2, 2007 and or July 31, 2007 meetings so as to refute or contradict allegations levelled against him by the Board before the Board advised the Teachers Service Commission (the Commission) that it would not recommend him for the permanent post of principal.

(b) The learned trial judgment [sic] erred in law and in fact by refusing and or neglecting and or failing to determine whether or not the Appellant/Claimant was regularly assessed within the provisions of Schedule A 2 (f) of the Education Regulation, 1980.

(c) The learned trial judge erred in law and in fact by refusing, and or neglecting and or failing to determine whether or not the Commission was under a duty to act fairly in relation to the Appellant/Claimant in that he should have been given an opportunity to make representations, either orally or in writing, before [sic] the Commission at its July 7, 2007 meeting so as to challenge allegations made against him by the Board before [the] Commission advised the 2nd defendant not to confirm him in the post of principal.

(d) The learned trial judge erred in law and in fact by refusing and or neglecting and or failing to determine whether or not the Appellant/Claimant should have been given reasonable notice before his employment as provisional principal came to an end or whether or not s 54 (i) of the Education Regulations, 1980 applied to him.

(e) The learned trial judge erred in law and in fact by refusing and or neglecting and or failing to determine whether or not the Board was properly constituted when the decision was made by it at a June 2, 2007 and or July 31, 2007 meetings convened for the purpose of determining whether or not to recommend the Appellant/Claimant for the post of principal, especially having regard to the fact that Ms. Hope Leach, Ms. Sharon Earl and Mrs. Jennifer Francis who were not members of the Board were present at the meetings and voted.

(f) The learned trial judge misconstrued the terms and effects of Schedule A 2 (f) of the Education Regulations, 1980."

Submissions

[10] Mr Wilson argued that the meeting of 2 June 2006, was in respect of the appellant's tenure and in light of the damning report made against him, an invitation

ought to have been extended to him to attend the meeting to speak to the allegations in the report before the Board advised the 2nd respondent that it would not be recommending his appointment. The appellant's refusal to sign the assessment form for 2005 to 2006 with the assessor was due to the fact that it had been made available to the Board before it was discussed with him, he argued. The appellant, having not been afforded an opportunity to make representations before the Board, the decision was null and void, he contended. He cited the cases of ***Owen Vhandel v The Board of Management of Guys Hill High School*** SCCA No 72/2000 delivered 7 June 2001; ***R v Minister of Education ex parte Dorothy Lewis*** SC Misc No 69/1991 delivered 28 November 1991; ***Ridge v Baldwin*** [1963] 2 All ER 66; ***Chief Constable of the North Wales Police v Evans*** [1982] 3 All ER 141; ***R v Commissioner of Police ex parte Tennant*** [1977] 15 JLR 79, among others, in support of his submission.

[11] He submitted that assessments of a principal's performance over a year, by way of random routine visits, could not be regarded regular assessments and ***R v Minister of Education ex parte Lewis*** shows that there must be more than random visits. In that case, assessments done on eight visits were not found to be regular and in this case only three visits for the assessments of the appellant were carried out, he submitted. The word "shall", in section 2(d) of the Education Regulations (the Regulations), connotes a mandatory requirement in respect of regular assessments, he contended.

[12] Referring to section 32(2) of the Education Act (the Act), counsel submitted that although awesome powers are conferred upon the Commission by the Act, there is

nothing in the Act to suggest that a teacher should not be afforded a fair hearing before the Commission where its decision would adversely affect him and in the absence of such provision, the court will apply the principle of fairness. The case of ***Wiseman & Another v Borneman & Others*** [1971] AC 297, among others, was cited by counsel to support this submission.

[13] The appellant is a member of the Board but the Board, in flagrant disregard of sections 70(10)(b) and 88(3) of the Regulations, failed to invite him to the meetings, he argued. Citing ***Minister of Education ex parte Lewis***, he submitted that the meeting of 2 June 2006, was improperly constituted, in that, there were persons present who were not members of the Board and as a consequence, there would not have been a quorum when the decision was taken.

[14] It was further submitted by counsel that the learned judge erred in concluding that the appellant's tenure ended by the effluxion of time. Effluxion of time, he submitted, is used in the employment lexicon and the appellant being employed as provisional principal for two years his appointment could have been confirmed or rejected during that period.

[15] Referring to section 2(2)(f) of the Regulations, he submitted that it is intended that the person making the recommendation to confirm or not to confirm the appointment should do so in a reasonable time and failure to do so within a reasonable time renders the Board's decision bad. The Board, being minded to recommend the appellant as unsuitable, should have given its advice to the Commission within a

reasonable time, he argued. He further submitted that the appellant had a legitimate expectation that he would have been appointed principal and this is a matter to which the court can give consideration and the fact that due to no fault of his own he was not appointed within a reasonable time, he ought to be declared the principal.

[16] An objection was raised by Mr Cochrane that mandamus and certiorari, having been sought questioning the decision made on 31 August 2006, the Commission and the Minister ought to have been the proper parties before the court as respondents. The parties cited as respondents are not the decision makers within the context of section 2(f) of schedule A of the Regulations, he argued. Admitting that there were procedural flaws in the meeting of 2 June 2006, held by the Board, he submitted that these were trivial and would not have assisted the appellant. Further, he argued, although the respondents have not filed a counter appeal in respect of this objection, the court should not act in vain as there was no evidence to show that the position of principal had remained vacant.

[17] In written submissions, Mr Cochrane submitted that on 1 May 2006, Miss Francis and Mr Ruddock met with the appellant and had discussions with him, at which time he raised objections to several aspects of the report which Miss Francis investigated the following day by visiting the school and objectively sought to verify them. Further discussions which were held between the appellant and these officers on 2 June 2006 show an adherence to the rules of natural justice. It was submitted that in most cases, the law is that a right to be heard implies an entitlement to make representations before a final decision is given but this does not always require a right

to give viva voce evidence. What is required, it was submitted, is an opportunity to respond to the allegations of an accuser. The cases of ***Ridge v Baldwin; Baker v Minister of Citizenship and Immigration*** (1999) 2 SCR 817; ***R v Commissioner of Police ex parte Keith Pickering*** (1995) 32 JLR 123; ***Nyoka Segree v Police Service Commission*** SCCA No 142/2001 delivered 11 March 2005 and ***The Attorney General v Graham*** (1997) 34 JLR 721 were cited to support this submission.

[18] It was further submitted that the cases of ***Ridge v Baldwin***, ***R v Commissioner of Police ex parte Tennant*** and ***Owen Vhandel v Board of Management of Guys Hill High School*** cited by the appellant, are distinguishable from the present case as those were cases involving disciplinary proceedings in which the parties were unaware of the allegations and were not given an opportunity to answer them, while, in the present case, the appellant was afforded such opportunity on 1 May 2006.

[19] It was also the respondent's submission that by virtue of section 2(f) of the Regulations, it is the Ministry and not any particular school board which is empowered to authorize a permanent appointment.

[20] In dealing with the question of whether the appellant had been regularly assessed, in written submissions the respondents submitted that the word "regular", in schedule A 2(f) of the Regulations, must be read in terms of its contextual applicability. The role of a principal is more complex than that of a teacher and in order to determine performance, a principal would have to be assessed in a broader context and due to the

nature of their respective duties the assessment of a provisional principal differs from a provisionally appointed teacher and the case of ***R v Minister of Education ex parte Dorothy Lewis*** cited by the appellant is of limited or no application to the present case.

[21] It was also submitted that the appellant's provisional appointment was done in conformity with the relevant statutory provisions. The cases of ***R v Commissioner of Police ex parte Keith Pickering*** and ***Segree v Police Service Commission*** were cited to show that what is important is that an opportunity must be afforded to make representations before a final decision is taken. Paragraph 32 of the appellant's affidavit, it was submitted, shows that regular visits were made to the school by persons from the Commission to observe and assess the performance of the appellant and it was the Commission which provided the Board with an assessment of the appellant subsequent to discussing it with him.

[22] Counsel also submitted that section 54(1) of the Regulations expressly provides for teachers and not provisional principals and therefore would not have been applicable. The decision not to appoint the appellant would have far reaching consequences as the letter of 31 August, from the Board, sought to inform him of the decision not to appoint him. It was submitted that a permanent appointment would have to be made by the Minister through the Commission and such appointment having not been made, the appellant's position was terminated by effluxion of time.

[23] It was also the respondent's submission that there was no evidence that Ms Hope Leach or Miss Francis who were present at one of the meetings, voted or participated in the deliberations. Although the absence from three consecutive meetings could result in a person ceasing to be a member of the school board, Mrs Earle retained her position as a member, as, she had tendered apologies for absence from two meetings and there was no indication that they were not accepted.

[24] It was also submitted by the respondent that the appellant raised a point that "specific members of the Board were not invited to the meeting" but this had not been included as a ground of appeal and he, having not pleaded the point, ought not to be allowed to argue it.

[25] Referring to the appellant's submission that the learned judge misconstrued section 2(f) of the Regulations, it was submitted by the respondent that the appellant's appointment as a provisional principal would have been for two years which he had served and such appointment could not have been extended. The order sought by the appellant for reinstatement is not feasible, he having served the two years as a provisional principal as provided for by the statute, counsel submitted.

[26] Before embarking on the analysis of the appeal, it is necessary to point out that a counter notice of appeal had not been filed by the respondents in respect of the objection raised as to the parties named as respondents. Further, there is no evidence that this was a matter which was raised in the court below. As a consequence, no consideration will be given to the objection.

Issues arising in this appeal are:

1. Whether the appellant ought to have been given an opportunity, by the Board, to be heard prior to the making of the recommendation that his tenure be terminated.

2. Whether a proper assessment of the appellant's performance was carried out.

3. Whether the Teachers' Services Commission acted unfairly in not hearing from the appellant before advising the Minister to terminate the appellant's appointment.

4. Whether the Board acted in breach of Regulation 54(1) of the Education Act.

5. Whether the Board was properly constituted on 2 June and 31 July 2006.

6. Whether the learned judge misconstrued the Education Regulations Schedule A 2(f).

Issue 1- whether appellant should be heard by the Board

[27] The first attack launched against the Board by Mr Wilson was that it failed to have given the appellant the right to make representations to it before recommending that he should not be appointed the principal of the school.

[28] The Act and the Regulations made thereunder are silent as to the right of a party to be heard during the conduct of proceedings which affects him or her. However, the lack of statutory provision would not operate as a bar to an aggrieved party praying in aid the rules of natural justice. It is well settled that, where the circumstances so demand, the court, by implication, may give consideration to the

principle of natural justice despite the absence of statutory guidance. In ***Wiseman v Borneman***, Lord Guest at page 310 had this to say:

> "It is reasonably clear that on the authorities that where a statutory tribunal has been set up to decide final question affecting parties' rights and duties, if the statute is silent upon the question, the courts will imply into the statutory provision a rule that the principles of natural justice should be applied. This implication will be upon the basis that Parliament is not, to be presumed to take away parties' rights without giving them an opportunity of being heard in their interest."

[29] Natural justice demands that both sides should be heard before a decision is made. Where a decision had been taken which affects the right of a party, prior to the decision, in the interests of good administration of justice, the rules of natural justice prevail. In Sir William Wade's Administrative Law (6th Edition) at pages 496 and 497, the learned author placed this proposition in the following context:

> "As the authorities will show, the courts took their stand several centuries ago on the broad principle that bodies entrusted with legal power could not validly exercise it without first hearing the person who was going to suffer. This principle was applied very widely to administrative as well as to judicial acts, and to the acts of individual Ministers and officials as well as to the acts of collective bodies, such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing was just as much a canon of good administration as of good legal procedure. Even where an order or determination is unchallengeable as regard its substance, the Courts can at least control the preliminary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration."

[30] It is common ground that an unfavourable performance report was made against the appellant. There is also no dispute that two meetings were convened by the Board which touch and concern the appellant, one on 2 June 2006 and the other on 31 July 2006. At the first meeting, the decision was taken against recommending the appellant to the post of principal. At the second, the letter from the Commission was read and discussed.

[31] Prior to the meeting of 2 June, Miss Francis discussed the Performance Assessment Form with the appellant, at which time he raised objections to certain aspects of its contents. This caused Miss Francis to make further investigations in respect of the appellant's performance.

[32] Miss Francis, in her affidavit of 12 February 2007, avers that Mr Ruddock and her met with the appellant on 2 June 2006, and he was shown the Performance Assessment Form which he refused to sign, he having raised objections thereto. In an affidavit of the appellant sworn on 31 October 2006, he avers that on 5 June 2006, he received a call from Miss Francis inviting him to attend the offices of the 2nd respondent to sign the Performance Evaluation Form. There is evidence that the meeting with Mr Ruddock and Miss Francis would have been on 5 and not 2 June as Miss Francis has asserted. Further details will be made to this later. However, the appellant had seen an assessment form on 1 May 2006. A second form was prepared on 2 June 2006, the contents of which are identical to that which had been done previously and the appellant has knowledge of that report. Therefore, it cannot be said, as in ***R v Commissioner of Police ex parte Tennant***, ***Ridge v Baldwin*** *and* ***Vhandel v***

Board of Management of Guys Hill High School that the appellant would not have been aware of the allegations against him. Despite this, the fact that the form had been discussed with him prior to 2 June, does not mean that he had been given an opportunity to dispute any of the findings in the report when the meeting of the Board was convened on 2 June as the respondents contend. He raised objections and these were not aired before the Board.

[33] A Performance Assessment Form dated 5 June 2006 which Miss Francis discussed with the appellant was exhibited to her affidavit. There can be no doubt that the assessment form of 2 June 2006 would have been before the Board. What is important is that there was an inauspicious report concerning the appellant before the Board. Having had this document in its possession, the Board would have ultimately arrived at its decision in not recommending the appellant being appointed as principal because of its unfavourable contents. It is also not unlikely that the Board would have been informed that he had objected to the report as Miss Francis was present at the meeting. In all the circumstances, it would have been fair and proper for the appellant to have been invited to the meeting to make a protest as to the contents of the report as he would have had an entitlement to do.

[34] It is obvious that the appellant had been deprived of a right to express his disagreement with the report. In which event, the appellant's complaint of having not been afforded the opportunity to have placed before the meeting an answer to the adverse allegations contained in the assessment report is justified. Clearly, the principles of natural justice had not been followed.

Issue 2 - **whether a proper assessment of performance regularly made**

[35] It would be useful to set out Schedule A 2 of the Regulations which outlines the procedure for the appointment of a principal. It states:

> "Principals
>
> (a) A first appointment as a principal shall be on a provisional basis unless otherwise recommended by the Commission and approved by the Minister. The duration of the provisional appointment shall not normally exceed three school terms.
>
> (b) For a second or subsequent appointment, recommendation for a provisional appointment may be made by a Board to the Commission, indicating the period of the provisional appointment recommended.
>
> (c) The Commission may, as it thinks fit, recommend to the Minister that the period of the provisional appointment referred to in sub-paragraph (a) be varied or may recommend a provisional appointment where a permanent appointment has been recommended.
>
> (d) During the period of the provisional appointment, arrangements for the regular assessment of the principal shall be made by the Ministry and a report on such assessment which shall be discussed with the principal shall be made to the Board.
>
> (e) The Board shall before the expiration of the period of the provisional appointment referred to in sub-paragraph (c), make a report to the Commission and that report shall, take into account the assessment made by the Ministry as to the professional competence and performance of the principal.
>
> (f) The Commission shall determine in consultation with the Board, subject to confirmation by the Minister, whether the provisional appointment shall be made permanent or be extended for a further period; but the total period of an

> appointment on a provisional basis shall not exceed two years."

[36] The complaint of the appellant is that assessments, as required by section 2(f), were not done regularly. It is necessary to state that it is section 2(d) which makes provision for the regular assessment of a provisional principal and not 2(f) as stated by the appellant. This notwithstanding, the question is whether regular assessments of the appellant were carried out in keeping with the requisite regulatory scheme.

[37] Mr Wilson contended that the issue turns on the use of the word "regular" within the context of the Regulation. After making reference to the definitions of the word in the Oxford Paper Back and the Collins dictionaries, he submitted that regular assessment implies assessments being carried out at pre-arranged intervals over a reasonable time. In order to achieve objectivity and to reduce the appearance of bias, a performance report, he submitted, being highly subjective and technical ought to be carried out frequently. Submitting that three random visits over a period of two years could not reasonably constitute proof of a regular assessment of the appellant, he cited the case of ***The Ministry of Education ex parte Dorothy Lewis*** in support of his submission. That case, the respondent submitted, is of no assistance to the appellant as in the case, several visits were made to the school by persons from the Ministry which predated Ms Lewis' appointment as provisional principal and further, the purpose for the visits were not stipulated in the log book.

[38] Section 2(d) of the Regulations, in specifying that arrangements for the regular assessment of a provisional principal shall be done, makes such prescription mandatory.

The word, "regular" as used within the regulatory framework is clear and unambiguous. It must be given its natural and ordinary meaning. The word is defined by the Concise Oxford Dictionary as meaning, "arranged in constant or definite pattern, especially with the same space between individual instances"; "recurring at short uniform intervals: a regular monthly check"; "done or happening frequently".

[39] As can be observed from the Regulation, a person cannot be appointed principal before first serving as a provisional principal. Prior to an appointment of a principal, the Regulation imposes upon the Ministry of Education a duty to effect regular assessments of the performance of a provisional principal during his tenure. The question therefore, is whether an assessment of the appellant was conducted within the constraints of the requisite Regulation.

[40] Notations extracted from the School's log book reveal that there were 12 visits between 12 May 2004 and 2 May 2006, by personnel from the Ministry of Education but only three of which could be said, were directly related to an appraisal of the appellant. Miss Francis visited the school, carried out a performance assessment, made a written report and on 8 February 2006 and this, she discussed with him. A further visit was made on 2 May 2006 by her, for the purpose of garnering additional information in light of his remonstration with regard to the earlier assessment.

[41] Mr Wilson seeks to secure support from the case of ***The Ministry of Education ex parte Dorothy Lewis*** to show that the visits by the Ministry were random. That case is distinguishable from the case under review for the reason that, in

The Ministry of Education ex parte Dorothy Lewis random routine visits were made to the school without the purpose for the visits being outlined in the log book. In that case, the appellant was appointed provisional principal at the Hampton High School for a year, effective from 1 September 1989. By letter dated 26 June 1991, under the hand of the acting Chairman of the school board she was informed that a decision had been made by the Ministry of Education to terminate her appointment as provisional principal on 31 August 1991. This led to the appellant moving the court in seeking an order for certiorari to quash the decision of the Minister. A ground in support of the motion was that, in breach of Regulation 2(d), no assessment of the applicant was carried out. After examining the extracts from the school's log book which were exhibited, the court found that random routine visits to the school by officials from the Ministry without a purpose for the visit being stated, where the only evidence of such visit is contained in the log book, cannot be a substitute for regular assessment as required by the Regulations.

[42] In the case under review, there were visits by Miss Francis for the purpose of assessing the appellant's performance. This has been disclosed in the log book. Although ***The Ministry of Education ex parte Lewis*** is distinguishable on the facts, the question still remains whether regular visits were made for the purpose of the assessment of the appellant during his tenure as a provisional principal prior to his prospective appointment as principal, in keeping with the prescription of the Regulation.

[43] It was the respondent's submission that the word "regular" must be read in terms of its contextual applicability and that the requirements for regular assessment of a

principal would not be the same as a teacher due to the nature of their duties. Clearly, this submission must be rejected. It implies that regular assessments would not be required for a provisional principal but would be required for a teacher. It is not insignificant that, ordinarily, the object of the performance assessment of a teacher or provisional principal is with a view to promotion or confirmation in a post. Therefore, assessments, as prescribed by the Regulations, must be carried out on a regular basis, whether done in respect of a provisional principal or a teacher. The appellant had occupied the position as provisional principal from 2004 to 2006. In her affidavit, Miss Francis acknowledged that the visit on 8 February 2006 was for the appraisal of the appellant. This was confirmed by the appellant in his affidavit. It would have been the first for the period 2005 to 2006. Only one appraisal had been done for 2004 to 2005. Two were done, for the year 2005 to 2006 and this was due to the appellant's protest as to the poor ratings given in the earlier reports. It cannot be said that three assessments being done over approximately 1 year and 8 months could be regarded as having been done frequently, or in a constant pattern, or recurring at short intervals in compliance with the Regulation.

Issue 3 – whether the Commission under duty to act fairly

[44] There is no dispute that a decision terminating the employment of the appellant had been made. The question now is whether the Commission, in its failure to invite the appellant to make submissions to contradict the adverse statements in the report was unfair or prejudicial to him.

[45] The duration of the provisional appointment of a principal is limited to two years. During the period of such appointment, as provided by section 2 of the Regulations, in confirming or refusing an appointment of a principal, the process is carried out in three stages. Firstly, a recommendation is sent by the Board to the Commission in respect of the provisional principal. Secondly, a determination is made by the Commission, in consultation with the Board, as to the permanent appointment. Thirdly, an advice is given to the Minister by the Commission whether or not a permanent appointment should be made.

[46] In this case, it could be said that the Board, in making the recommendation, was carrying out an exercise in the first step of a sequential process. As earlier indicated, the Board failed to have observed the requisite principles of natural justice before making its recommendation. This being so, it could not be said that it would not be necessary that the appellant be heard by the Commission after its consultation with the Board and prior to its transmission of its advice to the Minister.

[47] A decision maker is required at all times to observe the requirement of procedural fairness. The rule is "of universal application and founded on the plainest principles of justice" - see ***Ridge v Balwin***. As a consequence, an aggrieved party must be given an opportunity to address any adverse complaint affecting his rights.

[48] The importance of observing the *audi alteram partem* maxim has been pronounced in a trilogy of authorities. This rule embraces the concept of fairness. In ***Regina v Secretary of State for the Home Department v ex parte Doody***

[1993] 3 WLR 154 at page 169, Lord Mustill speaking to the requirement of fairness within the rules of natural justice had this to say:

> "My Lords, I think it unnecessary to refer by name or to quote from, any of the often- cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances, (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision and this is to be taken into account in all its aspects (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and shape of the legal and administrative system within which the decision is taken (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable results or after it is taken with a view to procuring its modification; or both (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interest, fairness will often require that he is informed of the gist of the case which he has to answer."

[49] Sections 31 and 32(2) (a) of the Act imposes on the Commission a duty to give advice to the Minister in respect of matters relating to the appointment of a principal. Referring to sections 32(1) and (2) of the Act, Mr Wilson submitted that in keeping with these sections, the Commission, in playing a vital role on the question of the appointment of a party as a principal, ought to have invited him to make a written or oral report prior to making the decision not to appoint him principal.

[50] There is evidence which discloses that on 5 June 2006, the appellant attended a meeting with Mr Ruddock and Miss Francis at the Ministry's regional office in Montego Bay when he objected to the report. The objection manifests itself in a notation appearing at the end of the Performance Assessment Form, which was exhibited by Miss Francis in her affidavit. It states: "The Principal refused to sign the Performance Assessment Form on 5 June 2006 because he needs to examine the comments thoroughly and respond to them in writing". The appellant's signature was affixed to this notation. It is obvious that on 5 June 2006, the appellant declared an intention to advance his objections in writing. It cannot be said that any discussions which Miss Francis and Mr Ruddock had with the appellant, or any objections raised by him during these discussions, could have amounted to a hearing as the respondents assert. Mr Ruddock and Miss Francis are not the tribunal which had been charged to make a decision affecting the appellant's appointment as principal.

[51] The Performance Assessment Form with the notation was before the Commission when it met on 7 July 2006 to consider the recommendation of the Board. Ms Hawthorne, in her affidavit, stated that the Commission reviewed the report of the Board as well as the assessment form. Clearly, the Commission would have been aware of the appellant's intention to raise his disapproval of the assessments. It however, obviously disregarding the appellant's request to be heard, arbitrarily proceeded to consider the matter, made a determination on 13 July 2006 and then proceeded to uphold and submit the Board's recommendation to the Minister.

[52] What is of importance is that the aggrieved party is given a hearing prior to the making of a final decision. In ***R v Commissioner of Police ex parte Keith Pickering***, it was held that the failure to give the applicant a fair hearing prior to dismissing him was a procedural impropriety and a breach of natural justice. In our opinion, the principle of fairness demands that the appellant ought to have been given the right to register his concerns in writing before the Commission as he had indicated. The failure of the Commission to have permitted him to submit his written protest before advising the Minister of their decision is unfair and is clearly a breach of natural justice.

Issue 4- whether section 54 (1) of the Regulations applies to the appellant

[53] Section 54 (1) of the Regulations reads:

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

[54] The appellant submitted that section 54(1) of the Act does not apply to a provisional principal, as his appointment as a provisional principal ought to have been determined with reasonable notice for reasonable cause and that the Board acted unlawfully in purportedly terminating his services.

[55] Although schedule 2 of the Regulations deals with the appointment of teachers and principals and makes a distinction as to the procedure governing the provisional appointments of those persons, so far as the question of notice is concerned, only section 54(1) of the Regulations makes provision for the issuance of a notice, prior to the termination of a teacher's appointment. Neither the Regulations nor the Act provides for the issuing of a notice in respect of the termination of a provisional principal's appointment. The appellant, although holding the position of a provisional principal, was a teacher. His appointment in that capacity was terminated. A notice terminating his appointment would fall within the purview of section 54(1) which provides for the giving of a month's notice. It follows therefore that, in keeping with this Regulation ordinarily, the appellant's appointment could have been properly terminated by one month's notice. However, in this case, no notice would have been required as the appellant had served the requisite two years as a provisional principal and his tenure in that post could not have exceeded two years. He would have been required to demit office on 31 August 2006.

Issue 5 - Whether Board failed to notify members and whether Board improperly constituted.

[56] The issues here, are whether at the time the meetings were convened on 2 June 2006 and 31 July 2006, there were breaches with regard to the notifying of the members of the Board, and whether a proper quorum was present when the Board arrived at its decision to make the recommendation.

[57] Section 70(1)(b) of the Regulations provides that the principal of the institution shall be a member of the Board, which should not exceed 19 members.

Section 88 reads:

> "(1) Every Board of Management shall in each school year meet at least once in every term and at such other times as may be necessary for the transaction of business.
>
> 2) Meetings of the Board shall be held at such places as the Board may determine.
>
> (3) Subject to paragraph (4), prior notice of ordinary meetings shall be given not less than ten clear days before the date of the meeting.
>
> (4) Notice of special meetings shall be delivered by hand to each member of the Board or to his known address not less than forty eight hours before the time arranged for the meeting.
>
> (5) Notice of all special meetings shall be given to every member and to every person whom the Board knows to be authorized by the Minister to represent him at such meetings.
>
> 6) The chairman of the Board shall preside at the meetings of the Board at which he is present; in the case of his temporary absence, the vice-chairman shall preside. If both chairman and vice-chairman are absent. the members present and voting and forming a quorum shall elect one from among their number to preside at the meeting.
>
> (7) The Minister may be represented at any meeting of a Board by such person or persons as he may authorize to represent him at such meeting and any such person or persons may take part in the proceedings of the Board at the meeting but shall not vote on any matter.
>
> (8) No member shall vote on any question in which he has a direct personal interest.
>
> (9) Where there is a conflict of interest, the member of the Board concerned shall declare his interest and shall not

participate in the deliberations on the particular matter and he shall withdraw from the meeting during the period of the discussion of the matter.

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

[58] Section 79 (5) of the Regulations provides:

"Any member of the Board who is absent for three consecutive meetings without justifiable excuse shall be deemed to have vacated his membership on the Board and the Board shall report the matter to the Minister and to the group which nominated that member."

[59] It was Mr Wilson's complaint that the Board's failure to notify the principal and other members of its meeting of 2 June 2006, was in breach of section 70 (1)(b) and 88(3) of the Regulations. As can be observed, by section 70(1)(b) the appellant would have been a member of the Board and under section 88(3), 10 clear days' notice is required before the convening of a Board meeting. The minutes taken on 2 June shows that the members were notified on 26 May 2006. It follows therefore that only six days notice was given. As submitted by Mr Wilson the use of the word shall in section 88(3) is mandatory. Therefore, it is a compulsory requirement that 10 days' notice be given. This essential procedural requirement laid down by the Regulations must be observed and obeyed by the Board. Only six days' notice was given. In ***R v Minister of Education ex parte Dorothy Lewis,*** the Board failed to notify one of its members as required by Regulation 88(3). It was held that the regulatory procedure having not

been adhered to, the proceedings of the Board were invalid. In the present case, the Board's failure to pay due regard to the regulatory requirements by notifying the members within the specified time could be classified as non service and would therefore render the decision made 2 June invalid.

[60] So far as the question of the quorum is concerned, Mr Wilson contended that the absence of a quorum at the meeting of 2 June 2006, invalidated the proceedings. Section 70(2) of the Regulations provides that quorum of the meeting of the Board shall be seven. It was contended by the appellant that Ms Hope Leach, the secretary of the board and bursar of the school, and Miss Francis who were not members of the 1st respondent were present at the meeting and Ms Sharon Earle who had been absent from four previous meetings had vacated her membership by reason of section 79(5) of the Regulations, which specifies that absence by a member from three consecutive meetings without justifiable excuse shall be deemed to have vacated his or her membership.

[61] The submission by the respondent that Ms Earle had tendered apologies for her absence on two of the four previous meetings which she did not attend and in light of the apologies, she retained her position as there is no evidence that the apologies were not accepted, as being meritorious. An examination of the minutes discloses that apologies were in fact tendered on behalf of Ms Earle for her absence on two of four meetings prior to 2 June 2006. The minutes do not state the reasons for her absence but this does not necessarily mean that a good reason had not been proffered by her. Further, as the respondents stated, there is no evidence that the apologies were not

accepted. In these circumstances, Ms Earle would remain a member of the Board who was eligible to vote on 2 June. Nine persons were present including Miss Francis and Ms Leach. There is no indication that either Ms Leach or Miss Francis voted. The minutes show that the votes were unanimous. These votes would have emanated from the quorum of the remaining seven persons who voted.

[62] Mr Wilson argued that the meeting of 31 July 2006, being, ostensibly, a special meeting, each member of the Board must be served with a notice not less than 48 hours prior to the meeting. He argued that the president of the parent teachers association, the students council representative and the appellant were absent as they, being members of the Board, were not served with a notice and that the failure to notify them rendered the proceedings invalid. He also complained about the absence of a quorum. The meeting of 31 July is insignificant, it having served no useful purpose so far as the refusal to appoint the appellant permanently is concerned. By then the Board had already made its recommendation, the Commission and Minister had also made their decision.

Issue 6 - Learned judge misconstrued Schedule A 2(f)

[63] As prescribed by section 2(f) of the Regulations, the post of provisional principal cannot be held by any person for a period exceeding two years. The learned judge concluded that the appellant having completed two years as a provisional principal, he was not entitled to remain in the post by reason of effluxion of time. She said:

> "The claimant having completed two years as provisional principal would not be entitled to remain in the post of

> provisional principal for any longer period. Not having appointed him principal his tenure as provisional principal would be automatically at an end and he would not occupy any position from which he could be terminated."

[64] The question which arises is whether the learned judge had correctly interpreted the section. The tenure of a provisional principal cannot exceed two years. The appellant had completed the term permitted by the Regulation, as a provisional principal. Even if the question of his appointment as principal had not arisen, his tenure would have ceased by 31 August 2006.

[65] It will be necessary to deal with the claims made by the appellant. Several claims have been made by him. He seeks an order by way of mandamus to be reinstated and confirmed as principal. The appellant was never appointed principal. Therefore, there is nothing on which a ground for an order for mandamus could have been established. The remedy of mandamus is available where a tribunal fails to perform its public law duties. The decision makers did not fail to conduct hearings and make decisions (albeit fraught with procedural errors) refusing to appoint the appellant principal.

[66] The appellant's claim, in seeking an order of certiorari to quash the decision terminating his appointment as provisional principal, is without merit. At the time of the termination of his appointment, he had already served the period of provisional principal permitted by law and therefore this remedy would be one in which he cannot successfully seek recourse.

[67] He has, however, in the alternative, challenged by way of certiorari, the decision that he be not appointed principal. Although a clear vacancy for an appointment of a principal existed when the claim was filed and although certiorari is a relief which could be available to him, this does not necessarily mean that he would have been permanently appointed principal. There are procedural defects in the procedure adopted by the Board in dealing with the matter. There is also the disadvantageous performance assessment report to which the appellant did not get an opportunity to respond. In these circumstances, the proper order would be for the court to remit the matter to the Board to proceed in accordance with the Act and the Regulations and ensure that the appellant is afforded a hearing. The court is not unmindful that such an order could create some difficulty, in that there is no evidence that the post had not been filled when the claim was denied. However, a determination must be made by this court.

[68] The appeal should be allowed. The proceedings are quashed. The matter is remitted to the Board for it to hold a new hearing. The court directs that the Board notifies the appellant of the date of the hearing and that appellant be permitted to attend and make oral submissions or prepare his submissions in writing and submit same to the Board. The costs of the appeal and the costs in the court below are awarded to the appellant.

DUKHARAN JA

[69] I have read in draft the judgment of my sister Harris JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

[70] I too have read the draft judgment of Harris JA and agree with her reasoning and conclusion.

HARRIS JA

ORDER

The appeal is allowed. The proceedings are quashed. The matter is remitted to the Board for it to hold a new hearing. The court directs that the Board notifies the appellant of the date of the hearing and that appellant be permitted to attend and make oral submissions or prepare his submissions in writing and submit same to the Board. The costs of the appeal and the costs in the court below are awarded to the appellant.