In The Supreme Court of Bermuda

CIVIL JURISDICTION
2019: No. 320

BETWEEN:

CHEYRA BELL

Applicant

-and-

(1) THE ATTORNEY GENERAL

(2) THE DEPARTMENT OF CHILD AND FAMILY SERVICES

(3) THE HEAD OF CIVIL SERVICE

(4) THE PUBLIC SERVICE COMMISSION

Respondents

Before:	**Hon. Chief Justice Hargun**
Appearances:	**Mr. Dantae Williams, Marshall Diel & Myers Limited, for the Applicant**
	Ms. Lauren Sadler-Best, Attorney-General's Chambers, for the 1st – 3rd Respondents
	Mr. Richard Horseman, Wakefield Quin Limited, for the Public Service Commission
Dates of Hearing:	**5-6 April 2021**
Date of Judgment:	**3 June 2021**

JUDGMENT

Judicial review of the decision of the Head of Public Service ("HOPS") to summarily dismiss a Residential Care Officer for gross misconduct; scope of duty of fairness at the investigation stage and at the hearing before the HOPS; the right to an oral hearing and the right to cross-examine witnesses; whether it is open to the applicant to raise procedural irregularities as grounds for judicial review when those issues were not raised before the HOPS or in the appeal proceedings before the Public Service Commission ("PSC"); relevance of the statutory appeal to the PSC; whether a decision of the HOPS vitiated by apparent bias.

HARGUN CJ

A. Introduction

1. These judicial review proceedings relate to the decision of Derrick S. Binns, JP, Ph.D. (**Dr. Binns**), Head of the Public Service ("**HOPS**")[1] dated 23 February 2019 whereby Dr. Binns held that Ms. Cheyra Bell ("**Ms. Bell**" or "**the Applicant**"), a Residential Care Officer ("**RCO**") at the Department of Child & Family Services ("**DCFS**") was guilty of gross misconduct on the ground that she was unfit for duty as a result of being under the influence of alcohol or drugs and that the appropriate penalty in all the circumstances was dismissal with immediate effect.

2. The Applicant seeks Orders of Certiorari quashing (i) the decision of the DCFS dated 16 November 2018 to refer the Applicant to the HOPS for gross misconduct; (ii) the decision of the HOPS dated the 23 February 2019 to summarily dismiss the Applicant for gross misconduct; and (iii) the decision of the Public Service Commission ("**PSC**") to refuse the Applicant's appeal. The applicant seeks a declaration that her employment has not terminated and continues until such time as she resigns or comes to an end by

[1] Head of Public Service (HOPS) was formerly known as Head of Civil Service (HOCS).

some lawful means. The Applicant seeks payment of salary and benefits from 1 February 2019 to the date of judgment.

3. The facts relied upon by the Applicant are set out in the Notice of Application for Leave to apply for Judicial Review dated 12 August 2019. The Applicant was at all material times an employee in the Public Service and in 2014 was engaged as RCO within DCFS.

4. Following a Child Protection Referral sent to the DCFS on or about 15 June 2018, an investigation commenced in relation to the Applicant and her colleague Mr. Shayne Hollis ("**Mr. Hollis**"), for being intoxicated while on shift. The allegations against the Applicant were considered to be offences of gross misconduct whilst the allegations against Mr. Hollis were considered to be the offence of simple misconduct.

5. The DCFS investigation team of Mr. Leon Smith and Ms. Maureen Trew (the "**Investigation Team**"), reviewed the complaint against the Applicant. In doing so, the Investigation Team spoke with two child (adolescents) residents at the Youth Development Center (the "**YDC**"), three RCOs and Mr. Hollis. The Interview Team compiled a report based on interviews from these witnesses. The Applicant complains that the Investigation Team did not request that the witnesses write their own statements in their own words. Additionally, the witnesses were not given an opportunity to review and verify the statements recorded by the Investigation Team. A summary of the conversation was prepared by the Investigation Team and sent to the Acting Director of the DCFS, Ms. Renee Brown (the "**Acting Director**").[2] The Investigation Team submitted a report dated 29 August 2018 (the "**Investigation Report**") to the Acting Director. The Acting Director provided the Applicant with a letter dated 1 October 2018 which sets out the basis of the allegation of gross misconduct and invited the Applicant, together with a trade union representative or a friend, to a meeting to discuss the allegations and present her side of the matter.

[2] Ms. Renee Brown was serving as Acting Director for Mr. Alfred Mabury who was on administrative leave at the time.

6. The Applicant met with the Acting Director and five others on 6 November 2018. Present at the meeting were Ms. Renee Brown, the Acting Director, Ms. Natasha Shabdeen, Human Resource Manager at the Department of Human Resources, Mrs. Monique Shannon, Supervisor, Mr. Kevin Grant, Assistant General Secretary of the Bermuda Public Services Union ("**BPSU**"), Mrs. Linda Bogle-Mienzer, 2nd Vice President of BPSU and Mr. Musceo Hunt, Shop Steward.

7. By letter dated 6 November 2018, the Acting Director referred the charge of gross misconduct to HOPS. The applicant complains that in referring the matter to the HOPS, the Acting Director did not recommend a penalty in respect of the charge, as required by section 7.4 of the Conditions of Employment and Code of Conduct (the "**Code of Conduct**").

8. On 12 February 2019, the Applicant appeared before the HOPS for a disciplinary hearing in respect of the charge of gross misconduct (the "Disciplinary Hearing"). Present at this hearing were Ms. Renee Brown, Ms. Natasha Shabdeen, Mr. Kevin Grant, Mrs. Linda Bogle-Mienzer, Mrs. Mellonie Furbert, Divisional Chair of the BPSU and Ms. Angela Todd, the Recording Secretary from the Cabinet Office.

9. At the Disciplinary Hearing, the Applicant complains that the HOPS did not call any witnesses and relied on the Investigation Report. The Applicant also complains that the HOPS did not request that the Director of DCFS, Mr. Maybury, who had returned to work by that date, attend the Disciplinary Hearing in accordance with the Public Service Commission Regulations 2001 (the "**PSC Regulations**"). The Applicant was eventually dismissed by the decision of the HOPS dated 23 February 2019 (the "**Decision**")

10. The Applicant appealed the Decision to the PSC by submissions dated 6 March 2019. The Applicant's appeal was dismissed on 2 April 2019 after a review of the matter on the record. The PSC affirmed the summary dismissal of the Applicant.

B. Challenge to the decision of the Acting Director

11. The Applicant relies upon a number of grounds which are said to vitiate the decisions under consideration. The grounds can be conveniently considered under three phases: the first phase leading up to the meeting with the Acting Director on 6 November 2018; the second phase leading up to the Disciplinary Hearing on 12 February 2019 and the Decision itself on 23 February 2019; and the third phase comprising the appeal to the PSC.

12. In relation to the first phase the Applicant complains that:

    (a) The Acting Director did not obtain witness statements from each witness which were in their own words or confirmed the truth of their content. The result is, counsel for the Applicant submits, that the Acting Director's decision to refer the matter to HOPS turned on anonymous disputed hearsay evidence.

    (b) The Applicant was not given an opportunity to review the Investigation Report to confirm the summary contained therein was a true summary of her conversation with the Investigation Team prior to it being submitted. In doing so, counsel submits, the ultimate decision-maker accepted challenged evidence and suggested that the Applicant had reason to lie when these matters could have been adequately addressed if the Applicant wrote her own version of events or if she was given an opportunity to review the notes taken by the Investigation Team to determine if they were an accurate reflection of what she said.

    (c) The Applicant was not provided copies of the witness statements and was not provided the witness summaries.

    (d) The Applicant did not know the identity of the parties and witnesses and was unable to raise any favourable points in rebuttal and or adequately challenge the witness

summaries. Further, the credibility of the witnesses could not be assessed against the credibility of Ms. Bell through *viva voce* evidence.

(e) The DCFS did not provide a report to the HOPS with a recommendation as to the penalty for gross misconduct in accordance with paragraph 7.4 of the Code of Conduct which requires that "*in cases of gross misconduct, the Head of the Department must send a report in writing to the Head of the Civil Service with the recommendation with respect to the penalty, which will be at the discretion of the Head of the Civil Service*."

13. In considering these complaints it is relevant to keep in mind that the procedure in relation to the investigation and the determination of allegations of gross misconduct by public officers is governed by the PSC Regulations.

14. Regulation 24 (2) provides that the procedure set out in the Second Schedule to the PSC Regulations shall be followed in the adjudication of a disciplinary offence involving gross misconduct.

15. In relation to the first phase of the process, the investigatory phase, the Second Schedule requires the following process and procedures to be followed:

*"**PROCEDURE FOR HANDLING CASES OF ALLEGED GROSS MISCONDUCT***

1 The Head of Department shall prepare a written statement of the alleged offence and give a copy to the officer in question.

2 The Head of Department shall afford the officer the opportunity to meet him to discuss the allegation and present the officer's side of the matter. A representative of the Director and also, where appropriate, the officer's job supervisor shall be present at any such meeting. The officer may have a trade union representative or a friend present to assist him if he so wishes.

3 After the meeting referred to in paragraph 2, the Head of Department shall—

(a) determine whether the allegation should be dismissed. If he so decides, he shall inform the officer by notice in writing accordingly; or

(b) refer the case to the Head of the Civil Service."

16. It appears that the procedure outlined in paragraphs 1 to 3 of the Second Schedule above was indeed followed by the Acting Director. By letter dated 1 October 2018, the Applicant was provided with a written statement of the alleged offence as required by paragraph 1 of the Second Schedule. The letter stated:

"STATEMENT OF ALLEGED DISCIPLINARY OFFENCES

In accordance with the Second Schedule of the Public Service Commission Regulations 2001, which outlines the procedure for handling cases of alleged Gross Misconduct, I am hereby providing a written statement of the alleged offence(s) which constitute gross misconduct by you which is said to have occurred on March 9th 2018 and brought to the Department's attention through a Child Protection Referral on June 18th 2018, as set out below:

In accordance with the Government of Bermuda Conditions of Employment and Code of Conduct (C.E.C.C.) 7.4.2 (b) – "An officer is guilty of gross misconduct if the officer (b) is unfit for duty as a result of being under the influence of alcohol or drugs".

- *The Department of Child & Family Services (DCFS) Investigation Team received a Child Protection Referral on June 15th 2018 regarding an allegation that you, while in the capacity of Residential Treatment Services Residential Care Officer, was intoxicated while on shift and transported clients in the work van while under the influence of alcohol. This offence is*

said to have occurred on March 9th 2018. As a result of this referral, a DCFS child protection investigation commenced on June 18th 2018.

- *The Investigation Outcome report indicates that there is evidence that on June 15th 2018, during the 2pm to 10pm RTS/YDC shift you and your colleague were on shift together and transported two clients to Cornerstone Youth Group. You admitted during the interview that while the residents were at youth group, you and your colleague went to the Bermuda Athletic Association (BAA) Clubhouse. The Investigation Outcome Report recorded witness statements from both residents as well as RCO staff who came on duty for the next shift. Witnesses indicated that you was seen "stumbling when you exited the van". When inside the cottage, you "could be heard vomiting". You were also reported to be "acting very differently, such as speaking loudly with slurred speech". It was alleged that your eyes were bloodshot and alcohol could be smelt on your breath. When leaving the facility it was alleged that you were again stumbling and acting out of character as you are usually reserved in your behaviour. The investigation report states that a friend was called to pick you up because your colleague was concerned about you riding your bike in the condition you were in.*

- *During your second in office interview on July 30th 2018 with DCFS Investigation Social Worker Smith you admitted to drinking two or three Corona beers while at the BAA Clubhouse.*

- *In the Investigation Outcome Report, the investigator wrote "it should be noted that later on July 30th 2018 Ms. Bell called the undersigned [investigator] and stated that she wanted to add something to her earlier interview. Ms. Bell stated that she knows that she made a bad decision (drinking alcohol on shift) and it was very irresponsible on her part. She stated that she had thought about it and can see just how irresponsible it was and it has not happened again since this incident for that very reason".*

- *It should be noted that although you admitted drinking multiple alcoholic beverages, the Investigation Outcome Report did not contain any evidence that you drove the Government Vehicle at any time while you were under the influence of alcohol.*

  As per the Public Service Commission Regulations, 2001, Schedule 2 paragraph 2, please be advised that you are invited to attend a meeting, on October 17th 2018 at 10am at the Department of Child & Family Services' Head Office… to discuss the above allegations and present your side of the matter. Myself as Acting Director and your Unit Supervisor will be present for the meeting. You may have a trade union representative or a friend present to assist you, if you so wish."

17. The purpose of the meeting suggested in the last paragraph of the letter dated 1 October 2018 was to allow the Acting Director to decide whether the allegations should be dismissed or whether the case should be referred to the HOPS for a Disciplinary Hearing. In *Director of Public Prosecutions v Cindy Clarke* [2019] Bda LR 46 Kay JA referred to this stage as the "*filter stage*" which he explained at [34]:

> *"When one stands back and surveys the situation at the filter stage, what do we see? Plainly the Director had considered there to be a prima facie case against the Deputy at the earlier charging stage. However, at the filter stage he would have more material, in particular that which the Deputy and her attorney chose to place before him, before consideration of whether to dismiss or refer the decision. I do not accept that we should fear that an experienced Director of Public Prosecutions would not act conscientiously at that stage. Moreover, we must still keep in mind the context of the filter; it is not a final adjudication. If the Director decides to refer the matter to the Head of the Civil Service there will, we must assume, be a fair procedure leading to an independent adjudication."*

18. Accordingly, the purpose of the meeting with the Acting Director was not to determine finally whether the charge of gross misconduct had been proved but whether the complaint should either be dismissed summarily or referred to the HOPS for Disciplinary Hearing. For that limited purpose, it seems to me that the Applicant was provided with detailed particulars of what was being alleged against her as a basis for the charge of gross misconduct. This is not a case where it could reasonably be said that she could not understand the factual basis of the allegations which were being made against her. For the purposes of determining whether the case should be dismissed summarily or referred to the HOPS for a disciplinary hearing it was unnecessary that the Applicant should be provided with a copies of the Investigation Report and the witness statements.

19. Mr. Williams for the Applicant referred the Court to the decision in *Evan Rees v Richard Alfred Crane* [1994] 2 AC 173 where the Privy Council recognises that the full force of the rules of natural justice does not necessarily apply at the investigatory or filter stage. Lord Slynn referred at 190 C to the Board's earlier decision in *Furnell v Whangarei High Schools Board* [1973] AC 660, holding that when a subcommittee reported to a school board the result of its investigation, and the board suspended the teacher concerned without giving him an opportunity to deal with the charges made against him, there was no breach of natural justice. Lord Slynn also referred at 190 E to the decision in *Wiseman v Borneman* [1971] AC 297, where the House of Lords held that in the context of section 28 of the Finance Act 1960 which lays down a procedure which enables the Commissioners of Inland Revenue by a certificate to refer to the tribunal, the question whether there was a prima facie case for proceeding against a taxpayer, natural justice did not require that the taxpayer should have the right to be represented by counsel at the tribunal's determination of that question or to see the commissioner's certificate. At 191 G Lord Slynn held that:

> *"It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the*

courts to this conclusion have included the fact that the investigation is purely preliminary, that there will be a full chance adequately to deal with the complaints later, that the making of the inquiry without observing the audi alteram partem maxim is justified by the urgency of administrative necessity, that no penalty or serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice, that the statutory scheme properly construed excludes such a right to know and to reply at the earlier stage."

20. Here, the procedure adopted by the Acting Director complied with the precise terms of the paragraphs 1 to 3 of the Second Schedule to the PSC Regulations. Furthermore, the Applicant was given a detailed written statement of the allegations made against her which were said to constitute gross misconduct. It seems to me that for the purposes of the "*filter stage*" there was appropriate compliance with the rules of natural justice and the provision of witness statements or the Investigation Report was not required at this stage. Finally, the Applicant provided a written response in relation to the allegation made and discussed at the meeting held on 6 November 2018. The written response does not express any concern that the allegations in question were merely supported by the evidence of anonymous witnesses.

21. The allegation that the DCFS did not provide a report to the HOPS with a recommendation as to the penalty for gross misconduct is one of a number of allegations made in these judicial review proceeding in circumstances where no such point was taken either at the Disciplinary Hearing before the HOPS or in the appeal proceedings before the PSC. The Respondents understandably argue that it is not open to the Applicant to pray in aid alleged irregularities in the procedure when she did not raise those issues either at the Disciplinary Hearing before the HOPS or in the appeal before the PSC. This issue can conveniently be considered with the other issues in respect of which no complaint was made by the Applicant either at the Disciplinary Hearing before the HOPS or in the subsequent appeal before the PSC (see paragraph 28 to 46 below).

C. Challenge to the decision of the HOPS

22. In relation to the Disciplinary Hearing before the HOPS on 5 February 2019, the Applicant makes the following additional complaints:

(a) The HOPS failed to invite the Applicant's supervisor and the Head of Department and any other officers relevant to the case to attend and take part in the Disciplinary Hearing (including the Investigation Team). It is said that this omission by the HOPS was in breach of paragraph 6A of the Second Schedule to the PSC Regulations which requires the HOPS to "i*nvite the officer's job supervisor and Head of Department, and any other officers whom he considers relevant to the case, to appear before him*." It is accepted that neither the Applicant nor the three trade union representatives who appeared at the hearing with the Applicant (Mr. Kevin Grant, Assistant General Secretary of BPSU, Mrs. Linda Bogle-Mienzer, 2nd Vice President of BPSU and Mrs. Melanie Furbert, Shop Stewart) suggested to the HOPS that the Applicant's supervisor and the Head of Department should be present at the hearing. Further, the grounds of appeal to the PSC, set out in the BPSU letter dated 6 March 2019, made no mention of this alleged procedural irregularity.

(b) No witnesses were called by the HOPS. The Applicant complains that consequently, there was no cross examination conducted even though the Acting Director admitted that there were significant discrepancies in the evidence. Whilst the Applicant, Mr. Grant (by way of a written statement) and Mrs. Linda Meinzer made submissions to the HOPS at the Disciplinary Hearing, it is accepted that neither the Applicant nor any of the three BPSU representatives suggested or requested that the Applicant should be given the opportunity to cross-examine any of the witnesses who had provided evidence to the Investigation Team in relation to the charge of gross misconduct against the Applicant. Further, the grounds of appeal set out in the BPSU letter dated 6 March 2019 made no mention of this alleged procedural irregularity.

(c) The HOPS did not determine the charge according to the correct standard of proof. It is now contended by the Applicant that the charge of gross misconduct should have been determined on the basis of the criminal standard of proof such that HOPS was required to be satisfied in relation to the factual allegations beyond reasonable doubt. It is not contended by the Applicant that this submission was made to the HOPS either by her or the three BPSU officers who accompanied her at the Disciplinary Hearing. Further, the grounds of appeal set out in the BPSU letter dated 6 March 2019 made no mention that in coming to his decision in relation to the Applicant, the HOPS erroneously applied the civil standard of proof when he should have applied the criminal standard of proof.

(d) The HOPS did not afford the Applicant the opportunity to provide submissions on the penalty after a finding that she was guilty of gross misconduct. It does not appear that the Applicant requested that she be allowed to make further submissions in the event the HOPS concluded that the charge of gross misconduct had been proved. Further, whilst the grounds of appeal set out in the BPSU letter dated 6 March 2019 are exclusively aimed at the issue of whether immediate dismissal was the appropriate penalty, no point was taken in the appeal proceedings before the PSC that the Applicant was denied the opportunity to provide submissions on the issue of appropriate penalty.

(e) The HOPS participated in the prosecution and suspension of the Applicant and then was the sole decision-maker in the adjudication. On 10 September 2018 the Acting Director wrote to the HOPS to request his opinion on whether the Applicant's actions were of such gravity as to warrant being treated as gross misconduct. The HOPS responded that the alleged actions indeed warranted gross misconduct and placed the Applicant on administrative leave. The Applicant contends that this placed the HOPS in a position of conflict such that a fair-minded an informed observer is likely to conclude that there was a real possibility of the HOPS being biased.

23. The procedure in relation to a hearing before the HOPS is set out in paragraphs 5 to 9 of the Second Schedule to the PSC Regulations:

> *"5 Where a case has been referred to the Head of the Civil Service under paragraph 3(b) he shall conduct a hearing, after giving at least fourteen days' notice of the date, time and place of the hearing to the officer.*
>
> *6 The officer shall appear before the Head of the Civil Service in person and may have a trade union representative or friend to assist him if he wishes.*
>
> *6A The Head of the Civil Service shall invite the officer's job supervisor and Head of Department, and any other officers whom he considers relevant to the case, to appear before him.*
>
> *7 The Head of the Civil Service shall give the officer full opportunity to be heard or to make representations and shall, after hearing both sides, determine the matter or dismiss the allegation.*
>
> *8 Where the Head of the Civil Service imposes a disciplinary penalty, he shall inform the officer accordingly by notice in writing, setting forth in the notice a statement of the officer's rights of appeal to the Commission under these Regulations.*
>
> *9 The Head of the Civil Service may delegate any of his functions under this Schedule to the Deputy Head of the Civil Service."*

The scope of duty of fairness

24. The submissions made on behalf of the Applicant assume that a Disciplinary Hearing before the HOPS under the PSC Regulations has to meet the exacting standards for hearing in a court of law. However, requirements of rules of natural justice and fairness

are necessarily flexible and depend upon the particular circumstances of the case. The requirement to hold a "hearing" does not necessarily require an oral hearing with all the witnesses of the facts being tendered for cross examination. Further, the issue of "fairness" is determined in the context of the position taken by an applicant before the decision-maker. If an applicant elects not to raise a particular point before the decision-maker, such as requesting to cross examine witnesses of fact, it would be rare for a court in judicial review proceedings to conclude that the absence of cross examination entailed a breach of the rules of natural justice or fairness.

25. The flexibility of the application of the rules of natural justice and fairness is reflected in the commentary in De Smith's Judicial Review, Eighth Edition, at paragraphs 7-065 and 7-068:

> *"7-065 A fair "hearing" does not necessarily mean that there must be an opportunity to be heard orally: "one is entitled to an oral hearing where fairness requires that there should be such a hearing, but fairness does not require that there should be an oral hearing in every case" (R. (on the application of Ewing) v Department of Constitutional Affairs [2006] 2 All ER 993 at [27]). It has been observed that where an oral hearing is required, "[t]he interest at stake are such as to trump other factors in the balance such as cost and perhaps the efficiency" (H [2008] EWCA Civ (Admin)). Whether an oral hearing is necessary in any given case will depend on the facts of the particular case and it would be preferable to have an oral hearing where, for instance, on the evidence, there are facts which are in dispute, (although a dispute of fact alone will not automatically necessitate an oral hearing) or if there is doubt as to whether an oral hearing may be of assistance, the presumption should be in favor of it. In any case, if there is a failure to request an oral hearing, it may be fatal to a judicial review challenge on this ground (Re Solicitor [2008] EWCA Civ 411 at [27]).*
>
> *7-068 An oral hearing will not necessarily be conducted as though it was a hearing in court. In some cases, it will merely involve the right to deliver oral*

representations, untrammeled by the rules of evidence or rights to produce or cross-examine witnesses."

26. In *Lloyd v McMahon* [1987] AC 625 Lord Bridge expressed the view that "*the so-called rules of natural justice are not engraved on tablets of stone to use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.*"

The Disciplinary Hearing before the HOPS

27. The Disciplinary Hearing which took place on 5 of February 2019 is summarised in the Decision of the HOPS dated the 23 February 2019. After informing the attendees that the Hearing had been called for the adjudication of a disciplinary offence involving an allegation of gross misconduct, in accordance with the Second Schedule of the PSC Regulations, the following oral submissions were made by the respective representatives:

    (a) Ms. Renee Brown, the Acting Director of DCFS, summarised the events that led to the charge against the Applicant by noting that on June 15, 2018 a Child Protection Referral was received by the intake section of DCFS stating that the Applicant and her colleague were intoxicated while on shift and had transported clients in the work van while being under the influence of alcohol. The investigation revealed that the Applicant was not the driver of the Government vehicle on that evening. However, there were a number of witness statements regarding the Applicant's behaviour while on duty that fit the description of being intoxicated or having diminished control i.e., breath smelled of alcohol, stumbled when exiting the car, vomiting was heard and the smell of vomit was reported, slurred speech, eyes bloodshot and sleeping in the van. In addition, Ms. Brown stated that some staff that were on duty expressed concern regarding the state of Applicant's condition and described her

as belligerent and that she appeared intoxicated. At the time, clients were awake and likely to have observed the Applicant's condition.

(b) Ms. Brown further stated that during the Applicant's interview with the investigative team she admitted to drinking two or three Corona beers while on duty and acknowledged that she had made a bad decision and that it was irresponsible on her part. The Head of Department's view was that the Applicant's actions breached the Code of Conduct and posed a risk to the welfare of clients in her care and to the reputation of the Department as it is incumbent upon the DCFS workers to not impose additional trauma on children in care by their actions.

(c) The Applicant stated at the outset of the investigation she had little recall of the incident, given the passage of time, and having received in the interim personal medical information that had preoccupied her attention. She added that once shown the logbook for the day in question, the entries triggered her memory. The Applicant acknowledged that initially she had denied drinking on shift in an effort to protect her colleague. Upon acknowledging that she did indeed consume "one or two Coronas" while on shift, she maintained that she was not unfit for duty.

(d) The Applicant disputed the suggestion contained in the witness statements that someone called a friend of hers to collect her from work, as in her opinion none of her colleague's knew the contact information of a friends.

(e) Mrs. Meinzer, speaking on behalf of the Applicant, offered that the Applicant has been forthcoming and had admitted that she had had a drink while on shift. Ms. Meinzer stressed that one drink would not indicate that someone was unfit for work or under the influence of alcohol. Consequently Mrs. Meinzer suggested that Ms. Bell should not have been charged under paragraph 7.4.2 of the Code of Conduct. Mrs. Meinzer also suggested that as two people had been involved in the incident it was unfair for them to be treated differently, while the other person having been treated for misconduct offence while the Applicant was treated for gross

misconduct offence. Mrs. Meinzer suggested that as the Applicant had completed her responsibilities before ending her shift, so she must not have been unfit for duty.

(f) Mrs. Meinzer suggested that reports of the Applicant vomiting and being intoxicated were from questionable sources and should be discounted. She further suggested that reports of intoxication had been embellished because the clients making the reports did not like the way the Applicant managed them.

(g) Mr. Grant, the BPSU representative again speaking on behalf of the Applicant, provided a written statement which was placed on the record and which Mr. Grant summarised as follows:

- The evidence provided by the two residents should not be considered given their ages, their relationship to the accused and their interest in having a penalty applied to the Applicant;

- the accounts provided by workers present on the night in question conflicted;

- the evidence provided by co-worker should not be considered as that individual was not present for the alleged events; and

- the evidence provided by the Applicant's colleague on the evening in question cannot be relied upon as he had lied to the investigators.

(h) Mr. Grant raised concerns regarding the disciplinary process given his view that both the Applicant and her colleague had committed the same offence but were treated differently. Mr. Grant suggested that the Applicant's colleague "received the benefit of no suspension and remains employed" while the Applicant faces gross misconduct charges.

(i) Ms. Brown, the Acting Director, in response to the suggestion concerning the differential treatment applied to the Applicant and her partner, advised that the Applicant's partner had been adjudicated for misconduct based on the evidence obtained, which did not substantiate allegations that he was intoxicated.

(j) The Applicant stated that she had learned a lesson and that her behavior on the evening in question did not define her. She added that she had taken responsibility for her actions.

Issues not raised before the HOPS

28. The above oral hearing took place before the HOPS without any suggestion, either before or at the hearing, from the Applicant or the BPSU representatives that:

(a) The Applicant considered it inappropriate that the Acting Director did not obtain witness statements from each witness in their own words or that the Applicant was not provided copies of the witness statements and was only provided witness summaries.

(b) The Applicant was concerned that she did not know the identity of the parties and witnesses and was unable to raise any favorable points in rebuttal and/or adequately challenge the witnesses' summaries.

(c) The Applicant considered it inappropriate that the HOPS had failed to invite the Applicant's job supervisor and the Head of Department and any other officers whom he considered relevant to the case and take part in the Disciplinary Hearing. It is to be noted that the Acting Director was in attendance at the Disciplinary Hearing.

(d) The Applicant was concerned that no witnesses were called by the HOPS and that as a result the Applicant and her representatives were denied the opportunity of cross-examining witnesses of the material facts.

(e) It was the Applicant's position and submission that before the HOPS could make a finding of gross misconduct he had to be satisfied that all material facts had been established beyond all reasonable doubt.

(f) The Applicant was concerned that the DCFS did not provide a report to the HOPS with a recommendation as to penalty for gross misconduct in accordance with paragraph 7.4 of the Code of Conduct. Had the Applicant raised this point at the Disciplinary Hearing it could have been resolved by the Acting Director, who had dealt with this charge of gross misconduct throughout, by making the appropriate recommendation at the hearing on 5 February 2019.

(g) In the event that the HOPS found that the charge of gross misconduct had been proven, the Applicant wished to have an opportunity to make further representations in relation to the issue of penalty.

29. The authorities make it clear that not every case requires oral presentation or the oral evidence to make a proper determination of the facts. In *Foster v Secretary of State for Justice* [2015] EWCA Civ 281, the court was concerned with the rights of prisoners to an oral hearing prior to an adverse decision affecting their prospective liberty or the conditions in which they were detained. The Court of Appeal held at [38]:

> *"In truth, this is not a case which required flexibility of oral presentation or oral evidence to determine the truth of the appellant's account (cf Goldberg v Kelly (1970) 397 US 254) or investigate potential mitigation. The Secretary of State was entitled to conclude that the appellant's account made little sense and that there was a clear breach of the conditions of the licence not least because the officer and the appellant were face to face with each other and the obligation to comply with the licence (irrespective of any request he might have made) was on the appellant. He should not have been arguing about immediate compliance in the first place."*

30. In this case the HOPS was able to make the relevant finding on the basis of the evidence collected in the witness statements and the submissions made in relation to that evidence by the parties. The HOPS' analysis of the evidence is set out at paragraphs 14 to 24 of the Decision letter dated 23 February 2019. In summary the HOPS held:

(a) In order to be found guilty it has to be established that the Applicant (i) was under the influence of alcohol or drugs; and (ii) as a result was unfit for duty.

(b) With regard to the first criterion, the Applicant acknowledged that she had consumed at least two to three beers on the evening in question and was therefore under the influence of alcohol.

(c) With regard to the second criterion, fitness for duty can be determined by the nature of the behaviors presented. Multiple witnesses described the Applicant's behavior in a manner that would be consistent with being under the influence of alcohol:

- Witnesses described the Applicant as stumbling upon her return to the facility.

- Witnesses noticed an odor when the Applicant returned to the vehicle.

- Witnesses reported hearing the Applicant vomiting.

- Witnesses described changes in the Applicant's speech, such as speaking loudly with slurred speech, not being able to complete a sentence and talking differently.

(d) Based on the alignment of the evidence of multiple witnesses it can be concluded that the Applicant was unfit for duty as a result of being under the influence of alcohol.

31. Even if it could be persuasively argued that this was a suitable case where cross examination of the witnesses should have been allowed at the Disciplinary Hearing, long-standing authority makes it clear that in any judicial review proceedings the court is only likely to conclude that there was a breach of the rules of natural justice or duty of fairness if the applicant in question in fact requested that there be cross examination of witnesses of fact and that request was in fact refused.

32. *Thompson v The Law Society* [2004] EWCA Civ 167 involved two applications for judicial review arising out of the decisions by the Office of the Supervision of Solicitors and the OSS professional regulation casework committee. Those decisions were reviewed by the Law Society's adjudication panel. The hearing took place on the papers only. No request for an oral hearing had been made in respect of the reviewable first decision but an application for an oral hearing was made in respect of the second review. The request was refused. In so far as the common law was concerned it was held that the duty of an adjudicator or equivalent at first instance and the appeal body was to act fairly. What is fair depends on the circumstances of the case. At paragraph 46 Sir Anthony Clarke MR referred to paragraph 37 of the judgment of Kennedy LJ in *Smith v Parole Board* [2003] EWCA Civ 1269 where he stated "*an oral hearing should be ordered where there is a disputed issue of fact which is central to the Board's assessment and which cannot fairly be resolved without hearing oral evidence*." However, at paragraph 47 Sir Anthony Clarke MR said:

> "*I cannot at the moment think of a circumstance in which a solicitor who did not ask for an oral hearing before the adjudicator or appeal panel could complain that no oral hearing was held. In my judgment, [the claimant's] failure to ask for an oral hearing is fatal to his argument at common law."*

33. The earlier Privy Council decision in *University of Ceylon v Fernando* [1960] 1 All ER 631, concerned a commission of inquiry appointed by the Vice Chancellor of the University, consisting of himself and two others, to assist him in inquiring into the certain allegations which had been made by B, a woman student, and which, if they were true,

were explicable only on the footing that F, a student, who was taking a university examination, had acquired knowledge of the German passage in one of the examination papers before taking the examination. The Privy Council held that the fact that the commission did not tender B, or any other witness, for cross examination by F was not a failure to comply with the rules of natural justice, but the position might have been different if F had requested to be allowed to cross-examine B and had not been allowed to do so. Lord Jenkins, giving the advice of the Board, held:

> *"Their Lordships are, therefore, satisfied that the interviews, so far as they went, were fairly conducted and gave the plaintiff an adequate opportunity of stating his case. But it remains to consider whether, in the course they took, the interviews must be held to have fallen short of the requirements of natural justice on the ground that the plaintiff was given no opportunity of questioning Miss Balasingham. She was the one essential witness against the plaintiff and the charge in the end resolved itself into a matter of her word against his. In their Lordships' view, this might have been a more formidable objection if the plaintiff had asked to be allowed to question Miss Balasingham and his request had been refused. But he never made any such request, although he had ample time to consider his position in the period of ten days or so between the two interviews. There is no ground for supposing that, if the plaintiff had made such a request, it would not have been granted. It, therefore, appears to their Lordships that the only complaint which could be made against the commission on this score was that they failed to volunteer the suggestion that the plaintiff might wish to question Miss Balasingham or in other words to tender her unasked for cross-examination by the plaintiff. Their Lordships cannot regard this omission, or a fortiori the like omission with respect to other witnesses, as sufficient to invalidate the proceedings of the commission as failing to comply with the requirements of natural justice in the circumstances of the present case."*

34. It is accepted by the Applicant that at no time did she request that any of the witnesses be produced at the hearing so that they could be cross examined by her or by her Union

representatives. Given that the Applicant and/or her representatives failed to request cross examination of the witnesses, any failure on the part of the HOPS to suggest that there be cross examination of relevant witnesses cannot, in my judgment, invalidate the proceedings before him as failing to comply with the requirements of natural justice in the circumstances of this case.

35. Similar analysis applies in relation to other allegations of procedural irregularities, which now form the basis of the judicial review proceeding, in respect of which no complaint was made at the Disciplinary Hearing. As noted at paragraph 28 above the Applicant made no complaint to the HOPS that (i) the Applicant considers it inappropriate that the Acting Director did not obtain witness statements from each witness in their own words; (ii) the Applicant was concerned that she did not know the identity of the witnesses; (iii) the Applicant considers it inappropriate that the HOPS had failed to invite the Applicants job supervisor and the Head of Department to take part in the Disciplinary Hearing; (iv) the Applicant was concerned that the DCFS did not provide a report to the HOPS with the recommendation as to penalty for gross misconduct; and (v) the Applicant was concerned to have an opportunity to make further representation in relation to the issue of penalty. It was not suggested by the Applicant and/or her Union representatives that any of the above issues were controversial issues between the parties in respect of which the HOPS was required to make a determination.

36. The Respondents submit that having regard to the conduct of the Applicant in these proceedings in relation to the issues referred to in paragraph 28 above, it is no longer possible for the Applicant to raise these issues in the present judicial review proceedings as grounds for contending unfairness of the Disciplinary Hearing. In this regard, counsel for the PSC, relies upon *Thomas v University of Bradford (No 2)* [1992] 1 All ER 964, where it was accepted that the University had not followed the correct procedure in the removal of Ms. Thomas from office. However, the University relied on the fact that from the start Ms. Thomas and her advisers knew well that the correct procedure was not being followed. Ms. Thomas and her advisors took part in hearings before the joint committee and council, in the circumstances, it was argued on behalf the university, that it would

be wrong to permit Ms. Thomas to go back on what was manifestly her acquiescence in the procedure actually adopted and which (though incorrect) complied with all the rules of natural justice. In considering the submission Lord Browne-Wilkinson held:

> *"I have no doubt that, according to ordinary rules of contract, the failure by a party who has full knowledge of the facts to object to a proposed procedure which is then adopted and used at considerable expense of time and money by the other party prevents the non-objecting party from subsequently relying on a failure to follow the procedure laid down by the contract. In contract law, the non-objecting party would be held to have acquiesced in the variation of contractual procedures. To the extent therefore that Miss Thomas's claim is based on her contract of employment, she must be taken to have waived her right to insist on the contractual procedure.*
>
> *...*
>
> *In judicial review cases, where a complainant has acquiesced in a mere procedural irregularity (as opposed to an excess of jurisdiction) the court will not exercise its discretion to give him relief: de Smith's Judicial Review of Administrative Action (4th edn, 1980) pp 275, 423;* R v *Williams, ex p Phillips [1914] 1 KB 608; R v Inner London Quarter Sessions, ex p D'Souza, [1970] 1 WLR 376."*

37. In the circumstances I have come to the view that, having regard to the complete lack of any complaint at the Disciplinary Hearing in relation to the grounds set out at paragraph 28 above, it would not be appropriate or just to allow the Applicant to argue these grounds for the first time in these judicial review proceedings. In the circumstances the Applicant must be considered to have waived any right to raise the in these proceedings.

Issues not raised before the PSC

38. The lack of any complaint in relation to the matters which form the basis of these judicial review proceedings is compounded by the fact that whilst the Applicant exercised her statutory right to appeal the decision of the HOPS to the PSC, none of the grounds which

are the primary focus of these judicial review proceedings were raised in the appeal proceedings.

39. In the appeal proceedings before the PSC, the Applicant made no complaint in relation to substantially all the matters which now form the basis of these judicial review proceedings:

    (a) The Applicant made no complaint to the PSC that the Acting Director did not obtain witness statements from each witness in their own words.

    (b) The Applicant made no complaint to the PSC that she was not given an opportunity to review the Investigation Report to confirm the summary contained therein was a true summary of a conversation with the Investigation Team prior to it being submitted.

    (c) The Applicant made no complaint to the PSC that she was not provided copies witness statements and was only provided the witness summaries.

    (d) The Applicant made no complaint to the PSC that she did not know the identity of the parties and witnesses and was unable to raise any favourable points in rebuttal and/or adequately challenge the witnesses' summaries.

    (e) The Applicant made no complaint to the PSC that the DCFS did not provide a report to the HOPS with a recommendation as to the penalty for gross misconduct pursuant to paragraph 7.4 of the Code of Conduct.

    (f) The Applicant made no complaint to the PSC that the HOPS failed to invite the Applicants job supervisor and the Head of Department and any other officers whom he considered relevant to the case to attend and take part in the Disciplinary Hearing.

(g) The Applicant made no complaint to the PSC that as no witnesses were called by the HOPS there was no cross examination conducted even though the Acting Director admitted that they were significant discrepancies in the evidence.

(h) The Applicant made no complaint to the PSC that the HOPS was required to determine the charge of gross misconduct by applying the criminal standard of proof (beyond reasonable doubt) and that he failed to do so.

(i) The Applicant made no complaint to the PSC that the HOPS did not afford her the opportunity to provide submission penalty after a finding that she was guilty of gross misconduct.

(j) The Applicant made no complaint to the PSC that the HOPS participated in the prosecution and suspension of the Applicant and then was the sole decisionmaker in the adjudication with the result that this conflict of interest on the part of the HOPS gave rise to an appearance of bias.

40. The grounds of appeal to the PSC are set out in the letter from the Bermuda Public Services Union letter dated 6 March 2019. The substance of that letter states:

"In accordance with Clause 28(1)(b) of the Public Service Commission Regulations 2001, the Bermuda Public Services Union (BPSU) would like to appeal the disciplinary award given to our member Ms. Cheyra Bell, received on February 25, 2019. Ms. Bell was awarded the penalty of dismissal in accordance with paragraph 7.5.2 e of the Conditions of Employment and Code of Conduct (CECC), because she was found guilty of Gross Misconduct.

…

In his Decision Report, the Head of the Public Service concluded that:

- *Because Ms. Bell acknowledged that she had consumed at least 2-3 beers on the evening in question, she was therefore under the influence of alcohol;*
- *Multiple witnesses described Ms. Bell's behaviour in a manner that would be consistent with being under the influence of alcohol and therefore as a result was unfit for duty.*

Notwithstanding the aforementioned, the BPSU would like to submit the following:

- *This is the first time Ms. Bell has been charged with any disciplinary offences during her tenure at the Department of Child and Family Services (DCFS).*

- *She has worked hard to achieve her qualifications and is just beginning of career as a young aspiring civil servant.*

- *The penalty award is harsh considering this is her first offence and would appear inconsistent with other penalty awards of this nature.*

- *She and her colleague (who was driving the vehicle) were charged with the same offence. Although he admitted that he had consumed alcohol and lied multiple times during the investigation, he has not been penalized and is in fact still employed in the same department.*

- *Although it is the opinion of the Head of the Public Service, that Ms. Bell was under the influence of alcohol, there is no real concrete evidence of this as she was never tested for being under the influence of alcohol.*

- *More importantly - with this being Ms. Bell's first offence a more appropriate penalty would be that of progressive discipline.*

…

The BPSU are extremely disappointed and concerned that the Head of the Public Service has seen fit to utilise such a harsh penalty award when there were so many other options at his disposal, especially when in the past, so many offences of this nature have been given a penalty award that is more akin to a progressive disciplinary process. With this being Ms. Bell's first offence, this makes the statement even more baffling.

There is no doubt that because of her dedication and commitment to the DCFS, Ms. Bell realizes the severity of being charged with an offence such as this. However, the penalty that she has received seems unfair and inconsistent with someone who has a clean record and has never been charged before of any wrongdoing. She has represented Bermuda internationally playing soccer and as a coach, has a reputation for being of sound character.

…

Against this background, we request that the Public Service Commission review this matter in its entirety, noting the inconsistency, past precedents and seemingly unfair penalty award that has thrown a dedicated and committed public servant to the unemployment line. The BPSU would like to emphatically request that Ms. Bell the reinstated to her substantive post under a more progressive disciplinary process whereby she is given the opportunity to make amends for this ad hoc decision of poor judgment."

41. The right to appeal in respect of a "disciplinary award" is set out in Regulation 28 of the PSC Regulations. The terms of Regulation 28 were analysed by Kawaley CJ in *Patrick Glenn Lake v The Public Service Commission* [2016] SC (Bda) 39 Civ (8 April 2016) and at [26] held that the statutory definition clearly embraces decisions on both "guilt" and penalty.

42. The existence of an alternative remedy by way of statutory appeal is a relevant factor in considering whether this Court should exercise its discretionary jurisdiction to provide a remedy by way of judicial review. Authorities make it clear that where an alternative

remedy exists and the Court is only likely to grant a remedy by way of judicial review in exceptional circumstances. This aspect was also considered by Kawaley CJ in *Lake* at [22-23]:

> *"22. However, Crown Counsel relied on the well-known principle that relief by way of judicial review will generally be refused if the applicant had a right of appeal which he should have pursued but did not pursue. The Applicant's counsel responded that even if an appeal was available and had not been pursued, the points of law relied upon in the present application were not appropriate for adjudication through the appeal process in any event. There was no need to cite authority for these propositions and judicial support for the principles is abundant. As Bell J (as he then was) stated in Stoneham and Fleming-v-Attorney-General et al [2008] Bda LR 14: "14. It is well established that judicial review is a remedy of last resort, so that where a suitable statutory appeal is available, the Court will exercise its discretion in all but exceptional cases by declining to entertain an application for judicial review; see, for instance, the judgment of Sedley LJ in R (on the application of Lim and another) v Secretary of State for the Home Department [2007] EWCA Civ 773 (paragraph 13). This is perhaps but one of the latest in a long line of judicial pronouncements to the same effect, and I do not see that any useful purpose would be served by setting out extracts from judgments other than the one to which I have referred above, all of which repeat the principle in the same or similar terms."*
>
> *23. The principles are also helpfully illustrated in terms of a more recent judicial articulation by the Caymanian Grand Court decision in Aitkin-v-Immigration Appeal Tribunal [2015] (1) CILR 27, where Smellie CJ stated:*
>
> > *"4 Judicial review is not normally available where there is an alternative remedy by way of appeal. While the court retains a discretion, even where there is an alternative remedy, to entertain an application by way of judicial review, it will do so only exceptionally: see Kirk Freeport Plaza Ltd. v.*

> *Immigration Bd. (6). In that case, the Court of Appeal (1997 CILR at 515) adopted the settled principle that an application for judicial review may be entertained "where the alternative . . . remedy [of appeal] is 'nowhere near so convenient, beneficial and effectual' or 'where there is no other equally effective and convenient remedy.'" The principle has often been followed and applied in subsequent cases; see, for example Proprietors, Strata Plan No. 103 v. Development Advisory Bd. (8) and Ford v. Immigration Appeals Tribunal (5)."*

43. The existence of a statutory appeal to the PSC is also relevant in the context of allegations of breach of the rules of natural justice since such a breach is capable of being cured by such an appeal which may involve, at the request of the Applicant and consent of the PSC, a full rehearing of the complaint of gross misconduct.

44. In *Boden v The Governor of Bermuda* [2019] SC (Bda) 50 Civ (19 August 2019) this Court referred to the decision in *Preiss v General Dental Council* [2001] 1 WLR 1926, where the Privy Council was of the view that the disciplinary proceedings before the General Dental Council did raise the appearance of bias and the tribunal lacked the necessary appearance of impartiality but held that the "*points taken under article 6(1) cannot succeed if the Board is itself prepared to conduct a complete rehearing of the case, including a full reconsideration of the facts and the question whether the facts found amount to serious professional misconduct. Their Lordships consider that the position is no different under the common law rule of natural justice applicable to proceeding before domestic tribunal*."

45. In *Faye and Payne v The Governor and the Bermuda dental Board* [2006] Bda LR 65, Kawaley J stated at [35] that the Privy Council decision in *Preiss "illustrates the well-recognized principle that complaints about noncompliance with the fundamental fair hearing rights which occur before a statutory tribunal (other than a court) which is not sufficiently independent or impartial can be cured where the right of appeal to a constitutionally compliance tribunal exists."*

46. In the circumstances, not only was the Applicant obliged to pursue the alternative remedy of the statutory appeal provided by Regulation 28, the Applicant was also obliged to take all the points that she complains of in these judicial proceedings, in the statutory appeal. Save in exceptional circumstances, a complainant will not be allowed to raise points in the judicial review proceeding which were not pursued or abandoned in the statutory appeal under Regulation 28. No credible argument has been advanced as to why the Court should consider granting relief in these proceedings on grounds which were never pursued either before the HOPS in the Disciplinary Hearing or before the PSC in the appeal proceedings. The grounds of challenge which were not raised in the appeal proceedings, consistent with the position in the Disciplinary Hearing, are, in the judgment of the Court, to be considered as either waived by the Applicant or abandoned. It seems wrong in principle not to pursue grounds in the statutory appeal (which could have been pursued) but to do so in the judicial review proceeding which are intended to be proceedings of last resort.

Allegation of apparent bias on the part of the HOPS

47. The Applicant contends that the decision of the HOPS is vitiated on account of apparent bias based upon two underlying facts. First, it is alleged that prior to the commencement of these proceedings the HOPS expressed his view that the facts in question warranted the charge of gross misconduct. Secondly, it is alleged that it was the decision of the HOPS to "suspend" the Applicant under Regulation 26 (1) which allows the HOPS to suspend an officer if he is satisfied that the officer has committed a criminal offence or a disciplinary offence involving gross misconduct and the suspension is required in the public interest.

48. Paragraph 7.4.2 of the Code of Conduct defines gross misconduct and provides that an officer is guilty of gross misconduct if the officer:

    (a) Assaults another officer or member of the public while on duty.

(b) Is unfit for duty as a result of being under the influence of alcohol or drugs.

(c) Acts fraudulently or dishonestly or is involved in theft for failure to account for Government funds or moneys of property belonging to the Government.

(d) Commits a series of acts of misconduct or a single act of misconduct of such gravity that in the opinion of the Head of the Civil Service it warrants being treated as a gross misconduct.

(e) Acts in a manner that is in the opinion of the Head of the Civil Service likely to bring the Civil Service into disrepute.

49. It will be seen that section 7.4.2 (d) and (e) require a formal opinion from the HOPS that the conduct in question is to be considered as a gross misconduct. As Kawaley CJ held in *Lake* at [11] that it is self-evident that where a charge under paragraph 7.4.2 (d) or (e) is involved, the HOPS opinion must be either (a) a precondition for the charge being "laid"; or (b) an essential element of the material relied upon in the disciplinary hearing to support the relevant disciplinary charge.

50. It is also to be noted that the charge of gross misconduct under paragraph 7.4.2(b), relating to being unfit for duty as a result of being under the influence of alcohol or drugs, does not require any opinion from the HOPS as a condition of such a recommendation by the Head of Department. Despite the fact that such an opinion was not required from the HOPS, the Acting Director in this case did indeed seek the guidance of HOPS. By letter dated the 10 September 2018 the Acting Director sought the opinion of the HOPS "*on the following the alleged incidents by two DCFS employees who, according to DCFS Child Protection Investigations, are reported to have occurred and if they warrant being treated as gross misconduct*" The opinion in relation to the Applicant was sought under "*(Potential breach of C.E.C.C. 7.4.2 (b) Is unfit for duty as a result of being under the influence of alcohol or drugs)".*

51. The Acting Director, in a letter dated the 10 September 2018, also requested that the Applicant "*be placed on Administrative Leave in accordance with the Memorandum of Understanding between the Secretary to the Cabinet/Head of Public Service and the Bermuda Public Service Union dated 31 July 2012 for the course of the investigation and if it is determined that the disciplinary charges that should be laid as a result of the investigation, the officers remain on Administrative Leave until the disciplinary conclusion.*"

52. The HOPS replied by letter dated 11 September 2018 and stated:

> *"It is noted that… Employee "B" [the Applicant] is alleged to have been unfit for duty as a result of being under the influence of alcohol or drugs in possible breach of C.E.C.C. 7.4.2(b).*
>
> *It is my opinion as Head of the Public Service that the incidents are of sufficient gravity that they should be treated as Gross Misconduct"* (emphasis added).

53. In relation to the issue of Administrative Leave the HOPS replied by a separate letter on 11 September 2018 to the Acting Director stating:

> *"As investigations of allegations of Gross Misconduct have commenced against the above named, a period of administrative leave is required.*
>
> *Under the circumstances, and in accordance with the Agreement between the Head of the Public Service and the Bermuda Public Services Union, I herewith authorize a period of administrative leave in respect of Ms. Bell effective immediately until Tuesday, 11th December 2018. During this time the disciplinary process will proceed in accordance with the Second schedule of the Public Service Commission Regulations."*

54. Mr. Williams for the Applicant, relies upon the statement by Kawaley CJ in *Lake* that where the HOPS has expressed an opinion under paragraph 7.4.2(d) that the acts of an officer amount to gross misconduct, the HOPS might have to recuse himself from adjudicating upon that very complaint. At [18] Kawaley CJ said;

> *"…However an important procedural nuance not addressed in the course of argument should be noted. The power conferred by paragraph 9 of the Second Schedule to the Regulations enabling the HOCS to delegate his hearing functions to an Assistant Cabinet Secretary may have to be deployed to ensure fairness in any case where the HOCS is involved in the investigative phase of disciplinary proceedings. In charges under paragraph 7.4.2(d) of the Code of Conduct, for instance, there would very obviously be a manifest appearance of bias if the HOCS were to both:*
>
> *(a) opine that the series of acts of simple misconduct complained of amount to gross misconduct for the purposes of instituting gross misconduct proceedings; and*
> *(b) adjudicate a hearing of the relevant charge, whether at the liability or penalty stage."*

55. Mr. Williams also argues that in this case the requirement to take administrative leave is equivalent to suspension under Regulation 26 (1) which provides that the HOPS may direct that an officer be suspended from duty upon believing that the officer has committed a criminal offence or a disciplinary offense involving gross misconduct and that the suspension is required in the public interest. Mr. Williams argues that in agreeing to administrative leave, as set out in the HOPS letter of 11 September 2018, the HOPS must have formed the view that either a criminal offence or a disciplinary offence involving gross misconduct had been committed by the Applicant. In the circumstances, he argues, that for HOPS to continue to adjudicate upon the allegation of gross misconduct would give an appearance of bias on his part.

56. Ms. Sadler-Best for the Attorney General argues that the point relied upon in *Lake* was *per incuriam* as it was not subject of argument by counsel for the parties and it appears that relevant authorities may not have been cited to the learned Chief Justice. In particular, it does not appear that Kawaley CJ was taken to the instructive judgment of the Court of Appeal in *R v Chief Constable of Merseyside Police ex parte Bennion* [2001] IRLR 442. In that case Mrs. Bennion, a police officer, commenced proceedings against the Chief Constable alleging sexual discrimination and victimization. At the request of the Chief Constable, the proceedings were stayed pending the outcome of disciplinary proceedings against her that might result from ongoing inquiries.

57. In accordance with the Police (Discipline) Regulations, the disciplinary proceedings against Mrs. Bennion were to be heard by the Chief Constable. Regulation 14(2) provided that a case must be remitted by the chief officer concerned to another chief officer if he is interested in the case otherwise than in his capacity as such. Regulation 14(7) provided that a case not falling within 14(2) may be remitted where the chief officer concerned considers it appropriate to do so.

58. Mrs. Bennion requested that the Chief Constable exercise the discretion conferred on him under Regulation 14(7) to remit the case to another Chief Constable, arguing that, in the view of the pending claim before the employment tribunal, it would appear to be inappropriate for the respondent in one separate proceedings to be the arbiter in the other. The Chief Constable refused to do so pointing out that he had no personal involvement in the case, either in relation to the disciplinary matters or to the matters which were the subject of proceedings before the employment tribunal and concluded that a reasonable observer would not say that there was a danger of bias or unfairness.

59. The Court of Appeal agreed with the position of the Chief Constable holding that the requirements of judicial impartiality which would be understood to apply to any judge should not be assumed inexorably to apply to a Chief Constable conducting disciplinary proceedings in accordance with his operational responsibilities. Judge LJ held:

"The immediate difference stems from the operational responsibilities of the office of the Chief Constable. Notwithstanding his general interest in the outcome of every disciplinary hearing, reg. 13.1 is unequivocal. It is normally appropriate, and thought to be in the best interests of the force as a whole, for the Chief Constable to adjudicate in disciplinary matters. No such assumptions or operational considerations apply to the judge. Ignoring the court's control over the proceedings, the judge has no disciplinary function over the litigants. By contrast, the Chief Constable always has an interest (in its general sense) in the course of every set of disciplinary proceedings brought against any one of its officers. When the judge gives judgment, his interest and involvement with the litigants comes to an end. He has no further "interest" at all. Sitting as an adjudicator in separate proceedings, the Chief Constable has a direct and continuing involvement in the consequences of its decisions in a way in which the judge does not. For example, if it were alleged that three or four of the officers under his command had abused their authority, or indulged in a racially discriminatory behaviour, his finding that they have done so reflects adversely on the force under his command. No one suggests that the Chief Constable should not adjudicate. Indeed, it is his duty to do so. It is confidently expected that the decision will be made fairly and objectively, and that he will not be prohibited from making a finding adverse to the officers by the thought that he may be identified as a defendant, vicariously liable for their conduct in any civil proceedings for damages subsequently brought by the victim."

60. Lady Hale considered that unless the Chief Constable has personal involvement or other interest in a particular case which is closer than this, he cannot be regarded as automatically disqualified from discharging his duty to deal with the matter. In the present circumstances there was no real danger of actual bias.

61. There are similarities in the role of the HOPS in the present case and the role of the Chief Constable in the *Bennion* case. Under the Code of Conduct and the PSC Regulations, the HOPS has a central role in the disciplinary process in relation to public officers particularly in relation to allegations of gross misconduct which may lead to termination of employment

of a public officer. Under paragraph 7.4.2 (d) and (e) the HOPS is given the authority to certify whether particular conduct on the part of an officer should be the subject of disciplinary proceedings as gross misconduct. The penalties for gross misconduct are set out in paragraph 7.5.2 of the Code of Conduct and are to be imposed by the HOPS. Paragraph 5 of the Second Schedule to the PSC Regulations requires that in cases of alleged gross misconduct the HOPS shall conduct a hearing in accordance with the provisions of paragraphs 5 to 7 of the Second Schedule. Paragraph 8 of the Second Schedule provides that where the HOPS imposes a disciplinary penalty he shall inform the officer accordingly by notice in writing and advise the officer's right of appeal to the PSC under the Regulations. Like the Chief Constable in the Bennion case, the public officers in Bermuda expect the HOPS to personally deal with complaints of gross misconduct which may lead to an officer's dismissal. The HOPS has an institutional responsibility for the public service in Bermuda.

62. The Court of Appeal in *Director of Public Prosecutions v Cindy Clarke* [2019] Bda LR 46 approved the reasoning and analysis in the *Bennion* case. At [30] and [33] Kay JA analysed the position as follows:

> *"30…In the case of Bennion, supra, the role of the Chief Constable was a final adjudicatory one in the disciplinary regime. Nevertheless, the rules of natural justice were ameliorated for operational or organisational reasons. It was said that the Chief Constable "always has an interest...in the outcome of every act of disciplinary proceedings brought against one of his officers", per Judge LJ paragraph 44. This is because, per Hale LJ at paragraph 50 , "he is personally responsible for the good order and discipline of his force". Accordingly, he is only disqualified in the event of a more pronounced personal interest in the outcome.* (emphasis in original)
>
> …
>
> *33 Mr Adamson submits that the judge was wrong to characterise this as "a fraud practised on the Director" giving rise to a more pronounced personal interest in*

the outcome of the proceedings. In my judgment, there is force in this submission. It is important to keep in mind that this is not a case in which it is now said that the Director was motivated by bad faith, or acted pursuant to an ulterior motive. He was the person with the responsibility for maintaining the integrity of his department. He had an important constitutional role. It seems to me that his interest is more properly described as institutional, organisational or professional, rather than personal, even though in relation to one of the charges he has alleged an intention to deceive him. Any such deception, if proved, would be of the Director in capacity as head of department, not in his personal capacity." (emphasis added)

63. Consistent with the position of the Director of Prosecutions in the *Clarke* case, it seems to me that the position of the HOPS is properly described as institutional and organisational rather than personal. Indeed, it is not suggested on behalf of the Applicant that the HOPS has any personal interest in the adjudication of the complaint of gross misconduct against her. The position of HOPS in the present case is, in all material aspects, identical to the Chief Constable in *Bennion*.

64. The opinion expressed by the HOPS in his letter of 11 September 2018 was not based upon his assessment of the facts. It was based upon "*alleged*" facts and the HOPS did not conclude that there was indeed gross misconduct on the part of the Applicant. The letter expressly referred to a "*possible breach of C.E.C.C. 7.4.2(b)."*

65. In my view the analysis of Kawaley CJ in *Lake* at [11] should be confined to cases where the opinion of the HOPS is expressed under paragraph 7.4.2 (d) and (e) and that opinion is based upon the HOPS' evaluation of the facts and circumstances as opposed to based upon the *alleged facts* as is the position in the present case.

66. In relation to the contention by the Applicant that the HOPS was instrumental in suspending her, I am unable to accept that there was in fact a suspension pursuant to the terms of Regulation 26 of the PSC Regulations. All the correspondence makes it clear that

this was not a case of suspension under Regulation 26 but a case of administrative leave under the Memorandum of Understanding between the Secretary to the Cabinet/Head of the Civil Service and the Bermuda Public Service Union effective 9 July 2012. This is made clear in the letter from the HOPS to the Acting Director dated 11 September 2018 and the letter from the HOPS to the Applicant dated 11 December 2018. In agreeing to administrative leave the HOPS made no determination of any wrongdoing by the Applicant. The Memorandum of Understanding expressly provides that *"an officer may be placed on administrative leave, with or without notice, while the employing Department is reviewing or investigating actions amounting to Misconduct or Gross Misconduct..."*

67. It is accepted by the parties that the test for apparent bias is *"whether the relevant circumstances ascertained by the Court would lead a fair-minded and informed observer to conclude that there was a real possibility that the [decision maker] had been biased"* (*Porter and Another v Magill* [2001] UKHL 67 and *Clarke* at [22]). In all the circumstances outlined at paragraphs 61 to 66 above, I am satisfied that a fair-minded and informed observer would not include that in dealing with the disciplinary proceedings against the Applicant, the HOPS was biased.

Allegation of predetermination

68. Mr. Williams submits that by the time the Applicant appeared before the HOPS, he had already made up his mind that the Applicant was guilty of gross misconduct in breach of the right to a fair hearing and natural justice. Mr. Williams submits that the unchallenged evidence of the Applicant is that in addition to prosecuting and suspending her, the HOPS stated that he was going to make his decision on the papers which meant that nothing the Applicant could have said to the HOPS could have affected the outcome.

69. Having regard to the evidence set out above, I am unable to accept Mr. Williams' submission that the HOPS had predetermined the result of the Disciplinary Hearing. The evidence shows that the Applicant and the two Union representatives were invited to make representations at the Disciplinary Hearing and they did so. It is undisputed that neither the

Applicant nor the Union representatives ever made a request that they wish to cross examine any of the witnesses. The HOPS analysed the evidence before him and gave a reasoned decision. In the circumstances, it is the view of the Court that the HOPS was entitled to conduct the hearing without hearing viva voce evidence from witnesses whose evidence was summarised in the Investigation Report. The HOPS was entitled to take the view that the charge of a gross misconduct had been established on the evidence before him.

70. The Applicant also challenges the decision of the Acting Director to charge the Applicant with gross misconduct as opposed to simple misconduct. The applicant also criticises the decision of the HOPS to summarily dismiss her as being unduly harsh in all the circumstances.

71. The starting point in considering this objection is that in judicial review proceedings the Court is not entitled to substitute its decision merely because the Court, had it been adjudicating the matter in the first instance, would have been more lenient and meted out a different penalty. The Court can only interfere with a decision if there have been material procedural irregularities or the decision is wrong as a matter of law, which would include a decision which is Wednesbury unreasonable. As correctly submitted on behalf of the Attorney General, where the matter is brought by way of judicial review "*the functions of the Court are much more restricted than in an appeal from an administrative decision… Judicial review is not concerned with the merits of the decision in respect of which the application is made, but with the process of decision-making itself*" (*Minister of environment v Barnes* Civil Appeal No 16 of 2019).

72. In this case the Applicant, when first confronted with the allegation of consuming alcohol whilst being on duty, lied to the investigating officers. On any basis the Applicant occupied a highly responsible position of looking after vulnerable children. The Acting Director, it seems to me, was entitled to take the position expressed in a letter of the 23 November 2018 that it was her opinion "*that there are very serious allegations that warranted the allegation of Gross Misconduct being referred to the HOPS.*"

73. In considering the appropriate penalty, the HOPS took into account the following considerations appearing at paragraphs 32 and 33 of his Decision dated 23 February 2019:

> *"32. Public Officers are expected to be fit for duty and to conduct themselves in accordance with the Conditions of Employment and Code of Conduct of the Government of Bermuda. It can be argued that the expectations on those Officers who were charged with the responsibility of caring for those who have been placed in the care of the Director of Child and Family Services are higher given the responsibility for vulnerable minors. Such Officers are expected to set an example by their own behaviour for those under their care. Consuming alcohol while on duty and while responsible for vulnerable minors cannot be considered appropriate conduct. Indeed, such behaviour is counter to all that would be expected of a Residential Treatment Officer.*
>
> *33. The witness statements suggest that an unhealthy, non-therapeutic and harmful cultural exists among the Offices of RTS. The existence of such an alleged culture cannot be accepted as an excuse for the behaviours of Ms. Bell. Similarly, the existence of such a culture, if such a cultural exists, cannot be considered as a mitigating factor when determining an appropriate penalty."*

74. I accept the submission made on behalf of the Attorney General that, a referral of gross misconduct and a penalty of dismissal, fell within the range of reasonable responses. It cannot be said that no reasonable authority would have arrived at the same conclusion and it is not for the Court to impose its own view as to what it may have done in the circumstances. The Court was referred to a number of authorities in relation to the appropriate penalty for misconduct by a public officer involving dishonesty or lack of integrity in support of the position that the decision to dismiss the Applicant was an appropriate response in all the circumstances. These decisions included *R (on the application of Darren Williams) v Police Appeals Tribunal* [2016] EWHC 2708 (Admin) and *The Commissioner of Police v The Public Service Commission and Oswin Pereira* [2021] SC (Bda) 10 Civ (15 February 2021). It is unnecessary to analyse these decisions

as the Court is satisfied that the decision of the HOPS to dismiss the applicant was within the range of reasonable responses.

Standard of proof

75. Mr. Williams submits that the HOPS should have determined the allegations against the Applicant by applying the criminal standard of beyond all reasonable doubt. It is to be noted that no such suggestion was made to the HOPS at the disciplinary hearing and this contention formed no part of the appeal to the PSC.

76. The submission appears to be based upon the contention that the substance of the complaint against the Applicant was that she had neglected the two children in her care (by being unfit for duty as a result of being under the influence of alcohol) and that constitutes a criminal offense under section 19 of the Children Act 1998. I am entirely unable to accept this submission. Under Section19 "*any person who, having the care and control of, or parental responsibility for, any child, willfully abuses, mistreats, neglects, deserts or abandons the child or causes or procures the child to be abused, is treated, neglected, deserted or abandoned*" is guilty of an offence. The Applicant was not charged with the constituent elements of the offence created under section 19. The Applicant was charged with gross misconduct in that she was unfit for duty as a result of being under the influence of alcohol.

D. <u>Challenge to the dismissal of appeal by the PSC</u>

77. As noted at paragraph 40 above the Applicant's appeal was made by way of a letter from the BPSU dated 6 March 2019. The PSC dismissed the appeal by letter dated to April 2019 stating that:

> *"Given the clear evidence in this case, the Commission agreed in accordance with section 14 of the Procedure Governing Discipline Appeals to the Public Service Commission to review the matter "on the record".*

It was also agreed that the penalty of dismissal should be affirmed as Ms. Bell was under the influence of alcohol while carrying out the duties as a Residential Care Officer responsible for caring and providing services to vulnerable minors."

78. The Applicant challenges the decision of the PSC on the grounds that the PSC did not consider, or alternatively did not consider the merits of, her appeal. Secondly, the Applicant complains that the PSC did not afford her a hearing in breach of the legitimate expectation that the PSC established through practice and custom with the BPSU.

79. In the First Affidavit of Carlita O'Brien, the Secretary to the PSC, it is said at paragraph 4 or that "*the Appeal filed by the BPSU on behalf of the the Applicant primarily sought to appeal the decision of the award itself and it did not seek to challenge any of the factual findings. The Appeal did suggest that there was no concrete evidence that the Applicant was not under the influence as a breathalyzer was not administered but there was no substantial challenge to the facts. The thrust of the appeal was that a lesser penalty should have been imposed and that the penalty of dismissal was excessive in the circumstances*."

80. Mr. Williams for the Applicant argues that the statement by Ms. O'Brien that the BPSU *"primarily sought to appeal the disciplinary award*" is an admission of the fact that both the finding of a gross misconduct and the penalty was being appealed against. He argues that nevertheless the PSC failed to deal with the appeal against the finding of gross misconduct.

81. A fair reading of the letter from the BPSU, set out at paragraph 40 above, in view of the Court, makes it clear that the appeal was only against the penalty of dismissal and did not challenge the finding of gross misconduct. The last sentence of the concluding paragraph summarises the Applicant's position where it is stated that "*The BPSU would like to emphatically request that Ms. Bell be reinstated to her substantive post under a more progressive disciplinary process whereby she is given the opportunity to make amends for this ad hoc decision of poor judgment*" (emphasis added). It seems clear from this last sentence of the appeal letter that the Applicant, through her representatives, was accepting

the finding of a gross misconduct but was seeking a lesser penalty than dismissal from employment.

82. As noted in the O'Brien affidavit the only fact challenged in the BPSU letter was that there was no concrete evidence of the Applicant being under the influence as she was never tested, the suggestion being that in the absence of a breathalyzer or blood test, there was no evidence of the applicant being under the influence of alcohol. However, the Applicant admitted that she had been drinking alcohol while being on duty. There was no dispute that she had lied to the investigator when she first stated that she had not had any alcohol whatsoever. There was evidence from four individuals who gave statements which were consistent with one another which evidenced that the Applicant was under the influence and unfit for duty. Moreover, neither the Applicant nor her representatives sought to cross-examine any of the witnesses in relation to these matters.

83. The Applicant also complains that the PSC wrongfully failed to hold an oral hearing. In this regard it is to be noted that the letter from the BPSU dated 6 March 2019 starts with the sentence that the appeal is being pursued "*in accordance with clause 28(1)(b) of the Public Service Commission Regulations 2001*". Regulation 28 (2) also provides that oral hearings before the PSC are at its discretion:

> *"The officer may include with the notice referred to in paragraph (1) any representations he wishes to bring to the attention of the Commission but, unless the Commission otherwise orders, neither the officer nor the empowered person who made the disciplinary award shall be entitled to appear before the Commission."*

84. The Procedures Governing Discipline Appeals To The Public Service Commission, adopted by the PSC on 17 July 2017, provides in clear terms that in order to have an oral hearing the appellant must make such a request at the time of appealing:

"All appeals will be decided by a Panel of the Public Service Commission. Section 28 of the Regulations does not require an attendance in person and hearings are on the Record unless prior permission to prepare has been requested and granted."

"All Appeals shall be conducted by the Commission without an oral hearing, except with the permission of the Commission. The discipline authority may make submissions in reply to the appeal only with the permission of the Commission."

"A party may ask for permission to appear in person to address the Panel. A request to appear in person shall be in writing and shall be made with the Notice of Appeal. The Commission may deny the request or grant the request to appear in person."

"Any party may present evidence with the permission of the Panel and shall be entitled to make representations to the Panel with the assistance of a union representative or friend."

85. Despite the clear terms of Regulations 28(2) and the Procedures Governing Discipline Appeals to the Public Service Commission neither the Applicant nor the BPSU ever advised the PSC that the applicant and her representatives wished to have an oral hearing. In the circumstances, the decision of the PSC cannot be set aside on the basis that it failed to provide the Applicant with an oral hearing.

86. Mr. Williams also argues that the Applicant had a legitimate expectation that the PSC will provide to the Applicant an oral appeal hearing. In this regard he relies upon the judgment of Laws LJ in *R (on the application of Noorrullah Niazi v The Secretary of State* [2008] EWCA Civ 755 at [29]: "*The paradigm case arises where a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy*."

87. The "*unequivocal assurance*" in this case comes in the form of four appeals to the PSC apparently handled by Mr. Grant of the BPSU. Mr. Grant says that in all four cases he did not ask for an oral hearing but the PSC nevertheless held an oral hearing. I am unable to accept that this evidence constitutes an "*unequivocal assurance*" by the PSC that the PSC will hold an oral appeal hearing in all cases. The evidence of Mr. Grant is entirely consistent with the terms of Regulation 28(2) which states that an oral appeal hearing is held at the discretion of the PSC. In this case, leaving aside the fact that the Applicant did not seek an oral hearing at the time of filing her appeal, it is the evidence of Ms. O'Brien that the PSC did not consider that this was an appeal which warranted an oral hearing. It is also to be noted that when Mr. Grant received a letter from the PSC dismissing the appeal on the record he made no suggestion to the PSC that he was under the impression that there would be an oral hearing. In all the circumstances I am satisfied that the decision of the PSC cannot be set aside on the basis that the failure by the PSC to hold an oral appeal hearing was in breach of the PSC's unequivocal assurance to the Applicant to the contrary.

E. <u>Conclusion</u>

88. Having regard to the above findings, the Court dismisses the Applicant's application to quash (i) the decision of the DCFS referring the Applicant to the HOPS for gross misconduct; (ii) the decision of the HOPS to dismiss the Applicant for gross misconduct; and (iii) the decision of the PSC to refuse the Applicant's appeal against the finding of gross misconduct and the decision to have her dismissed.

89. The Court will hear the parties in relation to the issue of costs of these proceedings, if necessary.

Dated this 3rd day of June 2021

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NARINDER K HARGUN

CHIEF JUSTICE