

THE EASTERN CARIBBEAN SUPREME COURT

ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV 2021/0007

BETWEEN:

MALCOLM WEBSTER

Claimant

and

HEALTH AUTHORITY OF ANGUILLA

Defendant

Appearances:

Ms. Jean M. Dyer of Counsel for the Claimant

Mr. D. Michael Bourne of Counsel for the Defendant

Employment Law – Disciplinary Proceedings brought against employee – Employee claiming right to be represented by legal practitioner at disciplinary hearing – Labour Relations Act, 2018 ('LRA') section 116(2) – Whether employer failed to properly exercise its discretion under section 116(2) of the LRA in refusing the employee's request to be represented by counsel at disciplinary hearing – Whether in refusing employee's request employer exercised its discretion unfairly and irrationally – Whether refusal to allow legal representation unfair and in breach of principles of natural justice – Whether employee ought to have been permitted legal representation at disciplinary hearing

2021: May 14;
2022: February 28.

JUDGMENT

- [1] **INNOCENT, J.:** This judgment concerns a claim brought by the claimant seeking a Declaration that the defendant acted improperly and unfairly in refusing to exercise its statutory discretion under section 116(2) of the Labour (Relations) Act, 2018 (the 'Act') to permit the claimant to be accorded legal representation at certain disciplinary proceedings brought by the defendant against the claimant.
- [2] The claimant is a Civil Engineer by profession and is employed by the Health Authority of Anguilla ('HAA') in the capacity of Director of Facilities since 11th

November 2013. The HAA is a body corporate established under section 4 of the Health Authority of Anguilla Act.¹

- [3] On 26th January 2021, the claimant received a letter of even date headed “Invitation to a disciplinary hearing” directing him to attend a disciplinary hearing to be held on 27th January 2021.² The convening of the disciplinary hearing was made pursuant to section 5.8 of the Employee Manual. The disciplinary hearing was in relation to the consideration by the Human Resource Committee (the ‘Committee’) of charges of gross misconduct under section 5.4(4) of the Employee Manual, in particular paragraphs (q) Gross insubordination or willful disregard or disrespect toward a supervisor or representative of management; and (v) serious misconduct of any nature, which adversely affects the organisation’s best interest and reputation, to include acts of a criminal, dishonest and immoral nature. The defendant was by the same letter informed of his rights which included his right pursuant to section 5.9 of the Employee Manual, to be accompanied by a fellow employee of his choice or a member of the Staff Association, if he so desired.
- [4] The defendant’s legal practitioner responded to the claimant’s letter of 26th January 2021 requesting an adjournment of the disciplinary hearing to afford the claimant reasonable time to prepare his defence and to give necessary and proper instructions to his counsel in light of the short notice given to him.³ On 27th January 2021 the Committee wrote acknowledging the claimant’s letter informing that a new meeting date would be set after confirmation by the Committee.⁴
- [5] On 3rd February 2021, the Committee wrote to the claimant’s legal practitioner in the following terms:
- “Section 5.9 of the Health Authority of Anguilla Employee Manual, of which Mr. Webster is aware, makes clear that “Subject to the Regulations, Policies and Procedures of the HAA, the Human Resources Committee shall advise the employee of his/her right to be accompanied by a fellow employee of their choice or a member of his or her Staff Association.” This position is

¹ R.S.A. c. H3

² Exhibit MW-1

³ Exhibit MW-3

⁴ Exhibit MW-4

consistent with the applicable law, that is, section 116 of the Labour (Relations) Act 2019. Please therefore be advised, having considered the present disciplinary matter, the hearing is not complex or one of exceptional circumstances where the justice of the case requires the attendance of legal counsel.”⁵

[6] Ms. Jean Dyer, counsel for the claimant responded to the Committee’s letter of 3rd February 2021 in the following terms:

“We are in any case instructed to request... that the Committee revisits its decision since it seemingly did not consider all of the relevant factors in arriving at same. While we accept that legal representation is not an absolute right under the Labour (Relations) Act, 2018 (“the Act”) for employees appearing before a disciplinary hearing, the Committee has a discretion under section 116 of the Act as to whether to allow legal representation at a disciplinary hearing. The authorities make clear that the Committee is to exercise its discretion properly. We respectfully submit that the Committee has not done so since it was seemingly oblivious to the fact that: -

- (i) the notions of fairness and equity apply to disciplinary proceedings;
- (ii) the Committee is subject to the duty of observing what are called the rules of natural justice; and
- (iii) where the charges are serious and the employee’s livelihood and or reputation may be affected by the outcome, natural justice requires that he be defended, if he wishes, by legal counsel. We would respectfully refer you in this regard to the dicta of Lord Denning in *Pett v Greyhound Racing Association Ltd.* [1969] 1 QB 125 ...”

[7] Ms. Dyer, by her letter went on further to state: -

“The Committee ought to have considered the following material factors in exercising its discretion: -

- (i) that the charges made against our client are **serious** and affect not only his reputation but also his livelihood. Indeed our client stands the chance of losing his employment with the HAA given the CEO’s recommendation that this case warrants more than a final written warning. Natural justice requires that our client be defended by counsel as per his wishes; and
- (ii) the procedural irregularities complained of by our client and the objections made on his behalf are such that our client would be disadvantaged if he were represented by a member of the HAA or the Staff Association and not by counsel. They cannot reasonably be expected to make submissions on such procedural points. In any event,

⁵ Exhibit MW-6

it would be inappropriate for a member of staff to attend and make such objections and point out the procedural errors made by the CEO.

- [8] The Committee responded to Ms. Dyer's letter by correspondence dated 8th February 2021.⁶ It will be necessary to refer to the contents of this letter in extenso as it sets the backdrop to the present legal proceedings. The Committee wrote:

"With respect to your contentions that the Human Resources Committee has not properly considered the matter of Mr. Webster being legally represented, we disagree. As we have stated, Mr. Webster has been at all times aware that the legal representation is not provided for in the Employee Manual with respect to internal disciplinary matters of the HAA; a position which is consistent with the Labour (Relations) Act. Further, the Employee Manual is part of his employment contract with the HAA and same has been accepted by him. This position has not expressly or impliedly altered.

- [9] The Committee's letter went on to state their position based on legal advice obtained and made reference to the matters that the Committee took into account in arriving at their decision not to permit the claimant to be represented by counsel at the disciplinary hearing. The Committee stated in this letter that:

"We are advised that the requirements of natural justice are fact specific. As such the statement of Denning LJ cannot be considered to be a one size fits all prescription.

For the avoidance of doubt, we have considered, amongst other things the following matters in arriving at our decision: the HAA policy as stated in the Employee Manual, the nature of the matter; and the potential severity of the consequences of an adverse finding."

- [10] It appears from the correspondence mentioned above that the Committee held the view that they, having considered the Employee Manual, found no ambiguity as to the class of persons who may accompany the claimant at the disciplinary hearing. The Committee based their position on the fact that the matter was not of a complex nature and while the potential for the claimant's dismissal existed it ought not to prevent him from continuing in his chosen profession. According to the Committee's letter, they having considered these factors, had formed the view that the case was not an appropriate one to create an exception and allow the claimant to be legally represented.

⁶ Exhibit MW-8

- [11] The claimant's counsel replied to the Committee's letter of 8th February 2021 by letter dated 10th February 2021⁷ indicating that the Committee's decision was irrational and that it had not properly exercised its discretion in relation to the question of whether the claimant ought to be permitted to be represented by counsel at the disciplinary hearing.
- [12] On 18th February 2021, the claimant filed an application for an interim injunction restraining the Committee from proceeding with and hearing the disciplinary proceedings against him until further order of the Court or unless he was permitted to be represented by legal counsel.
- [13] The claimant's application for an injunctive relief was heard on 25th day of February 2021. On that date the Court ordered that the disciplinary proceedings against the claimant by the HAA be stayed pending the determination of the claim or further order of the Court; and gave directions for an early trial of the claim.
- [14] In the present proceedings, the claimant seeks a declaration that the Committee's decision refusing to permit him to be accompanied and represented by legal counsel at the disciplinary hearing was an improper exercise of its statutory discretion conferred upon it by section 116(2) of the Act.

Claimant's submissions

- [15] The starting point of the claimant's submission is that the claimant, as an employee, is not entitled as of right to legal representation in proceedings of a disciplinary nature under the Act. According to Ms. Dyer, counsel for the claimant, an employee is only entitled under section 116(1) of the Act to be accompanied and represented at the disciplinary hearing by a member of a trade union or another employee.
- [16] Ms. Dyer went on further to submit that, notwithstanding the provisions of section 116(1) of the Act, there is no absolute bar under the provisions of the Act to the appearance of counsel at the hearing of disciplinary charges.

⁷ Exhibit MW-10

- [17] Ms. Dyer developed her argument further by submitting that in fact, section 116(2) of the Act confers a statutory discretion on an employer to permit an employee such representation which suits the justice of the case where a member of the trade union or another employee is unavailable or, given the context of the case, it is inappropriate for one of them to attend. According to Ms. Dyer, the Act contemplates that the existence of a legal right to be accompanied which she argued can extend to legal representation in certain circumstances. The circumstances, she submitted, are however not prescribed in the Act.
- [18] In support of the claimant's case that he had a right to legal representation at the disciplinary hearing, Ms. Dyer submitted that there was an implied term in the claimant's employment contract that to the extent that he would be permitted such representation which suits the justice of the case at a disciplinary hearing.
- [19] It is the claimant's case that the discretion conferred on the Committee by section 116(2) of the Act was triggered in the circumstances of this case and that the Committee ought to have found that this was a proper case for the exercise of its discretion in the claimant's favour.
- [20] Ms. Dyer argued that the circumstances referred to in paragraph 4 of the claimant's Statement of Claim wherein the claimant sets out the basis of his request for legal representation, consisted of ample justification for the exercise of the Committee's discretion. In similar vein, the claimant relied on what is contained at Exhibit "C" and, in particular, the letter from the claimant's solicitors to the Committee dated 5th February 2021.
- [21] The claimant's posture was that it would be inappropriate for him to be represented by a member of staff or of his staff association to attend the disciplinary hearing and make the objections which he intends to make and also point out the various procedural errors that were made by the HAA's CEO. In the circumstances, the claimant contended that the Court ought to find that the statutory discretion under section 116(2) of the Act was triggered in the circumstances of the present case and that the Committee ought to have exercised its discretion in the claimant's favour.

Defendant's submissions

- [22] The initial thrust of Mr. D. Michael Bourne's ('Mr. Bourne') argument on behalf of the defendant was that the claimant's terms and conditions of employment are governed by the Labour Relations Act and the Staff Orders which forms the basis of the contractual relationship of employer and employee between the claimant and the HAA. Consequently, the terms of the contractual relationship contains nothing less than the minimum standards prescribed by the Act. According to Mr. Bourne, it is by these terms and conditions of employment that formed the basis of the contractual relationship that the claimant agreed to be bound. Therefore, the claimant was not entitled to any further protection in relation to the disciplinary proceedings than that provided by the Act which is embodied in the Staff Orders insofar as they relate to disciplinary proceedings.
- [23] According to Mr. Bourne, section 116(2) of the Act does not operate to alter the contractual relationship between the claimant and the HAA. Mr. Bourne further submitted that by extension, the provisions of section 116(2) of the Act did not provide an unqualified right to legal representation at internal disciplinary hearings. Mr. Bourne took the position that all the provisions of section 116(2) purported to do was to provide that where one of the specified classes of persons named in the section is unavailable or it is inappropriate for one of them to attend, the employee is permitted to be accompanied at the disciplinary hearing with another person as the justice of the case required.
- [24] Mr. Bourne argued trenchantly that the claimant had failed to demonstrate that he can avail himself of the provisions of section 116(2) of the Act that entitled him to representation by a legal practitioner at the disciplinary hearing. Mr. Bourne's contention was that the claimant has not shown demonstrably that any of the classes of persons mentioned in section 116(2) of the Act were or are unavailable, that is a trade union representative or another employee.
- [25] In addition, Mr. Bourne took the position that the claimant failed to allude to the matters that made it inappropriate to have a trade union representative or other

employee appear with him at the disciplinary hearing. In this vein, Mr. Bourne argued that the matters to which the claimant averred in his statement of claim, without more, amounted to bare assertions not supported by any cogent evidence.

[26] Ultimately, Mr. Bourne assumed the position that it was not entirely a matter of the claimant's preference for a particular kind of representation at the disciplinary hearing. On the contrary, section 116(2) of the Act conferred a discretion on the Committee which they must exercise in accordance with the purport and effect of section 116(2) of the Act.

[27] It appears from the submissions advanced by the Committee, that in considering whether the claimant was entitled to legal representation at the disciplinary hearing, they did not treat section 116(2) of the Act as being exclusionary, to the extent that it deprived them of the discretion to grant permission to the claimant to be so represented.

[28] Instead, they submitted that on the contrary, they sought to determine whether they indeed had such a discretion and how such a discretion ought to be exercised. In the premises, the Committee claimed that it applied its collective mind, after having sought the advice of counsel to the decisions in **R (on the application of G) v The Governors of X School and Y City Council**,⁸ and **Kulkarini v Milton Keynes Hospital NHS Trust and Secretary of State for Health**⁹, in arriving at its decision that the claimant could not be accompanied and represented at the hearing by a legal representative.

[29] It appears from the written submissions advanced on behalf of the Committee that having addressed its mind to the dicta of **Smith LJ** in **Kulkarini**, the Committee found that if such a discretion existed then the circumstances of the present case did not merit the discretion being exercised in the claimant's favour.¹⁰

⁸ [2010] IRLR 222; [2010] EWCA Civ 1

⁹ [2009] IRLR 829; [2009] EWCA 789

¹⁰ At para [16]

- [30] Mr. Bourne referred the Court to the Committee's correspondence dated 3rd February 2021 wherein, consistent with his foregoing submission, it is stated that: "...having considered the present disciplinary matter, the hearing is not complex or one of exceptional circumstances where the justice of the case requires the attendance of legal counsel."
- [31] Mr. Bourne then took the Court to the contents of the Committee's correspondence dated 8th February 2021 and submitted that its contents demonstrated that the Committee in actively exercising its discretion, clearly applied the appropriate test and conveyed to the claimant the matters that they took into consideration when applying their discretion.
- [32] Mr. Bourne concluded that the abovementioned correspondence, when read together, show explicitly that the Committee took into consideration the provisions of section 116(2) of the Act, the nature of the disciplinary hearing including the nature of the charges and the possible severity of the consequences of the charges against the claimant in the event of an adverse finding against him, the complexity of the disciplinary charges and the implications for the claimant's professional life.
- [33] On the foregoing basis, Mr. Bourne contended that the considerations adverted to by the Committee were apt. Therefore, he argued, that in giving due weight to these considerations in light of the general legal principles, the decision of the Committee was within the range of permissible outcomes. In the circumstances, Mr. Bourne concluded that the claimant has failed to establish that the Committee committed any error of principle or erred in the exercise of its discretion.
- [34] The issues that arise for determination in the current proceedings are (1) whether the Committee arrived at its decision to refuse permission to the claimant to be represented by counsel at the disciplinary hearing by failing to exercise a discretion which it had; (2) assuming that the Committee did in fact recognise that it did have such a discretion, whether the Committee properly exercised its discretion by its refusal to permit the claimant to be represented by counsel at the disciplinary hearing; (3) whether the Committee having exercised its discretion did so by taking

into account irrelevant factors and failing to consider or give adequate weight to such matters that were relevant to the exercise of its discretion; and (4) whether the matters relied on by the claimant has satisfied the requirements of section 116(2) of the Act which ought to have permitted the Committee to permit him to have legal representation at the disciplinary hearing.

- [36] In the Court's view, the present claim interrogates the interpretation of section 116(2) of the Act and the manner in which the Committee must exercise the discretion conferred on it by this provision of the Act. Section 116 of the Act provides:

“(1) Where an employer invites an employee to attend a disciplinary meeting or hearing, the employee has the right to be accompanied and represented at the meeting or hearing by a member of a trade union or another employee.

(2) Where a member of a trade union or another employee is unavailable or given the context of the case it is inappropriate for one of them to attend then the employee has the right to be represented by any other representative which suits the justice of the case.”

- [36] It appears that the interpretation of this statutory provision is yet uncharted waters in this jurisdiction. There is a dearth of judicial authority emanating from this jurisdiction with respect to not only the interpretation of section 116(2) but also in relation to the broader question of whether an employee is entitled to legal representation at a disciplinary hearing.

- [37] Section 116(1) on its plain meaning simply says that an employee is entitled to be represented at a disciplinary hearing by a member of a trade union or another employee. Section 116(2) provides an alternative in the event that a member of a trade union or another employee is unavailable, or given the context of the case it is inappropriate for one of them to attend. Therefore, the provisions of section 116(2) are disjunctive.

- [38] The Committee in exercising its discretion was obliged to consider either one of the two limbs of section 116(2). The Committee was not required to be satisfied that both limbs of section 116(2) obtained in order to find that the claimant was entitled

to have another representative than one contemplated by the provisions of section 116(1) of the Act.

- [39] The terminology found in section 116(2) of the Act which creates some measure of difficulty where interpretation is concerned are “given the context of the case it is inappropriate for them to attend”. The Act itself makes no allusion to the definition of these terms, in particular to the words “context” and “inappropriate”. In their ordinary meaning relative to the regime of the Act, they seem meaningless if not broad and give no guidance as to matters which the Committee can deem “inappropriate” or the “context” referred to.
- [40] In any event, it seems that the word “context” refers to the nature or subject matter of the disciplinary hearing itself; and the word “inappropriate” suggests that given the nature or subject matter of the disciplinary hearing itself it would be inappropriate to have either a trade union representative or another employee accompany and represent an employee at a disciplinary hearing.
- [41] The question that arises is what are the circumstances that would render it inappropriate for a trade union representative or another employee to accompany and represent an employee at a disciplinary hearing? Another question that arises by extension of the first is whether the circumstances that would render another employee or trade union representative accompanying and representing an employee at a disciplinary hearing should be left entirely to the discretion of the Committee based on its own subjective assessment of the circumstances rather than such circumstances being circumscribed by some objective test.
- [42] For the purpose of exposition it may be necessary to answer the second question first as this may very well lay to rest the issues related to the exercise of the Committee’s discretion canvassed in the present proceedings. The first question, in the Court’s view, turns substantially on the facts and circumstances of any given case. In light of what has been described as a dearth of judicial authority on the point, the Court has examined the issues raised in the present case in light of the

principles of natural justice explored in the decisions emanating from the United Kingdom.

- [43] A convenient starting point is the case of **Pett v Greyhound Racing Association Ltd**¹¹, where a trainer held a licence issued by an organization. The disciplinary powers of the organisation were contained in certain written rules issued by the organisation. However, the rules, unlike in the present case, did not provide for the procedure to be followed in inquiries conducted by the disciplinary body. Following certain events, an inquiry was ordered and the trainer was advised of the date, time and place of the inquiry and the nature of the charges. The trainer requested an adjournment of the inquiry for the purpose of seeking legal representation. The request for an adjournment was granted, but before the adjourned hearing the trainer was advised by the organisation that he would not be permitted legal representation at the inquiry. The trainer sought a declaration that he was entitled to be represented by counsel at the inquiry and an injunction to restrain the organisation from holding an inquiry unless he was allowed to be represented. He was granted an interlocutory injunction by the court of first instance.
- [44] The organisation appealed this decision, and it was held, dismissing the appeal, that a sufficient *prima facie* case had been made out to support an interlocutory injunction. The Court of Appeal in **Pett v Greyhound Racing Association Ltd** reasoned that if there was a right of audience at such an inquiry where the charge concerned a person's reputation and his livelihood, there was a right to appoint an agent, and once a person has the right to appear by an agent there was no reason why that agent should not be a lawyer, and the balance of convenience was in favour of continuing the injunction.
- [45] The arguments advanced by the appellants before their Lordships in **Pett v Greyhound Racing Association** were somewhat similar to that advanced by the Committee in the present case. It was argued on behalf of the appellants that the absence of legal representation did not make the inquiry procedure unfair. They

¹¹ [1969] 1 Q.B. 125

took the view that if legal representation was allowed as of right, the delay and complications involved would inevitably frustrate the organisation's intention to conduct their meeting expeditiously and with complete fairness. They also contended that the right to be heard is not a right to be heard in a specific manner and that the organisation had a right to determine its own procedure. The organisation also argued that the court at first instance was wrong to interfere with the absolute discretion of the organisation in the determination of an inquiry of that type and that the refusal to permit representation by counsel did not amount to an affront to the principles of natural justice.

- [46] Lord Denning M.R. in delivering the judgment of the Court in **Pett v Greyhound Racing Association Ltd** said:

"Mr. Pett is here facing a serious charge... If he is found guilty, he may be suspended or his licence may not be renewed. The charge concerns his reputation and his livelihood. On such an inquiry, I think that he is entitled not only to appear by himself but also to appoint an agent to act for him. ...Once it is seen that a man has a right to appear by an agent, then I see no reason why that agent should not be a lawyer. It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence... He cannot examine or cross-examine witnesses... If justice is to be done, he ought to have the help of someone to speak for him. And who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He also has a right to speak by counsel or solicitor."

- [47] Learned counsel, Ms. Dyer, directed the Court's attention to the decision in **Enderby Town Football Club Ltd. v Football Association Ltd.**¹² where it was held that a rule which excluded legal representation except in certain circumstances, was held not invalid as being contrary to the principles of natural justice.

¹² [1971] Ch. 591

[48] It is necessary from the outset to point out that the case of **Enderby Town Football Club Ltd. v Football Association Ltd.** is entirely distinguishable from the circumstances in the present case. The decision in the former case seemed to have turned on its own peculiar facts. In **Enderby Town Football Club Ltd.** there was in existence a specific rule, unlike in the present case, which excluded legal representation. On appeal from the decision in the court below, Lord Denning M.R. delivering the judgment of the appellate court reasoned that:

“Seeing that the courts can inquire into the validity of the rule, I turn to the next question: Is it lawful for a body to stipulate in its rules that its domestic tribunal shall not permit legal representation? Such a stipulation is, I think, clearly valid so long as it is construed as directory and not imperative: for that leaves it open to the tribunal to permit legal representation in an exceptional case when the justice of the case so requires. But I have some doubt whether it is legitimate to make a rule which is so imperative in its terms as to exclude legal representation altogether, without giving the tribunal any discretion to admit it, even when the justice of the case requires it.”

[49] Notwithstanding Lord Denning’s misgivings about the exclusionary rule, in dismissing the appeal Lord Denning made a very salient point of principle, which the Court in this instance intends to rely upon. Lord Denning in deciding that the court should not insist on legal representation before the tribunal of the Football Association reasoned that:

“The points which the club wishes to raise are points of law which should be decided by the courts and not by the tribunal. The club is at liberty to bring these points before the courts at once and have them decided with the aid of skilled advocates. If they choose not to bring them before the courts, but prefer to put them before a lay tribunal, they must put up with the imperfections of that tribunal and must abide by their ruling that there be no legal representation.”

[50] It appears from the decision in **Enderby Town Football Club Ltd.** that the appellate court did not discount the fact, that notwithstanding the exclusionary rule, the tribunal still had a discretion and that they ought not to treat the exclusionary rule as imperative but rather as directory.

- [51] Counsel also referred the Court to the decision in **R v Secretary of State for the Home Department and others, ex parte Tarrant** and another.¹³ In **ex parte Tarrant**, the court was concerned with the exercise of a prison board of visitors discretion refusing to permit prisoners who had been charged with various grave offences contrary to prison discipline under the Prison Rules requests for legal representation. The applicants applied for judicial review of the prison board of visitors on the grounds that a prisoner was entitled as of right to legal representation as a matter of natural justice and that the board had a discretion in the matter and ought to have exercised that discretion by allowing legal representation.
- [52] The court in **ex parte Tarrant** held, inter alia, that although a prisoner appearing before a board of visitors on a disciplinary charge was not entitled as of right to have legal representation or the assistance of a friend or adviser, as a matter of natural justice, a board of visitors had a discretion to allow such representation or assistance at any hearing before it under the common law rule that a prisoner retained all civil rights not taken away from him expressly or by necessary implication, since the power of a board of visitors to control its own procedure was not limited by common law or by statute and therefore a board had an unfettered discretion to allow legal representation.
- [53] In addition, the court in **ex parte Tarrant** seemed to have laid down the following principled approach to guide the exercise of the board's discretion. The court found that having regard to the complicated nature of the charge and the gravity of the consequences if the charge was proved, the prisoners' request for legal representation ought to have been considered on the merits. The court in **ex parte Tarrant** held, that the board having totally failed to exercise its discretion it followed that there had been a breach of natural justice.
- [54] The principles that can be distilled from the case of **ex parte Tarrant**, even though stated per curiam, are that it is necessary to ensure that a party appearing before a disciplinary tribunal is afforded a full opportunity to present his case; and the tribunal

¹³ [1984] 1 All ER 799

should take into account the seriousness of the charge and the potential penalty or consequences, whether any points of law are likely to arise, the individual's capacity to present his own case, the need for reasonable speed in making an adjudication and the need for fairness as between the parties (in this case between employer and employee).

- [55] Learned counsel, Ms. Dyer, drew the Court's attention to the decision in **National Commercial Bank of Jamaica Ltd. v Industrial Disputes Tribunal and another (No 1)**¹⁴ where it was held that legal representation was not an absolute right to persons appearing before an inferior tribunal, but rather such a tribunal had discretion to allow legal representation. Fairness, however, obliged disciplinary tribunals to exercise their discretion properly. A refusal of legal representation in circumstances where the charges were serious and the accused person's livelihood and reputation were at stake, would constitute an improper exercise of the discretion. Tribunals were required to conduct their enquiries fairly. Whether a tribunal's exercise of discretion at a disciplinary hearing was correct was, therefore, open to scrutiny.
- [56] Mr. Bourne adverted the Court to the decision in **McKelvey v Iarnród Éireann/Irish Rail**.¹⁵ This case examined the issue of the entitlement of an employee who was the subject of disciplinary proceedings to be legally represented at an internal hearing to be conducted by his employer as part of an agreed code.
- [57] In order to appreciate the legal principles involved in **McKelvey** it will be necessary to examine the factual circumstances that arose in that case. The employee was initially subjected to an investigation concerning the irregular purchase of fuel using a company card. The employer proposed to commence disciplinary proceedings alleging misuse of the card amounting to what might reasonably be considered theft of fuel.

¹⁴ (2016) 90 WIR 364

¹⁵ [2019] IESC 79

- [58] The employee's request for legal representation was refused by the employer on the basis that there was no provision for representation by a lawyer in the formal procedures prescribed by the Grievance and Disciplinary Policies and Procedures of the employer ('Disciplinary Code'). The employer held the view that the Disciplinary Code provided the employee with the right to representation by fellow employees or trade union representative.
- [59] Although the Disciplinary Code referred only to an employee's right to representation by a fellow employee, it was not disputed by the parties to the proceedings that the employer had a discretion to permit the employee to be legally represented at the disciplinary hearing. Also, it was not disputed that the Disciplinary Code formed part of the employee's contract of employment.
- [60] The employee in **McKelvey** asserted an entitlement to be legally represented at the disciplinary hearing. The employer made it clear that they did not consider that the employee was entitled to be so represented. The employee sought an injunction from the High Court to prevent the disciplinary hearing proceeding. The High Court granted the employee an injunction restraining the employer from commencing the disciplinary proceedings against the employee unless his entitlement to be legally represented was granted. The employer appealed this decision and the appeal was allowed. The employee then appealed to the superior court.
- [61] In **McKelvey**, the court gave consideration to the following approach in resolving the issue at hand. The Court commenced its reasoning from the overarching presumption that a regime, whether contractual or statutory, that provides for a disciplinary process will contain an implied term that the relevant process will be fair. However, it is also clear that precisely what is required to ensure that a process is fair in that sense will depend on a variety of factors and may well vary from case to case. Legal involvement may be necessary in some limited circumstances but ordinarily will not necessarily involve a finding that it is only in those cases where legal representation is necessary to achieve a fair hearing that any implied entitlement to such representation can be said to exist.

[62] The court in **McKelvey** found that the ultimate issue which any court had to determine in a case such as this, is whether disciplinary proceedings continuing without legal representation would amount to unfair proceedings and thus be in breach of the implied term as to fairness. It follows, in turn, that such a breach could only be established where it can be shown that legal representation is “necessary” to ensure a fair process.

[63] Clarke CJ, delivering the judgment of the court in **McKelvey** opined:

“It seems to me that the criteria of “necessity”, as thus identified, requires further explanation. There may be many cases where the forensic skills of an experienced advocate with a legal qualification may enable the presentation of a case in a more favourable light. But it seems to me that to say that a case might be somewhat better presented by a lawyer falls a long way short of saying that the presence of a lawyer is necessitated in order for the process to be fair.”

[64] Having expressed this view, Clarke CJ held:

“When considering whether any process is fair, in the context of representation, the question is not whether a particular type of representation might give some added value but whether its absence can be said to leave the person concerned without an adequate level of representation. The level which will be considered adequate will depend on an overall assessment of all of the circumstances of the process envisaged. In that context, I would, at the level of principle, agree with the submission made by counsel for Mr. McKelvey to the effect that the proper approach to the approval by Geoghegan J. of the criteria identified in *Tarrant* does not involve treating those criteria as elements which need to be necessarily separately established but rather that they, and any other appropriate factors, go into the overall evaluation made in the context of reaching an assessment as to whether legal representation is necessary in order for the process to be fair (as opposed to a consideration of whether legal representation might give some added value).”

[65] According to the decision in **McKelvey**, the appropriate assessment to be made is as to whether it has been demonstrated that, in all the circumstances of the case, legal representation is truly necessary. The decision in **McKelvey** supports the view that it then becomes necessary to consider whether there are any circumstances established on the evidence in the case which make clear that legal representation is necessary to ensure a fair process rather than, potentially, being merely of some possible advantage to the relevant employee. The overall question therefore,

according to **McKelvey**, is whether it is clear at this stage of the proceedings that allowing the disciplinary process to proceed without legal representation would result in a final decision which, if adverse to the employee, would be most unlikely to be sustainable in law.

[66] Another salient principle emanating from the case of **McKelvey** is that it is not appropriate to consider mere speculation as to issues or questions which might arise in the course of a hearing. According to Clarke CJ, “almost any disciplinary process, no matter how simple, might theoretically take a turn which would give rise to very difficult legal questions where the benefit of legal advice and assistance might be necessary. But the theoretical possibility of such an eventuality does not justify a decision that legal advice and representation is necessary from the beginning in order that there be a fair process.”

[67] In deciding that it was not satisfied that it had been established that there was a clear case that the employee’s representation in the disciplinary proceedings by an experienced trade unionist would not be adequate to meet the needs of a fair process, the court declined to find that the circumstances of the case justified the grant of an interlocutory injunction. The court in **McKelvey**, applying the principles set out in the case to the facts established by the evidence, reasoned that:

“... the procedures to be followed are well-established and would be well known to any experienced trade union official who was experienced in the conduct of disciplinary procedures involving Iarnród Éireann. I have to say that I cannot see anything in either the allegations, the likely evidence or the process likely to be followed which would place these disciplinary proceedings beyond the competence of an experienced trade union official.

It should be recalled that an internal disciplinary process such as this is not a criminal trial. While the process must be fair, the formal rules of evidence or the procedures which govern either criminal or civil proceedings do not necessarily apply. The position of persons who may also have been the subject of investigation and the question of any evidence which they might give is not necessarily governed by the procedures or rules of evidence which would apply in a similar situation in the courts. Of course, the credibility of such persons may, in an appropriate case, be questioned on the basis of their own possible involvement. But they do not necessarily have to be treated in exactly the same way as a potential accomplice, co-accused or codefendant in court proceedings. What is required is that

Mr. McKelvey and his trade union representative be given a reasonable opportunity to challenge the evidence of any such persons on any reasonable basis. In those circumstances, it does not seem to me that there is, at least at present, any real basis for suggesting that legal issues of any substance will emerge.

It is true that the allegation is one of theft and that an adverse result to the process could result in dismissal. That is undoubtedly a factor to be taken into account, but it does not seem to me that it can, of itself, bring the case into a category where it can be shown that legal representation is necessitated. The fact that theft may also be a criminal offence is of some marginal relevance but is, in my view, of limited weight having regard to the fact that any result of this disciplinary process could have no bearing on a criminal trial where the guilt of an accused would need to be established beyond reasonable doubt. If, coupled with the seriousness of the allegation and of the potential consequences, there are particularly difficult issues of law or extremely complex facts, then the cumulative effect of each of those matters might lead, in an exceptional case, to the view that legal representation was required. However, it does not seem to me that this is such a case.

[68] Mr. Bourne relied on the decision in **Kulkarini v Milton Keynes Hospital NHS Trust and Secretary of State for Health**¹⁶ in support of his contention that the Committee had adopted the correct approach and properly exercised their discretion when they denied the claimant legal representation at the disciplinary hearing.

[69] The general principle emanating from the case of **Kulkarini** which is relevant for the purposes of the present case, is that in the presence of an express term covering the right to representation, there is no room for an implied term entitling the employee to require the employer to exercise a discretion to extend the right of representation. However, it is always open to an employer to waive the strict terms of the contract of employment and there is nothing to stop an employee from asking the employer to permit him to be legally represented outside the terms of the contractual provision. The employer could say that he is not prepared to consider the request. If he does consider it, he should do so fairly and rationally. If the employer refuses to grant representation in a case which does engage questions of

¹⁶ [2009] IRLR 829

unfairness or the nonobservance of the rules of natural justice, this refusal will be unlawful. The employer should give the request for legal representation fair consideration and when doing so to bear in mind the possibility that a denial of full rights of representation might be held to be a breach of the principles of fairness and natural justice.

[70] Lastly, the Court was referred to the case of **AB v University of XYZ**¹⁷. In that case the court adopted the approach espoused in **ex parte Tarrant**. The following principles can be distilled from the decision in **AB v University of XYZ**. Firstly, the contractual relationship between employer and employee, whether they exist in contractual or statutory form in respect of disciplinary proceedings, must comply with natural justice. Secondly, there was no right to legal representation simply because there were disciplinary proceedings. Thirdly, the latter does not mean that there cannot be individual cases where fairness requires legal representation.

[71] The court in **AB v University of XYZ** found that the Defendant misinterpreted its contractual obligations. That although the Regulations appeared to have provided for a student to be accompanied by someone rather than represented by them, those provisions do not exclude the need to ensure “natural justice” and so need to be read in light of the overriding duty to ensure “natural justice”. As a consequence, legal representation could be required when that was necessary for fairness. However, that does not mean the contract was breached unless the failure to permit legal representation was a breach of natural justice on the facts.

[72] The court opined that **ex parte Tarrant** remains the best guidance as to the factors to be taken into account when deciding whether legal representation is required in a particular case. However, the court expressed one obvious difficulty in applying the **Tarrant** criteria in the circumstances of that case. The court found that the claimant did not clearly articulate the reasons why legal representation was required. Also, the correspondence appeared to suggest that the Claimant believed he had an automatic right to legal representation, which is not correct.

¹⁷ [2020] EWHC 2978

[73] Interestingly, the court in **AB v University of XYZ** concluded that it was not just the Claimant who misunderstood the legal position. The court found that the Defendant also appeared to have wrongly proceeded on the basis that there were no circumstances in which representation would be permitted. As a consequence, the Claimant did not articulate a claim to legal representation based on the specific circumstances of the case and the Defendant did not invite such a claim. Given that it is for the court to determine what fairness requires, it appeared that the court should assess what fairness required on the basis of matters that would have been clear had thought been given by the parties to the **Tarrant** criteria. The court then went on to apply the principles in **ex parte Tarrant** to the facts of the case.

Conclusion

[74] The following principles can be distilled from the above cited judicial authorities:

- (i) An employee is not entitled to legal representation as of right at a disciplinary hearing;
- (ii) A disciplinary tribunal such as the Committee retained a discretion whether to allow a request for legal representation at the disciplinary hearing;
- (iii) An employee's request for legal representation ought to be considered by the disciplinary body on its merits;
- (iv) The disciplinary body, in exercising its discretion, ought to give consideration to the nature of the charge and the gravity of the consequences if the charge is proved;
- (v) If the tribunal failed to exercise a discretion which it had, then this would amount to a breach of the principles of natural justice;
- (vi) In exercising its discretion a disciplinary tribunal ought to take into account the need to ensure that a party appearing before it is afforded a full opportunity to present his case; the seriousness of the charge and the potential penalty and consequences; whether any points of law are likely to arise; the employee's capacity to present his own case; the need for reasonable speed in making an adjudication; and the need for fairness as between the parties;
- (vii) Legal representation may be necessary in some limited circumstances but ordinarily will not necessarily involve a finding that it is only in those cases

where legal representation is necessary to achieve a fair hearing that any implied entitlement to such representation can be said to exist;

- (viii) The ultimate issue which the court has to decide in each case, is whether the disciplinary proceedings continuing without legal representation would make the proceedings unfair and amount to a breach of the implied term that such proceedings must be fairly considered;
- (ix) Such a breach as mentioned at (viii) above could only be established when it can be demonstrated that legal representation is necessary to ensure fairness;
- (x) The court's determination of whether legal representation is necessary for the disciplinary process to be fair, requires an overall assessment of all the circumstances of a particular case. The court must engage in an evaluative process which does not involve treating each criteria already identified which needs to be established separately but instead, that these factors and any other appropriate factors, go into the overall evaluation made within the context of arriving at an assessment as to whether legal representation is necessary in order for the process to be fair as opposed to whether legal representation would bring some added value to the proceedings;
- (xi) In making the evaluative assessment, that is, looking at matters in the round, the court making a review of the exercise of the tribunal's decision, should ask itself whether it is clear that allowing the disciplinary hearing to proceed without legal representation would result in a final decision which, if adverse to the employee, would not likely be sustainable in law;
- (xii) It is not appropriate to consider mere speculation as to issues or questions which might arise in the course of a disciplinary hearing. These issues or questions must be shown to demonstrably be in existence.

[75] In the Court's view, having examined the principles enunciated in the case law, it appears that the provisions of section 116(2) are permissive and not restrictive, and therefore ought to be given a purposive interpretation rather than the restrictive application as espoused by the Committee. In other words, the Court holds that the provisions of section 116 of the Act are not imperative but rather directory.

[76] There is nothing elusively magical in the provisions of section 116(2) of the Act. Although section 116(2) does not expressly grant any entitlement to be legally represented at a disciplinary hearing, it is implied that the Committee has a discretion whether to permit a request for legal representation. The parties to the

present proceedings are at the very least in agreement with the existence of such an implied discretion.

[77] We turn now to the application of the **ex parte Tarrant** criteria to the present case. It appears that in respect of the intended disciplinary hearing, the claimant intends to make certain preliminary objections that appear to be procedural in nature. These objections relate to some of the evidence intended to be presented at the disciplinary hearing.

[78] One of the preliminary points which the claimant intends to raise at the disciplinary hearing is that the investigation conducted by the HAA's Chief Executive Officer ('CEO') pursuant to section 5.7(1)(a)(ii) of the HAA's Employee Manual (the 'Employee Manual') lacked objectivity and was tainted with bias. According to the claimant, the findings contained in the report of the investigation failed to establish the facts relevant to the inquiry but instead contained expressions of subjective feelings and opinions. More specifically, the investigative report referenced certain prior disciplinary incidents upon which the CEO relied to ground her recommendation to the Committee that the most recent alleged conduct deserved more than a final warning.

[79] Section 5.7 of the Employee Manual deals with the procedure to be followed in an initial investigation into conduct of the employee in the case of alleged conduct likely to trigger disciplinary proceedings. Specifically, section 5.7(1)(a) of the Employee Manual provides:

“when the immediate supervisor of an employee becomes aware that an employee have deviated from a regulation, policy, rule procedure or acceptable standard of conduct or performance established by the HAA, the immediate supervisor shall:

- i. Investigate to establish the facts and separate them from opinions and feelings;
- ii.
- iii. analyse the facts and determine the nature and significance of the offence and the likely impact it would have on the morale of the department and the consequential perceptions of the HAA's

regulations, policies, rules and procedures and standards of conduct and performance.”

- [80] The criticism made by the claimant with respect to the CEO’s recommendation to the Board with respect to the sanction warranted by the claimant’s conduct is clearly in breach of the provisions of section 5.7 of the Employee Manual. However, it cannot be said with any degree of certainty that the CEO’s recommendation will be followed by the Committee. In the Court’s view, that is hardly a technical legal issue.
- [81] It cannot readily be assumed, without more, that the Committee in its deliberations and adjudication would ignore or fail to adhere to its own procedural rules and as a consequence act on information not properly disclosed or that came to it in contravention of its own rules. The Court cannot in applying the legal principles set out in this judgment determine or predict that they would one way or the other.
- [82] If the Committee does in fact act on such a recommendation as made by the CEO, then clearly it is likely to affect the fairness of the proceedings. In such a case the claimant has recourse under the law to remedy such a breach of the principles of fairness.
- [83] The claimant’s contention is that the CEO should not have made such a recommendation while publishing conduct on the part of the claimant that resulted in prior disciplinary action at that stage of the proceedings. The claimant’s position is that the inclusion of such information in the report disclosed to the Committee was not only prejudicial to him but also amounted to a violation of section 5.7(4)(f) of the Employee Manual to the extent that the CEO was only required to forward all relevant evidence to support the existing charge against the claimant. In addition, the claimant is fortified in this view by the provisions of section 5.13(2) of the Employee Manual which provides that a written warning expires after 12 months.

[84] Section 5.7 of the Employee Manual sets out the procedure to be followed prior to the convening of a disciplinary hearing under the rubric “Investigation”.¹⁸ In relation to the claimant’s complaint, a convenient starting point would be section 5.7(d) of the Employee Manual which provides, that if the case against the employee is substantiated and is considered to warrant more than a written warning, the Head of Department/Division shall immediately notify and forward to the Chief Executive Officer all the relevant evidence.

[85] Section 5.7(4)(e) then sets out the procedure to be followed by the CEO upon receipt of the evidence. The section provides that:

“the Chief Executive Officer shall:

- i. if he or she agrees with the assessment of the case by the Head of Department/Division, give the employee a final written warning;
- ii. if the employee concerned already has a record of a written warning less than twelve months old on file, immediately issue a final written warning.”

[86] The discretion conferred on the CEO is further extended by the provisions of section 5.7(4) (f) of the Employee Manual. It provides that:

“If on receiving the statements and documentary evidence the Chief Executive Officer is of the opinion that the case warrants more than a final written warning, then the Chief Executive Officer shall immediately notify the Chair of the Human Resources Committee of the case against the employee and forward to the Committee all the relevant evidence.”

It appears from a reading of section 5.7(4) that once the CEO has performed the duties required by the section, the CEO has no further role to play in the disciplinary process unless such powers as contemplated by section 5.21 of the Employee Manual are delegated to the CEO by the Board of the HAA in consultation with the Committee. In the circumstances, it is inconceivable that the Committee would rely on the recommendation that the claimant’s alleged conduct deserved more than a final warning if such a recommendation was not in conformity with the procedure set out in the Employee Manual. In any case, the CEO, by virtue of section 5.7(f) of the

¹⁸ Section 5.7(1)-(4) Employee Manual

Employee Manual, obliged to come to the finding that the case warranted more than a final warning before notifying the Committee of the case against the claimant.

- [87] The claimant's contention, taken to its logical conclusion, seems to suggest that the duty imposed on the CEO to notify the Committee pursuant to section 5.7(f) of the Employee Manual had not been triggered since there was no final warning that came into existence by virtue of the provisions of sections 5.7(4)(c) and (e) of the Employee Manual. In addition, the claimant contended that the warning relied upon by the CEO was contrary to the provisions of section 5.13(2) of the Employee Manual, which provides that:

“A warning shall cease to count against an employee and shall be deemed to have expired if there is no further misconduct or performance below expected standards during the twelve month period immediately following such warning. These warnings shall however remain on his or her personal file and shall be taken into account in any further disciplinary action under the procedures of this Chapter ...”

The Court makes two pertinent observations with respect to the claimant's contentions on this point. Firstly, the claimant's argument presupposes that disciplinary proceedings cannot be instituted in the absence of prior written or oral warnings having been issued to the claimant. Secondly, that the advertence to a prior written warning issued to the claimant ought not to have been placed before the Committee. It is the Court's view that neither of these two complaints are well founded.

- [88] Section 5.7 of the Employee Manual deals with several instances of misconduct or violations that each attract separate treatment. For example section 5.7(2) deals with violation of the rules which shall result in written warnings and repeat violations which could lead to suspension and termination. Section 5.7(3) deals with violations which could result in suspension without prior warnings and repeated violations which could lead to termination of employment. Ultimately, section 5.7(4) under the rubric “Gross Misconduct”, which is the substantive provision under which the claimant stands charged, deals with violations of the rules that are considered gross misconduct and are cause for immediate dismissal or termination. In addition,

section 5.7(4) (e) and (f) confers a discretion on the CEO. The CEO obviously found that this was not a case where a written or final written warning would suffice. Therefore, there was no need for the CEO in exercising her discretion to advert her mind to the timing of the issuance of any previous warnings to the claimant.¹⁹

[89] In any event, the disciplinary procedure sets out a three stage process, namely, an oral warning for minor infractions, a written warning for serious infractions not warranting dismissal, and a final written warning as a final stage before dismissal is considered. However, before dismissal can occur it appears that the alleged misconduct would have had to occur within twelve months after final written warning was issued. It seems that in any event, in keeping with the Employee Manual, the Committee would have kept records of all disciplinary procedures employed in the case of the claimant. Therefore, the Committee would have already had notice of previous disciplinary procedures employed in the case of the claimant on his personnel file.

[90] The Court has painstakingly examined the provisions of the Employee Manual as they relate to the HAA's disciplinary procedure to make the point that the Employee Manual contains a comprehensive set of rules by which the employee agreed to be bound by virtue of the contractual nature of his employment. There appears nothing in the rules that gives rise to any ambiguity. Therefore, in the Court's view, there is nothing technical in the points that the claimant intends to raise at the disciplinary hearing that would warrant legal representation on that basis alone. These are matters that can be resolved by simple reference to the Employee Manual itself.

[91] It was on the foregoing basis that the claimant expressed his fear that a fair hearing would be unlikely in light of the irrelevant and prejudicial material having already been disclosed to the Committee. The Court does not find the claimant's fears well founded.

¹⁹ See also section 5.17 of the Employee Manual

- [92] The claimant also alluded to the seriousness of the charge and the likely penalty or consequences resulting from an adverse finding by the Committee which had the tendency to affect both his livelihood and reputation. It appears from the evidence presented to the Court that the claimant passed several invoices submitted by the HAA's vendor which were paid out despite these invoices having already been paid. The allegation also interrogates the claimant's failure to adhere to standard operating procedures related to the financial operations of the HAA as regulated by public accounting procedures stipulated by the Ministry of Finance.
- [93] It is not readily apparent from the evidence presented to the Court that any allegation of impropriety consistent with the offence of theft, fraud or any other offence of dishonesty is sustainable in the disciplinary proceedings brought by the HAA. It is unfortunate that one of the charges alleges conduct described as including "acts of criminal, dishonest and immoral nature". It seems that the Committee in drafting the charges adopted wholesale the terminology appearing in section 5.4(4)(v) of the Employee Manual.
- [94] In any event, it does not appear to the court that the issues related to the charges brought against the claimant are sufficiently complex to warrant legal representation. Indeed, legal representation may add some value to the proceedings; however, it cannot be assumed that the absence of legal counsel would necessarily make the proceedings unfair.
- [95] In any event, the disciplinary proceedings is nothing comparable to actual criminal proceedings where issues such as the burden and standard of proof apply. The procedure at the disciplinary hearing is likely to be informal and would not necessarily require complex legal argument on points of law or procedure.
- [96] The commencing of any criminal proceedings against the claimant does not appear to be dependent in any respect on the outcome of the Committee's deliberation and adjudication in relation to the claimant's alleged misconduct. The Court is fortified in this view by the provisions of section 5.14(1) of the Employee Manual, which states:

“When there is reason to believe that a disciplinary matter might also constitute a criminal offence, then the matter shall, without delay, be brought to the attention of the Chief Executive Officer who shall, subject to the advice of the Attorney General, report the matter to the police.”

No evidence has been presented before this Court in the present proceedings that the CEO has sought the advice of the Attorney General or reported the matter to the police. On the basis of the judicial authorities to which the Court was referred in these proceedings, it does not seem that the possibility of an event occurring in the future, which is uncertain, should factor into the consideration given to the question of whether the claimant was entitled to legal representation. Perhaps the situation would be different if proceedings had already been commenced with a view to criminal prosecution.²⁰

- [97] In the Court’s view, the preliminary objections sought to be addressed by the claimant at the disciplinary hearing relate to procedural matters and, at its highest, raises issues of bias which, in the court’s opinion, can be competently addressed by the Committee at the disciplinary hearing without the assistance of counsel.
- [98] For the sake of argument, it is safe to assume that the Committee will be sufficiently versed in the provisions of the Employee Manual and sufficiently adroit to deal with issues related to the question of bias. In the event that the Committee errs on procedural points or arrives at a conclusion that is adverse to the claimant, unfair and unsustainable in law, there are other avenues of redress available to the claimant.
- [99] The Court has also formed the view that if any criminal proceedings were to materialise as a consequence of the disciplinary proceedings against the claimant, the findings made by the Committee at the disciplinary hearing would have very little, if no effect at all, on any future criminal proceedings.

²⁰ See sections 5.14(2), (3) and (4) of the Employee Manual

- [100] The claimant has not articulated demonstrably that he would be unable to address the procedural and evidential issues identified by him on his own at the disciplinary hearing. In the court's view, it would be entirely inconceivable that should the claimant require the need to obtaining legal advice in the course of the disciplinary hearing that an adjournment would not be granted to him for that purpose.
- [101] In the premises, the Court has arrived at the conclusion that the claimant has failed to show demonstrably that the Committee's refusal of his request for legal representation at the disciplinary hearing would result in unfairness or a breach of the principles of natural justice.
- [102] Having regard to the matters raised in these proceedings, it is apparent that both parties have seemingly misunderstood the principles to be applied to the exercise of the Committee's implied discretion to allow legal representation at the disciplinary hearing. The Committee's reasons for denying the claimant's request for legal representation are not based on a proper application of or appreciation for the principles set out in the judicial authorities discussed in this judgment. This much can be gleaned from the tenor of the correspondence exchanged between the Committee and the claimant's legal representatives.
- [103] By letter dated 26th January 2021, the claimant was advised of his rights under section 5.9 of the Employee Manual to be accompanied at the disciplinary hearing by a fellow employee of his choice or a member of his Staff Association. It is clear from the Committee's letter of 3rd February 2021 in response to the claimant's request for legal representation that the Committee held the concerted view that legal representation was impermissible by virtue of the provisions of section 116 of the Act and section 5.9 of the Employee Manual.
- [104] The position held by the Committee in respect of the claimant's request to be represented by counsel at the disciplinary hearing is amplified by the terms of the letter of 3rd February 2021. This letter read:

"This position is consistent with the applicable law, that is, section 116 of the Labour Relations Act 2018. Please therefore be advised, having

considered the present disciplinary matter, the hearing is not complex or one of exceptional circumstances where the justice of the case requires the attendance of legal counsel.

For the avoidance of doubt, we hereby confirm that Mr. Webster may attend the internal disciplinary hearing with either a fellow employee or a member of the Staff Association as applicable. We anticipate that Mr. Webster will in this regard comply with the Employee Manual.”

- [105] It seems pellucid from the content and tenor of the Committee’s letter of 3rd February 2021 that it held steadfastly to the strict and literal interpretation of section 116 of the Act and section 5.9 of the Employee Manual. For all intents and purposes, the Committee appeared unwavering in its decision not to allow the claimant’s request for legal representation at the hearing.
- [106] The Court is of the considered view, that in deciding not to allow the claimant’s request for legal representation at the hearing, in light of the grounds advanced by the Committee, the Committee not only erred in principle but also failed to exercise a discretion which they had and/or exercised its discretion on an improper basis. It appears that rather than applying the approach set out in the authorities discussed in the present judgment, the Committee placed an overreliance on the strict reading of the provisions of section 116 of the Act and section 5.9 of the Employee Manual. The reasons provided by the Committee in refusing to allow the claimant’s request for legal representation was a far cry from the principled approach set out in the case of **ex parte Tarrant**.
- [107] The Committee also reiterated its position in a letter dated 8th February 2021 in response to the claimant’s legal practitioner’s missive of 5th February 2021, wherein the Committee held firmly to the position that it would be guided by the terms of section 5.9 of the Employee Manual. The Committee expressly stated that it had always been the Committee’s position as made clear by the Employee Manual that legal representation would not be permitted at a disciplinary hearing, a fact which the claimant ought to have been aware of as a senior manager of the HAA.

[108] The position held by the Committee and expressed in their letter of 8th February 2021, appears to be an expression of a rigid policy unqualified by the exercise of any implied discretion reposed in the Committee. The Court is unable to discern any allusion by the Committee to the existence of any discretion that they held in relation to the question of legal representation.

[109] It appears that the Committee regarded the exclusion of legal representation at disciplinary hearings as a hard and fast rule not susceptible to any exemption save and except in exceptional cases. This fact is further evidenced by the Committee's statement in its letter of 8th February 2021 wherein the Committee adverted to what it described as "the standard position of the HAA which was at no time expressly varied".

[110] In addition, the Committee denied that it failed to consider the question of the claimant being accompanied by counsel at the hearing and reiterated its original position thus:

"As we have stated, Mr. Webster has been at all times aware that legal representation is not provided for in the Employee Manual with respect to internal disciplinary matters of the HAA; a position which is consistent with the Labour Relations Act.

Further, the Employee Manual is part of his employment contract with the HAA and same has been accepted by him. This position has not been expressly or impliedly altered."

[111] In its correspondence of 8th February 2021, the Committee adopted the posture that having complied with the provisions of section 5.8 of the Employee Manual, the Committee had already fulfilled its entire obligation and duty to act fairly to the claimant and therefore, was not in breach of the principles of natural justice. The Committee's letter read:

"Moreover, and importantly, he will have the opportunity to be heard before the Human Resource Committee ... Each of these steps supports the notion of fairness, equity and observe the rules of natural justice."

[112] The Committee adverted the claimant's legal practitioner's attention to the matters which it took into account in arriving at its decision to deny the claimant's request for legal representation at the disciplinary hearing. Primary among the matters considered was what the Committee described as the HAA's policy as stated in the Employee Manual.

[113] It is apparent from the Committee's letter of 8th February 2021 that primordial importance was ascribed to the HAA's Employee Manual as opposed to the **Tarrant** criteria. This is quite evident from a portion of the letter where it reads:

"Having considered the HAA Employee Manual, there is no ambiguity as to the class of persons who may accompany Mr. Webster to the disciplinary hearing."

Section 5.9 of the Employee Manual provides:

"Subject to the Regulations, Policies and Procedures of the HAA, the Human Resources Committee shall advise the employee of his/her right to be accompanied by a fellow employee of their choice or a member of his or her Staff Association."

[114] It is not in dispute that the claimant's terms and conditions of employment with the HAA are governed by the provisions of the HAA Employee Manual and that the claimant has agreed to be bound by the contractual terms therein. It is also beyond dispute that the Committee has the right to regulate its own procedure. However, this is not to say that the Committee is not under a duty to ensure that disciplinary proceedings are conducted fairly. In that vein, the Committee erred in principle by failing to apply the implied discretion that it possessed by treating the provisions of section 5.9 of the Employee Manual as being imperative rather than directory and thereby creating an exclusionary rule that had implications for the observance of fairness in the disciplinary process.

[115] In any event, by virtue of section 3 of the Act the Committee ought to have recognised that the provisions of section 116 of the Act took precedence over any contractual terms of employment brought into existence by virtue of the Employee Manual. Therefore, the Committee ought to have been guided in their approach by

the provisions of section 116 without ascribing excessive importance to the provisions of the Employee Manual.

[116] The Court also formed the view that the Committee fell into error when it conveyed the opinion that:

“The matter does not appear complex. While there is potential for dismissal, we have considered that even if it arises, it ought not to prevent Mr. Webster from continuing in his chosen profession. Therefore, having considered these factors, we are of the view that this is not an appropriate case to create an exception and allow Mr. Webster to be legally represented.”

[117] The use of the term “exception” in the Committee’s letter gives rise to concerns that the Committee applied the wrong approach in determining the question of the claimant’s request for legal representation.

[118] The allusion to “exception” and “exceptional circumstances” conveyed the impression that the Committee held fast to the notion that it possessed no discretion in the matter and that the categories of persons who were permitted to accompany the claimant at the disciplinary hearing were closed; the same being confined and restricted by the terms expressed in section 116 of the Act and section 5.9 of the Employee Manual, and that any permission given to the claimant to be legally represented at the hearing was an exception to what the Committee elevated to the status of a rule of general application – that legal representation was prohibited outright by the provisions of section 5.9 of the Employee Manual.

[119] It appears that nowhere, in any of the correspondence exchanged between the parties, did the Committee allude to it possessing or exercising any discretion which it possessed in determining the question of the claimant’s request to be legally represented. Also, it does not appear that the Committee gave any thought to the application of the principles enunciated in the judicial authorities on the point.

[120] Therefore, it cannot be said with any degree of certainty, having regard to the content and tenor of the Committee’s various correspondence, that it addressed its mind to questions pertinent to the overall assessment of the fairness of the proceedings if the request for legal representation was denied.

[121] The Court is further fortified in its view by the Committee's opinion expressed in its letter of 8th February 2021 after having had the benefit of legal advice. The Committee wrote:

"Having been so advised, looking at the nature and extent of those rights, which we have considered to be akin and/or superior to those engaged in a consideration of the rules of natural justice, we remain of the view that this is not an exceptional case and is not determinative of any civil right of Mr. Webster."

[122] Having assessed and evaluated the Committee's responses in light of the principles distilled from the case law, it is the Court's considered view that not only do the reasons stated by the Committee portray a blatant misunderstanding of the correct approach to the determination of the question of the claimant's request, but they also highlight the Committee's misapprehension of its lack of discretion and the manner in which its discretion ought to have been exercised.

[123] Therefore, one is lead to the ineluctable conclusion that the Committee erred in principle and therefore did not apply a discretion which it mistakenly or otherwise failed to recognise that it possessed. The Committee appeared to erroneously place the concept of exceptionality as the primary conditionality for allowing the claimant to be represented by counsel at the disciplinary hearing while making a complete disavowal of the existence of any discretion on its part.

[124] Therefore, the Court concludes that the Committee's decision to deny the claimant's request for legal representation cannot stand on the basis and the approach adopted by the Committee.

[125] In the circumstances, and for the reasons articulated in this judgment, the Court does not hesitate to declare that the Committee failed properly, adequately, or at all, to exercise the implied discretion that it had pursuant to section 116(2) of the Labour (Relations) Act, 2018 in refusing the claimant's request to be legally represented at the disciplinary hearing.

[126] However, notwithstanding this declaration made by the Court, the Court has also formed the view that even if the Committee had exercised its discretion on the proper basis in denying the claimant's request for legal representation at the disciplinary hearing, the Court does not find that the claimant has made out a case whereby he has demonstrated that legal representation was necessary. Therefore, the Court declines to grant any injunctive relief to the claimant by ordering that the disciplinary proceedings be stayed unless the claimant is legally represented.

[127] On the issue of costs, having regard to the Court's findings herein, and given the nature of the matter and the relationship between the parties, the Court makes no order as to costs.

Shawn Innocent
High Court Judge

By the Court

Registrar