

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CIVIL CAUSE No. 0007 OF 2016

DR. LAM – LAGORO JAMES **APPLICANT**

VERSUS

MUNI UNIVERSITY **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

RULING

This is an application under the provisions of Article 42 of *The Constitution of the Republic of Uganda, 1995*, section 98 of *The Civil Procedure Act*, sections 33, 36 and 38 of *The Judicature Act* and rules 3 (1) (a), 2, 4, 6 and 7 of *The Judicature (Judicial Review) Rules, S.I. 11 of 2009*. The applicant seeks the prerogative order of certiorari to quash decisions of his interdiction and subsequent termination of his employment by the respondent, an order of prohibition restraining the respondent from preventing him from performing his duties, a permanent injunction restraining the respondent from advertising his position, general damages and costs.

In the affidavit supporting his claim, the applicant deponed that at all material time, he was serving as the Academic Registrar of the respondent. On 4th September 2015, he was accused of physically assaulting the University Secretary resulting in criminal charges being instituted against him before the Chief Magistrates Court of Arua. Before the case could be heard and decided, the respondent's Vice Chancellor interdicted him on 9th September 2015 which interdiction was extended further on 7th October 2015. He contends that the meeting of the respondent's Council that came up with the resolutions was not properly constituted and it was wrought with multiple procedural irregularities including denying him his right to a fair hearing. Subsequently, he was on 29th February 2016 served with a letter of termination of his employment. In the meantime, his position was advertised as vacant yet he still had the chance of being reinstated, hence the application for the prerogative orders.

In their affidavit in reply sworn by the respondent's Senior Human Resource Officer, Mr. Ijosiga Abdul Wahid, the respondents oppose the application and contend that the applicant's employment contract was terminated upon payment of three months' salary in lieu of notice by reason of insubordination and assault of the respondent's University Secretary. The applicant was accorded his procedural rights, in that; he was initially interdicted for one month which was later extended to six months, there was no conflict of interest involved in the meetings at which those decisions were taken, a select committee of the University Council was constituted to investigate the accusations made against the applicant, the applicant appeared before that committee, it presented its report to the University Council which in turn forwarded it to the Appointments Board, which accorded the applicant a fair hearing and on basis of its report, the University Council terminated the applicant's employment. Thereafter the vacant position of Academic Registrar was filled after a process of advertisement of the vacancy, short-listing and interviewing suitable applicants. The applicant has since then turned down the respondent's invitation for him to hand over office to the new office holder.

Although the parties agree on the sequence of events that led to the dispute between them, there is a divergence in points of view regarding some of the detail. The applicant was appointed as the Academic Registrar of the Respondent on a five year contract commencing on 2nd January 2015. The respondent contends that the events leading to the current dispute were sparked off by the applicant physically assaulting the respondent's University Secretary from the office of the Vice Chancellor on 4th September 2015. On his part the applicant states that there was no such assault but rather on being upset by the sarcastic laughter of the University Secretary, the applicant rose from his seat and moved in the direction of the University Secretary while gesticulating to indicate his displeasure. The applicant was physically restrained by the respondent's Assistant Engineer and he left the meeting at that point.

Thereafter, the University Secretary reported a criminal case of assault occasioning actual bodily harm to the police. The applicant was charged and tried by the Grade One Magistrate's Court of Arua whereupon he was on 28th July 2016 convicted and sentenced to three days of community service of five hours each, which he duly served. In the meantime, the respondent initiated disciplinary proceedings against the applicant. The process commenced at a meeting of the

University Council of 8th September 2015 where a Select Committee was constituted to investigate the incident. The Acting Vice Chancellor was as well directed to interdict the applicant and on 9th September 2015 she wrote the applicant a letter to that effect interdicting him for one month, to pave way for investigations in the applicant's alleged assault of the University Secretary. The interdiction was on 7th October 2015 extended for another five months with effect from 21st October 2015, pending the decision of court in the then ongoing trial. The applicant was one of the respondents interviewed by the Select Committee on 22nd September 2015. The Select Committee then compiled its report dated 25th November 2015 and submitted it to the respondent's University Council which forwarded it to the Appointments Board. At its meeting of 15th February 2016, the Appointments Board interviewed both the applicant and the University Secretary. Having established as a matter of fact that the applicant had physically assaulted the University Secretary as accused, the Committee found that the applicant had engaged in misconduct justifying dismissal and it therefore recommend the termination of the applicant's employment. At its meeting of 26th February 2016, the University Council considered the report of the Appointments Board and decided that the applicant's employment be terminated with payment of three months' salary in lieu of notice. By a cheque dated 18th March 2016, the applicant was paid a sum of shs. 12,421,500/= as three months' salary in lieu of notice. By a letter dated 14th June 2016, the applicant was invited to officially hand over office which invitation he never responded to.

In his submissions, counsel for the applicant, Mr. Nasur Buga Mohammed stated that the applicant seeks five issues to be determined in the application. He challenged the legality of the meeting arguing that it was not lawful because the complainant was part of the decision making. It was an administrative meeting attended by the complainant. The meeting recommended interdiction of the applicant. The resolutions were taken as directives by the Vice Chancellor. Whereas section 55 (2) (a) of *The Universities and other Tertiary Institutions Act, 7 of 2001 Act* provides that the Vice Chancellor has powers of interdiction, it was procedurally wrong and an improper exercise of discretion when she took the resolution of the meeting as a directive thus fettering her discretion.

He submitted further that the appointments Board did not conduct proper proceedings at its meeting. The Board sat as a disciplinary body and assumed powers of discipline. It acted *ultra vires*. The manner of the proceedings was subject to the rules of natural justice which were not observed since there was no cross-examination of witnesses. The evidence was given in the applicant's absence. There was no opportunity on his part to call witnesses. It was a biased tribunal as it acted as prosecutor and judge.

There was a delay in filing the affidavit in reply and this should result in striking out the affidavit. He cited *Springwood Capital v. Twed consulting limited*. In his capacity as Senior Human Resource Officer, the deponent to the affidavit in reply was not competent to swear the affidavit. The Chairman Appointments Committee or the Chairperson of the University Council was the proper person. The deponent did not disclose the source of information and did not distinguish between matters based on personal knowledge and those based on information. Most of its content is based on second hand information whose sources are undisclosed. Section 57 (3) of *The Universities and other Tertiary Institutions Act, 7 of 2001* converted the applicant's dismissal into a suspension and in addition the applicant, as per annexure "G" to the affidavit in support of the application, appealed to the University Council and a decision on that appeal has not been taken yet. Section 55 (2) of the Act specifies a procedure which was not followed. The applicant had a five year contract yet he has not been receiving his salary, and all the allowances. There were four years left to the end of the contract. The contract is not one which could be terminated on notice. There is no termination clause in the agreement. Termination is not implied by any provision in the contract. Counsel cited *Betty Tinkamanyire's case* as authority. He abandoned the claim seeking a permanent injunction restraining the respondent from advertising the post of Academic Registrar but prayed that all other orders sought be granted with costs.

In response, counsel for the respondent, Mr. Samuel Ondoma opposed the application. He submitted that under section 31 of *The Universities and other Tertiary Institutions Act, 7 of 2001* the Vice Chancellor has the power to interdict. In the meeting, the Vice chancellor communicated the issue of the assault. The Council resolved that the applicant be interdicted and a select committee constituted thereafter acted independently in its investigation. Under S. 40 (1) of the *The Universities and other Tertiary Institutions Act, 7 of 2001*, the Select Committee

reported to the Appointments Board. There was no irregularity in the procedure which is provided for under s. 50 (3) of the Act since the Vice Chancellor had power to interdict. The Vice Chancellor cannot stop or reject resolutions of Council. The proceedings before the appointment Board were fair and conducted without bias. The applicant was invited to attend the Board meeting. He never requested to cross-examine any witness. Practically it would not be possible to cross-examine unless the committee had advance notice. The Committee was a neutral body. They posed questions within their knowledge. They did not have any interest in the outcome. They had no personal knowledge in the matter.

Regarding the delay in filing the affidavit in reply, he submitted that the minutes to be attached to the affidavit in reply required approval before they could be produced and the meetings at which they were approved took time to be convened. The University Council sits quarterly. Although not all the matters in the affidavit in reply were based on knowledge, such paragraphs can be severed. The Staff Tribunal did not exist and therefore the applicant's purported appeal is incompetent. The applicant was given three months payment in lieu of notice and therefore termination of his employment was not illegal. Section 58 (3) (c) of *The Employment Act* permits termination of contracts of employment and the applicant received the requisite payment. The payment was posted to his account. The remittance was made in March 2016 and has never been refunded. He therefore prayed that the application should be dismissed with costs.

The court ought to proceed in the instant application with due regard to the limits within which courts may review the exercise of administrative discretion when interfering with an administrative function of an establishment or an employer as stated in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1947] 2 ALL ER 680: [1948] 1 KB 223, which are;- (i) illegality: which means the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it. (ii) Irrationality: which means particularly extreme behaviour, such as acting in bad faith, or a decision which is "perverse" or "absurd" that implies the decision-maker has taken leave of his senses. Taking a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it and (iii) Procedural impropriety: which encompasses four basic concepts; (1) the need to comply with the adopted

(and usually statutory) rules for the decision making process; (2) The common law requirement of fair hearing; (3) the common law requirement that the decision is made without an appearance of bias; (4) the requirement to comply with any procedural legitimate expectations created by the decision maker.

It is trite that administrative systems which employ discretion vest the primary decision-making responsibility with the agencies, not the courts. As a result, the judicial attitude when reviewing an exercise of discretion must be one of restraint, often extreme restraint, only intervening when the decision is shown to have been unfair and irrational. The principle in matters of judicial review of administrative action is that to invalidate or nullify any act or order, would only be justified if there is a charge of bad faith or abuse or misuse by the authority of its power. The challenge ought to be over the decision making process and not the decision itself. The jurisdiction to decide the substantive issues is that of the authority and the Court does not sit as a Court of Appeal, since it has no expertise to correct the administrative decision, but merely reviews the manner in which the decision is made. It is elsewhere said that, if a review of administrative decision is permitted, the court will be substituting its own decision without the necessary expertise, which itself may not be infallible.

Judicial review of administrative action therefore is a procedure by which a person who has been affected by a particular administrative decision, action or failure to act of a public authority, may make an application to the High Court, which may provide a remedy if it decides that the authority has acted unlawfully. While it has been said that the grounds of judicial review “defy precise definition,” most, if not all, are concerned either with the processes by which a decision was made or the scope of the power of the decision-maker. A public authority will be found to have acted unlawfully if it has made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of reasonableness); or without observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness). Failure to observe natural justice includes: denial of the right to be heard, the rule against actual and apprehended bias; and the probative evidence rule (a decision may be held to be invalid on this ground on the basis that there is no evidence to support

the decision or that no reasonable person could have reached the decision on the available facts i.e. there is insufficient evidence to justify the decision taken).

Decisions made without the legal power (*ultra vires* which may be narrow or extended. The first form is that a public authority may not act beyond its statutory power: the second covers abuse of power and defects in its exercise) include; decisions which are not authorised, decisions taken with no substantive power or where there has been a failure to comply with procedure; decisions taken in abuse of power including, bad faith (where the power has been exercised for an ulterior purpose, that is, for a purpose other than a purpose for which the power was conferred), where power not exercised for purpose given (the purpose of the discretion may be determined from the terms and subject matter of the legislation or the scope of the instrument conferring it), where the decision is tainted with unreasonableness including duty to inquire (no reasonable person could ever have arrived at it) and taking into account irrelevant considerations in the exercise of a discretion or failing to take account of relevant considerations. It may also be as a result of failure to exercise discretion, including acting under dictation (where an official exercises a discretionary power on direction or at the behest of some other person or body. An official may have regard to government policy but must apply their mind to the question and the decision must be their decision).

Applications for Judicial review under rule 3 of *The Judicature (Judicial Review) Rules, 2009, S.I. 11 of 2009*, made under section 38 (2) of *The Judicature Act*, for orders of mandamus, prohibition, certiorari or an injunction are directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by public decision makers. They are designed to enforce the rule of law and adherence to the Constitution. The focus of judicial review is to quash invalid decisions by public bodies, or require public bodies to act or prohibit them from acting, by a speedy process. Its overall objective is good governance. These public purposes are fundamentally different from those underlying contract and tort cases or causes of action under statute, and their adjunct remedies, which are primarily designed to right private wrongs with compensation or other relief. An application for judicial review combines an allegation that a public authority has acted contrary to the substantive principles of public law, along with a claim for one of the kinds of relief listed. The discretionary nature of the courts' supervisory

jurisdiction reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individuals. It is essentially a claim for unlawful or unfair termination of employment with only a thin pretence to preventing the abuse of power. As regards the requirement that the impugned act should be of a public nature the case of *R v. East Berkshire Health Authority ex parte Walsh* [1984] 3 WLR 818 provides an illustration. That case involved an application for certiorari by an employee of a public body, namely a senior nursing officer of the East Berkshire Health Authority, whose services were terminated by the District Nursing Officer, on the recommendation of a committee of inquiry. He then took two parallel steps. He first set in motion the appropriate industrial dispute procedure and then applied for certiorari to quash his dismissal and any subsequent appellate proceedings thereto. In relation to the preliminary point raised by the health authority that the judicial review proceedings were incompetent, as relating to a matter of private law, Sir John Donaldson MR said at page 824:

The remedy of judicial review is only available where an issue of “public law” is involved but as Lord Wilberforce pointed out in *Davy v. Spelthorne Borough Council* [1934] 3 All ER 278; [1934] AC 262, the expressions “public law” and “private law” are recent immigrants and whilst convenient for descriptive purposes must be used with caution, since English Law traditionally fastens not so much upon principles as upon remedies. On the other hand, to concentrate on remedies would in the present context involve a degree of circuitry or levitation by traction applied to shoestrings, since the remedy of “certiorari” might well be available if the health authority is in breach of a “public law” obligation but would not be if it is only in breach of a “private law” obligation.

A similar decision is to be found in *Regina v. Civil Service Appeal Board Ex Parte Bruce* [1988] ICR 649, where May LJ, said: “I think that at the present time in at least the great majority of cases involving disputes about the dismissal of an employee by his employer, the most appropriate forum for their resolution is an industrial tribunal (now of course an employment tribunal). The Courts should not be astute to hold that any particular dispute is appropriate for consideration under the judicial review procedure.”

However in *Kadamas and another v. Municipality of Kisumu* [1986–1989] 1 EA 194, it was held that infringement of an employee’s ordinary right to fair treatment can be the basis of judicial review since bodies having legal authority to decide issues affecting the rights of persons and expected to act judicially. Acts in excess of legal authority by any body of persons having legal

authority to determine questions affecting the rights of subjects, and having the duty to act judicially, will be subject to the controlling jurisdiction of the High Court exercised in the prerogative writs (see *R v. Electricity Commissioners [1924] 1 KB 171*). Therefore, although judicial review is ordinarily not granted for breach of a “private law” obligation or where there are alternative remedies, unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted (see for example in *R v Lord Chancellor's Department ex parte Nangle [1992] 1 All ER 897*), and whereas employment disputes are better tried by ordinary suit rather than by affidavit evidence, I think the court should not in general decline jurisdiction on the basis that the claim looks like a case that should be pursued by an ordinary suit for unlawful or unfair termination of employment rather than by way of judicial review. Courts will be called upon to intervene in situations where public authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations of applicants, even where such conduct is not strictly within the purview of the “three I’s” of Illegality, Impropriety and Irrationality. It is for that reason that the court has chosen to determine this application on its merit rather than defer it to be resolved through the available alternative remedies. The issues to be decided in this application are; whether the proceedings leading to and the actual decision to terminate the applicant’s contract of employment involved any illegality, Procedural Impropriety or Irrationality.

As preliminary issues, it was contended by counsel for the respondent that the affidavit in reply ought to be rejected on three grounds; firstly for the reason that it was filed out of time and secondly because it was sworn by a person not competent to do so and lastly because much of its content is based on information whose sources the deponent does not disclose and without distinguishing such content from what is based on his personal knowledge.

Concerning the belated filing of the affidavit in reply, the respondent was served with a copy of the notice of motion on 14th June 2016 yet the affidavit in reply was filed on 1st November 2016, nearly five months later. In *Springwood Capital Partners Limited v. Twed Consulting Company Limited, High Court Misc. Application No. 746 of 2014*, where a notice of motion was filed on 13th October 2014 while the affidavit in reply to the application was filed on 1st December 2014,

about six weeks from the date of service of the application, the question arose as to whether the respondent was obliged to file the affidavit in reply within 15 days as prescribed by Order 12 rule 3 (2) of *The Civil Procedure Rules* after service of the application. Alluding to the express requirement that a defendant served with summons in the form prescribed under Order 8 rule 1 of *The Civil Procedure Rules* has to file a defence within 15 days after service of the summons, the court held that the same time lines should apply to all interlocutory applications such that a reply to an application has to be filed within 15 days and failure to file within the 15 days puts the affidavit in reply out of the time prescribed by the rules.

Although I agree with the argument that the rules of procedure are meant to give parties timelines within which to file and complete their pleadings and that legal practitioners ought to be discouraged from filing affidavits in reply at pleasure, I respectfully defer from the conclusion reached in that decision. Unlike a written statement of defence which serves only one purpose of disclosing the case a defendant proposes to put forward or serving as a means of disclosing the facts which support particular issues raised by each party, an affidavit can be used in a number of important ways, most often as containing evidence to support or oppose an application. The affidavit becomes evidence in the case. This is illustrated by Order 52 rules 3 and 7 of *The Civil Procedure Rules* which indicate that the filing an affidavit alongside a motion or chamber summons is optional, only when evidence is required in support of the application. Whereas a written statement of defence presents allegations of facts the defendant will rely on, an affidavit in reply presents evidence on oath. Affidavits are a way of giving evidence to the court other than by giving oral evidence. They are intended to allow a case to run more quickly and efficiently as all parties know what evidence is before the Court. Consequently, time constraints applied to defences may be misplaced when applied to affidavits.

Where the rules committee considered it necessary to specify time limits for the filing of affidavits in reply, it prescribed such time periods, for example under Order 10 rule 8 of *The Civil Procedure Rules*, interrogatories are answered by affidavit which has to be filed within ten days, or within such other time as the court may allow. That the Rules Committee did not generally specify time limits for the filing of affidavits in reply in my view is indicative of the flexibility with which it intended courts to deal with them. The only rule that can safely be

implied by this silence is that all affidavits in reply, and other pertinent documents attached as annexures, should be filed before the hearing of the motion or summons in chambers. An affidavit in reply, being evidence rather than a pleading in *stricto sensu*, should be filed and served on the adverse party, within a reasonable time before the date fixed for hearing, time sufficient to allow that adverse party a fair opportunity to respond. For that reason, an affidavit in reply filed and served in circumstances which necessitate an adjournment to enable the adverse party a fair opportunity to respond, should not be disregarded or struck off but rather the guilty party ought to be penalised in costs for the consequential adjournment.

Of course the Rules of procedure, like any set of rules, cannot in their very nature provide for every procedural situation that arises. Where the Rules are deficient, my view is that the court should go so far as it can in granting orders which would help to further the administration of justice, rather than hampering it. In the circumstances, I find the rigidity proposed in *Springwood Capital Partners Limited v. Twed Consulting Company Limited, High Court Misc. Application No. 746 of 2014* unjustifiable. I find myself unable to agree that the decision in that case should be followed, most especially since it is not binding on this court. General rules should not be rigidly applied in all instances; some flexibility, controlled by the presiding Judge exercising his or her discretion in relation to the facts of the case before him or her, must necessarily also be permitted, especially where no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs. I think in appropriate cases, if the interests of justice require it, the Court is entitled to refuse to take heed of a technical irregularity in a procedure which does not cause prejudice to the opposite party. The letter and spirit of Article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995* is that technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits. In modern times, courts do not encourage formalism in the application of the rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the Courts.

In the instant application, the respondent explained that it was not possible to file an affidavit in reply sooner than they did because some of the minutes they needed to annex to the affidavit

required approval at subsequent meetings of the respondent's Council. Section 42 (1) of *The Universities and Other Tertiary Institutions Act* provides that in the discharge of its functions, the respondent's Council is to meet at least once in three months. I have perused the annexures to the affidavit in reply and they indicate the minutes of the Governing Council meeting of 8th September 2015 were approved 3rd November 2015 and those for 26th February 2016 were approved on 19th August 2016. I am therefore satisfied with the respondent's explanation for the filing done in November which was well before the actual hearing on 23rd March 2017. The applicant did not show me why nor how he was or would be prejudiced should the affidavit in reply be taken into account in deciding this application. There is no allegation of prejudice caused or likely to be caused to the applicant nor have I been referred to any such prejudice if the matter is to be disposed of on its merits despite the "late filing" of the affidavit in reply. Insofar as it may be necessary and within my discretion to allow the affidavit in reply, I do so in order to decide the merits of the dispute between the parties unfettered by technicalities.

It was further argued by counsel for the applicant that the affidavit in reply was defective for failure of the deponent to distinguish between matters sworn to from the deponent's own knowledge from those sworn to from information. According to Order 19 rule 3 (1), affidavits should be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated (see *The Co-operative Bank Limited v. Kasiko John* [1983] HCB 72). Thus, the source of information is a material fact that must be before the court. Any facts that enhance the credibility of the source should be given.

The requirement that in interlocutory applications the deponent should state the source of hearsay evidence and the fact of his or her belief in the evidence, is not a mere formality where the evidence is contentious, and non-compliance may result in the rejection of the affidavit (see *Construction Engineers & Builders Limited v. African Textile Mills Limited and Attorney General* [1991] HCB 79; *Kassamali Gulamhussein Co. Kenya Ltd v. Kyrtatas Bros Ltd* [1968] EA 542; *Bombay Flour Mill v. Chunibhai M Patel* [1962] 1 EA 803; *Premchand Raichand Ltd. v. Quarry Services Limited* [1969] EA 514; *Kabwimukya v. Kasigwa* [1978] HCB 251; *Banco Arabe Espanol v. Bank of Uganda* [1992] 2 EA 22 at 35 and *Noormohamed Janmohamed v.*

Kassamali Virji Madhani (1952), 20 E.A.C.A. 8.) In those cases, it was decided that since the relevant paragraphs were expressed to be upon the deponents' information and belief, and the source of the information or the grounds of the belief were not stated, the affidavits were worthless, and the motions based on such affidavits were dismissed. The learned judges were dealing with affidavits stating that the information deposed to was true to the best of the deponents' knowledge, information and belief without stating specifically which parts were true to their knowledge and which parts were merely stated as their belief from information obtained by them. The courts held that in such cases it is clearly desirable and imperative that the deponent should state how much of the affidavit is sworn to from their own knowledge and how much is merely sworn to from information which they believe to be true.

However, it has been decided elsewhere that an affidavit that does not set forth the grounds of information and belief is not worthless if the court can otherwise ascertain the source of the information and belief (see *British Columbia Society for the Prevention of Cruelty to Animals v. Barr (1946), 63 B.C.R. 250, [1947] 1 D.L.R. 292 (C.A.)*). Also that omission to state in an affidavit an already obvious source of information is a minor error which does not invalidate it (see *Barirunda v. Bitakeise [1990 – 91] 1 KALR 89*). The court therefore may disregard non-compliance with the requirement of distinguishing between matters sworn to from a deponent's own knowledge from that sworn to from information, where no injustice is caused (see *Kawooya Patrick v. C. Naava [1975] HCB 322*). The court is further cognisant of the case of *Col. (Rtd) Besigye Kizza v. Museveni Yoweri Kagutta & Electoral Commission, Presidential Election Petition No. 1 of 2001*, where it was held in that case that the offending paragraphs of an affidavit can be severed and the rest of the paragraphs considered. This is in line with the letter and spirit of Article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995* to the effect that technical objections to less than perfect pleadings should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits. There is a general trend towards taking a liberal approach in dealing with defective affidavits. I have not found in the affidavit in reply any information whose source cannot be ascertained from its context. There is no allegation of prejudice to the applicant nor have I been referred to any such prejudice occasioned by the failure of the deponent to distinguish between matters sworn to from the deponent's own knowledge from those sworn to from information in

the affidavit in reply. Insofar as it may be necessary and within my discretion to allow the affidavit in reply, I do so in order to decide the merits of the dispute between the parties unfettered by technicalities.

Lastly, regarding the competence of the deponent, section 30 (b) of *The Evidence Act* provides for the “business records” exception to hearsay, which can be invoked in cases where it is permissible for one person from a corporate entity to testify in such situations where the attendance of all persons involved as authors of various documents of evidential value cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable. The only requirements under that section being that; such records should have been made and kept by a corporate entity in its ordinary course of regularly conducted business, they must have been made at or near the time of the events they record, and by or from information transmitted by someone with knowledge. For as long as neither the source of information nor the method or circumstances of preparing the records indicate that the records are untrustworthy, they will be admissible whether by *viva voce* evidence or by affidavit. A member of staff familiar with how the business records are created and maintained is competent to swear the affidavit. It must be such a person as is familiar with the corporation’s record keeping practices and who can attest that the document was created and kept in the ordinary course of the entity’s regularly conducted business.

I have perused the documents attached and considered the circumstances in which they came into the hands of the deponent. I have not found any reason to doubt that all averments made by the deponent are by a person, who in his capacity as Senior Human Resource Officer, is familiar with how these records are created and maintained by the respondent, they are documents *prima facie* made in the respondent’s ordinary course of regularly conducted business, they were made at or near the time of the events they record, and by or from information transmitted by persons with knowledge. They are documents relating to the applicant’s employment with the respondent in respect of which the Senior Human Resource Officer is competent to testify. Requiring affidavits from or the attendance of all persons involved as authors of the various documents in the circumstances of this application would be requiring persons whose attendance cannot be procured without an amount of delay or expense, which appears to the court unreasonable. For

all the foregoing reasons I have not found merit in the preliminary points argued by counsel for the applicant. I now proceed to consider the merits of the application.

1. Whether the proceedings leading to and the actual decision to terminate the applicant's contract of employment involved any illegality.

The respondent is a Public University established on 9th May 2013 by Statutory Instrument, No. 31 of 2013 (*The Universities and Other Tertiary Institutions (Establishment of Muni University) Instrument*) pursuant to the procedure for establishment of public universities as set out in the provisions of *The Universities and Other Tertiary Institutions Act, 2001* as amended. Being a corporation set up under statute and the corresponding Statutory Instrument, it has only those powers which are expressly or impliedly granted to it there under. Assessing the limits of the powers of a corporation created by or under a statute and a Statutory Instrument is a question of the interpretation of the statute and corporation's constituting Statutory Instrument which give the corporation its powers.

Review of the impugned procedure and decision for illegality means that the court seeks to determine whether the administrative decision-makers within the respondent understood correctly the law that regulates their decision making power and gave effect to it. The powers include those expressly provided for in the statute as well as those that arise by necessary implication (see Lord Selborne LC and Lord Blackburn, in *Attorney General v. Great Eastern Railway Co.*, (1880) 5 AC 473). Whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held by judicial construction, to be *ultra vires*. In the same sense, what those sources do not expressly or impliedly authorize is to be taken to be prohibited but those things which are incidental to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited. To the extent that a corporation acts beyond its powers, its actions will be *ultra vires* and invalid.

An action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers. In challenging the legality of the decision to

terminate the applicant's contract of employment, counsel for the applicant relied entirely on the provisions of *The Universities and Other Tertiary Institutions Act, 2001* to advance the argument that the respondent's Acting Vice Chancellor did not have the power to interdict the applicant and later terminate his contract of employment. If an act is within the powers granted, it is valid. If it is outside them, it is void. In *Regina v. Hull University Visitor, Ex parte Page; Regina v. Lord President of the Privy Council ex Parte Page*, [1993] 3 WLR 1112, [1993] AC 682, the House of Lords considered the nature and purpose of the system of judicial review from this perspective and stated:

The fundamental principle [of judicial review] is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In all cases.....this intervention.....is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a *Wednesbury* sense.....reasonably. If the decision-maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is *Wednesbury* unreasonable, he is acting *ultra vires* his powers and therefore unlawfully.

The applicant's letter of appointment, annexure "B" to the affidavit in support of the motion and "L" to the affidavit in reply, indicated that the appointment was subject to *The Constitution of the Republic of Uganda, 1995, The Universities and Other Tertiary Institutions Act* and "other laws applicable." Under section 38 (1) and 40 (1) of *The Universities and other Tertiary Institutions Act, 7 of 2001*, the University Council is the supreme organ of a Public University and as such is responsible for the overall administration of the objects and functions of the University. Under section 50 (3) of the Act, the Appointments Board, which is a Committee of the University Council, is responsible to the University Council for the appointment, promotion, removal from service and discipline of all officers and staff of the academic and administrative service of the University, as may be determined by the University Council. The University Council is empowered by section 72 (f) of the Act to make statutes not inconsistent with this Act for the better carrying out of its functions, including the procedure for appointment of staff, the terms and conditions of service including discipline, salary and retirement benefits of members of all categories of staff. Under section 40 (2) (a) of the Act, the University Council is as well responsible for the direction of the administrative affairs of the University, and under section 40

(2) (b) the residual power to do any other thing and take all necessary decisions conducive to the fulfilment of the objects and functions of the University.

Under section 31 (1) (a) of *The Universities and other Tertiary Institutions Act, 7 of 2001*, the Vice-Chancellor is responsible for the academic, administrative and financial affairs of the University, and under section 55 (2) (b) of Act has the power in writing, to suspend a member of the academic staff from office or employment pending investigations, where there are reasonable grounds for believing that the member of staff should be removed from office or employment on grounds of misconduct.

In suspending the applicant, the respondent's Vice Chancellor adopted the disciplinary procedures outlined in *The Public Service Standing Orders, 2010* in part (F-S) as indicated in the letter of interdiction dated 9th September 2015 (annexure "C" to the affidavit in reply). Under the Standing Orders, interdiction means the temporary removal of a public officer from exercising the duties of his or her office while investigations over a particular misconduct are being carried out. By virtue of regulation 8 of Part (F-S) at page 129, the procedure, with modifications, required that;

- a. the charges against the applicant are investigated expeditiously and concluded;
- b. the Responsible Officer had to ensure that investigations are done expeditiously in any case within (three) 3 months for cases that do not involve the Police and Courts and 6 months for cases that involve the Police and Courts of Law;
- c. the applicant is informed of the reasons for the interdiction;
- d. the applicant receives such salary not being less than half of his basic salary, subject to a refund of the other half, in case the interdiction is lifted and the charges are dropped;
- e. the applicant was not to leave the country without permission from the Responsible Officer;
- f. the applicant's case is submitted to the University Council
- g. after investigations, the Responsible Officer had to refer the case to the University Council with recommendations of the action to be taken and relevant documents to justify or support the recommendations had to be attached.

The "Responsible Officer" for purposes of that process, and according to section 55 (2) (b) *The Universities and other Tertiary Institutions Act, 7 of 2001*, is the respondent's Vice Chancellor. The letter of interdiction specifies the reason for the interdiction as paving way for

“investigations of the alleged assault by [the applicant] on the University Secretary.” It was initially for one month which was later extended to six months (annexure “D” to the affidavit in reply). While on interdiction, the applicant continued to receive half of his salary and the final determination by way of termination which was communicated by a letter dated 29th February 2016 (annexure “F” to the affidavit in support of the motion).

I have found from the evidence available on record that in writing to the applicant, the respondent’s Vice Chancellor stated that; “I have been directed by the University Council....to issue you with an interdiction....” That expression suggests that the interdiction of the applicant by the Vice Chancellor was done on the “directives” of the University Council of the respondent following its meeting of 8th September 2015, yet section 55 (2) (b) *The Universities and other Tertiary Institutions Act, 7 of 2001*, vests in the Vice Chancellor, the discretion to interdict a member of staff of the respondent, in respect of whom the Vice chancellor “has reasonable grounds for believing that” he or she “should be removed from office or employment on the grounds of misconduct.” This provision imposes the duty to exercise the discretion so vested in the Vice Chancellor in good faith and upon proper principles. The question then is whether the Vice Chancellor in attributing the impugned decision to the University Council so abused or fettered her discretion as to amount to a failure to exercise of discretion. It is trite that if there has been an arbitrary or unreasonable use of power, then the discretion has lost its true character.

Discretion connotes the ability to make a choice between more than one possible courses of action upon which there is room for reasonable people to hold different opinions as to which of the options should be preferred (per Lord Diplock in *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council*, [1977] AC 1014 at 1064). Persons in whom discretion is vested are not to delegate decisions for which they are exclusively responsible, and which therefore only they can make. Allowing another person to take a decision for them, means that they are giving their power away and hence a failure to be properly accountable. They must ensure that they have not fettered their discretion. In this connection, it may help to quote from De Smith, Woolf and Jowell in their *Judicial Review of Administrative Action*, (5th Edn. 1995), Chapter 11 (*Procedural Fairness: Fettering of Discretion*), thus;

A body that does fetter its discretion.....may offend against either or both of two grounds of judicial review; the ground of legality and the ground of procedural propriety. It offends against legality by failing to use its powers in the way they were intended, namely, to employ and to utilise the discretion conferred upon it. It offends against procedural propriety by failing to permit affected persons to influence the use of that discretion. By failing to keep its mind “ajar” by shutting its ears to an application the body in question effectively forecloses participation in the decision-making process.

Administrative discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where an administrative decision is a matter of discretion it will not be disturbed on judicial review except on a clear showing of abuse of discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. In the instant application, the Acting Vice Chancellor would have fettered her discretion if it is determined that in taking the decision to interdict the applicant, she elevated the status of the directive of the University Council at the expense of the merits of the case before her. If the court finds that no discretion was exercised by the Acting Vice Chancellor in interdicting the applicant or that, considerations foreign to the exercise of the discretion entered into its exercise that fact may become an unlawful fetter upon her discretion.

The minutes of the University Council meeting of 8th September 2015 (attached as annexure “E” to the affidavit in reply) show that under MIN.5/MUCM/009, the Acting Vice Chancellor made her remarks immediately after the communication from the Chair. Under point 11 at page 6 of the minutes, she reported to the meeting the circumstances surrounding the applicant’s conduct while in her office on 4th September 2015 when he physically attacked the University Secretary and the fact that she had as a result taken an administrative measure of asking the applicant to step aside and hand over his office to his deputy to allow for an inquiry by a committee of management and staff. After deliberations, the meeting resolved to constitute a Committee of Council to investigate the matter and report back to the Appointments Board of Council within two weeks and “Council also directed [the] Acting Vice Chancellor to interdict Dr. Lam Lagoro James for one month to allow investigations to be carried out.”

From the foregoing, it emerges that the Acting Vice Chancellor only stopped at asking the applicant to step aside. The decision to interdict the applicant was taken at a meeting of the University Council rather than the Acting Vice Chancellor. It was not taken on basis of conclusions drawn from objective criteria considered by the University Council rather than by the Acting Vice Chancellor independently. It was not based on the unaided sound judgment of the Acting Vice Chancellor, exercised with regard to what was right under the circumstances and without doing so arbitrarily or capriciously but rather on the directive of the University Council after it had listened to her. The Acting Vice Chancellor failed to recognise her discretion and exercise it and instead interdicted the applicant on what appears to be the directive of Council rather than on the merits of the case before her. In the circumstances it is correct to say, that the Acting Vice Chancellor, by placing the matter before the Council for a decision on interdiction, to an extent limited her own discretion or put fetters upon it. In *Anirudhsinhji Karansinhi Jadeja v. State of Gujarat (1995 (5) SCC 302*, the Supreme Court of India observed that: “..... if the discretion is exercised under the direction or in compliance with some higher authority's instruction, then it will be a case of failure to exercise discretion altogether.” Hence in the instant case, the Acting Vice Chancellor partly fettered her discretion and her independent judgment could have been made illusory. She did not herself exercise the discretion but appears to have acted at the behest of the superior authority of the University Council. There is some merit to the argument that she failed to exercise the discretion vested in her by section 55 (2) (b) *The Universities and other Tertiary Institutions Act, 7 of 2001*. When a statute requires a thing to be done in a certain manner, it ought to be done in that manner alone and the court would not expect it to be done in some other manner.

Failure to exercise a discretion vested by statute constitutes an abuse of discretion hence a possible illegality. Discretionary powers must be used in good faith and for a proper, intended and authorised purpose. The role of the decision-maker is to make a decision taking into account all relevant information. Some of the general principles relevant to the exercise of discretion are: acting in good faith and for a proper purpose, complying with legislative procedures, considering only relevant considerations and ignoring irrelevant ones, acting reasonably and on reasonable grounds, making decisions based on supporting evidence, giving adequate weight to a matter of great importance but not giving excessive weight to a matter of no great importance, giving

proper consideration to the merits of the case, providing the person affected by the decision with procedural fairness, and exercising the discretion independently and not under the dictation of a third person or body. However the court observes that in this case, since the Acting Vice Chancellor attended the meeting and participated in the deliberations that led to the decision to interdict the applicant, this is not a clear cut case of abdication of her duty to the University Council so as to amount to a failure to exercise her discretion and instead act under the direction or in compliance with some higher authority's instruction. The process undertaken by the Vice Chancellor was more of a consultation with the University Council than taking a directive from it. A decision-maker can consult on a "preferred option" (see *Nichol v. Gateshead Metropolitan Council (1988) 87 LGR 435*), and even a "decision in principle", so long as his or her mind is genuinely ajar. The consultation in the instant case was unnecessary and led to the blurring of the lines of authority between her and the Council and resulted in the unfortunate phrase "I have been directed by the University Council....to issue you with an interdiction...." Since what matters is the legality and not the correctness of the decision, the phrase must be considered in its proper context. From that perspective, consultation with the University Council did not render the interdiction invalid or illegal but instead irregular since the Acting Vice Chancellor did not act entirely independent of Council as the law vesting the power of interdiction in her suggests.

The irregular interdiction was followed by a termination of the applicant's employment. By virtue of section 50 (3) of *The Universities and other Tertiary Institutions Act*, the Appointments Board, which is a Committee of the University Council, is responsible to the University Council for the appointment, promotion, removal from service and discipline of all officers and staff of the academic and administrative service of the University, as may be determined by the University Council. However, section 43 (1) (a) and (2) of the Act authorises the respondent's University Council to appoint committees and delegate any of its functions to such committees. It is in exercise of that power that a five member select committee of the University Council was constituted to investigate the accusations made against the applicant, the applicant appeared before that committee, it presented its report to the University Council (dated 25th November 2015 and attached as annexure "G" to the affidavit in reply) which in turn forwarded it to the Appointments Board, which accorded the applicant a fair hearing and on basis of its report, the University Council terminated the applicant's employment (by a letter dated 29th February 2016

and attached as annexure “F” to the affidavit in support of the motion and annexure “A” to the affidavit in reply) with effect from 1st March 2016.

The minutes of the University Council meeting of 26th February 2016 (attached as annexure “J” to the affidavit in reply) show that under MIN/7.1(b)/MUCM/11, the Chairman of the Appointments Board presented the report to the University Council. Under MIN/7.1(b) 2 and MIN/7.1(b) 4, the Council considered the report of the Appointments Board. In MIN/7.1(b) 3, the meeting considered the recommendation of the Appointments Board for termination of the applicant’s contract of employment and in MIN/7.1(b) 5 (i) the Council resolved to terminate the contract for assault and insubordination both of which were found to constitute misconduct. I find that when she wrote the letter of termination on 29th February 2016, the respondent’s Vice Chancellor did so on behalf of the University Council, which under section 50 (3) of the Act had the power to do so. Neither the Vice Chancellor nor the University council acted without or in excess of their jurisdiction. I therefore do not find any illegality from this perspective.

Lastly, the applicant contended that since he appealed the decision of the University Council to terminate his employment, under section 57 (5) of the Act, where a member of staff has been removed from office or employment by the Appointments Board he or she is deemed to be suspended until the expiry of the period allowed for appeal, at which date the removal becomes effective, or, where an appeal has been lodged in time, the suspension shall remain in force until the court determines the appeal. Section 56 (5) of the Act is to the effect that proceedings both before the Appointments Board and the appeal there from to the Staff Tribunal should be concluded within a period of six months from the date from which the suspension of a member of staff takes effect.

Under section 57 (1) of *The Universities and other Tertiary Institutions Act, 7 of 2001*, a member of staff may appeal to the University Staff tribunal against a decision of the Appointments Board within fourteen days after being notified of the decision. Attached to the affidavit in support of the notice of motion is annexure “G” dated 14th March 2016, constituting the appeal made by the applicant. It is addressed to the Chairman of the respondent’s Council because at the time “the University Staff Tribunal [had] never been constituted” which fact, according to the applicant,

made it “irregular for the appointments Board to work alone and unchecked in matters of disciplining University Staff.” In paragraph 14 of the affidavit in reply, the respondent admitted it as a fact that at the time of termination of the applicant’s employment, there was no Staff Tribunal in place. The contemplation of Parliament in enacting section 56 (1) of the Act was that there would be an appellate body to which appeals would lie from decisions of the Appointments Board of the University Council. The appeal given to the appellant by this provision is an administrative one. Under section 57 (3) of the Act, a member of staff aggrieved by the decision of the Tribunal would then within thirty days from the date he or she is notified of the Tribunal’s decision, apply to the High Court for judicial review. By virtue of the non-existence of the University Staff tribunal, the applicant could not take benefit of the provisions of section 57 (1) of *The Universities and other Tertiary Institutions Act*. The purported appeal to the University Council was incompetent since the University Council has no such power vested in it by law.

Whereas sections 22 (3) and 32 (3) of the Act obliges the National Council for Higher Education to ensure that a University Council for a Public University is constituted within six months of establishing the University, there is no similar provision regulating time limits for the establishment of the Staff Tribunal. In the result, three years after its inauguration, the respondent was yet to constitute such a tribunal. In *Nestor Muchumbi v. Inspector General Government and another, High Court Civil Appeal No. 0062 of 2009*, Article 235A of *The Constitution of the Republic of Uganda, 1995*, as amended in 2005 provided that “There shall be a Leadership Code Tribunal whose composition, jurisdiction and functions shall be prescribed by Parliament by law.” At the time of hearing the appeal, no such tribunal had been constituted. The Court only lamented Government’s failure to set up such a tribunal. In *John Ken Lukyamuzi v. Attorney General and another Const. Appeal No. 02 of 2007*, the Supreme Court found that because of that failure, the Inspectorate of Government had effectively turned into an accuser, investigator, prosecutor and judge in violation of the rules of natural justice.

In the case of *London Passenger Transport Board v. Upson, [1949] 1 All E.R. 60*, the House of Lords affirmed the existence of a tort of statutory breach distinct from any issue of negligence. It is sufficient to show that a statute prescribes a duty owed to the plaintiff who then needs only to show; (i) breach of the statute, and (ii) damage caused by the breach. In the instant application, in

absence of a statutory guide as to the time limits within which the Tribunal should be constituted, the material before the court is insufficient to prove with certainty a breach of the statute in order to support a finding of illegality based on failure to execute a legal obligation. The court can only opine that there appears to be an inordinate delay in constituting the tribunal and thereby can do no more than require the respondent to take appropriate corrective measures.

The system is designed to be, so far as possible, a self-sufficient structure, dealing internally with errors of law and fact made at first instance and resorting to higher appellate authority where a legal issue of difficulty or of principle requires it. By this, serious questions of fact and law are channelled into the legal system through judicial review. The practical effect of failure to constitute the Staff Tribunal is that the applicant could not take benefit of section 57 (5) of the Act, by virtue of which he would have been deemed suspended until the expiry of the period allowed for appeal (which according to section 57 (1) – (3) comprises; - appeal within 14 days after notice of the decision of the appointments Board, the Staff Tribunal's decision within 45 days thereafter, apply to the High Court within 30 days after notice of the decision of the Staff Tribunal) at which date the removal would become effective. The applicant having been notified of the decision of the Appointments Board on 29th February 2016, the time allowed for exhaustion of the internal remedies before applying to the High Court elapsed on or about 28th May 2016, whereupon his removal from office became effective. He was asked to hand over his office on 23rd June 2016, which is after the termination of his contract had become effective. Unlike the case of *John Ken Lukyamuzi v. Attorney General and another Const. Appeal No. 02 of 2007* where failure to constitute a tribunal of first instance was found to have occasioned a violation of the rules of natural justice and thereby vitiated the proceedings, in the instant application the inability of the applicant to exercise his right of appeal to a staff tribunal because none existed was cured by the instant application for Judicial Review which was filed on 24th May 2016. In any event, recourse to administrative or domestic appellate procedures is not a necessary preliminary to impugning the determination in the courts (see *B. Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] A.C. 322 (P.C.)*).

On the other hand, irregularities in the initial stages of a proceeding before domestic tribunals can be cured at subsequent stages. For example, failure to observe natural justice can be cured in

appeal (see *King v. University of Saskatchewan* [1969] S.C.R. 678; *White v. Kuzych* [1951] A.C. 585 and *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561). In my view, this application serves a purpose similar to what an administrative appeal to the Staff Committee would have performed. All in all, I find that the irregularity in the applicant's interdiction was cured by the subsequent termination of the contract by the appropriate body of the respondent.

2. Whether the proceedings leading to and the actual decision to terminate the applicant's contract of employment involved any Procedural Irregularity.

Termination of the applicant's contract of employment was an administrative decision taken at the culmination of a disciplinary process. Although there is no general duty at common law to conduct a hearing before an administrative decision is taken, in circumstances where important interests are at stake such as one's livelihood a hearing has been required (see *R v. Commissioner for Racial Equality exp. Helling don LBC* [1982] AC 779). The classic situations in which the principles of natural justice become applicable include situations where some legal rights, liberty or interest is affected. This having been a disciplinary process with the potential of dismissal thereby impacting on the livelihood of the applicant, it was a quasi-judicial process to which the principles of natural justice applied. The requirements of natural justice though are dependent on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with, and so forth (see *Russell v. Norfolk* [1949] 1 ALL E.R. 109). The rules of natural justice are not immutable but context-dependent and should therefore be interpreted within the specific context, the basic or fundamental principle being that of a procedurally fair hearing before an impartial decision-maker.

In this regard, it is contended by counsel for the applicant that the procedure leading to the termination of the applicant's employment was wrought with procedural unfairness for which reason the decision should be vitiated. He presents a two-pronged argument; first that the applicant was denied the right to a fair hearing and secondly that the University Council laboured under bias in taking the decision it took. Breach of the rules of natural justice either way is a ground for judicial review, but this complex notion covers a number of very diverse situations, particularly bias or the lack of independence of the adjudicator and the *audi alteram partem* rule

in all its variations. P.G. Osborn's *The Concise Law Dictionary*, 5th Edition at p.217 defines the concept as follows:

The rules and procedure to be followed by any person or body charged with the duty of adjudicating upon disputes between, or the rights of others; e.g. a government department. The chief rules are to act fairly, in good faith, without bias, and in a judicial temper; to give each party the opportunity of adequately stating his case, and correcting or contradicting any relevant statement prejudicial to his case, and not to hear one side behind the back of the other. A man must not be judge in his own cause, so that a judge must declare any interest he has in the subject matter of the dispute before him. A man must have notice of what he is accused. Relevant documents which are looked at by the tribunal should be disclosed to the parties interested.

Unless there are statutorily prescribed procedures, and subject to the overall requirements of fairness, the decision-maker will usually have a broad discretion as to how a disciplinary proceeding should be carried out. The University Council, through its Appointments Board, was therefore free to determine its procedure but one that is compliant with its general duty to act fairly, in good faith, without bias and in a judicial temper, giving the applicant the opportunity to adequately state his case, to correct or contradict any relevant statement prejudicial to his case, and not to hear the other party behind his back.

The essence of the *audi alteram partem* rule was explained by Lord Denning in *Kanda v. Government of the Federation of Malaya* [1962] AC 322, [1962] 2 WLR 1153 as follows;

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence is given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.....it follows, of course, that the Judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing.

A quasi judicial body need not meet the standards of a trial in court but fairness must prevail. A duty resting upon a committee "to hear and decide" is an exercise of the auditory faculty which

means to hear both sides and imports, at the very least, a duty to afford the parties an opportunity to be heard. To hear must mean “to listen judicially to” or “to give audience to.” The University Council had the duty give to each of the parties the opportunity of adequately presenting his case. The applicant was entitled to know why he was being accused of misconduct and he was entitled to respond to and correct any statements prejudicial to his position. The principle is that a person before a tribunal of this character should, to use the words of Lord Greene, M. R. in *R. v. The Archbishop of Canterbury* [1944] 1 K. B. 282; [1944] 1 All E. R. 179 at p. 181, be given “... a real and effective opportunity of meeting any relevant allegations made against him.” It follows that;

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, L. C. in *Board of Education v. Rice* [1911] A.C. at p. 182 down to the decision of their Lordships’ Board in *Ceylon University v. Fernando* [1960] 1 WLR 223. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice, sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing. Instances which were cited to their Lordships were *Re Gregson* (1894) 70 L.T. 106, *Rex v. Bodmin Justices* 1947 K.B. 321 and *Goold v. Evans* (1951) 1 T.L.R. 1189, to which might be added *Rex v. Architects Registration Tribunal* (1945) 61 T.L.R. 445, and many others. Applying these principles their Lordships are of opinion that Inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby, J. in these words: “In my view, the furnishing of a copy of the Findings of the Board of Inquiry to the Adjudicating Officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this Court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal.” The mistake of the police authorities was no doubt made entirely in good faith. It was quote proper to let the adjudicating officer have the statements of the witnesses. The Regulations show that it is necessary for him to have them. He will then read those out in the presence of the accused. But their Lordships do not think it

was correct to let him have the Report of the Board of Inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice.” (See *B. Surinder Singh Kanda v. The Government of The Federation of Malaya* [1962] A.C. 322 (P.C.).

The University Council was required to have before it the whole of the evidence presented but was not to proceed as if the question before it were a trial. It had no power to administer an oath, and needed not examine witnesses and for that reason, could obtain information in any way it thought best, but always giving a fair opportunity to the parties involved in the controversy for correcting or contradicting any relevant statement prejudicial to their view (see *Board of Education v. Rice* [1911] AC 179 at p. 182). It could regulate its procedures as it thought fit for example by hearing the interested parties orally or by receiving written statements from them, or by appointing a person to hear and receive evidence or submissions from interested parties for its own information (see *James Edward Jeffs and others v. New Zealand Dairy Production and Marketing Board and others* [1967] AC 551). Although the rules of natural justice need not involve an oral hearing, the University Council had an obligation to give the parties a fair opportunity to correct or contradict any relevant prejudicial statement.

Whichever procedure is adopted, it must be capable of letting the applicant know the materials that were collected, what evidence was given and what statements or reports were made affecting his rights. He must have been given a fair opportunity for correcting or contradicting any relevant statement prejudicial to his view. The disciplinary procedure adopted by the University Council in the instant case involved two stages; the first stage involved an investigation of the allegation of misconduct by a select committee after which it presented its report to the Appointments Board of the University Council (annexure “G” to the affidavit in reply). Having thereby determined that a charge against the applicant was warranted, the Appointments Board by a letter dated 29th January 2016 summoned the applicant to appear before it. It was indicated in that letter that the applicant was being summoned to be heard on allegations levelled against him “in relation to alleged assault case that occurred at the office of Muni University, Vice Chancellor on 4th September 2015.”

At its special meeting of 15th February 2016, the Appointments Board heard the evidence of the complainant, the University Secretary Rev. Fr. Dr. Picho Epiphany Odubuker (pages 6 – 12 of annexure “H1” to the affidavit in reply) and that of the applicant (pages 12 – 19 of annexure “H1” to the affidavit in reply). The Board asked the applicant the following questions; did you assault Fr. Picho? What happened on 4th September 2015? What caused the injury on Fr. Picho’s face? Is it good for staff to fight? Can you work with Fr. Picho if assuming the Appointments Board decides that you go back to work? Why did you go to the VC’s Office? Who makes requisitions for service of vehicles? etc. Thereafter, the Board heard evidence from two other members of staff; the applicant’s official driver and the University Bursar. It then deliberated over the evidence so gathered and made its recommendations.

Although notified of the general nature of the accusations made against him, the applicant was not provided with a copy of the report that had been submitted to the University Council’s Appointments Board by the select committee. In *Re K (Infants) [1963] Ch 381*, the court discussed the need for those appearing before tribunals to be given sufficient access to all the material placed before the tribunal. Upjohn LJ said:

It seems to be fundamental to any judicial inquiry that a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part. If it is so withheld and yet the judge takes such information into account in reaching his conclusion without disclosure to those parties who are properly and naturally vitally concerned, the proceedings cannot be described as judicial.

Lord Devlin set out “the fundamental principle of justice that the judge should not look at material that the parties before him have not seen.” This right though is not absolute. There may be exceptional circumstances where it may be justified to withhold such information from one of or both parties. For example in *Roberts v. Parole Board [2005] 2 AC 738, [2006] 1 All ER 39, [2005] 3 WLR 152* the appellant had been convicted of the murder of three police officers in 1966. By the time his appeal from the decision of the parole board was considered by the House of Lords, his sentence of thirty years’ imprisonment had long expired. He complained that material put before the parole board reviewing his case had not been disclosed to him. In dismissing the appeal, the House of Lords held that the court should focus on the need of the

Parole Board to carry out its work balancing the rights of the prisoner and the needs of society.

Lord Carswell said:

The present case is a classic instance of weighing up competing interests. The appellant's interest in presenting his case effectively with sufficient knowledge of the allegations made against him is clear and strong. The informant has a compelling interest in being protected from dangerous consequences which might ensue if any indication leaked out which could lead to his identification. Thirdly, there is the public interest in ensuring that the Parole Board has all proper material before it to enable it to decide which prisoners are safe to release from prison. Having balanced these interests, I conclude that the interests which I have outlined of the informant and the public must prevail over those of the appellant, strong though the latter may be. I accept that there may well be cases in which it would not be sufficiently fair to be justifiable and each case will require consideration on its own facts.

In the case of an alleged violation of the *audi alteram partem* rule, even if it can be difficult to obtain evidence to that effect in certain cases, the applicant for judicial review must establish an actual breach. In the instant application, nowhere in his interaction with the Appointments Board was the applicant informed that the complainant had already met the Board and given his evidence or representations. Nowhere during that interaction did the Board bring to the applicant's attention the report given to it by the select committee, the evidence given to it, statements and representations made by the complainant, Rev. Fr. Dr. Picho Epiphany Odubaker, and the rest of the witnesses, which affected him. The procedure adopted by the Board thus amounted to hearing evidence or receiving representations from one side behind the back of the other. It is not indicated that these were confidential proceedings or that there were exceptional circumstances involving matters the withholding of which, from the applicant, would be justifiable in public interest. The applicant did not know what was placed against him before the select committee and the Board nor was he afforded an opportunity to correct or contradict any statement prejudicial to his position. As a result, withholding of the material was a clear breach of accepted rules of natural justice. Failure to disclose that material to the applicant deprived the applicant's eventual appearance before the board in exercise of his fundamental right to an oral hearing, of all meaningful content. The applicant was denied a fair opportunity to correct or contradict that material, a real and effective opportunity to respond to and correct any statements prejudicial to his position. By this the applicant's right to a fair hearing was violated.

It was contended by counsel for the applicant that the applicant's right to a fair hearing was violated by the Appointment's Board's failure to afford the applicant an opportunity to cross-examine adverse witnesses. Indeed in some circumstances it may amount to a breach of natural justice to refuse a party the right to cross-examine a witness who has given evidence, or not to afford the opportunity for cross-examination (see e.g., *Osgood v. Nelson (1872) L.R. 5 H.L. 636* and *Marriott v. Minister of Health [1937] 1 K.B. 128*. See also the Canadian decision of *Strathcona (County) No 20 and Chemcell Ltd. v. Provincial Planning Board, City of Edmonton (1970) 75 W.W.R. 488*). It is equally clear on authority that in some circumstances failure to afford the opportunity for cross-examination is not a failure to follow the rules of natural justice (see e.g., *T.A. Miller Ltd v. Minister of Housing and Local Government [1968] 1 W.L.R. 992*; *Mpungu and Sons Transporters Ltd. v. The Attorney General and Kembe Coffee Factory (Coach) Ltd [2006] HCB 26*; *Moses Isamat and others v. The Governing Council of Uganda Institute of Allied and Management Sciences – Mulago (Formerly Mulago Paramedical Training Schools) High Court Misc Cause No. 5 of 2013* and *The University of Ceylon v. Fernando [1960] 1 WLR 223*, where the applicant is given the opportunity to cross-examine but does not take it up). In the latter case it was observed that the opportunity to cross-examine a witness may not be held to have been denied while the complainant is given a chance but does not take it up. This was a case of dismissal of a student for examination mal-practice. The victim did not cross-examine one of the witnesses before the disciplinary committee although he was given a chance. It was pointed out that the principle is not that one must cross-examine but that one must be given the opportunity.

In the end, how nearly a domestic disciplinary inquiry, or any other inquiry by a statutory body, a public statutory inquiry, or any other inquiry which has to make decisions must approach to the full-blown procedure of a court of justice in order to comply with the rules of natural justice is not doubt a matter of degree. The essential requirements of natural justice are that; the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, the tribunal should act in good faith (see *Byrne v. Kinematograph Renters Society Ltd, [1958]1 WLR 762*). Cross-examination of adverse witnesses will be considered obligatory only in so far as it is necessary in the circumstances of the case to advance the applicant's ability to state his case. It is an aspect of fairness that the tribunal

presents the facts in a way that facilitates an effective response. In my view, the particulars constituting misconduct for which the applicant was accused were stated, to a certain extent, at the outset, and the rest were evolved in the course of the hearing by way of questions put to the applicant, and the applicant was thus afforded an opportunity of meeting them, and he did meet them. Whether he met them satisfactorily or not is a different question but it certainly was not affected by failure to be afforded an opportunity to cross-examine any of the adverse witnesses, it had no material adverse effect on the process. I find that on the facts of this case, affording the applicant an opportunity to cross-examine any of the adverse witnesses was not obligatory and his right to a fair hearing was not violated when he was not given the opportunity to cross-examine any of them.

The last argument advanced by counsel for the applicant regarding violation of the applicant's procedural rights arises in connection with the second stage of the disciplinary proceedings which involved the University Council's consideration of the report of the Appointments Board. The argument he advanced was that the University Council was biased in that the complainant, the University Secretary, was part of the Council when it made its decision. In short the argument advanced is that the University Council was not impartial. The concept relied upon is reflected in the judgment of Cotton LJ in *Leeson v. General Council of Medical Education* [1890] 43 Ch D at 379 in which he said: "of course the rule is very plain, that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgment to decide in that particular case, either his own case, or in any case where he brings forward the accusation or complaint on which the order is made."

Impartiality connotes absence of bias, actual or perceived. Impartiality of the decision-making body is a critical feature of the right to a fair hearing which is captured by the Latin maxim, *nemo iudex in causa sua debet esse* (no one should be the judge in his own cause). There are many different factual settings which could place the impartiality of a decision-making body in question; among such contexts are situations where the decision-makers have or are perceived to have a pecuniary interest, either direct or indirect, in the outcome of the hearing before them. Another such context is where the relationship of the decision-maker to one of the parties or counsel is sufficiently close to give rise to a reasonable apprehension of bias.

In its position as the ultimate decision-maker, the University Council was under a duty to act honestly and impartially, not under the dictation of some other person or persons to whom the authority is not given by law. The test to be adopted is limited to the demonstration of a reasonable apprehension that the “mind” of the University Council might have been biased, but with care that judicial review of a decision of an administrative body may not rest on speculative grounds. If a requirement to establish actual bias had been adopted as a general principle, judicial review for bias would have been a rare event indeed. The test is whether a reasonably well-informed person, considering the nature of the interest at stake giving rise to the apprehension of bias, might consider that it might have an influence on the exercise of the official’s public duty. For the duty is to hear and decide, the test is expressed in terms of a reasonable apprehension of bias. A fair hearing cannot be guaranteed if the decision-maker is biased. There must be no reasonable apprehension of bias with regard to the decision.

In *R. v. Architects’ Registration Tribunal* [1945] 2 All E. R. 131 (K.B.D.), at p. 138, Lewis J. observes:

Where a decision maker has preconceived opinion and a predisposition to decide a cause or an issue in a certain way, or where one does not leave the mind perfectly open to conviction, and one’s inclination clearly appears bending towards one side, it all shows an attitude of bias. The presence of bias thus leaves a reasonable person in doubt as to the impartiality of the decision making process. In these circumstances courts have quashed such decisions where it is obvious that a decision maker stood tainted by bias (see *R. v. Governor of John Banco School* [1990] C.O.D 414).

There is no standard basis for apprehension of bias. As stated by Reid, *Administrative Law and Practice*, 1971, at p. 220: “tribunals” is a basket word embracing many kinds and sorts. It is quickly obvious that a standard appropriate to one may be inappropriate to another. Hence, facts which may constitute bias in one, may not amount to bias in another.” In the instant case, a reasonable apprehension of bias would occur if a Council member pre-judged the matter to such an extent that any representations to the contrary would be futile. However, the question of bias in a member of a domestic tribunal entrusted by statute with an administrative discretion exercised in the light of its experience and of that of its technical advisers cannot be examined in the same light as that in a member of a court of justice. The basic principle is of course the same, namely

that natural justice be rendered. But its application must take into consideration the special circumstances of the tribunal. Accordingly, counsel for the applicant's argument that the University Council is perceived to be biased by reason of the fact that the complainant, Rev. Fr. Dr. Picho Epiphany Odubaker, is a member of the University Council which ultimately made the decision to terminate his contract, should be examined within the wider context provided by *The Universities and other Tertiary Institutions Act, 7 of*. In the case at bar, the test must take into consideration the composition and broad functions entrusted by law to the University Council. It is to that wider context that I now wish to turn.

That the complainant is by law a member of the decision-making body may not necessarily of itself give rise to a reasonable apprehension of bias. Section 33 (3) (a) of *The Universities and other Tertiary Institutions Act, 7 of 2001*, sets forth the composition of the University Council and it provides that the University Secretary is the Secretary to the University Council. It so happens that the complainant in the case of misconduct against the applicant also served as the University Secretary and therefore, by virtue of that section, the Secretary of the University Council. If the governing body or a disciplinary tribunal is given such a composition by the legislation creating it, it must surely be a rebuttable presumption that the authority will be exercised fairly and judiciously. In the context of internal disciplinary proceedings within institutional settings and disciplined service organisations, especially self-governing professional organisations, that presumption is usually upheld.

For example in *Ex parte Fry [1954] 1 W.L.R. 730*, a squat search was ordered of all 184 prisoners in two wings of a high security dispersal prison holding some 550 prisoners. The previous Friday, two dogs trained in arms and explosives detection had given positive indications within one of the prison's classrooms, a classroom used only by prisoners from those two wings. A search of the classroom and the surrounding area having revealed nothing, it was decided to carry out a lock-down search of both wings with the prisoners confined to their cells. The two appellants, both then long-term category A prisoners, were on the affected wings and amongst those ordered to squat (although in the event the search was called off after 94 prisoners had been searched). The appellants, however, unlike the rest, refused to obey the order. Mr Carroll refused on the ground that he had not been given proper reasons for it; Mr Al-Hassan (formerly

known as Anthony Steele) on the ground that a reasonable suspicion was required and there was none in his case. Disciplinary proceedings were brought against both appellants under rule 47 (19) to the effect that: “A prisoner is guilty of an offence against discipline if he . . . disobeys any lawful order.” Rule 48 (3) required that: “every charge shall be inquired into by the Governor.”

The Governor appointed to hear the charges against these appellants was Deputy Governor Copple. Separate adjudications were held, respectively on 17th December 1998 and 2nd March 1999, in each case following adjournments to enable the prisoner to obtain legal advice (although each was refused legal representation for the hearing). In both cases there was no dispute that the order had been disobeyed; the defence of each was rather that the order had not been “lawful.” Mr Copple ruled in both cases that the order was lawful and accordingly found both appellants guilty, findings later upheld by the Secretary of State. The penalty imposed on Mr Carroll was two additional days’ detention, ten days cellular confinement and ten days stoppage of earnings. He was at the time serving a sentence of 15 years for offences of robbery and assault. Mr Al-Hassan was penalised by the stoppage of 15 days earnings and the forfeiture of certain privileges. He was and remained a life sentence prisoner, serving four life sentences for offences committed whilst in prison. Both appellants brought judicial review proceedings seeking to quash the findings of guilt recorded against them on grounds that in order to have avoided the appearance of bias, Mr Copple would either have had to make plain at the adjudications that he himself had actually been present when the squat search order was confirmed (rather than give the impression, as he appears to have done, that he had known nothing of it) and sought the prisoners’ consent to his nevertheless hearing the charges, or alternatively stood down to enable them to be heard by a different governor (if necessary from another prison) without any such previous involvement in the case. However, dismissing the appeal, the court observed;

As the facts of the present case demonstrate, however, people who are called on to adjudicate will often have substantial experience in the relevant field and will therefore be familiar with the background issues which they may have encountered previously in various roles. Indeed, the individuals concerned will often be particularly suited to adjudicate on the matter precisely because of the experience and wisdom on the topic which they have accumulated in those other roles. In many continental systems, at various stages of their careers judges spend time as legal civil servants in ministries, drafting and advising on legislation. Undoubtedly, when they return to the bench, it is expected that they will use their experience to enrich their

work. Today, British judges draw on their previous work, whether as advocates, legal civil servants or academic lawyers. Therefore, they may well have to decide a point which they had argued as counsel, or on which they had written an article - or, even, which they had decided in a previous case. In various political or other contexts, judges may have publicly advocated or welcomed the passing of the legislation which they later have to apply. Judges who have served in some capacity in the Law Commissions may have to interpret legislation which they helped to draft or about which they helped to write a report. The knowledge and expertise developed in these ways can only help, not hinder, their judicial work.

It would be absurd, then, to suggest that in such situations their previous activities precluded the judges from reaching an independent and impartial judgment, when occasion demanded. The authoritative decision in *Locabail (UK) Ltd v. Bayfield Properties Ltd* [2000] QB 451 is a resounding rejection of any such approach. In any event, if proof were needed, experience confirms that judges are quite capable of acting impartially in such cases. Judges have not infrequently been party to decisions overruling their own previous decisions. Similarly, in *The "Rafaela S"* [2003] 2 Lloyd's Rep 113, 145, para 158, sitting in the Court of Appeal, Peter Gibson LJ freely admitted that he had taken a different view from the one adopted in a report which he had previously subscribed as Chairman of the Law Commission. In, *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, Lord Mackay of Clashfern took part in a decision in which the House struck down a system adopted by a local authority for "starring" the essential milestones of their care plan adopted under the Children Act 1989. The appeal turned on identifying a cardinal principle of the Act - a piece of legislation for which Lord Mackay, as Lord Chancellor, had been the lead minister when the Bill was going through this House in its legislative capacity. More than that, as he explained, at p 327, para 108, he had actually given a lecture in which he suggested the idea of starring stages. At the beginning of the appeal, however, he informed counsel of this and they did not object to his sitting. So any question of apparent bias was resolved. Again, since Lord Mackay agreed with the decision to disapprove the starring system, the informed and fair-minded observer would have seen that he was well able to judge the matter independently and impartially when called upon to do so.

Nor should it be supposed that only professional judges are capable of the necessary independence of approach. That would be to disregard the realities of life in many organisations today. For example, on a daily basis, head teachers have to apply school rules which they have helped to frame. By virtue of their knowledge of the way the school works and of its problems, they will often be best placed to apply the rules sensitively and appropriately in any given situation. Again, it is not to be assumed that the head teachers' mere involvement in shaping the rules means that a

fair-minded observer who knew how schools worked would conclude that there was a real possibility that they would not be able to apply the rules fairly. The same goes for managers in businesses and for officers in the Armed Forces who are committed to upholding the edifice of lawful orders on which the services rest. Equally, I have no doubt that an informed and fair-minded observer would regard prison governors, or their deputies, as being quite capable of interpreting and applying the prison rules fairly and independently, even though they are obviously committed to upholding them. In all these situations, if things do go wrong, the decision can be judicially reviewed or challenged in an employment tribunal, as the case may be. The present case is an example of that safeguard in action.....The inter-relationship between management and the fair administration of discipline in institutional settings and disciplined services has long been a source of concern. It used to be thought that the courts could not supervise the disciplinary actions of prison governors, chief constables, chief fire officers and the like, because to do so would interfere with the free and proper exercise of their disciplinary powers: see *R v Metropolitan Police Commissioner, Ex p Parker* [1953] 1 WLR 1150, 1155, *Ex p Fry* [1954] 1 WLR 730, 733, per Goddard LJ. Then it was held that the disciplinary decisions of prison Boards of Visitors could be distinguished from those of prison governors and were amenable to judicial review: see *R v Board of Visitors of Hull Prison, Ex p St Germain* [1979] 1 QB 425. But it was still thought that the governor's role in maintaining good order and discipline within the prison was part of his overall function of managing the prison: see *R v Deputy Governor of Camphill Prison, Ex p King* [1985] 1 QB 735. In the words of Lawton LJ at p 749, it was thought that "Management without discipline is a recipe for chaos." Others, however, had difficulty in drawing a logical distinction between the disciplinary functions of governors and Boards of Visitors: see *Re McKiernan's Application* [1985] NI 385. In England and Wales, the distinction was abolished by the decision of this House in *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533. Since then it has been clear that the functions of a governor adjudicating upon disciplinary charges are separate and distinct from his functions in running the prison; they are subject to the supervision of the courts in their compliance with the rules of natural justice. This distinction was perhaps even more important during the years following 1992 when all prison discipline was in the hands of the Governor.

Similarly in *King v. University of Saskatchewan*, [1969] S.C.R. 678, the appellant had, after several attempts, failed to obtain the standing required by the law school of the respondent university which would have entitled him to the degree of bachelor of laws. A special committee was appointed by the president of the university to consider an appeal by the appellant from the decision of the law school, and, after holding a number of hearings, the committee rendered its

report which concluded with the recommendation that due to special circumstances and for compassionate reasons the appellant be granted his degree in law. This report was, considered by an executive committee of the faculty council, and the executive committee, refusing to accept the recommendation of the special committee, recommended to the faculty council that the appellant be not granted the degree. The reports of the special committee and of the executive were presented to the council and the council agreed with the recommendation of the executive that the degree not be granted. The appellant then appealed to the chancellor. The latter considered the appeal to be one to the senate of the university and, in accordance with the provisions of statute XII of the statutes of the senate, he appointed a committee consisting of himself, the president of the university and three deans. Unlike the earlier hearings and meetings of the various university bodies, where the appellant was neither present nor represented by counsel, at the hearing of the senate committee the appellant was present in person and represented by counsel. The committee refused to allow the appeal.

An application for mandamus requiring the university through its faculty council to hear and determine the appeal of the applicant was dismissed. As to the submission that in each case when the appellant's appeals were being considered by the successive tribunals, there was a duplication of membership in the body with the earlier tribunal, the Court was not ready to agree that such duplication would result in any bias or constitute a breach of natural justice. In such matters as were the concern of the various university bodies here, duplication was proper and was to be expected. It was significant that no member of any of the bodies was a member of the law faculty, and that when the dean or members of that faculty attended any of the bodies they withdrew before voting.

Lastly, in *Ringrose v. College of Physicians and Surgeons (Alberta)*, [1977] 1 S.C.R. 814, the appellant, a medical practitioner registered with the respondent College, was served with two notices, one of which was to the effect that it had been reported to the disciplinary committee of the College that he might have been guilty of unbecoming conduct. On the instruction of the executive committee of the council of the College, he was suspended from the privileges of a medical practitioner pending investigation by the discipline committee. Following the hearings of the disciplinary committee, it recommended to the council that the appellant be suspended for

one year. A Dr. McCutcheon who sat as a member of the discipline committee was also a member of the executive committee. An application by the appellant for an order of certiorari to quash the proceedings, decision and recommendation of the discipline committee was refused at first instance and an appeal to the Appellate Division was dismissed. Both the Appellate Division and the trial judge came to the conclusion that in the circumstances of the case no reasonable apprehension of bias could be entertained. With leave, the appellant then appealed to the Supreme Court where he argued that the circumstances were such as to give rise to a reasonable apprehension of bias. Dismissing the appeal, the court held that no reasonable apprehension of bias is to be entertained when the statute itself prescribes overlapping of functions. Such was exactly the situation under *The Medical Profession Act*. By s. 66, the council may “suspend any member of the College pending investigation” as to disciplinary matters. On the other hand, by s. 47, the council may “appoint a discipline committee (consisting of not less than three members of the council) to investigate the facts”. Thus, the same council, the members of which were by law entitled to take part in all its decisions, was by statute authorised at the same time to suspend during investigation and to appoint a disciplinary committee staffed by at least three of its midst. Thus, it was clear that the legislator had created the conditions forcing upon the members of the council overlapping capacities.

In the instant application, a strict application of the reasonable apprehension of bias as a test could undermine the composition of the University Council as ascribed by Parliament in section 33 (3) (a) of *The Universities and other Tertiary Institutions Act, 7 of 2001*. The fact remains that had Rev. Fr. Dr. Picho Epiphany Odubuker, in his capacity as University Secretary, participated in the deliberations and decision of council as a member of the University Council, he would by law have been empowered so to sit as a member during the disciplinary proceedings. Had he sat, his sitting would have been implicitly authorised by legislation.

In my judgment the objective observer, despite knowing all this, would have been disturbed at the presence of Rev. Fr. Dr. Picho Epiphany Odubuker at that meeting, being the alleged victim of the applicant’s conduct complained of. It however so happens that when the University Council sat on 26th February 2016 to consider the report and recommendations of its Appointments Board, under MIN/7.1(b)/MUCM/11 (annexure “J” to the affidavit in reply) the

University Secretary, Rev. Fr. Dr. Picho Epiphany Odubuker, was asked to leave and did not attend the closed door session on account of being “the alleged victim in the assault case and he had declared a conflict of interest.” The Vice chancellor too moved out because “the alleged assault case happened at her office and she was a potential witness to the case.” Two members of staff who had testified before the select committee as well left. The Legal Officer of the University then served as the Secretary of the meeting. In the circumstances, the argument that the Council was biased by reason only of the nature of its composition at that meeting is not supported by the evidence on record. Having considered the evidence from all the material available to me, I have not found anything to support the view that there was a reasonable apprehension of bias at the Council meeting of 26th February 2016. The composition of the University Council did not, without more, create an apprehension of bias in a reasonably well-informed person that would taint the disciplinary proceedings against the applicant. From the now conventional question relating to perceived bias in a decision-maker, in the sense defined in *In re Medicaments [2001] 1 WLR 700*, as bias in a judicial decision-maker being “an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve,” there is nothing to support the possibility of a rational perception that bias, if there was any, had travelled from the advisory role of the select committee, through to the Appointments Board and ultimately to the University Council and hence into the decision-making process. On a fair reading of the minutes of the respondent at the meeting of 26th February 2016, I do not find any evidence to support the view that the issue had been pre-determined against the appellant. Therefore there is no merit to the argument of bias.

3. Whether the decision to terminate the applicant’s contract of employment was irrational.

The court was invited to determine whether the respondent has failed to exercise its statutory discretion reasonably as to amount to irrationality in the decision taken to terminate the applicant’s contract of employment. Reasonableness was defined in *Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223* where it was held:

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of

the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short v. Poole Corporation* [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Decision-makers remain free to take whatever decision they deemed right in their conscience and understanding of the facts and the law, and not be compelled to adopt the views expressed by other members of the administrative tribunal. “Reasonable” means here that the reasons do in fact or in principle support the conclusion reached. When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum; the result is to be looked at in the context of the evidence, the parties’ submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference is the appointment of the tribunal and not the court as the front line adjudicator, the tribunal’s proximity to the dispute, its expertise, etc. the concept of “deference as respect” requires of the court’s respectful attention to the reasons offered or which could be offered in support of a decision and not submission. The fact that there may be an alternative decision to that reached by the tribunal does not inevitably lead to the conclusion that the tribunal’s decision should be set aside if the decision itself is in the realm of reasonable outcomes. On judicial review, a judge should pay “respectful attention” to the decision-maker’s reasons, and be

cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

To justify interference by court without delving in the merits, the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. It is opined by De Smith, Woolf and Jowel in their *Judicial Review of Administrative Action*, Fifth Edition (pp.594-596) that it is “a principle requiring the administrative authority, when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues”. This principle, as reviewed by the Courts in cases such as *R (Daly) v. Secretary of State for Home Department [2001] 2 AC 532*, encompasses any or all of the following tests:

- i. The balancing test, which requires a balancing of the ends which an official decision attempts to achieve against the means applied to achieve them. This requires an identification of the ends or purposes sought by the official decisions. In addition it requires an identification of the means employed to achieve those ends, a task which frequently involves an assessment of the decision upon affected persons.
- ii. The necessity test which requires that where a particular objective can be achieved by more than one available means, the least harmful of these means should be adopted to achieve a particular objective. ...this aspect of proportionality requires public bodies to adopt those regulatory measures which cause minimum injury to an individual or community.
- iii. The suitability test requires authorities to employ means which are appropriate to the accomplishment of a given law, and which are not in themselves incapable of implementation or unlawful.

The proceedings against the applicant were of a disciplinary nature, taken within the context of an employment relationship between him and respondent. One of the possible outcomes of such proceedings is dismissal for serious misconduct, which includes physical assault of a fellow employee, as provided for by rules 3 (2) and 5 (c) of the Disciplinary Code, Schedule 1 of *The Employment Act*. Rule 2 (l) of section (F-s) of *The Public Service Standing Orders, 2010* too categorises assault as misconduct. Under rule 6 and 7 of section (F-t) of the same orders, a public

officer may be dismissed only in the most serious cases of misconduct and acting in a way incompatible with his or her status as a Public officer. In such circumstances, the public officer forfeits all his or her rights and privileges as a Public officer, including the claim to a period of notice. I have considered the three tests suggested in *R (Daly) v. Secretary of State for Home Department* [2001] 2 AC 532 in the light of the facts of this case. The issue raised here is whether the decision is vitiated by the University Council having taken into account irrelevant or neglected to take into account relevant factors or is so manifestly unreasonable that no reasonable authority would have made such a decision.

The select committee which investigated the applicant's conduct in its report (pages 16 – 17 of annexure "G" to the affidavit in reply) found, among other things, that the "University Secretary was physically assaulted by the AR, which occasioned an injury on his forehead..." at pages 18 – 19 of its report, it recommended that the Appointments Board takes into account the fact that; "the University has incurred a lot of expenses on the investigation of this assault; US (the University Secretary) suffered a physical and emotional injury as Senior University Officer; the AR's reputation has been put to test as Senior University Officer and the Ag. VC (Vice Chancellor) has been disrespected." The Committee made those recommendations because of the applicant's conduct's "severe ramifications on the image of the University and the reputation of the Council."

In turn, the Appointments Board in its recommendations to the University Council (page 28 of annexure "H1" to the affidavit in reply) stated as follows;

1. Dr. Lam Lagoro James assaulted Fr. Picho at the office of his supervisor, that is the VC, who requested him in vain not to assault Fr. Picho. This is Misconduct under *Uganda Public Service Standing Orders, Disciplinary Procedures (F-s), 2 (l)*. It is also insubordination under *Public Service Standing Orders, Disciplinary Procedures (F-t), 6 and 7*. A Public Officer who commits most serious cases of misconduct can be dismissed.
2. He should be terminated his service (sic) as AR but with Notice of 3 months' net pay to him in lieu of notice under section 65 (1) (a), (2) (a) and section 58 (3) (c) of *Employment Act, 2006* Laws of Uganda.

These recommendations were considered by the University Council at its closed meeting of 26th February 2016 (pages 3 – 5 of annexure “J” to the affidavit in reply) where it highlighted the following findings of the Appointments Board;

1. The fruitless efforts of the select committee to reconcile Fr. Picho and Dr. James Lam Lagoro even after Dr. Lam had first apologised for the council select committee which he later denied before the Appointments Board.
2. The refusal of Doctor Lam to take oath before members of Appointments Board.
3. The continued denial of the offence before the Appointments Board, in spite of the overwhelming evidence by eyewitnesses.
4. Dr. Lam’s inability to show remorse for his actions.
5. Dr. Lam’s lack of respect for the Vice Chancellor evidenced by the fact that he assaulted Fr. Picho in office of Vice Chancellor and in presence of Vice Chancellor.
6. The negative implication of Dr. Lam’s actions as a senior university officer on other university staff in event that Council failed to take administrative disciplinary action.
7. Dr. Lam’s lack of respect to his senior colleague.
8. Un-acceptable gross misconduct, insubordination and untruthfulness of a senior University Officer.

Following deliberations, (at pages 8 – 11 of annexure “J” to the affidavit in reply) the University Council then resolved under minute 7.1(b).5. i and ii at page 11 of the minutes that; “Dr. James Lam Lagoro, the Academic Registrar be terminated with three months’ payment in lieu of notice for assault and insubordination which constitute misconduct in line with Uganda Public Service Standing Orders, 2010, Disciplinary Procedures (F-t), 6 and 7 and further sections 65 (1) (a), (2) (a) and section 58 (3) (c) of Employment Act, 2006 Laws of Uganda.” Further that “the termination letter should be issued to Dr. James Lam Lagoro, the Academic Registrar as soon as possible.” The applicant was then issued with a letter of termination of his services dated 29th February 2016 with payment of three months’ salary in lieu of notice. By a cheque dated 18th March 2016, the applicant was duly paid a sum of shs. 12,421,500/= as three months’ salary in lieu of notice. It is clear from the minutes of the meeting that the University Council arrived at its decision as to its preferred option after a full and proper consideration of the material before it, and was not simply rubber-stamping the recommendations of the Appointments Board.

It is curious though that the applicant's letter of appointment (annexure "B" to the affidavit in support of the motion and annexure "L" to the affidavit in reply) indicated that the appointment was to take "effect from the date of assumption of duty for a period of five years and may be legible for re-appointment for one more term." The contract is silent as regards termination of employment before expiry of the stipulated five years. Where a contract of employment stipulates a specific duration but is silent as to termination, it may be construed as a fixed-term employment contract. The premature termination of a fixed-term employment contract amounts to a breach of contract, unless the contract specifically makes provision for earlier termination. Under common law the damages that an employee is able to claim for breach of such a contract, is limited to the amount still due for the remainder of the period of the contract.

In the Canadian case of *John Howard v. Benson Group Inc., carrying on business as The Benson Group Inc.* 2016 ONCA 256, the appellant was employed as a Truck Shop Manager and then a Sales Development Manager with the defendant employer, an automotive repair centre. His employment contract was for a five-year term. The employer terminated his employment, without alleging cause, just twenty-three months into the five-year term. The appellant filed a suit for breach of contract and sought compensation for the remainder of his contract, three years' salary. The employer responded relying upon a termination provision (clause 8.1) contained in the employment contract in support of its position that it could terminate the appellant's employment during the term of the employment relationship by providing him with notice. The relevant termination provision stated as follows:

Employment may be terminated at any time by the Employer and any amounts paid to the Employee shall be in accordance with the *Employment Standards Act of Ontario*.

In reaching its decision, the court determined that the termination provision in the employment contract was "sufficiently ambiguous as to the true extent of the plaintiff's entitlement under the *E.S.A.* and in the result, that ambiguity must be construed against the defendant again having regard to the power imbalance that exists between an employer and employee as a matter of course." As a remedy, the appellant was awarded common law damages for wrongful dismissal the quantum of which was left to be assessed at a trial. On appeal, the issue to be decided was whether an employee who is employed under a fixed term employment contract that does not

provide for early termination without cause, is entitled to payment of the unexpired portion of the contract on early termination of the contract. The court answered this question in the affirmative, reversing the motion judge's decision. Specifically, the court concluded that if a pre-determined notice period is not specified in a fixed-term employment contract, the employee is entitled to all the wages he or she would have received to the end of the fixed term if the employer terminates the contract early.

By way of comparison, in *Regina v. Hull University Visitor, ex parte Page*, [1992] ICR 67 the employee's terms included two provisions, one in his letter of appointment which provided for either party to terminate on three months' notice in writing, and one in the university's statutes empowering the university to dismiss him for good cause. The court held that the employee could be dismissed on either basis. Good cause was not required if three months' notice was given. The right to terminate on notice was not to be cut down by the "good cause" term. The court made clear, that this was a question of construction of the particular contractual documents and terms involved and no general principle of law was established that notice clauses in such contracts are to prevail over other express terms concerned with termination.

Unlike in the above case in which an express provision in the contract was inconsistent with the university's statutes, in *Howard v. Benson Group* 2016 ONCA 256, the parties had not bargained for a particular term of notice or payment in lieu thereof. In the instant case, although the letter of appointment did not specify that the applicant's employment could be terminated on notice, it expressly provided that the appointment was in accordance with "the 1995 constitution of the Republic of Uganda as amended, the Universities and Other Tertiary Institutions Act and other laws applicable." By this clause, the provisions of sections 65 (1) (a), (2) (a) and 58 (3) (c) of *The Employment Act, 2006* became implied terms in the contract. It therefore is not a fixed term contract despite its silence as regards termination of employment before expiry of the stipulated five years and could be terminated at any time by the respondent upon giving the applicant three months' notice or payment in lieu of notice. Absence of an express provision for early termination of the contract could therefore not preclude the respondent from invoking the relevant provisions of *The Employment Act, 2006*.

The position arrived at above is supported by the decision in *Barclays Bank of Uganda v. Godfrey Mubiru S. C. Civil Appeal No.1 of 1998* where it was decided that “where a service contract is governed by a written agreement between the employer and the employee, as in this case, termination of employment or service to be rendered will depend both on the terms of the agreement and on the law applicable.” it was further held that;

Where any contract of employment, stipulates that a party may terminate it by giving notice of a specified period, such contract can be terminated by giving the stipulated notice for the period. In default of such notice by the employer, the employee is entitled to receive payment in lieu of notice and where no period for notice is stipulated, compensation will be awarded for reasonable notice which should have been given, depending on the nature and duration of employment...”

Having reviewed the considerations which guided the respondent in arriving at the decision it did, taking into account the proportionality of dismissal as the means employed to achieve those ends, the impugned decision cannot be labelled as manifestly unreasonable that no reasonable authority properly instructed in law entrusted with the power in question could reasonably have arrived at such a decision. There is no evidence that the respondent took into account irrelevant or neglected to take into account relevant factors and the reasons given do in fact and in principle support the conclusion reached. The decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law and which any well-governed public body, with the public interest at heart, could have taken. I therefore find that the respondent’s decision to terminate the applicant’s contract of employment was not irrational.

4. Whether the applicant is entitled to the remedies sought.

Judicial review by way of the old prerogative writs has always been understood to be discretionary. This means that even if the applicant makes out a case for review on the merits, the reviewing court has an overriding discretion to refuse relief. The orders sought by the applicant are of a discretionary nature and court is at liberty to refuse to grant any of them if it thinks fit to do so depending on the circumstances of the case, even where there is a clear violation of the principle of natural justice (see *John Jet Mwebaze v. Makerere University Council and two others*, H.C. Misc Application No. 353 of 2005; D. J. Mullan, “*The Discretionary Nature of Judicial Review*”, in R. J. Sharpe and K. Roach, eds., *Taking Remedies*

Seriously: 2009 (2010), 420, at p. 421 and D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (6th ed. 2014), at pp. 686-87). Considering a similar issue in *Nichol v. Gateshead Metropolitan Borough Council (1988) 87 LGR 435 (CA)*, the court described how it was to exercise any discretion it had, to give relief on an application for judicial review, thus:

The court has an overall discretion as to whether to grant relief or not. In considering how that discretion should be exercised, the court is entitled to have regard to such matters as the following:

- (1) The nature and importance of the flaw in the challenged decision.
- (2) The conduct of the applicant.
- (3) The effect on administration of granting relief.

In the instant application, I have found that the respondent's Vice Chancellor acted irregularly when she expressed her decision to interdict the applicant as a directive by the University Council after her consultation with the Council. The University Council's Appointments Board as well violated the applicant's right to a fair hearing when it failed to disclose to the applicant the contents of the report presented to it by the select committee and the adverse statements and representations given to it by the complainant and other witnesses during the disciplinary proceedings. Nevertheless, I am also mindful of the fact the conduct for which the applicant's employment was terminated was also the subject of criminal charges for which the applicant was charged and tried by the Grade One Magistrate's Court of Arua whereupon he was on 28th July 2016 convicted and sentenced to three days of community service of five hours each, which sentence he duly served.

Furthermore, at common law there cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or none (see *Ridge v. Baldwin [1964] AC 40* and *Stanbic Bank Ltd. v. Kiyemba Mutale, S. C Civil Appeal No. 02 of 2010*). Although, section 71 (5) (a) of *The Employment Act* empowers court to order reinstatement in exercising this discretion, fair play towards the employee on the one hand and interest of the employer, including considerations of discipline in the establishment, on the other, require to be duly safeguarded. This is necessary in the interest both of security of tenure of the applicant and of smooth and harmonious working of the respondent. Proper balance has to be achieved between the conflicting claims of the employer and the employee without jeopardising the wider interests of industrial peace and progress. In any event, according to section 71 (6) (d)

of the Act, such an order will not be granted where the dismissal is found to have been unfair only because the employer did not follow a proper procedure. In the circumstances of this case, considering the strained relations between the applicant and the respondent, reinstatement is neither desirable nor expedient.

In addition, section 69 (3) of *The Employment Act* authorises an employer to summarily dismiss an employee where such employee has “fundamentally broken his or her obligations arising under the contract of service.” There is no exhaustive list of the misconduct that justifies summary dismissal and according to *Laws v. London Chronicle [1959] 1 WLR 698*, even one isolated act of misconduct is sufficient to justify summary dismissal. The test as stated in that case is whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service (see also *Bank of Uganda v. Betty Tinkamanyire, S. C. Civil Appeal No.12 of 2007*). Summary dismissal according to section 69 (1) of The Employment Act is dismissal without notice or with a shorter period of notice than that to which the employee is entitled by law or contract (see also *John Elatu v. Uganda Airlines Corporation [1984] HCB 40*).

In *Assimwe v. Amref, H. C. Civil Suit No. 628 of 1992*, the court set out some of the situations under which an employer may exercise his or her right to summarily dismiss an employee when it stated that;

There is no doubt that a master has a right to dismiss his employee without notice on grounds of employee’s insulting behaviour, disobedience of lawful and reasonable orders, immorality, assault of fellow workers, incompetence, negligence and drunkardness (sic). A servant may be dismissed summarily on grounds of gross misconduct and neglect of duty or if guilty of fraud or dishonesty in his conduct of his employer’s business. (Emphasis added).

The applicant’s contract of employment was terminated mainly because it was established as a fact following disciplinary proceedings that he physically assaulted the respondent’s University Secretary, Rev. Fr. Dr. Picho Epiphany Odubuker, from the office of the respondent’s Vice Chancellor and in her presence on 4th September 2015. Assaulting a fellow employee at work is in law characterised as an act of gross misconduct in employment relations. It is conduct which under section 69 (3) of *The Employment Act* authorises would constitute a fundamental breach of

the employee's obligations arising under the contract of service justifying an employer to summarily dismiss an employee. This was an option available to the respondent on the facts of this case and had the respondent opted for it, the applicant would have been dismissed summarily in which case he would under section 69 (1) of *The Employment Act* have lost any claim to payment in lieu of notice. The respondent was magnanimous in terminating his employment with payment in lieu of notice. I have as well considered that in light of the minor violations in procedure, the termination would technically be unfair but under section 66 (4) of *The Employment Act*, the remedy for unfair dismissal is an award of a sum equivalent to four weeks' pay. In addition, an employment agreement into which a term of notice or payment in lieu is read should be treated as fixing liquidated damages or a contractual amount. From either perspective, the applicant was fully indemnified by the three months' payment in lieu of notice.

Overall, I find this application to be essentially a collateral attack. It is a proceeding whose specific object is other than vindicating an aspect of public law. It is intended instead to circumvent the effect of an employment decision rendered against the applicant whose reversal would be very difficult through an ordinary suit for the enforcement of employment rights. It constitutes an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision was justified, as clearly it was. Moreover, the grant of remedies under judicial review is itself discretionary and may be denied even if the applicant establishes valid grounds for the court's intervention. The discretionary nature of judicial review reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individuals. The analysis in the instant application cannot simply look at the intended aims of judicial review from the applicant's perspective but also must engage with the more fundamental question of how judicial review interacts with the operation of alternative procedures in employment law litigation. For the foregoing reasons I find that the applicant has not made out a case justifying exercise of the court's discretion in his favour. The application is therefore dismissed with costs to the respondent.

Delivered at Arua this 15th day of June 2017.

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Stephen Mubiru
Judge
15th June 2017.