

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
MISCELLANEOUS CIVIL CAUSE No. 0007 OF 2018

OYARO JOHN OWINY APPLICANT

5

VERSUS

KITGUM MUNICIPAL COUNCILRESPONDENT

Before: Hon Justice Stephen Mubiru.

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RULING

This is an application made under the provisions of sections 33 and 36 of *The Judicature Act*, Rules 3, 4, 5, 6, 7 and 8 of *The Judicature (Judicial Review) Rules*, S.I. No. 11 of 2001, and section 98 of *The Civil Procedure Act* seeking judicial review of an administrative decision by way of grant of an order of Certiorari quashing that decision taken by the respondent to interdict the applicant from his employment with the respondent as the Head teacher of Pandwong Primary School, an order of mandamus compelling and directing the respondent to restore the applicant to his position with full pay, an order of prohibition restraining the respondent from flouting Public Service Disciplinary Procedures, General damages and costs.

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The application is supported by an affidavit sworn by the applicant by which he contends that the process leading to and the ultimate decision to interdict him from his employment was illegal and the action was taken without jurisdiction, he was denied an opportunity to be heard and the decision violated all disciplinary procedure prescribed by *The Uganda Public Service Standing Orders (2010)*. His subsequent transfer as Head teacher from Pandwong Primary School to Kitgum Girls' Primary School and later to Kitgum Prison Primary School was done without consultation with the foundation bodies of the affected schools and therefore breached *The Education (Management Committee) Regulations*.

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The application is opposed. In an affidavit in reply sworn by the respondent's Human Resource Officer, Mr. Ochan Patrick Ocitti, it is contended that the decision to transfer the applicant was part of the normal processes of transfer and the respondent's Town Clerk was legally empowered to do so. The applicant's substantive appointment was that of Deputy Head teacher but upon the

resignation of the then head teacher of Pandwong Primary School during 2016, he was assigned the duties of head teacher pending the appointment of another head teacher. When a new head teacher for Pandwong Primary School was subsequently appointed, the applicant was transferred to Kitgum Girls Primary School but the applicant refused to hand over to the new head teacher
5 posted to Pandwong Primary School. Despite several warnings given to him asking him to hand over, the applicant was adamant. This prompted his interdiction on disciplinary grounds.

It is common ground as the background to this application that before his transfer to Kitgum District, the applicant had on or about 1st April, 2008 been appointed on promotion as Deputy
10 Head teacher, Grade Two, by Wakiso District Service Commission and posted to Kirugaluga primary School in Wakiso District (annexure "A1" and "A2" to the affidavit in reply). Upon his transfer to Kitgum District, he was retained at that position and posted to Kitgum Primary School, later to Kitgum Public Primary School and eventually to Pandwong Primary School (annexure "B1," "B3" and "B4" to the affidavit in reply). Upon the resignation of the then head
15 teacher of Pandwong Primary School, he was assigned the duties of head teacher, pending the appointment of another head teacher (annexure "A" to the affidavit in support of the motion and "C" to the affidavit in reply). When a new head teacher for Pandwong Primary School was subsequently appointed, the applicant was transferred to Kitgum Girls Primary School, then to Kitgum Prison Primary School and finally back to Padwong Primary School, on the latter
20 posting, as Head teacher (annexure "C," "D" and "E" to the affidavit in support of the motion and "B1," "B3," "B4," "C" and "E" to the affidavit in reply).

Following accusations of insubordination, the applicant was on 12th April, 2018 interdicted by the respondent's Town Clerk (annexure "H1" to the affidavit in support of the motion and "C" to
25 the affidavit in reply). Whereas the applicant contends that interdiction was illegal since the Town Clerk could not exercise such authority and was taken in violation of his right to be heard, the respondent contends it was lawful and justified by reason of the applicant's misconduct and the decision was taken in accordance with the relevant procedural requirements. The decision appears to have attracted political intervention of the Mayor (annexure "A" to the applicant's
30 affidavit in rejoinder).

In his written submissions, counsel for the applicant Mr. Silver Oyet Okeny argued that the Town Clerk's decision to interdict the applicant was *ultra vires* in that such power is instead vested in The Chief Administrative Officer of Kitgum Local Government or in the alternative, the District Service Commission. Furthermore, the applicant's interdiction was arbitrary,
5 oppressive and vindictive. The established procedure was not complied with. The progressive approach to disciplinary action was not followed. He was as well never accorded an opportunity to be heard. He therefore argued that the applicant is entitled to the prerogative orders sought as well as general damages.

10 In response, counsel for the respondent Mr. Ogik Jude argued that the Town Clerk's decision to interdict the applicant was not *ultra vires* in that the supervisory power vested in The Chief Administrative Officer of Kitgum Local Government at the District level is the same that is vested in a Town Clerk at the Municipal Council level. The decision to interdict is not subject to the rules of natural justice but rather it is during the disciplinary processes that follow, that those
15 rules should be observed. The applicant at the stage of interdiction was only entitled to being given reasons for the interdiction and this was done. He was invited by the letter of interdiction to present his defence within fourteen days, which he has not done to date thereby stalling the disciplinary process. The application consequently is premature and the applicant is not entitled to any of the reliefs sought.

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According to rule 3 of *The Judicature (Judicial Review) Rules, 2009, S.I. 11 of 2009*, applications may be made under section 38 (2) of *The Judicature Act*, for orders of mandamus, prohibition, certiorari or an injunction (by way of judicial review). Judicial review of administrative action is a procedure by which a person who has been affected by a particular
25 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.

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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).

Public authorities need to be particularly careful to ensure that all aspects of their actions and decisions are not only lawful, but can be clearly shown to be fair and reasonable in the circumstances. Decisions will be unlawful if they are made without the legal power, i.e. where a public authority acts beyond its statutory power or in abuse of power or where there are defects in its exercise. This includes; 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 include; 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 was 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).

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It may as well arise where there has been an excess of jurisdiction, including: error of law (in arriving at their decision, a decision-maker must not misinterpret the legislation under which they are acting or in any way indicate a misunderstanding of the law. Like *ultra vires* therefore, this ground involves persons or bodies acting beyond their lawful authority.

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Judicial review on any of those grounds is concerned not with the merits of the decision, but rather with the question whether the public body has acted lawfully. Judicial review is not the re-hearing of the merits of a particular case, but rather the High Court reviews a decision to make sure that the decision-maker used the correct legal reasoning or followed the correct legal procedures. If the Court finds that a decision has been made unlawfully, the powers of the court will generally be confined to setting the decision aside and remitting the matter to the decision-maker for reconsideration according to law.

The court ought to proceed with due regard to the limits within which it 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, thus; - (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 and in matters of administrative decision making in exercise of discretion, the challenge ought to be
5 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
10 administrative decision is permitted, the court will be substituting its own decision without the necessary expertise, which itself may not be infallible.

It follows from this that there will be circumstances in which although a decision is not the correct or preferable decision on the facts, it will not be open to judicial review. Conversely,
15 there may be situations where a decision is the correct or preferable one, but may be set aside because it is subject to legal error. As noted earlier, the results or outcomes of the decision-making process are not primary concerns of judicial review. In *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd*: (1986) 162 CLR 24, 40-41 citing *Wednesbury Corporation [1948] 1 KB, 228* the court opined;

20 The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion, which the legislator has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.

25 Similarly in *Ridge v. Baldwin and Others [1963] 2 All ER 66 at 91, [1964] AC 40 at 96*, it was observed;

30 a danger of usurpation of power on the part of the courts ... under the pretext of having regard to the principles of natural justice ... I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity for putting his case.

Lord Brightman came to the same conclusion in his holding at page 154 where he said:

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

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The issues to be decided in this application are as follows;

1. Whether the respondent's Town Clerk's interdiction of the applicant was *ultra vires* his powers.
2. Whether the applicant's interdiction was marred by procedural irregularity.
- 10 3. Whether the decision to transfer the applicant was irrational.
4. Whether the applicant is entitled to the relief sought.

First issue : Whether the respondent's Town Clerk's interdiction of the applicant was *ultra vires* his powers.

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The arguments under this issue by counsel for the applicant are twofold; first, that the Town Clerk acted without the legal power to do so (unlawful on the grounds of illegality), and secondly, he acted without observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness).

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- a. Illegality on account of absence of legal power to interdict;

The applicant faults the respondent's decision to interdict him, advancing the argument that such power was wrongly exercised by the Town Clerk since it is a power that vests in the district
25 Chief Administrative officer. It was therefore exercised in an *ultra vires* manner, hence it is tainted with illegality. He relied on the provisions of sections 55, 64 (1) and 65 (2) (c) of *The Local Governments Act* and a number of decisions of this court and the Court of Appeal. The respondent disagrees and argues that whereas the power to interdict public officers working with a District Local Government lie with Chief Administrative officer, in respect of public officers
30 employed by Municipal Councils they are vested in the Town Clerk. He relied on the provisions of section 64 (2) of *The Local Governments Act*, Regulation 31 of *The Public Service Commission Regulations* and 28 of *The Education Service commission Regulations*.

Supervisory and disciplinary control over public servants is governed by law. Under Article 200 of *The Constitution of the Republic of Uganda*, District Service Commissions have the power to appoint persons to hold or act in any office in the service of a district, including the power to confirm appointments, to exercise disciplinary control over persons holding or acting in any such office and to remove those persons from office. Section 24 of *The Interpretation Act*, provides that where, by any Act, a power to make any appointment is conferred, the authority having power to make the appointment also has power (subject to any limitations or qualifications which affect the power of appointment) to remove, suspend, reappoint or reinstate any person appointed in the exercise of the power. However, article 200 (2) of *The Constitution of the Republic of Uganda, 1995* requires that the terms and conditions of service of local government staff must conform with those prescribed by the Public Service Commission for the public service generally.

Section 29 (1) of *The Education Service Act, 2002*, vests the Teaching Service Commission with the power to make standing orders providing for the administration and conduct of, and the terms and conditions of service of public officers in the Education Service. Sub-section (2) thereof provides that until the Commission makes standing orders under the Act, any standing orders in force in the public service immediately before the coming into force of the Act shall, with the necessary modifications, continue to apply to the Education Service as if made under that Act. It is by virtue of this provision that *The Uganda Public Service Standing Orders (2010 edition)*, apply to the teaching service in the Local Government setup.

According to regulation 10 (d) of Part (A – a) of *The Uganda Public Service Standing Orders (2010 edition)*, the power to appoint, confirm, discipline and remove officers from office in the public service is vested in the relevant District Service Commission in the case of Local Government staff except the Chief Administrative Officer, Deputy Chief Administrative Officer, Town Clerk and Deputy Town Clerk of City and Town Clerks of a Municipal Council. The Applicability Chapter of *The Uganda Public Service Standing Orders (2010 edition)* provides that all public officers are bound by the Standing Orders. These orders therefore apply to all public officers serving in Ministries, Departments or Local Government units.

The expression "Public Officer" has the meaning assigned to it by articles 175 (a), 175 (b) and 257 (1) of *The Constitution of the Republic of Uganda, 1995* which are; "any person holding or acting in an office in the public service," where "public service" means service in any civil capacity of the Government the emoluments for which are payable directly from the Consolidated Fund or directly out of monies provided by Parliament; and that "public office" means an office in the public service; "public officer" means a person holding or acting in any public office; "public service" means service in a civil capacity of the Government or of a local government. Being a person employed in civil capacity a local government, whose emoluments are payable directly from the Consolidated Fund or directly out of monies provided by Parliament, the applicant is a Public Officer, bound by the Standing Orders.

The Public Service Standing Orders, 2010 in part (F-S), define interdiction as "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." Accordingly, interdiction involves a temporary removal of an officer from performing his or her normal duties. An officer, who is interdicted, is prohibited from coming to work, and he or she receives no less than one half (1/2) of his or her salary with effect from the date of interdiction until the matter is finalized. If the officer is cleared or acquitted at the conclusion of the disciplinary proceedings or trial that triggered the interdiction, he or she is granted all emoluments withheld during the period of interdiction in the event that he or she is allowed to return to duty. All emoluments are therefore restored.

Under *The Public Service Commission Regulations, S.I No.1 of 2009*, Regulation 38 vests that power in the "responsible officer," which expression means; - (a) the Permanent Secretary of the Ministry in or under which, the officer is serving; (b) the Chief Administrative Officer or Town Clerk of the Local Government, Municipality or Town Council under which the officer is serving; (c) in the case of an officer serving in or under a Ministry or department set out in the first column of the schedule, the person holding the office set out opposite; or (d) in the case of an officer to whom neither of the preceding paragraphs of this definition applies, the Permanent Secretary of the Ministry of Local Government. Under Regulation 38, the responsible officer

may interdict an officer from exercising his or her powers and performing the functions of his or her office, where:-

- a. a responsible officer considers that public interest requires that a public officer ceases to exercise the powers and perform the functions of his or her office; or
- 5 b. disciplinary proceedings are being taken or are about to be taken or if criminal proceedings are being instituted against him or her,

Similarly, Under *The Education Service Commission Regulations, S.I 51 of 2012*, “responsible officer” means; - (a) the permanent secretary of the ministry responsible for education; (b) the
10 chief administrative officer at the district; and (c) the town clerk at the city and municipal council. Under Regulation 28, the responsible officer may interdict an officer from exercising his or her powers and performing the functions of his or her office, where the responsible officer considers that due to public interest:-

- a. an officer should cease to perform the functions of his or her office;
- 15 b. disciplinary proceedings for an officer’s dismissal are being taken or are about to be taken; or
- c. criminal proceedings are about to be instituted against an officer.

An officer may therefore be interdicted when disciplinary proceedings for his or her dismissal
20 are being undertaken or are about to be undertaken or if it is considered not in the public interest for him or her to remain in office before he or she is cleared of the charge against him or her. Interdiction may also take place on the grounds that criminal charges are pending.

I have considered the provisions of sections 55, 64 (1), (2) and 65 (2) (c) of *The Local*
25 *Governments Act* and the authorities cited by both counsel in their written submissions. These provisions deal generally with; the functions of a district service commission and functions of the chief administrative officer. It is one of the rules of statutory interpretation that when one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter
30 prevails. If two statutes address the same subject, the more specific statute controls over the general statute. I find that *The Local Governments Act* is silent on the powers and procedures of interdiction yet both Regulation 38 of *The Public Service Commission Regulations, S.I No.1 of 2009*, and Regulation 28 of *The Education Service Commission Regulations, S.I 51 of 2012*, deal

with the question of interdiction in a more specific manner. A specific regulation may not be nullified by one of general application unless the legislative intent is plain (see *Commonwealth ex rel. Virginia Department of Corrections v. Brown*, 259 Va. 697, 529 S.E.2d 96 (2000)). For that reason being the later and more specific statutes, they controls over the earlier, more general statute (*generalia specialibus non derogant*).

The Uganda Public Service Standing Orders (2010 edition), define "responsible officer" as "the Permanent Secretary of a Ministry or a Department under which the officer is serving; or head of Department as defined in the Public Service Act, or Chief Administrative Officer or Town Clerk of a Local Government. Regulation 16 of Part (A – a) thereof at page 5 casts upon "Responsible Officers," the duty to ensure the proper application of the provisions of the Standing Orders. The applicant herein was employed as a "Public Officer" by a Municipal council. By virtue of Regulation 38 of *The Public Service Commission Regulations, S.I No.1 of 2009*, and Regulation 28 of *The Education Service Commission Regulations, S.I 51 of 2012*, the Town Clerk, being the "Responsible Officer," had the legal capacity to interdict the applicant, who is a "Public Officer," from exercising his powers and performing the functions of his office. The Town Clerk's decision therefore cannot be assailed for illegality on account of absence of legal power to interdict. I find that it was not *ultra vires* on that account.

a. Illegality on account of failure to observe the rules of natural justice;

Secondly, the applicant argues that his interdiction violated his right to just and fair treatment in administrative decisions in so far as the Town Clerk was biased, prejudiced and acted summarily in breach of the rules of natural justice. The respondent's rebuttal of this argument is that no right to a hearing attaches to the decision to interdict, since that right is guaranteed in the disciplinary processes that follow upon interdiction.

It is trite that any discretionary power which has to be, or has been exercised by a public authority, must be, or must have been exercised, reasonably and in good faith, and in furtherance of the pertinent statutory provisions which govern the exercise of that authority. Accordingly, there is no such thing as unreviewable or unfettered administrative discretion (see *Padfield v.*

Minister of Agriculture, Fisheries and Food, [1968] AC 997; *Teh Cheng Poh alias Char Meh v. Public Prosecutor, Malaysia* [1980] AC 458; and *C.O. Williams Construction Ltd. v. Blackman and Another* (1989) 41 WIR 31). The now well-established doctrine that statutory powers must be exercised reasonably and in good faith and in keeping with the overall statutory objectives as regards the exercise of that power, has had to be reconciled by the Courts with the equally important doctrine that the Court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts *ultra vires*, but if it remains within those bounds, it acts *intra vires* and it is not for any Court to interfere with the exercise of that discretion

By virtue of Regulation 38 of *The Public Service Commission Regulations, S.I No.1 of 2009*, and Regulation 28 of *The Education Service Commission Regulations, S.I 51 of 2012*, a public officer may be interdicted pending a disciplinary enquiry. Interdiction therefore is not a form of a disciplinary sanction but is in the nature of the first step taken towards possible disciplinary sanctions. In that sense, interdiction is the employment equivalent of arrest. Factors that should be taken into account at that stage include;- the nature and gravity of the criminal or disciplinary offence laid against the officer; possibility of the same offence or misconduct recurring if the officer remains in office; availability of suitable posts for re-deploying the officer; and the likely public perception. Interdiction of an officer ordinarily occurs only when re-deployment to alternative duties is not possible or inappropriate and where to do otherwise is manifestly not in the public interest. It is imposed in respect of an officer charged with a criminal or disciplinary offence which may lead to his or her removal from the service.

The key rationale for interdiction is the reasonable apprehension that the public officer will interfere with investigation or repeat the misconduct. It follows that it is only in exceptional circumstances that a public officer should be suspended pending a disciplinary enquiry. Interdiction may be justified where the Responsible Officer has a reasonable concern that the "business interest" of the entity would be harmed by the public officer's continued presence in the workplace, or where the public officer 's presence would affect working relationships, or

where the public officer has access to confidential information, or if the offence or accusation is of a serious nature.

In most cases of interdiction, the nature and gravity of the criminal or disciplinary offence laid
5 against the officer is such that it would not be in the public interest for the officer to continue to
discharge his or her official duties before he or she is cleared of the charge. That a specific
administrative authority has had a practice of proper resort to this option may be illustrated by
the fact that a higher percentage of its interdicted officers have eventually been either dismissed,
compulsorily retired or otherwise removed from the service at the conclusion of the disciplinary
10 proceedings, and that there have not been cases where such officers have been vindicated or
reinstated upon judicial review.

There are nevertheless substantial social and personal implications inherent in an interdiction.
Like an arrest, interdiction usually prejudices an alleged offender psychologically by being
15 barred from going to work and pursuing one's chosen calling, and of being seen by the
community as "a suspect." The Public Officer suffers palpable prejudice to reputation, and
possibly advancement and fulfilment. Consequently, resort to interdiction is not a matter to be
taken lightly. These possible repercussions make a compelling case for safeguards and regulation
of decisions that involve stoppage of a public officer from reporting to work, albeit in different
20 ways; depending on whether such a decision is an interdiction or a suspension. The rules of
fairness applicable to suspension are not necessarily applicable to interdiction.

Within the context of employment relations, interdiction is not the same as suspension. Whereas
both measures involve the temporary stoppage of a public officer from reporting to work,
25 suspension may be taken as a disciplinary sanction, (but may also be taken for reasons purely of
good administration or business efficacy, unrelated to discipline). On the other hand, interdiction
is not a disciplinary sanction but invariably taken as a step pending a disciplinary enquiry and
adjudication. Unlike interdiction which is a neutral action taken to allow unfettered investigation,
suspension is in most cases a disciplinary action that must therefore be taken in the context of
30 natural justice. This is more so in situations where a suspension is so prolonged that it acquires
the character of a final disciplinary action.

Suspension takes two forms;- preventative or precautionary suspension; and punitive suspension. Suspension when adopted as a sanction or for punitive reasons is not a neutral act since it implies an assumption of guilt, hence invokes a duty to act fairly. Fairness will very often require that a person who may be adversely affected by the decision would have an opportunity to make
5 representations on his own behalf either before the decision is taken with a view to producing a favourable result or after it is taken with a view to procuring its modification or both. All that is required before suspension is to give the public officer an opportunity to make representations to the responsible officer why he or she should not be suspended. The standards of fairness are not immutable though. They may change with the passage of time both in the general and in their
10 application to suspensions of a particular type. The principles of fairness are not to be applied by a rod identically in every situation. What fairness demands is dependent on the context of the decision and this is to be taken into account in all aspects (see *Doody v. Secretary of State for the Home Department and Others [1993] All ER 92*).

15 On the other hand, since interdiction is a neutral act and implies no assumption of guilt, but is simply the first step taken before a disciplinary enquiry and adjudication, the only considerations that satisfy the requirements of fairness in a decision to interdict are; (a) a public officer's involvement or suspected involvement or attempted involvement in the commission of a criminal offence or serious misconduct (it is necessary that interdictions are based on substantive and
20 objective reasons, more than a mere suspicion that the public officer committed an offence or engaged in misconduct, but not an absolute certainty); and (b) reasonable grounds for believing that the public officer's interdiction is necessary in the public interest, for example when it is believed that a public officer who is suspected to have committed serious misconduct may interfere with the employer's investigation or tamper with evidence.

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There is need to afford a hearing to a person before making a finding which may have an impact on personal reputation as well as other interests, such as findings that attribute misconduct. Suspension taken as a disciplinary action is based on findings that attribute misconduct, hence it attracts the right to a hearing. For example under Regulations 29 (2) of *The Education Service
30 Commission Regulations* and 39 (1) of *The Public Service Commission Regulations*, upon a criminal conviction of a public officer, the responsible officer may, if he or she considers it to be

in the public interest, suspend the officer. In contrast, at the stage of interdiction, no finding that attribute misconduct has been made. Interdiction is based only on preliminary investigations conducted by the employer and is but the initial stage within the disciplinary process. An officer on interdiction remains innocent until proved otherwise. In addition, such an officer has a
5 legitimate expectation that he or she will be given an opportunity to respond to any adverse findings arising out of the preliminary investigations conducted by the employer. I find therefore that the decision to interdict does not subject to the right to be heard.

The purpose of a preliminary investigation is for the responsible officer to decide if the evidence
10 against the officer is sufficient to proceed to the respective Service Commission. It has a relatively low standard of proof to meet in order for the case to be transferred to the respective Service Commission. During such an investigation, the responsible officer takes the evidence at face value. In other words, the responsible officer makes no determination if a person is telling the truth. Determining credibility is an issue for the actual disciplinary hearing by the respective
15 Service Commission. The preliminary investigation is not a determination of guilt or innocence. Rather, the responsible officer's sole responsibility is to decide if the available evidence has shown whether it is possible the officer did what they are accused of doing. The employee's continued attendance at the work place will jeopardize the investigations.

The Public Officer may at the stage of interdiction be interviewed by the Responsible Officer or
20 other investigating officers and be made aware of the investigations. The only requirement specified by Regulation 8 (c) of Part (F - s) at page 129 of *The Uganda Public Service Standing Orders (2010 edition)*, is that where a Public Officer is interdicted, he or she has to be informed of the reasons for such an interdiction. The letter of interdiction should thus be very explicit of
25 the fact that the interdiction is only the first step and forms part of a process that would be finalised after the Public Officer has been given an opportunity to present his or her evidence and to appear before the disciplinary body in person.

Regulation 8 (a) of Part (F - s) at page 129 of *The Uganda Public Service Standing Orders*
30 *(2010 edition)*, envisages an investigation following interdiction to the extent that it requires the charges against an officer to be investigated expeditiously and concluded. Similarly, Regulations

28 (6) and (7) of *The Education Service Commission Regulations*, and 38 (5) and (6) of *The Public Service Commission Regulations* require the responsible officer, to immediately submit a detailed report, a copy of the letter of interdiction, a statement of allegations and charges and the disciplinary or criminal proceedings which are being taken or about to be taken against the officer for the Commission ((Kitgum District Service Commission) to note the interdiction. Thereafter, to speed up investigations into the conduct of the interdicted officer and to submit a report to Kitgum District Service Commission (within three months after the date of interdiction for misconduct). Regulations 34 (6) and (7) of *The Education Service Commission Regulations*, together with 44 (4) of *The Public Service Commission Regulations* then guarantee an interdicted public officer the right to be heard by the respective Service Commissions (in this case it would be Kitgum District Service Commission). It is at that stage that it becomes imperative to provide the public officer an opportunity to be heard in his or her defence before an adverse finding is made by the disciplinary body, Kitgum District Service Commission.

15 While it will not be appropriate to carry out a complete investigation before deciding whether or not to interdict, it is important for the Responsible Officer to have conducted some preliminary investigations to establish "prima facie" evidence of the alleged misconduct because interdiction should not be a "knee jerk" reaction and an automatic process. There must be some reasonable, objective grounds for the suspicion, based on known facts and information which are relevant to the likelihood that the offence or misconduct has been committed, that the public officer liable to interdiction committed it and reasonable grounds for believing that the public officer's interdiction is necessary in the public interest, since not all alleged transgressions that are the subject of a disciplinary enquiry warrant a public officer's interdiction. Both elements must be satisfied but the circumstances which may satisfy those criteria remain a matter for the operational discretion of individual Responsible Officers. By virtue of Regulation 8 (c) of Part (F - s) at page 129 of *The Uganda Public Service Standing Orders (2010 edition)*, an officer interdicted because of allegations against him or her, is entitled to know what the allegations are.

In the letter of interdiction, the Responsible Officer must outline the facts, information and other circumstances which provide the grounds and reasons for the suspicion (facts and information relevant to the public officer's suspected involvement in an offence or misconduct) and the

grounds for believing that interdiction is necessary. Interdiction must demonstrably be the practical, sensible and proportionate option in the circumstances.

5 Before interdiction, the applicant had in a letter dated 5th March, 2018 (annexure "J" attached to the affidavit in support of the motion) cautioned that "refusal to comply with the transfer instruction will tantamount to insubordination and abuse of office which will attract disciplinary action as per section F-S of the Uganda Standing Orders in place." I have perused the letter of interdiction dated 12th April, 2018 (annexure "B" to the affidavit in support of the motion, which is annexure "H₁" to the affidavit in reply). The grounds for suspecting misconduct are alleged to
10 be;- the fact that the applicant "stubbornly refused to pick [his] transfer letter even after several reminders...", "persistently failed to adhere to [the Town Clerk's] instructions despite several consultative meetings in [his] office...in which [they] had agreed that [he] hands over to the incoming head teacher on 9th April, 2018...." he "even walked away from [the Town Clerk's] office in protest...which clearly [showed] a high level of insubordination and indiscipline."

15

The grounds for believing that interdiction was necessary can be construed from the general tone of that behaviour. According to Regulation 1 and 2 (u) and (w) of Part (F - s) at page 128 of *The Uganda Public Service Standing Orders (2010 edition)*, insubordination and refusal to comply with a posting instruction or order are some of the acts which contravene laws relating to the
20 Public Service and which are otherwise prejudicial to the efficient conduct of the Public Service or tend to bring the Public Service into disrepute. The letter of interdiction therefore not only informed the applicant of the reasons for the interdiction, but also the grounds for suspecting misconduct as well as the grounds for believing that interdiction was necessary. It demonstrably reflects the decision to interdict to have been a practical, sensible and proportionate option in the
25 circumstances. The letter satisfied the rules of fairness applicable to an interdiction.

Certiorari issues to quash decisions that are *ultra vires* or which are vitiated by error on the face of the record or are arbitrary and oppressive (see *In Re An Application By Bukoba Gymkhana Club [1963] E.A. 473* and *Haji Mohamed Besweri Kezaala v. The Inspector General of
30 Government and 2 others, H.C. Misc. Application No.28 of 2009*). I have not found an error on the face of the record. I find nothing to show that the decision of the respondent's Town Clerk to

interdict the applicant was vindictive, arbitrary, oppressive, malicious or in violation of the applicant's right to a fair hearing. This limb of his argument as well fails.

Second issue : Whether the applicant's interdiction was marred by procedural irregularity.

5

It has been decided in resolving the first issue that the right to a fair hearing is triggered at the stage after interdiction, during the preliminary hearing before the Responsible Officer makes a finding or prepares a report that contains adverse information about him or her for submission to the relevant Service Commission, and continues until the final decision is taken by the relevant service Commission. The common law rule regarding the right to be heard does not provide a standard set of procedures. Its requirements are adjusted to take into account the legislative framework, the subject matter, and the nature and potential consequences of the decision to be made. Even for the same power and the same decision maker, the same procedures may not be appropriate in all cases. Natural justice requires consideration of the particular circumstances of each case.

15

A decision maker commits a legal error when they breach natural justice or fail to follow a statutory procedure that is designed to provide natural justice. There must be practical injustice before the decision is unlawful for a failure to comply with natural justice. The requirements of natural justice come from general administrative law, not the particular statute being administered. Many statutes do, however, spell out procedures that must be followed when making decisions; for example, it might stipulate who is entitled to notice, when notice should be given and in what form, what kind of hearing is to be given, and how much time is allowed for a person to respond. Natural justice imposes similar requirements, independently of the statute.

25

If the statutory procedures are equivalent to or superior to what natural justice would require, compliance with the statutory procedures will also satisfy the requirements of natural justice. On the other hand, if the statutory procedures fall short of what natural justice would require, this means it might not be sufficient to comply only with the statutory procedures if natural justice requires more. The question of whether the statute establishes a complete procedural code arises. A statute that deals exhaustively with decision-making procedures might be read as implicitly

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excluding natural justice. If natural justice is not excluded its requirements operate alongside the statutory procedures and supplement them.

5 Generally, unless the statutory procedures exclude natural justice, those procedures should be read as minimum requirements. The High Court of Australia in *Saeed v. Minister for Immigration and Citizenship* (2010) 241 CLR 252 neatly summarised the position by stating: “when a statute confers power to destroy or prejudice a person’s rights or interests, principles of natural justice regulate the exercise of that power”; and “all statutes are construed against a background of common law notions of justice and fairness,” thus Parliament must use clear
10 words to exclude natural justice. In particular cases natural justice might require something more than the statute provides for.

In this regard, Regulation 8 of Part (F-S) at page 129, of *The Uganda Public Service Standing Orders* (2010 edition), provides as follows;

15

Interdiction

8. Interdiction is the temporary removal of a public officer from exercising his or her duties while an investigation over a particular misconduct is being carried out. This shall be carried out by the Responsible Officer by observing that:-

20

- (a) the charges against an officer are investigated expeditiously and concluded;
- (b) where an officer is interdicted, the Responsible Officer shall 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
25 months for cases that involve the Police and Courts of Law;
- (c) where a Public Officer is interdicted, he or she shall be informed of the reasons for such an interdiction;
- (d) a Public officer interdicted shall receive such salary not being less than half of his or her basic salary, subject to a refund of the other
30 half, in case the interdiction is lifted and the charges are dropped;
- (e) the Public officer under interdiction shall not leave the country without permission from the Responsible Officer;
- (f) the case of a public officer interdicted from exercising the powers and functions of his or her office shall be submitted to the relevant
35 Service Commission to note;

- (g) after investigations, the Responsible Officer shall refer the case to the relevant Service Commission with recommendations of the action to be taken and relevant documents to justify or support the recommendations should be attached.

5

Thereafter, the relevant Service Commission (in this case Kitgum District Service Commission) is furnished with a statement of allegations and charges and the disciplinary or criminal proceedings which are being taken or about to be taken against the officer for the Commission to note the interdiction, and when the preliminary investigations are completed, a report, the
10 defence of the accused officer, if any, the responsible officer's comments on the matter and his or her recommendation.

Regulations 34 (2) and (3) of *The Education Service Commission Regulations*, together with 34 (1) and (2) of *The Public Service Commission Regulations*, guarantee a Public Officer a hearing
15 before an adverse report is made to the respective Service Commissions. They require that the responsible officer only submits copies of those documents where the officer either;- (a) does not within twenty-one days (Regulation 34 (2) of *The Public Service Commission Regulations* and Regulation 6 of Part (F-S) at page 129, of *The Uganda Public Service Standing Orders (2010 edition)* each stipulates fourteen days), from the date of receiving the statement of the charges
20 show cause in writing, why disciplinary proceedings should not be instituted against him or her; or (b) if his or her grounds of defence do not, in the opinion of the responsible officer, exculpate him or her.

The hearing rule requires that a person whose interests could be adversely affected by a decision
25 be notified that the decision is to be made. The notice should provide sufficient information to allow the person to make effective use of the right to respond and present arguments. The nature of the decision and its possible consequences should be described. Details of when, where and how a submission can be made should be given. And the time allowed for a response should be reasonable in the circumstances, having regard to the preparation time involved. The notice
30 should be consistent with any statutory requirements (compliance with Regulations 34 (6) and (7) of *The Education Service Commission Regulations*, or with 44 (4) of *The Public Service Commission Regulations* would guarantee this).

Administrative decision-making can occur in stages. For example, there may be a first stage at which a recommendation or preliminary finding is made, followed by a second stage at which a final decision is made by the appointing or disciplinary authority. Even if there has already been a hearing at the initial stages of that process, an interdicted Public Officer must be given an opportunity to rebut or comment on any new material that is adverse to their case when it emerges at the later stages. This also applies to information gathered by the Service Commission. The duty of disclosure is a continuing one at all stages. If the Service Commission becomes aware of new evidence at any stage of the decision-making process, this information must be disclosed to the Public Officer unless it is being disregarded because it is not credible, relevant and significant.

Regulations 34 (6) and (7) of *The Education Service Commission Regulations*, together with 44 (4) of *The Public Service Commission Regulations* require the respective Service Commissions to inform the accused officer of the specified day, time and place, at which the charges preferred against him or her will be heard and the officer to be allowed or if the Commission so determines, to be required to appear before it to defend himself or herself, provided that the Commission is enjoined to treat the officer in accordance with the rules of natural justice. Provided no new material or factors are introduced at the later stages, a hearing accorded at the initial stages may not necessitate further hearing before the respective Service Commission, adopts or rejects the recommendation or finding. It is for that reason that the Service Commissions are empowered, on basis of the report, the statement of the charge preferred against the officer, the officer's reply, if any, and a copy of the responsible officer's comments on the matter made and forwarded to it by the responsible officer, to determine what punishment the officer is liable to, if satisfied with the evidence before it (see Regulation 34 (4) of *The Education Service Commission Regulations* and Regulation 45 (3) of *The Public Service Commission Regulations*). Otherwise, the Service Commission may itself conduct further inquiries if dissatisfied with the evidence before it (see Regulation 34 (5) of *The Education Service Commission Regulations* and Regulation 45 (4) of *The Public Service Commission Regulations*).

30

In many cases natural justice is satisfied if the affected person is afforded the opportunity to make a written submission. Oral hearings are more likely to be called for if there are disputed questions of fact to be determined, there is a need to assess whether a person is telling the truth, or an affected person cannot adequately put their case in written submissions. In the most serious matters, such as disciplinary proceedings, natural justice might require formal, structured court-like proceedings.

Natural justice means more than affording someone the opportunity to "say their piece." Individuals have a right to a hearing and are entitled to respond to any adverse material, from whatever source, that could influence the decision. They are entitled to have their evidence and submissions properly considered. Failure to give genuine, realistic and proper consideration to both sides of a case can give rise to an apprehension of bias on the basis of prejudgment. In this case, I find that the statutory procedures contained in Regulations 34 of *The Education Service Commission Regulations*, Regulation 44 of *The Public Service Commission Regulations* and Regulations 1 and 8 of Part (F-S) at page 129, of *The Uganda Public Service Standing Orders (2010 edition)* are equivalent to what natural justice would require. They establish a complete procedural code compliance with which also satisfies the requirements of natural justice.

Although the Responsible Officer may interdict a public officer pending a disciplinary enquiry, the investigation into the public officer's alleged transgressions must be concluded within a reasonable period. Some latitude is allowed between the act of interdiction and the institution of the proceedings but the gap must inevitably be short (see *Wycliff Kiggundu v. Attorney General, S.C. Civil Appeal No. 27 of 1992*). Thereafter, according to regulations 38 (5) of *The Public Service Commission Regulations*, 8 (b) of Part (F-S) at page 129 *The Uganda Public Service Standing Orders (2010 edition)* and 28 (6) of *The Education Service Commission Regulations*, investigations into the conduct of the interdicted Public Officer must be speeded up and brought to conclusion within a period of three months from the date of interdiction for offences under investigations by the Ministry or department, or Auditor General, and not requiring or involving the police or a court of law, and six months from the date of interdiction for offences requiring or involving the police or a court of law.

Expeditious conclusion of the disciplinary process is imperative considering that the normal operation of the department concerned will be affected by the prolonged interdiction of its staff members. Naturally where an officer has to be interdicted, alternative arrangements have to be made to cover for the officer without any significant undue problems to the departments. In spite
5 of this, prolonged interdiction resulting from intentional protraction of the proceedings would be an abuse of power.

The complexity of disciplinary cases varies though. It is not practicable to prescribe at the outset how long the disciplinary inquiry should take. In the interest of due process, the officer must be
10 given a fair hearing and reasonable opportunities to defend his or her case. This will vary from case to case depending primarily on the complexity of the case which may involve lengthy arguments over the legal merits of each party's representations; a large volume of documentary evidence; and the need to consider the testimonies of a large number of witnesses. That said, the respective Service Commission or court should be fully conscious of the public's expectations
15 that the processing time should be kept within reasonable bounds. Disciplinary proceedings must be completed within a reasonable span of time. Cases could be disposed of expeditiously while observing natural justice.

For example in *Lebotse v. The Attorney General, 2008 2 BLR 451 (HC)*, the applicant, who had
20 been interdicted from his employment pending the outcome of a disciplinary hearing and / or criminal proceedings against him, challenged the length of the interdiction and sought it to be declared unlawful. He sought that he be paid the salary withheld during the period of interdiction. The respondent opposed the application, arguing first that the applicant has failed to call for a review within a reasonable time and secondly that the route open to the applicant was
25 one for an application for permanent stay of the criminal proceeding. As a justification for the continued inaction, the respondent cited a statutory provision to the effect that if criminal proceedings have been instituted against an officer in any court, no disciplinary proceedings could be instituted against the officer on any grounds involved in the criminal charges pending the result of the criminal proceeding. The applicant, for his part, cited a provision of a different
30 statute that imposed an obligation, after the passage of six months, on the relevant authority to review the continued interdiction of the applicant with a view to setting it aside.

Deciding that where there are conflicting legal provisions, the conflict must be resolved in favour of the individual who stands to be affected adversely, the court held that a period of interdiction that lasted six years without any criminal or disciplinary proceedings having been undertaken against the employee was unreasonable. The court declared that interdiction of the applicant
5 beyond the initial six months was unlawful and without reasonable justification. It ordered his reinstatement and payment of such portion of his salary as was withheld during the period of interdiction.

I have reviewed the disciplinary process at hand. I find that following the letter of interdiction,
10 and contrary to the requirements of Regulations 34 (2) and (3) of *The Education Service Commission Regulations*, together with 34 (1) and (2) of *The Public Service Commission Regulations*, which required him within twenty-one days (Regulation 34 (2) of *The Public Service Commission Regulations* and Regulation 6 of Part (F-S) at page 129, of *The Uganda Public Service Standing Orders (2010 edition)* each stipulates fourteen days), to submit his
15 defence before a report could be furnished to the District Service Commission (Kitgum District Service Commission), the applicant did not furnish his defence.

According to regulations 38 (5) of *The Public Service Commission Regulations*, 8 (b) of Part (F-S) at page 129 *The Uganda Public Service Standing Orders (2010 edition)* and 28 (6) of *The
20 Education Service Commission Regulations*, Kitgum District Service Commission had to ensure that investigations relating to the applicant's conduct are brought to conclusion within a period of three months from the date of interdiction, hence by 12th July, 2018. However, the applicant on 22th May, 2018 filed the instant application, i.e. slightly over one month following the interdiction and nearly two months before expiry of the period allowed for the District Service
25 Commission to conclude the investigations.

The implication is that the applicant has sought intervention of court into a disciplinary process that has not run its full course. Where administrative decision-making occurs in stages, many errors committed at the preliminary stages may be corrected at the secondary or later stages
30 before the final decision is made. The Court will only entertain such applications in truly exceptional circumstances and if material irremediable prejudice or injustice is shown to exist,

which is not the case in this application. The court's intervention before the process has run its full course would be tantamount to assuming the role of the decision-maker.

5 The courts will not intervene in any employer's internal disciplinary proceedings until it has run its course. Only after the process has run its course may the court be called upon to review the component parts of the process that lead up to the final outcome, from the perspective of fairness and legal reasonableness. The only situation when the court will interfere is in exceptional circumstances where great injustice might result or where justice might not by any other means be attained (see *Judith Mbayah Tsisiga v. Teachers Service Commission [2017]*
10 *eKLR*). In the present case it has not been demonstrated that there are any exceptional circumstances or any danger of grave injustice. Court should be cautious in exercising its jurisdiction so as not to appear to take over and exercise managerial prerogatives at work places.

15 Following the process step by step will reflect fairness on the part of the employer and if an employer acts with due care in taking disciplinary action, the courts will not intervene. As a matter of principle, a disciplinary process laid down by statute must be allowed to run its course before the court's intervention. Courts will only intervene in uncompleted disciplinary proceedings if exceptional circumstances are shown to exist (see *Zondo and Another v. Uthukela District Municipality and Another (2015) 36 ILJ 502 (LC)* at para 38; *Jiba v. Minister: Department of Justice and Constitutional Development and Others, (2010) 31 ILJ 112 (LC)* at
20 para 17 and *Furnell v. Whangarei High Schools Board [1973] AC 660*). Applications to review and quash preliminary findings made during the course of a disciplinary enquiry or to challenge the validity of the institution of the proceedings ought to be discouraged. In the instant application, there is nothing to show that the applicant cannot be afforded substantial redress at a
25 hearing in due course before the Kitgum District Service Commission or that failure to intervene would lead to grave injustice.

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
30 untenable grounds, or for untenable reasons. 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, taking into account 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. What fairness requires will vary from case to case and manifestly the gravity and complexity of the charges and of the defence will impact on what fairness requires.

10 An interdiction would be unlawful in instances where the right or power of the Responsible Officer to effect an interdiction violates the prescribed regulations. The unlawfulness is founded on the employer not complying with the prescribed rules. I find nothing to show that the decision of the respondent's Town Clerk to interdict the applicant was made in abuse of discretion, or that it is manifestly unreasonable, or that the power was exercised on untenable grounds, or for untenable reasons or that the Town Clerk violated any of the applicant's right to a fair hearing or failed to follow the statutory procedure that is designed to provide natural justice. This limb of his argument as well fails.

Third issue : Whether the decision to transfer the applicant was irrational.

20 The applicant has further challenged the respondent's Town Clerk's transfer and posting instructions in respect of himself and a couple of other teachers that were made between January, 2018 and April, 2018 on grounds that were irrational. This is mainly because in directing the impugned transfers and postings, the respondent's Town Clerk never consulted with the respective schools' Management Committees and Foundation Bodies. They were also characterised by multiple rapid transfers, cancellations and reversal of those instructions within a spate of only a couple of months. As a result, they have caused a lot of anxiety, confusion and interruption of the learning environment within the Municipality, thereby attracting the intervention of the political leadership.

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In reply, counsel for the respondent argued that instead of following the disciplinary process, the applicant invoked the intervention of the Municipal Council's political leaders, in the name of the Mayor and the Resident District Commissioner, to the extent of threatening the Town Clerk with interdiction himself. It is that political interference that has resulted in the anxiety, confusion and interruption of the learning environment within the Municipality that is complained of by the applicant, but not the decision to transfer the applicant. The applicant is therefore the author of his own predicament by; failing to defend himself, causing political interference in a disciplinary process, and seeking judicial review prematurely.

10 The concept of administrative irrationality is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come. This is the essence of what is most commonly called "Wednesbury unreasonableness." It is a concept premised on the fact that discretionary powers must be employed in a structured and reasonable manner and in the public interest. In making their decision, the decision-makers will consider "objective criteria" or general facts or principles. Decision-makers must use their judgement and make this choice. The decision-makers will be required to apply the relevant principles and use their judgement to arrive at a decision which is appropriate to the circumstances. This involves making a choice and is often called a "discretion." Issues of fact are within the decision-making power of officials unless an erroneous conclusion deprives the official of jurisdiction.

20

The Court may intervene if in taking that decision, the decision-maker failed to comply with a mandatory and material procedure or condition prescribed by an empowering provision; the decision was procedurally unfair; it was materially influenced by an error of law; it was taken with an ulterior motive or purpose calculated to prejudice the applicant's legal rights; the respondent failed to take into account relevant considerations; the respondent acted on the direction of a person or body not authorised or empowered by any written law to give such directions; the decision was made in bad faith; the decision is not rationally connected to- (i) the purpose for which it was taken; (ii) the purpose of the empowering provision; (iii) the information before the respondent; or (iv) the reasons given for it by the respondent, or such similar grounds.

30

Just like the appointment of civil servants, their transfer has not been left to the whims and caprice of Responsible Officers. It is governed by rules and regulations, indeed, the anachronistic concept where government servants held office during the pleasure of the Crown had no place in a dispensation created and paid for by the people. All state authority is in the nature of a “trust” (see objective XXVI. (i) of *The Constitution of the Republic of Uganda, 1995* regarding “Accountability”). Its bearers should therefore be seen as fiduciaries. Matters of tenure, appointment, posting, transfer and promotion of public servants, being an exercise of state authority, cannot be dealt with in an arbitrary manner. Decisions in that respect can only be sustained when they are in accordance with the law and established procedures. Responsible officers cannot be allowed to exercise discretion at their whims, or in an arbitrary manner; rather they are bound to act fairly, evenly and justly and their exercise of power is judicially reviewable.

A person entrusted with discretion must direct himself or herself properly in law and established evaluative criteria. He or she must call his or her own attention to the matters which he or she is bound to consider. He or she must exclude from his or her consideration matters which are irrelevant to the decision he or she has to make. The court will generally leave to the District Service Commission the decision as to what evaluative criteria should be used, how they should be weighted, and how they should be applied. The court will focus its attention instead on the fairness of the procedures adopted and whether similarly situated candidates for promotion were treated equitably. Rarely will a court overturn a negative employment decision because the criteria were unclear but will most readily do so where the procedures were biased.

Generally, if a Responsible Officer uses fair procedures and can articulate a plausible, non-discriminatory reason for reaching the decision he or she did relating to posting or transfer, the court will not interfere. If however, rules and instructions are deviated from in what appears to be an abuse of discretion and as a result the decision is manifestly unreasonable, the court will intervene. Posting, deployment and transfer decisions affect the human resource and ultimately, productivity. The balance between the competing pulls of discretion and rule based decision making is a fine one where perception of fairness and even handed treatment is of utmost importance, hence the need to follow guidelines.

Posting, deployment and transfer decisions have potentially serious adverse effects on Public Officers' rights, interests or status. Although they are purely administrative decisions, made in exercise of a purely administrative power, Responsible Officers have a duty to act fairly, which is a less onerous duty than that of observing the rules of natural justice demanded of such bodies
5 when they act in a quasi-judicial capacity, such as when they undertake disciplinary proceedings.

The right to fair treatment in administrative action is guaranteed by article 42 of *The Constitution of the Republic of Uganda, 1995*. The duty to act fairly is specifically applicable to decisions that are likely to have serious adverse effects on someone's rights, interests or status. This duty to act
10 fairly is flexible and changes from situation to situation, depending upon: the nature of the function being exercised, the nature of the decision to be made, the relationship between the body and the individual, the effects of that decision on the individual's rights and the legitimate expectations of the person challenging the decision (see *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.)). The discretion to post or transfer a
15 public officer is to be exercised, and exercised only, in accordance with such a process. It is not a discretion that may be exercised arbitrarily and without accountability.

All that is required is for the Responsible Officer to have done his or her best to act justly, and to reach just ends by just means, i.e. acting honestly and by honest means. In some situations,
20 Responsible Officers may be required to observe a high standard of participatory rights to ensure the decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the Responsible Officers. The nature of this standard may involve giving the Public Officer a fair opportunity to make any
25 relevant statement which he or she may desire to bring forward regarding the proposed posting or transfer, but this is not a legal requirement.

The right to fair treatment in administrative action is a guarantee that Public Officers have the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally
30 fair. It may also include the right to be given reasons for any administrative action that is taken

against them, where an administrative action is likely to adversely affect their rights or fundamental freedoms.

The Court is concerned with evaluating fairness as Lord Hailsham L. C. ably puts it in *Chief Constable of North Wales Police v. Evans*, [1982] 1 W. L. R. 1155 at 1160;

10 It is important to remember in every case that the purpose ... is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that authority constituted by law to decide the matters in question.

The court will not intervene in decisions that are fair and reasonable lest it substitutes its opinion for that of the decision-maker. Decisions are seen as "fair" when they are perceived to be morally right, e.g. ethical, dictated by conscience, honest, uncorrupted and free from prejudice, 15 favouritism or self-interest, balanced, etc (the focus is primarily internal and subjective). Conduct is seen as "reasonable" if it is perceived to be administratively just, e.g. lawful, in accordance with accepted standards of conduct, in good faith and for legitimate reasons, unbiased, rational, consistent, what is appropriate for a particular situation, etc (the focus is primarily external and objective). Fairness can be seen as one of the criteria for assessing 20 reasonableness, and vice versa, and some of the criteria that can be used to assess fairness can also be used to assess reasonableness, for example honesty, legality, regularity, provision of a fair hearing, etc.

One option when reviewing the reasonableness of a decision is the standard of a "reasonable 25 person." The concept of the "reasonable person" is the standard used by the courts to assess conduct in a range of contexts. However, depending to a degree on the context there are a number of variations in the formulation or description of this standard, for example: the "reasonable person," the "reasonable or fair minded observer," the "fair-minded observer," the "fair-minded and informed observer," what "fair-minded people reasonably apprehend or 30 suspect," a "hypothetical fair-minded lay observer," or "right-minded people." It is generally agreed that this test, however expressed, focuses on what the court believes the public would be likely to think about the issue in question. Alternatively, the court may review administrative

conduct primarily from the perspective of whether or not the framework of policies, procedures and processes supporting decision-making were fair and reasonable, within that framework that the conduct itself was reasonable, and the decisions / outcomes were reasonable in the circumstances.

5

The focus of the court in making such assessments can be expected to include;- whether the conduct was unreasonable, unjust, oppressive or improperly discriminatory, or based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations, contrary to law (amongst other things). When assessing whether conduct meets a reasonable standard, the focus
10 of the court will be on such considerations as;- that the conduct was made or done in good faith (i.e. honestly, for the proper purpose, on relevant grounds and within power); whether conduct has an evident and intelligible justification (was justified on the facts); whether the reasoning that led to the conduct was valid, logical and rational; whether the response was proportionate and appropriate weight given to relevant factors; whether a decision-maker was impartial or
15 influenced by a conflict of interests; consistency – compared to decisions or actions in similar circumstances.

A decision will fail the test of reasonableness and thus be found to be unlawful only if it is one to which no reasonable authority could have come in the circumstances, for example by being;- an
20 obviously disproportionate response, one arrived at by giving disproportionate weight to some factor, one affected by a particular error of reasoning of a fundamental nature, one arrived at by reasoning illogically or irrationally, or a decision lacking an evident and intelligible justification. Such decisions may readily support a finding of unreasonableness. The approach I have taken is to review the framework of policies, procedures and processes supporting the decision-making
25 and determine whether they were fair and reasonable. Then within that framework, determine whether the posting and transfer decisions themselves were reasonable, and the outcomes were reasonable in the circumstances.

Regulation 25 of *The Education Service Commission Regulations* stipulates that an officer may
30 be appointed on transfer within service in accordance with *The Uganda Public Service Standing Orders*. The guidelines to be followed when a public officer is to be transferred from one Local

Government to another (and presumably from one duty station to another within the same Local Government) when need arises are specified by Standing Order 2 of part (F - c) of *The Uganda Public Service Standing Orders (2010 edition)* as follows; -

- (a) Posting must always be justified on genuine administrative considerations;
- 5 (b) Postings must never be used as a punitive measure; and
- (c) Postings must be carried out in accordance with deployment plans.

Under Regulation 3 of Part (A - 1) at page 27 of *The Uganda Public Service Standing Orders (2010 edition)*, a public officer may be deployed from one school to another within the same
10 Local Government, provided it is done "in the public interest" and should never be used as a punitive measure or a way of disciplining public officers. In addition, Regulation 17 (1) of *The Public Service Commission Regulations*, requires the District Service Commission to effect transfers taking into account "the maintenance of the high standard of efficiency necessary in the public service." I find this basic framework supporting the decision-making in relation to
15 transfers to be fair and reasonable to the extent that it excludes transfers motivated by prejudice, favouritism or self-interest or ones based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations, or contrary to law so as to turn out to be unreasonable, unjust, oppressive or improperly discriminatory.

20 Apart from that basic framework laying down the guiding principles, there are no corresponding policies, procedures and processes reregulating decisions to transfer Public Officers that have been submitted to this court by any of the parties. This Court has therefore resorted to carrying the analysis forward by focusing on what the court believes the public would be likely to think about the transfers in question, since the paramount guiding principle under Regulation 3 of Part
25 (A - 1) at page 27 of *The Uganda Public Service Standing Orders (2010 edition)*, is that transfers should be done "in the public interest."

Public interest can cover a wide range of values and principles relating to the public good, or what is in the best interests of society. Thus, for example, there is a public interest in upholding
30 standards of integrity and in ensuring fair treatment for all. This is not a complete list since "the public interest" can take many forms. The expression "in the public interest," when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined

factual matters (see Mason CJ, Brennan, Dawson and Gaudron JJ in *O'Sullivan v. Farrer*, [1989] HCA 61; (1989) 168 CLR 210 at 216, quoting Dixon J in *Water Conservation and Irrigation Commission (NSW) v. Browning* [1947] HCA 21; (1947) 74 CLR 492 at 505). This suggests that in each case, the public interest test involves identifying the appropriate public interests and assessing the extent to which they are served by the decision. There is undoubtedly public interest in good decision-making by public bodies, but those bodies may also need space and time in which to fully consider their policy options, to enable them reach an impartial and appropriate decision, away from public or political interference.

5 I have examined the series of letters of transfer executed by the respondent's Town Clerk within the period of January, 2018 to April 2018 (annexure "D," dated 18th January, 2018 from Kitgum Primary School to Pandwong Primary addressed to Ms. Apoko Hellen Irene; "E," dated 15th March, 2018 from Kitgum Prison Primary School to Kitgum Public Primary School addressed to Ms. Apoko Hellen Irene; "G," dated 15th March, 2018 from Kitgum Public Primary School to Pandwong Primary School addressed to Mr. Loklanya N. Vincent; and "C," dated 9th April, 2018 from Pandwong Primary to Kitgum Prison Primary School addressed to the applicant; all attached to the affidavit is support of the motion; and annexure "E," dated 18th January, 2018 from Kitgum Primary School to Pandwong Primary School addressed to Ms. Apoko Hellen Irene, attached to the affidavit in reply).

20

The apparently erratic nature of these transfers is explained in paragraphs 6 - 13 of the affidavit in reply sworn by the respondent's Senior Human Resource Officer, Mr. Ochan Patrick Ocitti, in that the need for the transfers was sparked off by the sudden resignation in June, 2015, of the then Head teacher of Pandwong Primary School, Ms. Lamwaka Margaret Odwar. The applicant, as Deputy Head Teacher at the school, was assigned duties of caretaker Head teacher until the appointment of a substantive Head Teacher, to replace Ms. Lamwaka. The replacement was found nearly three years later on 18th January, 2018, by way of transfer of Ms. Apoko Hellen Irene from Kitgum Primary School to Pandwong Primary School, hence annexure "E" attached to the affidavit in reply of the Principal Education Officer, Ms. Atim Harriet.

30

For determination of the overt intentions behind those transfers, I have examined annexure "J" dated 5th March, 2018 attached to the affidavit in support of the motion. Therein, when responding to an appeal against the transfers presented by the Chairperson of Pandwong Primary School, the respondent's Town Clerk wrote;

5 The recent transfers of teachers within the Municipality are not a punishment but
done in good faith for some affected schools and teachers for good service
delivery.....you are aware that since the early retirement of a substantive Head
Teacher of the school in 2015, the school had been without [a] Head Teacher up to
10 now, and that is one of the reasons of transfer.....Uganda Government Standing
Orders Section A-1 states that a Public Officer shall be transferred to or from one
duty station after a continuous stay at his or her current station for at least three (3)
years and not exceeding five (5) years, subject to the exigency of the service.
Accordingly, that has affected the Deputy Head teacher of [the] school who has
15 stayed in the school for over five (5) years now.....in this regard the transfer still
stands.

Unfortunately, the applicant refused to hand over office to Ms. Apoko Hellen Irene despite several interventions by his immediate supervisors. It would appear that both the Mayor and the Resident District Commissioner then intervened on the side of the applicant, dissuading the
20 Town Clerk from effecting the proposed transfer, to the point of threatening him with dire
consequences (see annexure "K" attached to the affidavit in support of the motion where on 12th
April, 2018 the Resident District Commissioner, Kitgum wrote "directing" the Town Clerk to
cancel the transfers; and annexure "L" attached to the affidavit in support of the motion where on
13th April, 2018 the Mayor Kitgum Municipal Council wrote indicating that he considered
25 interdiction of the applicant a "wrongful interdiction" and warning the Town Clerk that he would
be held personally responsible for the repercussions). The Town Clerk had at one point in that
process obliged by cancelling the applicant's transfer and making new ones. He later reversed
that decision as well. These transfers had a ripple effect necessitating the rest of the transfers.

30 It emerges from the evaluation of the available evidence that in making the initial transfer, the
respondent's Town Clerk was properly guided by the relevant laws and principles. It was done
taking into account "the maintenance of the high standard of efficiency necessary in the public
service," and also "in the public interest." The presumption in statutory interpretation is that the
Legislature is taken to intend that a statutory discretionary power will be exercised reasonably.

Therefore when assessing whether a discretionary power has been exercised reasonably, the focus of the court is on determining whether the power was exercised unreasonably (on the assumption that if the exercise was not unreasonable then it must be taken to be reasonable).

5 The applicable standard against which the reasonableness of conduct is measured has long been the concept referred to as "Wednesbury unreasonableness," i.e. irrationality (a decision so unreasonable that no reasonable person could have arrived at it). There is nothing before me to suggest that the applicant's transfer was done in violation of the relevant guidelines and considerations. To justify grant of the orders sought, it was incumbent upon the applicant to
10 show that his transfer was a negative employment decision that was motivated by discrimination rather than by administrative considerations and deployment plans of the respondent, and that it was "perverse" or "absurd." Instead, what court has found is unjustified political interference intended to unfairly favour the applicant by reversing that decision. It is this interference that resulted in the undesirable consequences complained of by the applicant, on basis of which he
15 cannot be heard to seek relief. There is no evidence that he disassociated himself from that interference by submitting himself to the disciplinary and administrative processes provided for under the legal framework, and if dissatisfied, invoke the appellate process provided for therein.

The other reason advanced by the applicant for impugning the transfer is failure by the Town
20 Clerk to consult the founding bodies and School Management Committees of the respective schools affected by the transfer, before making the transfer decision. Regulation 11 (4) of *The Local Government (Kitgum District) (Education) Ordinance, 7 of 2011* and Regulation 13 (4) of *The Education (Management Committee) Regulations*, comprised in the second schedule of *The Education (Pre-Primary, Primary and Post-Primary) Act, 13 of 2008* stipulate that "there shall
25 be consultation with the foundation body before transfer or posting of a head teacher and deputy head teacher to a school."

The general approach to the principles of consultation in administrative decision-making was summarised by the Court of Appeal in *R (United Company Rusal PLC) v. The London Metal
30 Exchange [2014] EWCA Civ 1271*. Where a public body is under a duty to consult, the content of that duty to consult is governed by a common law duty to act fairly, and the Court should only

intervene if there is a clear reason on the facts of the case for holding that the consultation is unfair.

5 In order for consultation to be fair, a public body must ensure;- (a) that consultation must be at a time when proposals are still at a formative stage; (b) second, the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response; (c) third, adequate time must be given for consideration and response; and, finally, (d) fourth, the product of consultation must be conscientiously taken into account in finalising any proposals (see *R v. Devon County Council ex p Baker* [1995] 1 All ER 73 pp 91 and 87; *R v. North and East Devon Health Authority ex p Coughlan* [2001] QB 213 [108]; and *R (Royal Brompton and Harefield NHS Foundation Trust) v. Joint Committee of Primary Care Trusts* (2012) 126 BMLR 134; and Lord Wilson in *R (BAPIO Action Ltd) v. Secretary of State for the Home Department* [2007] EWCA Civ 1139).

15 The decided cases show that the Courts allow public bodies a wide degree of discretion as to the options on which to consult. There is no general principle that a public body must consult on all possible alternative ways in which a specific objective might arguably be capable of being achieved. The remedy for a breach of the duty to consult also varies with the situation. The public body's failure to consult can lead to a number of remedies ranging from injunctive relief
20 against the threatening activity altogether, to damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct. Certiorari and prohibition together serve injunctive functions and an order to carry out consultation before proceedings is the functional equivalent of quashing a decision and sending it back to the original decision maker.

25

However, when statutory provisions stipulate that certain formal and procedural requirements must be observed before an administrative decision is arrived at, they rarely state what consequences follow non-compliance with these statutory requirements. The courts are, for the most part, left to their own devices as far as the consequences of non-compliance with procedural
30 requirements are concerned. The general rule is that an imperative or absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they

cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

Although both Regulation 11 (4) of *The Local Government (Kitgum District) (Education) Ordinance, 7 of 2011* and Regulation 13 (4) of *The Education (Management Committee) Regulations*, require that "there shall be consultation," no universal rule can be laid down as to whether enactments mandatory language should be considered directory only or obligatory with an implied nullification for disobedience. An enactment, mandatory in form, might in substance be directory. The use of word "shall" does not conclude the matter. The fact that the statute uses the word shall while laying down a duty is not conclusive on the question whether it is a mandatory or a directory provision (see *Kampala Capital City Authority v. Kabandize and ten others, S.C. Civil Appeal No. 013 of 2014*). Use of the word "shall," though significant, does not invariably create a mandatory duty because statutes must be construed as a whole to ascertain legislative intention.

15

The Court has to ascertain the object which the provision of law in question is to serve and its design and the context in which it is enacted. If the object of the law will be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as directory.

It is the duty of courts to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered. The question for the court is to interpret the legislature's silence on the topic. The meaning and intention of the Legislature must govern, and this is to be ascertained not only from phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it the one way or the other. Whether a statutory provision which, on the face, appears to be obligatory is to be regarded as truly mandatory or is merely to be regarded as directory in nature, depends on the statutory intent and whether compliance with the provision can fairly be said to be essential to

the general object intended to be secured by the Act, in addition, the extent to which harm has been suffered as a result of non-compliance has often influenced judges charged with determining whether a provision is mandatory or directory.

5 The purpose of the conventional mandatory / directory distinction was to ensure that one party could not rely on a minor or technical breach of prescribed statutory requirements in order to invalidate an administrative decision. In practice, this conventional distinction has proved difficult to draw and, increasingly, the courts seek to examine all the circumstances of the case. The relevant test has been stated by Henchy J, in *State (Elm Developments Ltd) v An Bord*
10 *Pleanála [1981] I.L.R.M. 108 at 110* in the following terms:

If the requirement which has not been observed may fairly be said to be an integral and indispensable part of the statutory intendment, the courts will hold it to be truly mandatory, and will not excuse a departure from it. But if, on the other hand, what is
15 apparently a requirement is in essence merely a direction which is not of the substance of the aim and scheme of the statute, non-compliance may be excused.

That test is whether the prescribed mode of action is of the essence of the thing to be accomplished, or in other words, whether it relates to matter material or immaterial, to a matter of convenience or of substance. The better test for determining the issue of validity was stated in
20 *Regina v. Soneji and another (Respondents), [2003] EWCA Crim 1765* as being; to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.

A court addressing this issue will have to ask two questions. First, is the provision mandatory or directory? Second, should the violation of the provision be tolerated or not? The first question is
25 essentially an exercise in discerning legislative intent; the second more a matter of judicial policy as applied to the facts of particular cases. In general, the stronger the legislative intent and the more serious the consequences of the violation, the more compelling the argument will be to invalidate the impugned decision. Conversely, where legislative intent is weaker and the consequences of non-compliance are relatively harmless, the more compelling the argument will
30 be not to invalidate the impugned decision. The more serious the public inconvenience and injustice likely to be caused by invalidating the resulting administrative action, including the frustration of the purposes of the legislation, public expense and hardship to third parties, the less

likely it is that a court will conclude that legislative intent is best implemented by a declaration of invalidity.

In answering the first question, the court must determine whether Parliament intended the provision to be treated as mandatory or directory. Several interlinked considerations have to be taken into account: statutory language; fair procedures and the protection of personal interests; constitutional rights; the centrality of the provision to the statutory scheme; and statutory purpose. The stronger (as opposed to merely exhortatory) the statutory language, the more central the provision to the proper functioning of the statutory scheme and the greater the effect on rights and interests, the more likely it is that Parliament intended the provision to be treated as mandatory. Conversely, where statutory language is looser, where a provision is not essential to the achievement of the objectives of the statutory scheme and where the impact of non-compliance on rights and interests is relatively harmless, the legislature's likely intention is that the provision be treated as directory.

15

A different approach was proffered in *Gillen v. Commissioner of An Garda Síochána* [2012] IESC 3; [2012] 1 I.R. 574 where Finnegan J., took the view, having reviewed the authorities on mandatory and directory provisions, that a two-step analysis was required:

1. Did the legislature intend total invalidity to result from failure to comply with the statutory [time] limit?
2. If the answer to that question is yes no further question arises. If the answer is no then the court must consider whether there has been substantial compliance which would depend upon the facts of each individual case and will involve consideration of whether any prejudice has been caused or injustice done by regarding an act done out of time as valid.

25

In answering the second question from the perspective of any of the two formulations, the court will have regard to the consequences of the failure to comply with the provision. This will turn on the extent to which there has been compliance (notwithstanding that the compliance has not been perfect) and prejudice to third parties. Where there has been substantial compliance (satisfying the objectives of the statutory scheme) which results in no third party suffering prejudice, the courts have tended to tolerate the conduct at issue. But where there has been no compliance at all, or an attempt at compliance that does not advance the objectives of the

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statutory scheme, and prejudice to third parties has resulted, judicial tolerance of the conduct is not to be expected.

To these may be added a third stage. Judicial review remedies are discretionary. In some
5 circumstances, a remedy might be withheld even though there has been a failure to comply with
a mandatory requirement (see Lord Justice *Hobhouse in Credit Suisse v. Allerdale Borough
Council [1997] QB 306 at 355D*). "The discretion of the court in deciding whether to grant any
remedy is a wide one. It can take into account many considerations, including the needs of good
administration, delay, the effect on third parties, the utility of granting the relevant remedy. The
10 discretion can be exercised so as partially to uphold and partially quash the relevant
administrative decision or act."

Provisions which relate to the essence of the thing to be performed or to matters of substance,
are mandatory, and those which do not relate to the essence and whose compliance is merely a
15 matter of convenience rather than of substance, are directory. If it appears that the object in
imposing the conditions is the maintenance of public order or safety, or the protection of persons
dealing with those on whom the conditions have been imposed, it will be considered mandatory.
On the other hand, where the conditions are imposed merely for administrative purposes and no
specific penalty is imposed for breach or violation of such conditions, decisions in breach of
20 them are valid.

Section 1 of *The Education (Pre-Primary, Primary and Post-Primary) Act, 2008* specifies its
objectives as being; (a) to give full effect to education policy of Government and functions and
services by Government; (b) to give full effect to the decentralization of education services; (c)
25 to give full effect to the Universal Primary Education Policy of Government; (d) to give full
effect to the Universal Post Primary Education and Training Policy of Government; (e) to
promote partnership with the various stakeholders in providing education services; (f) to promote
quality control of education and training; (g) to promote physical education and sports in
schools.

30

The requirement for consultation appears to be a procedural rule geared towards achieving objective (e); promotion of "partnership with the various stakeholders in providing education services." In deciding whether it is mandatory or directory, the court has to consider the importance of the requirement and the harm done by its breach in the context of the objects of the statutory scheme of which it forms part. I find that, save the promotion of good relations and comity (courtesy and considerate behaviour towards others) between government and other stakeholders, especially in religious denominational founded schools, a failure to comply with this provision is not likely to result in any injury or prejudice to the substantial rights of interested persons, or in the loss of any advantage, the destruction of any right or the sacrifice of any benefit. It relates to a matter of convenience rather than of the substance of the Act. Legislative provisions designed to secure order, system and dispatch in proceedings are ordinarily held to be directory. It is well settled that generally speaking the provisions of a statute creating public duties are directory while those conferring private rights are imperative.

This rule creates only a public duty without corresponding private rights. Insistence on strict compliance with this rule in all cases is likely to result in serious general inconvenience in the realisation of objective (f); of promoting quality control of education and training, if some stakeholders choose to take an uncompromising stance. In such situations, substantial rather than full compliance with this requirement will suffice, if the public officer affected has not been prejudiced significantly.

On the other hand, a procedural rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage, unless by according such permission to rectify the error later on, another rule would be contravened. I note that under Regulation 13 *The Education (Management Committee) Regulations* (Second Schedule to the Act), and Regulation 11 (5) *The Local Government (Kitgum District) (Education) Ordinance*, the school management committees have a right to appeal to the District Council Executive Committee against the posting or transfer of a teacher to or from a school. The relevant paragraphs of Regulation 13 provide as follows;

(5) A management committee shall have right to appeal to the district council executive committee against the posting or transfer of a teacher to or from a

school within twenty-one days from the day it is notified of the posting or transfer.

(6) Where there is an appeal by the management committee under sub-regulation (5), the teacher affected shall be informed of the reasons giving rise to the appeal to enable him or her to respond as and when necessary.

(7) At the hearing of the appeal referred to in sub-regulation (6), the teacher affected shall have the right to appear and defend himself or herself at the hearing of the appeal and may be assisted by a representative of his or her choice.

Another reliable guide in determining whether a statutory provision is directory or mandatory is whether the provision is accompanied by language that expressly invalidates any action taken after noncompliance with the provision. The power to transfer specified by Standing Order 2 of part (F - c) of *The Uganda Public Service Standing Orders (2010 edition)* is not so limited by the direction to consult stipulated in Regulation 13 of *The Education (Management Committee) Regulations (Second Schedule to the Act)*, that it cannot be exercised without following the directions given. No penalty has been provided for failure to comply with the terms of the provision and the enactment is silent in regard to the consequence of non-compliance.

No substantial rights depend on a strict observance of this provision; no injury can result from ignoring it; and this Court cannot declare that the principal object of the legislature that a teacher should be capable of being transferred, has not been achieved. Considerations of convenience and justice plainly require that this provision should be held to be directory and not mandatory. Considering that any procedural irregularity in a decision to post or transfer of a teacher to or from a school may be appealed and thus is curable by appeal to the District Council Executive Committee, I construe the duty to consult not as a mandatory requirement, breach of which would deprive a decision-maker of power to act, but only as a directory requirement, breach of which does not have that effect.

On the other hand, it would be extremely inconvenient if every error which infringed a legal requirement in the making or implementation of a decision were to deprive it of legal effect. The error might be minor, or do no harm to anyone. The damage caused by refusing all legal effect to it might then be out of all proportion to the seriousness of the error. The applicant relied on an

alleged injustice caused to him by lack of consultation. In my view this argument was overstated. The prejudice to the applicant was not significant. It is also decisively outweighed by the countervailing public interest in not allowing a public officer facing disciplinary action to upset that process for what were no more than bona fide errors in the transfer process.

5

In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the "merits" of the matter in some way or another. As long as the court determining this issue is aware that it enters the merits not in order to substitute its own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order. The Court cannot substitute its own decision for that of the Responsible Officer. The limit of the authority of court in judicial review is first to establish whether or not there was illegality, irrationality or impropriety in the process, whereupon if established it may then proceed to direct the Responsible Officer to comply with the legal and procedural requirements but not to substitute, its own decision for that of the Responsible Officer. Since the applicant has not advanced any evidence of the nature that proves unreasonableness of the decision, there is no basis for intervening in what is otherwise a purely administrative decision of the respondent's Town Clerk. I have not found any of such reasons warranting this court's intervention.

20 **Fourth issue :** Whether the applicant is entitled to the relief sought.

The applicant having failed to prove any of the grounds on basis of which he sought to challenge the decision to transfer and subsequently to interdict him, he is not entitled to any of the reliefs he sought. Consequently, there is neither a basis for issuing the orders sought nor for the award of damages. This application is therefore dismissed with costs to the respondent.

Dated at Gulu this 13th day of September, 2018.

.....
Stephen Mubiru
Judge.
13th September, 2018.

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