

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2008-02949

BETWEEN

WATSON DUKE

Claimant

AND

**THE PUBLIC SERVICES ASSOCIATION
OF TRINIDAD AND TOBAGO**

Defendant

Before The Hon. Madam Justice C. Gobin

Appearances:

Mr. R. Persad and Mr. J. Heath instructed

by Mr. L. Luckhoo for the Claimant

Mr. G. Peterson SC and Mr. R. Harnanan instructed

by Ms. E. Greene for the Defendant

JUDGMENT

Background

1. The defendant is the recognized trade union engaged inter alia in collective bargaining on behalf of the monthly paid employees of the Water and Sewerage Authority (WASA). The claimant was until July 28th 2008 a member of the defendant and the chairperson of the WASA section of the union. On July 28th 2008 the defendant was notified of his expulsion from the defendant. This arose as a result of a finding of his guilt by the General Council on the determination of disciplinary proceedings against the defendant. The charges arose out of two incidents, the first of which allegedly occurred on March 6th 2008 at the defendant's head office at 89 Abercromby

Street, Port of Spain and the second on April 15th 2008 at the defendant's Tobago office.

2. The charges were as follows:

STATEMENT OF CHARGE NO. 1

Misconduct contrary to article 82(e) of the Constitution of Public Services Association of Trinidad and Tobago.

PARTICULARS OF CHARGE:

That between the hours of 1:00 p.m. and 2:00 p.m. on the 6th of March, 2008, you, Watson Duke being an ordinary member of the Public Services Association of Trinidad and Tobago did misconduct yourself at the premises of the Head Office of the said Public Services Association of Trinidad and Tobago at 89 Abercromby Street, Port of Spain, Trinidad by:

- (a) Invading the 1st floor of the Head Office of the said Public Services Association of Trinidad and Tobago at 89 Abercromby Street as aforesaid together with Ronald Le Gendre, Cliff St. John, Louis Tannis and other persons unknown;
- (b) Shouting at and otherwise being aggressive and or disrespectful to the Ag. President of the said Public Services Association, Mr. Stephen Thomas.
- (c) Intimidating the staff of the said Public Services Association.
- (d) Shouting at and otherwise being aggressive to the staff of the said public Services Association of Trinidad and Tobago.
- (e) Otherwise engaging in conduct at the said Head Office unbecoming of an ordinary member of the Public Services Association of Trinidad and Tobago.

STATEMENT OF CHARGE NO. 2

Misconduct contrary to article 82(e) of the Constitution of the Public Services Association of Trinidad and Tobago

PARTICULARS OF CHARGE

That between the hours 3:30 p.m. and 5:30 p.m. on the 15th of April 2008, you Watson Duke being an ordinary member of the Public Services Association of Trinidad and Tobago did misconduct yourself at the premises of the said Public Services Association of Trinidad and Tobago by:

- (a) Disrupting the conduct of the elections for the Tobago Section of the Public Services Association of Trinidad and Tobago.
- (b) Shouting at the persons gathered for the elections for the Tobago Section of the Public Services Association of Trinidad and Tobago.
- (c) Gesturing aggressively at the persons gathered for the elections for the Tobago Section of the Public Services Association of Trinidad and Tobago
- (d) Refusing to leave the said elections for the Tobago Section of the Public Services Association of Trinidad and Tobago despite repeated requests for you so to do.
- (e) Otherwise engaging in conduct at the said elections unbecoming of an ordinary member of the Public Services Association of Trinidad and Tobago.

3. The claimant now challenges his expulsion on three grounds. These are that the decision was infected by bias arising from –

- (1) The presence and involvement of the President of the defendant, Ms. Jennifer Baptiste-Primus who presided over both hearings.
- (2) The presence and involvement of the Vice President, Mr. Stephen Thomas who sat on the hearing into the second charge

- (3) That the failure to stand down to 1:00 p.m. the hearing on July 28th 2008 to accommodate the attendance of the claimant's attorney, as well as to adjourn the proceedings to allow the defendant to call witnesses amounted to a denial of the claimant's right to a fair hearing.

The defendant denies the allegations of bias. It says further that the refusal to adjourn was proper in the circumstances and that in any case, by his attendance and participation in the proceedings on July 15th 2008 and on July 28th 2008, the claimant waived any objection to the composition of the tribunal on the ground of bias.

4. Before I proceed to deal specifically with these issues, I turn to the defendant's constitution and the provisions relating to the composition of the disciplinary tribunal. Article 82 vests power to take disciplinary action in the General Council. Article 25 prescribes that 15 members excluding officers shall form a quorum. Article 26 states that the President or in her absence the 1st Vice President or in his absence the 2nd Vice President shall chair the meeting of the General Council. It further provides that if none of them is present, any member appointed shall chair the proceedings. The constitution does not appear to require the presence of the President or the 1st Vice President for a quorum. In the course of the proceedings I specifically raised the issue of necessity and both sides agreed it was inapplicable.

Waiver

5. This issue can appropriately be dealt with firstly. The record reveals the following. The claimant was summoned to attend the hearing of two charges on July 15th 2008. The President was sitting as well as chairing the meeting. The claimant was represented by legal counsel Mr. Thomas Cunningham. Mr. Cunningham attempted to take a point “in lumine” and was refused. It was felt that the charges had to be read. They were so read. The claimant pleaded not guilty. At the first opportunity following his plea, his attorney took certain objections including the following:

“I further submit that the President, sitting as she is today, will seem to indicate an apparent bias, given what she has been reported in the media as saying after the outcome of the High Court action in which certain injunctive reliefs were made consequently. It is the view of the defence that Mr. Watson would not get a fair hearing.”

6. The claimant and his attorney left soon afterwards participating no further. The President adjourned for ten minutes, sought the advice of Senior Counsel and returned with this response to the particular objection of her own bias.

“On his third objection that I am biased because I have made statements in the media, Counsel enquired whether or not he specifically stated the grounds for his objection that “In the Newsday it was reported you said that”, “on TV 6 you said that,” “on CNC 3 you said that”. What he has said or what he has advised is that Mr. Cunningham has failed to condescend and state clear grounds for his objection and his statement of the chair’s biasness (sic) and as a consequence,

therefore the objection is without merit and I so rule.”

7. The proceedings continued in the absence of the claimant and his attorney and the hearing into the first charge was concluded that day. The proceedings were then adjourned because the witnesses to support the second charge were not to be found. No explanation was offered for their absence. The hearing was nevertheless rescheduled to July 28th and a notice of the adjourned date was sent out to the claimant. The claimant on the adjourned date, albeit over an hour after the start of the proceedings when they were well on the way.

8. In support of the plea of waiver, the defendant submits that in these circumstances, the claimant was fully aware before he appeared before the tribunal of the facts and matters relevant to his decision to participate in the proceedings on July 15th and 28th 2008. This is a somewhat surprising view given the facts. The claimant could not have anticipated prior to his attendance of July 15th 2008 that the President would have been chairing the proceedings. At the earliest opportunity his attorney took an objection on the basis of the President’s bias. He could hardly have been expected to provide particulars without an opportunity or an invitation to do so. The record does not give the impression that there was either. The defendant’s constitution clearly contemplates the conduct of proceedings in the absence of the President. Before he arrived there, that morning the claimant could not

necessarily have anticipated even her presence at the meeting. To my mind, the position is the same for the proceedings as they continued on the 28th. The clear and unequivocal objection first taken on July 15th must be taken to have continued so long as the President presided as she did. In the circumstances I hold the submission as to waiver to be without merit.

The President's refusal to adjourn the hearing
On July 28th 2008/impact on right to fair hearing
Right to be heard in defense

9. On July 28th 2008 the hearing into the second charge was proceeded with. It began in the absence of the claimant. At the close of the evidence in chief of the sole witness, the president invited the claimant to cross-examine. He asked for the matter to be stood down as his lawyer was unable to be there "this morning". The request was refused. He was again invited to cross-examine the witness, he declined "at this point in time". The witness was then excused. Counsel closed the case for the prosecution. Then the following exchange appears on the record.

Chairperson: Thank you very much Mrs. Gafoor and General Council at this point in time evidence has been led on the two disciplinary charges preferred against Watson Duke, ordinary member of PSA. And at this point in time, Mr. Duke you will be presented with the opportunity to call any witness or witnesses you may wish, or to make any statement in your defence before the General Council.

Mr. Duke: Morning again comrades, the Chair I must say I have no witness to call at this point in time. My witnesses on both matters were unable to make it today and I hope and I would like the matter to be stood down until I could arrange some finance to bring the witnesses from Tobago to Trinidad and perhaps proper leave will be sought so the other witness from WASA could attend this General Council Meeting, Madam.

Chairperson: May I remind you, Mr. Duke, at the last hearing of this matter on Tuesday 15th of July, both you and your Counsel walked out while the hearing was in progress. Neither you nor your Counsel indicated to this Tribunal any intention to call any witnesses in the matter. In fact your Counsel indicated in a rather strong manner the intention not to participate and to take this matter elsewhere. So that at this point in time if you have no witnesses to call in this matter I would want to thank Mrs. Gafoor for leading the evidence and to adjourn this meeting for ten minutes and then we will resume to consider the evidence laid this morning. This meeting stands adjourned.

10. While the closing submissions filed herein by the claimant addressed narrow aspects of this issue, I approach it more broadly in the light of the evidence and the declaration which the claimant sought in these terms:

“A declaration that in breach of Article 83 the claimant was not afforded a reasonable opportunity to defend himself against the allegations of misconduct by reason of the following unreasonable actions of the President/Chairman of the meeting hearing the charges against him on the 28th July 2008:

- (a) Refusal to grant an adjournment to 1:00 p.m. to facilitate the appearance of his Attorney to represent him in his defence of the charges by cross-examining witnesses called against him.
- (b) Refusal to grant an adjournment to another day to facilitate the claimant calling witnesses in his defence; and/or
- (c) Failure and/or refusal to advise the claimant that he could himself give evidence in his defence.

11. To determine whether the claimant is entitled to this declaration as claimed the first point to note is that the defendant's constitution provides as follows:

Article 83:

Where an allegation has been made against a person under Rule 82 that person shall be informed in writing of the exact nature of the allegation and be afforded reasonable opportunity to defend himself/herself.

This rule expressly incorporates the basic rules of natural justice. In the circumstances the passage cited by the defendant in its submissions, as to the rules of a society empowering it to violate the rules of natural justice from the case of *Dickason v Edwards [1910] 10 CLR 243*, is irrelevant. What must now follow is an examination of the procedure adopted by the General Council to determine whether it applied the rules to achieve fairness.

12. While fairness is not necessarily achieved by an "over judicialised" process, in this case it is significant that the procedure adopted by the tribunal resembled a summary judicial enquiry. The chairman's own words described it at the outset -

"The procedure that will be followed would be a very simple one where Mr. Duke would have all opportunity to defend himself. You being present here is an expression of him ensuring that he's well represented. We will be calling certain witnesses to give evidence and Mr. Duke, through your good self, no doubt, would have the opportunity to cross-examine the witnesses, following which, at the end of the evidence, and cross-examination, undoubtedly both Mrs. Gafoor and yourself would sum up to the General Council, after which the General Council will

seclude itself to arrive at a determination consistent with the Constitution of the PSA.”

13. What immediately strikes one is that the process formalized and “judicialised” as it was, did not afford the opportunity to the claimant, the subject of serious allegations of misconduct, to give evidence or to call witnesses. It is true that the claimant was invited at the close of the prosecution’s evidence to call witnesses. But it was the first time that he was being notified that this opportunity was available. The same applies to the invitation to make a statement in his defence, if by this was meant to give evidence, as opposed to the “summing up” that was referred to when the procedure was first outlined. On the face of it therefore, the procedure adopted by the defendant as outlined by the President was unfair to the claimant in that it deprived him meaningfully of the right to be heard. The prosecution was allowed to call viva voce evidence. The allowance for cross-examination of the prosecution witnesses was not sufficient in these circumstances to remove the unfair advantage to that side.

14. As to the claimant’s application for the adjournment to secure the attendance of his witnesses from Tobago, since the incident that had given rise to the charge had allegedly taken place there and the claimant’s witnesses if he were being allowed them would have been coming from the sister isle and as WASA workers would have had to have permission to leave their jobs, his request for the adjournment was not unreasonable. Further, when the

chairman refused the application for the adjournment for witnesses, she proceeded to adjourn for ten minutes to consider the evidence without returning to the issue of the defendant's evidence or statements. This approach to the hearing was consistent with what had initially been outlined, a process which did not properly afford an opportunity for the defendant to present a defence in accordance with Article 83 or with his basic common law right. In the circumstances where the procedure adopted by the General Council clearly afforded this for the prosecution, its failure to do the same for the claimant, on the face of it in the words of the President and in practical terms as things turned out, rendered the procedure unfair.

15. I have noted that on his cross-examination the claimant indicated that he expected he would have had to give evidence and to call witnesses and that he had actually spoken to some witnesses prior to the date of hearing. Whatever might have been his expectations, the procedure which was expressly described in the clearest terms did not include these features. The claimant's responses do not change that fundamental position. When he said he was ready to proceed with his matter, it could only have meant he was ready in accordance with the procedure outlined. If that procedure deprived him of an opportunity to properly present a defence and to be heard, his readiness to do otherwise could not cure that defect.

16. On the specific issue of the refusal to stand down the matter for the arrival of the claimant's counsel, in the circumstances of the proceedings having been adjourned from July 15th to July 28th because of the non-appearance of witnesses for the prosecution, this too could not have been considered an unreasonable request. This is more so because for the first time, in the absence of the claimant's counsel, the procedure which had been outlined at the onset was being modified to call upon him to make a statement and to call witnesses. In these circumstances the matter ought properly to have been adjourned to allow a reasonable opportunity to the claimant to take advice on and comply with the modified procedure. The refusal even to stand the matter down to 1:00 p.m. was even more unreasonable. According to the record the proceedings actually ended at 12:25. It appears that the President took the view that since Mr. Cunningham had not himself in a telephone conversation with the defendant's secretary, indicated his own unavailability until 1:00 p.m., that there was some inconsistency with his client's request. There was no reasonable basis for that view. There could have been any number of reasons for the position in which the claimant found himself.

17. As to whether the claimant was properly informed of the particulars of the second charge, the letter of the 24th June adequately indicated these and I reject the submission that his rights were breached in this regard as alleged.

Bias – Mr. Stephen Thomas

18. The claimant claims a declaration that the purported decision communicated to the claimant under letter dated 28th July 2008 is infected by bias by reason of the presence and involvement of the 1st Vice President, Mr. Stephen Thomas, participating in and being part of the meeting which heard and determined the second charge.

19. On July 15th 2008 when the charges were read and after the claimant had pleaded not guilty to both, Mr. Stephen Thomas was a witness called by the prosecution in support of the first charge. At that time it was expected, as the claimant had been notified, that both charges would have been heard then. At the end of the evidence, the General Council retired to consider the evidence on the first charge and returned with a verdict of guilty. When the President was informed that the witnesses to support the second charge could not be found, the proceedings were adjourned to July 28th.

20. By letter dated July 16th 2008 the claimant was advised of the adjourned date. In that letter the claimant was informed as follows –

“I am directed to inform you that the proceedings of the two disciplinary charges preferred against you which commenced on Tuesday 15th July 2008 is scheduled for continuation on Monday 28th July 2008 at PSA’s roof top. (emphasis mine)

On July 28th 2008 Mr. Thomas sat as a member of the Tribunal into the hearing of the second charge. Mr. Duke had pleaded not guilty to this charge on the previous occasion, that is the occasion when Mr. Thomas was a witness. The question is whether in

these circumstances the fact of Mr. Thomas' presiding as a member of the tribunal on resumption of the proceedings two weeks later, was capable of giving rise to a real possibility of bias, not only on his part but with the effect of infecting the entire tribunal.

21. I consider it a matter of significance that even from the defendant's communication, the proceedings were considered to be continuing, albeit for the purpose of dealing with the second charge. On the resumption of the proceedings, in effect Mr. Thomas was changing his position from the main witness on one charge, to adjudicator on another. This alone I consider sufficient to raise a certain level of discomfort in the mind of the informed and fair-minded observer. But it goes beyond that.

22. Mr. Thomas had given evidence of a certain kind of conduct on the part of the claimant in relation to the first charge. It was evidence of the claimant misconducting himself at the defendant's head office. It involved invading the defendant's premises, shouting and aggressive behaviour. Two weeks later in the continuation of the same proceedings he was a member of the tribunal judging the claimant's behaviour in relation to allegations of strikingly similar conduct only allegedly on a different occasion and at different premises in Tobago. Very early on I indicated what they were. A mere glance at them would indicate the similarity. I think in the circumstances it is fairly easy for the informed fair-minded observer to conclude that there was a real possibility of bias. A simple illustration by way

of analogy might better make the point. If a magistrate gave evidence as a victim of an assault against a particular person X, I should think that would disqualify him or her from presiding over an assault trial against X whether it was two weeks afterwards or later.

23. The next question is whether then this bias was capable of infecting the rest of the tribunal. There is no evidence that, other than for the inclusion of Mr. Stephen Thomas, the tribunal of 28th July 2008 was differently constituted from that of 15th July. As the second highest office holder in the union one would expect that simply by virtue of his office Mr. Thomas would command among his fellow members of the General Council a certain level of respect and authority as well as affection. If any or all of the remaining members of the tribunal had previously on July 15th heard and accepted his account of what had transpired in relation to the first charge, it seems to me his inclusion as part of the tribunal to judge the claimant's conduct on July 28th might have served to forcefully remind the members of the previous conduct of which Mr. Thomas had given evidence and there is a real possibility that this together with his presence as a fellow adjudicator among them have rendered his fellow tribunal members more disposed to accepting evidence of similar conduct alleged on the part of the claimant, albeit emanating from different witnesses completely. I consider that there was a real possibility of subconscious bias arising from the fact that one among them had had a similar experience in relation to which he had formally testified

before them on the last occasion that they had met to discipline the claimant. In coming to this conclusion I have been influenced by the reasoning of Lord Steyn in the case of *Lawal v Northern Spirit Ltd [2003] UKHL 35*. Although the facts in that case were dissimilar to some extent, I found it to provide guidance on the issue of subconscious bias.

24. The inclusion of Mr. Thomas was completely unnecessary for the proper constitution of the General Council and it unfortunately only opened the decision of July 28th 2008 to criticism on the ground of bias. I consider this criticism be well founded.

Bias – The President Ms. Jennifer Baptiste-Primus

25. The claimant claimed that the history of personal animosity between himself and the President would lead a fair minded observer to conclude that there was a real possibility of bias. The defendant has responded that there was no evidence of personal animosity, the President was at all times acting in her official capacity. This may be so, but at the end of the day, I think that distinction matters, little.

26. The circumstances which the claimant says give rise to the appearance of bias are set out in the claimant's witness statement. The history was not seriously disputed. The relationship between the claimant and the President was fraught with friction and hostility. It began with disagreements as to the

extent of their respective jurisdictions under the defendant's constitution and the organizational hierarchy as well as historically as a matter of practice between their offices. The situation worsened when the President came to the view that the claimant and some of his associates in the WASA section were leading a renegade section of the defendant's union.

27. In her witness statement the President identified several concerns. It is helpful to reproduce the paragraph since it is a good indication of how fundamentally these matters would have touched and affected the relationship between the claimant and the defendant union and by extension the President.

(Para 31)

“The New Management Committee WASA section was not following the Constitution of the defendant or the instructions of the President, and that they were acting according to their own agenda and not the interests of the membership of the defendant which made up the WASA section. The Executive Committee discussed the following issues and concerns:

- (a) The claimant's refusal to adhere to instruction not to schedule branch elections as they are not consistent with the constitution of the defendant and to await guidance on how to proceed in establishing Joint Consultative Committees. The claimant had in fact scheduled a series of branch elections and had in fact conducted one such election with respect to the Waste Water employees.
- (b) The claimant's failure to adhere to instructions not to request time-off on behalf of the section representatives.

- (c) The claimant's failure to adhere to the instructions not to communicate with the CEO on the matter of overtime.
- (d) The claimant's failure to attend regular weekly meetings with the President as provided for in the constitution of the defendant.
- (e) The claimant's failure to forward the specific dates and names of the officers for time-off for two days per week.
- (f) The claimant's daily attendance at meetings with the President of UWETT, Mr. Leroy Baptiste.
- (g) The claimant's disloyalty to the defendant
- (h) The claimant's refusal to report to the President in accordance with Article 58A of the constitution of the defendant.

28. The President's duties and responsibilities are set out under Article 38 of the constitution. She is constitutionally appointed the chief negotiator, she is vested with tremendous powers as well as responsibilities. She is inter alia entrusted to take such actions as are necessary to protect or advance the interests of the association. Given her responsibilities the President could not be criticized for the robustness of her approach to her duties and her spirited response to what she perceived to be acts of betrayal toward the defendant by the claimant and those in his camp.

29. I have said before, very much of what is alleged by the claimant about the relationship is not in dispute. The fact of two previous High Court actions

which arose out of the unhealthy relationship of these parties is well known to this court. The first action challenged the attempt by the defendant to discipline the claimant as chairman of the WASA section. One of these charges arose out of the same incident involving Mr. Thomas. In all of this the President was very much involved, as indeed the constitution allowed. Her answers candidly given on cross-examination are the best indication of her position regarding the claimant and I quote –

Sometime after August 2007 a dispute arose with the claimant as Head of WASA Section . What happened was as a result of the failure to follow certain directives. I had cause to write Duke regarding certain actions he had taken. It was the view of the General Council to convene to ask him to explain his failure to follow directions. The General Council decided to call him as part of the executive. I would have shared the view that he should have been called to give an explanation. My experience as President is to ensure that sections adhere to the Constitution. My view on reading the constitution was that he was breaching Article 53 (a). I had cause to indicate to Mr. Duke that the Constitution made certain provisions and he needed to adhere to them. After November 2007 there was the view of the executive that he was breaching Article 53 (a) of the constitution. I shared that view. I was of the view he was trying to operate a union within a union. I viewed his actions as disloyal to the PSA. Mr. Duke was a new representative, that was how the relationship began. Based on his actions in November and December 2007 I formed view. I considered him to be a renegade. I found him associating with other unions to whom we were not related. It was in the newspaper. I wrote

a letter to Mr. Guiseppi dated November 29, 2008. (See T.....38).

I see paragraphs where I referred to him as a renegade member. I see reference to claimant encouraging them to leave the defendant and join NUGFW. I had formed the view the claimant was trying to get members to leave the PSA. WASA section has 1700 members. It is one of 106 sections making up PSA. WASA section is the second largest section, second to Ministry of Health. The fact that the claimant was perceived as creating a union within a union concerned to me because the constitution makes provision for that. As president of a large union it was a matter of concern that persons within was trying to encourage members to break ranks.

Letter refers to what I called an unprovoked attack. (shown letter)

I had taken the view he had misconducted himself and I was calling upon him to explain his behaviour.

30. The President openly explained her sensitivity to the claimant's conduct at paragraph 32 of her witness statement:-

“There were similarities between what the defendant experienced in 2007 with the claimant. There was a clear affiliation between the claimant and Leroy Baptiste, “the Visionaries” and “the Original Visionaries”, which was a matter of grave concern to me as President of the Defendant, and it was also a matter of serious concern to the Executive Committee of the defendant. It was on these bases that the Executive therefore unanimously decided to make certain recommendations to the General Council of the defendant to resolve the situation so as to protect the interest of its members in WASA. These recommendations included the immediate

withdrawal of the defendant's approval of full time-off for the claimant".

31. In the light of that earlier experience, the President was entitled to the intensity of feeling that she demonstrated in her communications to the claimant, to the President of a rival union, Mr. Robert Guiseppi, and her public statements as reported in the Newsday and on a radio station she has not denied. The statements were as follows:

"Somehow, somewhere, Watson Duke will face a disciplinary committee". (Newsday)

And all I will say at this point in time the reprieve Watson Duke has obtained is a temporary reprieve. He will not escape the disciplinary mechanism of this Union since no member stands above the Constitution and we will proceed accordingly and there will be a lot more water to flow under this bridge". (Radio broadcast)

32. The simple question at the end of the day is whether the above circumstances including the very direct involvement of the President in all of the actions of the defendant following her perception since November 2007, a mere month after he assumed office, that the claimant was a threat to the defendant and was acting outside of the constitution to the time of the laying of the charges; her involvement in giving advice to her officers as certain events, the subject of the enquiry were unfolding; her direct involvement in the previous court cases, her public statements, her views of the claimant as a traitor to the defendant, a renegade, someone who was encouraging persons to leave the defendant for a rival union; whether all of these matters did not

disqualify her from presiding over the disciplinary proceedings against the claimant. I noted early on that her presence as President was not indispensable to the proceedings.

33. The defendant relies on a passage from the judgment of Maugham J in **Mc Lean v The Workers' Union [1929] 1 Ch. 602** to support the proposition that mere personal prejudice on the part of the president would not be sufficient to vitiate the disciplinary proceedings.

34. The answer to this is that the actions of the President amounted to a sustained campaign to deal with a perceived element of disloyalty and insubordination spearheaded by the claimant. This goes well beyond what can be described as “mere personal prejudice”. Further the broader statement Maugham J appears to have been made in the context of the accepted rule that parties may by contract (e.g. the rules of an association) entrust the duty to prosecute and to adjudicate the same persons or tribunal, because there is no one else to prosecute.

35. This principle is inapplicable in this case where the rules of the association incorporate the right to a fair hearing and where the participation of the President was not required under the rules. The very case cited by the defendant, **Australian Workers' Union v Bowen [No.2] [1948] 77 CLR 601** arose out of similar facts. There, a certain Mr. Dougherty, the Secretary of the

Union was entitled under the rules to police and prosecute. He sat on the disciplinary hearings as well and a decision arising out of such a hearing was challenged. The following passage out of the judgment of Dixon J at pg. 631, sums up the position as I see it.

“He had been engaged in bitter public attacks on the respondents, particularly on Bowen, and had exhibited the most intense and extreme opinion about the respondents’ conduct concerning the matters in question. Then at the hearing of the charges he assumed the functions of a prosecutor and so to speak presented the case in support of the charges to the Council. It is true that the rules make him a member of the Council as general secretary and require the general secretary’s attendance. But they do not make his presence indispensable and do not necessitate his participation in the decision of questions in which his interest or concern makes it improper. “In interpreting rules conferring jurisdiction to any tribunal, there is always to be read into them the underlying condition that the proceedings shall be carried on in accordance with the fundamental principles of natural justice. It is upon a party who wishes to shut out the implication of that basic condition to show that the rules expressly or by necessary implication negative the implication of its existence”: per O’Connor J. in *Dickason v Edwards* (1). It is not in accordance with the principles of natural justice to have present as a member of the tribunal a person who has promoted the charge and supports it as the prosecutor or one who is invincibly biased against the accused as a result of his participation in the controversy, and this was the case with Dougherty. If a person disqualified by such considerations sits with the tribunal and takes part in the decision, that is enough to vitiate it: *Dickason v Edwards* (2)”.

36. On a full consideration of the history of the relationship I find that the President was “invincibly biased” and that her presiding over and participation

in the special General Meeting which was convened to discipline the claimant was sufficient to vitiate the proceedings. The defendant has not demonstrated that the rules removed the right of the claimant to hearing before a council that was impartial and free from bias.

37. Applying the test for apparent bias established in **Panday v Virgil Mag. App. No.75 of 2006**, I find that the fair-minded and informed observer would conclude that there was a real possibility that the defendant's President was biased, sufficient to vitiate the disciplinary proceedings and the decision to expel the claimant.

Disposition

38. There shall be judgment for the claimant. The court grants the following reliefs.

- (1) A declaration that in breach of Article 83 the claimant was not afforded a reasonable opportunity to defend himself against the allegations of misconduct by reason of the following unreasonable actions of the President/Chairman of the meeting hearing the charges against him on the 28th July 2008:
 - (a) Refusal to grant an adjournment to 1:00 p.m. to facilitate the appearance of his attorney to represent him in his defence of the charges of cross-examining witnesses called against him.
 - (b) Refusal to grant an adjournment to another day to facilitate the claimant calling witnesses in his defence; and/or
 - (c) Failure and/or refusal to advise the claimant that he could himself give evidence in his defence.

- (2) A declaration that the purported decision communicated to the claimant under letter dated 28th July 2008 is infected with bias by reason of the presence and involvement of the President/Chairman Mrs. Jennifer Baptiste and Mr. Stephen Thomas in participating in and being part of the meeting which heard and determined the charges.
- (3) A declaration that the purported decision of the General Council to expel the claimant was arrived at in breach of the principle of natural justice.
- (4) A declaration that the purported decision communicated to the claimant under letter dated July 20th 2008 is null and void and of no effect and that the said letter does not in terms expel the claimant from the defendant.
- (5) The defendant will pay the claimant's costs in the sum of \$14,000.00.

Dated this 3rd day of July 2009

CAROL GOBIN

JUDGE