REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV 2016-00547

IN THE MATTER OF DOCTORS VICTOR WARREN WHEELER, NARASIMHA RAJA BATTULA AND AGBAI DIMGBA

AND

IN THE MATTER OF THE REGIONAL HEALTH AUTHORITIES (CONDUCT) REGULATIONS 2008

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER PART 56 OF THE CIVIL PROCEEDINGS RULES, 1998 AND THE JUDICIAL REVIEW ACT, 2000

AND

IN THE MATTER OF THE PURPORTED DECISIONS OF THE TOBAGO REGIONAL HEALTH AUTHORITY TO PUBLICIZE, INITIATE, CONDUCT AND CONTINUE DISCIPLINARY PROCEEDINGS AGAINST THE APPLICANTS

AND

IN THE MATTER OF THE PURPORTED DECISIONS OF THE TOBAGO REGIONAL HEALTH AUTHORITY TO SUSPEND THE APPLICANTS FROM THEIR EMPLOYMENT

BETWEEN

DR. VICTOR WARREN WHEELER	**First Claimant**
AND	
DR. NARASIMHA RAJA BATTULA	**Second Claimant**
AND	
DR. AGBAI DIMGBA	**Third Claimant**
AND	
THE TOBAGO REGIONAL HEALTH AUTHORITY	**First Defendant**
AND	
DR. INGER MANSWELL-MYRIE	**Second Defendant**

Before the Honourable Madame Justice Margaret Y Mohammed

Dated the 21st September 2017

APPEARANCES:

Mr. Elton Prescott S.C. leads Mr. Ian Benjamin and instructed by Ms. Nalini Jagnarine for the Claimants.

Mrs. Pamela Elder S.C. leads Mr. Ken Wright and instructed by Mr. Richard Thomas for the Defendants.

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JUDGMENT

The Claimants case

1. The Claimants are medical practitioners duly registered with the Medical Board of Trinidad and Tobago and employed at the Scarborough General Hospital in the Department of Obstetrics and Gynaecology of the First Defendant. The First Claimant is a Senior Medical Officer, the Second Claimant is a Registrar and the Third Claimant is a House Officer.

2. The First Defendant is a body corporate created by section 4 of the **Regional Health Authorities Act**[1] and by section 5 (2) is subject to the provisions of the **Tobago House of Assembly Act**[2] and governed by a Board of Directors ("the Board"). The Second Defendant was the Acting Medical Chief of Staff of the Scarborough General Hospital.

3. The Claimants have challenged by judicial review certain decisions made by the Defendants in January 2016 and October 2016 as being in breach of **the Regional Health Authorities (Conduct) Regulations 2008 (Misconduct & Disciplinary Proceedings)** ("the Regulations"), sections 5 (3) (a) to (g) and (j) to (o) of the **Judicial Review Act**[3] **("the JRA")** and contrary to the common law.

4. The background to this action started in December 2015. Mrs. Rose Gordon ("Mrs Gordon") was a thirty-five (35) year old woman in her third pregnancy. She was admitted on the 29th December 2015 to the Scarborough General Hospital and diagnosed as suffering from severe pre-eclampsia at 34 weeks gestation, she had a breech presentation, fibroids and anaemia. Following examination and consultation by Dr. Ammar Singh, Senior Medical Officer in the department of Obstetrics and Gynaecology, a planned caesarean section was scheduled.

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[1] Ch 29:05
[2] Ch 25:03
[3] Ch 7:08

5. On Thursday 31st December 2015 at 6.35 p.m. the Second Claimant with the assistance of the Third Claimant performed the caesarean section on Mrs. Gordon and administered drugs in order to control the bleeding. There were only two units of blood available for Mrs Gordon and one unit was used to transfuse her following the operation.

6. As at 1:30 a.m., on the 1st January 2016, Mrs. Gordon's bleeding was not satisfactorily controlled. The First Claimant advised the Second Claimant to proceed with an emergency hysterectomy. Under the supervision of the First Claimant, the Second Claimant performed the subtotal hysterectomy procedure with the assistance of the Third Claimant and Dr. Rheanna Harrilal, Intern on duty. The First Claimant prepared the post-operative notes and noted a haematoma (large blood clot) in the left broad ligament, that is, next to the uterus of about 300 mls and that the suture line of the uterus was intact, with no active bleeding and no blood stained urine.

7. Following the hysterectomy Mrs Gordon was taken to the Intensive Care Unit (ICU). Mrs Gordon's ICU notes indicated that there was good urine output with no blood stain; good air entry of her lungs; she was not ventilated, breathing on her own with the assistance of a face mask with oxygen and that she was able to speak. On further review by the Second Claimant and Dr. Marrielle Armstrong, House Officer on duty, Mrs Gordon was noted in a stable condition with no significant vaginal bleeding, was awake and alert and producing urine that was not blood stained with her haemoglobin (blood count) at 5.7 gm/dl (below normal -11.0 gm/dl).

8. At about 11:30 a.m. on the 1st January 2016, the First Claimant was informed by Dr. Armstrong, House Officer, that the blood bank technician had advised that there were only two units of blood available and none was released for Mrs. Gordon. The First Claimant informed then Acting Medical Chief of Staff, Dr. Andrew Belle, who later confirmed same.

9. Thereafter the First Claimant as Senior Medical Officer reviewed all the patients on the Maternity Ward to determine if any were at an increased risk of needing a caesarean

section or post-partum haemorrhage and therefore arrangements might be made for transfer to Trinidad where blood would be available.

10. At about 2:30 pm on the 1st January 2016, Dr. Armstrong, House Officer informed the First Claimant, that following an attempt by the ICU House Officer Dr. Joseph to site a central line on the right side of the upper chest, the patient 'crashed' and was being resuscitated by the ICU team. Despite several attempts, the ICU team was unsuccessful and Mrs Gordon died.

11. Sometime thereafter, the Acting Medical Chief of Staff, Dr. Andrew Belle informed the First Claimant, contrary to earlier indications, that the blood bank had five (5) units of blood available and not two (2). The First Claimant personally informed the next of kin of her death.

12. Dr. Andrew Belle planned the post mortem, which was performed by Professor Hubert Daisely ("Professor Daisley") on the 4th January 2016, videotaped and witnessed by Dr. Armstrong, House Officer, Dr. Joseph, ICU House Officer, Nurse George, Head Nurse, Maternity, and the First Claimant as Head of Department of Obstetrics and Gynaecology.

13. Following the post mortem, Professor Daisley, in the First Claimant's presence informed Mrs. Gordon's family, that she had lost a lot of blood; that her lungs were collapsed; that he did not know the cause of the lung collapse; that his histological analysis of the lung and uterine tissues would be completed by the 6th January 2016 in order to determine the cause; and that a meeting with the family would thereafter take place on the 8th January 2016 at 10.00 am.

14. Dr. Nathaniel Duke, Chief Executive Officer (Ag.) ("Dr Duke") of the First Defendant prepared and submitted to the Chairman of the First Defendant a report dated the 5th January, 2016 on the death of Mrs Gordon ("the CEO's report").

15. On the 7th January 2016, the Claimants attended meetings with the First Defendant's Dr. Duke and then Acting Medical Chief of Staff, the Second Defendant wherein they were informed of the alleged findings of the Post Mortem Report, more particularly, that two blood vessels were not tied off and as a result, Mrs Gordon bled to death. The Claimants were directed to cease clinical duties with immediate effect and to report to the Second Defendant. By letter dated 7th January, 2016 ("the CEO's letter"), the CEO informed the Claimants inter alia that they were "temporarily removed from clinical duty effective immediately, pending an independent investigation into the death of Rose Gordon at the Scarborough General Hospital on the 1st day of January 2016". On the 7th January, 2016, ("the Chairman's letter") the Chairman issued a suspension notice to the Claimants informing them inter alia that they were suspended from duty with effect from the 8th January, 2016 pursuant to Regulation 27(1).

16. On the 3rd January 2016 on the broadcast of the TV6 news there was media coverage of the death of Mrs Gordon and on the 7th January 2016 there was an article in the Trinidad Express Newspaper on the same matter. On the 8th January 2016 the Trinidad Express newspaper published a second article under the headline *"Botched Caesarian section at Scarborough General Hospital 3 doctors suspended"*. In the article the Board issued a statement confirming that it had suspended the doctors who were involved in the death of Mrs Gordon and that they had launched an investigation following an examination of all relevant reports and circumstances surrounding her death. At that time the First and Second Claimants had received written communication that they had been suspended but the Third Claimant was not in receipt of written communication that he had been suspended from clinical duties.

17. As a result of their respective suspensions, the Claimants received only their basic salary which amounted to about 40% of their total remuneration package and which said reduction adversely impacted their ability to meet their financial commitments at the time.

18. By letter dated the 13th January 2016 ("the investigator's letter") to each Claimant, the Second Defendant indicated that she was appointed the investigating officer ("the Investigating Officer") pursuant to regulation 21 (3) (a) of the Regulations. She notified the Claimants that they were to provide a written explanation to her within 7 days of receipt of the investigator's letter concerning the following allegation of misconduct:

> "That on January 01st 2016 you performed your duties negligently in accordance with Regulation 19(1) (b) of the Regulations which resulted in the death of Rose Gordon at the Scarborough General Hospital."

19. In the investigator's letter, the Investigator also informed the Claimants that they were required to attend an Enquiry ("the Enquiry') on Tuesday 19th January 2016 at 1:00pm in LRC #17 at the Scarborough General Hospital. The First Claimant received the investigator's letter on the 14th January 2016 and both the Second and Third Claimants received it on the 13th January, 2016.

20. By letter dated the 15th January 2016, the First Claimant's Attorneys-at-Law requested copies of Mrs Gordon's Progress Notes, Nurses Notes, Lab Results, Admission and Discharge Record, Patient Registration, Consent Forms and all documents with respect to the Post Mortem Report, including the video, slides, samples of tissues taken from the lungs and uterus and any other organs. The Defendants were not supplied documentation with respect to the Post Mortem Report.

21. The Claimants also requested details and/or clarification with respect to the nature of the Enquiry which was requested and by letter dated the 21st January 2016, the Defendants' Attorney-at- Law responded that the Enquiry was not a tribunal and it would not be making any determination on the matter; that time was extended to the 26th January 2016 for the First Claimant to provide a written response and called upon the Claimant to attend the Enquiry.

22. On the 19th January 2016 the Claimants attended the Enquiry. At the Enquiry the Second Defendant chaired the Enquiry which consisted of a panel comprising Dr. Brian Brady,

Obstetrician, Port of Spain General Hospital, Mr. Elroy Julien, Quality Officer and Ms. Ada Guevara Retired Midwife and District Health Visitor.

23. The Enquiry panel did not permit the First Claimant's union representative or his attorney at law to be present. The First Claimant eventually submitted his report/ explanation by letter dated the 26th January 2016.

24. The Second Claimant attended the Enquiry on the 19th and 26th January, 2016 where he was questioned. He eventually submitted his report by Friday 29th January 2016. The Enquiry panel also did not permit the Second Claimant's union representative to be present.

25. The Third Claimant was permitted to bring his union representative into the Enquiry on the 18th January 2016. However on the 19th January 2016 the union representative was prevented from attendance with the Third Claimant. On the 26th January 2016 the Third Claimant again attended the Enquiry. His attorney at law was not permitted to attend with him. On the 28th January 2016, the Third Claimant submitted a written response which detailed his concerns about the Post Mortem Report being factually inaccurate and published at a time when the histological analyses were incomplete.

26. On the 15th February 2016 pre-action protocol letters were sent to the Defendants on behalf of the Claimants complaining of adverse publicity, the Claimants suspensions from clinical duties, the appointment of the Second Defendant as the Investigating Officer and the disciplinary process.

27. On the 1st March 2016, the Court granted the Claimants permission to apply for judicial review of the First Defendant's decision to suspend them from clinical duties, to appoint the Second Defendant as the Investigating Officer to conduct the Enquiry surrounding the death of Mrs Gordon and to commence disciplinary proceedings against them. On the 29th April 2016 ("the Interim Order") the Court stayed the Claimants suspensions with effect from the 8th January 2016. It also ordered the First Defendant to forthwith pay the

Claimants such part of their remunerations which it had declined and failed to pay since the 8th January 2016 and it directed the First Defendant to reinstate each Claimant forthwith and roster each Claimant to perform clinical duties without further loss of remuneration.

28. Subsequent to the Interim Order, the Claimants were rostered for clinical duties on the 13th May 2016 and the cheques for their loss of remuneration were paid on the 16th May 2016. However on the 7th June 2016 the Second Claimant was instructed to proceed on all his accumulated vacation leave with effect from the 1st July 2016 until September 2018.

29. The First Claimant, as the Head of Department intervened setting out the reasons why the Second Claimant should not be sent on all of his leave from the 1st July 2016. Subsequent thereto, on the 7th July 2016, the Second Claimant applied for six weeks' vacation leave and he was allowed to proceed on leave for the said six weeks from the 1st August 2016 until the 13th September 2016. However, when the Second Claimant submitted his request for Leave Application Form on the said 7th July 2016, the Second Defendant as Medical Chief of Staff wrote on the Leave Application Form, *'approved but he needs to continue leave he has 572 days'.* The Second Claimant informed the Second Defendant that he did not have 572 days of leave but he has since confirmed he had 486 days of leave as of October 2016.

30. On the 13th September 2016, the Second Claimant resumed duties and on the 22nd September 2016, he submitted his Contract Renewal Form to the Second Defendant having received a good appraisal from the First Claimant as Head of the Department. On the 23rd September 2016, the Second Defendant wrote on the Contract Renewal Form, "*hold the renewal at this point*" and on the next page she commented that a patient, *"Ms. Cane Lowe asked for an investigation into her management and there is a matter in the High Court with regards to the case of his suspension re Rose Gordon said matter has been appealed by TRHA"*.

31. According to the Second Claimant, the comment by the Second Defendant meant that he would not have received his gratuity from the First Defendant which was due in December 2016.

32. On the 28th September 2016, the First Claimant compiled the roster for on call duty for the month of October, 2016 and the Second Claimant was included in the roster. However, on the 29th September 2016, the Second Claimant was informed by letter from Dr Duke that he had a balance of 211 compensatory time days and 275 vacation days and that based on the First Defendant's policy the Second Claimant was required to proceed on leave with effect from Monday 1st October, 2016 to 14th September, 2018.

33. The Second Claimant responded to Dr. Duke by letter dated 30th September 2016, setting out his concerns. On the said 30th September 2016, the First Claimant wrote a letter to the Chairman of the Board of the First Defendant wherein he explained the reasons the Second Claimant should not proceed on all his accumulated leave with effect from 1st October, 2016. The Second Claimant reported for duties, however on the 4th October, 2016, he was given a letter from the Second Defendant with a complaint that he had not gone on leave.

34. By letter dated the 5th October 2016, Dr. Duke, wrote to the Second Claimant directing him to *"proceed on leave with immediate effect"* until September 2018 and if he did not he would be *"found to be in violation of this final directive, (his) presence would be categorised as unauthorized and the TRHA shall take the appropriate action to safeguard its integrity."*

35. On the 17th October 2016 the instructing attorney at law for the Second Claimant wrote to the First Defendant concerning the Interim Order and questioned the rationality of its subsequent actions with respect to mandating the Second Claimant to proceed on leave until September 2018.

36. The First Defendant permitted the Second Claimant to return to work on the 13th March 2017.

37. Based on the aforesaid facts the Claimants complaints and the grounds that support them were as follows:

    a. Over the period 4th to 7th January 2016, the Defendants did not act in good faith since they unlawfully leaked to the media the findings of an incomplete Post Mortem Report into the death of Mrs. Gordon resulting in adverse media publicity and the widespread public condemnation of the Claimants.

    b. The Defendants unlawfully relieved the Claimants of their clinical duties forthwith contrary to the Regulations.

    c. By the Chairman's letter the First Defendant's unlawfully suspended the Claimants from their employment with effect from the 8th January 2016 and reduce their respective remuneration to basic pay contrary to Regulations.

    d. The Claimants' suspensions was without regard to the relevant consideration of the public interest since it resulted in the cancellation of all major surgeries in the Department of Obstetrics and Gynaecology and the compromise of existing and future patient-care.

    e. The First Defendant's appointment of the Second Defendant as the Investigating Officer to conduct the Enquiry into allegations of misconduct against the Claimants was unlawful since she lacked the clinical qualifications and the statutory requirement of neutrality.

    f. The Enquiry convened by the Second Defendant on the 18th, 19th and 26th January 2016 was unlawful and contrary to the Regulations. The Enquiry panel acted unlawfully by refusing to permit the Claimants to have legal or trade union representation present to represent or otherwise assist them. The said actions by the Enquiry panel gave the appearance of bias and was

contrary to natural justice and the Claimants' legitimate expectations of procedural fairness.

g. The First Defendant's letter dated the 5th October 2016, was contrary to the letter and spirit of the Interim Order since it effectively suspended the Second Claimant when he was directed to proceed on leave with immediate effect until September 2018.The Second Claimant was sent on leave for the period the 5th October 2016 to 13th March, 2017 when the Defendants rescinded the directive letter dated the 5th October 2016.

38. Based on the aforesaid complaints the Claimants seek the following orders:

A. An Order restraining the Defendants, their servants or agents from publicizing and/or causing and/or permitting to be publicized and/or sanctioning and/or continuing to do so any or any further matters or information that is adverse to the Claimants or may cause prejudice to the Claimants;

B. An Order that the suspensions and/or removal of the Claimants from all clinical duties at the Scarborough General Hospital and/or the deprivation of the Claimants of such part of their remuneration as the Defendants have declined and failed to pay to the Claimants since the 7th January 2016 to date be stayed until further Order;

C. An Order directing the Defendants do pay forthwith to the Claimants such part of their remuneration as the Defendants have declined and failed to pay to the Claimants since the 7th January 2016 to date;

D. An Order that the Enquiry and disciplinary proceedings pending against each of the three Claimants be stayed until further Order;

E. An Injunction prohibiting the Defendants from continuing and/or pursuing the Enquiry and all disciplinary proceedings against the three Claimants;

F. Alternatively an Interim Order of Prohibition directing that the Defendants do forthwith cease the Enquiry and all disciplinary proceedings against the three Claimants;

G. A Declaration that the decisions of the Defendants to initiate and continue the Enquiry and all disciplinary proceedings against the Claimants are *ultra vires*, invalid, null, void, and of no effect;

H. An Order of Certiorari to bring into this Court and quash the decisions of the Defendants to initiate and continue the Enquiry and all disciplinary proceedings against the three Claimants;

I. Alternatively an Interim Order of Mandamus directing that the Defendants do reinstate forthwith each Claimant in his employment and/or roster each Claimant to perform clinical duties without any or further loss of remuneration;

J. A Declaration that the decisions of the Defendants to suspend and/or to direct the Claimants to cease their clinical duties and/or not be paid their full remuneration and each of them is *ultra vires*, invalid, null, void and of no effect;

K. An Order of Certiorari to bring into this Court and quash the decisions of the Defendants to suspend and/or direct that the Claimants do cease their clinical duties and not be paid their full remuneration;

L. An Order that the decision to appoint the Second Defendant to convene the Enquiry and to act as the Investigating Officer into the alleged misconduct of the three Claimants be stayed;

M. An Injunction prohibiting the Second Defendant from performing or purporting to convene the Enquiry and to act as or to perform the functions of Investigating Officer in respect of the alleged misconduct of the Claimants;

N. Alternatively an Interim Order directing that the Second Defendant do forthwith cease to convene the Enquiry and to perform the functions of Investigating Officer in respect of the alleged misconduct of the three Claimants;

O. A Declaration that the establishment of the Enquiry and the appointment of the Second Defendant as Investigating Officer in respect of the alleged misconduct of the three Claimants is *ultra vires*, invalid, null, void, and of no effect;

P. An Order of Certiorari to bring into this Court and quash the establishment of the Enquiry and the appointment of the Second Defendant as Investigating Officer in respect of the alleged misconduct of the three Claimants;

Q. An Order for the disclosure by the Defendants to the Claimants of all documents in connection with the purported disciplinary proceedings and/or purported Enquiry into the death of Mrs.Gordon, which are in the possession or control or custody of the Defendants;

R. An order that the Defendants' decision by letter dated the 5th October 2016 directing that the Second Claimant do "*proceed on leave with immediate effect"* until the 14th September, 2018 be stayed until the hearing and determination of the claim herein or until further order;

S. An Order restraining the Defendants, their servants or agents from giving any or continuing effect to and enforcing its directive dated the 5th October 2016 directing that the Second Claimant do proceed on leave with immediate effect

until September 2018 until the hearing and determination of the claim herein or until further order;

T. An Order restraining the Defendants, their servants or agents from giving any or continuing effect to and enforcing its threats as stated in the letter dated the 5th October 2016, that should the Second Claimant be *"found to be in violation of this final directive, (his) presence would be categorised as unauthorized and the TRHA shall take the appropriate action to safeguard its integrity*";

U. An Order of Certiorari to bring into this Court and quash the Defendants' decision by letter dated the 5th October 2016 directing the Second Claimant do "*proceed on leave with immediate effect"* until September 2018;

V. A Declaration that the Defendants' decision by letter dated the 5th October 2016 directing the Second Claimant do "*proceed on leave with immediate effect"* until September 2018 is *ultra vires*, invalid, null, void, and of no effect;

W. A Declaration that the Defendants' threats as stated by its letter dated the 5th October 2016 that should the Second Claimant be *"found to be in violation of this final directive, (his) presence would be categorised as unauthorized and the TRHA shall take the appropriate action to safeguard its integrity*" are *ultra vires*, invalid, null, void, and of no effect; and

X. Costs.

The Defendants response

39. The Defendants stated that at the end of every Executive Council meeting by the Tobago House of Assembly ("the THA") there is a post executive briefing with the media where

there is an open question and answer session. After the death of Mrs Gordon at one of the THA's sessions, the Secretary for Health, Mrs. Claudia Groome-Duke, fielded questions from reporters about the death of Mrs Gordon, the probable cause(s) including the major cause identified by Professor Daisley being two (2) vessels which were left untied. The Defendants stated that Professor Daisley also duly informed members of the immediate family of Mrs Gordon of the major cause of death, that is, that she had lost too much blood from two (2) vessels left untied after the hysterectomy procedure.

40. The Defendants response to the Claimants allegation that they were suspended without due process being followed was that the First Defendant's 'Policy and Procedure – Adverse Events Management' classifies the death of a patient as a 'Reportable Clinical Adverse Event'. In accordance with the 'Notification Provision' of this policy at A 3, the Head Nurse of Intensive Care Unit and the Quality Manager, inter alia must submit a report on the adverse incident to the Chief Executive Officer (CEO). The then CEO Dr. Duke after careful consideration of the Post Mortem findings, the Incident Report from the aforementioned personnel formed the opinion that there was misconduct on the part of the Claimants, and prepared the CEO's report to the then Chairman of the Board Ms. Lydia Peters. The Chairman after careful consideration of the CEO's report instructed Dr Duke to suspend the Claimants from clinical duties as a precautionary measure. On 7th January, 2016 Dr Duke orally suspended the Claimants from clinical duties as instructed. This was followed up and confirmed in writing by the Chairman's letter. The Claimants were then suspended from performing clinical duties only with basic salary pending the determination of the matter pursuant to Regulation 27 (2).

41. The Defendants response to the Claimants challenge of the appointment of the Second Defendant as the Investigating Officer and the Enquiry was as follows. The Defendants stated that immediately after the Claimants suspension, the First Defendant through Dr Duke appointed the Second Defendant as the Investigating Officer to investigate the matter pursuant to Regulation 21 (1) (b). By the investigator's letter the Second Defendant wrote the Claimants with respect to her appointment as the Investigating Officer of the allegations of misconduct and further requested that the Claimants

provide written reports within seven (7) days as per the Regulations. Between the period 18th to 26th January, 2016 the Second Defendant convened the Enquiry and conducted enquiries surrounding the Claimants involvement or otherwise on the allegations of misconduct. Following the Enquiry there has been no decision taken by the First Defendant whether or not to lay charges or otherwise against the Claimants for misconduct.

42. The evidence in support of the Claimants' complaints were contained in the Claimants' affidavits filed on the 26th February 2016, 16th May 2016, 21st February 2017, 3rd April 2017 and the 28th July 2017 The Defendants affidavits in opposition were the affidavit of Dr Duke filed on the 27th April 2016, the affidavit of the Second Defendant filed on the 2nd May 2016 and the affidavit of Mr Godwyn Richardson, acting CEO filed on the 17th March 2017.

43. Having dealt with the interim relief in the Interim Order the only matters to be addressed are the substantive reliefs. In my opinion the issues which would determine if the Claimants are entitled to any of the substantive reliefs sought are:

(a) Was the release of the Post Mortem Report done in bad faith and in breach of the requirements of natural justice principles?

(b) Was the Claimants suspension from clinical duties contrary to the Regulations and in breach of natural justice principles?

(c) Was the appointment of the Second Defendant as the Investigating Officer contrary to the Regulations and in breach of natural justice principles?

(d) Was the Enquiry conducted contrary to natural justice principles and in breach of the Claimants legitimate expectation of procedural fairness?

(e) Was the First Defendant's treatment of the Second Claimant after the Interim Order unlawful?

Was the release of the Post Mortem Report done in bad faith and in breach of the requirements of natural justice principles?

44. The supervisory jurisdiction performed by the Court in judicial review proceedings was adequately summarized by Lord Clyne in **Reid v Secretary of State for Scotland**[4] as:

> "Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence" (Emphasis added).

45. **Section 20 of the JRA** states that a person acting in the exercise of a public duty must perform that duty in accordance with the principles of natural justice or in a fair manner. It states:

> "20. An inferior Court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law shall exercise that duty or perform that function in accordance with the principles of natural justice or in a fair manner."

[4] [1999] 2 AC 512, 541F-542A

46. A decision is taken in bad faith if it is taken dishonestly or maliciously. The Court in **R v Derbyshine County Council Ex.p**. **The Times Supplements Ltd & Others**[5] opined that where a decision is activated by bad faith or vindictiveness, it is unlawful.

47. According to the First Claimant after Mrs Gordon's death the then Acting Medical Chief of Staff, Dr Belle planned that Professor Daisley would perform the post mortem on the morning of the 4th January 2016 and thereafter a meeting would follow on the 5th January 2016 at 11:00am with Mrs Gordon's family, Dr Belle other relevant persons and him as Head of Department. The post mortem which was performed by Professor Daisley on the morning of the 4th January 2016 was witnessed by the First Claimant, Dr Armstrong, House Officer, Dr Joseph, House Officer, ICU and Nurse George (Head Nurse on maternity). The post mortem was videotaped. After the post mortem was completed Professor Daisley again spoke with Mrs Gordon's sister in the First Claimant's presence and told her that Mrs Gordon had lost a lot of blood, that her lungs were collapsed, that he did not know the cause of the lung collapse but that he would do a histology of the lungs and uterine tissues to see if the cause could be determined.

48. The First Claimant then informed Professor Daisley that a meeting was planned with the family for the next day (i.e. 5th January 2016) in order to go through the Post Mortem Report and to inform them of the cause of death. Professor Daisley suggested that the meeting be postponed in order for him to conduct the histological analysis. He informed Mrs Gordon's sister and the First Claimant that he would complete his analysis by Wednesday 6th January 2016 so the meeting could take place after. As a result the First Claimant informed Mrs Gordon's sister that they would have the meeting on Friday 8th January 2016 at 10:00am. He also informed the Acting Medical Chief of Staff Dr Belle of this and he agreed that to attend the meeting.

49. According to paragraphs 35 and 36 of the First Claimant's affidavit filed on the 26th February 2016:

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[5] (1990) 3 Admin LR 241

"35. On the 7th January 2016 at about 7.00 a.m., I received a telephone call from Dr. Gillian Wheeler, Head of Department of Paedetrics, who informed me that the contents of the post mortem were published the same day in the Trinidad Express Newspaper under the headline "Botched C-Section led to mom's death". This story was the main headline on the front page of the newspaper and Ms. Elizabeth Williams, the journalist whose byline appears under the article, revealed that her newspaper had obtained a copy of the autopsy report and in this regard, it appears newspaper had obtained a copy of the autopsy report and in this regard, it appears to me that the Intended Defendants permitted access to it. …

36. Following the publication, I received calls from Friends and colleagues asking about it. It is to be noted that at the time of this publication, as far as I am aware, no histological analyses had been completed. The publication condemned the Applicants as having botched the C section is highly prejudicial to the disciplinary proceedings and damaging to our professional and personal reputations in a small community such as Tobago…"

50. At paragraphs 33 and 38 of the Second Claimant's affidavit filed on the 26th February 2016 he described how he became aware of the media reports. He stated that:

"33. On 7th January, 2016 I received several telephone calls from colleagues and friends informing me that the contents of the post mortem were published on social media under the headline "Botched C-Section led to mom's death". Then I saw the newspaper article online by Ms. Elizabeth Williams, the journalist whose by line appears under the article wherein she revealed that her newspaper had obtained a copy of the autopsy report. At the time of the publication, as far as I am aware, no histological analyses had been completed. The publication condemned the Applicants as having botched the C-section and is highly prejudicial to the

disciplinary proceedings and is highly damaging to our professional and personal reputations. The story was the main headline on the front page of the newspaper…..

38. On the 8th January 2016, as appears from the Trinidad Express Newspaper under the headline "Three doctors suspended", it appears that the Intended Defendants issued a press release that it launched an investigation and referred again to our suspension which had not been communicated in writing to me until later on that day. This time the express referred to a post mortem report. This publication was also highly damaging to our professional and personal reputations. ….

51. The Third Claimant's position was articulated at paragraph 49 of his affidavit filed on the 26th February 2016 that:

"48. On the 3rd January 2016, while looking at the evening news broadcast on TV 6, I saw media coverage of Ms. Gordon's death. I also saw the article on the Express Newspapers on 7th January, 2016. It appears that the Intended Defendants permitted access to the post mortem report and at the time of the publication, as far as I am aware, no histological analyses had been completed. The publication condemned the Applicants as having botched the C-section and called for our suspension without naming us. It is highly prejudicial to the disciplinary proceedings and is highly damaging to our professional and personal reputations. Following the media publications, I received telephone calls from friends and co-workers who already knew that I was suspended and told me that the media reported that the C Section was botched.

On the 8th January, 2016, the Trinidad Express Newspaper published a second article under the headline **"Three doctors suspended"** and it appears that the Intended Defendants issued a press release that an investigation had been launched and referred again to our suspension.

Further, the article referred to the post mortem report without any explanation as to the cause of the collapse of Mrs. Gordon's lungs. This publication was also damaging to our professional and personal reputations.

52. The Defendants response to the Claimants evidence were set out in the affidavit of Dr Duke filed on the 27th April 2016. He stated that he was unaware that the First Defendant initiated any media coverage of the incident or disclosed to the media the Post Mortem Report. However he stated that he was aware that at the end of every Executive Council meeting by the THA there is a post executive briefing with the media where there is an open question and answer session. He stated that he recalled viewing the television coverage of a particular session at which the Secretary for Health, Mrs Claudia Groome-Duke fielded questions about the death of Mrs Gordon.

53. Based on the Defendants evidence they have not disputed the Claimants evidence that, Professor Daisely, immediately following the post mortem performed by him on the 4th January 2016, reported that Mrs. Gordon's lungs were collapsed; that he did not know the cause of the lung collapse; that his histological analysis of the lung and uterine tissues would be completed by the 6th January 2016 in order to determine the cause of Mrs Gordon's death; and that he would meet with the family thereafter on the 8th January 2016 at 10.00 am. The Defendants also did not provide any evidence that the steps were carried out. Further the Defendants did not deny that the Secretary of Health obtained a copy of the incomplete Post Mortem Report from the First Defendant. There was also no evidence that the Post Mortem Report was given to the Gordon family.

54. On the evidence, Dr. Duke accepted that the Secretary for Health released information to the press about Mrs. Gordon's death before the Enquiry was commenced. This appeared to have been corroborated by the Trinidad Express Newspaper's published article dated the 7th January 2016, headlined *"Botched C-Section led to mom's death",* which referred to the Post Mortem Report which led to widespread adverse media publicity. In my opinion even if the First Defendant did not release the Post Mortem Report to the media

directly, by failing to take steps to prevent the Post Mortem Report from ending up in the public domain by the Secretary for Health of the THA before the Enquiry, the First Defendant acted in bad faith.

Was the Claimants suspension from clinical duties was contrary to the Regulations and in breach of natural justice principles?

55. The Claimants argued that the Regulations provide a chronology or timetable that there should be no suspension until an allegation of misconduct has been brought to the attention of the Claimants and they have been given an opportunity to explain their actions and that neither the Chief Executive Officer nor the Board had any lawful power to remove the Claimants from clinical duties *before* any report of an Enquiry had been submitted to the Board and before any charge of misconduct had been formulated against or communicated to the Claimants.

56. The Claimants also submitted that their suspensions, first by Dr. Duke and then ratified by the Board, was punitive and not precautionary suspensions since the suspensions were of an indefinite nature and on the face they imposed financial punishment upon the Claimants. It was the Claimants' position that the Board's purported suspensions did not cure the defects of the Chief Executive Officer's suspensions as neither letter notified the Claimants of an allegation of misconduct. The Claimants also argued that the First Defendant failed to take into account the adverse effect that the Claimants suspension would have on the public.

57. The Defendants have maintained that the Claimants' suspension by the Board was done pursuant to Regulation 27(1) and not Regulation 39(1); the suspension imposed was precautionary and not punitive/disciplinary and the Claimants were fully aware of the reason for their suspension, which was the death of Mrs Gordon, who was the subject of their medical intervention. They also argued that it was in the public's interest to suspend the Claimants from clinical duties.

58. **Section 5(3) of the JRA** sets out the grounds upon which the Court may grant relief to a person who filed an application for judicial review to include the following:

> "(3) The grounds upon which the Court may grant relief to a person who filed an application for judicial review includes the following:
>
> (a) that the decision was in any way unauthorised or contrary of law;
>
> (b) excess of jurisdiction;
>
> (c) failure to satisfy or observe conditions or procedures required by law;
>
> (d) breach of the principles of natural justice;
>
> (e) unreasonable, irregular or improper exercise of discretion;
>
> (f) abuse of power;
>
> (g) fraud, bad faith, improper purpose or irrelevant consideration;
>
> (h) acting on instructions from an unauthorised person;
>
> (i) conflict with the policy of an Act;
>
> (j) error of law, whether or not apparent on the face of the record;
>
> (k) absence of evidence on which a finding of assumption of fact could reasonable be based;
>
> (l) breach of or omission to perform a duty;
>
> (m) deprivation of a legitimate expectation;
>
> (n) a defect in form or a technical irregularity resulting in a substantial wrong or miscarriage of justice; or
>
> (o) an exercise of a power in a manner that is so unreasonable that no reasonable person could have so exercised the power."

59. The Claimants relied on section 5(3) (a) to (g) and (j) to (o).

60. At paragraph 60.1.9 page 620 of Michael Fordham's **Judicial Review Handbook**, the author cited **R v Secretary of State for the Environment, ex parte Greater London Council (3rd April, 1985) unreported** and the decision of Mustill LJ who identified the ways in which a decision under review might be regarded as being procedurally improper namely:-

(a) unfair behaviour towards person affected by the decision.

(b) failure to follow a procedure laid down by legislation.

(c) failure properly to marshall the evidence on which the decision should be based.

(d) taking into account an immaterial factor or failing to take into account a material factor or failing to take reasonable steps to obtain the relevant information; and

(e) failure to approach the decision in the right spirit. For example, where the decision maker is actuated by bias, or where he is content to let the decision be made by chance."

61. Diplock LJ in **Council of Civil Service Unions v Minister for the Civil Service**[6] described the principles of illegality, irrationality and procedural impropriety in the context of a decision which can be judicially reviewed as-

> "By illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges by whom the judicial power of the state is exercisable.
>
> By irrationality I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' …. It applies to a decision which is so outrageous its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.
>
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.

[6] [1985] AC 374, 410D-411B

This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of justice."

Compliance with the procedure laid down by legislation

62. It was submitted on behalf of the Defendants that the First Defendant's action in suspending the Claimants from clinical duties was procedurally sound and in keeping with the legislative framework and the Board in exercising its powers under Regulation 27 (1) was only enjoined to consider what is necessary to protect the public interest and the reputation of the First Defendant and that the suspension notices issued to the Claimants indicated that those were the reasons for the Claimants suspension.

63. It was also argued on behalf of the Defendants that the Claimants led no evidence that: the Board in suspending them ignored the relevant legislative considerations and was instead guided by extraneous matters and to rebut the presumption of regularity. In support of those submissions the Defendants relied on the Court of Appeal decision in **Police Service Commission v Rodwell Murray**[7] where in referring to Regulation 79 (1) of the **Police Service Commission Regulations** which provided for suspension of a police officer in the public interest or the repute of the Police Service, stated:

> *"In coming to this conclusion the Respondent has made no attempt to rebut the presumption of regularity by evidence. In any event where Parliament has entrusted to the Commission and not the courts the determination of what is in the public interest that is a matter for the Commission alone. It is well to remember the words of Lord Brightman in Chief Constable of the North Wales Police v. Evans (1982) 1 WLR 1155 at 1174-5: "The court cannot be expected to possess knowledge of the reasons of policy which lie behind the administrative decision*

[7] Civ App 143 of 1994

nor is it desirable that evidence should be called before the court of the implication of such a policy".[8]

64. In my ruling for the Interim Order I examined regulation 79 of the **Police Service Commission Regulations** which dealt with interdiction. I compared it to Regulation 27 and I concluded that the fundamental difference between both regulations was that the effect of a suspension under Regulation 27 was that the employee's salary was reduced to his basic salary whereas there was so such reduction in salary for a suspension under regulation 79. Therefore, there was no injustice being done to an employee who was suspended pursuant to regulation 79 by the Commission's failure to afford him a right to be heard prior to the suspension since he is suspended with full pay and therefore there is no prejudice suffered by the employee. I found that in order to determine if there is a right to be heard before the suspension in regulation 27, fairness dictated that where an employee would be prejudiced by the suspension there is to be implied in the regulation 27 the opportunity to be heard before a decision is made to suspend him and that one of the objects of regulation 21 is to give the employee the opportunity to make a written explanation if he wishes to do so at the first or investigative stage of the disciplinary process (regulation 21 (3)). By giving a written explanation, the employee may therefore be able to prevent preferment of charges or narrow the range of the enquiry.

65. The Defendants also relied on the judgment of Seepersad J in **Maxwell Adeyami v The TRHA**[9] in support of their position that the First Defendant's decision to suspend the Claimants was not flawed. In **Adeyami** the First Defendant had preferred a charge against the Applicant (doctor). There had been a report by the investigating officer and it was preceded by several notifications to the Applicant (Adeyami). The suspension was not in issue but the issue was whether the First Defendant's decision to proceed with the charge against the Applicant was reasonable. In my view although the facts and the issues in **Adeyami** are distinguishable from the instant case the sequence of events in **Adeyami** are

[8] Supra at page 16
[9] CV 2015-01384

instructive since they demonstrate that the First Defendant was aware of the duty to notify an employee of allegations of misconduct in writing before suspension.

66. In **Adeyami** the First Defendant issued a letter to the Applicant (doctor) on the 8th October 2014 where the Applicant was informed of four (4) specific acts of misconduct namely failure to administer proper medical care; failure to adhere to proper protocol and management of a patient under the First Defendant's care; departure from the facility after treatment of the patient had commenced without leaving instructions for the nurses on duty and not being available to be contacted. Two days afterwards when the Applicant (Adeyami) was suspended he was informed that his suspension was pending disciplinary proceedings for misconduct and his notice of suspension repeated the same allegations of misconduct which he was informed of on the 8th October 2014. Therefore in **Adeyami** which was less than two years before the instant matter the First Defendant was aware that it had a duty to inform an employee when it was suspending him of the allegations of misconduct against him and the reason for the suspension namely pending disciplinary proceedings for misconduct.

67. In my ruling on the Interim Order I had cause to examine the statutory scheme established under section 35 of the **Regional Health Authority Act** to regulate the conduct of employees, misconduct, disciplinary proceedings and reviews under the RHA. Regulations 20-42 set out under the Heading "Disciplinary Proceedings" contained the mechanism for dealing with allegations of misconduct by an employee of the RHA.

68. The relevant regulations are:

> 20. (1) Where a supervisor or a person acting in that position reasonably believes that an act of misconduct is committed by an employee, he shall report the matter to the Chief Executive Officer.
>
> (2) The Chief Executive Officer shall take a statement from the supervisor and if he is of the opinion that a case of misconduct has been made out against the employee, he shall report the matter to the Board.

(3) Where a criminal offence appears to have been committed by an employee, the Board shall ascertain from the Director of Public Prosecutions whether he contemplates criminal proceedings against the employee, before instituting disciplinary proceedings against the employee.

(4) Where the Director of Public Prosecutions advises that criminal proceedings are contemplated, the Board shall not act under subregulation (2) before the determination of criminal proceedings and the expiration of the time allowed for an appeal.

21. (1) Where an allegation of misconduct is made, the Chief Executive Officer shall –

(a) in addition to making a report as required under regulation 20(1), inform the employee in writing of the allegation; and

(b) forthwith refer the matter to a neutral employee to investigate the matter.

(2) The employee referred to in subregulation (1) (b) shall be –

(a) senior to the employee against whom the allegation has been made; and

(b) employed by the same Authority.

(3) The investigating officer –

(a) shall give the employee written notice within three days of his appointment requiring him to give a written explanation concerning the allegation within seven days from the date of receipt of the notice;

(b) shall require those persons who have direct knowledge of the alleged misconduct to submit written statements to him within seven days;

(c) shall submit to the Board all original statements, explanations, relevant documents and his report of the investigation within forty-five days of his appointment; and

(d) may be granted an extension for a period of up to thirty (30) days by the Chief Executive Officer to submit his report.

22. (1) The Board shall decide whether to lay a charge against the employee with misconduct after considering the report of the investigating officer.

(2) Where the Board decides to lay a charge against an employee, the Board shall give him written notice of the charge together with the particulars of the allegation on which the charge is based, within seven days of its decision….

27. (1) The Board may direct an employee, in writing to not report for duty until further notice, where the Board is of the opinion that it is necessary to protect the interest of the public and the reputation of the Authority.

(2) Notwithstanding subregulation (1), an employee shall continue to receive his basic salary in his substantive position until the determination of the matter.

(3) The effective date of suspension shall be the date stated by the Board in the notice given under subregulation (1).

28. (1) Where –

(a) disciplinary proceedings; or

(b) criminal proceedings,

Having been or are to be commenced against an employee and where the Board is of the opinion that the public interest requires that the employee

should forthwith cease to perform the functions of his office, the Board shall giver him written notice of prohibition.

(2) The effective date of prohibition shall be the date of receipt by the employee of the notification.

(3) An employee who has been prohibited under subregulation (1) shall receive his basic salary in his substantive position until the determination of the matter.

(4) An employee shall be entitled to –

(a) the full remuneration he would have received had he not been prohibited, if he is exonerated from the disciplinary proceedings or criminal proceedings against him; or

(b) Such salary as the Board may determine in circumstances where the disciplinary proceedings result in punishment other than dismissal.

(5) An employee who had been prohibited from performing his duty shall not leave the country without the permission of the Board and where he leaves the country without the permission he shall be guilty of misconduct."

68. Based on my analysis, of the Regulations, I concluded that the Regulations laid down a statutory disciplinary statutory code, which is a two stage process. The first stage is the investigative stage and the second is the tribunal stage.

69. The procedure laid down in Regulations 20 to 27 is:

(a) The Chief Executive Officer must form an opinion that a case of misconduct has been made out against an employee (regulation 20);

(b) The Chief Executive Officer must

(a) inform the employee in writing of the allegation; and

(b) appoint an investigating officer;(regulation 21)

(c) The investigating officer shall request a written explanation from the employee concerning the allegation and, thereafter, submit to the Board all statements, explanations, relevant documents;

(d) The Board shall decide whether to lay a charge of misconduct after considering the report of the investigating officer and, shall give notice of the charge to the employee (Regulation 22);

(e) The Board may appoint a disciplinary tribunal to hear and determine the penalty, if any, which may be imposed, without further inquiry (Regulations 23 and 24);

(f) The Board may direct the employee not to report for duty until further notice. This may only be done where the Board is of the opinion that such a step is necessary to protect the interest of the public and the reputation of the Authority (regulation 27). The power to suspend in regulation 27 is not a stand alone provision but it is a power to be used by the Board in the disciplinary process.

(g) Until the determination of the matter, whether by way of an inquiry under Regulation 23(1) and 24(1) or by the Board without further inquiry (Regulation 24(2), the employee is entitled to continue to receive his basic salary in his substantive position (Regulation 27 (2).

70. I was also of the view that even if disciplinary proceedings started in the second stage which is after the charge is laid in both stages, the investigative and the tribunal, the employee must have notice of the allegation of misconduct against him and the

opportunity to answer since the consequence of suspension is prejudicial to the employee. It was Parliament's intention for the Board to have the power to suspend after receipt of the CEO's report in urgent circumstances and before a charge is laid but the power given to the Board in Regulation 27 is different from that given in Regulation 28 since Regulation 28 is to be exercised when a charge in disciplinary proceedings are about or have been laid or when criminal proceedings are or have been commenced.

71. Based on my understanding of the Regulations, the Chief Executive Officer had no power to remove the Claimants from clinical duties:

    (a) before the report of an investigation had been submitted to the Board (Regulation 21 (3)(c)); and

    (b) before any charge of misconduct had been formulated against or communicated to the Claimants.

72. Although the Board is empowered by Regulation 27(1) to direct the Claimants not to report for duty, it was not empowered to do so:

    (i) before the report of an investigation had been submitted to it (Regulation 21(3)(c)); and

    (ii) before any charge of misconduct had been formulated against or communicated to the Claimants (Regulations 22 and 24(1)).

Notice of allegations of misconduct

73. The Defendants evidence on this issue was provided by Dr Duke in his affidavit filed on the 27th April 2016. Dr Duke admitted that after he sent the CEO's report to the Board of the First Defendant on the 7th January 2016 he orally suspended the Claimants from clinical duties which was followed up by the CEO's letter which the Claimants referred to in their affidavits filed on the 26th February 2016. He did not indicate that he informed the Claimants orally or in writing that there were allegations of misconduct made against them.

74. The allegations made against the Claimants in the CEO's letter to the Board were set out in the summary as:

> "It is quite clear that officers failed to carry out their duties in a responsible manner with this case. In the following:
>
> - A high risk patent undergoing a high risk procedure was not done by the responsible Specialist Medical officer who is also the head of department and who must be held accountable at a higher level.
> - Questionable documentation of blood loss volume.
> - Failure of the team to recognize impending shock as seen in the decreasing urine output since the patient had the first surgical procedure.
> - House officer failed to respond when called to assess the patent post blood transfusion.
> - Medical documents written in Retrospect which seem questionable."

75. In addition to the aforesaid allegations of misconduct, with respect to the First Claimant the following were particularized as: *"Dr. Wheeler was in Theatre and Surgeon Dr Raja was assisted by Dr Dimgba. It is important to note that high risk procedures must be done by the responsible Specialist Medical Officer. This patient was a high risk patient to undergo a high risk procedure and as such the procedure must be done by the responsible specialist medical officer"*; and *"This incident raised questions as the medical records contains several notes that have been written in retrospect, along with the responsible Specialist Medical Officer not doing any of the surgical procedures on a very high risk patient."*

76. Similarly in addition to the aforesaid allegations of misconduct there was one additional allegation against the Third Claimant namely: *"It is also documented that Dr Dimgba was contacted to review the patient and he refused to see the patient as documented in nursing note."*

77. Therefore by the 5th January 2016 the CEO had formed the opinion that there was a case of misconduct made out against the Claimants.

78. According to the First Claimant's evidence in his affidavit filed on the 26th February 2016, at the meeting on the 7th January 2016 Dr. Duke told him that the Post Mortem Report stated that two blood vessels were not tied off and as a result, the patient bled to death. The First Claimant stated that he recalled that during the post mortem, Professor Daisely showed him two small blood vessels that were not tied off and it was his view that it could not have been the source of any significant bleeding. At that stage the First Claimant stated that he had not seen the Post Mortem Report so he asked Dr Duke what about the findings of the collapsed lungs. The First Claimant told Dr Duke that, Professor Daisley had indicated to him that he was to perform a histological analysis of samples taken from the lungs. Dr. Duke's response was that the collapsed lungs could arise in a patient who has had a general anaesthetic. According to the First Claimant, in light of his observations from the ICU Notes and from conversations with Dr. Armstrong and the Second Claimant, that opinion was insupportable. Without saying anything more, Dr. Duke told the First Claimant that he was to cease clinical duties with immediate effect.

79. According to the First Claimant, Dr Duke informed him that he had sent the CEO's report to the Board who were to deliberate on the matter later that day. The First Claimant asked Dr Duke for something in writing as soon as possible. The First Claimant stated that he asked for this as it appeared to him that Dr. Duke was reacting to the media calling for suspension before Dr Duke had any authority to do so. The meeting then ended and the Second Defendant did not say anything.

80. The First Claimant also deposed in his affidavit filed on the 26th February 2017 that on the Monday 11th January, 2016, he received the CEO's letter and the Chairman's letter where he was informed in writing that he was removed from clinical duties with effect from the 7th January 2016 and he was directed to report to the Second Defendant in her capacity as Acting Medical Chief of Staff.

81. The Second Claimant's evidence was that in response to a telephone call from the Second Defendant he attended before her at the CEO's office on the 7th January 2016 at 8:30 a.m. About 8:40 a.m., he was called inside with the Third Claimant and present in the office

were Dr. Duke, the Second Defendant, as the Acting Medical Chief of Staff and Dr. Andrew Belle (who was Acting Medical Chief of Staff on the date of Mrs Gordon's death). Dr. Duke told the Second and Third Claimants that it was going to be a short meeting and that he was not going to spend much time with them because he had other people waiting, and he had some meetings to attend. He then said he had read the post mortem report and the nurses' notes and that Mrs Gordon's death was due to hypovolemic shock from unlighted blood vessels As a result of that, Dr Duke told them that they were going to be relieved from clinical duties with immediate effect.

82. According to the Second Claimant he collected a letter on the 7th January 2016, from Dr Duke which was headed "Notice of Removal from Clinical Duty". By this letter the Second Claimant was directed that he was temporarily removed from clinical duty with immediate effect being the date of the letter and he was directed to report each day to the Second Defendant, as Acting Medical Chief of Staff to be delegated such duties as she saw fit. According to the Second Claimant, the letter from Dr Duke did not inform him that any report of misconduct had been made and that there were any allegation or allegations of misconduct

83. The Second Claimant went on to state that later that day, at about 3.55 p.m., he got another telephone call, summoning him to collect another letter. He was also asked to provide his residential address as well. He collected this other letter on the 8th January 2016, which was signed by the Acting Chairman of the Board and headed "Suspension Notice" which he signed for upon receipt. This letter indicated that 'you shall receive your basic salary pending the determination of the matter'. He pointed out that by this letter he was suspended with effect from the 8th January 2016 .According to the Second Claimant this letter did not inform him that any report of misconduct had been made to Dr. Duke as CEO and of any allegation or allegations of misconduct as the Regulations required.

84. The Third Claimant's evidence on the events of the 7th January 2016 were similar to that of the Second Claimant's.

85. In my opinion, based on the evidence the Claimants were not informed in writing of any allegation of misconduct against them before they were suspended from clinical duties neither by Dr Duke, the Acting CEO nor the Board. While the Claimants have not challenged the suspension by Dr Duke, his suspension of the Claimants was not proper since he did not communicate any charge of misconduct to them before he issued his notice of suspension. Further the Board's suspension also was not proper since the Claimants were not notified of any allegations of misconduct against them.

Opportunity to be heard prior to the suspensions

86. In Michael Fordham's **Judicial Review Handbook**, at page 626, paragraph 60.2.3 the learned author explained the meaning of fairness in the context of the principles of natural justice and cited with approval the *dicta* of Mustill LJ in **R v Secretary of State for the Home Department ex p Doody**[10]:-

> "Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to procuring a favourable result or after it is taken, with a view to procuring its modification; or both."[11]

87. The evidence from the Claimants was that they were not given any opportunity to respond to the allegations made against them which Dr Duke had in the CEO's report to the Board before they were suspended.

88. The collective evidence by all the Claimants was they were prejudiced as a result of the suspension. The Claimants evidence was that the prejudice they suffered by the suspension was loss of salary and loss of reputation due to adverse media publicity.

89. According to the First Claimant's affidavit filed on the 26th February 2016:

> "35. Following the publication, I received calls from Friends and colleagues asking about it. It is to be noted that at the time of this publication, as far

[10] [1994] 1 AC 531
[11] 560D-G

as I am aware, no histological analyses had been completed. The publication condemned the Applicants, as having botched the C-section is highly prejudicial to the disciplinary proceedings and damaging to our professional and personal reputations in a small community such as Tobago. A true copy of the Newspaper Article is at **TAB 7** of the Applicants' Bundle of Documents in support of the Part 56 Notice of Application filed herein.

43. Prior to my suspension, my total package with my allowances was $60,143.00 gross before tax. I now only receive a basic salary of $24,135.00 which is a significant reduction and is punitive and prejudicial as I have mortgages and other financial commitments to meet. A true copy of my pay slip is at TAB 12 of the Applicants' Bundle of Documents in support of the Part 56 Notice of Application filed herein."

90. In paragraphs 33, 38 and 40 of the Second Claimant's affidavit filed on the 26th February 2016 he stated that:

"33. On 7th January, 2016 I received several telephone calls from colleagues and friends informing me that the contents of the post mortem were published on social media under the headline "Botched C-Section led to mom's death". Then I saw the newspaper article online by Ms. Elizabeth Williams, the journalist whose by line appears under the article wherein she revealed that her newspaper had obtained a copy of the autopsy report. At the time of the publication, as far as I am aware, no histological analyses had been completed. The publication condemned the Applicants as having botched the C-section and is highly prejudicial to the disciplinary proceedings and is highly damaging to our professional and personal reputations. The story was the main headline on the front page of the newspaper. A true copy of the Newspaper Article is at TAB 7 of the Applicants' Bundle of Documents in support of the Part 56 Notice of Application filed herein.

38. On the 8th January 2016, as appears from the Trinidad Express Newspaper under the headline "Three doctors suspended", it appears that the Intended Defendants issued a press release that it launched an investigation and referred again to our suspension which had not been communicated in writing to me until later on that day. This time the express referred to a post mortem report. This publication was also highly damaging to our professional and personal reputations. A true copy of the Newspaper Article dated the 8th January 2016 is at TAB 9 of the Applicants' Bundle of Documents in support of the Part 56 Notice of Application filed herein…

40. Prior to my suspension my total package was $48, 000.00 gross before tax and as a result of my suspension I only received my basic salary of $17, 783.13 (after tax). This reduced amount is the equivalent basic salary of a House officer and not for my substantive post, therefore it is a significant reduction of more than half of my normal salary and is punitive and prejudicial as I have mortgages and other financial commitments to meet. As a result of this, I have been constrained to write to the Chief of Staff on the 29th January seeking to sell 100 of my accumulated compensatory days in order for me to meet my commitments. I am awaiting a decision on this. A true copy of my pay slip is at TAB 12 of the Applicants' Bundle of Documents in support of the Part 56 Notice of Application filed herein."

91. The Third Claimant stated in his affidavit filed on the 26th February 2016 that:

"48. ……Following the media publications, I received telephone calls from friends and co-workers who already knew that I was suspended and told me that the media reported that the C Section was botched…

49. Prior to my suspension, my total packaged salary with allowances amounted to $42,837.77 gross before tax, however since then, I only receive my basic salary of $15,047.00. Therefore being placed on basic

salary is a significant reduction of more than half of my normal salary and is punitive and prejudicial as I have mortgages and other financial commitments to meet. A true copy of my last job letter is TAB 12 of the Applicants' Bundle of Documents in support of the Part 56 Notice of Application filed herein.

50. These events affected me severely emotionally and financially. I have a family of six and I am the only financial provider. I have had to cancel my planned trip to Brazil for training in Colposcopy. My wife and I had also planned that she was to restart her training for nursing in Trinidad at the University of the Southern Caribbean, however, this too had to be put on hold as we have to drastically cut our expenses."

92. Dr Duke' evidence in response to the Claimants allegations that the suspension caused them financial hardship and that there is a real risk of disastrous consequences on the Claimants, was that their claim was speculative and unclear and that the onus was on them to prove their loss. Dr Duke also deposed that the First Claimant has a private practice at the Triangle Building in Tobago and he also practices out of Calder Hall Medical Centre also in Tobago where he earns additional income. With respect to the Second and Third Claimants, he stated that they were not significantly financially prejudiced since they were not prohibited from engaging in private work and the suspension does not prevent them from seeking alternative employment and that the suspension against the Claimants was limited to Tobago and more narrowly the First Defendant's health care institution.

93. Dr Duke did not dispute the Claimants assertion that the effect of the suspension was that their salary from the First Defendant was substantially reduced. He also remained silent on their assertion that the adverse media publicity caused them a loss of reputation.

94. According to Regulation 27 an employee who is suspended pursuant to the said Regulation, is not to receive his full salary but instead only receives his basic salary in his

substantive position until the determination of the matter. When the Board took the decision to suspend the Claimants it only had the CEO's report and it did not have any explanation from the Claimants. The Board knew that they did not afford the Claimants an opportunity to be heard before the First Defendant took the decision to suspend them in circumstances where the effect was a reduction in salary and by extension it was prejudicial to the Claimants.

95. In my opinion the failure by the Board to take steps to obtain the relevant information such as the Claimants position before it took the step to suspend meant that it did not have all the relevant information/material before it made this decision. In such circumstances, where the consequences of the suspension was prejudicial to the Claimants I am of the view that the failure by the Board made its decision to suspend unlawful.

Precautionary vs Punitive suspension

96. According to Regulation 27 (1) the Board can direct an employee of the First Defendant not to report for duty until further notice. When the Board takes such a step the employee is only to receive his basic salary.

97. The notices of suspension, which were given to the Claimants, did not state a period for their suspension. The letter from the CEO stated that they were *"temporarily removed from clinical duty effective immediately, pending an independent investigation into the death of Rose Gordon at the Scarborough General Hospital on the 1st January 2016"*. The Chairman's letter informed them that they were suspended from duty with effect from the 8th January 2016 pursuant to Regulation 27 (1).

98. In my opinion given that the Claimants were not given the opportunity to present their case before the decision was taken to suspend them from clinical duties; that there was no fixed period for their suspension ; and the effect of the suspension was financial punishment I agree with the Claimants submissions that the suspensions were punitive.

Public interest as a relevant consideration

99. It was submitted on behalf of the Claimants that their suspension was without regard to the public interest since it resulted in cancellations of major surgeries in the department of Obstetrics and Gynaecology and it compromised existing and future patient care.

100. The Defendants position was that the Claimants have not supported this ground by any credible evidence whatsoever since subsequent to the suspension of the Claimants, the CEO (Ag) implemented alternative arrangements to ensure that the Department continued its operations effectively and without any surgery cancellations. Patient care had not been compromised by the suspension of the Claimants. As such they submitted that the public interest did not suffer.

101. Regulation 27 empowers the Board to direct an employee not to report for duty until further notice. This may only be done where the Board is of the opinion such a step is necessary to protect the interest of the public and the reputation of the Authority (regulation 27). The Chairman's letter stated that *"the Board is of the opinion that such action is necessary to protect the interest of the public and the reputation of the Authority in light of the circumstances leading up to the death of Rose Gordon…"*

102. In exercising the discretion bestowed on it by Regulation 27 the Board as a public body has a duty to exercise the discretion reasonably. In **Associated Provincial Picture Houses, Limited v. Wednesbury Corporation**[12] Greene MR at page 229 described the approach the decision maker should adopt in considering what was reasonable as:

> "It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. <u>For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own</u>

[12] [1948] 1 KB 223

attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation [16] gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another." (Emphasis mine)

103. Did the Board consider the interest of the public and the reputation of the First Defendant before it took the decision to suspend the Claimants from clinical duties?

104. The material which the Board considered before it took the decision to suspend the Claimants was the CEO's report and its attachments. The full text of the CEO's report to the Chairman of the Board was:

> "Dear Mr. Peters
>
> The above patient was admitted to the Scarborough General Hospital via the Emergency Department on 29th December 2015 with a chief complaint of swollen feet and increased blood pressure. Patient Rose Gordon is a 35 year old female, Gravida 3, para 1+1, blood pressure 117/12, pulse 90, R 20, temperature 36. She was estimated to be thirty-four (34) weeks pregnant and was admitted from the Emergency Room in the initial care of Dr. Singh where she was managed for her underlying increase in blood pressure and swollen legs.
>
> A decision was made for the patient to undergo Caesarian Section due to the Diagnosis of severe pregnancy induced hypertension and intra uttering growth retardation of the baby. Reference is made to ***pages 37 and 38*** of the patient record. At 11:15 am, Dr. Singh's team discussed the case with the Pediatrics Department, where the patient was reviewed by the Pediatric Registrar and a Caesarian Section was discussed as the mode of delivery in the best interest of the baby. Dr. Singh, team went off call on 4:00 pm on 31st

December 2015, when the care of this patient was handed over to Dr. Wheeler and his team. A Caesarian Section was done at 6:06 pm on 31sr December 2015 by Dr. Raja- Surgeon, who was assisted by Dr. Dimgba as ***page 39*** of the medical record (see operative notes on ***page 40*** of the medical records).

Post Caesarian Section, the patient was in the Recovery Room of the Operating Theatre where it was noted blood clots per vagina approximately 300 mls. She was transfused one (1) unit of blood (See ***page 42***- Blood transfusion record 61031-15) ***Page 45*** shows that Dr. Wheeler was in Theatre, and Surgeon Dr. Raja was assisted by Dr. Dimgba. It is important to note that high risk procedures must be done by the responsible Specialist Medical Officer. This patient was a high risk patient to undergo a high risk procedure and as such the procedure must be done by the responsible specialist medical officer.

Post procedure, at 9:15 pm, the patient was placed in the Recovery Room and was transferred another unit of blood. During this time it is documented that the nurse on duty noticed a trickle of blood while cleaning the patient. **It is also documented that Dr. Dimgba was contacted to review the patient and he refused to see the patient as documented in nursing note.**

The patient was then admitted to ICU from the recovery ward on 1st January 2016 in a stable condition, however the patient developed low blood pressure and a decrease in uterine output. The patient subsequently decompensated requiring CPR at around 2:45 p.m. The patient was pronounced dead at 3:33 p.m.

This incident raised questions as the medical records contains several notes that have been **written in retrospect**, along with the responsible Special Medical Officer not doing any of the surgical procedures on a very high risk patients. This is a cause for concern as the Minister of Health has indicated to all Heads of Departments in the Obstetrics and Gynaecology Departments of all Regional Health Authorities that all high risk procedures must be done by the responsible Specialist Medical Officer. Also, several meetings were held in Trinidad on this issue with the Ministry of Health and the Head of Department- Obstetrics and Gynaecology at the Scarborough General Hospital was in attendance at all meetings.

To investigate this death, I recommend the following:

1. With immediate effect, the removal from clinical duty the following physicians relating to the case:
   i. The current Head of Department-Obstetrics and Gynaecology
   ii. The Registrar
   iii. The House Officer

2. A review of the process done by an external OBGYN who is not affiliated with the Tobago Regional Health Authority, A Quality professional and an experienced Midwife.
3. Prompt alerting of the Minister of Health of this issue.
4. A Post Mortem Report to be obtained on Monday 4th January.
5. Urgent recruitment of physicians to augment the clinical services who have the requisite qualifications for the positions in the department.

This case highlights one of the many mishaps that has taken place under this team lead by this consultant. Other adverse events occurring under this consultant relates to the following patients:

1. Infant of Latoya Wachakwu who was admitted to hospital and had a stillbirth one week into hospitalization.
2. Shimmel Williams who had laparoscopic surgery then developed abdominal sepsis requiring emergency surgery by the on call team Dr. Singh.
3. Debra Bethel damage to the kidneys post ovarian surgery resulting in a very high cost to the TRHA to have the damaged kidney repaired at a private hospital in Trinidad.
4. Carlene Cape-Lowe (Pre action protocol).
5. Kai Duncan (Pre action protocol).
6. Akimba Grant.
7. Ms Sheppard who was the focus of the first maternal death with Dr. Albert Persad report highlighting several deficiencies with the current head of department this is available to the Board of Directors.

In Summary

This patient was admitted with complications due to pregnancy and underwent a C section continued to bleed requiring hysterectomy to contain the bleeding. **These procedures were not done by the responsible specialist medical officer.** Autopsy revealed the patient died from hypovolemic shock as a result of bleeding. The source of the bleeding was identified as two arteries that were not secured/tied off during the surgical procedure. Therefore medical no amount of transfusion would of prevented this patient from going into shock unless the blood vessels were secured appropriately **(see post mortem report affixed**).

Recommendations have been made in the past which I have affixed for your review and consideration dated 9th July 2015. It is quite clear that officers failed to carry out their duties in a responsible manner with this case. In the following

- A high risk patient undergoing a high risk procedure was not done by the responsible Specialist Medical Officer who is also the head of department and who must be held accountable at a higher level.
- Questionable documentation of blood loss volume.
- Failure of the team to recognize impending shock as seen in the decreasing urine output since the patient had the first surgical procedure.
- House officer failed to respond when called to assess the patient post blood transfusion.
- Medical documents written in Retrospect which seem questionable.

I bring this to your attention noting the adversity of this situation so that this matter can be dealt with accordingly.

105. According to Dr Duke the circumstances leading up to the Claimants suspension were that subsequent to the death of Mrs Gordon: (a) there was a reverberating collective chorus of displeasure and a heightened sense of mistrust and loss of confidence in the First Defendant, its agents and servants; (b)the community of Tobago by then had had its fair share of infant mortality and maternal deaths; (c) prior to suspending the Claimants from clinical duties, he had obtained and given careful consideration to the Post Mortem Report of Professor Daisley in which he stated inter alia *"…two small vessels that were*

not tied off". He also considered all the other documents in his possession such as the Incident Report by the Head Nurse of the Intensive Care Unit and the Report on the incident from the Quality Department headed by Ms. Janice Paul-Cheekley, Quality Manager (Ag.). According to Dr Duke, having considered the said documents he formed the honest and reasonable belief that the suspension of the Claimants from clinical duties was necessary to protect the public interest and the reputation of the First Defendant. Dr Duke also stated that he also formed the opinion that the material in his possession showed misconduct by the Claimants.

106. The Claimants disputed certain allegations made in the CEO's report to the Board. The First Claimant deposed at paragraphs 20 and 21 that:

> "20. In yet further response to paragraph 17 as to the report dated 5th January 2016 Dr. Nathaniel Duke submitted to the board on page 3 certain alleged events that allegedly concerned the deponent Wheeler. Dr. Nathaniel Duke did not disclose to the board that the deponent Wheeler had written to Dr. Nathaniel Duke dated 15th October 2015 where he identified the names of patients about whom he had written medical reports as requested by him and he requested an update of any investigation done as a result but the deponent Wheeler did not receive a response to this letter. The deponent Wheeler in his capacity of Head of Department wrote report letters to Dr. Nathaniel Duke in respect of:
>
> | | |
> |---|---|
> | Ms. Glenda Sandy | 12th September 2014 |
> | Ms. Debra Bethel | 9th February 2015 |
> | Ms. Shimmel Williams | 26th March 2015 |
> | Mrs. Akimbar Grant | 29th July 2015 |
> | Ms. Latoya Wachukwu | 5th October 2015 |
>
> 21. The deponent Wheeler wrote these letters in his capacity of Head of Department they do not clearly distinguish who was the Specialist Medical Officer involved in the care when the adverse events occurred. In fact, he was the Specialist Medical Officer involved for four out of the seven cases: Debra Bethel,

Akimbar Grant, Carlene Cape Lowe and Shimmel Williams. For Latoya Wachakwu he was out of the country on approved vacation leave when she had the stillbirth. Kai Duncan and Ms. Sheppard were being managed by another consultant when their adverse events occurred. Dr. Nathaniel Duke did not disclose any of these letters to the board. The deponent has not received any correspondence from Dr. Nathaniel Duke suggesting his actions were at fault or negligent or otherwise. There are now produced and shown to us the letters written by Deponent Wheeler as a bundle exhibited and marked as Tab **L**.

107. The Claimants also disputed certain matters raised in Duke's affidavit. According to their joint affidavit filed in reply on the 16th May, 2016 they stated that they did not accept Dr Duke's assertion that there was a chorus of displeasure and a sense of mistrust and loss of confidence. The Claimants had merit in this statement since Dr Duke failed to provide a basis for this statement.

108. The First Claimant deposed that for the period 1996 to 2013 there number of maternal deaths were zero; in 2014 there was one maternal death; in 2015 there was none and in 2016 there was one. They also stated that infant mortality referred to deaths in infants from one month of age to less than one years of age and the Defendants know that the management and care of such infants is the responsibility of the Paediatric Department and not the Department of Obstetrics and Gynaecology.

109. The Claimants also deposed that Dr Duke did not have the authority to suspend and that only the Board had such power. Further, the Nurse's Report and the report of Nurse Checkley did not indicate any act of misconduct on the part of the Claimants. The first time the Claimants saw the Adverse Event report which Dr Duke said he considered in his letter dated the 5th January 2016 to the Board was on receipt of the affidavit filed on the 18th March 2016.

110. Based on the evidence the Board had a limited, one sided view of how the Claimants action impacted on the public's interest and the First Defendant's reputation. In my opinion at the time the Board took the decision to suspend the Claimants from clinical

duties it only had the CEO's position of the impact of the Claimants actions on the public's perception of the First Defendant. Notably absent from the CEO's report to the Board were any proposed measures to be implemented to deal with patient care after the Claimants suspension. In my opinion as a public body these were matters which the Board were duty bound to consider before making the decision pursuant to Regulation 27.

111. Dr Duke also deposed that subsequent to the Claimants suspension, the Obstetrics and Gynaecology Department at the Scarborough General Hospital continued to function without interruption due to several measures which were put in place from the re-assignments of House Officers, promotion of persons to the position of Registrar and the employment of a locum consultant. There was no evidence that such matters were before the Board for its consideration before it took the decision to suspend the Claimants.

112. The Claimants have disputed as a fact the measures and the effect of the said measures which were put in place after their suspension.

113. In Michael Fordham's **Judicial Review Handbook**[13] at page 179 at paragraph 17.2 the learned author described the circumstances when fresh evidence is permitted in judicial review. He stated that:

> "The starting point is to focus on evidence which was before, or available to, the public body at the time of its impugned action. But other evidence can be relevant and admissible in judicial review, including where it relates to (1) the impugned action; (2) background information: (3) a ground for judicial review; (4) a further issue arising; and sometimes even (5) material which is now, or would now be before the decision-maker."

114. The measures implemented by the First Defendant after the suspension of the Claimants to deal with patient care is important background information which is now before the

[13] 6th Ed.

Board. However, there is a dispute of fact on the effect of the said measures which I cannot resolve since there was no cross-examination to test the veracity of the evidence. Having found that the Claimants' suspension were procedurally flawed for the other reasons I have set out aforesaid in my opinion the evidence by Dr Duke on the measures implemented after the Claimants suspension have little bearing on the outcome of the legality of the Board's decision to suspend the Claimants from clinical duties.

115. I have concluded that the failure by the First Defendant to notify the Claimants of the allegations of misconduct against them, the failure to give them the opportunity to respond to the said allegations and the failure to consider any response by the Claimants to the allegations of misconduct before the Board took the decision to suspend the Claimants meant that First Defendant did not follow the statutory code set in the Regulations and they also breached the principles of natural justice.

Was the appointment of the Second Defendant as the Investigating Officer contrary to the Regulations and in breach of the principles of natural justice?

116. The Claimants argued that the First Defendant's appointment of the Second Defendant as Investigating Officer was unlawful and in excess of jurisdiction as she lacked the obstetrician/gynaecologist clinical qualifications since she is a paediatrician) and she lacked neutrality since she was present when they were informed of their suspension from clinical duties by Dr Duke.

117. The Defendants' position was that the Second Defendant played no part in the decision to suspend the Claimants; she met the statutory requirements since she was in a senior position in relation to the Claimants including the First Claimant. In this regard it was argued on behalf of the First Defendant that when Mrs Gordon died on 1st January, 2016 and later when the Claimants were issued notice of the investigation on 13th January, 2016 the Second Defendant held the position of Medical Chief of Staff (Ag.) (the most senior medical position in the authority) from 1st December, 2015. Prior to 1st December, 2015 the Second Defendant's substantive position was that of Senior Medical Officer

Pediatrics and that she was in a senior position in relation to the Claimants including the First Claimant whose position is that of Consultant in the Department of Obstetrics and Gynaecology. The First Defendant therefore submitted that the Second Defendant met the statutory regulatory requirements to serve as the Investigating Officer.

118. Dr Duke stated at paragraphs 19-21 of his affidavit filed on the 27th April 2016 the basis for his selection of the Second Defendant as the Investigating Officer to conduct the Enquiry. According to Dr Duke Regulations 21(1) (2) (a) provides that the Investigating Officer must be senior to the employee against whom the allegation has been made and employed by the same Authority. He was satisfied that the Second Defendant met the above conditions for appointment as the Investigating Officer since her substantive post is that of Senior Medical Officer Paediatrics and she was employed by the First Defendant.

119. Only the First Claimant challenged the qualifications of the Second Defendant's as the Investigating Officer on the basis that her substantive post is that of Senior Medical Officer in Paediatrics; she is not head of Paediatrics and therefore she was not substantively his senior. There was no such challenge from the Second and Third Claimants. The First Claimant's evidence was that he was a Specialist Medical Officer (Consultant) in Department of Obstetrics and Gynaecology since 1st November, 1996 to present and Head of Department of Obstetrics and Gynaecology from 1st March 2011 to present.

120. According to Regulation 21(1) (2) (a) the Investigating Officer must be senior to the employee against whom the allegation has been made and employed by the same Authority. In my opinion, a literal interpretation of the regulations contemplate that the officer must be senior in the substantive post since to interpret otherwise would create the mischief of a person in lower substantive post but acting in a higher post would meet the requirements and this could not have been the intention of Parliament. The Second Defendant's appointment to conduct the investigation against the First Claimant did not meet the statutory requirements that she was an officer senior to him. Therefore the

appointment of the Second Defendant as the Investigating Officer to conduct the Enquiry for the First Claimant was procedurally flawed since she failed to satisfy the statutory requirement of being an officer senior to him. In my view the Second Defendant's lack of clinical qualifications as Obstetrician Gynaecologist was not relevant.

121. In **Vernon Barnett v The Commissioner of Police**[14] the Court recognised the importance of the observation of natural justice in the promotion process. At paragraph 12 the Court stated the relevance of the principles at:

> "12. Natural justice has however, long placed upon anyone who decides anything a duty to act in good faith and fairly listen to both sides; see ***Board of Education v Rice***[15]**.** The common law imposes minimum standards of fairness, formerly referred to as natural justice or the right to be heard along with the right against bias"

122. The Claimants evidence was that the Second Defendant was not neutral since she and Dr. Duke suspended them on 7th January 2016 and she was present when Dr. Duke's issued his directive to them to cease clinical duties and report to her.

123. Dr Duke's affidavit filed on the 27th April 2016 explained that the Second Defendant did not play any part in his decision to suspend the Claimants from clinical duties and that in appointing the Second Defendant as the Investigating Officer he was satisfied that she was a neutral employee as required by the Regulations

124. In the Second Defendant's affidavit filed on the 2nd May 2016 she denied that she suspended Claimants and she also denied that she participated in or was instrumental in the decision to suspend the Claimants. She admitted that she was present at the office of Dr Duke on the 7th January 2016 when he informed the Claimants that he was temporarily removing them from clinical duties which would be followed up in writing. She then

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[14] [2011]UKPC 28
[15] [1911] AC 179 at 182

stated that Dr Duke told the Claimants that they should all report to her, in her capacity as Acting Medical Chief of Staff to receive further instructions.

125. In the House of Lords decision of **Porter v Magill** [16] Lord Hope summed up the test of bias as whether *"the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias"*[17]

126. According to all the Claimants when each of them met with Dr Duke at different times on the morning of the 7th January 2016, the Second Defendant was present. I understood the Claimants to be asserting that because the Second Defendant was present at the respective meetings on the 7th January 2016 she is tainted with bias.

127. While there was no evidence that the Second Defendant had any role in the decision to suspend the Claimants the undisputed evidence was that on the 7th January 2016 the Second Defendant was present when they were each informed by Dr Duke that they were suspended from clinical duties and they were told by Dr Duke that they were to report to her as the Acting Medical Chief of Staff. In my opinion, having considered that the Second Defendant's presence on the 7th January 2016 and her role thereafter as the person the Claimants were told to report to, to a fair minded observer would have concluded that she was tainted with bias.

128. It is for these reasons I concluded that the Claimants have merit in their argument that the Second Defendant as the Investigating Officer was not neutral.

Was the Enquiry conducted contrary to natural justice principles and in breach of the Claimants legitimate expectation of procedural fairness?

129. The Claimants asserted that following receipt of the notice of investigation the Second Defendant wrongly convened and presided over the Enquiry, which included a panel of

[16] [2002] 2 AC 357
[17] [2002] AC 357 at [103]

four (4) persons, which questioned the Claimants of the alleged misconduct and denied them an opportunity to be advised and or represented.

130. The Defendants submitted that the Enquiry convened was for the sole purpose of fact-finding and not a disciplinary tribunal pursuant to Regulation 23. In support of this argument the Defendants referred the Court to the decision from the CCJ **Lucas and anor. v Chief Education Officer and ors[18].** In **Lucas** the first instance court properly quashed the suspension of the two teachers and this was not challenged at the appellate level., According to Nelson, Hayton and Anderson JJ paragraph 33:

> On October 13, 2010 Hafiz-Bertram J made orders of certiorari quashing the Appellants' suspensions by the Chief Education Officer as ultra vires the Education Act. The learned judge also declared the appointment of the investigating team, its investigation, its subsequent Report and the referral of that Report (the 2008 Report) by the Ministry of Education illegal and unlawful. She made those declarations on the basis that only the Board of ESTM had the power to suspend under the Education Act and the Education Rules and not the Chief Education Officer. The investigation was held to be unlawful because it was said to breach the Appellants' right to be heard. The Report was unlawful because "the Committee" breached the procedural and substantive legitimate expectation of the Appellants to a fair investigation by a duly appointed investigation team. The learned judge also ordered the Board of ESTM (not a party to the proceedings) to proceed to comply promptly with section 16 of the Education Act in taking any disciplinary action against the Appellants.

131. In my opinion **Lucas** does not assist the Defendants since the Court found that *the* investigations were held before the suspensions and not afterwards. The adverse investigation report was leaked to the media and the Chief Education Officer had no power to suspend; only the Board had that power. Further, in **Lucas,** the Caribbean Court of Justice held that even though the investigative team was appointed only to gather facts they were under a duty to act fairly.

[18] [2015] CCJ 6 (AJ)

Composition of Enquiry panel

132. According to the Claimants' evidence they were notified by the investigator's letter that the Second Defendant had been appointed as the Investigating Officer pursuant to Regulation 21 (1) (b) to conduct the Enquiry in to the allegation of misconduct made against them by the First Defendant. When they attended the Enquiry the Second Defendant was not the only person present but instead she was 1 of 4 persons present which consisted of Dr Brady, an obstetrician from Port of Spain General Hospital, Mr Elroy Julien a Quality officer attached to one of the Regional Health Authorities in Trinidad and Ms Ada Guevara a Retire Midwife and District Health Visitor.

133. The Second Defendant in her affidavit filed on the 2nd May 2016 did not dispute that she notified the Claimants of her appointment as the Investigating officer and that she was not the only investigator but that when the Enquiry was convened it consisted of a panel with the persons as stated by the Claimants.

134. In my opinion the Enquiry was not properly constituted since the Regulations do not allow for a panel to conduct the Enquiry. This was a procedural flaw which is sufficient to nullify the proceedings.

Procedure followed after notice of the Enquiry

135. The Claimants evidence was that after the Second Defendant called upon each of the Claimants to respond in writing within seven (7) days and to attend an Enquiry by letter dated the 15th January 2016, the First Claimant's Attorneys-at-Law requested copies of the patient's Progress Notes, Nurses Notes, Lab Results, Admission and Discharge Record, Patient Registration, Consent Forms and all documents with respect to the Post Mortem Report, including the video, slides, samples of tissues taken from the lungs and uterus and any other organs. The Defendants were not supplied the documentation as requested.

136. The Claimants also stated that on the 18th, 19th and 26th January 2016 in the conduct of the Enquiry, the Second Defendant refused to permit the Claimants to have their legal or trade union representative present to represent or otherwise assist them. They contended that such action was contrary to natural justice and the Claimant's legitimate expectation of procedural fairness.

137. The Second Defendant did not dispute the aforesaid evidence by the Claimants and there was also no explanation from the Second Defendant to account for the failure by the Enquiry to permit the Claimants to be represented either by Counsel of their union representative before the Enquiry.

138. A party has a legitimate expectation that a public body will act fairly towards him. At paragraph 7 of **Francis Paponette** the Board described when the onus is shifted to the Defendant as:-

> "Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation…. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation ….. It will then be a matter for the court to weigh the requirements of fairness against that interest"

139. The Defendants did not place any material before the Court to justify the frustration of the Claimants' legitimate expectation to be treated fairly by the Investigating Officer. At paragraph 38 of **Francis Paponette**, their Lordships observed that an authority which fails to answer the claim:-

> "…..runs the risks that the court conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of process"

140. And at paragraph 42 of it was observed that:-

> "Without evidence [from the authority to explain why it has frustrated the legitimate expectation] the Court is unlikely to be willing to draw an inference in

favour of the authority. This is no more technical point … Fairness, as well as the principle of good administration, demands that it be justified. If it (the authority) wishes to justify its act by reference to some overriding public interest it must provide the material on which it relies" (emphasis added)

141. In the absence of any explanation from the Defendants for the aforesaid failures, I have concluded that the Claimants were not treated fairly by not being permitted to be represented by their attorney at law or union representative and by the failure to provide them with the documents requested before the hearing of the Enquiry. It was not fair to them since they were not in a position to know what material was considered against them.

Was the First Defendant's treatment of the Second Claimant after the Interim Order unlawful?

142. According to the Second Claimant's evidence by letter dated the 7th June 2016, Dr Duke instructed him to proceed on all his accumulated leave with effect from 1st July, 2016. He informed the First Claimant as the Head of Departments and he intervened, writing two letters dated the 21st June 2016 and the 27th June 2016 respectively, setting out the reasons why the Second Claimant should not be sent on all of his leave from the 1st July 2016. In the First Claimant's letter dated 21st June 2016 he outlined the adverse impact on the Obstetrics and Gynaecology department and by extension patient care.

143. Subsequent thereto, on the 7th July 2016, the Second Claimant applied for six weeks vacation and he was allowed to proceed on leave for the said six weeks from the 1st August 2016 until the 13th September 2016. When the Second Claimant submitted his request for Leave Application Form on the said 7th July 2016, the Second Defendant, as Medical Chief of Staff wrote on the Leave Application Form, *'approved but he needs to continue leave he has 572 days'*. On seeing this, the Second Claimant immediately told her that he did not have 572 days of leave. The Second Claimant however, has since confirmed that he had 486 days of leave as of October 2016.

144. The Second Claimant proceeded on his leave as requested and approved, however, while he was on leave, he was informed by the First Claimant that Dr. Keshi , Registrar was also on leave so that for three weeks in August, 2016 and the first week in September, 2016 which meant that the First Claimant's Unit did not have a Registrar. Further, for one week in August, 2016, the first Claimant was forced to ask Dr. Keshi to break his leave from the 8th of August 2016 to 15th August 2016 because the First Claimant needed assistance in providing coverage while on call and assistance with performing major surgeries in theatre and seeing patients in the outpatient clinic.

145. According to the Second Claimant, during the time that the First Claimant did not have a Registrar which forced him to cancel all patients with gynaecological problems from the outpatient clinic. The First Claimant also cancelled all major elective surgery in the operating theatre and cancelled all new appointments in the outpatient clinic. Further, while the First Claimant's Unit was without a Registrar, the First Claimant had to perform second and third on call duties which was very demanding.

146. On the 13th September 2016, the Second Claimant resumed duties and on the 22nd September 2016, he submitted his Contract Renewal Form to the Second Defendant having received a good appraisal from the First Claimant as his Head of the Department. On the 23rd September 2016, the Second Claimant wrote on the Contract Renewal Form, "*hold the renewal at this point*" and on the next page she commented that a patient, *"Ms. Cane Lowe as for an investigation into her management and there is a matter in the High Court with regards to the case of his suspension re Rose Gordon said matter has been appealed by TRHA"*. The Second Claimant deposed that without a renewed contract, he would not receive his gratuity from the First Defendant which was due in December 2016.

147. According to the Second Claimant on the 28th September 2016, the First Claimant compiled the roster for on call duty for the month of October, 2016 and he included the Second Claimant on that roster. However, on the 29th September 2016, the Second Claimant received a letter dated the 22nd September 2016 from Dr. Duke informing him

that he had a balance of 211 compensatory time days and 275 vacation days and that the First Defendant's policy required me to take *"proceed on leave with effect from Monday 1st October, 2016 to 14th September, 2018 to ensure that all outstanding leave is utilized in accordance with the Authority's policies"*. In the said letter of the 22nd September, 2016 Dr. Duke, also stated:

> "Kindly note that the TRHA's Human Resource Policy and Procedure policy No. HRP&P 41.2 dictate that officers shall not accumulate more than 90 days vacation leave and as such ought not to accumulate leave pass the end of their contractual employment".

148. The Second Claimant deposed that he was informed that the First Defendant's Human Resource Policy and Procedure Policy No. HRP&P 41.2 states:

> "Accumulation of Vacation Leave
>
> All employees are required to proceed on and utilize all annual (vacation) leave prior to their retirement however an employee may be allowed to accumulate annual vacation leave to a maximum of sixty (60) working days in offices less than the maximum of Range 24 of the public service salary classification and ninety (90) working days in offices greater than the maximum of Range 24 of the public service salary classification.
>
> An employee may be allowed to accumulate annual leave (vacation) in excess of the maximum stipulated above on the approval of the CEO and the subject to the exigencies of the Authorities operations."

149. The Second Claimant responded to Dr. Duke by his letter dated 30th September 2016, setting out his concerns. On the said 30th September 2016, the first Claimant wrote a letter to the Chairman of the Board where he explained why the Second Claimant should not proceed on all his accumulated leave with effect from 1st October, 2016.

150. Following the aforesaid letters, the Second Claimant reported for duties however on the 4th October, 2016, he met with the Second Defendant and he was later given a

Memorandum with a complaint that he had not gone on leave. By another Memorandum also dated the 4th October, 2016 from the Second Defendant to the First Claimant, the Defendants alleged that the Executive Management of the First Defendant had:

> "commenced the process of enforcing the policy relative to the accumulation of leave by requesting those person who have accumulated leave in excess of the permissible 90 days to reduce the excess substantially. To this end, a meeting was held to transmit this information to you. At this meeting you were of a contrary view that Dr. Raja proceed on leave in small increments. This approach was found to be counter productive and ineffective given the exceedingly large amount of leave (486 days) attributed to Dr. Raja. The management could not accede to your request consequently dated September 22nd 2016 was dispatched to Dr. Raja from the CEO."

151. By letter dated the 5th October 2016, Dr. Duke, Acting CEO wrote to the Second Claimant directing him to *"proceed on leave with immediate effect"* until September 2018 and should I be *"found to be in violation of this final directive, (his) presence would be categorised as unauthorized and the TRHA shall take the appropriate action to safeguard its integrity."*

152. The Second Claimant deposed that he was aware that other doctors such as Dr Ngosi Keshi and Dr C Keshi who have accumulated more than 90 days annual leave in the Departments of Obstetrics and Gynaecology, Paediatrics, General Surgery, Internal Medicine, Anaesthetics and Accident and Emergency and he was unaware of anyone else being forced to take all their accumulated leave with immediate effect.

153. According to the First Claimant in his affidavit filed 21st February 2017 he was informed that the following doctors from their respective departments have accumulated an excess of 90 days leave as of 1st December, 2016:

Dr. Ngosi Keshi over 250 days Department of Paediatrics

Dr. C. Keshi over 250 days Department of Obstetrics and Gynaecology

Dr. O. Okeke over 160 days Department of Medicine

Dr. Carol Solomon over 210 days Department of Anaesthetics

Dr. Andrew Belle over 400 days Department of Surgery

154. The First Claimant also deposed that he had over 210 days accumulated leave and that he was unaware of any of the aforesaid doctors being forced to take all of their accumulated leave with immediate effect, and that they have been allowed to incrementally reduce their accumulated leave in a manner which does not adversely affect the care provided in their various departments.

155. The First Claimant continued that on the 21st November 2016, he received an electronic mail from Ms. Cleo Williams, Administrative Officer, Office of the Medical Chief of Staff informing him that he was required to submit a December roster for 2016 and that Dr. Dimgba would be on leave from 1st October 2016 to 31st January, 2017; Dr. Ramsaran from 30th December 2016 to 7th January 2016 (sic 20170; Dr. Figaro from 1st to 3rd and 16th December 2016 to 31st December 2016; Dr. Armstrong from 9th to 23rd December 2016; Dr. Edmund from 23rd to 26th December 2016; Dr. Bailey from 20th to 30th December 2016; Dr Benn from 1st December to 31st December 2016; Dr. Henry from 5th to 11th December 2016; Dr. Alleyne from 25th to 31st December 2016; Dr. Gunning from 11th to 25th December 2016; and Dr. Singh from 15th December to 15th January 2017.

156. According to the First Claimant this was the first time he was notified that Drs. Bailey, Benn and Singh had applied for leave even though the usual practice was for him as Head of Department to approve leave and then inform the Medical Chief of Staff.

157. According to the First Claimant sending the Second Claimant on immediate leave for almost two years would have had a negative effect on the Department, his Unit and all the patients who come for care at the Obstetrics and Gyneacology Department at the Scarborough General Hospital.

158. The First Defendant's response to this was set out in the affidavit of Mr Godwyn Richardson CEO (Ag) filed on the 17th March 2017 at the time. According to Mr Richardson:

7. I am aware of the letter dated 7th June 2016 which instructed me in my previous capacity as General Manager, Corporate Services to enforce the TRHA's policy on accumulated leave in respect of certain staff including the Second Applicant. However the request was not sent to him alone but others as is self-evident. In this regard I can state that the previous CEO Ag., issued the said letter pursuant to directives from the Board of Directors whom he took instructions and from whom I was duty bound to take instructions.
8. In fact in my previous position as General Manager Corporate Services and part of executive management, I was given similar instructions by correspondence dated 29th June and 5th September 2016 from the previous CEO, (Ag) to ensure compliance with the excessive leave requirement. **(Copies of these letters are now shown me in a bundle and marked "G.R. "1")**. I can further state that this is an on-going exercise and was begun much earlier that the date (7th June 2016) on which the Second Applicant and others on the same letter received notice. A review of the files show that the previous CEO (Ag) issued reminders to several executives and managers since January 2016 to ensure staff under their management took excess and vacation leave entitlement by the anniversary date. **(Copies of some of these letters are now shown me and hereto annexed in a bundle and marked G.R.. "2").**

9. I therefore do not share the concluded position, express, implied or otherwise by the Applicants, that the TRHA by its issuance of the letter dated 7th June 2016 to staff (including the Second Applicant) was/is in any way an "Unsuitable attempt" and calculated to "…get rid…" of the Second Applicant or any of the Applicants and or frustrate and or defy the order of the honourable court. Rather the action represents compliance with TRHA's policy position on excessive leave by staff and treatment thereof.

10. In respect of the policy's application to excessive leave, I am intimately aware of same from review of correspondence between and amongst the Second Applicant, the First Applicant, and the First and Second Defendants. I am also very familiar with the practical application in situations where one has excessive leave and by virtue of the nature of an employee's job, and or the needs of the organisation, how the leave can be taken.

11. In my position as CEO (Ag.) when the mater came to my attention and after consultation with the Second Applicant, I submitted a briefing note to the Board of Directors outlining a leave utilization plan for the Second Applicant. The plan recommended that the excess leave for the Second Applicant be staggered over multiple periods based on departmental needs and mutual agreement of the employee, the Second Applicant.

12. The Board of Directors approved the utilization plan which approval was communicated to the Second Applicant as a result of which there was agreement for his return to his duties on March 13th 2017. I am aware that the Second Applicant reported for duty and has been on duty on this day.

13. In light of the foregoing I am advised by my Attorneys at Law and I believe that there is no further basis for the court's intervention as the amended claim for additional relief which originated from and is rooted in excessive leave, has been mutually resolved"

159. In the letter dated the 29th June 2016 which Mr Richardson referred there were two doctors who had 70 and 34 days compensatory time off and their respective contracts were ending on the 31st July 2016.

160. The First Claimant deposed in his affidavit filed 3rd April 2017 that the doctors who were referred to in the letter dated 29th June 2016 were not forced to take all of their accumulated leave with immediate effect. He also stated that the two doctors who were

referred to in the memorandum dated the 12th January 2016 worked in the community and had 38 and 64 days accumulated leave therefore there was no prejudice in sending them on their end off contract vacation leave. The other employees listed were not doctors and did not have anywhere close to the number of days accumulated. He also stated that there were other doctors who had accumulated leave in the range of 160 days to 400 days and they were not forced to take all their accumulated leave.

161. The First Claimant also deposed that the other Specialist Medical Consultant in the department of Obstetrics and Gynaecology Dr Ammar Singh had over 300 days accumulated leave as at 24th March 2017 and he was not sent on all immediate leave and his contract expired on the 18th April 2017. In the First Claimant's affidavit filed on the 28th July 2017 he deposed that since in or about the 28th April 2017 he has been the sole Consultant on staff in the Obstetrics and Gynaecology Department since Dr Ammar Singh the other Senior Medical Officer has been pre-retirement leave and since April 2017 and the First Defendant has arranged for a locum Specialist Medical officer Dr Leslie Bishop to attend for one week out of the four weeks.

162. It was argued on behalf of the Claimants that the First Defendant's decision to mandate the Second Claimant to proceed on all his accumulated leave was a de facto suspension and an interference with and an attack upon the Interim Order Court and a contempt of court.

163. It was also argued that the First Defendant's ruse of vacation leave was unlawful as a misconstruction of its alleged policy and was a disproportionate act of discrimination against the Second Claimant that singled him out for adverse and negative treatment in comparison with his peers by refusing to permit him to take leave in increments. The First Defendant's decision was irrational as it failed to ensure adequate coverage on the Obstetrics and Gynaecology Department; and was contrary to the legitimate expectation of the Claimants, including the Second Claimant, established by practice over time that they would be permitted to take such leave in increments and not en bloc.

164. It was also argued that the First Defendant appeared to have accepted after six (6) months, that their treatment of the Second Claimant was objectionable since he was permitted to resume work in March 2017.

165. The Defendants argued that there was no mala fides on their part in the treatment of the Second Claimant and that the new CEO in conjunction with the Chairman of the First defendant proceeded to work at arriving a mutually agreeable solution which was accepted by the Second Claimant. Therefore the allegations of contemptuous behaviour and unfairness toward the Second Claimant was unfounded and unsustainable.

166. In **Anissa Webster & Ors v the Attorney General of Trinidad and Tobago**[19] the Judicial Committee of the Privy Council summarized the relevant principles for establishing inequality of treatment under section 4 (d) of the Constitution as at paragraph 24 as:-

(1) the situations must be comparable, analogous or broadly similar, but need not be identical. Any differences between them must be material to the difference in treatment;

(2) once such broad comparability is shown, it is for the public authority to explain and justify the difference in treatment;

(3) to be justified, the difference in treatment must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised;

(4) weighty reasons will be required to justify differences in treatment based upon the personal characteristics mentioned at the outset of section 4: race, origin, colour, religion or sex; and

[19] [2015] UKPC 10

(5) it is not necessary to prove mala fides on the part of the public authority in question (unless of course this is specifically alleged).

167. The reason that the First Defendant directed the Second Claimant to take all his accumulated leave was that it was enforcing its policy that its employees who had accumulated in excess of 90 days had to proceed on leave. However, based on the evidence of the First Claimant which was not disputed by the First Defendant there were other doctors who had accumulated substantial leave and who the First Defendant had not directed to proceed on all their accumulated leave. In my view the actions by the First Defendant towards the Second Claimant in giving such direction was unlawful since it was an arbitrary application of the "Accumulation of Vacation policy".

168. It was also irrational since based on the First Claimant's evidence which was not disputed by the First Defendant, the First Defendant did not take into account the negative effect of mandating the Second Claimant to take all his accumulated leave had on patient care at the Department of Obstetrics and Gynaecology at the Scarborough General Hospital.

169. In those circumstances, the First Defendant's treatment of the Second Claimant by directing him to proceed on all his accumulated leave without providing a rational reasons for treating him differently meant that the decision was not rational and unlawful.

Conclusion

170. I have found that even if the First Defendant did not release the Post Mortem Report directly to the media, by failing to take steps to ensure that it did not end up in the public domain before the Enquiry the First Defendant acted in bad faith.

171. The Board had the power to suspend under Regulation 27. Regulation 27 empowers the Board to direct an employee not to report for duty until further notice. This Regulation empowers the Board to do so where it is of the opinion that such step is necessary to

protect the interest of the public and the reputation of the Authority. It is not a stand alone provision but it is used by the Board in the disciplinary process.

172. The Regulations laid out a procedure which the First Defendant, as a public body had a duty to follow before making its decision to suspend the Claimants. Fundamental in the Regulations was a duty on the Claimants being notified in writing of any allegations of misconduct before suspension. They were not so informed in the instant matter since neither the CEO nor the Board complied with this procedure. The Regulation also require that the employee who is to be adversely affected by a suspension in the instant case the Claimants are entitled to be given the opportunity to submit their explanation before the decision to suspend is taken. In the instant case I have found that the Claimants were deprived of this opportunity and therefore when the Board which is empowered under Regulation 27 to suspend, took the decision to suspend them it did not have all the relevant materials. The Board also failed to take reasonable steps to obtain the relevant information before it took the decision to suspend.

173. The Claimants' suspension was punitive and not precautionary since on the face of it the suspension appeared to be indefinite since there was no limited period or condition set out in the notices of suspension to them. Further, the effect of the suspension was prejudicial to the Claimants since it substantially reduced the Claimants salary from the First Defendant and painted the Claimants in a negative light to their colleagues and the public.

174. The appointment of the Second Defendant by the First Defendant as the Investigator to conduct the Enquiry under Regulation 21 was unlawful. In my opinion to a fair minded observer having considered her presence on the day when Dr Duke informed the Claimants verbally of their suspension and that they were told to report to her subsequent to their suspension would have tainted her with bias. I have also found that the Second Defendant did not meet the statutory requirement to be an employee senior to the First Claimant. In my opinion, it was Parliament's intention that Regulation 21(1) (2)(a) was to be given a literal meaning since to interpret otherwise would create a mischief that a

person in a lower substantive post but acting in a higher position would meet the requirements.

175. The procedure used at the Enquiry was fundamentally flawed. The Regulations only speak about one Investigating Officer and not a panel. In the instant case there was a panel of four (4) persons. Further the Claimants are entitled to have a legitimate expectation to be treated fairly. Fairness dictated that they were entitled to the documents they requested before they appeared before the Enquiry and before they gave a statement in response. They were also entitled to be permitted to be represented by their legal or union representative.

176. Finally, the First Defendants treatment of the Second Claimant after the Interim Order by directing him to proceed on all his accumulated leave was unlawful and in effect a suspension. The First Defendant's action was irrational and an arbitrary application of its " Accumulated Leave Policy" since there were other doctors employed by the First Defendant who had substantial accumulated leave which the First Defendant did not to proceed on leave. The First Defendant failed to provide a rationale reason for treating the Second Claimant differently.

Order

177. The Defendants, their servants or agents are restrained from publicizing and/or causing and/or permitting to be publicized and/or sanctioning and/or continuing to do so any or any further matters or information that is adverse to the Claimants or may cause prejudice to the Claimants.

178. It is declared that the decisions of the Defendants to initiate and continue the Enquiry and all disciplinary proceedings against the Claimants are *ultra vires*, invalid, null, void, and of no effect.

179. The decisions of the Defendants to initiate and continue the Investigation and/or the Enquiry and all disciplinary proceedings against the three Claimants are quashed.

180. It is declared that the decisions of the Defendants to suspend and/or to direct the Claimants to cease their clinical duties and/or not be paid their full remuneration and each of them is *ultra vires*, invalid, null, void and of no effect.

181. The decisions of the Defendants to suspend and/or direct that the Claimants do cease their clinical duties and not be paid their full remuneration is quashed.

182. It is declared that the establishment of the Enquiry and the appointment of the Second Defendant as Investigating Officer in respect of the alleged misconduct of the three Claimants is *ultra vires*, invalid, null, void, and of no effect.

183. The establishment of the Enquiry and the appointment of the Second Defendant as Investigating Officer in respect of the alleged misconduct of the three Claimants is quashed.

184. The Defendants are to disclose to the Claimants all documents in connection with the purported disciplinary proceedings and/or purported Enquiry into the death of Mrs. Gordon, which are in the possession or control or custody of the Defendants.

185. The Defendants' decision by letter dated the 5th October 2016 directing the Second Claimant do "*proceed on leave with immediate effect"* until September 2018 is quashed.

186. It is declared that the Defendants' decision by letter dated the 5th October 2016 directing the Second Claimant do "*proceed on leave with immediate effect"* until September 2018 is *ultra vires*, invalid, null, void, and of no effect.

187. It is declared that the Defendants' threats as stated by its letter dated the 5th October 2016 that should the Second Claimant be *"found to be in violation of this final directive, (his)*

presence would be categorised as unauthorized and the TRHA shall take the appropriate action to safeguard its integrity" are *ultra vires*, invalid, null, void, and of no effect; and

188. The Defendants are to pay the Claimants costs. I will hear the parties on quantum.

…………………………..
Margaret Y Mohammed
Judge