**IN THE SUPREME COURT OF BELIZE, A.D. 2009**

**CLAIM NO. 420 OF 2007**

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| | **(MOHAMMAD KAMRAZZUMAN** | **CLAIMANT** |
| | **(** | |
| **BETWEEN** | **( AND** | |
| | **(** | |
| | **(UNIVERSITY OF BELIZE** | **DEFENDANT** |

**Before: Honourable Justice Sir John Muria**

**10 July 2009**

***Dr. E. Kaseke* for Claimant**
***Ms Lois Young S.C.* for Defendant**

**J U D G M E N T**

*CLAIM – breach of contract of employment – suspension pending investigation and disciplinary proceedings on 50% pay – balance of salary withheld – termination of employment – refusal to pay remaining 50% of salary, other benefits and entitlements – whether breach of contract – whether entitled to 50% salary, benefits and entitlements*

**MURIA J.:** By his claim form filed on 18th September 2007, the claimant claims damages for breach of contract of employment and /or for wrongful dismissal. The breach of contract is said to be in respect of non-payment of salary increases, allowances and salary during period of suspension. The defendant vehemently denied the claim and says that the claimant is not entitled to any damages as claimed.

***Brief Background***

The claimant was, by a letter dated 14th February 2003 under the hand of the President of the defendant, offered an appointment to the post of Director of Adult and Continuing Education (ACE) at the University of Belize (UB), at the salary of $28,596.00 on pay scale 20, together with allowances, for transportation $115.00 per month and telephone $75.00 per month. Although there was suggestion by the defendant that the claimant had not returned a signed acceptance of the offer of appointment, Exhibits MK8 read together with MK1 and MK7 show that the claimant had accepted the offer of appointment to the post of Director of ACE.

Seven (7) months later, on 23rd September 2003, the claimant wrote to the President of the University seeking an adjustment of his salary to pay scale 24 together with three (3) increments effective from December 2002 when the claimant first took up employment with the defendant on probation.

In response, Dr. Lewis (President) advised the claimant by letter of 29th September 2003, that the Provost would review the position and make recommendation before she could deal with the claimant's request.

On 1st February 2004, the claimant received a letter from the Director of Human Resources Department of the defendant informing him that he was suspended from duty with immediate effect until further notice because of alleged irregularity over the use of funds at the ACE Department. The claimant was suspended on 50% pay until the outcome of the investigation into the alleged misuse of funds at the ACE Department.

The claimant's request for salary adjustment was consequently put on hold. The claimant was told of this in a letter dated 25th April 2004 from the President of the defendant.

Following the investigation into the claimant's alleged misuse of funds at ACE Department, the claimant was on 29th July 2004 charged for the offence of theft of $106,070.00. The DPP, however, entered a *Nolle Prosequi* in respect of the charge against the claimant on 1st June, 2005.

In the meantime, the purported termination of the claimant's employment in a letter of 28th August 2004 w.e.f. 1st October 2004, was withdrawn. However, the claimant was to remain suspended on half pay until the conclusion of the criminal proceedings against him. That position followed from the Legal advice given by Mr. Gian Gandhi S.C., Legal Counsel in the Ministry of Finance.

Following the discontinuance of the criminal proceedings against the claimant, the defendant notified the claimant by a letter dated 14th June 2005 that he would be subjected to disciplinary proceedings since a recommendation for his dismissal for gross misconduct had been made to the President of the defendant. On 16th June 2005 the claimant's attorney, Mr. Lutchman Sookanandan wrote to the defendant claiming the claimant's benefits following the *Nolle Prosequi.*

On 20th October 2005, the defendant terminated the claimant's employment by a letter dated the same date for "good and sufficient cause" pursuant to section 46(1) of the ***Labour Act*** (Cap. 297). The letter also advised that the sum of $12,179.00 was owing to the claimant for

outstanding leave and for which he would be paid. The said amount had not been paid and so on 26th June 2006, the claimant's attorney renewed his client's claim, not only for the $12,179.00, but also for half-pay from 1st February, 2004 to 20th October, 2005, transportation and telephone allowances for the said period and salary increments for 2003, 2004 and 2005. The total benefits said to be outstanding from the defendant was $49,640.50. By a letter dated 31st October 2006, the defendant refused to pay the amount of $49,640.50 claimed by the claimant for half salary, transportation and telephone allowances, salary increase and vacation pay on the basis of clause 4.8.2 of the ***University of Belize Faculty and Staff Handbook*** (the Handbook).

***Case for the claimant and defendant***

The claimant's case is that he was appointed Director of ACE with effect from February 1, 2003 at pay scale 20 of $28,596.00 per annum with transportation and telephone allowances. He claimed that he was entitled to be placed on salary scale 24 with three (3) increments retroactive to the date of his probationary appointment in December 2002.

At the date of his termination which he said was unlawful he was not yet given his salary adjustment, or his half salary, allowances, and other entitlements.

He claimed that criminal proceedings against him having been nolled his half pay should be given to him. By not so doing, the defendant was in breach of his contract of employment.

The defendant, on the other hand, was adamant that the claimant was lawfully terminated and that he was not entitled to be paid his half salary or his other benefits.

As to the effect of the *nolle prosequi,* the defendant's case is that the withdrawal of the case by the prosecution did not affect the defendant's right to take disciplinary action against the claimant. Having taken the disciplinary action, the defendant lawfully terminated the claimant.

***Issues***

The parties have raised a number of issues in the course of arguments. However, in the Court's mind there are really only three issues that need

to be considered in order to determine the outcome of this case. These issues are:

1. Whether the claimant was appointed a Director of ACE;

2. Whether his termination was lawful;

3. Whether he was entitled to be paid his employment benefits during his suspension.

The other issues raised are peripheral to these three central questions. I feel, however, that this dispute will properly be resolved by considering the three main issues set out above. I will therefore deal with each of them in the order as they appear.

***Whether claimant appointed Director of ACE***

In so far as the issue of whether the claimant was appointed Director of ACE or not, the evidence clearly shows that the claimant was so appointed. There is some argument by the defendant that the claimant's acceptance of the offer of appointment contained in the letter of 14 February 2003 was missing from the claimant's personal file kept by the defendant. The evidence on behalf of the defendant is that the claimant

did not return the signed acceptance of the letter of offer of 14 February 2003.

The evidence of the claimant is that he signed the acceptance of the offer of appointment and returned it to the Secretary of the Director of Personal Affairs of the defendant as directed in the letter.

In response to the letter of 8 September 2004 from the claimant's then attorney, Mr. Lutchman Sooknandan, the legal counsel in the Ministry of Finance, Mr. Gian Ghandi, instructed by the defendant, wrote on 13/9/04 to the claimant's attorney acknowledging drawing the attention of the defendant to the letter of 14 February 2003. However Mr. Ghandi acknowledged that the letter of 14 February 2003 was "*missing*" from the claimant's personal file.

Consequently, the defendant's letter of 29 August 2004 to the claimant advising him of his termination "*as Director*" of ACE with effect from 1 October 2004 was withdrawn. In that same letter the claimant was to have been employed on a month-to-month basis because of no signed contract on record. It seems obvious to the court that having been drawn

to its attention of its letter of 14 February 2003, and clearly with the benefit of legal advice, the defendant had to withdraw its letter of 29 August 2004. The defendant must be taken to have accepted the claimant as being appointed Director of ACE. The letters MK3, MK5.4 and MK7 from the defendant all made reference to the claimant as Director of ACE. At the Ad Hoc Disciplinary Committee Meeting on 15 September 2005, the claimant was referred to as Director of ACE.

Despite the strong contention by Ms. Lois Young, SC, for the defendant that the claimant had never been appointed Director of ACE, I find on the evidence before the court that the claimant had been appointed by the defendant as Director of ACE. Even if the acceptance of appointment letter was "missing' from the claimant's personal file kept and administered by the defendant, the claimant was accepted, paid and treated during his period of employment between 14 February 2003 and 20 October 2005 as Director of ACE. That is also good enough ground to regard the claimant as being accepted by the defendant as Director of ACE. I find and hold that the claimant, prior to his termination of employment, was employed by the defendant as Director of its Adult Continuing Education (ACE) Department.

***Whether termination of claimant's employment lawful***

On the issue of the lawfulness of the claimant's termination, the case as presented by Dr. Kaseke, counsel for the claimant, is that the defendant unlawfully terminated the claimant's employment. The principal grounds relied upon by the claimant are that: (1) he was not given the opportunity to defend himself, a breach of the rule of natural justice, (2) the termination was contrary to Clause 4.8.2 (a) of the defendant's Handbook, and (3) in view of the *nolle prosequi*, the defendant was in breach of contract to terminate the claimant's contract.

I deal with the three basic grounds in the reverse order. It is contended on behalf of the claimant that following the entry of the *nolle prosequi* by the DPP on the criminal charges against the claimant, the suspension of the claimant should also end. Support for that contention was placed on Mr. Ghandi's letter dated 13 September 2004 (MK8) which counsel for the claimant argued constitutes a 'promise' that upon the conclusion of the criminal proceedings against the claimant his suspension from duty on half pay would come to an end. The defendant, submitted counsel, is estopped from seeking to resile from that promise, relying in support

from the passage in ***Halsbury's Laws of England***, 4th Edn. (Re Issue) (1992) Vol. 16 para 955 pp. 842-843 where it is said:

> "Where a person has by words or conduct made to another a clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise then he represented it to be."

Before I deal with the question of whether MK8 constituted a promise flowing from the *nolle prosequi* in the present case, I feel it would be necessary to state what the legal effect of a *nolle prosequi* is in connection with disciplinary proceedings faced by an employee such as the claimant in the present case. The position has been generally stated that a *nolle prosequi* excludes any hearing of the criminal charge and its determination by way of acquittal or conviction. However, it does not prohibit disciplinary proceedings against a person who had been the subject of such criminal charge. See the Irish cases of ***John keady -v-***

***The Commissioner of An Garda Siochana and Others*** (1st December 1988) High Court 1987 No. 554 1 P; and ***Patrick Farrelly -v- The Commissioner of An Garda Siochana Ireland and The Attorney General*** [20007] 1 EHC84.

I return to MK8 the contents of which are as follows:

> "I am writing to you on the instructions of the University of Belize (UB).
>
> We refer to you letter of September 8, 2004 which was in response to the UB's letter of August 29, 2004. We must thank you for drawing to our attention the UB's earlier letter dated February 14, 2003, offering Mr. Kamaruzzman a tenure post of Director, Adult and Continuing Education. This letter was, unfortunately, missing from your client's personal file maintained at the UB and was therefore overlooked.
>
> In view of the letter of February 14, 2003, the UB's letter of August 29, 2004, purporting to terminate Mr. Kamaruzzman's appointment as from October 1, 2004, was obviously written in error and is hereby withdrawn.

Resultantly, Mr. Kamaruzzman will continue to remain suspended from duty in accordance with UB's letter of February 1, 2004 and will continue to receive half pay until the conclusion of criminal proceedings against him.

The question of payment of the half pay being withheld during suspension would depend on the outcome of the criminal proceedings and would be considered at the appropriate time.

We do hope you find this reply helpful. Any inconvenience caused is regretted."

Dr. Kaseke strenuously argued that the words "*continue to remain suspended from duty in accordance with UB's letter of February 1, 2004 ... until the conclusion of criminal proceedings against him*" in Mr. Gandhi's letter, constituted a promise by the defendant that the claimant's suspension from duty on half pay would end following the *nolle prosequi* on the criminal charge against him. With respect, that is taking the intention of that letter too far. The words referred to, in my judgment, are clear and unequivocal. They simply advised the claimant that he was to remain suspended from duty until the conclusion of the criminal proceedings against him. The decision on the state of the claimant's suspension after the conclusion of the criminal proceedings

against him was not the province of Mr. Gandhi's letter. That was a matter for the defendant employer. Thus MK8 could not, and did not constitute a promise as suggested by the claimant

It would, therefore, be wrong to accord Mr. Gandhi's letter with the interpretation placed on it by Counsel for the claimant, which will have the effect of making it impossible for the defendant employer to take any other disciplinary actions, if warranted, following its investigation into the allegations against the claimant. This is because the entry of the *nolle prosequi* in this case could not, and did not, bar the defendant from proceeding with its disciplinary case against the claimant.

Was the defendant in breach of contract when it proceeded to discipline the claimant following the *nolle prosequi* of the criminal charges against him? The claimant argued that the defendant was so in breach. The contention by Dr. Kaseke on behalf of the claimant runs as follows:

> "When UB therefore embarked on the *ad hoc* disciplinary procedure against the Claimant after the conclusion of the *then* criminal proceedings against the Claimant, it was in breach of its duty of trust and care, in breach of its earlier promise, and in

breach of his contract of employment. Consequently, damages should, in principle, be granted to the Claimant."

With respect to Counsel, the contention cannot stand for two principal reasons: first, the *nolle prosequi* did not bar the defendant from proceeding with its disciplinary case against the claimant. Secondly, as I have already found, MK8 could not, and did not constitute a promise by the defendant that it would end the claimant's suspension from duty at the end of the criminal proceedings.

The position of the defendant on its disciplinary case against the claimant is clearly demonstrated by the various correspondence between itself and the claimant starting with the letter of February 1, 2004 (claimant's MK4) which is the letter of suspension of the claimant from duty on 50% pay *"until the outcome of the investigation*," the letter of 25th April 2004 (MK5.4) putting on hold the claimant's request for upgrade in salary due to the investigation into the financial irregularities at ACE Department, the letter dated 28th June 2004 (defendant's Doc. No. 2) to the claimant from the defendant, informing the claimant that the investigation into the alleged irregularities in the Department of ACE "still on going" and that his suspension from duties on ACE Director on

50% salary had been extended "*until the completion of the investigation*," and the letter of July 14th, 2005 from the defendant informing the claimant's attorney that despite the *nolle prosequi*, the defendant proposed to proceed with the disciplinary charges against the claimant and that the hearing before the Ad Hoc Disciplinary Committee was arranged for August 30, 2005 at 9:30 a.m. at the Conference Room of the Administration Building Central Campus. Those correspondence unequivocally show that the investigation and the disciplinary proceedings against the claimant would continue even after the *nolle prosequi* on the criminal charge against the claimant.

I now turn to the issue of whether the claimant was lawfully terminated or not. As stated earlier in this judgment, the claimant's case is that he was unlawfully terminated from his employment. In support of the claimant's case, Dr. Kaseke grounded his submission on two fronts. First, the claimant was subjected to disciplinary proceedings by an *ad hoc* committee constituted under the University of Belize Faculty and Staff Handbook. Both Handbook and the Ad Hoc Disciplinary Committee, submitted counsel, are *ultra vires* the ***University of Belize Act*** (Cap. 37) (the UB Act). Secondly, Counsel argued that even if the handbook and

ad hoc committee are lawful, the ad hoc committee conducted he disciplinary proceedings against the claimant in breach of the rule of natural justice. Consequently it is submitted that the decision of the ad hoc committee is unlawful, null and void.

Ms. Lois Young SC of Counsel for the defendant did not directly deal with the first point raised by the claimant on the legal status of the Handbook and the ad hoc committee in her written submission. Counsel, however, firmly submitted that the defendant had acted lawfully pursuant to its powers under the Handbook in terminating the claimant's employment and that it had acted fairly in doing so.

I deal first with the legality of the Handbook and the ad hoc committee. I need first to point out that, notwithstanding the fact that the defendant has not directly dealt with the point, it does not relieve the claimant of its obligation to establish his case on the legal point raised. This is because the claimant must succeed on the strength of his case and not on the weakness of his opponent: ***Kodilinye - v- Odu*** (1932) 2 WACA 336, 337-338; ***Masaray -v- Williams*** (1968-1969) A.L.R. (S.L) 326***;*** and ***Seymour***

***Wilson -v- Musa Abbess,*** Civil App. 5 of 79 (Supreme Court of Sierra Leone).

The contention of Dr. Kaseke for the claimant is that the ad hoc committee was established under the Handbook which does not constitute "rules" within the meaning of section 31 of the UB Act and section 3(1) of the ***Interpretation Act*** (Cap. 1). For convenience sake, I set out the two relevant provisions relied on by claimant. Section 31 of the UB Act states:

> "31.(1) Subject to section 3 above, the Board may with the approval of the Minister make rules for the better carrying out of the provisions of this Act.
>
> (2) Without prejudice to the generality of subsection (1) above, such rules may provide for all or any of the following matters:
>
> ……..
>
> (e) the appointment, dismissal and disciplinary control over employees of the University."

And sections 3(1) of the Interpretation Act (Cap. 1) provides:

> "3. (1) In this Act, unless the contrary intention appears –
> "regulation" includes any rule, by-law, order, form or notice, issued or made under the authority of any law;
> "rule" includes regulation and has the same meaning as that term;
> "subsidiary Legislation" means any proclamation, regulation, rule, order, resolution, rule of court, by-law, or other instrument made under or by virtue of any Act and having legislative effect."

Counsel further seeks to buttress his argument by relying on section 21 of the Interpretation Act to say that the rules contemplated in section 31 of the UB Act, as subsidiary legislation, must be published in the Gazette. As the handbook was not so published, it could not constitute "rules" within the meaning of the word under section 31 of the UB Act, so the argument goes for the claimant.

As far as the court is concerned, this is an argument in semantics and bears little weight on this aspect of the claimant's case. This is because, I am satisfied that the University of Belize Board is authorized by the UB Act to make policies, guidelines and rules for the efficient management, maintenance and development of the University and for the better carrying out of the provisions of the Act as well as for the fulfillment of the mission of the University. See sections 15 and 31(2) of UB Act.

The appointment of the Ad Hoc Committee is one that is well within the powers of the Board to make. I am satisfied that the Ad Hoc Disciplinary Committee in this case was properly and lawfully constituted by the Board under the powers given to it by the UB Act.

On the allegation that the Ad Hoc Disciplinary Committee failed to observe the rules of natural justice as enshrined in sections 3 and 6 of the Constitution of Belize, the case for the claimant as put by counsel is that "the claimant did not know what UB investigated against him" on. Counsel further contended that the fact that the claimant was given a "bulky" package of papers fifteen minutes before the disciplinary proceedings could not amount to compliance with the natural justice. References were made to the cases of ***Knight -v- Indian Head School Division No. 19*** [1990] 3 WWR 289 (CAN) and ***Epicurean Limited -v- Madeline Tayler*** (May 27, 2004) Civ. App. 4 of 2003, Eastern Caribbean Court of Appeal.

The evidence before the court, both from the defendant and the claimant himself shows that the claimant knew very well as from 1 February 2004

he was suspended from duty and what the investigation against him was about. In his own words his suspension and the investigation were about "*an alleged irregularity regarding dispensation of funds at the Adult and Continuing Education Department of UB*." See MK4 and paragraph 5 of the claimant's own witness statement. For the purposes of suspending the claimant pending investigation into the allege misuse of funds at ACE, I am satisfied that the claimant was properly notified.

It was on 20 October 2005, following a disciplinary hearing before the Ad Hoc Disciplinary Committee that the claimant was disciplined in the form of dismissal. The focus of the claimant's complaint on this part of his case is the procedure adopted by the Committee during the disciplinary hearing. At any level of the disciplinary process against an employee, in my view, the strictures of the rule of natural justice must be observed. This is because the decision to discipline an employee cannot be properly taken until the investigation is complete, the disciplinary charge is made and the employee is notified of it, and that he is given an opportunity to rebut the allegation raised against him.

The question in the present case is: following the investigation of the alleged misuse of funds at ACE by the claimant and prior to the disciplinary hearing, did the defendant notify the claimant of the allegation or charge against him, and afford him the opportunity to defend himself?

The evidence is that on 14 June 2005, the Director of Human Resources of the defendant in the person of Ms. Yura Monsanto, informed the claimant by letter that he was going to be subjected to disciplinary proceedings since recommendation had been made to dismiss him for gross misconduct. There is also evidence that the notice of the hearing before the Ad Hoc Disciplinary Committee for August 30th 2005 was given to the claimant as well as his then Attorney under two letters separately addressed to the claimant and his Attorney dated July 14th, 2005. See Defendant's Documents Nos. 3, 4, 5, and 6. In the same letter the claimant was invited to make his representation on the charge of "*violation of the University of Belize's Policy on cash handling and subsequent loss of income to the University of Belize's ACE Department while under your Directorship*" and in addition "*your violation of*

*Sections 4.2.1(a)(b)(c)(d)(e)(f) of the University's Faculty and Staff Handbook.*"

On 24th August 2005, the claimant wrote to the defendant confirming that he would attend the hearing before the Ad Hoc Disciplinary Committee on 30th August, 2005. He also informed the defendant that his legal representative would be Mr. Lutchman Sooknandan.

The hearing before the Ad Hoc Disciplinary Committee was postponed to September 15th, 2005 and the claimant was notified of the change (see defendant's Document No. 6). The hearing was finally held on 15th September, 2005 at which the claimant was present and made his representations to the allegations made against him on the mismanagement of funds at the ACE Department and the use of his office for private gain, namely using the University Letterhead in a letter dated 21st January 2003, to the Director of Immigration to facilitate the entry of his three relatives from Bangladesh into Belize.

I have read and considered the documents and the correspondence mentioned above including the Minutes of the hearing before the Ad Hoc

Disciplinary Committee. I have also considered the evidence adduced by the claimant as well as those of Dr. Corinth Morter-Lewis (President of the University of Belize) and Ms. Yura Monsanto (Human Resource Director, University of Belize). It seems clear to the court on the evidence that the claimant knew, having been notified, of the nature of the allegations brought against him by the defendant. The opportunity was given to him to respond and did indeed respond before the Ad Hoc Disciplinary Committee on 15th September 2005. The claimant had the benefit of legal representation as confirmed in his letter of 24th August, 2005. Further, I am satisfied that, with the postponement of the hearing from 30th August to 15th September 2005, the claimant also had the benefit of time to prepare his response to the allegations raised against him.

Having considered the evidence as a whole I am not satisfied that the claimant's claim for breach of the rule of natural justice has been made out. On the contrary, the actions taken by the defendant were in conformity with the rules of natural justice. Thus the hearing before the Ad Hoc Committee was also done in accordance with the procedure laid down under the Handbook and the rules of natural justice. I cannot

detect any sense of unfairness in the action taken by the defendant to discipline the claimant by way of dismissal from his employment as a Director of the ACE at the University of Belize.

It seems obvious to the court that the focus of the complaint about his termination is on the procedure adopted by the Ad Hoc Disciplinary Committee to discipline him. The claimant offered very little or no challenge to the substance of the findings and reasons for his dismissal from his employment. It is therefore difficult to resist the conclusion reached by the defendant that the claimant was lawfully dismissed for good and sufficient cause under section 46 of the ***Labour Act*** (Cap.297).

I hold therefore that the termination by the defendant of the claimant's employment was lawful.

***Whether claimant entitled to employment benefits during suspension***

I now turn to the third issue of whether the claimant is entitled to be paid his benefits. The claimant's claim on this issue is on two fronts, namely a claim for three (3) salary increments, and fifty percent (50%) of his salary withheld during his suspension, including his allowances.

On his claim for three salary increments, the claimant relies on his assertion that he was verbally promised "Salary Scale 24 with three increments of $34,356 per annum" backdated to December 2002 when he was first appointed on probation to the University, the assertion firmly refuted by the defendant. Apart from his letter (MK2) which by its contents is self-serving, the claimant has not produced any evidence to support his assertion that he was verbally offered Salary Scale 24 with three increments of $34,356 per annum by the defendant. Both Dr. Lewis and Ms. Monsanto denied such a promise on the part of the defendant. If there was any promise (which is denied) the claimant would not be entitled to it since he failed to fulfill the requirements as set out under the Faculty and Staff Handbook, one of which was for the claimant to submit his Masters Degree or evidence of its successful completion. According to Ms. Monsanto, when asked in re-examination by Counsel for the defendant if there was any Masters Degree in the Claimants file, she said "No, none."

Section 5.10.2(d) of the Handbook provides that to be awarded two (not three, as claimed by the claimant) salary increments, an employee must complete relevant and approved masters degree. The section reads:

> "5.10.2. When an employee successfully completes an approved program of studies increments shall be awarded on the existing salary scale, according to the following schedule.
> ……..
> (d) Successful completion of a relevant and approved masters degree, two increments are awarded and one increment is awarded if the degree is not relevant."

The letter of 25th April 2004, (MK5.4) from the UB President sought to be relied upon by the claimant does not lend any support to the claimant's case for salary increments. If anything, that letter should serve as a beacon to the claimant that his request for salary increments was at the mercy of the investigation mounted against him by the defendant over his alleged misconduct as Director of ACE.

An added weakness in the claimant's claim on this aspect of his case is the fact that the rule (Clause 5.10.2) only permits increments to be

awarded on the existing salary scale and not on a verbally promised salary scale as the claimed by the claimant.

In any case increments are awards given at the discretion of the employer. In a case of a suspended employee there is no legal obligation on the employer to award increments to such employee during his period of suspension.

The burden is on the claimant to establish the basis for his claim for salary increments. I am not satisfied that he has done so. His claim for three salary increments cannot therefore be maintained and must fail.

I now deal with the claimant's claim of 50% salary which was withheld during his suspension. The claimant's case is that he should be paid his 50% salary that was withheld by the defendant during the suspension. The defendant refused to pay to the claimant his 50% salary that was withheld, relying on Clause 4.8.2(a) which provides that:

"a. **Termination for Misconduct or Criminal Conviction**

The University reserves the right to terminate an appointment for flagrant misconduct or criminal conviction (e.g., gross insubordination, grand theft, embezzlement of funds, sexual harassment as per UB policy, criminal conviction by a court of law).

Where a supervisor has strong evidence of flagrant misconduct or criminal conviction that may warrant termination of employment on the part of an employee, the supervisor may recommend to the respective Vice President of Center Administrator, termination of the employee's employment and the suspension or interdiction of the employee on 50 percent of regular salary for a specified period of time up to three months, with the possibility of an extension if warranted. The respective Vice President submits his recommendation to the President who decides on a course of action.

The case against the employee is referred to an Ad Hoc Disciplinary Committee for review and recommendation. The committee is appointed by the President. Membership on the committee is to include either the staff or faculty representative depending on the substantive post of the person suspended or interdicted, a peer preferably from another department, and one additional person fro within not including the person making the accusation. The accused person has the right to representation at his/her expense in presenting his/her defense.

If the Ad Hoc Disciplinary Committee recommends to the President termination of employment for flagrant misconduct or criminal conviction, the President duly considers the merits of the case. The President provides the employee with an opportunity to persuade him why the employee's employment should not be terminated. The President may decide to (i) terminate the employee's appointment (ii) return the case to the Ad Hoc Committee on procedural grounds (iii) impose a sanction, or (iv) throw out the case

Should the employee's employment not be terminated, the employee is entitled to the portion of his salary withheld if applicable."

*[Underlining added]*

The courts have now recognised that there are two types of suspension, namely, suspension pending investigation and disciplinary hearing (preventative suspension) with full pay and suspension without pay imposed as a sanction following disciplinary hearing (punitive suspension). Both types of suspension are available to employers. One of the classic reasons for the suspension pending investigation is to prevent tampering with evidence or repetition of the alleged offence if accused employee is allowed access to the premises. Hence in the

present case, to obviate that risk, the suspension of the claimant as per the letter of 1st February 2004 was with immediate effect.

The defendant in this case suspended the claimant on 50% pay on 1st February 2004 pending an investigation into the alleged misconduct said to have been committed by the employee (preventative suspension). The evidence shows that the investigation into the allegations against the claimant was completed by 14th July 2005 (Defendant's Doc. No. 4). The claimant and his attorney were so advised of the completion of the investigation and the charges or allegations made against the claimant and of the disciplinary hearing date before the Ad Hoc Committee.

The suspension of the claimant as from 1st February 2004 was not a disciplinary action. Rather that was a step taken by the defendant, a preventative suspension, to enable the defendant to conduct its investigation into the allegations with a view to taking disciplinary action against the claimant. As to the letter of suspension dated 1st February 2004 that, as pointed out in ***Hunkin -v- Siebert*** (1934) 51 CLR 538, was to inform the claimant that he was to desist from performing his duties until the investigation was completed and the allegation/charge against

him was dealt with. In ***Hunkin -v- Siebert***, one of the issues was whether the employee was entitled to his salary during the period of suspension from 5 March 1932 to 14 December 1932 (date of his dismissal). The Supreme Court of South Australia decided that he was so entitled and the High of Australia affirmed the Supreme Court's decision. Referring to the letter of suspension in that case, Starke J said:

> "*The fair meaning of the notice of the 5th March – 'I have suspended you from your duties ... until the charge ... has been finally dealt with' – was not a determination of the respondent's service or office, but an intimation that he should desist from performing his duties until the charge was deposed of.*"

Under common law there is no inherent power to suspend an employee without pay: ***Devonald -v- Rosser and Sons*** [1906] 2KB 728 CA; ***Hanley -v- Pease and Partners Ltd*** [1915] 1KB 698; ***Marshall -v- English Electric Co. Ltd*** [1945] 1 All ER 653 CA; ***Gorse -v- Durham County Council*** [1971] 2 All ER 666, [1971] 1 WLR 775***; Bond -v- CAV Ltd*** [1983] 1RLR 360. So an unpaid suspension may well amount to a breach of the employment contract by the employer to pay the salary due

to the employee during the suspension. Any restriction on the claimant's right to his full salary during the period of suspension must therefore be expressly provided for by statute, before the defendant can impose it on his salary. I have not cited nor had Counsel referred the court to any such statutory restriction in this case.

The South African cases of ***SA Post Office Ltd -v- Jansen Van Vuuren NO & Others*** [2008] ZALC 33; [2008] 8 BLLR 798 (LC); ***Dladla -v- Council of Mboumbela Local Municipality & Another*** [2008] ZALC 22; and ***Naidoo/Rudolph Chemicals (Pty) Ltd*** (2008) 17 NBCC1 6.4.1 also support the proposition that suspension pending investigation and disciplinary hearing (preventative suspension) must be on full pay since the suspension is not taken as a result of a disciplinary sanction which is usually imposed following a hearing and determination after a disciplinary hearing.

Ms Lois Young S.C. relied on Clause 4.8.2 (a) of the Handbook to support her submission that the defendant was justified in withholding the claimant's 50% salary and other benefits due to him. In my view reliance on Clause 4.8.2(a) by the defendant as the basis for refusing to

pay the claimant's salary and benefits due to him during his suspension is misconceived. That provision only applies once a decision has been reached following disciplinary hearing and the decision has been taken to discipline an employee otherwise than by termination.

It is therefore not without significance that the words "*if applicable*" are added at the end of Clause 4.8.2(a). Those words clearly qualify the instances in which an employee's salary can be withheld. Had the defendant, following the disciplinary hearing, imposed a disciplinary sanction against the claimant in the form of suspension without pay, there would be little room for the claimant to complain about non-payment of his salary, including the 50% withheld because he was "*not terminated*," but only suspended without pay. The defendant would be justified in doing what it did with the claimant's salary and other benefits. In this case, Clause 4.8.2 (a) does not apply because the claimant was terminated. There was nothing to withhold.

The claimant, though suspended, continued to be an employee of the defendant throughout the period of his suspension, and as such he is entitled to all the benefits of that employment, unless limited by statute.

As I have said, the court has not been referred to any statutory restriction in this case.

That being the case, I hold that the claimant in the present case is entitled to his full salary, 50% of which had already been paid, and other benefits and entitlements during his suspension pending the outcome of the disciplinary hearing of the allegations against him. It was the contractual obligation on the part of the defendant to fulfill. The withholding by the defendant of the claimant's employment benefits during the suspension was a breach of that contractual obligation.

I note the defendant's letter of 20th October 2005 which acknowledged owing the claimant the sum of $12,179.00 being payment for 100 days outstanding leave, and that of the claimant's attorney dated June 26th 2006 claiming the sum of $49,640.50 being the total of what was owing to the claimant. In the light of what I have said above, I feel in this case the amount that the claimant is entitled to is $41,190.50 which represents 50% of his salary (excluding increments) during his 21 months suspension ($25,021.50), transportation allowance ($2,415.00), telephone allowance ($1,575.00) and outstanding leave pay ($12,179.00).

There is no question of the requirement on the claimant to mitigate his loss in this case because this is really payment rightfully due to him during his suspension from work, and not as damages to which a common law duty to mitigate would apply. Further he could not be expected nor compelled to seek alternative employment while still employed by the defendant during his period of suspension.

***Conclusion and Order***

I have already found that the claimant's employment was lawfully terminated and so his claim for damages for unlawful termination of his contract of employment must fail. The claimant is, nevertheless, entitled to and should be paid, his employment benefits namely, his full salary, 50% of which had already been paid, and other benefits due to him during the period of his suspension pending disciplinary hearing of the charges against him.

***Order:***

1. Claimant's claim for damages for unlawful termination of employment is dismissed.

2. Claimant is entitled to and should be paid his full salary, 50% of which had already been paid, transportation and telephone allowances, and leave pay during the period of his suspension pending investigation and disciplinary hearing against him. The total amount due to the claimant under this paragraph is $41,190.50.

3. Each party to bear its own costs

**Sir John Muria**
**Justice of Supreme Court**