Neutral Citation Number: [2023] CA (Bda) 3 Civ

Case No: Civ/2021/12

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION**
**THE HON. CHIEF JUSTICE**
**CASE NUMBER 2019: No. 320**

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 17/02/2023

**Before:**

**THE PRESIDENT, SIR CHRISTOPHER CLARKE**
**JUSTICE OF APPEAL SIR MAURICE KAY**
**and**
**JUSTICE OF APPEAL GEOFFREY BELL**

**- - - - - - - - - - - - - - - - - - - - -**

**Between:**

**CHEYRA BELL**

**Appellant**

**- and -**

**(1) THE ATTORNEY-GENERAL**
**(2) THE DEPARTMENT OF CHILD AND FAMILY SERVICES**
**(3) THE HEAD OF PUBLIC SERVICE**
**(4) THE PUBLIC SERVICE COMMISSION**

**Respondents**

Dantae Williams, Marshall, Diel & Myers, for the Appellant

Lauren Sadler-Best, of the Attorney-General's Chambers, for the 1st - 3rd Respondent
Richard Horseman, of Wakefield Quin Ltd, for the 4th Respondent

Hearing date(s): 3 November 2022

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**APPROVED JUDGMENT**

**KAY JA:**

## Introduction

1. Cheyra Bell ("the Appellant") was employed as a Residential Care Officer in the Department of Child and Family Services ("DCFS"). By a decision of the Head of Public Service ("HOPS") dated 23 February 2019, she was found guilty of gross misconduct on the ground that she was unfit for duty as a result of being under the influence of alcohol. She was dismissed with immediate effect.

2. She appealed to the Public Service Commission ("PSC") but the decision of summary dismissal was affirmed. She commenced judicial review proceedings in which she challenged (i) the initial decision of the DCFS to refer her to HOPS for gross misconduct proceedings; (ii) the decision of the HOPS, finding her guilty of gross misconduct and summarily dismissing her; and (iii) the decision of the PSC which rejected her appeal. In a judgment handed down by the Chief Justice on 3 June 2021, he refused her application. She now appeals to this Court.

3. The issues arising on this appeal are more procedural than factual. The findings of fact that emerged from the disciplinary proceedings can be summarised briefly. On 15 June 2018, the Appellant and a colleague, Shayne Hollis, transported two adolescent residential clients to Cornerstone Youth Group. While the residents were at the youth group, the Appellant and Mr. Hollis went to the Bermuda Athletic Association Club. Witnesses said that the Appellant was *"stumbling"*, *"vomiting"* and *"acting very differently. Such as speaking loudly with slurred speech"*. Her eyes were bloodshot, and alcohol could be smelled on her breath. She later admitted in interview that she had consumed *"two or three Corona beers."*

## The disciplinary process

4. The Appellant's employment was governed by the Second Schedule to the Public Service Commission Regulations 2001 ("the Regulations"). Essentially, there is a three-stage procedure. At the first stage, the approach is investigative in nature. An investigation team is established within the DCFS and it produces an investigation report to the Head of Department, namely the Director (or in this case, the Acting Director at the time, Ms Renee Brown). The procedure is prescribed as follows:

> "...
>
> *(i) The head of department shall prepare a written statement of the alleged offence and give a copy to the officer in question;*
>
> *(ii) The head of department shall afford the officer the opportunity to meet him to discuss the allegation and present the officer's side of the matter. A representative of the director and, where appropriate, the officer's job supervisor shall be present at any such meeting. The officer may have a trade union representative or a friend present to assist him if he so wishes.*
>
> *(iii) After the meeting referred to in paragraph two, the head of department shall*

*(a) determine whether the allegation should be dismissed. If he so decides he should inform the officer by notice in writing accordingly or*

*(b) refer the case to the head of the civil service [HOPS]."*

5. One of the purposes is plainly to filter out unsustainable allegations of gross misconduct. The second stage culminates in a disciplinary hearing before the HOPS, Dr. Derrick Binns. The relevant provisions of the Second Schedule state:

*"...*

*(v) Where a case has been referred to the Head of the Civil Service under paragraph 3(b), he shall conduct a hearing after giving at least 14 days' notice of the date, time and place of the hearing to the officer.*

*(vi) The officer shall appear before the Head of the Civil Service in person and may have a trade union representative or friend to assist him if he wishes.*

*(a) the Head of the Civil Service shall invite the officer's job supervisor and Head of Department and any other officers who he considers relevant to the case to appear before him.*

*(vii) The Head of the Civil Service shall give the officer a full opportunity to be heard or to make representations and shall after hearing both sides determine the matter or dismiss the allegation*

*(viii) where the head of Civil Service imposes a disciplinary penalty. He should inform the officer accordingly by notice in writing, setting forth in the notice a statement of the officers right of appeal to the Commission under these regulations.*

*(ix) the head of the civil service may delegate any of his functions under the schedule to the Deputy Head of the Civil Service."*

6. Following the adverse findings against her by the HOPS, the Appellant had a right of appeal to the PSC. Regulation 28(2) of the Regulations provides:

*"The officer may include with the notice referred to in paragraph one, any representations he wishes to bring to the attention of the Commission, but unless the Commission otherwise orders, neither the officer nor the empowered person who made the disciplinary award shall be entitled to appear before the Commission."*

7. The PSC has also adopted Procedures Governing Discipline Appeals to the Public Service Commission dated 17 July 2017, which provides: *"all appeals will be decided by a panel of the Public Service Commission."* Section 28 of the Regulations does not require an attendance in person and hearings are on the record unless prior permission to appear has been requested and granted. All appeals shall be conducted by the PSC without an oral hearing, except with the permission of the PSC. The disciplinary authority may make submissions in reply to the

appeal only with the permission of the PSC. A party may ask for permission to appear in person to address the panel. A request to appear in person shall be in writing and shall be made with the notice of appeal. The PSC may deny or grant the request to appear in person. Any party may present evidence with the permission of the panel and shall be entitled to make representations to the panel with the assistance of a union representative or friend.

**The Grounds of Appeal**

8. The grounds of appeal seek to attack the decision of the Chief Justice in relation to all three stages of the disciplinary proceedings. They begin with the assertion "(1) the learned judge erred in his application of the law by holding that the entire disciplinary process involving the second, third and fourth respondents was not flawed, and that the Appellant was not deprived of a proper and fair disciplinary process." However, in the following paragraphs, they seem mainly to be concerned with the HOPS and the PSC.

9. In his skeleton argument, Mr. Dantae Williams restructured his submissions under three headings: (i) natural justice; (ii) bias; and (iii) waiver. Nevertheless, it remains necessary to consider the three stages in order.

**Stage 1: the DCFS**

10. On 13 July 2018, Mr. Alfred Maybury Jr, then the director of the DCFS, wrote to the Appellant notifying her of the allegation against her and encouraging her to contact Mr. Leon Smith, one of the appointed investigators. On 17 July, the Appellant attended for interview with a union representative who told the investigators that he had advised the Appellant not to say anything until the DCFS provided *"the evidence"*. On 30 July, the Appellant again attended for interview, this time unaccompanied. She explained that she did not consider the union to have her best interests at heart. She initially denied that she had consumed alcohol. Towards the end of the interview, she admitted that she and her colleague had drunk alcohol in the Club. She estimated her consumption as *"Corona beers…about two or three"*.

11. Later on the same day, she telephoned one of the investigators saying that she knew she had made a bad decision and it had been *"very irresponsible"*. The investigators' report was sent to Ms Brown as Acting Director on 29 August 2018. It was detailed, containing over 10 pages of single-spaced information and analysis. It described what had emerged from the interviewed witnesses, including the two residents and three employees. On 11 September, the Appellant was placed on administrative leave for three months. On that date, Ms Brown also wrote to the HOPS asking whether the allegations merited being treated as gross misconduct. The HOPS replied in the affirmative.

12. On 1 October Ms. Brown wrote to the Appellant under the heading *"Statement of Alleged Disciplinary Offence."* The allegation was one of gross misconduct in the form of being "unfit for duty as a result of being under the influence of alcohol or drugs", pursuant to paragraph 7.4.2 of the contractual Conditions of Employment. That effectively concluded stage one of the investigation stage.

13. Can it be said that it was procedurally flawed? Mr. Williams makes essentially two submissions. First, it is said that the investigation process was insufficiently rigorous or transparent, because, for example, (i) Ms Brown did not obtain witness statements from each witness, in their own words, confirmed by statements of truth; (ii) the Appellant had not been

given the opportunity to review the report in order to check its accuracy in relation to her interviews; and (iii), she was not provided with copies of witness statements or summaries.

14. Secondly, it is admitted that there was a breach of the prescribed procedure, in particular paragraph 7.4 which provides that, in gross misconduct cases, the Head of Department, effectively Ms Brown at the relevant time, "must send a report in writing to the HOPS with a recommendation with respect to penalty, (which will be at the discretion of the HOPS)". This was never done.

15. As regards the first submission, I consider it to be misconceived. The first stage is what I described in a similar context in *Director of Public Prosecutions v Cindy Clark*e [2019] Bda LR 46. It is not concerned with findings of fact or adjudication. The purpose is simply to establish whether the allegation of gross misconduct should be dismissed summarily or referred to the HOPS for a disciplinary hearing. The Chief Justice said:

> *"[18] For the purposes of determining whether the case should be dismissed summarily or referred to the HOPS for a disciplinary hearing it was unnecessary that the Applicant should be provided with copies of the Investigation Report and the witness statements."*

16. And later:

> *"[21] The allegation that the DCFS did not provide a report to the HOPS with a recommendation as to the penalty for gross misconduct is one of a number of allegations made in these judicial review proceedings in circumstances where no such point was taken either at the Disciplinary Hearing before the HOPS or in the appeal proceedings before the PSC. The Respondents understandably argue that it is not open to the Applicant to pray in aid alleged irregularities in the procedure when she did not raise those issues either at the Disciplinary Hearing before the HOPS or in the appeal before the PSC. This issue can conveniently be considered with the other issues in respect of which no complaint was made by the Applicant either at the Disciplinary Hearing before the HOPS or in the subsequent appeal before the PSC"*

17. I am sure that that analysis is correct and I endorse it.

18. The second submission has a firmer foundation in that Ms. Brown did not send a report in writing to the HOPS with a recommendation as to penalty. However, not all technical breaches vitiate disciplinary proceedings. Ms Sadler-Best points out the well-known distinction between mandatory or imperative provisions and provisions that are merely "directory". She refers to *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286, which draws heavily on *Howard v Bollington* (1877) 2 PD 203. That case concerned the requirement that a bishop "shall", within 21 days, transmit a copy of a representation to the archbishop. The bishop omitted so to do. Lord Penzance referred to the imperative/directory distinction and said at page 211:

> *"…there are some provisions in respect of which the court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end. Now the question is, to which category does the provision in question*

*in this case belong? I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."*

And in *Wang* itself, the crucial question was whether or not the legislature had intended that a failure to comply would deprive the decision-maker of jurisdiction and render any decision which he purported to make null and void.

19. In the present case, I have no doubt that the omission of Ms Brown to make a recommendation in writing as to penalty did not vitiate the proceedings. For one thing, it could go only to penalty and not to the issue of gross misconduct. Moreover, if the Appellant or her union representatives had been concerned about this omission at the time, they could have raised it before the HOPS (at whose hearing Ms Brown was present) and/or the PSC. They did not, even though the procedure required a written recommendation, and none had been disclosed to them.

**Stage 2: The HOPS**

20. The disciplinary hearing before the HOPS took place on 5 January 2019. Those present included Ms Brown, as Acting Director, the Appellant and three officers of her union (Assistant General Secretary, Second Vice President and a shop steward). The decision of the HOPS is set out in a detailed letter dated 23 February 2019. It describes how the Acting Director presented the case, the explanation of the Appellant – which amounted to an admission of alcohol consumption but a denial of unfitness - and submissions (oral and written) from the two senior union representatives, who commented on alleged inconsistencies between and/or unreliability of the witnesses, and the fact that the Appellant's colleague, Mr. Shayne Hollis, had only been charged with simple misconduct and was still in post. The Acting Director explained this by reference to the fact that the evidence in relation to him did not establish unfitness. Finally, the Appellant stated that she had learned a lesson, that her behaviour on the evening in question did not define her and that she had taken responsibility for her actions.

21. The central section of the HOPS decision letter contains a detailed analysis of the evidence on the issue of unfitness. He stated:

*"[16] In this regard the following was submitted as evidence:*

*a. The two residents that were in the vehicle with Ms. Bell on the evening in question and Worker A all gave evidence that Ms. Bell was stumbling upon her return to the facility.*

*b. Both residents stated that they noticed an odour in the vehicle. One described it as alcohol and the other as musty.*

*c. Both residents reported hearing her vomiting. One reported smelling vomit.*

*d. Both residents and worker A describe changes in her speech, such as speaking loudly with slurred speech, not being able to complete a sentence and talking differently.*

*e. One resident reported smelling alcohol on her breath and that her eyes were bloodshot.*

*f. Worker A noted being concerned about Ms. Bell on that evening as her behaviours were out of the ordinary and she appeared to be intoxicated. Worker A also noted that the residents were awake and privy to all that was transpiring."*

22. The HOPS referred to the evidence of Mr. Hollis, which he approached with due caution, but observed that, in relation to the Appellant's intoxication, loudness and emotional instability, it aligned with the evidence of the two residents. The ultimate finding of unfitness was explained as follows:

> *"[28] With regard to the second criterion, fitness for duty can be determined by the nature of the behaviours presented. Multiple witnesses described Ms. Bell's behaviour in a manner that would be consistent with being under the influence of alcohol:*
>
> *a. witnesses described Ms. Bell as stumbling upon her return to the facility.*
> *b. witnesses noticed an odor when Ms. Bell returned to the vehicle.*
> *c. witnesses reported hearing Ms. Bell vomiting.*
> *d. witnesses described changes in Ms. Bell's speech, such as speaking loudly with slurred speech, not being able to complete a sentence and talking differently.*
>
> *[29] Based on the alignment of the evidence of multiple witnesses I conclude that Ms. Bell was unfit for duty as a result of being under the influence of alcohol."*

23. The HOPS then considered penalty. The sanctions for gross misconduct prescribed by the Code of Conduct ascend from suspension with partial loss of pay to dismissal. In concluding that summary dismissal was appropriate in this case, the HOPS said:

> *"[32] Public officers are expected to be fit for duty and to conduct themselves in accordance with the Conditions of Employment and Code of Conduct of the Government of Bermuda. It can be argued that the expectations on those officers who are charged with the responsibility for caring for those who have been placed in the care of the Director of Child and Family Services are higher given their responsibility for vulnerable minors. Such Officers are expected to set an example by their own behaviour for those under their care. Consuming alcohol while on duty and while responsible for vulnerable minors cannot be considered appropriate conduct. Indeed, such behaviour is counter to all that would be expected of a residential treatment officer."*

24. One of the submissions advanced by Mr. Williams is that the fact that the HOPS had replied to the Acting Director at the investigatory stage on 11 September 2018, stating that, in his opinion, *"The incidents are of sufficient gravity that they should be treated as gross misconduct"* (see paragraph 11 above) amounted to a breach of natural justice and/or evidence of bias or apparent

bias, such as to vitiate his ultimate decision. It was, submits Mr. Williams, a clear case of predetermination. There are at least two answers to this. First, the HOPS' letter of 11 September 2018 in no sense prejudiced the issue of gross misconduct by reason of being unfit for duty as a result of being under the influence of alcohol. Essentially, the HOPS had been asked whether, if proved, the facts were capable of amounting to gross misconduct. That is why in his letter he referred to the "allegation", and a "possible breach", of the Code of Conduct. The same applies to the role of the HOPS in placing the Appellant on administrative leave on 11 September 2018. In the language which I used in *DPP v Clarke,* at paragraph 33, at those stages the HOPS was discharging an "institutional or organisational" role, without in any way compromising his impartiality. The Chief Justice dealt with this aspect of the case at paragraphs 47 to 67 of his judgment. I respectfully agree with his thorough analysis.

25. In addition to that line of attack, Mr. Williams also seeks to establish other breaches of the procedure and/or of natural justice on the part of the HOPS. The Chief Justice dealt with this issue compendiously. In effect, he held that, in relation to a procedural complaint, if no such point had been taken or made by the Appellant or her experienced union representatives at the disciplinary hearing before the HOPS or when giving notice of the appeal to the PSC, it could not be taken in these judicial review proceedings. Mr. Williams seeks to characterise this as a waiver and refers to numerous authorities on the law of waiver relating to private law transactions. However, it seems to me that he is fishing in the wrong pool. The Chief Justice was applying established public law principles, not the doctrine of waiver in the sense used by Mr. Williams. There are many instances of applicants for judicial review being prohibited from taking points which they simply did not raise at the appropriate stage of disciplinary proceedings. For example, in *Thompson v Law Society* [2003] EWCA 1269, a decision of the Office of the Supervision of Solicitors had been reviewed by the Law Society's Adjudication Panel. Sir Anthony Clarke MR said:

> *"I cannot at the moment think of a circumstance in which a solicitor who did not ask for an oral hearing before the adjudicator or appeal panel could complain that no oral hearing was held. In my judgement, (the claimant's) failure to ask for an oral hearing is fatal to his argument at common law."*

26. In *University of Ceylon v Fernando* [1961] All ER 631, the Judicial Committee of the Privy Council was concerned with a commission of inquiry which had to consider an allegation of examination cheating. The issue was whether the plaintiff ought to have been enabled to cross-examine the principal witness against him. Lord Jenkins said:

> *"There is no ground for supposing that if the plaintiff had made such a request, it would not have been granted. It therefore appears to their Lordships that the only complaint which could be made against the Commission on this score was that they failed to volunteer the suggestion that the plaintiff might wish to question Miss Balasingam or in other words to tender her unasked for cross-examination by the plaintiff. Their Lordships cannot regard this omission or a fortiori the like omission with respect to other witnesses as sufficient to invalidate the proceedings of the Commission, as failing to comply with the requirements of natural justice in the circumstances of the present case."*

27. In the present case, applying these authorities, the Chief Justice said:

*"It is accepted by the Applicant that at no time did she request that any of the witnesses be produced at the hearing so that they could be cross examined by her or by her Union representatives. Given that the Applicant and/or her representatives failed to request cross examination of the witnesses, any failure on the part of the HOPS to suggest that there be cross examination of relevant witnesses cannot, in my judgment, invalidate the proceedings before him as failing to comply with the requirements of natural justice in the circumstances of this case."*

I have no doubt that that analysis is correct. The Chief Justice then applied the same reasoning to a number of other complaints including (i) the omission to obtain witness statements (as opposed to interview summaries) from each witness in their own words; (ii) failing to disclose the identity of witnesses; (iii) failure to invite the Appellant's job supervisor and Head of Department to attend the disciplinary hearing; (iv) failure to obtain a report from the DCFS in relation to penalty; and (v) the lack of opportunity to make further representations as to penalty.

28. The Chief Justice then said at paragraph 37:

*"In the circumstances I have come to the view that, having regard to the complete lack of any complaints at the disciplinary hearing in relation to the grounds set out at paragraph 28 above, it would not be appropriate or just to allow the applicant to argue these grounds for the first time in these judicial review proceedings. In the circumstances, the applicant must be considered to have waived any right to raise them in these proceedings."*

29. Quite apart from that difficulty for the Appellant, there is the prior problem of whether the prescribed procedure or the principles of natural justice and fairness required the sorts of measures for which Mr. Williams contends. Natural justice is a flexible concept with demands that vary with the context. Internal disciplinary proceedings are not judicial proceedings of the kinds that take place in the criminal and civil courts. Whilst it is apparent that there were disputed facts in this case, as is pointed out in de Smith ‚Judicial Review, 8th Edition, paragraph 7.065, *"a dispute of facts alone will not automatically necessitate an oral hearing."* Moreover, de Smith goes on to say t(7-068):

*"An oral hearing will not necessarily be conducted as though it was a hearing in court. In some cases, it will merely involve the right to deliver oral representations, untrammelled by the rules of evidence or rights to produce or cross-examine witnesses."*

30. In *Lloyd v McMahon* [1987] AC 625, Lord Bridge said:

*"The so- called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework within which it operates"*

31. In the present case, the statutory framework in relation to the HOPS (see paragraph 5 above) plainly required him to conduct "a hearing", and to "give the officer full opportunity to be heard

or to make representations" but did not expressly provide for the cross-examination of witnesses. It required the HOPS to "invite the officer's job supervisor, and Head of Department" and "any other officers whom he considers relevant to the case to appear before him." It is true that the job supervisor seems not to have been invited but the events with which the hearing was concerned did not occur in the job supervisor's presence. Neither was the Appellant's Head of Department at the time of the events (Mr. Maybury) invited, but the de facto Head of Department during the disciplinary process (Ms. Brown) was present. Whilst it would have been open to the HOPS to ensure that the residents and employee witnesses attended and were tendered for cross-examination, in the circumstances of this case, I do not consider that there was any operative unfairness in his omission to do so. Moreover, at risk of labouring the point, there had been no such request emanating from the Appellant or her union representatives, either in advance, or at the hearing.

32. In a detailed and rigorous analysis of the evidence and material before him, the HOPS explained how he had come to the conclusion that the gross misconduct obligation had been proved. I detect no significant unfairness in his approach, nor was there any vitiating error in his imposition of the sanction of summary dismissal. This too, was fully explained and, in the light of the findings, well within the range of reasonable responses of a reasonable employer, given the nature of the Appellant's responsibilities.

**Stage three: The PSC**

33. By a letter dated 6 March 2019, the Appellant's union gave notice to the PSC of her intention to appeal against, "the disciplinary award". It is plain from the terms of section 28 of the Regulations that at this third stage what is envisaged is a review rather than a rehearing. The permitted grounds of appeal include "the finding or disciplinary action was unreasonable", (within section 28(1)(a)), and it is expressly provided that "unless the Commission otherwise orders neither the officer nor the empowered person who made the disciplinary award shall be entitled to appear before the commission" (within section 28(2)). This is reinforced by the Procedures Governing Discipline Awards to the Public Service Commission which makes it clear that in order to have an oral hearing, an Appellant must request and be granted one. At no stage did the Appellant or her union representatives make such a request. The PSC's decision letter of 2 April 2019 stated:

> *"At its meeting held on Monday, 25 March 2019, The Public Service Commission noted your correspondence dated 6 March 2019, appealing the disciplinary award handed down by the Head of Public Service to Miss Cheyra Bell, Residential Care Officer with the Department of Child and Family Services. Given the clear evidence in this case, the Commission agreed in accordance with section 14 of the procedures governing discipline appeals to the Public Service Commission to review the matter "on the record" (without an oral hearing). It was also agreed the penalty of dismissal should be affirmed, as Ms. Bell was under the influence of alcohol while carrying out her duties as a Residential Care Officer responsible for caring and providing services to vulnerable minors."*

34. The Notice of Application for leave to apply for Judicial Review was somewhat terse in relation to the PSC. It simply stated:

> *"The PSC did not consider the merits of the [Appellant's] appeal. Further, the PSC did not ensure that the [Appellant's] basic rights to a fair hearing were adequately protected and followed."*

35. In his judgment, the Chief Justice identified two grounds of challenge namely (1) failure to consider the merits of the appeal and (2) failure to provide a hearing in breach of a legitimate expectation.

36. As regards failure to consider, "the merits", Ms Carlita O'Brien, Secretary to the PSC, explained in her first affidavit that the PSC had construed the notice of appeal as primarily an appeal against the sanction of dismissal, rather than against the HOPS' findings of fact. She added, *"The thrust of the appeal was that a lesser penalty should have been imposed, and that the penalty of dismissal was excessive in the circumstances"*. In his judgment, the Chief Justice concluded (at paragraph 81) that it was "clear that the appeal was only against the penalty of dismissal, and did not challenge the finding of gross misconduct". I do not wholly agree with that conclusion. Although the letter of 6 March 2019 was to a large extent focused on the penalty of dismissal, It also included these passages:

> *"Although it is the opinion of the Head of Public Service, that Ms. Bell was under the influence of alcohol, there is no real concrete evidence of this, as she was never tested for being under the influence of alcohol…it is imperative that this matter concerning Ms Bell is reviewed in its entirety.*
>
> …
>
> *Against this background, we request that the Public Service Commission review this matter in its entirety, noting the inconsistency, past precedents and seemingly unfair penalty award that has thrown a dedicated and committed public servants to the unemployment line. The BPSU would like to emphatically request that Ms Bell be reinstated to her substantive posts under a more progressive disciplinary process, whereby she is given the opportunity to make amends for this ad hoc decision of poor judgement."*

37. It seems to me that taken as a whole, the letter is amenable to a construction that it was also indicating an appeal against the finding of gross misconduct. However, that does not assist the Appellant on this appeal. Knowing that the statutory procedures rendered oral hearings the exception rather than the rule., it was incumbent on the Appellant and her union representatives to spell out in the letter precisely how they put their appeal against the finding of gross misconduct. The one specific complaint – *"no real concrete evidence…and she was never tested for being under the influence of alcohol"* – was hopeless. It had been rejected by the HOPS because there was plenty of evidence from the witnesses and, in any event, testing was not a requirement. The PSC considered there to be "clear evidence in this case". That was a permissible, indeed inevitable, conclusion on the issue of gross misconduct.

38. The submission that there was a legitimate expectation of an oral hearing is founded on the fact that, on four previous occasions involving other members of the same union, the PSC had convened oral hearings, without any prior requests from the union. Like the Chief Justice, I find this to be a wholly inadequate basis upon which to found a claim of legitimate expectation. The PSC had a discretion to order an oral hearing. In the present case it decided not to do so. Given the terms of the union's letter that was well within its discretion.

**Conclusion**

39. It follows from what I have said that I would dismiss this appeal.

**BELL JA:**

40. I agree.

**CLARKE P:**

41. I, also, agree. The appeal is therefore dismissed.