

**THE EASTERN CARRIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

**SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

SKBHCV2021/0151

**In the matter of the Ross University School of
Veterinary Medicine Student Handbook**

**And in the matter of an application for declaratory,
Injunctive and other reliefs by Nalini Bhup, pursuant
to section 24 of the Eastern Supreme Court (Saint
Christopher and Nevis) Act**

BETWEEN:

NALINI BHUP

Claimant

and

THE ROSS UNIVERSITY SCHOOL OF VETERINARY MEDICINE (ST. KITTS) LIMITED

Defendant

Appearances:

Mr. Brian J. Barnes with him Ms. Leigh-Anne Wellington for the Claimant

Ms. Tammi Pilgrim with her Mr. Glenford Hamilton, Ms. Sharina Laws and Mr. Benjamin Henry for
the Defendant

2022: February 6, 7;

April 21.

JUDGMENT

- [1] **GILL, J.:** A student expelled from a university, being aggrieved, seeks re-instatement and other relief.
- [2] The claimant, Nalini Bhup ("Ms. Bhup"), a national of Canada, was a student of the defendant, The Ross University School of Veterinary Medicine (St. Kitts) Limited ("Ross"), from May 2016. Ms. Bhup was enrolled in Ross' undergraduate degree program of Doctor of Veterinary Medicine, having obtained a scholarship from Ross towards her tuition. Ms. Bhup successfully completed three semesters. Her grades showed her to be a model student to the extent that, at the insistence of some of her lecturers, she applied for, and was granted, a teaching assistant position. However, having completed exams for which she was afforded certain accommodation, including a private room outfitted with cameras, due to her medical condition, and promoted to the fourth semester, she was accused of, and charged under Ross' disciplinary process, of cheating in the said exams by the use of a cell phone. The allegations against her included one of lying in relation to the said cheating in her exams.
- [3] The hearing or conduct panel, established under Ross' Student Handbook ("the Student Handbook"), found against Ms. Bhup. The conduct panel recommended a penalty of suspension. However, the Chair of the panel, the Conduct Administrator, determined that she be dismissed or expelled. Ms. Bhup was expelled from Ross on May 31, 2017. Her passing grades for the third semester, which propelled her into the fourth semester, were all changed to zero.
- [4] Ms. Bhup's appeal, pursuant to the provisions of the Student Handbook against the decision of the hearing panel, was unsuccessful.
- [5] Ms. Bhup contends that Ross' actions were wholly unsubstantiated, and that Ross has failed, neglected or refused to restore her to her program, a consequence of which, she has been unable to complete her education.
- [6] On August 29, 2017, Ms. Bhup filed a fixed date claim form under Part 56 of the Civil Procedure Rules 2000 as amended (CPR 2000), seeking remedies in public law against Ross, a private institution. The claim was amended twice, the last version being a re-amended claim form filed on April 9, 2019. Ms. Bhup agreed to discontinue the Part 56 claim and to proceed under the common law. At paragraph 68 of the claim, Ms. Bhup seeks the following:

- a) A declaration that the hearing of the conduct panel authorised by the defendant to inquire into whether the claimant should be expelled from the Ross University School of Veterinary Medicine (RUSVM) is subject to natural justice principles;
- b) Further, or in the alternative, a declaration that the decision by the defendant to expel the claimant for breach of four forms of code of conduct violations was a breach of an implied term between the claimant and the defendant that such a decision would be reasonable, fair and or subject to the rules of natural justice;
- c) A declaration that Mr. Jeffrey Fazio, the chairman of the conduct panel was infected with actual and or perceived bias against the claimant and could not fairly or properly fulfil his functions as chairman of the conduct panel, or under the RUSVM Student Handbook or at all;
- d) A declaration that the defendant contravened Rule 1.8.3.5.c of the RUSVM Handbook which states that:
 - *In advance of the hearing, both the complainant and the respondent will be given access to the identified information that is available **before** the hearing which will be considered by the conduct panel:*
- e) A declaration that the defendant contravened Rule 1.8.3.5.e of the RUSVM Handbook which states that:
 - *The University, the complainant, the respondent and the conduct panel shall be allowed to present witnesses, subject to the right of cross examination by the conduct panel*
- f) A mandatory injunction directing the defendant to accept, ratify and uphold: (i) the course grades; and (ii) the promotion to the fourth semester issued to the claimant on April 21, 2017 pursuant to the Grading Policy set out in Rule 2.7.7 of the RUSVM Student Handbook;
- g) [deleted on amendment]
- h) An order as to damages as against the defendant, including aggravated and exemplary damages for the decision to expel the claimant on May 31, 2017.
- i) Any other relief as deemed necessary by this Honourable Court.

- [7] There is no dispute that Ms. Bhup's enrollment at Ross gave rise to a contractual relationship between the parties. The Student Handbook proclaims that its terms are binding on all students enrolled at Ross. By Ross' acceptance of her application and by her enrollment, Ms. Bhup agreed to be bound by Ross' internal rules and regulations, including its disciplinary procedures. Implied in that unwritten contract is an undertaking by Ross to conduct such disciplinary proceedings in accordance with its internal rules and regulations and the principles of natural justice.

Issues

- [8] Notwithstanding the extensive pleadings and submissions in this matter, I have narrowed the issues as follows:

- 1) Whether Ross' disciplinary proceedings resulting in the expulsion of Ms. Bhup were conducted in accordance with their internal rules and regulations and the principles of natural justice;
- 2) If not, what remedies are available to Ms. Bhup?

- [9] Having stated the issues to be decided, I wish to make it clear that the function of this court is not to conduct a rehearing of the charges or allegations against Ms. Bhup, that is, not to determine whether or not she cheated in her exams or lied to a university administrator. I feel constrained to emphasize this point because a significant part of the proceedings, (despite the court's efforts to keep the parties on course), dealt with issues of fact surrounding the determination of whether or not Ms. Bhup cheated, a function of the conduct panel.

Jurisdiction

- [10] I raised the issue of the court's jurisdiction in cases dealing with universities, in particular, the issue of the sole, exclusive and final jurisdiction of the office of 'visitor' over the internal affairs of a university. I highlighted university cases¹ and asked learned counsel for the parties to address the point. Having reviewed the cases, learned counsel for both sides agreed that this court has jurisdiction to entertain this claim. Ross is a body corporate, having been incorporated under the laws of St. Kitts and Nevis, and there is no evidence that its existence is by the express intention of the

sovereign, that is, by Royal Charter, or the government of the Federation. Ross does not qualify as a university with a visitorial system.² Accordingly, the court is satisfied that it has jurisdiction to determine Ms. Bhup's claim.

Ross' Disciplinary Proceedings

- [11] The Student Handbook provides students with "information about the policies and procedures that will govern their participation in the Doctor of Veterinary Medicine program and/or Postgraduate degree programs".³ Part 1.8 of the Student Handbook is headed 'COMPLAINTS CONCERNING STUDENT CONDUCT AND DISCIPLINARY PROCEEDINGS'. For the purposes of this judgment, it is useful to set out the following Rules under this Part in full:

1.8.1 Conduct Administrator and Conduct Panel

1. *The Conduct Administrator shall determine the composition of conduct panels and determine which conduct shall be authorized to hear each case. Where a multi-person panel is used instead of hearing by a Conduct Administrator, the conduct panel shall include, at minimum, three members of the RUSVM community.*
2. *The Conduct Administrator shall develop procedures for administration of the Code of Conduct and for conducting hearings which are consistent with this Code of Conduct.*
3. *Decisions made by a conduct panel and/or Conduct Administrator shall be final, pending the appeal process.*
4. *In appropriate situations, the conduct panel and/or Conduct Administrator may also provide a respondent who is subject to the hearing process with referral information for external counseling or other services available within the greater community that may help the respondent to ameliorate his/her conduct to prevent further violations of the Code of Conduct or University policy.*

1.8.3 Disciplinary Procedures – Charges and Hearings

1. *Any member of the RUSVM community or the University itself may file charges against any covered person for misconduct. In instances where community safety is a concern, notice of a possible violation may result in charges being filed by the University whether or not the impacted community member wishes to proceed. Charges shall be prepared in writing and*

¹ *Rajiv Gunness v Saint George's University Limited (Owners and Operators of Saint George's University) and Another* GDAHCVAP2016/0040; *Dr. Matt Myrie v The University of the West Indies and Others* Claim No. 2007 HCV 04736; *Deborah Chen v The University of the West Indies* [2022] JMCA Civ 19

² See *Saint David's College, Lampeter v Ministry of Education* [1951] 1 All ER 559

³ Rule 1.1

directed to the Conduct Administrator at the appropriate University location. Any charge should be submitted as soon as possible after the event takes place.

2. Once charges have been filed, the Conduct Administrator will investigate to determine if charges have merit and/or if they can be resolved by mutual consent of the complainant and the respondent on a basis acceptable to the Conduct Administrator (such as mediation). The Conduct Administrator may also issue a conduct warning to a respondent or complainant where a charge is resolved by mutual consent. If charges cannot be disposed of by mutual consent, the Conduct Administrator may later hold the hearing either individually or as a member of the conduct panel. Mediation will not be used for charges involving sexual misconduct.
3. All charges shall be presented to the respondent in writing, in which a date and time is set for a hearing within a time frame reasonable under the circumstances. The dates of the hearing and related events are at the discretion of the Conduct Administrator, usually not less than two, nor more than 15 calendar days after the respondent has been notified of the charges. The timeframe for scheduling of hearings may be extended at the discretion of the Conduct Administrator.
4. The Conduct Administrator may choose to hold the hearing himself/herself, or may require a hearing by the full conduct panel when he/she believes that such a procedure is in the best interest of the University. If either the complainant or the respondent believes that a member of the conduct panel has a conflict of interest, he or she should bring this concern to the attention of the Conduct Administrator, or if the alleged conflict is held by the Conduct Administrator to the attention of the location's Complaint Administrator (as identified in the Student Complaint Procedure published in this Student Handbook). Conflicts of interest should, whenever possible, be identified and brought to the attention of the appropriate person to the date of the hearing.
5. Hearings shall be held by a conduct panel according to the following guidelines:
 - a. The Conduct Administrator should serve as chairperson of the conduct panel, assuming no conflict of interest exists.
 - b. Hearings shall be in private. Admission of any person to the hearing shall be at the discretion of the Conduct Administrator/chairperson.
 - c. In advance of the hearing, both the complainant and the respondent will be given access to the identified information that is available before the hearing which will be considered by the conduct panel.
 - d. The complainant and the respondent have the right to be assisted by any advisor they choose during the hearing at their own expense. The advisor may be an attorney. The complainant and the respondent are responsible for presenting his/her own case and, therefore, advisors are not permitted to speak or to participate directly in any hearing before a conduct panel. The complainant and the respondent must provide the names (relationship and title, if applicable) of those attending the hearing with them at least one business day before the hearing.

- e. *The University, the complainant, the respondent and the conduct panel shall be allowed to present witnesses, subject to the right of cross-examination by the conduct panel.*
 - f. *Pertinent records and exhibits including video and written statements, may be accepted as evidence for consideration by a conduct panel at the discretion of the Conduct Administrator/chairperson.*
 - g. *All procedural questions related to the complaint process and hearing are subject to the final decision of the Conduct Administrator/chairperson.*
 - h. *After the hearing, the conduct panel shall deliberate in private and determine (by majority vote for a multi-person conduct panel) whether the respondent has violated the Code of Conduct.*
 - i. *The conduct panel's determination shall be made on the basis of whether it is more likely than not that the respondent violated the Code of Conduct.*
- 6. *There shall be a single record of all hearings before a conduct panel or Conduct Administrator. The record shall be the record of the University.*
 - 7. *No respondent may be found to have violated the Code of Conduct solely because the respondent failed to appear before a conduct panel. Even if the respondent does not appear, the evidence in support of the charges shall be presented and considered. Likewise, a respondent may be found to have violated the Code of Conduct even in instances where the complainant has not participated in the conduct proceedings.*
 - 8. *The Complaint Administrator shall notify the respondent of the outcome in writing, and in appropriate cases, shall also notify the complainant. In cases of sexual misconduct allegations, the complainant and the respondent will be informed simultaneously. Where safety concerns exist, the complainant may be given appropriate notice prior to formal notification.*
 - 9. *Disciplinary action, other than a written warning, will become a part of the respondent's educational record. (Emphasis added)*

[12] The appeal process, which Ms. Bhup unsuccessfully pursued, is provided for in Rule 1.8.6 of the Student Handbook.

The parties' positions

[13] Ms. Bhup's submissions revolve around her contention that the procedure Ross employed to expel her from the veterinary program was unfair and that in several respects, Ross was in breach of the principles of natural justice. She challenges the exam process, the complaint, and the conduct hearing leading to her expulsion. She submits that she did not have a fair trial and consequently, the

decision of the hearing panel ought to be set aside and her enrollment ought to be restored with damages and costs.

[14] Ross makes three main submissions as follows:

- i. The parties were in an unwritten contractual relationship in which Ms. Bhup agreed to be bound by Ross' rules, and Ross undertook to conduct all disciplinary hearings against her in accordance with its internal regulations and the principles of natural justice;
- ii. Ross followed its internal procedures which Ms. Bhup agreed to be bound by consequent on her enrollment, and provided a fair hearing in compliance with the rules of natural justice; and
- iii. Ms. Bhup is not entitled to damages or a mandatory injunction.

The charges/complaint

[15] As set out in her witness statement, Ms. Bhup says that she was formally charged with four violations of Ross' Code of Conduct, which is contained in Part 1.6 of the Student Handbook. The charges (abridged) read:

- i. *Code of Conduct 1.6.3.15.8: Violations of Academic Integrity; Academic integrity includes a commitment not to engage in or tolerate acts of falsification, misrepresentation or deception;*
- ii. *Code of Conduct 1.6.3.16: False information; which includes knowingly providing false statements or testimony during an investigation or University proceeding;*
- iii. *Code of Conduct 1.6.3.21 Violation of published University policies, procedures, rules or regulations; and*
- iv. *Academic Misconduct: Rule 1.11.1: It is an offence for any covered person to make use of unethical or unfair means in any RUSVM assessment. It includes "Receipt or transmission of unauthorized aid on assignments or examination materials or other*

forms of dishonesty in academic affairs are also considered as academic misconduct.

- [16] It is a fundamental principle of natural justice that an accused person has a right to know the case that has been brought against him. Ms. Bhup, by her evidence, understood that she was charged for cheating in her exams by bringing a cell phone into the examination room, and for lying to the university administrator, Mr. Jeffrey Fazio ("Mr. Fazio"), during the interview he conducted with her before charging her on May 5, 2017. The Administrative Complaint dated May 5, 2017, and signed by Mr. Fazio, states, *"RUSVM is filing complaint that Ms. Nalini Bhup violated RUSVM Exam Center policy by bringing a cell phone into the private, accommodated testing room in the examination center during examinations. It is alleged that Ms. Bhup use [sic] the cell phone to ascertain an advantage (cheating) on several final examinations. Furthermore, Ms. Bhup lied to university administrator, Jeffrey Fazio, about possessing a cell phone in the exam center...."* The content and import of the charges are not in dispute.
- [17] The letter dated May 5, 2017 to Ms. Bhup, informing her of the complaint, sets out that the complaint was filed by Ross. Although learned counsel for Ms. Bhup submits that Ross is an artificial person and cannot file a complaint in this matter, Ms. Bhup herself stated, "In this case, Mr. Fazio is the complainant as he is the one who issued the charges against me." This is consistent with Mr. Fazio's evidence that he formulated the complaint. It is interesting that learned counsel makes the 'artificial person argument' when the assertion that Mr. Fazio is the complainant against Ms. Bhup is a prime factor in Ms. Bhup's allegations of bias and conflict of interest against Mr. Fazio. In addition, learned counsel for Ms. Bhup submits that the basis of the investigation was an incident report dated April 17, 2017. That report was made by one Darion King. It is headed 'Exam Center Incident Report' and concerns what allegedly transpired during Ms. Bhup's first of her four final exams. It contains the description 'Suspected Academic Dishonesty' and names Nalini Bhup as the person involved.

Access to information

- [18] Ms. Bhup seeks a declaration that Ross contravened Rule 1.8.3.5.c of the Student Handbook. The rule reads:

In advance of the hearing, both the complainant and the respondent will be given access to the identified information that is available before the hearing which will be considered by the conduct panel.

- [19] In addition, Rule 1.8.3.5.f states:

Pertinent records and exhibits including video and written statements, may be accepted as evidence for consideration by a conduct panel at the discretion of the Conduct Administrator/chairperson.

- [20] Ms. Bhup's evidence is that she was given what Ross decided were the relevant parts of the video tape, clips and still shots, and that neither she nor her advisor Dr. Jennifer Ketzis saw the whole tape (twelve hours of video surveillance) as they were not allowed to do so. Further, they were not given enough time to review the footage they were shown. Ms. Bhup contends that she was not allowed to see the case in its entirety, and had no idea what else was on the tape. Therefore, she alleges that there was a breach of the rule that she be allowed to see the information forming the charge. Ross counters that the substance of the case against Ms. Bhup was contained in the extracts of the surveillance footage and those were provided to her for review, comment and response. Moreover, Ross submits that it was Dr. Ketzis' unchallenged evidence that, to her knowledge, Ms. Bhup neither asked to see more footage nor complained about the time they got to review the video clips. Additionally, Mr. Fazio, the Conduct Administrator in Ms. Bhup's case testified that if Ms. Bhup wanted to see the entire video, she could have seen it, but that she gave no indication that she wanted to see the rest of the video. Further, Mr. Fazio stated that the sections of the video which Ms. Bhup saw were the same sections the conduct panel saw.

- [21] Ms. Bhup further alleges that on May 11, 2017, she was only able to access hearing documents with Dr. Ketzis' assistance. Owing to her poor eyesight, Dr. Ketzis had to read statements to her. The documents and the video clips were provided on Ross' compound and Mr. Fazio permitted an hour which was insufficient time. The hearing was scheduled for May 19, 2017. Mr. Fazio stated that he did not limit Ms. Bhup's time, which was more than one hour, and she did not request additional time.

Further, Dr. Ketzis' unchallenged evidence is that after she and Ms. Bhup watched the video extracts, which they played and rewound several times, she and Ms. Bhup went to a separate room to review the documents for about forty-five minutes.

- [22] On the evidence, Ms. Bhup had access to the information forming the charge. I accept that she should have been given the opportunity to view the entire video tape. She was entitled to see what else was on the tape and to determine, for instance, if there was any exculpatory evidence to support her case, in particular, that the alleged object was not a cell phone or other prohibited item. However, I cannot conclude that Ms. Bhup was denied the opportunity to view the entire tape. Also, the evidence does not convince me that that she was denied sufficient time to review the hearing packet. Therefore, I hold that Ms. Bhup has not shown to the satisfaction of the court, on a balance of probabilities, that Ross was in breach of Rule 1.8.3.5.c of the Student Handbook.

Witnesses and cross-examination

- [23] Ms. Bhup also seeks a declaration that Ross contravened Rule 1.8.3.5.e of the Student Handbook. That rule reads:

The University, the complainant, the respondent and the conduct panel shall be allowed to present witnesses, subject to the right of cross-examination by the conduct panel.

- [24] In her defence that she did not cheat in her exams, Ms. Bhup's explanation for her "concerning behaviour" observed in the video surveillance was her medical condition. The behaviour in question is described by Mr. Fazio in his witness statement. In the video footage, he stated that he saw Ms. Bhup repeatedly (a) uncovered and recovered her head with her hair and her clothing to form a tent-like obstruction from view of her writing the exams; (b) put her head underneath her clothing for minutes at a time without writing; and (c) displayed unusual hand/arm motions under her clothing and hair which were not consistent with writing. Apart from medical reports she was allowed to submit, Ms. Bhup also requested that she be allowed witnesses and statements from other students about her medical condition, how her condition made her behave, and to provide character evidence. Having reviewed the statements provided by Ms. Bhup, Mr. Fazio disallowed them. His evidence is that Ms. Bhup's friends' statements were excluded because they were classified as character evidence and lay opinions on medical conditions. He stated that character witness statements are not permitted as a matter of Ross' policy, applicable to all students, not just Ms. Bhup. I agree with

the submission that witness statements purporting to speak to Ms. Bhup's character were properly excluded. The students, not being medical practitioners, were also rightly precluded from giving evidence of Ms. Bhup's medical condition. Mr. Fazio exercised his discretion pursuant to the rules and he has not been shown to be plainly wrong in this regard.

Darion King

- [25] Ms. Bhup maintains that the basis of the investigation was the incident report dated April 17, 2017, made by Darion King. This is the report that named her as being suspected of academic dishonesty in the exam center. The report includes observations by and interactions or conversations between Ms. Bhup and Darion King, and Ms. Bhup and Abijah Isaac, the Exam Center Administrator. The report also states that Abijah Isaac requested the camera footage for review.
- [26] Darion King's report, 'Exam Center Incident Report', is listed first in the documents attached to an email dated May 10, 2017, to the members of the conduct panel. Darion King was not identified as the complainant and he was not brought as a witness. Ms. Bhup submits that she never had the opportunity to confront Darion King before the conduct panel on his report which was disclosed to the panel. She asserts that she was denied the opportunity to face her accuser, rendering the hearing unfair.
- [27] In the House of Lords judgment in **B. Surinder Singh Kanda v Government of the Federation of Malaya**,⁴ Lord Denning opined:
- "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: **and then he must be given a fair opportunity to correct or contradict them.**" (*Emphasis added*)
- [28] It is clear that Darion King's report of Ms. Bhup's suspected academic dishonesty initiated the process in the allegations against Ms. Bhup. It is startling therefore that Mr. King was not presented before the conduct panel.

⁴ [1962] AC 322 at 337

[29] Rule 1.8.3.5.e gives the right to cross-examine witnesses to the conduct panel only. The rules do not provide for a charged individual (Ms. Bhup in this case) to cross-examine witnesses. The question arises whether it was fair, in the circumstances of this case, not to afford Ms. Bhup the opportunity to challenge Darion King through cross-examination and not merely by giving her side of the story or giving her a right to comment on it. Even where the rules are silent, did Ross, through the Conduct Administrator, have an obligation, in the interest of fairness, to present Darion King as a witness and to allow Ms. Bhup to cross-examine him?

[30] “The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.”⁵ The rules of natural justice are not rigid or mechanical as pointed out by Lord Morris in **Wiseman v Borneman**,⁶ where His Lordship explained:

“But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only “fair play in action”.”

[31] Ross uses the case of **R v Governors of St Gregory’s RC Aided High School, ex parte Roberts**⁷ to demonstrate that a disciplinary tribunal has a discretion not to call witnesses at an exclusion (expulsion) hearing, when it is clear that the student knew the nature of the case and when what matters is the credibility and demeanour of the student and his version of events regarding an incident. In **ex parte Roberts**, a student was said to have sworn in the presence of a teacher. Primary witnesses were not called. The student was ultimately expelled by the headmaster. The court declined to find that the process was unfair. At page 29 of the judgment, the court stated:

“It was evident from the description of what happened in the appeals committee hearing that they performed their function not only by conducting a full review of the evidence obtained by the headmaster at the stage of his inquiry, but specifically they permitted Roberts himself to give evidence concerning the incident.”

In the circumstances, the decision of the committee not to hear direct evidence from the primary witnesses was not unreasonable and there was no procedural unfairness. It would

⁵ Per Tucker LJ in *Russell v Duke of Norfolk* [1949] 1 All ER 109, at 118

⁶ [1971] AC 297 at 309

⁷ The Times 27 January 1995 (QB)

have been quite unrealistic to suppose that the witnesses would have had a genuinely fresh recollection of the incident rather than a recollection of what they had earlier said about it.”
(*Emphasis added*)

- [32] In my view, in the circumstances of Ms. Bhup’s case, it was not sufficient for her simply to give a contrary version of the events alleged. The serious allegation of cheating in her university exams with the possible consequence of derailment of her career path, demanded that she confront and challenge the accuser whose report initiated the proceedings. In fact, Ms. Bhup submits that the disciplinary offences with which she was charged were quasi-criminal. A ‘quasi-crime’ is defined as “an offence not subject to criminal prosecution but for which penalties or forfeitures can be imposed”.⁸ Learned counsel for Ms. Bhup argues that the charges against her certainly fall within this category, raising issues of the applicable burden of proof. Given the seriousness of the allegations, in particular, the cheating charge, I am of the view that the exclusion of Darion King as a witness before the conduct panel, denying Ms. Bhup the opportunity to confront him and challenge his report, was procedurally unfair. That is so even if it can be correctly stated that Ross was not in breach of Rule 1.8.3.5.e. The obligation was on Ross, through its Conduct Administrator, to appreciate and accept that in the particular circumstances of Ms. Bhup’s case, fairness demanded that she be allowed to cross-examine the witness whose report initiated the proceedings against her.

The Conduct Administrator, Mr. Jeffrey Fazio

- [33] The main thrust of Ms. Bhup’s claim is the allegation that Ross’ Conduct Administrator, Mr. Jeffrey Fazio, breached the principles of natural justice in the conduct of the proceedings that resulted in her expulsion from the university. The evidence reveals that Mr. Jeffrey Fazio, as the Conduct Administrator, performed various roles in this matter.
- [34] On April 20, 2017, Mr. Fazio received an email request from Ms. Ria Ramoutar of Ross’ Exam Center to review camera footage from four final exams from April 2017. The email did not name Ms. Bhup. Pursuant to Rule 1.8.3.2, Mr. Fazio started his investigation to see if there was any merit in charges. Having reviewed the video surveillance footage, and based on his overall investigation, Mr. Fazio

⁸ Black’s Law Dictionary, Ninth Edition at page 429, as referenced by the court in *Clifford Jackson v Police Service Commission* ANUHCv 2010/0487 at paragraph 61(v)

formed the view that the allegations against Ms. Bhup were serious enough to justify convening a conduct panel.

- [35] Before meeting with Ms. Bhup, Mr. Fazio preliminarily arranged a conduct panel, he says “as a provisional measure”. Ms. Bhup contends that in contravention of the Student Handbook, Mr. Fazio, before contacting her or informing her that she was being accused of misconduct, started a case number, and contacted Abijah Isaac, the Exam Center Administrator, to be a witness in the panel conduct hearing which he already scheduled for May 19, 2017. She submits that for a trial to be set up and witnesses summoned in these circumstances amounted to a predetermination of the matter. Under cross-examination, Mr. Fazio explained that it was not unusual to convene a panel and have it ready if needed, and that the only reason for assembling the conduct panel beforehand, was to secure dates for the multiple people involved, considering how stressed calendars were.
- [36] On May 5, 2017, Mr. Fazio met with Ms. Bhup at length (three hours) in relation to her alleged use of “an unauthorized object” in her exams. At the end of the meeting, Mr. Fazio completed the ‘charging letter’ in Ms. Bhup’s presence and handed it to her.
- [37] In addition to the allegations/charges of using an unauthorized object in the examination room, Mr. Fazio was of the view that during the said meeting, Ms. Bhup did not provide a reasonable explanation for the object he saw in the video. He “also suspected from her demeanour and conduct during the meeting that Ms. Bhup had not been forthright in her explanations to [him] during this investigation, given the object on the video”. Mr. Fazio then and there, formulated a dishonesty charge against Ms. Bhup. It is on this basis that he says he decided to submit this case to a full conduct panel of members, that is, instead of sitting as a sole member as authorised by the rules.
- [38] On May 19, 2017, Mr. Fazio, as the Conduct Administrator, sat as Chair of the six-member conduct panel, the other five members being from the Ross Faculty and a student government representative. Mr. Fazio insists that as Chair, he did not participate in the deliberations of the conduct panel and he was not a voting member of the conduct panel, but exercised administrative and procedural tasks for the conduct panel, and during the hearing. This evidence is contradicted by Ross’ own witness, Dr. Melissa Bucknoff, a member of the conduct panel in Ms. Bhup’s case. Dr. Bucknoff, in her witness

statement (examination-in-chief) averred that Mr. Fazio stayed in the room with them and was part of their discussion, he talked to the panellists as they were deliberating, and he expressed the view that he believed Ms. Bhup was in violation of the Code of Conduct based on the evidence.

- [39] The conduct panel concluded that Ms. Bhup was in violation of the Code of Conduct as alleged and recommended that she be suspended for two semesters, and a grade of zero in the four courses she took in the third semester.
- [40] The Conduct Administrator, not being bound by the sanctions recommended by the full conduct panel, imposed a sanction of dismissal. In his witness statement, Mr. Fazio sought to justify his discretion to hand down what is the most severe of the available sanctions set out in Rule 1.8.4 of the Student Handbook for a person found to have violated the Code of Conduct. He stated, “The four failing grades would have resulted in an **automatic** (*my emphasis*) academic dismissal under the Code of Conduct. As a result, I imposed a sanction of dismissal after consultation with the Defendant’s administration and in-house legal team as to the effect of the Conduct Panel’s recommendation for sanctions under the Student Handbook. This decision was also in line with previous decisions from conduct panels on similar charges, namely for students found in violation of academic integrity on a significant number of final examinations.” I note that by virtue of Rule 2.9 of the Student Handbook subtitled “Academic Dismissal”, in an unlimited list of events that may result in academic dismissal, is “*Except for students enrolled in 1st Semester, receiving two or more F grades in a semester*”.
- [41] Ms. Bhup submits that in the circumstances of this case where Mr. Fazio on his own evidence was complainant, investigator, formulator of charges, and (she alleges) predeterminer of facts not complained of, he ought not to have sat in judgment of her, as in the eyes of a fair-minded observer, he would not have approached this matter with an open mind or an objective view.
- [42] By virtue of Rule 1.8.3.5.a of the Student Handbook, the Conduct Administrator should serve as chairperson of the conduct panel, assuming that no conflict of interest exists. Under Rule 1.8.3.4, Ms. Bhup was authorised to bring to the attention of the Complaint Administrator her belief that Mr. Fazio had a conflict of interest.

- [43] Ms. Bhup's evidence is that from the May 5, 2017 meeting, she viewed Mr. Fazio not as fair but as biased and prejudiced. She states that from that moment, she sought to request his removal as the chair of the panel as she knew she could not receive a fair trial from his membership of the panel, whether or not he took an active part.
- [44] The Complaint Administrator at the time was Dr. Charles Wallace. In a bit of confusion, the evidence shows that Ms. Bhup, in an email dated May 15, 2017 to the address of Dr. Sean Callanan, a Dean of Ross, addressed the receiver saying, "Hello Dr. Wallace", and that she "would like to see if it is possible for a change in the chair for my hearing". Dr. Callanan responded to Ms. Bhup that he did not get involved in conduct hearings, and that if there was a valid conflict of interest, she could request a change through Dr. Wallace. Strictly speaking, therefore, as Ross contends, Ms. Bhup did not bring the alleged conflict to the attention of the Complaint Administrator in accordance with Rule 1.8.3.4 of the Student Handbook.
- [45] Ms. Bhup alleges that Ross ignored her request and gave it no value whatsoever.
- [46] Ross submits that based on the evidence, Mr. Fazio is a professional in his field, operating under sophisticated internal regulations regarding professional standards and that he is trained to find exculpatory information and not to be judgmental. Mr. Fazio stated categorically that he was not the one who decided the allegations, which reflected a concern that Ms. Bhup had a cell phone, based on circumstantial evidence which was itself based on preliminary video evidence. Consistent with its defence, Ross' position is that Mr. Fazio, in all instances, acted in accordance with its internal rules and regulations, which Ms. Bhup by her enrollment in the university, agreed to be bound.
- [47] Mr. Fazio's presence on the conduct panel gives rise to the court's consideration as to whether the panel was tainted with bias, resulting in a breach of Ms. Bhup's right to be heard by an independent and impartial tribunal. Ms. Bhup alleges actual and/or apparent bias on the part of Mr. Fazio and submits that (i) he predetermined that she used a cell phone to cheat in her exam (ii) after interviewing her, he predetermined that she lied to a University Administrator (iii) he failed to summon a critical witness and (iv) restricted her to full access at all times to hearing bundles.

[48] In **Otkritie International Investment Management Ltd and Others v Mr George Urumov**,⁹ having stated the basic principle laid down in **Porter v Magill**¹⁰ that a judge should not sit to hear a case in which “the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that [he] was biased”, the Court of Appeal declared:

“It is an even more fundamental principle that a judge should not try a case if he is actually biased against one of the parties. The concept of bias includes any personal interest in the case of friendship with the participants, but extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have “pre-judged” the case.”

[49] Further, in **Benjamin Exeter v Winston Gaymes and Others**,¹¹ Baptiste JA stated:

“A real danger of bias may well be thought to arise if any question at issue in proceedings before him, the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind.”

[50] In **The Attorney General of Trinidad and Tobago v Kublalsingh and Others**,¹² Mendonca JA gave invaluable guidance on the applicable test in apparent bias. His Lordship stated:

“The test is an objective one. In essence it requires the Court to ascertain the view of the public, through the eyes of a fair-minded informed observer, whether the Judge was or would be biased. The test therefore acknowledges and gives effect to a critical requirement that justice must not only be done but must be seen to be done. It is the “public perception of the possibility of unconscious bias” that is the key (see **Lawal v Northern Spirit Ltd.** [2003] UKHL 35 at para. 14).”

[51] At paragraph 6 of the judgment, His Lordship went on:

“It is important to emphasize that we are not dealing with actual bias but the appearance of bias. If the fair-minded and well informed observer were to conclude that the Judge is disqualified by the appearance of bias, it would amount to a finding that he is actually biased. The test recognizes that bias might be subconscious and does not examine the state of mind of the Judge. Statements by the Judge, therefore, that he can bring an impartial mind to the matter, have no relevance.”

⁹ [2014] EWCA Civ 1315 at paragraph 1 per Lord Justice Longmore

¹⁰ [2002] 2 WLR 37 at paragraph 103 per Lord Hope of Craighead

¹¹ SVGHCVAP2016/0021 consolidated with SVGHCVAP2016/0022 *Lauron Baptiste v Vil Davis and Others*, delivered June 13, 2017 at paragraph 14

¹² Civil Appeal No. P018 of 2014, delivered February 19, 2014 at paragraph 4

- [52] The fair-minded and informed observer “always reserves judgment on every point unless he has seen and fully understands both sides of the argument. He will therefore not come to hasty conclusions. He is not to be confused with the person who makes the complaint.... He can distinguish what matters are relevant and what are irrelevant.... He is able to put whatever he has read or seen into its overall context and will appreciate that context forms an important part of the material which he must consider.... He is not complacent. He knows that fairness requires that a Judge must be seen to be unbiased.... He is not an insider. He is not a party to the action, and is not unduly sensitive or suspicious”¹³
- [53] Rule 1.8.3.1 of the Student Handbook provides for the filing of charges for misconduct against any covered person by any member of the Ross community or the University itself. Written charges are to be directed to the Conduct Administrator. The filing of these charges triggers the investigation by the Conduct Administrator under Rule 1.8.3.2. In this case, it appears that there was no “clear-cut” charge or charges filed against Ms. Bhup in accordance with Rule 1.8.3.1. Mr. Fazio’s evidence reveals that he began his investigation as a result of the email request sent to him to review camera footage from exams held in April 2017. Ms. Bhup was not named in the email. However, evidently, the footage was of Ms. Bhup sitting her four Final exams of her third semester.
- [54] After meeting with Ms. Bhup on May 5, 2017, Mr. Fazio handed her the charging letter including an allegation which amounts to a charge of Ms. Bhup lying to him during the said meeting. Whereas there is some uncertainty as to the complainant or charging personnel or body making the cheating charge, clearly, in relation to the lying charge, Mr. Fazio is the complainant against Ms. Bhup.
- [55] As to whether Mr. Fazio participated in the deliberations of the conduct panel, notwithstanding his absolute denial of that allegation, stating that he was not present for most of the deliberations, I find as a fact that he did. Defence witness, Dr. Melissa Bucknoff saw it fit to record in her witness statement that Dr. Fazio participated in the deliberations of the conduct panel and expressed his view that Ms. Bhup had violated the Code of Conduct. This was Dr. Bucknoff’s examination-in chief, with no need for cross-examination by learned counsel for Ms. Bhup on this part of her evidence.

¹³ Per Mendonca JA, *ibid*, at paragraph 8; see also *Milad Sassine v Lady Antrobus and Another* SVGHPT2011/0079 at paragraph 16

Having heard the evidence, and observed the demeanour of the witnesses, I believe Dr. Bucknoff's evidence as stated in her witness statement on the participation of Dr. Fazio in the deliberations of the conduct panel into the charges against Ms. Bhup.

[56] On these facts, the court is to determine whether the fair-minded, informed observer would conclude that there was a real possibility that Mr. Fazio was biased or that he predetermined the matter against Ms. Bhup. Learned counsel for Ms. Bhup submits that Mr. Fazio predetermined that Ms. Bhup had cheated in her exams by the use of a cell phone. Counsel argues that in order to formulate a charge of lying, it is clear that Mr. Fazio came to a predetermination of the matter that the object in the footage was a cell phone. This is on the premise that in the meeting of May 5, 2017, Ms. Bhup alleges that Mr. Fazio tried to convince her that she had a device looking like a cell phone in the Exam Center. Mr. Fazio vehemently denied that suggestion. In his witness statement, Mr. Fazio stated, *"During this meeting, I did not think that Ms. Bhup provided a reasonable explanation for the object I saw on the video. I also suspected from her demeanour and conduct during the meeting that Ms. Bhup had not been forthright in her explanations to me during this investigation, given the object on the video."*

[57] This is Ms. Bhup's version: *"Mr. Fazio interviewed me for three hours and made repeated allegations that I cheated. He ordered me to 'confess' and threatened me with expulsion if I did not. He accused me of bringing a **white phone** into the exam rooms...his mind to me was already made up. There was no indication that he either sought the truth or was trying to get my side of the story, or interested in my version of events."* Crucially, Mr. Fazio signed the "Administrative Complaint by RUSVM" in which he stated, *"Furthermore, Ms. Bhup lied to university administrator, Jeffrey Fazio, about possessing a cell phone in the exam center. Her claim is refuted by video evidence."* Notably, in the evidence before this court, none of the members of the conduct panel concluded from the video surveillance that Ms. Bhup had a cell phone in any of the exams in question.

[58] In the circumstances, I believe Ms. Bhup's evidence on this issue, and accept the submission that Mr. Fazio predetermined that she had violated the Code of Conduct by bringing a cell phone into the Exam Center.

[59] I have already concluded that Mr. Fazio was the complainant in the lying charge. How then can it be said that he did not predetermine that charge? He was the one making the allegation. As such, he was the sole witness to that complaint. This state of affairs gives rise to a glaring conflict of interest. To my mind, it would amount to an absurdity for anyone to suggest that Mr. Fazio, sitting as chairperson of the conduct panel, on an allegation of lying that he made, had not determined that Ms. Bhup was guilty of that aspect of the violation of the Code of Conduct. This is a clear case of predetermination and bias on the part of Mr. Fazio. It matters not that Mr. Fazio is “a professional in his field” and “trained to find exculpatory information and not be judgmental”, and that he was not a voting member of the panel. The fair-minded observer, armed with all the relevant facts, is likely to conclude that there was a real possibility that the conduct panel, chaired by Mr. Fazio, was tainted with bias, and that Mr. Fazio had predetermined the charges against Ms. Bhup. Mr. Fazio ought not to have sat as chair of the conduct panel or at all, given the blatant conflict of interest that arose in his conduct of this matter. Even though Ms. Bhup failed to comply with the requirement in Rule 1.8.3.4 to bring the alleged conflict of interest to the attention of the Complaint Administrator, fairness dictated that Mr. Fazio, of his own volition, should have disqualified himself from sitting as chair of, or on the conduct panel at all. There was good reason for him to do so without Ms. Bhup raising a concern.

[60] Moreover, Ms. Bhup did not have the opportunity to cross-examine Mr. Fazio on his allegation of lying.

Other allegations of unfairness

[61] I am of the considered view that the decision of the conduct panel ought to be set aside on the conduct of Mr. Fazio alone. However, Ms. Bhup raises other concerns as to the unfairness of the proceedings leading to her expulsion which are worthy of note and/or consideration. I note two of them.

Evidence not considered

[62] Apart from her contention that she did not bring a cell phone to the Exam Center, Ms. Bhup’s defence at the conduct panel hearing was that the “concerning behaviour” observed in the surveillance video was because of her medical condition. Dr. Felix Toka, a member of the conduct panel, told the court,

in cross-examination, that he was unaware that Ms. Bhup had a medical condition with her eyes. He stated that the bundle of documents was quite large, and he found it hard to go through. He admitted that the medical evidence could have been included in the bundle, but he could not recall. Whereas I do not accept that Ms. Bhup was tried before the conduct panel without the full evidence before it (as submitted by learned counsel for Ms. Bhup), it appears that a major limb of Ms. Bhup's defence at the hearing was not considered by at least, one member of the panel. Notwithstanding Ross' detailed submissions on the medical evidence, I maintain that the credibility of the medical or other evidence on Ms. Bhup's "concerning behaviour" at the Exam Center is not an issue for this court.

Prejudicial evidence

- [63] Ms. Bhup alleges that Abijah Isaac was allowed to state that she had cheated prior to her third semester final exams. Dr. Felix Toka also admitted in cross-examination that he recalled Abijah Isaac giving evidence at the hearing that Ms. Bhup had been cheating since the second semester. Learned counsel for Ms. Bhup submits that this was highly prejudicial evidence which was not disclosed to Ms. Bhup who was ambushed, rendering the hearing unfair. Learned counsel for Ross urges the court not to give weight to Dr. Toka's testimony in this regard, that is, to disbelieve Ross' own witness. Mr. Fazio recalled that Abijah Isaac indicated that Ms. Bhup's prior behaviour was a cause for concern in the Exam Center. This apparent conflict between Ross' witnesses as to whether Abijah Isaac clearly stated that Ms. Bhup had been cheating since the second semester is to be resolved in favour of Ms. Bhup. This specific evidence was not disclosed to her, another serious allegation, capable of prejudicing the conduct panel.

Conclusion

- [64] I am of the view that in several respects, Ross followed its internal rules and regulations. On the evidence, I have concluded that Ross afforded Ms. Bhup access to the identified information available before the conduct panel hearing and she was afforded the right to call witnesses, albeit that her witness friends were excluded at the discretion of the Conduct Administrator. Therefore, I rule that she is not entitled to the declarations in paragraph 68 (d) and (e) of her claim. However, Ms. Bhup has proved her case on a balance of probabilities that Ross breached the implied term of their contractual relationship that the disciplinary process that led to her expulsion would be fair and in accordance with the rules of natural justice. I hold that Ms. Bhup is entitled to the declarations sought

in paragraph 68 (a), (b) and (c) of the re-amended claim. Therefore, the decision of the conduct panel must be set aside

Relief

[65] Ms. Bhup seeks a mandatory injunction directing Ross to accept, ratify and uphold her course grades and her promotion to the fourth semester. She also seeks damages against Ross, including aggravated and exemplary damages for the decision to expel her.

[66] The general rule for the measure of damages for breach of contract is that the claimant be put in the position he or she would have been in had the contract been performed. The same principle applies for breach of an implied term to afford a fair hearing. Learned counsel for Ms. Bhup did not provide the court with any authorities for the award of damages in this case. However, learned counsel for Ross cited the case of **Haron bin Mundir v Singapore Amateur Athletic Association**¹⁴ in which it was held that in an action for breach of an implied term to afford a fair hearing, the claimant was entitled to special, and not general damages. Applying this principle, Ms. Bhup would be required to plead, particularise and prove special damages. She has done none of these. The Singapore case is also authority for the submission that as a general rule, damages for frustration, injured feeling, mental distress, humiliation and loss of reputation will not be awarded for breach of contract. Further, learned counsel for Ross cited cases for the principle that the court will not award aggravated or exemplary damages based on breach of contract.¹⁵ On the foregoing principles, I conclude that Ms. Bhup is not entitled to damages in this case for Ross' breach.

[67] A mandatory injunction is not a proper remedy in this case. The court, having determined that the decision of the conduct panel should be set aside, is not concluding that Ms. Bhup did not commit the disciplinary offences as alleged. That would be to usurp the function of the conduct panel. The proper course would be to remit the matter to a conduct panel of different members for the case against Ms. Bhup to be conducted in accordance with its internal rules and procedures and the principles of natural justice.¹⁶

¹⁴ [1992] LRC (Const) 1006

¹⁵ See *Addis v Gramophone Co Ltd* [1909] AC 488; *Archibald v Blake* KN 1993 HC 18; *Nisbett v Nevis Housing and Land Development Corporation* NEVHCV 2017/0154, delivered December 1, 2020;

¹⁶ See *Tillman Thomas v Richard Cheltenham* GDAHCV2005/0296 at paragraph 9; see also *Stuart A Lockhart v [1] Valentina Nonini and Maurizio Pandini [2] The Disciplinary Committee* ANUHCVP2019/0004 at paragraph 37

Order

[68] Based on the foregoing, I make the following declarations and orders. It is hereby declared that:

- 1) The hearing of the conduct panel authorised by Ross to inquire whether Nalini Bhup violated Ross' Code of Conduct is subject to the principles of natural justice;
- 2) The decision to expel Ms. Bhup for breach of four forms of Code of Conduct violations was a breach of the implied term between Ms. Bhup and Ross that such a decision would be reasonable, fair and or subject to the rules of natural justice.
- 3) Mr. Jeffrey Fazio, the chairman of the conduct panel was infected with actual and or apparent bias against the claimant and could not fairly or properly fulfil his functions as chairman of the conduct panel.

[69] Accordingly, it is hereby ordered as follows:

- 4) The decision of the conduct panel that the claimant violated the defendant's Code of Conduct is set aside.
- 5) Consequently, the decision of the Conduct Administrator to expel the claimant is set aside.
- 6) The complaint filed against the claimant is remitted to the conduct panel for rehearing by a differently constituted panel.
- 7) Prescribed costs to the claimant on an unvalued claim pursuant to CPR 65.5 in the sum of \$7,500.00.

Tamara Gill
High Court Judge

By the Court

Registrar