COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2018/CLE/gen/00003

BETWEEN

CANDACE BOSTWICK

Plaintiff

AND

CIVIL AVIATION AUTHORITY OF THE BAHAMAS

AND

THE BAHAMAS AIR NAVIGATION SERVICES DIVISION

AND

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

Defendants

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Kahlil Parker and Ms. Roberta Quant of Cedric L. Parker & Co. for the Plaintiff
Mr. Kirkland Mackey and Ms. Lukella Lindor of the Attorney General's Chambers for the Defendants

Hearing Dates: 27 June, 19 September, 7 November 2018, 24 February 2020

Employment Law – Disciplinary process – Breach of Industrial Agreement – Principles of natural justice – Duty to be fair - Whether instances of procedural improprieties are so grave to warrant setting aside the decision - Appeal – whether letter responding to grounds of appeal constitutes appeal

The Plaintiff alleged that the Defendant breached various provisions of the Industrial Agreement and principles of natural justice by (i) not giving her adequate notice of her interview before the Board of Inquiry; (ii) not furnishing her in advance with all the relevant material to assist her in her defence; (iii) inordinate delay of the investigation; (iv) omitting to interview an integral party to the

incident; and (v) failing to give due consideration to other important considerations including acknowledgement that Miami contributed to the incident which involved two commercial airlines nearly colliding in midair in the transition from Bahamian airspace to American (Miami) airspace. The Plaintiff argued that a letter from the General Manager of the Bahamas Air Navigation Services Division did not constitute an appeal and therefore, she was not afforded a right to an appeal.

HELD: Setting aside the decision of the Defendants' Internal Board of Inquiry in their Final Report submitted on 30 October 2017, the Defendants are ordered to carry out a proper investigation in accordance with the provisions of the Industrial Agreement and the principles of natural justice.

1. Taken together, the various procedural irregularities of the Defendants' Internal Board of Inquiry's investigation breached several provisions of the Industrial Agreement and also breached the principles of natural justice. Consequently, the investigation was unfair.

2. Decisions made in breach of natural justice cannot stand. In **Ridge v Baldwin** [1964] A.C. 40 at 66, Lord Reid said **"a decision given without regard to the principles of natural justice is void."**

3. As an appeal is a revision of a first instance decision, it requires that the appealing party be heard: see **Ridge v Baldwin** [1964] A.C. 40 at page 80 **"*The body with the power to decide cannot lawfully proceed to make a decision until it has afforded the person affected a proper opportunity to state his case*."**

JUDGMENT

Charles J

Introduction

[1] Just before midnight on 5 September 2017, Jet Blue Airlines ("JBU1994") and Bahamasair ("BHS207") nearly collided in the transition from Bahamian airspace to American (Miami) airspace. Both airlines had to quickly take evasive action in response to a Resolution Advisory ("RA") thus avoiding a midair collision. At the time of the incident, the Plaintiff, Candace Bostwick ("Mrs. Bostwick") was the Radar Data Controller and one Mr. Gerard Wilson ("Mr. Wilson") was the Approach Controller at the Sir Lynden Pindling International Airport ("LPIA"). Although Mr. Wilson accepted full liability for the incident, Mrs. Bostwick was also investigated. The investigation revealed that she contributed to an Operational Error ("OE") in the matter of a reported separation loss between the two aircrafts. Mrs. Bostwick

takes issue with the findings of the Defendants' Internal Board of Inquiry ("the Board") and the manner in which the Board came to its findings and what she says was a failure of the Board to afford her an appeal in respect thereof.

[2] As a result, on 4 January 2018, she filed an Originating Summons against the Defendants seeking answers to the following questions and the following relief:

1. Whether, having regard to Article 19.31 of the Industrial Agreement between the Government of The Bahamas and The Bahamas Air Traffic Controllers Union ("the Union") dated 1 March 2013 - 31 May 2017 ("the Industrial Agreement") , the letter to Mr. Hinsey McKenzie ("Mr. McKenzie"), President of the Union from Mr. Keith Major ("Mr. Major"), General Manager of Bahamas Air Navigation Services Division ("BANSD") and Bahamas Civil Aviation Authority ("BCAA") dated 7 December 2017, satisfied Mrs. Bostwick's right to appeal against the decision of Mr. Lenn King ("Mr. King"), Manager of BANSD, to accept the recommendations of the Internal Board of Inquiry ("the Board") in their Final Report, submitted on 30 October 2017? Whether the said decision and recommendations were arrived at reasonably, lawfully, in accordance with the principles of natural justice, and/or in accordance with the letter and spirit of the Industrial Agreement?

2. If the answer to the question above is no, then a Declaration that the Defendants' decisions, which were arrived at in contravention of, or without regard to, the said provisions of the Industrial Agreement and the principles of natural justice were unreasonable, unfair, null, void and of no legal effect;

3. A Declaration that the Defendants are bound, by the terms of the Industrial Agreement and the principles of natural justice, to reasonably and properly facilitate and consider Mrs. Bostwick's appeal and afford her due process and a right to be heard before arriving at decisions affecting her rights and entitlements;

4. An Order that the Defendants rescind any and all decisions they have made without proper, or any, consideration of, or regard for, Mrs. Bostwick's rights under the Industrial Agreement and in accordance with the principles of natural justice;

5. A Declaration that Mrs. Bostwick has a right to and a legitimate expectation that the Defendants will comply with the letter and spirit of the Industrial Agreement, and that the Defendants would substantively engage with her in order to resolve perceived breaches thereof in a timely and transparent manner;

6. An Order that any and all adverse decisions taken with respect to Mrs. Bostwick pursuant to the said impugned decisions and report or otherwise, be set aside pending proper compliance by the Defendants with her right to a fair first instance hearing and to an appeal in accordance with the provisions of the Industrial Agreement and the principles of natural justice;

7. Such further or other relief as the Court may in the circumstances deem just and;

8. Costs of and occasioned by this action.

Salient facts

[3] The salient facts are broadly not in dispute. To the extent that some of the facts may be in dispute, then what is expressed must be taken as positive findings of facts made by me.

[4] At about 23:30 UTC on 5 September 2017, Mrs. Bostwick was the Radar Data Controller and Mr. Wilson was the Approach Controller at LPIA when a midair collision nearly occurred. JBU 1994 came about one mile and 500 feet of BHS207 before both airlines took evasive action in order to avoid that midair collision.

[5] Mr. Wilson is not a party in these proceedings so this judgment focuses on Mrs. Bostwick.

[6] As Radar Data Controller, Mrs. Bostwick's primary function, according to The Bahamas Air Control Handbook, was to assist the Approach Controller in the execution of his duties which include monitoring separation and sequencing activities of the Approach Controller and coordinating air traffic control activities with the adjacent facilities.

[7] The old radar system at LPIA drowned in Hurricane Matthew in or about 2016. Therefore, at the material time, the new radar system, in which the staff were not adequately trained, was in test mode.

[8] It later came to Mrs. Bostwick's knowledge that the Miami controller was working combined positions, which meant that he was performing the duties of both the Approach Controller and Data Controller and that the Miami radar was not fully operational at the material time.

[9] On 6 September 2017, Mr. King requested a preliminary investigation. The preliminary investigation identified the parties involved.

[10] On 13 September 2017, in accordance with Article 19.16 of the Industrial Agreement, Mrs. Bostwick and Mr. Wilson were asked, after reviewing the tape of the material time, to produce written statements explaining the incident from their respective perspectives. Mr. Wilson wrote to Mr. King taking FULL responsibility for the OE as the Approach Controller of record. Mrs. Bostwick denied being responsible or contributing to the OE. Thereafter, an investigation into the matter was launched.

[11] By letter dated 11 September 2017, Mrs. Bostwick was advised that she was prohibited from working in any Radar Approach Control positions pending the resolution of the OE and that she was to be assigned to either Flight Service Station or the Control Tower.

[12] On 20 September 2017, Mr. King wrote to Mrs. Bostwick advising her that a Board of Inquiry was to be convened on 25 September 2017 to determine whether she had contributed to the OE. The letter stated that she would be advised when the Board wished to have a meeting with her.

[13] On 28 September 2017, Mr. McKenzie, President of the Union, wrote to Mr. King requesting that the Union be informed when the Board was to be convened to decide the matter.

[14] Due to delays as a result of preparation for Category 4 Hurricane Irma, the Department of Civil Aviation did not ask the Union to nominate a member for the Board until 21 September 2017, some 16 days after the OE. Thereafter, the Union further contributed to the delay in the Board convening as a result of difficulty with securing a willing participant. On 3 October 2017, 12 days later, Mrs. Daphne Menon was nominated. As she was on vacation at the time of her nomination, the Board was activated/convened on 9 October 2017 (already more than 30 days after the OE).

[15] On 6 October 2017, Mr. King wrote to Mrs. Bostwick notifying her that she would be advised by the Board when it wishes to interview her.

[16] On 18 October 2017, the Defendants attempted to telephone Mrs. Bostwick purportedly to advise her of the interview which was to be held the following day. Further, the Investigator-In-Charge, Claudette Williams-Nixon ("the Investigator"), wrote to Mrs. Bostwick on the same day advising her that the Board had requested her presence for an interview to be held the following day, 19 October 2017.

[17] On 19 October 2017, Mrs. Bostwick was informed that the Board had attempted to contact her to arrange the interview. She was given the option to proceed at that time or to wait for another day. She was advised that since she was a member of the Union, she was permitted to have a representative at the meeting. Mrs. Bostwick opted to proceed at that time, hoping "to get it over with".

[18] Immediately before the interview, Mrs. Bostwick and the Union Representative, Mr. Ricardo Moncur, were supplied with a transcript of the radar data position to be used for reference during the interview. However, they were not provided with (i) the voice recording of the Approach and Radar Data positions; (ii) video presentation and snapshots of the scenario leading up to the incident and (iii) copies of the facility log and position log. Plainly, the Board used these materials to arrive at its findings.

[19] During its investigation of the OE, the Board utilized the Miami/Nassau Letter of Agreement, transcripts of events from various transmissions, correspondence between Mrs. Bostwick and the Defendants, voice recordings, a video presentation, the recorded interview with Mrs. Bostwick, Mr. Wilson's letter accepting full responsibility, copies of the facility log and position log, the CAD 1142, Bahamas Air Traffic Controllers Handbook and The Union Article 19. However, it never interviewed Mr. Wilson as they did with Mrs. Bostwick.

[20] On 22 October 2017, Mr. McKenzie (of the Union) wrote to Mr. King notifying him of their request for an appeal on Mrs. Bostwick's behalf.

[21] On 30 October 2017, the members of the Board submitted its final report to Mr. King which concluded that Mrs. Bostwick contributed to the OE. Mr. King accepted/adopted the decision and recommendations of the Board. The Report also found that the Miami Center had contributed to the OE and recommended further training for staff.

[22] The final report of the Board and subsequently the decision of Mr. King to accept the Board's final report constituted the third incident in a 2 ½ year period for which Mrs. Bostwick was either directly involved or was found to have contributed to. It was later determined that, in accordance with the CAD 1142, recommendations for Mrs. Bostwick's de-certification and re-training ought to have been made by the Board. However, due to inadvertence, this was not done at the initial hearing. Consequently, the Board reconvened to recommend a training and re-certification

programme for Mrs. Bostwick. The recommendation was for her to undergo remedial training. Mrs. Bostwick was advised of the recommendation by letter dated 31 October 2017. This brought an end to the investigation.

[23] On 27 November 2017, Mr. McKenzie wrote to Mr. Major requesting an appeal on Mrs. Bostwick's behalf and setting out the grounds of appeal.

[24] As General Manager, Mr. Major is responsible for appeals arising from OEs or deviations. As part of his review, he met with the Board and the Union's executives but he never met with Mrs. Bostwick.

[25] On 7 December 2017, Mr. Major wrote to Mr. McKenzie addressing the grounds of appeal set out in Mr. McKenzie's letter of 27 November 2017.

[26] The investigation of the OEs and the appeal process are provided for pursuant to the terms of the Industrial Agreement and the CAD Doc 1142, which is to be used in conjunction with the Industrial Agreement. Part II of the CAD 1142 sets out guidelines for the investigations of OEs and deviations.

Mrs. Bostwick's assertions/complaints

[27] At the heart of Mrs. Bostwick's complaints are that:

1. The Inquiry of the Board was not conducted in accordance with principles of natural justice. Consequently, the decision of the Board was unreasonable, unlawful and unfair and;

2. Mr. Major's letter responding to Mrs. Bostwick's grounds of appeal did not constitute an appeal or satisfy Mrs. Bostwick's right of appeal. Therefore, she was deprived of her right to an appeal from the decision of Mr. King to accept the Board's decision and recommendations, to which she was entitled by the Industrial Agreement.

Submissions, analysis and findings

No reasonable notice of interview before the Board

[28] Learned Counsel Mr. Parker argued that there were several procedural irregularities in the Board's investigation of this matter which were not in accordance with the Industrial Agreement and the principles of natural justice. He further argued that because the process was unfair, this Court ought to void the Board's decision and recommendations and make an order that the Defendants investigate the incident properly and in accordance with natural justice and the Industrial Agreement.

[29] Mr. Parker submitted that one of the instances of unfairness of the investigation process is that Mrs. Bostwick was given no prior or reasonable notice of her interview before the Board.

[30] Learned Counsel for the Defendants, Mr. Mackey, argued that Mrs. Bostwick did have notice of the interview since the Defendants attempted or intended to give her one day's notice (the phone call made to her the night before the interview). Mr. Mackey further argued that the Defendants should not be held responsible for the interview being held without reasonable notice to Mrs. Bostwick since she was given the option of proceeding with the interview either on the same day or on another day. According to Mr. Mackey, it was Mrs. Bostwick who opted to proceed immediately in *"order to get it over with"*.

[31] Reasonable notice is fundamental to the principles of natural justice. In determining whether the statutory procedure for disciplinary proceedings of an attorney were fair and in accordance with natural justice, the Court of Appeal of Barbados, in **Re Niles (No. 2)** [2004] 5 LRC 32 determined that adequate notice of the date and time of the hearing is one of four essential elements of a fair hearing. At paragraph 46, Simmons CJ stated:

> **"…Indeed it is our opinion that the scheme of legislation preserves the right of an attorney at law to a fair hearing in so far as it provides for: (a) real and effective access to the Court of Appeal; (b) adequate**

> **notice of the date and time of the hearing; (c) an opportunity for the parties to present the respective cases and (d) a right to a reasoned decision….All that natural justice requires is that the procedure before a tribunal shall be fair in the circumstances."**[Emphasis added]

[32] The objective of adequate notice is to allow the person an opportunity to properly prepare himself/herself to defend his/her case.

[33] In **O'Reilly v Mackman** [1982] 3 All ER 1124, Lord Diplock explained that essential fairness and natural justice is a **reasonable opportunity for the person to put forward his case to answer to what is alleged against him.** At page 1130, he stated:

> **"Wherever any person or body of persons has authority conferred by legislation to make decisions of the kind I have described, it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failure to act fairly towards the person who will be adversely affected by the decision by failing to observe either one or other of the two fundamental rights accorded to him by the rules of natural justice or fairness, viz to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made."**

[34] The case of **Elizabeth Byrne Pursuer v Mental Health Tribunal for Scotland Defenders** 2007 Scot (D) 3/1 is also useful. The lack of notice to the appellant was the subject of the appeal and the basis on which the Court set aside the decision. The appellant was informed on 6 December 2005 that there was to be a hearing in two days. Sherriff Principal J A Taylor at pp. 4 and 5 respectively said that:

> **"…only in the most extreme circumstances could it be thought that less than 48 hours' notice of a hearing was adequate." "Representation cannot be meaningful when the solicitor has seen the papers for the first time 10 minutes before the Tribunal starts."**

[35] The letter of 18 October 2017 indicated that the interview was fixed for the following day. This could not, as the Defendants contended, be cured by giving Mrs. Bostwick the option to proceed as planned or to adjourn to an undesignated date.

This is because in accordance with natural justice principles generally and the Industrial Agreement, it was the Defendants' duty to ensure that Mrs. Bostwick received a fair hearing.

[36] Neither could the one day notice be cured by Mrs. Bostwick having previously received an indication from the Defendants that the Board would *eventually* request her presence. Both letters of 20 September 2017 and 6 October 2017 respectively advised her that she would be requested by the Board at some point in the future but never specified a date or even a possible date. The effect was that the interview was conducted without adequate notice to Mrs. Bostwick. Like the appellant in **Elizabeth Byrne Pursuer** [supra], Mrs. Bostwick was not given the notice required for her representations to be meaningful. She was, therefore, disadvantaged in equipping herself to defend herself or to respond to the Board's questions and conclusions.

Failure to provide Mrs. Bostwick with material in advance

[37] Mr. Parker submitted that another procedural irregularity which gave rise to the unfairness of the investigation process was the failure of the Defendants to provide Mrs. Bostwick with the relevant material in advance of the hearing. It is useful to set out some relevant provisions of the Industrial Agreement:

> **Article 19.22:"The circumstances prompting the investigation, and the perceived operational situation immediately prior to the alleged incident, *shall* be made available to the Controller and his representative prior to any questions being put to the Controller."**
>
> **Article 19.24: "*The Controller and his representative have the right, prior to appearing before the Board, to review all relevant video and audio recordings*."**
>
> **Article 19.27: "<u>Prior to his being required to answer questions put forth by any Board of Inquiry hearing or investigation, the Controller and/or his representative *shall* be furnished with any transcript and/or computer readouts of Air Traffic Control operations pertaining to the investigation.</u>"** [Emphasis added]

[38] It is plain that the objective of the foregoing provisions is to assist Mrs. Bostwick with putting forward a defence. The Industrial Agreement mandates that the

Defendants are to provide the controller (Mrs. Bostwick) with all relevant audio and video recordings, transcripts and/or computer readouts. Yet, the Defendants provided her only with the transcripts and the correspondence between herself and them. In coming to its decision, the Board utilized materials that were never furnished to Mrs. Bostwick. Therefore, there was a deficiency in what was provided to her which undoubtedly limited her ability to properly defend herself or respond to the Board's questions.

[39] Further, the deficient materials were not furnished *in advance* of the hearing as required by the Industrial Agreement. She and her representative were provided with deficient materials immediately prior to the interview. This is not in keeping with the letter and spirit of the Industrial Agreement. In advance of the hearing could not mean immediately prior to the interview.

[40] The Defendants were in breach of the foregoing provisions notwithstanding that Mrs. Bostwick was permitted to listen to the audio recording shortly after the incident for the purpose of submitting her written statement. She was permitted to do so on 13 September, 2017 which was more than one month prior to the interview before the Board. Further, this was specifically in order to comply with Article 19.16.

[41] In order to ensure a fair trial, it was incumbent on the Defendants to give Mrs. Bostwick all of the materials relevant to the incident upon which they intended to rely for their determination in contemplation of her interview before the Board.

[42] Then, Article 19.25 of the Industrial Agreement states:

> **"The IIC [Investigator-In-Charge] of the Board shall cause all circumstances leading up to the inquiry hearing or investigation to be stated before any controller is required to answer any questions that may be put to him."**

[43] In cross-examination, the Investigator stated that "*Mrs. Bostwick had access to all portions of information relative to the investigation prior to, during and after the investigation*". I however accept Mrs. Bostwick's evidence that she was unaware

of some external factors that may have assisted her in her defence which may have affected the Board's conclusion. The facts that the Miami controller was working combined positions, which meant that he was performing the duties of both the Approach Controller and Data Controller and that the Miami radar was not fully operational are circumstances surrounding the incident that were directly relevant to determining the cause of the incident. These facts were favourable to Mrs. Bostwick. It cannot be said with certainty that, had she been provided with this information, she could not have explained her potential/suspected contribution to the incident.

[44] Learned Counsel Mr. Parker cited the case of **R v Gaming Board for Great Britain Ex Parte Benaim and Khaida** [1970] 2 QB at 430 in support of the contention that the Defendants were required to disclose all information to Mrs. Bostwick for her interview. In that case, the applicants sought judicial review of the Gaming Board's decision to refuse the gaming licence on the basis that the Board did not disclose the sources of their information which led them to doubt the applicants' unsuitability for licences. The plaintiff properly contended that fundamental to the principles of natural justice is providing the "defendant" (in this case, Mrs. Bostwick) with all of the available information so that they can have a full opportunity to challenge or otherwise respond to it. In that case, the Court was convinced that the Gaming Board accorded with the principles of natural justice because "*they put before the applicants all the information which led them to doubt their suitability*….The Board gave the applicants full opportunity to deal with the information."

[45] By not furnishing Mrs. Bostwick with all of the materials that the Board used to determine the matter and by not giving her an opportunity to use facts favourable to her in responding to the allegations against her, she was not afforded reasonable opportunity to put forward her case to the Board. Accordingly, the Defendants failed to conduct the proceedings in accordance with the principles of natural justice.

Decertification before the investigation process

[46] Mr. Parker argued that the Defendants perpetuated another procedural impropriety when, contrary to the principles of natural justice, Mrs. Bostwick was removed from working all radar control positions pending the resolution of the matter, that is, before being found to have played a contributory role. In other words, Mrs. Bostwick was decertified before the investigative process took place. In support of this, she relied on the letter dated 11 September, 2017 advising her that she was prevented from working all radar control positions.

[47] Learned Counsel for the Defendants, Mr. Mackey, argued that in the absence of the word "decertified", Mrs. Bostwick was not in fact decertified pending the determination of the matter and that she was not decertified until after the Board had made its decision, at which time the word was expressly used. He argued that, notwithstanding the submissions advanced on behalf of Mrs. Bostwick, the CAD Doc 1142 expressly provides for such removal and states the rationale for same:

> **"Removal From Operational Duty**
>
> **"The initial removal of an employee from operational duty is for the purpose of commencing the investigation."**

[48] In my judgment, as a preliminary investigation had determined that Mrs. Bostwick may have contributed to the incident, she was properly removed from operational duty pending the completion of the investigation. Such removal did not amount to a procedural irregularity.

Failure to complete the investigation within 30 days

[49] Learned Counsel Mr. Parker submitted that a further indication of the unfairness of the investigation process was the failure of the Defendants to have the investigation completed within the requisite time frame.

[50] Article 19.19 of the Industrial Agreement states that the time taken to investigation OEs/deviations is critical and should be completed within 30 days from the date of the occurrence of the event.

[51] The incident occurred on 5 September 2017. The investigation was not completed until 55 days later when the Board submitted its report to Mr. King on 30 October 2017. Strictly speaking, the investigation ought to have been completed by 5 October 2017.

[52] In order to determine whether the Defendants were in breach of the provision and if so the extent to which it was breached, a relevant consideration is whether the time period is intended to be mandatory or directory.

[53] The Privy Council in **Charles v Judicial and Legal Service Commission & Anor (Jamaica)** [2002] UKPC 34 was confronted with the issue of the effect of failures to observe time limits laid down by regulations relating to discipline and misconduct in public service. In delivering the Opinion of the Board, The Rt. Hon. Justice Tipping referred to the speech of Lord Penzance in **Howard v Bodington** (1877) 2 PD 203 at 210***:***

> **"…in each case you must look at 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."**

[54] In the leading authority of **Wang v Commissioner of Inland Revenue** [1995] 1 All ER 367, it was established that the determination of whether time limits are mandatory or directory involves examination of several considerations including the role of the legislation in issue, the purpose and policy of the time provision and a judgment as to whether those who promulgated the legislation intended that a breach of the time limit render any subsequent decision null and void. Applying the facts of **Charles v Judicial and Legal Service Commission**, the Court found that the primary purpose of the time limit was to expedite the investigation process for the benefit of the public interest in having matters of misconduct dealt with. They found that this made it unlikely that a breach of the timeline was intended to lead to the frustration of that ultimate purpose. Further, because the delays were in good faith and were not lengthy and because the appellant suffered no material

prejudice and no fundamental human rights were at issue, failure to accord with the time limits were found not to deprive the Commission of jurisdiction.

[55] The provision of the Industrial Agreement states that the investigation is time critical which indicates that the time that the investigation takes is important to the fairness of the investigation. However, it does necessarily follow that exceeding the time frame constitutes a breach. The use of the word "should" regarding the stipulated time is important, but suggestive only, indicating that 30 days is a reasonable period of time.

[56] The Defendants sought to absolve their liability in this regard by attributing blame for the delay to the Union.

[57] True, the purpose of the investigation as stated in Article 19 of the Industrial Agreement is *"to determine what happened, why it happened, and what can be done to prevent a recurrence."* Further, the importance of the time limits is underscored by the fact that air traffic controllers who may have been involved in an OE are removed from operational duty and Mrs. Bostwick was so removed. So, there was a clarion call for action.

[58] As the evidence demonstrates, both the Defendants and the Union were jointly responsible for the delay of 25 days. Taking into account the facts surrounding the delay, I cannot say that the failure of the Defendants to observe the time limits laid down by Article 19 was done in bad faith and that the delay was inordinately lengthy. The factors that contributed to the delay were two-fold namely: (i) The Bahamas and indeed LPIA were preparing for Category 4 Hurricane Irma (which had, on 7 September 2017, ravaged the British Virgin Islands as a Category 5 hurricane and on 8 September 2017, Irma made landfall in The Bahamas on the Island of Little Inagua and South Acklins Islands at a Category 4 hurricane) and (ii) the Department of Civil Aviation asked the Union to nominate a member on 21 September 2017 (already 16 days after the OE), and the Union took 12 days to nominate Mrs. Menon on 3 October 2017. Then, she was on vacation at the time

of her nomination which meant that the investigation could not have taken place until she returned.

[59] The more serious delay in my opinion can be attributable to the Union. Had a member (not on vacation) been nominated earlier, I believe that the Defendants would have been able to complete the investigation within the time frame set in the Industrial Agreement.

[60] That being said, I cannot fault the Defendants for not completing the investigation within the required time frame.

Omission to interview Mr. Wilson

[61] In arriving at its decision, the Board never interviewed Mr. Wilson, the Approach Controller. This, Mr. Parker argued, was a fundamental flaw of the Defendants' investigation in that the investigation could not be said to have been complete, thereby contributing to the unfairness of the investigation.

[62] Article 19.2 of the Industrial Agreement emphasises the importance of ascertaining all the facts in an investigation of an OE; the objective being the prevention of future accidents:

> **"the investigation process is designed in order that air traffic controllers can contribute fully to the investigation…It is necessary to gather all relevant facts that led up to the operational errors/deviation…"**

[63] The CAD 1142 sets out requirements for the Investigation. One of the factors required to be considered is "controller action":

> **"The investigation of an occurrence is a fact finding process. An essential and in depth inquiry into such areas as facility procedures, facility training, facility supervision, equipment, controller environment, external impact and controller action".**
>
> **"Since many employees in the facility, either controllers and supervisors, may be knowledgeable of or a party to this incident, an interview with all possibly involved personnel shall be held".**

[64] The Defendants attempted to refute this point by arguing that the investigation was not deficient – that Mr. Wilson's written statement made shortly after the incident was sufficient information to have taken his perspective into account.

[65] Mr. Parker, however, correctly argued that the failure of the Board to interview Mr. Wilson constituted a major procedural error contrary to both the Industrial Agreement and the CAD as well as the principles of natural justice generally. Mr. Wilson was, at the relevant time, the Approach Controller. As stated by Mr. Parker, the Defendants' Board of Inquiry was mandated, by the CAD 1142 rules, to have interviewed **all persons potentially involved**.

[66] It is plain and this was admitted by Mr. King under cross-examination that Mr. Wilson was a very critical person to have been interviewed when looking into the incident. It follows that there was critical information missing from the Board's investigation and they could not have, as required by the Industrial Agreement, considered all of the relevant facts and circumstances. The Board itself acknowledged that an interview has the effect of giving them a better understanding of the incident. The Board, in its report, stated *"After having reviewed the recordings mentioned above the Board also interviewed Mrs. C. Bostwick to get a better understanding of the events that transpired."*

[67] Therefore, it cannot be said that had the Board interviewed Mr. Wilson, it would not have discovered more facts which may have led them to a different conclusion. In my judgment, the Board could not have conducted an in depth inquiry into "controller action" without interviewing the controller of record. Mr. Wilson was a critical witness in this investigation. He has direct knowledge of the circumstances and was, as acknowledged by the Defendants, a party to the incident. The investigation, especially in light of the 3.3 of the CAD, cannot be said to have been complete without interviewing Mr. Wilson. As such, I agree with Mr. Parker that there was a fatal flaw in the investigation thereby contributing to the unfairness of the investigation.

Acceptance of responsibility

[68] Mr. Parker vehemently argued that because Mr. Wilson accepted full responsibility for the incident, there need not have been an investigation as the cause of the incident was determined. To this end, Mr. Parker sought to prove that the full acceptance of responsibility by Mr. Wilson absolved any responsibility of the Mrs. Bostwick. Paragraph 5 of Mr. McKenzie's affidavit stated that *"When an air controller accepts responsibility for an incident that has typically resolved the matter. There is typically no investigation where the cause of the incident has been demonstrated."* Under cross-examination Mr. McKenzie repeated that assertion.

[69] However, as correctly argued by Mr. Mackey, although it was common that when a traffic controller takes responsibility for an incident, that is usually the end of the matter, this does not exclude the possibility that someone else could have contributed to the incident. The only argument that can be made in relation to the value of Mr. Wilson's letter is that the Board ought to have supplemented it with an interview. By not interviewing Mr. Wilson to fully understand the reason for his acceptance of responsibility, the Board did not conduct an in depth investigation as to all the factors that it ought to have considered as required by the CAD 1142. Mrs. Bostwick's argument that Mr. Wilson's acceptance of liability absolved any level of potential responsibility on her part is untenable.

[70] The Board is entitled to come to its own findings so long as it has taken into consideration all of the facts and circumstances of the case. The Board correctly took Mr. Wilson's statement into account in coming to their conclusion. In its report, the Board's acknowledged Mr. Wilson's acceptance of responsibility. However, such acknowledgment did not encumber the Board's ability to find that Mrs. Bostwick also contributed. That finding is not inconsistent with his statement accepting responsibility.

[71] Therefore, Mr. Parker's argument on this issue is untenable and must fail.

Acknowledgement that Miami contributed to incident

[72] The Board's final report stated:

> **"Further, based on the evidence provided to the Board, it is apparent that Miami Center also contributed to the incident."**

[73] It was not disputed that Miami contributed to the incident. In addition to the Board's report, the re-examination of Mrs. Bostwick revealed that the Miami controller was working combined positions. In cross-examination, Mr. King accepted that Miami contributed to the incident. On this basis, Mr. Parker suggested that the Board did not give due weight to Miami's contribution to the incident. This argument is similar to that regarding Mr. Wilson's responsibility. The question is whether the fact that Miami contributed to the incident negates the possibility of Mrs. Bostwick's contribution thereto.

[74] In my considered opinion, a finding that Miami contributed to the incident and a finding that Mrs. Bostwick also contributed to the incident are not mutually exclusive.

Further training for staff

[75] Mr. Parker argued that, in coming to its decision, the Board did not give due consideration to the inadequacy of the training on the new system. The final report stated that the Nassau Air Traffic Control System would benefit greatly from further training in specific areas. In addition, there is the evidence of Mr. McKenzie that staff members have not been properly trained on the new system as well as that of Mr. Bryan Wilson, an expert in radar system called to testify on Mrs. Bostwick's behalf ("the expert"), who affirmed Mr. McKenzie's assertions. It is useful to reverberate what the expert asserted at paragraphs 7, 8 and 10 of his Affidavit:

> **Para. 7: "The Defendants' Terminal Radar Controls facility presently consists of four (4) independent controller work stations. Under the new system the Plaintiff would not be as aware of what the controller was doing as she might have been under the Defendants' old system."**
>
> **Para. 8: "It is imperative that the Plaintiff made sure that all the information was made available to the controller in the system and**

> **she did her job in that regard. The Defendants appear to have applied the standards of the old system, suggesting that the Plaintiff did not do all that she could have done to affect the situation."**
>
> **Para 10: "There is training available for persons engaged in professional reviews such as that purportedly conducted by the Internal Board of Inquiry, however <u>in my view the Defendants have not facilitated the level of training in this regard as is necessary to ensure that these processes are as objective and professional as they could be</u>."**

[76] Although Mr. King affirmed his acceptance of the Board's findings under cross-examination, he sought to establish that the Defendants had fulfilled their obligations to train staff by stating that staff members received a booklet, which gives an overview of the equipment, that thereafter they went into the simulator for three weeks and that finally, the expert went through basic procedures.

[77] However, I accept the evidence of the expert. As trainer, he is most suitable to determine whether further training is required.

[78] I therefore find that the Board in coming to its findings failed to investigate and give due weight to the insufficiency of the training provided by the Defendants. This is based on the Board's failure in its report to indicate that it considered not only the fact of the deficient training, but also the failure to explore the role that their deficient training may have had on the incident. One of the essential facts identified by the CAD which is required to be inquired into is "facility training".

Systems in Nassau and Miami not fully operational

[79] Mr. Parker suggested that the Board, in its investigation, did not sufficiently consider that the Nassau and Miami radar systems were not properly functioning at the material time. It is true that the Board's report did not indicate that consideration was given to that undisputed finding.

[80] As equipment is obviously an important factor in air traffic control, it is likely that the malfunctioning of the equipment of both centers could have had a significant

effect on the performance of duties by the Controllers. Under the CAD, “equipment” is a factor which is requires in depth investigation.

[81] It cannot be conclusively said that the Board would have come to the same decision if adequate consideration had been given to the underperformance of the equipment and the effect it had or did not have on the OE.

[82] I have to decide whether the Defendants’ procedural irregularities were so grave/fatal to warrant setting aside the Board’s findings and recommendations. The unfairness of the process is evident from the following circumstances: (i) inadequate notice of the interview; (ii) not being provided with all the materials; (iii) the failure to interview a critical person namely Mr. Wilson and (iv) failure to fully investigate and give due weight to the fact of and the effect of the lack of training and the inadequacy of the equipment.

[83] Taken singly, the procedural irregularities by the Defendants may not be sufficient to substantiate Mrs. Bostwick’s assertion that the procedure was conducted unfairly. However, when taken together, they amount to fatal breaches of the Industrial Agreement compromising the fairness of the investigation. As properly argued by Mr. Parker, Mrs. Bostwick was disadvantaged by all of these factors in relation to the investigation which led to the findings and recommendations of the Board. The effect was that Mrs. Bostwick was not afforded a fair hearing. It follows that the Board came to its decision unlawfully, unreasonably and unfairly. Lord Reid in **Ridge v Baldwin** [1964] AC 40 at 66 said *“a decision given without regard to the principles of natural justice is void.*” Therefore, the decision of Mr. King to accept the findings and recommendations of the Board is manifestly void and must be set aside.

The Appeal

[84] Mr. Parker asserted that, with respect to the appeal, it was contrary to Article 19.31 of the Industrial Agreement in that Mrs. Bostwick was not afforded an opportunity to appeal Mr. King’s decision which accepted the Board’s findings and

recommendations. According to Mr. Parker, the letter from Mr. Major addressing Mrs. Bostwick's grounds of appeal was not an appeal. Article 19.31 of the Industrial Agreement provides Controllers with a right of appeal. It states:

> **"Any Controller aggrieved by any decision imposed by the Deputy Director responsible for Air Traffic Services, based on the findings and recommendation of the Board of Inquiry may appeal the decision to the Director of Civil Aviation."**

[85] Due to a transition in authority in the Civil Aviation Authority, the "Deputy Director of Air Traffic Services" has been replaced by "Manager of Air Traffic Services" and with respect to the service provider duties, "Director of Civil Aviation" has been replaced by "General Manager of Bahamas Air Navigation Services". Accordingly, Mr. King was the proper person to have accepted or rejected the Board's findings and recommendations and Mr. Major was the proper person to conduct the appeal from that decision.

[86] In order to determine whether Mrs. Bostwick was afforded an appeal, it must first be established what constitutes an appeal. The Black's Law Dictionary Eighth Edition defines "appeal" as:

> **"A proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal."**

[87] An appeal is a hearing to review a previous decision. A fundamental element of an appeal is allowing the applicant to dispute the findings. The rules of natural justice must still apply in that the person must be afforded some opportunity to be heard. In **Bahamasair Holdings Limited v Omar Ferguson** SCCivApp No. 16 of 2016, the Bahamian Court of Appeal explored fairness in the context of unfair dismissal. The Court at page 15 found that central to the employer's duty to dismiss its employees fairly is the *"most cherished principle of natural justice which mandates that no man should be condemned, punished (or as in this case, dismissed) without being given a hearing and the opportunity to explain or respond to any charge or adverse decision to be taken against him."* The Court noted that the

opportunity to be heard need not necessarily be oral, but the opportunity must be afforded.

[88] Mr. Parker referred to **Ridge v Baldwin** [1964] AC 40 at page 80 where the Court stated that:

> **"The body with the power to decide cannot lawfully proceed to make a decision until it has afforded the person affected a proper opportunity to state his case."**

[89] As properly argued by Mr. Parker, Mr. Major's purported "review process" does not constitute an appeal at all. His letter to Mr. McKenzie merely gives his response to the concerns raised. His letter did not address Mrs. Bostwick's discrepancies with the Board's findings and/or with Mr. King's acceptance of those findings. Mr. Major's decision to uphold the Board's findings was not based on merit but rather on the unanimity of the Board's findings. He stated: *"I note that the decision of the board of inquiry was unanimous, including the representative appointed by BATCU. Therefore, I uphold the decision of the board and expect that Mrs. Bostwick make herself available for the remedial training scheduled to commence on Monday December 11, 2017".*

[90] Further, in carrying out his "review" of the Board's findings, Mr. Major met with the Board and the Union's executives but never with the key person: Mrs. Bostwick.

[91] As the appellate body, Mr. Major ought to have afforded Mrs. Bostwick the opportunity (whether in writing or in person) to state why he should have set aside the findings of the Board. Mr. Major was obliged to scrutinize the merits of her arguments against the Board's findings.

[92] In actuality, what Mr. Major contends was an appeal was not actually an appeal. Therefore, Mrs. Bostwick was not afforded the right of appeal to which she was entitled by the Industrial Agreement.

Conclusion

[93] There is no doubt that the unfairness of the process of the Board's investigation was compounded by the failure of the Defendants to allow Mrs. Bostwick a proper appeal from the Board's findings and recommendations. The Industrial Agreement mandates that Controllers be afforded a right to appeal the Board's decision. Mr. Major's letter did not constitute an appeal. In all the circumstances, the findings and recommendations of the Board and the decision of Mr. Major cannot stand.

[94] In the premises, the Declarations sought in the Originating Summons are granted. The Board's findings and recommendations and the decision of Mr. Major are set aside. The Defendants are ordered to conduct the investigation fairly, in accordance with the principles of natural justice and the provisions of the Industrial Agreement.

[95] Mrs. Bostwick is awarded costs in the sum of $27,000.00 to be paid within 21 days hereof.

Dated this 26th day of February, A.D., 2021

Indra H. Charles
Justice