



Neutral Citation Number: [2020] CA (Bda) Civ 12

Case No: Civ/2020/07

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS
ORIGINAL CIVIL JURISDICTION
THE HON. ASSISTANT JUSTICE RIIHILUOMA
CASE NUMBER 2018: No. 392**

Sessions House
Hamilton, Bermuda HM 12

Date: 23/07/2020

Before:

**THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL ANTHONY SMELLIE
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER**

Between:

DR GINA TUCKER

Appellant

- v -

THE PUBLIC SERVICE COMMISSION

1st Respondent

- and -

THE BOARD OF EDUCATION

2nd Respondent

Mr Mark Diel (Marshall Diel & Myers Ltd.) for the Appellant
Mr Richard Horseman (Wakefield Quin Ltd.) for the 1st Respondent
Mr. Delroy Duncan QC and Mr. Ryan Hawthorne (Trott & Duncan Ltd) for the 2nd Respondent

Hearing dates: 3 June 2020

APPROVED JUDGMENT

SMELLIE JA

Introduction

1. By her Notice of Motion for Judicial Review filed on 30 November 2018 in the Supreme Court, the Appellant Dr Tucker sought a declaration against the Public Service Commission (the “PSC”) and the Board of Education (the “Board” or “BOE”) (together “the Respondents”), that the appointment of Mrs Kalmar Richards as Commissioner of Education for Bermuda made by the Governor on the recommendations of the Respondents, is void on the ground of illegality and that the appointment be declared null and void. Further relief sought by Dr Tucker included an order of certiorari to quash the decision of the Governor to appoint Mrs Richards and an order of mandamus requiring the Respondents to conduct the recruitment process again “*fairly and in accordance with the Education Act 1996 and the Public Service Commission Regulations 2001*”.
2. By his judgment dated 29 January 2020, Assistant Justice Riihiluoma dismissed Dr Tucker’s Notice of Motion and awarded to the Respondents their costs of the action.
3. Dr Tucker appealed to this Court and her appeal was heard on 3 June 2020, when judgment was reserved. This is the judgment on the appeal.
4. Dr Tucker holds a doctoral degree in education as well as other academic qualifications. She has many years of experience both as an educator and administrator working within the Department of Education. Having been unsuccessful in her application for the post of Commissioner in August 2018, in September 2018 she elected to transfer to the Ministry of National Security in a senior position and currently serves in a Director’s position in the Cabinet Office.
5. Dr Tucker had earlier applied unsuccessfully for the post of Commissioner of Education (hereinafter “Commissioner”) in 2013 and 2016. She applied for the post of Commissioner in 2018 but, as already mentioned, was again unsuccessful. Mrs Richards was then appointed. The gravamen of Dr Tucker’s complaint is that the entire process by which Mrs Richards was shortlisted as a candidate, interviewed and appointed as Commissioner was, as she alleges, “fatally flawed”.
6. Her complaint concerns the process used by the BOE in making their recommendation to the PSC and by the PSC in turn, in making their recommendation to the Governor, the ultimate appointing officer.¹
7. The alleged legal and procedural irregularities are manifold. There is also an allegation of bias. The allegations, as developed in the submissions of counsel, will be addressed in turn below but first it is necessary to set out the background.

¹ It is noted, as the Court was informed by the parties, that His Excellency the Governor is not a party to these proceedings and no complaint is made against him. He has however, agreed to be bound by the outcome.

Background

8. The Department of Education operates and administers the public education system in Bermuda. In this regard, subsections 5(2) and 5(2A) of the Education Act 1996 (“the Act”) provide that:

“The Department shall, subject to the general direction and control of the Minister-

- (a) be under the supervision of a public officer who shall be known as the Permanent Secretary; and*
- (b) consist of the Commissioner of Education and such other public officers as may from time to time be authorized by the Governor.*

2A. The Commissioner of Education shall be Head of the Department”

9. The BOE is appointed by the Minister for Education pursuant to section 3 of the Act and the fifteen (15) persons who may be appointed as members of the BOE are specified by that section. By section 4 of the Act, the BOE is charged with several functions. That function which is the subject of this action is prescribed by subsection 4 (1)(b) which requires the BOE to:

“make recommendations to the Public Service Commission regarding the appointment of the Commissioner of Education, directors of the Department [of Education] and principals”.

10. The PSC is established under section 81 of the Bermuda Constitution Order 1968 (“the Constitution”). By section 82, power to make appointments to senior public offices, including that of Commissioner, is vested in the Governor acting in accordance with the recommendation of the PSC.
11. By section 82(2) of the Constitution, before the PSC recommends to the Governor the appointment of a person to (inter alia) the office of Commissioner, the PSC shall consult the Premier. In the making of recommendations and the performance of any other of its functions, the PSC is by section 84(6) of the Constitution, allowed to regulate its own procedure, subject only to the Public Service Commission Regulations 2001 (“PSC Regulations”) and the requirements of the Constitution itself.
12. The statutory procedural requirements for the appointment of the Commissioner may be summarized as follows:
- (i) The PSC causes the vacancy to be advertised unless it considers that there is good and sufficient reason not to advertise (PSC Regulations 10 and 11).
 - (ii) The Head of Department in which the vacancy occurs shall review the applications resulting from the advertisement and report to the PSC stating whether or not he or she is recommending an applicant for appointment and if so, identifying the recommended

applicant (PSC Regulation 10(2)). At the relevant times, while the post of Commissioner was vacant, the responsible Head was the Permanent Secretary of the Ministry of Education, Mrs Valerie Robinson-James (“the PS”).

- (iii) The PSC is nonetheless obliged to consider all applications (PSC Regulation 16);
 - (iv) As already noted, the BOE makes recommendations to the PSC regarding the appointment of the Commissioner (section 4(1)(b) of the Act.) Thus, there is a dual process of recommendation – part involving the BOE and the other involving the Head of Department (PSC Regulation 10(2)).
 - (v) The PSC may require any applicant to submit further information and attend for such interview, examination and tests as in the opinion of the PSC are necessary to establish that the applicant is qualified for and capable of performing the functions of the office (PSC Regulation 14);
 - (vi) The qualifications or relevant experience, or both, for any office shall be those for the time being specified by the Head of the Civil Service for that office (here again, the PS) and the PSC shall recommend for appointment thereto a person who possesses such qualifications or relevant experience, or both. (PSC Regulation 18(1)).
 - (vii) Notwithstanding PSC Regulation 18(1), the PSC may recommend for appointment a person who does not possess the qualifications or relevant experience, or both, as specified (by the PS), if the PSC is satisfied that the person is of sufficient merit to enable it to make the recommendation (PSC Regulation 18(1A)).
 - (viii) The PSC shall not recommend a person who is not a Bermudian for permanent appointment to an established office unless the person is the spouse of a Bermudian. A Bermudian shall be preferred to a person who is not a Bermudian (a “non-Bermudian”). A non-Bermudian who is a spouse of a Bermudian shall be preferred to any other non-Bermudian, except another non-Bermudian who is the spouse of a Bermudian. (PSC Regulations 19(5), (6) and (7)).
 - (ix) The PSC, after consultation with the Premier, shall recommend to the Governor the best candidate for the post (section 19(2) of the Public Service Act).
13. The post of Commissioner was advertised with a closing date of June 6, 2018 and the Appellant and Mrs Richards were among the seven applicants. From those seven, they were the two shortlisted and invited to attend for interview. The interviews were conducted on 10 July 2018 and Mrs Richards was recommended to the BOE by the interview panel. The other five candidates, three of whom were non-Bermudians and two, although Bermudian deemed not qualified, were not shortlisted for interview.

14. The interview panel - about which more must be said below - was convened by the PS, with the assistance of Mrs Germaine Trott, the Senior Human Resource Manager within the Department of Education.
15. On 14 August 2018, the BOE met, considered and unanimously accepted the interview panel's recommendation.
16. By way of a letter dated August 17, 2018 written by the PS ("the 17 August 2018 letter"), the BOE recommended Mrs Richards to the PSC for appointment.
17. As confirmed by the first affidavit of its Secretary, Carlita O'Brien, the PSC met on 27 August 2018, and having received the letter of 17 August 2018, considered the applications of Dr Tucker and Mrs Richards and decided to recommend Mrs Richards for appointment to the post. As confirmed by the second affidavit of Carlita O'Brien, the other five applicants were also considered by the PSC but as three of them were non-Bermudian and two deemed not qualified for the post, the PSC eliminated the five and went on to consider the applications of Dr Tucker and Mrs Richards.
18. After consultation with the Premier in accordance with section 82(2) of the Constitution, the PSC's final recommendation was made to the Governor for the appointment of Mrs Richards.

The Complaints

19. Dr Tucker's various complaints may be identified and considered under the following headings:
 - (i) The alleged improper selection and composition of the interview panel.
 - (ii) The alleged improper and *ultra vires* delegation by the BOE of its functions to the interview panel, including the function of short-listing of candidates. The alleged delegation to the interview panel is said to be *ultra vires* because the panel was not a "committee" to which the BOE could delegate its functions as permitted by paragraph 12 of Schedule 1 to the Act. This complaint will be examined below by reference to the provisions of paragraph 12.
 - (iii) The involvement of the PS, Mrs Robinson-James, as a member of the interview panel when not herself a member of the BOE and while allegedly harbouring bias against the Appellant.
 - (iv) The PSC in turn failed to conduct any form of independent process relying solely on the "flawed" recommendation of the BOE. The PSC has the following obligations which it must itself fulfill and which it failed to fulfill:
 - (a) to consider all applications;
 - (b) to recommend the best candidate;

- (c) the PSC may recommend a candidate who lacks qualifications or experience or both (as it is said of Mrs Richards by Dr Tucker), if the PSC is satisfied that the recommended candidate is of sufficient merit to enable it to make the recommendation. But here the PSC failed to consider that issue itself, instead simply deferring to the BOE's "flawed" recommendation.

Further background

20. In addition to the foregoing, it is necessary to set out some more of the factual context which, fortunately, is largely undisputed. Important aspects come from the affidavits of Mrs Germaine Trott the senior HR Manager within the Department of Education. Affidavit evidence was put before Riihiluoma AJ from several other witnesses including Dr Tucker herself and Mrs Robinson-James, the PS. Reference will be made to some of this evidence.
21. Mrs Trott explains that, during her seven years as senior HR Manager, she had been responsible for and directly involved in numerous recruitment exercises for positions at various levels within the Department of Education. She acknowledges that the aim of recruitment is to obtain the best candidate for the position, with Bermudian candidates receiving preference among those who are qualified, in accordance with PSC Regulation 19.
22. She states that recruitment within the Department of Education follows the Government of Bermuda Recruitment Code, published on November 18, 2014 and last updated in July 2018 ("the Recruitment Code"). The Recruitment Code will also be examined below.
23. Mrs Trott states that she was responsible for leading the recruitment process for the position of Commissioner on three occasions, in 2013, 2016 and most recently, that which is the subject of criticism by Dr Tucker here, in 2018. The recruitment practices in 2018, as in 2013 and 2016, were similar. At [14] of her affidavit, she states that the vacancy was advertised locally and placed in the Official Gazette. After the closing date for the submission of applications, she reviewed all applications and then arranged to meet with the PS with whom she agreed on the shortlist for interviews, which included the only two sufficiently qualified Bermudians who applied- Dr Tucker and Mrs Richards. She nonetheless prepared an Applicant Summary Form listing all the applicants who applied and indicated whether the applicants were qualified in accordance with the job description and the PSC Regulations; and/or shortlisted.
24. At [15] of her first affidavit, Mrs Trott explains that in the shortlisting process, it was noted by herself and the PS, that Mrs Richards did not possess the minimum academic qualifications set out in the job description (as set by the PS herself). However, in accordance with the Guidance for Appointments as prepared by the Department of Human Resources used across Government (a copy of which she also exhibits), Mrs Richards, who has other relevant advanced academic qualifications and wide experience, was regarded as sufficiently qualified to be shortlisted for interview. Mrs Trott also notes that it was borne in mind that PSC Regulations 16 and 18 permit the PSC to recommend for appointment individuals who do not "*possess the qualifications or relevant experience, or both*" as may be specified by the relevant Head of the Civil Service, "*if the person is of sufficient merit*".

25. At [16] of her first affidavit, she explains that after the shortlisting process, she then met with the PS about the make-up of the interview panel. It was observed that the Recruitment Code stated that no more than five persons should sit on a panel, which should include the Designated Recruitment Manager (in this instance Mrs Trott herself, “the DRM”), the direct line manager for the post being recruited (in this case the PS herself, “the line manager”), and an independent assessor from outside the employing Department. In this instance Mr Randy Rochester, the Permanent Secretary of another Ministry, was selected. To ensure that members of the BOE were directly involved in the recruitment process, two members of the BOE were asked to sit on the interview panel which came to be comprised as follows:

Mr Lorren Wilson – the then Acting Chairman of the BOE
Ms Ru-Zelda Severin – a member of the BOE
Mrs Valerie Robinson-James - the PS and line manager
Ms Germaine Trott - Human Resource Manager and DRM
Mr Randy Rochester- Independent Assessor.

26. Mrs Trott explains at [17], that she prepared a timeline spreadsheet for reference by the interview panel, outlining the steps required in the competition for the position of Commissioner, a copy of which she exhibits; and at [19], that the panel conducted interviews on July 10, 2018. Each interviewer was provided with an evaluation form and kept scores for each candidate, copies of which are also exhibited. Further at [20], she explains that, following the interviews, each member of the panel independently collated their scores by adding their individual scores in each category to reach a total for each applicant. Each member of the Panel’s scores were then added together to reach a total out of a maximum of 205 for each applicant. Mrs Richards’s aggregate score was, at 176.8/205 very significantly higher than Dr Tucker’s at 122.4/205; and so it was determined that Mrs Richards was the best suited candidate to present to the BOE. The decision of the Panel was unanimous.

27. As to the presentation of the findings of the Panel to the BOE, Mrs Trott goes on to explain, at [21]- [23]:

“21. I attended the (BOE) meeting on 14 August, 2018 to discuss the process undertaken and the panel’s recommendation for the post of Commissioner...The meeting was chaired by Mr Loren Wilson, Acting Board Chair. The other Board member who sat on the panel, Ms Ru-Zelda Severin, was also present. The PS attended and provided input as necessary.

22. In my presentation to the Board I gave a step by step overview of the recruitment process for the post of Commissioner.. The Board members posed questions to me for clarity and further understanding of the process and both the shortlisted and non-shortlisted applicants.

23. Once there were no further questions from Board members regarding the interview process and the two candidates who were interviewed, the Acting Board

Chair asked the members of the Board whether they were ready to vote on their recommendation to the PSC. The Board indicated that they were ready and it was unanimously agreed to recommend Mrs Richards to the PSC for appointment as the Commissioner. The Board agreed that the PS would communicate the Board's recommendation to the PSC. This was done by letter dated August 17, 2018".

28. Against that background, Mrs Trott states at [8] that the BOE "*chose to use the Government's recruitment process...and after being informed by the interview panel of the best suited person for the post, made the recommendation based on the interview panel's findings. The (PS) wrote to the (PSC) to inform of the (BOE's) decision to recommend a particular candidate.*"
29. By her second affidavit, Mrs Trott exhibits copies of the aforementioned score sheets setting out the aggregate scores of each member of the interview panel as well as the discussion notes of the interview panel. She also exhibits a copy of the aforementioned Applicant Summary Form and a copy of the minutes of the meeting of the BOE held on 14 August 2018 from which, confirmatory of her evidence, it is apparent that the Acting Chairman Mr Lorren Wilson stated that "*the purpose of the meeting was to discuss the process undertaken for the recruitment of a Commissioner of Education; and to consider the recommendation of the interview panel.*" The minutes also state that "*He then invited Mrs Germaine Trott, Senior Human Resource Manager in the Department of Education to guide the Board through the recruitment process for the hiring of the Commissioner.*"
30. These minutes of the meeting of the BOE also reveal that the PS was required to and did address concerns expressed by BOE members "*about the process not being shared with them prior to the interviews*". Additional questions required answers as to the selection of the interview panel and about the interview process itself. The minutes show that after deliberations, the Acting Chair asked the PS to read to the Board the recommendation for the appointment of the Commissioner and that "*The function of the Board was read as per the Education Act, section 4(1)(b) with the Board stating that Mrs Kalmar Richards be recommended to the PSC for appointment as Commissioner. The Acting Chair asked who was in favour by show of hands; all voted to submit the recommendation to the PSC. The Acting Chair sought any final questions from the Board of which there were none.*"
31. It is against the background of the foregoing description of the interview and selection process resulting in the BOE's decision to recommend Mrs Richards to the PSC for appointment, that Dr Tucker, through Mr Diel, complains, describing it, among other things, as the improper and *ultra vires* delegation by the BOE of its functions to the interview panel.
32. When we come below to discuss these criticisms, it will also be important to bear in mind that Mrs Trott explains further at [9] of her affidavit, that although the BOE is required to make recommendations to the PSC regarding the appointment of the Commissioner in accordance with section 4(1)(b) of the Act, as the BOE does not have its own administrative resources for the purposes of conducting employment competitions, it relies on the resources of the Department of Education for that purpose, along with the participation of members of the BOE on the Recruitment (interview) Panel. She also explains that, as the appointment of the Commissioner is a permanent

Public Service appointment, the established practice is that the process should align with that of the Recruitment Code and the PSC Regulations.

33. For her part, in her affidavit, the PS sought to correct what she described at [6], as the many “*false assertions and implications made by Dr Tucker in her first affidavit*”, going essentially to the allegations of bias. While refuting entirely the allegations, she specifically mentions two considerations going to show lack of bias on her part. The first was the offer she had made to Dr Tucker in 2016 to serve as Commissioner Designate, an offer which Dr Tucker then rejected because of her expressed feelings that the offer, which required her to understudy the then incumbent, an expatriate; diminished her stature and suitability as a qualified Bermudian for an outright appointment to the post. The second addresses the PS’s reason for having appointed Mrs Richards to act as Commissioner in December 2017 when the vacancy leading to the 2018 recruitment occurred. As to this, the PS explained [23]: “*My decision to have Principal Kalmar Richards act as Commissioner...was based on a broader perspective of having responsibility for the Ministry of Education and knowing that a transformative shift was needed in the public school education system*”. We will return below to express our conclusions on the allegations of bias.
34. In her 17 August 2018 letter² sent to the PSC following the BOE meeting of 14 August 2018, the PS provided the PSC with a detailed description of the recruitment and interview process leading to the recommendation for the appointment of Mrs Richards. The 17 August 2018 letter also deals comprehensively with the subject of Mrs Richards’ qualifications, experience and suitability for the appointment, including her “*35 years experience as an educator, since 1983 when she commenced in the public school system as a high school teacher in English, French, Spanish and Civics. She possesses a Bachelor’s Degree in English, a Bachelor’s Degree in Education, and a Master’s Degree in Management and Human Resource Development.*”
35. Significantly, given the nature of the controversy here, the 17 August 2018 letter concludes:

“At a meeting held on August 14 2018, the Acting Board Chair who served on the Interview Panel, presented the Panel’s conclusion to the Board of Education as per the Education Act, Paragraph (sic) 4(1)(b) which states one of the functions of the Board is to : “make recommendations to the Public Service Commission regarding the appointment of the Commissioner of Education...” There was a unanimous vote from Board members in support of the Panel’s recommendation.

Although Mrs Richards has a professional qualification in an education discipline and the minimum relevant and senior management level experience required for the post, she does not possess a Master’s Degree in Educational Administration as per the official job description, which was reviewed on September 2nd 2014. Therefore Mrs Richards is being recommended for the post in accordance with Regulation 18(2) [sic]³ of the Public Service Commission Regulations and section 2 (d) of the Guidance for Appointment ...

² Actually presented in evidence as an exhibit to the second affidavit of Dr Tucker.

³ This is obviously meant to be a reference to Regulation 18(1A)

The approved job description seeks 15 years' relevant experience including 10 years' experience at a senior management level. Mrs Richards has 35 years relevant experience with 23 years' experience at the senior management level.

The Panel recommends her appointment to the post of Commissioner. I support the recommendation of the Panel."

The Arguments

36. Mr Diel submits that the use of an interview panel selected by the DRM and the PS for the purposes of selecting a candidate for appointment as Commissioner is completely at odds with section 4(1) (b) of the Act, which requires the BOE to make its recommendation to the PSC. The BOE may delegate its functions to a sub-committee but, he submits, that can be done only in keeping with Paragraph 12 of Schedule 1 to the Act, which is in these terms:

"12 (1) The Board may appoint a committee for any of the purposes of the Board, and delegate any of its functions to such a committee with or without restrictions or conditions.

(2) The number of members of a committee appointed under this paragraph and their term of office shall be fixed by the Board.

(3) The Board shall appoint one of its members to be chairman of the committee.

(4) A committee appointed under this paragraph may include persons who are not members of the Board, but the chairman and at least one half of the other members of every committee must be members of the Board."

37. Mr Diel's primary point on the *ultra vires* argument, as we understand it, is that, having been given an express power by the statute to delegate to a committee which the BOE does not purport to have used, the BOE cannot try to fall back on some inherent power to adopt the process of the interview panel, when they have an express power. To apply the provisions of the statute in the way the Respondents have argued would render the requirements of the statute meaningless.
38. On the assumption that the BOE must therefore have proceeded under the provisions of paragraph 12 of Schedule 1 of the Act to delegate its function to the interview panel, Mr Diel also raised criticisms about non-compliance with the requirements of paragraph 12 itself. These criticisms are to the effect that (i) a majority of the delegate committee had to be BOE members but this was not the case. In the interview panel there was only one BOE member (Mr Wilson) and the majority were civil servants⁴; (ii) in any event, the interview panel were not appointed by the BOE but by the PS and the DRM, as confirmed not only by them but also by Mr Wilson, the Acting Chair of

⁴ This point was based on the erroneous assumption that Ms Ru-Zelda Severin was not in fact a BOE member but this we were told during the hearing, was retracted. Even so, on the basis of this assumption, the argument is that paragraph 12 (4) of the Schedule was not satisfied.

the BOE, in his affidavit. Thus, there was no validly constituted committee to which the BOE could have delegated its function of making a recommendation to the PSC regarding the appointment of the Commissioner; (iii) if, as turned out to be the case, the BOE did not appoint the interview panel, they could not possibly rely upon the recommendations of the panel. This concern, says Mr Diel, is simply a derivative of the “*he who decides must hear*” concept of the rules of natural justice, a subset of the *audi alteram partem* maxim, citing a longstanding decision of this Court in *Bermuda Telephone Co. Ltd v Minister of Communications*⁵; (iv) this last mentioned concern is underscored and exacerbated, Mr Diel submitted, by the revelation that the BOE based their recommendation solely on the interview panel’s finding, citing in support of this proposition a phrase from the first affidavit of Mrs Trott the DRM⁶ to the effect that the BOE made its recommendation “*based on the interview panel’s findings*”.

39. Separate criticisms are levelled against the PSC in relation to its role in the recruitment process:

- (i) First, it is said that as the interview panel (by its process of shortlisting) and thus by extension the BOE, did not consider all the applicants, neither did the PSC, contrary to the requirements of PSC Regulation 16. This particular criticism is based on the assumption (now shown to be falsified by the unrefuted evidence of Mrs Trott and Carlita O’Brien – see [17], [23] and [29] above) that information about the other five (5) candidates was not put before the BOE and PSC and considered by them before their recommendations were made.
- (ii) Second, it is said that the PSC failed to conduct any form of independent process relying solely on the “flawed” recommendation of the BOE.
- (iii) Third, it is said that the PSC, in accepting the recommendation, failed to comply with PSC Regulation 18(1A) which allows the PSC to recommend a candidate who lacks qualifications or experience or both as specified by the relevant Head of the Civil Service only if the PSC is satisfied that the recommended candidate “*is of sufficient merit to enable it to make the recommendation.*” This objection points to the PS’s citation of the “*experience*” of Mrs Richards rather than “*merit*” or ability.

40. By reference to the foregoing alleged litany of failings on the part of both the BOE and the PSC, Mr Diel submits that their decisions to recommend the appointment of Mrs Richards demonstrate illegality or unlawfulness within the meaning of the first three grounds of *ultra vires* identified by Lord Diplock in *CCSU v Minister for Civil Service [1985] A.C. 374* ; or alternatively demonstrate irrationality (the second of those grounds)⁷.

⁵ Civil Appeal No 20 of 1990, judgments delivered on 19 July 1991 and in which the Court stated, quite incontrovertibly per Georges JA (at pp18-19): “*I do not understand the Solicitor General to dispute the principle that members of the Commission who were not fully apprised of all the evidence should not participate in making the decision....The principle that a decision maker should have available for consideration all the facts and submissions put forward by a party to a dispute which is being adjudicated is crucial.*”

⁶ At [8]

⁷ Mr Diel developed his arguments by reference to further case authority, including a decision of this Court in *Coxon and others v Minister of Finance and Grosvenor Trust Company Ltd [2007] Bda LR 78 all in the well traversed field*

41. As to the alleged illegality, the gravamen of Mr Diel's arguments as we understand them, is to the effect that, in the first place, the BOE had the responsibility to itself consider the merits of the candidates and their applications but it failed to do so, instead unlawfully abdicating this responsibility to the interview panel. To the extent that the BOE could have delegated these responsibilities, it was obliged to do so, says Mr Diel, only in the manner expressly allowed by the Act; ie: by way of paragraph 12 of Schedule 1, which among other things, prescribes the composition of a delegation committee, a composition with which the interview panel did not comply.
42. The unlawful delegation also resulted says Mr Diel, in a breach of the duty of proper enquiry which includes a duty on the BOE to itself properly consider and grapple with all relevant material, including a duty on its part as the decision maker:
- (a) to explore all the material evidence before it, citing *R v Doncaster MBC, ex parte Nortrop* (1996) 28 HLR 862, 874;
 - (b) to balance the relevant factors, not just to have them in mind, citing *R v Secretary of State for the Home Department, ex p Ajayi* 12th May 1994 unreported;
 - (c) to make proper decisions on important issues of fact, citing *R v Secretary of State for the Environment, ex p West Wiltshire* [1996] Env LR 312;
 - (d) to carefully and clearly assess and properly analyse and consider all material issues, citing (*R v Birmingham CC, ex p Killigrew* (2000) CCLR 109, *R v Ealing London BC, ex p C* (2000) 3 CCLR 122, *R v Lambeth London BC, ex p K* (2000) 3 CCLR 141) and *R v Secretary of State for the Home Department, ex p Iyadurai* [1998] AR 470 at 475, per Lord Woolf MR.
43. As to irrationality, Mr Diel laid great emphasis on the fact that Mrs Richards did not have the stipulated academic qualifications while Dr Tucker did and the decision to overlook that fact is revelatory, he submits, of the failure of both the BOE and the PSC to bring to bear a rational mind, relying here, inter alia, upon the dictum of Laws LJ from *R (on the application of Mahmood) v Secretary of State for the Home Department*⁸: “If the decision does not add up, if there is an error of reasoning which robs the decision of logic, if the facts are not logically capable of sustaining the findings and the decision based upon them, then it cannot be said that a rational mind has been brought to bear and the decision must therefore be irrational”.
44. Finally, Mr Diel complains that as a further consequence of the breaches of duty cited above, the BOE and the PSC also breached their duty, owed to Dr Tucker, to act fairly. In particular, they did not themselves interview the candidates and so (in her case) in not allowing Dr Tucker to address any concerns they may have had about her application, they denied her the reasonable and fair opportunity to do so. Instead, they abdicated their responsibility to the interview panel which was

of Judicial Review. In light of our conclusions on the facts of this case, we do not see the need to examine those cases in detail.

⁸ All ER Official Transcripts, 8 December 2000, at [

organized by the PS (who allegedly harboured bias against his client), to do her bidding, albeit it is to be inferred, unwittingly. Here Mr Diel relied upon the well-known dictum of Lord Diplock from *O'Reilly v Mackman* [1982] 3 All ER 1124, 1127:

“Whenever 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 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 him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and in the absence of personal bias against him on the part of the person by whom the decision falls to be made.”

45. While the statements of principles arising from the cases cited by Mr Diel above are uncontroversial, in the context of this case we regard them as misplaced and inapposite.
46. Dealing with the last complaint first, there simply is no proper basis for complaint that Dr Tucker was deprived of a fair opportunity to present or advance her application. As will be shown below, the recruitment processes in which she participated were well known and common to all the applicants. And as between herself and Mrs Richards, the two shortlisted candidates, the interview process was standardized and the same for both. As Dr Tucker must have been aware from her earlier candidacy, the interviews were intended to inform the BOE’s deliberations. If she felt that fairness required a further opportunity to address the BOE members in person, she could have asked for that opportunity. She did not do so.
47. As to the further complaints, we are satisfied that the proper premise for the analysis in this case is that identified in the conclusion of Riihiluoma AJ in the court below (at [38] of his judgment):

“The key feature here is that the decision to recommend Mrs Richard’s appointment was made by the (BOE)”

48. Once that premise is recognized and understood, we are satisfied that the grounds of complaint are all misconceived, premised as they are upon the erroneous assumption in the first place, that the BOE must have sought or purported to delegate its function to the interview panel.
49. In actuality, that is not at all what transpired. As explained by Mrs Trott, what transpired was a process in keeping with the PSC Regulations and the Recruitment Code, and consistent with that which is usually engaged for the recruitment of public officers. The criticism invites the Court to overlook the evidence of Carlita O’Brien as to the deliberations of the PSC and the import of the very detailed 17 August 2018 letter in which the PS explained to the PSC the recruitment process. The criticism also overlooks the deliberations of the BOE leading to their recommendation of Mrs Richards to the PSC and further, the reasons why Mrs Richards, with her otherwise strong qualifications and experience while not having a particular academic qualification, was regarded as highly suitable for appointment.

50. To complete the context, it is worthwhile setting out the relevant provisions of the Recruitment Code⁹. These are those identified by Mrs Trott in her role as the DRM, by the PS as the line manager and by the BOE in turn, in relying upon the findings of the interview panel:

“1.0 Introduction

This Recruitment Code is for the use of Managers and Officers directly involved with the recruitment and appointment of public officers to substantive positions within the Government of Bermuda Civil Service.

2.0 The Scope of the Recruitment Code.

This Code provides a step to step guide to the recruitment process for the appointments of public officers. The Code has been endorsed by the Public Service Commission, the Secretary to the Cabinet and the Bermuda Public Service Union.

3.0 General Principles of Recruitment to the Civil Service

The existing regulations concerning recruitment to the Civil Service are set out in the “Public Service Commission Regulations 2001”, “The Public service (Delegation of Powers) Regulations 2001” as amended from time to time and within the “Conditions of Employment and Code of Conduct” as amended from time to time

...

Additionally, Civil Service recruitment procedures must be consistent with employment legislation, including the following statutes [setting out an extensive list of relevant legislation], as may be amended from time to time.

...

5.0 Principles of Delegated Recruitment

..

5.1 Line Managers and/or Designated Recruitment Managers (DRMs) are responsible for:

- a. ensuring that the **best applicant** is selected, ensuring at all times that there is open and fair competition for all vacancies [original emphasis]*
- b. the confidentiality of personal information supplied by applicants*
- c. ensuring that the recruitment procedures are carried out in accordance with this Code and all relevant legislation.*

...

6.0 General Procedure for Filling Vacancies

The Department of Human Resources (“DHR”) will identify a Designated Recruitment Manager (“DRM”) who has the responsibility for ensuring that the appropriate procedures are followed.

7.0 Step 1- Recruitment Request

⁹ As updated in July 2018.

The Permanent Secretary, on behalf of the employing Department, is responsible for ensuring that there is an operational necessity for the substantive vacancy to be filled...

...

7.4 Selection of Interview Panel

The DRM selects the Interview Panel members in accordance with “9.4” of this Code. The panel is chaired by the DRM and the DRM leads the recruitment and selection process.

[Here, as the DRM Mrs Trott explains, it was thought best that the Chairman of the BOE should take the chair and at least one other member of the BOE should be on the Panel, given the particular statutory responsibility of the BOE to make the recommendation].

...

8.0 Step 2 – Shortlisting

Applicants are shortlisted based on the minimum education and experience requirements of the established post as outlined in the official Job Description.

8.1 Applicant Summary

The DRM will be responsible for identifying, on the Applicant Summary Form, those applicants that have been shortlisted for interview.

...

9.0 Step 3 – The Interview Process & General Considerations

...

The DRM is responsible for ensuring that the necessary arrangements are made for interviews, including scheduling of interviews, booking a suitable venue and distributing timely invitations to both shortlisted applicants and the Interview Panel.

...

9.4 Interview Panel

The Interview Panel is typically comprised of no less than (3) individuals. Only the Designated Recruitment Manager has to be certified in recruitment and selection, one panelist must be an independent assessor from outside of the employing Department and the remaining panelist should be the direct line manager...

Where the vacancy requires a specific technical skill or qualification, then one panelist should possess the specific skills or qualifications in order to assist in making an effective technical evaluation

[Mrs Trott explains that both the PS and Ms Severin are qualified and experienced educators].

...

While there is no maximum number of Interview Panelists; however, it is recommended that the Interview Panel does not exceed five (5) persons.

9.5 Interview Report Forms

Each Interview Panel member is responsible for completing his or her own interview question report for all interviewed applicants. Upon completion of the interviews the DRM will be responsible for recording the Interview Panel's decision for each candidate on the respective interview report form. The decision captures the results of the interview and the rationale for recommendation.

9.6 Interview Records

It is important that interview report forms are maintained for each vacancy file for both successful and unsuccessful applicants.

...

10.0 Step 4 – Recommendation for Appointment

Once the interview has been completed, the appropriate Head of Department forwards the recommendation letter to the linked (Human Resource Manager) or (Human Resource Officer) for review and submission to either the Public Service Commission for those posts that require His Excellency the Governor's approval (over PS25) or the Director of Human Resources (under PS25)."

[Hence, as the PS explains, the 17 August 2018 letter to the PSC notwithstanding the BOE's statutory duty to make the recommendation. This provision of the Code goes on to require that the complete package of documents from the recruitment process must accompany the submission to the PSC].

51. It will be immediately apparent that the Recruitment Code provides a modern, transparent, rational and accountable process for the recruitment of public officers. As regards the present dispute, it also provided a process which was readily given to adoption by the BOE - even while complying with Government policy and the PSC Regulations - for the purpose of information gathering in order to make its recommendation to the PSC and without the BOE having to delegate or abdicate its function.
52. This becomes even clearer when it is understood that the function of the BOE, that of making a recommendation to the PSC, was advisory in nature.

53. That this is how the BOE has consistently regarded its reliance on an interview panel in the recruitment process, is confirmed not only by the evidence of Mrs Trott and the PS as discussed above, but also by the evidence of Mr Wilson, the Acting Chairman of the BOE. This is explained at [17] of his first Affidavit:

“...I was a member of the panel that interviewed applicants for the position of Commissioner of Education in March 2016. I can confirm that, as with this current competition, none of the candidates that made it to the interview phase of the 2016 competition were interviewed directly by the Board. I can further confirm that as with the current competition, the Board did not appoint an interview panel to act as its agent for the interview phase of the competition. I do not perceive that the Education Act contemplates this function to be the role of the Board as a whole. The Board is empowered by section 4(1)(b) of the Education Act “to make recommendations to the Public Service Commission regarding the appointment of the Commissioner of Education”. The Act does not set out the method by which the Board should obtain information that it will consider in making its recommendation. Further, the Board as a body does not have the financial or administrative resources to post job advertisements, collect resumes, shortlist candidates, etc. There must be an administrative support body to support this process. Additionally, the Commissioner of Education is a civil service post and the recruitment of the post holder must be performed in alignment with the recruitment code of the Public Service and the PSC Regulations.”

54. Further confirmation of the BOE’s consistent reliance on the Government’s recruitment process is given by Mr Curtis Dickinson, a former Chairman of the BOE, at [13]-[15] of his Affidavit:

“13. For the sake of clarity, it should be understood that in the absence of an administrative mechanism for undertaking full recruitments, the Board uses the Government’s recruitment process for hiring civil servants and the HR services of the Department of Education. As guided by the Department’s HR Manager, the recruitment process allows flexibility in the use of different evaluation tools during the recruitment process

...

15. The Board of Education acknowledged and accepted the credibility of the Government’s recruitment process and used it for the three recruitments that I was involved in as Chair of the Board.”

55. That the process enabled the BOE fairly to consider the applications and arrive at an unimpeachable decision, is also confirmed by Dr Timothy Jackson, the current chairman of the BOE and a member at the relevant time in August 2018. As he states at [4] to [11]:

“4. I was invited to attend a special meeting of the Board on 14 August 14, 2018. Acting Board Chair Mr Wilson commenced the meeting by informing members that

he had been instructed by the Minister to call a special meeting to discuss the recruitment of the Commissioner of Education and consider the recommendation of the Interview Panel.

5. He then asked the Senior HR Manager from the Department of Education, Mrs Trott, to outline the Government's recruitment process and share the details of the interview process with Board members. Mrs Trott explained the Government's Recruitment process and the requirements that had to be followed from the advertising of the position to the interviewing of applicants for the post.

6. Mr Wilson gave Board members the opportunity to ask questions about the process, all the applicants who applied and the two applicants who were interviewed.

7. I observed that all Board members offered questions but recall quite a bit of time was spent on questions focusing on why qualified Bermudians were interviewed and not the qualified non-Bermudians who applied.

8. The Board members were able to question Mr Wilson, Ms Ru-Zelda Severin and the permanent secretary, Mrs Valerie Robinson-James.. as to the relative merits of the two candidates interviewed and gain an understanding of why the interview panel preferred Mrs Kalmar Richards over the applicant, Dr Gina Tucker. I recall there being vigorous questioning as to the process and the candidates' performances. In relation to the performances, I recall there being questions that were specific to the presentation and the answers given by the candidates to questions during the interview.

9. I believe that we had more than sufficient information in relation to the candidates' performances on which to make a recommendation to the PSC. It was quite clear that the feedback was quite consistent amongst the interview panel: Mrs Richards outperformed Dr Tucker in relation to both the presentation and the interview. I recall there being a specific issue in relation to Dr Tucker failing to submit her presentation in advance as required and not dealing with the specific issues that the candidates were asked to address.

10. I believe the process that was followed was fair. I did not consider it necessary for the Board to have carried out the interviews...I did not consider it necessary to meet the candidates personally in order to make a recommendation to the PSC. Frankly, had the Board members wanted to meet the candidates, we were given the opportunity to say so at the meeting. The board members are not shy about expressing their views and would not have hesitated to ask if they thought it was necessary. However, the fact is that based on the information we had, we were confident that we could recommend the best suited candidate out of the two that interviewed for the position of Commissioner of Education to the PSC.

11. ...when Mr Wilson asked Board members if we were ready to consider all the information provided about the recruitment process and the interviews, the Board members expressed that they were satisfied with the process and the information provided by the interview panel. Again, if the Board had not been provided with sufficient information or were dissatisfied with the process, we would have made that known.”

56. In concluding as we do (in agreement with Rihiluoma AJ in the Court below) that both the BOE and PSC acted well within the bounds of their statutory remits, we emphasize first of all, that there are no provisions which prescribe a procedure to be followed, either by the BOE or the PSC, for arriving at a recommendation for the appointment to the post of Commissioner.
57. In the case of the BOE, the provision in paragraph 12 of Schedule 1 to the Act speaks only to a situation where the BOE intends to delegate a function, not to a situation such as clearly developed here, where the BOE relied upon the interview panel to obtain information to inform their own making of the recommendation.
58. In the case of the PSC, as noted above, section 84 (6) of the Constitution leaves the procedure they might adopt as a matter for the PSC themselves to determine. And, as Carlita O’Brien confirms, the PSC, having received the 17 August 2018 letter, conveying not only the BOE’s recommendation but also that of the PS herself (the dual recommendation required by the PSC Regulations), considered the applications of Dr Tucker and Mrs Richards (and observed the positions of the other candidates as recorded on the Applicant Summary Form) before deciding to recommend Mrs Richards for the post.
59. We consider that Rihiluoma AJ correctly relied upon and adopted, as do we with the able assistance of Mr Horseman and Mr Duncan QC, the following persuasive dicta from the Court of Appeal for England and Wales in ***R (on the application of Reckless) v Kent Police Authority*** [2010] EWCA Civ 1277. There, the debate before the court, much as the debate here, was directed at the question whether there was power to “delegate” the function of appointment of a Police Authority, to a panel. The decision was delivered per Carnwath LJ (as he then was), on behalf of the majority:

“25. In my view, the arguments about statutory delegation as a formal concept have diverted attention from the real point. The fact that the decision has to be made by “the existing members” and cannot be delegated, tells nothing about the process which they are to adopt.

...

29. Apart from the specific provisions referred to above, the regulations do not purport to prescribe the means by which the members are to investigate the matter, or to reach their decision. For example, there is no specific requirement for all or any of them to interview any of the candidates, nor as to the manner of voting. In the absence of any prescribed rules, the procedure is a matter for them. All that is

necessary in law is that it should be fair, and reasonably adapted for the purpose of providing the members with the material necessary to make an informed decision as between the candidates on the statutory short-list, and enabling them to reach what can properly be termed a collective decision. There is no reason why, as part of that process, they should not ask a smaller group of members to assemble information, to conduct interviews for the purpose, and to make recommendations. That is not a delegation of their statutory function. It is simply an exercise of their implied power to take steps to obtain the information necessary to perform it”.

60. The principle that a decision-maker or tribunal is allowed to determine its own fair procedure in the absence of one prescribed by the applicable statute, is long settled in the case law.
61. At the highest level, the principle has been declared in general and resounding terms by the House of Lords, in a case where the question was whether the right to a hearing in person, should have been accorded before the responsible tribunal decided to impose penalties upon Liverpool City Councillors for wilful misconduct in failing to comply with a statutory duty to impose a valid rate: **Lloyd v McMahon** [1987] 1 A.C. 625; at 702 H -703 B per Lord Bridge:

“My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other frame-work in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.”

62. In this case, so far as the BOE was concerned, “*the power prescribed by statute*” which could have been applied, was the power to delegate prescribed by paragraph 12 of Schedule 1 to the Act. It follows, that in deciding not to delegate its function of recommending, but instead relying upon the interview panel to garner the necessary information, the relevant question, that which we are satisfied has been correctly answered in the affirmative by Riihiluoma AJ, became whether the BOE acted fairly in so doing.
63. With more specific application to circumstances like the present, the principle was earlier recognized by the Privy Council in 1963, in a case involving a similar question whether the delegation of the information gathering process was tantamount to the unlawful delegation of the decision itself. The following dicta appears from the judgment of the Judicial Committee delivered by Viscount Dilhorne, in **Jeffs v New Zealand Dairy Production and Marketing Board** [1967] 1 A.C 551, 558 E-559 A:

*“On the facts of this case it does not appear that the board asked the committee to hold the public hearing or delegated to the committee any part of its duties. Subject to the provisions of the Act and any regulations thereunder, the board can regulate its procedure in such manner as it thinks fit (1961 Act, s. 12 (10)). Whether the board heard the interested parties orally or by receiving written statements from them is, as Hamilton LJ said in **Rex v Local Government Board, Ex parte Arlidge** [1914] 1 K.B. 160., a matter of procedure. Equally, it would have been a matter of procedure if the board had appointed a person or persons to hear and receive evidence and submissions from interested parties for the purpose of informing the board of the evidence and submissions (see **Osgood v Nelson** (1872) L.R. 5 H.L. 636, H.L and **Rex v Local Government Board , Ex parte Arlidge** (above)). This procedure may be convenient when the credibility of witnesses is not involved, and if it had been followed in this case and as a result the board, before it reached its decision, was fully informed of the evidence given and the submissions made and had considered them, then it could not have been said that the board had not heard the interested parties and had acted contrary to the principles of natural justice. In some circumstances, it may suffice for the board to have before it and to consider an accurate summary of the relevant evidence and submissions if the summary adequately discloses the evidence and submissions to the board.”*

64. This dictum from **Jeffs** was appropriately followed and applied by Justice Simmons in the Supreme Court in **Dolding v Public Service Commission** [2004] Bda LR 15, in which Mr Dolding, (as does Dr Tucker in this case), complained of the use by the PSC of an interview panel, there comprising the Permanent Secretary for Marine and Port Services and others, for the selection of the most suitable candidate for appointment as Director of Marine and Port Services.
65. Justice Simmons, in reliance on the foregoing dictum from **Jeffs**, rejected the complaint in terms which in our view, were properly adopted and applied by Riihiluoma AJ as being applicable to the role of both the BOE and PSC in the present case:

“I have demonstrated above that under section 84 of the Constitution the PSC can order its own affairs. From the principles extracted from the above authority and cases it is clear that the wide discretion imposed on the PSC can in my view encompass the PSC relying on a Head of Department assisting in the interview portion of the selection process. There can be much merit in relying on an interview panel. Many competencies are required to be assessed in competition for a post. One cannot expect that the members of the PSC are personally equipped to assess every competency, as relevant competencies vary as greatly as do job descriptions.

Provided that the panel or Head of department supplies the PSC with a report containing the relevant assessments no criticism can be made of the process. The only caveat to this to be derived from legal principle is that it is vital that the PSC itself should make the decision about whom they will recommend to the Governor for appointment”.

66. We are satisfied that Riihiluoma AJ, was right to have concluded at [37] and [38] of his judgment, that, based upon the reasoning in *Reckless* and *Dolding* (both above), the interview panel process used in the BOE's and PSC's consideration and recommendation of Mrs Richards for appointment to the post of Commissioner comported with the principles identified in the case law. It was a fair process for garnering the necessary information for the rendering of their recommendations and did not constitute an improper delegation or abdication of the functions of either the BOE or PSC, nor a breach of either the Act or the PSC Regulations.

The Allegations of Bias

67. As discussed above, Mrs Robinson-James had distinct, important and independent responsibilities in the recruitment process in her capacities as PS and line manager for the post of Commissioner. The objection to her participation overlooks the fact that the evaluation being made was the dual one required of the BOE and of the PS herself who, as the relevant Head of Civil Service, settles the criteria for the job description and who, in putting forward the recommendation does so, not only on behalf of the BOE but also in her own right in keeping with PSC Regulation 10(2). The objection also overlooks the fact that the PS, in the 17 August 2018 letter to the PSC, cites not only PSC Regulation 18(2)¹⁰ but also section 2(d) of the Guidance for Appointments, which specifically allowed for Mrs Richards' experience to be taken into account instead of a minimal educational requirement. The reliance on Mrs Richards' experience as well as her other obvious qualifications and skills, far from indicating bias, is therefore quite justifiable by reference to verifiable objective criteria.
68. In sum, the PS's participation in the process was necessary and prescribed both by the PSC Regulations and the Recruitment Code and far from having introduced any element of irregularity was very important to the proper completion of the process.
69. Nor do we consider that there was anything about the history of her relationship with Dr Tucker, to suggest to a fair-minded and informed observer with full knowledge of their interactions cited by Dr Tucker and addressed by the PS, and of the circumstances of the recruitment exercise – see *Porter v McGill* [2001] UKHL 67 - that the PS's involvement meant that there was a real possibility that either the interview panel, the BOE or the PSC was tainted by bias against Dr Tucker. Riihiluoma AJ was correct in his rejection of this allegation as well.
70. In the result, the appeal is dismissed. Subject to any submissions being made to the contrary within seven days of the handing down of this judgment, the Appellant shall pay the Respondents' costs of the appeal, to be taxed at the standard rate if not agreed.

CLARKE P

71. I agree.

¹⁰ An obviously erroneous reference to PSC Regulation 18(1A).

GLOSTER JA

72. I also agree.