*Privy Council Appeal No. 7 of 1972*

**Paul Wallis Furnell** – – – – – – – – *Appellant*

*v.*

**The Whangarei High Schools Board** – – – – *Respondent*

FROM

**THE COURT OF APPEAL OF NEW ZEALAND**

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# JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH NOVEMBER 1972

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*Present at the Hearing:*

LORD REID
LORD MORRIS OF BORTH-Y-GEST
VISCOUNT DILHORNE
LORD SIMON OF GLAISDALE
LORD KILBRANDON

*Majority Judgment delivered by* LORD MORRIS OF BORTH-Y-GEST

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The Education Act 1964 (No. 135) is " an Act to consolidate and amend certain enactments of the General Assembly relating to the education of the people of New Zealand ". It is an Act of over 200 sections. The undoubted public importance of the subject matter is reflected in the range and the precision of what the Legislature has laid down. Part IV deals with the enrolment and attendance of pupils. Part V (comprising sections 131 to 165) deals with the appointment and employment of teachers. Part VI (comprising sections 166 to 182) deals with the Incorporation of Societies of Teachers and with appeals by teachers.

Included in the sections dealing with the appointment and employment of teachers are various sections which relate to offences. Section 157 concerns certain cases where a criminal charge is brought against a teacher. It is provided that if a teacher is charged with having committed any offence for which the maximum punishment is not less than two years' imprisonment (whether on indictment or on summary conviction) then he may be suspended by the School Board employing him. The Board would exercise its discretion. In such cases the decision whether he had or had not committed the alleged offence would of course be made in the appropriate criminal court and not by the Board. Likewise the Board would not decide as to the bringing of a charge. If the teacher were convicted, then (whether or not he had been suspended) he might either be peremptorily dismissed by the Board or if the Board so determined he might be deemed to have committed an offence under the Education Act and the Board might impose on him one or more of certain prescribed penalties. Further detailed provisions were made. The Board is empowered to transfer a teacher temporarily to other duties if of the opinion that pending the hearing of the charge the teacher should be removed from his position but need not be suspended (see sub-section (2)). A teacher may appeal to the Teachers Court of Appeal.

Sub-section (3) is as follows:

"(3) Any teacher who is dismissed or otherwise punished, or who is suspended, by the Board under this section may appeal to the Teachers Court of Appeal in accordance with the provisions of Part VI of this Act against the decision of the Board."

The sub-section, as also does sub-section (4), makes it clear that suspension is not to be regarded as a punishment. Sub-section (4) is as follows:

"(4) Where a teacher who is dismissed or otherwise punished or suspended under this section is subsequently acquitted of the charges made against him, he shall be reinstated in his position and shall receive his full salary in respect of the period for which he did not receive that salary; but, subject to any decision of the Teachers Court of Appeal, a teacher shall in no other case receive any salary or payment in respect of any period of suspension imposed under this section unless the Board otherwise directs."

The next section (s. 158) relates not to conduct which might constitute a serious criminal offence but to conduct which, within the framework of the Education Act, is to be regarded as constituting a disciplinary offence. The section is as follows:

"158. Disciplinary offences—(1) Every teacher commits an offence against this section who—

(*a*) By any act or omission fails to comply with the requirements of this Act:

(*b*) In the course of his duties disobeys, disregards, or makes wilful default in carrying out any lawful order or instruction given by any person or Board having authority to give such order or instruction:

(*c*) Is negligent, careless, or indolent in the discharge of his duties:

(*d*) Is grossly inefficient or incompetent in the discharge of his professional duties:

(*e*) Improperly uses property, stores, or equipment for the time being in his official custody or under his control or fails to take reasonable care of any such property or equipment:

(*f*) Absents himself from his duties without leave or valid excuse:

(*g*) Is guilty of conduct in his capacity as a teacher or otherwise which is unbecoming to a member of the teaching service or shows his unfitness to remain in his present position or in the service.

(2) A teacher who is alleged to have committed an offence under this section shall be dealt with in accordance with section 159 of this Act."

The Act proceeds with precision and elaborate detail to prescribe the steps which are to be taken if it is alleged that an offence under s. 158 has been committed. In that event (see s. 159(1)) the Board "shall forthwith advise the teacher in writing of the full details of the charge against him" and then the later provisions of the section "shall apply". By the next sub-section the teacher concerned "shall . . . be required to state in writing within a reasonable time to be specified in the notice whether he admits or denies the truth of the charge". Then if the Board decide to proceed with the charge they may, pending its hearing and determination, either suspend or transfer the teacher. The charge is then referred for investigation to a committee. The committee consists of not more than three members appointed by the Board and one member appointed by the teachers' organisation (as defined). Such committee

is endowed with the powers and authority (to summon witnesses and receive evidence) which are conferred by the Commissions of Inquiry Act 1908 upon Commissions of Inquiry. At the investigation the teacher is entitled to be represented by counsel or agent. Then the committee, after hearing the case, reports to the Board and sends notes of the evidence. The teacher is given a copy of the report and of the notes of evidence. Then the Board after considering the reports relating to the charge, the reply or explanation of the teacher, and the report and notes of evidence of the committee decide whether they are satisfied as to the truth of the charge. If they are then they may caution or reprimand the teacher and may in addition impose one of the following penalties: transfer to another position (even one involving a lower salary) or peremptory dismissal (see sub-section (5)). If a teacher has been suspended and if the charge made against him is sustained he is not entitled to receive any salary or payment in respect of the suspension period except with the express approval of the Board (see sub-section (8)). If charges are not proved a teacher is allowed legal costs (see sub-section (10)). A teacher who is aggrieved by any finding of the Board or any penalty it imposes on him under s. 159 may appeal to the Teachers Court of Appeal.

The provisions thus described and summarised prescribed comprehensively the procedure which had to be followed in cases where an " offence " under s. 158 was alleged. The present litigation relates to such alleged offences but at the relevant time other provisions even more comprehensive and detailed had in reference to certain teachers taken the place of those in s. 159 above referred to. This came about as the result of s. 7 of the Education Amendment Act of 1969 (No. 66). That section provides as follows:

> " 7. Procedure for alleged offences by certain teachers—The principal Act is hereby amended by inserting, after section 161, the following section:
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> ' 161A. On the advice of the Minister, given on the joint recommendation of the organisation of teachers representing the majority of the teachers employed in any class or classes of schools or in specified positions and of the association or associations representing the Boards employing the teachers in the schools or positions, the Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes in respect of the teachers so employed:
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> (*a*) Prescribing the procedure to be adopted for the investigation, hearing, and determination of the charge in any case where it is alleged that a teacher so employed has committed an offence against section 158 of this Act:
>
> (*b*) Prescribing the penalties which may be imposed and the rights of appeal against those penalties where, under the procedure so prescribed for the investigation, hearing, and determination of a charge against a teacher, the charge against a teacher so employed is held to have been proved:
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> (*c*) Prescribing to what extent and with what modifications the provisions of Part VI of this Act relating to appeals by teachers shall apply in the case of any right of appeal by a teacher for which provision is made under paragraph (*b*) of this section:
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> (*d*) Declaring that the provisions of section 159 of this Act shall not apply to any teacher so employed.' "

Pursuant to the power so given the Secondary and Technical Institute Teachers Disciplinary Regulations 1969 were made on 15th December 1969. It is important to have in mind that they were made

not only on the advice of the Minister but on the joint recommendation of those representing teachers and of those representing Boards employing teachers. The Regulations define (see Reg. 3) the teachers to whom they apply. It is not in doubt that the present appellant was one. By Regulation 12 it is provided that s. 159 of the Education Act shall not apply to any teacher to whom the regulations apply.

It is clear therefore that these substituted regulations prescribe "the procedure to be adopted for the investigation, hearing and determination" of any charge that the appellant committed an offence under s. 158. It is reasonable to suppose that the new elaborate procedure which it became obligatory to adopt was that which was jointly evolved by the Minister and those representing teachers and Boards as being procedure which for all concerned (the public, the employing Boards and the teachers employed) was considered to be fair.

The new regulations lay down procedure which much differs from that laid down by s. 159. Disciplinary action by the Board is curtailed. Their powers are restricted. If a charge of an offence under s. 158 is made and if it is dealt with by the Board their powers are limited (see Regulation 6). In cases not dealt with by the Board (with their limited powers) the charge is referred to a body called the Teachers' Disciplinary Board and that body is comprised as set out in Regulation 7. But before a matter can even be referred to this body (which alone can impose the severer penalties provided by Regulation 10) there must be the interposition of the Director-General of Education. But furthermore and apart from all this there is a provision for a preliminary investigation of a complaint. Whereas under s. 159 sub-section (1) when it is alleged that any teacher has committed an offence against s. 158 the Board must forthwith advise the teacher in writing of the full details of the charge and require him to state in writing whether he admits or denies the truth of the charge, in the new regulations the procedure is different. The following provision is contained in Regulation 4:

> "4. Preliminary investigation of complaint—(1) Where a Board receives a complaint against a teacher, it shall, before taking any action in accordance with regulation 5 of these regulations, either appoint a person (who may be member of the Board or any other person except an employee of the Board) to investigate the complaint or set up a sub-committee (which shall include a representative of the teachers' organisation) for that purpose.
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> (2) The person so appointed or the subcommittee set up for the purpose shall undertake the investigation of the complaint at such time and place as the Board may determine, and shall, on completing the investigation, forward a report in writing to the Board which shall include any recommendation which the person or the subcommittee, as the case may be, thinks fit to make."

This provision operates in the interests of teachers and may be a valuable protection for them. A complaint may be found to lack substance, or to be the product of idle tittle-tattle, or to be unrelated to any possible charge of an "offence" against s. 158, or otherwise to be such as not to warrant any action being taken. In such cases the result would be that a complaint received by a Board need not involve even the making of a charge. The Board also is greatly assisted. They have a responsibility both to pupils and parents and they cannot afford lightly to ignore a complaint about a teacher that they receive. They will however not wish to take any action if a complaint can be regarded as frivolous or trifling. Nor would they wish that such a complaint should come to the knowledge of the teacher concerned. The screening process may however lead to the view, which may be embodied in a report, that the teacher may have

committed an offence under s. 158, e.g., that he is grossly inefficient or incompetent as a teacher. But whatever view is taken of the value of the process of having a preliminary investigation of a complaint, what is of great significance is that in the new regulations, which are lengthy and detailed and in which, as will be seen, there are precise provisions as to the times when and the way in which a teacher can deal with any matter raised, there is no provision requiring any communication to or enquiry of a teacher if a preliminary investigation of a complaint is being made. This fact of itself throws light on the nature of the preliminary investigation and strongly suggests that the intention was that it should be the means of eliminating complaints which need never mature into charges.

Regulation 5 lays down the procedure which the Board is to follow if after receiving what is called a " report on a complaint " it thinks that a teacher " may " have committed an offence. The Regulation is in the following terms:

> " 5. Procedure for alleged offences—(1) Where a Board, after receiving a report on a complaint against a teacher in accordance with regulation 4 of these regulations, has reason to believe that the teacher may have committed an offence to which section 158 of the Act applies, the Board shall forthwith advise the teacher in writing of the full details of the alleged offence, and may then suspend the teacher pending the determination of the matter in accordance with the following provisions of these regulations.
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> (2) The teacher concerned shall, by notice in writing given by the Board and delivered to the teacher or sent to him by post in a registered letter addressed to him at his usual or last known place of residence, be required, within a reasonable time to be specified in the notice, to state in writing whether he admits or denies the truth of the charge, and to forward any explanation which he wishes to give relating to the charge.
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> (3) The Board shall, in any notice forwarded to a teacher in accordance with subclause (2) of this regulation, inform the teacher that, if he so wishes, he may make a statement in person to the Board concerning the alleged offence and that, on informing the Board accordingly, he shall be heard at a time to be specified by the Board.
>
> (4) The Board, after considering any statement or explanation supplied by the teacher in accordance with subclause (2) of this regulation and any statement made in person by him in accordance with subclause (3) of this regulation, shall do one of the following:
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> (*a*) Decide that no further action is to be taken in relation to the charge, in which case the teacher shall, if he has been suspended, be reinstated in his position and receive his full salary for the period of suspension:
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> (*b*) Decide that the offence with which the teacher is charged shall be dealt with under regulation 6 of these regulations, in which case the provisions of that regulation shall apply accordingly:
>
> (*c*) Decide that the charge should be referred to the Director-General for consideration as to whether or not it should be referred to the Teachers' Disciplinary Board for hearing and determination, in which case the Board shall then forward to the Director-General all particulars relating to the charge.
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> (5) The Director-General, on receiving the particulars of a charge against a teacher, including the findings of any preliminary investigation undertaken in accordance with regulation 4 of these regulations, shall, after considering those particulars, do one of the following:

(*a*) Direct that no further action is to be taken in relation to the charge, in which case the teacher shall, if he has been suspended, be reinstated in his position and receive his full salary for the period of suspension:

(*b*) Require that the offence with which the teacher is charged shall be dealt with under regulation 6 of these regulations, in which case the Board shall so deal with the matter and the provisions of that regulation shall apply accordingly:

(*c*) Refer the matter to the Teachers' Disciplinary Board for hearing and determination."

The scheme of the regulation is that if, following the receipt of a complaint, and after there has been a preliminary look at it either by a single person or by a sub-committee who will report on it, the Board think that a teacher "may" have committed an offence they then write to the teacher and give him full details. The Board then has a discretion as to whether to suspend the teacher. But if they do, that can only be "pending the determination of the matter". Such determination will be according to the procedure laid down. Before there is any such "determination" a teacher will be heard. The Regulations draw a distinction between a complaint and a charge. A complaint may be stillborn, but once there is a charge the correct course of procedure is prescribed. After being notified of the charge of an alleged offence the teacher must do one thing and may do others. He must in writing say whether he admits or denies the charge. He may forward any explanation that he wishes to give. Furthermore he may appear personally before the Board and make a statement. The Board will then consider everything that the teacher has wished to say and will adopt one of three courses. They may decide that no further action need be taken. If the teacher had not been suspended he would just continue his work, which would not have been interrupted. If the teacher had been suspended he would be reinstated and his salary would be paid him for the suspension period. Another course open to the Board would be to deal with the matter themselves within the limited and restricted powers given them by Regulation 6. Under that Regulation if they are "satisfied" that the alleged offence has been proved all that they can do is to caution the teacher or reprimand him or censure him and if the offence which is proved to their satisfaction is that the teacher absented himself from his duties without leave or valid excuse the Board may order that he do not receive his salary for a part or all of the period during which he was so absent. Another course open to the Board (a course that would probably be adopted in the more serious cases) is to refer the charge to the Director-General for him to consider whether or not the charge should be referred to the Teachers' Disciplinary Board "for hearing and determination". Even if that course is adopted it does not follow that the charge will go to the Teachers' Disciplinary Board: the Director-General may direct that no further action be taken or he may require the Board to deal with the matter under Regulation 6.

Regulations 7, 8, 9 and 10 deal in great detail with the hearing and determination of a charge which is referred to the Teachers' Disciplinary Board. That Board has as its Chairman a barrister or solicitor of not less than seven years' practice. He is appointed by the Minister of Education. One member is appointed by a teachers' organisation. One member is appointed by the "Boards' Association". The Teachers' Disciplinary Board "for the purposes of the investigation of any charge referred to it for hearing and determination" has the same powers and authority to summon witnesses and receive evidence as are conferred upon Commissions of Inquiry by the Commissions of Inquiry Act 1908. The contrast is very marked between the preliminary investigation of a complaint and the investigation of a charge for the purposes of a hearing and determination.

Before the Teachers' Disciplinary Board the Director-General (or someone whom he appoints to act on his behalf) presents the case against a teacher. The teacher may present his own case or be represented by counsel or agent (Regulation 8 (2)). The procedure to be followed is laid down in great detail (see Regulation 8 (3)). The Teachers' Disciplinary Board hears the teacher or his counsel or agent and any evidence he may wish to adduce but in the first place the case against the teacher is heard and any evidence that may be adduced. Evidence in rebuttal may be adduced by either party. After the evidence the Director-General may sum up and the teacher or his counsel or agent may sum up after that. Then if the Teachers' Disciplinary Board " is satisfied from the evidence adduced at that hearing that the charge has been proved " it may, subject to a right of appeal which the teacher is given by the regulations, impose one of certain prescribed penalties. These are set out in Regulation 10. There may be a caution or a reprimand or censure. There may be a deduction from salary to a limited extent. There may be one of the two penalties (a direction to transfer or peremptory dismissal) which under s. 159 (but not under the substituted regulations) can be imposed by the Board governing the school. There is a special provision relating to cases where the offence charged is one of having been absent from duty without leave or valid excuse. If the Teachers' Disciplinary Board holds that a charge has not been proved the teacher is reinstated in his position and gets his full salary for any period for which he did not receive it: the reasonable legal and other costs which he has incurred and as determined by the Disciplinary Board are paid to him by the Board governing his school. In other cases (other than where it is held that the charge is not proved) a teacher does not receive salary or payment in respect of a suspension period unless the Teachers' Disciplinary Board expressly determines otherwise. But whenever a charge is referred to the Teachers' Disciplinary Board a teacher is paid the actual and reasonable expenses which he incurs in attending the hearing of the charge.

Whether a charge has been dealt with under Regulation 6 by the School Board or whether the charge has been heard by the Teachers' Disciplinary Board a teacher has a right of appeal from any finding that an offence has been proved and furthermore a right of appeal from any penalty imposed upon him by either body. (See Regulation 11.) The appeal is to the Teachers' Court of Appeal which is constituted as set out in the Act and which has a Magistrate as its chairman. The appeal is by way of re-hearing and the Court must hear or re-hear all evidence that either party wishes to present: an appellant may himself appear or be represented by some other person. Sections 174 to 182 contain provisions in reference to the appeals and by s. 175 any teacher who has received a notice of dismissal, suspension, or transfer, or of any other decision in respect of which under the Act he is entitled to appeal may within a stated time appeal to the Teachers' Court of Appeal.

With this outline review of the multi-tiered and elaborate code which governs and protects the interests of teachers the facts may now be stated which have culminated in this appeal. At the relevant time the appellant was a school teacher at Kamo High School near Whangarei. He had been employed as a teacher at that school since 1968. After graduating in 1957 (he is a Master of Arts of Cambridge University) and after teaching in the United Kingdom for two years he went to New Zealand in 1960: he was engaged by the New Zealand government to teach. For three years he taught at Gisborne Boys High School: he advanced in his teacher gradings from Grade I to Grade II. Then for four years he taught at Waikohu College at Te Karaka near Gisborne: he advanced in grading to Grade III. At Kamo High School his grading became B12. In the year 1969 certain difficulties arose. The Headmaster considered

that he was failing to keep order in school. The Headmaster suggested to the appellant that he should make application for teaching positions elsewhere. The appellant did so but without success. In the following year (1970) complaint was made about the appellant's conduct and the procedure laid down in the Regulations was followed. A sub-committee was set up under the Regulations and the committee investigated the complaint. A letter was then sent to the appellant and he was advised in regard to his obligations and rights (see Regulation 5 (1) (2) and (3) as above set out). The letter was in the following terms:

WHANGAREI HIGH
SCHOOLS BOARD
35 Bank Street,
Whangarei
20th March 1970.

" Dear Mr. Furnell,

A complaint has been made about your conduct at Kamo High School and has been investigated by a Committee set up under the Secondary and Technical Institute Teachers Disciplinary Regulations 1969.

You are charged with various offences under Section 158 of the Education Act 1964 in that:

1. You have been grossly inefficient or incompetent in the discharge of your professional duties having:

(*a*) Failed consistently to maintain reasonable order and discipline in your classroom.

(*b*) Struck children on several occasions.

(*c*) Allowed a state of uproar to arise and continue in your classroom to such an extent that work in neighbouring classrooms has been disrupted.

2. You have failed to take reasonable care of school equipment in that you have allowed the furniture and cupboards in your room to be grossly defaced.

3. In the course of your duties you have disobeyed, disregarded or made wilful default in carrying out instructions given by a person having authority to give them, in that you have failed to carry out the following school administrative duties:

(*a*) In that your class attendance register was not marked from December 1st to 11th 1969.

(*b*) You have not taken a normal part in teacher activity in that you did not enter the staffroom for long intervals to hear notices and instructions to staff.

4. By virtue of the occurrences set out above you are guilty of conduct in your capacity as a teacher which shows your unfitness to remain in your present position.

You are accordingly suspended from your duties at Kamo High School as from today's date March 20th 1970 pending further determination of these charges.

You are required by not later than 4 p.m. on Wednesday April 8th to state in writing whether you admit or deny the truth of these charges and to forward by this date and time any explanation relative to these charges which you may wish to give.

You may if you so wish in addition to any such written statement make a statement in person to the Board concerning the alleged offences.

If you wish to make any such statement you must advise the Board Secretary by not later than 4 p.m. on April 8th of your wish, and an interview will be arranged for you.

We recommend that you obtain legal assistance in this matter.

Yours faithfully,

C. A. REED
Chairman"

The appellant consulted solicitors, who wrote to the Chairman of the School Board on 25th March 1970. In addition to a denial of the charges or of guilt of any offence under s. 158 a number of points were taken. It was set out that the appellant had received no prior indication of any investigation or of any charge: that no investigation by the committee could properly take place without that committee at least obtaining some explanation from the appellant: that further particulars as requested should be provided and that without them explanation of the charges was not possible: that having lacked particularity the charges were null and void: that the Regulations were completely *ultra vires* with the consequence that the Board could not validly proceed against the appellant pursuant to them: that there had been a denial of natural justice: and that all legal rights were reserved. It was also said that if, but only if, the appellant could be represented by Counsel would he make a statement in person as laid down by Regulation 5 (3). Otherwise he would rely on a written explanation pursuant to Regulation 5 (2).

There followed a lengthy letter in reply from the Chairman of the School Board (dated 6th April 1970) giving full details of the charges. The first part of the letter related to the charge that the appellant was grossly inefficient or incompetent in discharging his duties in that he had consistently failed to maintain order and discipline in his classroom. In relation to this charge some fifteen items were set out (ranging in date from March 1969 to March 1970) alleging lack of order and control, alleging various occasions when pupils complained that they were hampered in their work by the failure of the appellant to keep order, alleging occasions when the Principal had to enter the appellant's class to restore order, alleging complaint that noise from the appellant's classroom was disturbing the teaching in other rooms, and alleging occasions when the Principal had interviewed the appellant and suggested that he should leave. Other parts of the letter set out a number of items in relation to the charges under 1 (*b*), 2, 3 and 4 contained in the letter of 20th March.

On 20th April 1970 the appellant's solicitors sent a lengthy document to the Chairman as the explanation of the appellant pursuant to Regulation 5 (2) and the solicitors (while reserving all legal rights) stated that as the appellant was not allowed to make a statement through his solicitor before the Board the appellant relied on the explanation. In general the appellant denied each and every offence, pointed out that fourth formers were most difficult to control and contended that the various incidents set out in the letter of 6th April were of a comparatively trivial nature.

Pursuant to Regulation 5 (4) (*c*) the Board decided to refer the charges to the Director-General of Education. He in turn decided under Regulation 5 (5) (*c*) to refer the charges to the Teachers' Disciplinary Board "for hearing and determination". He notified the appellant to that effect by letter dated 29th May 1970. The hearing was fixed for 30th June 1970 and the appellant was reminded that pursuant to Regulation 8 (2) he could either present his own case or be represented at the hearing by counsel or agent.

If the hearing had taken place and if the charges had not been proved the appellant would have been re-instated and would have received arrears of salary and would have received his costs and expenses. But the hearing never took place. The appellant chose litigation rather than a hearing. First, he brought proceedings both against the High Schools Board and the members of the Teachers' Disciplinary Board. He alleged that there was a denial of natural justice on the part of the investigating sub-committee that had been appointed and alleged that as a consequence his suspension by the Board was unlawful. He claimed an injunction directed to the High Schools Board " removing the suspension and reinstating him to teaching duties ". Against the members of the Teachers' Disciplinary Board he claimed a writ of prohibition to prohibit them from hearing and determining the charges. Secondly, some two months later, *i.e.* 2nd September 1970, he filed a motion for a writ of *certiorari* against the High Schools Board to remove the decisions of the Board into the Supreme Court for the purpose of quashing them. Complaint was made that the appellant had not been given an opportunity to make an explanation to the investigating sub-committee and had not seen or had the opportunity of replying to or commenting on their report.

Both sets of proceedings were heard together by Speight J. on 15th September 1970. He delivered judgment on 22nd October. In the first he gave an injunction against the High Schools Board requiring them to remove the suspension and a writ against the Teachers' Disciplinary Board prohibiting them from hearing the charges. In the second he ordered that a writ of *certiorari* issue " removing all decisions of the Board subsequent to receiving the report of the investigating committee into this Court and quashing the same ". Speight J. stated that his orders only related to the proceedings " so far taken ", with the result that the original complaints were kept alive for such proper proceedings as the High Schools Board might desire to take.

The High Schools Board appealed. It was agreed that pending the hearing of the appeal the appellant should not return to the School but he was paid his salary from the date of the judgment of Speight J. It was so paid until 1st February 1971. The appeal came on for hearing on 10th and 11th February 1971 but before those dates, *i.e.* on 1st February 1971, the appellant resigned from the employment of the Board. The Court of Appeal delivered judgment on 19th March 1971 and allowed the appeal. From that judgment the appellant now appeals.

Before considering the main issues which are raised two matters call for mention. Firstly, from the recital of the facts it will have been seen that " full details " were not set out in the letter of 20th March 1970 though they were set out in the letter of 6th April 1970. In the proceedings before Speight J. this matter was relied upon by the appellant as involving that the respondents had acted in breach of the Regulations: but the contention was not pressed in the Court of Appeal, and is not raised in the appellant's printed case. Secondly, on the hearing of this appeal a point was raised to the effect that as the appellant had not known that a sub-committee had been set up under Regulation 4 it could not have included " a representative of the teachers' organisation ". This point would involve partly some questions of fact and partly an issue as to the meaning in Regulation 2 of the words " ' Teachers' organisation,' in relation to any teacher, means the New Zealand Post-Primary Teachers' Association or the Association of Teachers in Technical Institutes, whichever the teacher may nominate ". As this point had not previously been raised either before Speight J. or in the Court of Appeal, and had not either as to fact or law been considered, it was clear that it could not now be entertained. The appeal proceeded on the assumption that the sub-committee was properly constituted and that therefore it included a representative of the " Teachers' organisation ".

As the appellant resigned on 1st February 1971 it is necessary to state what order he now seeks. As he is no longer in the employment of the Board it was said that the revival of the order of injunction was inappropriate and the writ of prohibition against the Teachers' Disciplinary Board was not sought: what is sought however is the restoration of the issue of a writ of *certiorari* so as to quash all decisions of the Board subsequent to receiving the report of the sub-committee. It will be observed that the point originally taken in correspondence that the Regulations were *ultra vires* was not thereafter pursued.

The main contention advanced on behalf of the appellant is that the so called rules of natural justice were at some stage not observed. It becomes necessary to analyse this complaint in order to ascertain against whom it is made. In argument it was the sub-committee that was much criticised. But in the result it was the action of the Board that was mainly criticised. The criticism related to the decision to suspend. If there had been no suspension it is not clear whether criticism of the procedure followed would have been made.

Speight J. in his judgment pointed to the difference between the committee designated by s. 159 to investigate a charge and the sub-committee which may be appointed under Regulation 4. He said (correctly as their Lordships think)—" Under the 1969 Regulations the situation is quite different. Presumably to provide additional protection for the teachers, the committee or the individual is required only to investigate the complaint and not to determine it. Presumably the purpose of such an investigation is to ensure that the complaint is not trivial, malicious or, in some other way, demonstrably ill founded." The main reasoning of Speight J. was that the Board ought not to have suspended the appellant before his point of view was ascertained: Speight J. regarded suspension as a punishment even though it might be one of only temporary duration. His view was that the Board had a duty to satisfy themselves that they had ascertained both sides of the matter in a preliminary way before deciding on suspension. In one passage in his judgment he said that where it is contemplated that suspension will take place " this should not be done unless under Regulation 4 the ' investigation of the complaint ' has included some reference to the teacher of the nature of the allegations made against him and a statement from him giving his version of the event if he wishes ". This suggests that the sub-committee in the present case erred in not interviewing the appellant. In a later passage the learned judge said: " I wish to make it clear that in the present case invalidity only attaches to such proceedings as took place in accordance with the Board's letter of 20th March 1970 and subsequent actions ". Even if there is some ambiguity as to whether the sub-committee (who were not parties and were not heard) were being condemned, the main conclusion was that if the Board had not had the view of the appellant made known to them in a report of the sub-committee as a result of an interview of the appellant by the sub-committee they (the Board) should not have suspended the appellant until they themselves had had his comments in regard to the charges.

On behalf of the appellant it was contended that he had had a right to be heard by the sub-committee: alternatively it was contended that if he was not heard by the sub-committee he should have been heard by the Board if they contemplated suspending him: the submission was not developed that he had a right to be heard both by the sub-committee and by the Board before any decision to suspend was made. The contentions as to the nature of his right to be heard by the sub-committee were somewhat imprecise: it was contended that he should have heard the evidence if any received by the sub-committee and should have been allowed to put questions informally (without his questioning developing into a formal cross-examination) and been allowed to give his version of the matters of complaint and to call witnesses if he so wished.

In support of these claims the rules of natural justice were invoked. It becomes necessary therefore to consider whether the detailed and elaborate code which prescribes the procedure to be followed when there is a suggestion of an offence under s. 158 is a code which gives scope for unfairness and whether in its operation the Court in the interests of fairness must supplement the written provisions. In the present case do the well-known words of Byles J. in *Cooper v. Wandsworth Board of Works* ( (1863) 14 C.B. (N.S) 180) apply, viz.—" Although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature "? Or is the code one that has been carefully and deliberately drafted so as to prescribe procedure which is fair and appropriate? In whatever way the status of the appellant as a teacher is in law to be defined he agreed to serve under the conditions laid down in the Regulations and unless some provisions are to be read into them or are incorporated in them it is clear that they were faithfully followed. It is not lightly to be affirmed that a regulation that has the force of law is unfair when it has been made on the advice of the responsible Minister and on the joint recommendation of organisations representing teachers employed and those employing. Nor is it the function of the Court to re-draft the code. As was said in *Brettingham-Moore v. Municipality of St. Leonards* (1969) 121 C.L.R. 509, 524—" The legislature has addressed itself to the very question and it is not for the Court to amend the statute by engrafting upon it some provision which the Court might think more consonant with a complete opportunity for an aggrieved person to present his views and to support them by evidentiary material ".

It has often been pointed out that the conceptions which are indicated when natural justice is invoked or referred to are not comprised within and are not to be confined within certain hard and fast and rigid rules. (See the speeches in *Wiseman v. Borneman* [1971] A.C. 297). Natural justice is but fairness writ large and juridically. It has been described as " fair play in action ". Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker L.J. in *Russell v. Duke of Norfolk* [1949] 1 A.E.R. 109, 118 the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration.

The significance of what was said by Tucker L.J. is illustrated when it is seen how divergent have been the situations in certain reported cases and how different they were from those in the present case. Thus *R. v. Gaming Board for Great Britain ex parte Benaim* [1970] 2 A.E.R. 528 concerned the situation of a Gaming Board who have to make inquiries about an intending applicant for a licence and who receive information from various sources. A certificate of consent from the Gaming Board is necessary before there can be an application to magistrates for a licence. What procedure therefore should the Gaming Board follow to avoid the risk that a certificate of consent may be refused for reasons which the would-be applicant could displace if he knew of them? The situation in *Re H.K. an infant* [1967] 2 Q.B. 617 concerned the opportunity which should be given to an immigrant to satisfy the Immigration Officer of certain matters laid down by statute. The case of *Re Pergamon Press Ltd.* [1970] 3 A.E.R. 535 related to a Board of Trade investigation under the Companies Act and to the duties of inspectors. Their role differed materially from that of the sub-committee in the present case. Their function was inquisitorial and they could if they thought fit make findings of fact. They were under a duty to report to the Board of Trade and were obliged to send a copy of their report to the Company concerned. In the result the report might be made public and on the basis of it

proceedings against a Director might be instituted. Lord Denning said "The inspectors can obtain information in any way which they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him." By comparison the sub-committee in cases such as the present one do not either condemn or criticise. They merely report in regard to a complaint and if at a later date there follows a charge the code lays down specifically when and how the teacher has opportunity to deal with the charge. While (bearing in mind what Tucker L. J. said) no complete or precise analogy with the situation in the present case is to be sought, the words of Lord Reid in *Wiseman v. Borneman* (*supra*) are apposite:—"Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a *prima facie* case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him."

In *Pearlberg v. Varty* [1972] 1 W.L.R. 534 there was an application to a general commissioner for leave to raise certain assessments and it was held, on a construction of s. 6 of the Income Tax Management Act 1964, that the application for leave was intended to be *ex parte* and that the function of the commissioner in deciding whether or not to grant leave was an administrative one and that natural justice did not require that the taxpayer should have the right to be heard. In his speech the Lord Chancellor, Lord Hailsham of Saint Marylebone, said—"It is true, of course, that the Courts will lean heavily against any construction of a statute which would be manifestly unfair. But they have no power to amend or supplement the language of a statute merely because on one view of the matter a subject feels himself entitled to a larger degree of say in the making of a decision than the statute accords him. Still less is it the functioning of the Courts to form first a judgment on the fairness of an Act of Parliament and then to amend or supplement it with new provisions so as to make it conform to that judgment." Viscount Dilhorne having cited what Lord Reid said (at p. 308) in *Wiseman v. Borneman* (*supra*) said at p. 545—"I would only emphasise that one should not start by assuming that what Parliament has done in the lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown. And Parliament thought it fair that the person affected should have the right to be heard where leave was sought under s. 51 of the Finance Act 1960 and have the right to make representations to the tribunal under s. 28 of that Act. The omission so to provide in s. 6 of the Income Tax Management Act 1964 cannot, as I have said, in my opinion be regarded as anything other than deliberate and, if deliberate, it should be assumed that Parliament did not think that the requirements of fairness made it advisable to provide any such rights for the person affected. If this was the view of Parliament, it would require a very strong case to justify the addition to the statute of requirements to meet one's own opinion of fairness." Lord Pearson (at p. 547) in reference to the principles of natural justice said: "A tribunal to whom judicial or quasi-judicial functions are entrusted is held to be required to apply those principles in performing those functions unless there is a provision to the contrary. But where some person or body is entrusted by Parliament with administrative or executive functions there is no presumption that compliance with the principles of natural justice is required, although as 'Parliament is not to be presumed to act unfairly', the Courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness. Fairness, however, does not necessarily require a plurality of hearings or representations and counter-representations."

The whole scheme of the Regulations and of the provisions of the Education Act points to the conclusion that the task of the person or sub-committee appointed under Regulation 4 is to give consideration to a complaint with a view to presenting a report to the Board (*i.e.* the governing body of the school in question). Their finding may be that the complaint could be ignored as being mischievous or irresponsible. Their finding on the other hand may be that the complaint might have substance and could not be ignored. The absence of any provision relating to making a communication to the teacher concerned must have been deliberate since the Regulations proceed with great particularity to specify when and how communication should be made to him and when and how he should make response. The procedure for the preliminary investigation of a complaint before ever there is a charge is procedure which must have been devised as an additional safeguard for teachers. If those investigating a complaint thought in any particular circumstances that it would be desirable for them to ask a teacher to see them with a view to seeking his explanation of some matter it would be open to them to take that course. There might be some relatively straightforward issue capable of explanation or some situation which may have resulted from a misunderstanding. Those investigating in the exercise of their discretion would do what was reasonable. But if they thought that a complaint (as for example a complaint of sustained and continuing inefficiency) could not be so simply disposed of and could really only be dealt with under the subsequent procedure as laid down there would be nothing unfair in their reporting to such effect without communicating with the teacher concerned. Certainly in the present case there are no grounds for holding that the sub-committee acted unfairly. When the nature of the detailed and formulated charges in this case and of the lengthy and detailed comments of the appellant are considered it seems reasonably clear that matters could not possibly have been disposed of without some kind of inquiry extending very much beyond any form of a preliminary investigation of complaints.

There is a marked contrast in the Regulations between a complaint and a charge. So also is there a contrast between investigating a complaint before ever there is a charge and a " determination of the matter " (see Regulation 5 (1) ), which is the investigation of a charge. One of the principles of natural justice is that a man should not be condemned unheard. But the sub-committee do not condemn. Nor do they criticise.

In the present case the terms of the report of the sub-committee are not known. On behalf of the appellant it was first suggested and in his written case it is claimed that he had been entitled to see the report: that suggestion was not pursued. There is neither condemnation nor criticism of a person if it is found that there are matters calling for determination under a scheme of procedure which amply provides (1) that before there can be any adverse finding a person must know what charge is alleged and (2) must have opportunity to answer the charge and (3) that before those dealing with the charge can condemn or punish they must be satisfied of guilt and (4) that their decision is subject to an appeal by way of re-hearing. In their Lordships' view the scheme of the procedure gives no scope for action which can properly be described as unfair and there are no grounds for thinking that the sub-committee acted unfairly.

It is next necessary to consider whether there was any unfairness on the part of the Board, as was strongly suggested in the submissions made on behalf of the appellant. Though the Board followed faithfully the directions of the Regulations it is said that nevertheless they should give a teacher an opportunity of being heard before they decide to suspend. Neither in the Regulations nor in the Act is suspension classified as a penalty. Section 157 (3) shows that it is not. It must however be recognised that suspension may involve hardship. During suspension

salary is not paid and apart from this something of a temporary slur may be involved if a teacher is suspended. But the regulations (by Regulation 5) clearly contemplate or lay it down that the written statement of a teacher (under Reg. 5(2)) and the oral personal statement (under Reg. 5(3)) will be made after suspension if any has taken place. Suspension is discretionary. Decisions as to whether to suspend will often be difficult. Members of a Board who are appointed or elected to act as the governing body of a school must in the exercise of their responsibilities have regard not only to the interests of teachers but to the interests of pupils and of parents and of the public. There may be occasions when having regard to the nature of a charge it will be wise, in the interests of all concerned, that pending decision whether the charge is substantiated a teacher should be suspended from duty. In many cases it can be assumed that charges would be denied and that only after a full hearing could the true position be ascertained. It is not to be assumed that a Board, constituted as it is, will wantonly exercise its discretion. Furthermore a teacher knows that under the terms governing his employment if charges are made and are to be investigated a suspension "pending the determination of the matter" may take place. In the present case because of the course adopted by the appellant it cannot be known whether on 30th June 1970 the Teachers' Disciplinary Board would or would not have found the charges proved, but there is no warrant for supposing that the Board (the governing body of the school) acted irresponsibly or unfairly in exercising their discretion to suspend in a case in which one matter for enquiry was whether a teacher was continuously failing to keep order and was allowing a state of uproar in his classrooms to continue. In their Lordships' view the procedure laid down in Regulation 5 is not unfair and there are no grounds for thinking that the Board acted unfairly.

Their Lordships are in full agreement with the judgments delivered in the Court of Appeal. It becomes unnecessary to consider whether had the appellant been successful he would have been entitled to relief in the form that he sought.

For the reasons set out above their Lordships will humbly advise Her Majesty that the appeal be dismissed.

*Dissenting Judgment of* VISCOUNT DILHORNE *concurred in by* LORD REID.

By a letter dated the 20th March 1970 Mr. Furnell, then employed by the Respondent and who had in 1960 been brought out to New Zealand as a teacher, was notified by the chairman of the Respondent Board that a complaint had been made about his conduct as a teacher at Kamo High School and that it had been investigated by a committee set up under the Secondary and Technical Institute Teachers Disciplinary Regulations 1969; that he was charged with three offences under s. 158 of the Education Act 1964, namely (1) with having been grossly inefficient or incompetent in the discharge of his professional duties in that he had (*a*) failed consistently to maintain reasonable order and discipline in his classroom, (*b*) struck children on several occasions and (*c*) allowed a state of uproar to arise and continue in his classroom to such an extent that work in neighbouring classrooms had been disrupted; (2) with having failed to take reasonable care of school equipment in that he had allowed the furniture and cupboards in his room to be grossly defaced; and (3) that in the course of his duties he had disobeyed, disregarded or made wilful default in carrying out instructions in that he had failed to mark his class attendance register from December 1st to 11th December 1969 and had failed to take a normal part in teacher activity by not entering the staff room for long intervals to "hear notices and instructions to staff."

The letter alleged that he had been guilty of conduct which showed his unfitness to remain in his position and stated that he was as from 20th March 1970 suspended from his duties. While suspended, he was not entitled to any remuneration.

The letter required him to state whether he admitted or denied the charges and to forward any explanation he might wish to give by 8th April. He was also told that if he wished he might make a personal statement to the Board. The letter ended by advising him to obtain legal assistance.

On 3rd October 1969 Mr. Furnell had been seen by the Principal of the school and told that he was not teaching effectively and that he should resign. Mr. Furnell agreed to apply for positions elsewhere but had not by 20th March 1970 succeeded in obtaining one.

Mr. Furnell, who was not told that his conduct was being investigated by a committee appointed under the Disciplinary Regulations, was not asked by the committee to appear before them and was given no opportunity by the committee of answering the allegations made against him. The committee made no attempt to find out what he had to say.

Apart from alleging failure to mark the class attendance register, the letter of 20th March gave no indication of the dates and events on which the charges were based. On 25th March 1970 Mr. Furnell's solicitors asked for information as to them and on 6th April the chairman of the Board in a long letter gave details of numerous incidents extending from 4th November 1968 to 2nd February 1970. That was the first intimation that Mr. Furnell had of the occasions and events on which the charges were based. Prior to the receipt of the letter of 6th April, he was consequently not in a position to offer any explanation, and he was required to furnish one by 8th April.

In the circumstances it is perhaps not surprising that Mr. Furnell should complain that he was treated unfairly by the Board and by the committee appointed by the Board in suspending him without pay and imposing on him the stigma which suspension brings, without having been told of the allegations made against him and without being given any opportunity by the committee or by the Board of answering the case against him before he was suspended. The Solicitor General for New Zealand agreed that the investigating committee was under a duty to act fairly. The Board was also under a duty to do so.

In *In re Pergamon Press Ltd.* [1971] 1 Ch. 388 where two inspectors had been appointed under s. 165 (*b*) of the Companies Act 1948 to investigate the affairs of Pergamon Press Ltd. and report thereon, Lord Denning M.R., after pointing out that their report might accuse some and condemn others, that it might ruin reputations and careers and might lead to judicial proceedings, said:

> "Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, nor quasi-judicial, but only administrative; see *Reg. v. Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 Q.B. 417. The inspectors can obtain information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice."

I do not take Lord Denning's last sentence to mean that it will suffice to tell a man what charges are being preferred against him, as in the letter of the 20th March, but as meaning that he must be given an outline of the case against him so that he knows what is being said against him sufficiently to have a fair opportunity of correcting or contradicting it.

In *De Verteuil v. Knaggs* [1918] A.C. 557 where under an Immigration Ordinance the Governor of Trinidad had power "on sufficient ground shown to his satisfaction" to transfer the indentures of immigrants from one employer to another, it was held that this power could not be properly exercised without inquiry and Lord Parmoor delivering the judgment of the Board which consisted of Earl Loreburn, Lord Dunedin, Lord Sumner and himself, said at p. 560:

> "Their Lordships are of opinion that in making such an inquiry there is, apart from special circumstances, a duty of giving to any person against whom a complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice".

He gave as an instance of a special circumstance which might justify the Governor taking action without giving the person affected such an opportunity, an emergency when promptitude was of importance.

Only after the Board has received the report of the committee and if they have reason to believe that an offence against s. 158 of the Education Act 1964 may have been committed, can they suspend a teacher to whom the Disciplinary Regulations apply. As the Board suspended Mr. Furnell and charged him with offences against s. 158 after receiving the committee's report, it can be assumed that that report was adverse to Mr. Furnell and accused him of committing the offences charged by the Board. The committee may also have recommended his suspension.

In the light of Lord Denning's observations quoted above and what was said in *De Verteuil v. Knaggs* (*supra*), in my opinion the investigating committee and the Board acted unfairly and contrary to natural justice in not giving Mr. Furnell an opportunity of answering the case against him before he was suspended.

The proceedings of an investigating committee can be quite informal. If their investigation leads them to the conclusion that the complaints against a teacher are unjustified, and they propose so to report to the Board, there is no need for them to communicate with the teacher before they report.

If, however, they are minded to report adversely upon the teacher, and *a fortiori* if they are thinking of recommending his suspension, the committee must before they report, to be fair, give the teacher an opportunity to put his case; and to enable him to do so, must tell him the case against him with sufficient particularity to enable him to counter it either in writing or orally. If they do not do so, the Board will not get a proper picture of the case.

It must have been apparent to the Board when they received the committee's report that the committee had not done so. There was no great urgency. Before suspending him the Board could have given him an opportunity of stating his case or have remitted the matter to the committee for them to do so. In failing to take this course, the Board in my opinion acted unfairly. Instead of doing so, the letter of 20th March was written. That letter gave him an opportunity after he had been suspended of tendering an explanation or of making an oral statement to the Board but that letter did not tell him the case against him with sufficient particularity to enable him to answer it.

It was, however, contended by the Solicitor General that the Disciplinary Regulations did not provide for the giving of any such opportunity to an accused teacher; that the Regulations formed a complete code and that consequently it was not right to import into them a duty on the part of the committee and of the Board to furnish such an opportunity. In relation to this contention it is necessary to consider the Regulations in some detail, and the background to them; to consider whether they do not, in fact, when properly construed, provide for the giving of such an opportunity by the committee; and, if they do not, whether the Regulations clearly show an intention to exclude that which natural justice would otherwise require.

The Education Act 1964 itself contained a disciplinary code applying to teachers. If a teacher is charged with a criminal offence carrying a maximum punishment of not less than two years' imprisonment, the Board which employs him may suspend him but if the Board do not think that pending the hearing of the charge he should be suspended but that he should be removed from his position, they may transfer him to other duties (s. 157). So even when a serious criminal charge is preferred, suspension is not automatic.

S. 158 specifies conduct on the part of a teacher which constitutes " an offence against this section " and s. 159 prescribed the procedure that must be followed when it is alleged that an offence against s. 158 has been committed. Presumably in the majority of, if not all, cases the allegation will be made by the Board which employs the teacher. When such an allegation is made, the Board must forthwith advise the teacher in writing of the " full details of the charge against him " and require him to state within a specified time whether he admits or denies the truth of the charge. If the Board decide to proceed with the charge, they must refer the matter to a committee of three, appointed by them, of whom one must be a representative of a teachers' organisation nominated by the teacher accused. That committee is given the powers and authority with regard to summoning witnesses and receiving evidence that are given to a commission of inquiry by the Commissions of Inquiry Act 1908. The committee " after hearing the case " has to send its report to the Board together with notes of the evidence received at the inquiry. Copies of the report and the notes of evidence have to be given to the accused teacher.

Then if the Board after considering the report of the committee and the notes of evidence and reports relating to the charge, and also " the reply or explanation, if any, furnished by the teacher " (the section makes no express provision for such a reply or explanation), " is satisfied as to the truth of the charge " they may caution or reprimand the teacher or transfer him to another post at an equivalent or lower salary or peremptorily dismiss him.

S. 159 (7) provides that any teacher against whom a charge is made under s. 159 may, pending the hearing and determination of the charge, be suspended or transferred by the Board and s. 159 (8) provides that at any inquiry or investigation held under the section the teacher shall be entitled to be represented by counsel or agent.

Several matters are to be noted about this section: (1) a teacher may be suspended directly a charge is made and without any investigation before the charge is made: (2) the committee, which has the powers of a Commission of Inquiry, nevertheless exercises judicial or quasi-judicial functions; s. 159 (3) refers to the hearing of the case and s. 159 (7) to the hearing and determination of the charge: (3) although it is expressly provided that he may be represented at any inquiry or investigation, the section does not in terms provide that a teacher shall be entitled to give evidence or call witnesses or that the witnesses against him may be

cross-examined: (4) after the committee has reported, the section does not provide for any further investigation by the Board. If satisfied after considering the reports, the notes of evidence and the reply or explanation, if any, furnished by the teacher, of the truth of the charge the Board can impose penalties: and (5) there is no provision for repayment of salary lost during suspension if the Board is not satisfied of the truth of the charge although s. 159 (8) provides that save with the express approval in writing of the Board, he shall not receive any salary for that period " if the charge made against him is sustained on inquiry or investigation as hereinbefore provided ".

In establishing this code of procedure in the Education Act 1964, the intention must have been to create a code that was fair. That one is entitled to assume. No one could regard a code as fair which did not allow an accused teacher proper opportunities of making his defence to the charge preferred against him and yet the section makes no express provision for that although it does for his representation.

S. 159 (3) commences with the words " In any case where the Board decides to proceed with the charge it shall refer the matter for investigation. . . ." What is meant in this context by investigation? Surely not just hearing the evidence in support of the charge, the evidence for the prosecution. If, as I think, investigation by the committee in the context means hearing both sides, allowing both sides to call witnesses and to cross-examine and allowing the teacher to give evidence if he wishes, then the section gives the accused teacher those rights which natural justice requires an accused person to have. But if I am wrong about this and investigation is not to be so interpreted, natural justice requires those rights to be imported.

" Natural justice " as was said in *Wiseman v. Borneman* [1971] A.C. 297 at p. 308 " requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances. . . . For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found it to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

If I am wrong in giving this content to the word " investigation ", then it cannot be said that to import those rights for an accused person would frustrate the purpose of the Education Act 1964.

Mr. Furnell was not dealt with under s. 159. He was proceeded against under the Disciplinary Regulations made on 15th December 1969 as he was a teacher to whom they applied. The language of those Regulations is clearly modelled on the provisions of the Act and if, as I think, the investigation by a committee appointed in accordance with the Act necessarily involves hearing both sides and the accused having the rights to which I have referred, it is unlikely that investigation by a committee under the Regulations was intended to have a different meaning.

Those Regulations were made under s. 161A of the Education Act, a section inserted in that Act by the Education Amendment Act 1969. That section gave the Governor-General power " on the advice of the Minister, given on the joint recommendation of the organisation of teachers . . . and of the association or associations representing the Boards employing the teachers " to make regulations applying to teachers in any class or classes of schools prescribing the procedure to be adopted for " the investigation, hearing, and determination of " a charge under s. 158 and declaring that s. 159 should not apply to those teachers.

On 15th December 1969 the Secondary and Technical Institute Teachers Disciplinary Regulations were made in the exercise of this power. They provided that s. 159 should not apply in relation to teachers to whom the Regulations applied. The procedure established by the Regulations differed in a number of important respects from that under s. 159. They provide that there must be a preliminary investigation of a complaint against a teacher either by a person appointed by the Board or by a sub-committee of the Board; that that person or the sub-committee (as in this case it was a sub-committee, reference will only be made to a sub-committee) " shall undertake the investigation of the complaint at such time and place as the Board may determine "; and that on completion of the investigation, the sub-committee has to report in writing to the Board and that that report shall include any recommendation which the sub-committee thinks fit to make (Regulation 4).

The provision that the Board is to fix a time and place for the investigation indicates that there has to be a hearing. The sub-committee may recommend what action should be taken. They could if they thought fit recommend suspension and also peremptory dismissal. What their report contained in this case and what recommendation they made is not known for under the Regulations a copy of the report of the investigating committee is not required to be supplied to the teacher as it is under s. 159.

If a Board after receiving the report has reason to believe that an offence against s. 158 may have been committed the Board must forthwith advise the teacher in writing " of the full details of the alleged offence ". They may then suspend the teacher pending the determination of the matter. The teacher is to be required to say whether he admits or denies the truth of the charge and to put forward any explanation he wishes within a specified time and told that if he wishes he may make a personal statement to the Board. Then, after considering any such statement or explanation, the Board may decide to take no further action, or " that the offence . . . shall be dealt with under Regulation 6," or to refer the charge to the Director-General for consideration as to whether or not it should be referred to the Teachers' Disciplinary Board " for hearing and determination " (Regulation 5).

It is only after the teacher has received full details of the alleged offence, that any express provision is made in the Regulations for his giving an explanation or making a statement and his suspension may precede that.

Merely telling the teacher what charges have been preferred, as did the letter of the 20th March, is not giving him full details of the alleged offences and not providing him with sufficient information to enable him to have a fair opportunity of making an explanation or statement about them. Mr. Furnell did not receive full details of the alleged offences until he got the letter of the 6th April. Although in the Statement of Claim the point was taken that his suspension was invalid as the condition precedent to suspension, the furnishing of full details of the alleged offences, had not been complied with, and was advanced in argument before Speight J. who decided in Mr. Furnell's favour on other grounds, it was not raised in the Court of Appeal or in the Appellant's printed case. The Solicitor General contends that it is now not open to the Appellant and that in my opinion is the case. If it had been open, it might have been necessary to consider whether an invalid suspension could be validated by the giving of full details later, by the letter of the 6th April.

If the case is referred to the Teachers' Disciplinary Board which " for the purpose of the investigation of any charge referred to it for hearing and determination " is given the powers of a Commission of Inquiry conferred by the Commissions of Inquiry Act 1908, detailed provisions for the hearing and determination of the charge are made in Regulation 8. The teacher is entitled to present his own case or to be represented at the hearing by counsel or agent. After hearing the case against the teacher, the Disciplinary Board has then to hear the teacher charged or his counsel or agent and any evidence he may wish to adduce. If he is found guilty, the Disciplinary Board may impose penalties ranging from a caution, reprimand or censure to peremptory dismissal (Regulation 10).

If the Board decides that the case shall be dealt with under Regulation 6, the Board " may (if satisfied that the alleged offence has been proved) caution, reprimand, or censure the teacher ".

Unlike Regulation 8, Regulation 6 contains no provisions for the investigation, hearing and determination of the charge. It says that if the Board is satisfied that the charge has been proved, it may do certain things. This Regulation appears to envisage that the Board may be so satisfied after considering the report of the sub-committee and any explanation or statement made by the teacher, and to reflect s. 159 (5) which provides that a Board after considering the reports therein mentioned and the reply or explanation, if any, of the teacher, may, if satisfied of the truth of the charge, do certain things.

If this is right, then it leads to an important conclusion. Where a charge is dealt with under Regulation 6, the only investigation may be by the sub-committee under Regulation 4. It is then an investigation preliminary to further action but not to a further investigation and hearing such as must take place if the case goes to the Teachers' Disciplinary Board.

It must have been thought that the Regulations improved the position of the teachers to whom they applied. If, however, the contention of the Solicitor General is right, their position was worse than it was under the Education Act 1964 for they can be reprimanded and censured by the Board without having had an opportunity of putting forward their defence and of calling witnesses. That result cannot have been intended. That the Disciplinary Regulations contain a detailed disciplinary code is not disputable. That it is a complete code is. Regulation 8 does not give an accused teacher the right to cross-examine. There is no provision for repayment to him of salary he has lost while suspended if the Board decide to take no further action though there is if he is acquitted by a Teachers' Disciplinary Board.

Merely to have an opportunity of making a statement or giving an explanation after he has been criticised or condemned by the sub-committee, criticism that may lead to his immediate suspension and to his being censured by the Board without any further inquiry, is no substitute for an opportunity to put forward his defence and to call witnesses. The opportunity to make a statement and to give an explanation after condemnation by a sub-committee is, where the Board deals with the case under Regulation 6, analogous to a prisoner being asked whether he has anything to say before he is sentenced.

As I have said, in my opinion s. 159, when it speaks of an investigation by a committee, means that it is the duty of the committee to go into the matter thoroughly and to hear not just one side but both sides, if the teacher wants to be heard. A sub-committee appointed by a Board, the teacher's employers under the Regulations, is in my view under a similar duty. Investigation under s. 159 and under Regulation

4 has the same meaning. The investigation by a Teachers' Disciplinary Board involves hearing both sides and resembles a trial. The investigation by a sub-committee is not the trial of the case where it is referred to a Disciplinary Board but it may be the only " trial ", if my construction of the Regulations is right, that an accused teacher has if his case is dealt with under Regulation 6.

In my opinion the sub-committee failed to discharge the duty imposed on them by Regulation 4 by not giving Mr. Furnell an opportunity of being heard by them and so, in my opinion, this appeal should be allowed.

If, however, the reference to investigation in Regulation 4 does mean only that the case in support of the complaints is to be investigated and does not mean that the teacher's answer, if he wishes to put one forward, must also be investigated, and so that he must be given an opportunity of putting forward his answer, then in my opinion the appeal should also be allowed, for natural justice requires this duty to be read into the Regulations. To do so would not frustrate their purpose. It would implement it. I see nothing in the Regulations to suggest that what natural justice requires was deliberately excluded.

The function of a sub-committee, if it may lead to a Board censuring a teacher without any further inquiry, although a further investigation must take place before he is censured by a Teachers' Disciplinary Board, is not comparable with the preparation of a case by the prosecution.

It is not in this case necessary to decide whether the function of the sub-committee is to be described as judicial, quasi-judicial or administrative. I am inclined to think that it is at least quasi-judicial, but if it be administrative, it was the duty of the sub-committee before they condemned or criticised Mr. Furnell " to give him a fair opportunity of commenting or contradicting what is said against him ". That they did not do.

For these reasons in my opinion this appeal should be allowed.

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**In the Privy Council**

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**PAUL WALLIS FURNELL**

*v.*

**THE WHANGAREI HIGH SCHOOLS BOARD**

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