



Ryan Clement, Called to the Bar in 1996, is a member of Conference Chambers. He specialises in general civil, employment, immigration and construction. He is a member of the Chartered

Institute of Arbitrators, Employment Law Bar Association and TECBAR.

## Nemo judex in parte sua

Or [No person may judge their own case]

Nemo judex in parte sua. Latin is prohibited from use in our courts, but, arguably, there is a case for its inclusion in the national curriculum for our schools, especially when, judging from a recent employment tribunal case, the governors of a school argued that it had delegated, legally, the powers of a Staff Disciplinary Committee (of at least three members) ("SDC") to its Head Teacher (of one) ("HT") to: investigate a case against a teacher; decide whether that teacher should face a disciplinary hearing; conduct the case against that teacher at the disciplinary hearing; sit in judgment (as the SDC, now, of course, of one i.e. the HT) at the same disciplinary hearing; make submissions (as the prosecutor, wearing her HT's hat) to herself (wearing her SDC hat); decide on the evidence put by both her and the teacher in question; decide whether or not she favoured her own submissions (made to herself); reach a decision based on the case put by herself; and, finally, impose the sanction.

The facts of *W. McGovern v The Governing Body of Cardinal Hinsley RC School* (3314776/2006) are interesting. In September 2000 the Claimant was employed by the school as a teacher, and in 2002 had become the Head of the ICT Department.

Part of the Claimant's terms of his contract of employment stated, "Since September 2003 regulations made under the Education Act 2002 have given greater power to Governing Bodies to delegate their powers, including their power to dismiss staff, to Headteachers if they so wish. Consequently Governing Bodies must have regard in applying the Disciplinary Procedure to guidance issued by the Secretary of State in relation to these powers..."

Clause 8.6.2 of the Disciplinary Procedure stated, "A final written

warning may be imposed by the [HT] or [SDC]. If there is a possibility that the [Teacher] may be dismissed the matter must go to the [SDC]..."

Under the new HT's regime, between February 2005 and May 2006 the Claimant was the subject of three disciplinary matters. At one of the disciplinary hearings, the Claimant stated that he expected the hearing panel to consist of three governors of the school and not the HT and reference was made to the terms of the Disciplinary Procedure. Despite having two advisors present to assist her, the HT was not told by either that she could not be prosecutor, judge and jury in her own 'court'.

Unsurprisingly, each of the disciplinary hearings during which she wore all three hats the Claimant's defence was unsuccessful. Put another way, the HT upheld her 'own' complaints. The Claimant complained that the HT's role at each and every stage of the disciplinary process was a breach of the Disciplinary Procedure and, if nothing else, unfair; a breach of natural justice. He appealed the HT's decisions. For various reasons the appeals were heard in his absence, and the HT's decisions were upheld. In consequence, by letter dated 8 May 2006 the Claimant resigned and subsequently presented a complaint to the employment tribunal alleging unfair constructive dismissal.

The test under s95(1)(c) of the Employment Rights Act 1996 is whether the employer has been guilty of conduct that is a significant breach of the contract of employment going to the root of the contract or which shows the employer no longer intends to be bound by one or more of the essential terms of the contract, the employee has left as a result and acted promptly. Applying the

cases of *Western Excavation (ECC) Ltd v Sharpe* 1978 ICR 221, *Lewis v Motorworld Garages Ltd* 1985 IRLR 465 and *Malik v The Bank of Credit and Commerce International SA* 1997 IRLR 462 it was concluded, "in those circumstances the Tribunal has no doubt in coming to the conclusion that this Claimant has been constructively unfairly dismissed."

The Tribunal said, among other things, that in its view, there was no delegated power within the Procedure itself. Clause 8.6.2, on which the school relied so heavily, is merely stating that in the event of the SDC coming to a determination that a member of staff has been guilty of, say, misconduct, the SDC can in fact delegate the sanction to the HT rather than impose the sanction itself. The HT in such circumstances has the power to impose a final written warning. The Tribunal gained comfort for that interpretation by the fact that part of clause 8.6.2 says, "if there is a possibility that the [Teacher] may be dismissed the matter must go to the [SDC]". So, in other words, the SDC is the only body that could have imposed a dismissal but it could delegate a sanction of a final written warning to the HT. In the Tribunal's opinion, "to attempt to incorporate the word "Head Teacher" into the Procedure in place of the words "Staff Disciplinary Committee" makes no sense whatsoever".

Admittedly, the opening phrase, "no person may judge their own case", does not fully cover the many breaches identified by the Tribunal, but it was the closest one could find. I guess our friends from the Classical world would have thought a phrase covering, fully, the HT's acts would have been redundant and unnecessary. How wrong they were!



Tom Cryan is an Honorary Member of the Middlesex Law Society

## A Retired Life

**Now, one of the rather strange things I have found myself doing in retirement is reading old law books. I confess my knowledge was always a little out of date but most of the time I was in the right century; not any longer.**

Most of you will have staggered into court with a relatively current edition of *Stones Justices Manual*. Its predecessor, or at least one of them, was *Burn's Justice of the Peace* a five volume work which sets out to thoroughly educate the practitioner so that when, for example, you stand up to defend a burglar you can tell the poorly schooled bench that the word "burglar seemeth to have been brought unto us out of Germany, by the Saxons, and probably to be derived out of the German burg, a house, and larron, a thief, probably from the Latin, *latro, latronis*." Harrow Magistrates have been worrying about the derivation of that word ever since I first appeared before them.

At the time therefore of my 1869 edition of *Burn's* the common law applied. This meant that under the age of seven a child could not be convicted but between the ages of seven and fourteen there was a rebuttable presumption that the child was *doli incapax* i.e. unable to know that what he or she had done was wrong. It is, as I probably imperfectly understand, the current law that this rebuttable presumption was abolished by the *Crime and Disorder Act 1998*. We are now left with only the first part of the *Doli Incapax* rule applying to children under ten years of age and meaning, in effect, that the modern age of criminal responsibility is ten.

Back in 1869 the application of the old rule could, however, have some devastating results. A case that was still good law at the time was that of **William York** tried at Bury Summer Assizes in 1748 and reported in (*Fost 70*) just in case you happen to have that volume in the office. Young William was tried before Lord Chief Justice Willes for the murder of a girl aged five. William was a lot older than her, in fact he was twice her age, he was ten. The children were both parish children. We would today say they were in care. They lodged with the same parishioner.

On the day of the offence both the man of the house and his wife went to their work early, leaving the children still in bed. Upon their return the girl could not be found. William protested that he had helped her get dressed in the morning but he had no idea where she had gone. After a search of nearby ditches the parishioner or carer as we would call him today, noticed that a heap of dung near his house had been turned over. Well, as you can guess the girl's body was found under a foot in depth of dung.

The dilemma then facing the judges was how to deal with William York at his tender age. The evidence was carefully considered and what to our modern mind would appear a frightful conclusion was reached; namely that by his actions William had shown evidence of what was termed "mischievous discretion" and accordingly it was proper to impose capital punishment. It was reasoned that it would be inappropriate not to do so as it would fail to deter others of a similar age from committing murder. How necessary it was to prevent a crime wave of murders by ten year olds in 1748 is something I am unable to comment on. It is none the less amazing that such a sentence could have been passed.

In 1869, the year of my edition of *Burns*, William could still be executed. The chief justice did grant a reprieve requesting the original justice to look further into the matter to see if perhaps the boy had committed this offence at the instigation of others but when no report to that effect was forthcoming William had to be left to the justice of the law. Eventually William received the King's pardon on the extraordinary condition of his entering immediately into the sea service; another example of recruitment to His Majesty's senior service.

In truth there is apparently little evidence of the death penalty being implemented for children under fourteen years of age in the nineteenth century and the last execution of a person under the age of eighteen took place in 1833, the prisoner being seventeen years old. The mere fact that such a sentence was a possibility shocks us now.

We all have some knowledge of the *Craig and Bentley* case in which Derek Bentley, then aged nineteen was hanged for the murder of a policeman. Bentley was carrying a knife but his sixteen year old accomplice Chris Craig had a gun with which he shot and killed the officer. Bentley is alleged to have said "Let him have it Chris" (did this mean the gun or a bullet?) and on the strength of that he was convicted and hanged in January 1953. Craig being under the age of eighteen could not be hung.

Nowadays nobody is executed and in July 1998 the Court of Appeal ruled that Derek Bentley's conviction was unsafe.