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## THE UNIVERSITIES (DISCIPLINE OF STAFF) RULES: AN ADMINISTRATIVE LAW PERSPECTIVE

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### I. INTRODUCTION

This article will attempt to discuss and examine the Discipline of Staff Rules of the local universities which are established under the Universities and University Colleges Act, 1971<sup>1</sup> primarily from the viewpoint of Administrative Law. The discussion and examination will be focused only on the University of Malaya (Discipline of Staff) Rules, 1979<sup>2</sup> as the other local universities established under the UUCA 1971 also possess similar rules.<sup>3</sup> The Staff Rules shall apply to 'a staff member'<sup>4</sup> throughout the entire duration of his service, including the periods during which he is on

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<sup>1</sup>Act 30. Hereinafter to be referred to as 'the UUCA 1971'.

<sup>2</sup>P. U. (A) 23 of 1979. Hereinafter to be referred to as 'the Staff Rules'.

<sup>3</sup>P. U. (A) 20 of 1979 of UPM; P. U. (A) 21 of 1979 of UKM; P. U. (A) 22 of 1979 of UTM; P. U. (A) 169 of 1991 of ITM. Note that ITM was not set up under the UUCA, but it adopted the Staff Rules of the local universities *via* P. U. (A) 169 of 1991.

<sup>4</sup>Defined in r 3 as 'a member of the staff, or an officer, or employee of the University'. By virtue of the generality of this provision, the Staff Rules should apply equally to probationers and contract staff. Contracting out is not permissible in the absence of any empowering provision in the Staff Rules.

leave.<sup>5</sup> Certain provisions thereof apply only to teachers.<sup>6</sup> The subject-matter encompassed herein are the composition and jurisdiction of 'the Disciplinary Authority',<sup>7</sup> the code of discipline for staff members, the application of and liability under other laws, the types of disciplinary procedure applicable and the punishments that can be imposed by the DA and also appeals against decisions of the DA. From the perspective of Administrative Law, a few pertinent and general observations may first be made here at the outset. First, the power to discipline the staff members of a 'University'<sup>8</sup> is nothing but an ordinary discretionary power which is amenable to judicial review through the instrumentality of the *ultra vires* doctrine. The control of discretions and procedural fairness are, therefore, the key focal points of this article. The *ultra vires* doctrine is infringed if and when there occurs an abuse or non-exercise of power, or where there is any non-compliance with any express mandatory procedure<sup>9</sup> of any of the rules of natural justice, or where the DA's action or decision is *ultra vires* the express substantive limits of its powers. The application of each of the various specific aspects of the *ultra vires* doctrine will be further elucidated whenever and wherever it is relevant and necessary to do so. Secondly, so far as procedural fairness is concerned, if a statute expressly provides for a procedure to be followed, then that statutorily prescribed procedure breached is mandatory in nature. A mandatory procedure is to be followed and any non-observance thereof may render an administrative

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<sup>5</sup>R 2

<sup>6</sup>See rr 17 & 20. A teacher is defined in r 3 to mean a teacher appointed by the Council in accordance with the Constitution of the University and includes a professor, associate professor, reader, lecturer, tutor, and guru bahasa.

<sup>7</sup>Hereinafter to be referred to as 'the DA'.

<sup>8</sup>The word 'University' defined in r 3 to mean of the respective university to which the Staff Rules apply.

<sup>9</sup>If the right of hearing is granted by a statute or subsidiary legislation, more often than not it is regarded as a mandatory procedural requirement. Any gap that exists therein may be supplemented and strengthened by the rules of natural justice - *infra* n 11. The non-observance of both the rules of natural justice and the statutory right of hearing cannot be condoned - *infra* nn 12 & 13.

proceeding null and void if the procedure breached is mandatory in nature. A mandatory procedure is one which is vital and goes to the root of the matter considering its importance and its relation to the general object intended to be secured thereby and any non-compliance thereof cannot be condoned even if no real prejudice has ensued to the affected party.<sup>10</sup> Thirdly, in the same context, if there exists any lacuna in the statutorily prescribed procedure, the rules of natural justice may be implied to supplement and strengthen the gap therein unless they are excluded expressly or by implication.<sup>11</sup> A failure to comply with the rules of natural justice<sup>12</sup> or their equivalents in statutory form<sup>13</sup> will invalidate an administrative action or decision taken by the administration.<sup>14</sup> Fourthly, as procedural fairness is an indispensable feature of modern administrative processes, the procedure established by law should be fair, reasonable and comprehensive. Brief and bare procedure is undesirable as it leaves too much to be strengthened and supplemented as a matter of natural justice and hence causes much uncertainty and may even lead to unfairness and injustice on those affected thereby. Finally, frequent references to and comparisons with the relevant provisions of the Students' Rules<sup>15</sup> of the local universities and the Public Officers (Conduct and Discipline) Regula-

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<sup>10</sup>A proposition laid down in *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1991] 3 MLJ 28, HC, a case on preventive detention. Note that this case has been affirmed by the Supreme Court in *Aw Ngoh Leang v IGP & Ors* [1993] 1 MLJ 65. This rule should by analogy apply to any mandatory procedure applicable to disciplinary proceedings because the authority relied upon in *Puvaneswaran* is a non-preventive detention case.

<sup>11</sup>*Malloch v Aberdeen Corp* [1971] 2 All ER 1278.

<sup>12</sup>*Ridge v Baldwin* [1963] 2 All ER 66.

<sup>13</sup>*IGP v Alan Nook bin Kamat* [1988] 1 MLJ 260, *exempti gratia*.

<sup>14</sup>By way of judicial review seeking an order of *certiorari* or a declaration or both.

<sup>15</sup>The University of Malaya (Discipline of Students) Rules, 1975, P. U. (A) 293, in particular. It is to be noted that all the other local universities established under the UUCA 1971, too, have similar rules. See P. U. (A) 296 of 1975 of UKM; P. U. (A) 353 of 1975 of UPM; P. U. (A) 386 of 1975 of UTM; P. U. (A) 426 of 1975 of USM.

tions 1993<sup>16</sup> will be made primarily with a view to identifying either the lacunae or the strengths and weaknesses, if any, that exist in the Staff Rules.

## II. THE DISCIPLINARY AUTHORITY

The DA is the disciplinary body or authority that has adjudicatory jurisdiction over the staff members for any breach of discipline or disciplinary offence allegedly committed by a staff member *vis-a-vis* the code of discipline laid down in Part II, and also in respect of the few additional matters specified in Part III of the Staff Rules whenever criminal proceedings have been instituted against a staff member.<sup>17</sup> The DA is defined in rule 3 to mean the DA constituted under section 16A of the UUCA 1971, and includes any delegatee thereof. This definition in fact gives effect to the provisions of sections 16A(1) and (3) of the UUCA 1971. Under section 16A(1), the DA in respect of every staff member of the University shall be the Disciplinary Committee of the University which shall consist of (a) the Vice-Chancellor, and (b) two members of the University Council elected by 'the University Council'.<sup>18</sup> In the exercise of its disciplinary functions, powers or duties, the Disciplinary Committee shall have the power to take such disciplinary action and impose such disciplinary punishment as provided for under the Staff Rules which were made by the University Council under section 16C of the UUCA 1971.<sup>19</sup> The types of punishment that may be imposed on

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<sup>16</sup>P. U. (A) 395. Hereinafter to be referred to as "the Public Officers' Regulations". The Public Officers' Regulations repealed and replaced the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980, P. U. (A) 203, with effect from 15th December, 1993. They apply to members of the public services of the Federation. Appeals by public officers against the decisions of the Disciplinary Authority are dealt with by the Public Services Disciplinary Board Regulations 1993, P. U. (A) 396. The Public Services Disciplinary Board Regulations 1993 in turn repealed and replaced the Public Services Disciplinary Board Regulations 1972, P. U. (A) 48.

<sup>17</sup>See *infra* Part D4 under the sub-heading of "Procedure in the case of criminal proceedings against a staff member".

<sup>18</sup>Hereinafter to be referred to as 'the UC'. The UC under section 16 of the University Constitution is the executive body of the University. It is to be noted that the discretion to discipline staff members are expressly and specifically conferred by the UUCA 1971 on the Disciplinary Committee. This will be elaborated shortly.

<sup>19</sup>S 16A(2).

an errant staff member found guilty of a breach of discipline or disciplinary offence and the extent of the powers to impose fines, forfeiture of salary and reduction of salary are provided for in Part IV of the Staff Rules. Section 16A(3) empowers the Disciplinary Committee to delegate its disciplinary functions, powers or duties to two groups of staff members, *viz*, any member of staff, any officer, or any employee, of the University, or any board of members of the staff, officers, or employees of the University, in respect of any particular member of the staff, officer or employee of the University or in respect of any class or category of members of the staff, officers or employees of the University. The delegatee or delegates shall carry out, exercise or discharge the functions, powers or duties so delegated under the direction and control of the Disciplinary Committee which shall have the power to review, rescind or vary any decision or finding of such delegatee or delegates.<sup>20</sup> It is also provided that no delegation shall be made so as to enable a member of the staff or officer or employee of the University to exercise any disciplinary authority or to be a member of a board which may exercise any disciplinary authority over a member of the staff, officer or employee who is superior to him in rank.<sup>21</sup> And the Disciplinary Committee shall have no jurisdiction in respect of the Chancellor, the Pro-Chancellor, or the Vice-Chancellor.<sup>22</sup>

A few matters arising hereunder may now be adverted to. First, it is to be noted that the term 'Disciplinary Authority' includes the Disciplinary Committee established and the delegatee or delegates of the Disciplinary Committee appointed, under section 16A of the UUCA 1971. The Disciplinary Authority is therefore a larger body than the Disciplinary Committee. The Disciplinary Committee is a standing committee in charge of disciplinary matters and as this body seldom sits to adjudicate over disciplinary cases, the power of adjudication is usually delegated to the delegatee or delegates under sec-

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<sup>20</sup>S 16A(3).

<sup>21</sup>Proviso to section 16A(3).

<sup>22</sup>S 16A(4). Note that the appointment and removal of these officers of the University are governed by sections 7, 8 and 9 of the University Constitution respectively.

tion 16A(3) of the UUCA 1971 on an *ad hoc* basis. Secondly, *vis-a-vis* the powers, functions or duties of the delegatee or delegates, it is provided under section 16A(3) that the delegatee or delegates 'shall carry out, exercise or discharge them under the direction and control of the Disciplinary Committee'. It must be pointed out that such a delegating formula does not empower the delegating authority to control the action of the delegatee or delegates in a specific case although it may issue general directions regarding the exercise of the power subdelegated.<sup>23</sup> Thirdly, the DA's powers are conferred and limited by law. Thus, the DA can only assume jurisdiction over matters upon which the Staff Rules and the UUCA 1971 have conferred discretion and in the exercise of its powers it must keep itself within the limits, whether express or implied, imposed by law,<sup>24</sup> and follow the requisite procedure. Fourthly, any other body established under UUCA 1971, for example, the University Council, has no power to assume jurisdiction over the same which in law properly belongs to and is exercisable only by the DA or its delegatee or delegates. It was held in *Fadzil Mohd v UTM*<sup>25</sup> that the purported exercise of the discretion to dismiss a staff member of Universiti Teknologi Malaysia by the University Council was *ultra vires* its power because the University Council did not possess such a discretion under the UUCA 1971, the Constitution or the University and the Staff Rules. The University Council is the executive body of the University "unless otherwise expressly provided by this Act [the UUCA 1971]".<sup>26</sup> The discretion of disciplining staff members is a power exercisable by the University.<sup>27</sup> However, by reason of the fact that the discretion of disciplining staff members is expressly and specifically conferred on the Disciplinary Committee *via* section 16A of the UUCA 1971, the Univer-

<sup>23</sup>See MP Jain, *Administrative Law of Malaysia and Singapore*, 2nd ed, pp 418-419.

<sup>24</sup>See *Robana & Anor v USM* [1989] 1 MLJ 487. This case dealt with both the express and implied limits imposed by the law. They will be dealt with later in this article.

<sup>25</sup>[1981] 2 MLJ 196.

<sup>26</sup>Emphasis supplied. S 7(2), UUCA 1971. See also s 4(1)(m) and s 16 of the University Constitution.

<sup>27</sup>S 4(1)(m), Constitution.

sity Council, therefore, enjoys no discretion in disciplining staff members. That discretion must rightly and properly belong to the Disciplinary Committee<sup>28</sup> save that of hearing appeals against the decisions or findings of the DA.<sup>29</sup> Fifthly, on the matter of delegation of disciplinary power, such a power can only be delegated to '*any member of the staff, any officer, or any employee of the University, or to any board of members of the staff, officers or employees of the University*'.<sup>30</sup> Hence, a practising advocate and solicitor, for instance, cannot be delegated with such a power for the simple reason that he is not 'any member of the staff, any officer, or any employee of the University'. Any infringement of this basic premise of the *ultra vires* doctrine will result in the body not constituted in accordance with law acting without jurisdiction and thus rendering all decisions made thereby null and void.<sup>31</sup>

### III. DISCIPLINARY OFFENCES OR BREACHES OF DISCIPLINE

Part II of the Staff Rules lays down a code of conduct or discipline for the observance of every member of the staff, officer, or employee of the University. As pointed out earlier, every member of staff, officer, or employee of the University must observe this code throughout the entire duration of his service, including the periods during which he is on leave.<sup>32</sup> Any non-observance or breach of any of the provisions of this code constitutes 'a disciplinary offence' or a 'breach of discipline' as these two terms are used interchangeably in Part II without suggesting any difference between them. Rule 23 states that a staff member who has breached any of the provisions of the Staff Rules and the breach thereof has been reported to his superior, may be subject to the appropriate

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<sup>28</sup>See the definition of 'Disciplinary Authority' in the Staff Rules.

<sup>29</sup>This power of hearing appeals is specifically conferred on the University Council. See s 16A(5), UUCA 1971 and Part V of the Staff Rules. Appeals will be covered by Part VI of this article.

<sup>30</sup>Emphasis added.

<sup>31</sup>MP Jain, *op cit*, pp 480-481.

<sup>32</sup>R 2. See *supra* n 5.

disciplinary proceedings under the Staff Rules.<sup>35</sup> Hence, a staff member can only be disciplined under the Staff Rules provided that he has committed a breach of discipline or a disciplinary offence, or when criminal proceedings have been instituted against him.<sup>34</sup>

The code of discipline adverted to will now be examined *albeit* not in its entirety. Rule 4 lays down a code of general conduct for the observance of every staff member. A staff member shall at all times and on all occasions give undivided loyalty and devotion to the Yang di-Pertuan Agong, the country and the University.<sup>35</sup> A staff member shall not, *inter alia*, subordinate his duty to the University to his private interest, use his position as a staff member of the University for his private advantage, conduct him-self so as to bring the University into disrepute or to bring discredit thereto, be dishonest, be irresponsible<sup>36</sup> or be insubordinate.<sup>37</sup> A staff member, save where he is required in the course of his duty or is expressly authorised in writing by the Vice-Chancellor, shall not engage himself in any outside employment whether gratuitously or for reward.<sup>38</sup> Barring certain exceptions, the giving or receiving of presents, tokens of value, gifts, etc., are also forbidden.<sup>39</sup> Provisions are also made requiring a staff to report, within the time period specified, to the appropriate authority of the University regarding the ownership or acquisition

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<sup>34</sup>The term 'disciplinary offence' is briefly defined in r 2 of the Students' Rules and r 70 thereof further provides that any breach, non-compliance or contravention thereof shall render a student guilty of a disciplinary offence. In the Public Officers' Regulations, it is provided in reg 2 (2) that the breach of any provision thereof shall render an officer liable to disciplinary action.

<sup>35</sup>The latter will be elaborated in due course under the sub-heading of "Procedure in the case of criminal proceedings against a staff member".

<sup>36</sup>R 4(1).

<sup>37</sup>Part III of the Public Officers' Regulations specifically imposes a new additional duty on senior officers, probably heads of departments, to exercise disciplinary control and supervision over junior officers over and above the general disciplinary offence of being irresponsible.

<sup>38</sup>R 4(2). Whether or not a staff member who has been found guilty of an offence before a syariah court could be regarded as having breached r 4(2)(d) in that he has "conduct[ed] *himself* so as to bring the University into disrepute or to bring discredit thereto" may not be irrelevant in view of the importance accorded to syariah law since of late.

<sup>39</sup>R 5(1).

<sup>40</sup>R 6.



of property.<sup>40</sup> It shall be a disciplinary offence for a staff member to live beyond his official emoluments and legitimate private means,<sup>41</sup> to be in serious pecuniary indebtedness,<sup>42</sup> to fail to disclose the full extent of his indebtedness or give a false or misleading account thereof,<sup>43</sup> or to be absent from work without prior leave or permission.<sup>44</sup> A staff member shall not, either orally or in writing or in any other manner, make any public statement on the policies or decisions of the University in relation to any matter, or circulate any such statement whether made by him or not, where such statement would be detrimental to such policies or decisions of the University.<sup>45</sup> Rule 21 prohibits a staff member from instituting legal proceedings in his personal interest in connection with matters arising out of his duties as staff member, not related to his terms and conditions of service, without obtaining the prior permission in writing of the Vice-Chancellor.<sup>46</sup> Acting as an editor of, or taking part in the management of, or making financial contributions to, any publication of a political nature are also prohibited.<sup>47</sup>

It must be pointed out that not all disciplinary offences alluded to in the foregoing are of equal seriousness or gravity. The serious ones, if successfully proven against an errant staff member to the satisfaction of the DA, will undoubtedly result in reduction in rank or even dismissal from office.

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<sup>40</sup>R 7.

<sup>41</sup>R 8.

<sup>42</sup>R 10(1).

<sup>43</sup>R 10(3).

<sup>44</sup>R22(1). Note the new provisions introduced by the Public Officers' Regulations, regs 29 to 31, on absence without leave and the whereabouts of an officer who cannot be traced. The Staff Rules do not contain such provisions therein.

<sup>45</sup>R 18(1).

<sup>46</sup>There is thus no bar against public interest litigation, for example. The Students' Rules impose no limitation at all on the students' right to institute legal proceedings against the University. See also reg 22 of the Public Officers' Regulations.

<sup>47</sup>R 19. It is to be noted that the list of prohibitions cited discussed here is not exhaustive. Note also the prohibitions imposed by rules 9, 13, 14, 16, and 20. Note also that drug addiction and alcoholism are not made disciplinary offences at all under the Staff Rules whereas they are under the Students' Rules. The Public Officers' Regulations are silent as to alcoholism. Surprisingly also, plagiarism, which is regarded as the gravest of all crimes that an academic can commit in his professional capacity, is not even mentioned in the Staff Rules *albeit* it can fall within the scope of 'general conduct' enumerated in r 4.

However, if a punishment meted out is too excessive, it may attract the application of the principle of proportionality and thus rendering it liable to be quashed by the court in an appropriate application made thereto for judicial review.<sup>48</sup>

#### IV. APPLICATION OF OTHER WRITTEN LAWS

It is to be noted that the Staff Rules are an additional code of written law being imposed on every member of the staff, officer, or employee of the University by virtue of the fact that the person concerned is a member of the staff, officer, or employee of the University. Therefore, nothing in the Staff Rules shall derogate from the liability of any member of the staff, officer, or employee of the University for any offence under any written law, *albeit* nothing is stated therein to that effect.<sup>49</sup> The same should apply to any civil liability incurred.

#### V. DISCIPLINARY PROCEDURE

##### A Preliminary Requirement

Rule 25 provides that in every case of an alleged breach of discipline by any staff member where no criminal proceedings have been instituted against him, the DA shall, in the first instance, before commencing any disciplinary proceeding in the matter, consider whether the breach of discipline complained of is of such a nature which merits a punishment of dismissal or reduction in rank, or a punishment lesser than dismissal or reduction in rank. This preliminary step is rendered necessary in view of the fact that under the Staff Rules there are two separate and distinct disciplinary procedures for cases involving no criminal proceedings outside the campus - one applicable to cases meriting punishment lesser than dismissal or reduction in rank, and another applicable to cases meriting the punishment of dismissal or reduction in rank. It is to be noted that in a case where criminal

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<sup>48</sup>*R v Barnsley MBC, ex p Hook* [1976] 3 All ER 452. The principle alluded to will be further elucidated later in this article. See *infra* n 99.

<sup>49</sup>The same applies to the Public Officers' Regulations. Note, however, that the Students' Rules contain an express provision in r 71 to that effect.

proceedings have been instituted against a staff member, a distinct third procedure applies.<sup>50</sup> Fairness demands that there must be sufficient evidence of probative value against a staff member before a case can proceed to the next stage where a charge or charges of a breach or breaches of discipline is or are proffered against a staff member and thereafter the case proceeds to hearing *albeit* nothing is stated to that effect in the Staff Rules.<sup>51</sup> The silence of the Staff Rules on this very important matter may occasion injustice, *albeit* rarely one hopes, to the affected staff member because of the possibility of a staff member being required to exculpate himself without even there being a *prima facie* case against him in the first place. Hence, it is always advisable and advantageous to have an express provision relating thereto in the relevant law in order to avoid unnecessary harassment and embarrassment whenever the evidence against a person is insufficient to stand up against him in litigation before the appropriate tribunal.

#### **B. Procedure for Cases Meriting Punishment Lesser than Dismissal or Reduction in Rank**

Where the DA decides under rule 25 that the breach of discipline alleged against a staff member merits a punishment lesser than dismissal or reduction in rank, it shall, either orally or in writing, inform the staff member of the

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<sup>50</sup>See *infra* Part D4. It must also be noted the new Public Officers' Regulations contain a new additional procedure of absence without leave and where the whereabouts of the officer cannot be traced.

<sup>51</sup>Is a *prima facie* case required to be established at this stage of the proceedings? Note that there is a provision to that effect in reg 28(1) of the Public Officers' Regulations which requires the existence of *prima facie* case for cases meriting the punishment of dismissal or reduction in rank at this stage of the proceedings. This matter will be commented upon in the later part of the article. A *prima facie* case probably means that there must be sufficient evidence to establish the bare ingredients of a breach or breaches of discipline for the matter to proceed to the next stage when and where the charge or charges of a breach or breaches of discipline will be proffered against a staff member and thereafter the case will then be heard before DA even though the whole process is handled by one and the same body. This proposition is based, by analogy, on the rule established in preliminary enquiry cases - *Re Osman bin Abdullah* [1954] MLJ 237; *In Re Pang Po Pah* [1985] 2 MLJ 214.

facts of the breach of discipline alleged against him and give him an opportunity of making representations, either orally or in writing against the allegation.<sup>52</sup> Rule 24A confers on the staff member to be disciplined a right to be represented by another staff member of his choice, or by an advocate and solicitor.<sup>53</sup> After considering the representations made by the staff member, the DA shall determine whether or not the staff member is guilty of the alleged breach of discipline, and if it determines that he is guilty thereof it shall impose any one, or any appropriate combination of two or more, of the punishments specified in paragraphs (a) to (d) both inclusive, of rule 33.<sup>54</sup> The punishments referred to are:

- (a) warning;
- (b) fine;
- (c) forfeiture of salary; and
- (d) reduction of salary.

Rules 34 and 35 impose a limit on the powers to impose fines or forfeiture of salary, and reduction of salary respectively.<sup>55</sup> Notwithstanding the provision of rule 26(2) cited above, where the DA finds that in any disciplinary proceeding against a staff member that he is guilty of the alleged breach of discipline, the DA may, having regard to any extenuating circumstances in respect of the breach, or to any special circumstances relating to the staff member, including his past conduct and record, decide not to impose any punishment

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<sup>52</sup>R 26(1).

<sup>53</sup>This right of legal representation should include a right to make written representation through one's counsel. *Doreswamy v PSC*, [1971] 2 MLJ 127, by analogy. Note that the Students' Rules are silent on the question of legal representation whereas under reg 28(8) of the Public Officers' Regulations the DA may permit the officer disciplined to be represented by an advocate and solicitor "in exceptional cases" only.

<sup>54</sup>R 26(2).

<sup>55</sup>Note that r 35(1) imposes a limit on the power to reduce the salary of a staff member. The salary of a staff member can only be reduced "to such point in the salary scale of his grade" and for such period as the DA deems fit. Note also the limit imposed by r 34 on the power to impose fines and forfeiture of salary. These will be elaborated below under the sub-heading of "Procedure for cases meriting the punishment of dismissal or reduction in rank" that follows immediately hereinafter.

on him.<sup>56</sup> If the DA so decides, then no record whatsoever of the disciplinary proceeding shall be entered in the staff member's record of service.<sup>57</sup>

A few matters arising therefrom may be considered here. First, it is settled that the DA in imposing punishment on an errant staff member must not impose a punishment which is *ultra vires* its power under rule 26(2) read together with rules 33(a) to (d), 34 and 35. The authority which lends support to this proposition is *Robana & Anor v USM*.<sup>58</sup> In that case, the High Court pointed out that neither the DA nor the University Council was empowered to impose punishment in excess of the express limit imposed by rules 35 read together with rule 33(d) of the Staff Rules. To put things in perspective, under rule 33(d) the DA has the power to impose the punishment of reduction of salary on an errant staff member, and rule 35(1) goes on to provide that where the DA imposes the punishment of reduction of salary, it may only reduce the salary of the staff member "to such point in the salary scale of his grade"<sup>59</sup> and for such period as it deems fit. In other words, the power under rule 33(d) cannot be used to effect or prejudice the salary grade of an errant staff member. In *Robana*, this limitation on rule 33(d) was not adhered to, thus resulting in the punishment imposed being held to be null and void. In that case, the punishment of reduction of salary by five salary increments for five years on the second applicant had the effect of reducing him from salary grade A10 to grade A11<sup>60</sup> and therefore *ultra vires* rule 35(1). Secondly, rule 26(1) does not stipulate any time period between the giving of notice and the making of representations during which the staff member to be disciplined can adequately prepare his defence. Obviously there exists a lacuna in rule 26(1) which may be supplemented by the

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<sup>56</sup>R 28(1).

<sup>57</sup>R 28(2).

<sup>58</sup>[1989] 1 MLJ 487.

<sup>59</sup>Emphasis added. In other words, the lowest point to which the salary of a staff member can be reduced is the lowest scale in a particular grade. The reduction, to be *intra vires*, must not prejudice the salary grade of a staff member.

<sup>60</sup>Note that salary grade A10 is a higher grade than A11.

rules of natural justice or fairness. At common law, the rules of natural justice require that adequate notice of the alleged charge or charges be given to the affected party and this must necessarily include an adequate opportunity to prepare his defence to the charge or charges proffered against him. This requirement of the rules of natural justice or fairness should be implied here as it is not excluded either expressly or by implication by the Staff Rules. Failure to comply therewith may affect the validity of the disciplinary proceedings.<sup>62</sup> Thirdly, although rule 26(1) states that notice of the facts of the alleged breach of discipline may be given orally, this mode may not be advisable for the DA to adopt in practice because the staff member disciplined may plead later that he has not been given any notice or adequate notice of the alleged breach of discipline proffered against him. If this plea is combined and fortified with other allegation of procedural substantive defects, the DA may have a difficult task at hand to counter the allegations of the staff member disciplined. Fourthly, rule 26 says nothing about what procedure should be adopted in case the staff member disciplined fails to respond to the opportunity accorded to him to make representations, and what is the consequence of the failure on the part of the staff member disciplined to respond to the opportunity to make representations. At common law, a person who has been adequately notified of the charges against him and given a reasonable opportunity of being heard, but who fails or refuses to avail himself of the opportunity so accorded, cannot complain subsequently of any failure of natural justice if the administrative body charged with the duty to adjudicate his case goes ahead with the hearing of the case *ex parte* and decides the case accordingly in the absence of the party charged.<sup>63</sup> Fifthly, the DA has to observe the *nemo iudex in causa sua* maxim while adjudicating a case against a staff member of the University. Of particular relevance

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<sup>61</sup>Note the rule established in *Malloch* referred to earlier. See *supra* n 11.

<sup>62</sup>*Phang Moh Sbin v Commissioner of Police* [1967] 2 MLJ 186. This case emphasises the importance of giving adequate opportunity to the officer disciplined to prepare his defence. The same should by analogy be applicable here.

<sup>63</sup>Jain & Jain, *Principles of Administrative Law*, 4th ed., p 244.

here is personal bias. It may arise in a number of different circumstances where an adjudicator has some form of personal relationship, be it favourable or adverse, with a party to the dispute he is adjudicating. If the relationship alluded to exists, then the adjudicator must disqualify himself from adjudicating the dispute lest his decision be nullified subsequently on the ground of personal bias. Sixthly, rule 24A confers on the staff member disciplined a right to be represented by counsel but is silent as to the right of the University to be similarly represented. This being the case, the rules of natural justice will come into play in order to supplement the lacuna that exists in the Staff Rules. If one party to a dispute is allowed legal representation, the other party has to be accorded the same privilege as a matter of natural justice or fairness. Finally, in respect of the power of the DA not to impose any punishment on a staff member found guilty of an alleged breach of discipline or disciplinary offence, the decision of the DA under rule 28<sup>64</sup> cannot be questioned or reviewed at the instance of a third party provided that it is made in accordance with the requirements of rule 28, i.e. if it is made "having regard to any extenuating circumstances in respect of the breach, or to any special circumstances relating to the staff member, including his past conduct or record." Furthermore, the position may be fortified by the pleas of *res judicata* and lack of *locus standi*. However, if the notes of disciplinary proceedings do not reveal that these requirements or considerations have been taken into account by the DA in deciding not to impose punishment on a staff member, then the decision of the DA may be open to judicial review.<sup>65</sup> The same applied if a case is investigated but discontinued for no apparent reason, then

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<sup>64</sup>Under this rule, the DA may condone a staff member found guilty thereby of a disciplinary offence under certain circumstances.

<sup>65</sup>By analogy, based on the principle established in *Re Haft Sazali* (1992) 2 MLJ 864. It is to be noted that most of the observations made above under this Part of the article on the right to counsel, bias and the powers under rules 28, 26(2) read with r 33 are also of relevance to cases meriting the punishment of dismissal or reduction in rank or to cases where criminal proceedings have been instituted against a staff member.

it may be reopened subsequently even after a long lapse of time as the argument of time bar or limitation does not apply to this type of proceeding which is regarded as criminal in nature.

### **C. Procedure for Cases Meriting the Punishment of Dismissal or Reduction In Rank**

For cases meriting the punishment of dismissal or reduction in rank, rules 24, 24A and 27 govern the procedural requirements of notice and hearing that must be complied with by the DA. It is to be noted that the preliminary requirement imposed by rule 25 must have been observed before rules 24 and 27 can come into play. The DA must have in the first instance under rule 25 decided that the alleged breach of discipline in question is of such a nature that it merits a punishment of dismissal or reduction in rank.

#### **1. Interdiction from Office in Cases Meriting Dismissal**

Save in a case which, in the opinion of the DA, merits a punishment of reduction in rank, the DA shall decide, in the first instance, whether or not the staff member shall, during the pendency of the disciplinary proceedings, be interdicted from his office; if he is interdicted from his office, it shall also decide as to the portion of his monthly emoluments which shall be paid to him during the period of his total monthly emoluments.<sup>66</sup> The DA shall notify its decision to the Vice-Chancellor who shall give effect thereto and it shall be within the power of the DA to vary its decision on this matter from time to time as it deems fit.<sup>67</sup>

It is to be noted that rule 27(2) applies only to cases meriting the punishment of dismissal. Another matter of relevance here is the limitation imposed on the power of the DA to decide on how much of the total monthly emoluments shall be paid to the staff member who is interdicted from his

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<sup>66</sup>R 27(2).

<sup>67</sup>*Ibid.*



office, the non-observance of which will offend against the *ultra vires* doctrine.<sup>68</sup>

## 2. Notice and Hearing

Once the requirement of rule 25 is complied with, the following procedure applies.

In a case meriting the punishment of dismissal or reduction in rank, rule 24 stipulates that in all proceedings of this kind no staff member shall be dismissed or reduced in rank unless he has been informed in writing of the grounds on which it is proposed to take action against him and has been afforded a reasonable opportunity of being heard. The right to be heard referred to in rule 24 is a right to an oral hearing or a mixture of oral hearing and written representations before the DA. A staff member to be disciplined must also, in accordance with rule 27(3), be informed in writing of the facts of the breach of discipline alleged against him. The pre-hearing and hearing procedure and other related matters will be examined next.

After the DA has applied its mind to the matter of interdiction and payment of monthly emoluments during the interdiction, it shall inform the staff member in writing of the facts of the breach of discipline alleged against him<sup>69</sup> and give him an opportunity to appear before it on such date and at such time as it may specify, being, in any case, not less than one month from the date of service upon the staff member of the information as to the breach of discipline.<sup>70</sup> Rule 24A confers a right on the staff member to be represented in the disciplinary proceedings by another staff member of his choice or by an advocate and solicitor. If the staff member avails himself of the opportunity to appear before the DA, he may make, either orally or in writing or both orally and in writing, such representations as may, in the opinion of the DA,

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<sup>68</sup>See the last issue dealt with in the *Robana* case discussed previously in n 58.

<sup>69</sup>As adverted to previously, r 24 mandatorily requires that the staff member to be disciplined must also be informed in writing of the grounds on which it is proposed to take action against him.

<sup>70</sup>R 27(3).

be relevant to the alleged breach of discipline, provided that if any written representations are made, the same shall be forwarded to the DA not less than ten days before the date of appearance fixed before the DA.<sup>71</sup>

The hearing procedure is scantily provided for in the Staff Rules. Rule 27(4)(b) states that at the hearing, the DA may make such enquiries from the staff member or any other person and examine such document or other article whatsoever as it may deem fit.

### 3. The Decision of the DA and Punishment

Where the staff member fails to appear before the DA on the date and the time specified by the DA under rule 27(3) or where he appears before the DA under rule 27(4) and the procedure thereunder has been complied with,<sup>72</sup> the DA shall proceed to decide whether or not the staff member is guilty of the alleged breach of discipline, and if it decides that the staff member is guilty, it shall impose such punishment as it may deem fit and the punishment so imposed may be dismissal or reduction in rank, or any one, or any appropriate combination of two or more, of the punishments specified in paragraphs (a) to (f), both inclusive, of rule 33. To put matters in perspective, it may be useful to enumerate the punishments that can be imposed by the DA<sup>73</sup> under rule 33. They are:

- (a) warning;
- (b) fine;
- (c) forfeiture of salary;
- (d) reduction of salary;
- (e) reduction of rank; and
- (f) dismissal.

If the punishment imposed is lesser than dismissal, the DA shall also decide whether the portion of the emoluments of

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<sup>71</sup>R 27(4)(a).

<sup>72</sup>R 27(5)(a) & (b) respectively.

the staff member which was withdrawn from him during the period of his interdiction, if any, should be forfeited in full or in part.<sup>74</sup> However, if the punishment imposed is dismissal, the staff member shall not be paid the portion of his emoluments which was withheld from him during the period of his interdiction.<sup>75</sup>

In respect of the imposition of punishments of fine, or forfeiture or reduction of salary, rules 34 and 35 impose some restrictions thereon. In the case of fines or forfeiture of salary, the amount imposed shall not exceed an amount equal to one quarter of the staff member's monthly salary, and if he is fined or subjected to forfeiture of salary on more than one occasion in any single month, the aggregate of fines imposed or the forfeiture of salary to which he is subjected in that month shall not exceed an amount equal to one quarter of the staff member's monthly salary, and if he is fined or subjected to forfeiture of salary on more than one occasion in any single month, the aggregate of fines imposed or the forfeitures of salary to which he is subjected in that month shall not exceed an amount equal to fifty per centum of his monthly salary.<sup>76</sup> However, where a staff member is found to have been absent from work without leave, the amount imposed in both cases (i.e fine or forfeiture of salary) may extend to an amount which is equal to his salary for the period of his absence without leave.<sup>77</sup> The fine or forfeiture of salary shall be deducted from the monthly emoluments of the staff member on whom it is imposed.<sup>78</sup> In the case of reduction of salary, the DA may reduce the salary of a staff member to such point in the salary scale of his grade and for such period as it deems fit.<sup>79</sup> The punishment

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<sup>73</sup>And for that matter, the appellate authority, upon appeal. See *Robana case, supra* n 58, on 'the *ultra vires* point' at pp 497 & 498.

<sup>74</sup>R 27(6). Can the emoluments which were withdrawn be restored in full to the affected staff member under r 27(6)?

<sup>75</sup>R 27(7).

<sup>76</sup>R 34(1).

<sup>77</sup>R 34, provisos (a) & (b) respectively.

<sup>78</sup>R 34(2).

<sup>79</sup>R 35(1). This point has already been dealt with above. See *supra* nn 58-60.

of reduction of salary shall entail a loss of seniority to the staff member by a period equal to that which it will take him to earn the salary which he received immediately before the punishment was imposed.<sup>80</sup>

Notwithstanding the provision of rule 27(5) discussed above, where the DA finds a staff member, in any disciplinary proceeding against him, guilty of the alleged breach of discipline, it may, having regard to any extenuating circumstances in respect of the breach, or to any special circumstances relating to the staff member, including his past conduct and record, decide not to impose any punishment on him.<sup>81</sup> If the DA so decides, then no record whatsoever of the disciplinary proceeding shall be entered in the staff member's record of service.<sup>82</sup> However, if punishment is imposed on the staff member, rule 36 requires that every punishment imposed shall be recorded in the staff member's record of service.

#### 4. Matters Arising

A few issues relating to the disciplinary procedure, the punishments that can be imposed, and other related matters relating to cases meriting the punishment of dismissal or reduction in rank may be of interest to administrative lawyers. They are:

First, one may ask whether the Vice-Chancellor has the discretion of vetting a complaint of a breach of discipline against a staff member in order to determine if there is substance in the complaint before deciding to forward the matter to the Disciplinary Committee for disciplinary proceedings to be initiated against a staff member. It must be said that the Staff Rules are silent thereon. It will be perfectly alright if the Vice-Chancellor were to act as a mere conduit pipe to convey the complaint to the Disciplinary Committee without play-

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<sup>80</sup>R 35(2).

<sup>81</sup>R 28(1). All issues that may arise hereunder have already been dealt with above. See *supra* nn 64 and 65.

<sup>82</sup>R 28(2).

ing any role in vetting the complaint. However, it will be otherwise if vetting is done as this process involves the exercise of a specific power and must therefore be expressly conferred by the Staff Rules. It must be pointed out that any power that may affect a person's right or interest adversely must have express statutory authorisation.

Secondly, rules 25 to 27 of the Staff Rules are silent as to whether the DA must vet a complaint of a breach of discipline with a view to determining whether there is a case against a staff member subsequent to compliance with rule 25 before initiating disciplinary proceedings against the errant staff member and thereafter setting the case down for hearing. The Staff Rules are silent whether at this stage of the proceedings, the DA has to establish a *prima facie* case against an errant staff member. With regard to the silence of the Staff Rules on the matter raised, it must be said that the lacuna therein could lead to the power of the DA being abused by an ill-advised or informed DA by commencing disciplinary proceedings against a staff member even though there is no case against the staff member. It is incredible and unfair that a staff member should be subjected to the harassment and embarrassment of having to exculpate himself before the DA even though there is no case against him. Of course, a properly advised DA will reject a complaint if it finds that there is no substance in the complaint. The DA certainly has such a power even though the Staff Rules are silent thereon. It is submitted that it will certainly be better, for purposes of fairness and justice, for the Staff Rules to have an express provision thereon in order to avoid the possibility of subjecting someone through a disciplinary process even though there exists no case against him.<sup>63</sup>

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<sup>63</sup>Note that reg 28(1) of the Public Officers' Regulations 1993 requires the establishment of *prima facie* case at this stage of the proceedings.

Thirdly, a matter relating to personal bias may be hypothetically posed for consideration here. Assuming that the Disciplinary Committee purportedly delegates the adjudicatory function to a board of officers of the University under section 16A(3) of the UUCA 1971 because there is a reasonable suspicion of a real likelihood of bias on its part, will the delegation neutralise the effect of personal bias? The answer should be in the negative because if a body is incapable of or is disqualified from adjudicating by reason of personal bias, it cannot neutralise and overcome that disqualification by delegating the adjudication to another body acting under its supervision and direction and then adopt and confirm the decision of the delegates purportedly justifying everything so done by relying upon section 16A(3). In the event of such a situation occurring, the right and proper thing to do is for the University to appoint a new Disciplinary Committee with a view to overcoming the disqualification so encountered. Assuming further that if the disqualification only affects a member of the Disciplinary Committee, then that disqualified member should be replaced by appointing a new one in his place.

Fourthly, on the matter of notice, rule 24 says that the notice must state in writing 'the grounds on which it is proposed to take action against him [the staff member]' and then rule 27(3) goes on to provide that the staff member must be informed in writing of 'the fact of the breach of discipline alleged against him'. Nothing in these provisions says anything about whether the notice must also state in writing of 'the facts of the breach of discipline alleged against him'. Nothing in these provisions says anything about whether the notice must also state in writing of the contemplated punishment that might be inflicted on the staff member in case he is found guilty of the breach of discipline alleged against him. The questions that may arise here are whether the notice must bring to the attention of the staff member the proposed punishment, and if so, what is the consequence of non-compliance therewith. A Supreme Court

case, *IGP & Anor v Alan Noor bin Kamat*<sup>64</sup> may shed some light on the matters in question *albeit* that case was dealing with a provision of the repealed General Orders which expressly required that the officer disciplined must be informed in writing of the ground or grounds on which it is proposed 'to dismiss the officer or reduce him in rank'.<sup>65</sup> The Supreme Court in that case ruled that the notice must bring to the attention of the officer of the contemplated punishment so as to make him appreciate the gravity of the situation against him and thus enable him to give a satisfactory explanation as best as he could, and any non-compliance therewith is fatal to the action of the DA. Reverting to the questions posed, it is submitted that as there exists a lacuna in rule 24, the same may be read thereinto by implication as a matter of natural justice of fairness<sup>66</sup> and for the same reason and with the same consequence if the implied requirement is not complied with.

Fifthly, save for the deficiencies highlighted above, the combined effect of rules 24 and 27(3) and (4) does confer on the staff member a right to be informed of the grounds on which the DA proposed to take action against him, the facts of the alleged breach of discipline and the right to appear before the DA and to make representations thereon, either orally or in writing or both orally and in writing. Further, the hearing cannot be held less than a month from the date of the service on the staff member of the written notice. *A fortiori*, rule 24A, which confers on a staff member disciplined a right to be represented by an advocate and solicitor or another staff member of his choice, is indeed an outstanding feature of the Staff Rules in terms of procedural fairness which distinguishes it from the Stu-

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<sup>64</sup>[1988] 1 MLJ 260.

<sup>65</sup>Emphasis added. See also reg 28(1) of the Public Officers' Regulations where the same clause is used.

<sup>66</sup>Based also on the principle adverted to earlier in *Malloch v Aberdeen Corp*. See *supra* n 11.

dents' Rules and the Public Officers' Regulations. Thus in the context of procedural fairness, these provisions do confer protection on the staff member disciplined and it is submitted that these requirements, together with that implied into rule 24 adverted to in (iv) above, are mandatory<sup>87</sup> in nature and any non-compliance thereof will vitiate the disciplinary proceedings taken against the staff member.

Sixthly, the Staff Rules mention nothing about pre-hearing discovery. This right may be vital to the preparation of the defence because without which it would be difficult to prepare an adequate defence. Hence, any material and relevant information and evidence in the possession of the DA and which would be used against the staff member should be made available to the staff member upon request as a matter of natural justice or fairness. The High Court in *Robana* justified the right to pre-hearing discovery on the grounds that a defendant is generally entitled to notes of evidence that might assist his case as a matter of natural justice or procedural fairness, that the denial of such right would be tantamount to denying a staff member of his right to make representations conferred on him by rule 27(4)(a) of the Staff Rules, and, further, it is established law that an adjudicator cannot have access to prejudicial evidence against an officer in a disciplinary proceeding against that officer without according him an opportunity to explain, correct and contradict the same.<sup>88</sup>

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<sup>87</sup>Applying the test that the requirements are vital and go to the root of the matter considering their relation to the general object intended to be secured thereby, in which case they would be mandatory and any breach thereof cannot be condoned. See *supra* n 10.

<sup>88</sup>*SS Kanda v Government of the Federation of Malaya* [1962] 1 MLJ 169, PC; and as re-affirmed recently by the Supreme Court in *Shamstah Ahmad Sham v PSC, Malaysia* [1990] 3 MLJ 364. This point was also highlighted in *Robana* case. Note that the same question may also arise in cases meriting punishment lesser than dismissal or reduction in rank discussed under Part C2 above. The proposition established in *SS Kanda* is of great significance as it can operate independently in the absence of the context in which it is discussed, to wit, pre-hearing discovery. It must also be noted that the proposition in *SS Kanda* is particularly relevant when a prior enquiry has already been carried out before the subsequent hearing before the adjudicator who is in possession of the prejudicial report of the prior enquiry.



Seventhly, it is surprising to note that the hearing procedure established in rule 27(4)(b) for cases meriting dismissal or reduction in rank is very brief in that it merely says that "*the DA may make such enquires from the staff member or any other person and examine such document or other article as it may deem fit*".<sup>89</sup> Therefore, many matters relating to procedural fairness are left to be implied as a matter of natural justice or fairness. Such a situation is, it is submitted, not conducive to the attainment of procedural fairness in adjudicatory proceedings. Certainly, a more detailed procedure could be provided for in such cases as reduction in rank or dismissal entail grave consequences, particularly in the case of the latter, to a staff member disciplined. A more detailed hearing procedure can be found in regulations 28(6), (7), (9), (10), (11) and (12) of the Public Officers' Regulations. The Students' Rules contain even better and more detailed provisions than the Public Officers' Regulations in the provisions of rules 46 to 54, particularly rules 50 and 51 which must be highlighted here as they are akin to the trial procedure of a court of law in prosecuting a criminal offence. Rule 50 requires the DA to prove its case against the errant student whereas rule 51 relates to the procedure applicable when the student defends or exculpates himself by rebutting the case against him. The hearing procedure of the Staff Rules is a far cry from that of the Students' Rules. Reverting to the lacunae left open in the Staff Rules, a few selective remarks may be made here. First, there should be provisions dealing with, besides the rights on the part of the staff member to be informed of the facts of the alleged disciplinary offence at the commencement of the hearing<sup>90</sup> and to plead thereto, the rights to inspect and examine evidence used by the DA, to

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<sup>89</sup>Emphasis supplied.

<sup>90</sup>This requirement is distinct from the provision of r 27(3). See r 48 of the Students' Rules.

cross-examine and re-examine witnesses if necessary, and to plead for leniency of punishment in case he is found guilty of the disciplinary offence charged. Next, the trial procedure is silent as to who should prosecute the offender. That burden cannot be discharged by the DA for reason of bias. It seems that in practice it is the complainant who has to shoulder this burden. It is submitted that to allow the complainant to prosecute the offender may lead to unfairness against the offender. A fair trial procedure would ensure objectivity on the part of the prosecution. The complainant should be restricted to the role of a witness, the DA should restrict itself to the task of adjudication only, and the University should have a prosecuting department to take over the prosecution of disciplinary cases. An officer trained in the art of prosecution should be an advocate and solicitor because an officer who is trained and well-versed in the art of prosecution should for all intents and purposes be regarded as a lawyer.<sup>91</sup> In fact, the use of a trained prosecutor can serve a three-fold purpose. Besides ensuring fairness and objectivity in prosecution, it also places the University on par with the staff member disciplined if he were to engage the services of an advocate and solicitor. A good case may be ruined just because the prosecutor bungles in the prosecution. Also, this proposed practice will lead to consistency and uniformity of approach on the part of the prosecution.<sup>92</sup> Hence, there is an urgent need for this feature to be incorporated into the Staff Rules.

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<sup>91</sup>The terms 'lawyer' should be given a liberal interpretation. It should include someone who does not possess a professional qualification but is well versed in the intricacies of the law through practical training on the job. See *A.K. Roy v Union of India* AIR 1982 SC 710, 747; *J. K. Aggarwal v Haryana Seeds Development Corp Ltd* AIR 1991 SC 1221, 1223.

<sup>92</sup>For example, as there are no criteria for determining whether a disciplinary case falls within the category of cases meriting a punishment of dismissal or reduction in rank, or the other category of cases meriting a punishment lesser than dismissal or reduction in rank, the establishment of prosecuting department handling and specialising in the drafting of charges and prosecuting the offenders will ensure uniformity and consistency of approach on the part of the prosecution.

In this context, the Students' Rules come very close to an epitome of a fair hearing procedure save for the absence of a prosecuting department specialising in handling disciplinary cases.<sup>93</sup> Another point to be noted is that the coaching of witnesses on what to say in the hearing is forbidden for the sake of procedural fairness.<sup>94</sup> The DA must strictly observe the *nemo iudex in causa sua* maxim in that if there is any reasonable suspicion of a real likelihood of bias on the part of any member thereof, he must be advised to disqualify himself as an adjudicator on pain that if he does not do so the decision of the DA may be subsequently invalidated on the ground of bias.<sup>95</sup> Finally, there should be a right to reasoned decisions in a university environment as there is a right of appeal under the Staff Rules and particularly if the action taken against a staff member is one which would entail grave consequences on the staff member.<sup>96</sup>

Eighthly, on the discretion of the DA<sup>97</sup> to impose punishment on a staff member found guilty of the disciplinary offence or offences charged under rules 33, 34, and 35, and also in cases where criminal proceedings have been brought against a staff member,<sup>98</sup> it must be pointed out that the DA must not act beyond the ex-

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<sup>93</sup>See rr 46-54.

<sup>94</sup>This point was emphasised in *Robana*.

<sup>95</sup>Note that this point, too, was raised and decided in *Robana* and the proposition thereof is referred to and emphasised here. In that case, the disciplinary proceedings against two lecturers were quashed on, *inter alia*, the ground of personal bias on the part of the Registrar of the defendant University. The Registrar who acted as the secretary of the DA and the UC in the proceedings against the lecturers concerned was also the complainant against the lecturers. The Registrar's presence during the DA's deliberations was held by the High Court to be contrary to the rules of natural justice.

<sup>96</sup>This point was also raised and decided in *Robana*. In fact, this proposition is based on case law decided quite some time ago *albeit* it has just been recently adopted and given effect to in this country. Another point of relevance already dealt with previously in Part C2 is with regard to the right of a University to counsel. The same shall *mutatis mutandis* apply here.

<sup>97</sup>The University Council upon hearing any appeal against the decision of the DA.

<sup>98</sup>The procedure in relation to cases where criminal proceedings have been instituted against a staff member will be dealt with later in Part D4 below.

press limits of its powers lest its decisions be held to be *ultra vires* and as a result null and void. This *ultra vires* point was also succinctly dealt with in the *Robana* case. In addition, there also exists an implied restriction, to wit, the principle of proportionality, on the power to impose punishment in that the punishment inflicted should not be excessive; the punishment meted out should be proportionate to the offence or wrong committed. An example *par excellence* of this proposition is to be found in the case of *R v Barnsley MBC, ex p Hook*<sup>99</sup> where the court held that revoking the licence of a market trader for urinating in a side street one evening after the market had closed and public lavatories had been locked, was excessive as it was disproportionate to the wrong committed. A few other propositions of relevance hereto relating to substantive *ultra vires* must also be alluded to. It has frequently been said that if an administrative decision or conclusion is not based on any evidence, then it is liable to be quashed as a jurisdictional error.<sup>100</sup>

The same is also true if the decision of a tribunal is so perverse that no reasonable tribunal could have reached that kind of decision,<sup>101</sup> or if the decision is motivated by *mala fides*, or if relevant considerations have been ignored, or where undue weight has been given to a

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<sup>99</sup>[1976] 3 All ER 452. See also *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 All ER 122, a case on excessive fine.

<sup>100</sup>See the recent case of *Pushpadevi Singam v UM* [1993] 2 AMR 41:3025 in which the decision of the university to terminate the services of a telephone operator by medically boarding her out was successfully challenged, *inter alia*, on the ground that the finding of the Medical Board was not justifiable in that its decision was one which no reasonable tribunal could have reached as there was no evidence to support the finding that the applicant was medically unfit to continue with the performance of her duties as a telephone operator. It was also pointed out that as the decision of the Medical Board was defective in law, there was no way for the University to validly accept the recommendation and in consequence the decision of the University to terminate the services of the applicant was void *ab initio*. Although this decision was not based on the Staff Rules, the propositions established therein, nevertheless, are of equal significance to decision made thereunder. Note that the decision of the High Court has been recently affirmed by the Federal Court.

<sup>101</sup>*Pushpadevi Singam v UM, ibid; Malayan Banking Bhd v Association of Bank Officers, Peninsula Malaysia & Anor* [1988] 3 MLJ 204.

relevant consideration at the expense of other relevant factors, or if irrelevant considerations have been taken into account, or if the decision-making body has misdirected itself in law, or if it did not apply its mind to the matter under consideration.

Lastly, the Staff Rules contain no direct provisions like the Students' Rules on matters regarding written notes of disciplinary proceedings, register of disciplinary proceedings, right to notes of disciplinary proceedings, etc.<sup>102</sup> although rule 38 thereof does indirectly refer to 'notes of disciplinary proceedings'. This indirect reference clearly shows that notes of disciplinary proceedings must be kept by the DA. Concerning the notes of disciplinary proceedings, one may enquire whether the staff member disciplined is entitled to a copy thereof. This will be dealt with later in relation to appeals. Another matter to be noted here relating to notes of disciplinary proceedings is that if such notes are so brief and sketchy that they do not contain material information relating to the disciplinary proceedings taken against a staff member, problems may arise if the decision of the DA is subsequently subjected to judicial review. The decision of the DA may even be quashed in a proper case where the record of the proceedings does not show that material considerations which must be taken into account have in fact been taken into account by the DA in its decision-making process.<sup>103</sup>

#### **D. Procedure in the Case of Criminal Proceedings Against a Staff Member**

##### **1. Preliminary Requirements**

In a case where criminal proceedings have been instituted against a staff member, irrespective of whether they are

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<sup>102</sup>See regs 56, 57, & 59(2) of the Students' Rules.

<sup>103</sup>By analogy, based on the principle established in *Re Haji Sazali* [1992] 2 MJJ 864.

instituted within or outside Malaysia,<sup>104</sup> it shall be the duty of a staff member to forthwith report the matter to the DA and the Vice-Chancellor.<sup>105</sup> Where the same are initiated by or on behalf of his Head of Department, such Head of Department shall do likewise.<sup>106</sup> Then the Vice-Chancellor shall take steps to obtain from the court in which the proceedings are instituted or from the police or other prosecuting authority the information and particulars relating to the charge or charges against the staff member, the time and date of arrest if the staff member is arrested, whether he is on bail or not, and such other information as is relevant.<sup>107</sup> Next, the Vice-Chancellor shall cause the same to be forwarded to the DA for further actions to be taken thereon in accordance with the Staff Rules.<sup>108</sup>

## 2. Interdiction and Withholding of Emoluments

The DA shall then decide whether or not the staff member shall be interdicted from his office during the pendency of the said criminal proceedings and if it so decides, it shall also decide as to the portion of his monthly emoluments which shall be paid to him during the period of the interdiction, being, in any case, not less than one-half of his total monthly emoluments.<sup>109</sup> The Vice-Chancellor shall then be notified thereof and he shall give effect thereto, but the DA may change its decision regarding the interdiction from time to time as it deems fit.<sup>110</sup>

## 3. Institution of Disciplinary Proceedings During the Pendency of Criminal Proceedings or Upon Acquittal

Rules 30 stipulates that during the pendency of the criminal proceedings against the staff member, no disciplinary pro-

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<sup>104</sup>R 29(4).

<sup>105</sup>R 29(1)(a).

<sup>106</sup>R 29(1)(b).

<sup>107</sup>R 29(2).

<sup>108</sup>R 29(3).

<sup>109</sup>R 29(4). The observation made earlier on 'the *ultra vires* point' in Part V3 (d)(v) shall *mutatis mutandis* apply hereto.

<sup>110</sup>*Ibid.*

ceeding shall be taken against him on any ground which raises any issue that is substantially similar to any issue which arises in the criminal proceedings pending against the staff member. However, nothing in rule 30 shall prevent any disciplinary proceeding from being taken against him during the pendency of such criminal proceedings on any other ground arising out of his conduct in the matter. Where the staff member is acquitted on a criminal charge, his interdiction shall continue to have effect until the disposal of the appeal if an appeal is lodged by the prosecution.<sup>111</sup> In such a case, no disciplinary proceedings shall be taken against him on any ground which raises any issue which is substantially similar to any issue which arose in the criminal charge on which he was acquitted.<sup>112</sup> And nothing shall prevent any disciplinary proceeding from being taken against him on any other ground arising out of his conduct in the matter.<sup>112a</sup>

#### 4. Conviction and Related Matters

Where a staff member is convicted in any criminal proceedings, it shall be his duty to forthwith notify the Vice-Chancellor together with all the relevant particulars in respect of the conviction.<sup>113</sup> The word 'convicted' is defined in rule 32(9) to include any finding of guilt or any order involving any finding of guilt by any criminal court in Malaysia or outside Malaysia in the exercise of its criminal jurisdiction, or by a competent body conferred with power to conduct summary investigation under any written law to determine whether the person charged or accused has committed an offence. In the event of a criminal conviction, the Vice-Chancellor shall thereupon obtain from the court by which the staff member was convicted a copy of the record of the proceedings in the case and forward the same to the DA together with the staff member's record of service and the recommendations of his Head of Department as to whether

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<sup>111</sup>R 29(5).

<sup>112</sup>R 31.

<sup>112a</sup>*Ibid.*

<sup>113</sup>R 32(1).

any disciplinary punishment should be imposed on the staff member and, if so, the punishment recommended.<sup>114</sup> Where a staff member has been interdicted from his office under rule 29(4), he shall immediately upon conviction be deemed to be suspended from the service and shall not be entitled to be paid or to receive any emoluments in respect of his office during the period of such suspension.<sup>115</sup>

##### **5. Disciplinary Punishment or Waiver Thereof**

Upon receipt of the record of the criminal conviction, record of service of the staff member, and the recommendations of his Head of Department, the DA shall proceed to decide whether any disciplinary punishment should be imposed on the staff member, and if it decides that disciplinary punishment should be imposed on him, it shall, before doing so, call upon the staff member to make representations thereto within a period of not less than fourteen days.<sup>116</sup> The representations of the staff member referred to above shall be submitted through his Head of Department who shall forward the same to the DA together with such comments as he may wish to make on the matter.<sup>117</sup> After considering the representations of the staff member and the comments of the Head of Department, the DA may decide not to impose any disciplinary punishment on the staff member, or to impose any one, or any appropriate combination of two or more, of the punishments specified in paragraphs (a) to (f), both inclusive, of rule 33 read together with rules 34 and 35.<sup>118</sup> If the punishment imposed on the staff member is lesser than dismissal, the DA shall also decide whether the portion

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<sup>114</sup>R 32(2).

<sup>115</sup>R 32(3).

<sup>116</sup>R 32(4).

<sup>117</sup>R 32(5). This sub-rule is silent as to whether there is a further right of making representation against the comment of the Head of Department. Should adverse comment be made behind the back of another without giving him an opportunity of defending himself? This question will be dealt with hereinafter under the sub-heading of 'Matters Arising'.

<sup>118</sup>R 32(6).



of the emoluments of the staff member which was withheld during the period of his interdiction and the emoluments which were not paid to him during the period of his suspension should not at all be paid to him, or should be paid to him either in full or in part.<sup>119</sup> However, if the punishment imposed upon the staff member is dismissal, he shall not be paid the portion of his emoluments which was withheld from him during the period of his interdiction, and also the emoluments which were not paid to him during the period of his suspension.<sup>120</sup>

#### 6. Matters Arising

In the light of the provisions posited above regarding the procedure to be followed in the event of institution of criminal proceedings against a staff member, a few observations relating thereto may be made. First, the condition precedent to the actions to be taken by the Vice-Chancellor and the DA is that criminal proceedings must have been commenced against a staff member. The term 'criminal proceedings' in rule 29 is not widely defined to include proceedings before 'a competent body conferred with power to conduct summary investigations under any written law to determine whether the person charged or accused has committed an offence' whereas the word 'convicted' in rule 32(9) does. The omission to do so appears to be an oversight. Secondly, this Part of the Staff Rules is silent on the procedure to be followed in cases of preventive detention, restricted residence or deportation, etc, and therefore it has no application to such cases.<sup>121</sup> It is also to be noted that the Staff Rules contain no provision similar to regulation 49 of the Public Officers' Regulations which deals with termination of the employment of a member of the public service in the public interest or on grounds which cannot suitably be dealt with by the procedure laid

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<sup>119</sup>R 32(7).

<sup>120</sup>R 32(8)(a) & (b) respectively.

<sup>121</sup>Note that the Students' Rules read therein *via* the UUCA 1971, and the Public Officers' Regulations made specific reference thereto. See s 15D(3), UUCA 1971, and reg 36 of the Public Officers' Regulations respectively.

down therein. This being the case, the exception to the hearing rule as well as the other common law exceptions to natural justice may not be able to be invoked under the Staff Rules in the absence of an express provision to the contrary. Thirdly, this part of the Staff Rules imposes a duty on the part of the staff member to report the institution of criminal proceedings to the Vice-Chancellor, but the Rules are silent as to the consequence of non-performance thereof. Therefore, one wonders whether a breach of such a duty will incur additional liability under rule 4 of the Staff Rules. Fourthly, it is also uncertain whether this part of the Staff Rules applies to criminal proceedings or convictions in criminal proceedings before a syariah court. Although one may be tempted to argue that, on a literal interpretation thereof, rules 29 and 32(9) may be wide enough to include criminal proceedings and convictions before the Syariah Court. It is submitted that the temptation should be resisted in the absence of clear and express wording in the Staff Rules to that effect.<sup>122</sup> For the purpose of removing any doubt that may arise there under *in futuro*, an amendment to rules 29 and 32(9) is most desirable and advisable in the circumstances in order to settle things once and for all. The amendment suggested must define the actual legal position in relation to this matter so that the administrators will know exactly whether they come under this Part of the Staff Rules or that they be treated as coming under Part III thereof.<sup>123</sup> Fifthly, rule 32(4)

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<sup>122</sup>The relevant Part of the Public Officers' Regulations 1993 had been interpreted not to include proceedings and convictions in the Syariah Court because of the specific wording used therein. A circular letter issued by the Attorney General's Chambers on 31-3-83 so advised. It must be admitted that the wording used in the Staff Rules is different from that of the Public Officers' Regulations 1993. In spite of the difference in wording between the two laws, it still maintained that the position should be the same in both for a few reasons. First, the Syariah Court is merely a religious court. Secondly, is it fair to subject the Muslims to this Part of the Staff Rules whereas the non-Muslims are not? Thirdly, the disciplinary rules were drafted in an era when no or little importance was attached to offences in the religious courts and as such offences were never in the contemplation of the draftsmen at all. If it is the intention of the Government of the subject the Muslims to this Part of the Staff Rules for proceedings and convictions in the Syariah Court, then an amendment to this Part is necessary to clarify the position. It cannot be gainsaid that the discretion lies with the Government.

<sup>123</sup>That is r 4 which defines the general conduct. It is submitted that convictions in the Syariah Courts may fall within one of the limbs in r 4.

is silent as to whether the staff member is entitled to be informed of the specific disciplinary punishment proposed to be imposed on him before he makes any representation thereon. Knowledge of the specific punishment to be imposed is necessary and vital so that the staff member concerned knows of the gravity of the situation against him and thus enables him to defend himself accordingly or as best as he could in the circumstances. It is submitted that this right should arise by implication as a matter of natural justice or fairness or as part and parcel of the right to make representations under rule 32(4). Sixthly, rule 32 is also silent as to whether the convicted staff member to be disciplined is entitled to know his record of service and the recommendations and comments of his Head of Department under sub-rules (2) and (5) of rule 32 which are prejudicial to him before he makes his representations against the imposition of any proposed disciplinary punishment on him. It must be pointed out and emphasised here that the non-availability of which will definitely prejudice his right to make representations under rule 32. Thus there exists a procedural lacuna therein and it is, therefore, submitted that it should be supplemented and strengthened by the rules of natural justice or fairness. At common law, there is a right to pre-hearing discovery of evidence or documents or information prejudicial to the aggrieved person and the same should by analogy apply to the pre-imposition of punishment referred to in rule 32. Seventhly, rule 32(4) also contains an ambiguity in that it is uncertain as to when the fourteen day period stated therein should start to run against the staff member. And lastly, the *ultra vires* point raised and discussed in the *Robana* case and the principle of proportionality<sup>124</sup> will also be relevant hereto in so far as the discretion to impose punishments on an errant staff member is concerned.

#### E. Standard of Proof in Disciplinary Cases

As disciplinary cases are regarded as criminal in nature, the standard of proof required is that of the criminal case - proof

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<sup>124</sup>See *supra* nn 58-60 & 99 respectively.

beyond all reasonable doubt which requires a high standard or degree of proof, not on a mere balance of probabilities.<sup>125</sup>

## VI. APPEALS

### A Procedure and Related Matters

Section 16A(5), UUCA 1971 provides that any member of the staff, officer or employee of the University who is dissatisfied with the decision of the Disciplinary Committee or of any person or board delegated with disciplinary functions, powers or duties may appeal to 'the University Council'<sup>126</sup> which may give such decision thereon as it may deem fit and proper. When the UC considers an appeal, the members of the Disciplinary Committee may participate in the deliberation of the UC on the appeal but shall have no vote when a decision on the appeal is made by the UC.<sup>127</sup> Part V of the Staff Rules lays down the procedure of appeal and matters connected therewith. Rule 37(1) begins by stating that where a staff member is dissatisfied with any decision of the DA, he may give notice in writing of his intention to appeal against such decision by filing with the Vice-Chancellor a notice of appeal in duplicate within ten days of the date on which the decision was given or within such longer period as the Disciplinary Committee may allow upon an application by the staff member for an extension of time. The notice of appeal shall clearly set out the grounds of appeal.<sup>128</sup> The Vice-Chancellor shall upon receipt of the notice of appeal cause the same, together with a copy of the notes of disciplinary proceeding in respect of which a notice of appeal has been given, to be laid before the UC to furnish such further information or particulars in relation to the disciplinary proceeding as it may deem fit, provided that any such

<sup>125</sup>Re *Tang King Kai* [1991] 3 MLJ 91, 92, HC; *Rhina Bhar v Koid Hong Keat* [1992] 2 MLJ 455, 465, HC. Both cases dealt with allegations of misconduct against advocates and solicitors.

<sup>126</sup>Referred to in this article as 'the UC'. It is also to be noted again that 'the DA' is the abbreviation used for 'the Disciplinary Authority'.

<sup>127</sup>S 16A(6).

<sup>128</sup>R 37(2).

information or particulars are communicated to the staff member and he is given a reasonable opportunity to make written representations thereon.<sup>130</sup> The UC shall arrive at its decision on the appeal on the basis of the grounds of appeal, the notes of disciplinary proceeding before the DA, and any further information or particulars or representations thereon that may have been received thereby.<sup>131</sup> There shall be no oral hearing of the appeal.<sup>132</sup> The UC's decision on the appeal shall be communicated to the staff member through the Registrar of the University.<sup>133</sup> The punishment imposed by the DA under rule 33 shall take effect on the day immediately following the expiry of the period of 10 days for appeal specified in rule 37(1) or upon the expiry of any extension of this period granted under the proviso to rule 37(1), as the case may be, but where an appeal against the punishment is lodged by the staff member within such period of ten days or any such extension thereof, the appeal shall operate as a stay of execution of the punishment until the decision on the appeal.<sup>134</sup>

It may also be necessary here to refer to a general provision in rule 41. Every staff member shall furnish to the Registrar of the University an address which shall be his address for the purpose of serving on him any document or notice whatsoever under the Staff Rules or for the purpose of communication with him on any matter in relation to the Staff Rules. Any document, notice or communication left at or posted by ordinary post to the address for service supplied by the staff member shall be deemed to have been served upon or communicated to the staff member.<sup>135</sup>

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<sup>129</sup>R 36.

<sup>130</sup>R 39(1).

<sup>131</sup>R 39(2).

<sup>132</sup>*Ibid.*

<sup>133</sup>R 39(3).

<sup>134</sup>R 40. Note that the Students' Rules expressly provide in r 67 that an appeal shall not operate as a stay of execution of the punishment.

<sup>135</sup>Will the presumption operate in favour of the University if a document, or notice or communication is not correctly addressed to a staff member? This point will be considered shortly.

## B Matters Arising

In the light of the provisions relating to appeals set out above, a number of matters of relevance from the view point of Administrative Law may be looked into here. First, the jurisdiction of the UC in determining appeals is necessarily also circumscribed by the substantive provisions of the UUCA 1971 and the Staff Rules conferring discretions on the DA. For example, the UC cannot enhance the punishment imposed on a staff member so that it goes beyond the substantive limits prescribed by rules 33, 34 and 35, lest the *ultra vires* doctrine is infringed. This point was amply illustrated by the last point dealt with in the *Robana* case.<sup>136</sup> Secondly, rule 39(2) in no uncertain terms provides that the UC shall arrive at its decision on an appeal on the basis of the grounds of appeal, the notes of proceedings of the hearing before the DA and any further information or particulars or representations thereon. In other words, any other considerations other than the three categories of considerations enumerated above will be condemned as extraneous and therefore *ultra vires* the power of the UC in deciding an appeal. Rule 39(2) is in fact nothing but a reflection of an important substantive aspect of the *ultra vires* doctrine. Thirdly, the procedure for appeal laid down in the Staff Rules<sup>137</sup> must, it is submitted, be meticulously and strictly observed by the staff member; any non-compliance therewith may be fatal to the appeal of the staff member. Fourthly, the Staff Rules are silent on the right of the staff member to the notes of the disciplinary proceedings recorded and kept by the DA. Thus an obvious question that arises is whether a staff member who wishes to exercise his right of appeal is entitled to a copy thereof. It is submitted that he is entitled, because a refusal by the DA to supply a copy thereof may tantamount to denying or jeopardising the staff member's right of appeal.<sup>138</sup> Moreover,

<sup>136</sup>The '*ultra vires* point' at pp 497 and 498.

<sup>137</sup>For example, the time period during which an appeal must be filed, the requirements that the notice of appeal must be in writing and in duplicate, and that the grounds of appeal must be clearly set out in the notice.

<sup>138</sup>By analogy, based on the reasoning given by the court in the *Robana* case on the question of pre-hearing discovery of documents and information.

such a right should be accorded as a matter of natural justice or fairness. In the light of the aforesaid argument, any refusal by the DA to supply a copy thereof to a staff member who has made a specific request therefor, may be countered by way of an order of *mandamus* under Order 53 of the Rules of the High Court 1980 or a mandatory order under section 44 of the Specific Relief Act 1950. Fifthly, what consequences will ensue if the UC (a) mechanically adopts or confirms the decision of the DA without applying its mind to the appeal, and (b) fails to decide the appeal within a reasonable time? With respect to the first question, it may be said that to mechanically adopt or confirm the decision of the DA will amount to a non-exercise of discretion or non-application of mind on the part of the UC upon whom a discretion to decide on the appeal is conferred by rule 39.<sup>139</sup> Before answering the second question, it must be pointed out that the phrase 'as soon as practically possible' in rule 38 should mean 'as nearly as may be reasonable in the circumstances' or simply means 'within reasonable time'.<sup>140</sup> Reverting to the second question, it must first be said that any undue delay in deciding an appeal will entitle the aggrieved party to an order of *mandamus* under Order 53 of the Rules of the High Court 1980 or to a mandatory order under section 44 of the Specific Relief Act 1950. Any refusal to comply with the said order will amount to contempt of court. Next, it is unlikely that the court will entertain the argument that undue delay in deciding an appeal is tantamount to an abuse of power.<sup>141</sup> Even assuming that if such an argument succeeds, the decision of the DA still stands against the staff member unless the decision of the DA, too, is attacked and invalidated

<sup>139</sup>By analogy, based on the principle laid down in *Emperor v Sibnath Banerjee* AIR 1945 PC 156.

<sup>140</sup>By analogy, *Pbua Hing Lai v Timbalan Menteri Hal Ebuwal Dalam Negert, Malaysia & Ors & other appeals* [1990] 1 MLJ 173; and *Pemungut Hasil Tanah Daerah Barat Daya, Pulau Pinang v Ong Gait Kee* [1983] 2 MLJ 35.

<sup>141</sup>By analogy, based on a principle extracted from *IGP & Anor v Alan Noor bin Kamat* [1988] 1 MLJ 260, SC, a case under the repealed General Orders where the DA unreasonably delayed in deciding and finding a police officer guilty of the disciplinary offences brought against him.

either on procedural or substantive ground or on both procedural and substantive grounds. Sixthly, it can be seen that section 16(A) substantially curtails the operation of the *nemo iudex in causa sua* maxim to the hearing and deciding of appeals by the UC in that members of the Disciplinary Committee may participate in the deliberations of the UC on the appeal but shall have no vote when a decision on the appeal is made by UC. Ideally speaking, the maxim should be allowed to operate fully without any limitation as there are statutes or subsidiary legislation which observe the operation of the maxim *in toto*.<sup>142</sup> Seventhly, the presumption in rule 41(2), *viz* "any notice or communication left at or posted to an address for service" supplied by a staff member "shall be deemed to have been duly served upon or communicated to the staff member", will not operate in favour of the University if the document or communication has been inadvertently left at or posted to the wrong address by authority concerned.<sup>143</sup> Eighthly, one may ask whether the UC can on the hearing of an appeal remedy any procedural faults committed by the DA. On the question of remedying procedural defects or faults committed by a lower body, it all depends on whether the reviewing body possesses only an appellate jurisdiction or a jurisdiction to hear the matter *de novo*. In the case of the former, as in the case of the UC here in hearing appeals from staff members against the decision of the DA, the reviewing body cannot cure and rectify any procedural defect<sup>144</sup> whereas in the case of the latter it may be able to do so.<sup>145</sup> Further more, it is also of relevance to point out that a substantively defective decision<sup>146</sup> of a lower decision-making body cannot be validated or con-

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<sup>142</sup>*Exempli gratia*, rule 15(2) of the Peguam Syarie Rules 1993 provides that any person aggrieved by a decision of the Peguam Syarie Committee may appeal to the Majlis Agama Islam Wilayah Persekutuan and in considering an appeal, a member of the Committee who is also a member of the Majlis shall disqualify himself. Even if the rules are totally silent on the same, the *nemo iudex in causa sua* maxim may still operate by implication as a matter of natural justice or fairness.

<sup>143</sup>*Datin Azizah bt Abdul Ghani v DBKL* [1992] 2 MLJ 393, 401, where a similar phrase was interpreted by the Supreme Court.

<sup>144</sup>*Leary v National Union of Vehicles Builders* [1970] 2 All ER 713.

<sup>145</sup>*Stringer v Minister of Housing* [1970] 1 WLR 1281.



firmed<sup>147</sup> by an appellate body on appeal if the higher or appellate body did not address its mind to the error or errors committed at first instance by the lower body.<sup>148</sup> Finally, one may also question if the UC is an appropriate body to consider appeals against the decisions of the DA. As appeals may sometimes involve complicated questions of law, the UC may not be in a position to handle complicated cases of appeals. A couple of suggestions may be proffered here for consideration if the current arrangement is to be reviewed. First, without affecting the current structure and membership of the appellate body, section 16A(5) of the UUCA 1971 should be worded somewhat along the line of section 16A(3) in that the power of hearing appeals is to be delegated to a sub-committee of the UC headed by an administrative lawyer. Alternatively, for the sake and in the name of fairness, the best way to handle and hear appeals is for a totally separate body, whose membership excludes members of the UC, to be set up for handling and hearing appeals because three members of the UC are members of the Disciplinary Committee.

## VII. POWERS OF REVIEW, RESCISSION, ETC.

Besides appeals, the decisions of the DA<sup>149</sup> may be reviewed, rescinded or varied by the Disciplinary Committee under section 16A(3) of the UUCA 1971.<sup>150</sup> In other words, a de-

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<sup>146</sup>*Exempti gratia*, failure to take into account relevant considerations or taking into account irrelevant considerations in a decision-making process. The examples given deal with substantive faults committed at first instance by a lower decision-making body.

<sup>147</sup>Or for that matter accepted or endorsed the decision of the lower body as in *Pushpadevi Singam v UM* [1993] 2 AMR 41:3025.

<sup>148</sup>*Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204, SC.

<sup>149</sup>The term 'DA' is used here narrowly to refer only to the delegatee or delegates exercising disciplinary power over the staff members under section 16A(3), UUCA 1971.

<sup>150</sup>The relevant part of the sub-rule reads '... the disciplinary Committee ... shall have the power to review, rescind or vary any decision or finding of such members or staff, officer or employee or such board'.

cision or finding of the DA may be called into question in two ways, one by appeal and the other is by way of review, rescission, etc. The procedure of appeals is clearly set out in Part V of the Staff Rules whereas there are no provisions at all regarding the latter. Appeals can be claimed as a matter of right and further that the power of deciding appeals is a wider power than that of review or rescission, etc. In the light of the factors favouring appeals pointed in the foregoing, the affected staff members should be advised to exercise their right of appeal rather than invoking the uncertain mode of review or rescission save in cases where they have lost their right of appeal.

### VIII. CONCLUSION

In the light of the above discussion, one may conclude that the Staff Rules undoubtedly have their merits and demerits particularly in terms of procedure. Save for some general or strictly relevant remarks, no useful purpose would be served by repeating those meritorious and demeritorious aspects alluded to as they have all been dealt with accordingly in the foregoing at their respective places in this article. In several respects, the Staff Rules constitute a better code in terms of procedural fairness in comparison with the Students' Rules and also the Public Officers' Regulations. However, needless to say, they need to be improved and strengthened upon in those areas which are lacking in terms of procedural fairness and substantive provisions. And with a view to so doing, the university administrators will have to look beyond the Students' Rules and the Public Officers' Regulations before they can decide on the new and additional features to be incorporated thereinto. The Public Officers' Regulations alone do not and cannot constitute the sole model to rely upon for the said purpose *albeit* they have just been recently reformulated and that it is the Government's intention that all statutory and local governmental bodies adopt them as well.<sup>151</sup> As nothing can prevent the universities from having

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<sup>151</sup>The intention of the Government was expressed by the Chief Secretary to the Federal Government in the local press some time before the said Regulations came into force on 15th December 1993.

a better, fairer and more comprehensive code of discipline both procedurally and substantively than the Public Officers' Regulations, it is sincerely hoped that the university administrators will reformulate a better, fairer and more comprehensive code in the near future, keeping in the forefront of their minds that procedural fairness in particular is a *sine qua non* of a modern welfare state and that all efforts and attempts must be made to achieve that end. And in the context of procedural fairness in administrative or disciplinary proceedings against a particular group of individual or officers, it must be said that it is possible and in fact better and advisable to have a specific written code of procedure, as opposed to a general code governing a wide range of proceedings, which is comprehensive or even exhaustive and therefore very little is left to be implied as a matter of natural justice or fairness. At the same time, it must also be emphasised that the substantive provisions dealing with the code of discipline or disciplinary offences need to be made more comprehensive with a view to making more acts or omissions disciplinary offences or breaches of discipline.

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This article is based on a seminar, entitled *The University of Malaya (Discipline of Staff) Rules 1979 : An Administrative Law Perspective*, conducted by the writer and chaired by Associate Professor Dr LT Khaw on 26-1-95 at the Faculty of Law, University of Malaya. He is deeply indebted to the active participants thereof, particularly Professor MP Jain, who offered numerous constructive comments and suggestions. However, the writer remains personally responsible for all the errors and omissions, if any, made therein.

