2020 JMSC Civ.191

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. SU2019CV04599

BETWEEN	**KOJO DAWES**	**APPLICANT**
AND	**NATIONAL ENVIRONMENT PLANNING AGENCY (NEPA)**	**1ST RESPONDENT**
AND	**MINISTRY OF HEALTH AND WELLNESS**	**2ND RESPONDENT**

IN CHAMBERS

Ms. Nastassia Robinson for the Applicant.

Mr. Philip Cross for the 1st Respondent

Mrs. Carian Freckleton-Cousins instructed by Director of State Proceedings for the 2nd Respondent

HEARD: December 17, 2019, July 1, 2020 and September 18, 2020

Judicial Review- application for leave to apply for judicial review- application to extend time to apply for leave- whether good reasons exist to extend time- threshold test- whether arguable grounds having a realistic prospect of success - civil procedure rules part 56.

HENRY-MCKENZIE, J.

BACKGROUND

[1] This application before me is a Further Amended Notice of Application for Leave to Apply for Judicial Review filed by Mr. Kojo Dawes (the Applicant) on June 8, 2020. By way of this application, the applicant seeks the following orders:

> *(a) Leave to apply for judicial review, relief of certiorari against the decision of the respondents to terminate his employment.*
>
> *(b) Extension of time within which to make this application.*
>
> *(c) Such further or other relief that this Honourable Court deems fit.*

[2] The matter was initially brought before the court by way of a "Without Notice" Application for Judicial Review filed on November 18, 2019. The 1st respondent, National Environment Planning Agency (NEPA) was however served. The matter commenced before me on December 17, 2019 as an interpartes hearing. An application was then made by the applicant's attorney at-law Ms. Nastassia Robinson for an amendment to the Notice of Application, to add the Ministry of Health and Wellness as a respondent in the matter. This application was granted.

[3] By way of an Amended Notice of Application for Leave to Apply for Judicial Review, filed on January 8, 2020, the Ministry of Health and Wellness was added as the 2nd respondent.

[4] The applicant was permitted by the court to further amend the Amended Notice of Application for Court Orders to specify the particular relief for which the leave for judicial review was being sought. By way of a Further Amended Notice of Application for Leave to Apply for Judicial Review filed June 8, 2020, the applicant further amended the application to include the relief of certiorari. It is this Further Amended Notice of Application which is now before me for my consideration.

[5] The applicant has filed two affidavits in support of his application. The first was filed on November 18, 2019 and the second, on June 29, 2020. I will now summarize the salient aspects of his affidavits.

[6] The applicant asserted that he was employed to the 1st respondent (NEPA) for over 27 years in the capacity of Property, Transport and Security Officer in the Facilities Branch.

[7] On the 21st January 2019, he was informed by the Chief Executive Officer (CEO) Mr. Peter Knight and the Human Resource Director, Mrs. Karlene Hamilton-Reid, that the Ministry of Health stated that he was to be medical boarded effective the 21st December 2018, but that the date was extended the date to the 29th March 2019.

[8] Further, he indicated that he had lost his sight on the 20th April 2016 due to complications with hypertension and diabetes. That consequent upon a surgery performed on one of his eyes, he regained some vision, but his sight went permanently in June 2017.

[9] Since June 2017, he had been working and performing all his duties including travel assignments and submitting reports for every assignment he did. There were no complaints about the quality of his work. In fact, he was praised in his annual assessment for maintaining standards of work despite being visually impaired.

[10] Further, the applicant indicated that no contact was made with him in respect of a Medical Board being convened, nor was he interviewed or contacted by anyone from the Ministry of Health (as it then was). That no medical report was requested of him for this purpose, nor was he asked to do a medical examination by NEPA or the Ministry of Health.

[11] He indicated further, that after he was informed of the decision by NEPA, he attempted to have this decision reviewed so that he could retain his job. In so doing, he contacted the Jamaican Civil Service Association, the Combined Disabilities Association, Jamaica Society for Persons with Disabilities and the Jamaica Society for the Blind.

[12] He stated further, that he had meetings with NEPA's CEO, Human Resource Department (HR) and Legal Department, but the CEO would not change his mind.

[13] He further contended, that his loss of sight has not impaired his ability to perform his duties, as he has found alternative measures and solutions to ensure that his job was done to the highest standards. He relied on the medical report of his ophthalmologist Dr. Lizette Mowatt to make the argument that he can continue to perform his job.

[14] He indicated that it is his belief that proper procedure was not followed in having him retire on medical grounds and that the decision should be set aside and that he should be reinstated or compensated for loss and damage caused by this decision.

[15] Finally, he said that the delay in filing this application was due to his attempts to amicably resolve the matter by having the 1st respondent reconsider its position and further to secure documentation relevant to this application.

[16] He said he is also of the view that his dismissal was on the grounds of discrimination due to his disability.

APPLICATION FOR EXTENSION OF TIME

[17] Rule 56 of the Civil Procedure Rules (CPR) outlines the parameters within which an application for leave to apply for judicial review should be considered. I will focus firstly on the application made by the applicant for an extension of time to apply for leave for judicial review.

[18] Rule 56.6 emphasises the importance of promptitude in an application for leave for judicial review. Rule 56.6(1) stipulates:

> *"An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when the application first arose."*

[19] Rule 56.6(3) states that where leave is sought to apply for an order of certiorari, the date on which the grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings.

[20] There is dispute in this matter as to when the grounds giving rise to this application first arose. The applicant is contending that the relevant date is the 1st January 2019, this being the date on which he said he was informed by the 1st respondent of the decision to retire him on medical grounds. The 1st respondent on the other hand, is contending that the applicant was informed prior to 1st January 2019, and that he was told in August 2018.

[21] If the date posited by the applicant is to be accepted, it stands to reason that the time to make the application for leave for judicial review would have expired on the 1st April 2019. On the other hand, on the 1st respondent's account, the application would have had to be made by November 2018.

[22] This application was not made until the 18th November 2019, approximately ten (10) months after the applicant alleges that he was wrongfully terminated.

[23] In any event, the application for leave was filed out of time and therefore was not promptly made in keeping with rule 56.6(1). There is no gainsay, that there was undue delay in making the application.

[24] I must indicate however, that although delay is inimical to the granting of an order of certiorari, it is not an absolute bar. By virtue of rule 56.6(2), the court may extend time to make the application if good reason for doing so is shown. It means therefore, that the court is vested with a discretion whether to extend time to make the application.

[25] Further, the court has a discretion whether to refuse leave or grant relief because of delay, in accordance with rule 56.6(5) which stipulates:

> *"When considering whether to refuse leave or grant relief because of delay, the judge must consider whether the granting of leave or relief would be likely to:*
>
> *(a) Cause substantial hardship to or substantially prejudice the rights of any person: or*
>
> *(b) Be detrimental to good administration*

[26] Whilst the 1st respondent is not opposed to an extension of time being granted, the 2nd respondent has objected on the basis that the delay in making the application is inordinate and that the explanation given for the delay is without merit.

[27] Mrs Freckleton- Cousins for the 2nd respondent, has relied on two main cases in support of this contention. The first is **Clayton Powell v The Industrial Disputes Tribunal and Montego Bay Marine Port Trust** [2014] JMSC Civ. 196. In that case, Simmons J refused the application for leave for judicial review of a decision of the Industrial Disputes Tribunal, owing to the fact that the applicant, who filed the application for leave the day before the expiration of the three-month period, had failed to act promptly.

[28] The second case relied on by Mrs Freckleton- Cousins, is **Randean Raymond v Principal Rued Reid and the Board of Management Jamaica College** [2015] JMSC Civ. 59. In that case, the court of first instance denied an application for leave for judicial review on the basis of delay, in circumstances where the application was made approximately one year and four months from the date when the grounds of the application first arose. This decision was not disturbed by the Court of Appeal. His Lordship, F. Williams JA in his reasoning reinforced and emphasized the importance of acting promptly in judicial review cases.

[29] It would seem to me however, that the exercise of the court's discretion as to whether or not to extend time, may vary from case to case, depending on the circumstances of each case. In the case of **Randean Raymond** (supra) His Lordship pointed out that this discretion is not "rigidly delimited".

[30] Much seems to turn however, on what a court sees as constituting "good reason" for extending time. In **Randean Raymond** at paragraph 55, His Lordship Williams JA had this to say:

> *"In these circumstances where no hard and fast rules exist, the one clear principle that can be discerned is that in considering what amounts to "good reason" for extending time, a very great deal is left to the discretion of the particular judge hearing an application. The discretion given to the*

judge in these matters is a very wide one, not circumscribed by a "checklist" of any sort".

The case of **Constable Pedro Burton v Commissioner of Police [2014]** JMSC Civ. 187 reinforces the point that the court does have a wide discretion in relation to whether to extend time. In the circumstances of this case, Dunbar-Green J granted leave to apply for judicial review where the application was made some thirty-one (31) months after the grounds for the application first arose. Although she found that there was undue delay in making the application, she concluded that there were good reasons for extending time. She posited that it is recognized that a good reason for extending time may also be found in the reasons for the delay. The applicant in that matter had contended that one of the reasons for the delay in making the application was his pursuit of an appeal. The court found that this was a good reason to extend time.

[31] Reference is also made to the case of **Portmore Citizens Advisory Council and Portmore Citizens Association v Ministry of Transport and Works and the Attorney General of Jamaica** 2005HCV1055, a decision of G. Smith, J. In this case, there was delay of some three (3) years in bringing the application for leave for judicial review. The court ruled that the proceedings would nevertheless be considered, given the nature of the matter and its public importance.

[32] In the instant case, the primary question which falls to be considered is whether the applicant has shown good reason for time to be extended. The explanation given by the applicant for the delay in making the application is pertinent to a consideration of this question. The explanation proffered by the applicant is that the delay was due to his attempts to amicably resolve the matter and further, to obtain documents to support his application.

[33] The applicant deposed that after he was told of the decision for him to be retired on medical grounds, in a bid to have the decision revised, he contacted the Jamaica Civil Service Association, The Jamaica Society for Persons with Disabilities and The Jamaica Society for the Blind, to intervene. He spoke as well to meetings he had with NEPA's CEO and Human Resource and Legal Departments, but to no avail.

[34] Therefore, according to the applicant, when those attempts failed, he sought the services of an attorney-at-law, who subsequently filed this action.

[35] The applicant has submitted that the reason for the delay in making the application is due to his pursuit of alternative remedies.

[36] Rule 56.3(3) states that an applicant who seeks leave to apply for judicial review must state in the application:

> *(d) "whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued".*

The 1st respondent has argued that the applicant did not pursue all alternative remedies. This will be dealt with in greater details later.

[37] I accept that the delay in making the application was due mainly to the applicant's pursuit to resolve the matter. I accept as well, as he said, that he was making efforts to secure further documentation to support his application, some of which he had difficulty retrieving. In all the circumstances, I believe that he has a good explanation for the delay, therefore, there is good reason to extend time. In the circumstances of this case, I do not believe that the applicant should be denied the opportunity of pursuing his case, on account of delay.

[38] I also consider that based on the evidence presented, there is no indication that were leave to be granted, this would cause substantial hardship to, or substantially prejudice the right of any person, or be detrimental to good administration.

[39] Accordingly, the application for extension of time is granted.

THE APPLICATION FOR LEAVE FOR JUDICIAL REVIEW

[40] The applicant is seeking leave to apply for judicial review by way of an order of certiorari in relation to the decision of the respondents to retire him on medical grounds

[41] As earlier stated, CPR part 56 deals with application for leave to apply for judicial review. Rule 56.3 indicates that a person wishing to apply for judicial review must first obtain leave. That person must satisfy the court that he has standing to bring the matter. The applicant has established by the evidence, that he is personally and directly affected by the decision, and so has standing to bring this application.

[42] A convenient starting point is to indicate that at the leave stage of the judicial review proceedings, the court is not so much concerned with the substance or the merit of the decision made, but moreso, with the process by which the decision was arrived at. It is not within the purview of the court at this stage, to delve into the details of a matter or to decide on the merits of the case.

[43] One of the core functions of the court at this stage, is to ensure that actions which are frivolous and vexatious are sifted out and eliminated, so that leave should not be granted where an action is without a realistic prospect of success.

[44] The threshold test which governs whether leave should be granted in an application for leave for judicial review, was stated in the Privy Council decision of **Sharma v Brown-Antoine and others** (2006) UK P.C. 780 at 787, where the court opined:

> *"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy… But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in his application."*

[45] It is therefore well accepted, that an applicant must present an arguable case having a realistic prospect of success before leave can be granted.

[46] The gravamen of the applicant's complaint in this matter, is captured in paragraph 10 of his affidavit dated and filed on the 18th November 2019, in which he stated:

> *"It therefore came as quite a shock when I was told that I was being medical boarded. No contact was made with me with respect to a Medical Board being convened. I was never interviewed by the Ministry of Health or contacted by anyone from the Ministry of Health. No medical report*

was requested of me and I was not asked to do a medical by NEPA or the Ministry of Health. The 21st of January 2019 was the first time I was being made aware that it was even being contemplated for me to be medical boarded"

[47] Counsel Ms. Robinson on behalf of the applicant, has argued that the applicant does have an arguable case having a realistic prospect of success. The main thrust of her contention is the fact that the proper procedure was not followed by the 1st and 2nd respondents in their decision to have the applicant retired on medical grounds. She argued the respondents acted unlawfully, unfairly, and without just cause.

[48] In this regard, she drew reference to the Staff Orders for the Public Service (2004) and in particular Staff Orders 7.13.10 and 14.7.5. Also, the Human Resources Policies and Procedures Manual (Revised 1 April 2013) for NEPA and further, the Disabilities Act 2014 (sections 29, 30,31)

[49] She also cited in the support of her contention, the cases of **Archibald v Fife Council** (2004) UK H.L. 32, which speaks about the duty of an employer to take reasonable steps to ensure that an employee with a disability is not placed at a disadvantage in comparison with persons who are not disabled. **Natalia Psaras v Marie Lue and others** (2016) JMSC Civ. 22, which sets out the test on an application for leave for judicial review as laid down in **Sharma v Brown Antoine and others** (2006) WIR 379, as also the case of **Pedro Burton v Commissioner of Police**(supra)

[50] She argued that in keeping with the Staff Orders (2004), an employee may be retired on the ground of ill health based on a medical report from a Medical Board constituted in accordance with Staff Order 7.13.10 or a medical report from the Chief Medical Officer. The report should certify that the employee is incapable of discharging the duties of his office by reason of an infirmity, which is likely to be permanent.

[51] She contended that no Medical Board was convened, and no explanation was given for this, at the time of the applicant's retirement. Further, that no medical report was produced in accordance with Staff Order 7.13.10. She argued also, that the applicant was not told that a Medical Board was being contemplated neither was he asked to

submit to a medical examination by NEPA or the Ministry of Health. She contended that the applicant was retired on the basis of a medical report from Dr. Mowatt, his ophthalmologist, which did not state that the applicant was incapable of continuing his employment and which was in fact favourable to him. She drew reference to the applicant's performance appraisals up to December 2018, in which he scored high marks and was highly praised for his performance. Notwithstanding, she contended, he was dismissed. She argued that the only grounds for this was his blindness. She stated that there was no effort on the part of NEPA to provide assistance to him or to reassign or redeploy him. For these reasons, she submitted that the decision was unlawful and unfair and therefore should be reviewed.

[52] On the other hand, Mr. Cross for the 1st respondent, based his objections to the application on two grounds: that there is no arguable case with a realistic prospect of success and further, that there are alternative remedies more suitable to granting the review and the relief sought.

[53] He labelled the case brought by the applicant as frivolous. He indicated that proper procedure was followed in keeping with NEPA's Human Resources Manual. Further, he argued, the decision to retire the applicant on medical grounds was taken on a review of the medical reports released by the applicant to the Ministry of Health. That it was the applicant's own doctor who declared him to be legally blind and unlikely to improve. He further argued, relying on the affidavit of Dr. Naydene Williams, that there was no need for a Medical Board to be convened.

[54] He further submitted, that given the task that the applicant was assigned to do, this raised issues of liability and accountability and therefore the decision was not unreasonable. He placed reliance on the affidavit of Mrs. Karlene Hamilton-Reid, the Director of Human Resources Management and Development Branch of NEPA.

[55] Mrs. Hamilton-Reid asserted, that after the applicant became ill, he was unable to independently verify completeness of work done by persons he supervised and other external persons contracted to undertake major works for 1st respondent and in this

regard, he would reassign aspects of his major tasks to other individuals. She indicated further, that this impacted the 1st respondent's accountability framework and also that the use of third parties, not approved by the 1st respondent, exposed the 1st respondent's proprietary, private and confidential information to the third parties.

[56] Finally, Mr. Cross argued that the applicant was informed of the process and that there was no need for an oral hearing. Further, that procedural fairness does not automatically require an oral hearing. He cited the case of ***The Queen on the Application of Terrence Patrick Ewing V Department of Constitutional Affairs*** (2006) EWHA 504 in support of this argument.

[57] On the issue of alternative remedies, he argued that more suitable remedies are available. He referred to the fact that the Human Resources Manual provides for an aggrieved person to appeal to the Industrial Relations Unit at the Ministry of Finance for review. If the issue is not resolved, then the matter can be referred to the Ministry of Labour and Social Security as a dispute and ultimately, to the Minister for determination. For these reasons he concluded that the application should be refused.

[58] Counsel Mrs. Freckleton-Cousins on behalf of the 2nd respondent, has also objected to the application. This, on the basis that the delay in making the application was inordinate. I have already dealt with this objection. Further, that in relation to the claim against the 2nd respondent, the application filed discloses no reasonable grounds with a realistic prospect of success. The arguments advanced by Mrs. Freckleton-Cousins in this regard, are along the same lines posited by Mr. Cross and therefore will not be repeated.

[59] I reiterate that the court is not so much concerned at this stage with the merits or the substance of the decision which was arrived at, but moreso with the process which was employed in arriving at this decision, which was the applicant is challenging as being unlawful, unfair and in contravention of the Staff Orders and the Disabilities Act.

[60] The Staff Orders of the Public Service of Jamaica (2004) governs the conditions of service for public officers. The Staff Orders would be applicable, since the respondents are public bodies and the applicant was a public servant at the relevant time.

[61] The pertinent Staff Orders are 7.13.10 and 14.7.5. Staff Order 7.13.10 states:

7.13.10 Medical Boards

> *"(i) An officer may, at any time, be required by the Permanent Secretary/ Head of Department to submit to an examination by Medical Board appointed by the Chief Medical Officer, if it appears to the Permanent Secretary/Head of Department that the officer's state of health warrant such an examination.*
>
> *(ii) If an employee has been absent from duty on the ground of ill-health and the total period of continuous absence is to exceed ninety (90) calendar days the Permanent Secretary/ Head of Department should request the Chief Medical Officer to consider the appointment of a Medical Board to examine the employee.*
>
> *(iii) The Chief Medical Officer shall, unless he/she is satisfied that a Medical Board is unnecessary forthwith appoint the Board.*
>
> *(iv) The Medical Board should be made up of at least two (2) registered medical practitioners to be selected from a panel.*
>
> *(v) When asking that a Medical Board be convened to examine an employee, the Permanent Secretary/Head of Department should inform the Chief Medical Officer of the reason(s) which prompted the request.*
>
> *(Vi) In the case of disability, its nature, when and how incurred, and all relevant circumstances, should be stated.*
>
> *vii) In all cases where the appointment of a Medical Board is being requested, the Permanent Secretary/Head of Department should furnish a report indicating the amount of sick leave taken by the officer and the effect of the illness on performance. Medical Certificates should be attached, where applicable."*

[62] Staff Order 14.7.5 states:

14.7.5 Retirement on Medical Grounds

> *(i) An employee may be retired on the ground of ill health on the basis of a medical report from a Medical Board constituted in accordance with the provisions of the Staff Order 7.13.10 or from the Chief Medical Officer on the prescribed form.*
>
> *(ii) The report should certify clearly that the employee is incapable of discharging the duties of his office efficiently by reason of an infirmity of mind or body and that the infirmity is likely to be permanent.*

[63] From my understanding and interpretation of Staff Order 14.7.5, an employee may be retired on medical grounds in two ways:

> *(a) On the basis of a medical report from a Medical Board constituted in accordance with the provisions of Staff Order 7.13.10, or*
>
> *(b) A medical report from the Chief Medical Officer on the prescribed form.*

[64] By way of a letter dated 25th September 2018 under the signature of Mrs. Karlene Hamilton-Reid, the 1st respondent requested that a Medical Board be convened in relation to the applicant. There is no indication that a Medical Board was convened. It was argued by counsel Ms. Robinson that in these circumstances, one would expect that a Medical Board would have been convened. I take note as well, that the Human Resources Policies and Procedures Manual for NEPA indicates at 17.5.25, that the decision to retire an employee (on medical grounds) will be on the basis of a medical report from a Medical Board.

[65] Notably however, the Staff Order 7.13.10(iii) indicates that: "*The Chief Medical Officer shall, unless he/she is satisfied that a Medical Board is unnecessary forthwith appoint the Board".* This means that the discretion lies with the Chief Medical Officer, whether or not to appoint a Board.

[66] Dr**.** Naydene Williams deposed that at the relevant time she had the general responsibility for the conduct of Medical Boards and medical examination of public

sector employees, and that she was authorized to act for the Chief Medical Officer in the execution of his substantive duties. She indicated that in reviewing the reports from the applicant's doctor, Dr. Lizette Mowatt, dated the 18th April 2017 and 14th September 2018, and upon making multiple enquires of NEPA, and having being guided by the Staff Orders (2004), she formed the view that it was unnecessary to convene a Medical Board.

[67] Since a Medical Board was not convened therefore, as is permitted by the Staff Orders, then in accordance with Staff Order 14.7.5, to be able to retire the applicant on medical grounds, there should be a medical report from the Chief Medical Officer on the prescribed form. Such a medical report should state clearly, that the applicant is incapable of discharging the duties of his office effectively by reason of an infirmity of mind or body and that infirmity is likely to be permanent. Ms. Robinson has submitted, that the letter written by Dr. Williams does not qualify as a medical report on the prescribed form and so does not comply with Staff Order 14.7.5.

[68] Ms. Robinson's arguments are compelling. In a rather terse letter to the 1st respondent dated 14th December 2018, Dr. Williams stated:

> *"Based on the medical report from Dr. Lizette Mowatt, consultant ophthalmologist, it is recommended that Mr. Kojo Patrick Dawes be retired on medical grounds effective December 21, 2018".*

[69] Importantly, the medical report of Dr. Lizette Mowatt dated 14th September 2018 (which is the only medical report exhibited) on which Dr. Williams relied to come to her decision, states in part:

> *"Mr. Dawes has been able to continue to manage to work with modifications to allow continued functionality. He had adapted well; however, it will be very challenging for him without an assistant to help with reading written material…. It is unlikely due to the extent of the ocular pathology that his visual acuity could improve. He however has 10% of his vision and is legally blind. Due to his significant experience with his work, he appears to be managing, but could benefit from low vision aids to assist functionality at work."*

[70] Ms. Robinson has argued that there is nothing contained in Dr. Mowatt's medical report which clearly indicates that the applicant was incapable of discharging the duties of his office, neither was there any such indication in the letter written to the 1st respondent by Dr. Williams.

[71] The argument is forcefully made therefore, that there was no medical report from the Chief Medical Officer in keeping with the provisions of the Staff Orders, to allow for the retirement of the applicant on medical grounds. This raises issues relating to procedural fairness. I am persuaded, that the applicant has made out an arguable case with a realistic prospect of success, that proper procedures were not followed in retiring the applicant on medical grounds and that he was unfairly treated.

[72] The applicant has also made out an arguable case having a realistic prospect of success, that he was not offered the option to be reassigned or redeployed to an area of work where he would have been better able to function, whilst still being able to employ his skills and abilities. This he indicated, he would have welcomed. This also raises the question whether he was fairly treated and therefore this is worthy of further investigations.

[73] The applicant also complained that he was not informed that it was being contemplated to have him "medical boarded" until the 21st January 2019, neither was he interviewed or spoken to by NEPA or the Ministry of Health. The 1st respondent disputes this and indicates that the applicant was told before then, that a Medical Board was been contemplated. Mr Cross on behalf of the 1st respondent has submitted, that there was no need for an oral hearing in these circumstances, given the medical evidence and that it is not in every case that an oral hearing is required. He placed reliance in his submissions on **Ewing's** case. That case is however distinguishable on the facts. I will say however, that it is well recognized that the principles of natural justice must be observed and persons who are directly and personally affected by a decision, must be kept informed and must be given an opportunity to heard. These matters raised would benefit from further investigations at a hearing.

[74] On the issue of the alternative remedies, I had already intimated that CPR rule 56.3(3)(d) stipulates that an application for leave for judicial review must state whether an alternative form of redress exists, and if so, why judicial review is more appropriate or why the alternative has not been pursued. The onus is therefore on the applicant to show this. It has been widely accepted, that an applicant should exhaust alternative remedies before resorting to judicial review, however, this position has come under much scrutiny by the courts in recent times.

[75] The applicant has indicated that he has pursued alternative remedies, in that, he contacted the Jamaica Civil Service Association, the Combined Disabilities Association, the Jamaica Society for Persons with Disabilities and the Jamaica Society for the Blind, for them to intervene. Also, he had several meetings with the 1st respondent's CEO, the Human Resource Department and the Legal Department, in an effort to have the matter resolved, to no avail. He indicated as well, that despite the several meetings he had with the CEO and other persons at NEPA, he was never told of the mechanisms in place to resolve grievances. However, it is noted, that NEPA's Human Resources Policies and Procedures Manual outlines the procedure in place for the resolution of grievances and disputes .It indicates that if an employee is dissatisfied with the response after meeting with the CEO, then he/she has a right to report the grievance to the Ministry of Finance within 10 working days. Further timelines have been outlined by the manual for aggrieved employees to pursue those remedies.

[76] Although the applicant took reasonable steps to pursue alternative remedies, it seems that the applicant did not follow through with all the available remedies. It is noted however, that the time period outlined in the manual for this process, would have long been spent. It seems to me, that it would not now be possible for him to pursue those remedies and that the only recourse open to him at this time, is to seek to have the matter dealt with by way of judicial review. This begs the question however, whether the applicant's failure to pursue all alternative remedies, should be a bar to the grant of his application for leave for judicial review.

[77] In answer to this question, I will refer to the case of **Everton Tabannah & Worrell Latchman v The Independent Commission of Investigations** (2016) JMSC Civ.101.Sykes J (as he then was) at paragraph 75, examined rule 56.3(3)(d) and concluded:

> *"The wording of this provision must rest on the assumption that there may be other means of redress available and the applicant needs to justify why judicial review is more appropriate. If this is correct then it is no longer correct to say that judicial review can only be pursued if no alternative form of redress exists. What he can do is show why judicial review is more favoured than the others".*

[78] In reviewing this matter on appeal, in the case of **The Independent Commissioner of Investigations v Everton Tabannah & Worrell Latchman** (2019) JMCA Civ.15, Brooks J A at paragraph 62 of the judgment opined:

> *"It is unnecessary to decide definitively in this judgement whether rule 56.3 of CPR allows for leave to apply for judicial review where an alternative remedy exists. A reading of the rule certainly suggests as the learned judge held, that at the leave stage, the existence of an alternative remedy is not an absolute bar to the grant of leave."*

[79] I am of the view therefore, that in all the circumstances of this case, the applicant should not be barred from the grant of leave for judicial review, on account of his failure to pursue all alternative remedies which exist. I therefore make the following orders:

ORDERS

1. Extension of time is granted to the applicant to make the application for leave for judicial review.
2. Leave is granted to apply for judicial review
3. Leave is conditional on the applicant making a claim for judicial review within 14 days of the receipt of this order granting leave.
4. The first hearing of the claim is fixed for March 25, 2021, at 11 am for 1 hour.
5. Costs to be costs in the claim.

……
Hon. G. Henry-McKenzie