

Martin

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN MISCELLANEOUS

IN THE MATTER OF AN APPLICATION
by Karine Martin, Karl Dunkley, Michael
Brady, Millicent Williams, Carlton Rowe,
Gloria Salmon, Hermine Campbell, Marva
Phillips respectively for an Order of
Certiorari quashing the decision of the
Board of Governors of the Edith Dalton
James High School to terminate their
employment.

AND

IN THE MATTER OF the Education
Regulations 1980.

SUIT NO. M 02/01

BETWEEN	KARINE MARTIN	APPLICANT
AND	THE CHAIRMAN, BOARD OF MANAGEMENT EDITH DALTON JAMES HIGH SCHOOL	1 ST RESPONDENT
AND	THE MINISTRY OF EDUCATION & CULTURE	2 ND RESPONDENT
AND	THE ATTORNEY GENERAL	3 RD RESPONDENT

SUIT NO. M 03/01

BETWEEN	KARL DUNKLEY	APPLICANT
AND	THE CHAIRMAN, BOARD OF MANAGEMENT EDITH DALTON JAMES HIGH SCHOOL	1 ST RESPONDENT
AND	THE MINISTRY OF EDUCATION & CULTURE	2 ND RESPONDENT
AND	THE ATTORNEY GENERAL	3 RD RESPONDENT

SUIT NO. M 04/01

BETWEEN	MICHAEL BRADY	APPLICANT
AND	THE CHAIRMAN, BOARD OF MANAGEMENT EDITH DALTON JAMES HIGH SCHOOL	1 ST RESPONDENT
AND	THE MINISTRY OF EDUCATION & CULTURE	2 ND RESPONDENT
AND	THE ATTORNEY GENERAL	3 RD RESPONDENT

SUIT NO. M 05/01

BETWEEN MILLICENT WILLIAMS APPLICANT
AND THE CHAIRMAN, BOARD OF
MANAGEMENT EDITH DALTON JAMES
HIGH SCHOOL 1ST RESPONDENT
AND THE MINISTRY OF EDUCATION &
CULTURE 2ND RESPONDENT
AND THE ATTORNEY GENERAL 3RD RESPONDENT

SUIT NO. M 06/01

BETWEEN CARLTON ROWE APPLICANT
AND THE CHAIRMAN, BOARD OF
MANAGEMENT EDITH DALTON JAMES
HIGH SCHOOL 1ST RESPONDENT
AND THE MINISTRY OF EDUCATION &
CULTURE 2ND RESPONDENT
AND THE ATTORNEY GENERAL 3RD RESPONDENT

SUIT NO. M 07/01

BETWEEN GLÓRIA SALMON APPLICANT
AND THE CHAIRMAN, BOARD OF
MANAGEMENT EDITH DALTON JAMES
HIGH SCHOOL 1ST RESPONDENT
AND THE MINISTRY OF EDUCATION &
CULTURE 2ND RESPONDENT
AND THE ATTORNEY GENERAL 3RD RESPONDENT

SUIT NO. M 08/01

BETWEEN HERMINE CAMPBELL APPLICANT
AND THE CHAIRMAN, BOARD OF
MANAGEMENT EDITH DALTON JAMES
HIGH SCHOOL 1ST RESPONDENT
AND THE MINISTRY OF EDUCATION &
CULTURE 2ND RESPONDENT
AND THE ATTORNEY GENERAL 3RD RESPONDENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN MISCELLANEOUS

IN THE MATTER OF an Application for an Order
of Certiorari by Lorna Elaine Jackson, Merle
O’Beron Palmer and Marva Elaine Phillips.

AND

IN THE MATTER OF the Education Act and
Regulations

AND

IN THE MATTER OF the Pensions(Teachers) Act

SUIT NO.M. 18/01

BETWEEN	LORNA JACKSON	APPLICANT
AND	THE CHAIRMAN, BOARD OF MANAGEMENT HAILE SELASSIE HIGH SCHOOL	1 ST RESPONDENT
AND	THE MINISTRY OF EDUCATION & CULTURE	2 ND RESPONDENT
AND	THE ATTORNEY GENERAL	3 RD RESPONDENT

SUIT NO. M19/01

BETWEEN	MERLE PALMER	APPLICANT
AND	THE CHAIRMAN, BOARD OF MANAGEMENT BELFIELD ALL AGE SCHOOL	1 ST RESPONDENT
AND	THE MINISTRY OF EDUCATION & CULTURE	2 ND RESPONDENT
AND	THE ATTORNEY GENERAL	3 RD RESPONDENT

SUIT NO. M 20/01

BETWEEN	MARVA PHILLIPS	APPLICANT
AND	THE CHAIRMAN, BOARD OF MANAGEMENT HAILE SELASSIE HIGH SCHOOL	1 ST RESPONDENT
AND	THE MINISTRY OF EDUCATION & CULTURE	2 ND RESPONDENT
AND	THE ATTORNEY GENERAL	3 RD RESPONDENT

Dr. L. Barnett, Mr. Leroy Equiano and Mr. Frank Williams for the Applicants.
Mr. Lackston Robinson Deputy Solicitor General and Miss A. Lindsay Crown Counsel
for the Respondents.

Heard : March 28, 29, April 6, 2001

HARRISON J

On the 29th March 2001, I completed hearing arguments in this matter and reserved judgment. I promised that I would expedite delivery of the judgment so I now seek to fulfill this promise.

The Notices of Motion

The Applicants have moved this Honourable Court to make orders of certiorari and declarations pursuant to section 564A of the Judicature (Civil Procedure Code) (Amendment) Judicial Review Rules 1998. They seek the following order and declarations:

- (a) The quashing of letters from the Chairman of the Board of Management that were sent to the respective applicants and which purport to terminate their services.
- (b) Declarations that neither the Board of Management of the said schools nor the Ministry of Education has the power or jurisdiction to decide that the Applicants should go on pre-retirement leave or should be compulsory retired.
- (c) Declarations that the period during which they have been prevented from carrying out their duties at the said Schools should not be deducted from, or count against their leave entitlement.

It was agreed that the applications should be heard together since they were based on similar grounds.

The Grounds

The grounds are stated inter alia, as follows:

“....

- (vi) The action of the said first-named Respondent and/or the second-named Respondent in purporting to terminate the applicant's services is in breach of the Education Act and Regulations and/or the Pensions (Teachers) Act.
- (vii) There is no statutory basis for the action of the first-named Respondent and/or the second-named Respondent, and it is therefore ultra vires.
- (viii) The said action of the first-named Respondent and/or the second-named Respondent is in breach of the principles of Natural Justice, capricious, unreasonable and/or arbitrary in that:
 - a. The applicant was denied her legitimate expectation of continuing in her employment with the said School until the age of retirement of sixty (60) years.
 - b. The said action of the said first-named Respondent and/or the second-named Respondent was informed by a consideration of irrelevant matters, and marked by a failure to consider matters that were relevant to the taking of the said action.
 - c. The said action of the first-named Respondent and/or second-named Respondent is so unreasonable that no reasonable tribunal could have taken the said action, having regard to all the facts and circumstances of this case.
 - d. The said action of the first-named Respondent and/or second-named Respondent was taken without giving to the applicant any prior notice, or indication of the reasons why she was being selected for compulsory

retirement; or, without giving her any opportunity to present her case as to why the said action should not be taken.”

The facts relied upon by the Applicants

The factual background to the applications is set out in the respective affidavits of each applicant. The affidavits state inter alia, that the applicants had expected that the letters purporting to terminate their employment would not be implemented without them being given an opportunity to be heard in respect thereof. There were also allegations that the letters did not state the reason why they were singled out. Furthermore, it was contended that there were no negative appraisals given against them and neither were there complaints with regard to their performance as teachers.

The Respondents' affidavit evidence

The respondents filed and relied upon an affidavit sworn to by Doreen Faulkner, then Deputy Chief Education Officer in the Ministry of Education and Culture. The affidavit dealt with matters concerning:

1. The Minister's right by virtue of section 42 of the Education Regulations 1980, to fix pupil/teacher ratios for Educational institutions.
2. The establishment of pupil/teacher ratios, the procedure for computing these ratios and circulation of the guidelines to all relevant educational institutions.
3. The Jamaica Teachers' Association demand that the Ministry implement the pupil/teacher ratios at the Primary and All-Age levels.
4. The restructuring of educational institutions and rationalizing the teacher supply.
5. The oversupply of teachers in Government Educational Institutions.
6. The process of rationalizing the teacher supply in affected schools.
7. The failure to achieve the desired results in a number of overstaffed schools.
8. The advice to the Boards of Management of the overstaffed schools to implement compulsory retirement or relocation of teachers and the meeting with Principals in order to bring staffing levels in line with established ratios.
9. The issuing of letters to teachers in several schools
10. Meetings with the JTA and officials from the Ministry of Education and Culture at which the said letters and programmes were discussed.
11. The implementation of a process of review and recommendations from the JTA which acted on behalf of the teachers
12. The commencement of review hearings by a Review team.

THE ISSUES FOR CONSIDERATION

The following issues arise for consideration:

1. Was there statutory basis for the action of the first and second respondents?
2. Did the letters by their terms indicate that the Boards were acting in accordance with directives given by the Ministry of Education and Culture?
3. Was the action of the first and/or second respondents in breach of the Education Act and Regulations and the Pensions (Teachers) Act?

4. Were the teachers compulsorily retired by the Boards of Management or Ministry of Education pursuant to the provisions of the Pensions (Teachers) Act?
5. Was there a breach of the principles of natural justice?

The letters

The contents of the letters that are the focus of these applications are set out hereunder:

“Dear.....

The Government has commenced implementation of a restructuring policy to bring the staffing levels in line with the operating teacher pupil ratios and approved programme offerings. As a result of this exercise your employment as a teacher will cease at the end of the vacation leave to which you may be eligible.

The period December 1, 2000 to February 28, 2001 should be regarded as the period of notice.

In view of the above you will be granted earned vacation leave immediately following the period of notice at the end of which your employment will cease.

Notwithstanding the above you are kindly asked not to resume duties on January 1, 2001. Your salary will continue to be paid in the normal manner up to the expiration of the leave.

You are encouraged to explore and accept alternative employment in a school where a suitable vacancy may exist. A list of these schools is available at the Regional Office.

If a suitable placement has not been found at the end of the vacation leave you will be eligible for retirement in accordance with the Pensions(Teachers) Act. Your pension benefits will be determined as follows:

A gratuity if your service is a minimum of three (3) years but less than ten (10) years;

A pension if your service is ten (10) or more years

Should you choose to resign, you could give yourself the option to have previous teaching service linked to future service for pension purposes.

I look forward to hearing from you on your decision at the earliest possible date.

On behalf of the Board I wish to convey our appreciation for your years of service given to the field of education in Jamaica and wish for you success in your future endeavours.

Yours faithfully

Sgd.
Chairman.

There were eight letters in the format set out above.

The contents of the letters to Marva Phillips and Lorna Jackson are basically the same as those referred to above but they commence quite differently. They state inter alia:

“Dear...

As requested by the Ministry of Education and Culture, we wish to inform you that the Government has commenced implementation of a restructuring policy to bring the staffing levels in line with the operating teacher pupil ratios and approved programme offerings. As a result of this exercise your employment as a teacher will cease at the end of the vacation leave to which you may be eligible....”

Yours truly,
Sgd.
Chairman.

Dr. Barnett submitted on behalf of the applicants Phillips, Jackson and Palmer that the letters by their terms, indicated that the Boards were acting in accordance with directives given to them by the Ministry of Education and Culture. He contends that the letters had several implications, namely:

1. They seek to terminate the applicants' employment in the teaching service.
2. They seek to deprive them the practice of their occupation as teachers.
3. They seek to deprive them of their choice of the time which they should take vacation leave
4. They seek to force the applicants into premature retirements.
5. They seek to reduce the potential value of the pension or gratuity to which such persons would eventually become entitled.

He further submitted that the action by the decision maker must satisfy three basic requirements of administrative justice. Firstly, the action must be based on specific legal authority exercised by the appropriate body. Secondly, it must be based on rational grounds and thirdly, it must observe the fundamental principles of fairness. According to him, none of the tests were satisfied in the instant matters.

He contended that the Minister of Education is given powers under the Education Act but none of those powers relate to terminating the period of employment with respect to a teacher or to compel that teacher to retire or to abolish the teacher's post. He also contended that the provisions in sections 3,4,5,6,7,8 and 9 respectively of the Education Act did not give the Minister the right or authority to give the directives reflected in the letter referred to above.

He also argued that although the Minister is entitled to deal with general matters of policy, sections 17 and 18 of the Pensions (Teachers) Act, are very clearly stated. He

submitted that any issue as to the compulsory retirement of a teacher cannot be determined by the Board of Management, the Minister or any officer of the Ministry of Education and Culture. This responsibility he said, must be carried out in accordance to the statutory scheme in the Education Act. He argued that the sections referred to above make it very clear that it was the Governor General who must determine all questions in relation to pensions under the Pensions Act after consultation with the Public Service Commission.

He further submitted that there was no provision under statute or for that matter common law, for the Chairman of the Board of Management to have properly issued the letters and their actions in doing so, were ultra vires, null and void.

Mr. Equiano for his part, submitted on behalf of the other applicants that the Education Regulations 1980, clearly state the procedure to be followed in the event of termination of the services of a teacher and that any action taken by the Board, must be in accordance with the Regulations. He submitted also that the Regulations made no provision for the termination of services on the grounds specified in the letters sent to the teachers. He argued that the action taken by the Ministry was without any consultation whatsoever, and that these teachers were singled out for no reason except to state that "it was a policy directive". He further submitted that the letters of termination for these applicants were "ultra vires" "as the Board did not act with due process in the principle of natural justice". Furthermore, he submitted that "a Ministry policy or a directive that is in all respects ultra vires, cannot supersede the Education Act and by extension the Education Regulations no matter what the intentions are or the effect that may be desired".

Mr. Robinson for the Respondents, submitted however, that there was nothing in the letters from the Board of Management to suggest that the teachers' services were terminated by virtue of section 6(1)(vi) of the Pensions (Teachers) Act. He further submitted that although there was reference to the Pensions Act in the letters, it was only by way of advice to the teacher of his or her eligibility for pension in the event they were unable to be relocated.

What is the scheme of the Education Act? The Act makes provision inter alia, for the Minister of Education and Culture to promote education in Jamaica; to establish schools; to establish special Committees; to establish Boards of Management and to take action where the Board fails to carry out its duties; to move educational institutions to new sites; to establish compulsory education, to establish a Teachers' Services Commission and to set out its functions; and to make Regulations.

Regulations 5 and 42 of the Education Regulations 1980 empower the Minister to fix the pupil/teacher ratios for all public educational institutions. The regulations provide as follows:

"5. The Minister may specify in writing the standards or principles by, or in accordance with which classes, forms and grades are determined and arranged in a public educational institution."

“42. The Minister may specify in writing in relation to any category of public educational institution the minimum qualifications for employment as a teacher and the ratio of teachers to students. (Emphasis supplied)

The establishment of a pupil/teacher ratio would no doubt be matter of government policy. Accordingly, the Minister would be required to fix the ratios and ensure that this objective is achieved.

The duties and responsibilities of the Board of Management are set out in the Regulations. Regulation 89(1)(g) prescribes the following:

“89(1) The Board of Management is responsible for the administration of the institution for which it has been appointed and in discharging its responsibilities the Board shall be responsible for –

...

(g) dealing as prescribed in these Regulations with the appointment, termination of appointment, promotion, demotion, suspension from duty and other personnel matters in relation to members of staff of the institution.”

Regulation 54 of the Education Regulations provide for the termination of employment of teachers by notice. In the case of a teacher who holds a temporary, acting or provisional appointment one month’s notice must be given by either the teacher or the Board. In any other case three month’s notice must be given by either the teacher or the Board or by payment to the teacher of a sum equal to three month’s salary in lieu of notice by the Board. Regulation 54 (2) then states:

“(2) Where the Board of any public educational institution intends to terminate the employment of any teacher in that institution other than a teacher employed on a provisional, temporary or acting basis for less than year, the termination shall not have effect unless the procedure set out in regulations 56 to 59 are followed.”

The relationship between the Board and teacher is therefore one of employer/employee and is strictly one of contract.

It was argued that the proper procedures were not carried out with respect to the termination of services and that the Boards had failed to act in accordance with the Regulations. Regulation 54(2) speaks of the termination not having any effect unless the procedure set out in regulations 56 – 59 are followed.

Now regulation 56 provides for complaints to be made to the Board. It states as follows:

“ 56. Where the Board of a public educational institution receives a complaint in writing that the conduct of a teacher employed by the Board is of such that

disciplinary action ought to be taken against the teacher, it shall, as soon as possible, refer the matter to its personnel committee for consideration pursuant to regulation 85.”

The disciplinary offences are set out in regulation 55 and they include (a) improper conduct while in school (b) neglect of duty (c) inefficiency (d) irregular attendance (e) persistent unpunctuality (f) lack of discipline (g) such other conduct as may amount to professional misconduct.

Regulation 57 sets out the procedure to be followed when a complaint is referred to the personnel committee.

Regulation 58 deals with situations where complaint about a teacher’s conduct is not heard and a decision is not handed down within a fixed period.

Regulation 59 then states:

“ Where on the completion of a hearing into the conduct of a teacher, the Board decides to terminate the appointment of such a teacher, the Board shall as soon as possible thereafter submit to the Ministry the minutes of the meeting at which the decision was taken, together with a copy of the notice of termination of employment of the teacher”.

The question for consideration now, is whether or not the provisions contained in regulations 56 – 59 inclusive apply when a reduction in the number of teachers takes place as a result of the pupil/teacher ratio being enforced.

I agree with the submission made by Mr. Robinson that regulations 56-59 ought not to be strictly followed. The draftsman seems to have placed emphasis on matters touching and concerning complaints into the conduct of the teacher but without a doubt, the teacher whose services has been dispensed with due to overstaffing, would still be entitled to a hearing.

I am of the view therefore, that once the pupil/teacher ratio has been established it must be implemented. The Board would therefore have to carry out its duties and enforce the regulations.

What is the evidence placed before this Court with respect to the ratio requirements? The affidavit evidence of the respondents reveals that prior to the dispatch of letters to the affected teachers, the established pupil/teacher ratios and the procedure for computing these ratios were circulated to all relevant educational institutions. The evidence also reveals that the Ministry in its efforts to make the most effective and efficient use of available resources had embarked on a process of restructuring its educational institutions and rationalizing the teacher supply due to the oversupply of teachers. The restructuring process did not achieve the desired results in a number of overstaffed schools and as a

consequence, the Boards of Management were advised by the Ministry to “implement the compulsory retirement programme”.

There is also evidence that the teachers through their representative, the Jamaica Teachers’ Association (JTA) had demanded the Ministry to implement the pupil/teacher ratios in Primary and All-Age levels. Meetings were convened between the JTA and officials of the Ministry at which the disputed letters and programmes were discussed.

One must therefore examine the letters in dispute in order to see what was really conveyed to the teacher. It is my considered view and I so hold, that upon a proper construction of the letters, there is nothing in them to suggest that the Boards were given directives by the Ministry to terminate the teachers’ employment.

I further hold that although reference was made to the Pensions (Teachers) Act in the respective letters, it was only by way of advice to them of their eligibility for retirement in the event that they were unable to be relocated. Section 6(1)vi of the Pensions (Teachers) Act make provision for compulsory retirement but it seems to me that it was introduced to assist the teacher who for example has to be retired due to overstaffing. That teacher could benefit from either receiving a pension or a gratuity.

Was there a breach of natural justice principles?

Dr. Barnett submitted that there were serious factual issues as to the rationality of the action taken by the Boards not only in relation to particular educational institutions and the overriding duty to provide an efficient system for the students, but also in respect of the selection of particular teachers for retrenchment. He submitted that the issues that culminated with the letters of termination were not fairly dealt with since the teachers were not given the opportunity to present their cases. He referred to and relied upon the cases of **Regina v Kent Police Authority and Others, Ex parte Gooden** [1971] 3 WLR 416, **Perinchief v Governor of the Island of Bermuda and Ors.** [1997] LRC 171, **Duncan v The Attorney General** [1998] 3 LRC 414, **CCSU v Minister for the Civil Service** [1985] 1 A.C 374, **Associated Provincial Picture Houses v Wednesbury Corporation** [1948] 1 KB 223 and **Kanda v Government of the Federation of Malaya** [1962] AC 322.

Dr. Barnett also submitted that the action of the Boards when viewed against the background of the Applicants’ qualifications, the positions held at the various schools and their vast experience, were so unreasonable that no reasonable tribunal, seised of the same facts, would have taken the said action. He further argued that the Boards in acting as they did must have taken into account irrelevant matters. He submitted that they ought to have ignored the directions given by the Minister once they did not conform to the statutory scheme. Further, even if the Board had the discretion to act in the manner in which it did, it would have allowed itself to be fettered in the exercise of its discretion by the unlawful dictate of the Minister. Accordingly, there was no genuine exercise by the Boards of their discretions.

Mr. Robinson submitted on the other hand, that natural justice did not require that a hearing must be given before a decision is taken and that the requirements of natural justice will be satisfied if the person in respect of whom the decision is made is given an opportunity for a hearing subsequent to the making of the decision. He referred to and relied upon the decision of **R v Secretary of State for the Home Department, Ex parte Doody** [1993] 3 WLR 154 at page 168.

He further argued that fairness to the individual must be balanced against the public interest.

What does fairness require when one comes to consider the facts as they are presented in the instant case? Some assistance can be derived from the judgment of Lord Mustill in the case of **Regina v Home Secretary, Ex parte Doody** [1993] 3 WLR 154. At page 168 of the judgment His Lordship stated inter alia:

“(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken with a view to procuring its modification, or both.”

The facts presented in the instant case reveal that following the issuing of letters to the teachers, meetings were convened between the JTA and officials of the Ministry at which the letters were discussed. A process of review was implemented. The hearings were attended by the affected teachers and representatives of the relevant school management Boards. In each case the teacher was represented by a member of the JTA. Some of the teachers to whom letters were issued had in fact accepted retirement and were now retired from the teaching profession. Others had accepted relocations.

The records further reveal that the applicants before this Court were aware of the review process undertaken by the Ministry. Both Michael Brady and Gloria Salmon had requested a review but they had also filed suit. Marva Phillips and Lorna Jackson had requested a review of their cases. This review was scheduled for hearing but they subsequently declined and filed suit. The other applicants had not requested reviews but filed suit instead.

It is my considered view that the applicants were given an opportunity for a hearing but they declined. Based on the evidence presented, there seems to be good reason to believe that the Ministry had genuine intentions for a review programme to be put in place. No further termination letters have been sent out since the programme commenced. Furthermore, the teachers' representative the JTA, were actively involved on their behalf in discussions with the Ministry at different stages.

The Remedy sought

Mr. Robinson submitted that since the order sought is one of certiorari, it was necessary for the applicants to make full disclosure. He further submitted that the remedies sought are discretionary and although the applicants may be entitled to a remedy as of right it

was not “as of course”. He said that generally, a Court has discretion in certain circumstances to refuse to grant leave although the act complained of was unlawful.

He also submitted that the Court could refuse relief if there were any defect in the first procedure, that is, the issuing of the letters, because it could be cured by the agreed later proceedings that were already in progress and of which the applicants could avail themselves.

Finally, he submitted that the Court should consider the conduct of the applicants and decline to grant the orders sought. He argued that through the JTA, the applicants had agreed to a procedure for review based substantially on their recommendations and notwithstanding that, they were determined to pursue these proceedings.

In response, Dr. Barnett submitted that this Court was the appropriate body for the matters to be aired.

I agree with Mr. Robinson that the teachers’ conduct in the matter is a factor that ought to be considered. It is my considered view that such conduct weighs heavily against them when it comes to exercise one’s discretion whether to grant the relief sought.

Conclusion

There can be little question that the impact of termination of services will vary from individual to individual. Retirement whether mandatory or compulsory, results in a serious detriment to the workers' working lives, including loss of protection for job security and conditions, economic loss, and loss of a working environment. The Boards of Management are required nevertheless, to carry out government’s restructuring policy in order to bring staffing levels in line with established teacher/pupil ratios.

I hold that there was statutory basis for the actions on the part of the first and second Respondents. I further hold that the Chairman of the Board of Management for each school and the Ministry of Education were not acting in breach of the Education Act and Regulations nor the Pensions (Teachers) Act. They were neither acting ultra vires nor in breach of the principles of natural justice.

In the circumstances, the relief and declarations sought are therefore refused and the Motions are dismissed.