[2024] JMSC Civ 98

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. SU 2019 CV 04927**

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| **BETWEEN** | **MARTIN MURPHY** | **CLAIMANT** |
| **AND** | **FREE HILL PRIMARY AND INFANT SCHOOL BOARD OF MANAGEMENT** | **1ST DEFENDANT** |
| **AND** | **PAULETTE NELSON** | **2ND DEFENDANT** |

Mr Hugh Wildman and Mr Duke Foote instructed by Hugh Wildman and Co Attorneys-at-law for the Claimant

Mr Stuart Stimpson and Mr Steven McCreath instructed by the Director of State Proceedings Attorney-at-law for the Defendants

Heard: May 1, 2024 and July 31, 2024

*Judicial Review – Whether available alternative remedies are to be considered at the substantive hearing if not addressed at the leave stage – whether the Court can in its own discretion send the matter to the Appeals Tribunal if it is of the view that judicial review should not be granted*

**T. Mott Tulloch-Reid, J**

## Background

1. An unfortunate thing has happened to Mr Murphy. He has been terminated from his position as the Principal of Free Hill Primary and Infant School. He went overseas on August 13, 2018, and while there, he learnt that the school for which he was responsible was broken into. He was so informed on August 27, 2018. He returned to Jamaica on August 31, 2018, and visited the school on September 3, 2018. The police were called but they were not able to bring the perpetrators to justice. Following from the break in, persons from the Ministry of Education and its Board of Directors did an audit of the school's finances.

2. As a result of the findings of the audit, the Claimant was summoned to meetings which ended in disciplinary proceedings being brought against him. A complaint was lodged against the Claimant, alleging certain financial irregularities which were taking place at the school. The Claimant was called before the Personnel Committee for a hearing. He did not attend and in his absence, it was recommended that he be relieved from his post. The Board complied with the recommendation. The Claimant did not appeal the decision to the Appeals Tribunal as stipulated in Section 61 of the Regulations to the Education Act (the "Regulations") but rather is seeking judicial review of the decision of the Board on the basis that the decision was illegal, null and void and of no effect. Certain declarations have been sought as well as orders certiorari and a mandatory injunction.

**Available Alternative Remedy**

3. I will begin with Mr Stimpson's submissions as to whether an alternative remedy exists so as prevent the Claimant from approaching this Court first before utilising the alternative remedy available to him in the form of the Appeals Tribunal. Mr Wildman is of the view that because leave has been granted for the claim for judicial review to be filed, then the Court should not at this time, at the point when the substantive issue was to be decided, consider whether an alternative remedy was available to the Claimant. He argues further that the Defendants had offered no objection to leave being granted for judicial review and therefore should not be allowed to rely on that argument that an alternative remedy exists at the substantive hearing. He relies on the case of **West Yorkshire**. Mr Wildman did not provide the case, nor did he provide the citation for the case. I was unable to determine which case he meant so it was not considered in my decision. Based on the other cases on which Mr Wildman and Mr Stimpson relied, I am however comfortable that the decision arrived at would not have been altered even if the **West Yorkshire** case was properly before the Court.

4. Mr Wildman also relies on the case of **Millicent Forbes v Attorney General of Jamaica SCCA 29/05.** He argues that Fordham's analysis is that alternative

remedy is to be considered at the permission stage and not when the substantive issue is being considered. Mr Wildman sought to distinguish Justice Carr's decision in the case of **Treebos Holdings v Ministry of Economic Growth & Job Creation and NHT [2022] JMSC Civ 122** by arguing that the issue of delay was contemplated at the point when consideration was being made as to the remedy that was to be given to the aggrieved party and that she was not considering the issue of delay with respect to the granting of leave.

5. In **Treebos** the Court considered the fact that rule 56.3 of the CPR said that application for leave to apply for judicial review must be made promptly. In that case, the application was made 3 years after the Minister had made the decision which the Claimant wished to have quashed. In arguing their case, the defendants in **Treebos** relied on the decision of **R v Dairy Produce Quota Tribunal ex parte Caswell [1990] 2 AC 738** and submitted that even though the parties had been granted leave to apply for judicial review after they were given an extension of time to do so, this did not prevent the court from considering the issue of delay at the hearing of the substantive claim. It was held that in an application for judicial review, the application for leave could be granted even though there was a delay but that at the substantive hearing, the issue could be considered again, and the substantive claim fail because of the delay, if that delay was likely to cause prejudice or hardship or would be detrimental to the good administration of justice.

6. Delay is not the issue that this Court has to consider. It is however an issue that the Court must consider in determining whether leave to apply for judicial review is to be granted. It was considered in **ex p Caswell** at the leave stage and at the hearing of the substantive claim and it was also considered by the Court in **Treebos** at the leave stage and at the hearing of the substantive claim. Since this is so, I can see no reason for alternative remedy not to be considered at the substantive hearing stage even though it was not put forward as a defence at the leave stage. One of the key elements of applying for leave for judicial review is that if an alternative remedy is available to the claimant, his

application for leave to apply for judicial review should not succeed. The case of **Sharma v Brown-Antoine [2006] UKPC 57** is instructive on this point. If an alternative procedure can resolve the issues which plague the Claimant and which he wishes the administrative action to remedy, then the alternative procedure is to be utilised first. He must first exhaust all the remedies available to him before he can seek judicial review of a decision.

7. Mr Stimpson submits that the alternative remedy of attending on the Appeals Tribunal which was available to him was not utilised. Instead of participating in the hearing, then appealing the decision, the Claimant and his attorneys left the meeting and went to Kingston, presumably to seek leave to apply for judicial review. He also argues that the Claimant has filed an appeal with the Appeals Tribunal but rather than pursue his remedy there, he has come instead to the Court for judicial review of the decision. Mr Stimpson argues that the Claimant cannot have this remedy available to him but say it is not sufficient or helpful to deal with the issues of illegality, irrationality and unreasonableness which have tainted the Committee's decision. He must first go to the Appeals Tribunal and if he is not satisfied with the findings of the Appeals Tribunal, he can then seek relief through judicial review of the decision of the Appeals Tribunal on the basis that it was illegal, irrational or unreasonable.

8. Section 55 of the Regulations sets out the bases on which a teacher in a public educational system can have disciplinary action taken against him. Section 56 sets out the procedure for doing so. It provides that:

> *"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."*

Section 57 sets out what the personnel committee's role is upon receiving a complaint from the Board. If it finds that a hearing should be held, the personnel

committee must inform the complainant in writing of the date, time and place of the hearing and give written notice within a period of not less than 14 days before such date to the person complained against of the charges in respect of which the hearing will be held, the date and place of the hearing, the penalties that may be imposed if the charges are proven and his right to have a friend or attorney attend the hearing with him and make representations to the personnel committee. If the person intends to make representations, he must inform the chairman or secretary of the Board in writing at least seven days before the hearing and the complainant is to be notified. If the person complained against does not attend the hearing and the committee is satisfied that he was notified, then the hearing can be conducted in his absence.

Section 61 provides that

> *"A teacher who is aggrieved by any action taken by the Board under paragraph (6) of Regulation 57, may appeal to the Appeals Tribunal within twenty-eight days after the date of the action giving rise to such appeal."*

9. The Regulations are clear. If it is that the teacher against whom the complaint is made is not satisfied that Regulation 57 has been complied with, or with the decisions taken as a result of the committee's implementation of Regulation 57, then he may appeal to the Appeals Tribunal. The Appeals Tribunal would have a wider mandate than would this court. The Appeals Tribunal would be tasked with considering whether the decision to terminate the Claimant's employment was correct and whether the procedure followed in coming to that conclusion was proper. The Appeals tribunal could reinstate the Claimant as principal of the Freehill Primary and Infant School, if it thought that was what should be done based on the evidence before it. This Court has no such powers. This Court can only consider whether the Defendants acted within their given powers.

10. The case law is clear that except in exceptional circumstances leave to apply for judicial review will not be granted if there is an alternative remedy available

to the aggrieved person and the remedy is given by statute. This is so because to grant leave for judicial review when statute provides an alternative remedy could lead to an undermining of the statute (see **R (on the application of Christopher Wilford) v Financial Services Authority [2013] EWCA Civ 677 para 23**), utilising the statutory remedy will lead to a swifter outcome than seeking judicial review, which requires permission (see **R v Birmingham City Council ex p Ferrero Limited [1993] 1 All ER 530, 537**) and judicial review does not deal with the issues but simply returns the parties to their original positions. *"It does not enable the court to determine the merits of the underlying dispute"* (see **R (on the application of Christopher Wilford) v Financial Services Authority [2013] EWCA Civ 677 para 36**). The statutory remedy available to the Claimant, would in my view, determine the real issue which is whether the Claimant's employment should have been terminated by the Board. This Court, on judicial review, cannot decide that issue. The alternative remedy should have been used.

11. It is clear on the evidence before this Court and the submissions made by counsel for the Claimant that this part of the procedure to be followed was not complied with and there was no decision of the Appeals Tribunal on the Committee's decision. It is for the Appeals Tribunal not only to consider the decision of the Board, but it is also to consider whether the correct procedure was followed in coming to that decision. There lies an alternative remedy available to the Claimant which should have been utilised but was not and as such, based on the decision in **Sharma** judicial review is not an alternative open to the Claimant at this point in time. This is so, even though we are in the substantive hearing, and I come to that conclusion based on my assessment of the case law.

12. Mr Wildman also raised the following issues:
    a. Disclosure that was requested by the Claimant of the Defendants was not complied with. The disclosure was necessary in order for the Claimant to mount a full defence on the complaint laid against him and the failure of the Defendants to disclose the documents requested to the Claimant was prejudicial to him.

b. The 2nd Defendant should not have presided at the hearing as she was biased towards the Claimant having made certain statements previously.
c. The disciplinary proceedings were a nullity as they were not brought to the Board properly. The complaint was signed by Mr Purcell on behalf of Ms Brimm. The Regulations did not permit this course of action.

**Disciplinary Proceedings – a nullity**

13. I will start with the issue of the nullity. Mr Wildman argues that there is no complaint in law because a complaint cannot be signed on behalf of someone else. There must be a complainant. He relies on Section 56 of the Regulations and the Privy Council decision in the case of **Commissioner of the Independent Commission of Investigations v Police Federation and ors and Dave Lewin (Director of Complaints of the Independent Commission of Investigations) v Albert Diah [2020] UKPC 11** to support his position that no one can sign on behalf of the complainant. The complaint must be laid by the complainant himself. He argued that the complaint represents a quasi-judicial decision, and that the institution of disciplinary proceedings is quasi-judicial and cannot be delegated to anyone. Mr Purcell cannot complain on behalf of Ms Brimm. He also relies on the case of **Barnard v National Dock Labour Board [1953] 2 QB 18** and **Vine v National Dock Labour Board [1956] 1 QB 658**.

14. In **Barnard,** the Dock Workers (Employment and Regulation Scheme) 1947, granted the power to suspend a worker to the local dock labour board which was made up of equal number of representatives of workers and employers. The Port Manager suspended workers without reference to the board. The Court found for the workers on the basis that the power had been granted to the board and not to the Port Manager. Denning LJ held that an administrative function could be delegated but a judicial function rarely could be. No judicial tribunal could delegate its functions unless it was enabled to do so expressly or by necessary implication.

15. In **Vine** the board delegated its disciplinary functions to the disciplinary committee. This delegation was not allowed under the Dock Workers (Regulation and Employment Order) 1947 and the Court held that the quasi-judicial function of disciplining a worker could not be delegated. In the **Indecom case** the issue for consideration was whether the Indecom and its Commissioner and staff could initiate prosecutions for certain offences. The Independent Commission of Investigations Act 2010 empowered Indecom to undertake investigations into actions by members of the security forces and other state agents that resulted in the death or injury of persons or an abuse of the rights of persons. In the Diah appeal, the Court of Appeal with Phillips JA dissenting held that the Commissioner and the staff had the power to initiate prosecution of section 33 offences in their private capacity. The Commissioner appealed both decisions and the Privy Council dismissed them. The Commissioner could not act outside of the role he was supposed to play as detailed by the Act or other relevant legislation. The Commissioner could not prosecute incident offences. He only had an investigative function where incident offences were concerned.

16. Section 56 of the Regulations does not set out how the complaint is to be received by the Board or how the complaint is to be made. It just says the complaint must be made in writing. In the **Indecom case,** the Independent Commission of Investigations Act 2010 set out specifically the role the Commissioner and the Commission Staff was to play. It was an investigative function not a prosecutorial one.

17. Mr Stimpson on behalf of the Defendants argued that the complaint emanated from the audit that was done after the break in and which led to a finding of certain irregularities. Mr Purcell was the Regional Financial Controller and the substance of the complaint brought by Ms Brimm who was the Region 2 Regional Director was based on what Mr Purcell found in his investigations when he did the audit. The complaint is not quasi-judicial. The only quasi-judicial action would be the decision of the Personnel Committee and the Board. The effect of the complaint, says Mr Stimpson, is to trigger the disciplinary

process. It triggers the process of embarking on an inquiry. The Personnel Committee would consider the complaint, then make recommendations to the Board. The cases Mr Wildman relies on concern persons who have the decision-making power not to persons who simply make the allegation. Mr Purcell was Ms Brimm's subordinate, and Ms Brimm made the report to the Claimant. Since Mr Purcell did the audit, he would be the one who would come to the hearing to answer questions since it is his report that is the substance of the complaint. It is the Minister of Education who is the complainant says Mr Stimpson, not Mr Purcell or Ms Brimm who are merely her servants or agents. Mr Wildman argues that the taking of the evidence from Mr Purcell and not Ms Brimm could not stand on its merits. I recognise that Mr Wildman did not say that Mr Purcell could not give evidence. What he argues is that Mr Purcell could not sign on behalf of Ms Brimm and that he (Mr Brimm) should have made the complaint himself.

18. I do not find that the lodging of a complaint is a quasi-judicial function. It is in my mind an administrative function. The decision of the Board to suspend or terminate a position would be quasi-judicial in nature and that decision should not be delegated but the lodging of the complaint is not a decision with a judicial conclusion so based on Denning LJ's decision in **Barnard**, when Mr Purcell signed on behalf of Ms Brimm, it was an administrative function which could be delegated, and which is not defective. In any event, if the Claimant was of the view that this procedure of Mr Purcell signing on behalf of Ms Brimm was irregular, then this is something that should have been brought to the attention of the Appeal Tribunal for their consideration of whether the procedure by which the complaint was lodged was tainted in any way.

**Disclosure**

19. I come now to deal with the issue of disclosure. Mr Wildman argued that by his letter to the Board dated November 8, 2019, he requested certain documents which would help him in preparing the Claimant's defence. He wanted the following documents disclosed:
    a. Letter of complaint
    b. Copy of the police report

c. Letter of invitation
d. Minutes of the personnel committee meeting
e. Minutes if the board meeting where the complaint was presented
f. Witness statements on which the personnel committee relied to invite the Claimant to the hearing; and
g. Any other information relevant to the hearing to substantiate the claim.

In her affidavit, Ms Nelson stated that the documents were not disclosed as that would be in breach of section 87 of the Regulations. Mr Wildman argued that coming to that decision not to disclose was a misconstruing of section 87. Regulation 87 speaks to the Board not the Personnel Committee and in any event the Board has a discretion to disclose if requested to do so. He wanted to know from the minutes of the Personnel Committee meeting whether the 2nd Defendant had participated in the meeting when she should not have been allowed to do so because of her bias against the Claimant. There was no limit on disclosure from the personnel committee of its minutes.

20. Mr Stimpson submitted that there was no failure to disclose. The police report did not exist and could not be disclosed. He pointed to paragraphs in the Affidavit of Ms Nelson which indicated that the investigation for the break in went nowhere and so did not form a part of the investigation into the Claimant. Paragraph 22 of her affidavit lists the documents the Personnel Committee are said to have considered. Since she was not cross-examined, there is no way for the Court to determine whether or not she can be viewed as a credible witness. Mr Stimpson further argues that the Personnel Committee asked the Claimant and his attorney to leave the meeting so that a decision could be taken as to whether Mr Wildman was to be allowed to participate in the meeting. However, rather than waiting for a decision to be taken, both men left the meeting and so the meeting went on in their absence.

21. A reading of Regulation 87 makes it clear that it is what arises out of the board meetings that is to be kept confidential. There is no reference to meetings of the personnel committee and so in my view, the documents that were requested to be disclosed that did not arise out of the board meeting could have been

disclosed. But then, this again is a matter for the Appeals Tribunal to consider. Did the Personnel Committee follow the proper procedure as laid down by section 57 of the Regulations when they failed to disclose documents specifically requested by the Claimant to aid in his defence of the complaint laid against him?

**Bias**

22. The issue of bias has arisen because the 2nd Defendant is alleged to have said the Claimant made certain statements which have political implications and assignment of party allegiance to the Claimant and the 2nd Defendant. Both deny making the comments that they were each alleged to have made. However, the Claimant is of the view that because of the allegations, the 2nd Defendant should not have been allowed to sit on the Personnel Committee because she had bias towards him. Justice must not only be done but it must be manifestly and undoubtedly be seen to be done. If the 2nd Defendant's presence on the Committee could call into question any decision made by the Personnel Committee, then it may have been wise to have someone stand in her stead. The Claimant was not of the view that the 2nd Defendant should sit on the Personnel Committee as her presence there denied the Claimant the opportunity to have a fair and impartial hearing as guaranteed under the Charter of Fundamental Rights and Freedoms.

23. Mr Stimpson relies on the several cases to support his argument that there was no bias. Lord Hope of Craighead in the case of **Magill v Porter [2001] UK HL 67** said the test for apparent bias is

> *"whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

Mr Stimpson submits that there is no evidence that the 2nd Defendant said the words complained of. She denies doing so. In this context, I had no other expectation. Her say so would not be sufficient. However, the Claimant alleges so he must prove. He could have called the person who told him that the words

were said as a witness. That certainly would have strengthened his position. He did not. He should consider that for a hearing before the Appeals Tribunal.

24. In determining whether there is bias, the judge of fact must not only look at the allegation but at the conduct of the 2nd Defendant in the proceedings as a whole and then make an assessment of whether the Claimant's fears as to existence of bias were realised. (see the case of **Kerrie-Ann Dryden v Ministry of Economics Growth and Job Creation and ors [2023] JMSC Civ 152**).

25. I will not form any conclusion as to whether there was bias. This is for the Appeal Tribunal as it considers whether the decision of the Board who following the recommendation of the Personnel Committee was correct. Issues of bias, disclosure etc are all matters that would fall within the purview of the Appeals Tribunal in carrying out its mandate as prescribed by Section 61 of the Regulations. The Claimant failed to submit to that aspect of the procedure and by opting instead to circumvent that stage of the process and step directly into an application for judicial review, erred. This Court is bound to follow the requirements of statute and as such the Claimant's application for judicial review must fail.

**Additional issues raised before orders made**

26. Just before the orders were made, Mr Wildman raised another issue. He submitted to the Court that she could, as was done in the case of **Robert Ivey v Firearm Licencing Authority [2021] JMCA App 26**, make an order on its own initiative sending back the matter to the Appeals Tribunal for consideration. He submitted further that this could be and would need to be done because the Appeals Tribunal as an alternative remedy was no longer available to the Claimant as an option. He made further submissions on issues that were not before the Court in the pleadings or in the affidavit evidence and which therefore cannot be considered by me, and I will therefore not regurgitate those submissions in their entirety.

27. CPR 8.9A provides that

*"The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission."*

Although the rule speaks specifically to particulars of claim, I believe that it extends to evidence that is set out, or as in this case, not set out in the Claimants affidavits. If a party is allowed to submit on allegations not disclosed to his opponent, then that would not be fair to his opponent who would not be given an opportunity to respond. That course of action would go against the overriding objective.

28. There was nothing in the Claimant's evidence which suggested that the Appeals Tribunal could no longer be accessed. This, in my view, is something that he should have raised in his application for leave to apply for judicial review – not just the presenting of the application but in drafting the notice of application for court orders. He would have raised it in the application knowing that leave for judicial review is only available when there is no alternative remedy available to be utilised. Further, the Fixed Date Claim Form did not seek any orders from this Court for the matter to be remitted to the Appeal Tribunal in the event that judicial review was not granted. Notice that this alternative would be sought, would properly have to be given to the Defendants. It was not and as such the Claimant cannot be allowed to raise those submissions at this stage of the proceedings.

29. I will also say that I read the **Ivey decision** and I do not see where the Court of Appeal made any orders on its own initiative remitting the matter to the Review Board for consideration. In fact, leave to appeal the decision of the first instant judge not to grant leave to apply for judicial review, was refused. What the Court of Appeal did was to suggest to Mr Ivey that he could, if he was so minded, apply to the Review Board or to the Minister for an extension of time within which to apply to the Review Board for a review of the Firearm Licence Authority's revocation of his firearm's licences (see paragraph 79 of the judgment). It was a suggestion or recommendation only and nothing more. I do not know what the likely outcome will be, but I will make a similar

recommendation to the Claimant. If Mr Murphy is so minded, he may seek an extension of time to apply to the Appeals Tribunal for his case to be considered by it. This is a recommendation only and the Appeals Tribunal is well within its right to make its own decision without considering this Court's recommendation.

**Costs**

30. It is not usually the case that costs are allowed in judicial review matters. However, in this case, when the Claimant on his own evidence, failed to even wait for the decision as to whether his lawyer would be allowed to participate but went away and applied for judicial review in circumstances where there was clearly on the statute, a process to appeal the decision of the Board which was not favourable to him, I am of the view that this is a case in which the costs incurred by the Defendants in defending the case should be the Claimant's.

31. My orders are as follows:
    a. The declarations and orders sought in the Claimant's Fixed Date Claim Form filed on December 14, 2020 are refused.
    b. The Claimant is to pay the Defendants' costs in the claim which are to be taxed if not agreed.
    c. The Defendants' attorneys-at-law are to file and serve the Formal Order.