

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

S.C. MISC. 69/91

R. v. MINISTER OF EDUCATION EX PARTE DOROTHY LEWIS

BEFORE: ROWE, CHIEF JUSTICE (ACTING)
PATERSON, J.
LANGRIN, J.

LORD GIFFORD, Q.C. AND MISS ANTONNETTE HAUGHTON INSTRUCTED
BY GIFFORD, HAUGHTON & THOMPSON FOR APPLICANT

LENNOX CAMPBELL AND BERTRAND SMITH FOR RESPONDENT.

OCTOBER 7-10, NOVEMBER 28, 1991

ROWE, C.J. (ACTING)

Hampton High School is a public educational institution within the provisions of the Education Act of 1980. It is operated by the Munro and Dickenson Trust and is administered by a Board of Management as is provided for in Regulations 70 and 72 of the Education Regulations 1980. Schedule A to the Education Regulations under the caption "Types of Appointment" enables a Board of Management to make permanent appointments, provisional appointments and temporary appointments of teachers. Dorothy Lewis, the applicant herein was appointed Provisional Principal of Hampton High School for one year in the first instance with effect from September 1, 1989 and in the letter dated August 15, 1989 from the Ministry of Education to the Chairman of the Hampton High School Board of Management advising of the provisional appointment it was expressly stated that :-

" Her performance should be assessed during the period and your recommendation submitted before the end of the period. "

This period of provisional appointment was extended although the terms thereof were never committed to writing.

In a letter dated April 5, 1991 the Chairman of the Hampton School Board advised the applicant that "the Ministry of Education has decided not to extend the provisional appointment beyond August 31, 1991". The applicant protested. Correspondence passed between the applicant's attorney-at-law and the Ministry of Education. Many important meetings, about which much will be said later, were held and in a letter of June 25, 1991 signed by the Acting Chairman of the Hampton School Board, the applicant was advised that the Ministry of Education had decided not to confirm her in the post and that her provisional appointment would terminate effective August 31, 1991 in accordance with the code of regulations (Reg. 43 Schedule A (2)) re - Principals.

Again the applicant protested and following a series of meetings, on August 17 Sunpress carried a Press Release from the Ministry of Education which gave the Ministry's account of the history of the issues surrounding the applicant's provisional appointment and concluded, inter alia, that :

" Following these meetings and discussions the following decisions have been taken :

1. As of September 1, 1991, Miss Dorothy Lewis reverts to her substantive post as Vice Principal at Hampton.
2. Miss Doris Sims, an experienced Retired Teacher would be asked to act as Principal to ensure a smooth re-opening of school at Hampton in September. "

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All efforts having failed to obtain an administrative decision in her favour, the applicant moved the Court for an Order of Certiorari to quash the decision of the Minister of Education made on a date between the 7th and the 17th days of August, 1991 that the applicant should not be confirmed as Principal of Hampton School. Leave to apply was granted ex parte by a Judge in Chambers under Section 564B of the Judicature (Civil Procedure Code) Law, and the motion came on for hearing before us. At the conclusion of the arguments we made an order quashing the decision of the Minister of Education made between August 7 17, 1991 in which he confirmed the decision of the Teachers' Services Commission made on June 18, 1991 not to confirm the applicant as Principal of Hampton High School. The reasons for our judgment, which we promised to reduce into writing, are contained herein.

Thirteen grounds were relied upon by the applicant in support of her motion. They are set out below :

1. By letter dated 15th August, 1989, the Applicant was [appointed] provisionally as Principal of Hampton High School for one year with effect from September 1, 1989.
2. Paragraph 2(2)(d) Schedule A to the Education Regulations 1980 provides that arrangements for the regular assessment of a principal shall be made by the Ministry of Education during the period of a provisional appointment. In breach of the said regulation, no assessment was made of the Applicant during the school year 1989 to 1990.
3. During the school year 1990 to 1991 the Applicant continued to be the principal of the said school yet still no assessment of her performance was carried.
4. By letter dated 6th April, 1991 the Chairman of the Board of the said school advised the Applicant that her provisional appointment would not be extended, but following representations made on behalf of the Applicant the said decision was rescinded.

5. At a meeting between the Applicant and Officers of the Ministry of Education on the 27th May, 1991 the Ministry of Education purported to carry out an assessment of the Applicant, but the said meeting did not constitute a regular assessment as required by the said Regulations.
6. The said Regulations also provided that a report of the assessment shall be discussed with the Principal but contrary to the said Regulations and to the Rules of Natural Justice no such report was discussed with the Applicant.
7. At a meeting held on the 12th June, 1991 the Board of the said school purported to make a recommendation that the Applicant should not be confirmed as Principal.
8. The said Board was improperly constituted in the following respect :
 - (i) The school's bursar, Mr. W.A. Campbell took part in the meeting and voted for the said recommendation whereas he was not a member of the Board.
 - (ii) Ms. Pamela Smith, the representative of the Ancillary Staff was given no notification of the said meeting.
 - (iii) Contrary to Regulation 70(1) of the said regulations there was no member of the Board who had been nominated by the Minister.
 - (iv) Contrary to the same regulation there was no member of the Board elected by the Administrative and Clerical Staff.
9. Paragraph 2(2)(a) provides that the Board shall make a report to the Teachers' Service Commission on the performance of the Principal, but contrary to the said regulations the Board made no such report.
10. By letter dated the 26th June, 1991, the acting Chairman of the said Board informed the Applicant that the Ministry of Education had decided not to confirm her in the post of Principal and to terminate her provisional appointment.

11. Paragraph 2(2)(f) of the said Schedule A to the Education Regulations 1980 provides that it is for the Commission to determine, subject to confirmation by the Minister, whether the provisional appointment of a Principal is to be made permanent.
12. At a date between 7th and 17th August, 1991 the Decision was finally confirmed by the Minister of Education that the Applicant would not be confirmed as Principal, and on 17th August, 1991 the said Decision was published in a Press Statement by the Ministry of Education.
13. In the premises the decision not to confirm the Applicant in her post was made in breach of various statutory procedures and contrary to the Rules of Natural Justice and was ultra vires null and void.

Dated the 22nd day of August, 1991.

GIFFORD, NAUGHTON & THOMPSON. "

In support of these several grounds, affidavits were filed by the applicant Dorothy Lewis, the President of the Hampton High School Parent Teachers' Association, Mrs. Dorothy Miller, Ms. Easela Smith employed as Pantry Maid at Hampton, and Ms. Maxie Gowans, a Secretary at Hampton. The respondent replied with affidavits from Ms. Sonia Lawson, Senior Education Officer of the Ministry of Education, Mrs. Videna Falconer, a member of the Hampton School Board, Mr. William Campbell the Bursar of Hampton School and Secretary to the Board of Management, and Ms. Horna Burnett, the acting Secretary of the Teachers' Service Commission.

An application by Lord Gifford on the first day of the hearing, supported by an appropriate notice served on the respondent, to call deponents Mr. William Campbell and Mrs. Videna Falconer for cross-examination was opposed by the respondent. Section 406 of the Judicature (Civil

Procedure Code) Law permits evidence to be given by affidavit upon the hearing of a motion and enables the Court to order the attendance of any deponent for cross-examination, upon the application of the opposite party.

Mr. Campbell for the respondents argued that the process opted for by the applicant to seek relief was a very restricted one which did not allow her to obtain discovery or to serve interrogatories. A further consequence, he submitted, was that exceptional circumstances must exist before a court will allow cross-examination of a witness in an application for certiorari. This indeed was the view expressed by Lord Goddard in R. V. STOKESLEY YORKSHIRE JUSTICES ex parte Bartram [1955] 1 W.L.R. 255. There, a man who had been adjudged the putative father of a child on March 12, 1947 and ordered to pay a sum of money for maintenance, claimed in September 1955 that he was hearing of the order for the first time when he was served with summons for 8 years arrears of payment and that he had not been served or had any knowledge of the 1947 proceedings. In addition the order of the Court which originally did not indicate that the order was made ex parte, was altered to give the contrary effect. There was evidence from a police constable that he had served the summonses in 1947 and a denial by the man adjudged putative father. In the face of the altered document and the conflicting testimony, the Court with great reluctance granted leave for witnesses to be cross-examined upon their affidavits. Lord Goddard, Lord Chief Justice said :

"This is probably the first time in recent history in which application has been made in crown proceedings for leave to cross-examine on affidavits. Leave has never been given, or at least for a great number of years. "

In Rex. v. Kent Justices, ex parte Smith [1920 W.N. 137]

Lord Hewart, C.J. sitting with Avory & Shearman, JJ, said :

"For something like fifty or sixty years no order had been made on the Crown side for the cross-examination of a deponent. It was enough to add that such an order was not likely to be made except in very special circumstances and that no special circumstances had been shown in the present case."

The application was dismissed and Lord Goddard in delivering judgment said :

"I desire to say that it is the first time in my experience, and I think the first time in anyone else's experience in Crown proceedings for prerogative writs, that cross examination has ever taken place. I do not want this to be thought to be an easy precedent."

EMIR v. Secretary of State for the Home Department

[1939] 2 ALL ER 768 is a decision of the House of Lords. An immigration officer had issued an order that a person should be removed from the United Kingdom on the ground that his leave to enter had been vitiated. On the application by the immigrant for judicial review, Lord Wilberforce said :

"[The Divisional Court] considers the case on affidavit evidence, as to which cross-examination, though allowable, does not take place in practice. It is as this case will exemplify, not in a position to find out the truth between conflicting statements It cannot possibly act as, in effect, a Court of Appeal as to the facts on which the immigration officer decided."

The Board of Management of the Hampton High School did not consider any disputed facts, as to whether Mr. Campbell or Mrs. Falconer voted at the meeting of June 13, 1991 is issue on these matters was joined only after the Board meeting.

In our view the affidavit of Mr. Campbell contained an internal inconsistency which could fundamentally affect the outcome of the application and as that matter had not been considered by any earlier tribunal of fact, it was necessary in the interest of justice to seek an explanation of the inconsistency. The dispute as to facts in respect of Mrs. Falconer, although not as sharply defined as in the case of Mr. Campbell, related to matters which arose at the Board meeting of June 12, 1991 and about which the Board itself made no decision.

We considered that these circumstances were sufficiently exceptional to warrant leave for cross-examination and we so ordered. Mr. Campbell, for the respondent availed himself of the benefit of this ruling by applying successfully to cross-examine two witnesses who had deposed on behalf of the applicant.

The Minister responsible for Education is empowered by the Education Act to maintain or to assist in maintaining schools whether established by him or otherwise. Every public educational institution, which includes any educational institution maintained or aided by the Minister, must be managed by a board of management. The duties and responsibilities of each Board are provided in Regulation 69 of the Education Regulations 1990 and include -

- (a) responsibility for the conduct, supervision and efficient operation of the institution ;
- (b) appointing in consultation with the principal, the academic staff, the bursar, secretary, accountants and such other administrative and ancillary staff approved for that institution.

In the case of a public educational institution operated by a Trust, the Board of Management is constituted by seven persons including the chairman nominated by the Trust, the principal and 11 other members. Of these 11

members, 4 must be drawn from the school's environment viz.

one member elected by the academic staff ;

one member elected by the administrative and clerical staff ;

one member elected by the ancillary staff ;

and

one member elected by the student council.

It seems clear that there were two vacancies on the Hampton School Board in June 1951 as no one had been elected to represent the administrative and clerical staff and no one had been nominated by the Minister. But this irregularity is nullified by Regulation 84 which expressly states that

"The validity of the proceedings of any Board shall not be affected by any vacancy amongst the members or the categories of members thereof or by any defect in the appointment of a member."

The Teachers' Service Commission is established by section 5 of the Education Act and its powers are set out in PART V of the act in sections 32-39. Section 32 provides

32. (1) The Commission shall have power to deal with -

- (a) the registration of teaching personnel and matters related thereto ;
- (b) the discipline of teaching personnel and matters related thereto ; and
- (c) the assessment of qualifications and any other matter of a professional nature referred to the Commission by the Minister.

(2) The Commission shall also advise the Minister -

- (a) on matters relating to the appointment of principals ;

- (b) if requested by the Minister to do so, on matters relating to the appointment of vice-principals and teachers and teachers to posts of special responsibility; and
- (c) on any matter that the Commission may wish to bring to the attention of the Minister or which the Minister may refer to the Commission for its advice and guidance in the discharge of any of his duties under this Act.

It will be observed that the matters dealt with in subsection 1 of section 32 are matters over which the Teachers' Service Commission is given power to make decisions. On the other hand in respect of the issues specified in subsection 2 of section 32 the Commission can perform only an advisory role. Consequently the Commission has no power to appoint a principal or a vice-principal of a public educational institution.

The procedure for appointing the principal of a school is set out in Schedule A and Schedule B of the Education Regulations. Paragraph 6(1) of Schedule A is relevant to these proceedings, as it deals with the provisional appointment of principals. This paragraph provides:

"(2) Principals

- (a) a first appointment as a principal shall be on a provisional basis unless otherwise recommended by the Commission and approved by the Minister. The duration of the provisional appointment shall not normally exceed three school terms.
- (b) For a second or subsequent appointment, recommendation for a provisional appointment may be made by a board to the Commission, indicating the period of the provisional appointment recommended.

- (c) The Commission may, as it thinks fit, recommend to the Minister that the period of the provisional appointment referred to in sub-paragraph (a) be varied or may recommend a provisional appointment where a permanent appointment has been recommended.
- (d) During the period of the provisional appointment, arrangements for the regular assessment of the principal shall be made by the Ministry and a report on such assessment which shall be discussed with the principal shall be made to the Board.
- (e) The Board shall, before the expiration of the period of the provisional appointment referred to in sub-paragraph (c), make a report to the Commission and that report shall take into account the assessment made by the Ministry as to the professional competence and performance of the principal.
- (f) The Commission shall determine in consultation with the Board, subject to confirmation by the Minister, whether the provisional appointment shall be made permanent or be extended for a further period; but the total period of an appointment on a provisional basis shall not exceed two years.

It is within this legal framework that the applicant was appointed Provisional Principal of Hampton High School in August 1989. The Ministry of Education was obliged to make arrangements for the regular assessment of the applicant so as to determine her suitability for permanent appointment. From time to time officers of the Ministry visited the School. Extracts of notes made in the Log Book kept at Hampton were exhibited by the applicant and these disclose that there were 12 visits between 14th April 1988 and 8th April 1991. Six of these visits were made by Senior Education Officer, Ms. Sonia Lawson, either alone or together with another officer. The first of the visits in the period under review made by Ms. Sonia Lawson was on June 30, 1988. That Log Book entry reads :-

"Special visit re performance evaluation
of teacher

Sonia B. Lawson
S.E.O. (Acting) Secondary Unit"

There was no notification as to which teacher was being evaluated but that visit could not have related to the applicant herein in her office of Provisional Principal, which office was not established until September 1, 1989.

Ms. Sonia Lawson's second visit was on May 9, 1989 again pre-dating the provisional appointment. This was the note she made in the Log Book :-

"Special visit re Performance Evaluation
of Teachers"

S.B. Lawson
SEO (Actg.) Secondary Unit".

On December 4, 1989 Ms. Sonia Lawson made her third visit and entered the following note in the Log Book :-

"Routine visit. Held discussions with the Principal Miss Lewis on administrative matters. This school is experiencing transportation difficulties and there is a dire need for additional seats for students and teachers. Despite these inadequacies school is functioning normally.

S.B. Lawson, SEO
Secondary Unit. "

Her fourth visit was 19th September, 1990 and was recorded as :-

"Routine visit. Colleague Mrs. B. Gayle and I had discussions with the Acting Principal Miss D. Lewis on a number of administrative matters. School has started off smoothly despite the additional numbers and lack of adequate seating facilities. Urgent attention seems necessary for repairs to buildings, windows, etc.

S. Lawson, SEO
B. Gayle, EO
Secondary Unit. "

S.E.O. Ms. Lawson returned to Hampton on October 23, 1990 and she minuted in the Log Book :-

"Special visit re Assessment of
Performance of Staff Members. "

Another visit on 6th February, 1991 by Mrs. B. Gayle, E.O. and Ms. S. Lawson, S.E.O. was minuted in the Log Book :-

"Officers made a routine visit to Hampton High. Held discussions with Acting Principal re administrative matters. Had a fruitful discussion with acting Principal and acting Vice Principal. Recommendations made were :

- 1) Acting V.P. job description to be detailed in writing ;
- 2) Administrative meetings to be held regularly.

Concerns remain re furniture requests. Still not granted by Ministry of Education. 5th Form still without adequate seating. "

Mrs. B. Gayle visited Hampton on a familiarization tour on September 12, 1989, had discussions "with Principal" who conducted a tour of the school. Seating was the only problem identified.

When Mr. Barrett, C.E.O and Mr. Taylor, A.C.E.O. (Secondary Unit) visited the school on 27th November, 1990, the Principal was ill. That visit was noted as a "Special Visit". Three significant matters were recorded at that time in addition to the illness of the Principal viz. :-

- "(2) Held discussions with the Acting Vice Principal Mrs. Joan Linton re work assignments/duties ;
- (3) Discussed with Bursar preparation of the Vice Principal's Office for immediate use ;
- (4) Observed some administrative systems and identified needs. "

In all the Log Book entries from September 1989 to April 3, 1991 the applicant was referred to either as Principal or Acting Principal but never as Provisional Principal. Paragraph 4 of Schedule A (Types of Appointment) deals exclusively with Acting appointments which are completely different from provisional appointments. One is left to wonder if the Ministry Officials who visited Hampton after September 1989 were aware of the legal status of the

applicant. This doubt becomes significant when Senior Education Officer, Ms. Lawson, made three visits, viz. on 30th June, 1988, 9th August, 1989 and 23rd October, 1990 for the specific purpose of evaluating teachers and staff members, and never once intimated in the Log Book that she had come to the school to evaluate the applicant for the purposes of paragraph 2(d) of Schedule A Supra.

Random routine visits to the School without a stated purpose and where the only evidence of such visit is the Log Book entries cannot by any stretch of the imagination substitute for the regular assessment procedure established by the Education Regulations. We were therefore convinced that the applicant's complaint in paragraph 5 of her Statement that the meeting between herself and officers of the Ministry of Education on May 27, 1991 did not constitute a regular assessment as required by the Education Regulations.

Before leaving this point we wish to refer to the submissions of Mr. Campbell to the effect that as the Education Regulations do not specifically provide in Schedule A paragraph 2(d) that the reports of any assessment should be in writing, officers of the Ministry of Education could make observations when and where they were able and provided they had discussions with the provisional principal on administrative matters that was a sufficient method of evaluation. He contrasted this situation with the procedure in the Public Service where by virtue of Regulation 31 of the Public Service Regulations 1961, Permanent Secretaries and Heads of Departments are required to furnish annual confidential reports on all officers within the Public Service. For these officers forms numbered P. 14 and P. 15 are used for evaluation and these contain a space at which the employee signs his name signifying that he has reviewed the completed evaluation and that it has been

discussed with him. This is a sensible procedure and an eminently reasonable one from which no responsible reviewing officer should wish to derogate.

Paragraph 6 of the applicant's Statement complained that contrary to the provisions of the Education Regulations and the rules of natural justice no report of the assessment of the applicant was discussed with her. On April 6, 1991 the Chairman of the Hampton School Board advised the applicant that her provisional appointment as Principal would not be extended beyond August 31, 1991. In a vigorous protest addressed to the Permanent Secretary to the Ministry of Education dated April 11, 1991 Attorneys-at-Law for the applicant, stated inter alia :-

"The Regulations are clearly designed to reflect the basic rules of natural justice that a person in the position of a School Principal is entitled to be informed of any matters which may reflect adversely on her, and to have the opportunity to be heard in response. Both the Regulations and the rules of natural justice, have been breached in her case.

Accordingly, Miss Lewis is entitled (1) to have her performance as Principal properly assessed; (2) to have the Ministry's report on her performance discussed with her; (3) to have the Board take account of the Ministry's assessment; (4) to have the Commission make a fresh determination after these statutory procedures have been duly completed."

The Ministry's response in two letters dated May 3 acknowledged that no formal assessment of the applicant's performance as Provisional Principal had previously been made. To the Attorneys-at-Law the Ministry wrote :

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"Re: Miss Dorothy Lewis - Hampton High School"

This serves to acknowledge receipt of your letter dated 11th April, 1991 on the above subject and to advise that, in keeping with your request on behalf of your client, the following action has been taken:

- (i) Arrangements for the assessment of Miss Lewis' performance as Principal by the Ministry and discussion of her evaluation with the Board of Governors and Miss Lewis during the period of her provisional appointment
- (ii) A further report to the Teachers' Service Commission by the Board, taking into account the Ministry's assessment
- (iii) The placing in abeyance of the advertisement for the post of Principal.

Please be assured that the Ministry of Education recognizes Miss Lewis' entitlement to fair procedures as provided by law.

A copy of letter to the Chairman is attached for your information.

Yours faithfully,

(sgd.) F.K. Taylor,
for Permanent Secretary.

The letter to the Chairman of the Board was more revealing.

It said:

"Mrs. J. Francis,
Chairman
Board of Governors
Hampton School
St. Elizabeth.

Dear Madam:

Re: Miss Dorothy Lewis - Principal (Provisional)

Further to correspondence dated March 25, 1991 regarding the provisional appointment of Miss Dorothy Lewis, this is to advise that the decision has been taken to effect a formal evaluation of Miss Lewis' performance as required by the Code of Regulations - Schedule A - Types of Appointment Principals 2(d).

Kindly note that this assessment of Miss Lewis' performance is being undertaken by a Ministry team and that the Board will be apprised of its report to facilitate a discussion with Miss Lewis.

"Under the circumstances, kindly place the advertisement of the "Principal's" post in abeyance, and inform Miss Lewis that the decision to terminate her provisional appointment on August 31, 1991 is being reviewed.

Yours faithfully,

(sgd.) F. B. Taylor,
For Permanent Secretary. "

On the evidence before us the Ministry's team which was said on May 6, 1991 to be assessing the applicant's performance did not re-visit Hampton on or before June 12, 1991. However, a report was prepared and there was a discussion at the Ministry between its officials and the applicant on May 27, 1991. Minutes of that meeting were exhibited by the respondent. They indicate that the evaluation report was not shown to the applicant. Discussions surrounded

- (a) guidance received from the board ;
- (b) Log Book entry of 16th November, 1990 indicating that in the absence of the Principal, all Senior teachers were in charge in derogation of the authority of the vice-principal ;
- (c) non-provision of an office for the vice-principal ;
- (d) relationship with the vice-principal ;
- (e) principal's attitude to some teachers and allegations that she "spoke down to teachers" ;
- (f) meeting of students, allegedly in support of Principal.

Explanations and admissions were offered by the applicant to the questions raised except that it was noted that she refrained from answering some questions concerning her attitude to some teachers. A Ministry official signified that on a subsequent visit to the School, improvements in the relationship between Principal and Vice-Principal were noticeable.

The assessment team noted the strengths and weaknesses of the applicant to be as follows:

- (a) Miss Lewis had a keen interest in Hampton. She has always found her to be busy supervising and encouraging an orderly conduct of the School's operations ;
- (b) Miss Lewis has shown deep commitment to the School ;
- (c) She has not always been tactful in her handling of delicate matters, e.g., speaking with some teachers, handling of some parents.

The applicant could very well have gone away from the interview of May 27, with the belief that she had scored high marks with the Ministry officials and that the areas of weaknesses were isolated and were improving in the specific area about which the Ministry had shown concern.

Under the Regulations and as her Attorneys had so helpfully pointed out in their letter to the Ministry, the Assessment report had to be placed before the Board of Management. In the unchallenged affidavit of Mrs. Miller, President of the Parents-Teacher's Association and member of the Hampton School Board, the Ministry's representative informed the School Board on June 12, 1991 that the weaknesses of the applicant were:

- (i) That her management style was too autocratic - leading to sustained relationships and elements of fear ;
- (ii) that she showed weakness in delegating responsibilities, e.g. with the Acting Vice Principal ;
- (iii) that there was "feed-back" that her relationship with the larger community needed improvement, including with Munro College ;
- (iv) that there was a lack of skill and tactfulness in dealing with certain issues. "

We entirely agree with the submissions of Lord Gifford that the weakness listed at (i) above is a severe criticism of the applicant which was not brought to her attention in that form or at all in the interview of May 27. Who are those who were put in fear by the applicant and on what evidence? Further the criticism that the applicant's relationship with the community and with the other School operated by the Trust needed improvement was never mentioned on any visit to the School or in the interview. The applicant might have said to the interviewers: "Your sources are faulty" or: "Should you like to hear from the Board member who represents the community or the Principal of Munro College? They will refute these allegations". She had no opportunity to answer as she was never faced with the allegations? And although there was an admission by the Ministry that the applicant's relationship with the Vice-Principal had showed improvement, this was not conveyed to the Board.

What is there to indicate which of the weaknesses weighed most heavily with the members of the Board? Matters which could clearly undermine the fitness of the applicant for appointment were placed before the Board for its consideration without any previous confrontation with the applicant thereon. Had the assessment report, when reduced into writing, been put into the hands of the applicant, had she been able to peruse it, and to respond to its contents, this unwholesome litigation might not have arisen.

Lord Gifford submitted that the failure of an administrative authority to comply with statutory regulations which provide for an individual to be heard renders invalid the decision taken by the authority which adversely affects that individual's status or rights. In support of that submission he cited DeSmith's - Judicial Review of Administrative Action, 4th Ed. at pages 142-145. At page 144 the Author said

"Some classes of procedural requirements are so important that they will nearly always be held to be mandatory. For example, an administrative authority which fails to comply with a statutory duty to give prior notice or hold a hearing or make due enquiry or consider objections in the course of exercising discretionary powers affecting individual rights will seldom find the Courts casting an indulgent eye upon its omissions."

Greenwick Processing Laboratories Ltd. v. ACAS [1972]

1 All E.R. 339 concerned inter alia, the procedure for recognition of a trade union as bargaining agents for workers and the construction of section 14(1) of the Employment Protection Act 1975 (U.K.). Section 14(1) was in these terms:

"In the course of its enquiries into a recognition issue under section 12 or 13 above the Service shall ascertain the opinions of the workers to whom the issue relates by any means it thinks fit, but if in any case it determines to take a formal ballot of those workers or any description of such workers, the following provisions of this section shall apply."

In the course of his judgment Lord Diplock said at page 353 of the Report:

"First, as to the mandatory nature of the requirement on ACAS to "ascertain the opinions of the workers to whom the issue relates", whatever precisely that requirement may involve. It is introduced by the word "shall". Prima facie this expression appearing in a statute is used as a term of art to impose a duty to do what is prescribed, not a discretion to do it or not according to whether it is sensibly practicable to do it or something like it instead."

This rule of construction is in our view applicable to the instant case where in paragraph 2(1) of Schedule A (supra) the duty on the Ministry of Education is introduced by the word "shall" as well in the necessity for assessment as in the requirement that the assessment be discussed with the Provisional Principal.

Ridge v. Baldwin [1963] 2 All E.R. which was followed in Jamaica in R. v. Commissioner of Police ex parte Tennant [1977] 20 W.I.R. 457 decided that an officer cannot lawfully be dismissed without telling him what is alleged against him and hearing his defence or explanation. Ridge v. Baldwin was the case of the dismissal of a Chief Constable but the opinion of Lord Morris at p. 104 of the report can be applicable outside of the Police Regulations then under consideration. He said:-

"By Lords, inasmuch as the decision of the Disciplinary Committee was that the appellant had committed an offence or offences against the discipline code and inasmuch as the decision was arrived at in complete disregard of the regulations, it must be regarded as void and of no effect. The power to dismiss for an offence was a power that could only be exercised if the procedure of the regulations was set in motion. A purported dismissal in complete disregard of them cannot be recognized as having any validity."

In our view the Ministry of Education did not act in accordance with the provisions of paragraph 2(2)(d) of Schedule A - Types of Appointment - to the Education Regulations to the great detriment of the applicant, and although its action did not lead to the dismissal of the applicant, she was adversely affected in an important area of her professional life.

The Board is required by paragraph 2(c) of Schedule A, "Types of Appointment", to make a report to the Teachers' Service Commission, having taken into consideration the assessment report of the Ministry of Education. No evidence was produced before us to indicate whether such a report was made in the instant case. However that may be, evidence was put before us by the respondent of two meetings of the Commission which are relevant to these proceedings.

The first was February 19, 1991. Minutes of that meeting disclosed that :

"2. Hampton High School

The Committee carefully examined the submission made on behalf of Miss Dorothy Lewis and came to the decision that based on her unsatisfactory performance as stated by the Assistant Chief Education Officer (ACEO) and the refusal of the Board of Management to recommend her permanent appointment, her provisional appointment should cease on September 1, 1991. The post for Principal should then be advertised.

The Permanent Secretary should convey this decision to the Chairman of the Board. It was suggested that this matter should be dealt with speedily. "

This was the decision which the Permanent Secretary, Ministry of Education, said in the letter of May 8 to the Chairman of the Hampton School Board "is being reviewed". From the minutes of the meeting of June 13, 1991 the Commission proceeded as follows :-

"The Committee viewed and discussed a further submission on behalf of Miss Lewis. The Acting Secretary was asked to inform the Director of School Services that having considered the Ministry's assessment during the provisional period of her employment and the decision of the Board at its meeting held on June 12, 1991, the Committee has decided not to reverse its recommendation in respect of Miss Dorothy Lewis' provisional appointment at Hampton High School. "

Lord Gifford had advised the Ministry that when the proper assessment of the applicant's performance had been completed and the Board had made its report to the Commission it would be the turn of the Commission to make a "fresh determination" in the matter. The Commission

discarded this sage advice and harkened back to an invalid decision to which it had arrived in February. The February decision was a complete nullity as the statutory pre-conditions had not been complied with. The applicant so complained and the Ministry readily admitted the invalidity of that decision. There was nothing to confirm. The Commission ought to have revoked its February 19, 1991 decision, to have put out of its deliberations anything said and done at that meeting in respect of the applicant and to have started afresh. In the 22th of June proceedings the Commission contaminated its decision with the taint, virus of the February meeting. That being so, its decision is null, void and of no effect.

We turn now to ground 3(1) of the applicant's Statement which complained that the Board of Management was improperly constituted on June 12, 1991 in that the School's Bursar, Mr. W.A. Campbell, took part in the meeting and voted for the recommendation that the Provisional Principal be not confirmed whereas he was not a member of the Board. Mrs. Miller, in her affidavit sworn to on August 22, 1991 said Mr. W.A. Campbell the Secretary/Bursar spoke in opposition to the confirmation of the applicant's provisional appointment, that Mr. Campbell handed out eight ballot papers and kept one for himself. She said too that when all the ballots were handed in, she noticed that one Board member retained her voting paper. Mrs. Miller said that from the count of the votes it was clear that Mr. W.A. Campbell had voted.

A counter-affidavit was sworn to by Mr. W.A. Campbell on September 18, 1991. Although he did not dispute the fact that he had seen the affidavit of Mrs. Miller it is clear to us that he was endeavouring to meet and refute the charges which she had made in her affidavit. He admitted in paragraph 3 of his affidavit his presence at the Board meeting of June 12, 1991 and continued in paragraph 4 :

"That I did not vote on the issue before the Board and returned my ballot paper blank".

In cross examination to which we have already alluded, Mr. Campbell denied that he had a ballot paper or that he returned a blank ballot paper to the Chairman. He explained that the paragraph 4 of his affidavit got into the document by an oversight and not by his instructions.

No charge had been made against Mr. Campbell as to whether a ballot paper returned by him was blank or had been written up. The statement from him as to the return of a blank ballot paper was entirely new material.

Although Mr. Campbell freely admitted under cross-examination that he was not a member of the Board either in his capacity as Secretary Bursar or in a representative capacity, the minutes of the meetings of the Hampton School Board held on February 19, 1990, June 2, 1990 and January 12, 1991 all listed "Mr. W.A. Campbell" as one of the members present. These minutes were prepared by Mr. Campbell and there could be no mistake that he represented himself in those documents as a member of the Board.

This Court has drawn the inescapable inference that the state of mind of Mr. Campbell in 1990 and 1991 was that he was a member of the Hampton School Board of Management entitled to participate in the deliberations of the Board. We accept unreservedly the evidence of Mrs. Miller that she saw Mr. Campbell hand a ballot paper to the Chairman on June 12, 1991 and we do not accept either ^{of} Mr. Campbell's sworn statements that (a) he returned the ballot paper blank and (b) that he did not have a ballot paper at all. In our view, therefore, an unauthorised person voted at the Board meeting of June 12, 1991.

The applicant alleged too, that the Board was improperly constituted when it met on June 12, 1991 in that Ms. Pamela Smith was not notified of the said meeting. Issue was joined between the applicant and her witnesses on the one hand and the respondent through Mr. W.A. Campbell on the other hand as to whether, Mr. Campbell as Secretary to the Board knew that Ms. Pamela Smith had been elected by the ancillary staff in keeping with Regulation 70(1)(d)(iii) of the Education Regulations. There is a preponderance of evidence from the applicant, and Ms. Smith that Mr. Campbell was present at a luncheon in the summer of 1990 when the ancillary staff elected Ms. Smith as their representative on the Board. There is unchallenged evidence from Mrs. Miller that at the meeting of January 12, 1991, Mr. Campbell informed the Board that Ms. Smith was absent due to lameness of her leg and evidence from Ms. Smith that on the day prior to the June meeting of the Board, Mr. Campbell spoke to her in the School's car park saying words like: "Pam you must remember that there is a meeting next day" to which she replied: "I didn't get no notice so I am not going. I am not a dog. Miss Laura got a circular". Mr. Campbell denied knowledge of the election in the summer of 1990 and the conversation in June 1991 testified to by Ms. Smith. Oral testimony revealed that Ms. Smith had been a delegate for the N.W.U. from 1976 and continued in that position from year to year without re-election. Where then Mr. Campbell deponed that he was informed in 1990 by Miss Smith that she was the union delegate elected by the ancillary staff, but that he was not informed that she was the Board representative, this seems wholly out of character to the facts. Mr. Campbell had been Secretary Bursar for 10 years and Ms. Smith had been union delegate for 4 years. Why in 1990 would Ms. Smith be informing Mr. Campbell of her delegate status? The

cumulative evidence presented by the applicant satisfies us that Ms. Smith had been duly elected Board Representative for the ancillary staff in the summer of 1990, that Mr. Campbell was present at and became aware of that election, that he apologised for the absence of Ms. Smith at the meeting of the Board of 12th January 1991 and that he did not notify Ms. Smith of the meeting scheduled for June 12 apart from the conversation referred to by Ms. Smith.

Regulation 33 of the Education Regulations sets out the procedure to be followed at Board meetings. Subsections (3) and (4) thereof require that :

"(3) Subject to paragraph (1), prior notice of ordinary meetings shall be given not less than ten clear days before the date of the meeting :

(4) notice of special meetings shall be delivered by hand to each member of the Board or to his known address not less than forty-eight hours before the time arranged for the meeting. "

In the instant case these regulatory provisions were not followed in respect of Ms. Smith. Young v. Ladies Imperial Club, Ltd [1920] 2 K.B. 523 is authority for the proposition that failure to summon a member of a Board renders the proceedings of that Board invalid. Lord Sterndale M.R. in his judgment at p. 527 said :

"I cannot entertain any doubt that, with certain very limited exceptions where a special meeting of a committee or any other body has to be specially convened for a particular purpose, every member of that body ought to have notice of and a summons to the meeting. "

Warrington, L.J. said at p. 534 :

"[Here] the default in summoning one member rendered the committee incompetent at the meeting to deal with the business which was before it".

It was argued for the respondent that the presence of Ms. Smith would not affect the Board's decision as the vote was 5 to 3. This submission over-looked the possibility that the absent member could persuade others to vote in a different manner. Consequently the opportunity to participate in the proceedings must be given the highest value. On this score too, the meeting of the Board held on June 12 was invalid and its decision of no effect.

For the reasons contained herein we concluded that as the Teachers' Service Commission relied upon an irregular assessment by the Ministry of Education, an irregular decision of the Saxton School Board and its own invalid decision of February 19, 1991 its final decision of June 18, 1991, was wholly invalid. The Minister of Education purported to act upon the recommendation of the Teachers' Service Commission, arrived at on June 18, 1991, with the consequence that the Minister's decision is a nullity.

For these reasons we made the Order of Certiorari to quash the Minister's decision!

FRUTKIN, J.

I agree.

LANGRISH, J.

I agree.