



[2024] JMSC Civ. 35

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2023CV02476

| | | |
|---------|---------------------------------|---------------------------|
| BETWEEN | ODETTE RILEY-SMITH | CLAIMANT |
| AND | DENTAL COUNCIL OF JAMAICA | 1 ST DEFENDANT |
| AND | MINISTER OF HEALTH AND WELLNESS | 2 ND DEFENDANT |
| AND | THE ATTORNEY GENERAL OF JAMAICA | 3 RD DEFENDANT |

IN CHAMBERS

Kemoy McEkron instructed by McEkron Law on behalf of the Applicant

Taniesha Rowe Coke and Romario O. Miller instructed by The Director of State Proceedings on behalf of the Respondents

HEARD: January 30 and March 14, 2024

Application for Leave for Judicial Review - Whether there is a discretionary bar of delay - Whether the fact that the Applicant was in communication with the decision maker, seeking clarification, suspends the running of time. Whether the court can grant an extension of time in the absence of an application from the Applicant for an extension of time- Whether there is an arguable ground with a realistic prospect of success. (Rule 56).

THOMAS A, J:

INTRODUCTION

[1] This is an application for leave to apply for Judicial Review, in which the Applicant, Ms. Odette Riley Smith, Dental Nurse, is seeking to challenge the decision of the

Dental Council of Jamaica, (hereinafter refer to as the Council) regarding its decision to publish the names of a certain members of the Dental Auxiliary on its Website as compliant, and the prerequisite that it has established for such names to be included. The Application was initially brought against the Dental Council of Jamaica, The Minister of Health and Wellness, and the Attorney General. However, at the hearing of the Application the Applicant withdrew the Application against the 2nd and 3rd Defendant.

[2] This Application, was filed on the 4th of August 2023. The Applicant seeks the following orders:

- i) An order of Certiorari; Quashing the 1st respondent's decision to enforce a system requiring the registration of dental auxiliaries' post-enrolment and the payment of fees for obtaining a practicing certificate.
- ii) The introduction of a compliance system, which mandates the payment of retroactive fees for registration and practicing certificates before being acknowledged as compliant, in the publication of dental auxiliaries.
- iii) An order of Mandamus directing the 1st Respondent to comply with the Dental Act (hereinafter refer to as the Act) and Dental Regulations (hereinafter refer to as the Regulations) by publishing her name as a compliant enrolled Dental Nurse.
- iv) A Declaration that the 1st respondent's decision to implement a system requiring a practicing certificate for a dental nurse is beyond its authority and is null and void".

[3] The grounds as it relates to these proceedings, can be summarized as follows:

- i) The 1st respondent misunderstood the Act and Regulations by insisting that the Applicant must be "registered" as a dental nurse after making payments for a practicing certificate. Section 4 of the Act outlines the functions of the 1st respondent, specifying only the enrolment of dental auxiliaries, not their

- registration. This misinterpretation involves an error in understanding and interpreting the terms "register" and "enrol" in relation to dental auxiliaries.
- ii) The 1st respondent acted ultra vires the scope of the Dental Act and Dental Regulations by mandating re-registration and issuing practicing certificates to Dental Auxiliaries in Jamaica, exceeding its the statutory powers. Specifically, Section 4 of the Dental Act speaks only to the issuance of practicing certificates for Dentist. The requirement for practicing certificate for dental nurses employed in the government service without a waiver is unreasonable and constitutes an abuse of discretion. The decision also deviates from proper procedure, involving regulations not passed by parliament.
 - iii) This decision contradicts **Section 9(2)** of the **Dental Regulations** which exempts dentists in full-time government employment from paying prescribed fees for practicing certificates. The decision is deemed unreasonable, particularly for dental auxiliaries in similar government service.
 - iv) The 2nd respondent improperly delegated powers to the 1st respondent for establishing a regime with regulations for re-registration and practicing certificates for Dental Auxiliaries in Jamaica, as the 1st respondent's authority for making regulations necessitates approval from the 2nd respondent.
 - v) The applicant has been denied her legitimate expectation that, after enrolment, she would be recognized as an enrolled dental nurse by the 1st respondent, enabling her to continue employment in the government service and enjoy associated benefits. The denial of a practicing certificate not only affects her reputation but also jeopardizes her continued engagement in the government service.
 - vi) The application was made promptly.

[4] The Respondents are resisting the application on the following ground:

- (i) The Application for Leave was filed out of time.

THE FACTS

[5] In her affidavit filed on the 4th of August 2023, the Applicant Ms. Riley Smith outlines the following;

She is a registered Dental Nurse employed by South East Regional Health Authority (SERHA) as a Zone Dental Auxiliary Coordinator, with training completed at the Dental Auxiliary School from 1983 to 1985. She enrolled with the Council in 1985 (enrolment number 222) and began working as an enrolled Dental Nurse with the government on September 1, 1987, maintaining this role for the past 35 years. In 2019, the Council introduced a new system for registering dental auxiliaries, involving the payment of fees to obtain a practicing certificate. She made payments to the Council for registration for the period 2021-2023, (she exhibits receipt dated April 20, 2021) and in July 2023 for 2023-2025 (she exhibits receipt dated July,7 2023) but did not receive a practicing certificate.

[6] As of December 31, 2022, her name was absent from the Dental Auxiliaries (Dental Nurses) section on the Council's website. In 2019, she sought legal advice regarding the Council's proposed regime, considering the "Continuing Education Requirements for Dental Auxiliaries practising in Jamaica." Following this, her attorney wrote to the Council's registrar, seeking clarifications on the legality of the proposed measures based on existing legislation. In a letter dated January 31, 2019, the Registrar of the Council affirmed that Dental Auxiliaries were obligated to pay only enrolment-related fees, as registration was not compulsory for dental auxiliaries after they have been enrolled. On July 10, 2023, she was contacted by the Registrar, Dr. Lloyd Prince about an outstanding payment for the period 2019-2021 that needed settlement. Mrs. Riley-Smith complains that she has not received a practicing certificate and has been viewed by the Council as non-compliant.

[7] Following the conversation with the Registrar, she sought further legal advice and her attorney sent a letter to the Council on July 11, 2023, seeking further clarification. She believes that there has been no response to the letter and that she will not remain employed if she does not pay the prescribed fees, significantly affecting both her livelihood and professional advancement. She asserts that, being a dental nurse employed by the government of Jamaica, should exempt her from the obligation of obtaining a practicing certificate for her professional responsibilities. She has not found any officially published regulations or parliamentary amendments in Jamaica authorizing the Dental Council to implement a regime for registering dental auxiliaries or mandating a practicing certificate for dental nurses.

THE ISSUES

[8] The following are the issues which arise on this application.:

- (i) Whether there is a discretionary bar of delay. That is, whether the application was filed promptly.
- (ii) In the event that the application was not filed promptly, whether the Court is empowered to grant an extension of time in the absence of an application by the Applicant for such an extension.
- (iii) Whether there is an arguable case.

THE LAW

[9] The relevant rule that governs the procedure with regards to an application for leave for Judicial Review is Rule **56.6** of the **Supreme Court of Jamaica Civil Procedure Rules** (herein after refer to as the Rules). **Rule 56.6** read as follows:

1. *“An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose;*
2. *However, the court may extend the time if good reason for doing so is shown;*
3. *Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings;*
4. *Paragraphs (1) to (3) are without prejudice to any time limits imposed by any enactment;*
5. *When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to –*
 - a. *cause substantial hardship to or substantially prejudice the rights or any person; or*
 - b. *be detrimental to good administration*

WHETHER THERE IS A DISCRETIONARY BAR OF DELAY. THAT IS, WHETHER THE APPLICATION WAS FILED PROMPTLY?

[10] In accordance with **Rule 56**, an application for leave for Judicial Review must be filed as early as possible, and in any event it must be filed no later than three months after the grounds for leave first arose. It is to be noted that, there have been occasions where the Courts have ruled that applications have not been filed promptly despite the fact that they were filed within the three months. (See **R v Independent Commission Ex parte TV Northern Island LTD** Times Ca 1991 TLR 806, par 22;) **Andrew Finn-Kelcey v Milton Keynes Borough Council** [200.]

[11] In the case of **George Anthony Levy v. The General Legal Council** [2013] JMSC Civil . Marva McDonald Bishop, J. (as she then was) stated at paragraph, 52 that:

“The settled law is that the operative time for the ground to have arisen, and which set the timeline within which the application is to be made, is the

date of the judgment, order or decision and not the date that the applicant became aware of the decision”.

- [12] In the case of *City of Kingston Co-operative Credit Union Limited v Register of Co-operative Societies and Friendly Societies* (in the Supreme Court of the Judicature of Jamaica Claim NO. 2010 HCV 0204) Sykes J. as he then was stated:

*“In all the cases of which I am aware all point in one direction, namely, that the date of the decision (and not the date the applicant acquires subjective or actual knowledge of the decision) is the date from which time begins to run against the applicant.” (See paragraph 18, See also Andrew **Finn-Kelcey v Milton Keynes Council & MK Windfarms Limited** [2008] EWCA Civ 1067).*

- [13] In view of the aforementioned authorities, it is quite evident, that, in considering an application for leave for Judicial Review, and in so far as the question of delay is concerned, time is to be counted from the date of the impugned decision. Accordingly, the Court has to identify the date on which the grounds for the Application arose. Counsel for the Applicant asserts that the relevant date is the 10th of July 2023. That is, the date that contact was made by the Registrar of the Council with the Applicant indicating that after a review of her file, she was outstanding on payment for the period 2019-2021 that required settlement.

- [14] However, this position is resisted by counsel for the Respondents. She contends that based on the Applicant’s own affidavit evidence the impugned decision concerning the implementation of a regime requiring her to pay fees and obtain a practicing certificate was made on or about 2019. Therefore, counsel insists that the grounds for the application first arose from 2019. In support of this contention, she relies on the case of **Miguel v COP** [2015] JMSC Civ. 182. where Justice Campbell states that:

“An application for leave for Judicial Review ought to be made promptly or within three (3) months after the grounds to make the claim first arose. There are cases that have been brought within three (3) months but have failed this promptitude test. The court must be satisfied that the application was made promptly.”

- [15] In light of the divergent positions put forward by both Counsel, the court must, in an effort to resolve the issue of promptitude, first determine the time when the grounds for the application first arose.
- [16] The evidence of the Applicant is that “in 2019, the Dental Council of Jamaica introduced a new system for registering dental auxiliaries, involving the payment of fees to obtain a practicing certificate”. She also indicates that in 2019, she sought legal advice regarding the Dental Council's proposed regime, considering the "Continuing Education Requirements for Dental Auxiliaries practicing in Jamaica. Following this, her attorney wrote to the dental council's registrar, seeking clarifications on the legality of the proposed measures based on existing legislation.
- [17] As such, it is evident on the allegations of the Applicant that the decision that she is seeking to challenge was made in 2019. Counsel for the Applicant is seeking to take refuge in the fact that the correspondence regarding outstanding payment for 2019 was communicated in July 2023. However, this cannot change the fact that the impugned was made in 2019. The cases have been abundantly clear on the issue that the relevant date for the computation of time is not when the Applicant became aware of the decision, but the actual date that the decision was made. **(See, George Anthony Levy v. The General Legal Council (Supra). [City of Kingston Co-operative Credit Union Limited v Register of (Cooperative Societies and Friend; (Supra) and Andrew Finn-Kelcey v Milton Keynes Council & MK Windfarms Limited)**
- [18] However, a delay on the part of the decision maker in communicating the decision to the person aggrieved is a factor that the court may take into consideration in deciding whether or not to grant an extension of time. Nonetheless, the Applicant cannot avail herself of this consideration as on her own evidence she was aware of the decision to introduce the new regime from 2019. Additionally, she was concerned about the validity of that decision from as far back as 2019 This is reflected in the fact that from 2019 she engaged the services of an attorney-at-law

for the purposes of questioning the legality of the decision. Additionally, the first correspondence of her counsel to the Council, on the subject matter, as per email exhibited by her is dated January, 11, 2019.

- [19] I note that the Applicant states that in a letter dated January 31, 2019, the Registrar of the Dental Council of Jamaica affirmed that Dental Auxiliaries were ***obligated*** to pay only enrolment-related fees, as registration was **not compulsory** for dental auxiliaries. I will now examine this correspondence with a view to determine whether or not it affects or suspended the computation of time. In the event that there was any indication by the Council in their communication that they were suspending or abolishing this new regime, then it could successfully be argued that if the new regime was no longer in existence by virtue of this decision. Were that to have occurred, there would no longer be any decision for the Applicant to challenge. That is if an until the regime was re - introduce it would certainly lend to sound reason that time would again begin to run from the reintroduction of “the regime”.

The Correspondence

- [20] The letter of counsel for the Applicant to the Council in his email dated the 11th of January 2019, is captioned, Registration of Dental Auxiliaries. The contents of that letter are as follows:

“As per our brief conversation via telephone on Friday, January 11 of instant, I now set out in writing as per your instructions, the following inquiries regarding the registration of Dental Auxiliaries by the Dental Council.

I wish to be directed to the relevant piece/s of legislation/amendment/ministerial order/s which empowers the Council to register Dental Auxiliaries after they have been enrolled as prescribed by the Dental Act.

Further, I wish to be pointed to the relevant piece/s of legislation/subsidiary or otherwise which speaks to the payment of fees and how they are increased etc.”

- [21] The response of the Council is in a letter dated January 31, 2019. The contents are as follows:

“In furtherance to your e-mail regarding the subject matter, following another detailed review of the Dental Act and Dental Regulations of Jamaica and meetings with the Legal Department of the Ministry of Health please be informed that Section 11 (1) (c) of the Dental Act speaks to the payment of prescribed enrolment fees as one of the prerequisites to being enrolled as a dental auxiliary. The legislation does not speak to how the fees are increased.

The Dental Council of Jamaica does not register dental auxiliaries after they have been enrolled as prescribed by the Dental Act.” (Emphasis mine)

- [22] Undoubtedly, the response of the Council did address the question of registration as opposed to enrolment under the Act, but it obviously did not address or settle the questions raised in grounds ii, iii, and v, which appear to be the Applicant’s primary concern. That is, the procedure that has been mandated by the Council in order for her to receive a Practicing certificate. That is, continuing education and payment for same.

- [23] In fact, this particular issue was not specifically raised in the counsel’s letter of January 11, 2019. It was only raised by counsel for the Applicant in his letter of July 11, 2023 which reads;

“Re: Regulations for the registering of dental auxiliaries to include the payment of fees for practicing certificates. ’

The contents are as follows;

“I write regarding the matter at caption for and on behalf of my client Mrs. Odette Riley Smith.

I am instructed that Mrs. Riley Smith is an enrolled dental auxiliary under the category of dental nurse employed in the government service. My instructions are further that as an enrolled dental nurse she has been advised by the dental council that she's required to fulfill certain requirements to include the payment of fees in order to obtain a practicing certificate from the council.

However, my perusal of the relevant legislations and regulations to wit; Dental Act 1972 and the Dental Regulations 1974 do not speak to any requirement for dental auxiliary's to be registered after their enrolment or for dental nurses to have a practising certificate.

It is considered that the governing Act does give the Council the power with the approval of the Minister to make regulations from time to time. It is therefore in keeping with this knowledge that I now write to you, so that I may be directed to the relevant pieces of legislations and/or gazzetted regulations, which set out these requirements for practising certificate for dental nurses and payment of the prescribed fees.

This is very important in order for me to properly advise my client as to her legal obligations and responsibilities in respect of the Council. Further, I wish to also have clarification if our practising certificate is in fact required by law, whether a dental nurses ought not to be exempted from same since dental nurses are employed solely within the government services.

I am further instructed that the Council has published a list of compliant Dental auxiliary's (dental nurses) as at December 31st, 2022 on its website, of which my clients name does not appear. This is of grave concern to my client based on the ramifications which it purports to include reputational and professional harm.

*My client is therefore anxious to have this issue addressed urgently so that it can be rectified accordingly. Time is therefore of the essence, since if my client is not satisfied with their response within 14 days of this letter. I am instructed to seek legal redress in the Supreme Court." (Emphasis **mine**)*

- [24]** It is also discernible that the Applicant did not construe the Council's response as an indication that they were resiling from their original position regarding mandatory continuing education as a prerequisite for a practicing certificate. This is in light of the fact that in her affidavit evidence, she indicates that on the 20th of April 2021 she paid an amount of nine thousand dollars (\$9,000.00) to the Dental Council for registration, for the periods 2021-2023 and on July 7, 2023, for 2023-2025. This is clearly subsequent to her, seeking advice from counsel, receiving the response from the Council and prior to her receipt of the communication from the

Council in July 2023 outlining that she had outstanding payments for the period 2019 -to 2021.

- [25] Accordingly, I find that there was no communication to the Applicant or her counsel that the Council's decision regarding mandatory continuing education and the requirement for practicing certificates regarding continued education had changed since 2019. As such I can only conclude that the time or date when the grounds for the Application arose was in 2019. Since the Applicant has not provided a precise date in 2019 when the new regime was introduced, and there is no Affidavit in Response from the Respondent, the relevant date will be treated as January 11th 2019, when counsel first wrote to Council.
- [26] This application having been filed on the 4th of August 2023, would have been filed, approximately, 4 years after the grounds for the application arose. This is way in excess of the three months stipulated by the Rules. Therefore, I find that this Application was not filed promptly.

WHETHER THERE IS ANY BASIS TO GRANT AN EXTENSION OF TIME

- [27] In accordance with the **Rules**, the basis on which a court should exercise its discretion to extend the time for an application for leave for Judicial Review that has not been filed promptly is the demonstration of good reason to do so. That demonstration has to emanate from the Applicant placing material before the court evidencing the good reason to grant the extension.
- [28] There is no application before me for an extension of time. There is no affidavit evidence demonstrating any reason or in particular any good reason why the extension should be granted. **Rule 56.6 (2)** clearly states that:

"The court may extend the time if good reason for doing so is shown".

[29] On a careful examination of the provision, I find that the correct construction is that the court cannot extend time without reasons been advanced in the form of evidence. Counsel for the Applicant, Mr, McEkron has submitted that the extension can be granted on the basis that the Court has the authority to extend the time. Nonetheless, it is my view that this authority cannot be exercised on a whim but must be subject to the requirements in the **Rules**, that is good reason must be shown by the Applicant.

[30] This position is articulated by Anderson, K.J in the case of **Leroy Thompson v The Commissioner of Police and the Attorney General of Jamaica** [2012] JMSC Civ. 166 where he stated that :

“It cannot be over emphasized that where a court is to be called upon to exercise discretion in favour of a party, that party cannot be and never is entitled to the exercise of the court’s discretion in his favour, as a matter of right. Evidence of a sufficiently compelling nature must be placed before this court by a party, as could properly serve to justify the court’s discretion being exercised in that party favour. This court cannot and ought not to be expected to exercise its discretion on a whim, or in other words, on emotions. This court must act on that which it determines, based on well-hallowed principles of law, to be proven as facts.”

[31] As such, in order to be granted an extension of time, the Applicant would have to engage the Court’s discretion by placing before the court evidence that would demonstrate to the court that there is good reason for extending the time. In the case at bar the Applicant has failed to put any such material before the court.

[32] Furthermore, I again refer to the affidavit evidence of the Applicant, that she sought legal advice in 2019. That her counsel wrote to the Council seeking clarification and that the Council responded on January 31st 2019. Even in the event that I were to find that Ms. Riley Smith misconstrued the response of the Council to mean that the Council was withdrawing its decision to mandate Dental Axillaries to participate in continuing education and to obtain a practicing certificate at that time, it is demonstrated on her affidavit evidence that by April 2021 she was not labouring under this impression. This is in light of the fact that at that time she made payment for practicing certificates, essentially submitting to the “regime”.

[33] There has been no explanation as to why she had not filed the application by the latest April 2021, and why she instead chose to submitted to the” regime”. Additionally, the content of the above-mentioned letter of the Council would have been a clear signal to the Applicant’s Counsel that the clarity being sought and the response received did not settle the issue of the practicing certificate as it relates to the mandatory continuing education. Therefore, the response in these circumstances could not have been viewed as settling the issues, as the issue of whether a dental auxiliary is required to have a practicing certificate in order to practice would have remained a live one.

[34] Between April 2021 to July 2023, neither the Applicant nor her attorney-at- law did anything to challenge the decision of Council. It appears that they remained complacent and would have remained so had it not been that the Council in July 2023 wrote requesting payment for the years 2019 to 2021. Therefore, even if it were permissible for me to extend time without a written application being filed by the Applicant, she would not have placed sufficient reason before the court for an extension of time to be granted in her favour. This finding is sufficient to establish that there is in fact a discretionary bar to this application. That is having failed the promptitude test this application for leave to apply for Judicial Review must fail. However, for completeness I will go on to consider whether the Applicant has an arguable case.

DOES THE APPLICANT HAVE AN ARGUABLE CASE?

[35] In the case of **Sharma v Brown-Antoine et al** (2006) 69 W.I.R. 369, the Privy Council, stated that:

“the ordinary rule now is that the Court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy. ... But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application ... It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to

justify the grant of leave to issue proceedings upon a speculative basis which is hoped the interlocutory processes of the court may strengthen....”

[36] In the case of **Shirley Tyndall O.J. et al v Hon. Justice Boyd Carey (Ret’d) et al**, 2010 HCV 00474, (unreported) Mangatal J sought to explain, the concept of arguable ground with a realistic prospect of success. At paragraph 11, she stated that:

“It is to be noted that an arguable ground with a realistic prospect of success is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful or frivolous. A ground with a real prospect of success is not the same thing as a ground with real likelihood of success. The Court is not required to go into the matter in great depth though it must ensure that there are grounds and evidence that exhibit this real prospect of success.”

[37] In the instant application, the substantive reliefs and the ground on which these reliefs are being sought by the Applicant are the primary factors that will inform this court as to whether she has an arguable case. Therefore, my examination of these, is material to the determination of this issue. In her application, the Applicant contends that the Council failed to have regard to the Act and Regulations when they mandated the registration of Dental Nurse after making payments in order to obtain a practicing certificate. She further asserts that the Council has acted ultra vires the provision of the Act by implementing a regime that required the re registration of Dental Auxiliaries.

[38] In order for me to adequately address this issue it is important for me to again, examine the contents of the letter from the Council, dated the 31st of January 2019, as also the relevant provisions of the Dental Act. In the letter the Council categorically states that:

“The Dental Council of Jamaica does not register dental auxiliaries after they have been enrolled as prescribed by the Dental Act.”

[39] **Section 4 (a) – of THE DENTAL COUNCIL ACT, (1972)** states that one of the functions of the Council is:

(a) to register dentists and enrol dental auxiliaries;

[40] Section 11 reads:

(1) Any person who

(a) applies to the Council in the prescribed form for enrolment as a member of a prescribed class of dental auxiliary; and

(b) satisfies the Council that he-

i. possesses the prescribed qualifications;

ii. is of good character; and

iii. is a fit and proper person to practise as a member of the prescribed class of dental auxiliary in respect of which his application is made; and

(c) pays such enrolment fee as may be prescribed, shall be entitled to be enrolled as a member of that prescribed class of dental auxiliary.”

[41] An examination of the Act speaks to the enrolment of Dental Auxiliaries. It makes no mention of registration for Dental Auxiliaries. However, when one examines the correspondence, between the counsel for the Applicant and the Council they seem to be speaking at cross purposes. The Council clearly acknowledged that there is no requirement under the legislation for a Dental Auxiliary to be registered. The requirement is for enrolment. They also clarified their position that they were not requiring registration of Dental Auxiliaries in addition to registration under the Act.

[42] In light of the fact that there is no affidavit evidence from the Council, the courts view on this issue is predicated on the examination of the correspondence between Counsel for the Applicant and the Council, in addition to the Affidavit of the Applicant and the Website of the Council. The clear implication is that the unresolved issue between the parties relates to the introduction of mandatory continuing education for dental auxiliaries and the procedure and practice governing the same.

[43] The information extracted from the Council's Website to which the Applicant refers reads as follows;

"Continuing Education Requirements for Dental Auxiliaries practising in Jamaica" and registration of Dental Auxiliaries:

"In an effort to ensure the delivery of dental services of the highest professional standards and in keeping with best practices in dentistry, the Dental Council of Jamaica has mandated that, as in the case of Dentists, all Dental Auxiliaries (Auxiliaries) are required to obtain annual practicing certificates and complete the requisite Continuing Education Credits (CEs).

Auxiliaries practising in Jamaica as of January 1, 2018, will need to obtain Annual Practicing Certificates. Auxiliaries will need to complete 30 hours of continuing education credits over a two-year period.

Of these 30 CEs the Auxiliary may obtain:

The majority of these credits from core dental lectures

4 credits from internet-based continuing education programs (DCJ has a right to reject questionable programs)

10 credits from approved local general medical programs put on by Jamaica Medical Doctors Association, Medical Association of Jamaica, Nurses Association of Jamaica, or other entity approved by the DCJ.

2 mandatory continuing education credits are required from an infection control program

4 mandatory continuing education credits are required from anaesthetics /professionalism lecture.

One (1) 2" x 2" passport type photograph

The final requirement over the two-year renewal period is that of obtaining a basic life support (BLS) licence.

Please note that NO CE credits are awarded for BLS, it is a separate requirement.

For the Auxiliary specialist, the DCJ strongly recommends obtaining 80% of those credits from one's area of speciality.

Exceptions

Full-time lecturers at the local dental institutions will not be required to have 30 hours of continuing education credits but will be required to obtain the requirements for infection control and ethics, as well as completing BLS.

For non-full time lecturers and others that give lectures at accredited programs, 4 hours of continuing education credits would be awarded for each 1-hour of a lecture given. Each lecture presented may only be used once in each renewal period for claiming CE credits.

Authors who contribute to “peer-reviewed” scientific journals will receive 6 hours as primary author and 3 hours as the secondary author of each article published. The article may only be used to claim CE credits one time, even if re-published in a different journal.

Auxiliaries actively enrolled in full-time post-graduate programs, and not practising dentistry, will not be required meet any of the requirements for CE credits or BLS.

Auxiliaries actively enrolled in post-graduate programs, but still practising dentistry concurrently, will not be required to have 30 hours continuing education credits, but will be required to obtain the requirements for infection control and ethics, as well as completing BLS”.

[44] However, in my view, juxtaposing the aforementioned policy of the Council against **Section 17** of the Act, does lay the foundation for an arguable ground, with a realistic prospect of success that the Council acted Ultra Vires. That is, the argument that, by introducing mandatory continuing education for all Dental Auxiliaries, they acted contrary to section 17 of the Act and the Regulations thereunder.

[45] **Section 17 (1) (a-c)** of the Act reads:

The Council may, with the approval of the Minister, make regulations generally for the proper carrying out of the provisions and purposes of this Act, and in particular but without prejudice to the generality of the foregoing, may make regulations-

- a) prescribing the requirements which shall be satisfied as a prerequisite for registration as a dentist or enrolment as a "member of any prescribed class of dental auxiliary and all other matters pertaining to such registration or enrolment;*
- b) providing for temporary registration of dentists, or temporary registration of dental auxiliaries;*
- c) the manner in which any additional qualifications obtained by a person in the subject in respect of which he is registered or enrolled, as the case may be, or related thereto, may be added to those particulars already entered in relation to him in the register or the roll, as the case may be, and the procedure to be followed to ensure*

that the particulars entered in the register and roll are kept up to date;

[46] It is apparent that under **Section 17** of the Act the Council is empowered to make regulations regarding the proper carrying out of the functions of the Dental Auxiliaries. Nonetheless, this authority is subject to the approval of the Minister of Health. There was a promulgation of a set of regulations under **Section 17** of the Act in September of 1974. The 1974 Regulations clearly state in the heading that they were “*Made by the Dental Council, with the approval of the Minister on the 19th day of September 1974*”. The provisions governing the qualification and training for Dental Auxiliaries are **Regulations 12, 14 and 15**.

[47] Regulation 12 reads;

(l) *Subject to the provisions of subsection (2) of section 11 of the Act, no person shall be enrolled as a member of any class of dental auxiliary unless –*

(a) in the case of a dental nurse or a dental hygienist, he -

(i) holds an appropriate certificate of proficiency from the Dental Auxiliary Training School; or

(ii) holds an appropriate certificate of proficiency from an approved training institution; or

(iii) holds any other qualification in dental nursing or dental hygiene considered by the Council to be of at least equivalent standard as those specified in (i) and (ii); or

(iv) has passed the examination referred to in regulation 14; or

(b) in the case of a dental technician he –

(i) holds a certificate or diploma in dental technology from an approved training institution; or

(ii) holds any other qualification in dental technology considered by the Council to be of at least equivalent standard as that specified in (i); or

(iii) satisfies the requirements for registration as a dentist but is not so registered or has been registered as a dentist but whose name has been removed from the register; or

(iv) has passed the examination referred to in regulation 14.

...”

[48] Regulation 14 reads;

- (1) Where the Council is in doubt as to the standard of qualification or skill of an applicant for enrolment, it shall refer the application and all relevant documentary evidence of the training of the applicant to the Board of Examiners for determination.*
- (2) On examining such an application, the Board of Examiners may –*
 - (a) recommend that the applicant be enrolled; or*
 - (b) conduct an examination in respect of the applicant; or*
 - (c) recommend that the application be refused.*
- (3) A fee of five hundred dollars shall be paid in respect of any examination to be conducted pursuant to sub-paragraph (b) of paragraph (2).*

[49] Regulation 15 reads;

- 1) Any person who satisfies the requirements prescribed in regulation 12 for enrolment as a member of any class of dental auxiliary Form D. may apply to the Council in the form specified as Form D in the Schedule for enrolment as a member of that class of dental auxiliary.*
- 2) Any person who applies for enrolment as a member of any class of dental auxiliary in accordance with paragraph (1) and- (a) furnishes such satisfactory references as to character as the Council may require; and*
- 3) pays the enrolment fee of seven hundred and fifty dollars, shall be enrolled as a member of that class of dental auxiliary and shall, while he is so enrolled be entitled to use one of the titles, "Enrolled Dental Nurse" or "Enrolled Dental Hygienist" or "Enrolled Dental Technician" as may be relevant to the class of dental auxiliary in respect of which he is enrolled.*

[50] Therefore, on a perusal of the 1974 Regulations, there appears to be no requirement for continuing education for Dental Auxiliaries. That is education subsequent to enrolment. As such, in the absence of an amendment to the **1974 Dental Regulations** to include the mandatory continuing education for dental auxiliaries, with the approval of the minister, there appears to be an arguable ground with a realistic prospect of success. However, due to the fact that, the Applicant has failed to surmount the discretionary bar of delay her application fails.

[51] I must also add that the ground as it relates to legitimate expectation is not one that is arguable with a realistic prospect of success. The Applicant asserts that she is being denied her legitimate expectation that she would at all material times after her enrolment be considered by the Council to be an enrolled dental nurse. Moreover, she says that this will affect her continued employment in the government services. However, this has not been substantiated by her evidence at the hearing. At the hearing, she has admitted that her employment in the government service has not been disrupted. Additionally, it has also been revealed that her name is included on the Council's website not only as an enrolled dental nurse but she is also included in the list of compliant dental auxiliaries as of September 2023.

CONCLUSION

[52] I find that the Applicant has failed to satisfy the requirements for the grant of leave to apply for Judicial Review due to the discretionary bar of delay. Additionally, I find that the Applicant has failed, to show any good reason for an extension of time. There is nothing expressly stated or implied in the **Dental Act** or the **Dental Regulations of 1974** that requires the mandatory continuing education of dental auxiliaries. However, despite there being a viable argument in relation to the Council acting outside of their powers under **section 17** of the **Dental Act** in not seeking the approval of the Minister before making any changes to the practice and procedures governing the dental auxiliaries the Applicant has not been able

to successfully overcome the issue of the discretionary bar of delay. Therefore, her application fails.

ORDERS

[53] In light of the foregoing, the following orders are made by the court.

1. The Attorney General and the Minister of Health are removed as a parties to these proceedings.
2. The application for leave to apply for judicial review is refused.
3. Costs to the Respondents to be agreed or taxed.
4. Leave to Appeal is granted.

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Andrea Thomas
Puisne Judge