[2023] JMSC Civ 184

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

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2023CV02352**

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| **BETWEEN** | **CALBERT THOMAS** | **APPLICANT** |
| **AND** | **THE BOARD OF MANAGEMENT OF THE SEAFORTH HIGH SCHOOL** | **RESPONDENT** |
| **AND** | **THE ATTORNEY GENERAL OFJAMAICA** | **RESPONDENT** |

**IN CHAMBERS**

**Mr Keith Bishop instructed by Bishop and Partners for the Applicant**

**Messrs Louis-Jean Hacker and Jenoure Simpson instructed by the Director of State Proceedings for the Respondents**

**Ms Laurie Smikle, Legal Officer, Ministry of Education**

**Mr Calbert Thomas in person**

**Heard: September 20 &, 27, 2023**

**Judicial Review – Application for leave – Whether Attorney General is a proper party – Whether applicant claims against the decision maker - Threshold Test — Whether arguable grounds with realistic prospect of success – Whether breach of natural justice – Whether alternate remedy is by way of appeal to Appeal Tribunal**

**Education Act and Regulations, Part 56 Civil Procedure Rules**

**WINT-BLAIR, J**

## The Application

[1] This is an application by Calbert Thomas pursuant to Part 56 of the Civil Procedure Rules 2002 ("the CPR".) The applicant has filed a Notice of Application for Court Orders seeking the following relief[1]:

a. *An order for leave for judicial review;*

b. *An order of certiorari to quash the unlawful and unfair decision of the board of management of the Seaforth High School;*

c. *That the grant of leave operates as a stay of the dismissal as principal and teacher of the Seaforth High School;*

d. *Costs to be costs in the claim.*

[2] The grounds on which he seeks the orders above are as follows:

1. A breach of section 16(1) of the Charter of fundamental rights and freedoms, in that the applicant was not afforded a fair hearing within a reasonable time by an independent and impartial court;

2. A breach of section 16(6)(b) of the Charter in that the applicant was not given adequate time and facilities for the preparation of his defence;

3. Sanctions or penalties as outlaid in the letter to the applicant;

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[1] Filed on July 20, 2023

4. Breaches of the principles of natural justice

5. Alternative form of redress exists to wit, the Teachers Appeal Tribunal however, judicial review is the most appropriate remedy available to the applicant in that, if the court grants the order for leave for judicial review the grant of leave would operate as a stay which prevents the first defendant from appointing another person as principal. The Teachers Appeal Tribunal does not have this power.

6. The time limit for the making of the application has not been exceeded.

7. The applicant is personally and directly affected in light of the decision and recommendation of the first defendant to terminate his employment effective September 30, 2023, inter alia.

**The Claimant's Evidence**

*The Affidavit of Mr. Calbert Thomas*

[3] Mr Thomas filed his affidavit in support of the application on July 20, 2023. In his application, he states that though an alternative form of redress exists, judicial review is a more appropriate remedy, as it grants a stay whereas an appeal to a statutory body would not. The application has been made promptly and that the time limit for making it has not been exceeded. These are all relevant matters when making an application for leave pursuant to Rule 56.3 of the Civil Procedure Rules ("CPR.")

[4] The respondents have filed no affidavits and instead rely on their legal submissions in a bid to have the application dismissed. The Attorney General has raised the preliminary point that it is not a proper party to judicial review proceedings.

**Whether the Attorney General is a proper party**

[5] I will deal with the second respondent's preliminary point first. It is contended by Mr. Hacker that judicial review proceedings are not civil proceedings within the meaning of the Crown Proceedings Act. This issue has been settled by the Privy Council in case of **Minister of Foreign Affairs Trade and Industry v Vehicles and Supplies Limited and Another**[2] Further in the case of **Brady and Chen Limited v Devon House Development Limited**[3] Smith, JA said:

> *"By virtue of Section 2(2), the phrase civil proceedings does not include proceedings which in England would be taken on the crown side of the Queen's bench division and of course proceedings for the prerogative orders which have been replaced by proceedings for judicial review were brought on the crown side."*

[6] Mr Hacker argues that it is accepted in judicial review proceedings that the decision must be placed before the court and the decision maker named as a party to enable the court to exercise its supervisory jurisdiction over the decision maker. In this instance, the Attorney General is not the decision maker and cannot be joined pursuant to the provisions of the Crown Proceedings Act ("the CP Act.") There is There being no basis to join the Attorney General as a party, the joinder is unreasonable and is not supported by either fact or law.

[7] Mr Bishop argues that section 13(2) of the CP Act is the starting point and that section 16(2) sets out the relief. He relies on the proposition that the proper defendant in an action will depend on where the individual falls within the government structure. If an officer is employed to central government or a

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[2] [1991] 1 WLR 550

[3] [2010] JMCA Civ. 33, at paragraph 22

department within central government the action would fall within the CP Act and the proper defendant would be the Attorney General.

[8] The applicant contends that the Ministry of Education is a Ministry within central government as distinct from local government, government agencies corporations sole or a statutory body. The interpretation of the CP Act and related legislation is that section 13(2) refers to central government when it defines civil proceedings.

[9] Seaforth High school is fully owned and funded by the Ministry of Education. The first respondent is appointed by the Minister of Education whose ministry is responsible for the setting and observing of standards in all of its operations. The proper operation of Seaforth High school is a core function of the Ministry of Education and the complainant called against the applicant is an agent of the said ministry. The only witness called by the first defendant at the hearing was an employee of the Ministry of Education.

[10] Seaforth High school is not a body corporate, a public body or any other designation that would allow it to be sued without reference to the second defendant. The decision of the first defendant was dissimilar to the decision taken by the Minister in **Vehicles and Supplies** and in recent times in **Symbiote Investment Limited Versus Minister Of Science and Technology and Another**[4]. The decision of the first defendant was not an executive decision and thus it is amenable to an order for a stay to put a stop to the further conduct of the first defendant which will result in the termination of employment of the applicant on September 30, 2023. The decision is one which can be classified as quasi-judicial therefore in light of the foregoing, the second defendant is a proper party pursuant to section 13(2) of the CP Act.

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[4] [2019] JMCA Civ. 8

**Discussion**

[11] In Jamaica, civil proceedings have been defined in the Crown Proceedings Act and in the CPR. In the definition section of the statute it provides that: *"civil proceedings" does not include proceedings which in England would be taken on the Crown side of the Queen's Bench Division;* and *"rules of court" includes the Civil Procedure Rules, 2002."*

[12] The Act does not apply to "proceedings analogous to proceedings on the Crown side of the Queen's Bench Division in England," does not apply to public law matters, (which, as Lord Bingham remarked in **Gairy v Attorney General of Grenada**[5], are "fairly [to] be regarded as sui generis").[6]

[13] In the decision of the Judicial Committee of the Privy Council in **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd**, Lord Oliver said the Attorney General should be named as a respondent instead of the Minister of Foreign Affairs, Trade and Industry when the exercise of his statutory powers was under challenge by way of judicial review. …

> *"[T]heir Lordships entertain no doubt whatever that the Court of Appeal was correct in concluding that the proceedings were not "civil proceedings," as defined by the Crown Proceedings Act, and that the minister and not the Attorney-General was the proper party to proceedings instituted for the purpose of reviewing the exercise of his statutory powers."*

[14] The binding position is that judicial review proceedings fall outside of the CP Act. and are therefore not civil proceedings within the meaning of that statute. When the decision of a public body is to be reviewed, it is that body which is the appropriate respondent/defendant.

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[5] [2001] UKPC 30; [2002] 1 AC 167, para 21

[6] Seepersad (a minor) v Ayers-Caesar and others [2019] UKPC 7

[15] The Attorney General is therefore not a proper party to a judicial review claim pursuant to the CP Act. Accordingly, the Attorney General is removed as a respondent in this application.

**The threshold test**

[16] It is the applicant who bears the burden of demonstrating that he has an arguable case with a realistic prospect of success.[7] The respondent has filed no affidavits in answer and at this stage it does not have to disclose its entire case as it would on a substantive hearing. There can be no assumption on the part of the court that the facts or allegations put forward by the applicant are true, in order to decide whether there are arguable grounds with a realistic prospect of success.

[17] The court must not engage in a mini trial of the issues such as would be appropriate after leave were granted, nevertheless, an examination of the evidence and arguments is to be conducted at this the permission stage.

[18] The evidence discloses that on November 22, 2022, the board of management convened a meeting with the applicant at which officials from the Ministry of Education were present. The officials made presentations and recommendations to the board that disciplinary action should be taken against the applicant. He was handed a report by one of the officials which set out the charges which were a failure to monitor internal control systems; lack of adequate segregation of duties; a lack of regular checks and balances with respect to the Bursar; deviation from the standard operating procedure; non-adherence to the law and regulations; failure to balance cash books and reconcile bank accounts and making payment of salary and other emoluments to academic and administrative staff without prior approval from the ministry.

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[7] Sharma v Brown-Antoine et al (2006) 69 WIR 379

[19] On January 18, 2023, another board meeting was held, the applicant was present he was questioned by members of the board. He answered each question, and a copy of the minutes was produced and has been exhibited.

[20] On December 9, 2022, the applicant said he responded to the ministry's report by handing a copy of his first response to one Ms Blackwood from the Ministry of Education when he did so she advised him to hand it to the Chairman of the Board. The applicant made adjustments and handed a copy of his final response to the Chairman of the Board, that document has been exhibited.

[21] On January 25, 2023, the applicant says he was further interrogated by the board who met to discuss the report of the ministry, a copy of that report has been exhibited. On that date, the board decided that he would be placed on leave. a copy of that letter has also been exhibited.

[22] On January 30, 2023, the applicant was advised by the Bursar that he had received a letter from the board saying that the applicant should only be paid two-thirds of his regular salary. A copy of that letter was never handed to the applicant, but he saw it in his school e-mail, the letter having been sent from the region two office of the Ministry of Education to the school's Bursar. That letter is also exhibited.

[23] The applicant says he was never consulted by the Board, nor was he given a chance to say anything before he was suspended. His attorney at law wrote a letter to this effect on May 31, 2023.

[24] He received a letter with the signature of the Chairman of the board that he should attend a meeting of the personnel committee of the Board which has been exhibited, it gave him 13 clear days' notice which his attorney has advised, and he verily believes is in breach of section 57B of the Education Regulations, 1980.

[25] On June 14, 2023, the applicant and his attorney at law along with Mr Clayton Hall Deputy Secretary General of the Jamaica Teachers Association attended the meeting. The applicant has identified the several breaches which gave rise to the several grounds upon which he now bases this application.

[26] The personnel committee hearing ended abruptly because the Chairman insisted that the hearing should continue on to midnight in order to complete it, but failed to call the complainant, Ms Blackwood of the Ministry of Education. His attorney at law also did not complete the cross examination of Mr Purcell of the ministry in light of the foregoing.

[27] The applicant states that he was neither heard nor was he given an opportunity to make representations, call witnesses or produce documents at the personnel committee hearing. A copy of the transcript of evidence of that hearing has been exhibited.

[28] The applicant states that the notes of the hearing will prove most of the charges arose out of the incompetence and neglect of the Bursar whose conduct he had reported on several occasions to the Board, to Rohan Purcell and to other personnel of the Ministry of Education. Copies of the many reports he made regarding the Bursar have been exhibited.

[29] The applicant states that as a result of the conduct of the board chairman when he sat as the Chairman of the personnel committee, he was deprived of the opportunity to produce the documents attached to this affidavit in support of his case at that hearing.

[30] On June 23, 2023, the police knocked on the gate to his home and handed him a letter which he opened and read. It stated that he was terminated as principal of the Seaforth High school, due to neglect of duty and professional misconduct. That letter has been exhibited as well. The applicant further notes that most of the complaints raised at the hearing have been addressed and resolved if not fully then substantially within the last two years, as was the was the clear evidence of Rohan Purcell of the ministry at the disciplinary hearing held by the personnel committee. It was Mr Purcell’s evidence that the applicant did not commit any breaches of the criminal law and at the time of the hearing there was no evidence that he owed a dollar to the Seaforth High school.

[31] The standard of proof in relation to arguability was set out by the English Court of Appeal in **R (on the application of AN v Mental Health Review Tribunal (Northern Region) and Others.**[8]

> *"… the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."*
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> *…*
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> *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 it is hoped, the interlocutory processes of the court may strengthen. Matalulu v Director of Public Prosecutions [2003] 4 LRC 712 at 733.]*

[32] In my judgment these are grave allegations that require their arguability to be demonstrated with considerable strength or quality in order to meet the required threshold. I bear in mind that a ground with a realistic prospect of success is not the same thing as a ground with a real likelihood of success, the prospect of success has to be realistically and sufficiently demonstrated.

[33] The grounds advanced by Mr Thomas have not been answered. The offences allegedly committed are egregious in nature. The allegations carry very serious consequences for the applicant and the administration of the school. The evidence disclosed in the affidavit of Mr Thomas, point to issues regarding the administration

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[8] [2005] EWCA Civ 1605 at paragraph 62

of the Seaforth High School. The charges brought against the applicant were proven at a hearing during which he alleges he was not afforded basic due process among other allegations of irregularities made by him.

[34] Under the Regulations made pursuant to the Education Act, the principal is the CEO of the Board of Management, his conduct regarding the administration of the school is capable of review and scrutiny. The evidence with regard to the charges brought against the applicant and the handling of those charges meets the threshold test of arguability based on the nature and gravity of the affidavit evidence.

[35] The issue raised by Mr Hacker as to the proper decision to be challenged is without merit as the decision is that of the Board acting on the recommendation of the personnel committee. The Board has the power to vary or agree with the recommendation of the personnel committee at its discretion pursuant to regulation 57(6.)

**Sufficient Interest**

[36] I am satisfied that the criterion of sufficient interest has been met as the applicant is directly affected by the decision of the first respondent.

**Delay**

[37] This application fulfils the requirements of Rule 56.6(1) of the CPR, in that has been made promptly, and in any event, within three months of the date when grounds for the application first arose. The decision of the Board was dated June 23, 2023, and the instant application was filed on July 20, 2023.

**Alternative Remedy**

[38] Rule 56.3(d) requires the applicant for leave to state whether an alternative form of redress exists, and if so, why judicial review is more appropriate or why the alternative has not been pursued. In his written submissions Mr Hacker argued

that the (Teachers) Appeal Tribunal is the appropriate venue for an appeal from the decision of the board of management.

[39] Mr Bishop counters this by saying that the statutory appellate process is unsatisfactory in this case as a stay is required in order that that the applicant not lose his employment status on September 30, 2023, the Tribunal cannot grant such a remedy.

[40] Neither side has advanced any evidence under this head. Regulation 57 of the Education Regulations sets out the procedure when a complaint is made. The Board acting on the recommendation of the personnel committee or as varied and agreed at its discretion, decides the fate of the teacher and communicates this decision in writing to the Minister and the teacher concerned.[9] Pursuant to regulation 61, a teacher aggrieved by the decision of the Board under regulation 57(6) may appeal to the Appeals Tribunal within twenty-eight days after the date of the action giving rise to such appeal.[10]

[41] The Appeals Tribunal is established by section 37 of the Education Act and under regulation 37(3) an aggrieved teacher may appeal to that body. The Tribunal's powers as set out in regulation 37(4) are to confirm, vary or quash the decision or to return the proceedings to the decision maker for further information or action as it thinks just. The inclusion of a stay of proceedings is absent.

[42] The Education Act also speaks to the establishment of a Teachers Services Commission which has been given the specific powers to deal with the appointment of principals as well as to advise the Minister in the discharge of his/her duties under the Education Act. The Commission has the powers set out

[9] Regulation 61

[10] Regulation 61

in Part V and the First Schedule of the Education Act to appoint its own disciplinary committee and to regulate its proceedings.

[43] Appeals from the Commission also lie to the Appeals Tribunal pursuant to section 37. There are therefore different routes in terms of disciplinary action, and in my view, principals and teachers are not necessarily going along the same route given the operation of the Act. While there is interplay between the various sections, much is left to choice and the route to appeal may not be directly to the Tribunal as Mr Hacker suggests.

[44] Mr Bishop contends that the alternate remedy set out in the statute does not grant a stay of the proceedings where termination is at issue. However, this does not answer the question as to why the applicant failed to utilize the appellate statutory procedure. Judicial review being the remedy of last resort.

[45] The transcript of proceedings at the hearing suggests that the only avenue contemplated by Mr Bishop was that of judicial review and counsel said as much to the Chairman at the hearing. The transcript does not show where counsel raised the issue of obtaining the record of proceedings in order that an appeal to the Tribunal be lodged within twenty eight days. It shows a contentious hearing on June 23, in which the instant application was always in the offing. In fact, this application was filed on July 20, 2023 which is some evidence of an intention to advance directly to the court before engaging the statutory appellate process.

[46] There is no evidence in the affidavit of the applicant that after June 23, 2023, there was anything arising which demonstrated the need for a stay of the proceedings. The applicant had twenty-eight days after June 23, 2023, to lodge his appeal with the Tribunal, there is no explanation in the evidence as to why he failed to do so.

[47] Mr Bishop submitted that the non-disclosure of the minutes of the meeting was an issue however he did not connect this submission to a date or to any evidence. The applicant alluded to the conduct of the Chairman at the hearing in his affidavit

as being improper, but he does not go further to tie that alleged misconduct to his inability to pursue the statutory appellate procedure.

[48] While I tend to agree with Mr Bishop that the Appeals Tribunal does not have the power to stay the decision of the board of management, on the facts of this case the need for a stay would not have arisen had the statutory process been engaged.

[49] The learned authors of the Judicial Review Handbook[11] state:

> *"An existing alternative raises a question for the Court's discretion, whose judicial exercise is in truth a matter of "judgment." Since judicial review is regarded as a last resort, it can properly be declined if the Court concludes that the claimant has and should first pursue a suitable alternative remedy. The question whether the pursuit of judicial review is inapt is best addressed at the permission stage when the pursuit is commencing, rather than at the substantive hearing after it has occurred."*
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> *…*
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> *"…it is a cardinal principle that, save in the most exceptional circumstances, the jurisdiction to grant judicial review, will not be exercised where other remedies are available and have not been used.[12] Judicial review is to be used as a last resort/long stop.*

[50] The situation now facing the applicant is that the time for pursuing a statutory appeal having expired, he has no other remedy but that of judicial review. In my view, given the situation now facing the applicant, he ought to have used this opportunity to raise any exceptional circumstances upon which he could seek the exercise of the discretion of this court, this has not been done.

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[11] Fordham, 6th ed. Page 413 at para 36.3

[12] Paras 36.3.1 and 36.3.2

[51] While the existence of an alternate remedy does not oust the jurisdiction of this court to exercise a discretion whether to grant or refuse leave, the applicant must place the court in a position to exercise its discretion. In this case, there is no evidence upon which this court can exercise its discretion in his favour on this issue.

**Whether there is a realistic prospect of success**

[52] The central issue in this case is the status of the applicant. His post is statutory in nature, and he was terminated from this post. The lawfulness of the process employed to order to arrive at this decision is a classic public law question. In addition, the court would have had to determine the construction of the Education Act and its attendant regulations, the Financial Administration and Audit Act as well as the several guidelines and policy documents which informed this matter.

[53] As with any legal instrument, the construction of an enactment of Parliament must be informed by the relevant context of that enactment, including all matters that might give meaning to the text. The court would normally have had to embark upon this exercise in order to determine the central issue.

[54] The applicant raises breaches of the audi alteram partem rule, the rules of natural justice, as well as procedural impropriety in the grounds advanced before this court. Additionally, he raises the manner in which the charges were brought as being under the Financial Administration and Audit Act as opposed to the Education Act and Regulations.

[55] He sets out procedural improprieties in the hearing conducted at the stage of the personnel committee as disclosure was not provided pursuant to section 57(4)(c) of the regulations; the committee did not allow the main witness Ms Blackwood to give evidence and it refused to disclose the minutes of the personnel committee in order for an examination of the factors taken into account. Mr Purcell gave evidence but not under oath and a member of the Board who recused herself was

allowed to vote on the issue of his termination. Finally, the applicant was deprived of the opportunity to present witnesses and documents in support of his position.

[56] In all the circumstances of the case, while the grounds indicate that there are arguable grounds with a realistic prospect of success on the face of the record, the applicant has not been able to successfully overcome the discretionary bar of an alternate avenue for redress.

[57] The alternate remedy provides for defects to be cured in the earlier decision making process and it cannot be said that the applicant has either availed himself of or exhausted the statutory appellate process. This is an unfortunate situation for the applicant but it is one of his own making.

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

[59] **Orders**:

1. The Attorney General is removed as a party to these proceedings.
2. The application for leave to apply for judicial review is refused.
3. No order as to costs.
4. The applicant's attorneys-at- law shall prepare, file and serve the orders made herein.