

NMLG

**In the Supreme Court of Judicature of Jamaica
Claim No. HCV 3044/2006**

IN THE MATTER of an application by
Derrick Wilson for Orders of Mandamus,
Certiorari and injunction

AND

IN THE MATTER of the Education Act
and The Regulations made thereunder.

BETWEEN	DERRICK WILSON	CLAIMANT
AND	THE BOARD OF MANAGEMENT MALDON HIGH SCHOOL	1ST DEFENDANT
AND	THE MINISTRY OF EDUCATION	2ND DEFENDANT

HEARD: 25th, 26th, 27th, and 31st JULY 2007.

Hugh Wilson instructed by Wilson Franklyn and Barnes for the Claimant

Patrick Foster and Kevin Powell instructed by the Director of State Proceedings
for the Defendants.

CORAM: M. McINTOSH, J.

In this Application for Judicial Review, the Claimant Mr. Derrick Wilson, by Fixed Date Claim Form seeks the following orders:

1. An order of Mandamus directing the 1st and 2nd Defendants to Reinstatement the Claimant as principal of Maldon High School and to confirm him in his post as principal.
2. An order of Certiorari to remove into this Honourable Court and to quash the decision contained in letter dated August 31, 2006 to terminate the Claimant's appointment as provisional principal of Maldon High School aforesaid and or the decision of the 2nd Defendant not to confirm the Claimant in his post as principal.

The details of the nature of the claim as stated in the fixed date claim form are as follows:

1. By letter dated October 1, 2004, the Claimant was appointed principal of Maldon High effective September 1, 2004.
2. By letter dated June 23, 2005 the Claimant's provisional appointment was further extended for the academic year 2005 – 2006.
3. By letter dated August 31, 2006 (sic) the Board of Management of Maldon High School purported to terminate the Claimant's provisional appointment effective August 31, 2006.
4. The reasons stated in the said letter for terminating the Claimant's provisional appointment are not in accordance with law.

5. Even if the reasons are valid in law (which is denied) the termination of the Claimant's provisional appointment goes against the principle of proportionality and natural justice.
6. The Education Regulations paragraph 2 (2) (d) of Schedule A provides that the Ministry of Education shall make regular assessments of a principal during the tenure of his provisional appointment. In breach of the said Education Regulations, the Claimant has only been assessed twice for the academic years 2004-2005 and 2005-2006 respectively.
7. The said Education Regulations also make provision for a report of the performance assessment of a principal to be discussed with him. In breach of the said Regulations, the performance assessment for the period 2005-2006 was not discussed with the Claimant.
8. The 1st Defendant's decision to terminate the Claimant's provisional appointment and or the decision of the 2nd Defendant not to confirm him in his post as principal was in breach of the Education Regulations, and or natural justice, the Constitution of Jamaica and was therefore null and void and ultra vires.
9. The Claimant had a legitimate expectation that he would be confirmed in his post as principal of Maldon High School aforesaid.
10. The 1st and 2nd Defendants acted contrary to law when it (sic) purported to terminate the Claimant's provisional appointment by giving one (1) month's notice.

Counsel for the Claimant Hugh Wilson in presenting his case referred to the affidavit and supplemental affidavit of the Claimant Derrick Wilson and made the following "observations."

1. That the provisional principal was not regularly assessed in accordance with the Regulations.
2. That the provisional principal was not given an opportunity to be heard before terminating his employment.
3. That the first and second Defendants misconstrued Section 54 (1) of the Education Regulations.

These observations formed the basis of Counsel's arguments with an emphasis on fairness and justice. He submits that:

REGULARITY OF ASSESSMENT

1. Based on the definition given to the word "regularity" by the Collins Dictionary assessment of the Claimant must be sufficiently often, habitual or frequent in order to meet the objective of a fair, just and reasonable picture of the provisional principal. Random visits to the school and where such visits exist via a log book cannot constitute regular assessment in accordance with the Regulations. **R v Minister of Education ex p Dorothy Lewis SC 69/91 Misc. delivered November 28, 1991 and Vhandel v The Board of Management of Guys Hill High School SCCA No. 72/72000 delivered on June 2, 2001** were the authorities used in support thereof.

OPPORTUNITY TO BE HEARD BEFORE TERMINATION OF EMPLOYMENT

2. Claimant's counsel further submits that before the Board submits its report and /or submission to the Commission recommending that the provisional principal be terminated, the Claimant should be given a fair hearing and fair evaluation: **In re: Pergamon Press Limited (1971) Ch. 388**. The dictum of Parnell, J. in the case of **R v Commissioner of Police ex parte Tenant reported in (1977) 15 JLR 79 at p 82** was quoted in support thereof:

"If a man is considered to be unsuitable to remain in the force his Conduct, record and general behaviour may have weighed with the Commissioner before he arrives at his conclusion. And if it is alleged that he had misconducted himself then the nature of the alleged misconduct should be brought to the attention of the constable and he should be given a fair opportunity to meet the complaint. He cannot be drummed out of the force without the usual ceremony which involves a fair trial and a fair evaluation of the whole evidence at some inquiry."

3. According to the affidavit of Ms. Hawthorne, the letter of June 2, 2006 was addressed to the Regional Director and should have been addressed to the Teacher Services Commission. Relying on the case **Grunwick Processing Laboratories Limited v Advisory, Conciliation and Arbitration Service and Another (1978) AC 655**, Mr. Hugh Wilson for the Claimant submits that the word "shall" in the Regulations is mandatory hence the Board breached this mandatory requirement.

The Teachers Services Commission

Mr. Hugh Wilson in support of his argument refers to and sets out the duties, functions and powers of the Teachers Services Commission and points out that this a statutory body created by section 5 (1) of the Education Act and the role and powers of the Commission are particularized at section 32 (1). The Commission is endowed with certain coercive powers in Section 32 and the First Schedule that has the potential to affect the livelihood, pension or employment of an individual and for that reason it is under a duty to act fairly when carrying out its advisory or recommendatory functions. However it does not indicate that the Commission is under any obligation to act fairly or to observe the rule of natural justice, but it is clear from the authorities that where a statutory tribunal has been set up to decide final questions affecting parties, if the statute is silent on the question, the Court will imply into the statute a rule that the principle of natural justice will apply and the implication of this rule is predicated on the basis that Parliament is not presumed to take away parties' rights without giving them an opportunity of being heard in their interest. This rule is nothing new and is of respective ancestry as far back as 1863 in **Cooper v Wandsworth** and cited in the **Tenant** case.

4. The Commission is also under a duty to undertake an independent inquiry based on all the relevant material facts including the provisional principal's response and not rubberstamp a decision which was not properly before it. The Commission is an intermediary between the Board on the one hand and the Minister on the other. It is not a conduit pipe to the Minister and the reason for its establishment was to ensure that a school board does not submit before it frivolous or unfounded allegations to be used as the foundation to recommend that a provisional appointment should not be confirmed. The Commission ought not to assume that what was before them was accurate.

MISCONSTRUING SECTION 54 (1) OF THE REGULATIONS

5. This issue is argued within the context of the letter of August 31, 2006 sent to the Claimant. Paragraph three of the letter states *"that to date we have seen no significant improvement and as such your services will be terminated August 31, 2006."* Counsel contends that it was summary termination as it coincided with the date of the letter. According to section 54 (2) of the Regulations, "the employment of a teacher in a public education institution must be terminated by one month's notice by either side and if by the Board a reason for termination must be given as well as payment and a statement." However it is the Ministry of Education that terminates the appointment of principals. The Board has arrogated on to itself a power it does not possess.

6. There was an absence of an expressed term in the contract of employment as to the period of notice to be used to terminate the Claimant's employment and in such case the common law will imply reasonable notice. What constitutes reasonable notice is a matter of fact to be decided by the Court. This will depend on the nature of the employment, the position held at the time of the dismissal and the promptitude with which to obtain suitable alternative employment.

7. A provisional principal's appointment cannot go beyond two years the maximum period required during which the principal must be regularly assessed to determine his competence, capability and administrative expertise to manage his school. If during the two year period and during the period of regular assessment, the Board in its wisdom is of the view that the provisional principal is unsuitable for the school, it should act with alacrity, in recommending his non confirmation and should give in that context reasonable notice of its decision to the provisional principal. The consequence would be that he is in a position to seek alternative employment.

Validity of the Board Meetings

8. Another argument which Mr. Hugh Wilson for the Claimant advances is that at the time of the decision to terminate the claimant's employment the Board was not properly constituted and the meeting was invalid. Board member Sharon Earl was absent from four consecutive meetings. Notwithstanding she was present at the meeting where the decision taken not to confirm the claimant to the post of principal. In addition she voted and seconded the move for the claimant's dismissal. This is a flagrant breach of the Regulations.

9. The Ministry's representative, Ms. Francis was present at that meeting but the Minutes did not indicate whether she voted. **Vhandel** was cited as authority that the Minutes should make clear that Mrs. Francis did not vote and she ought to have withdrawn from the meeting. The Board was therefore in breach of section 88 (9) of the Regulations.

10. Ms. Francis' affidavit demonstrated "bias" towards the Claimant and the Court is asked to grant the relief prayed for in the Fixed Date Claim Form. This point was not taken as the Court's view was that Ms. Francis was not praying for anything but has given an opinion in response to the Claimant's affidavit.

11. Over the period of two years several letters were sent to the Claimant itemizing the things he failed to do. His response was made in a detailed affidavit refuting all the allegations. Subsequently the affidavits of Andrene Hawthorne and Hope Leach were filed, but they failed to challenge or contradict the Claimant's affidavit. If the Claimant's affidavit was unchallenged, it is taken that the Defendants accepted the truthfulness of the Claimant's response.

DEFENDANTS' SUBMISSION

Counsel for the Defendants submits as follows:

1. There are two core issues are to be determined by the Court, they are (a) whether the Claimant's provisional appointment was determined in accordance with the governing statutory provisions, and (b) whether the Claimant can be appointed principal of the school by the Court.
2. Judicial Review is not an appeal from the decision of the Board but a review of the manner in which the decision was made: **Chief Constable of North Wales Police v Evans [1982] 3 All ER 141; Owen Vhandel v The Board of Management of Guys Hill High School SCCA No. 72/2000**

delivered June 7, 2001. The role of the Court therefore is to examine the process that led to the decision to determine whether it was fair and in accordance with the law. If the Court determines that it was, the decision should stand even if the Court disagrees with the decision.

3. There must be compliance with the Regulations. If the process is flawed it compromises the decision and it is invalid. However, it is not for the Courts to take on administrative functions which are best left to school boards and tribunals as to who is or is not best to be appointed principals. The Vhandel case embodies the above principle in that the Court cannot employ them to the post.

4. The multitude of evidence as to the claimant's record on his job is irrelevant to the case. Reference was made to **Attorney General v Hugh Graham (1997) 34 JLR 721** a case involving seizure of a truck by the Revenue Protection Division in which Mr. Graham was given a right to a fair hearing but declined. In the instant case the Claimant was given the opportunity to hear his case and to comment on the report. He declined to do so as stated in his affidavit. Having been afforded the opportunity for a hearing, the claimant must now prove that the Board, Commission and the Ministry did not act in accordance with statutory framework governing his provisional appointment: **R v Minister of Education, ex p. Dorothy Lewis, SC Misc. 69/91 delivered November 28, 1991.**

5. The appointment for a provisional principal should not exceed three school terms or one year to facilitate an assessment. During the period arrangements for regular assessment were made by the Ministry. It is noted that regularity is consistency and not to be equated with frequency. Report on the assessment must be made to the Board who in consultation with the Commission recommend the appointment which is then confirmed by the Ministry.

6. The two year period is to reach some conclusive decision if the provisional principal will be appointed. When a provisional principal served for two years he is either appointed to the post or he ceases to become the principal. He ceases to occupy the position, but is not terminated.

7. The Regulations relating to the assessment of teachers differ from those of provisional principals in that teachers are assessed on a more frequent basis (section 2 (1) (b)). However, as stated in the affidavit of Jennifer Francis, a provisional principal would need more time because his various roles, that of principal, administrator and manager which are more complex and long term and must be assessed in a broader context to determine performance. This therefore rebuts the Claimant's submission that the teacher and provisional principal ought to be assessed in the same way. Assessments are done in accordance with paragraph eight of Ms. Francis' affidavit which supported by exhibit JFI. There is no allegation of random visits as occurred in the Dorothy Lewis' case.

8. The reason given for the Claimant's refusal to sign the assessment (which he wrote on the assessment form) was that he disagreed with the findings and needed more time to examine the contents thoroughly so as to respond to them. However in his affidavit of June 5, 2006, he gave a different reason for declining to sign.

9. Certain events were unfolding that made this matter of the Claimant's appointment relatively urgent – the school year was coming to a close, his tenure as provisional principal was coming to a close and therefore the Board wished to make a decision on the matter as quickly as it could, but at the same time it is obvious from the facts that there was no attempt to impair or limit his

rights to express his views on the performance evaluation form and it is the Claimant who declined to exercise this right that was conferred on him.

Defendants' counsel then focused on three main issues arising from the claimant's submission (a) purported dismissal of Derrick Wilson, (b) the validity of the Board Meetings and (c) the Court's power to appoint Mr. Wilson as principal by way of Mandamus.

Purported dismissal

10. Once a decision had been taken not to appoint Mr. Derrick Wilson as principal his position as provisional principal would have automatically come to an end by August 31, 2006. Under the Regulation a provisional principal cannot serve in that position for more than two years and at the expiration of that period if he is not appointed he no longer is in the post. In that context the letter of termination sent by the Board to Derrick Wilson had no legal effect and merely foreshadowed what was to happen on August 31, 2006 by operation of law.

11. For the record that letter was delivered to the claimant on July 31, 2006 but the minutes of the Board Meeting of July 31, 2006, (exhibit HL2) attached to the affidavit of Hope Leach, indicates that the letter was hand delivered to Derrick Wilson before mid night July 31, 2006. This rebuts the argument of summary dismissal by the Claimant. There was therefore no necessity on the part of the Board to invoke section 79 (1) of the Regulations which require the giving of one month's notice.

VALIDITY OF THE BOARD MEETINGS

12. Regarding the submission of the Claimant of an improperly constituted Board, the first element to the Claimant's submission that Ms. Francis voted is unfounded as there was no proof that she did in fact vote. Reference is made to the affidavit of Ms. Leach at paragraph five where she explicitly states the Board members in June 2006. She did not mention Ms. Francis' name as she was not a member and was not treated as such.

13. The minutes of June 2, meeting (exhibit HLI) indicated the persons in attendance and their status was listed. Board members were specifically identified with Ms. Francis identified as Education Officer. The last page of the Minutes stated that all members present voted, so Ms. Leach identified the members and Ms. Francis was not identified as such. The irresistible inference to be drawn is that Ms. Francis did not vote.

14. Where the Claimant's submission detailed various meetings where Mrs. Earle did not attend – where section 79 (5) was invoked, inference is that she ceased to be a board member and had no right to vote. It must be emphasized that persons absent without justifiable excuse would cease to be members of the Board, but where justifiable excuse was given such a persons would remain a member. Paragraph four of Ms. Leach's affidavit responded to paragraph four of Mr. Wilson's affidavit referring to the absence of Mrs. Earle from board meetings stating that she (Mrs. Earle) had tendered an apology for two of those meetings. If these apologies were accepted (and there is nothing to suggest they were not) then Mrs. Earle would retain her position as board member and was entitled to

be at the board meeting when the decision was taken to terminate Mr. Wilson's position as provisional principal and she was entitled to vote.

15 On July 18, 2006 the Ministry confirmed the recommendation of the Commission evidenced by the affidavit of Andrene Hawthorne exhibited as AH3. Therefore the meeting of July 31, 2006 was subsequent to the Minister's confirmation not to recommend the Claimant's permanent appointment as principal and would have had no effect on the Board's earlier decision. (See the letter from the Ministry to Mr. Harris, Chairman of the Board indicating the Commission had a meeting and considered the position of the principal and their recommendation to the Ministry and after careful consideration the Ministry confirmed that he would not be confirmed - exhibit VG2 attached to the affidavit of Vincent Guthrie).

16. The Board meeting on the 31st July 2006 went over areas relating to Derrick Wilson's performance and dealt with the issue of non appointment / termination and there was a decision to have a letter sent to him described as a termination letter. The Board meeting of the 31st July 2006 was more of a post mortem not to appoint and the decision to send letter of termination was one which has no legal consequence.

POWER TO APPOINT

17. As indicated earlier the period for which the principal can serve in a provisional capacity is two years: Section 2 (2) (f) of Schedule A. The Claimant has already had a provisional appointment for two years and it would be in direct contravention of the Regulations for his appointment to be extended.

18. Had steps been taken by relevant stakeholders to assess the principal and recommend him for appointment but no administrative steps taken to put him in the post, then a Court could issue an order of mandamus compelling the relevant authority to put him in his post as permanent principal. This does not arise in this case as the facts are to the contrary. An order of mandamus as sought by the Claimant in this instance is not relevant to the facts.

On the basis of these submission, the Claimant is not entitled to any relief sought in the Fixed Date Claim Form and should be dismissed with costs to the Defendant.

This Court finds that the Defendants did not terminate the Claimant's appointment as provisional principal of Maldon High School. The Defendants' decision was that they were unable to recommend the Claimant's appointment to the post of Principal - Maldon High School. The Education Regulations 1980 – Schedule A (2) Principals (f) provides that ".....the total period of an appointment on a provisional basis shall not exceed two years."

The Claimant having completed two years as provisional principal would not be entitled to remain in the post of provisional principal for any longer period. Not having appointed him principal his tenure as provisional principal would be automatically at an end and he would not occupy any position from which he could be "terminated."

In the light of this finding which relates to the second order sought by the Claimant, the first order, that is, the order for mandamus must fail. This Court has no power to "reinstate" the Claimant to the post of "provisional principal" and cannot confirm him in a position which he did not hold.

**ORDER: *The Claimant's application for Order of Mandamus
 and Order of Certiorari is refused.
 Costs to the Defendants to be agreed or taxed.***