



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 07119

BETWEEN	MESHIA DAVIS	CLAIMANT
A N D	ST. JOSEPH'S TEACHERS' COLLEGE	1ST DEFENDANT
A N D	THE MINISTER OF EDUCATION	2ND DEFENDANT
A N D	THE ATTORNEY GENERAL OF JAMAICA	3RD DEFENDANT

Jason Jones instructed by Nigel Jones & Company for the Claimant

Harrington McDermott instructed by the Director of State Proceedings for the Defendants

Heard: 31st January 2013 & 5th April, 2013

Judicial Review – rules provide for repeat of examinations – school no longer offering diploma – whether student has right to re-sit examination – whether a legitimate expectation – whether reasonable – whether court should grant a remedy.

CORAM: JUSTICE DAVID BATTS QC

[1] By an Amended Fixed Date Claim Form (which was further amended at the commencement of the hearing) the claim is as follows:

The Claimant, **MESHIA DAVIS**, of 41 Clinton Drive, Little Greendale, Spanish Town in the parish of St. Catherine, seeks a judicial review and specifically the following orders against the 1st Defendant, **ST. JOSEPH'S TEACHERS' COLLEGE**, a company duly incorporated under the laws of Jamaica with registered office at 152C Constant Spring Road in the parish of St. Andrew and also operating at 16

Old Hope Road, Kingston 5 in the parish of St. Andrew, 2nd Defendant, **THE MINISTER OF EDUCATION**, of 2A National Heroes Circle, Kingston 4 in the parish of Kingston and 3rd Defendant, **THE ATTORNEY GENERAL OF JAMAICA**, of 2 Oxford Road, Kingston 5 in the parish of St. Andrew:

- a) An Order of Certiorari to remove into this Honourable Court and to quash the decision of the Defendants in or about August 2011 to discontinue the year 1 of its diploma programme in Education and/or on its decision to discontinue the entire diploma programme in Education;
- b) An order of mandamus compelling the Defendants to offer the Claimant the opportunity to pursue a Diploma programme in Education;
- c) A Declaration that the Claimant is entitled to repeat the examination of the year 1 diploma programme and is entitled to two chances to repeat these courses within a three year period;
- d) In the alternative, an Order that the Claimant be admitted into the Bachelor of Education programme which the 1st Defendant is currently offering;
- e) Damages:
- f) Further and such other relief as this Honourable Court deems fit:
- g) Costs to be costs in the claim."

[2] The factual matrix giving rise to the claim is to be found in the affidavits of Meshia Davis dated 4th November 2011, 23rd January 2012, 11th October 2012 and 3rd December 2012; and of Cheryl Foreman dated 4th January 2012 and 25th January 2012; as well as the affidavit of Mark Malabver dated 27th November 2012.

[3] Notwithstanding the number of affidavits filed, and the several documents exhibited and contained in the agreed bundle of documents filed, the facts can be shortly stated. The claimant registered and was accepted to do a diploma programme.

The school's regulations allow students who fail a course to have three re-sits. The claimant failed several courses. However, in the year in which this occurred the school decided it would no longer offer a diploma but instead offered a degree. This decision was prompted by a cabinet decision. The school says the examinations are externally administered. The claimant was not allowed to do the re-sits and was refused entry to the degree programme. The claimant maintains she has a right to re-sits or alternatively to admission to the degree programme. The school says she has not matriculated to do the degree and ought to do so by acquiring additional Caribbean Examination Council (CXC) subjects. The school no longer offers a diploma and therefore it is impracticable if not impossible to offer the resits.

[4] In the course of submissions I enquired of counsel whether this was not a matter where the remedy if any lay in the law of contract. The claimant's counsel stated that although there was a contract with the school, there was a breach of regulation by the school and hence the matter was amenable to judicial review. If the court was not with him, he would agree to the matter being allowed to continue as if begun by claim form. The response from the Crown was to suggest that the court had no jurisdiction to allow continuation as if begun by ordinary claim.

[5] The regulations for teachers' certification on which the claimant relies, are issued by the Joint Board of Teacher Education. See page 1 of the agreed bundle of documents filed on the 29th January 2013. The preamble to Section A states:

"In 1965, the Institute Board of Teacher Education was established as a result of consultation between the governments in the regions and the University of the West Indies. Prior to this, the Ministries of Education in the Bahamas, Belize and Jamaica certified their teachers through Teacher Training Boards established by their respective ministries and granted their own certificates and diplomas in teaching. Accordingly, the Ministries of Education in the Bahamas, Belize and Jamaica devolved their teacher training functions to Institute Board and abolished their separate Teacher Training Boards. The Institute Board of Teacher Education, later

renamed the Joint Board of Teacher Education (JBTE), became the certifying body for teachers. One of the major functions of this new Board of Teacher Education was to guarantee standards in teacher education.

QUALITY MANAGEMENT

By definition, the Joint Board of Teacher Education (JBTE) is a regional body which has a Secretariat and conducts most of its meetings on the Mona Campus with one meeting held every three years in one of the other two territories. The regional nature of the JBTE is also manifested in its structure which ensures participation of representatives from educational institutions, Ministries of Education and teachers organizations in the three countries concerned. In 1965, Belize and the Bahamas were still colonies of Britain while Jamaica was a newly independent territory. Today, the Bahamas, Belize and Jamaica are all sovereign nations. In all of its responses to the needs and demands of the three countries, the JBTE seeks to be flexible and supportive as each country responds to its changing needs.

Since 1965, the JBTE has grown considerably with respect to the number of teachers being certified each year, the number of institutions that now fall under its umbrella and the number of programmes of teacher education that are currently in operation. As the participating nations develop and the demands of the teaching profession become more sophisticated and complex, this trend of diversification and quantitative expansion will continue. The challenge to the JBTE is to be sufficiently flexible in accommodating increasing and changing demands while at the same time continuing to ensure high standards throughout the region.”

[6] The Joint Board of Teacher Education is not a party to these proceedings.

[7] The regulations in Section C establish the three year diploma in teaching and provides,

“1. Certification

- a) Students who have completed a course of study approved by the JBTE and who have satisfied the conditions of passing as set out in these regulations, shall be deemed to have qualified for the award of the JBTE Diploma in Teaching.
- b) The qualification for certification shall be successful completion of the programme approved by the JBTE, and the possession of qualities and characteristics suitable for teaching.”

[8] Section 4, entitled Conditions of Passing reads as follows:

“The programme shall be structured on a credit basis and promotion from one level to the next of a subject will be determined by whether or not the student has satisfied the stated prerequisite(s). While each course will be examined in each semester or year in which it is taught, the Diploma Programme will be assessed in two parts; Part One and Part Two. Part One will coincide with the first year and Part Two with the second and third years. In order to successfully complete each Part and each programme as a whole, students must satisfy the following conditions:

a) Part One/Year 1

For Part 1, two levels of failure are recognized: outright failure and referral which are defined in relation to the particular programme as set out at (iv) - (vi) below.

- i) An outright failure must repeat the examination as a whole and will have two chances in three years to do so. He/she may apply for credit for those courses passed at a grade of B or above. Students who are unsuccessful in both re-sits will not be allowed to re-enter any teacher education programme approved by the JBTE for at least five years.
- ii) Students who are referred will be permanently credited with the courses passed.
- iii) No student may progress to Part 11 having failed courses totalling more than 12 credits.

- iv) Early Childhood, Primary and Special Programmes: In the Early Childhood, Literacy Studies, Primary and Special Education Programmes, a candidate who has failed courses totalling more than twelve credits across the entire year will be deemed to have failed the examination as a whole. Notwithstanding, if a student has failed courses totalling 12 credits within either (a) English and Education or (b) his/her area of specialization and either English or Education, he/she shall be deemed to have failed the examination as a whole.
- v) Candidates who have failed courses up to a maximum of twelve credits will be deemed to be referred as long as those twelve credits are not concentrated only within either English and Education, or his/her area of specialization and either English or Education.
- vi) Secondary Programme: In the Secondary Programme, a candidate who has failed courses totalling more than twelve credits across the entire year will be deemed an outright failure, that is, to have failed, that examination as a whole. Notwithstanding, a student who has failed courses totalling 12 credits within his/her teaching subjects will be deemed to have failed the examination as a whole.”

[9] The claimant admits to failing courses totalling more than 12 credits. In fact she failed courses totalling more than 28 credits, (see letter dated 9th August 2011 page 35 bundle 7 agreed documents). She explains her poor performance on personal difficulties and hardships experienced during the 2010-11 school year. These included her mother being diagnosed with cancer.

[10] She stated that at a meeting on the 4th July 2011, the school delivered to her a memorandum dated 28th June 2011 which read as follows:

*“To: Ms. Meshia Davis
SJ10-6393*

*From: Miss Cheryl A. Foreman
Vice Principal – Academic Affairs*

Date: June 28, 2011

You are referred in College English 1 (4), Foundation of Literacy Development (3), Mathematics I (6), Science for Primary Teachers (6),

Study & Teaching of Religious Education (3), and Social Studies Foundation (6). This is a total of twenty-eight (28) credits.

Joint Board of Regulation Section C 4A (IV) states that a candidate who has failed courses totalling more than twelve credits across the entire year will be deemed to have failed the examination as a whole. This is an outright failure. An outright failure must repeat the examinations a whole and will have two chances in three years to do so. Such a student is not eligible to write examinations in the supplemental sitting.

No student may progress to Part II having failed courses totalling more than 12 credits. Therefore you cannot be promoted to Year 2.

Please contact the College to discuss your options.”

[11] Subsequent to the meeting of the 4th July 2011, she alleges she was first advised by the 1st Defendant that year 1 of the diploma would no longer be offered effective September 2011. She was advised that if she wished to pursue a career in teaching she would need to apply for admission to the Bachelors in Education. The letter outlining that option is dated 9th August 2011. A more detailed statement of the position was related to her attorneys by letter dated 19th September 2011.

“ *St. Joseph’s Teachers’ College
16 Old Hope Road
Kingston 5
Jamaica W.I*

September 19, 2011

*Nigel Jones & Co.,
Attorney-at-law,
Suite #12,
Braemar Suites,
1D – 1E Braemar Avenue
Kingston 10*

Attention: Mr. Nigel Jones

Dear Sirs,

Re: Meisha Davis

Your letter of August 22, 2011 to St. Joseph's Teachers' College concerning the above named student has been brought to my attention. I regret delay in replying due to the fact that I was off the Island but I did have a telephone conversation with your Mr. Nigel Jones on the 7th instant and herewith confirm the following:

- 1. Your client was a Part 1/Year 1 Student in the Diploma Course which has been discontinued in all the teachers' colleges as of September 1, 2011.*
- 2. She failed courses totalling 28 credits in examinations administered by the Joint Board of Teacher Education and governed by Regulations of Teacher Certification.*
- 3. She cannot proceed to Year 2/Part 2 because Regulation 4(a) (iii) of the said Regulations stipulates that no student may proceed to Part 2 having failed courses totalling more than 12 credits in Part 1/Year 1.*
- 4. Whereas Years 2 & 3 of the Diploma Course are proceeding, the College does not have a Year 1 as all students in their first year are now on a four year degree course, for which matriculation is required and there are new applicable Regulations.*
- 5. If your client wants to do the degree course she should consult the College on the subjects that qualify for matriculation. It is my understanding that she requires at least one more academic subject to qualify and this she may do at the next sitting of the CXC.*
- 6. When she is duly qualified she may write a letter to the college requesting to be re-admitted.*

Hopefully this letter confirms our discussion on the 7th instant and that your client has a better understanding of the requirements to continue teacher training.

Yours,

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*Ursula Khan
Chairman of the Board of Management of St. Joseph's Teachers' College*

*cc: Dr. Sr. Melhado, Principal
cc: Permanent Secretary, Ministry of Education"*

[12] The claimant's attorneys by letter dated 19th September 2011 proposed the following:

- a) Immediate enrolment in the degree programme
- b) The claimant would give an undertaking to sit and obtain a pass in religious education on or before January 2013 and
- c) The claimant assured them she had recovered from her difficulties and has support to take care of her mother.

[13] The school rejected this proposal. The letter so advising is dated 21 September 2011 and is as follows:

September 21, 2011

*Messrs. Nigel Jones & Co.,
Attorneys at Law,
Suite #2 Braemar Suites,
1D – 1E Braemar Avenue,
Kingston 10.*

Attention: Mr. Nigel Jones

Dear Sirs,

Re: Meshia Davis

I have discussed the contents of your letter of the 19th instant with the Principal and the Vice Principal in charge of Academic Affairs of the College and I regret to inform you that your proposal cannot be accommodated as your client has not matriculated so as to qualify for admission to the degree program. Additionally her purported undertaking to qualify by January 2013 is too far into the future even if other considerations were acceptable.

Please note that as your client did not satisfactorily complete the lower academic level which is Year I/Part I of the Diploma course, she cannot be allowed to be enrolled into the higher academic level unless she has the required subjects for matriculation. Furthermore, she struggled in the lower academic level during the year therefore there is no evidence in her performance in the Diploma Program to suggest that she is ready to handle a higher academic standard at this time.

It is therefore in her best interests that she qualifies for matriculation before, asking to return to the College. In this way she would adjust mentally to her new environment both at home and at the College and be better able to cope with the stricter requirements and higher academic

standards of the degree course. Kindly use your good offices to try and help her to see the wisdom of waiting and qualifying so that the College may assist her in achieving her goal of contributing to the education of the nation.

Yours,

*Ursula Khan
Chairman of Board of Management of St. Joseph's Teachers' College*

cc. Dr. Sr. Melhado, Principal

cc. Permanent Secretary, Ministry of Education

[14] The claimant says that the defendants' decision to prevent her from repeating year 1 of the diploma was unreasonable and unlawful and in breach of her legitimate expectation.

[15] The defendants explain that as at August 2011 it no longer offered the diploma in teaching. This was in accordance with a decision of the cabinet that all the country's teachers should be qualified with at least a bachelor's degree. Teachers Colleges in Jamaica were therefore mandated to develop a Bachelors of Education Degree programme in accordance with that policy direction. This was done by a steering committee which advised and oversaw the phasing out of the diploma and the implementation of the four year Bachelors Degree in teacher training institutions. In the words of Cheryl Foreman, vice principal of the 1st defendant:

"The Bachelors of Education Degree Programme was commenced at the St Joseph's Teachers' College in September 2011. With the implementation of Bachelors Education Degree Programme, all year 1 courses in the JBTE Diploma in teaching are no longer offered by Teacher's Colleges. Therefore there is no year 1 of the JBTE Diploma in teaching programme to facilitate an opportunity for Miss Davis to repeat year 1 examination as a whole"

[Affidavit dated 4th January 2011 paragraph 9]

[16] At paragraph 15 of the said affidavit the vice principal stated:

“It is the College’s position that a student who performed so poorly at a lower level that is, at the Diploma level, cannot be automatically promoted to a higher level of study in circumstances where she does not matriculate. The college suggested to Miss Davis that she take the necessary steps to qualify for the degree programme, but she has not done so. Miss Davis was also informed that once qualified she would not have to reapply to the college, but simply write to the college requesting re-admittance and produce a transcript showing that she had passed the additional CXC/CSEC subject at the required level”.

[17] In her affidavit of the 25th January 2012, Cheryl Foreman outlined the differences between the bachelors programme and the degree programme. She also indicated that were the court to require the school to offer the diploma to the claimant she would be the only student registered. Courses would need to be reintroduced and at least 12 lecturers retained for the purpose. At paragraph 7 of the affidavit she stated:

“Another important consideration is that the college would not have the authority to assess the claimant’s work or confer the diploma at the end of the period of study. The Joint Board of Teacher Education (JBTE) is the body that prepares and certifies examinations and the diploma. The college offered the diploma in teaching on behalf of the (JBTE), an entity established in 1965 by the Government of Jamaica, through the Ministry of Education, to be the certifying body for teachers. The mandate of the JBTE will cease in June 2013 with an additional year for completion of the final part-time cohort. The JBTE no longer prepares examinations or assessments for year 1 or year 2 of the diploma programme. Therefore the college will have no authority to prepare anyone for assessment in these courses.”

[18] The parties filed written submissions supported by a plethora of authorities. This was buttressed by oral submissions before this court. I do not think it necessary to restate the submissions in this judgment nor to refer to the cases cited. Nor do I mean in any way to show a lack of appreciation for the industry of counsel which was self evident. However, this court is of the view that judicial review should be refused to the claimant on several grounds.

[19] In the first place it is well established that relief by way of judicial review is not readily granted where other remedies exist. Where there is an alternate remedy an explanation for not pursuing it is required Order 56.3(3)(d). In this case it would appear that the claimant's remedy, if any, ought to be contractual. Her written submissions refer throughout to her "contract" with the 1st defendant. Presumably there has been consideration passing between herself and the institution upon enrolment. Such private contractual relations are not the proper subject matter of an application for judicial review. I am not aware of any exceptional circumstance that would motivate this court to offer public order remedies where the relationship is one of private contract between the parties. The Claimant has an alternate remedy and the nature of the relationship is not one to attract public order remedies.

[20] Secondly, and even if this court were to treat the matter as appropriate for judicial review it is not a matter in which a court would offer a remedy. Relief would not be appropriate and will be refused for the following reasons:

- a) This court will not substitute its opinion as to what is appropriate in the specialist area of teacher education. Nor will the court determine the appropriate time line for implementation or the reasonableness of the policy decision to offer a degree rather than a diploma. It is not the role of the court to do so particularly where specialist organisations are established by a Parliament for the purpose.
- b) No authority has been cited nor regulation indicated which precludes the relevant authorities amending their regulations and phasing out or phasing in programmes. There is no suggestion that the decision to offer the degree instead of the diploma was *ultra vires*. As such the only questions arising are as to the reasonableness of the decision and whether the claimant had a legitimate expectation such as to preclude the change.
- c) The evidence relevant to legitimate expectation differs. The claimant alleges she was never told of the intention to change to a degree programme until after she had failed the courses. The defendants on the other hand allege that all entrants to the year I diploma were advised of the possibility of change and that all students in the course of the year were advised of the changes. There was no cross-examination and hence no basis for this court to prefer one account over the other. In any event, insofar as the facts to ground an alleged legitimate expectation will be the same to support a claim in contract, that is the regulations represented the

terms of the agreement to provided a diploma, this court of judicial review in its discretion would decline a remedy.

- d) The uncontested evidence of the defendants is that the change was a matter of public educational policy. Furthermore, the JBTE which is not a party to these proceedings, would no longer be examining for the diploma. Therefore even if the court were to grant the relief claimed against these defendants, it would be a matter outside its control as to whether the claimant could receive a diploma in teacher education.
- e) Insofar, as the alternative claim as amended i.e. for an order that she be admitted to the bachelor degree programme, is concerned, this court would similarly decline such remedy. This is because the experts have determined their matriculation requirements. It would be inappropriate for this court to impose on the institution a student they determined had not qualified. Furthermore her offered "undertaking" to pass certain subjects by a certain date is a promise the fulfilment of which cannot be guaranteed. This court would certainly not make the order sought in this regard.

[21] In the result therefore judicial review is inappropriate in the circumstances of this case. I will, however, make an order pursuant to Order 56 (10) (3) (b) that the application be dealt with as if commenced by Claim Form. The claimant if so advised may seek a remedy in that forum. Nothing I have said in this judgment is intended to impact on that action so that I am neither of the view that there is a viable action in contract nor am I to be taken to express a view that there is not. Simply put judicial review is discretionary and this court for the reasons outlined above will exercise its discretion to refuse the relief claimed in this forum. I therefore Order that:

1. The claim continues as if commenced by claim.
2. The claimant is to prepare file and serve Particulars of Claim on or before the 31st May 2013.
3. The defendants are at liberty to serve and file a defence within 42 days of the date of service of the Particulars of Claim.
4. Thereafter the matter is to proceed to mediation and Case Management Conference as provided for in the Rules.
5. In keeping with the general practice, and as acknowledged in Order 56 (15) (5) I make no Order for costs in relation to the proceedings for judicial review. I would not wish my costs Order to act as a disincentive for citizens who wish to challenge the actions of public servants. I do not

consider that the applicant acted unreasonably in bringing this application and permission was granted by this Court for her to do so.

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DAVID BATTS QC
PUISNE JUDGE