



[2022] JMSC Civ.200

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV00583

**IN THE MATTER OF DR. NICHOLEEN
DEGRASSE-JOHNSON, PRINCIPAL,
EDNA MANLEY COLLEGE OF THE
VISUAL AND PERFORMING ARTS**

AND

**IN THE MATTER OF THE BOARD OF
MANAGEMENT OF EDNA MANLEY
COLLEGE OF THE VISUAL AND
PERFORMING ARTS**

AND

**IN THE MATTER OF THE EDNA
MANLEY COLLEGE OF THE VISUAL
AND PERFORMING ARTS SCHEME
(APPROVAL) ORDER, 2004**

**THE BOARD OF MANAGEMENT OF
EDNA MANLEY COLLEGE OF THE
VISUAL AND PERFORMING ARTS**

AND

**IN THE MATTER OF THE EDNA
MANLEY COLLEGE OF THE VISUAL
AND PERFORMING ARTS SCHEME,
1999**

AND

**IN THE MATTER OF PART 56 OF THE
CIVIL PROCEDURE RULES, 2002**

BETWEEN	DR. NICHOLEEN DEGRASSE-JOHNSON	CLAIMANT
AND	THE BOARD OF THE EDNA MANLEY COLLEGE OF THE VISUAL AND PERFORMING ARTS	1ST DEFENDANT
AND	DONAHUE MARTIN	2ND DEFENDANT
AND	WINSTON EWART	3RD DEFENDANT
AND	DORRAINE REID	4TH DEFENDANT

(The 2nd to 4th Defendants are sued in their representative capacity as members of the 'Personnel Committee' of the Board of Management of the Edna Manley College of the Visual and Performing Arts)

AND	MARIGOLD HARDING	5TH DEFENDANT
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(In her representative capacity as a Chairman of the Board of Management of the Edna Manley College of the Visual and Performing Arts and of its 'Personnel Committee')

**Mr. Andre Earle K.C. and Ms. Diandra McPherson instructed by Earle and Wilson
for the Claimant**

Ms. Annaliesa Lindsay and Mr. Josemar Belnavis instructed by Lindsay Law Chambers for the Defendants

Heard: July 18, 2022 and November 11, 2022

Judicial Review – Section 9 of the Education Act – Section 7 of the Schedule to the Edna Manley College for the Visual and Performing Arts Scheme (Approval) Order – Regulation 55 of the Education Regulations – Illegality – Procedural Impropriety – Bias

CARR, J

Background

- [1]** The Claimant (Dr.Degrasse-Johnson) was appointed Principal of the Edna Manley College of the Visual and Performing Arts (**The College**) in 2014. By way of a letter dated July 24, 2019 she was notified of allegations made against her which were now the subject of disciplinary investigations. She was asked to respond to those allegations. She did so, by letter dated August 9, 2019. A few days later she was invited to proceed on leave to facilitate a forensic audit and investigations into complaints made against her. She declined the invitation. She was subsequently suspended pending the outcome of the investigations.
- [2]** In January of 2020 she was notified by letter of a disciplinary hearing that was to be conducted. The disciplinary hearing commenced on February 5, 2020 and Counsel on behalf of the Claimant challenged the jurisdiction of the ‘Personnel Committee’. The Personnel Committee after hearing the objections ruled that it was properly constituted and it had the jurisdiction to hear the complaint.
- [3]** The Claimant filed an application for leave to apply for judicial review and on February 25, 2020 Jackson-Haisley, J. granted the application and made the following orders:

1. That leave be granted to the Applicant to apply for judicial review by way of an Order of Certiorari against the 1st Respondent, quashing the decision of its alleged 'Personnel Committee', issued on the 13th day of February 2020, that the Committee was properly constituted and had jurisdiction to conduct the disciplinary hearing in relation to the Applicant.
2. That leave be granted to the Applicant to apply for judicial review by way of an order of mandamus compelling the 1st Respondent to return the Applicant to her substantive post as Principal of the Edna Manley College of the Visual and Performing Arts in order to carry out her duties herein.
3. That leave be granted to the Applicant to apply for judicial review by way of an order of prohibition prohibiting the alleged 'Personnel Committee' from continuing the disciplinary hearing against the Applicant.
4. An extension of time is granted to the 18th day of February, 2020 in order for the Applicant to apply for Judicial Review from the 1st Respondent's decision to refer complaints to the Personnel Committee.

The Claim

[4] By way of a fixed date claim form the Claimant seeks the following orders:

1. An order of Certiorari against the 1st Defendant, quashing the decision of its alleged 'Personnel Committee', comprised of the 2nd, 3rd and 4th Defendants, issued on the 13th of February, 2020, that the Committee was properly constituted and had jurisdiction to conduct the disciplinary hearing in relation to the Claimant.
2. An order of mandamus compelling the 1st Defendant to manage and maintain the Edna Manley College of the Visual and Performing Arts Scheme, 1999 by returning the Claimant to her substantive post as

Principal of the Edna Manley College of the Visual and Performing Arts in order to carry out her duties herein.

3. An order of prohibition restraining the alleged 'Personnel Committee', comprised of the 2nd, 3rd and 4th Defendants, from continuing the disciplinary hearing or proceedings against the Claimant.
4. An order of Certiorari against the 1st Defendant, quashing their decision to refer the complaints against the Claimant to their 'Personnel Committee'.
5. A declaration that the Education Regulations, 1980 does not apply to the Edna Manley College of the Visual and Performing Arts which is administered in accordance with the provisions of the Edna Manley College of the Visual and Performing Arts Scheme, 1999.
6. A declaration that the Edna Manley College of the Visual and Performing Arts is to be administered solely in accordance with the provisions of the Edna Manley College of the Visual and Performing Arts Scheme, 1999.
7. A declaration that the 1st Defendant's alleged 'Personnel Committee', comprised of the 2nd, 3rd and 4th Defendants, was without jurisdiction in conducting Disciplinary Proceedings in relation to the Claimant as the Edna Manley College of the Visual and Performing Arts Scheme, 1999 does not establish and permit such a 'Personnel Committee' and thus any decision by the 1st Defendant's said alleged 'Personnel Committee' is null and void and of no effect.
8. A declaration that the decision of the Personnel Committee, comprised of the 2nd, 3rd and 4th Defendants, made on the 13th day of February, 2020, is null, void and of no effect, owing to the bias or apparent bias of the 2nd Defendant.

9. A declaration that the 1st Defendant had no authority to suspend the Claimant from her post as Principal of the Edna Manley College of the Visual and Performing Arts pursuant to Regulation 60 of the Education Regulations, 1980, which does not apply to the Edna Manley College of the Visual and Performing Arts.
10. A declaration that the 1st Defendant had no authority to suspend the Claimant from her post as Principal of the Edna Manley College of the Visual and Performing Arts, as the 'Personnel Committee' that determined that there would be a disciplinary hearing into offences allegedly committed by the Claimant was improperly constituted.
11. A declaration that the decision to suspend the Claimant from her post as Principal of the Edna Manley College of the Visual and Performing Arts is null and void and of no effect because the 5th Defendant was in a position of conflict of interest, given that the suspension letter of the 27th of August, 2019 was a consequence of the 5th Defendant's chairing a Personnel Committee, comprised of the 3rd, 4th and 5th Defendants in which she was also complainant.
12. A declaration that the decision of the 'Personnel Committee', comprised of the 3rd, 4th and 5th Defendants on or about the 15th of August, 2019 to hold a disciplinary hearing was tainted by the bias or the apparent bias of the 5th Defendant as Chairman thereof, who was also the Complainant and is thus null and void and of no effect.
13. That such consequential directions may be given as may be deemed appropriate.
14. Damages
15. Costs.

16. Such further and other relief as this Honourable Court may deem just in the circumstances of the case.

Issues

[5] There are two main issues for determination in this case,

- a) Whether **The College** is governed by the Education Act (**The Act**) and the Education Regulations, 1980 (**Regulations**) **OR** the Edna Manley College for the Visual and Performing Arts Scheme (Approval) Order, 2004 (**Scheme Order**).
- b) Whether there was a breach of the principles of natural justice at the hearing of the disciplinary committee due to the apparent bias of two of the members who sat on the panel.

The Law

[6] It is incumbent on the Claimant to show by way of evidence that the actions of the Defendants are in breach of the law. A claim for judicial review is made on the basis that a Defendant has failed to comply with the legal framework set out for its operation or has acted in breach of the principles of natural justice. I am guided by the principles as set out by Lord Diplock in the case of **Council of Civil Service Unions v. Minister for the Civil Service**¹. In that case the grounds for judicial review were described in this way:

- a) *Illegality – where the decision is made which is ultra vires the law that regulates the decision making power.*

¹ [1984] UKHL 9

b) Irrationality – where the decision made defies logic. It has been known as the test of “Wednesbury unreasonableness”.

c) Procedural Impropriety – the failure to follow the rules of natural justice and procedural fairness as well as the failure of the decision maker to follow all the procedural steps required by the legislation which enables him to make the decision.

[7] Mr. Earle, has argued that the decision of the Board should be set aside on two bases, that of illegality and procedural impropriety. Ms. Lindsay has contended that the Board conducted itself within the ambit of the law and the decision to proceed with the hearing was unimpeachable.

Analysis and Discussion

Illegality

Submissions on behalf of Counsel for the Claimant and the Defendants

[8] Mr. Earle referred to Section 9(1) (b) and 9(2) of **The Act** which states:

(1) “Every public educational institution shall be administered –

(b) where the Minister so directs, in accordance with the provisions of a scheme approved by the Minister.”

(2) Every scheme which provides for the management of a public educational institution shall contain provisions for the constitution, powers and duties of a Board of Management for the educational institution to which the scheme relates and shall also provide for the keeping and audit of the accounts of such Board in a manner satisfactory to the Minister.”

[9] The **Scheme Order** was approved and gazetted on November 17, 2004. It is the **Scheme Order** which Mr. Earle argues governs **The College**. He further contends that there is no provision in the **Scheme Order** for a disciplinary board and hearing

akin to that provided for by **The Act**. As such the purported hearing conducted by the Board was illegal. In the event that the court does not find favour with that submission, it was suggested that the purported personnel committee was improperly constituted because it included the 3rd Defendant who was not nominated by the National Council on Education in accordance with regulation 85 of the **Regulations**.

[10] Ms. Lindsay accepted that there were no regulations in place with respect to the disciplinary proceedings which ought to be adopted by the Board. Counsel submitted that Section 9 of **The Act** ought to be construed as the overarching legislation as to do otherwise would result in an absurdity. Without regulations governing discipline, the teachers and or Principal of **The College** would be immune from any type of disciplinary action. She asked the court to apply the rules of statutory interpretation and find that **The Act** was the enabling legislation and in this case ought to be read together with the **Scheme Order** to give effect to parliament's true intention for the proper administration of **The College**.

[11] She buttressed her submissions by relying on the text **Statutory Interpretation**² and set out the following passage:

“Because it is made under authority conferred by a sovereign legislature, delegated legislation has the same legal force as statutes and for the most part is interpreted using the same rules and techniques. Generally, the enabling and delegated Legislation are read together as comprising a single scheme. However, the enabling legislation is the dominant partner in this scheme and, unless the legislature expressly provides otherwise, inconsistencies between the two are resolved in favour of the enabling legislation.”

² 2nd Ed., by Ruth Sullivan at page 11.

- [12] In the alternative, it was argued that even if **The Act** does not apply to **The College**, the sole requirement for the institution of disciplinary proceedings against the Claimant, was that, the panel complied with the rules of natural justice. This, she said, did occur and the Board cannot be faulted.
- [13] On the point of the composition of the disciplinary panel, Counsel submitted that the schedule to the **Scheme Order** governed the persons who were to sit on the Board and that there was no requirement for any of them to be a member of the National Council on Education. The court therefore should refer to the **Scheme Order** in making a determination as to the constitution of the members of the personnel committee and not **The Act**.

Findings

- [14] Section 7 of the Schedule to the **Scheme Order** gives the Board the power to make regulations in respect of academic and administrative matters. It is set out as follows:

“The Board may –

(a) after consultation with the principal and with the approval of the Minister, make regulations in respect of all academic and administrative matters relating to the College.”

- [15] There is no issue taken with the fact that there are no regulations in place that contemplate administrative matters. As such the disciplinary process in the event of a complaint made against a teacher, or in this case the Principal, has not been set out in the schedule or in any regulations. As it stands therefore, there is no statutory framework in place to provide procedural guidance in matters where disciplinary action is to be instituted against teachers employed to **The College**.
- [16] How is this to be addressed? It is noted that the Jamaica Gazette which gives effect to the **Scheme Order** speaks to **The Act**. The Schedule which sets out the **Scheme Order** also refers to **The Act**. I find and accept that the **Scheme Order**

is made pursuant to **The Act**, and that the **Scheme Order** is subsidiary to the **The Act** which is the primary legislation.

[17] The **Regulations** accompany **The Act** and at section 2 defines the “Board” or “Board of Management” as, “*the Board of Management of a public educational institution*”. The **Scheme Order** states, “*Whereas section 9 of the Education Act provides, inter alia, that, where the Minister so directs, a public educational institution (my emphasis) shall be administered in accordance with the provisions of a scheme approved by the Minister.*” It is clear from the wording of the section that **The College** is a public educational institution. It is my considered view that as a public educational institution **The College** is governed by **The Act**, and by extension the **Regulations**.

[18] Regulation 55 of the **Regulations** indicates that,

“A teacher in a public educational institution may have disciplinary action taken against him for –

(a) improper conduct while in school;

(b) neglect of duty;

(c) inefficiency;

(d) irregular attendance;

(e) persistent unpunctuality;

(f) lack of discipline;

(g) such other conduct as may amount to professional misconduct.”

[19] Regulation 85 (1) states, “*The Board of Management of every public educational institution shall, for the purpose of facilitating inquiries into allegation of breaches of discipline by or against members of staff or students appoint a personnel committee to which the Board shall refer any such allegations, and such personnel committee shall consist of –*

(a) in the case of a government owned institution –

i) the chairman of the Board;

- ii) one nominee of the Council;*
- iii) subject to sub-paragraph (c), the representative on the Board of the category of accused personnel;”*

[20] Mr. Earle’s contention that in the absence of regulations as to administration the Board is prohibited from instituting disciplinary proceedings against the Claimant does not auger well for the administration of justice. As per **Ruth Sullivan**³:

“In resolving problems in statutory interpretation, courts appropriately take into account the consequences of applying legislation to particular facts. Consequences that are judged to be good are generally presumed to be intended and are regarded as part of the legislative purpose. Consequences that are judged to be absurd or otherwise unacceptable are presumed not to have been intended. As much as possible, interpretations that lead to unacceptable consequences are avoided.”

[21] To follow King’s Counsel’s argument, without specific regulations governing the discipline of teachers at **The College**, the Board would be unable to undertake any proceedings relating to teachers who have committed any act which required disciplinary action to be instituted against them. This would not just be deleterious for the Board but also for the accused teacher. The Board would be constrained to ignore the misconduct of a teacher and continue with him or her in their employment, and the teacher may, if action was taken, be deprived of a fair hearing with regard to any complaint made against him or her. I am inclined to agree with Ms. Lindsay’s argument that this could not be the intention of parliament. Such an interpretation as set out in the text would lead to unacceptable consequences.

[22] In interpreting the legislation, I find that in the absence of regulations specific to **The College**, the overarching provisions and regulations contained under **The Act**

³ Ibid. p. 209

would govern the Board of **The College**. **The College** is a public educational institution and, although it is subject to a **Scheme Order**, it is primarily an institution which is governed under **The Act**.

[23] As a public educational institution it is subject to the **Regulations** as set out under **The Act**. In the circumstances I find that **The College** had the jurisdiction under **The Act** to embark upon disciplinary proceedings as set out in the **Regulations**.

[24] Mr. Earle further submitted, that if the court so finds that the Board had the jurisdiction to conduct the hearing that this should not be the end of the matter, as the panel was improperly constituted. This he says is because **Regulation 85 (1) (a) (ii)** speaks to a nominee of the National Council on Education. Ms. Lindsay asked the court to refer to the **Scheme Order** and highlighted Section 3 (2) which speaks to the members of the Board. The section is set out below:

“The Board shall consist of fifteen members appointed by the Minister of whom –

(a) one member shall be the principal;

(b) one member shall be a representative of the Ministry responsible for education;

(c) one member shall be a representative of the University of Technology, Jamaica and shall be nominated by the president of the University;

(d) one member shall be a representative of the University of the West Indies and shall be nominated by the Vice-chancellor of that University;

(e) three members shall be appointed from persons appearing to the Minister to be representatives of the College community, that is to say, members of staff of the College and members of the Student Council; and

(f) eight members shall be appointed from among persons appearing to the Minister to be suitably qualified for such appointment.

It was her submission that there is no requirement for a member of the Board to be a member of the National Council on Education. This she argued was distinct from the composition of a Board under the **Regulations**. It is important to note that the **Regulations** do not refer to the composition of a Board of a tertiary institution or an institution created under a **Scheme Order**. It is for this reason that I find that the court should adopt the composition of the Board as set out in the **Scheme Order** as opposed to the composition of the personnel committee as set out in **The Regulations**.

[25] In the event that I am wrong on this point. What would be the effect of having a member of the Board who is not a member of the National Council on Education sitting as a part of the personnel committee? The Board in relying on the **Regulations** to proceed to hear the complaint against the Claimant may be unable to have such a member present as the composition of the board did not contemplate a member of the National Council on Education. Given that the members of the board are the persons who are to form the personnel committee, for the purpose of disciplinary proceedings, I have to agree with Ms. Lindsay that this would not result in an injustice to the Claimant. The composition of the personnel committee must come from members of the Board. The decision to proceed with the hearing in the absence of a member of the National Council on Education does not vitiate the decision to proceed with the hearing.

[26] In summary, I find that **The College** was correct to rely on **The Act** and the **Regulations** to conduct the disciplinary hearing into the complaint made against the Claimant in the absence of regulations governing procedure. Although there was no member of the National Council of Education sitting on the panel I do not find that this resulted in an injustice to the Claimant, as no such nominee was required to be a member of the Board of **The College**. The declarations sought at paragraphs 1 to 10 of the fixed date claim form are refused.

Procedural Impropriety

Submissions of Counsel for the Claimant and the Defendants

[27] Mr. Earle raised the issue of bias on the part of the 2nd and 5th Defendant. The 2nd Defendant allegedly commented in a meeting with the 1st Defendant that in respect of the Claimant his “**confidence has waned for some time now.**” The 5th Defendant who was the Chairman of the personnel committee in an interview with the Gleaner newspaper commented, “**I think she felt it was better to lie to us than to lie to Parliament. When you lie to Parliament it is like lying to the nation.**” She also insinuated that the Claimant withheld information from the 1st Defendant. It was also the 5th Defendant who sat as the Chairman of the Personnel Committee which considered the complaints against the Claimant and determined that a hearing should be held into the charges laid against her.

[28] Mr. Earle cited the case of **Porter v. Magill**⁴ which he said set out the test for apparent bias as follows:

“whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.”

It was submitted that the 5th Defendant, who was also the complainant, was a judge in her own cause and so was tainted with bias. The decision of the personnel committee to proceed to a hearing was null and void and of no effect as it was tainted with bias on the part of both the 2nd and 5th Defendant.

[29] Ms. Lindsay responded to this submission by pointing out that the issue Mr. Earle raised is based on letters written by the 5th Defendant in her capacity as the Chairperson of **The College** and not as the Chairperson of the personnel committee. The first letter dated July 24, 2019 was written to the Claimant outlining

⁴ [2001] UKHL 67, [2002] 2 A.C. 357 at para. 99-103

the allegations against her. It was submitted that thereafter it was the 2nd to 4th Defendants who constituted the personnel committee who reviewed the response of the Claimant and made a determination to proceed with the hearing. The allegation that she was a part of the personnel committee is therefore inaccurate.

[30] The apparent or perceived bias on the part of the 2nd Defendant, it was submitted, could have been dealt with at the hearing. Counsel had the opportunity of cross-examination and he also had an opportunity to ask that the 2nd Defendant recuse himself from being a member of the personnel committee.

[31] Ms. Lindsay argued further that the procedural steps were followed in the hearing and that the principles of natural justice were applied. In the circumstances she asked that the court find that any apparent bias on the part of the 2nd Defendant was insufficient to nullify the decision to proceed with the disciplinary hearing.

Findings

[32] On the ground of procedural impropriety or a breach of natural justice, it is well established that the role of the tribunal is to ensure fairness. The fundamental pinnacle of a right to a fair hearing is that all sides must be heard. The rule against bias is that a judge or tribunal should disqualify themselves from any case in which they may be or may fairly be suspected to be biased.

[33] The comments attributed to the 2nd Defendant may be considered by a fair-minded observer as having an appearance of bias. The comments were directly concerned with the Claimant and would give anyone with knowledge of the attendant circumstances pause. However, having ruled on the issue of jurisdiction I am not of the view that his inclusion at the preliminary stage in determining to proceed in the face of the objection by counsel resulted in undue prejudice to the Claimant. The issue of jurisdiction having been determined based on the Regulations, it was now open to the personnel committee to hear further objections or arguments as to the composition of the committee.

- [34] As it regards the 5th Defendant, the evidence is that by letter dated July 24, 2019 the Claimant was advised that the Board of **The College** had received complaints about her conduct. The said letter advised the Claimant that the personnel committee had commenced investigations with respect to the complaints and a request was made for her to respond to the allegations to the personnel committee. The Claimant responded by letter dated August 9, 2019 and directed the letter to the Chairman of the personnel committee, "Attention: Chairman Harding".
- [35] By letter dated January 10, 2020 the Claimant was given Notice of the hearing which was to take place before representatives of the personnel committee. The names of the persons who would sit on the committee were set out at page 5 of the letter containing the Notice of Hearing as follows:
- “1. Donahue Martin, Interim Chairman of Committee
 2. Mr. Winston Ewart, Nominee of the Board
 3. Miss Dorraine Reid, Head of Department/Faculty Association/Acting Faculty Representative.”
- [36] The 5th Defendant was not a part of the personnel committee which commenced the hearing into the complaints. The referral of the complaints to the personnel committee by the 5th Defendant was required given her role as the Chairman of the Board of **The College**. As a complainant she was ineligible to sit on the personnel committee. In the circumstances I cannot find that the Claimant's right to a fair hearing was breached by the conduct of the 5th Defendant in referring the complaint to the personnel committee.
- [37] It is fair to say that from the details set out in the notice that the Claimant was given an opportunity to have a fair hearing of the complaints made against her. She was advised of the date of the hearing, the allegations, the fact that she could have an Attorney present, and the opportunity for her to call witnesses in her defence to the allegations. The Claimant was further advised that there would be 8

complainants/witnesses in the matter and that copies of the documents to be relied on at the hearing could be collected at **The College**.

[38] In summary, I find that the decision to refer the matter to the personnel committee and the decision that the committee had the jurisdiction to hear the complaint was in keeping with the rules of natural justice and was not tainted by the appearance of bias. The declarations sought at paragraphs 11 to 15 of the fixed date claim form are refused.

Conclusion

[39] The decision to refer the matter to the personnel committee for a hearing was not improper or illegal as the appropriate legislation to govern the discipline of teachers at **The College** is that of **The Act** and its **Regulations**. The proceedings as outlined by the Board was in accord with the principles of natural justice, as the Claimant was given an opportunity to have a fair hearing of the complaint made against her.

Order:

1. The orders sought in the fixed date claim form are refused.
2. Each party is to bear their own costs.