[2015] JMSC Civ 207

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

THE CIVIL DIVISION

CLAIM NO. 2014 HCV 02179

BETWEEN	**MONICA HAUGHTON**	**CLAIMANT**
AND	**PERSONNEL COMMITTEE OF THE BOARD OF MANAGEMENT OF LIBERTY HILL PRIMARY SCHOOL**	**1st RESPONDENT**
AND	**MINISTRY OF EDUCATION**	**2nd RESPONDENT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**3rd RESPONDENT**

IN CHAMBERS

Mrs. Georgia Hamilton instructed by Mesdames Georgia Hamilton & Co., Attorneys-at-Law for the Claimant/Applicant.

Miss. Lisa Whyte instructed by the Director of State Proceedings for the Respondents.

Heard: 5th June 2014 and 30th October 2015.

Judicial Review - Application for leave to apply for Judicial Review - Allegations of Professional Misconduct - Breach of Financial Administration and Auditing Act - Education Act – Education Regulations - Whether there is an arguable case with a realistic prospect of success - Continuation of hearing complain before inappropriate body – Matter Statute-Barred – Sufficient interest – Alternative Remedy available – Section 37 of the Education Act – Appellate Procedure – Application for Judicial Review fails.

CAMPBELL J,

[1] The Applicant, Monica Haughton, Principal of the Liberty Hill Primary School ("the Principal") filed an Ex Parte Notice for Leave to Apply for Judicial Review, on 7th May 2014, seeking inter alia;

"i. *Leave be granted to apply for Judicial Review of the decision of the 1st Respondent to commence hearing allegations of professional misconduct against the Applicant on February 25, 2014.*

ii. Leave be granted to apply for Judicial Review of the decision of the 1st Respondent to commence hearing allegations of professional misconduct against the Applicant on April 16, 2014.

iii. The grant of leave operates as a stay of the hearing of all complaints against the Applicant by the 1st Respondent.

iv. An Order for an interim payment of $371,489. 22 to the Applicant by the 2nd Respondent within seven (7) days of the date hereof together with interest at such rate and for such period as this Honourable Court thinks fit."

[2] In her application the Principal relied on certain facts to support the application. It was noted that on or about June 25, 2013, the Ministry of Education ("the Ministry") prepared a financial report ("the report") for the Liberty Hill Primary School containing allegations of irregularities. The report, however, did not state that disciplinary action ought to be taken against the Principal. The Ministry's financial report was submitted to the Chairman of the Board of Management of Liberty Hill Primary School ("the Board") on July 5, 2013 and was discussed in Board meetings held on July 9, 2013 and July 17, 2013.

[3] The Ministry's financial report was treated by the Board as a complaint against the Principal, and it was submitted to the Personnel Committee of the Board ("the Personnel Committee") for a determination. The Principal was suspended from her duties on 18th July 2013 and has had a portion of her salary withheld since that date.

[4] The Personnel Committee commenced hearing allegations against the Principal on February 25, 2014 and continued on March 26, 2014, March 27, 2014 and April 16, 2014. Further hearings were scheduled to continue on May 15, 2014 to May 16, 2014. On February 25, 2014, the Applicant's Attorneys-at-Law submitted to the Personnel Committee that the financial report was not a complaint as required by Regulation 56 of **The Education Regulations**, 1980 ("the Regulations"). The Personnel Committee rejected those submissions and decided to commence hearing of the allegations against the Applicant.

[5] On April 16, 2014 submissions were made to the Personnel Committee on the Applicant's behalf to the effect that the hearing of the allegations became statute-barred on April 10, 2014 based on Regulations 58. The Personnel Committee rejected the Applicant's submissions and has continued its hearing. In making this determination, the Personnel Committee stated that it relied on a letter purportedly written by the then Chairman of the Board.

[6] On behalf of the Principal it was submitted that the Personnel Committee acted ultra vires and without jurisdiction in commencing and continuing its hearing of allegations against the Applicant on February 25, 2014 and accepted inadmissible hearsay evidence, purporting to be from the then Chairman of the Board.

[7] It was further claimed that the Personnel Committee unfairly rejected the Applicant's evidence and on the 25th June 2013, the then Chairman of the School Board was served with the Financial Management Report, for the period September 2010 to April 2013, in respect of Liberty Hill Primary School. The report contained a number of points, which were discussed with the Principal and were to be implemented by July 4, 2013.

[8] On 19th July 2013, the Applicant's Attorneys-at-Law wrote to the Chairman, in which reference was made; "*with respect to a directive from the Board of Management of the Liberty Hill Primary School,… that she submit a request for early retirement to the Board first thing this morning, following allegations of*

financial impropriety made against her." The letter complained of the following, inter alia:-

i. The Board has not referred the matter to the Personnel Committee. There being no such Committee, requirements under Regulations 57(1) and (3) were not observed.
ii. There was no preliminary consideration by the Committee to determine whether the complaint was trivial or not.
iii. There was no preliminary report from the Committee to the Board.
iv. The meeting on 19th July 2013 did not constitute a meeting of the Committee, for the purposes of the Regulations.
v. The minimum fourteen (14) days notice was not given.
vi. There was no report from the Committee to the Board following the enquiry stating whether charges were proven or not.

[9] On 31stJuly 2013, a Notice of Hearing of Complaint, dated 30th July 2013, was sent to the Applicant, notifying her; "*that a complaint has been made to the Board of Management of Liberty Hill Primary School regarding breaches and violations to the Financial Administration and Auditing Act and also inefficiencies in your job performance as Principal of Liberty Hill Primary School*." There was listed a number of charges contrary to the **Financial Administration and Auditing Act ("FAAA").** The Principal was notified that a hearing into the complaints would be held at the school on Friday, 16th August 2013. That the Personnel Committee would make a determination of the categorization of the complaint, and the sanction that could be applied.

[10] On 19th July 2013, counsel for the Applicant wrote to the Chairman stating that; "*it is our considered opinion that this notice is defective, as there is no indication of the person at whose instance the notice is being given… the Board has acted ultras vires… as this matter does not fall within the Board's function…this is a power reserved specifically for the Personnel Committee.*"

[11] On January 21, 2014, a Notice of Hearing of Complaint was sent to the Principal outlining substantially similar charges to those that had formed the basis of the 16th August 2013 hearing, and contrary to the **FAAA**. The hearing was to be held on the 25th February 2014 at which time the Personnel Committee would make a determination, if any category of offence had been proven, and could make a recommendation to the Board for sanction to apply. The notice contained the names of the Personnel Committee members and the witnesses to be called.

[12] Mrs. Georgia Hamilton, on the 3rd April 2014 wrote to the 2nd Respondent, stating that the hearing will become statute-barred by April 9, 2014 and relied on Regulation 58 of **The Education Regulations**, 1980 which provides;

> *"If a complaint about a teacher's conduct is not heard* ***and a decision handed down within nine months*** *of the lodging of the complaint, the* ***matter of the complaint shall lapse*** *at the expiration of the period of nine months aforesaid."* **[Counsel's Emphasis]**

She submitted that the complaint, being the financial report, and the accompanying letter dated June 25, 2013, having been lodged on July 9, 2013, will elapse on April 9, 2014.

[13] The Ministry, in a letter dated the 7th April 2014, disagreed with Mrs. Georgia Hamilton's position, and stated in part, that;

> *"the financial report…was not the only written complaint investigated and referred to the Board of Management which*

initiated the hearing ... two Education Officers submitted reports to the Board during the investigation."

Further, in response to Mrs. Hamilton's position that the Board that received the financial report was not properly constituted and the lodging of the report on such a Board, "would therefore be of no effect*",* the Ministry contended that a properly constituted Board came into effect on January 1, 2014. The Personnel Committee weighed the reports and made its decision to prefer the charges on or about January 21, 2014, thereby giving due notice to Mrs. Monica Haughton.

The relevant Regulations

[14] Regulation 74, provides for the administration of "*every primary and all-age public educational institution* by *a Board, which shall consist of not more than eight (8) persons appointed by the Minister,"* constituted as prescribed by the Regulation.

[15] Regulation 56, provides for the reception of a complaint, which is the first step in a hearing to take sanctions against a teacher in a public educational institution. The complaint must be received by the Board, it must be in writing, to the effect that; *"the conduct of a teacher employed by the Board is of such that disciplinary action ought to be taken against the teacher*." The Board is to refer the matter for consideration to Personnel Committee pursuant to Regulation 85.

[16] Regulation 85, stipulates that, for the purpose of facilitating inquires into allegation of breaches of discipline by or against members of staff, the Board shall appoint a Personnel Committee, which should be constituted as provided by the said Regulation.

[17] A question for the court's determination, is, did the Personnel Committee act ultra vires and without jurisdiction? Mrs. Hamilton's contention on the question is that, the time guidelines stipulated by Regulation 58, were not met, in that the procedure could not be completed within nine (9) months as prescribed by Regulation 85. Mrs. Hamilton submitted that July 9, 2013, was the starting date;

being the date when the complaint was filed, and calculated that the period delimited would expire on the April 9, 2014. The Board notified the Applicant on the 18th July 2013 of the hearing for August 16, 2013, and that no Disciplinary Committee had been appointed to hear the matter.

[18] Mrs. Hamilton submitted that based on the Minutes of the Board Meeting on July 9, 2013 and July 17, 2013, the attendance on these dates were recorded, and the meetings were properly constituted, and were therefore in a position to receive a complaint. It was further submitted that, pursuant to Regulation 84 of **The Education Regulations**, even if, there was a defect in its constitution as stated the validity of its proceedings shall not be called into question. In the letter from the Chairman to the National Council of Education, dated 29th November 2013, indicating that the Records only reflected two (2) board members, three (3) duly elected members' names were submitted to serve for the period December 1st to 31st 2013. Counsel further submitted that any defect arising from this would be cured by Regulation 84 which provides;

> *"the validity of the proceedings of any Board shall not be affected by any vacancy amongst the members or the categories of members thereof or by any defect in the appointment of a member."*

[19] Mrs. Hamilton relied on **Sharma v Brown-Antoine and Other** [2006] UKPC 57, for the applicable test. She contended that there was an arguable ground for Judicial Review, concerning the issue of when the complaint was made. There was no alternative remedy in these circumstances. According to Mrs. Hamilton, the right of appeal under Regulation 61 which states that;

> *"a teacher who is aggrieved by any action taken by the Board under paragraph (6) of regulation 57, may appeal to the Appeals Tribunal within twenty-eight (28) days after the date of the action giving rise to such appeal."*

This is geared to appeal a decision of the Board, and not a decision of the Personnel Committee. The Regulation is quite clear, and therefore has no scope for interpretation.

[20] Ms. Lisa Whyte submitted that the person with the direct interest is the Applicant, but she has not deponed an affidavit. Instead, her counsel has deponed the affidavit. The person to make the application, as required by the Rules is the Applicant herself, being the person who is directly aggrieved. Rule 56.2(1) of the **Civil Procedure Rules (CPR)** requires an application by a person, group or body which has sufficient interest. Rule 56.3(3)(g) and (h) of the **CPR** provides that an application must state; (g) whether the applicant is personally or directly affected by the decision about which complaint is made; or (h) where the applicant is not personally or directly affected, what public or other interest the applicant has in the matter.

[21] Hence according to Rule 56.3(3) of the **CPR** the decision is that of the Board and not that of the Personnel Committee. The scheme of the legislation, Section 37 of the **Education Act**, provides for an Appeal Tribunal and allows for disciplinary decisions by a Board of Management. There is no recognition of the delegates of any decision of the then Board of Management. Section 37(1) of the **Education Act** states;

> *"There shall be an Appeal Tribunal established for the purposes of hearing appeals from the Commission and appeals from disciplinary decisions by a Board of Management of any public educational institution."*

It is the Board that makes the decision for matters to go to the Personnel Committee. If a jurisdictional point is being taken, the Applicant should take it before the Personnel Committee. The Personnel Committee has not come to a final decision on the basis that there is no jurisdiction. There is no decision to discontinue hearing the matter. The ultimate decision is that of the Board.

Discussion

[22] The Applicant, Monica Haughton, has not placed any direct assertions before the Court seeking leave to apply for Judicial Review. Mrs. Georgia Hamilton, her counsel has filed an affidavit on her behalf. For the Respondents it was submitted that, such a procedure is irregular and flouts the "sufficient interest" test that is demanded by the **CPR**, particularly Rule 56.2(1), and claims that the a person who is to make the application is the person who is aggrieved. Rule 56.2(1) of the **CPR** states; an application for judicial review may be made by any person group or body which has sufficient interest in the subject matter of the application. Rule 56.2(2)(a) of the **CPR** provides that sufficient interest includes person who has been adversely affected by the decision which is the subject of the application.

[23] Among the requirements for an application for leave, is the need to state whether the Applicant is personally or directly affected, by the decision about which the complaint is made. I do not understand, Mrs. Hamilton as affiant, to be saying she has sufficient interest as required to establish locus standi. There is no argument that she has either sufficient interest or is personally or directly affected by the decision of which her client complains. Neither do I understand the Attorney General to be saying that Mrs. Monica Haughton does not have sufficient interest to apply for judicial review of the impugned decision. Mrs. Hamilton's contention is that she is entitled, on an application for leave to apply for Judicial Review, to file an affidavit, pursuant to Rule 56.3(3), of the **CPR** on behalf of her client. The requirements of Rule 56.3(4) of the **CPR** which provides that; "*the application must be verified by evidence on affidavit which must include a short statement of all the facts relied on*" have been fulfilled.

[24] Do the Rules permit the verifying of the affidavit, in these circumstances to be to be deponed by another person on behalf of the Applicant; or is the Applicant the person who should have provided the affidavit? The threshold requirement for the acquisition of locus standi is sufficient interest, but included in the definition of sufficient interest are persons who have been adversely affected or bodies or

groups representing persons who are adversely affected. Rule 56.2(2)(b) of the **CPR**, spells out the persons who may apply for judicial review, where the application is by a person other than the person directly affected. Such applications are restricted to bodies or groups acting on the request of the person adversely affected or representing such a person.

[25] Rule 56.3(4) of the **CPR** provides that; "*the application must be verified by evidence on affidavit which must include a short statement of all the facts relied on*." The general rules in the **CPR** are applicable to Part 56, which deals specifically with applications for administrative orders. I agree with the observations of Sykes J, in **Regina v Industrial Disputes Tribunal** (**Ex parte J. Wray and Nephew Limited**, Claim No. 2009 HCV 04798 (unreported) delivered on 23rd October 2009) at paragraph 44 of the judgment, he said;

> "*…there has been a narrowing of the prior existing differences between judicial review application and an action begun by way of a Fixed Date Claim form*. *The general provisions of the CPR apply to both."*

[26] Part 30.1(3) of the **CPR** states that whenever an affidavit is to be used in evidence, any party may apply to the court for an order requiring the deponent to attend to be cross-examined. In any event judicial review proceedings, has not changed the substantive law. In **R v Inland Revenue Commissioners, Ex. p Rossminister** [1980] AC 952, per Lord Scarman, at page 1025 of the judgment said;

> *"The application for judicial review is a recent procedural innovation in our law. It is governed by R.SC Ord. 53 which was introduced in 1977. The rule made no alteration to the substantive law, nor did it introduce any new remedy. But the procedural reforms introduced are significant and valuable…The rule also makes available at the court's*

discretion discovery, interrogatories and cross-examination of deponents."

[27] Part 56.13(2)(a)(ii) of the **CPR** allows the judge at first hearing to make orders for the cross-examination of witnesses. As a deponent, counsel is susceptible to cross-examination. There has not been any examination of the substantive allegations in this matter, but it cannot be ruled out. What then? Further, the ability to grant leave, without hearing the parties, requires full and frank disclosure and calls to focus the coercive powers of the court where there is a failure to adhere to these principles.

[28] In **O'Reilly v Mackman** [1983] 2 AC 237, the court noted that what ever may have been the position before the Rule was altered, in all proceedings for judicial review that have been started since 1977, the grant of leave to cross-examine deponents on applications for judicial review is governed by the same principles as it is in actions begun by originating summons. It should be allowed whenever the justice of the particular case so requires (See; post, pp. 282G - 283A). First, leave to apply for the order was required. The application for leave which was ex parte but could be, and in practice often was, adjourned in order to enable the proposed respondent to be represented, had to be supported by a statement setting out, inter alia, the grounds on which the relief was sought and by affidavits verifying the facts relied on, so that a knowingly false statement of fact would amount to the criminal offence of perjury.

[29] Such affidavit was also required to satisfy the requirement of uberrima fides, with the consequence that failure to make on oath a full and candid disclosure of material facts was of itself a ground for refusing the relief sought in the substantive application for which leave had been obtained on the strength of the affidavit. This was an important safeguard, which is preserved in the new Order 53 of 1977. The best that counsel can do is to make assertions based on information and belief. These applications can be granted without notice being given to the respondent, and an applicant is required to be directly affected. It could not be the best evidence for a third party to speak of the applicant being

directly affected, when there is no plausible reason given for the absence of the applicant.

[30] An Attorney-at-Law representing a client would not have standing under Part 56.2(2) of the **CPR**, to make such representation at an application for leave to apply for judicial review. The application must be verified by affidavit as required by Rule 56.3(4) of the **CPR**. Rule 56.9(4) of the **CPR** provides; *"the general rule is, that the affidavit must be made by the Claimant or where the Claimant is not an individual by an appropriate officer of the body making the claim".* Rule 56.9(5) of the **CPR** provides; "*that where the Claimant is unable to make the affidavit it may be made by some other person on the Claimant's behalf, but must state why the Claimant is unable to make the affidavit*." There is no evidence adduced before me as to the inability of the Applicant to make the affidavit.

[31] Counsel may have in interlocutory proceedings the right to swear an affidavit of information and belief, but it is clear that the need for sufficient interest requirement is restrictive of persons who can make the application. The requirement that the application must be verified by affidavit and the requirement for full and frank disclosure, in the ex parte application for leave, leads me to the conclusion that the affidavit must be completed by the Applicant.

[32] What is being sought is Judicial Review of the decision of the Personnel Committee to commence and continue the hearing of the complaint brought against the Principal. The Respondents contend that no decision has been made by the Personnel Committee. Pursuant to Regulation 56, the Board should have received the Report, and firstly discern from that report, whether the conduct of the teacher is such that disciplinary action ought to be taken against the teacher. Whether disciplinary action is to be taken need not be contained in the complaint. The Board on its own may arrive at that decision independent of such an opinion in the complaint. It would be open to the Board having found that there is unmeritous conduct in one of its teachers, to decide that it will not initiate disciplinary action against the teacher.

[33] It is clear that it is the Board that initiates the disciplinary proceedings by forming an opinion or a determination of whether the complaint discloses that the matter warrants submission to the Personnel Committee if there is such a personnel committee in place. The function of the Personnel Committee is to; "*facilitate inquires into allegations of breaches of discipline by or against members of staff or students".* If there was no Personnel Committee in place when the Board makes its decision, there is a duty to appoint one in accordance with Regulation 85.

[34] **The Education Regulations** requires that the composition of the Personnel Committee subject to the quorum requirement include a representative on the Board of the category of accused personnel. In the circumstance where the accused person was the representative of that category of personnel on the Board that category is allowed to put forward another representative. The Principal is a member of the Board, in a public institution such as Liberty Hill Primary School (See; Regulation 74). If the Personnel Committee makes a finding that the matter is trivial and a hearing is unnecessary, then the matter is returned to the Board. However, if the Personnel Committee finds that a hearing should be held, the Chairman shall notify the complainant of particulars of the hearing and give written notice to the person complained against.

[35] The Applicant contends that the Personnel Committee commenced the hearings into the allegations against her on February 25, 2014 and hearing dates were scheduled for the May 15, 2014 and May 16, 2014. Submissions were made by the Applicant to the effect that the financial report was not a complaint as required by Regulation 56. Further that the allegations were statute-barred on April 9, 2014, pursuant to Regulation 58.

[36] As to whether the financial report on the Liberty Hill Primary School can be considered a complaint, that argument was not pursued with any force before me. The Report alleges several breaches of the **FAAA**, and calls into question adherence to acceptable accounting standards. The report itself needs not say, that sanctions should be applied to the person complained against. The Board

has the responsibility, of *"ensuring that proper books of accounts and other matters in relation to the assets and liabilities and to all sums of money received and expended by the institution are kept in strict accordance with such financial regulations as may be prescribed for public educational institutions*".(See; Regulation 89).

[37] In respect of her submissions on the matter being statute-barred, counsel, Mrs. Hamilton, outlined that the hearing began on the 25th February 2013, and at the end of the proceedings on March 27, 2014 the hearing was adjourned to be continued on April 16 and 17th and May 15th and 16th, 2014. The date, April 9, 2014 would be nine (9) months since the financial reports would be first considered by the Board of Management. Counsel had written to the Board of Management indicating her view, and that the period delimited for the hearing mandated in Regulation 58 would be surpassed and would bring the proceedings to an end.

[38] The Respondents resisted these submissions, contending that the financial report was not the only complaint they had received in respect of the Applicant. Further, the Board that received the financial report was not properly constituted. In a letter dated 29th November 2013, the Chairman of the Board notes that only two (2) members are reflected on the files. That he submitted to the National Council for Education, for appointment, a list with duly elected members. The Council is responsible pursuant to Section 4 of **The National Council on Education Act**, 1993 to nominate for the purpose of appointment to the Board, the number of persons prescribed by the **Education Act**. Section 9(a) of the **Education Act** provides that;

> *"Every public education institution shall be administrated by a Board of Management, which shall consist of not less than three persons appointed in the prescribed manner..."*

Regulation 74, says that Primary and All Age public educational institution (government owned); "shall *be administered by a Board which shall consist of not more than eight persons appointed by the Minister.*

> *(a) Two of those members nominated by the Council, one of whom shall be named as a chairman...*
>
> *(2) The quorum shall be three and shall include the chairman or the vice-chairman of the Board.'*

It is of importance that the letter of the Chairman states that there are only two (2) members shown on the files.

[39] Based on the Chairman's letter of 29th November 2013, the inference is that there was nothing to support the view that there was compliance with the statutory regime for appointment of members to the Board. There is no evidence that there was a subsisting Board properly constituted in place. The defect was made good, and the Board was properly constituted in January 1, 2014, and was only then able to receive or discharge any of its statutory functions. It is unchallenged that the first submission of the complaint under the Board so constituted would be 21st January 2014. The application in respect of the complaint being statute-barred fails, for the reason that the time delimited by Regulation 58, for the hearing of complaints has not been exhausted.

[40] The Respondents contend that the Applicant has not employed the statutory remedies provided in the **Education Act**. Section 37 of the **Education Act**, establishes an Appeals Tribunal for the purpose of among other functions; "*hearing appeals from disciplinary decisions by a Board of Management of any public educational institution*." Subsection 3, provides that any person who is aggrieved by any disciplinary decision taken by the Board of Management of any public educational institution may appeal to the Appeal Tribunal within such time and such manner as may be prescribed.

[41] The Applicant did not pursue the statutory appellate procedure in Section 37 of the **Education Act**. The nub of the submission on this point is that the decision of the Personnel Committee, for which review is sought, is not a disciplinary decision of the Board. The Board of Management pursuant to Regulation 89, is responsible for the administration of the institution. Its functions are enumerated in Regulation 89(1)(a) to (h). There is no challenge that the financial report was treated by the Board as a complaint that would trigger the disciplinary actions, and was so referred. It is that decision that started the proceedings. The hearings that have been undertaken were for disciplinary actions against the Applicant. The decision of the Personnel Committee was taken in furtherance of those hearings and to my mind are decisions that would properly be appealed pursuant to Section 37 of the **Education Act**.

[42] The statute has provided the form of procedure to be followed. This is not a common law matter but purely a creature of statute, and therefore, the remedy provided by the statute must be followed. In **Reg. v Inland Revenue Commissioners, ex p Preston** [1985] AC 835, Lord Scarman, at page 852 said;

> *"Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision."*

An Arguable case

[43] The ordinary rule when dealing with an application for leave to apply to Judicial Review is that the court will refuse leave unless satisfied that there is an arguable ground for Judicial Review having a realistic prospect of success not subject to a discretionary bar or an alternative remedy. Rule 56.3(3)(d) of the **CPR** mandates that the application for leave must state, inter alia, whether an alternative form of redress exists, and if so, why Judicial Review is more appropriate or why the alternative is not pursued. The Notice of Application states that, '*the Applicant has no alternative form of redress*'. It is a statement with which I disagree. I find

that the decision questioned falls within the ambit of Section 37 of the **Education Act** and is therefore a statutory alternative to judicial review. As such the application for leave to Judicial Review fails.