IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

IN MISCELLANEOUS

SUIT NO. M53 OF 1988

BEFORE; THE HON. MR. JUSTICE WOLFE,J.
THE HON. MR. JUSTICE LANGRIN,J
THE HON. MR. JUSTICE SMITH,J
(DISSENTING)

REGINA VS. BOARD OF THE SCHOOL OF PHYSICAL THERAPY
EXPARTE CHRISTOPHER EDWARDS.

Mrs. D. Kay Shelton-Mayne for the Applicant
Mr. W. Wilkins for the Respondent.

November 30, December 1, 1988
& September 28, 1989

LANGRIN, J.

The applicant seeks an order prohibiting the Board of the School of Physical Theraphy from setting up a Committee to hear charges against Christopher Edwards, the applicant himself. The charges are attached to a letter dated August 15, 1988 written by the Chairman of the Board and sent to the applicant.

The applicant is a Second Year student from the island of St. Lucia attending the School of Physical Therapy.

On the 5th day of October, 1987 he was dismissed from the School. As a result of that dismissal he was unable to sit supplemental examinations in September, 1987. He obtained an order of Certiorari on the 23rd February, 1988 quashing the decision to dismiss him. Sometime after his return to the School he was informed in writing by the Chairman of the Board that he would be offered every opportunity of graduating in the current year. In April, 1988

he sat supplemental examination but it was clear to the applicant that the questions were set for him to fail as it was impossible for him to complete the questions in the allotted time. The applicant failed these examinations and had to withdraw from the course. On the 21st May, 1988, a letter from the Chairman disclosed that if the applicant applied to be re-admitted to the course the previous charges would be laid against him. He appealed to the School Board in relation to the results of the examination and the appeal was dismissed after a hearing was conducted. The applicant was informed of the result of this appeal at the same time when the charges were sent to him. These charges may result in the expulsion of the applicant from the school thereby ensuring that he is unlikely ever to be admitted to the program for which he had been training. It is this letter which gave rise to the application before the Court.

The grounds on which the applicant now seeks relief are stated as follows:-

GROUNDS

1. That the Committee set up by the Board of the School of Physical Therapy is estopped from denying that the applicant would be given every opportunity to graduate from the said School, causing the applicant to alter his position in reliance of this statement.

2. That the setting up of the Committee by the Board of the School of Physical Therapy to hear charges against the applicant Eight (8) months after the Order of this Honourable Court in respect of Certiorari proceedings is contrary to the constitutional rights of the applicant as the charges were not brought within reasonable time.

3. That the setting up of this Committee by the Board of the School of Physical Therapy is contrary to the principles

of natural justice and the Education Act.

The main trust of the applicant's arguments relate to grounds two ands three. Ground one had been abandoned.

These proceedings marked another issue of considerable importance; whether the court has jurisdiction by means of an Order of Prohibition to prohibit the proposed action of the Board.

Mr. Wilkins, representing the Board from the Attorney General's Chambers, contended that prohibition did not lie since the Board was not a body amenable to the supervisory jurisdiction of the Court. The Board did not have statutory authority to carry out its functions and that being so its relation with the applicant was one of contract.

Before expressing any view upon the merits of the proposition advanced by the Respondent's Counsel, it is necessary to advert to the creation and organization of the School of Physical Theraphy. In doing so I now turn to the salient parts of the affidavit of Marjorie Forrester, Director of the School of Physical Therapy.

The following are two paragraphs taken from the Affidavit.

"20. That in or about 1972, the School was set up as a tertiary institution by the Ministry of Health along with the assistance of the University Hospital of the West Indies, Pan American Health Organization and the University of the West Indies. The School is not a Statutory body nor was it created pursuant to Statute.

21. That students are admitted to the School upon satisfying the matriculation requirements set up by the School upon the payments of the requisite academic fees to the School. The School is fully responsible for the

development and administration of the entry requirements and the academic programme of the School. The Board of the School which is appointed by the Minister of Health is autonomous and fully responsible for the administration and management of the School. The School through its Board is solely responsible for the setting of the professional standards, rules, regulations and policies of the School. The Ministry of Health keeps the funds of the School and makes disbursement thereof to the School upon its request. The Board does not receive any remuneration for its service."

It is important to note that the School was set up as a tertiary institution by the Ministry of Health and the Board was also appointed by the Minister. While the Ministry of Health disburse the funds to the School, the members of the Board do not receive any remuneration for their services.

In so far as the Board is concerned I have no doubt that its members are under a duty to act judicially when they are considering the charges against the applicant and I do not think that Mr. Wilkins would argue to the contrary. I would venture to say that any body making a decision affecting a party's rights or legitimate expectations must observe the rules of natural justice except of course in cases involving master and servant relationship. See Ridge v. Baldwin 1964 AC 40.

I now come back to the question whether the Board is a body of persons amenable to the supervisory jurisdiction of this Court. It is indeed true that the Board was not set up by statute, but the fact that it was set up by the Minister of Health does not render its acts any less

lawful. Indeed the prerogative orders have issued not only to tribunals set up by statute but to tribunals whose authority is derived inter alia from the Executive. Moreover, the Board though set up under the executive powers of the Minister and not by Statute had in fact the recognition of Parliament in debate and Parliament as well as other public agencies provided the money to satisfy its needs.

R.V. Criminal Injuries Compensation Board exparte LAIN 1967 3 WLR p.348, a landmark decision is of significant interest. A scheme for compensating victims of crimes of violence was promulgated under prerogative powers. The Home Secretary appointed the Criminal Injuries Compensation Board, consisting of a chairman with wide legal experience and five other legally qualified members. The Board was to award exgratia payments assessed on the basis of common law damages or where appropriate the Fatal Accidents Acts 1846 - 1959. The money was paid out of funds provided through a grant-in-aid. Paragraph 4 of the scheme provided: That board will be entirely responsible for deciding what compensation should be paid in individual cases and their decisions will not be subject to appeal or ministerial review."

The widow of a police officer shot on duty applied for compensation. The board made a nill award after deduction of certain National Insurance and police pension payments. The widow sought certiorari to quash the decision for errors on the face of the record. The board contended that certiorari did not lie to them as they exercise no statutory powers, and as they did not determine questions affecting the rights of subjects in that the applicants had no enforceable rights to

compensation. The Divisional Court held that the Board had not been in error, and also considered whether certiorari would lie.

Diplock, L.J. as he then was in his judgment had this to say:

> "The Jurisdiction of the High Court as successor of the Court of Queen's Bench to supervise the exercise of their jurisdiction by inferior tribunals has not in the past been dependent upon the source of the tribunals' authority to decide issues submitted to its determination, except where such authority is derived solely from agreement of parties to the determination. The latter case falls within the field of private contract and thus within the ordinary jurisdiction of the High Court supplemented where appropriate by its statutory jurisdiction under the Arbitration Acts."

The absence of a statutory power should not in itself be a conclusive reason for a refusal by the Courts to entertain proceedings in which it was alleged that an essentially public authority had breached the rules of natural justice.

To draw so sharp a distinction between the exercise of different governmental powers solely on the basis that if the discretion is not to be found in statute it must be found in contract is difficult to justify as a matter of principle.

The gravity of the consequences of the decision is a further factor to which the Courts have repeatedly referred. In holding that natural justice applied to a body of examiners which considered academic and non-academic matters the Divisional Court in R.V. Aston University Senate Exparte Roffey 1969 2 Q.B. 538 took account of the fact that so much was at stake.

The following extract from the speech of Lord Pearson in Pearlberg v. Varty (1972) 1 WLR 534, 547.

> "A tribunal to whom judicial or quasi-judicial functions are entrusted is held to be required to apply these principles [i.e. the rules of natural justice] in performing these functions unless there is a provision to the contrary. But where some person or body is entrusted by Parliament with administrative or executive functions there is no presumption that compliance with the principles of natural justice is required, although as Parliament is not to be presumed to act unfairly, the Courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness."

None of the cases involving the rights of student has clearly established the basis of the Courts jurisdiction. In Thompson v. University of London (1864) 33 L.J. Chan. 625 Kimbersley V.C. said that it was a misnomer to describe the relationship between a university and student as one of Contract. Further even if there is a contract between a student and an educational institution, that is not inconsistent with the observance of the rules of natural justice.

Supreme Court Court Appeal No.54 of 1983 Regina vs. The Technical Director of the Scientific Research Council is not relevant to the instant case as that case relates to a master and servant relationship which is excluded from the principle of natural justice.

In R. Pergamon Press Ltd. 1971 Chan. 388 Sachs L.J. in dealing with the applicant's right to a fair hearing had this to say at p.399.

> "It is not necessary to lable the proceedings judicial, quasi-judicial, administrative, investigatory; it is the characteristics of the proceedings that matter, not the precise compartment or or compartments into which they fall."

In the Council of Civil Service Unions and Others v. Minister for the Civil Service (1984) 3 AER 935 Lord Diplock in dealing with the susceptibility of a decision to judicial review had this to say at p. 1025:

> ".....the decision maker must be empowered by public law (and not merely, as in arbitration by agreements between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers.....
> .....The ultimate source of the decision making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision making the power may still be the common-law itself, i.e. that part of the law that is given by lawyers the label of the prerogative."

Later in his speech the Law Lord continued by saying:

> "Nevertheless whatever label maybe attached to them there have unquestionably survived into the present day a residue of miscellaneous fields of law in which the executive government retains decision-making powers that are not dependent upon any statutory authority but nevertheless have consequences on the private rights or legitimate expectations of other persons which would render the decision subject to judicial review if the power of the decision maker to make them were statutory in origin."

"Today the controlling factor in determining whether the exercise of power is subject to judicial review is not its source but its subject matter" (Per Lord Scammar and Diplock).

In the light of the affidavit evidence we find as a fact that the board is a body of persons of a public as opposed to a purely private or domestic character, having power to determine matters affecting subject and has a duty to act judicially.

The analogy between proceedings before Justices and those before a disciplinary committee of a board hearing charges is too close to be dismissed lightly. It is true the Board is not an ordinary court but it is a body set up under executive powers as a disciplinary tribunal to administer punishment where appropriate. That being the position it is clear to our mind that the Board are entitled to be protected from having actions at law brought against them.

The question which remains to be answered is this. What is the contractional relationship between the applicant and the School of Physical Therapy? It seems to us that the provisions of the Rules of the School are for the protection of the public and to ensure that competent and well trained professionals are delivered to the public. In our view there is no agreement between the applicant and the School which would form the basis for removing the supervisory jurisdiction of this Court. We see no reason in principle why the fact that no authority from Parliament is required by the executive government to entitle it to decide who shall remain in the School as a student, should exempt the Board from the Supervisory control of the Supreme Court over that part of its functions which are judicial in character. No authority has been cited which in our view compels us to decline jurisdiction. Certainly, the applicant has an interest in the proper performance by the Board of its judicial functions as well as the public whose money the Board utilizes in the administrative machinery of the School.

It is the Full Court of the Supreme Court which is equipped to deal with these matters and to deal with them expeditiously and we express the hope that in future it is this Court to which this type of problem will be submitted and that the temptation to deal with problems arising from breaches of natural justice by way of origina-

ting summons or the like will be avoided.

Our conclusion is that in the light of the public nature of the Board coupled with the quasi-judicial nature of its proceedings the only appropriate remedy in this case was by judicial review under Sec. 52(2) of the Judicature (Supreme Court) Act.

In passing I must mention two strange things in this case. The first relates to the fact that a similar motion was brought by the same applicant against the School Board and the same counsel represented the Board before the full Court yet no point was taken on the question of jurisdiction. The Court granted certiorari in that case. Secondly, counsel for the Board argues that the School Board is a private domestic tribunal yet it has the full representation of a government Department whose function is to deal with matters of a public nature.

In the result we hold that this Court has jurisdiction to enquire into the decision of the Board in order to see whether it should be prohibited from acting contrary to the rules of natural justice.

We turn now to the question of whether there was a breach of the principles of Natural Justice. Mr. Wilkins relied on the case of Director of Public Prosecutions v. Bell Privy Council Appeal No. 44/84 in which the Judicial Committee of the Privy Council was dealing with Section 20(1) of the Constitution.

In that case, much consideration was given to the past and current problems which affect the administration of justice in Jamaica. It is our view that these circumstances would be irrelevant to the instant case. In our view this is a proper case, where the charges relate

to a period as for back as September 1985 and in which the consequences could be expulsion for the Court to find that a trial now would be oppresive. It should be borne in mind that certiorari was previously granted to the applicant in respect of this same matter, albeit on different grounds. The applicant may wish to say that it was not his fault why a delay was caused by that process.

In Connelly v. Director of Public Prosecutions 1964 AC 1254 The House of Lords held that the prisoner who had been acquitted of murder could properly be charged with Robbery arising out of the same set of facts. Lord Devlin was prepared to accept fairness as a test of general applicability to guide judges in exercising their control over the Courts had this to say:

> "The judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the Court's process is used fairly and conveniently by both sides .... First, a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the English Criminal Law."

The House of Lords case of Birkett v. James (1978) AC 297 makes reference to the appropriate principle to be applied in cases of delay. Lord Diplock in a speech which the other Law Lords agreed, said that:

> "That Court has an inherbent jurisdiction to dismiss an action for want of prosecution if the delay was such as to involve a substantial risk that a fair trial of the issues would not be possible."

In the final analysis it is the totality of the delay from the alleged breach of discipline, from September 1985 to 15th August, 1988 when the charges were sent to the applicant which matters and the ultimate question is: Has the total delay from the alleged breach of discipline down to the 15th August 1988 been such as to make a fair trial of the charges impossible? If one applies that test to the totality of the delay here, it seems to us that the delay is such that no fair trial of these charges is possible.

We hold that there is a breach of natural justice on the part of the Board in not bringing the charges within a reasonable time. Accordingly, we would grant the application with costs to be taxed if not agreed.

WOLFE,J.

I have had the opportunity to read the Judgment of Langrin J and I concur therewith.

SMITH, J.

The applicant Christopher Edward, a St. Lucian student, applied for an Order of Prohibition to prohibit the Board of the School of Theraphy from setting up a committee to hear charges against the applicant. In the Notice of Motion it is stated that "the applicant intends to refer to and rely on the affidavit of Christopher Edward sworn to on the 26th October, 1988 and such further affidavits as the applicant may file from time to time."

In the affidavit referred to the applicant deposed that on the 9th October, 1987 he was dismissed from the School of Theraphy where he attended as a second year student and as a consequence was unable to sit supplemental examination in September 1987. That on the 23rd of February 1988 he obtained an Order of Certiorari quashing the aforesaid dismissal. That by letter dated 16th March, 1988, he was informed by the Chairman of the Board of Physical Theraphy that he would be offered every opportunity of graduating this year. He stated that he failed badly the supplemental examinations sat in April. The examinations, he alleged, were set and invigilated by the same teacher who had failed him in the regular examination and who had stated in April of the previous year that he "would never pass her courses." He further testified that by letter dated 21st May, the Chairman of the Board advised him that if he applied to be readmitted to the course the 'previous charges' would be laid against him.

He appealed the examination results to the Board. The appeal was dismissed and he was informed thereof by letter dated 15th August, 1988. By the same letter he was advised that the Board had set up a Committee pursuant to the School's rules and regulations to hear the 'original charges' against him.

Although the prayer of the applicant is inelegantly stated, in substance he is asking for an Order of Prohibition forbidding the Committee set up by the Board from hearing the charges laid against him. The grounds upon which this public law remedy is sought as appear in the statement, are:

1. That the Committee set up by the Board of the School of Physical Theraphy is estopped from denying that the Applicant would be given every opportunity to graduate from the said school, causing the Applicant to alter his position in reliance on this statement.
2. That the setting up of the Committee by the Board of the School of Physical Theraphy to hear charges against the Applicant eight (8) months after the Order of this Honourable Court in respect of Certiorari proceedings is contrary to the constitutional rights of the Applicant as the charges were not brought within reasonable time.
3. That the setting up of the Committee by the Board of the School of Physical Theraphy is contrary to the principles of natural justice and the Education Act.

Much could be said about the validity or otherwise of these grounds but, in my view it is not necessary so to do. It should be said, however, that ground 3 was not pursued by Mrs. Shelton-Mayne. What is clear is that the gist of the argument of Mrs. Shelton-Mayne is that the Board has acted unreasonably and that the Applicant will not have a fair hearing. She was perhaps encouraged to seek an Order of Prohibition because certiorari was granted on a previous occasion. Nonetheless this is not a basis to grant such a remedy because if the Court were in error before, that error ought not to be compounded by granting the further remedy of prohibition.

From an affidavit sworn by Ms. Marjorie Forrester, a Director of the School, it may be gleaned (see para.20) that the school was set up in or about 1972 as a tertiary institution by the Ministry of Health along with the assistance of the University Hospital of the West Indies, Pan American Health Organisation and the University of the West Indies. That the school is not a statutory body nor was it set up pursuant to statute. Paragraph 21 of her affidavit states "That students are admitted to the school upon satisfying the matriculation requirements set up by the school upon the payment of the requisite academic fees to the school. The school is fully responsible for the development and administration of the entry requirements and the academic programme of the school. The Board of the school which is appointed by the Minister of Health is autonomous and fully responsible for the administration and management of the school. The school through its Board is solely responsible for the setting of the professional standards, rules, regulations and policies of the school. The Ministry of Health keeps the funds of the school and makes disbursement thereof to the school upon its request. The Board does not receive any remuneration for its services.

Mr. Wilkins for the respondent submitted inter alia that the Education Act does not apply. The relationship between the Board and the student applicant is purely contractual and no prerogative order should go. This is so, he argued, even if the Board has a public element. He relied on R.V. The Technical Director of the Scientific Research Council et al Ex parte Chris Bobo Squire SCCA R.C. 54 of 1983 (unreported) and R. v. Criminal Injuries Compensation Board Ex parte Lain (1967) 3 W.L.R. 348.

I would venture to think that this is a case which begs for such point to be taken in limine. As I see it, the affidavit in support of the Notice of Motion does not attempt to establish that the applicant has such a status as would warrant the use

of a public law remedy to vindicate his rights. The unchallenged evidence of Ms. Forrester indicates that rules, regulations and policies of the school are made by the School Board and are non-statutory and therefore of a purely private or domestic character. Where a disciplinary body has no statutory powers its jurisdiction must be based upon contract - see Professor Wade's Administrative Law, 5th Edition p. 566. In the instant case the disciplinary power of the Board was based on the contract of matriculation. It follows therefore that the duty of the Board to observe natural justice in its relationship with the applicant student is based not upon statute but upon contract. Such non-statutory discipline may be controlled by the ordinary private law remedies for breach of contract such as injunction, declaration or damages, but not by a public law remedy such as prohibition. In Ex parte Lain (supra) at 358A Lord Parker C.J. said

> "Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived from contract, that is, from agreement of the parties concerned."

The decision in R. v. Senate of the University of Aston Ex parte Roffey, (1969) 2 All E.R. 964 which seems to run counter to Ex parte Lain has been the subject of severe criticism and was not followed in Herring v. Templeman and Others (1973) All E.R. 569 (see p. 584h et seq.) Indeed Professor Wade in his work already referred to at 566 has this to say:

> ".....students in universities and colleges have, ..., contractual rights based on their contracts of membership with implied terms which protect them from unfair expulsion. In these cases declaration and injunction are the appropriate remedies. Certiorari and prohibition are quite out of place since the Crown's supervisory powers over public authorities are not concerned with private contracts. Certiorari will therefore not issue to a contractual arbitrator though it may to a statutory arbitrator."

Lord Parker's dictum in Ex parte Lain was cited with approval in Law v. National Greyhound Racing Club Limited (1983) 1 W.L.R. 1302. Whereas, the Aston University Senate case was said to be "probably wrongly decided" on the issue of jurisdiction p. 1307H (ibid). In the Law v. N.G.R.C. case, the plaintiff's licence was suspended by a disciplinary decision given by the stewards of the defendant company acting as a judicial body for the conduct and discipline of Greyhound Racing. They issued a code of rules (the "Rules of Racing") in order to achieve an orderly and viable method of conducting Greyhound Racing and appointed stewards who had no financial interest in Greyhound Racing to enforce them.

In addressing the question as to whether proceedings for judicial review were the appropriate remedy it was held that the authority of the stewards to suspend the plaintiff's licence was derived wholly from a contract between him and the defendants and the status of the stewards was that of a domestic tribunal albeit their decision might affect the public, so that the process of judicial review would not have been open to the plaintiff.

Counsel in Law v. N.G.R.C. (supra) sought to rely on a passage from the judgment of the Privy Council in Nakhuda Ali v. Jayaratne (1951) A.C. 66, 75 where Lord Radcliffe said:

> "In truth the only relevant criterion by English law is not the general status of the person or body of persons by whom the impugned decision is made but the nature of the process by which he or they are empowered to arrive at this decision. When it is a judicial process or a process analogous to the judicial, certiorari can be granted."

Of this passage Slade L.J. at 1313 G (ibid) had this to say:

> "But those dicta were obiter and were made in the context of a judgment which attempted to draw a distinction (later shown to be erroneous by the decision of the House of Lords in Ridge v. Baldwin [1964] A.C. 40) between decisions that were quasi-judicial and those that were administrative only. They are, I think, of no assistance for the present purposes."

Mrs. Shelton-Mayne in her reply sought to refer to an affidavit by Professor Golding, the Chairman of the Board in another proceeding between the same parties. I am inclined to think that this cannot properly be done. But even so his evidence there that the Ministry of Health has "taken over" the school does not necessarily mean that the school should be regarded as being akin to a statutory public authority operating in the public law field and therefore amenable to prohibition - See Ex parte Chris Bobo Squire (Supra). It is of importance to note that Professor Golding went on to say in the same paragraph that the Board is responsible for the proper management and running of the School inclusive of matters pertaining to the discipline and conduct of students enrolled in the school.

I find therefore that there is not a shred of evidence to demonstrate the applicant's entitlement to the public law relief sought.

I would accordingly refuse the application.

PRESIDENT

By a majority Prohibition Order as prayed. Costs to be taxed if not agreed.