[2018] JMSC Civ.118

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016 HCV 03811

BETWEEN	**GENIA POWELL**	**APPLICANT**
AND	**THE BOARD OF MANAGEMENT OF JOHN MILLS PRIMARY AND JUNIOR HIGH SCHOOL**	**1ST RESPONDENT**
AND	**MINISTRY OF EDUCATION**	**2ND RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**3RD RESPONDENT**

IN CHAMBERS

Ms. Olivia Derrett for the Applicant.

Ms. Carla Thomas for the Respondents.

HEARD: 18th May, 2018 and 25th June, 2018

Application - for extension of time to apply for leave for Judicial Review - Whether the application was made promptly - Whether there is good reason to grant the extension of time - Where there will be substantial hardship or prejudice to the rights of any person - Whether there is an arguable case for legitimate expectation - Whether there will be detriment to good administration.

THOMAS, J. (AG.)

Introduction

[1] I will commence this matter by briefly summarizing the uncontested facts. By letter dated September 1, 2014, the Applicant was informed by the chairman of the Board of Management of John Mills Primary and Junior High School (herein after

refer to as the Board) that she was appointed to act as vice principal vice Ms. Beulah Dixon who proceeded on pre-retirement leave. That letter did not indicate when the Applicant's acting appointment would come to an end. The penultimate paragraph of that letter stated: "*The additional communication will be issued in due course.*" By letter dated the 24th of April 2015, the Applicant was informed by the principal of John Mills Primary and Junior High School, Mr. Bradley Robinson, that her acting appointment would end on April 1, 2015 and that she would be reverted to her substantive post May 1, 2015. (As will be seen from later correspondence and the date that the Applicant was told she would be reverted to her substantive post, the indication that the date her acting appointment would end on the 1st of April was clearly an error. It should have read the 30th of April). By letter dated the 3rd of February 2016, the Applicant was informed through her attorney- at-law Oswest Senior Smith and Company by Mr. Richard Gordon, the Director of Schools' Personnel of the Ministry of Education that approval had been granted for her to act as vice principal with effect from the 1st of September 2014 to the 30th of April 2015 vice Ms. Beulah Dixon on pre-retirement leave. The letter also indicated the salary and allowances that she should be paid for the period. By letter dated the 22nd of February 2016 the Applicant was informed through her attorney-at-law by the chairman of the Board, that it was the Board's position that the letter of appointment for the Applicant to act as vice principal, was for the Applicant to act vice Ms. Beulah Dixon who proceeded on preretirement leave with effect from September 1st 2014 to April 30th 2015. The letter further stated that, "*This means that the appointment of Ms. Powell ended on April 30, 2015 there being no further communication to her from the board extending said acting appointment"*.

[2] It is clear from the facts that the Applicant did commence duties as acting vice principal on the 1st of September 2014. In September of 2015 a new acting vice principal was appointed. In January 2016 another acting vice principal Mrs. Pearline Gayle was appointed to act for the period 1st of January 2016 to the 31st of August 2016. The indication from the Respondent, which has not been

challenged by the Applicant, is that Ms. Gayle is still acting in the position as vice principal.

[3] Arising from these facts there are in fact two applications for the court to consider. The original application was filed on the 9th of September 2016. However, an amended application was filed on the 7th of March 2017. In this amended notice of application, the applicant is seeking an extension of time to apply for leave for Judicial Review as also leave to apply for Judicial Review. In the application the Applicant seeks the following orders:

(i) An extension of time within which to apply for leave for Judicial Review.
(ii) Leave to apply for Judicial Review of the decision of the 1st Respondent.
(iii) A stay, restraining the 1st Respondent from appointing a permanent vice principal pending the determination of the matter.
(iv) Damages
(v) Orders as to cost
(vi) Such further and other reliefs as this Honourable Court deems just."

[4] The substantive reliefs that are being sought by the Applicant in relation to Judicial Review can be summarized as follows;

i. A declaration that the decision of the 1st Respondent is in breach of the Education Act (Regulation) and also in breach of the principles of natural justice.

ii. A certiorari to quash the decision of the 1st Respondent.
iii. That the Applicant be reinstated as the acting vice principal of John Mills Primary and Junior High School or in the alternative that she be paid three (3) years salary of an acting vice principal.

iv. That the 1st Respondent be restrained from appointing a permanent vice principal until this issue is determined.

[5] The grounds expressed by the Applicant for the reliefs being sought are as follows:

(i) The 1st Respondent has acted in breach of the Education Act (Regulation) in particular Schedule A (4).

(ii) The dismissal of the Applicant is in breach of the principles of natural justice.

(iii) There was no decision from the 1st Respondent dictating that the period for the Applicant to act as vice principal of John Mills Primary and Junior High School was for one(1) year

(iv) The principal of John Mills Primary and Junior High School attempted to terminate the employment of the applicant as acting vice principal without the consent or knowledge of the 1st respondent.

(v) The Applicant has suffered serious hardship from the decision.

(vi) For the fair and just disposal of the matter pursuant to the overriding objective of the Civil Procedure Rules, 2002, as amended.

[6] The correct approach the court must take with regard to the instant matter is that the application for extension of time must be considered first. Where this application fails the application for leave for Judicial Review will automatically fail.

ISSUE

[7] The issues that I must address with regard to the application for extension of time are:

(i) Whether there was delay in making the application for extension of time.

(ii) Whether there is any good reason for the application for extension of time to be granted.

In order for me to determine whether there was delay in making the application I must first determine the time that the grounds for the application arose.

THE LAW

[8] The procedure and requirements in relation to application for leave for Judicial Review are governed by ***Rule 56.6*** of the ***Supreme Court of Jamaica Civil Procedure Rules*** (herein after refer to as the Rules). Rule 56.6 read as follow:

> *(1) "An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose"*
>
> *(2) However the court may extend the time if good reason for doing so is shown*
>
> *(3) Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding*
>
> *(4) Paragraphs (1) to (3) are without prejudice to any time limits imposed by any enactment.*
>
> *(5) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to -*
>
> *(a) cause substantial hardship to or substantially prejudice the rights of any person; or*
>
> *(b) be detrimental to good administration*

Submissions

[9] Counsel for the Applicant asserts that the grounds for the action arose at the date of the letter of the 22nd of February 2016. That is the date of the letter from the Board indicating the specified period for which the Applicant was appointed to act.

However, this position is resisted by counsel for the Respondent. She contends that the impugned decision was first communicated by the letter of Mr. Robinson the then principal of the John Mills Primary and Junior High School. She made reference to the letter dated April 24, 2015. Therefore, she insists that the grounds for the application arose on the 24th of April 2015.

Analysis

[10] I am grateful to counsel for both sides for the number of authorities which they have presented for my consideration. I have reviewed all and while in the interest of time I will not make specific reference to all I will apply the principles derived from each where applicable in my analysis of the instant application.

WHEN DID THE GROUNDS FOR THIS APPLICATION ARISE? /WAS THERE DELAY IN MAKING THE APPLICATION?

[11] In accordance with ***Rule 56.6 .1*** an application for leave for Judicial Review must be made promptly and in any event within three months from the date when the grounds for the application first arose. A proper reading of this Rule indicates that the application must be made as quickly as possible after the date on which the grounds for the application arose, and in any event should not be made beyond three months. Therefore the first matter a court must address in an application for leave for Judicial Review is whether in all the circumstances the application was made promptly even if it was made within the three months. Additionally, the court will have to determine when the grounds for the action arose in order to determine:

(a) Whether the application was made promptly

(b) Whether the application was made out of time.

(c) Where the application was made after the three months from the time the grounds for the application arose whether there is any good reason to grant the extension of time.

[12] In the case of ***George Anthony Levy* v. *The General Legal Council*** [2013] JMSC Civil Mrs. Marva McDonald Bishop, J. (as she then was) stated at paragraph, 52 that:

> "*The settled law is that the operative time for the ground to have arisen, and which set the timeline within which the application is to be made, is the date of the judgment,* ***order or decision and not the date that the applicant became aware of the decision".***

[13] ***In the case of Randean Raymond v the Principal, Ruel Reid and the Board of Management, Jamaica College*** *[2015] JMCA Civ 59****,*** the applicant Mr. Randean Raymond, a temporary teacher at Jamaica College was informed that his services were no longer needed after March 31, 2013. This information was conveyed to him in a letter dated March 27, 2013. The letter was signed on behalf of the chairman by Mr. Ruel Reid, the principal. One of the grounds for his application for leave for Judicial Review was that the letter contravened article 54 of the Education Regulations of 1980. The 1st instant judge, Sykes J as he then was, at paragraph four (4) of his judgment stated that:

> "*By letter dated March 27, 2013, Mr Raymond was informed that his services were no longer needed after March 31, 2013. The letter was signed by Mr Ruel Reid, the principal, on behalf of the chairman. Mr Raymond contended that this letter failed to comply with the article 54 of the Education Regulations of 1980. Specifically, he said that (a) the letter should have been signed by the chairman; (b) no reasons were given in the letter as is required and (c) there was a breach of natural justice in that he was not given an opportunity to deal with any allegations that were made against him. On this premise, the grounds which would have permitted Mr Raymond to launch an application for judicial review first arose on March 27, 2013."*

Further at paragraph 23 he stated:

> "Rule 56.6 (1) of the CPR states that applications for judicial review must be made promptly and in any event within three months of the existence of facts which can ground an application. It is well known that time begins to run from the date grounds for the application arose. It is also well known that even an application

> within the three-month period may, depending on the circumstances, be held to be too late. The crucial point then is that judicial review proceedings are unique and special. They are subject to their own peculiarities. Speed of application is one of the hallmarks".

[14] This finding was not disturbed by the Court of Appeal (See also City **of Kingston Cooperative Credit Union Limited v. The Registrar of Cooperatives Societies and Friendly Societies and Yvette Reid** Claim No 2010 HCV 0204 and **Andrew Finn-Kelcey v Milton Keynes Council & MK Windfarms Limited** *[2008] EWCA Civ 1067).*

[15] Having assessed the circumstances of the instant application it is my view that the grounds for the application for leave first arose when the applicant received the letter from the principal Mr. Robinson informing her of the date her acting appointment would end. It is in that letter that she received the first written communication as to when her acting as vice principal would come to an end. That letter also conveyed the information that she would not be acting as vice principal for three years. Despite the fact that she alleges that it was a decision made by Mr. Robinson without authority and that he did not follow the correct protocol the alleged unlawful action would have arisen from the time she received that letter. Therefore there was a delay in excess of one (1) year in making this application.

WHETHER THERE IS GOOD REASON FOR GRANTING THE EXTENSION OF TIME

Is there any Good Reason for the Delay?

[16] Counsel for the Applicant indicates that the Applicant's reason for the delay was because the Applicant was seeking to exhaust all other remedies in order to resolve the matter. She further contends that if the party acted promptly after the other methods to resolve the issue fail it is usually considered a good reason to extend the time. She relies on **Regina *v. Rochdale Metropolitan Borough Council, ex parte Cromer Ring Mill Ltd*** [1982] 3 All ER 761, [1982] RVR 113, ***R. v. (British Aggregates Associates) Her majesty's Treasury*** [2002] EWHC 926.

[17] It is important to note that in the case of ***R v. (British Aggregates Associates) Her majesty's Treasury*** (Supra) despite the fact that the court stated that a party seeking to exhaust all other remedies in order to resolve the matter is a relevant factor to the issue of delay, it was also stated that "claimants cannot delay making claims (merely) on the basis that, they are seeking to persuade the decision maker to change its mind"

[18] Therefore from the time the Applicant received the letter from Mr. Robinson, regardless of whatever other steps she intended to take the Applicant should have been acting, always cognizant of the time limit, in order to ensure that her application was filed at least within the time stipulated by the rules. This is against the background that the cases have stated that even if the application is filed within the three months, depending on the circumstances the court can find that the application was not made promptly.

[19] In the case of **George Anthony Levy** (supra***)*** Mrs. Marva McDonald Bishop, J (as she then was) stated at paragraph 58 that:

> *"It is on this basis of the requirement for expeditious disposal of such matters that the relevant authorities have established that whenever the application is not made promptly, it may still be dismissed for delay even if made within the three-month period".*

[20] Therefore, the receipt of the afore-mentioned letter should have caused the Applicant to at least initiate proceedings for a review of the decision. Even if she did not accept what was communicated by the principal, while she "requested the intervention of the 1st Respondent" she should have been watching the time.

[21] She stated that later on in the year the principal withdrew her responsibilities as acting vice principal and divided same between a selected few teachers. In May 2015 Mr. Robinson communicated with her via email that he was not revoking her acting appointment but that it had come to an end. A new acting vice principal was appointed in September 2015. Therefore at the very latest by September 2015,

when a new acting vice principal was appointed one would have expected that the Applicant, would have put in her application for extension of time for leave for Judicial Review. At that juncture it should have become abundantly clear to her that there was no intention on the part of the Board or the Ministry of Education, (hereinafter refer to as the Ministry) the bodies vested with power of appointment, and approval, for her to return to that acting position. Therefore any acceptable excuse for any delay beyond this period would have to be something entirely outside of the control of the Applicant.

[22] Ms. Derrett, attorney-at-law for the Applicant submits that the Applicant's delay was due to the fact that she sought to challenge the decision of the decision maker hoping that the decision maker would change its mind. This challenge was between May 9th and July 8, 2016. She indicated that she requested by letter, a copy of the document received by the 2nd Respondent from the 1st Respondent on which the 2nd Respondent relied to base its reason as to why it had confirmed the decision of the 1st Respondent. She stated that she believed that this document ought to have been disclosed before litigation was pursued. She further contends that where the Applicant embarks on an alternative form of redress that may stand as a good reason for the delay.

[23] However, for my part I don't see how this could have prevented the application from being filed. I believe, as I have already outlined that the Applicant, had sufficient information in order to file an application for leave for Judicial Review. Therefore while the Applicant and her attorney-at-law were writing to, and communicating with the various parties one would have expected that they would have been anxiously watching the time. In light of the fact that the attorney-at-law for the Applicant should have been aware of the time bar to these kinds of application, after September 2015, which is well beyond the three (3) months there should have been no further delay. However even if the court were to find favour with the Applicant's explanation up to the point the Applicant's attorney-a-law wrote to the Board to "clarify" what the Board's position was, that information was received February 29, 2016 by letter dated 22.2.16. Additionally, by February 29,

2016 the attorney-at-law for the Applicant was also in receipt of correspondence from the Ministry confirming its approval of the position expressed by the Board.

[24] There is no date stamp from the attorney-at-law's office in relation to the date of receipt of the Board's letter. However in paragraph 27 of her affidavit filed on the 9th of September 2016 the Applicant states that "enclosed to that letter was communication from the Ministry of Education dated March 3, 2016 purporting that approval was granted for me to act as vice principal for the said period in the communication given to me by the Board"

[25] That "enclosed letter was in fact dated the 3rd of February 2016. In light of the fact that the date of receipt stamped by the attorney-at-law's office on this letter is the 29th of February 2016, the only logical conclusion is that the letter of the Board was also received on the 29th of February 2016.

These letters were sent to the applicant's attorney-at-law in response to their letter addressed to the chairman of the Board dated the 4th of January 2016.

The contents of that letter are as follows:

Re: Appointment of Genia Powell as Acting Vice Principal

The captioned matter is our reference.

It is our understanding that our client, Ms. Genia Powell, is still the Acting Vice Principal of the John Mills Primary and Junior High School as there was no decision by the Board to terminate said appointment.

We suggest that you take the requisite steps in regularizing this situation within the next seven (7) days from the date hereof.

We anticipate that your response will comply with the time ascribed.

Yours faithfully,
OSWEST SENIOR-SMITH & COMPANY

PER.....
OLIVIA DERRETT (MS.)

[26] The moment those two letters in reply were received on the 29th of February 2016 the Applicant's attorney-at-law should have been spurred into immediate action. I cannot envision what further investigations or explanation were necessary at this point. Additionally, the content of the above-mentioned letter of the Applicant's attorney-at- law would have been a clear signal to the Board and the Ministry that the Applicant may have been contemplating legal actions. In that letter the Board was given an ultimatum of seven days (7) days to comply with their request. Therefore, the response in these circumstances could not have been viewed as ambivalent, but definitive.

[27] Therefore**,** I don't see how the receipt of any other document from the Ministry would have changed position, the Board having stated its clear position. I cannot fathom why counsel chose to delay the filing of this application pending the receipt of another document. Despite the fact that she has indicated that she requested the afore-mentioned document, there is no indication that there was a promise to deliver this document. Counsel is well aware that an order from the court would have carried more force in relation to the disclosure of the document. Therefore she should have made the application and then sought the assistance of the court in relation to the said document. However the Applicant waited until September 2016 more than a year after the grounds for the application arose to file this application. Therefore I find that no good explanation has been presented for the delay in making this application.

WHETHER the Granting of this Application Will Cause Substantial Hardship to or Substantially Prejudice the Rights of Any Person; or (b) Be detrimental to Good Administration.

[28] ***Rule 56.6(5)*** gives direction to the court as to the factors that it should take into consideration, when deciding whether to refuse or grant leave when there is delay. I believe this Rule is applicable to the consideration of this application. It states:

> *"When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to:*

(a) *cause substantial hardship to or substantially prejudice the rights of any person; or*

(b) *be detrimental to good administration."*

[29] Ms. Derrett submits on behalf of the Applicant that the school has been in operation without hiccups. However the Applicant acknowledges the fact that after she had ceased performing duties as acting vice principal other person were appointed to act in that capacity. The Applicant has also indicated that she is aware that Ms. Pearline Gayle was appointed to act for the period January 2016 to August 2017. From all indications from the Respondents, and a fact which has not been challenged by the Applicant Ms. Gayle is the current acting vice principal. She is essentially acting in a vacant post. One of the reliefs being sought by the Applicant is an order that the Board be restrained from making a permanent appointment in that vacant position.

[30] Ms. Thomas made the following submissions of behalf of the Respondents:

"i). The court cannot simply terminate the appointment of Mrs. Pearline Gayle who was recommended to act in the position in circumstances where the Applicant has been guilty of undue and inexcusable delay in obtaining leave for Judicial Review almost two (2 years) after her acting appointment has ended.

ii) It will not be in the interest of John Mills Primary and Junior High School to be in limbo pending the determination of this matter. The school requires the post of vice principal to be filled.

iii) The need for good administration requires that public bodies be able to make decisions and not be kept in limbo while there are questions. It is not in the interest of good administration for a public body to remain in uncertainty where the Applicant

has delayed significantly in obtaining Judicial Review (she refers to the case ***O'Reilly v Mackman*** [1983] APP.L.R)

[31] In deciding on the application of ***Rule 56.6(5***), Frank Williams JA , at paragraph 34 of the Judgment of the Court of Appeal in the case of ***Randean Raymond v. The Principal Ruel Reid and the Board of Management Jamaica College*** [2015] JMCA Civ 59 stated:

> *"It is important to have a clear understanding of this rule; and in particular sub-paragraph (a) and also sub-paragraph (b), which indicate that, in considering the question of delay, a court might consider the effect of that delay in (a) causing hardship or prejudice; "or", (b) being detrimental to good administration. In other words, the sub-paragraphs are to be read disjunctively - that is, the rule contemplates that the court should consider prejudice and/or hardship on one hand; or detriment to good administration, on the other. If I am correct in this view, then considering the effect of delay on good administration would obviate what might have been any necessity for a consideration of hardship and/or prejudice".*

[32] ***Schedule D*** *of the* ***Education Act Regulations,*** *I980* outlines the duties and responsibilities of a vice-principal in a public educational institution in Jamaica. ***Section 3*** *states:*

> *"(1) A vice-principal shall perform such duties related to the administration and supervision of the institution as may be assigned to him by the principal. Such duties shall include such teaching as may be required.*
>
> *(2) During short absences of the principal a vice-principal shall be' in charge of the institution and shall perform the duties and carry out the responsibilities of the principal".*

[33] This provision indicates that the legislature created the position of vice principal with particular responsibilities which are necessary for the effective administration of the school. The holder of such office is required to perform some amount of administrative function in addition to teaching. This is the person who is tasked with the responsibility of deputizing for the principal when of necessity the principal has to be absent from duty. Therefore an order forbidding a permanent

appointment to that post until it is determined whether the Applicant is entitled to act for three (3) years cannot be good for the administration of the school. Essentially the effect of such an order would be to prevent a duly qualified person from being permanently appointed in the position. Even if such a person were to continue to act he or she may not be able to perform effectively, having no predictability of what the final outcome of the matter would be and how it would affect his or her position. This kind of uncertainty can engender a negative impact on the individual's ability to perform and as a consequence, negatively impact the good administration of the school.

[34] In the case of ***Randean Raymond v The Principal Ruel Reid and The Board of Management Jamaica College*** (Supra) the facts which are somewhat similar to this case, Frank JA at paragraph 35 stated:

> *"I cannot, for my part, see how it could ever be successfully argued that delay of well over a year in the filing of an application for judicial review might be regarded as being conducive to good administration (nor, happily, did the appellant attempt to argue it). On the contrary, it seems to me that such a lengthy delay as occurred in this case (against the background of the requirement for promptness and the particular reasons given), must be regarded as being detrimental to good administration."*

At paragraph 36 he further stated,

> *"the position that he had held was filled and there were no vacant positions (see the affidavit of Ruel B Reid filed 21 April 2015 - in particular paragraphs 12 and 13). The appellant was not permanently appointed and there were students to be taught. Delay in regularizing the dislocation that would no doubt have been caused by his removal from the job would, to my mind, have had an evidently detrimental effect on good administration."*

[35] Additionally**,** this kind of uncertainty caused by this delay would be prejudicial to the innocent 3rd party, Ms. Pearline Gayle who may very well be eligible for confirmation in the permanent position. She would be prevented from being confirmed due to the undue delay of the Applicant in making this application. In

any event, even if a court were to find that the Applicant was entitled to act as vice principal for the three years, it is my view that the appropriate relief in these circumstances would be a declaratory judgment and consequential award of damages.

DOES THE APPLICANT HAVE AN ARGUABLE CASE

[36] In the case of ***Sharma v Brown-Antoine et al*** (2006) 69 W.I.R. 369, a matter that was decided by the Privy Council, the court stated that:

> *"the ordinary rule now is that the Court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy. …But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application … It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which is hoped the interlocutory processes of the court may strengthen …."*

[37] In the instant application the substantive reliefs and the ground on which these reliefs are being sought by the Applicant are the primary factors that will inform this court as to whether or not she has an arguable case. Therefore my examination of these, is material to the determination of this issue. In her amended notice of application and supporting affidavits the Applicant contends that her right and legitimate expectation to act as vice principal for three (3) years at John Mills Primary and Junior High School have been infringed.

Did the Applicant have Legitimate expectation to act for three (3) years

[38] The basis of the Applicant's claim with regards to legitimate expectation is that there was no indication by the Board of the time period for which she would be appointed in the written offer, neither was there an oral communication of the same from the 1st Respondent. She further asserts that in light of the fact that the vacancy came about as a consequence of a permanent retirement there was no other reason for her to believe that her appointment was for a lesser period than

that which was implied in the Education Act (Regulation) 1980 which is for three (3) years".

[39] It is apparent that the Applicant's interpretation of the provisions of the Education Act Regulation (1980) is that in the absence of a time period being specifically stated in her letter of appointment, she is entitled to act for three (3 years).

[40] The doctrine of legitimate expectation is based on the principles of natural justice and fairness, and seeks to prevent authorities from abusing power. In the House of Lord's decision of ***O'Reilly v Mackman*** [1982] 3 All ER 1124 at page 1126: The court stated that:

> *"In public law, as distinguished from private law, however, such legitimate expectation gave to each appellant a sufficient interest to challenge the legality of the adverse disciplinary award made against him by the board on the ground that in one way or another the board in reaching its decision had acted out with the powers conferred on it by the legislation under which it was acting; and such grounds would include the board's failure to observe the rules of natural justice: which means no more than to act fairly towards him in carrying out their decision-making process,"*

[41] In the case of ***The United Policyholders Group and others v The Attorney General of Trinidad and Tobago (Trinidad and Tobago)*** [2016] UKPC 17 Privy Council Appeal No. 0017 of 2015 From the Court of Appeal of the Republic of Trinidad and Tobago at paragraph,121 the court stated:

> *"In summary, the trend of modern authority, judicial and academic, favours a narrow interpretation of the Coughlan principle, which can be simply stated. Where a promise or representation, which is "clear, unambiguous and devoid of relevant* qualification*", has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. In judging proportionality the court will take into account any conflict with wider policy issues, particularly those of a "macro-economic"*

[42] In order for me to adequately address this issue it is important for me to examine the contents of the letter of acting appointment, as also the relevant provisions of the Education Act. The afore-mentioned letter is captioned ***Post of Acting Vice Principal***. The contents are as follows:

> *1. "The board of Management conducted interviews on July 24 2014, for the post of Vice principal, vice Mrs. Beulah Dixon, who proceeds on pre-retirement leave effective September 1, 2014 for which you were a candidate. In a board meeting on September 1, 2014 the Board of management ratified the recommendation made by the personnel committee for you to act as Vice Principal. Please indicate your ability to accept the offer. The additional communications will be issued in due course".*

[43] ***Section 43 - of THE EDUCATION ACT, The Education Regulation (1980)*** reads:

> ***"(****1) The appointment of every teacher in a public institution shall be made by the Board of Management of that institution after consultation with the principal of the institution and shall be subject to confirmation by the Minister.*
>
> *(2) Every appointment shall be in accordance with one of the categories of teachers and one of the types of appointments stipulated in Schedule A.*
>
> *(3) The appointment of a principal, vice-principal or a teacher with special responsibility in a public educational institution shall only be made in accordance with Schedule B".*

[44] However the provision on which the applicant has based her claim is ***Schedule A, Section*** (***5). (4). (4).*** It reads:

> *"Acting appointment*
>
> *(1) A Board of Management may make an acting appointment to replace a principal or a teacher who is on leave or on assignment or is for any other reason absent with approval for a specified period. (my emphasis)*

> *(2) An acting appointment made in accordance with paragraph (I) shall not exceed three years unless the Board in any particular case otherwise recommends.*
>
> *(3) A principal or teacher who holds an acting appointment shall enjoy the privileges and benefits, except increments, for which he would be eligible" if he were employed permanently in the post; and the period of such acting appointment shall be computed for the purposes of vacation and other leave, increment, pension, prom down(?), benefit and allowance which he would normally"*

[45] A proper construction of the above-mentioned provisions is that the Board is empowered to make acting appointment of teachers including acting vice principals to replace teachers who are on leave or absent from work with ***approval for specified period***. Essentially this particular regulation makes provision for circumstances where any teachers including a vice principal who remains the substantive holder of a particular post is absent from active duties for a specified period, for another teacher to be temporarily appointed to perform duties in his or her absence. When a post becomes vacant there is no substantive holder of that post. Therefore it could not be determined that that teacher was on leave or absent from that post for a specified period. Essentially that teacher would have vacated the post creating a clear vacancy. Consequently this section does not apply to acting or temporary appointment in a vacant post.

[46] In any event, the provision has created a maximum period, for which the Board is empowered to make appointments. That is, in the absence of exceptional or special circumstances. However the regulation does not make any provision for a minimum period of appointment. Consequently where a teacher is appointed to act for another who is on leave for a specified period, in the absence of anything expressed to the contrary the maximum period that teacher would be expected to act is the extent of the leave of the holder of the substantive post. Therefore the fact that the Applicant was appointed to act vice Ms. Dixon who proceeded on leave, the relevant consideration at this stage is not the nature of the leave or

absence, but the specified period of Ms. Dixon's leave. In the absence of any communication to the contrary the only logical inference that could be drawn from the circumstances of the Applicant's initial appointment is that the maximum period of acting in this first instance had to be attached to the specified period of Ms. Dixon's leave. Essentially, in the first instant the maximum period could not exceed the period of Ms. Dixon's leave. Once her leave came to an end Ms. Dixon would no longer be on leave or be absent for a specified period. She would have vacated the post resulting in a clear vacancy. A new state of affair would have been created for which the Board would have had to meet again to consider an appointment to the vacant post.

[47] There is a significant difference in the nature of these appointments. ***Section (5).(4).(3) of Schedule A*** of the ***Education Regulation , (1980***)governs the procedure for temporary appointment in a vacant post. ***Section (5).(4).(4)*** of ***Schedule A*** provides for acting in place of an officer who is on leave for a specified period or absent with approval for a specified period. It also appears to be authorization for an internal reallocation of the duties of an existing staff member to another due to the exigencies of the service.

[48] However the only section which speaks to a temporary appointment in a vacant post is ***Schedule A 5.(4)3***. That section reads:

> *"3. Temporary appointments*
>
> *(1) A principal or a teacher may be appointed temporarily, to the staff of a public educational institution-*
>
> *(a) if he does not have the qualification or experience to be offered appointment to that particular post on a permanent basis; or*
>
> *(b) to fill a vacancy for which there is no substantive holder.*
>
> *(2) A temporary appointment shall be for a specified period not exceeding three terms unless the Board of the institution at the end of that period has agreed to extend the period of such appointment*.

[49] Under this provision the candidates are not necessarily limited to local staff members. This consideration also applies to the procedure under ***Schedule B*** with regards to permanent appointments. In fact while a decision is pending under Schedule ***B*** the Board can make a temporary appointment in a vacant post. However the provisions states that the temporary appointment in the vacant post should not exceed **three (3) terms unless at the end of that period the Board agrees to extend the period of such appointment.** There is no power vested in the Board to appoint a teacher to act beyond three (3) terms (approximately one (1) year) in the first instance in a vacant post.

[50] Therefore, in neither of these provisions is there a requirement for anyone to act for a minimum period of three (3) years. At the end of Ms. Dixon's leave the Board could only have proceeded under ***Schedule A 5.(4) (3***) with regard to temporary appointment in a vacant post and Schedule B with regards to permanent appointment in a vacant post. They would have had to convene another meeting in order to decide on a suitable candidate to fill the vacant post.

[51] The authorities have stated that a substantive legitimate expectation can be formed when a representation is made by an authority as to the final decision and outcome that the authority will make in a particular case (See ***UKPC 2, [1983] 2 A.C. 629, Privy Council*** (on appeal from Hong Kong) Therefore the relevant the considerations for me at this stage are:

(a) What decision was taken by the Board?

(b) What was in fact communicated to the Applicant?

(c) Based on what was communicated to the Applicant could any court find that she could have reasonably concluded from that communication that she was appointed to act for 3 years.

[52] The initial letter of the Board to the Applicant stated that the interviews were conducted for the post of vice principal for which she was a candidate. However in terms of appointment, it clearly states that:

(a) The Board of management ratified the recommendation made by the personnel committee for her to **act** as vice principal.

(b) That Ms. Dixon proceeded on pre-retirement leave.

(c) That she was acting vice Ms. Dixon.

No time period was specifically stated for her acting. However the letter also stated that "additional communications will be issued in due course".

[53] In addition to the initial letter of the Board to the Applicant, it is apparent from Mr. Thompson's affidavit that it was never in the contemplation of the Board for the Applicant to act for three (3) years. At paragraph eight (8) of his affidavit sworn to on the 6th of March 2017 Mr. Hugh Thompson states:

> "at *the time there was no specific time period to dictate how long her appointment would be. It was agreed that firstly the applicant would be assessed and the determination would be made whether she would be eligible to be appointed in the permanent position."*

[54] In the case of **Harinath Ramoutar v. Commissioner of Prisons and Public Service Commission From the Court of Appeal of the Republic of Trinidad and Tobago** [2012] UKPC 29 Privy Council Appeal No 0025 of 2011 at paragraph 13 the court stated that:

> *" Normally the word "eligible" imports a threshold condition of appointability. It does not normally mean "suitable"*

Therefore no decision with regard to the Applicant's suitability to the permanent position could have been taken by the Board in contravention of the procedure previously outlined.

[55] Despite the fact that Mr. Thompson states at paragraph nine (9) of his affidavit that to his knowledge the Board has the authority to appoint any one individual in an acting position for a maximum of three (3) years, there is nothing in his affidavit to indicate that the Board had contemplated appointing the Applicant to act for three years. Additionally there is nothing in Mr. Thompson's affidavit indicating that it was ever communicated to the Applicant by the Board, whether by words or conduct that she was appointed to act for three years.

[56] In the case of ***Francis Paponette and Others v The Attorney General of Trinidad and Tobago From the Court of Appeal of Trinidad and Tobago [2010] UKPC 32 Privy Council Appeal No 0009 of 2010,*** Their Lordships stated at paragraph 37 that:

> ***"The*** *initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too.****"***

[57] The fact that the Board declined to indicate to the Applicant the precise period that she would be expected to act vice Ms. Dixon in its initial letter of appointment cannot from any perspective be reasonably interpreted as an indication for her to act for three (3) years. The qualification in that letter was that she would receive further communication. I take note of the fact that Mr. Hugh Thompson, the then chairman of the Board said that no decision had been made by the board he chaired regarding the time period of her acting. However that could not translate into any legitimate expectation on the part of the Applicant to act for three (3) years. That Board, having omitted to provide clarity in that regard, the responsibility would then fall to the incoming board to provide that clarity and make decisions within its statutory powers. This was done and communicated by the Board in the letter addressed to the Applicant's attorney-at-law dated 22nd of February 2016.

[58] Therefore the fact that the period of the Applicant's acting appointment was later communicated to her by the principal, and then later by the Board cannot by itself invalidate the decision. The important issue is whose decision it was. The letter of 22nd of February 2016, communicated that it was the Board's decision.

Was the period of The applicants appointment **contrary to Practice and Policy**

[59] The next issue I must address with regards to the issue of legitimate expectation is whether or not there is any evidence on which a court could find that the Applicant's appointment to act for one year was contrary to, (a) practice of the Board and the ministry, (b) policy. Ms. Campbell from Ministry has indicated that the practice has been for personnel to be appointed to act for one (1) year after which an appraisal is done. This has not been challenged by the Applicant. Additionally there is supporting evidence coming from both sides that Ms. Pearline Gayle was initially appointed to act for one (1) year. In fact, this practice accords with the legislative provisions to which I have already referred, for temporary appointment in a vacant post.

[60] There is nothing in the communication of the Board chaired by Mr. Cameron that runs counter to that which what was previously communicated to the Applicant by the previous Board. The decision of the Board chaired by Mr. Cameron cannot be deemed illegal by virtue of the fact that Board does not constitute the same members as the previous Board.

[61] The authorities have stated that a legitimate expectation does not arise when it requires a public authority to act in breach of its statutory duty (See ***South Bucks District Council v. Flanagan*** [2002] W.L.R. 2601 at 2607, paragraph. 18, C.A. and Rowland ***v. Environment Agency*** [2003] EWCA Civ 1885, C.A.)

[62] I see no reasonable argument or arguable case that can be advance for a claim to act as vice principal for thee (3) years where; (a) no such entitlement was created by the legislature and (b) it was never in the contemplation of the Board (c) and it was never promised by words or conduct of the Board to the Applicant. This

expectation apparently arose out of her own assumption and was never induced by the Board or any other legitimate authority.

[63] Further, the Applicant stated at paragraph thirteen (13), of her affidavit filed on the 9th of September 2016, that in the interim between the period of September 2014 to January 2015 she made several checks at the ministry to query the status of ratification of the Board's decision. She said this:

> "was in order to obtain clarity as to her appointment as it was being said by persons other than the board that her appointment was for I year".

The fact that from as early as September 2014 she was seeking clarity suggest to me that she herself did not hold a firm view or expectation as to the period of her appointment. Therefore no evidence has been presented by the Applicant on which a court could find that her appointment to act as vice principal for one (1) year is contrary to practice and policy.

CONCLUSION

[64] There was inordinate delay in making this application for extension of time to apply for leave for Judicial Review. Additionally the Applicant has failed to provide any good reason for an extension of time. She has failed to demonstrate that the granting of the application for extension of time will (a) not cause substantial hardship to or substantially prejudices the rights of any person; or (b) will not be detrimental to good administration.

[65] There is nothing expressly stated or implied in the Education Act Regulation (1980) that there is a right to act in a post of vice principal for three (3) years. There is no evidence on which a court could find that the actions of the Board were unlawful or contrary to usual practice. Therefore an action to quash a lawful action of the Board or to compel the Board to do something that was not promised by the Board, and was not an established practice is not sustainable.

[66] The Applicant is not making a claim to the permanent position. Therefore there is no basis to her claim for a relief to bar the school from making a permanent appointment to the position of vice principal. Despite the foregoing however, the Applicant has presented sufficient evidence on which a court can find that she is entitled to be paid for the period for which she was appointed to act. That is the period that is stated in the Board's letter dated the 22nd of Feb 2016. However it is apparent from the various correspondences, that this is a position the ministry had accepted and had given instructions for her to be paid. Therefore, I find that the Applicant has failed to pass the threshold for extension of time to apply for leave for Judicial Review.

ORDER

(1) The application for extension of time to apply for leave for Judicial Review is refused.

(2) Leave granted to appeal.

(3) Cost to the Respondents to be agreed or taxed.