[2015] JMSC Civ 170

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014HCV04307

BETWEEN	AUDREY BERNARD-KILBOURNE	CLAIMANT
AND	THE BOARD OF MANAGEMENT OF MALDON PRIMARY SCHOOL	DEFENDANT

Mr. André Earle and Mrs. Nikeisha Young Shand instructed by Earle & Wilson for the Claimant

Ms. Carole Barnaby instructed by the Director of State Proceedings for the Defendant

January 28, March 17, April 24 and August 17, 2015

Part 56 of the Civil Procedure Rules – Whether or not application for declaration against public body without application for judicial review an abuse of process – Circumstances in which Reg. 54(2) of the Education Regulations 1980 apply – Effect of fit and proper requirements on membership of school Board – Meaning of "presence" under the Education Regulations 1980 – Effect of an invalid vote on decisions taken by Board – Meaning of "regular assessments" under the Education Regulations 1980 – Factors to be taken into account in exercise of discretion to grant or not to grant declarations

D. Fraser J

THE BACKGROUND TO THE CLAIM

[1] The claimant, Audrey Bernard-Kilbourne was appointed provisional principal of Maldon Primary School initially for one year commencing January 1, 2013 to December 31, 2013. This was by letter dated August 27, 2012 from the defendant Board then chaired by Mrs. Dorette Weir-Robinson. All the relevant subsequent decisions and actions of the defendant, were taken under the chairmanship of Mr. Samuel Johnson, who assumed the chairmanship of the defendant effective January 1, 2013.

[2] By letters to the Permanent Secretary of the Ministry of Education (Region 4) dated January 22, 2014 and March 25, 2014, the defendant recommended that the claimant's provisional appointment as principal of Maldon Primary School be extended until June 30, 2014. Her appointment was subsequently extended to July 30, 2014 by letter dated June 30, 2014.

[3] By letter dated July 30, 2014, the defendant advised the Ministry of Education that it was not recommending the claimant's appointment to the post of Principal of the Maldon Primary School. The defendant also indicated that it was extending the claimant's appointment as provisional principal to September 30, 2014 and that a further extension of such appointment would not be granted. The reasons for not recommending the appointment of the claimant were stated as:

i. Failure to follow the Board’s instructions in most cases
ii. Lack of interpersonal skills
iii. Inadequate team building skills
iv. Failure to establish a proper working relationship with the majority of her staff.

[4] The claimant was only assessed twice by the Ministry of Education during her tenure as provisional principal of the Maldon Primary School.

THE CLAIM

[5] On September 12, 2014 counsel for the claimant filed a Fixed Date Claim Form (FDCF) and Without Notice Application for Injunction. On that day the claimant obtained an *ex parte* injunction restraining the defendant for a period of 28 days or until further order of the court, from taking any steps to affect the claimant's position as provisional principal or filling the position of principal of the Maldon Primary School.

[6] On October 9, 2014 counsel for the claimant filed an amended FDCF seeking the following reliefs:

i. A declaration that the defendant's decision to terminate the claimant's position as Provisional Principal is not lawful as it failed to follow the procedure set out under regulations 56-59 of the Education Regulations, 1980.
ii. A declaration that the defendant's purported decision not to recommend the claimant's appointment as Principal is not valid.
iii. A declaration that regular assessments were not made of the claimant's performance as Provisional Principal by the Ministry of Education.
iv. A declaration that without the said assessments, the defendant is not in a position to make a decision as to whether or not to recommend that the provisional appointment of the Claimant be made permanent.
v. An injunction pending the determination of the claim herein
vi. Costs
vii. Such further or other relief as this Honourable Court sees fit.

[7] The matter was heard over a number of dates. The injunction was extended on more than one occasion pending the outcome of the Full Hearing. The First Hearing of the FDCF which commenced on January

28, 2015 and continued on March 17, 2015, was converted into the Full Hearing on April 24, 2015.

THE ISSUES

[8] The following are the issues arising for determination:

i. Is the fact that the claimant proceeded against the defendant Board other than by way of judicial review, an abuse of the process of the court? Should the claimant have proceeded by way of judicial review and sought orders for mandamus or certiorari? If so, should the matter be converted to an application for judicial review pursuant to the Civil Procedure Rules (CPR) rule (r.) 56.7?

ii. Was the decision of the defendant not to recommend the provisionally appointed claimant for permanent appointment as principal a termination pursuant to regulation 54 (2) of the **Education Regulations 1980** requiring the procedure outlined in regulations 56-59 to be followed, failing which the decision would be unlawful?

iii. Was Mr. Samuel Johnson precluded from being appointed as Chairman of the Board of Maldon Primary School on account that he was convicted of a criminal offence in the United States of America?

iv. At the time the Board took the decision not to recommend the claimant for appointment as principal, was Ms. Donnetta McGhie who participated part time by telephone "present" within the meaning of the **Education Regulations** and had she vacated her membership on the Board?

v. If Ms. McGhie's vote is declared invalid, did it invalidate the remaining majority vote of the Board not to recommend the claimant for appointment as principal?

vi. Were two assessments of the claimant by the Ministry of Education sufficient to be considered regular assessments

within the meaning of the **Education Regulations**? In the absence of a joinder of the Ministry or Minister of Education in the claim, can the claimant obtain a declaration that the Ministry had not arranged for the regular assessment of the claimant during her provisional appointment as principal?

vii. Did the Board as required receive and take into account a report of such assessments of the claimant's performance as provisional principal as undertaken by the Ministry of Education through its Education Officer in deciding not to recommend the claimant for appointment as principal?

viii. Should the court refuse to exercise its discretion to grant the declarations sought by the claimant on the bases:

a) Of acquiescence to a decision being taken by the Board on July 29, 2014 on two assessments; and

b) That the declarations would serve no useful purpose?

DISCUSSION AND ANALYSIS

Issue I *- Is the fact that the claimant proceeded against the defendant Board other than by way of judicial review an abuse of the process of the court? Should the claimant have proceeded by way of judicial review and sought orders for mandamus or certiorari? If so, should the matter be converted to an application for judicial review pursuant to the Civil Procedure Rules (CPR) rule (r.) 56.7?*

[9] Part 56 of the CPR that governs the current proceedings deals with Administrative Law not just judicial review. Rule 56.1 (1) and (2) in outlining the scope of the part and how applications are to be referred to provide as follows:

(1) This part deals with applications:-

(a) for judicial review;

(b) by way of originating motion or otherwise for relief under the Constitution;

(c) for a declaration, or an interim declaration in which a party is the State, a court, a tribunal or any other public body; and

(d) where the court has power by virtue of any enactment to quash any order, scheme, certificate or plan, any amendment or approval of any plan, any decision of a minister or government department or any action on the part of a minister or government department.

(2) In this part such applications are referred to generally as **"applications for an administrative order".**

[10] Notwithstanding CPR r. 56.1 (1) (c) counsel for the defendant submitted that, the well-established general rule that it is contrary to public policy and an abuse of the process of the court for a claimant complaining of infringements of her public law rights by a public authority to seek redress by action other than by judicial review, still applies. Counsel relied on the case of ***The Chairman, Penwood High School's Board of Management and the AG v Loana Carty*** [2013] JMCA Civ 30 which quoted with approval the well known English case of ***O'Reilly v Mackman*** [1983] 2 A.C. 237.

[11] Counsel submitted that by proceeding other than by judicial review the claimant sought to deprive the defendant of the safeguards against abuse built into the judicial review process, which safeguards are not available in an action other than for judicial review. Counsel further argued that as the matters complained of by the claimant were squarely within the realm of public law and not collateral to any private law right to fall within the exception to the general rule, the claim as brought was an abuse of the process of the court.

[12] Counsel for the claimant on the other hand submitted that the position advanced by counsel for the defendant was misconceived as it failed to take account of the current differences between the English Civil Procedure Rules and the Jamaican CPR. There is a lot of force in counsel's submission.

[13] At the time of the decision of ***O'Reilly v Mackman*** Order 53 Rules of the Supreme Court was in force in England. It has now been replaced by Order 54. Paragraphs 1 and 2 of Order 53 provided as follows:

> (1) An application for-
>
> > (a) an order of mandamus, prohibition or certiorari, or
> > (b) an injunction under section 21J of the Ordinance restraining a person from acting in any office in which he is not entitled to act,
>
> shall be made by way of an application for judicial review in accordance with the provisions of this Order.
>
> (2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1)(b)) may be made by way of an application for judicial review, and on such an application a judge may grant the declaration or injunction claimed if he considers that, having regard to-
>
> > (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari,
> > (b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and
> > (c) all the circumstances of the case,
>
> it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

[14] In outlining how Order 53 should be interpreted Lord Diplock who gave the judgment of the court had this to say at page 284 – 285:

> My Lords, Order 53 does not expressly provide that procedure by application for judicial review shall be the exclusive procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law; nor does section 31 of the Supreme Court Act 1981. There is great variation between individual cases that fall within Order 53 and the Rules Committee and subsequently the legislature were, I think, for this reason content to rely upon the express and the inherent power of the High Court, exercised upon a case-to-case basis, to prevent abuse of its process whatever might be the form taken by that abuse. Accordingly, I do not think that your Lordships would be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in an action begun by writ or originating

> summons a remedy against infringement of rights of the individual that are entitled to protection in public law.
>
> The position of applicants for judicial review has been drastically ameliorated by the new Order 53. It has removed all those disadvantages, particularly in relation to discovery, that were manifestly unfair to them and had, in many cases, made applications for prerogative orders an inadequate remedy if justice was to be done. This it was that justified the courts in not treating as an abuse of their powers resort to an alternative procedure by way of action for a declaration or injunction (not then obtainable on an application under 0.53), despite the fact that this procedure had the effect of depriving the defendants of the protection to statutory tribunals and public authorities for which for public policy reasons Order 53 provided.
>
> Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.

[15] Lord Diplock was commenting on the effect of the new Order 53. Prior to its implementation, under the old Order 53 discovery could not have been obtained on an application for certiorari. Further leave to allow cross-examination of deponents to affidavits was almost invariably refused. To circumvent those strictures litigants instead applied for a declaration of nullity of the impugned decision along with an injunction to prevent the challenged authority from acting on the decision. The courts "turned a blind eye" to the practice to avoid injustice. However with those impediments removed Lord Diplock indicated it was inappropriate to still proceed for a declaration against a public authority depriving the authority of the safeguards of judicial review in a context where the handicaps to a fair procedure had been removed.

[16] The current Part 54 of the Civil Procedure Rules in England appears to preserve the Order 53 position by providing that the judicial review procedure ***may*** be used for an application for a declaration or an injunction. It however goes one step further to provide that where an applicant is seeking a declaration or injunction in addition to a mandatory, prohibitory, or quashing order or an injunction under section 30 of the Supreme Court Act 1981 the judicial review procedure ***must*** be used.

[17] Therein lies the crucial difference in the Civil Procedure Rules of Jamaica and England in this area. Currently in England a declaration being sought in a public law context is addressed under the Part dealing with Judicial Review and Statutory Review. In Jamaica the applicable Part 56 of our Civil Procedure Rules treats declarations where one party is *"the State, a court, a tribunal or any other public body"*, as a separate administrative order. Essentially it is a public law declaration. Nowhere in the Jamaican rules is this type of declaration mentioned as needing to come under the aegis of judicial review. It is not even stated as in Part 54 of the United Kingdom Rules that where declarations are being sought in conjunction with the former prerogative orders the procedure must be by way of judicial review.

[18] I have come to this conclusion though mindful of the Court of Appeal decision of ***The Chairman, Penwood High School's Board of Management and the AG v Loana Carty.*** In that case the appellants sought inter alia to have portions of the respondent's claim struck out. These portions were where she: 1) sought a declaration that she was dismissed in breach of the Education Regulations 1980 and 2) sought damages for unfair dismissal. The application was refused in the Supreme Court and on appeal the issue in relation to point 1 was whether the aspects concerning the Education Regulations properly fell under the auspices of public law and therefore, to institute them in a private law claim is an abuse of the process of the court.

[19] In the Court of Appeal, Brooks JA cited with approval the general rule in ***O'Reilly v Mackman*** relied on by the defendant Board in the instant case. He also referred to the rule in ***Roy v Kensington and Chelsea and Westminster Family Practitioner Committee*** [1992] 1 All E R 705. This case provides an exception to the general rule stated in ***O'Reilly v Mackman.*** That exception provides that a litigant asserting his entitlement to a subsisting private law right, whether by way of claim or defence was not barred from seeking to establish that right by action, by the circumstance that the existence and extent of the private right asserted could incidentally involve the examination of a public law issue. The exception was however unable to assist the respondent as relief for unfair dismissal is available only from the Industrial Disputes Tribunal. Her claim was accordingly struck out.

[20] It is noteworthy however that the attention of the Court of Appeal in ***The Chairman, Penwood High School's Board of Management and the AG v Loana Carty*** was not adverted to CPR 56.1 (1) (c) as this court's attention has been. It does appear to this court that the Rules Committee of the Supreme Court in Jamaica though clearly aware of the decision in ***O'Reilly v Mackman*** has chosen a liberal approach. Our CPR therefore provides that a declaration against a public body can be obtained under CPR r. 56.1 1 (c) in the absence of an application for judicial review. This "public law" declaration is in contrast to the declaratory judgment obtainable under CPR r. 8.6 which provides, *"A party may seek a declaratory judgment and the court may make a binding declaration of right whether or not any consequential relief is or could be obtained."* Rule 8.6 provides for declaratory judgments in a context where no limitation is imposed on the nature of a party that must be involved. It is the provision under which declarations in private law matters not involving administrative law are pursued.

[21] My conclusion is supported by what transpired in the unreported case of Claim No. 2009 HCV 00660 ***Legal Officers Staff Association***

***(L.O.S.A) v. AG and Minister of Finance*.** In the paper **Judicial Review – Holding the State Accountable** presented at the Jamaican Bar Association Continuing Legal Education Seminar February 18, 2012, at paragraph 31 Mangatal J. in outlining what happened in the case stated that:

> An application for a declaration pursuant to Part 56 is separate from an application for judicial review and no leave is required in order to apply for a declaration. In this case, King J. had granted the applicants leave to apply for judicial review but his decision is on appeal. I accepted the submission made on behalf of L.O.S.A that as they were separate matters, a hearing for the Declarations could be set down notwithstanding that the issue of the grant of leave was on appeal. On appeal from my procedural decision, Norma McIntosh J.A. agreed with the proposition that they were indeed separate and that at a case management conference the court may direct that parts of a claim be dealt with separately. However, McIntosh J.A. ruled that since the Declarations being sought dealt with issues with which the leave application heard by King J. was also concerned, it was not desirable that the matters should proceed separately as both courts could potentially arrive at conflicting decisions. She therefore granted an application made by the Attorneys appearing for the Respondents staying the declarations hearing until the determination of the appeal.

[22] It should also be stated that in this new dispensation the concerns of potential abuse that were uppermost in Lord Diplock's mind in ***O'Reilly v Mackman*** are adequately addressed in Part 56 of our CPR. Detailed rules outline how an application for an administrative order should be made (CPR r. 56.9). The court has wide powers at the first hearing to provide for the expeditious and just hearing of the claim, including powers to provide for service of statements or affidavits, disclosure of documents and cross-examination of witnesses (CPR r. 56.13). CPR r. 56.13 also specifically imports the extensive general case management

powers under Parts 25 to 27 of the CPR, which contain within them all the necessary tools with which the court can prevent and punish abuse of its process. The only safeguard that is peculiar to judicial review is the need for leave.

[23] Further there is power to direct that a matter that commences by ordinary claim should proceed as an action for an administrative order (CPR r. 56.7). All in the context of Part 56 being interpreted in keeping with the overriding objective in CPR r 1.2, for cases to be dealt with justly. I therefore hold that it is not an abuse of process for the matter to have been commenced other than by way of judicial review and there is no requirement for the matter to be converted to a claim for judicial review pursuant to CPR r. 56.7.

Issue II - *Was the decision of the defendant not to recommend the provisionally appointed claimant for permanent appointment as principal a termination pursuant to regulation 54(2) of the* ***Education Regulations 1980*** *requiring the procedure outlined in regulations 56-59 to be followed failing which the decision would be unlawful?*

[24] Section 54 (2) of the **Education Regulations 1980** states that:

> Where the Board of any public educational institution intends to terminate the employment of any teacher in that institution other than a teacher employed on a provisional, temporary or acting basis for less than one year, the termination shall not have effect unless the procedure set out in regulations 56 – 59 are followed.

[25] Regulations 56-59 include requirements that a written complaint must be brought to the Board if disciplinary action is warranted. The complaint ought to be referred to the personnel committee. The personnel committee should then report its findings to the Board. If the Board decides to terminate the teacher, the Board must then submit to the Ministry of Education the minutes of the Board meeting where the

decision was made and a copy of the notice of termination of employment of the teacher.

[26] Counsel for the claimant submitted that the letter of July 30, 2014, from the defendant to the Ministry of Education, in which the defendant indicated it was extending the claimant's appointment as provisional principal to September 30, 2014, but not granting any further extension, nor recommending the claimant's appointment to the post of Principal of the Maldon Primary School, was effectively a letter of termination. The claimant having been employed as provisional principal from January 1, 2013, a period of more than one year at the time of her termination, reg. 54 (2) applied. Consequently the defendant's failure to follow the procedure under regs. 56 -59 rendered her termination and the recommendation of the defendant under para. 2 (2) (e) of Schedule A of the Education Regulations null and void and of no effect. Counsel cited ***Owen Vhandel v. The Board of Management of Guys Hill High School*** SCCA 72/2000 (June 7, 2001) in which Downer JA at page 17 alluded to the fact that the procedures set out in regulations 56-59 ought to be followed in the dismissal of temporary, acting or provisional teachers who are employed for more than a year. Further Downer JA opined that in any event in terminating a teacher employed for less than a year the Board was bound to observe the common law principles of natural justice.

[27] Counsel for the defendant countered by submitting that the letter of July 30, 2014 was not a termination within the meaning of reg. 54(2) and therefore the procedures under regs. 56 – 59 did not apply. Counsel argued that reg. 54(2) and regs. 56 - 59 were of general character. In keeping with the Latin maxim, *generalia specialibus non derogant,* which loosely translated means the general things do not detract from the special things, it was reg. 43 that deals specifically with the first appointment of a principal on a provisional basis and the non-confirmation of a provisional appointee as principal, which instead applied. Reg. 43 (2) requires every appointment to be in accordance

with one of the categories of teachers and one of the types of appointments in Schedule A. Counsel relied on Schedule A, Types of Appointments, (2) Principals, para.(f) which provides that:

> The Commission shall determine in consultation with the Board, subject to confirmation by the Minister, whether the provisional appointment shall be made permanent or be extended for a further period but the total period of an appointment on a provisional basis shall not exceed two years.

[28] Counsel therefore submitted that a provisional appointment could be terminated without recourse to reg. 54 (2) or regs. 56 – 59 by either, (i) the effluxion of time as it could not exceed two (2) years) or (ii) by the Commission in consultation with the Board and subject to the confirmation of the Minister, in exercise of the power to determine whether a provisional appointment should be made permanent. In relation to termination by effluxion of time, counsel relied on ***Wilson v the Board of Management of Maldon High School and the Ministry of Education*** [2013] JMCA Civ 21 [55].

[29] It is important in the analysis to closely examine the provisions of and relationship between regulations 54, 43 and Schedule A. The text of reg. 54 (1) and (2) reads as follows:

> (1) Subject to paragraph (2), the employment of a teacher in a public educational institution may be terminated—
>
> a) in the case of a teacher who holds a temporary, acting or provisional appointment, by one month's notice given by either the teacher or the Board and, where the employment is terminated by the Board, stating the reasons for the termination, or by a payment to the teacher of a sum equal to one month's salary in lieu of notice by the Board and such payment shall be accompanied by a statement by the Board of the reasons for the termination; and

b) in any other case by three months' notice given by either the teacher or the Board or by the payment to the teacher of a sum equal to three months' salary in lieu of notice by the Board.

(2) Where the Board of any public educational institution intends to terminate the employment of any teacher in that institution other than a teacher employed on a provisional, temporary or acting basis for less than one year, the termination shall not have effect unless the procedure set out in regulations 56 – 59 are followed.

(3) …

[30] Regulation 43 (1), (2) and (3) provide:

(1) The appointment of every teacher in a public educational 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.

[31] Paragraphs 1 and 2 of Schedule A under "Types of Appointment" reads:

When appointing teachers a Board of Management may make—

1. *Permanent appointments* in which the holder enjoys security of tenure in the particular institution until retirement, unless his employment is terminated in accordance with regulation 54.

2. Provisional appointments

(1) *Teachers*

(a) ….

(f) ....

(2) *Principals*

(a) A first appointment as a principal shall be on a provisional basis unless otherwise recommended by the Commission and

approved by the Minister. The duration of the provisional appointment shall not normally exceed three school terms.

(b) ….

(c) The Commission may, as it thinks fit, recommend to the Minister that the period of the provisional appointment referred to in sub-paragraph *(a)* be varied or may recommend a provisional appointment where a permanent appointment has been recommended.

(d) During the period of the provisional appointment, arrangements for the regular assessment of the principal shall be made by the Ministry and a report on such assessment which shall be discussed with the principal shall be made to the Board.

(e) The Board shall, before the expiration of the period of the provisional appointment referred to in sub-paragraph (c), make a report to the Commission and that report shall take into account the assessment made by the Ministry as to the professional competence and performance of the principal.

(f) The Commission shall determine in consultation with the Board, subject to confirmation by the Minister, whether the provisional appointment shall be made permanent or be extended for a further period; but the total period of an appointment on a provisional basis shall not exceed two years.

[32] Regulation 43 is the second regulation under the section of the Regulations headed “Teachers”. This section includes regulations 42 – 62. Regulation 43 speaks to the appointment of all teachers. Schedule A which is referred to in reg. 43 (2) outlines the categories of teachers and the types of appointments. Paragraph 2 (2) of Schedule A makes it clear that provisionally appointed principals fall under the description of “teachers”.

[33] While reg. 43 deals with appointments of teachers, reg. 54 deals with the procedure to be followed when a teacher’s appointment is to be terminated. Paragraph 1 of Schedule A which deals with permanent

appointments indicates that a permanent appointee enjoys security of tenure, unless his appointment is terminated in accordance with reg. 54.

[34] The scheme of reg. 54 (1) is that where a person holds a temporary, acting or provisional appointment that appointment can be terminated by one month's notice either by the teacher or the Board, or by the Board paying one month's salary in lieu of notice. Where the termination is by the Board it should state the reasons for the termination. In any other case i.e. for example where the person is permanently appointed, that appointment can be terminated by three months notice either by the teacher or the Board, or by the Board paying three months salary in lieu of notice. Curiously the same requirement for the Board to state reasons for the termination is not stipulated in this case. However the rules of natural justice would seem to dictate that where someone enjoys security of tenure there would be an even stronger case for reasons to be given for termination.

[35] Critically by virtue of reg. 54 (2) where a teacher is permanently appointed or appointed on a provisional, acting or temporary basis for more than a year, that appointment cannot be terminated unless the procedure in regs. 56 - 59 is followed. Counsel for the defendant Board submitted that reg. 43 and the provisions of Schedule A are discrete and operate separately from reg. 54. She maintained that acting under sub-para. 2 (2) (f) of Schedule A the Commission in consultation with the Board subject to the confirmation of the Minister, could determine whether a provisional appointment should be made permanent and no issue of termination under reg. 54 would arise. Similarly, if by effluxion of time two years passed without the provisional appointment being made permanent the provisional appointment would automatically lapse.

[36] It is clear from the regulations that the tenure of a provisional principal cannot exceed two years. That was recognised and stated in ***Derrick Wilson v The Board of Maldon High School and the Ministry of***

Education [2013] JMCA Civ 21 at para. 64. The injunction first granted September 12, 2014 however remains in force preventing the position of principal from being filled. Since the initial granting of the injunction the maximum two year period of the claimant's appointment as provisional principal expired on December 31, 2014 prior to the hearing of the claim. At this point two things should be noted. ***Firstly*** it is clear from the regulations that generally, provisional appointments are not expected to extend beyond three school terms. This is the case both for teachers and for principals.

[37] In Schedule A where the provisional appointment of a teacher is addressed, it is stated that such provisional appointment should not normally exceed three school terms. It is also stipulated that the fact of any non-confirmation should be notified to the teacher to take effect from the end of the third term. This after consultation with the teacher and the Board's consideration of the necessary assessments (done by the principal and supervisors) that have been conducted. Further, where continuation of appointment is recommended it is stated that subsequent appointment in the same or other public educational institution should not normally be offered or made on a provisional basis (See Schedule A (1) (a), (b), (c) & (d)).

[38] Schedule A next addresses provisional appointment of a principal. As with the case of a teacher, it is stipulated that the duration of the provisional appointment should not normally exceed three school terms. There are also provisions for regular assessments to be carried out by the Ministry during the period of the provisional appointment, and for the Board to make a report to the Commission that takes into account those assessments, before the expiration of the period of provisional appointment. As noted before the provisional appointment can be extended, but not beyond two years. There is no similar limitation where teachers are concerned. However for teachers there is a clear indication that any further appointment after three school terms should not be on a provisional basis.

[39] The ***second*** thing to note is that three school terms is a threshold akin to a probationary period for the provisional appointee. If the person is deemed unfit for appointment within that period, only a one month notice or payment in lieu of notice plus reasons for termination need be given by a Board. However once a provisional appointment exceptionally goes beyond three school terms, the provisional appointee acquires the same rights concerning termination as a permanent appointee under section 54 (2); though in the case of a provisional principal, those rights are subject to the fact that his provisional appointment cannot exceed two years. After three school terms and before the expiration of two years, on my reading of the regulations, the full procedure envisioned by regs. 56 - 59 has to be engaged before the termination of the provisional appointment can have effect.

[40] There is therefore in my view, contrary to the contention of counsel for the defendant, an organic interrelation between the appointment and termination provisions of regs. 43 (supplemented by Schedule A) and 54. I am also of the view that reg. 43 and Schedule A make it clear that a provisional principal is a teacher for the purposes of reg. 54. Not only do regs. 43 and 54 fall under the same section of the regulations headed “Teachers”, I have been shown no regulations, nor have I independently discovered any, that speak to separate disciplinary provisions for teachers as opposed to provisional principals or principals. It would be passing strange and entirely arbitrary, for regular teachers to be afforded more protection than provisional principals when both have passed the three term threshold. Even more fundamentally it cannot be that there are no disciplinary provisions that apply to principals or vice-principals. It therefore seems clear that “teacher” in reg. 54 applies to all teachers of whatever level and responsibility covered by the Education Regulations including principals and provisional principals.

[41] Therefore I hold that in the exercise of discretion by the defendant under sub-para. 2 (2) (f) of Schedule A, if the claimant, a provisional principal, was going to be terminated after having served for more than three school terms, and before the expiration of two years, reg. 54 (2) applied, requiring the procedure under regs. 56 – 59 to be followed. The facts of this case also make it pellucid that course was necessary. Regulation 55 outlines the factors about which a complaint justifying disciplinary action can be made under reg. 56. These factors include, neglect of duty, inefficiency, lack of discipline and such other conduct as may amount to professional misconduct.

[42] In the letter of July 30, 2014 among the reasons listed for the non-recommendation of the claimant was her: i) failure to follow the Board's instructions in most cases, ii) lack of interpersonal skills, iii) inadequate team building skills and iv) failure to establish a proper working relationship with the majority of her staff. On the face of it at least the first reason stated seems to be a charge that could have disciplinary implications. This in a context where given my reading of the regulations it appears that once the three term threshold has been passed, a provisional principal can only be removed before the expiration of two years, for a disciplinary reason, after the procedures outlined in regs. 56 – 59 have been adhered to.

[43] I have come to this conclusion cognizant of the Court of Appeal decision of ***Derrick Wilson v The Board of Maldon High School and the Ministry of Education*** [2013] JMCA Civ 21. In that case the appellant Mr. Wilson having served two years as provisional principal was not recommended for appointment. One issue addressed by the Court of Appeal was the effect of reg. 54(1). Harris P (Ag.) as she then was, opined at paragraph 55 that:

> Although, schedule 2 of the Regulations deals with the appointment of teachers and principals…so far as the question of notice is concerned, only (sic) section 54(1) of the Regulations makes provision for the issuance of a notice prior to the termination of a teacher's appointment. Neither the

> regulations nor the Act provides for the issuing of a notice in respect of the termination of a provisional principal's appointment. The appellant, although holding the position of a provisional principal, was a teacher. His appointment in that capacity was terminated. A notice terminating his appointment would fall within the purview of (sic) section 54(1) which provides for the giving of a month's notice. It follows therefore that, in keeping with this Regulation ordinarily, the appellant's appointment could have been properly terminated by one month's notice. However, in this case, no notice would have been required as the appellant had served the requisite two years as a provisional principal and his tenure in that post could not have exceeded two years. He would have been required to demit office on 31 August 2006.

[44] With respect and due deference to the learned acting President, it must be pointed out that the Court's attention was not adverted to and no analysis of reg. 43 and Schedule A was carried out relative to reg. 54, as this court has just conducted, to show that the provisional principal would fall under the rubric of teacher as used in reg. 54(1). Further reg. 54(2) was not addressed, in a context where the provisional principal was in place for more than three school terms. In any event as the maximum period for provisional appointment had expired in ***Derrick Wilson's*** case the discussion on reg. 54(1) was academic. As noted by the learned acting President, the appellant was in any event required to demit office at the end of his provisional appointment for two years.

[45] It should also be highlighted that in ***Derrick Wilson's*** case he was an appointed teacher at his school before he was appointed as provisional principal. That provided scope for the discussion concerning in what capacity his appointment had been terminated. In the instant case however there is no doubt, as the claimant was not previously a teacher at the Maldon Primary School. Her affidavit of September 12, 2014 reveals that prior to her appointment as provisional principal she was a math specialist employed to the Ministry of Education.

[46] The analysis has therefore led me to the conclusion that on the facts of this case, the letter of July 30, 2014 amounted to a letter of termination, in circumstances where reg. 54(2) applied. The procedures under regs.

56 – 59 should therefore have been applied. The defendant Board having failed to follow the appropriate procedure, the decision of the defendant to terminate the services of the claimant as provisional principal was null and void and of no effect.

Issue III - *Was Mr. Samuel Johnson precluded from being appointed as Chairman of the Board of Maldon Primary School on account that he was convicted of a criminal offence in the United States of America?*

[47] Neither the **Education Act** nor the **Education Regulations** establish threshold requirements for the nomination and appointment of the Chairman or other members of a school board. However, in 2009 the National Council on Education in collaboration with the Ministry of Education as part of the Revised Nomination Procedure for School Boards, imposed a fit and proper requirement. In the publication, **All Hands on Board: A Handbook for School Boards** clause 11.1.1 the following is provided:

> All members must satisfy the "fit and proper person" criterion, that is they must be persons of sound mind, have not been convicted of an offence under the Offences Against the Persons Act, The Child Care and Protection Act, the Sexual Offences Act, or an offence of fraud or dishonesty.

[48] The claimant challenged the appointment of Mr. Samuel Johnson as chairman of the Board of Maldon Primary School on account that he was not a fit and proper person to hold the post. Her challenge was based on the fact that Mr. Johnson has a criminal record in the United States of America having been convicted for aiding and abetting a corporation to file false tax returns. Counsel for the claimant submitted that it matters not in which jurisdiction the conviction occurred. As he was chairman at the time the decision was taken not to recommend her appointment the decision of the Board would have been thereby invalidated.

[49] Mr. Johnson in his affidavit sworn April 1, 2015 admitted the conviction though he indicated he had denied the charges and refused a plea bargain, requiring the matter to go to trial. Further, that during the sentencing the trial judge explicitly highlighted that he had not profited from the illegal activities of the corporation. Mr. Johnson also advised that he had resigned as chairman of the School Board effective February 2, 2015.

[50] Counsel for the defendant submitted that Mr. Johnson's conviction in a foreign jurisdiction does not offend the "fit and proper person" threshold. She maintained that he was not convicted of an offence of fraud or dishonesty in breach of Jamaican law. Counsel relied on what she submitted was the established common law principle that evidence of a previous foreign conviction is not probative of a domestic criminal offence. She cited the words of Montgomery JA of the Jersey Court of Appeal in ***Warren et al v The Attorney General*** [2009] JCA 135, where he indicated that the exclusion was premised upon the fact that:

> [16] The circumstances in which a determination of guilt may be made by a court will vary from cases where the determination is based upon an accused's confession or admission of guilt; to a jury trial where a jury accepts, but does not identify, evidence sufficient to prove the guilt of the accused. The method, burden and standard of proof will also vary according to the nature of the offence and the jurisdiction in which any trial take place.
>
> [17] Furthermore proof of the fact of conviction primarily evidences the opinion of the convicting court. That opinion will almost invariably be based upon evidence before the convicting court that is not available to (or even admissible in) the trial court in which the evidence of the previous conviction is tendered…
>
> [19] It is for this reason that common law countries have traditionally declined to admit in evidence, evidence of previous convictions, both foreign and domestic…"

[51] I do not however have to decide whether or not a foreign conviction for fraud and dishonesty would breach the fit and proper person requirements for appointment to a school board in Jamaica. Counsel

for the defendant made another critical submission which I find to be determinative of this point. She relied on reg. 84 of the **Education Regulations** which reads:

> 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.

[52] The import of reg. 84 is that, even if Mr Johnson had been convicted in Jamaica and there was no jurisdictional issue concerning whether or not he would have been appointed in breach of the fit and proper person threshold, reg. 84 would operate to preserve the validity of the proceedings of the Board. A similar type of provision is found in the Jury Act where section 6 (2) provides: "*No verdict or finding in any proceedings, whether civil or criminal or a Coroner's inquest, shall be invalidated by reason only of the fact that a person disqualified or exempt from so serving, served on the jury in those proceedings*."

[53] I therefore conclude for the reasons outlined, that the fact of Mr. Johnson having been convicted in the United States of America for an offence involving fraud or dishonesty, would not have served to invalidate the proceedings of the Board. The court however notes that the resignation of Mr. Johnson from the Board prevents the issue of whether or not his conviction offends "fit and proper person" requirements from arising in the current deliberations of the Board.

Issue IV *- At the time the Board took the decision not to recommend the claimant for appointment as principal, was Ms. Donnetta McGhie who participated part time by telephone "present" within the meaning of the* ***Education Regulations*** *and had she vacated her membership on the Board?*
Issue V *- If Ms. McGhie's vote is declared invalid, did it invalidate the remaining majority vote of the Board not to recommend the claimant for appointment as principal?*

[54] Reg. 88 (10) of the **Education Regulations** requires that:

> The decisions of a Board shall be by a majority of votes of members present and voting and, in addition to an original vote, the chairman or person presiding at a meeting shall have a casting vote in any case in which the voting is equal.

[55] Reg. 79(5) for its part prescribes that:

> Any member of the Board who is absent for three consecutive meetings without justifiable excuse shall be deemed to have vacated his membership on the Board and the Board shall report the matter to the Minister and to the group which nominated that member.

[56] Exhibit SJ-8 to the affidavit of Mr. Samuel Johnson contains the minutes of the three (3) meetings of the Board preceding the meeting of July 29, 2014, where the vote was taken not to recommend the claimant's appointment as principal. In the meetings of April 30, 2014 and June 24, 2014 it is clearly stated that Ms. McGhie was part-time on the phone for both. In respect of the meeting of June 20, 2014, Ms. McGhie was neither physically present nor participated by telephone or other technology. The chairman in fact indicated that he could not apologise for her because he was unable to reach her by telephone.

[57] Counsel for the claimant in his initial submissions maintained that presence by telephone did not satisfy the requirements of reg. 88(10). Therefore by the time the meeting of July 29, 2014 was held in which, Ms. McGhie participated part-time by telephone, she had vacated her membership of the Board pursuant to reg. 79 (5). Her participation in the meeting of July 29, 2014 was therefore improper, invalidating the vote of the Board. He relied on the case of ***Goby v Wetherill*** [1915] 2 K. B. 274, where it was held that the presence of a stranger in the room with a jury for a substantial time, (about 20 minutes), while they were considering their verdict, was sufficient to invalidate their verdict, even though no harm was done.

[58] Counsel for the defendant countered with the submission that legislative instruments are always speaking. Hence the court is required to take account of changes in technology and treat the language as modified where it is necessary to implement legislative intention. She relied on the presumption in statutory interpretation that an updated construction is to be applied whenever it is required. She cited **Bennion on Statutory Interpretation,** 5th ed, LexisNexis, 2011, 889-890 and 905-906. Counsel therefore maintained that in this electronic age, the requirement for personal presence can be satisfied by means other than physical presence in a space. The presence of Ms. McGhie by telephone was therefore in keeping with the requirements of reg. 79 (5).

[59] I indicated that the submissions of counsel for the claimant were "initial" as he subsequently conceded, and in the view of the court quite rightly, that presence by telephone satisfied the requirements of reg. 79 (5). Any other conclusion would be a retrograde and indefensible step, in the year 2015, regarding the conduct of Board meetings. Counsel however despite the concession persisted with the submission that Ms. McGhie had vacated her membership.

[60] With respect, on the facts, once it is conceded that Ms. McGhie was present by telephone at two of the three meetings prior to the meeting of July 29, 2014, then no issue of the vacation of her membership pursuant to reg. 79 (5) arises. Further even if she had vacated her membership, which I have found she had not, the case of ***Grant v The Teacher's Appeals Tribunal and the Attorney General*** [2006] UKPC 59 [32], relied on by counsel for the defendant, establishes that the entire voting process would not have been invalidated. Ms. McGhie's vote could have been subtracted leaving the other votes intact. That course is however not required as Ms. McGhie was validly present by telephone for part of the meeting on July 29, 2014 and entitled to fully participate as she did. These challenges of the claimant fail.

Issue VI *- Were two assessments of the claimant by the Ministry of Education sufficient to be considered regular assessments within the meaning of the* ***Education Regulations****? In the absence of a joinder of the Ministry or Minister of Education in the claim, can the claimant obtain a declaration that the Ministry had not arranged for the regular assessment of the claimant during her provisional appointment as principal?*

[61] Paragraph 2 (2) d of Schedule A of the **Education Regulations** was outlined earlier in this judgment. It establishes that it is the responsibility of the Ministry to make arrangements for regular assessments of the provisional principal and to make a report to the Board after the assessments have been discussed with the provisional principal.

[62] It is common ground that only two assessments of the claimant were conducted by the Ministry. Counsel for the claimant submitted that these two assessments did not satisfy the requirement for the assessments to be regular. He relied on three cases. Firstly ***Derrick Wilson v Board of Management of Maldon High School.*** In this case Harris JA at paragraph 38 stated that:

> The word, "regular" as used within the regulatory framework is clear and unambiguous. It must be given its natural and ordinary meaning. The word is defined by the Concise Oxford Dictionary as meaning, "arranged in constant or definite pattern, especially with the same space between individual instances"; "recurring at short uniform intervals: a regular monthly check"; "done or happening frequently".

[63] The learned Judge of Appeal in analysing the assessments done in that case then concluded at paragraph 43, *"It cannot be said that three assessments being done over approximately 1 year and 8 months could be regarded as having been done frequently, or in a constant pattern, or recurring at short intervals in compliance with the Regulation."*

[64] Counsel also cited ***Mavis Hamilton v Board of Management of Cambridge High School and others*** 2011HCV08047 (April 15, 2013) where Cole-Smith J concluded that two assessments carried out by the Ministry of Education over a period of one year and six months in that case could not be considered as regular assessments.

[65] The third case was ***R v Minister of Education ex parte Dorothy Lewis*** SC Misc No 69/1991 (November 28, 1991), which was reviewed in ***Derrick Wilson v Board of Management of Maldon High School. Ex parte Dorothy Lewis*** held that random routine visits to the school by officials from the Ministry without a purpose for the visit being stated, and where the only evidence of such visit was contained in the school log book, could not be a substitute for regular assessments as required by the Regulations. Accordingly counsel submitted that on the basis of the authorities there was a breach of the requirements for regular assessments.

[66] Counsel for the defendant in her submissions also relied on ***Mavis Hamilton v Board of Management of Cambridge High School and others*** and ***R v Minister of Education ex parte Dorothy Lewis.*** On the authorities counsel conceded that the assessments conducted did not meet the threshold of being regular. However counsel deployed a procedural challenge to the claimant's complaint. The Regulations vest the public duty to arrange for the regular assessments of the principal during her provisional appointment in the Ministry and requires that a report of those assessments be made to the Board.

[67] Counsel for the defendant pointed out that the claimant has brought a claim only against the defendant having failed to join the Ministry in this action. Accordingly counsel submitted the claimant had no right as against the Board for the performance of the Ministry's public duty and therefore had no basis on which to ask the court to make a declaration concerning the failings of the Ministry. Counsel relied on ***London Passenger Transport Board v Moscrop*** [1942] A.C. 332. The headnote is sufficient:

> It was a term of the employment of the respondent, an omnibus driver in the service of the appellants, a public authority, that drivers appearing before a divisional superintendent hearing charges of alleged breaches of discipline or on appeal, might be accompanied by an official of a named transport trade union acting as advocate. In practice, officials of that union would accompany none but its members. The respondent was not a member of that union, but on an appeal by him from a decision of a divisional superintendent, he was accompanied by an official of a different trade union to which he belonged. The appellants, however, refused to allow that official to act as the respondent's advocate or to represent him in any way. The plaintiff sought inter alia *a declaration that the condition of the plaintiff's employment with the defendants whereby the plaintiff is denied as an appellant before the defendants' disciplinary board the advantage of representation by an official of his own trade union while such advantage is granted to or is the right of other servants of the defendants who are members of another and their own trade union is unlawful*:- *Held*, that the appellants had not imposed a condition on the respondent by which he was denied the advantage of representation on the hearing of an appeal by him so that he was placed or liable to be placed under a disability and disadvantage as compared with other servants of the appellants, and that, accordingly, they had not contravened the provisions of s. 6, sub-s. 1, of the Trade Disputes and Trade Unions Act, 1927. As there had been no interference with any private right of the respondent, who had suffered no damage peculiar to himself by reason of the alleged breach of s. 6 of the Act, he was not entitled to a declaration that the condition was unlawful without joining the Attorney-General as a party. Furthermore, the declaration should not be granted to the respondent in an action in which the persons really interested, the named trade union, had not been joined as parties.

[68] Counsel for the claimant countered that the ***London Transport Board*** case was irrelevant to the proceedings because in the instant case the challenge was that the Board did not have the authority to do what it did as there were no regular assessments. Counsel also highlighted that in the peculiar circumstances of this case the Ministry has at all material times been privy to the matter, with a representative present and an affidavit had been filed by one of its officials in an attempt to answer the claimant’s claim.

[69] I am persuaded by the submissions of counsel for the claimant on this point. The ***London Transport Board*** case is distinguishable. In that case the Trade Union that would have been significantly and adversely affected by the declaration, had it been granted, was not a party to the action. The ruling of the House of Lords is therefore quite understandable. In the present action we have an entirely different situation. Firstly counsel for the defendant has conceded that the complaint made by the claimant is valid. This in a context where counsel who appears for the defendant is instructed by the Director of State Proceedings. The Director of State Proceedings would also have been charged with instructing counsel on behalf of the Ministry had the Ministry been added to the claim.

[70] Secondly though not added to the claim the Ministry has been actively involved in these proceedings. Their legal officer Ms. Rhonda Medley attended the proceedings and Mrs. Kayla Clarke-Stephenson, Education Officer from the Ministry provided an affidavit on behalf of the defendant Board in response to the FDCF. There has clearly therefore been a demonstration of the Ministry's active participation in this case. Thirdly and also critically, the declaration concerns whether a condition precedent for the Board itself to be able to lawfully proceed to deal with the issue of the claimant's status had been met. In all these circumstances it cannot be said that the rights of the Ministry as a third party may be adversely affected by the declaration without the Ministry having had the opportunity to have its position heard.

[71] Further the declaration directly relates to the question of whether or not the Board had authority to act as it did, given the number and nature of the assessments that had been conducted by the Ministry. A question that was within the competence of the Board itself. I therefore find that the fact that the Ministry has not been joined in the action does not preclude the court granting the declaration sought by the claimant.

Issue VII *- Did the Board as required receive and take into account a report of such assessments of the claimant's performance as provisional principal as undertaken by the Ministry of Education through its Education Officer in deciding not to recommend the claimant for appointment as principal?*

[72] The first assessment of the claimant was conducted on September 20, 2013. The claimant received above a passing rating in all areas of performance and levels of competence. The supplemental comments noted the strongest attributes of the claimant as *"Task oriented, Setting goals and achieving them, excellent organizer, very good financial skills."* The areas needing the most improvement were stated to be, "Staff motivation, communication, delegation of responsibilities, be a better team player, adopt a more democratic leadership style."

[73] The improvement goals against which the next appraisal would be measured were indicated as: *"1) Improve interpersonal relationship; 2) Improve communication with staff and other stakeholders; 3) Be a better team player and delegate more responsibilities; 4) The Board in collaboration with the provisional principal will seek to develop and implement a staff recognition program in conjunction with V.P and senior teachers."*

[74] After the performance appraisal the Education Officer, Mrs. Kayla Clarke-Stephenson met with the claimant and the Chairman of the Board. Mrs. Kayla Clarke-Stephenson did not make any comments but signed. The claimant declined to sign. The Chairman also made comments and signed. On review the subsequent comment of Mrs Stern, Senior Education Officer (Ag.) was, *"I concur with the findings of the appraisal team"*. There is however no evidence that there was a report on this assessment made to the Board.

[75] The second assessment was done on June 10, 2014. Again the claimant received above a passing rating in all areas of performance and levels of competence. In the comments she made on the appraisal

instrument, Mrs. Kayla Clarke-Stephenson reports that *"Mrs. Kilbourne is a hard working individual. She needs to understand, however, that the success of the school depends on team effort."* Mrs. Stern observed that *"The finding of the appraisal team reveals that the appraisee meets expectations in all areas assessed with planning and management of support facilities areas and interpersonal skills and organizational culture the weakest areas".*

[76] The minutes of the Board meeting of July 29, 2014 at which Mrs Clarke-Stephenson was present as an observer, disclose that the chairman updated the meeting on the second appraisal. The assessment ratings and comments in the appraisal instrument were also indicated in the minutes. The Board members were asked if there was anything they would like to add and there was an interchange between the PTA representative Mrs. Alphacine Wilson and the chairman on the question of the claimant's attitude.

[77] Counsel for the claimant maintained that no report was made to the Board concerning the assessments as required by para. 2 (2) (d) of Schedule A of the Regulations. The claimant in her affidavit filed April 17, 2015 suggested that, *"Commenting on the performance appraisal instrument is different from preparing and delivering a report arising from same."* Further counsel submitted that the Board did not take into account such assessments as had been done prior to making their decision. He relied on the ***Mavis Hamilton*** case in which Cole-Smith J held that the chairman of the Board holding discussions with Education Officers does not satisfy the requirement of a report being made to the Board.

[78] Counsel for the defendant on the other hand, while conceding that there was only a discussion with the chairman and not a report of the first assessment argued that there was a report to the Board of the second assessment and that the concerns identified on the second assessment essentially mirrored those on the first. She distinguished ***Mavis Hamilton*** in respect of this second assessment and also noted

that in ***Mavis Hamilton*** there was evidence that the Board refused to take the assessment into account which was not the situation here.

[79] Counsel also submitted that the Board was entitled to take into account other relevant matters, including the views of other stakeholders as revealed in the minutes of the meeting of July 29, 2014, apart from the assessments of the Ministry. She argued that of particular importance was that the "fundamental premise[s]" on which the decision was taken not to recommend the claimant for appointment as principal were team work related deficits; a concern that was consistent with the assessment made by Mrs. Clarke-Stephenson, the Education Officer from the Ministry.

[80] What amounts to a report? No indication was given to the court as to the usual format of reports made pursuant to para. 2 (2) (d) of Schedule A of the Regulations. There is also no requirement stipulated in the Regulations that the report must be in writing. Whether or not the way in which the contents of the second assessment were brought to the attention of the Board was in the form of a report as contemplated by the Regulations, it is clear that the contents of the second appraisal were put before the Board in some detail. In the absence of any express indication that the contents of the second assessment, though disclosed should not have been relied on by board members in the consideration of whether or not to recommend the claimant for appointment, it is reasonable to conclude they were considered. I also agree with counsel for the defendant that it is instructive that the concerns which led to the decision not to appoint the claimant mirror concerns in the assessment.

[81] In this discussion however the fundamental point cannot be forgotten that the claimant was not regularly assessed. A point that has been conceded by the defendant. The fact that the second assessment done was, it seems, considered by the Board, still has to be viewed in the light of the fact that an inadequate number of assessments had been

conducted. The Board was therefore acting on limited information from an incomplete process.

Issue VIII *- Should the court refuse to exercise its discretion to grant the declarations sought by the claimant on the bases:*

a) Of acquiescence to a decision being taken by the Board on July 29, 2014 on two assessments; and

b) *That the declarations would serve no useful purpose?*

[82] The minutes of the meeting of the Board on June, 24, 2014 exhibited as part of exhibit "SJ-8" in Mr Johnson's Affidavit disclose that on that date the Board considered an extension of the claimant's provisional appointment. By then two (2) appraisals had been conducted. The claimant was asked by the chairman of the Board whether she was in agreement with such an extension, the minutes states *"…to this she stated that she is not in agreement for an extension because she wants her appointment."* The meeting of June 24, 2014 was adjourned to July 29, 2014 to facilitate the oversight of the deliberations by representatives from the Ministry. The claimant raised no objection to the Board proceeding on the two assessments available.

[83] Counsel for the defendant submitted that the declaration, like an injunction and the prerogative remedies, is a discretionary remedy and the same principles as to the exercise of the discretion govern them all: Wade and Forsythe**, Administrative Law,** 10th edn, OUP, 480-81 and 489.

[84] Counsel maintained that it was the general rule that a discretionary remedy would not be granted to a Claimant who allowed a decision maker to proceed to a decision without setting up an objection to a matter of which she was aware *"except perhaps upon an irresistible case and an excuse for the delay, such as disability, malpractice, or*

matter newly come to the knowledge of the applicant": **Broad v Perkins** (1888) 21 QBD 533, 534-535.

[85] Consequently as the claimant knew that she had only been assessed twice during the period of her provisional appointment and raised no objection she had acquiesced to the Board proceeding to vote. Counsel argued that even after the meeting of July 29, 2014 if the claimant had complained or made her objection known to the Teacher's Services Commission, it had the power, if it thought fit to vary the provisional appointment, without recourse to the Board and steps could be taken to have more assessments. This in a context where there would have been approximately six (6) months during which the claimant could have continued as provisional principal and been assessed. The court should not therefore in those circumstances exercise its discretion to grant a declaration in her favour.

[86] There is some merit in the submissions of counsel for the defendant. It is true that had the result of the vote been otherwise the claimant would have been quite satisfied with the matter having proceeded. However there is a critical consideration that takes this case outside of the principle of acquiescence. As the court has earlier found section 54(2) applies and the procedure outlined in regs. 56 – 59 should have been engaged. The claimant cannot be said to have acquiesced and thereby clothed with validity, actions that would otherwise have been void. It was at that point no longer just a consideration of whether she was to be appointed or not. If she was to be removed as provisional principal the disciplinary procedures under regs 56 – 59 should have been followed. I therefore hold that the claimant's agreement for the vote to proceed would not preclude the court exercising its discretion to grant a declaration.

[87] The second sub-issue under this head concerns the question whether or not a declaration would have any utility. Counsel for the defendant submitted that the effect of a declaration of invalidity would be that the decision taken by the Board would be null and void so that there could

be no consultation between the Board and the Teacher's Services Commission as required by the regulations under para. 2 (2) (f) of Schedule A.

[88] Counsel maintained that as there would be no opportunity for further assessments the declarations would be pointless. Counsel relied on the authority of ***MW High Tech Projects UK Ltd v Haase Environmental Consulting Gmbh*** [2015] EWHC 152 (TCC), [32-33] for the principle that declaratory relief should only be granted if it would serve some useful purpose.

[89] The court is not of the view that the declarations would serve no useful purpose. What then would be the utility of the declarations? The reality is that the maximum two year period for provisional appointment having expired the provisions of regs. 54(2) and 56 -59 are no longer relevant. The existence of those provisions however, led the court to conclude that the claimant's purported termination by letter dated July 30, 2014 was unlawful. This had the effect that with the assistance of the injunction obtained by the claimant, she was enabled to serve the maximum possible two year period as a provisional principal.

[90] The assessments of the provisional principal and any report(s) of those assessments are to assist the Board in making a determination of whether or not to recommend the provisional principal for appointment. The injunction obtained by the claimant preserved her position as provisional principal until December 2014. However, the substantive hearing of the FDCF did not commence until after the maximum two year period for the claimant to remain as provisional principal had expired. No further assessments were conducted between the time the injunction came into force and the time when the maximum provisional period came to an end by the effluxion of time.

[91] The maximum period for provisional appointment having expired, no further assessments can now be conducted under Schedule A. However the aim should be to follow the procedure as closely as

possible given the current state of affairs. Both parties recognise that the assessments carried out, though insufficient to satisfy regularity, are relevant for consideration. It is expected that they would be utilised in any pertinent future decision making process by the Board and Teacher's Services Commission.

[92] In any such process it would be useful for it to be borne in mind that more assessments should have been undertaken. That fact should be taken into account in the claimant's favour given that the failure to have regular assessments was not her fault. There would also be the opportunity to provide a report on the first assessment and to supplement the information provided in respect of the second assessment, if deemed necessary.

[93] As the claimant has remained at the school due to the injunction that has been in place, it may be that a relevant consideration now would be an assessment of the performance of the claimant since the end of the provisional period, though any such assessment would not be in the capacity of assessments under para. 2 (2) d of Schedule A. This observation is made given that the court accepts that as counsel for the defendant submitted, the assessments under Schedule A are not necessarily the only relevant material the Board could have taken into account. Assessments outside the provisional period may now become an additional relevant consideration.

[94] In keeping with the principles of natural justice at any meeting for reconsideration of the question of the appointment of the claimant, she should be given an opportunity to be heard on the issue.

[95] Given the nature of declaratory relief the court has provided the above observations for consideration but not as binding orders.

DISPOSITION

[96] The claimant is entitled to a declaration that the defendant's decision to terminate the claimant's position as provisional principal was unlawful as it failed to follow the procedure set out under regulations 56 – 59 of the **Education Regulations 1980**.

[97] The claimant is entitled to a declaration that regular assessments were not made of the claimant's performance as provisional principal by the Ministry of Education.

[98] The claimant is also entitled to declarations both that:

i. Without the regular assessments the defendant was not in a position to make a decision as to whether or not to recommend that the provisional appointment of the claimant was to be made permanent; and as a consequence,

ii. The defendant's decision not to recommend the claimant's appointment as principal was invalid.

[99] I reiterate that in the analysis on the utility of the declarations the court has, within the ambit of the nature of declaratory relief, given as much guidance as possible concerning the way forward.

[100] The claimant not having sought any final injunctive relief the injunction that has been in place will not be extended beyond today. The court expects the parties will be guided by the declarations made.

[101] Costs to the claimant to be agreed or taxed.