[2021] JMSC Civ 201

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. SU 2019 CV 02293

BETWEEN **ALFRED GRAYSON** **CLAIMANT**

AND **THE BOARD OF HOPEWELL HIGH SCHOOL** **DEFENDANT**

IN OPEN COURT

Mr Hugh Wildman and Ms Indira Patmore instructed by Messrs. Hugh Wildman & Company for the Claimant

Ms Tessa Simpson instructed by Messrs. Knight, Junor & Samuels for the Defendant

Heard: December 2 and 8, 2021

Judicial review – Claim for judicial review – Availability of remedy – Certiorari – Wrongful dismissal of dean of discipline – Natural justice – Rules of natural justice not observed in dismissal procedure – Claimant not allowed to call witnesses at the hearing in the dismissal procedure – Whether an order of certiorari should be granted – The Education Regulations, 1980, regulations 55, 56, 57, 59, 61, 62 and 89

Costs – Whether a cost order should properly be made in the circumstances – The appropriate cost order to be made in the circumstances – Civil Procedure

Rules, 2002, rules 56.15(4) and (5), 64.3, 64.6(1), 64.6(3), 64.6(4)(a),(b),(d)(i) and (ii), (e)(i), (ii) and (iii), 64.6(4)(f) and 64.6(4)(g)

A. NEMBHARD J

INTRODUCTION

[1] The Claimant, Mr Alfred Grayson, a former Dean of Discipline at Hopewell High School, seeks judicial review of the decision of the Defendant, the Board of Hopewell High School ("the Board"), to terminate his employment.

[2] By way of a Fixed Date Claim Form, which was filed on 8 August 2019, Mr Grayson seeks the following relief: -

(i) A Declaration that the Defendant did not comply with sections 57(1) and 57(4) of The Education Regulations, 1980, in purporting to terminate the services of the Claimant as the Dean of Discipline of the Hopewell High School, rendering the said termination illegal, null and void and of no effect;

(ii) A Declaration that, under sections 57(1) and 57(4) of The Education Regulations, 1980, the Claimant is entitled to be heard before any decision can be made by the Defendant, to terminate the services of the Claimant as the Dean of Discipline of the Hopewell High School;

(iii) A Declaration that, in affording the Claimant a right to be heard under sections 57(1) and 57(4) of the Education Regulations, 1980, the Defendant ought to afford the Claimant the right of calling witnesses as part of his defence before any decision is made to terminate the Claimant as the Dean of Discipline of the Hopewell High School;

(iv) An Order of Certiorari quashing the decision of the Defendant as contained in letter dated April 17, 2019, purporting to terminate the

Claimant from the post of the Dean of Discipline of the Hopewell High School;

(v) Damages to the Claimant against the Defendant to be assessed for the illegal actions of the Defendant in purporting to terminate the Claimant as the Dean of Discipline of the Hopewell High School;

(vi) Costs of the Claim to the Claimant; and

(vii) Such further and other relief as this Honourable Court deems appropriate.

BACKGROUND

[3] Mr Grayson was temporarily appointed as the Dean of Discipline of Hopewell High School, with effect from 6 January 2011. He was permanently appointed in that position on 1 January 2018.

[4] Mr Grayson asserts that, as the Dean of Discipline, he was responsible for the safety, security and general discipline as well as the implementation of policies and procedures.

[5] On 10 January 2019, Mr Grayson was accused by the Principal of Hopewell High School of unpunctuality.

[6] On 11 January 2019, Mr Grayson, in response to that accusation, indicated orally to the Vice Principal of Hopewell High School that his unpunctuality was as a result of his sending the students to school which, he contends, formed part of his job description.

[7] Mr Grayson was instructed to record his reasons for failing to be punctual in the Log Book at Hopewell High School, which he did.

[8] On 27 March 2019, Mr Grayson was informed, by way of a letter bearing the same date, of the charges of neglect of duties, inefficiency, persistent

unpunctuality and professional misconduct and formally inviting him to a hearing that was scheduled to take place on 16 April 2019.

[9] Mr Grayson contends that, at that hearing, he was heard but was denied the opportunity to call witnesses.

[10] Mr Grayson further contends that that refusal on the part of the Board, is a 'serious' breach of the right to a fair hearing, as guaranteed by section 57(1)(b) and 57(1)(4) of The Education Regulations, 1980 ("the Regulations"), the Common Law and the Constitution of Jamaica.

[11] Mr Grayson asserts that that refusal on the part of the Board renders its decision to terminate his employment illegal, null and void and of no effect.

[12] Mr Grayson also asserts that the letter dated 17 April 2019, which purports to terminate his employment as the Dean of Discipline of Hopewell High School, is illegal, null and void and of no effect.

[13] For its part, the Board contends that, under the general direction of the Principal of Hopewell High School and working in close collaboration with the Guidance Counsellor of the school, Mr Grayson was responsible for developing and implementing plans and programmes to promote positive behaviour among the students. Mr Grayson was also responsible for providing intervention and support for the enhancement and resolution of students' disciplinary and behavioural issues.[1]

[14] Mr Grayson, having been sent previous letters by the Vice Principal, was given a letter dated 10 January 2019 which detailed his attendance record and similar letters detailing his unpunctuality, his neglect of duty, professional misconduct

[1] See – Exhibit **"BG1"** of the Affidavit in Response of Byron Grant, filed on 23 October 2019

and refusal to complete his monthly reports that were required to be submitted to the Ministry of Education, Youth and Information, pursuant to its requirements.[2]

[15] In the circumstances, the Board contends that Mr Grayson was afforded a fair hearing, within the meaning of regulation 57 of the Regulations.

THE SUBMISSIONS

The submissions on behalf of the Claimant

[16] Learned Counsel Mr Hugh Wildman raised a single narrow issue in respect of the disciplinary hearing that was conducted by the Board. He accepts that Mr Grayson was afforded a hearing by the Board. The gravamen of the complaint made is that he [Mr Grayson] was denied the opportunity to call witnesses in his own behalf.

[17] To buttress this argument, the Court was referred, primarily, to the authorities of **General Council of Medical Education and Registration of the United Kingdom v Spackman**[3] and **Malloch v Aberdeen Corporation**.[4]

[18] Mr Grayson contends that he had at all times indicated that he wished to call the school nurse, whom, he asserts, could corroborate his case that when he was off campus he was engaged in school business which formed part of his job description.[5]

[19] Mr Grayson contends further that he indicated that he intended to call approximately ten (10) students, as witnesses, to corroborate his case.[6]

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[2] See – Exhibits **"BG3", "BG4"** and **"BG5"** of the Affidavit in Response of Byron Grant, filed on 23 October 2019

[3] [1943] 2 All ER 337

[4] [1971] 2 All ER 1278

[5] See – Paragraph 12 of the Affidavit of Alfred Grayson in support of Fixed Date Claim Form, filed on 8 August 2019

[6] See – Paragraph 14 of the Affidavit of Alfred Grayson in support of Fixed Date Claim Form, filed on 8 August 2019

The submissions on behalf of the Board

[20] Learned Counsel Ms Tessa Simpson, in her submissions, advanced on behalf of the Board, denied that Mr Grayson was not afforded the opportunity to call witnesses at the hearing before the Personnel Committee ("the Committee").

[21] It was submitted that, in respect of the evidence to be elicited from the school nurse, the members of the Committee indicated to Mr Grayson that they believed him on that aspect of his evidence and that there would be no need for him to call her as a witness.

[22] In respect of the students to be called as witnesses by Mr Grayson, the Board contends that Mr Grayson never indicated that he wished to call any students on his behalf nor did he identify who those students were.[7]

[23] Finally, Ms Simpson submitted that, should the Court not find favour with this argument, it should refuse to exercise its discretion in favour of granting Mr Grayson the relief he seeks, in light of the gravity of his unprofessional conduct.

THE ISSUES

[24] The primary issue raised for the Court's determination is whether the Board acted lawfully when it dismissed Mr Grayson and, if not, what remedy can properly be granted to the aggrieved Dean of Discipline.

[25] In order to determine that issue, the following sub-issues must also be resolved: -

(i) Whether there was a statutory basis for the action of the Board;

(ii) Whether the Board terminated Mr Grayson's employment in a manner that was in accordance with The Education Regulations, 1980 and in accordance with the principles of natural justice; and

[7] See – The Affidavit of Alfred Grayson in support of Fixed Date Claim Form, filed on 8 August 2019, at paragraph 14

(iii) Whether, if there were a procedural error on the part of the Board, that procedural error would render the Board's decision invalid.

THE LAW

The role of the court in matters of judicial review

[26] Part 56 of the Civil Procedure Rules, 2002 ("the CPR"), is entitled Administrative Law and deals with matters such as this. The role of the court in judicial review is to provide supervisory jurisdiction over persons or bodies that perform public law functions or that make decisions that affect the public.

[27] The approach of the court is by way of review and not of an appeal. The grounds for judicial review have been broadly based upon illegality, irrationality or impropriety of the procedure and the decision of the inferior tribunal. These grounds were explained in the case of **Council of Civil Service Unions v Minister for the Civil Service**.[8]

[28] Roskill, LJ stated as follows: -

> *"...executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, Wednesbury principles (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice'."*

[29] Judicial review is the courts' way of ensuring that the functions of public authorities are executed in accordance with the law and that they are held

[8] [1984] 3 All ER 935

accountable for any abuse of power, unlawful or ultra vires act. It is the process by which the private citizen (individual or corporate) can approach the courts seeking redress and protection against the unlawful acts of public authorities or of public officers and acts carried out that exceed their jurisdiction. Public bodies must exercise their duties fairly.

[30] Since the range of authorities and the circumstances of the use of their power are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. It is important to remember that, in every case, the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law.

[31] The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority, after according fair treatment, reaches, on a matter which it is authorized or enjoined by law to decide for itself, a conclusion which is correct in the eyes of the court.[9]

[32] Judicial review is concerned, not with the decision but with the decision-making process. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power.

The requirements of fairness

[33] Where an Act of Parliament confers an administrative power, there is a presumption that it will be exercised in a manner which is fair, in all the

[9] See – **Chief Constable of the North Wales Police v Evans** [1982] 3 All ER 141, at pages 143 g-h and 144 a

circumstances. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision and this is to be taken into account in all its aspects. An essential feature of that context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.

[34] Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken, with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.

[35] Fairness will also very often require that the person concerned is informed of the gist of the case which he has to answer.

[36] In **General Council of Medical Education and Registration of the United Kingdom v Spackman**,[10] on a hearing of a petition for divorce, S, a registered medical practitioner, was found to have committed adultery with a married woman. The General Medical Council, at a meeting at which the erasure of his name from the medical register was considered, found that he stood in a professional relationship with the married woman at all material times and adjudged him to have been guilty of infamous conduct in a professional respect.

[37] In accordance with the council's standing orders, S was invited to state his case and produce evidence in support of it. S sought to negative the court's finding of adultery be tendering evidence which, although available, was not called in the divorce proceedings. The council refused to hear fresh evidence on the subject and directed the erasure of S's name from the register. S contended that by reason of the council's refusal to hear the evidence, the due inquiry required by

[10] [1943] 2 All ER 337

the Medical Act, 1858, s 29, had not been held and that there had been a failure of natural justice.

[38] In the Court of Appeal, MacKinnon LJ, Lord Clauson and Goddard LJ were unanimous in adopting the view which had been expressed by Singleton J, at first instance. MacKinnon LJ held that due inquiry does involve at least a full and fair consideration of any evidence that the accused desires to offer and, if he tenders them, hearing his witnesses.

[39] MacKinnon LJ had this to say: -

> *"It is plain that the statute throws upon the council and on the council alone the duty of holding due inquiry and of judging guilt. They cannot, therefore, rely upon inquiry by another tribunal. The practitioner charged is entitled to a judgment the result of the considered deliberation of his fellow practitioners. They must, therefore, hear him and all relevant witnesses and other evidence that he may wish to adduce before them…the very conception of prima facie evidence involves the opportunity of controverting it…"*

[40] In **Malloch v Aberdeen Corporation**,[11] the appellant was formerly employed by the respondent Scottish education authority as a teacher. On 19 March 1969, the respondents served on the appellant a notice of dismissal terminating his employment with them on 24 April 1969. The notice followed a meeting of the respondent's education committee at which the committee passed a resolution dismissing the appellant from their employment, on the basis that he was unregistered and that his employment was no longer lawful, by virtue of the Schools (Scotland) Code, 1956, as amended. Section 3 of the Public Schools (Scotland) Teachers Act, 1882, provided, inter alia, that no resolution of a school board for the dismissal of a certificated teacher was to be valid unless notice of the motion for his dismissal was sent to the teacher, not less than three (3) weeks prior to the meeting.

[11] [1971] 2 All ER 1278

[41] The appellant sought the reduction of the resolution of the education committee and the notice of dismissal, on the ground that, contrary to natural justice, the education committee had admittedly refused to receive his written representations or to afford him an opportunity to be heard before the resolution had been passed.

[42] The respondents contended, inter alia, that, even if in general a teacher had a right to be heard before being dismissed by an education authority, to have afforded the appellant a hearing would have been a useless formality because despite what he might say they were legally bound to dismiss him; and that, even if the appellant was entitled to a hearing he was not entitled to have their decision to dismiss him reduced or annulled.

[43] The court held, inter alia, that, the right of a man to be heard in his own defence was the most elementary protection of all and where a statutory form of protection would be less effective if it did not carry with it the right to be heard, it was not difficult to imply that right. To have afforded the appellant an opportunity to be heard would not have been a useless formality for there was an arguable case which the appellant might have made to the education authority committee and which might have influenced enough members, to prevent a majority against him. Without affording the appellant a hearing, a responsible public body could not be said to have reached a fair decision.

[44] In **Karine Martin v The Chairman, Board of Management Edith Dalton James High School & Ors**,[12] Harrison J, as he then was, treated with the issue of whether there had been a breach of the principles of natural justice. He concluded that the teachers' conduct in the matter is a factor that ought to be considered. He concluded that such conduct weighs heavily against them [the teachers] when it comes to the exercise of the court's discretion whether to grant the relief sought.

[12] Suit No. M 02/01, unreported, judgment delivered on 6 April 2001

[45] The Applicants had moved the court to make orders of Certiorari and declarations pursuant to section 564A of the Judicature (Civil Procedure Code) (Amendment) Judicial Review Rules 1998. They sought declarations quashing the letters from the Chairman of the Board of Management that had been sent to the respective Applicants and which purported to terminate their services; Declarations that neither the Board of Management of the schools nor the Ministry of Education had the power or jurisdiction to decide that the Applicants should go on pre-retirement leave or should be compulsorily retired; Declarations that the period during which they had been prevented from carrying out their duties at the said schools should not be deducted from or count against their leave entitlement.

[46] The applications were made against the background of the Minister of Education's right, by virtue of regulation 42 of The Education Regulations, 1980, to fix pupil/teacher ratios for educational institutions.

[47] In his concluding paragraph, Harrison J had this to say: -

> *"There can be little question that the impact of termination of services will vary from individual to individual. Retirement, whether voluntary or compulsory, results in a serious detriment to the workers' working lives, including loss of protection for job security and conditions, economic loss and loss of a working environment. The Boards of Management are required nevertheless to carry out government's restructuring policy in order to bring staffing levels in line with established teacher/pupil ratios.*
>
> *I hold that there was statutory basis for the actions on the part of the first and second Respondents. I further hold that the Chairman of the Board of Management for each school and the Ministry of Education were not acting in breach of the Education Act and Regulations nor the Pensions (Teachers) Act. They were neither acting ultra vires nor in breach of the principles of natural justice.*

In the circumstances, the relief and declarations sought are therefore refused and the Motions are dismissed."

[48] In **David Halliwell v The Board of Management of the Manchester High School**,[13] relying on the authority of **Glynn v Keele University**,[14] Batts J found favour with the submission that, if any ground of complaint found favour with the court, this was an appropriate case for the court to, in its discretion, refuse relief. The reason being that, on the facts and in light of the admission made by the claimant, any tribunal which reheard the matter would in all likelihood also come to the same result. Batts J opined that, no injustice had been done, as, given the claimant's position; his failure to carry out his duties; and his response at the hearing, demotion was the only just result.

ANALYSIS AND FINDINGS

[49] Both Mr Wildman and Ms Simpson are in agreement with the law in relation to the role of the courts in matters concerning a claim for judicial review. It is accepted that the role of the court is to provide supervisory jurisdiction over persons or bodies that perform public law functions or that make decisions that affect the public. It is also accepted that the approach of the court is by way of review and not of an appeal and that the grounds for judicial review have been broadly based upon illegality, irrationality or impropriety of the procedure and the decision of the inferior tribunal.

[50] It is equally accepted that there is a requirement of fairness and that the standards of fairness are not immutable; that fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf.

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[13] [2013] JMSC Civ 51, at paragraph 28

[14] [1971] 1 W.L.R. 487

[51] While the Board denies that it failed to allow Mr Grayson the opportunity to call witnesses, it contends that the Court should refuse to exercise its discretion in favour of granting Mr Grayson the relief he seeks, in light of the gravity of his unprofessional conduct.

[52] In the present instance, the affidavit evidence demonstrates that Mr Grayson acted temporarily in the role of the Dean of Discipline at Hopewell High School, since 6 January 2011, before being permanently appointed in that position on 1 January 2018. The management of the school subsequently became concerned about Mr Grayson's poor attendance at work, his unpunctuality, his inefficiency and the unprofessional manner in which he approached his duties as Dean of Discipline. As a consequence, letters and memoranda were sent to Mr Grayson by the management of the school regarding these concerns.

[53] The uncontradicted evidence before this Court reveals that during the period 29 September 2016 to 7 June 2017, Mr Grayson was absent from work on forty-eight (48) occasions. In this instance, he exceeded the number of days on which he was permitted to be absent from work, by a total of seven (7) days. The unchallenged evidence before this Court also reveals that, during the period 4 September 2017 to 28 February 2018, Mr Grayson was late for work on forty-eight (48) occasions. The uncontested evidence before this Court reveals that Mr Grayson failed to complete and submit monthly reports, required by the Ministry of Education, Youth and Information since September 2017 and that, at the time of the hearing of this claim, those reports had neither been completed nor submitted by Mr Grayson.[15]

[54] It is on the preponderance of this evidence, which has not been challenged by Mr Grayson in any respect, that the Court is asked to refuse to exercise its discretion in favour of granting the relief sought, in light of his unprofessional conduct.

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[15] See – Exhibits **"BG3", "BG4"** and **"BG5"** of the Affidavit in Response of Byron Grant, filed on 23 October 2019

[55] Undoubtedly, Mr Grayson had a right to be heard and to call witnesses in his own behalf, at the hearing before the Committee. Indeed, there can be no doubt that the Board fell into error when it did not allow Mr Grayson the opportunity to call his witness, in the person of the school nurse. Nor is it within the purview of the Board to predetermine or prejudge the cogency of any evidence to be adduced and the potential value of that evidence. Notwithstanding the fact that the members of the Committee had clearly formed the view that the evidence to be elicited from the school nurse would have added no value to the proceedings before it, for the reason that her evidence concerned matters on which the members of the Committee already believed Mr Grayson, the Committee ought properly to have afforded him the opportunity to call her as a witness in his own behalf.

[56] The Court is, however, unable to agree with the submission that the Committee also failed to allow Mr Grayson to call as witnesses, some ten (10) students of Hopewell High School. A careful review of Mr Grayson's affidavit evidence reveals an indication that he intended to call these students as witnesses in his own behalf. It falls short of stating that he had ever acted on that intention or that he had ever identified any of those ten (10) students. In the circumstances, it cannot tenably be argued that the Committee failed to allow Mr Grayson to call these unidentified students as witnesses in his own behalf.

[57] The Court accepts and adopts the submissions of Ms Simpson that it ought properly to refuse to exercise its discretion, in favour of granting the relief Mr Grayson seeks, in light of his unprofessional conduct.

[58] The Court accepts that the position of Dean of Discipline is a specialized position that was established with the specific purpose of arresting the increasing incidence of indiscipline and acts of violence perpetrated by some of the nation's students in its institutions of learning. The unchallenged evidence before the Court is that Mr Grayson was directly responsible for developing and implementing plans and programmes to promote positive behaviour among the

students. He was also responsible for providing intervention and support for the enhancement and resolution of students' disciplinary and behavioural issues. Against that factual background, the Court finds Mr Grayson's conduct unacceptable, unbecoming and grossly unprofessional.

[59] Given the fact of Mr Grayson's position as Dean of Discipline; the uncontradicted evidence of his unprofessional conduct; the unchallenged evidence of his absence on more than one occasion when he was required to attend to incidents of indiscipline among the student population; and his responses at the hearing before the Committee, this Court is of the view that any tribunal which reheard the matter would, in all likelihood, also come to the same result as did the Committee.

[60] The Court finds that no injustice had been done to Mr Grayson, as, given his position; his gross dereliction of his duties; and his responses at the hearing before the Committee, dismissal was the only just result.

[61] As a consequence, this Court is of the view that the relief and Declarations sought in the Fixed Date Claim Form, filed on 8 August 2019, ought properly to be refused and the Fixed Date Claim Form dismissed.

The issue of costs

[62] Part 64 of the CPR contains general rules in relation to costs and the entitlement to costs. Where a court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.[16]

[63] Rule 64.3 of the CPR provides that the court's power to make orders about costs include the power to make orders requiring any person to pay the costs of another person arising out of or related to all or any part of any proceedings.

[16] See – Rule 64.6(1) of the CPR

[64] In deciding who should be liable to pay costs, the court must have regard to all the circumstances and, in particular, to the conduct of the parties both before and during the proceedings. The court may also consider whether it was reasonable for a party to pursue a particular allegation; and/or to raise a particular issue; the manner in which a party has pursued his/her case, a particular allegation or a particular issue; and whether the claimant gave reasonable notice of an intention to issue a claim.[17]

[65] In the circumstances of this case, this Court is of the view that a departure from the general rule is unwarranted.

DISPOSITION

[66] It is hereby ordered as follows: -

(1) The relief and Declarations sought in the Fixed Date Claim Form, filed on 8 August 2019, are refused and the Fixed Date Claim Form, filed on 8 August 2019, is dismissed;

(2) Costs are awarded to the Defendant against the Claimant and are to be taxed if not sooner agreed; and

(3) The Defendant's Attorneys-at-Law are to prepare, file and serve these Orders.

[17] See – Rules 64.6(3), 64.6(4)(a), (b), (d)(i) and (ii), (e)(i), (ii) and (iii), 64.6(4)(f) and 64.6(4)(g) of the CPR