



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 HCV 04457

IN THE MATTER of an application by David Halliwell for Judicial Review (an order of certiorari) to quash a decision of the Board of Management of the Manchester High School accepting the decision of its personnel committee that he was in neglect of his duties and demoting him from his position of special responsibility at the school.

A N D

IN THE MATTER of the Education Act and Regulations

Judicial Review – Head of Department demoted – whether notice of charge given – whether decision perverse – whether hearing unfair due to presence of principal – whether decision ultra vires the Education Act and Regulations – whether punishment unreasonable and unlawful-whether issue prejudged by committee.

Debayo Adedipe for Claimant.

Analesia Lindsay instructed by John Graham & Co. for the Board of Management of the Manchester High School.

Heard: 21st, 22nd February, 2012 & 19th April, 2013

CORAM: JUSTICE DAVID BATTS QC

[1] The Claimant in this application for Judicial Review is a teacher with 24 years experience. He was at all material times head of the science department at the Manchester High School.

[2] On the 21st day of August, 2012 the claimant obtained permission to apply for certiorari to bring to this court and quash a decision of the Board of Management of the Manchester High School (hereinafter referred to as the Board) demoting him from his post of Special responsibility that is Head of the Science Department.

[3] The Order of the 21st day of August 2012 among other things also:

- a) Ordered a stay of the proceedings against the applicant.
- b) Ordered full disclosure of the following documents:
 - i) the minutes of the meeting at which the complaint was first considered by the Board
 - ii) the notes of proceedings before the personnel committee and all documents used there
 - iii) the minutes of the meeting of the Board at which the recommendation of the personnel committee was considered.

[4] The grounds for relief in the Claimants Amended Fixed Date Claim form may be summarized as follows:

- a) The Claimant was found guilty and punished for an offence for which he had not been charged.
- b) The decision was perverse and unreasonable
- c) The decision was the result of an unfair process as the investigation which preceded it was "unilateral" and the matter was therefore prejudged.
- d) The decision was based upon a reversal of the burden of proof.
- e) The committee relied on documentation which had not been supplied namely his assessment for 2010
- f) The decision was made based on the recommendation of the personnel committee without the applicant being given an opportunity to be heard.

- g) The decision was made without consideration of the applicant's record
- h) The decision was made without a quorum being present
- i) The decision was tainted with bias by the presence of the person laying the complaint against the claimant and members of the personnel committee who had made the recommendation.
- j) The requirement that the claimant submit lesson plans fortnightly was unreasonable and contrary to the provisions of the Education Act and Regulations.
- k) The penalty imposed on the claimant was unreasonable, disproportionate excessive and unlawful.

[5] The Claimant relied on affidavits dated 8th August 2012, 17th August 2012, 3rd September 2012 and 7th December, 2012 in support of his claim. The Board relied on the Affidavits of Malcolm Housen and Karlene Thompson both dated 22nd November 2012.

[6] There was no cross-examination as the facts were not in dispute. The relevant facts may be summarized as follows:

- i) The claimant has been a teacher at the Manchester High School for 19 years, for 12 of which he has been Head of the Science Department.
- ii) He is a very good teacher and has received commendations and recognition. His most recent results in Biology 1 and 2 and Chemistry 1 and 2 speak for themselves as he received 100% passes in both subjects in 2011 at the CXC. See Exhibit DH2 to Affidavit of David Halliwell dated 3rd September, 2012. The Board says when results over a 5 to 10 year period are considered they show poor results in some years and moderate success in others so the results are "not consistent." The Board admits he is a very good teacher.
- iii) In his review of the 20th July 2010 it was noted,

“Mr. Halliwell is very negligent in preparing and submitting lesson plans” and
“Teacher’s negligence in submitting plans is of concern. Sometimes he does well in other areas.”

- iv) In that same review document of 20th July, 2010, which was signed by the claimant, it was noted “after much discussion on the issue teacher will submit lesson plans as required by the school.”
- v) By Memorandum dated 25th November 2011, 30th November 2011, 13th January 2012, 9th February, 2012, 28th February 2012 and 18th April 2012 the Vice Principal (Dorrette Nelson) repeatedly asked the claimant to submit lesson plans for the subjects he taught as well as for the other teachers in his department. It is therefore apparent that he did not live up to the promise he made which is referred to at paragraph (iv).
- (vi) At a Board of Management meeting held on the 29th February 2012, the Human Resource Committee reported on two teachers who are heads of department and failed to submit lesson plans. The principal was asked to write to the Board on the matter. Those minutes also reflect that a letter was written to David Halliwell regarding neglect of duties and failure to develop lesson plans on a consistent basis. See Exhibit DH5 Para 24 Affidavit of David Halliwell dated 3rd September 2012.
- (vii) “A Notice by Personnel Committee to Teacher” dated 19th March 2012 was issued to the Claimant under the hand of Karlene Thompson, Chairman of the Personnel Committee. The Notice read as follows:

“Application has been made by Mr. Josford Gabriel Principal Manchester High School Path Road Mandeville, Manchester to the Personnel Committee under the Education Act and the Education Regulations 1980, that you be required to answer to the following charges based on the complaint attached hereto:

1. Neglect of duty – In that despite repeated efforts to have you lead the department by example in

planning for students learning, you fail to develop lesson plans on a consistent basis.

AND TAKE NOTICE that the 19th day of April 2012 is the date fixed for the hearing of the Application by the Personnel Committee. The Personnel Committee will sit at Manchester High School, Perth Road, Mandeville, Manchester at 5:00 p.m.

You have the right to have a friend or an Attorney at Law appear with you at the hearing and make representations on your behalf to the Personnel Committee.

AND TAKE FURTHER NOTICE that if you fail to appear the Personnel Committee may proceed in your absence. And if the charges are proceeded against you, any one or more of the following penalties may be recommended against you.

1. You be admonished/censured
2. You be demoted if you held a post of special responsibility.
3. Your appointment as a teacher with Manchester High School be terminated.”

(viii) The Personnel Committee hearing took place on the 19th April 2012. The Claimant attended with a representative Mr. Howard Thompson. The minutes of this hearing record the fact that at the February 2012 Board Meeting the principal reported to the Board that the Claimant had neglected his duty by consistently failing to develop lesson plans on a timely basis the minute stated,

“The Board of Management at the said meeting directed the Personnel Committee to ascertain the facts. The Committee investigated the matter and advised the Board that Mr. Halliwell should answer to the charges.

Having investigated the charges, the Personnel Committee was of the opinion that Mr. D. Halliwell indeed neglected his duties to develop lesson plans on a timely basis and as such, should be brought before the Committee to defend his actions.”

- (ix) At the hearing on the 19th April 2012, the Chairman of the Personnel Committee asked the claimant, “what is your response to the charges made by the principal?”

He responded as follows:

“I agree that I have not been consistent with writing lesson plans, but that does not say I don’t plan my lessons, I plan for students and not the administration.”

- (x) The minutes of 19th April 2012 records a long exchange between the claimant and the committee. At one point in the meeting the Principal and the Vice Principal were invited into the meeting and also participated, the following exchange is worthy of quotation,

“Mr. Housen stated that Mr. Halliwell happened to have a post of responsibility, so he was not only to prepare his plans, he was to see that other lesson plans were prepared by the teachers under his charge. So if Mr. Halliwell was not preparing plans what he was saying was that he was planning the lessons for the students and not for Administration, so apparently they would not need Administration. Mr. Halliwell said that you did need Administration, but the duty of the Administration was to do other things than to examine Lesson plans. Mr. Housen stated that one of the duties, was that the Vice Principal was to review lesson plans and that could not be reviewed in one’s head, so they have a system in place where lesson plans were written and presented to them for revision.

Mr. Housen then asked Mr. Halliwell why he refused to submit the lesson plans.

Mr. Halliwell said that it was not that he refused to submit lesson plans as not always doing something did not mean you have refused to do it. He said that he was busy because he spent a lot of time after school helping students so finding the time to write lesson plans was difficult. He said that he placed his students and their needs above the Administration. He said that his duty was to teach effectively and to not to waste time to write very long lesson plans. He

said that he was trying to improve on that and had a certain amount of lesson plans written and certainly next year because he had a lot electronically stored, they would be adjusted and would be available.”

- xi) Later in the meeting the principal stated “there was no doubt about Mr. Halliwell’s quality as a teacher and his content and versatility in all science subject areas at CSEC & CAPE levels.” He said, the issue had to do with “his leadership of the department in the crucial area of planning; and further we should be able to use his lesson plans for training younger teachers which would be a part of improving the profession.”
- xii) Towards the end of the meeting with the Personnel Committee the Claimant promised to work on developing his lesson plans over the summer holidays so during the term he, “would be able to develop plans on a timely basis.”
- xiii) At a meeting of the Board of Management on the 1st May, 2012 the chairman of the personnel committee reported on the Claimant’s hearing of 19th April, 2012. A letter dated 1st May, 2012 from the personnel committee to the Board was read to the meeting. The letter recommended that Mr. David Halliwell be demoted. It should be noted that the claimant was not the only person under consideration for such a breach. The minutes record the following,
 - “After extensive discussion all seven (7) members of the Board of Management present at the meeting excluding the principal voted in favour of the demotion of Miss Tanya Tomlinson and Mr. David Halliwell.”
- xiv) The decision of the Board was communicated to the Claimant by letter dated 10th May, 2012, in the following terms:

“Re: Outcome of hearing into matter neglect of duties in Lesson planning at Manchester High School

The Board of Management at its meeting of May 1 2012 received in writing from the Personnel Committee that the charge of neglect of duties in “writing and submitting lesson Plans” has been proved and further recommend that you be demoted from you (sic) post of Special responsibility.

The Board of Management unanimously upheld the decision.

Pursuant to Clause 57 sub-clause 6, we hereby advise that effective August 1 2012 you will be demoted from your post of special responsibility; this is Head of Science Department.

In the future we hope that you will make every effort to improve your performance in this critical area.”

[7] Each party to this claim filed written submissions and were also allowed to make oral submissions. The submissions centered on the grounds of complaint as listed in paragraph 4 above. In this judgment I will therefore treat each separately.

[8] The claimant was found guilty and punished for an offence for which he had not been charged.

I found no merit whatsoever in this ground. Claimant’s counsel submits that the Claimant was charged with neglect of duty in that he failed to develop lesson plans on a consistent basis. On the other hand he was found guilty of neglect of duties in ‘writing and submitting’ lesson plans. Counsel seemed to think that “development” of lesson plans is entirely different and unconnected to “writing and submitting” lesson plans. As I indicated to counsel in the course of submission, the charge was neglect of duty, the particulars of the charge was failing to develop lesson plans. Furthermore proof of the development of lesson plans could only take place if they were written and submitted. In any event it is manifest on a reading of the minutes of the hearing that the claimant was well

aware of the requirement to submit lesson plans and had promised to do so. The minutes of the hearing do not reflect surprise at the charge or any misunderstanding as to the case he was required to meet. This ground of challenge fails.

9. The decision of the Personnel Committee is perverse and unreasonable

The contention here is that when regard is had to the Claimant's years of distinguished service the findings and recommended punishment are so unreasonable that no reasonable committee would have arrived at them. It is the decision of this court that not only are the results not perverse and unreasonable but that when regard is had to the history of requests for lesson plans and the fact that his responsibilities included seeing to it that the teachers in his department submitted lesson plans, the decision of the Personnel Committee could hardly have been otherwise. Indeed with his note of defiance the claimant having said he planned for students not for administration, it left, the committee with little alternative. This ground therefore has no merit.

[10] The decision was the result of an adverse process as the investigation which preceded it was unilateral and the matter was therefore prejudiced.

The submission in this regard, was that the "investigation" referred to in the minutes of the 19th April 2012 amounted to a prejudging of the issue and therefore denied the Claimant a fair hearing.

In response to this submission Counsel for the Board relies on Regulations 56 & 57 of the Education regulations. These provide:

"56. Where the board of a public educational institution receives a complaint in writing that the conduct of a teacher employed by the Board is of such that disciplinary action ought to be taken against the teacher, it shall, as soon as possible, refer the

matter to its personnel committee for consideration pursuant to regulation 85.

57. 1) The personnel committee shall consider the complaint referred to it under regulation 56 and –
- a). if it finds that the complaint is trivial and that a hearing is unnecessary, report such finding to the Board forthwith; or
 - b). if it finds that a hearing should be held, notify the complainant in writing of the date, time and place of the hearing and give written notice within a period of not less than fourteen days before such date to the person complained against of –
 - i) The charge or charges in respect of which the hearing is proposed to be held.
 - ii) The date, time and place of the hearing
 - iii) The penalties that may be imposed under the Regulations if the charges are proven against such person; and
 - iv) The right of the person complained against and a friend or his attorney to appear and make representations to the committee at the hearing.

[11] Counsel for the Board submitted that the regulations not only contemplated but clearly authorized a preliminary investigation which would determine whether or not a hearing was required. This submission I agree with. Indeed it is not an unusual approach in these administrative tribunals. The Legal Profession Act also contemplates a preliminary determination (in the absence of the attorney) of whether or not a hearing is to be held. Counsel relied on the decision by the Judicial Committee of the Privy Council in Easton Wilberforce Grant v The Teachers Appeal Tribunal & AG PCA No. 45 of 2005 in which the same regulations were considered. In that case one ground of complaint was that the Personnel Committee had not had a preliminary investigation of the matter. Their Lordships stated in that regard,

“28. There is no more substance in the argument concerning the requirements in Regulation 57(1) that the Personnel Committee is to consider whether the complaint is trivial and that a hearing is unnecessary. This is a provision designed as a filter mechanism, not uncommonly found in disciplinary codes, which obviates the need for the committee to spend time giving extended consideration to unfounded complaints. The fact that the Personnel Committee had in October 1998 given a full hearing to the complaints and the appellants defence to them, and proceeded to repeat this procedure in May 1999, is an unequivocal indication that it did not regard them as trivial or unfounded and that it did not consider that Regulation 57(1)(a) applied to them. Their Lordships do not consider that the committee was required in those circumstances to hold a special hearing to see whether Regulation (57) (1) (a) applied to them. Their Lordships do not consider that the committee was required in these circumstances to hold a special hearing to see whether Regulation 57(1)(a) should be applied. They also reject the appellant’s complaint that the principal’s letters did not constitute sufficient information about the charges being brought.”

[12] I therefore reject this ground also. The Personnel Committee were entitled to conduct an ex parte and preliminary consideration of the matter. Having done so they recommended that a hearing be held. It is true that the Committee’s words as recorded in the minutes of the 19th April 2012 are rather didactic and appear to refer to a final rather than a prima facie finding. However having regard to the Claimant’s response at the hearing, which was an admission that he had not prepared lesson plans in writing nor had he submitted them when requested, it is difficult to imagine the effect of any ‘prejudging’ of the issues. There was at the end of the day no contest from the Defendant to the substance of the allegations.

[13] The decision was based upon a reversal of the burden of proof

The submission of claimant’s counsel is that at the hearing the Committee placed the onus on the Claimant to absolve himself. The Board denies that this occurred and says that the committee merely invited the claimant to give a

response to the charges. Again I agree with the submission of counsel representing the Board. The tribunal is not a court, it is not staffed by judges and it is by nature (and design) free of many of the formalities. Nevertheless it is clear on a reading of the minutes that the Personnel Committee was first of all interested in the Claimant's response to the charge. When that response took the form of an admission, the committee then concerned itself with obtaining from the Claimant an explanation of his words in the admission, and, of his reason for not submitting written lesson plans. Far from reversing a burden of proof and acting unfairly it appears to me that the Committee was patient careful and fair in the conduct of the hearing.

- [14] The committee relied upon documentation which had not been supplied to the complainant prior to the hearing namely his assessment for 2010.

It is true that the assessment of 2010 was considered by the Committee although not provided to the Claimant prior to the hearing. However, in the course of the hearing the minutes record that-

“Mr. Housen read from the last evaluation 2010 “after much discussion of the issue, the teacher would submit lesson plans as required by the school.”

Mr. Housen asked Mr. Haliwell if he agreed with that statement.

Mr. Haliwell said “yes.”

It is therefore manifest that the material part of the assessment was brought to the claimant's attention and he admitted its accuracy. It was a document signed by him. He was also given an opportunity to speak to and explain it. I find no merit in this ground.

- [15] The decision was made based on the recommendations of the personnel Committee without the applicant being given an opportunity to be heard.

The Claimant's submission is that the Board ought not to act on the recommendation of the Personnel Committee without giving the claimant a

hearing. If correct the submission would mean that the Regulations intended two hearings for the Claimant. It would militate against any saving in time or cost by having a personnel committee consider the matter and make a recommendation. The submission in any event flies in the face of the words of the Regulations which mandate that the Board

“shall act on the recommendation as received from the personnel Committee, or as varied and agreed at the discretion of the Board.” (Regulation 57(5).

I find that the Claimant is not as a matter of law or practice entitled to a further hearing before the School's Board.

[16] The decision was made without consideration of the applicants record

The minutes of the Board meeting of the 1st May 2012 do not make any reference to the Claimant's teaching record. However the Personnel Committee had before it and referred to the Claimant's assessment of 2010. The minutes of the 19th April (the Personnel Committee meeting) also noted the principal's review and assessment of the claimant's quality as a teacher. The Board by regulation 57(5) is obliged to act on the Personnel Committee's recommendations except as may be varied or agreed. The inference is clear that the Board saw no reason to depart from that obligation. This ground also fails.

[17] The decision was made without a quorum being present.

The claimant's Counsel submitted that

- i) Eight members of the Board were present at the meeting of May 1st 2012.
- ii) The principal was present but according to the minutes did not vote.
- iii) Three members of the Personnel Committee were present and did vote however they were not entitled to do so as each had a direct personal interest in the question to be voted on. This submitted the Claimant's Counsel was prohibited by Regulation 88(8) of the Education Regulations which provides:

“No member shall vote on any question in which he has a direct personal interest.’

- [18] Counsel for the Board submitted in reply that the members of the personnel committee had no “personal” interest in the matter within the meaning of the Regulations. The Regulations do not bar the Personal Committee members from sitting to deliberate on the matter when the Full Board sits to do so.
- [19] I agree with the submission of counsel for the Board. The scheme of the Regulations is clear and had it intended otherwise would have excepted the Personnel Committee members. However the Board is not sitting as an appeal from the Personnel Committee but merely to ‘action’ its recommendations except “as varied and agreed”[See Paragraph 15 above]. This clearly suggests that it was the intent that the Board members be present along with those of its membership who constituted the personnel committee. This ground is therefore without merit.
- [20] The decision was tainted with bias by the presence of the person laying the complaint against the claimant and members of the personnel committee who had made the recommendation.

In response to this assertion Counsel for the School's Board submitted,

“The only person in this instant matter that may be accused of having a personal interest in the complaint was the complainant, and the principal. The records reflect that the principal did not vote, nor did he participate in the discussions on the Applicant's situation at the Board meeting.”

The evidence supports those submissions and I so find. In any event the Board was required to “act on” the Personnel Committee's recommendations and therefore any effect of the principal's presence could hardly have been more prejudicial than the regulatory stipulation. I therefore also reject this ground of complaint.

[21] The requirement that the Claimant submit lesson plans fortnightly was unreasonable and contrary to the provisions of the Education Act and Regulations.

It is not surprising that the Claimant's Counsel did not elaborate on this ground. It needs only to be stated to see its weakness. In the first place it is not for this court to determine what is a reasonable educational policy. The schools administration determined that lesson plans should be supplied and that request was communicated to the teachers. Nothing in the Act or Regulations provides or forbids them doing so. Indeed Schedule D 2(1) (a) and (b) of the Regulations suggests it is part of the duty of a Head of Department. This ground also fails.

[22] Counsel for the Claimant submitted an additional ground.

This is that the Education Regulations give no power to demote and therefore the Board acted *ultra vires*. I enquired of counsel whether he was saying that the only alternative was a dismissal. He answered in the affirmative.

[23]. The submission has its genesis in what counsel submits are the categories of Teachers contained in Regulation 44 and Schedules A and D of the Education Regulations. Counsel submits that Regulation 44 provides:

“44 – (1) Principals, vice-principals, heads of department and teachers with special responsibility shall perform such functions as are stipulated in Schedule D and teachers shall perform such duties as are assigned to them.

(2) In addition to regular teaching activities a teacher's duties shall include

- a) developing lesson plans on a regular basis
- b) evaluating and testing students
- c) keeping adequate records of students' progress
- d) the fostering of students' development on the personal and social level

- e) performing such other duties as may be required by the principal or such member of staff as may be delegated responsibility by the principal.

Counsel further submits that Schedule A of the Regulations recognizes pre-trained teachers, trained teachers, Specialist Teacher, teachers with Special responsibility. Schedule B he says provides for the method of appointment of Principal, Vice-Principal and Teacher with Special responsibility. Counsel submitted that Schedule D outlines the duties and responsibilities of heads of departments, vice-principal and principal.

24. It is against that background Counsel submitted that regulations 55, 56 and 57 should be read. The sections the submission goes, applies to punishment to be accorded to teachers and is not applicable to principals, vice-principals or heads of department. Alternatively submitted counsel a “head of department” is not a teacher with special responsibility within the meaning of Regulation 57 (5) (b)(iii) and hence demotion is not a form of punishment open to the Board.

25. Section 57(5)(b)(iii) reads,

“The personnel committee shall report in writing to the Board
Not later than fourteen days after the date of the enquiry –

(a)

(b) That the charges against the teacher have been proved and may recommend –

i) ...

ii) ...

iii) that he be demoted if he holds a post of special responsibility; or

iv) ...

and the Board shall act on the recommendation as received from the personnel committee or as varied and agreed at the discretion of the Board.”

26. I do not agree with the submissions. In the first place it is clear that the word “teacher” is a generic term used throughout the Regulations and used in two senses in Section 44(1) and (2). Secondly, the Board of Management is given

responsibility for dealing with breaches of discipline by members of staff and students (Regulation 89 (1) (f)). The Schedules are to be understood in that context so that a teacher with “special responsibility” as per Schedule A (4) is still a teacher and may even be a head of department.

27. I am therefore of the view and so find that the Board of Management acted within its jurisdiction and reasonably when it accepted the recommendations of the Personnel Committee to demote the claimant and remove his responsibilities as Head of Department.
28. Counsel for the Board made a submission to the effect 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 the admission made by the Claimant any tribunal which reheard the matter would in all likelihood also come to the same result. Further no injustice had been done as, given the Claimants position and his failure to carry out his duties and his response at the hearing, demotion was the only just result. Counsel relied upon the authority of Glynn v. Keele University & Anor. [1971] 2 All ER 89.
29. This court agrees with that submission of Counsel for the Board. If I may be pardoned for adopting the words of Vice Chancellor Pennycuick in the case cited, I regard the decision of the Board as “intrinsically a perfectly proper one.” Therefore even had I found merit in any of the Claimants grounds, I would have exercised my discretion to refuse relief.
30. The claim is therefore dismissed and I award costs to the respondent Board of Management, such costs to be taxed if not agreed.

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David Batts Q.C.
Puisne Judge