



[2019] JMSC Civ. 80

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014 HCV 01527

BETWEEN	JUNNET LYNCH	CLAIMANT
AND	TEACHER'S APPEAL TRIBUNAL	1ST DEFENDANT
AND	THE ATTORNEY GENERAL	2ND DEFENDANT
AND	THE BOARD OF MANAGEMENT OF CHARLEMONT HIGH SCHOOL	3RD DEFENDANT

IN CHAMBERS

Mr. Mario Anderson for the Claimant

Ms. Tamara Dickens instructed by the Director of State Proceedings for the Defendants

May 22, 2018, July 31, 2018 and April 15, 2019.

Judicial Review – Dismissal of Teacher – Breach of Natural Justice – Apparent Bias – Standard of Proof

G. BROWN, J.

[1] The claimant filed a Fixed Date Claim on March 28, 2014 seeking leave to apply for judicial review which was granted on May 29, 2014. The application for Judicial Review was filed on June 9, 2014.

[2] The claimant was previously employed as a Senior Teacher and the Head of the Visual Arts Department at the Charlemont High School in the parish of St.

Catherine. Her employment was terminated by the Board of Management by letter dated August 13, 2012 arising from a recommendation of the personal committee that had held a disciplinary enquiry into her conduct.

[3] The principal of the school was the complainant who had made the written complaint to the Board regarding the claimant's conduct. She was notified by letter dated May 17, 2012 of the Board's intention to convene the disciplinary enquiry. The claimant was subsequently charged with the following offences:

- i. Neglect of duty*
- ii. Inefficiency as head of the Department-Visual Arts*
- iii. Persistent unpunctuality*
- iv. Lack of discipline-failure to follow reasonable and lawful instruction*
- v. Insubordination*
- vi. Absent from work without permission and reasonable excuse*
- vii. Leaving your place of work without permission*
- viii. Failure to ensure the safety and security of students under your supervision.*

[4] The disciplinary hearing was held on June 28, 2012 and July 27, 2012 before the personnel committee comprising of the Chairman and Vice Chairman of the Board, Mr. Venton Brown and Ms. Rita Banahan respectively, and Ms. Karen Lee, the Academic Representative. The claimant was represented by Mr. Hopeton Henry, a Jamaica Teachers Association representative.

[5] The claimant entered a plea of not guilty on all the charges except persistent unpunctuality to which she pleaded guilty by a majority, Mr. Brown and Ms. Banahan found the claimant guilty of all the offences except neglect of duty and recommended to the Board that her appointment be terminated. Ms. Lee in a separate report also found the claimant guilty for the offences of:

- i. Inefficiency as Head of Department Visual Arts*
- ii. Persistent unpunctuality*

iii. *Lack of discipline-failure to follow reasonable and lawful instructions.*

[6] With regards to the other charges Ms. Lee found her not guilty and recommended that the claimant should either be demoted from the post of senior teacher or be censored. However, she did not agree that the claimant be dismissed.

[7] The reports were tabled before the Board which considered the matter at its meeting of August 13, 2012 and determined that the claimant's appointment as a teacher should be terminated. The chairman by letter dated August 13, 2012 advised the claimant of the Board's decision and concluded as follows:

"Having considered carefully all the available evidence, the totality of the infractions and the number of violations, the Charlemont High School Board of Management hereby informs you that your actions were unacceptable and constitute gross misconduct. Therefore, in accordance with the Education Regulations 1980, you are informed that your appointment as a teacher... is to be terminated on the grounds of gross misconduct."

[8] She appealed that decision to the Teacher's Appeal Tribunal which subsequently heard the matter. She filed seven grounds of appeal as follows:

1. *The Personnel Committee did not meet, deliberate and decide whether or not the allegations against the teacher had been proved pursuant to Regulation 57(5) of the Education Regulations 1980.*
2. *The Personnel Committee did not report in writing to the Board within 14 days of the date of the enquiry, or at all, pursuant to Regulations 1980.*
3. *The Chairman and the Vice Chairman of the Board of Management, without any or any sufficient reason, proceeded to make findings, decisions and recommendations without the input of Ms. Karen Lee, the representative on the Board of the*

category of the teacher, contrary to Regulation 85(1)(a)(iii) of the Education Regulations, 1980.

4. *In finding that the charges against the teacher had been proved, the purported Personnel Committee applied the wrong standard of proof, that is, proof on a balance of probabilities, when in fact the correct standard of proof which was to have been applied was the criminal standard of proof beyond a reasonable doubt.*
5. *The appellant was not given a fair hearing, as throughout the enquiry the Chairman and or Vice Chairman proceeded to “cross-examine” the appellant and therefore bias and/or lacked impartiality in the conduct of the said enquiry, rendering the findings, decisions and recommendations of the Personnel Committee irregular and void.*
6. *In pursuing charges against Ms. Lynch the Board is in breach of the Regulations 58, in that it considered matters which fell outside of the time stipulated for treating with the matters.*
7. *The Board is in contravention of Regulation 20(1) g).*

The appellant withdrew grounds 6 and 7. The Tribunal on December 30, 2012 dismissed the appeal.

[9] It was the claimant’s contention that the conduct of the hearings was in breach of the principles of natural justice as she was not given a fair hearing by an independent and impartial tribunal. It was further contended that the wrong standard of proof was applied rendering the hearing unfair and a nullity.

[10] The fulcrum of the claimant’s case was that the Chairman and or the vice-chairman were biased and there was a real danger that the claimant had not had a fair trial. It was their contention that they were judges in their own cause. Further, that they were the prosecutor as they took on the duty of cross

examining her and not the virtual complainant, the principal and later collaborated and submitted the report without the third member on the panel participating.

- [11] Counsel for the defendants on the other hand denied the allegations and maintained that the claimant's constitutional rights were not breached. She was given a fair hearing by an impartial tribunal and the decision by the Teacher's Appeal Tribunal ought to stand.

THE LAW

- [12] The principles of law as it relates to judicial review are well settled. The authorities were review by Brooks **JA in Mark Leachman v Portmore Municipal Council and others** [2012] JMCA Civ. 57 who stated as follows:

"The court of judicial review is not concerned with the merits of the decision which is been challenged but rather with ensuring that the decision-maker/public body concerned observes the substantive principles of public law and that the decision making process is lawful."

- [13] The court is only concerned with the manner in which those decisions have been taken. It does not act as an appellate tribunal. Its purpose is to review the process adopted by the inferior tribunal. It is the master of its own proceedings but must observe the rules of natural justice.
- [14] The Education Regulations, 1980 gives the Board the power to discipline the claimant. Section 56 provides *that where the Board 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, soon as possible; refer the matter to its personnel committee for consideration pursuant to regulation 85.* Thus, it was the function of the personnel committee to determine whether the complaint was serious and if so, hold a hearing.
- [15] Section 85 reads: *The Board of Management of every public educational institution shall, for the purpose of facilitating inquiries into allegation of breaches*

of discipline by or against members of staff or students appoint a personnel committee to which the Board shall refer any such allegations, and such personnel committee shall consist of--

(a) in the case of a government owned institution--

(i) the chairman of the Board;

(ii) one nominee of the Council;

(iii) subject to sub-paragraph (c), the representative on the Board for that category of accused personnel;

[16] It is a settled principle of law that a Court will quash a decision of a tribunal for breach of natural justice. A defendant is entitled to a fair hearing by an independent tribunal. In this case the claimant challenged the decision primarily on the ground of bias which may either be actual or apparent. In **R v London Rent Assessment Panel Committee, ex p Metropolitan Properties Co** (FGC) Ltd, [1969] 1 QB 577, [1968] 3 All ER 304 Denning MR explained:

“In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.”

[17] In **R v Gough** [1993] 2 All ER 724 THE House of Lords held that the correct test was to ask whether there was a real danger that the appellant had not had a fair trial. However, this must be real and not fanciful. In **George Meerabux v The A.G of Belize** [2005] UKPC 12 the Judicial Committee of the Privy Council confirmed that the test of apparent bias is whether a fair minded lay observer, having considered the facts, would consider that there was a real possibility was bias.

[18] Bias may arise as a result of members of the tribunal been exposed to prejudicial pre-trial statements and information thereby rendering the decision unfair. In this case there was no objection or dispute against any member of the personnel

committee at the commencement of the hearing by the applicant. However, before the Teacher's Appeal Tribunal, counsel for the claimant raised the issue of apparent bias as he was of the view that the committee members may have been privy to prejudicial information prior to the conduct of the hearing. He argued that at the commencement a warning should have been given by the chairman on how to treat or deal with such prejudicial information. He relied on the Privy Council decision in **Ramachondra Subramanian v The Medical Council P.C.** App. No 16 of 2002.

[19] Mr. Venton Brown was the chairman of the Board and also chairman of the personnel committee as stipulated by the Regulations. Neither he nor the other members recuse themselves from hearing the matter. As members of the Board the Principal's complaint was first made to them in accordance with the Regulations. However, the chairman gave no warning to the members of the tribunal to disregard extraneous information or material.

[20] In **Easton Wilberforce Grant v The Teacher's Appeals Tribunal and The Attorney General of Jamaica** PCA No 45 of 2005 the teacher was found guilty of serious professional misconduct by the personnel committee and was dismissed by the Board. He claimed that there was a breach of natural justice when the reconstituted Personnel Committee was composed of the same members as those who had sat in October 1998, more so as one at least had already reached a conclusion adverse, to the appellant. Lord Carswell in delivering the judgment wrote:

"Much may depend on the facts of individual cases, but their Lordships do not consider that a hearing will necessary be unfair if a committee or other body has heard a complaint before and proceeds to rehear before reaching a final decision. The rehearing may still be fair and valid even if the committee has earlier reached a conclusion on the subject matter, provided it gives genuine and fair consideration and any further facts or arguments put before it on the second occasion."

[21] In Grant's case the three members on the committee had previously heard the matter and the Court concluded that rehearing was not unfair. In this case there

was no evidence before this court that the members were privy to any prehearing prejudicial information which would have caused both the chairman and the vice-chairman to be disqualified from hearing the matter. Therefore, the failure to issue any warning or direction did not make the hearing unfair.

- [22] A second ground of appeal before the Teachers Appeal Tribunal was that *“the appellant was not given a fair hearing, as throughout the enquiry the Chairman and or Vice Chairman proceeded to “cross-examine” the appellant and therefore were biased or lacked impartiality in the conduct of the said enquiry, rendering the findings, decisions and recommendations to the Personnel Committee irregular and void.”*
- [23] The Appeal Tribunal in dismissing the appeal found that the use of the word cross-examines *“was a description utilised at the choice of the note-taker. Nothing to suggest to the Tribunal that this term was used by a legally trained mind to depict a particular adversarial process. The material before us are insufficient for us to deem the use of the term ‘cross-examine’ as proof of an unfair that resulted in or evidence of bias. The Tribunal, as precedence dictates had to ask itself whether there was a real danger or the possibility of bias in the minds of the members of the Personnel Committee of the Board against the teacher charged. There was no evidence to lead us to an affirmative response to the aforementioned question. ”*
- [24] Counsel for the claimant disagreed with the Appeal Tribunal and in his written submission he argued that it was not the language used to describe the actions of the Chairman that determines whether there was in fact a cross-examination but rather the actual actions of the Chairman and the Vice-Chairman of the committee.
- [25] He was of the view that the Chairman/Vice Chairman had descended in the arena by questioning the claimant to adduce evidence to support the complainant case which violated the basic principles of the adversary system of justice. They

were acting both as prosecutor and judge. He relied on the dictum of Lord Diplock in **Dennis Reid v The Queen Privy Council Appeal No. 37 of 1977**. He said:

“It is the prosecution’s function, and not the part of the function of the court, to decide what evidence to adduce and what to elicit from the witness it decide to call. In contrast the judge’s function is to control the trial, to see that the proper procedure is followed, and to hold the balance evenly between the prosecution and the defence during the course of the hearing...”

- [26] Consequently, he concluded that the chairman’s action in cross examining the claimant gave rise to a reasonable apprehension of bias by the personnel committee.
- [27] Additionally, the decision by the Chairman and the Vice-chairman to submit a joint report to the Board and excluded the third member on the committee clearly demonstrated that they had failed to meet and deliberate. There were no minutes of the deliberation from the personnel committee to show that the three members met and had deliberated in accordance with the Regulations. Instead the chairman and vice-chairman submitted a joint report to the Board and Ms. Karen Lee a separate one. This clearly showed that there was no consensus between the three members on the personnel committee. Thus, the failure by the personnel committee to provide any minutes of deliberation was not fatal to the defendant’s case.
- [28] Counsel for the claimant further contended that despite objections prejudicial evidence was admitted by the Personnel Committee such as events that had occurred many years prior to the hearing. These actions by the Chairman clearly showed actual or apparent bias resulting in the complainant not receiving a fair trial.
- [29] The general rule in criminal and civil cases is that nothing may be given in evidence which does not directly tend to the proof or disproof of the matter in issue.

“A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. Save with regards to admission and confessions and generally with regards to evidence obtained from the accused after the commission of the offence he has no discretion to refuse to admit relevant evidence on the ground that that it was obtained by improper means.” (R v Sang [1979] 2 All E. R. 1222)

However, this was neither a criminal nor a civil trial but instead a disciplinary inquiry. It was not bound by the rules of evidence as a court and was therefore not in breach of the rules of evidence and procedure.

- [30] A review of the notes of evidence showed that the claimant was asked questions in relation to her conduct outside of the period charged. Her attendance record from 2009 was exhibited which showed that she frequently arrived late at school. She was charged for persistence unpunctuality and had pleaded guilty. The Board accepted that she had received the appropriate warnings for this concluded and that *“based on the totality of the evidence, it is likely that you were intentionally persistent unpunctual.”* On this finding therefore the Board had the right to terminate her employment.
- [31] It was also contended that the standard of proof to be applied for professionals facing disciplinary hearings is the criminal standard. He alleged the personnel committee had throughout their report referred to the balance of probabilities and not beyond a reasonable doubt. As a result, they had applied the wrong standard of proof thereby rendering the hearing unfair and a nullity.
- [32] He relied on the Privy Council decision in **Wilston Campbell v Davida Hamlet** [2005] UKPC 19 to support his case that the criminal standard of proof is to be applied by a disciplinary tribunal that is proof beyond reasonable doubt. This principle was applied by Day J. in the Jamaica case *Paul Thompson v the A.G. and The Board of Management Bethlehem Moravian College* [2012] JMSC Civ. 74. He said:

“The ruling of the Teacher’s Appeals Tribunal on the ground of appeal does not disclose that the Tribunal considered the application of the

criminal standard of proof in this disciplinary hearing. The omission is material. The charge is serious and there is no clear indication that the Principal had the benefit of this rule of procedure that exists to ensure him of a fair hearing on a serious charge of professional misconduct.”

[33] However, Lord Brown in delivering the judgment of the Court in Wilston Campbell case explained that “to find this complaint proved it was not necessary for the Committee or the Court of Appeal to find each and sub-issue proved beyond reasonable doubt. A sufficient number of strong probabilities (or even mere probabilities) can in aggregate amply support a finding of proof beyond reasonable doubt. That, indeed, is how many a criminal case is proved in reliance principally upon circumstantial evidence.”

[34] He later went on to state:

“in any event, as the recent English cases show the apparent difference between the two standards ‘is, in truth, largely illusory’ Lord Bingham in B; ‘the heightened civil standard and the criminal are virtually indistinguishable’ (Lord Steyn in McCann).

[35] In this case the Teacher’s Appeal Tribunal in dismissing this ground of appeal accepted that the applicable standard of proof for disciplinary action involving teachers as being beyond a reasonable doubt. However, they were “*unconvinced that it has been proven that the standard of proof used in this matter was non-compliant with the Paul Thompson decision.*”

[36] I have read the report from the personnel committee and the letter from the Board to the claimant. However, I can find no evidence to support the claimant’s assertion that the personnel committee applied the standard of proof on a balance of probability in arriving at the decision to dismiss her. It is my opinion that there are a sufficient number of strong probabilities to support the tribunal’s finding of proof beyond reasonable doubt.

[37] Mr. Venton Brown was the chairman of the Board and the personnel committee in accordance with the Regulations. The principal of the school had made a written complaint to the Board dated April 19, 2012. The Board at its meeting on

April 26, 2012 referred it to the personnel committee for consideration. She was advised by letter dated May 17, 2012 of the results and that there will be a disciplinary hearing. She was served with the witness statements and other relevant documents. The allegations of misconduct were amended as disclosed in letter dated May 28, 2012. The hearing was held on June 28, 2012 and July 27, 2012. He did not recuse himself or the other members from hearing the matter or issued any warning or direction on how to deal with pre-hearing statements.

- [38]** The transcript showed that the claimant was extensively questioned by both the Chairman and the Vice- Chairman. However, this was not a criminal trial and therefore the question one must ask, was whether in disciplinary inquiry members of the personnel tribunal were prevented from asking the defendant any question.
- [39]** In this case the personnel committee was established in keeping with the Education Act and Regulations to inquire into the claimant's conduct. It was required to hear and assess the evidence and argument and then to make a report along with their recommendations to the Board. The procedure adopted was clearly inquisitorial which allowed the committee to question any witness including the claimant during the hearing. Consequently, I do not agree that the chairman and vice chairman were acting as prosecutor and judge.
- [40]** In the circumstances, and having reviewed the evidence the Chairman and the Vice-Chairman had a right to sit on the Personnel Committee and were not disqualified from hearing the matter because they were members of the Board to whom the complaint was first made.
- [41]** Finally, would a fair minded observer, having considered the facts, would consider that there was real possibility of bias. In my view the answer is "No".

[42] In my view, the personnel committee and the Board of Management of Charlemont High School acted reasonable and did not breach the claimant's rights to a fair hearing by an independent and impartial tribunal.

Order

- 1) The claimant's claim is therefore dismissed.