



[2015] JMSC Civ. 115

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. 2014 HCV 04619**

IN THE MATTER OF THE PHARMACY ACT

AND

**IN THE MATTER OF THE PHARMACY
REGULATIONS 1975**

AND

**IN THE MATTER OF THE REGISTRATION
APPEALS TRIBUNAL**

AND

**IN THE MATTER OF A DECISION BY THE
REGISTRATION APPEALS TRIBUNAL DATED
JULY 8, 2014**

BETWEEN PHARMACY COUNCIL OF JAMAICA CLAIMANT

AND REGISTRATION APPEALS TRIBUNAL DEFENDANT

IN OPEN COURT

Mr. Ransford Braham Q.C., Mr. Philmore Scott and Mrs. Camille Scott, Attorneys-at-Law for the Pharmacy Council instructed by Philmore Scott & Associates.

Ms. Althea Jarrett, Attorney-at-Law for the Registration Appeals Tribunal instructed by The Director of State Proceedings.

Mr. Nigel Jones, Attorney-at-Law for the Interested Parties, CC and AW, instructed by Nigel Jones & Company.

Heard: May 5th, 6th and 7th 2015

Judicial Review – Jurisdiction of the Registration Appeals Tribunal – Was there a refusal by the Board to register the applicants as pharmacists – Competence – Does the Registration Appeals Tribunal have the power to make a decision after

the expiry of its term in office – Conduct of the Appeal Hearing – The Pharmacy Act, s. 4, 11, 15 and 16, First Schedule s. 9 and Second Schedule s.8

PUSEY J

- [1] The Pharmacy Council of Jamaica (“the Council”) is the entity that is charged with the responsibility to register pharmacists in Jamaica. Its powers are derived from the Pharmacy Act (the Act). In the context of this case section 4 (a) and (b) of the Act are crucial. It states –
- 4. *The functions of the Council shall be –*
 - (a) *to register pharmacists, pharmaceutical students, pharmacies and owners of pharmacies;*
 - (b) *to regulate the training of pharmaceutical students;*
 -
- [2] It is of particular note that the powers include the training of Pharmacists. The First Schedule of the Act set out the Constitution and procedure of the Council. It explains that the Council shall consist of ten members appointed by the relevant minister of whom six members shall be nominated by the Pharmaceutical Society. However, section 9 of First Schedule also indicates that the Council shall be a body corporate with perpetual succession, and the power to hold and dispose of property.
- [3] For ease of reference, I have called the members of the Council sitting together “The Board.” This is necessary to distinguish its function from that of the body corporate (“the corporation”). My understanding of the Act is that the Board directs the corporation. There are however some functions which are solely the remit of the Board.
- [4] One of these functions which is a non-delegable duty of the Board is the registration of pharmacists as set out in section 11 of the Act. The registration of pharmacies and their owners is also dealt with by the Board. Although it is not pertinent to this case, another non-delegable function is the disciplinary action against a pharmacist, pharmacy student or owner of a business.

[5] The Registration Appeals Tribunal (“the Tribunal”) is established under sections 15 and 16 of the Act to hear the appeals from refusal to register among other things.

Why are we here?

[6] In October 2013, the Registrar of the Council sent out letters to some Pharmacy interns. This is an example of one of the letters –

Dear Miss xxxxxxxx

Re: Pharmacy Internship Exam 2013

Please refer to your application for Registration as a Pharmacist.

As you are aware, the successful completion of the pharmacy internship programme is one of the pre-requisites for registration to practice pharmacy in Jamaica. In addition, this is contingent on obtaining a pass mark of 70% in the examination administered at the end of the programme.

I regret to inform you that you obtained an overall grade of 65% in the recent examination. The grade distribution is as follows

<i>General Knowledge</i>	<i>62%</i>
<i>Pharmacy Law</i>	<i>53%</i>
<i>Pharmacy Calculation</i>	<i>100%</i>
<i>Diabetes Case</i>	<i>73%</i>

You will be advised at the meeting to be held at the Pharmacy Council on Tuesday, October 8, 2013 at 3:00 p.m., of the measures recommended by the Council for you to meet all the requirements to be placed in the Registrar of Pharmacists.

Yours truly,

Pharmacy Council

/s/ Gloria P. Gibbs

Registrar

The letters indicated that they were unsuccessful in their examinations as they had failed to acquire the pass mark of 70%. These interns were persons who had already obtained a degree and gone through a training period supervised by the Council. At the end of a one-year period they were given an examination.

- [7] Four students including CC and AW, the interested parties, appealed to the Tribunal as a result of the letters. After that appeal a second examination was held in November 2013; CC and AW among others were still unsuccessful. They were advised in January 2014 of their lack of success and invited to resit another examination. That second resit examination was set for May 2nd, 2014.
- [8] A hearing of the Tribunal was held on May 7th and 9th 2014. In July 2014, the Tribunal ruled that CC and AW were competent to be registered as Pharmacists and directed the Council to register them.
- [9] The Council sought judicial review of the decision of the Tribunal claiming, *inter alia*, that the Tribunal was a statutory body which exceeded its jurisdiction.

Preliminary Issues

- [10] There are a few miscellaneous matters to be dealt with.
- [11] Mr. Nigel Jones for the interested parties raised a preliminary point that the Tribunal did not currently have members so it had no legal capacity and the action should be struck out. The cases cited dealt with an unincorporated body (see: **Junior Doctors Association & Anor v Attorney General** (unreported) Court of Appeal, Jamaica, SCCA 21/2000 delivered 12 July, 2000) and a statutory body which no longer exists (see: **Demings v Workers' Compensation Appeals Tribunal** (2012) BCSC 475).
- [12] Neither of these cases refer to the Tribunal which has legal standing while the relevant sections of the Act are still in force. The Tribunal exists in law even if the members have not been appointed. This point was misconceived and the Court ruled that the matter could proceed.

[13] In the early stages of this matter there were some arguments that the acts of the Registrar were not the acts of the Council. It is for this reason I have set out the two ways in which the word Council is used and I have differentiated the Board from the statutorily incorporated body. The Registrar is not a member of the Board and keeps the various registers, acts as Secretary to the Council and appears to be the chief executive office of the Council.

Jurisdiction

[14] The Council through the able and thorough submissions of Mr. Ransford Braham Q.C. pointed out that its Board had not taken any decision to refuse the Applicants (the interested parties). He cites the evidence of Dr. Nelson, the Chairman of the Council. She states in her October 2014 Affidavit that the practice of the Council is that after a period of internship, the Council considers the conduct of the applicant and other requirements. She said that the procedure as set out in the manual is that applications are considered by the Board twice a year. These applications are submitted by the Registrar with the required particulars. Candidates also submit a portfolio of documents and pay a prescribed fee.

[15] The Chairman points out that the applications of CC and AW were never placed before the Board and refused.

[16] This evidence is supported by the Affidavit of the Registrar, Dr. Radcliffe Goulbourne. He states that his responsibility is to vet the applications for registration and submit those that *"have attained all the prerequisites for consideration of the Pharmacy Council."* If these prerequisites have not been attained the applications are not submitted. The applications of CC and AW were not put before the Board because they were not deemed to have attained the necessary standard.

[17] The evidence set out in the notes of evidence of the hearing indicate that CC and AW at the start of their internship filled out a Form B and paid a fee. The Form B is the application to be registered as a Pharmacist as set out by The Pharmacy Regulations. These forms and fees are collected by the employees of the Council and kept until the

applications are submitted to the Board. Since CC and AW were unsuccessful in the examinations, arrangements were made for the resitting of the exams.

[18] In simple terms, the Council's policy is that the applications are not submitted to the Board for the acceptance or refusal of registration as a pharmacist until the examinations are passed.

[19] The Tribunal is invoked only where there is a refusal of the registration as set out in section 16(1)(a) of the Act:

Any person aggrieved by the refusal of the Council to register him as as a pharmacist or a pharmaceutical student or as the owner of the business carried on in a pharmacy, or to register as a pharmacy any shop owned by him may appeal to the Tribunal against such a refusal or decision within such time and in such manner as may be prescribed.

The Board had no opportunity to refuse or accept as the applications were not placed before them. It is suggested that the Registrar had no power to refrain from putting forward the application of CC and AW. It could also have been argued that the Council was responsible for the neglect to consider these applications. These arguments may have been the fuel for judicial review. However, the Tribunal had no power to review any action of the Board or the Council except where there is an express refusal to register someone.

[20] The interested parties contended that the Council was responsible for the action of the Registrar based on the principle that a principal is liable for the acts of its servant or agent. They say the letters of the Registrar to the interested parties were *de facto* refusals to register CC and AW and ought to be deemed to be done at the behest of the Council.

[21] The letters do not expressly state that the parties have been refused registration but contain elements which may give that impression. They speak of the "*requirement to be registered.*" One understands why the interns would assume that they were refused registration. However, the unchallenged evidence of Dr. Nelson and Dr. Goulbourne indicate that no submission of the names were made to the Board and no refusal was

made. This clear and unequivocal evidence must be preferred over the implications gleaned from the letters.

[22] In passing, it is apparent that aspects of the training programme of the Council were unclear to the interns. Much is made about the requirement for a 70% pass mark and the addition of an examination to the end of the internship. This is disputed by the Council. They say that the interns were told of the procedure to achieve registration and the Pharmacy manual has been cited in support of this. The information about the examination in the manual is not clear to me. There appears to be an indication that 70% refers to an “*overall grade*” and not explicitly or exclusively to the examinations. Although the training of students is a statutory duty imposed by the Act and reviewable by the Court, there is no power for the Tribunal to examine this aspect of the work of the Council.

[23] In conclusion, the Board had not refused to register CC and AW. Therefore, there was no refusal from which an appeal to the Tribunal could be made. Consequently, the Tribunal did not have jurisdiction to make the orders it did.

Timing of the Decision

[24] The Claimant also contends that the Tribunal handed down its decision after the expiry of the term of its members. That term expired on July 3rd 2014. The first intimation of the Tribunal’s decision came from a letter dated July 2nd 2014 penned by Miss Sheryl Dennis to the interested parties and copied to the Ministry of Health officials but not to the Council. The letter said:

Dear Miss xxxxxxxx

Re: Hearing by the Registration Appeal Tribunal – CC and AW v. The Pharmacy Council

Please be advised that the Tribunal has ruled in your favour, thus allowing your appeal against the Pharmacy Council.

We have been advised that the written reasons for the decision are being finalized. The same will be made available to you as soon as we are in receipt of it.

The Tribunal Chairman has indicated his regret for the delay in the ruling.

Sincerely,

Sheryl A. Dennis (Ms.)

Legal Officer

For Permanent Secretary

On July 10th 2014, Miss Dennis, responding to a letter from Dr. Goulbourne, reiterates that her “*instructions*” are that the appeal of CC and AW was allowed by the Tribunal. She goes on to explain that –

...we have no written instructions as to the details of “what is being allowed” or the **directive** to the Council as we are not yet in possession of the written reasons for the Decision and the considerations of the Tribunal.

[25] The Chairman of the Tribunal sent an email from July 11th 2014 with the decision and on the following day sent a “*final and corrected*” version. These documents were titled “*determination and reasons*” and were both dated July 8th 2014.

[26] Ms. Althea Jarrett who appears for the Tribunal has pointed out that the Tribunal had been properly constituted at the time of the hearing. She argued that this is a necessary interpretation of the powers of the Tribunal under the Act. Ms. Jarrett relied on section 40 of the Interpretation Act which declares that –

Where in any Act power is given to any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the act or thing.

[27] The reasoning is that this section is taken to mean that the Tribunal should be deemed to have the “*reasonably necessary*” power to deliver its judgment even after its appointment has been expired.

[28] This view is rejected. The principle of construction is that if an office holder's powers are to be extended beyond his appointment it has to be expressly stated in the legislation or empowering document. The most notable example of this is section 100(2) of the Jamaican Constitution that sets out that where the appointment of a Judge of the Supreme Court has expired by the retirement or the end of his acting stint he may deliver judgments after the determination of his time in his office.

[29] The common law rules of statutory interpretation gives much guidance in this area. The general approach that is usually taken to statutory interpretation is a literal one. The classic statement made by L. Tindal CJ at para 143 in the **Sussex Peerage Case** (1844) 8 ER 1034 is that:

“The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of parliament which passed the act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.”

[30] The judge must carry out the wishes of the legislature regardless of the opinion he may have. In **Stock v Frank Jones (Tipton) Ltd** [1978] 1 All ER 948, Lord Simon of Glaisdale highlighted Lord Wensleydale's golden rule at 235:

“... you are to apply statutory words and phrases according to their natural and ordinary meaning without addition and subtractions, unless that meaning produces injustice, absurdity, anomaly or contradiction, in which case you may modify the natural and ordinary meaning so as to obviate such injustice but no further.”

[31] In **Federal Steam Navigation v Department of Trade and Industry** [1974] 1 WLR 505, Lord Reid asserted the following preconditions for substituting words at 509 –

Cases where it has properly been held that a word can be struck out of a deed or statute and another substituted can as far as I am aware be grouped under three heads: where without such substitution the provision is unintelligible or absurd or totally unreasonable; where it is unworkable; and where it is totally irreconcilable with the plain intention shown by the rest of the deed or statute.

Consequently, the Tribunal would not have the power to make a decision after the expiry of its term in office.

[32] The other argument in support of the validity of the Tribunal's order is that the decision was made before the end of the term. This is supported by Miss Dennis' letter that she had been instructed that the Tribunal had decided in the favour of the Applicants. It is noted that there is no requirement in the Act or the regulations for the decision of the Tribunal to be set in writing.

[33] Mr. Braham answered this assertion by reliance upon the case of **Blattgerste v Hering** (2008) BCCA 186. In this case, the judge died before handing down judgment. The Chief Justice delivered the judgment. He reviewed the draft of the judge's unsigned reasons for judgment and signed them having opined that they were "*virtually completed*" and having satisfied himself that the reasons were supported by the material that was before the judge. Frankel J in the majority judgment at paragraph 31 stated that –

In my view reasons for my judgment cannot be said to be final and complete unless they are signed by the judge who wrote them. The act of signing evidence that the judge is fully satisfied with what he or she has written with respect to the facts, the law and the result. Until reasons are signed they are a work in progress, subject to being revised or even abandoned. Regardless of how complete draft reasons appear to be, the reason they are unsigned may be because the judge wishes to give them further thought. In affixing his signature to the reasons for judgment, the judge is in effect certifying that he or she considers them to be a final opinion. This is not diminished by the fact, as discussed in *Harrison v Harrison*... a judge has a discretion to reopen a matter after reasons for judgment has been released (or delivered orally), but before the formal order has been entered.

[34] This case is distinguishable from **Yukon College v Human Rights Board of Adjudication** (2011) YKSC 90. In that case, the adjudicator of the Human Rights Board signed her decision some five months after her term had expired. The Human Rights Board had a panel of adjudicators from which an adjudicator was appointed to the Board that would hear a particular matter. The Supreme Court of Yukon which is a court of first instance, like the Jamaica Supreme Court, held that the adjudicator had the jurisdiction to deliver the judgment as although her appointment to the panel of adjudicators had expired, her appointment to the Board had not expired because the

legislation failed to set out a time limit to the appointment of the Board to hear a particular matter.

[35] The **Yukon College Case** supra does however set out some other important principles. Marceau J demonstrates that in Canadian law the inclusion of a grace period, that is additional time to allow an appointee to render a decision, must be set out in legislation. He said that:

Administrative tribunals must operate strictly within the confines of their enabling legislation... Unless there is a statutory provision allowing a retired tribunal member to complete any outstanding duties, he/she would be action without his jurisdiction and his/her decision would be void...

[36] He also cited with approval **Blattgerste v Herringa**, supra and decided that the decision is made on the date that it was signed. Marceau J also importantly concluded that the Court ought not to read into legislation a grace period to allow the handing down of a decision.

[37] This court finds the reasoning and conclusion in the **Yukon College Case** instructive.

[38] The Tribunal did not clarify or express its decision in any written form before the expiry of the life of the Tribunal. The intimation to Miss Dennis cannot be seen to be a ruling of the Tribunal.

[39] The unequivocal written form is the earliest manifestation of a decision. As there is no legislative indication of what is called a "*grace period*" in the **Yukon College Case**, the indication to the legal officer of the Ministry of Health was similar to a draft unsigned judgment in the case of **Blattgerste v Herringa** supra.

[40] It is my view that the Tribunal did not have the competence to make the decision at the time it did and therefore its decision is void.

Conduct of the Hearing

- [41] The Applicants also complained about the manner in which the hearing was conducted by the Tribunal. Having decided that the Tribunal did not have the jurisdiction to hear the complaint and did not have the competence to make the decision at the time they did, the Court addresses this issue *ex abundant cautela*.
- [42] The summary of the complaints are that the hearing breached natural justice in that it was procedurally deficient and consequently were unfair to the Claimant. It is claimed that the Claimant was denied the opportunity to have an attorney represent them at the hearing. On the first day of the hearing which was more than six months after the complaint was made, the Council sought an adjournment to have counsel represent them. The Tribunal decided that because of the delays in getting the hearing they would proceed. The students were also unrepresented.
- [43] An attorney appeared on the second day of the hearing, but the Council complains that she was not given enough time to prepare the case and the “*hostile*” attitude of the Tribunal prevented her from seeking an adjournment.
- [44] The response to these submissions are simply that the proceedings were fair in that both parties were unrepresented at the outset. The representative of the Council took a point in limine and indicated that the Tribunal did not have jurisdiction. These representatives were adept enough to put forward their case. It is well known that an adjournment is at the discretion of the Tribunal. That discretion was properly exercised and caused no injustice.
- [45] Having instructed counsel after the hearing started, there was no rule of law which required that the Tribunal stops its proceedings to allow this attorney to be prepared or to have the notes of the previous hearing provided to the attorney.
- [46] Mr. Braham persisted. He used the word “*shambolic*” to describe the conduct of the proceedings.

- [47] He pointed out that the persons giving evidence were not sworn or affirmed, cross examination was not permitted and the Council had their presentation interrupted from time to time by the interns. The Council asserted that the proceedings were “*conducted in a haphazard and unregulated manner where there was no demarcation between evidence and submissions.*”
- [48] While the language used by Mr. Braham may have been harsh, the observation of the procedural insufficiencies mentioned are fairly accurate.
- [49] These deficiencies did not occur out of ignorance. The Ministry of Health provided an excellent booklet about the conduct of tribunals which was provided to the Tribunal and endorsed by the Chairman at the beginning of the proceedings. The Council complains that this booklet was not provided to them. However, there was no need to do so as it was primarily for the members of the Tribunal.
- [50] Ms. Jarrett answered these criticisms adequately in her submissions. She relied on time honoured authorities such as **Board of Education v Rice** [1911] AC 179 and **Ceylon University v Fernando** [1960] 1 WLR 223 to establish that the Tribunal did not have to follow the formal evidential rules in its enquiry into the matter. In more recent times the Court of Appeal in **Industrial Disputes Tribunal v University of Technology** [2012] JMCA Civ 46 indicated that the Industrial Disputes Tribunal, a statutory tribunal, had a “*free hand*” in determining its procedure by virtue of section 20 of the Labour Relations and Industrials Disputes Act which allows them the liberty to regulate their own procedure. Brooks JA in paragraph 13 said of the Industrial Disputes Tribunal that “*...it is important to note that the [tribunal] is not bound by the ordinary or strict rules of evidence, provided there is no breach of the rules of natural justice.*” That principle also applies to the tribunal in this case as it is also a statutory tribunal who has been given the same liberty to regulate its procedure by section 8 of the Second Schedule of the Pharmacy Act.
- [51] Ms. Jarrett also pointed out that the examination of the transcript indicated that the conduct of the enquiry was fair to the Council and that it examined both sides of the

issues raised. For example, the Tribunal did explore the issue as to whether or not the Council had explained the rule of a 70% pass mark.

[52] The conclusion of this Court is that, although the hearing was not conducted in the most ideal manner, there is not sufficient impropriety to establish that it was unfair to the Council.

Conclusion

[53] For the reasons set out, the decision of the Tribunal is set aside.

[54] I must comment however, that the Manual as to the requirements for registration is unclear in relation to the examination. Additionally, the act of the Registrar not to forward the applications of persons who had not passed the examination may have been reviewable by the Courts. The conduct of the trainings was not reviewable by the Tribunal but it may have been reviewable by the Courts. These interns may have been able to obtain relief from judicial review of the decision of the Council.

[55] My recommendation, which does not have the force of law, is that the Council consider the Registration of CC and AW based on the unusual circumstances which has led to them being in limbo for nearly eighteen months. I believe the Manual needs to be explicit in relation to the qualification for registration and that defect ought not to prejudice these Applicants.

[56] The Court makes the following orders and declarations:

1. An Order of Certiorari quashing the decision of the Defendant made on the 8th of July, 2014, compelling the Claimant to register CC and AW as pharmacists.
2. A declaration that the Claimant did not meet to consider any application for registration submitted by CC and AW as they had not fulfilled all the prerequisites for registration as prescribed by the Claimant.
3. A declaration that the ruling of the Defendant was of no legal effect as it was made after the expiration of its term of office, without any extension of their time of service.