



**IN THE SUPREME COURT OF JUDICATURE**

**THE CIVIL DIVISION**

**CLAIM NO. 2014 HCV 03907**

<b>BETWEEN</b>	<b>GEORGIA WAUGH-RICHARDS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>JAMAICA TEACHERS' ASSOCIATION</b>	<b>RESPONDENT</b>

Mr. Seymour G. Stewart, Attorney-at-Law for the Claimant.

Mrs. Caroline P. Hay, Mrs. Trudy-Ann Dixon-Frith and Ms. Janett Levy, Attorneys-at-Law instructed by Taylor Deacon & James, Attorneys-at-Law for the Respondent.

Ms. Kerry-Ann Tracey, instructed by John S. Bassie & Co., an interested party.

Heard: 15<sup>th</sup> & 19<sup>th</sup> August 2014.

**CAMPBELL J.**

[1] The Claimant, Mrs. Waugh-Richards, is the Principal of Harmons Primary School, Harmons District. She is a full member of the Jamaica Teachers' Association, and was one of five candidates who stood in the 2014 President-Elect election.

[2] Jamaica Teachers' Association (hereinafter called "JTA"), is a company incorporated under the Companies Act of Jamaica with liability by guarantee and operates as a Trade Union representing teachers throughout Jamaica. Its objects include furthering the welfare of the teaching profession. It is comprised of 14 parish Associations. It has 24,000 teachers and 1,200 schools under its purview.

**Background.**

- [3] Within the JTA, elections for President-Elect, usually takes place in June of each year. The successful candidate is inaugurated as President-Elect in August at the Annual Conference. The President-Elect assumes the Presidency one year later at the Annual Conference. Mrs. Waugh-Richards and Mr. Norman Allen were among the candidates who contested in the election for President-Elect 2014.
- [4] An election was held during the week of June 16<sup>th</sup> - 20<sup>th</sup> 2014. Numbered ballots were prepared by the JTA in batches which correlate with the number of JTA members at each school with additional ballots in case of spoilage. The Returning Officer delivers the ballots to the schools. Each member who votes is so acknowledged on a list. At the conclusion of the voting, the Presiding Officer places all the ballots in an envelope with a list of the names of the voters. The envelopes are then sealed. A certification is then signed by the Principal or Vice Principal of the institution. The envelopes with the ballots are opened individually, at each table, in the presence of the persons counting, and the scrutineers who represent each candidate.
- [5] At the close of the counting of the ballots which took place at the Jamaica Grande Hotel, in the parish of St. Ann, Dr. Adolph Cameron, Secretary General, announced that Mrs. Waugh-Richards had amassed 6,079 votes and the candidate with the second highest number of votes was Mr. Norman Allen, with 5,996 votes. The margin of victory was 83 votes.
- [6] Mr. Norman Allen was unhappy with the results so, at 8.28 pm, an e-mail was sent from, Clayton Hall <claytonhall@yahoo.com to Derrick Hall Cameron <jtateacher@gmail.com, which states "Dr. Cameron, I am Norman Allen candidate in JTA 2014 Elections. I am requesting a recount by an external body.
- [7] The following morning, the 2nd July 2014, at 11.27 am, Mr. Clayton Hall <claytonhall@yahoo.com sent a text message, to Adolph Cameron<jtateacher@gmail.com, which stated; "I have communicated to Mr. Allen that he needs to present a formal request for the recount. He used my phone because his phone was dead. I am sure that he could not expect that

message to even be treated. He should not have used my phone to send the message. Kindly disregard.”

[8] In response, Adolph Cameron<jtateacher@gmail.com. wrote,

Dear Mr. Hall, I have noted the request for a recount purportedly sent by Mr. Norman Allen. Kindly note that there is no evidence that the message came from Mr. Allen so the appropriate action cannot be taken based on this message. For the matter to be considered he needs to submit a formal request to the Secretary General.

Adolph Cameron, Secretary General.”

### **Mr. Allen’s Injunctive Relief of recount of the votes.**

[9] On the 4<sup>th</sup> July 2014, Mr. Allen applied to the court for an injunctive relief by way of, ‘a recount of the ballots cast in the JTA’s President-Elect Election or in the absence of a recount that the election be declared null and void.’ In his affidavit supporting his application, Mr. Allen complained that, “at the tallying of the votes, the information that was reported by the administrative staff differed from the earlier consensus of the observers. The administrative staff was divided as to which of the said two contenders was the winner...”

[10] On the 4<sup>th</sup> July 2014, Mrs. Justice Marva McDonald-Bishop, on Mr. Allen’s application, granted an interim injunction and ordered, a recount of the ballots cast in the election. It was also ordered that the recount be conducted by the Electoral Office of Jamaica. There was a further order that the ballots be sequestered and held by BDO or the EOJ. Orders were made restraining JTA from removing the ballot boxes relating to the elections from the Jamaica Grande Hotel, and restraining them from declaring a winner.

[11] A meeting was held, which the candidates with the exception of Mrs. Waugh-Richards attended. The procedures to be followed at the recount were then decided. Mrs. Waugh-Richards notified the Association that she reserved her right to challenge the outcome of the recount. The recount was held, as agreed,

on the 18<sup>th</sup> July 2014 under the auspices of the Electoral Office of Jamaica (hereinafter called “EOJ”), in the presence of various scrutineers of the respective candidates. Mr. Norman Allen was declared winner by 179 votes. Dr. Nicely’s, affidavit, in opposition to Mrs. Waugh-Richards application says, that ‘upon a recount of the votes cast the number of votes received by the Claimant on July 1, 2014 and in the recount were reduced by spoilt ballots only.’ Dr Nicely denied that there were any ballots missing on the recount.

**Mrs. Waugh-Richards Claim.**

[12] Mrs. Waugh-Richards was unhappy with the results of the recount, so on the 15<sup>th</sup> August 2014, she filed a Fixed Date Claim Form, and an Amended Notice of Application. The Fixed Date Claim Form sought, among others, the following orders:

“An Order that the defendant election held between the 16<sup>th</sup> - 20<sup>th</sup> June 2014, to elect its President-Elect for the 2014 conference year be declared null and void due to numerous irregularities leading to conduct of the said election being unfair to the Claimant.

An Order that the election for the 2014 President-Elect of the Defendant be re-run and be supervised independently of the Defendant.

A declaration that Norman Allen, principal of Four Paths Primary and Junior High School has been wrongfully declared by the Defendant to be its President-Elect.

A declaration that the Defendant has acted in breach of Article 3 of its Memorandum and Articles of Association in relation to the Claimant in respect of the conduct of its 2014 President-Elect Election.

An Order that the Defendant discloses to the Claimant within 7 days of the hearing hereof the reason why the Claimant had fewer votes than Mr. Norman Allen after the recount of the ballots on 18<sup>th</sup> July 2014 in its 2014 President-Elect election.

An injunction to restrain the Defendant and/or its servants or agents from proclaiming, declaring or affirming Norman Allen as its President-Elect for 2014 until further orders of this Honourable Court.”

**[13]** The Notice of Application, before this Court, seeks:

“An injunction to restrain the Defendant and/or its servants or agents from proclaiming, declaring or affirming Norman Allen as its President-Elect for 2014 until further orders of this Honourable Court.

An Order that the Defendant discloses to the Claimant within 7 days of the date thereof the Minutes of its General Council meeting on 28<sup>th</sup> June 2014.

An Order that within 7 days of the date hereof the Defendant gives a full account of the number of ballots given to the Electoral Office of Jamaica for the recount that was done on the 18<sup>th</sup> July 2014.”

**[14]** Mrs. Georgia Waugh-Richards complained at paragraph 16 of her affidavit in support, dated August 13<sup>th</sup> 2014, of the lack of independent supervision at the first count, the lack of security for the ballots from the 1<sup>st</sup> July 2014 through the 18<sup>th</sup> July 2014, the unfairness of the procedure during the second counting of the votes and the missing ballots at the second count. She also pointed out, that whereas the other candidates’ votes were “more or less the same” on the recount; her vote was reduced more dramatically, by 281 votes. Further, that the officer corps, some of whom were involved in counting the ballots, exerted undue, unfair and unprecedented influence on the election process.

The Law:

**[15]** The Claimant alleged a breach of Article 3 of the Articles of Association of the Jamaica Teachers’ Association, which states:

“All members shall have equal rights to the services of the Association and to the privileges inherent in being a member of the Association except as otherwise stated in the Memorandum of Association, these Articles of Association or the

By-Laws of the Association. They shall observe the professional and ethical standards set by the Association from time to time and any failing to observe its standards, rules, code of regulation shall be dealt with by the Council as it deem fit, members violating the accepted principles of the Association may be deprived membership or otherwise disciplined. Persons who have been refused membership or have had their membership suspended, withdrawn, cancelled or forfeited may reapply for membership.”

[16] In **Bonsor v Musicians’ Union [1956] A.C. 104** , it was held that where a Union member was wrongly expelled pursuant to the rules book, the action will be for a breach of contract and such member may recover damages from the Union. More recently, Professor Hugh Beale, in **Chitty on Contracts, 31<sup>st</sup> Edition Vol. 1**, highlighted that it is an established principle of law that the relationship between a member of a Trade Union and the Union itself is contractual and the terms of the contract are to be found in the rules of the Union. A member of the Trade Union has in general the right to proceedings to enforce compliance with the Union’s own rules in relation to matters such as election of officers and other internal regulations. (See: **Taylor v National Union of Mineworker (Derbyshire Area) [1985] B.C.L.C 237**).

[17] Counsel for the Defendant, although she initially questioned whether there was a cause of action disclosed in the Claimant’s pleadings, did not contend, that a breach of Article 3 of the Articles of Association of the Defendant, could not ground a claim by Mrs. Georgia Waugh-Richards. It was contended that the Orders sought were matters for resolution by the membership of the Association at their General Meeting and further that there was no serious issue to be tried. I was not minded to undertake making decisions on difficult questions of law, which might involve detailed arguments from counsel and mature considerations.

### **Discussion.**

[18] The Court of Appeal, in the case of **Carib Ocho Rios Apartment v Proprietors Strata Plan No. 73 & Anor (2013) JMCA Civ. 33**, recently rehearsed the

relevant principles on an application for the grant of an interim injunction. The court examined **American Cynamid Co. Ethicon (1975) AC 396** and the Privy Council decision in **National Commercial Bank Jamaica Ltd. V Olint Corporation Ltd. 1 WLR 1405**, where at paragraph 17, Harris JA said:

*“in making a decision on an application for injunctive relief, the court is usually guided by the classical principles laid down by Lord Diplock in American Cynamid Co. v Ethicon (19750 AC 396; namely there must be a serious issue to be tried; where there is a serious issue to be tried if damages are an adequate remedy and they can be paid, an injunction should not be granted. However there are cases in which serious triable issues are raised and a claimant could be adequately compensated in damages. In such circumstances, consideration should be given to the balance of convenience as to whether or not an injunction ought to be granted.”* Harris JA, noted that *The National Commercial Bank Ltd. case was not a departure from the hallowed principles adumbrated in the American Cynamid case, but a focus on the principle of, “least likely to result in irremediable prejudice to either party.”*

Harris JA, recognized the difficulty in saying whether damages or the cross undertaking will be an adequate remedy and quoted from the judgment of National Commercial Bank Ltd. v Olint Corporation Ltd, where at paragraph 1, Lord Hoffman said in part:

*“the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice and to what extent, if it turns out that the injunction should not have been granted or withheld as the case may be. The basic principle is, the court should take whatever course seems likely to cause the least irremediable prejudice to one party or the other.”*

[19] In determining the question as to whether there is a serious issue to be tried, Lord Diplock, in the **American Cyanamid case**, at 406G, said:

*“In the context if the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief, the Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial.”*

Megarry VC, in **Mothercare Ltd. v Robson (1979) FSR 466**, identified that the initial hurdle raised, of a serious issue to be tried, will be not be cleared if it “fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial.” So the question is, has Mrs. Waugh-Richards’s, application any real prospect of succeeding? This is to be determined without too detailed an examination.

[20] In relation to the first counting of the ballot on the day of the election. The affidavit of Mark Nicely, dated the 15<sup>th</sup> August 2014, states, at paragraph 13:

“That no protest was lodged up to the time of the counting of the last box by the Claimant or any of the candidates or their representatives. In fact, it was after the counting had finished, and the calculation of the total votes cast for each candidate was taking some time to be determined, there were, expressed concerns that the calculation done in tallying the total number of votes were incorrect.”

[21] However, those concerns did not deter, the Secretary General, of the Association, who was overseeing the count, to declare that Mrs. Georgia Waugh-Richards had amassed 6,079 votes and was therefore the winner over Mr.

Norman Allen 5,996 votes. The JTA, in a media release, that same evening, stated that a total of 15,092 votes had been cast in the election, and declared Mrs. Waugh-Richards, the President-Elect, she having received the highest number of votes in the preliminary count. Despite winning the election, Mrs. Waugh-Richards complains that the first count was not as properly supervised as was the recount supervised by the Electoral Office of Jamaica.

**[22]** Mr. Allen, also complained about the conduct of the first count. His affidavit in support of his claim, says at paragraph 4, inter alia,:

“I was considered the winner by consensus through discussions among observers for all candidates and several Central Executive members involved in the count. The margin of victory was 183 votes in spite of this result I was not declared the winner of the election.”

Mark Nicely’s affidavit makes no mention of Mr. Allen being regarded as the winner by consensus among observers for all candidates. There is no mention of a margin of victory of 183 for Mr. Allen. It should be noted that the scrutineer on whom Mr. Allen relies, has the margin of victory for Mr. Allen at 183. Mark Nicely’s affidavit, speaks to a margin of victory of 83, for Mrs. Waugh-Richards.

**[23]** Mr. Wayne Mullings, scrutineer and Official Recorder Keeper for Mr. Allen, is also silent about there being a consensus among observers that Mr. Allen was the winner. Mr. Mullings says his duty was to collect the total number of votes for all the candidates at the respective tables. He recorded 15,092 as the total votes cast in the election, in this regard his records and that of the JTA independently arrived at are in agreement. The record attached to his affidavit, under the rubric “Margin of Victory” has two sets of computations. Firstly,  $5,993 - 5,798 = 195$  and secondly,  $5,996 - 5,813 = 183$ . Under the heading, “Overall Polls” –

Candidates		# Votes
Allen	5,993 + 3	5,996
Dawes	1,010 + 1	1,011
Johnson	1,255 + 1	1,256
James	717 + 2	719
Richards	5,798 +15	5,813
	Total	14,795

[24] There are some,  $(15,092 - 14,795) = 297$  votes unaccounted for on the records produced by Mr. Mullings. Similarly, the EOJ, through no fault of theirs, had 294 votes less than were available to the JTA's Secretary General supervised first count on the 1<sup>st</sup> July 2014. Despite the difference in total votes, Mr. Mullings' records bear a striking similarity to the EOJ recount votes. The records produced by the EOJ, in respect of the 18<sup>th</sup> July 2014, had a total vote of 14,798 inclusive of spoilt ballots. Mr. Mullings, recorded a total vote count of 147,795, a difference of three votes separating the total ballots counted for all the candidates on Mr. Mullings's recording and the EOJ's recount. Mr. Allen received 5,977 in the recount conducted by EOJ, and 5,993 votes on Mr. Mullings's record in respect of the 1st July 2014 count, a difference of 16 votes. Mr. Mullings recorded 1,011 for candidate, Dawes, whilst EOJ, had two less votes for him. In respect of candidate Johnson, Mr. Mullings recorded 1,255, EOJ had one more. Mr. Mullings recorded 719 for Johnson, EOJ, had one less. In the case of Mrs. Waugh-Richards, Mr. Mullings recorded 5,813, and EOJ scored 5,798. The 6,079 scored for Mrs. Waugh-Richards on JTA's first count is 281 votes more than that recorded by EOJ, and 266 more than that recorded by Mr. Mullings. It must be borne in mind that the EOJ recorded a total vote cast of 14,798 votes, which is 294 votes less than Mr. Mullings who recorded 15,092 total vote cast in respect of 1<sup>st</sup> July 2014. This provides grounds for Mrs. Waugh-Richards complaint at

paragraph 16 (f) that the other candidates received “more or less” the same votes (Mr. Allen had 19, less), but her share was reduced by 281. She asks why?

**[25]** With all the boxes accounted for and overseen by the JTA’s Secretary General, Mrs. Waugh-Richards, received 6,079 votes and Mr. Norman Allen 5,996. The total votes counted for all the candidates were 15,052 of a total of 15,092, it is safe to assume 40 votes were spoilt. This is the same number of spoilt votes that EOJ recorded. The EOJ in its recount had 294 less votes, than did the officials at the first count .Therefore, a reasonable basis for the applicant’s belief that ballots counted at the first count were missing at the recount. The applicant’s claim is not frivolous or vexatious, and discloses a real prospect of succeeding in her claim.

**[26]** There are serious issues as to the reliability of the records of Mr. Mullings. In the submissions before me it was clear that the findings of the scrutineers for Mr. Allen were the plank on which his complaints of the first count were based. Another scrutineer, Mr. Collin Spence, although he kept a tally sheet and kept an unofficial record of the Claimant’s score he did not produce those records, but remembers that the Claimant (Mr. Allen) won the St. Andrew division, much to the disappointment of the scrutineers for the other candidates. According to Mr. Spence, the scrutineers for the other candidates conceded that Mr. Allen had won. Mr. Spence remembers the final table to be counted and recounts the events at that count. The account given in the affidavit of Mark Nicely is that, it was after the count that problems occurred, and the problems were concerned with the tallying of the votes.

**[27]** On the evidence, the JTA’s, and Mr. Mullings’s record attest to there being 15,092 votes cast. It also appears from the record of JTA, that there were 40 spoilt ballots. The EOJ recount, although effected without 294 of the votes cast, has accounted for those 40 spoilt ballots. If the EOJ is correct that there were 40 spoilt votes, the reduction of 281 in the numbers of votes cast for Mrs. Waugh-Richards, on the recount, cannot be explained, as Dr. Nicely (See, paragraph 30 of the affidavit of Mark Nicely) attempts to do, that Mrs. Waugh-Richards

votes were reduced “by spoilt votes only”. Dr. Nicely’s assertion is not mathematically feasible. Mr. Mullings’s records do not displace the inference of 40 spoilt votes in the first count. There were 294 viable votes that were not available to the EOJ. It is not necessary on this application to say when or by what means they were made unavailable. I note, that Dr. Nicely’s denial of missing ballots at paragraph 35 (e) of his affidavit and that I find that there are serious issues to be tried.

[28] Lord Diplock in the American Cyanamid case at page 408, said:

*“If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage. If on the other hand damages could not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff’s undertaking as to damages as for the loss he would have sustained from being prevented from doing so between the time of the application and the time of trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.”*

[29] Counsel for the JTA, said that damages are an adequate remedy for the applicant. Although injunctive relief would not normally be granted in respect of a breach of contract since damages would be an appropriate remedy if a breach were proved. I cannot agree. The evidence before this court, is that the JTA, is a powerful national institution that speaks on behalf of over 24,000 teachers, whose President represents the JTA locally and abroad. The Claimant is not

party to a private contractual arrangement. She represents a body of persons who she has impressed with her vision for the Association. Those persons are affected by her application. Would they have a claim at common law, for the breach of Mrs. Waugh-Richards rights? Is damages in the measure recoverable at common law by those voters? Damages will not compensate for the denial of the right of leadership that the membership would anticipate from Mrs. Waugh-Richards. The Trade Union is an important institution in our system of government. A usurpation of the rights of the Union is not easily or adequately remedied by a measure of damages.

**[30]** The balance of convenience, has been urged by Counsel for the Jamaica Teachers' Association, to be in favour of the JTA whose work will be stymied without, the leadership of the President-Elect. The importance of the President-Elect role, will to my mind be seriously undermined, if his election is shrouded in controversy of this nature. A substantial part of JTA's membership supported Mrs. Waugh-Richards. A mere 179 votes separated the candidates out of a total vote of just over fifteen thousand on the recount. According to the JTA's own count she had amassed 83 more votes than Mr. Allen had with all the ballots in account.

**[31]** The JTA has maintained that it conducted itself with rectitude and transparency. However, that has been challenged by Mr. Norman Allen, on his application for an injunction seeking to have a recount of the votes. He specifically charged that although he had secured a margin of victory of 183 votes on the first count of 1<sup>st</sup> July 2014, he was not declared the winner of the election. This contention is even more pointed, in that, the election was under the supervision of General Council of the JTA, the Secretary General and his father, Sherlock Allen, an immediate past president, as was his campaign manager, Mr. Hall President being present. After highlighting, the failure to declaring him a winner, Mr. Allen, states at paragraph 5, of his affidavit that, "This irregularity has been ongoing since the commencement of the campaign for the position of President-Elect."

**[32]** How can it be in the convenience of JTA, to proceed to have an installation of a President-Elect, when it is being seriously questioned, that the recount of votes which had been ordered by the Supreme Court, was done in the absence of some 294 viable votes, which were part of the pool, from which JTA declared, that Mrs. Waugh-Richards, was the winner of the votes for President-Elect. The Order 2 of Mrs. Justice McDonald-Bishop dated 4<sup>th</sup> July 2014, recognized the importance of securing the votes. The Order sought to restrain the JTA, from removing the ballot boxes from the Sunset Jamaica Grande or otherwise dealing with the boxes. Those measures were to ensure that there was retained all the votes that were available at the first count and that the recounting of a reduced number of votes would in fact constitute a recount, or a compliance with Justice McDonald-Bishop's order.

**[33]** The affidavit of Mark Nicely, states that once the decision was taken to recount the votes, steps were taken to secure the ballots. The ballots were placed in 33 boxes and locked in a room and the keys given to Dr. Cameron. The affidavit over several paragraphs recites the steps taken by JTA to secure the ballots from the evening of the 1<sup>st</sup> July 2014. The Judge's Order ran from the 4<sup>th</sup> July 2014 until the date of the recount. Despite the elaborate steps taken some 294 votes less were recorded by the EOJ for the recounting exercise. The records of Mr. Mullings and the JTA reveal that 15,095 votes were available for counting on the 1<sup>st</sup> July 2014 recount. The onus is on the Defendant to explain the absence of the ballots. All the consequences that Counsel for JTA has urged will befall the institution if this application succeeds, will be much worsened, by a President-Elect, whose election is hobbled by a lack of transparency, brought on, no doubt by no fault of his own.

The balance is in favour, of the applicant who represents a body of persons whose democratic rights enshrined in Article 3 of the Articles of Association must be respected.

The court grants the following orders:

1. An injunction to restrain the Defendant and/or its servants or agents from proclaiming, declaring or affirming Mr. Norman Allen as its President-Elect for 2014 until further order.
2. An Order that the Defendant discloses to the Claimant within 7 days of the date hereof the reason why the Claimant had fewer votes than Mr. Norman Allen after the recount of the ballots on the 18<sup>th</sup> July 2014 in its President-Elect election.
3. An Order that the Defendant discloses to the Claimant within 7 days of the date hereof the Minutes of its General Council meeting held on 28<sup>th</sup> June 2014.
4. An Order that within 7 days of the date hereof the Defendant gives a full account of the number of ballots given to the Electoral Office of Jamaica for the recount that was done on the 18<sup>th</sup> July 2014.
5. An Order that this claim proceed as if it commended by Claim Form.
6. An Order that the Claim Form and Particulars of Claim filed on the 15<sup>th</sup> August 2014 by the Claimant do stand.
7. An order that the time for serving this Notice of Application be abridged.
8. Questions of costs reserved until the August 22<sup>nd</sup> 2014 at 9:45 am.