[2021] JMSC Civ. 148

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020 CV 02395

BETWEEN	**CHRISTOPHER STEPHENSON**	**APPLICANT**
AND	**THE BOARD OF MANAGEMENT OF PENWOOD HIGH SCHOOL**	**1ST RESPONDENT**
AND	**TEACHERS' APPEAL TRIBUNAL**	**2ND RESPONDENT**

IN CHAMBERS

Manley Nicholson and Donna Rufus instructed by NicholsonPhillips, Attorneys-at-Law for the Applicant.

Hugh Wildman instructed by Hugh Wildman & Co. for the 1st Respondent.

Tamara Dickens and Louis Jean Hacker instructed by the Director of State Proceedings for the 2nd Respondent.

Heard: 22nd April and 28th May 2021.

Judicial Review - Application for Leave - Composite decision making process - Whether there are reasonable grounds for judicial review with a realistic prospect of success - Failure to challenge decision making process of appellate tribunal which is capable of curing defects in earlier process - Late stage amendment of application for leave.

C. BARNABY, J

[1] On the 28th December 2016 Mr. Christopher Stephenson's employment as a teacher at Penwood High School was terminated by the school's Board of Management (the "School Board"). This decision was upheld by the Teachers' Appeal Tribunal (the "Tribunal") on the 10th December 2019.

[2] By way of Notice of Application for Court Orders (Application for Leave to Apply for Judicial Review) filed 3rd July 2020, Mr. Stephenson sought leave to remove into this court the decision of the Tribunal so that an order of certiorari may issue to quash the same. On the 24th July 2020 when the application came on for hearing before J. Pusey, J however, it was amended to enable Mr. Stephenson to pursue an application for leave in respect of *"[t]he Respondents' decision made on 28 December 2016 to terminate the Applicant's employment…"*. The evidence discloses that only one of the two Respondents made a decision on that date, the School Board. Outside of this prerogative relief, Mr. Stephenson also intends to pursue a declaration that the Respondents erred in the exercise of their discretion in terminating his employment.

[3] After several adjournments, the amended application for leave to apply for judicial review came on for hearing before me on the 22nd April 2021 and a decision thereon was delivered orally on the 28th May 2021. The application was refused, so too Mr. Stephenson's belated attempt to further amend the application and his oral application for leave to appeal the latter decision. At the request of Counsel for Mr. Stephenson, I now reduce into writing the reasons for these decisions.

Extension of time within which to make application for leave to apply for judicial review

[4] An application for leave to apply for judicial review must be made promptly, and in any event, within three (3) months from the date on which the grounds for the application arose for the first time: CPR 56.6(1). Where an order of certiorari is being sought to quash a judgment, order, conviction or proceedings, pursuant to CPR 56.6(3), the date on which the grounds for the application first arose is *"… taken to be the date of that judgment, order, conviction or proceedings."*

[5] The decision of the School Board which Mr. Stephenson is seeking to quash having been made on the 28th December 2016, the date on which the grounds for leave would first have arisen was some three (3) years

and six (6) months before the application for leave was in fact filed. I note however, that during the period Mr. Stephenson availed himself of the statutory facility available to him under the **Education Act** to appeal to the Tribunal, which process culminated with the Tribunal's decision on 10th December 2019.

[6] Judicial review is a remedy of last resort and the delay which arises from exhausting an alternative avenue for redress ought not to operate to the detriment of an applicant for leave. Consequently, the date on which the grounds for leave first arose is properly the date of the decision of the Tribunal. The application for leave having been made almost seven (7) months after that date, it was not promptly made.

[7] Although the School Board submitted that Mr. Stephenson should not be entertained by the court on account that he had not sought an extension of the time within which to make his application, that contention was based on an error as to fact. Mr. Stephenson sought as one of his relief an extension of the time within which to make the application for leave. It is to this aspect of the application that I first and very briefly turn.

[8] Where an application for leave to apply for judicial review has not been promptly made, the court is nevertheless permitted to extend the time within which to make the application if there is good reason for doing so: CPR 56.6(2).

[9] In addition to seeking redress from the Tribunal which returned its decision on the 10th December 2019, it is also Mr. Stephenson's evidence that he was advised of that decision in March 2021. Thereafter, he experienced difficulty in obtaining the assistance of Counsel, which difficulty was exacerbated by the global pandemic. Mr. Stephenson's evidence in these regards is accepted. I find that the delay was not inordinate and regard the difficulty in securing legal representation as a good reason for extending the time for making the application for leave to apply for judicial review.

[10] Having determined that threshold issue, I now consider whether the amended application discloses any arguable ground for judicial review with a realistic prospect of success.

Whether the application disclosed any arguable ground for judicial review with a realistic prospect of success

[11] On consideration of Mr. Stephenson's application, I find that it does not disclose any ground for judicial review against the decision of the Tribunal and in consequence, there is no arguable ground for judicial review with a realistic prospect of success.

[12] One of the seminal principles of judicial review is that leave will not be granted where the appellant has an alternative avenue for redress. This bar has among its premises the fact that alternative avenues for redress are capable of being curative of defects in earlier decision making processes. This is demonstrated in the Court of Appeal decision in **James Ziadie v Jamaica Racing Commission** (1981) 18 JLR 131.

[13] In **The Board of Management of Bethlehem Moravian College v Dr. Paul Thompson and the Teachers Appeals Tribunal** [2015] JMCA Civ 41 (hereinafter called **ex parte Paul Thompson**) on which Mr. Stephenson relies, it was determined that all stages in a statutory decision making process may be amendable to judicial review and that an order of certiorari may lie where there are alleged breaches of the principles of natural justice. I will refer to proceedings of this nature as "composite judicial review proceedings".

[14] It is my judgment that consistent with principles which govern applications for leave to apply for judicial review, there must be some basis for challenging the decision making process which is sought to be impugned by the composite judicial review proceedings as envisioned by the Court of Appeal, especially where an applicant has exhausted his statutory avenue for redress, which avenue is capable of curing defects in the decision making process which precede it. It is the absence of any challenge to the decision of the Tribunal which I find to be the

insurmountable deficit on Mr. Stephenson's amended application for leave to apply for judicial review.

[15] Pursuant to section 37(4) of the **Education Act**, on an appeal against the decision of a school board, the Teachers' Appeal Tribunal may *"…either confirm the decision appealed against or vary or quash that decision, and the Tribunal may from time to time return the proceedings to the person or authority concerned with the making of that decision for further information or for such other action as the Tribunal thinks just."* It was therefore entirely within the Tribunal's remit to confirm the decision of the School Board to terminate Mr. Stephenson's employment. I therefore find that it is insufficient to merely join the Tribunal as a Respondent, without mounting a challenge to the exercise the duty which has been given to it by statute.

[16] I believe that Morrison P who was in the minority in **ex parte Paul Thompson** correctly recognised that the appellate process at the Teacher's Appeal Tribunal may in fact be curative in an appropriate case. While the majority did not consider the process to be curative in the circumstances of **ex parte Paul Thompson**, I do not believe the decision established that an appeal to the Teachers Appeal Tribunal could never be curative. Similarly, it is my view that the decision does not permit the court to quash the decision of the school board in circumstances where that decision was confirmed by the appellate tribunal and the latter decision remains unchallenged and therefore valid.

[17] In a very apt extract from the minority decision in **Matalulu v Director of Public Prosecutions** [2003] 4 LRC 712, 733, which has been cited with approval many times over in this jurisdiction, including in the relatively recent decision of the Court of Appeal in **Fritz Pinnock and Ruel Reid v Financial Investigations Division** [2020] JMCA App 13, it was stated that potential arguability *"… cannot be used to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen."* The papers must disclose an arguable ground with a realistic prospect of success. This is

no different in composite judicial review cases, more so where the final stage in the statutory decision making process is capable of curing defects in an earlier stage of the composite process.

[18] It is in these premises that at the beginning of the hearing before me on the 22nd April 2021, I asked Counsel for Mr. Stephenson to address me on the propriety of the course being adopted, having announced the observation I made on the papers - that there was no challenge to the exercise of the Tribunal's appellate jurisdiction. I required this to be addressed ahead of the arguments each party intended to raise in respect of the "substantive application" for leave to apply for judicial review.

[19] In particular, I asked to be addressed on:

(1) The propriety of applying for leave for judicial review against the decision of the School Board having exhausted the statutory avenue for redress of that decision, and there being no ground of challenge to the decision of the Tribunal to which that decision was appealed; and

(2) The reason for adding the Tribunal as Respondent to the application for leave to apply for judicial review in the circumstances.

[20] In respect of the first question, it was Mr. Nicholson's submission that the Tribunal is not the final body and that if the Applicant could not go back and review the School Board's decision, he would suffer injustice. He indicated that there is authority, which he undertook to supply at a later date, that the decision of an appellate body would not take away the right of an applicant to seek judicial review of the initial decision. In response to the second question, he went on to say that the Tribunal has been added as a Respondent because it upheld the decision of the School Board which had denied Mr. Stephenson natural justice. He went further to state that the decision of the Tribunal was not being challenged in terms of judicial review. On these bases he submitted that the proper procedure was adopted and that if leave was not granted, Mr. Stephenson would

suffer prejudice. He also submitted that there was nothing detrimental to good administration for leave to be granted to pursue judicial review. He then went on to make reference to his written submissions and argued that Mr. Stephenson by his affidavit evidence and those submissions had demonstrated that there is an arguable case for judicial review with a realistic prospect of success. There was insistence by Counsel that the course adopted was appropriate and no application was made to amend the application.

[21] The decision which Counsel promised to supply in support of the contention that the appropriate course had been adopted by Mr. Stephenson is **ex parte Paul Thompson** to which I referred previously. Unlike the instant case however, where there is no attempt to challenge the decision of the Tribunal, the power exercised by the Teacher's Appeal Tribunal in **ex parte Paul Thompson** was itself the subject of challenge on the application for judicial review. The cases are therefore distinguishable on their facts.

[22] An appeal to the Teachers' Appeal Tribunal being capable of curing procedural defects at the level of the school board in an appropriate case, it is my judgment that Mr. Stephenson had an obligation to set out the grounds upon which the exercise of that statutory function are challengeable by judicial review, if they exist. He has not done so. This makes unsurprising the absence of affidavit evidence in response to the application for leave to apply for judicial review from the Tribunal.

[23] The **Education Act** having provided for an appeal to the Tribunal, it is my view that in the absence of a challenge to the exercise of the statutory function by it in confirming the decision of the School Board, any alleged deficiency in the decision making process by the latter must be taken to have been cured on appeal to the former.

[24] It has previously been remarked, with which I am in total agreement, that judicial review is a practical remedy and that leave ought not to be granted to pursue it where no useful purpose would be served. To grant leave to

apply for certiorari to quash the decision of the School Board in the absence of challenge to the decision making process of the Tribunal would be an exercise in futility in my view as the latter subsuming and potentially curative process and decision would continue to be extant. To grant leave in these particular circumstances would in fact be detrimental to good administration, antithetical to the purpose of judicial review and may well be regarded as an entreaty to the court by the applicant to usurp the statutory role of the tribunal and an abuse the judicial review process. Accordingly, and without pronouncing on the merit or otherwise of the decision making process at the level of the School Board, the application for leave to apply for judicial review is refused.

Late stage attempt to further amend application for leave to apply for judicial review

[25] While I cannot now presuppose the outcome of an application to further amend the application for leave to apply for judicial review had one been made on the occasion that the concerns were raised, to allow an amendment of the application does not now recommend itself. The Appellant and Respondents argued the substantive application before me on the 22nd April 2021 following Mr. Nicholson and Ms. Rufus' insistence that the appropriate course had been adopted. Arguments were made in circumstances where the Tribunal, given the nature of Mr. Stephenson's case against it did not file an affidavit in response to the application for leave and the date limited by the court for the parties to file affidavits having long passed. In fact, the Appellant relied on the absence of challenge to its decision making process in arguing that the application for leave should be refused. While I did permit the Applicant to file and serve written responses to the authorities relied on by the 2nd Respondent, the submissions filed by the Applicant went well beyond the bounds of that which was ordered.

[26] It is in the foregoing circumstances and in forecasting that the proposed amendments would require further delay in resolving the application so as to avoid breaching the Respondents' right to a fair hearing that I

determined that the petition to the court in the written submissions filed on behalf of Mr. Stephenson on the 30th April 2021 were untimely, wholly inappropriate and refused to permit them. By those submissions the court was invited to disregard the submissions made on Mr. Stephenson's behalf at the inter partes hearing of the application for leave to apply for judicial review on the 22nd April 2021; and proceed to determine the application on the further substantial amendments to the application for leave to apply for judicial review proposed in those written submissions.

Application for leave to appeal the decision to refuse further amendments of the Application for Leave to Apply for Judicial Review

[27] Ms. Rufus on behalf of Mr. Stephenson sought leave to appeal the court's decision to refuse the amendments sought to be made by way of written submissions filed on the 30th April 2021.

[28] Both Mr. Wildman and Ms. Dickens on behalf of the 1st and 2nd Respondents respectively opposed the application for leave to appeal on the basis that an appeal had no realistic prospect of success.

[29] Mr. Wildman submitted that if the court had permitted the amendments at the late stage at which Mr. Stephenson sought to introduce them, in circumstances where the Tribunal had not filed any affidavit evidence based on the case it had to meet, and the school's continued to deprivation of the opportunity to replace Mr. Stephenson, it would have been detrimental to good administration.

[30] Ms. Dickens' opposition was premised on the fact that the absence of grounds of challenge to the decision making process at the Tribunal was raised by the court before the substantive hearing and that Counsel for Mr. Stephenson had failed to apply to amend the application to include the decision of the tribunal and grounds for challenge to it. She argued that in the circumstances the court had correctly refused to grant the amendment. She submitted further that it was only after the full inter partes hearing had taken place that Mr. Stephenson sought to introduce

substantial amendments by way of written submissions in breach of the rules of natural justice.

[31] Ms. Rufus requested and was permitted to respond to the submissions of the Respondents. It was her further submission that there would not be any substantial prejudice to the Respondents as the matters on which Mr. Stephenson relied to put his best case forward were already set out in the submissions filed on 30th April 2021, and that a party is permitted to make amendments at any time before a case management conference.

[32] Having heard the submissions, I refused the application for leave to appeal on the basis that I did not believe that an appeal had a realistic prospect of success having regard to the stated basis for refusing to grant the belated request for an amendment to the application which are set out at paragraphs 25 and 26 herein.

[33] While the court must always strive to have matters determined on their merits, the parties have an obligation to put the court in a position to do so. This is consistent with each party's responsibility to assist the court in advancing the overriding objective of dealing justly with cases. The Applicant failed to discharge that responsibility by the time of the *inter partes* hearing of the application before me almost ten (10) months after the filing of the application and previous adjournments of the hearing.

[34] An opportunity was in fact presented to Counsel for Mr. Stephenson to reconsider the basis of the application and the course adopted on the day of the hearing, ahead of hearing arguments on the substantive application. Mr. Stephenson did not avail himself of the opportunity.

[35] While Mr. Stephenson was permitted to file submissions in response to the authorities in the Tribunal's written submissions and the Respondents were allowed to respond in writing to the authority Counsel promised to supply if that was thought necessary, there was nothing further to be done by the parties in respect of the hearing on the 22nd April 2021, save attend to receive the decision on the application which had been reserved.

[36] In respect of Ms. Rufus' contention that a party is permitted to make amendments before a case management conference, this is an application for leave to apply for judicial review. There is no claim before the court for which there could be said to be an impeding case management conference or first hearing which is to be so treated, so as to enable a party to invoke the rule relating to amendments to a party's statement of case before a case management conference.

[37] Additionally, Part 56 of the CPR makes specific provision for amendments to applications for leave to apply for judicial review. While cognizant that the court has the power to allow amendments on an application for leave, having regard to the particular circumstances of this case I refuse to exercise that power.

[38] It is my judgment that an appeal against the decision to refuse the Applicant's late stage attempt at further amending the application for leave for judicial review does not have a realistic prospect of success, leave to appeal is therefore refused.

ORDER

[39] In all the foregoing premises it was ordered as follows.

1. The application for leave to apply for judicial review is refused.
2. No order as to costs.
3. Application for leave to appeal is refused.
4. The Applicant's Attorneys-at-Law are to prepare, file and serve this order.

Carole Barnaby
Puisne Judge