[2015] JMCA Civ 46

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 71/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**ALVIN LAWSON**	**APPELLANT**
AND	**PROFESSOR CLAUDE PACKER**	**1ST RESPONDENT**
AND	**THE BOARD OF DIRECTORS OF THE MICO UNIVERSITY COLLEGE**	**2ND RESPONDENT**

Miss Georgia Hamilton and Hadrian Christie instructed by Georgia Hamilton & Co for the appellant

Garth McBean QC instructed by Pickersgill Dowding & Bayley Williams for the respondents

18, 19, 20 November 2014 and 28 September 2015

PHILLIPS JA

[1] This is an appeal from the decision of P Williams J made on 25 July 2013 refusing the orders sought on the appellant's fixed date claim form for judicial review of the decision made by the 2nd respondent ("the board") to terminate his employment at the Mico University College ("the Mico") on 27 July 2011.

[2] On 26 October 2011, outside of the prescribed period permitted by rule 56.6(1) of the Civil Procedure Rules ("the CPR"), the appellant filed his application for permission to apply for judicial review along with a supporting affidavit sworn to on 25 October 2011. On 14 November 2011, Thompson-James J granted an extension of time permitting that application to stand, and setting the date for the hearing of the application for leave for 22 June 2012. On 27 June 2012, Pusey J granted leave for the appellant to file an application for judicial review and set the first hearing for 17 September 2012. On 11 July 2012, the appellant filed the fixed date claim form seeking judicial review along with affidavit sworn to on the said date in support thereof. On 17 September 2012, B Morrison J set the hearing of the application for 23 October 2012, made standard orders for disclosure, and gave time tables for the filing of affidavits and written submissions. The application was eventually heard by P Williams J on 9 May 2013 and as indicated determined on 25 July 2013. The appellant, being entirely dissatisfied with that decision, filed his notice of appeal on 5 September 2013.

[3] The following are the relevant background facts relating to this matter which have been culled from the application for judicial review and the accompanying affidavit of the appellant, which was the only affidavit filed on his behalf but contained all the documents referred to below as exhibits to the same:

(i) The appellant is a trained teacher who had received his licence from the Teacher's Services Commission in 1996. Prior to that he had obtained his initial teaching qualifications from the Mico, and subsequent

to that his Bachelor of Science Education degree from the Western Carolina University, Cullowhee, North Carolina in the United States of America, his Master of Education and Master of Science degrees from the University of Manchester, in the United Kingdom.

(ii) He was initially employed through the Ministry of Education to teach at Saint George's College, and after completing his studies abroad, he was employed at the Donald Quarrie High School, and as a part time lecturer at the Mico. He was later given a one-year contract for the period 5 January 2009 to 4 January 2010 as a lecturer at the Mico in the Faculty of Liberal Arts and Education. This was by way of letter dated 29 December 2008 which contained the terms of his employment. The letter was duly signed by the 1st respondent, as president of the Mico and by the appellant, acknowledging receipt of the offer of employment and confirming that he understood and accepted the terms therein.

(iii) When the one-year contract ended he continued lecturing at the Mico.

(iv) On 7 December 2009 and 27 September 2010, the appellant received what he described as letters of commendation for his "devotion to duty" and for that "extra touch" in the execution of the graduation exercise and the matriculation and consecration ceremony both of which, as a result of his efforts, were successful events. His performance evaluation as at June 2011 was also graded as satisfactory.

(v) On 25 March 2010 the board wrote to the Permanent Secretary in the Ministry of Education indicating that at its meeting held on 16 March 2010, it had approved certain persons from among the academic staff, which included the appellant, for permanent employment with effect from 1 April 2010. The letter sought the approval from the ministry for the appointments and was signed by the 1st respondent as president of the Mico and by R Karl James, CD, chairman of the board.

(vi) On 27 July 2010, the Mico wrote a letter to the appellant indicating that his permanent employment as lecturer in the Faculty of Education and Liberal Arts had been approved with effect from 1 September

2010, pending ratification from the Ministry of Education. All other terms and conditions of his employment save for his remuneration remained the same. He was thanked for his invaluable service. He signed on 19 August 2010 accepting the terms and conditions stated therein, and submitted his completed Form 503 pursuant to schedule C of the Education Regulations ("the ER"), National Insurance Scheme (NIS) and Taxpayer Registration Number (TRN) cards, inter alia, for onward transmission to the Ministry of Education.

(vii) There was no further communication in respect of his situation for almost a year, during which time he continued to perform his duties at the Mico.

(viii) On 6 June 2011, the 1st respondent wrote the appellant advising him that his temporary employment would not be extended beyond 31 August 2011. On behalf of the board, he was thanked for his services to the institution and was wished well for the future. The letter was signed by the 1st respondent, described as president of the Mico.

(ix) On 7 July 2011, the appellant's attorneys-at-law wrote to the 1st respondent stating quite forcefully that the appellant's contract of employment had been unlawfully and arbitrarily terminated. They asserted that the termination was not in keeping with the ER or the rules of natural justice. They challenged the description of "temporary" in respect of the appellant's employment in the letter, and opined that, although the appointment had not been ratified, that could not defeat the fact that the appellant's employment was governed by the ER and the rules of natural justice. They indicated further that only the board could terminate the services of the appellant, and that the board would have to comply with regulations 56 to 59 of the ER. The 1st respondent had no jurisdiction, they stated, to terminate the services of the appellant. They requested a written apology acknowledging that the purported termination was invalid. They threatened that unless they received a response in a timely manner they would be seeking the intervention of the courts for resolution of these issues.

(x) On 25 July 2011, the appellant's attorneys-at-law wrote chastising the 1st respondent for not even the courtesy of a response to theirs of 7 July 2011.

(xi) On 27 July 2011, a letter over the signatures of the 1st respondent, described as the President, and R Karl James, CD described as the chairman of the board and pro-chancellor, on the letterhead of the Mico was sent to the appellant advising that his temporary appointment would not be extended beyond 31 August 2011. This decision was stated to be due to "certain organizational changes in the department". He was again thanked for his services and wished well for the future. The last paragraph read thus:

> "This letter supersedes our correspondence dated June 8, 2011."

(xii) There had been no letter from the board or the 1st respondent to the appellant on 8 June 2011. The appellant assumed that the reference to the letter of 8 June 2011 meant the letter dated 6 June 2011.

(xiii) On 11 August 2011, the appellant's attorneys-at-law wrote to the permanent secretary in the Ministry of

Education enclosing the items of correspondence dated 6 June 2011 and 27 July 2011, from the 1st respondent and the board, respectively. The attorneys voiced their concerns and asked for an inquiry into the matter so that the appellant could be allowed to pursue his employment "without any further arbitrary and/or unlawful interferences". They asked for a response within 14 days.

(xiv) On 22 August 2011, the Ministry of Education, over the signature of its legal consultant, on behalf of the Permanent Secretary, wrote to the appellant's attorneys-at-law, copied to Mr Karl James of the Mico, indicating that:

> "...the termination of employment of a teacher in a public educational institution (PBI) is within the exclusive purview of the Board of Management of that institution, acting in accordance with the Education Regulations 1980, or where relevant, the institution's scheme of management.
>
> Legal challenges against the termination of employment of teachers in PBI's may be made to the Appeals Tribunal established under section 37 of the Education Act, or where advisable, by application to the court for judicial review."

(xv) On 31 August 2011, the appellant's attorneys-at-law wrote to the senior director in the Ministry of Education, Human Resource Management & Administration department, requesting their intervention with regard to the unlawful termination of the appellant's services. They were of the view that rule 61 of the ER does not allow the appellant to petition the Appeals Tribunal, "given the manner in which he was purportedly dismissed". An urgent inquiry into the matter was again requested, but in this case, by the human resource department.

(xvi) On 6 September 2011, a response came from the Human Resource department in the Ministry of Education to the appellant's attorneys-at-law noting that the ministry's legal consultant had already communicated with the attorneys-at-law, and advised that a meeting would be convened with its legal consultant to discuss the matter after which, their position will be stated.

(xvii) The appellant was never informed of any position coming out of that meeting and concluded that the meeting did not take place.

(xviii) The appellant deposed that since 1 September 2011 he had applied for several jobs at different institutions but had not been successful. He testified that he had been appointed to the post of dean of discipline at the Jose Marti Technical High School but that was short lived, as after only two weeks he was relieved of his duties due to the unresolved dispute, which is the subject of the claim before this court, on appeal. He had therefore been without earnings since September 2011, and had been financially embarrassed, as he had not been able to meet his obligations in respect of certain loans outstanding and he had had to rely on the kindness of his sister. He stated that he had exceeded the limits on his two credit cards.

(xix) The appellant averred that although the Mico had indicated that there had been organizational changes within the department, he had discovered that since his departure from the institution the Mico had engaged the services of six lecturers in the Education Department in the Faculty of Liberal Arts and Education.

(xx) The appellant was of the view that he was a permanent employee of the Mico, and as such he was entitled to security of tenure and the benefit of the ER; that the 1st respondent had no jurisdiction to terminate his employment and in any event the purported termination of his employment by the Board was done in bad faith, in breach of the ER and therefore unlawful.

[4] The 1st respondent swore to an affidavit on 28 September 2012 which was the only affidavit filed on behalf of the respondents and which referred to the affidavits of the appellant filed in support of the application for leave to apply for judicial review and in support of the fixed date claim form, which essentially contained the same information and attachments. The affidavit of the 1st respondent did not address the substance of the appellant's affidavit. Its essence was set out at paragraphs 3 and 4 thereof:

"3. That since the termination of the temporary employment of Alvin Lawson on 31st August, 2011 the post which he occupied has ceased to exist as in 2011 the Mico University Colleges carried out extreme changes in several Faculties. The Department of Professional Studies in which Alvin Lawson was employed, no longer exists [sic] being subsumed along with several Departments into a new Faculty known as Education and Leadership.

4. The Faculty of Education and Leadership has its full complement of staff. Two Senior Faculty members

> who were away on study leave have since returned and are teaching in this field."

The respondents failed to obey orders for standard disclosure which were made as part of the case management orders.

[5] As the exchange of correspondence and discussions between the attorneys-at-law on behalf of the appellant and various personnel at the Ministry of Education did not bear fruit, the fixed date claim form was filed on 11 July 2012, as already indicated. The appellant sought the following orders:

> "1. A declaration that the [appellant] is a permanent member of the academic staff of The Mico University College ('the Mico') and is entitled to security of tenure;
>
> 2. Further and/or alternatively, a declaration that the [appellant] can only be dismissed from the Mico for cause;
>
> 3. An order for certiorari quashing the decisions of the 1st and 2nd [respondents] purporting to terminate the permanent employment of the [appellant] in breach of the Education Regulations, 1980;
>
> 4. A declaration that the [appellant] had a legitimate expectation that his permanent appointment would be considered and addressed by the Minister of Education;
>
> 5. An order for mandamus directing the Board to reinstate the [appellant] as a permanent member of the academic staff of The Mico with effect from 1 September 2011, subject only to the requirement for confirmation by the Minister of Education;
>
> 6. An order for restitution of income and/or damages for loss of income and all other consequential losses

flowing from the decisions of 1st and 2nd [respondents], purporting to terminate the [appellant's] employment;

7. Costs to the [appellant] to be taxed if not agreed;

8. Liberty to apply; and

9. Such further and/or other relief as this Honourable Court deems just."

[6] These claims were based on the following seven grounds:

"1. The [appellant] was formally appointed to the position of permanent Lecturer with security of tenure effective 1st September 2010. His appointment and removal are governed by the Education Regulations, 1980, which Regulations also govern the acts of the 1st and 2nd [respondents];

2. The 1st [respondent] does not - under any circumstance - have the authority to terminate the services of the [appellant]; accordingly, in his letter dated 6 June 2011 the 1st [respondent] acted ultra vires and contrary to the Education Regulations, 1980;

3. The 2nd [respondent], by its letter dated 27 July 2010, acted ultra vires when it purported to terminate the services of the [appellant]. The 2nd [respondent] failed - whether the [appellant's] appointment is permanent or temporary - to adopt the prescribed procedure outlined by the Education Regulations 1980, more precisely: Regulations 56 to 59;

4. The 2nd [respondent] acted in bad faith when they each purported to terminate the [appellant's] permanent appointment;

5. Both the 1st and 2nd [respondents] acted in bad faith when they each purported to reclassify the [appellant's] appointment as 'temporary';

6. The [appellant] possessed a legitimate expectation that his permanent appointment would be considered and addressed by the Minister of Education - whether by confirmation or disapproval. The 1st and 2nd [respondents] frustrated this expectation when they purported to terminate his permanent appointment before the Minister of Education could consider same as mandated to do by the Education Regulations, 1980; and

7. The [appellant], by virtue of the acts of the 1st and 2nd [respondents], has been out of a job and without a salary since 1 September 2011."

[7] Based on those pleadings and the affidavit evidence, the learned judge P Williams J, in declining to make the orders sought, made several findings in her reasons for judgment. In order to fully comprehend the same, I think it may be prudent to set out in detail the relevant provisions of the ER, particularly with regard to the appointment and termination of the employment of particular categories of teachers, which required review and interpretation of the court for resolution of the competing contentions in this matter.

[8] Regulations 43 and 54 of the ER are of significant relevance for the determination of this appeal. As a consequence, I have set out both regulations in their entirety for ease of reference.

[9] In respect of the appointment of teachers in public educational institutions, regulation 43 is explicit as to who bears the responsibility of making the appointment, and states that the appointment must be effected in accordance with the category of teacher stipulated in the respective schedules. The regulation states as follows:

"43.—(1) The appointment of every teacher in a public educational institution shall be made by the Board of Management of that institution after consultation with the principal of the institution and shall be subject to confirmation by the Minister.

(2) Every appointment shall be in accordance with one of the categories of teachers and one of the types of appointments stipulated in Schedule A.

(3) The appointment of a principal, vice-principal or a teacher with special responsibility in a public educational institution shall only be made in accordance with Schedule B.

(4) Upon the appointment of every teacher in a public educational institution an agreement in writing in the form set out in Schedule C shall be executed, and—

(a) such agreement shall be in triplicate and shall state the duration, type and category of employment and the duties which may be required to be performed as a condition of employment in that category;

(b) a copy of the executed agreement shall be kept by the Ministry, one copy by the teacher, and one placed on the personal file of the teacher in the institution in which he is appointed; and

(c) no variation or amendment of the agreement shall be made by any party unless it is initialled by all the parties to the agreement.

(5) It shall not be required as a condition for appointment of a teacher in a public educational institution that he shall perform any duties not connected with his work and responsibilities as a teacher."

Schedule A to regulation 43 states that teachers shall be classified into one of several categories, namely: pre-trained and trained teachers, specialist teachers and teachers with special responsibility. There is special mention in the schedule that when appointing teachers a board of management may make: (i) permanent appointments, (ii) provisional appointments (iii) temporary appointments, and (iv) acting appointments.

[10] Regulation 54 addresses the effective termination of employment of teachers in public educational institutions, the specific manner of termination depending on the particular category of deployment. It reads as follows:

> "54—(1) Subject to paragraph (2), the employment of a teacher in a public educational institution may be terminated—
>
> (a) in the case of a teacher who holds a temporary, acting or provisional appointment, by one month's notice given by either the teacher or the Board and, where the employment is terminated by the Board, stating the reasons for the termination, or by a payment to the teacher of a sum equal to one month's salary in lieu of notice by the Board and such payment shall be accompanied by a statement by the Board of the reasons for the termination; and
>
> (b) in any other case by three months' notice given by either the teacher or the Board or by the payment to the teacher of a sum equal to three months' salary in lieu of notice by the Board.
>
> (2) Where the Board of any public educational institution intends to terminate the employment of any teacher in that institution other than a teacher employed on

a provisional, temporary or acting basis for less than one year, the termination shall not have effect unless the procedure set out in regulations 56 to 59 are followed.

(3) The employment of a teacher may be terminated by the Board or the teacher at any time without notice or payment of salary, as the case may be, if there is an agreement in writing between the teacher and the Board to that effect.

(4) A teacher—

(a) who unilaterally terminates his appointment without due notice to, or the consent of, the Board of a public educational institution; or

(b) who fails to take up duty in a public educational institution in violation of a written agreement, and without the consent of the Board,

shall be liable to be charged with professional misconduct."

[11] Regulations 56-59 deal with the process to be followed once a disciplinary complaint has been laid against a teacher. If the board is of the view that action ought to be taken it shall refer the matter to its personnel committee. The committee if it thinks it necessary will set the matter for a hearing. Details of how the hearing is to be conducted are prescribed. Regulation 56 and certain aspects of regulation 57 are stated below:

"56. Where the Board of a public educational institution receives a complaint in writing that the conduct of a teacher employed by the Board is of such that disciplinary action ought to be taken against the teacher, it shall, as soon as possible, refer the matter to its personnel committee for consideration pursuant to regulation 85.

57.—(1) The personnel committee shall consider the complaint referred to it under regulation 56 and—

(a) if it finds that the complaint is trivial and that a hearing is unnecessary, report such finding to the Board forthwith; or

(b) if it finds that a hearing should be held, notify the complainant in writing of the date, time and place of the hearing and give written notice within a period of not less than fourteen days before such date to the person complained against of—

(i) the charge or charges in respect of which the hearing is proposed to be held;

(ii) the date, time and place of the hearing;

(iii) the penalties that may be imposed under the Regulations if the charges are proven against such person; and

(iv) the right of the person complained against and a friend or his attorney to appear and make representations to the committee at the hearing.

…"

Regulation 58 provides that if the complaint is not heard and a decision handed down within nine months of the lodging of the complaint, the matter of the complaint shall lapse at the expiration of the nine months.

Regulation 59 requires the board to submit to the Ministry of Education the minutes of the meeting at which the decision was taken to terminate the employment of the teacher and also a copy of the notice effecting the same.

[12] Regulation 89 refers to the duties and responsibilities of the board of management, confirms its accountability to the minister, and its focus on the efficient administration of the institution, including the appointment of its members of staff, administrative, academic and otherwise. The significant obligation for these present purposes is stated in this way:

> "89.—(1) The Board of Management is responsible to the Minister for the administration of the institution for which it has been appointed and in discharging its responsibilities the Board shall be responsible for—
>
> (a) the conduct, supervision and efficient operation of the institution;
>
> (b) …
>
> (c) ...
>
> (d) …
>
> (e) appointing in consultation with the principal, the academic staff, the bursar, secretary-accountants and such other administrative and ancillary staff as are approved for the establishment of the institution; and such members of staff shall be paid such salary and other allowances as the Minister may approve and shall be eligible for such leave and other fringe benefits as may be determined by the Minister, and the appointment and termination of appointment of such members of staff shall be on such terms and conditions as may be approved by the Minister;
>
> …"

The judgment of P Williams J

[13] Having reviewed the chronology of events as set out earlier herein, the learned judge in her judgment detailed the submissions made by both counsel before her. As they were somewhat similar to those made to this court, I will not repeat them here but will set them out later when dealing with the submissions made by counsel in the appeal. At this point, I will set out summarily the findings of the learned judge on the law and on the facts.

[14] The learned judge found, in reliance on the dictum of Panton P in **Lafette Edgehill *et al* v Greg Christie** (**Contractor General of Jamaica**) [2012] JMCA Civ 16, in which the learned President endorsed the statement of Donaldson MR in his judgment in **Regina v East Berkshire Health Authority *ex parte* Walsh** [1984] 3 All ER 425, that there was a need for a statutory underpinning governing the appointment and dismissal of an employee to make such action subject to judicial review. She confirmed the principle and its applicability to the instant case, as the appointment and termination of the appellant's employment, she indicated, were to be in accordance with the ER. Indeed, she found that the initial employment of the appellant fell squarely within the provisions of regulation 43.

[15] The learned judge also found that when the appellant was offered and accepted the one-year contract, the offer "without more would be seen as a temporary or acting appointment". The learned judge however stated that the appointment could not have been considered "temporary" on the basis of a lack of qualification or experience, on the part of the appellant. She commented that the appellant's letter of appointment did

not state that his position was to fill a vacancy or to replace an absent teacher but the learned judge acknowledged that it was accepted by the parties that the position was to be temporary.

[16] She referred to the "uncertain and untidy" situation which existed after the year had elapsed and the appellant continued in employment for another seven months without any specific extension of his appointment, which she said, led to the conclusion that the parties must have agreed to the extension. His employment was, she said, in this "undefined state" when his permanent appointment was approved by the Board pending the ratification from the Ministry of Education. The learned judge pointed out that the wording in the letter of 27 July 2010 from the Mico to the appellant, advising that his permanent employment as lecturer in the Faculty of Education and Liberal Arts was approved with effect from 1 September 2010 pending ratification from the Ministry of Education, "departed somewhat" from what was provided in the ER, as regulation 43(1) states that the appointment of every teacher in a public educational institution was to be made by the Board after consultation with the principal, but shall be "subject to confirmation by the Minister".

[17] The learned judge found that the confirmation by the Minister was a "necessary pre-requisite" before the appointment could be considered completed and valid. She therefore stated that the confirmation by the Minister was a condition precedent to the appellant's appointment being made permanent. The letter from the Mico advising the appellant that his appointment had been approved with effect from 1 September 2010

was therefore without authorization, the learned judge found, and as a consequence, in her opinion, his "permanent appointment remained in limbo".

[18] The learned judge then dealt with the termination of the appellant's employment, stating a concern that, in her view, the problem as to how to do so properly arose from the fact that his appointment did not fall fully into any of the categories of appointment under the ER. She indicated her agreement with counsel for the appellant that the letter of 6 June 2011 from the 1st respondent advising the appellant that his temporary appointment would not be extended, was invalid. She referred to regulation 89 of the ER and stated that it was the board which ought to terminate such an appointment, and although the board could delegate its responsibility under regulation 89(2), the matters to be delegated were limited under 89(1)(e) and did not include the termination of employment of the appellant by the principal. The terms and conditions of termination of the appellant's employment would, in any event, she stated, have to be approved by the Minister.

[19] The learned judge pointed out that the letter of 27 July 2011 signed by the 1st respondent and the chairman of the board was confirmatory of an effort to correct and address the deficiencies in the first letter of 6 June 2011, particularly as it stated that it superseded the earlier letter. The learned judge stated that the termination was then being made in accordance with regulation 54 in respect of a teacher who was temporarily employed. The learned judge appeared to be of the view that the fact that the appellant had been employed for a period in excess of a year, ought to "bring him

into the provisions of Regulation 54(2)" and "hence termination should not have effect unless the procedure set out in Regulations 56 to 59 are followed".

[20] The learned judge however found that to do so "would suggest that a teacher who had not been permanently appointed should acquire the security of tenure from such an appointment by virtue of the length of time he was temporarily employed". She further opined however that in her mind that situation "points to a flaw and serious gap in the regulations which leads [sic] to a less than satisfactory state of affairs". Consequently, she stated as follows:

> "It cannot be seen as the intention of the drafters of these regulations to afford to a teacher who has not been permanently employed the same tenure as one whose appointment has not been confirmed by the Ministry [sic] as required elsewhere in the regulation [sic]."

[21] The learned judge concluded that the respondents therefore continued to treat the appellant as one who was temporarily employed and had terminated his appointment accordingly. She found that the basis as stated by the 1st respondent for the termination of the appellant's appointment "though blunt and to the point" could not, without more, be seen as "lacking in credibility". As a consequence she declined to make the orders sought.

The appeal

[22] On 5 September 2013, the appellant filed his notice of appeal, in which he sought the following orders:

"(i) A declaration that the [appellant] is a permanent member of the academic staff of The Mico University College ('the Mico') and is entitled to security of tenure;

(ii) Further and/or alternatively, a declaration that the [appellant] can only be dismissed from the Mico for cause;

(iii) An order for certiorari quashing the decisions of the 1st and 2nd respondents purporting to terminate the permanent employment of the [appellant] in breach of the Education Regulations, 1980;

(iv) An order for mandamus directing the 2nd respondent to reinstate the [appellant] as a permanent member of the academic staff of The Mico with effect from 1 September 2011, subject only to the requirement for confirmation by the Minister of Education; and

(v) An order for restitution of income and/or damages for loss of income and all other consequential losses flowing from the decisions of 1st and 2nd respondents, purporting to terminate the [appellant's] employment with these issues being remitted to the Court below for consideration."

[23] He relied on 10 grounds of appeal under four headings as set out below.

"***The Appellant's status as a Lecturer at the Mico between January and June 2010*** **was** ***defined***

(a) The learned judge erred in fact in finding that the Appellant's employment between January and July 2010 remained in an undefined state.

The requirement for confirmation by the Minister of Education is distinct and separate and apart from the 2nd Respondent's appointment of the Appellant

(b) Her Ladyship erred in fact and in law by deciding that the [appellant's] permanent appointment

under section 43 of the Regulations was not complete without the confirmation of the Minister of Education ('the Minister').

The Appellant's circumstances fall within Regulations 54(2) and 56 to 59 and, as a corollary, he is entitled to security of tenure

(c) Further and/or alternatively, Her Ladyship erred in fact and in law in finding that Regulations 54(2) and 56 to 59 did not apply to the Appellant's circumstances.

(d) Her Ladyship misconstrued the terms and effects of Regulations 54 to 59 of the Regulations.

(e) Her Ladyship erred in fact and in law in finding that although the Appellant had been temporarily appointed for a continuous period in excess of three terms, the Regulations did not afford him security of tenure.

(f) Her Ladyship erred in law in finding that Regulations 54(2) only applied to teachers against whom disciplinary proceedings have been brought.

(g) Her Ladyship erred in law in finding that the effect of the Regulations in granting security of tenure to a teacher temporarily employed for in excess of one year points to a 'flaw and serious gap in the regulations which leads [sic] to a less than satisfactory state of affairs.'

(h) Her Ladyship erred in fact and in law in finding that the Appellant, who had been employed for in excess of one year and was awaiting permanent confirmation to the post, was not similarly entitled to security of tenure as someone who has been permanently appointed.

(i) Her Ladyship erred in fact and in law in finding that the Respondents lawfully terminated the services of the Appellant.

The evidence of 'extreme changes' at the Mico is, at best, dubious and should not have been accepted

(j) Her Ladyship erred in fact in failing to disregard the bald assertion of the 1st Respondent that the Appellant's termination was prompted by 'extreme changes' at The Mico University College ('The Mico'), as both Respondents had failed to comply with the Order for Standard Disclosure and, in particular, they failed to provide a single shred of documentary evidence on the issue."

[24] On perusal of these grounds it seems to me that there are essentially three issues in the appeal, namely:

Issue (1)

What was the status of the appellant's appointment when the one-year contract was over? Was the appointment temporary or permanent?

Issue (2)

What is the true interpretation of regulations 43 and 54 of the ER with particular reference to the termination of the appointment of the appellant? Has the appellant's appointment been lawfully terminated in accordance with the ER?

Issue (3)

What remedies are available to the appellant, in the light of -

(a) the failure of the respondents to provide:

(i) standard disclosure, or

(ii) evidence of the abolition of the educational posts?

(b) the failure of the appellant to challenge and or respond to the affidavit of the 1st respondent?

Issue (1) – status of the appellant's appointment

The appellant's submissions

[25] Counsel submitted that the appellant's appointment was governed by regulation 43 of the ER. Counsel challenged the finding of the learned judge that as the confirmation of the appointment by the Minister had not taken place, the appointment was in limbo. Counsel submitted further that the roles of the board and the Minister were quite distinct and the appointment and confirmation processes separate and apart. Counsel relied on regulation 89(2) to support the proposition that the power to appoint a teacher is vested in the board and referred to the correspondence highlighted earlier which showed that the appellant's permanent appointment had a specific date on which it was to take effect. The role of the Minister in respect of the confirmation was, counsel submitted, a "mere formality" which:

> "accords with the fact that the Minister plays certain other critical roles in relation to the tenure of a teacher — the

> payment of salary, the approval of leave, the determination of allowances and so on."

Counsel relied on the dictum of Downer JA in **Owen Vhandel v The Board of Management Guys Hill High School** SCCA No 72/2000, delivered 7 June 2001, to submit that in making a determination as to the nature of the appellant's appointment, one must first look at what the board had done and then consider what the Minister had done thereafter.

[26] Counsel submitted, however, that should the court not find favour with the submission that the appellant's appointment was a permanent one, then the appointment was certainly temporary. Counsel took issue with the learned judge's description of the situation as being uncertain and untidy at the end of the one year period and that the appellant's employment remained in an undefined state for a period in excess of seven months. It was counsel's contention that there was more than adequate basis for the court to have concluded that, as the appellant had been employed on a continuous basis in excess of two years and seven months, the Mico had extended his employment. Counsel argued that regulation 43(2) states that every appointment of a teacher shall be in accordance with one of the categories of teachers and one of the types of appointment in schedule A. The appointment of the appellant, in her submission, fell into the definition of temporary appointment in schedule A of the ER namely that:

> "A temporary appointment shall be for a specified period not exceeding three terms unless the Board of the institution at

> the end of that period has agreed to extend the period of such appointment."

[27] Counsel submitted that the appellant's appointment from 5 January 2009 until 4 January 2010 was in keeping with the three terms, save with the extension, as agreed, which did not have to be in writing, but which counsel argued, must be accepted on the basis of the conduct of the parties. In any event, counsel for the respondents conceded that the appellant's appointment was temporary and on that basis the learned judge ought not to have taken issue with that description of his employment.

The respondents' submissions

[28] Counsel for the respondents submitted that it was correct for the learned judge to find that the appellant's employment between January 2010 and July 2010 remained in an undefined state, as the appellant had been employed for a period of one year and there had been no communication that the appellant's employment would continue for a defined or fixed period.

[29] Counsel also submitted that there was no basis whatsoever for the appellant to claim that his appointment was a permanent one as the ER required that there be confirmation by the Minister of Education and there was none in this case. The appellant had also been told that his appointment was approved subject to ratification by the Minister. Counsel scoffed at the submission that the approval or ratification by the Minister was a formality in the light of the clear wording of regulation 43 of the ER.

Counsel conceded however that the appellant's employment could be described as temporary.

Analysis

[30] On a close reading of regulation 43 of the ER, there is no doubt that the appointment of every teacher in a public educational institution such as the Mico shall be made by the board of the institution after consultation with the principal of the said institution and "**shall be subject to confirmation by the Minister**" (emphasis supplied). This is not a mere formality. I do not accept that the different role of the board in the appointment of the teacher, as against the payment of his salary, being the role of the Minister, in any way affects the interpretation of regulation 43 in this regard. In the circumstances of the instant case, the appellant did not fall into the definition of "permanent appointments" as set out in schedule A of the ER, which indicates a person who "enjoys security of tenure in the particular institution until retirement, unless his employment is terminated in accordance with regulation 54". In the appellant's case his appointment had not yet been confirmed. He was in an extended period by agreement since his one-year contract period had expired. I therefore reject that his appointment could have been considered a permanent one. The requirements for and status of temporary appointments are stated as follows in schedule A:

> "3. *Temporary appointments*
>
> (1) A principal or a teacher may be appointed temporarily to the staff of a public educational institution—

(a) if he does not have the qualification or experience to be offered appointment to that particular post on a permanent basis; or

(b) to fill a vacancy for which there is no substantive holder.

(2) A temporary appointment shall be for a specified period not exceeding three terms unless the Board of the institution at the end of that period has agreed to extend the period of such appointment.

(3) Temporary appointments shall take effect on the day that the teacher assumes duty, but where a teacher is expected to assume duty on the first working day of a term, the appointment shall take effect at the beginning of the term."

[31] On the basis of the facts of this case, the learned judge found that the appellant certainly had the qualifications and the experience, and that there was no indication that he had been appointed to fill a vacancy. The evidence was that the specified period for which he had been employed had expired, but his contract of employment had clearly been extended by agreement of the board: as counsel submitted, with which I agree, the evidence showed that he had been continuously employed and he was being paid. His appointment pursuant to the provisions of the ER including schedule A, fell under the definition of "temporary appointments".

Issue (2) - interpretation of regulations 43 and 54 of the ER

The appellant's submissions

[32] Counsel submitted that the learned judge had erred in her interpretation of regulation 54 of the ER. By suggesting that there was a flaw or a serious gap in the ER resulting in an unsatisfactory state of affairs, and thereby coming to a contrary conclusion than the one stated in the ER, the learned judge had disregarded one of the most basic and well-established rules of construction which counsel stated was that one should give the words their plain and ordinary meaning. Counsel relied on the learned author Maxwell on the Interpretation of Statutes, 12th edition, in support of this submission. It was counsel's contention that it was not the role of the learned judge to cure any perceived flaws or defects in the ER, which was a matter, if well founded, for Parliament. Counsel also argued that the provisions in the ER were clear and did not lend themselves to any creative interpretation.

[33] Counsel relied heavily on the judgment of Smith JA in **Lorna Elaine Jackson and Others v The Chairman Board of Management Haile Selassie Comprehensive High School Belfield All Age School and Others** SCCA Nos 52, 53 and 54/2001, delivered 20 December 2001, where this court found that in order to determine the extent of the power of the board of the school to terminate the appointment of a teacher one has to examine the ER. The court also found, counsel submitted, that regulation 54 contained essential procedural requirements which must be observed by the board and that the failure to do so may result in the dismissal being

declared void. Counsel argued that regulations 56 to 59 placed a restriction on the basis on which the board may dismiss a teacher.

[34] Counsel submitted that in construing the ER, regulation 54(1) must be read with and subject to 54(2). Counsel argued that being employed for one year or more was the qualifying event. In the instant case the board had tried to dismiss the appellant under regulation 54(1) with one month's notice, but that, counsel submitted, was in breach of his rights under regulation 54(2) as he would not have been accorded the benefits under regulations 56 to 59. Counsel submitted that the appellant or an acting or provisional teacher who had served for a year or more, or a teacher with a permanent appointment had a right to insist, based on regulation 54(2) that their termination of employment from the government service should only be for cause. The regulation, she surmised, was drafted to protect the employment of those who had served in excess of a year, save in respect of professional misconduct. Counsel submitted therefore that the reasons given by the board for termination of the appellant's employment were in breach of the ER, *ultra vires* and void.

The respondent's submissions

[35] Counsel submitted that the true interpretation of regulation 54(1) and (2) would be determinative of this appeal. He stated that the learned judge was correct in finding that regulations 54(2) and 56 to 59 did not apply to the appellant and that he was not afforded security of tenure by the ER. Counsel argued that regulations 56 to 59 were only triggered when a disciplinary complaint in writing had been received by the board

and that had not occurred in the instant case. Further counsel submitted that those particular regulations are only applicable when misconduct on the part of the teacher has been alleged. Those provisions set out the procedure to be followed once the disciplinary process had begun. As a consequence, the argument continued, as there was no such allegation in the case at bar, those regulations were inapplicable. Counsel submitted that the **Lorna Jackson** case made it clear that those regulations were applicable in circumstances of professional misconduct and with regard to teachers who held permanent appointments.

[36] It was counsel's contention that a perusal of regulation 54(1) and (2) revealed that there were three regimes for the termination of a contract of employment of a teacher. The first regime, regulation 54(1)(a), is the termination by either party, in respect of a teacher with a temporary, provisional, or acting appointment giving one month's notice or payment in lieu thereof; the second regime, regulation 54(1)(b), is the termination by either party in respect of a teacher who holds a permanent appointment, and in that circumstance, three months notice must be given or payment in lieu thereof and the third regime 54(2), is termination for cause. It is linked to the disciplinary procedures in regulations 56 to 59, which, as counsel indicated, had not occurred in this case. Counsel submitted that regulation 54 provided security of tenure to persons who were covered by the regulation. Counsel submitted further that the respondents acted correctly, and the learned judge found correctly, that the appellant's appointment could be terminated by one month's notice.

[37] Counsel argued that the learned judge was correct when she stated that it could not be the intention of the legislature to give a teacher with a permanent appointment the same security of tenure as one whose appointment had not even been ratified. Counsel submitted that in order to construe regulation 54 correctly, one must peruse the regulation closely. He stated that the "comma" after "provisional" in regulation 54(2) meant that the words "for less than one year" should only be associated with "acting basis" and not with "provisional or temporary". It was his contention therefore that the "one year" only related to "acting", and that persons holding provisional or temporary appointments would not be entitled to the benefit of regulations 56 to 59. Counsel submitted that punctuation is very important in legislation and must be given the significance it has in ordinary English use.

[38] Counsel concluded that regulation 54(2) related specifically to permanent employees and in circumstances of professional misconduct, regulations 56 to 59 would be applicable. Also, if the teacher has an acting appointment for over a year, then in terminating that appointment and only in respect of cause, regulations 56 to 59 would give protection. In the case of a teacher with a temporary appointment for a year or more, even in respect of cause, regulations 56 to 59 are not applicable. So, counsel concluded, regulation 54(1) deals with the notice regime and regulation 54(2), with the regime dealing solely with termination for cause.

Analysis

[39] It is a well accepted principle of statutory interpretation that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning, if they have acquired one, and otherwise in their ordinary meaning (see **R v Commissioners of Income Tax** ((1888) 22 QBD 296). Also phrases and sentences are to be construed according to the rules of grammar.

In Maxwell on the Interpretation of Statutes, the learned author had this to say at page 29:

> "Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise…Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a statute is not to be collected from any notions which may be entertained by the court as to what is just and expedient: words are not to be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded. The duty of the court is to expound the law as it stands, and to 'leave the remedy (if one be resolved upon) to others.' …"

In my view the words of both regulations 43 and 54 are clear and unambiguous. I think that the appeal can be resolved in this way. There is no doubt that the appointment of teachers in public educational institutions is made by the board of the institution in consultation with the principal of the institution and is subject to confirmation by the Minister. This has been stated previously as I gave my opinion in respect of issue (1) (paragraph [29] above). It is also clear that the appointment must

be made in accordance with the categories of teachers and the types of appointments as stated in schedule A (regulation 43(2)) of the ER. In my view, these provisions are capable of only one meaning and must therefore be construed accordingly. On the clear wording of schedule A, the appellant could only be a teacher with a temporary appointment, as I have stated previously, as his appointment having not been confirmed, it remained temporary. I am of the view that counsel for the appellant advanced the "rubber stamp" position in respect of the Minister's confirmation of the approval of the appellant's recommended permanent appointment before us with diffidence, understandably so, as that position was clearly wrong.

[40] With regard to regulation 54, I make the following observations:

(a) Regulation 54(1) is subject to regulation 54(2), which means that the subsections must be read in conjunction with each other, and subsection (1) will obtain, save and except where what is stated in subsection (2) affects what is stated in subsection (1).

(b) Regulation 54(1)(a) treats with a teacher who holds a temporary, acting or provisional appointment. Such a teacher may terminate the appointment by giving one month's notice to the board. Subject to the provisions of regulation 54(2) (and thus the teacher's employment would have continued for less than a year), the board may also terminate the teacher's employment by giving a month's

notice or, in lieu of notice, by making a payment equal to one month's salary. In either case, however, the board must state its reasons for the termination.

(c) In cases where section 54(1)(a) does not apply, including where the teacher is permanently employed, the appointment may be terminated by three months notice by either side. The board may elect to pay three months' salary in lieu of notice. Again, regulation 54(2) circumscribes the board's entitlement. The correct construction of regulation 54(2) is critical to the decision in this case. The regulation states:

> "Where the Board of any public educational institution intends to terminate the employment of any teacher in that institution other than a teacher employed on a provisional, temporary or acting basis for less than one year, the termination shall not have effect unless the procedure set out in regulations 56 to 59 are followed."

(d) In my view, the words "provisional, temporary or acting", as used in regulation 54(2) cannot stand by themselves, either individually or collectively, as they are each only adjectives. There must, therefore, be a noun to which they apply, either individually or collectively, or the regulation would not read

intelligently. That noun is the word "basis". I, therefore, disagree with the interpretation put forward by counsel for the respondents that the word "basis" related to "acting" only. The phrase "for less than one year" also qualifies the word "basis". Indeed it is clear to me that the entire clause "other than a teacher employed on a provisional, temporary or acting basis for less than one year," must be read together as one conceptual unit. The test of this interpretation as opposed to that of counsel, is that if any of the adjectives, "provisional", "temporary" or "acting", in the regulation quoted above, were to be deleted, the regulation could still be read intelligently, but not so if the words "acting basis" or the word of "basis" were deleted.

(e) The correct interpretation of regulation 54(2), is therefore, where the institution is a public institution, and the teacher's provisional appointment, temporary appointment or acting appointment has been for a period in excess of one continuous year and in the case of those holding permanent appointments, the board may only properly terminate that appointment if it follows the procedure set out in regulations 56 to 59 (requiring the board to act on a complaint and to hold an enquiry regarding that complaint). If the employee

holds a temporary, provisional or acting appointment for less than one year, regulations 56 to 59 are inapplicable. This regulation relates to permanent employees also, as the regulation speaks to the termination of employment "of any teacher", which must mean, just that; any teacher, save those who are excepted, as stated above (ie those who hold temporary, provisional or acting appointments for less than one year).

(f) It is clear that once the type of teacher's employment is not excluded from regulation 54(2), then the employment of the teacher can only be terminated for cause, and the regulations 56 to 59 followed. It is not, as counsel for the respondent has argued, that those provisions are not applicable in relation to the protection of employees in circumstances relating to the termination of their employment and are only applicable when triggered once a complaint in respect of professional misconduct has been laid.

(g) It is true that this interpretation will give to persons holding temporary, provisional and acting appointments for over one year, and whose appointments may not have been confirmed, the same protection as those holding permanent

appointments, which may appear to be unusual, or in the words of the learned judge "flawed" or "a gap" in the legislation. In fact, it may even be considered absurd, but that is what the regulation says, and that therefore is what must obtain, and be followed, for the termination of any teacher to be effective.

(h) The appellant's appointment having been a temporary one, for over one year, (in fact, as indicated he had been in continuous employment at the Mico for two years and seven months), could only have been terminated pursuant to regulations 56 to 59, which did not occur, and the attempt by the board to terminate his employment with one month's notice or pay in lieu thereof, would therefore have been *ultra vires* and void.

(i) In the **Lorna Jackson** case, Smith JA (Ag) (as he then was) in his judgment, on behalf of the court, stated that regulation 54 of the ER was important as it prescribes and governs the power of the board to terminate the appointment of a teacher. He stated further that the regulation sets out essential requirements to be observed by the board, and stated that "[f]ailure to observe them may

result in a dismissal being declared void". Having canvassed regulations 54 through to 59, the learned judge of appeal had this to say:

> "It seems clear to me that Regulations 56 to 59 place a restriction as to the grounds on which the Board may dismiss a teacher. In my view by virtue of these Regulations (56-59) the Board acting under Regulation 54(2) cannot dismiss a permanent teacher unless there is something against him to warrant dismissal. This must be so otherwise the words 'the termination shall not have effect unless the procedure set out in Regulations 56 to 59 are followed' would not harmonize with the other regulations. A written complaint accusing the teacher of professional misconduct or inefficiency must be made to the Board before the Board may act against a permanent teacher under Regulation 54."

I agree entirely with this interpretation of the relevant regulations.

[41] In that case there was, as in the instant case, no question of misconduct or inefficiency. It is true, that in that case the court was dealing with teachers holding permanent appointments. However, based on my interpretation of regulations 43 and 54, the above statement of Smith JA (Ag) is equally applicable to the appellant as a person holding a temporary appointment for a period of over one year.

Issue (3) - what remedies are available to the appellant

The appellant's submissions

[42] Counsel submitted that the respondents had failed to provide any proper evidential basis on which to claim that the termination of the appellant's employment

had been necessitated by extreme changes at the Mico or even that extreme changes had taken place at the Mico at all. It was the complaint of the appellant that in spite of an order for standard disclosure, which was made by B Morrison J on 17 September 2012, no documentation to that effect had been provided. The only evidence before the court was the bald assertion of the 1st respondent that the post which the appellant had occupied had ceased to exist, due to those extreme changes which the Mico had allegedly undergone and that even the department where the appellant had been previously deployed had been subsumed by several other departments into a new faculty. This mere statement by the 1st respondent, without more, counsel submitted, was not sufficient.

[43] Counsel argued that the respondents would also have to prove that the Minister had the clear legislative authority to abolish the post which was a critical matter which they had failed to prove. Counsel submitted additionally, that while the board may appoint a teacher, with the Minister's approval and terminate that appointment, there is no provision in the Education Act or the ER to abolish a post. That could only be effected through amendment of the Act. Had the appellant's post been lawfully abolished, counsel argued, the respondents would have demonstrated that to be so, as it would have been a powerful answer to the claim for certiorari and mandamus. However, having failed to do so, the court ought to reinstate the appellant to the position which he had previously occupied. Counsel relied on the judgment of Smith JA (Ag) in the **Lorna Jackson** case, and certain authorities cited therein, for these submissions.

The respondents' submissions

[44] Counsel stated that what was relevant, was what was stated in the letter of 27 July 2011, from the Mico to the appellant informing him of the decision not to extend his temporary employment, which was stated to be due to "certain organizational changes in the department". He submitted that as the termination of the appellant's employment was not for professional misconduct or for cause, and in the light of the fact that the learned judge had found that the termination of the appellant's employment had been effected in accordance with the ER it was "unnecessary to look behind or to investigate the reason given in the letter of termination as this was irrelevant to the issues before the Learned Judge". Additionally, counsel pointed out, the information contained in the 1st respondent's affidavit, in respect of the reason for the said termination, was given post termination. However, counsel maintained that there had not been any order for specific disclosure, and so in the light of the unchallenged evidence in the 1st respondent's affidavit, the court could not have acted otherwise, and counsel submitted that in those circumstances, the order of mandamus was no longer open to the appellant.

Analysis

[45] The employment and termination of teachers are governed by a statutory scheme which must be complied with, and when there is failure to do so certiorari must lie. In this case, as indicated, the board attempted to terminate the appellant's employment by giving him one month's notice which was in breach of the ER and

therefore *ulta vires*. The decision to do that was therefore unlawful and would have to be quashed.

[46] In **Lorna Jackson**, Smith JA (Ag) made the statement that "there must be clear legislative authority for the Minister to abolish the post of a permanent teacher". He referred to two cases in support of this statement of the law, namely **Perinchief v Governor of the Island of Bermuda and Others** (1997) 1 LRC 171 and **Director-General of Education v Suttling** (1987) 162 CLR 427. I must say with respect that I do not find these two cases particularly helpful as although they do refer to and acknowledge that public service posts cannot be abolished without legislative authority, in each, the particular statutory regime and where relevant the Constitution, was reviewed in the context of its own peculiar provisions and applicability. In **Perinchief**, the court held that on a proper construction of the Police Act, any changes in the establishment of the police force had to be determined by enactment in accordance with certain provisions of the Bermuda Constitution Order and the Constitution, which required the Governor to reserve for Her Majesty's pleasure Bills affecting reserved matters including the police. As no such legislative authority had been obtained to abolish the post of assistant commissioner which had been held by the applicant, that decision was ineffective and the post still existed. The court ruled that refusal to grant relief would validate an *ultra vires* act.

[47] In **Director-General v Suttling**, an Australian teacher had been employed in an educational post for a period of two years. The statutory scheme permitted the

abolition of the post, but the court found that it ought not to have been effected by the Director-General nor in the manner in which he did. The order was found to be invalid.

[48] In adopting the approach as stated by Smith JA (Ag) in the **Lorna Jackson** case, I am of the view that the respondents would have had to canvass any relevant statutory provisions in order to satisfy the court that there was legislative authority to abolish the appellant's post and/or that such authority had been pursued in accordance with the said statutory provisions. It may have required an amendment to the Education Act and the assent of the Governor-General. All these matters ought to have been in the knowledge and/or possession of the respondents if they intended to rely on the same in opposition to the hearing for judicial review, and if so, I would have expected that even without an order for specific disclosure such information would have been provided to the court. In any event an order had been made for standard disclosure to have been done by 28 September 2012. Rule 28.2 of the CPR does place a duty on a party to disclose all documents in their control, failing which they will not be permitted to produce and or rely on the same at trial (rule 28.14(1)). There has been no information put before the court as to whether the respondents were ever in possession of any documentation which could support the *ipse dixit* statement made by the 1st respondent with regard to the abolition of the appellant's post. Equally, there was no information to support the statement made in the letter from the 1st respondent indicating that there had been "certain organizational changes in the department" at the Mico resulting in the decision not to extend the appellant's temporary appointment.

[49] Whilst I accept that it may have been prudent for the appellant to have filed an affidavit in reply challenging those assertions, in my view, the evidential burden still remained on the respondents to demonstrate that they had the legal authority to do what they claimed to have done, and this they failed to do. So, in spite of the fact that the appellant has indicated that there have been six lecturers engaged in the department since he received the letter of 27 July 2011, and the 1st respondent has indicated that the Faculty of Education and Leadership at the Mico has its full complement of staff, nonetheless, as there is no information with regard to the posts held, and or the type of categories of appointment, in all the circumstances of this case, in my view, I find that the appellant continues to remain employed to the Mico.

Conclusion

[50] So with regard to the orders sought on this appeal, I would make the following declarations and orders:

(i) A declaration that the appellant is not a permanent employee of the Mico pursuant to regulation 43 of the ER.

(ii) A declaration that the appellant was/is a temporary employee whose permanent appointment was approved by the Mico, and although not confirmed by the Minister, had been in continuous employment by the Mico in excess of one year, and whose

appointment could only be terminated for cause in accordance with regulation 54(2) and regulations 56 to 59 of the ER.

(iii) An order for certiorari quashing the decisions of the 1st and 2nd respondents purporting to terminate the employment of the appellant in breach of the ER.

(iv) A declaration that the appellant remains a temporary employee of the academic staff of the Mico with approval for permanent appointment subject to confirmation from the Minister, with effect from 1 September 2010.

(v) An order for restitution of income and/or damages for loss of income and all other consequential losses flowing from the decisions of the 1st and 2nd respondents, purporting to terminate the appellant's employment with these issues being remitted to the court below for determination.

I would order costs of the appeal to the appellant to be paid by the respondents to be taxed if not agreed.

MCINTOSH JA

[51] I have read the judgment of Phillips JA and agree that this appeal should be allowed with the consequential orders as set out below.

BROOKS JA

[52] I too have read the draft judgment of my sister Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

ORDER

1. The appeal is allowed.
2. (i) It is hereby declared that the appellant is not a permanent employee of the Mico pursuant to regulation 43 of the ER.

   (ii) It is hereby declared that the appellant was/is a temporary employee whose permanent appointment was approved by the Mico, and although not confirmed by the Minister, had been in continuous employment by the Mico in excess of one year, and whose appointment could only be terminated for cause in accordance with regulation 54(2) and regulations 56 to 59 of the ER.

   (iii) An order for certiorari is granted quashing the decisions of the 1st and 2nd respondents purporting to terminate the employment of the appellant in breach of the ER.

(iv) It is hereby declared that the appellant remains a temporary employee of the academic staff of the Mico with approval for permanent appointment subject to confirmation from the Minister, with effect from 1 September 2010.

(v) An order is made for restitution of income and/or damages for loss of income and all other consequential losses flowing from the decisions of the 1st and 2nd respondents, purporting to terminate the appellant's employment with these issues being remitted to the court below for determination.

3. Costs of the appeal to the appellant to be taxed, if not agreed.