[2016] JMCA App 4

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 216/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN	**HUBERT SMITH**	**APPLICANT**
AND	**THE BOARD OF MANAGEMENT OF THE QUEEN'S SCHOOL**	**1ST RESPONDENT**
AND	**THE APPEALS TRIBUNAL**	**2ND RESPONDENT**

André Earle and Miss Nickesha Young-Shand instructed by Earle & Wilson for the applicant

Mrs Denise Kitson QC and Mrs Trudi-Ann Dixon-Frith instructed by Grant Stewart, Phillips & Co for the 1st respondent

Miss Monique Harrison instructed by the Director of State Proceedings for the 2nd respondent

3 and 19 February 2016

BROOKS JA

[1] This is an application by Mr Hubert Smith for leave to appeal from the decision of Laing J, who, on 4 December 2015, granted permission to the Board of Management of the Queen's School (the Board) to apply for judicial review of the decision of the Teachers' Appeals Tribunal (the Tribunal). Mr Smith also seeks a stay of the judicial

review proceedings pending the hearing of the appeal. Laing J refused to grant Mr Smith permission to appeal. He has therefore renewed his application before this court.

[2] Laing J granted the Board's application for leave to apply for judicial review on a number of bases. In a detailed, thorough, written judgment, he decided that the Board had a number of bases on which it could argue with real prospects of success, that the Tribunal had erred in its review of the process by which the Board had fired Mr Smith from his job as a teacher at the Queen's School (the school).

[3] Mr Smith contended that the learned judge erred in his findings. He asserted that the relevant points, cited by Laing J, are the subject of specific stipulations by the Education Regulations 1980 (the Regulations). On that basis, Mr Smith contended, there was no scope for argument that the Board could depart from those stipulations as it had done in its process of terminating his employment. At least one of the relevant stipulations is so fundamental, Mr Smith contended, that the Board's process would have been irretrievably flawed and there would be no basis for a court, on a judicial review, to set aside the Tribunal's ruling.

[4] The main question to be decided, in assessing whether or not to grant permission to appeal, is whether Mr Smith's complaint has any reasonable prospect of success on appeal. It is first necessary to outline the relevant facts of the case and thereafter examine the more salient points raised by Mr Smith.

Background

[5] The brief background to the termination of Mr Smith's employment was that an issue arose with the examination results of some of the school's students who sat the Principles of Accounts examination in the Caribbean Examinations Council's examinations in mid 2012. As a result of the issue, five of the students had their results cancelled. Four of those were Mr Smith's students for that subject.

[6] The issue was brought to the attention of the Board and it decided to investigate the matter. It communicated its decision to Mr Smith by letter dated 16 August 2012 and invited him to attend a meeting of the Personnel (Disciplinary) Committee of the Board (the Committee), at which the investigation would be conducted. The meeting was held on 30 August 2012, and Mr Smith attended and was also represented. The Committee, thereafter, recommended to the Board that his employment be terminated. The Board accepted the recommendation and, on 10 September 2012, issued Mr Smith with a letter terminating his employment.

[7] Mr Smith appealed from the decision to the Tribunal. It dismissed five of his nine grounds of appeal, but allowed four. The Tribunal's record of its decision detailed each of the grounds and their decision on each one. The grounds that were allowed may be summarised as follows:

a. The Committee erred in that it failed to meet as is required by Regulation 57(1) of the Regulations.

b. In contravention of regulation 85(1)(b), the Board failed to comply with or adhere to requirements for the composition of the Committee.

c. The Board meetings convened in relation to Hubert Smith breached regulation 88(9) and (12).

d. The decision of the Board breached regulations 59 and 62.

[8] The Tribunal's decision was dated 12 September 2013, but was signed by the three members of its panel on different dates. The last member signed on 26 September 2013 and the decision was communicated to the Board on that latter date. The Board filed its application for leave to apply for judicial review on 27 December 2013. Laing J heard the application on 6 October 2015 and, as mentioned above, delivered his decision in a written judgment on 4 December 2015.

The proposed grounds of appeal

[9] Mr Smith's proposed grounds of appeal read as follows:

> "a. the learned judge erred by exercising his discretion to grant leave to the [Board], to apply for judicial review against the decision of the Appeals Tribunal issued on September 26, 2013 in that:
>
> i. There was no evidence that the [Committee] met or otherwise considered the complaint against the [Mr Smith] contrary to Regulation 57 (1) of the Education Regulations, 1980 as appears from pages 20-21 of the Notes of Proceedings before the Appeals Tribunal where Counsel appearing for the [Board] admitted same;

ii The [Committee] was improperly constituted contrary to Regulation 85 (1) (b) of the [Regulations] as there were two unauthorized additions to wit Professor Geraldine Hodelin and Dr. the Reverend Veront Satchell thereto contrary to the aforesaid Regulations and which is a fundamental procedural irregularity;

iii The principal being the complainant was present during the deliberations of the [Committee] on August 30, 2012 and the Board on September 7, 2012 contrary to Regulations 88 (8) and 88 (9) of the [Regulations] and the rules of natural justice;

b. The learned judge failed to consider the [Board's] breaches of Regulations 59 and 62…in that:

i. the [Board] failed to submit to the Ministry of Education the minutes of the meeting at which the decision to terminate [Mr Smith's employment] was taken, together with a copy of the notice of termination; and

ii the [Board] failed to submit a full report to the Teachers' Services Commission.

c. The learned judge failed to consider that:

i. the [Board's] application for Judicial Review was late as the decision of the [Tribunal] allowing Mr. Smith's Appeal was made on September 12, 2013 and not September 26, 2013 as contended by the [Board];

ii The [Board] failed to provide any explanation for the late filing of the application on December 27, 2013."

The application

[10] It is apparent from the proposed grounds that Mr Smith acknowledges that the learned judge was exercising a discretion afforded him by the Civil Procedure Rules (the

CPR). This court has consistently held the position that it will not lightly interfere with the judicial exercise of a discretion except in certain circumstances. Morrison JA (as he then was) set out that position in **Attorney General of Jamaica v John MacKay** [2012] JMCA App 1. He said at paragraph [20]:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[11] This approach is consistent with the guidance given by Lord Diplock in his judgment in **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042 at page 1046. The relevant portion of the learned Law Lord's judgment reads as follows:

> "On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. **It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist**…" (Emphasis supplied)

[12] Although Lord Diplock wrote in reference to an interlocutory injunction, the principle is of broader application and is relevant for these purposes. The principle is, however, mainly aimed at guiding a court hearing an appeal from the decision of a judge at first instance. It is important to note that this court is not at that stage.

[13] It is particularly relevant at this stage to also note that Laing J's task was to decide whether the Board had an arguable case having a realistic prospect of success in a judicial review of the Tribunal's ruling. That is the test that was approved in **Sharma v Browne-Antoine et al** [2006] UKPC 57, (2006) 69 WIR 379. Morrison JA, as he then was, noted at paragraph [19] of his judgment in **Minister of Finance and Planning and Public Service and Others v Viralee Bailey-Latibeaudiere** [2014] JMCA Civ 22 that the applicable standard was set out at para. [14] (4) of **Sharma**. He said that the judgment described as the "ordinary rule" that:

> "...'the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy'."

[14] Laing J's decision was to permit the parties to have a full hearing of their dispute in a judicial review of the Tribunal's decision. An appellate court is only likely to disturb that decision if it can be demonstrated that one or more of the following conditions existed:

a. the Committee was plainly wrong in its procedure;

b. the Board was plainly wrong to have terminated Mr Smith's employment;

c. the Tribunal was plainly correct in allowing certain aspects of his appeal;

d. there was plainly no scope for success on judicial review; or,

e. Laing J was plainly wrong to have found that there were arguable issues for judicial review.

[15] At this stage of considering the grant of leave to appeal, the court has to decide whether Mr Smith's complaints are arguable on appeal, with a real prospect of success. In considering whether to grant leave to appeal, the court faces the conundrum that if it finds that Mr Smith's complaints are arguable in this court with a real prospect of success, it may fairly be said that the learned judge in the court below was entitled to find that the Board's opposing arguments on those points, were arguable with a real prospect of success before a court conducting a judicial review. In such a case the learned judge would have been correct in granting the Board's application.

[16] In seeking to avoid that conundrum this court should not seek to hold Mr Smith to the higher standard of having to prove that he could not fail on appeal. Such a standard should not be applied, even if it would result in the litigation occupying more than its fair share of the court's resources, with the same points being argued on appeal before they were argued during a judicial review. This court may say, however, that one or other of Mr Smith's complaints could not succeed on appeal, bearing in mind the respect given to the exercise of discretion by a judge at first instance. Based on those principles, Mr Smith's application for permission to appeal will be allowed to

succeed if it satisfies the standard that his contentions are arguable on appeal with a real prospect of success.

[17] Using that standard, some of Mr Smith's proposed grounds of appeal cannot overcome the "discretion" hurdle. The complaint that the learned judge failed to consider all the complaints raised by Mr Smith cannot be a basis for setting aside his decision to grant permission to apply for judicial review. The learned judge had considered several points that he viewed as being arguable for the purposes of judicial review. He was not the tribunal conducting the judicial review. It was, therefore, not necessary for him to consider every complaint raised by Mr Smith and to assess each one individually.

[18] The other complaint that was clearly within the learned judge's discretion was whether the Board had made its application in time. It may be that this court would be concerned about some aspects of the learned judge's approach to the issue, but it cannot be said that he was plainly wrong in his finding that a time bar did not operate to prevent the Board from being granted permission to apply for judicial review.

[19] What remains, therefore, are the issues raised by the alleged breaches of the Regulations, which breaches, Mr Smith contended, are so fundamental that the Board cannot overcome the flaws in its procedure. These are assessed separately below.

Whether there was a breach of regulation 57(1)(a)

[20] The first of those alleged breaches is that the Committee failed to meet to decide whether the complaint was trivial. This issue is addressed by regulation 57(1). The relevant portion states:

> "The personnel committee shall consider the complaint referred to it under regulation 56 and—
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> (a) **if it finds that the complaint is trivial and that a hearing is unnecessary, report such finding to the Board forthwith**; or
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> (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—
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> (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;
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> (iii) the penalties that may be imposed under the Regulations if the charges are proven against such person; and
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> (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." (Emphasis supplied)

[21] The Tribunal found that there was no evidence of any compliance with regulation 57(1)(a). It so held in face of the evidence that the Committee held a disciplinary hearing with Mr Smith after having given him written notice of the hearing in the letter of 16 August 2012. He was both present and represented at the hearing.

[22] The learned judge held that the letter of 16 August 2012 was arguably demonstrative of compliance with regulation 57(1)(b). It would seem a very short step to also say that it was arguable that, having decided to adopt the procedure in 57(1)(b), meant that the Committee found, that the complaint was not trivial. The learned judge could not be faulted in his finding that the Tribunal's ruling on the point should be the subject of judicial review.

Whether there was a breach of regulation 85(1)(b)

[23] The second of the alleged breaches is that the Committee was unlawfully constituted, in that, in breach of regulation 85(1)(b), it was comprised of five persons, instead of a maximum of three. Regulation 85 states:

> "85.-(1) The Board of Management of every public educational institution shall, for the purpose of facilitating inquiries into allegation of breaches of discipline by or against members of staff or students appoint a personnel committee to which the Board shall refer any such allegations, and such personnel committee shall consist of—
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> (a) in the case of a government owned institution—
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> …
>
> (b) **in the case of an institution owned by a denomination or Trust—**
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> (i) the chairman of the Board;
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> (ii) one nominee of the denomination or Trust or the Board;
>
> (iii) subject to sub-paragraph (c), the representative on the Board of the category of accused personnel;

(c) where the accused personnel is the representative on the Board [another representative may be chosen].

(2) **The quorum of the personnel committee shall be two, one of whom shall be the chairman or the vice-chairman of the Board**.

(3) Upon completion of its hearing into the alleged breach..." (Emphasis supplied)

It is to be noted that the school is an institution falling under paragraph (1)(b).

[24] In considering the point, the learned judge found that the issue of the composition of the Committee was one of construction. He found that the question of construction was "an arguable ground for judicial review having a realistic prospect of success" (paragraph [41] of the judgment).

[25] Mr Earle, on behalf of Mr Smith, submitted that regulation 85(1)(b) only admitted of one interpretation, that is, that in the case of a paragraph (1)(b) institution, the Committee could only properly have been comprised of the three persons listed in the paragraph. He submitted that the learned judge was wrong in finding that the point was arguable.

[26] Mrs Kitson QC submitted on behalf of the Board that the learned judge was correct in accepting that the point was arguable, bearing in mind the provisions of paragraph (2), that additional persons could have been properly appointed to the Committee. The reference in paragraph (2), learned Queen's Counsel submitted, to

"the vice-chairman", meant that persons, in addition to the three listed in paragraph (1)(b), could have been properly appointed to the Committee.

[27] Given the fact that, as Mr Earle pointed out, the Regulations, at other places, such as regulation 73, speak to minimum numbers for the composition of bodies, Mr Smith's contention is arguable on appeal, with a real prospect of success. This is not the point, however, where the court may say that the learned judge was plainly wrong in finding the contention to have met the standard of being arguable on judicial review. That is for the court hearing the appeal. In the circumstances, Mr Smith should be granted leave to appeal, at least on this ground.

Whether there was a breach of regulation 88(9) and (12)

[28] The third of the alleged breaches by the Board was that the Committee, and thereafter, the Board itself, improperly allowed the person who had made the complaint to the Board, against Mr Smith, to participate in the respective deliberations of those bodies. The person who made the complaint was the principal of the school, Ms Williams. By regulation 70, the principal is one of the members of the Board.

[29] Mr Earle submitted that, not only did the principal's participation fly in the face of natural justice and a number of decisions in previous cases, but that it also breached the express provisions of regulation 88(9) and (12). Regulation 88 provides for the procedure at a meeting of the Board. For the purposes of context, the provisions of regulation 88(8), (9) and (12) are respectively set out below:

> "(8) No member shall vote on any question in which he has a direct personal interest.
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> (9) Where there is a conflict of interest, the member of the Board concerned shall declare his interest and shall not participate in the deliberations on the particular matter and **he shall withdraw from the meeting during the period of the discussion of the matter**.
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> ...
>
> (12) The Board shall keep in proper form the minutes of all meetings of the Board and its committees and of any hearing or inquiry conducted by or on behalf of the Board or of any committee of the Board." (Emphasis supplied)

[30] The record of the respective meetings of the Committee and of the Board, as they each considered Mr Smith's case, show that the principal was present during the deliberations. In considering the Board's application for leave to apply for judicial review, the learned judge found, at paragraph 48 of his judgment, that it was "not the mere presence...but the active participation in the meeting and deliberations which forms the basis for any resulting decision to be impugned and declared null and void".

[31] Mr Earle submitted that mere presence tainted the entire process. He further submitted that the learned judge was wrong to have found that it was arguable to consider the extent to which the principal may or may not have influenced the respective deliberations and decisions of the Committee and the Board. He argued that the regulation was clear that the principal should have withdrawn.

[32] Mrs Kitson submitted that an examination of the record plainly revealed that the principal, although present, only provided clarification on a point and received

instructions at another point. On learned Queen's Counsel's submission there would have been no breach of the spirit of the regulation regarding the principal's presence.

[33] Once again, this is a case where Mr Smith has an argument which has a real prospect of success on appeal. He should be allowed to argue it.

Summary and conclusion

[34] In order to secure permission to appeal, Mr Smith has to show that if he were granted leave, he has a real prospect of succeeding on appeal. The nature of the judgment from which he has sought leave to appeal, is one in which Laing J was exercising a discretion given to him by the CPR. This court, when hearing an appeal in such circumstances does not lightly disturb the resultant decision.

[35] The present task is, however, not an appeal. The standard at this stage is whether Mr Smith's proposed appeal has a real prospect of success. Although it may seem to be the mirror image of what the learned judge considered and decided, an assessment of Mr Smith's proposed grounds of appeal shows that at least two of them have a real prospect of success on appeal. Leave to appeal should, therefore, be granted.

[36] Despite the opinion that one or two of Mr Smith's grounds would be unlikely to meet the standard required for disturbing the decision resulting from an exercise of the discretion given to Laing J, there should be no restriction on the permission granting

leave to appeal. No doubt, his legal advisors will guide him appropriately as those issues may affect the question of costs on the outcome of the appeal.

Stay of proceedings

[37] The proceedings in the court below must be stayed pending the outcome of the appeal.

SINCLAIR-HAYNES JA

[38] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

P WILLIAMS JA (AG)

[39] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing that I can usefully add.

BROOKS JA

ORDER

a. The application for permission to appeal is granted.

b. The proceedings in the court below are ordered stayed until the outcome of the appeal or further order of the court.

c. Costs of the application to be costs in the appeal.