[2016] JMCA Civ 51

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 26/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**HUBERT SMITH**	**APPELLANT**
AND	**THE BOARD OF MANAGEMENT OF THE QUEEN'S SCHOOL**	**RESPONDENT**

André A K Earle and Mrs Nickeisha Young-Shand instructed by Earle & Wilson for the appellant

Kevin Williams and Miss Shannon Mair instructed by Grant Stewart Phillips & Co for the respondent

Ms Vanessa Young and Ms Faith Hall instructed by the Director of State Proceedings watching proceedings on behalf of the Teachers' Appeals Tribunal

7 and 17 November 2016

MORRISON P

[1] I have read in draft the judgment of my brother F Williams JA. I agree with his reasoning and conclusion and have nothing useful to add.

F WILLIAMS JA

Background

[2] This appeal arises from the respondent's decision to dismiss the appellant from his employment as a senior teacher at the Queen's School (the school).

[3] The process was begun with the receipt by Miss Jennifer Williams, the principal of the school, of an e-mail correspondence from the Caribbean Examinations Council. This correspondence contained allegations of the duplication of school-based assessments (SBAs) in the subject, Principles of Accounts, in respect of five students, four of whom were taught by the appellant. As a result, the students' examination results were cancelled. It led to an investigation by the vice-principal of the school and, eventually, to a letter from the principal to the chairman of the respondent dated 15 August 2012.

[4] By way of letter dated 16 August 2012, the appellant was informed that the matter would be addressed by the personnel (disciplinary) committee of the respondent (the committee) on 30 August 2012.

[5] On 30 August 2012, the committee met as scheduled and arrived at a decision to terminate the appellant. It communicated that decision to the respondent, which met on 7 September 2012 and, in keeping with the recommendation of the committee, took a decision to immediately terminate the appellant. The appellant, by way of letter dated 10 September 2012 from the respondent, was informed of his immediate termination.

[6] On 5 October 2012, the appellant challenged the respondent's decision by lodging an appeal with the Teachers' Appeals Tribunal (the Tribunal). This appeal was heard by the Tribunal on 20 June 2013 and on 12 September 2013, the Tribunal allowed the appellant's appeal in full.

[7] By way of a notice of application filed on 27 December 2013, the respondent sought to challenge the decision of the Tribunal allowing the appellant's appeal, by seeking leave to apply for judicial review. The application was heard by a judge on 6 October 2015 and on 4 December 2015, the learned judge granted the respondent leave to apply for judicial review and refused the appellant's application for permission to appeal.

[8] The appellant then sought the said permission from the Court of Appeal by way of notice of application filed on 18 December 2015. The application was heard on 3 February 2016 and permission to appeal was granted by this court on 19 February 2016. In granting permission to appeal, this court (differently constituted) considered in the main the alleged breaches of the Education Regulations (the regulations). It found that the appellant had an arguable case with some prospect of success in relation to (i) regulation 85(1)(b), dealing with the composition of the committee; and (ii) regulations 88(9) and (12), in relation to the principal's participation in the termination process. The court granting leave, although finding that the appellant has arguable grounds with a real prospect of success in relation to these two grounds, nonetheless granted permission to appeal without restriction, leaving it to the appellant's legal advisors to advise him which grounds to pursue.

The appeal

[9] With the above guidance from the court granting leave, Mr Earle, on behalf of the appllent, sought to advance on the appellant's behalf only those two grounds (grounds 4 and 7) which were identified by the court as being arguable and having a real prospect of success.

[10] These are the grounds:

> "Ground (a): The Personnel Committee was improperly constituted contrary to Regulation 85 (1)(b) of the Education Regulations, 1980 as there were two unauthorized additions thereto contrary to the aforesaid Regulations.
>
> Ground (b): The Principal being the complainant was present during the deliberations of the Personnel Committee on August 30, 2012 and was present and participated during the deliberations of the Board on September 7, 2012 contrary to Regulation 88(9) of the Education Regulations, 1980 and the rules of natural justice."

[11] We may now proceed to consider the individual grounds.

Ground (a)

[12] The resolution of ground (a) turns on an interpretation of regulation 85(1)(b) of the regulations. It reads as follows:

> "(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 –
>
> a. ...

b. in the case of an institution owned by a denomination or Trust -

(i) the chairman of the Board;

(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;"

[13] There is no dispute that the committee that considered the appellant's case, consisted of five members.

Appellant's submissions

[14] Against this background, Mr Earle, submitted that the fact that the committee was made up of five members, and not the required three, was a flagrant breach of the regulation. There were two unauthorized additions to the committee in the persons of Professor Geraldine Hodelin and Dr the Reverend Veront Satchell, he submitted.

[15] Citing the case of **Owen Vhandel v Board of Management of Guys Hill High School** SCCA No 72/2000, judgment delivered 7 June 2001, Mr Earle further submitted that what he argued was the incorrect composition of the committee amounted to a fundamental procedural irregularity, which made any recommendation of the committee null and void, and had a similar effect on the decision of the respondent.

[16] Mr Earle also cited the cases of **Leary v National Union of Vehicle Builders** [1969 L No 5156] [1971] Ch 34 and **Lane v Norman** (1891) 61 LJ Ch 149. In **Lane v Norman**, North J is reported to have opined as follows:

> "But when persons who do not belong to the committee are summoned to attend the committee, to take part in the discussions which ensue, and to use their influence as to what the committee should do, and to vote upon the point, then in my opinion the body is not a committee duly appointed, but an committee with an unauthorized addition or additions made to it."

[17] Mr Earle further submitted that regulation 85(1)(b) must be considered along with two other regulations: namely, (i) regulation 70 and (ii) regulation 82(1).

[18] This is the wording of regulation 70:

> "70 (1) Every secondary public educational institution which is owned by a denomination and which is government-aided shall be administered by a Board of not more than nineteen members appointed by the Minister in the following manner -
>
> (a) seven members including the chairman nominated by the denomination;
>
> (b) the principal of the institution;
>
> (c) one member nominated by the Council;
>
> (d) four members elected in the following manner -
>
> (i) one by the academic staff;
>
> (ii) one by the administrative and clerical staff;
>
> (iii) one by the ancillary staff; and
>
> (iv) one by the student council;
>
> (e) three members elected as follows-
>
> (i) one by the Old Students' Association where such an association exists;
>
> (ii) one by the Parent Teachers' Association where such an association exists; and

(iii) one by a recognized local community group;

(f) three members nominated by the Board for their particular expertise."

[19] Regulation 82(1) reads as follows:

> "Where the chairman is absent or unable to attend a meeting of a Board the vice-chairman shall assume the duties of the chairman and where both the chairman and the vice-chairman are absent the members present and voting shall elect a chairman for that meeting."

[20] It was the submission of Mr Earle that, when regulations 85(1)(b) and 70 are read together, it becomes clear that the committee ought to have been composed only of (i) the chairman of the board; (ii) one nominee of the denomination or Trust or Board; and (iii) a representative of the category of the accused personnel. He further argued that the vice-chairman could not participate in his own right; but only in the absence of the chairman. However, even if the vice-chairman could participate in his own right, that would make the permissible membership of the committee, four; and so, by having a fifth member, the breach of the regulation would still be evident. He also pointed out that regulation 73, for example, stated a minimum number for the composition of a body with which that regulation deals and regulation 85(1)(b) could not be viewed as stating a minimum number.

[21] Against this background, Mr Earle submitted, the learned judge erred in holding that the question of the composition of the committee as set out in regulation 85(1)(b) was a matter of construction; and, as such, the respondent had an arguable ground for judicial review with a realistic prospect of success. The respondent did not, as is

required (the submission continued), show that the construction that it was advancing was arguable, having a realistic prospect of success.

Respondent's submissions

[22] On behalf of the respondent, Mr Williams submitted that the learned judge was correct in holding that the point of construction of regulation 85(1)(b) was arguable with a realistic prospect of success. In this regard he sought to place reliance on regulation 85(2) which reads as follows:

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

[23] The interpretation that he sought to have the court place on this regulation is that additional persons could properly have been appointed to the committee.

[24] Mr Williams further submitted that the cases being relied on by Mr Earle were distinguishable on the facts.

Discussion

[25] It is best to start with the general proposition that applies to the court's consideration of both these grounds of appeal; and to the court's consideration of appeals from decisions of judges exercising their discretion in interlocutory matters.

[26] Both sides accept the applicability of cases such as **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 (cited in the written submission of Mr Earle for the appellant); and Beverley **Harvey and Elaine Harvey (in their capacity as administratrices of the estate of the late Naomi Francis, deceased) v**

Gloria Smith and Phillip Smith [2012] JMCA Civ 29; and **G v G** [1985] 2 All ER 225 (cited in the written submissions of Mr Williams for the respondent). These cases refer to and rely on the House of Lords decision of **Hadmor Productions Ltd and others v Hamilton and Others** [1982] 1 All ER 1042.

[27] The case of **The Attorney General of Jamaica v John MacKay** clearly and succinctly sets out the standard by which an appellate court is to gauge its decision to review the exercise of a judge's discretion. In that case, Morrison JA (as he then was) observed at paragraph [19] as follows:

> "[19] It is common ground that the proposed appeal in this case will be an appeal from Anderson J's exercise of the discretion given to him by rule 13.3(1) of the CPR to set aside a default judgment in the circumstances set out in the rule. It follows from this that the proposed appeal will naturally attract Lord Diplock's well-known caution in **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042, 1046 (which, although originally given in the context of an appeal from the grant of an interlocutory injunction, has since been taken to be of general application):
>
> > '[The appellate court] 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.'
>
> [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'."

[28] In applying this standard to the facts before the court, I am minded to accept the submissions of Mr Earle to the effect that the learned judge applied the correct principle wrongly when he found that the respondent had an arguable case with a realistic prospect of success (see paragraph [41] of the judgment below).

[29] It is my view that, even if the court should accept the submissions on behalf of the respondent as to the possible inclusion of the vice-chairman, that would have the effect of justifying a committee consisting of, at the most, four persons. There would be no justification on any interpretation of the regulations for the committee being composed of five persons, as occurred in the instant case.

[30] The respondent's submissions, when advanced by another counsel in the court below, were described by the learned judge as being "creative". I have come to the view that although being possibly creative, the said submissions could not be said to be arguable with any real prospect of success. This to me is the only possible result from a consideration of the plain words of regulations 85(1)(b) when read together with regulations 70; 73 and 82(1).

Ground (b)

[31] The issue that is joined in respect of this ground is whether the presence of the principal at the meeting of the committee and the respondent was permitted by the regulations; or in breach thereof.

[32] The learned judge found at paragraph [48] of the judgment that:

> "[48] It is therefore my view that the authorities establish clearly that it is not the mere presence of the non-committee member 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."

[33] Having reviewed the notes of evidence, the learned judge was of the view that the transcript disclosed only limited participation by the principal, restricted to providing information for the members of both bodies (the committee and the respondent).

[34] Mr Earle cited the case of **Barbados Turf Club v Eugene Melnyk** [2011] CCJ 14 (AJ). In that case, a decision of the disciplinary committee of the turf club was overturned on appeal, primarily on the basis that when the disciplinary committee met to consider the question of the disqualification of a horse from a race, the lawyers for the applicant were present during the committee's deliberations.

[35] The CCJ found that the lawyers' presence during the deliberations of the disciplinary committee had the effect of raising the possibility of apparent bias.

[36] Mr Williams, in essence sought to support the approach taken by the learned judge, pointing the court to several excerpts in the transcript which he sought to use to persuade us that, although the principal had been present, her participation was minimal.

Discussion

[37] The relevant regulation is regulation 88(9), which deals with the procedure to be followed at meetings of a board of management of a school. It is of sufficient importance to a resolution of this issue for it to be set out in full:

> "88(9) Where there is a <u>conflict of interest</u>, the member of the Board concerned shall <u>declare his interest</u> and <u>shall not participate</u> in the deliberations on the particular matter and he <u>shall withdraw</u> <u>from the meeting</u> during the period of the discussion of the matter." (Emphasis added)

[38] To my mind, this regulation makes it clear that where there is an actual or potential conflict of interest involving a member of a board, there are three actions that are required on the part of that member; namely: (i) to declare that interest or conflict; (ii) not to participate in the meeting; and (iii) to withdraw from the meeting when the matter is being discussed.

[39] In the instant case, it is to be remembered that the proceedings against the appellant were commenced by the principal issuing a letter (dated 15 August 2012) to the respondent, in which she, *inter alia*, made the following request:

> "In this regard I therefore seek the intervention of the Board as the school has been placed in disrepute having breached Regulation 6.2 of the CXC Policy."

[40] Here the principal can clearly be seen to be the one who set the disciplinary process against the appellant in motion; and, in doing so, to be expressing a view or arriving at a conclusion that is one properly for a personnel committee appointed pursuant to regulation 85(1) "...for the purpose of facilitating <u>inquiries</u> into <u>allegation[s]</u> of breaches of discipline..." (emphasis added).

[41] To my mind, in this context the submissions of Mr Earle that the position of the principal could be regarded as potentially adverse to that of the appellant must be

accepted. There is in these circumstances at the least a *prima facie* impression of a conflict of interest.

[42] In cases of this nature where there is the possibility of an outcome adverse to the person whose conduct is being investigated, it is appropriate to have regard to the overarching principle stated as long ago as 1924 by Lord Hewart, CJ in **R v Sussex Justices**, **ex parte McCarthy** [1924] 1 KB 256, 259, that:

> "...it is...of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

[43] As old as that case may be, its facts are also of some relevance to the matter before us. Briefly stated, the case concerned an acting clerk to the justices who had tried the defendant and found him guilty of the offence of dangerous driving. When they retired to consider the verdict, retiring with them was the clerk who, as it turned out, was a member of a firm of solicitors appearing for a plaintiff against the applicant in a civil suit arising from the same accident. In that case the justices swore affidavits to the effect that, although the clerk had been with them, they had not consulted with him. The conviction was nonetheless quashed on the basis of apparent bias.

[44] Also of relevance to a consideration of this issue are dicta on apparent bias in the **Barbados Turf Club** case. As was stated there at paragraph [10] of the judgment:

> "[10] Where, as in this case, the Respondent contends that the decision of the tribunal was tainted by apparent bias, the appropriate test is 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased'

> : In re Medicaments and Related Classes of Goods (No. 2[9]). In our view a reasonably well informed fair-minded observer seeing the PSB huddled in its one and a quarter hours of deliberations with the two lawyers for the applicant, knowing that those lawyers had earlier performed a quasi-prosecutorial function in the cross-examining of witnesses for the trainer, could reasonably come to the view that the deck was stacked against the trainer. There was no opportunity for whatever the applicant's lawyers might have said or intimated to have been contradicted by the lawyers for Mr Issa. There was no balancing of interests in this regard and any argument to the contrary is doomed to fail." (Emphasis added)

[45] Even if we were to accept the submissions of Mr Williams as to the minimal participation by the principal in the proceedings and the fact that she only participated to answer questions asked of her, the plain requirements of regulation 88(9) are there. Whilst the principal remained present during the respondent's deliberations, the appellant was absent throughout (except for briefly being allowed to make a plea after a decision had in fact been taken). He was, therefore, unavailable even to correct any error that the principal might have made in responding to the enquiries that were made of her. It seems to me that, even if her participation was only minimal, the regulation proscribes any participation at all; and, in fact required her withdrawal from the deliberations.

[46] In the light of this, it is evident that the respondent's position in relation to this regulation is not one that might fairly be said to be arguable with a real chance of success.

[47] In the result, I would allow the appeal on both grounds.

P WILLIAMS JA

[48] I too have read the draft judgment of my brother F Williams JA and agree with his reasoning and conclusion. I have nothing to add.

MORRISON P

ORDER

The appeal is allowed. No order as to costs.