[2015] JMCA Civ 59

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 48/2015

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**RANDEAN RAYMOND**	**APPELLANT**
AND	**THE PRINCIPAL RUEL REID**	**1ST RESPONDENT**
AND	**THE BOARD OF MANAGEMENT JAMAICA COLLEGE**	**2ND RESPONDENT**

Written submissions filed by Bignall Law for the appellant

Written submissions filed by the Director of State Proceedings for the respondents

23 September and 13 November 2015

PROCEDURAL APPEAL

(Considered by the Court on paper pursuant to rule 2.4 of the Court of Appeal Rules 2002)

DUKHARAN JA

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

BROOKS JA

[2] I too have read the draft judgment of F Williams JA (Ag) and agree with his reasoning and conclusion.

F WILLIAMS JA (AG)

Background

[3] This is a procedural appeal arising from the refusal by a judge of the Supreme Court to grant to the appellant an extension of time for leave to apply for judicial review.

[4] The appellant filed a without-notice application for leave to apply for judicial review on 3 September 2014. His said application having been filed out of time, he also filed on 13 April 2015, an application for extension of time within which to apply for the said leave. His application arose from the termination of his employment with the 2nd respondent. That was done by way of letter dated 27 March 2013, signed by the 1st respondent. The said termination took effect on 31 March 2013. By way of further background, the appellant, who was enrolled at the University of Technology (UTECH) as a student teacher, did his practicum at Jamaica College from January to March 2012. Thereafter, he became a part-time teacher until the end of July 2012 and from September 2012 he was temporarily employed as a physics teacher and substitute for the holder of the substantive post, who had been seconded to the Ministry of Education. While so employed, he was involved in an altercation with a student and the police were called in.

[5] The application for extension of time was dismissed by the learned judge on 27 April 2015, having been heard on 22 April 2015, with the appellant being granted leave to appeal.

[6] The appellant, by notice and grounds of appeal filed 5 May 2015, seeks to challenge the learned judge's judgment refusing him the extension of time within which to apply for leave. These are the ten grounds of appeal as set out in the "Appellant's Amended Submission", filed 7 July 2015:

> "I. The learned judge erred in ruling that he will not consider the merit [sic] of the proposed judicial review in seeking to determine whether he would exercise his powers under rule 56.6(2).
>
> II. The learned judge erred in failing to address sufficiently or at all, the fact that the merits of the proposed judicial review could provide a good reason for exercising his power under rule 56.6(2).
>
> III. The learned judge erred in failing to address sufficiently or at all, whether (and for what reasons) the 'lack of promptness' weighed more in favour of the public interest than the merits of the proposed judicial review.
>
> IV. The learned judge erred in failing to address sufficiently or at all, whether the public interest could provide a basis for him to exercise his powers under rule 56.6(2), even if the appellant had not justified the delay in applying for judicial review.
>
> V. The learned judge erred in failing to consider sufficiently or at all, whether the appellant had provided sufficient good reasons for the delay to justify him exercising his powers under rule 56.6(2).
>
> VI. The learned judge erred in holding that the overriding objective (of dealing justly with cases) should not be

applied in interpreting rule 56.6(2) on the issue of extension of time.

VII. The learned judge erred in not applying the overriding objective when considering whether to exercise the court's power under rule 56.6(2) especially in light of the full facts as set out in three affidavits by [the] appellant and in the affidavit of the 1st respondent.

VIII. The learned judge erred in not considering sufficiently or at all the fact that the absence of any affidavit evidence of substantial hardship or prejudice to third parties or detriment to good administration could provide a good reason for exercising the power under rule 56.6(2).

IX. The learned judge misdirected himself on the facts when he accepted and treated and elevated unproven, unsworn statements made in exhibits "RR3" of the Further Affidavit of Randean Raymond filed on 13 April 2015 as evidence of the purpose of the application before the court.

X. The learned judge erred in not exercising his power under rule 56.6(2) in the full circumstances of this case."

[7] A careful reading of the grounds will reveal some overlapping among them. No doubt recognizing this, counsel for the appellant argued some of the grounds together.

Summary of submissions for the appellant

[8] In amended written submissions filed on 7 July 2015, counsel for the appellant submitted that the sole issue before this court is whether the learned judge had properly exercised his discretion in refusing the application for extension of time. It was submitted that, although the function of the appellate court was one of review, the court might nonetheless disturb the findings of the learned judge, if satisfied that the

judge was palpably wrong (counsel cited, *inter alia*, **Hadmor Productions Ltd and another v Hamilton and others** [1982] 1 All ER 1042 and **Watt v Thomas** [1947] AC 484).

[9] Counsel further set out what (it was submitted) were the three relevant considerations outlined in **R v Secretary of State for Trade and Industry, ex parte Greenpeace (No 2)** [2002] 2 CMLR 94, namely:

> "i. Is there a reasonable objective excuse for applying late?
>
> ii. What, if any, is the damages [sic], in terms of hardships [sic] or prejudice to the third party rights and detriment to good administration, which would be occasioned if permission were not granted?
>
> iii. In any event, does the public interest require that the application be permitted to proceed."
> (See paragraph 9 of the "Amended Appellant's Submission".)

[10] In addressing grounds I-IV (argued under the heading: "Merits"), counsel argued that the critical consideration for extending time was whether there was a good reason for doing so, which should include a consideration of the merits of the case. Further, it was submitted that the learned judge was required to state why the public interest and merits of the case did not require the application to proceed (citing **Fisherman and Friends of the Sea v The Environment Management Authority and BP Trinidad & Tobago LLC**, Privy Council appeal No 30 of 2004, judgment delivered 25 July 2005, and **ex parte Greenpeace**).

[11] In respect of ground V (argued under the heading: "Reason for the Delay"), counsel for the appellant submitted that the learned judge had failed to consider all the relevant factors explaining the delay after January 2014, and instead placed too much emphasis on 'speed' being one of the 'hallmarks' of judicial review applications.

[12] Where grounds VI-VII (argued under the heading: "Overriding Objective"), were concerned, counsel contended that the decision of the learned judge to the effect that Part 56 of the Civil Procedure Rules (CPR) was 'self-contained' and that there could be no reference to any other part of the CPR unless Part 56 itself made that reference, was incorrect. It was not (counsel submitted) supported by the authority of **Orrett Bruce Golding and the Attorney-General of Jamaica v Portia Simpson Miller** SCCA No 3/2008, judgment delivered 11 April 2008, in that "…the decision of the Court of Appeal was not so expansive as to re-write, discount or dilute the clear words of Rule 1.3 of the Civil Procedure Rules" (See paragraph 25 of the "Amended Appellant's Submission.") That case dealt with the issue of "resurrecting" expired conditional leave. Consequently, the learned judge ought to have given consideration to the overriding objective of dealing with cases justly.

[13] With regard to ground VIII (argued under the heading: "Hardship and Prejudice"), counsel contended that, whilst it was not a condition precedent for the grant of an extension of time for leave to apply for judicial review, for the applicant to provide affidavit evidence showing that there would be no substantial hardship and/or substantial prejudice, or detriment to good administration, the absence of such

evidence should nevertheless have been a factor considered by the learned judge. His doing so would not have gone against the authority of **Jones and others v Solomon** (1989) 41 WIR 299. Additionally, counsel for the appellant requested that the court rule on this issue due to what he submitted was the absence of relevant decisions in this jurisdiction which addressed the issue.

[14] Further, in relation to ground IX (argued under the heading: "Statements in Exhibits"), it was argued by counsel that the learned judge wrongly expanded his decision beyond the appellant's intended limited scope for the letters exhibited. In doing so (the submission continued) he erred - especially since the appellant was not given an opportunity to address the court on the observations in relation to the affidavit.

[15] Counsel also submitted that there was a clear breach of the Education Regulations and the principles of natural justice. It was submitted that it was in the public interest to prevent that type of breach by public officials, which would trump any issue of delay in the instant case.

Summary of submissions for the respondents

[16] Counsel for the respondents contended that the learned judge correctly exercised his discretion in refusing the application. The starting point of counsel's submission was rule 56.6 of the CPR, which outlines the rules pertaining to the making of an application for leave to apply for judicial review. Counsel also submitted that there were limited circumstances in which the appellate court could interfere with the

decision of a judge of first instance (citing the **Hadmor** case). Counsel noted that rule 56.6(2) of the CPR was silent as to the factors to be taken into account in deciding whether or not to extend time, providing only that the court may extend time "if good reason for doing so is shown".

[17] With regard to the issue of whether the learned judge should have considered the merits of the case, counsel submitted that the authorities relied on by the appellant did not establish a point of principle that the merits must be considered in deciding whether to enlarge time. Further, counsel submitted that the manner in which a judge exercises his discretion and the order in which he considers the issues, were the prerogative of the particular judge; and that where the judge had first considered the question of delay in seeking an extension of time for leave to apply for judicial review, it might be futile to further consider the merits of the case.

[18] Counsel for the respondents further contended that there was an onus on an applicant to prove the absence of prejudice in convincing a court to extend time. Additionally, it was submitted that even where a court might otherwise be persuaded to extend time for the application to be made, it could nonetheless refuse leave on the basis of hardship, prejudice or detriment to good administration.

[19] Where the application of the overriding objective was concerned, counsel submitted that: 'the local authorities are very clear that Part 56 of the CPR is self-contained having regard to administrative/public law' (see paragraph 36 of the respondents' submissions).

[20] It may now be best to consider the powers of this court in reviewing the learned judge's decision; and also the relevant part of the CPR that governs applications of this nature. Let us consider the provisions of the CPR first.

Part 56

[21] Part 56 of the CPR is entitled "Administrative Law" and deals, *inter alia*, with applications for judicial review; for leave to apply for judicial review and similar matters. Rule 56.6 specifically deals with the question of delay. It was to the provisions of this particular rule that the learned judge gave special consideration in deciding whether to grant the application and, ultimately, in refusing it. It will, therefore, have to be considered in determining the outcome of this application. These are its terms:

> "**Delay**
>
> 56.6 (1) An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose.
>
> (2) However the court may extend the time if good reason for doing so is shown.
>
> (3) Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings.

> (4) Paragraphs (1) to (3) are without prejudice to any time limits imposed by any enactment.
>
> (5) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to –
>
> a) cause substantial hardship to or substantially prejudice the rights of any person; or
>
> b) be detrimental to good administration."

The court's power on review

[22] There are three cases that can be of significant assistance in a consideration of the powers of this court when reviewing the decision of a lower court. One case (dealing with the question of custody of a child) is that of **G v G** [1985] 2 All ER 225. Although the issues arising in that case are different from those in this case, the observations of Lord Fraser of Tullybelton at pages 228 j -229 c of the judgment, are, nonetheless, of some use in assisting us to understand the general powers of a court of appeal in reviewing a decision of a lower court. This was what he observed:

> "…there will be some cases in which the Court of Appeal decides that the judge of first instance has come to the wrong conclusion. In such cases it is the duty of the Court of Appeal to substitute its own decision for that of the judge. The circumstances in which the Court of Appeal should substitute its own decision have been described in a number of reported cases, to some of which our attention was drawn. We were told by counsel that practitioners are

> finding difficulty in ascertaining the correct principles to apply because of the various ways in which judges have expressed themselves in these cases. I do not think it would be useful for me to go through the cases and to analyse the various expressions used by different judges and attempt to reconcile them exactly. Certainly it would not be useful to enquire whether different shades of meaning are intended to be conveyed by words such as 'blatant error' used by Sir John Arnold P in the present case, and words such as 'clearly wrong,' 'plainly wrong,' or simply 'wrong' used by other judges in other cases. All these various expressions were used in order to emphasise the point that **the appellate court should only interfere when it considers that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible**." (Emphasis added).

[23] The second case is one from this court. It is **Harvey and Harvey (In their capacity as administratrices of the estate of the late Naomi Francis, deceased) v Smith and Smith** [2012] JMCA Civ 29. In that case, Brooks JA reviewed several authorities on which he based the following observations at paragraph [12] of the judgment:

> "[12] An appellant who seeks to overturn a decision of a judge of the Supreme Court, which decision is based on an exercise of that judge's discretion, undertakes an arduous task. That is because an appellate court will not set aside such a decision on the basis that it would have come to a different conclusion in the

> circumstances (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 2). In **Mackay**, Morrison JA, with whom the rest of the court agreed, reiterated the principle that an appellate court may exercise an independent discretion in limited circumstances only."

[24] The other case is that of **Hadmor Productions Ltd**, a House of Lords decision. Reference is made to this case in both of the other previously-mentioned judgments. It is the case that, in my view, is most directly relevant to the circumstances of this case in that it speaks specifically to the powers of a court of appeal when reviewing a decision of an administrative court in granting discretionary interlocutory relief. It is not necessary to consider the facts of that case. What is important are the dicta of Lord Diplock on this area of the law, set out at page 1046, a - e of the judgment. These were his words:

> "…it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. 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 upon a misunderstanding of the law**

> **or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."** (Emphasis added).

[25] Having established the limits of this court's powers in reviewing the decision of the lower court, we may now turn to an examination of the issues in the case.

The issues

[26] The central issue in this case is whether the learned judge exercised his discretion properly. There are also sub-issues to this central issue. As indicated previously, several of the grounds were argued together. When examined, the 10 grounds might be seen to fall for consideration under four heads (as indeed they were largely argued by both sides). These are: (i) merits and public interest; (ii) hardship

and/or prejudice; (iii) the overriding objective and (iv) delay. Some reference was also made to the use of an exhibit to an affidavit in the case. The sub-issues might therefore be stated to be as follows:

i. Whether the learned judge ought to have considered the merits of the case and the public interest and not just delay when deciding whether or not to extend time for applying for leave.

ii. Whether the learned judge ought to have considered the question of hardship and/or prejudice against the respondents or third parties and/or detriment to good administration in coming to his decision.

iii. Whether the learned judge erred in giving the consideration he did to the exhibit "RR3" to the Further Affidavit of Randean Raymond.

iv. Whether the learned judge had any or any sufficient regard to the overriding objective; and, if he did not, whether he erred in that regard.

The decision of the court below

[27] A reading of the written judgment of the court below shows that the learned judge gave consideration to and based his decision on a number of matters. For example, the grounds on which the appellant sought to challenge the decision to

terminate him were identified. The main bases of his complaint were identified as being that: (i) his letter of dismissal should have been signed by the chairman of the 2nd respondent (as, he submits, is stipulated in the Education Regulations, 1980), rather than by the principal (the 1st respondent); (ii) no reasons were given for his termination; and (iii) his termination was not done in accordance with the rules of natural justice, in that he was not given an opportunity to be heard.

[28] The decision also examined the reasons to which the delay was attributed, which the appellant stated arose from his desire to resolve the matter without resorting to litigation. The steps that he took in an effort to achieve this goal were outlined in his affidavit evidence and given due consideration in the decision. These include his going to the Ministry of Education to seek redress when he received his letter of termination. Also outlined in affidavit evidence and given due consideration by the court below were the appellant's visits to the Jamaica Teaching Council (the JTC); the Jamaica Teachers' Association (the JTA) and the Ministry of Labour, all with a view to achieving an amicable resolution. Meetings were also held with the 1st respondent and the chairman of the school board. The court found that in doing all these things without keeping an eye on the passage of time, the appellant did not act promptly, as required by rule 56.6 of the CPR; and that by June of 2013, had placed himself outside the three-month window within which to file his claim.

[29] By October of 2013 he had contemplated taking legal action and by December of that year he had engaged the services of an attorney-at-law, who became a part of the

negotiation or discussion process. It was not until 3 September 2014, however, that the application for leave to apply for judicial review was filed. The finding of the court below (at paragraph [23] of that judgment) was that:

> "The crucial point then is that judicial review proceedings are unique and special. They are subject to their own peculiarities. Speed of application is one of the hallmarks".

[30] The court also considered and found at paragraph [35] of the judgment that:

> "What has happened is that judicial review is a special area where speed is of the essence. Once it became clear, and that was clear from as early as October 2013, that the negotiations were going nowhere the[n] Mr. Raymond should have acted".

[31] The court found that the appellant should have instituted court proceedings by January 2014, at the latest. It also rejected the submission of counsel for the appellant that the application for an extension of time should have been granted, as no hardship or prejudice to the respondents had been proven. That submission was rejected on the basis of the following dicta of Edoo JA in the case of **Jones v Solomon** at page 318:

> "I reject the submission of the attorney for the respondent that proof by the appellants, of substantial hardship or substantial prejudice is a condition precedent to the refusal of relief. This is an untenable proposition, since it would throw the burden upon the commission of proving that the grant of relief would cause substantial hardship or substantial prejudice to the commission, irrespective of the length of time which has elapsed since its decision."

Main requirements of rule 56.6 of the CPR

[32] Having examined the learned judge's decision, it is, I think, best to highlight some of the provisions of rule 56.6, which establish the parameters within which an application for extension of time for leave to apply for judicial review should be considered. Looking at rule 56.6(1), for example, it is important first to note that an application for leave ought to be made "promptly". Second, having regard to rule 56.6(2), what an applicant has to establish in order to win an extension of time is to show "good reason" for the court doing so. As a third observation, we know as well from a reading of rule 56.6(3) that, in essence, time begins to run from when the grounds for the application first arose. In this case there is no dispute concerning that date; and that date is taken to be 27 March 2013 – that is, the date of the appellant's letter of termination. Finally in respect of rule 56.6, we know from rule 56.6(5) that where a court is considering the matter of delay as a primary factor in deciding whether or not to grant leave or relief, it should consider whether the effect of granting the said leave or relief would be to cause substantial prejudice or hardship to the rights of any person; "or" be detrimental to good administration.

Discussion

[33] It is useful to observe at the outset of this discussion, (as submitted at paragraph 16 of the respondents' submissions), that rule 56.6 gives no indication as to the matters that should be given consideration in an application for extension of time. The only stated requirement is that "good reason" be shown. The statement of this requirement by itself, standing alone and with no connected governing principles,

guidelines or ground rules, presages the conclusion (similar to an application for the grant of leave), that the matter is entirely discretionary. What this further means is that any case relating to what another court might have considered to be good reason, while indicating an approach that another judge might have taken in seeing whether good reason existed in those particular circumstances, could never be binding on this court; but, at the most, persuasive only.

Prejudice; hardship and delay

[34] The submissions being made now by the appellant on paper are either entirely or in large measure those made before the court below, which submissions were rejected. For example, the appellant had submitted that prejudice or hardship must be demonstrated. In relation to this issue, I find the words of Edoo JA in the **Jones v Solomon** case referred to by the court below to be the complete and definitive answer to the said submission. That is so whether we regard those matters either as a condition precedent or as factors that a judge ought to consider. Accepting that submission would have the effect of diminishing the decisive effect of delay that many of the authorities illustrate. But it is to be remembered as well that there is another element to rule 56.6(5). It is important to have a clear understanding of this rule; and in particular sub-paragraph (a) and also sub-paragraph (b), which indicate that, in considering the question of delay, a court might consider the effect of that delay in (a) causing hardship or prejudice; "or", (b) being detrimental to good administration. In other words, the sub-paragraphs are to be read disjunctively – that is, the rule contemplates that the court should consider prejudice and/or hardship on one hand; or

detriment to good administration, on the other. If I am correct in this view, then considering the effect of delay on good administration would obviate what might have been any necessity for a consideration of hardship and/or prejudice.

[35] I cannot, for my part, see how it could ever be successfully argued that delay of well over a year in the filing of an application for judicial review might be regarded as being conducive to good administration (nor, happily, did the appellant attempt to argue it). On the contrary, it seems to me that such a lengthy delay as occurred in this case (against the background of the requirement for promptness and the particular reasons given), must be regarded as being detrimental to good administration. It will especially be seen to be so when we bear in mind the observations made by Panton P in the case of **Orrett Bruce Golding**, (also referred to in the judgment of the court below) on the changes brought by the advent of the CPR. At paragraph 15 of that judgment, Panton P expressed himself thus:

> "15. Before leaving this matter, I have to remind litigants and their attorneys-at-law that they ignore the Civil Procedure Rules at their peril. The days of paying scant regard to the Rules are over. Those days went out with the 1990s. It will not always be productive to cite authorities from diverse jurisdictions on this point. Those jurisdictions do not necessarily suffer from the problems that we face in our Courts. Ignoring the Rules over the years has been a major factor in the length of time that matters have taken to be disposed of in this country. There can be no return to such times as it is not in the interests of justice for the Courts to permit such laxity."

[36] In relation to the matter of "good administration", the material before the court indicated that the appellant, a temporary teacher, having been terminated, and

apparently at first having accepted the termination (in e-mail correspondence with the 1st respondent); the position that he had held was filled and there were no vacant positions (see the affidavit of Ruel B Reid filed 21 April 2015 – in particular paragraphs 12 and 13). The appellant was not permanently appointed and there were students to be taught. Delay in regularizing the dislocation that would no doubt have been caused by his removal from the job would, to my mind, have had an evidently detrimental effect on good administration.

[37] Additionally, where the question of delay is concerned, there have been cases in which applications were dismissed for reason of delay even where the applications were made within the period limited by the rules for the making of such applications. One such case is that of **Andrew Finn-Kelcey v Milton Keynes Council & MK Windfarms Limited** [2008] EWCA Civ 1067, in which Lord Justice Keene (with whom the other members of the Court of Appeal agreed), considered the provision – CPR 54.5(1)- in the English rules (which is *in pari materia* with rule 56.6(1) of the CPR - the Jamaican provision). Keene LJ observed as follows at paragraph 21 of the judgment:

> "As the wording indicates and as has been emphasised repeatedly in the authorities, the two requirements set out in paragraph (a) and (b) of that rule are separate and independent of each other, and it is not to be assumed that filing within three months necessarily amounts to filing promptly: see *R v. Independent Television Commission, ex parte TV Northern Ireland Limited* [1996] J.R. 60, [1991] TLR 606 and *R v. Cotswold District Council, ex parte Barrington Parish Council* [1997] 75 P. and C.R. 515."

[38] In the **Finn-Kelcey** case, the claim was filed four days short of the expiration of the three-month period; but was regarded by the court as not having been filed promptly.

[39] The position was similar in the case of **R v Independent Television Commission**, **ex parte TV Northern Ireland** [1996] JR 60, where the English Court of Appeal dismissed the appeal of TV Northern Ireland, which had challenged the refusal of Otton J to grant it leave to apply for judicial review. What was being challenged in that case was the decision of the Independent Television Commission (ITC) to grant certain companies regional licences, whilst denying those licences to the appellant. Lord Donaldson MR opined as follows:

> "It had been stated in the press that all applicants had three months in which to apply for leave to move for judicial review. That was not correct. Applicants in such matters, which could affect good administration, had to act with the utmost promptitude since so many third parties were affected. The present applicants had not done so."

[40] That was another case in which the application for leave had been made within the three-month period stipulated in the rules.

[41] Similarly, in **R v Cotswold District Council, ex parte Barrington Parish Council** [1997] 75 P. and C.R. 515, where a parish council sought leave to apply for judicial review to challenge the grant of planning permission by a local planning authority, an application for extension of time for leave to apply for judicial review was refused. One of the grounds for the refusal was that the court was of the view that the

application had not been made promptly, even though it was made within the three-month period, it having been made eight weeks after the grant of the said permission.

[42] From a consideration of these cases, I agree with the approach of the court below in placing greatest emphasis in its analysis of the issues in this case on the issue of delay. I find that there is support for this position in Lord Diplock's speech in **O'Reilly v Mackman** [1983] 2 AC 237, in which judicial review proceedings were described as meant to provide a "very speedy means" of resolving disputes, such as that in the instant case. (It is noteworthy, as well, as pointed out in the said judgment that the period for applying for leave was reduced in England in 1977 in Order 53, from six months to three months.) I find (as submitted by counsel for the respondents) that this ground of the appeal lacks merit.

The merits of the application and the public interest

[43] One of the arguments advanced by the appellant was to the effect that the learned judge ought to have considered the public interest and the merits of the application in deciding whether the extension of time for applying for leave ought to have been granted (see, for example, grounds of appeal I – IV of the appellant's "Amended Appellant's Submission"). In support of this submission the appellant relied on the following cases for the propositions stated thereunder:

[1] **George Anthony Levy v the General Legal Council** [2012] JMSC Civ 1, in which McDonald-Bishop, J (as she then was) at paragraph [61] is quoted as stating that:

> "The authorities have established that the critical consideration on [the issue of extending time for judicial review] is not so much whether there is good reason for the delay but rather whether there is good reason for the time to be extended."

[2] **Constable Pedro Burton v the Commissioner of Police** [2014] JMSC Civ 187, per Dunbar-Green J (Ag) (as she then was). The principle for which this case was cited was that good reason for extending time may also be found in the reasons for the delay as well as the strength of the merits of a particular case.

[3] **Fisherman and Friends of the Sea v the Environment Management Authority and another**. In paragraph 27 of that judgment it is suggested that the first-instance judge formed a preliminary view that the application for extension of time ought to have been dismissed by reason of delay; but (although ultimately dismissing the application), nonetheless tested that view against other issues, including the public interest and strengths and weaknesses of the applicant's case.

[4] **R v Secretary of State for Trade and Industry, ex parte Greenpeace**. This case was cited for the proposition that both the merits of a case and public-interest considerations should be borne in mind when consideration is being given to an application for an extension of time.

[44] For their part, the respondents also relied on a number of cases in arguing that the question of the merits of the case was not something that the learned judge was required to consider. Among the cases was one in which there was an interplay between the issues of delay and whether there was merit in the appeal. That case is **R (on the application of Ford) v The Press Complaints Commission** [2001] EWHC Admin 683, in which Silber J at paragraphs 45 and 46 of the judgment stated as follows:

> "[45]. The Claimant also refers to "fundamental and important issues" raised by this claim for Ms Ford and the right to respect for private and family life with the result that "it will be unjust to reject the application for permission [on grounds of delay] as this claim is otherwise meritorious". Even if I had found that this claim for judicial review had legal merit, I would have been unable to accept that bold submission as using that fact to justify an extension of time; as if correct, it would mean that the rules on the time limits for submitting an application were of no value and could be ignored if the arguability and significance of the claim could of itself constitute a good reason to extend the time. This would mean that the rules on the circumstances for extending the three-month time limit were subject to an overriding factor based on the strength of the claim.

> [46]. There is no justification or legal basis for this contention or for the submission that the time for making the application by the claimant should be extended as the Commission and the Interested Parties have not been prejudiced by the delay. Mr Robertson drew my attention to a passage in *Civil Procedure (spring 2001)* in which reference is made at page 47 to a decision in *Commissioners of Customs and Excise v Eastwood Care Homes (Ilkeston) Limited* (The Times 7 March 2000.) That case according to the note establishes, as I believe to be the position, that time limits are there to be observed and that justice might be seriously defeated if there was laxity in respect of compliance with them. The stark fact is that the legislature has decided that there should be a 3 month time-limit for bringing judicial review applications with limited powers to extend, which cannot be invoked merely because the defendant or the Interested Parties have not suffered prejudice as a result of the delayed application. So, I conclude that Ms Ford cannot avail herself of those powers. For all those reasons, the claim of Ms Ford is time-barred."

[45] Another case cited on behalf of the respondents was: **R v Vale of Glamorgan Borough Council and Another, ex parte James** [1996] JPL 832. In that case Hirst LJ observed that cases cited to him in support of the argument that the importance of the case ought to be considered, did not decide any point of principle and further stated at pages 6-7 that:

> "In any event this point as to delay was entirely a matter for his discretion and there was no error of principle which would justify this Court in interfering with his decision upon it."

[46] The respondents also cited the case of **George Anthony Levy** that the appellant sought to rely on. The respondents' use of this case was to refer to their interpretation of the judgment, which is to the effect that the learned judge in that case

refrained from considering the merits of the claim in determining whether good reason existed for the application to be granted. (See, for example, paragraph [67] of that judgment.)

[47] The words of Silber J in the **Press Complaints Commission** case commend themselves to me – in particular as they accord with the views expressed by Panton P in the **Orrett Bruce Golding** case. The learning to be derived from them is that time periods are to be carefully observed; and that, as a general rule, delay ought not to be countenanced.

The exhibits to the affidavits.

[48] The appellant complains that the learned judge ought not to have given to exhibit "RR3" the consideration and weight that he gave to it. That exhibit (actually a bundle of documents exhibited to the appellant's affidavit filed on 13 April 2015), consists of some 16 letters that passed between the appellant and various bodies (such as the JTA and the Ministry of Labour and Social Security); and a copy of a newspaper article from the Sunday Gleaner of 8 September 2013).

[49] It is somewhat difficult to understand the exact nature of and reason for the appellant's complaint on this score. This is especially so when one considers that those documents were not ones exhibited to an affidavit filed by the respondents. Quite the opposite: they are documents exhibited to an affidavit that was filed by the appellant himself, pursuant (presumably) to rule 30.5 of the CPR. To my mind that means that they are documents meant (in the words of rule 30.5 (1)): "…to be used in conjunction

with an affidavit…" Whilst I recognize that there is a duty of disclosure on all parties to litigation, the fact that these documents were exhibited raises the following question: If the appellant did not mean for the court to place reliance on these documents, then why were they exhibited by him to one of his affidavits and so introduced into the proceedings for the judge's consideration? And, if there was a possibility of the documents being construed in a manner that was adverse to the appellant, why did his counsel not (by the filing of additional documents or affidavit evidence), attempt to eliminate or minimize this? From a perusal of the judgment, it cannot fairly be said that the court below placed any undue or improper reliance on the particular exhibit. On the contrary, it is apparent that it was just one of several documents and matters that the learned judge took into account in giving consideration to the broader circumstances of the case.

[50] Additionally, in relation to the question of public interest, it would be difficult for the appellant to convince a tribunal that the termination of a temporary teacher (as unfortunate and as personally far-reaching as that might be for him), could, in these particular circumstances assume the character or description of being of significant general public interest; and of such public interest as to outweigh the inordinate delay in this case.

The overriding objective

[51] Another contention of the appellant was that the court below failed to have any regard to the overriding objective in arriving at its decision. The approach adopted by

the court below was to say, in essence, that rule 56 is to be viewed as self-contained and that (citing the **Orrett Bruce Golding** case), for that reason, no recourse could be had to the overriding objective in considering that rule.

[52] To my mind, even if it could successfully be argued that the learned judge was wrong in taking this approach, it is useful to remind ourselves of what is meant by the overriding objective. The elements of the overriding objective are set out in rule 1.1 of the CPR as follows:

> **"The overriding objective**
>
> 1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing justly with a case includes –
>
> (a) ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;
>
> (b) saving expense;
>
> (c) dealing with it in ways which take into consideration –
>
> (i) the amount of money involved;
>
> (ii) the importance of the case;
>
> (iii) the complexity of the issues; and
>
> (iv) the financial position of each party;

> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

[53] If we accept (as we must) that those are the constituent elements of the concept known as "the overriding objective", then it is clear that there is nothing that has been put before this court that could successfully be used to establish a breach of any part of the overriding objective by the court below.

Overview and disposition

[54] A review of all the cases cited on behalf of both the appellant and the respondents confirms what was earlier stated about these various authorities: that is, that they illustrate various approaches taken by various judges in respect of the various issues that arise in applications for extension of time for leave to apply for judicial review. Some are first instance decisions; some local; some foreign. It is fair to say, however, that they are not binding: only persuasive. And, moreover, (accepting the submissions made on behalf of the respondents), they do not (none of them), establish any binding principle as to how these applications are to be dealt with or what matters are to be taken into account by a judge considering whether sufficient good reason has been shown. So then, the exercise of the discretion involved in deciding whether to grant an application for extension of time for leave to apply for judicial review is not rigidly delimited.

[55] In these circumstances where no hard-and-fast rules exist, the one clear principle that can be discerned is that in considering what amounts to "good reason" for extending time, a very great deal is left to the discretion of the particular judge hearing an application. The discretion given to the judge in these matters is a very wide one, not circumscribed by a "checklist" of any sort. Indeed, one lucid, succinct and helpful description of the issue and the judge's task is to be found in the words of Lord Brandon of Oakbrook in the case (cited by the respondents) of **Kleinwort Benson Ltd v Barbrak Ltd and other appeals; The Myrto (No 3)** [1987] 2 All ER 289. Although that case dealt with an application to extend the validity of a writ, which makes it somewhat different from the instant case, its consideration generally of the meaning of the expression "good reason" might, nonetheless, assist us. At page 300 c, it was stated that:

> "The question then arises as to what kind of matters can properly be regarded as amounting to 'good reason'. The answer is, I think, that it is not possible to define or circumscribe the scope of that expression. Whether there is or is not good reason in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the judge…"

[56] Against this background, it is necessary to return to the principles enunciated in the **Hadmor** case outlining the circumstances in which an appellate court might interfere with or disturb a ruling given or judgment made as a result of the exercise of a judge's discretion. Doing so, (and bearing in mind that this court functions primarily as a court of review), it seems to me that the judgment of the court below reflects the judge's customary careful consideration of all matters relevant to and necessary for his

decision. A perusal of the judgment does not reveal any misunderstanding of the law or of the evidence that was before the court below. Neither does it reveal any inference that particular facts existed or did not exist that might now be demonstrated to be wrong by further evidence. There has been, additionally, no change of circumstances after the delivery of the judgment and the making of the orders that would justify the grant of the orders that had been sought. And, it certainly could never fairly be said that the decision is: "…so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it".

[57] In summary, there is nothing that has been put before us to indicate that the learned judge exercised his discretion incorrectly, on wrong principles, or in any way that can be faulted. Indeed, from all indications, he exercised his discretion correctly, even giving some accommodation to the appellant, where it was felt that some of the delay could not fairly be attributed to him. In the circumstances there is no reason or basis for this court to disturb that judgment. The appeal must, therefore, be dismissed with costs to the respondents to be agreed or taxed.

DUKHARAN JA

ORDER

Appeal dismissed. Costs to the respondent to be agreed or taxed.