[2021] JMCA App 31

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MRS JUSTICE G FRASER JA (AG)

APPLICATION NO COA2021APP00104

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

Manley Nicholson, Harrington McDermott and Ms Donna Rufus instructed by Nicholson Phillips for the applicant

Mr Hugh Wildman and Ms Indira Patmore instructed by Hugh Wildman & Co for the 1st respondent

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

20 September and 17 December 2021

BROOKS P

[1] On 28 May 2021, Barnaby J refused Mr Christopher Stephenson's application for permission to apply for judicial review of a decision to terminate his employment as a teacher at the Penwood High School ('Penwood'). The learned judge also refused Mr

Stephenson permission to appeal. He, thereafter, renewed his application before this court.

[2] This court heard his application on 20 September 2021, and made the following orders:

> "1. The application for leave to appeal the decision of Ms Justice Carole Barnaby made on 28 May 2021 is refused.
>
> 2. Costs to the respondents to be taxed if not agreed."

At that time, we promised to put our reasons in writing. We now fulfil that promise.

[3] The Board of Management of Penwood ('the Board') decided on 28 December 2016 to terminate Mr Stephenson's employment. The Teachers' Appeals Tribunal ('the Tribunal'), considered his appeal from the Board's decision, and on 10 December 2019, upheld the decision. Mr Stephenson then filed the application that Barnaby J eventually refused.

[4] He complains that the learned judge, in arriving at her decision, failed to properly take into account that he was seeking the review of both the decision of the Board and of the Tribunal. The fact that his application, which went before her, only spoke to the date of the decision of the Board, he said, did not prevent her from appreciating that he was also complaining about the decision of the Tribunal.

[5] Learned counsel for Mr Stephenson argued that the learned judge should have granted Mr Stephenson's application to amend the application so as to include the Tribunal's decision. He should also have been allowed, counsel argued, to retract prior oral submissions, which were to the effect that Mr Stephenson would not pursue an appeal against the Tribunal. The learned judge, he said, also wrongly refused to consider further submissions that he made in that regard, although they were made after she had reserved her decision.

[6] The main question, which was to have been decided, in assessing whether or not to grant permission to appeal, was whether Mr Stephenson's complaint had any reasonable prospect of success on appeal. The relevant facts of the case may be briefly stated before further considering the issues that Mr Stephenson has raised.

Factual background

[7] The Board's decision arose from Mr Stephenson's failure, in mid-2016, to timeously submit School Based Assessments ('SBAs'), for certain Penwood students, to the Overseas Examination Office. The default was brought to the attention of the Board and it commissioned an investigation of the matter. At a meeting held on 20 December 2016, the Personnel Committee of the Board ('the Committee'), investigated a charge of neglect of duty against Mr Stephenson. He attended the meeting, held for that purpose, and was also represented by legal counsel. The Committee, thereafter, recommended to the Board that his employment be terminated. The Board accepted the recommendation and, on or about 28 December 2016, informed him of its decision. His dismissal came into effect on 31 March 2017.

[8] Mr Stephenson appealed from the Board's decision to the Tribunal. Although the Tribunal's decision to dismiss his appeal was made on 10 December 2019, it was not until March 2020 that Mr Stephenson received notice of that decision.

Procedural background

[9] On 3 July 2020, Mr Stephenson filed his application in the Supreme Court for leave to apply for judicial review. The originally named respondents were the Board, the Tribunal and the Attorney General. The decision to which he referred in his application is that of 10 December 2019, that is the Tribunal's decision.

[10] On the first occasion that the case came on for hearing before the Supreme Court, Mr Stephenson removed the Attorney General as a respondent. The application was also amended to refer to the decision of the Board on 28 December 2016 instead of that of the Tribunal made on 10 December 2019. The case was then adjourned.

[11] After one other adjournment, the application came on for hearing before the learned judge on 22 April 2021. The submissions on behalf of the Tribunal, were only filed on 21 April 2021, but learned counsel for Mr Stephenson did not request an adjournment. The learned judge heard submissions and reserved her decision to 28 May 2021, requesting, that in the interim, learned counsel for Mr Stephenson file submissions in response to the authorities cited on behalf of the Tribunal.

[12] Learned counsel filed written submissions within the time specified by the learned judge. The written submissions contained, however, not only an attempt at retracting some of the oral submissions made before the learned judge, but also sought to reinstate Mr Stephenson's complaint against the Tribunal's decision.

[13] On 28 May 2021, before the learned judge handed down her decision, learned counsel for Mr Stephenson sought to support the application to retract the oral submissions, which were previously made. The learned judge refused the application to retract, and she delivered her decision as she had promised. At the request of counsel, she later produced a written judgment.

The learned judge's reasons for her decision

[14] In her reasons for judgment, the learned judge first found that although Mr Stephenson's application had been filed out of time, he had, in the circumstances of the onset of the COVID-19 pandemic, in March 2021, a good reason for that delay. She, therefore, found that the delay was not inordinate and had been adequately explained.

[15] She next referred to the statutory process by which the matter was placed before the Tribunal. The learned judge stated that she had raised with Mr Stephenson's counsel, before hearing submissions on the substantive application, the propriety of seeking leave to apply for judicial review of the Board's decision, when there was no challenge to the Tribunal's decision. Counsel, nonetheless insisted, she said, on pursuing the adopted course.

[16] The learned judge referred to the proceedings before her, comprising, as it did, of the Board's decision and the Tribunal's confirmation of that decision, as "composite judicial review proceedings". She found that since the Board's decision had been confirmed by the Tribunal, and the Tribunal's decision had not been challenged, the Board's decision could not, on its own, be subject to the court's review. The learned judge found that Mr Stephenson had not placed before her any basis for faulting the Tribunal's decision and, therefore, he had "no arguable ground for judicial review with a realistic prospect of success". She found that the Education Act ('the Act') having provided an avenue for appeal to the Tribunal, and there being no issues raised in relation to the Tribunal's exercise of its statutory function, in upholding the Board's decision, any alleged deficiency in the decision-making process by the Board, "must be taken to have been cured on appeal" to the Tribunal. She found, on those bases, that the application for leave to apply for judicial review had to be refused.

[17] The learned judge then dealt with her refusal of the application that counsel for Mr Stephenson, made on 28 May 2021, prior to the delivery of her decision. The application was to further amend submissions that had been made at the 22 April 2021 hearing. The learned judge explained that the application had been made too late and would not have been consistent with the overriding objective contained in the Civil Procedure Rules ('CPR'). She pointed to the fact that, prior to hearing the substantive application, she had given counsel for Mr Stephenson the opportunity to reconsider the basis of the application but they did not avail themselves of that opportunity.

The proposed grounds of appeal

[18] Mr Stephenson's proposed grounds of appeal read as follows:

> "(a) The Learned Judge erred in the exercise of her judicial discretion by holding that [Mr Stephenson] could not withdraw oral submissions that were made on [22] April 2021; and that in so doing the Learned Judge erred in refusing to consider submissions that were filed on behalf of [Mr Stephenson] prior to the delivery of her

judgment, which submissions sought to withdraw oral submissions that were made on [22] April 2021.

(b) The Learned Judge erred in law in finding that [Mr Stephenson's] filing of submissions on 30 April 2021 wherein [he] sought to withdraw previous oral submissions that had been made, amounted to an abuse of process of the court.

(c) The Learned Judge erred in the exercise of her discretion when she failed to [recognise] that it was [the Board's and the Tribunal's] failures to abide by the court's previous orders that materially contributed to any delay in the hearing of the application for leave to apply for Judicial Review. In failing to recognise this the Learned Judge failed [to] balance the scales of justice as between the parties and failed to further the overriding objective.

(d) The Learned Judge erred in law when she failed to appreciate that [Mr Stephenson's] application for leave to apply for Judicial Review as well as the evidence filed in support, at all times sought to challenge the decision of [the Board and the Tribunal], viz the termination of [Mr Stephenson's] employment as a teacher by [the Board] and the upholding of that decision by [the Tribunal].

(e) The Learned Judge failed to apply the overriding objective and the fundamental principle of access to justice whereby parties have a right to have their cases heard on the merits and should not be defeated by purely procedural or technical matters which do not in any way impact the substantive issues or the justice of the case.

(f) The Learned Judge erred in law in holding that [Mr Stephenson's] application for leave to apply for Judicial Review disclosed no arguable ground for judicial review having a realistic prospect of success." (Underlining as in original)

The issues

[19] The issues arising from Mr Stephenson's grounds of appeal are whether the learned judge:

a. erred when she refused to allow Mr Stephenson to alter course (grounds (a), (b), (d) and (e));
b. failed to give effect to the overriding objective (grounds (c) and (e); and
c. erred in her conclusion that Mr Stephenson's application for judicial review disclosed no realistic prospect of success (ground (f)).

[20] Before analysing those issues, it is important to note that this is not an appeal from Barnaby J's decision, but rather an application for leave to appeal from that decision. The guiding principle for considering an application for leave to appeal in civil cases is outlined at rule 1.8(7) of the Court of Appeal Rules, as amended. It states:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

[21] The phrase "real chance of success" has been interpreted by Lord Woolf MR in **Swain v Hillman and another** [2001] 1 All ER 91 to mean "a 'realistic' as opposed to a 'fanciful' prospect of success" (see paragraph [21] of **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and another** [2015] JMCA App 27A). Mr Stephenson must therefore satisfy this court that his challenge to the learned judge's findings has a realistic prospect of success. One method of demonstrating a real prospect of success is to satisfy this court that the learned judge was plainly wrong in the exercise of her discretion in refusing his application. This court has, in such cases, consistently stated that it will not ordinarily interfere with the judicial exercise of such a discretion. Morrison JA (as he then was) so stated in **Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, 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'."

Although Barnaby J's decision was not strictly an interlocutory one, the principles set out above are applicable in these circumstances.

The refusal to allow Mr Stephenson to alter course (grounds (a), (b), (d) and (e))

[22] Mr McDermott, on behalf of Mr Stephenson, submitted that the documentation presented before Barnaby J, on behalf of Mr Stephenson, demonstrated that he was challenging the decision of both the Board and the Tribunal. Mr McDermott acknowledged that counsel for Mr Stephenson, in oral submissions made to Barnaby J, first indicated that Mr Stephenson would only challenge the decision of the Board, then later resiled from that position. Mr McDermott submitted that counsel had made an error, which he should have been permitted to amend or clarify. In support of those submissions, he relied on **Gale v Superdrug Stores plc** [1996] 3 All ER 468 and **Rohan Collins and Another v Wilbert Bretton** (unreported), Supreme Court, Jamaica, Suit No E227 of 2002, judgment delivered 26 May 2003.

[23] He argued that Mr Stephenson's change in position, to challenge the decisions of the Board and Tribunal, was reflected in the affidavit evidence before Barnaby J and so would not have been "new". He added that there were clear challenges to the Tribunal's conduct. Additionally, Mr McDermott submitted that Barnaby J had the discretion, pursuant to rule 56.4(6) of the CPR, to allow amendments to judicial review applications, and she ought to have exercised her discretion in favour of Mr Stephenson.

[24] Learned counsel pointed to the fact that the written submissions, challenging the Tribunal's findings, had been filed before the learned judge delivered her decision, so, the amendment ought to have been permitted. He contended that, the learned judge permitted the Tribunal to file late submissions and so should have allowed Mr Stephenson to file his submissions late as well. He added that the learned judge's failure to consider the amendment resulted in prejudice to Mr Stephenson. He argued however, that, conversely, if the learned judge had granted the amendment, it would not have resulted in prejudice to either the Board or the Tribunal.

[25] Learned counsel for the Board, Mr Wildman, submitted that Mr Stephenson withdrew his complaint against the Tribunal on the first occasion that the case came before the court. That withdrawal, learned counsel argued was an acceptance that there was no flaw in the Tribunal's procedure and of its finding that there was nothing wrong with the Board's finding or process. Additionally, Mr Wildman submitted, Mr Stephenson had not demonstrated that there was any error by either the Board or the Tribunal.

[26] Ms Dickens, on behalf of the Tribunal, contended that Mr Stephenson's complaint was misplaced. She pointed out that learned counsel for Mr Stephenson did not ask for an adjournment on the date when the case came before Barnaby J and that the substantive issues were fully argued. She submitted that in those circumstances it was not appropriate for Mr Stephenson to seek to alter his stance before the court. Learned counsel sought to distinguish **Rohan Collins and Another v Wilbert Bretton**, which Mr McDermott had cited. She contended that, unlike that case, there was no claim before Barnaby J, but rather, an application. She also stressed that at the time that the application for leave to apply for judicial review went before Barnaby J, there was no complaint against the Tribunal's decision.

<u>The analysis</u>

[27] In addressing learned counsel's submissions, it is noted that a party should ordinarily be allowed to advance its "entire and best case" (see paragraph [30] of

Caricom Investments Limited and others v National Commercial Bank Jamaica Limited [2020] JMCA Civ 15). To accommodate a party advancing its entire and best case, the court may grant an amendment to pleadings before it perfects its order, even where the amendment advances a new argument. Neuberger J, as he then was, in **Charlesworth v Relay Roads Ltd (in liquidation) and others** [1999] 4 All ER 397, considered an application to amend pleadings and introduce evidence after judgment was handed down, but before the perfection of the order. In so doing, he identified the contending factors at play when a court is asked to exercise its discretion in determining whether to permit a party to amend its pleadings. After identifying that the application before him had to be considered with the overriding objective in mind, he said, at pages 401-402:

> "As is so often the case where a party applies to amend a pleading or to call evidence for which permission is needed, **the justice of the case can be said to involve two competing factors**. The first factor is that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired: a party prevented from advancing evidence and/or argument on a point (other than a hopeless one) will understandably feel that an injustice has been perpetrated on him, at least if he loses and has reason to believe that he may have won if he had been allowed to plead, call evidence on, and/or argue the point. Particularly where the other party can be compensated in costs for any damage suffered as a result of a late application being granted, there is obviously a powerful case to be made out that justice indicates that the amendment should be permitted…
>
> On the other hand, even where, in purely financial terms, the other party can be said to be compensated for a late amendment or late evidence by an appropriate award of costs, it can often be unfair in terms of the strain of litigation, legitimate expectation, the efficient conduct of the case in question, and the interests of other litigants whose cases are waiting to be heard, if such an application succeeds…." (Emphasis supplied)

After considering the circumstances of that case in the context of those competing factors, which he identified, Neuberger J dismissed the application.

[28] The court must therefore assess each matter on a case-by-case basis and weigh the two competing factors. Accordingly, it is prudent for a party to advance its case at an early stage in order to avoid abusing the court's process. In **The Minister of Housing v New Falmouth Resorts Ltd** [2016] JMCA Civ 20, F Williams JA considered an appeal by the Minister of Housing from a ruling by a trial judge that a particular application was an abuse of process. The trial judge in that case decided that the Minister's claim was similar to other applications that the Minister had made before other judges. Although that was a case concerning *res judicata* (a thing already adjudicated upon) and abuse of process, F Williams JA's reasoning at paragraph [89] is relevant. He said:

> "…a party must raise all relevant issues at the earliest opportunity and not be dilatory in doing so, in order not to occasion an abuse of the court's process."

[29] In the context of an application for leave to apply for judicial review, the court has the discretion to grant amendments to the application (see rule 56.4(6) of the CPR).

[30] In line with the principle set out in **Attorney General of Jamaica v John MacKay**, Mr Stephenson, in order to succeed in the present application, must demonstrate that it is likely that the court will find that the learned judge was plainly wrong when she refused to grant his application for permission to withdraw his oral submissions made on 22 April 2021.

[31] Mr McDermott's submissions on this issue are unlikely to succeed on appeal. The learned judge cannot be faulted for her approach and ultimate refusal to accept the withdrawal of the oral submissions made on behalf of Mr Stephenson. She operated openly and fairly with counsel for Mr Stephenson. She identified, as a preliminary point, that which she considered to be a cause for concern, and asked counsel to address her

on it. Having ascertained that Mr Stephenson was intent on proceeding against the Board only, the learned judge proceeded and heard arguments on the substantive matter.

[32] In **Gale v Superdrug Stores plc** Millet LJ noted that if a litigant or his counsel makes a mistake, he should be allowed to correct that error, even if causes delay and expense, if it can be done without causing injustice to the other party. This court must therefore consider whether the amendment was likely to have caused any prejudice to the Board or Tribunal.

[33] Mr McDermott's submission that there were complaints in Mr Stephenson's application about the Tribunal's approach, cannot be supported. Order number one of Mr Stephenson's original notice of application, filed 3 July 2020, refers to the decision made on 10 December 2019, which is the Tribunal's decision. That order was changed in his amended notice of application and the date in order number one changed to 28 December 2016, which is the date of the Board's decision. Mr McDermott's submission that there is a complaint against the Tribunal's decision, is, therefore, plainly untenable, as the Tribunal made no decision, in relation to Mr Stephenson, on that date.

[34] Mr McDermott next pointed to certain paragraphs of Mr Stephenson's affidavit, which, learned counsel asserted, directly challenged the decision-making process of the Tribunal.

[35] The first reference is to paragraph 11 of Mr Stephenson's affidavit, filed 3 July 2020, in support of the application for leave to apply for judicial review. In that affidavit, Mr Stephenson states that "the resulting Tribunal hearing would have arisen out of irregular Board procedures". That is not a challenge of the Tribunal's procedure, but rather a complaint against the procedure utilized by the Board.

[36] The next reference is to paragraph 20, in which Mr Stephenson alleges that "the Tribunal did not take into account the irregular procedure followed and the existence of

Dr. Iva Bailey's letter of his personal recommendation for the termination of my employment".

[37] This submission has no realistic prospect of success. Dr Iva Bailey, was a member of the committee that considered the charge against Mr Stephenson. The other two members were, Mrs Jereen Simmonds and Miss Jacinth Baker. The Committee, by a vote of 2-1, found Mr Stephenson guilty of neglect of duty. Dr Bailey reported this finding to the Board by letter dated 21 December 2016. Contrary to Mr McDermott's submission, this was not Dr Bailey's personal recommendation. The letter was addressed to the chairman of the Board. It summarised the process that the Committee had conducted and concluded with the sentence:

> "We are recommending that his position as a teacher of [Penwood] be terminated for Neglect of Duty."

Mrs Simmonds and Ms Baker were both present at the Board Meeting when Dr Bailey presented the report of the Committee. Importantly, the minutes of the meeting reports that Dr Bailey concluded his presentation by stating the options that were open to the Board:

> "After the report was given, Dr. Bailey stated that the Board should decide **whether Mr Stephenson be admonished or censored; demoted or his appointment as a teacher at [Penwood] be terminated**." (Emphasis supplied)

There is no reason for impugning the decision of the Board, or of the proceedings of the Tribunal, on the basis of Dr Bailey's letter.

[38] Mr McDermott's reference to paragraphs 21 and 22 of Mr Stephenson's affidavit is, similarly, without merit. Neither paragraph challenges anything done by the Tribunal. In paragraph 21, Mr Stephenson states that he has been advised that he has good grounds to overturn the decision of the Tribunal, but does not amplify that statement in respect of the Tribunal, although he does so in respect of the actions of the Board. In

paragraph 22 he merely states that he is adversely affected by the "Respondents' decision".

[39] It cannot be left unsaid, in this context, that, as Mr Nicholson has candidly admitted in his written submissions to this court, that the submissions made by Mr Stephenson's counsel to the learned judge, on 22 April 2021, was that there was "no challenge to the Tribunal's decision in the Applicant's Affidavit evidence". Although learned counsel wished to withdraw that submission, it is, indeed, correct.

[40] In those circumstances, if the learned judge had granted the amendment, it would have resulted in prejudice to the Tribunal, and to the Board, for reasons which will hereafter be amplified.

The overriding objective (grounds (c) and (e))

[41] Mr Stephenson's issue in relation to the overriding objective is two-fold. Firstly, Mr McDermott contended that, the learned judge erred when she did not consider that the previous adjournments of the case were occasioned by the other parties, not Mr Stephenson. It is for that reason, learned counsel argued, that if, at the time that the learned judge considered Mr Stephenson's amendment, it would have resulted in an adjournment, it should not have been a deterrent to the granting of the amendment. He contended that the learned judge did not balance the interests of the parties and did not further the overriding objective in her approach.

[42] Secondly, Mr McDermott submitted that the learned judge did not apply the overriding objective when she refused to hear the merits of Mr Stephenson's case.

[43] Ms Dickens stressed the requirement of the overriding objective for efficiency.

<u>The analysis</u>

[44] The overriding objective is outlined at rule 1.1 of the CPR. It provides 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."

[45] All these elements, combined, constitute "the overriding objective", and the court, in furthering the overriding objective, must therefore consider them collectively. The overriding objective does not consider one side only. It requires the court to consider the interests of all parties, not just the present parties before it but also parties to other cases, who are waiting to have their matters heard. It also seeks to ensure that the court does not waste its already stretched time and resources.

[46] The learned judge pointed out that there had been several adjournments of the matter before it came before her. She did not, however, ascribe blame to any party, and certainly did not seek to blame Mr Stephenson. She indicated that if she granted the "proposed amendment", it would result in further delays. She also considered that the written submissions filed on behalf of Mr Stephenson on 30 April 2021, wherein he sought to "petition" the court to determine the application for leave to apply for judicial review on further substantial amendments, were late and inappropriate so she did not consider them. That refusal was to preserve the right of the Board and the Tribunal to a fair hearing. The Tribunal in particular had not filed any affidavit evidence in the

proceedings. This was, undoubtedly, based on the fact that Mr Stephenson had indicated that he was not pursuing any complaint against the review process conducted by it. The Board which represented the interests of the school would have been further delayed in engaging a replacement for Mr Stephenson. The learned judge noted that counsel for Mr Stephenson, in not placing all the merits of the case before the court, did not advance the overriding objective. Had the learned judge allowed the amendment, the Tribunal would therefore have had to change its entire defence to the claim. Mr Stephenson was not entitled to another "bite of the cherry". The learned judge, therefore, correctly exercised her discretion in not permitting Mr Stephenson's counsel to withdraw the submission that Mr Stephenson's application would only be against the Board.

[47] The learned judge attempted to do justice between the parties when she invited counsel for Mr Stephenson to reconsider his case, before the hearing of the substantive issues. Counsel insisted on pursuing the course that had been taken, and declined this invitation. In these circumstances, the learned judge cannot be held to have erred in the exercise of her discretion. Mr Stephenson's case was not compelling. The fact that he was not allowed to pursue it, did not result in injustice.

Whether Mr Stephenson's application for judicial review has any realistic prospect of success (ground (f))

[48] Mr Nicholson, in written submissions, argued that, the learned judge, having refused the application for amendment, did not consider Mr Stephenson's full case. He argued that the learned judge would not have been able to properly determine whether Mr Stephenson's application had a real prospect of success. Learned counsel argued that Mr Stephenson's application has an arguable case with a realistic prospect of success.

[49] These submissions must also fail. The Privy Council in **Sharma v Browne-Antoine and others** [2006] UKPC 57, (2006) 69 WIR 379 reiterated the standard, which applies when a court is considering an application for leave to apply for judicial

review. Their Lordships said, at paragraph 14 of their judgment, that the "ordinary rule" is 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."

Their Lordships reiterated this position in the recent decision of **The Children's Authority of Trinidad and Tobago v Sookhan** [2021] UKPC 29, at paragraph 2.

[50] The decision to grant or refuse leave to apply for judicial review lies within the discretion of the judge who hears the application. As has already been pointed out, an appellate court, in this context, is only likely to disturb the learned judge's decision if it can be demonstrated that the learned judge was plainly wrong. Applying that standard to this case, this court should examine whether the learned judge erred, on at least one of the following bases, and thereby caused injustice, in:

a. assessing the law concerning the composite effect of the decisions of the Board and the Tribunal;
b. determining whether Mr Stephenson had a real prospect of success in showing that the Board was wrong in its procedure in considering the complaint against him;
c. determining whether Mr Stephenson had a real prospect of success in showing that the Board was wrong to have terminated his employment; or
d. determining whether Mr Stephenson had a real prospect of success in showing that the Tribunal was wrong in dismissing his appeal.

a. Whether the learned judge was wrong in her assessment of the composite effect of the decisions of the Board and Tribunal

[51] The learned judge considered the law in respect of the composite effect of the decisions of the Board and of the Tribunal. She acknowledged that the Tribunal had affirmed the Board's decision. She noted that since she had refused Mr Stephenson's application for amendment, the Tribunal's decision stood unchallenged. Accordingly, the learned judge concluded that the court could not quash the Board's decision. Essentially, the learned judge found that the Tribunal's decision had cured any potential defects that may have arisen from the Board's decision. She ruled that if she quashed the Board's decision, in the absence of any challenge to the Tribunal's decision, she would have usurped the statutory role of the Tribunal, resulting in an abuse of the judicial review process. In that regard, she applied the principles enunciated in **Ziadie v Jamaica Racing Commission** (1981) 18 JLR 131.

[52] Learned counsel's tack in respect of the learned judge's approach to this issue was to stress that there were "irregularities leading up to the appeal before the Tribunal" and that the Tribunal did not take into account those irregularities. The criticism was that the learned judge failed to properly assess Mr Stephenson's case in the context of those irregularities.

The analysis

[53] It is understandable that in the absence of a complaint against the Tribunal's decision, learned counsel for Mr Stephenson would be hamstrung in respect of an analysis of the composite effect of that decision. Nonetheless analysis of the learned judge's reasoning is still allowable.

[54] The principle behind the consideration of the composite effect of the decisions of an inferior tribunal and an appellate tribunal, which considered the inferior tribunal's decision, is that any defect in the application of the rules of natural justice by the inferior tribunal would be cured by the subsequent proceeding in the appellate tribunal. That is the effect of the decision in **Ziadie v Jamaica Racing Commission**.

[55] In **Ziadie v Jamaica Racing Commission**, the stewards of the Jockey Club of Jamaica ('the Jockey Club'), following a hearing, found Mr Ziadie, who was a licensed racehorse trainer and member of the Jockey Club, guilty of corrupt practices. He appealed to the Jamaica Racing Commission ('the Commission'), alleging that the proceedings before the Jockey Club breached natural justice. The Commission dismissed his appeal and affirmed the Jockey Club's decision. Mr Ziadie then applied to the Full Court of the Supreme Court to quash the Jockey Club's decision. One of the grounds for appeal was that the proceedings breached natural justice. The Full Court ruled that where an inferior tribunal has breached the rules of natural justice, an appellate court or tribunal with the power to review the inferior tribunal's decision, can cure those breaches committed by the inferior tribunal. Campbell J (as he then was), who delivered the judgment of the Full Court, in that case, said in part, at page 137:

> "…The powers in my view are designed to ensure that in the appeal proceedings an applicant is given full hearing with opportunity to bring further evidence and have it heard. Any breaches of the rules of natural justice, if such had existed in the original proceedings, would in my view be cured…
>
> In my view [Mr Ziadie] in this case had a full hearing both at the Jockey Club [and] before the Commission in relation to a matter of which he was fully aware, and a decision was reached against him albeit a hard one. There is no basis for his complaint…."

[56] Campbell J, also at page 137, accepted "the principle that a court can and ought properly to consider the entirety of the proceedings, original and appellate, before saying that a rule of natural justice, the breach of which has been complained about, has remained incurably breached at the end of all such proceedings".

[57] The learned judge was entitled to find that the principle set out in **Ziadie v Jamaica Racing Commission** was applicable to the appellate process that is set out in the Act. The majority of the court in **The Board of Management of Bethlehem Moravian College v Dr Paul Thompson and the Teachers Appeals Tribunal**

[2015] JMCA Civ 41 ('**Bethlehem v Thompson**'), in considering a case involving an appeal to the Tribunal, accepted the principle as was set out in **Ziadie v Jamaica Racing Commission**. However, the court, in **Bethlehem v Thompson**, found that the Tribunal's decision had not cured the Bethlehem Board's decision. The learned judge, however, properly distinguished **Bethlehem v Thompson** because the teacher (a principal) in that case, who had been dismissed, had challenged the procedure adopted by the Tribunal in its handling of his case.

[58] The Act does not state that the Tribunal may receive further evidence but, it provides that the Tribunal may confirm, vary or quash the decision appealed against or remit the matter to the relevant person or authority for further information or for any action that the Tribunal deems appropriate (see section 37(4) of the Act). The learned judge was therefore entitled to find that, since the Tribunal's decision had not been challenged and was therefore valid, it cured any procedural defects by the Board.

b. Whether Mr Stephenson had a real prospect of success in showing that the Board was wrong in its procedure in considering the complaint against him

c. Whether Mr Stephenson had a real prospect of success in showing that the Board was wrong to have terminated his employment

d. Whether Mr Stephenson had a real prospect of success in showing that the Tribunal was wrong in dismissing his appal

[59] The above analysis of the learned judge's ruling on the composite effect of the decisions of the Board and Tribunal assists in determining these issues. Mr Stephenson does not have an arguable appeal with a realistic prospect of success that the Board's procedure or decision, to terminate his employment, was wrong. Any procedural error by the Board was cured by the Tribunal's decision, which was not challenged and therefore remains valid. Additionally, Mr Stephenson, having not challenged the Tribunal's decision, does not have an arguable appeal against the Tribunal, with any realistic prospect of success.

Costs

[60] This court is aware that rule 56.15(5) of the CPR provides that there may be no order as to costs against an applicant who seeks an administrative order unless the court thinks the applicant acted unreasonably in making the application or by his/her conduct of the application. That rule however does not apply to this court.

[61] In **National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Another** [2016] JMCA Civ 24A, this court considered the difference in approach between awarding costs at first instance and at the appellate stages in applications for judicial review. The court, instead of applying the principle in rule 56.15(5) of the CPR, applied the general rule regarding costs, namely rule 64.6(1) of the CPR, which states:

> "If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party."

[62] Although the court may depart from the general rule if the circumstances so require, this case does not require any departure. The Board and the Tribunal completely succeeded in resisting Mr Stephenson's application. The court, therefore, awarded them their costs incurred in the application.

Conclusion

[63] Mr Stephenson could only have succeeded in his application for leave to appeal the decision of the learned judge, if he had proved that he has an arguable appeal with a realistic prospect of success. He, however, failed in that endeavour. The learned judge properly exercised her discretion when she refused his application for leave to amend his application for leave to apply for judicial review. She was also correct in finding that since Mr Stephenson had not challenged the Tribunal's decision, it was not only valid, but had cured any claimed procedural breach by the Board. There is therefore no basis for disturbing the learned judge's decision. It is for these reasons that we made the orders, which have been set out at paragraph [2] above.

DUNBAR-GREEN JA

[64] I have read, in draft, the judgment of Brooks P. Similar reasoning led me to agree with the decision that was handed down in this matter.

G FRASER JA (AG)

[65] I too have read the draft judgment of Brooks P and agree with his reasoning that led to the decision, with which I agreed.