

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
CIVIL DIVISION

CAUSE NO: G 0127 of 2016  
LACV0119/2016

IN THE MATTER OF THE PRISONS LAW

AND IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF HER EXCELLENCY  
THE GOVERNOR TO DISMISS THE APPLICANT'S APPEAL AGAINST THE UNLAWFUL  
TERMINATION OF HER EMPLOYMENT AS A PRISON OFFICER BY THE CHIEF OFFICER  
OF THE MINISTRY OF HOME AFFAIRS

AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO O. 53  
OF THE GRAND COURT RULES 1995.

BETWEEN:

ANI SCOTT

APPLICANT

AND:

HER EXCELLENCY THE GOVERNOR

FIRST RESPONDENT

CHIEF OFFICER, MINISTRY OF HOME AFFAIRS

SECOND RESPONDENT

PRISON DIRECTOR

THIRD RESPONDENT



Appearances:

Mr. Ben Tonner, Q.C. and Ms. Sue-Helen McConnell of McGrath Toner,  
Attorneys for the Applicant  
Ms. Ann-Marie Rambarran of the Attorney General's Chambers, Attorneys  
for the Respondents

Before:

Hon. Justice Marlene I. Carter Actg.

Heard:

3 December 2018

Delivered:

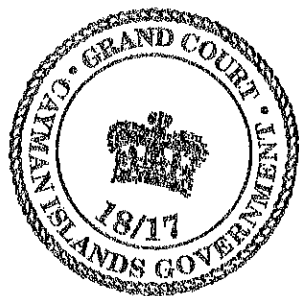
7 June 2019

HEADNOTE

*Civil Law – Judicial Review – GCR O.53 – The Prisons Law – Prison Officers Disciplinary  
Regulations (1999 Revision) – Termination of Employment – Grounds for Review: Statutory  
timeframe, statutory procedure etc.*

## JUDGMENT

1. The Applicant was granted leave to apply for Judicial Review against the decision to dismiss the Applicant by Order of McMillan J on the 8<sup>th</sup> September 2016. By Notice of Motion filed on the 12<sup>th</sup> of February 2018 the Applicant sought a number of declarations and Orders in pursuance of the application for judicial review. The relief sought was as follows:



- “(a) A Declaration that the Third Defendant’s termination decision was invalid, null and void and did not terminate the Plaintiff’s tenure as Prison Officer;*
- (b) A Declaration that the Second Defendant’s application of the Public Service Management Law was illegal and void;*
- (c) A Declaration that the Second Defendant’s termination decision was invalid, null and void and did not terminate the Plaintiff’s tenure as Prison Officer;*
- (d) A Declaration that the First Defendant’s decision on appeal was invalid, null and void;*
- (e) A Declaration that the Plaintiff is still engaged in the position of Prison Officer until such time as she resigns or her tenure lawfully comes to an end;*
- (f) An Order for payment of arrears of salary and pension contributions since 13 April 2015;*
- (g) Such further and other relief as the Court may deem appropriate in all the circumstances; and*
- (h) For an order that the costs of and incident to this application are paid by the Defendants.”*

2. The chronology of events which led to the application for judicial review are not in dispute.

- A. The Applicant was first employed by with Her Majesty’s Cayman Islands Prison Service on the 7 January 202. She was employed on a fixed-term basis from 8 January 2014 to 7 January 2015, and from 8 January 2015 to 7 January 2017.*

B. On 22 January 2015 and on 1 February 2015 the Applicant was charged with a total of 6 charges arising out of events occurring between 7 and 9 January 2015 while the Applicant was on duty at Her Majesty's Prison Fairbanks.

C. The charges are as follows:

Charge 1 – alleged that on 6 January 2015 the Applicant made entries on the ACCT Plan with respect to the prisoner Tamara Butler which she knew to be false pursuant to section 2(e) of the Prison Officers (Disciplinary) Regulations (1999 Revision) (“**POD Regulations**”).

Charge 2 – Alleged that in relation to charge 1 above, the Applicant failed to make the required checks on prisoner Tamara Butler pursuant to section 2(d)(i) of the POD Regulations.

Charge 3 – Alleged that on the 7 January 2015 the Applicant committed the same disciplinary offence as that alleged in charge 1.

Charge 4 – Alleged that on the 7 January 2015 the Applicant committed the same disciplinary offence as that alleged in charge 2.

Charge 5 – Alleged that on the 8 January 2015 the Applicant committed the same disciplinary offence as that alleged in charge 1.

Charge 6 – Alleged that on the 8 January 2015 the Applicant committed the same disciplinary offence as that alleged in charge 2.

D. On 26 March 2015 a disciplinary hearing was convened before the Third Respondent and other prison staff to enquire into the charges against the Applicant. The Applicant admitted charges 1, 3 and 5 and challenged charges 2, 4 and 6. The panel was advised through the Applicant's attorney at that time, that his then client was not in fact denying the charges but was challenging the specific wording 'neglect of duty and without good and sufficient cause' in charges 2, 4 and 6. The Applicant's position was that she was ill on the nights in question and had come to work having taken medication; had underestimated the effect of the medication which made her very drowsy and led to the charges which she was now challenging.

E. On 26 March 2015 the hearing adjourned thus 'The Director deferred a decision of an award pending further review of the CCTV footage, hearing the cases of the two other officers being charged and any legal advice he could solicit on the matter'. There were two other officers charged with disciplinary offences in relation to the incidents.



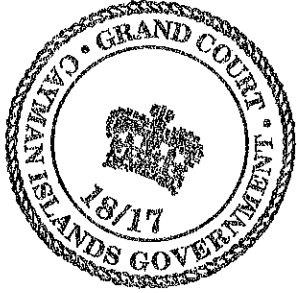


- F. On 27 March 2015 the hearing was resumed briefly but adjourned again.
- G. On 13 April 2015 the Third Respondent reconvened the hearing and announced the penalty for the 6 charges. The Third Respondent terminated the Applicant's employment with the Prison Service in accordance with section 6(i) of the POD Regulations.
- H. On 22 April 2015 the Applicant filed an appeal with the Second Respondent. On 4 May 2015, the Applicant received a letter from the Second Respondent advising her that her employment with the Prison Service had been terminated pursuant to section 6(1)(i) of the POD Regulations effective as of 13 April 2015.
- I. On 9 July 2015 the Applicant filed her perfected grounds of appeal with the First Respondent. On 29 June 2016 the First Respondent advised the Applicant in writing that the appeal had been dismissed."

3. The Applicant states that her dismissal was unlawful, null and void and that all the grounds upon which a court may reverse an administrative decision by way of judicial review are present in the instant case. The applicant also argues that the termination process and the resulting decision to terminate failed to comply with Section 19(1) of Part 1 of the Cayman Islands Constitution Order 2009.
4. Specifically, the Grounds for review can be set out as follows<sup>1</sup>:
- a. The Third Respondent did not observe the statutory timeframe for notifying the Applicant of the charges;
  - b. The Third Respondent did not observe the statutory procedure when the hearing was held in that the Applicant was not given an opportunity to cross-examine Stephen Atherley, who gave evidence on behalf of the Prison Service, was not given an opportunity to call witnesses in support of her defence, and the Third Respondent did not cause the record of hearing to be signed by the relevant witnesses;

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<sup>1</sup> Applicant's Skeleton Argument, Beginning at 4 -- paras (a) – (f)



- c. The Third Respondent did not give proper consideration to the Applicant's mitigating circumstances when imposing dismissal as punishment and/or did not give adequate reasons for his decision;
- d. The Second Respondent did not have standing to terminate the Applicant's employment.
- e. The First Respondent did not give proper consideration to matters raised on appeal and/or did not provide adequate reasons for her decision;
- f. The punishment was so unreasonable that no reasonable authority when considering all of the relevant facts and circumstances would have imposed it.

5. A number of affidavits were filed by each side for the court's consideration: the applicant's affidavit in support of the Notice of Motion, and for the Respondent the affidavits of Eric Bush, Raquel Solomon and Neil Lavis. On the date of hearing the Court was advised that the Applicant did not intend to adduce any additional evidence nor was there an intention to cross-examine any of the witnesses who had provided affidavits for the Respondents. Some of the grounds were modified somewhat during the course of the hearing while others were not proceeded with. The Applicant did not pursue the relief sought at Paragraph 1 (b) and (c), nor did she pursue grounds (b) and (d) as set out Paragraph 3 above.

#### **GROUND 1 – NOTIFICATION OF CHARGES**

6. The Applicant submitted that the 3<sup>rd</sup> Respondent acted unlawfully in that he did not observe the statutory timeframe for notifying the Applicant of the charges and for commencing the hearing of the charges.
7. Regulations 3 & 4 of the *Imprisonment (Discipline) Regulations (1999 Revision)* (hereinafter "*the Regulations*"), states:



- “3.(1) A charge against an officer for an offence against discipline shall be handed to him not later than twenty-four hours from the time it was signed.
- (2) The charge sheet shall specify the provisions under which the charge is made and shall contain such particulars as will leave the officer in no doubt as to the precise nature of the allegations on which the charge is based.
- (3) The accused officer shall, as soon as practicable but in any event within eight days of receipt of the charge sheet, indicate on the charge sheet-
- (a) whether he admits or denies the charge;
  - (b) if he so desires, his reply to the charge; and
  - (c) the names of any witnesses whom he desires to call at the hearing, and
- thereafter the hearing shall be commenced within eight days.
- (4) Without prejudice to subregulations (1), (2) and (3), the Director shall, at any time, refer an alleged disciplinary offence to the police for their action if, in his opinion, it is of a sufficiently serious nature.
4. The Director shall hear the case as soon as possible, and shall take or cause to be taken a written record of the proceedings, and witnesses shall sign such parts of the records as comprise evidence given by them.”

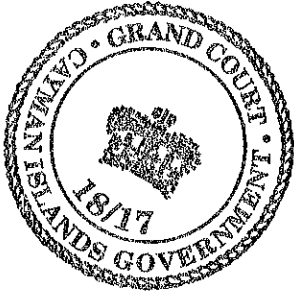
8. The Applicant submitted that the 3<sup>rd</sup> Respondent, as a creature of statute, was required to hand the charge that had been laid against the Applicant to her no less than 24 hours after it had been signed. The Applicant contends that this Regulation was not observed and states in her Skeleton Argument<sup>2</sup>:

“22. The charges arising out of events on the evenings of 7 and 8 January 2015 were signed by the Charging Officer, Mr. Atherley, on 22 January 2015.

23. In breach of Regulation 3(1), the charges were handed to and signed by the Applicant on 28 January 2015. Each of these charges contains a note indicating that the Applicant was advised on 1 February 2015 that she was being remanded on these charges.

24. The charges arising out of events on the evening of 6 January 2015 were signed by the Charging Officer, Mr. Atherley on 1 February 2015. The

<sup>2</sup> Paras 22-25 at page 6.

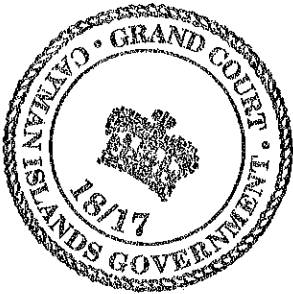


*charges were signed by the Applicant on 5 February 2015. Each of these charges contains a note indicating that the Applicant was advised on 9 February 2015 that she was being remanded on these charges.*

25. *In breach of Regulation 3(3)(c) the hearing in respect of all of these charges did not commence until 26 March 2015, nearly 2 months after the Applicant had signed the first of these charge sheets.”*

9. The Respondents accept that the Applicant was not handed the charges within the twenty four hours of them being signed but state that the hearing dates were initially scheduled within the 8 day time frame of Regulation 3 of the Regulations and that these were deferred due of the non-availability of the parties. The Respondents submit that it was more prudent to adjourn the hearing to dates when all necessary persons were available.
10. The Applicant submit that the effect of the non-compliance with the time stipulations in the regulations leads to the result that the disciplinary hearing was time barred, that the Director therefore acted unlawfully and ultra vires his powers in proceeding with the hearing notwithstanding the lapse of time and consequentially, that the hearing and decisions which flow from those illegal proceedings have no legal force and are null and void.
11. The Applicant has not submitted to this court that she has been in any way prejudiced by the adjournment of the hearing from the dates originally assigned for such hearing. While the non-adherence to the time stipulations in the Regulations should not be ignored, it is not every failure to adhere to such stipulations that will result in a decision or in this case, a hearing, being found to be null and void as a result thereof.

12. In *O'Reilly v Mackman*<sup>3</sup>, Lord Diplock set out the principle to applied as follows:



*“Where the legislation which confers upon a statutory tribunal its decision-making powers also provided expressly for the procedure it shall follow in the course of reaching its decision, it is a question of construction of the relevant legislation, to be decided by the court in which the decision is challenged, whether a particular procedural provision is mandatory, so that its non-observance in the process of reaching the decision makes the decision itself a nullity, or whether it is merely directory, so that the statutory tribunal has a discretion not to comply with it if, in its opinion, the exceptional circumstances of a particular case justify departing from it.”*

13. The authorities have refined these principles. In *R v Immigration Appeal Tribunal v Jeyanthan*<sup>4</sup> Lord Woolf MR, approached this issue as follows:

*“In the majority of cases it provided limited, if any, assistance to inquire whether the requirement is mandatory or directory.*

...

*I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test.”*

14. He went on to offer an approach of the court asking itself relevant questions the advantage of which was that they *“should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction and directory which do not.”*

*“(1) Is the statutory requirement fulfilled if there has been substantial compliance in the case at issue even though there has not been strict compliance?*

...

*(2) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case?*

...

*(3) If it is not capable of being waived or is not waived then what is the consequences of non-compliance?”*

<sup>3</sup> [1983] AC 237, at 275H -276 A

<sup>4</sup> [2000] 1 WLR 354

15. I have considered the Regulations with the approach adopted by Lord Woolf. Regulation 3 (1) is essential to alert an officer that a charge has been made against him. There is no challenge to the fact that the charge sheet specified the charge and particulars so that the Applicant was not in doubt as to the precise nature of the charge against her and it is a fact that the Appellant was able to confirm receipt of the charge and to return it within the eight days as required by Regulation 3 (3). As stated above, there is no issue of prejudice here. There has been substantial compliance with the Regulations as a whole.

16. It is to be noted that there was no challenge to this issue of a lag in the time from the charge being signed to when it was first handed to the Applicant at the disciplinary hearing itself.

17. Given the nature of the issues raised on the hearing itself and that the hearing was held within a reasonable, the non-compliance complained of can and should be waived in all the circumstances of this case. The statutory requirement to alert the officer to the charge within a short time of it being signed was fulfilled. I am not persuaded that the lapse in time was such as to render the proceedings a nullity.

18. This ground of review fails.

## **GROUND 2 – NON-OBSERVANCE OF THE STATUTORY PROCEDURE**

19. The applicant submits that the 3<sup>rd</sup> Respondent unlawfully established a panel to hear the disciplinary charges against the Applicant, that this was an illegal panel.

20. *The Prisons Law* (hereinafter “*the Law*”) at Section 7 (a) states:



“7 The Commissioner shall be in charge of the service and shall be responsible for all prison buildings, fittings, accoutrements and stores, whether consumable or non-consumable and the accounting therefor (sic) and in addition –

(a) Shall be responsible for the discipline and good order of officers and prisoners;

(b) ....”

21. Further Section 7A – which is s.8 of *The Imprisonment (Amendment) Law, 1981*, states:

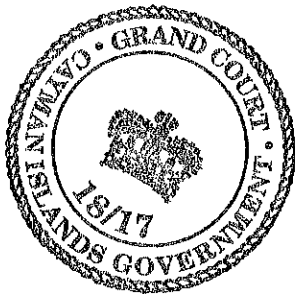
“8. The principal Law is amended by inserting the following new section immediately after section 7 –

*Power of the Director to Delegate.*

7A. The Director may delegate the exercise or performance of any of the several powers and duties conferred or imposed by this Law, except the power –

(a) To hear an appeal by an officer against a disciplinary award;

(b) To make a disciplinary award involving dismissal or reduction in rank.”



22. The Applicant contends that the Director convened a panel of three persons to try the disciplinary charges against the Applicant in contravention of these sections of the Law and the Regulations as there is nothing in either of these provisions which empower him to establish a panel to hear disciplinary matters.

23. The Respondents argue that the 3<sup>rd</sup> Respondent heard the disciplinary matter and made the decision in relation to same. While they agree that there were other persons present at the disciplinary hearing, they contend that these persons were not part of the deliberation and that there was nothing untoward about having other persons present at the hearing. The Respondents directed the Court’s attention to the affidavit of Raquel Solomon, the Human Resources Manager. In her affidavit, Solomon states as follows:



"15. On or about 26 March 2015, I attended the adjudication hearing as requested by the then Director of Prisons, to take notes of the proceedings. The then Director of Prisons, Mr. Neil Lavis, conducted the disciplinary proceedings in relation to the Applicant and informed the Application that he found that the charges against the Applicant were proved; and the said hearing was adjourned for the decision of the penalty or disciplinary award and the Applicant was informed as such. The Staff Adjudication stated that the Adjudicating Officer was the Director of Prisons, Mr. Neil Lavis. A true copy of the minutes of the Adjudication Hearing dated 26 March 2015 is now produced and exhibited hereto as Exhibit 'R.S.8'.

16. The adjudication hearing resumed on 13 April 2015 and the then Director of Prisons informed the Applicant that her employment was terminated in accordance with regulation 6(1)(i) of the Prison Officers (Discipline) Regulations (1999 Revision). A true copy of the resumed adjudication hearing dated 13 April 2015 is now produced and exhibited hereto as Exhibit 'R.S.9'.

17. When the hearing resumed on 13 April 2015. Mr. Lavis informed the Applicant of the decision to dismiss the Applicant and noted that staff is assigned the care and custody of. A prisoner, who had demonstrated significant risk of self-harming, and not making the relevant checks, and falsifying the documentation was grossly dishonest, but in doing so the life of a prisoner was put in danger and the actions of the Applicant demonstrated a lack of integrity and the trust between the organization and the applicant was lost..."

...

24. The panel did not conduct the disciplinary proceedings nor did it have any role in the said disciplinary proceedings or the decision making process. The then Director of Prisons made the decision that the charges were proved and the decision to dismiss the Applicant. The other members of the panel were merely present for the disciplinary hearing."

24. The 3<sup>rd</sup> Respondent's affidavit is relevant here. Mr. Lavis gave an explanation for the presence of the other persons at the hearing and I quote from his Affidavit:



- “7. *At the Adjudication Hearing I had both the Charging Officer Mr. Stephen Atherley and Remanding Officer Mr. Marlon Hodgson as witnesses in support of the charges laid. I also required Ms. Raquel Solomon, the HR Manager to take a written record of the proceedings. Further in attendance, as a witness, was Mr. Peter Foster, a Custodial Manager. The Applicant was present along with her two attorneys, Mr. Dennis Brady and Mr. Crister Brady and representations were made by Mr. Dennis Brady on behalf of the Applicant which was a plea in mitigation. The panel did not conduct the disciplinary proceedings nor did it have any role in the said disciplinary proceedings or the decision making process. I made the decision that charges are proved and I made the decision to dismiss the Applicant. The other members of the panel were merely present for the disciplinary hearing.*
8. *After hearing the evidence and reviewing the CCTV footage and taking into account the Applicant’s submissions of mitigating factors, I determined that the charges against the Applicant were proven. I informed the Applicant of my decision to dismiss her and the reasons for reaching the decision. I explained that the staff was assigned the care and custody of a prisoner, who had demonstrated significant risk of self-harming and not making the relevant checks and falsifying the documentation was grossly dishonest, but, in doing so the life of a prisoner was put in danger and the actions of the Applicant demonstrated a lack of integrity and the trust between the organization and the Applicant was lost. The Applicant was advised of her right to appeal to the Governor.”*

25. In a letter dated the 31<sup>st</sup> March 2016 to Her Excellency the Governor the 3<sup>rd</sup> Respondent addressed this issue as he sought to address matters raised in the Applicant’s appeal to the Governor. With regard to issues surrounding “irregularities or illegalities” with the Panel the Director stated:

- “1. *Panel*  
*Although there were others present at the hearing, they are there to provide support and ancillary services. Mr. Foster represented the charging officer in Ms. Scott’s hearing that is the officer who actually laid*



*charges against Ms. Scott by the authority of the Prison Officers (Discipline) Regulations. Once charges are laid, it is my responsibility to hear those charges, evidence and any mitigating factors and decide whether the charges are proven and an award. Ms. Solomon was also present and as the Human Resources Manager, provides me with guidance on the law, policy and procedural correctness. Ms. Solomon also provides recording services during these hearings. Mrs. Range was present as the Deputy Director responsible for HMP Fairbanks and has been heavily involved in the investigation of the matter. I asked her to be present to provide evidentiary material as needed.*

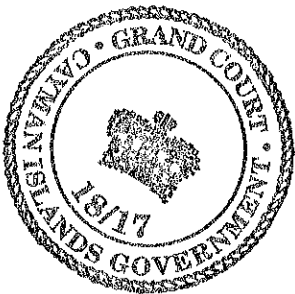
*Further the Prison Officers (Discipline) Regulations are silent on the actual content and logistics of a hearing. Despite others being present, I can state unequivocally that the decision made during Ms. Scott's hearing was mine and mine alone. Although I may have heard input from those in attendance, I alone decided on the charges and the award."*

26. The Applicant was represented by two attorneys at the disciplinary hearing. There is nothing appearing on the minutes to indicate that they made any objection to other persons being present at the hearing nor is there any indication that they addressed these other persons or were addressed by the other persons present, matters which may have shown that the other persons present had some role other than that indicated by the Director in his affidavit at paragraph 7 above.
27. The Regulations do not stipulate that a Panel is to be established for a disciplinary hearing but it also does not state that a panel *in the form and for the purposes* as outlined by the Director is prohibited or precluded. The Applicant has not presented any evidence to show that by dint of constituting a "panel" that the 3<sup>rd</sup> Respondent transferred any of his obligations or duties on to the Panel in relation to the disciplinary hearing.
28. The Applicant further contends, in relation to the issue of the Panel, that the Director was not entitled to hear input from other persons and that in doing so he took into consideration matters which he ought not to take into account, that "the Applicant had no way of knowing what those

views were, the time and place at which they were expressed and was not therefore given the opportunity to respond to them.”

29. It is not clear from the Director’s statement the extent of the input made by other persons. Ms. Solomon stated that she attended to take notes of the proceedings. There is nothing in her affidavit to indicate that she had any further role than that of note taker.

30. In her affidavit she also confirmed the role of Mr. Atherly during the hearing. At paragraph 21 of her affidavit she deponed:



*“The statement read by Mr. Stephen Atherley was simply the charges laid out on the charge form and the summary of his findings from the investigation which were made available to the Applicant. There were no new details included and the Applicant on the same charge form, agreed to the details of the charge. The Applicant or her attorneys never requested to cross examine Mr. Atherley. Mr. Atherley merely read the charges.”*

31. Similarly, the 3<sup>rd</sup> Respondent’s affidavit’s confirmed that the panel did not conduct the disciplinary proceeding nor did it have any role in the said disciplinary proceedings or the decision-making process.

32. While the Director’s statements may seem, at first glance, to be difficult to reconcile, it appears to this court that the Director’s statement in the letter of 31 March 2016 should be read in full context. In addressing the allegation of irregularity, he maintains and explains the role of the other persons present. It is in that context, their stated roles that the note of “input” is made. It is immediately followed by his indication that he alone decided on the charges and award. While it may have been an unfortunate term or word to use at that point, there is nothing in any of the evidence to indicate that there was any input by any of the other persons present at the hearing or

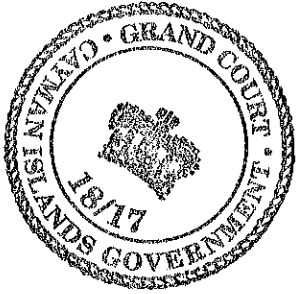


on the Panel other than that indicated by the Director. There is nothing to substantiate the Applicant's submission that the Director delegated his duties to the Panel.

33. This ground of review fails.

### **GROUND 3 - BREACHES OF NATURAL JUSTICE – PROCEDURAL IMPROPRIETY**

34. The Applicant took issue with several aspects of the procedure followed by the 3<sup>rd</sup> Respondent. These relate to matters which took place after the disciplinary hearing on the 26<sup>th</sup> March 2015, when it was found that the charges had been proved, and the decision on penalty was adjourned. The notes of the hearing state that the 3<sup>rd</sup> Respondent adjourned the hearing - *“The Director deferred a decision of an award pending further review of the CCTV footage, hearing the cases of the two other officers being charged and any legal advice he could solicit on the matter.”*
35. When the hearing resumed on the 13 April 2015, the 3<sup>rd</sup> Respondent stated that he had heard the evidence in the case against all three Prison Officers charged, had reviewed relevant CCTV footage to confirm the evidence presented and had sought advice on the case.
36. Firstly, the applicant argues that neither she nor her attorneys were privy to the evidence that the Director had reviewed *“despite the fact that such evidence had clearly informed the Director’s decision.”* The applicant argues that the Applicant was therefore “not afforded an opportunity to view or respond to evidence which had influenced the Director’s decision making and that such failure was a breach of natural justice.



37. The second limb of the Applicant's argument on procedural impropriety and breach of natural justice is directed at the 3<sup>rd</sup> Respondent's failure to alert the Applicant that he was considering her dismissal. The Applicant submits that the 3<sup>rd</sup> Respondent was obliged to have:

- a. Given her notice of the fact that he was considering dismissing her as a result of the convictions for disciplinary offences;
- b. Stated the reasons why he felt that dismissal was necessary;
- c. Given her a proper opportunity to respond to those reasons; and
- d. Considered Ms. Scott's response in a fair and unbiased manner (prior to making a final decision) in order to determine what effect, if any, the response had on the merits of the reason for contemplating dismissal.

38. Third, that the 3<sup>rd</sup> Respondent should have given the applicant an opportunity to address him on an appropriate penalty in all the circumstances.

39. The Fourth failing complained of on the part of the 3<sup>rd</sup> Respondent was that he did not consider mitigating circumstances raised by the applicant's attorneys at the disciplinary hearing leading to a charge of neglect to take relevant matters into account.

40. The chronology of the hearing record is pertinent evidence on this ground. The Notes record:

*"NL: Ms Scott, you now have the opportunity to state your case.*

*DB: Ms. Scott did not seek legal representation because she denies the charges against her. She in fact fully accepts the charges. However, she challenges the wording of the charge 'neglect of duty without good and sufficient cause'. On the evenings in question, Ms. Scott was not well. But as a conscientious employee, she felt that it would be better to self-medicate, attend work and not inconvenience her colleagues by reporting sick for her shift. Ms. Scott felt that the medication would help as it had in the past. She was confident that she would be able to perform her*



*duties as expected. It was not her intention to neglect her duties and I submit that a lack of intention negates the claim of negligence. Ms. Scott underestimated the effect of the medication. However, she continued to work.*

....

*On the evening of January 6<sup>th</sup>, Ms. Scott made her initial checks upon arrival.*

....

*Her decision to 'fix' the situation of not having made the required checks because of the effects of the medication by making entries into the books was ill-advised. Ms. Scott is ashamed of her decision and action and apologizes for it. In hindsight, Ms. Scott should have left the books blank versus making a false entry.*

*...We ask that Ms. Scott be given credit for accepting the charges and her conscientious efforts to minimize the impact reporting sick would have caused.*

....

*We ask that you consider giving Ms. Scott the minimum award for this charge to deter similar actions amongst staff but at the same time considering Ms. Scott's mitigating circumstances.*

*NL: Ms. Scott, why didn't you inform anyone of your illness?*

*AS: I informed Mrs. Range at the end of December. This is something that has been going on a long time. I took medication on the 3 nights that I worked.*

*NL: Did you inform anyone that you took medication and the effects?*

*AS: No. The illness was the result of the weather change, causing chest congestion etc.*

*NL: Did you inform anyone that you were unable to make the required checks?*

*AS: No.*

*NL: After the first night and your inability to make checks why did you continue?*

*AS: I don't trust my coworkers. I didn't want anyone to think that I was calling in sick because I had previously applied for annual leave and was denied and so this was reactive.*

#### Decision

NL: *Ms. Scott, as you've admitted to failing to conduct prescribed checks and entering false statements in the Occurrence Book and ACCT booklet for Prisoner T. Butler, I find that the charges have been proven.*

Submissions – Mitigation

NL: *Do you have any further comments, submissions that may be considered mitigating factors?*

DB: *Our initial submissions have been presented. In addition, Ms. Scott didn't inform anyone of her illness, the medications and her failure to do checks because she feels that she is not treated fairly at work. She says that she is treated differently from everyone else, that she is treated harshly, unwarranted and unreasonably. Ms. Scott doesn't want to be seen as a complainer.*

*Ms. Scott mentioned her medical issues to Mrs. Range but it was not a new issue, reoccurring.*

*Ms. Scott has worked whilst ill in the past and received no complaints about her performance.*

Director's Consideration:

*The Director deferred a decision of an award pending further review of the CCTV Footage, hearing the cases of the two other officers being charged and any legal advice he could solicit on the matter.*

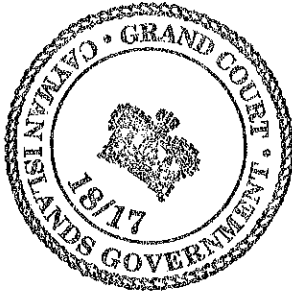
*The hearing was adjourned until Friday, March 27<sup>th</sup>.*

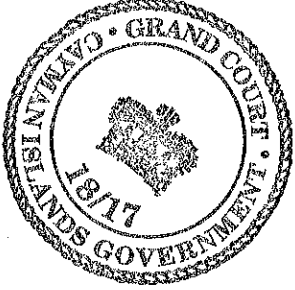
*The hearing was further adjourned until further notice on Friday, March 27<sup>th</sup>."*

**THE CCTV FOOTAGE**

41. With regard to the 3<sup>rd</sup> Respondent's viewing of the relevant CCTV footage this was an issue that was referred to and ventilated prior to the date of the hearing during. Solomon states in her affidavit:

*"22. Prior to the disciplinary hearing a copy of all the evidence was provided to the Applicant with the exception of the CCTV footage which requires specific software to view. I informed the Applicant before the disciplinary hearing that she may view the CCTV footage using required equipment but she declined to do so. It appears that nothing on the CCTV footage was in*





*dispute by the Applicant and the Applicant did not request to review the CCTV during the disciplinary hearing.”*

42. There was no challenge to Solomon’s evidence at the hearing before me. There was no indication the CCTV footage was being challenged during the course of the hearing nor was any request made during the hearing to view the footage as would have been the Applicant’s right. Further there is nothing to indicate that there was some other CCTV footage to which the 3<sup>rd</sup> Respondent may have directed his attention in this matter. The Applicant had already admitted to the charges and the 3<sup>rd</sup> Respondent had found those charges proved. His indication was that he adjourned to further review the CCTV footage. Upon resumption he indicated that he had “*reviewed the relevant CCTV footage to confirm the evidence presented.*” The applicant was given an opportunity to view the footage.

#### **MITIGATION**

43. There is a clear indication from the Minutes of the Hearing that the applicant was given an opportunity to present mitigation and that she did so. At this juncture the Applicant was represented by two attorneys and they were then present. There is no reason to doubt that the 3<sup>rd</sup> Respondent considered these mitigating circumstances when he arrived at his decision on the penalty. In his affidavit of Lavis states:

“8. *After hearing the evidence and reviewing the CCTV footage and taking into account the Applicant’s submissions of mitigating factors, [emphasis mine] I determined that the charges against the Applicant were proven. I informed the Applicant of my decision to dismiss her and the reasons for reaching the decision. I explained that the staff was assigned the care and custody of a prisoner, who had demonstrated significant risk of self-harming and not making the relevant checks and falsifying the documentation was grossly dishonest, but, in doing so the life of a prisoner was put in danger and the actions of the Applicant demonstrated a lack of integrity and the trust*



*between the organization and the Applicant was lost. The Applicant was advised of her right to appeal to the Governor.”*

44. The affidavit evidence of the Applicant is also relevant here. In her affidavit at paragraph 20 the Applicant stated:

*“20. At the disciplinary hearing I expressed remorse through my counsel. I did not deny the allegations made against me but I explained that the neglect of duty arose because I had been unwell and suffered from side-effects of medication that I was taking at the time.”*

These statements confirm that the Applicant was given the opportunity to and did make representations to the 3<sup>rd</sup> Respondent during the course of the disciplinary hearing.

45. Further evidence of the opportunity to present mitigation is found in the 3<sup>rd</sup> Respondent’s letter to the Governor:

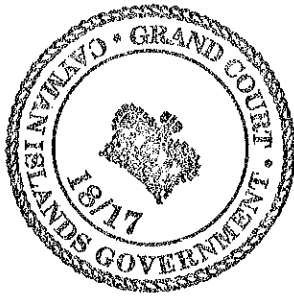
*“Notice of Termination*

*As the hearing held is not a formal legal proceeding nor am I a legal professional, I can agree that there may be common law and precedents which I am not aware of. I did inform Ms. Scott that the charges against her were proven after a recess to consider and gave her the opportunity to respond. Ms. Scott, as an officer of the Prison Service is trained in the details of the various Prison Laws and is well aware of the possible consequences of proven misconduct.*

*Ms. Scott had an opportunity to consider the proven charges and to my best recollection, it was discussed with her at the hearing that termination was an option in awards.”*

**PENALTY/AWARD**

46. The 3<sup>rd</sup> Respondent had a number of options open to him with regard to the penalty to be instituted once he found the charges against the Applicant had been proved. The Regulations state that the following:



*"33. Section 6(1) of the Regulations sets out a range of options available to the Prison Director following the conviction of an officer on a disciplinary charge(s). Section 6(1) states;*

*"If the charge against the accused officer is proven, the Director may award the guilty officer any one or a combination of not more than three of the following punishments:*

- (a) Caution;*
- (b) Reprimand;*
- (c) Surcharge in respect of any loss sustained;*
- (d) Fine not exceeding fifty dollars from pay;*
- (e) Reduction in rank;*
- (f) Forfeiture of increments due over a twelve-month period;*
- (g) Special probation for a period not exceeding twelve months;*
- (h) Requirement to resign as an alternative to dismissal; and*
- (i) Dismissal"<sup>5</sup>*

47. This Court agrees with the Respondents submission that the Applicant and her legal representatives must have been aware of these options at the time that they were invited to present submissions in mitigation after the charges were found to have been proved. Dismissal was one of the options open to the 3<sup>rd</sup> Respondent. There is no obligation upon the 3<sup>rd</sup> Respondent to provide a further forum to the Applicant to present other submissions at this juncture. The Applicant had been given an opportunity to present mitigating circumstances in light of the finding that the charges were proved.

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<sup>5</sup> Prison Officers (Discipline) Regulations (1999 Revision), Section 6

48. The notes of the Minutes set out at paragraph 37 above show that the Applicant's attorneys did turn their minds to and address the matter of an appropriate award. The record of the Minutes show that the Applicant's attorney Mr. Dennis Brady stated:



*"We ask that you consider giving Ms. Scott the minimum award for this charge to deter similar actions amongst staff but at the same time considering Ms. Scott's mitigating circumstances."*

49. This ground of review fails.

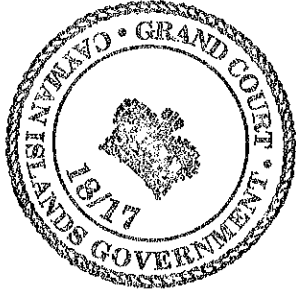
#### **GROUND 4 - MISDIRECTION ON THE APPLICABLE LAW**

50. At the time that the 3<sup>rd</sup> Respondent gave his decision on the 13 April 2015 the record indicates that *"Mr. Lavis stated that he had no other recourse but to terminate Ms. Scott's employment with the Prison Service."* The Applicant argues:

*"43. The Applicant submits that the Director misdirected himself in law by stating he had no other option. The Director failed to take into consideration matters that he should have taken into consideration, namely whether any of the alternative penalties were appropriate and if not, why not. The Director's failure to direct himself in accordance with the law was a material misdirection which renders the sentencing process and the resulting decision unlawful."*

51. This submission appears to have been made without taking into account the full context in which the 3<sup>rd</sup> Respondent's statement that *"he had no other recourse"* was made. The statement was made at the end of the 3<sup>rd</sup> Respondent's reasons for his decision. Having set out the route by which he had arrived at his decision as to which award under Regulation 6(1) he considered to be appropriate in the circumstances, he then made the statement that he did. In his letter to the

Governor in response to the matters raised on the Applicant's appeal, the 3<sup>rd</sup> Respondent, after setting out how he came to his decision went on to say:

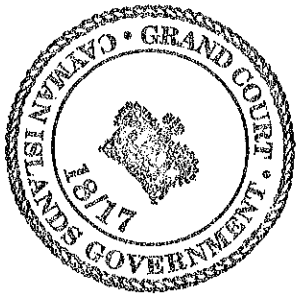


*“As the Director of Prisons, it was my decision that the only suitable award for Ms. Scott’s actions, despite her apology after her actions were discovered, her claims that she was unwell and her assurances that such would not reoccur, was termination of her employment on the grounds that she could no longer be trusted to act responsibly as an officer of this service. A repeat of this action could not be tolerated.”*

52. There is weight in the Respondent’s submission on this Ground that the statement: *“The decision made to terminate Ms. Scott was the only recourse”* implies that other options were considered. This is also reflected in the process of reasoning described by the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent did not misdirect himself on the applicable law.
53. On the question of misdirection of the applicable law, the Court must consider whether the 3<sup>rd</sup> Respondent applied the wrong legal test to the facts. The facts of this matter do not lend themselves to any finding that the 3<sup>rd</sup> Respondent misapplied the applicable law.
54. This ground of review fails.

#### **GROUND 5 – IRRATIONALITY - UNREASONABLENESS OF THE PUNISHMENT**

55. The next ground relates to the 3<sup>rd</sup> Respondent’s decision or conclusion that there was a breakdown of the trust between the organisation and the employee leading to dismissal. The Applicant contends that this decision and the Director’s conclusion that Ms. Scott could no longer be trusted to act responsibly and that a repeat [of her actions] could not be tolerated *“are*



*irreconcilable with the Director's decision to entrust Ms. Scott with precisely the same duties between the date the charges were laid and the date she was dismissed."*

56. The Applicant complains that the 3<sup>rd</sup> Respondent's actions in commencing the disciplinary hearing 7-8 weeks after the Applicant was charged and/or his failure to place the Applicant on suspension pending the hearing or to subject her to additional supervision make it "inconceivable" that the Prison Service did not or could not trust Ms. Scott during this period. For this reason, the Applicant submitted that the reasoning offered by the Director was fundamentally flawed and this rendered the decision to terminate irrational and unreasonable.
57. The Applicant did not admit all the charges before the date of the disciplinary hearing. A disciplinary hearing was therefore found to be necessary. It is not the action of the 3<sup>rd</sup> Respondent previous to the decision under review that this court must consider. That the 3<sup>rd</sup> Respondent did not suspend the Applicant in the interim is not in this Court's mind a relevant consideration in determining whether the reasons advanced by the Director after hearing all the evidence and having taken all relevant matters into consideration was reasonable or not in all the circumstances. There may well have been a complaint had the Director suspended the Applicant before the disciplinary hearing.
58. The court is mindful of its role upon this judicial review application. On the issue of irrationality, the court must consider the decision made in the context of whether or not relevant circumstances were properly considered or whether irrelevant considerations influenced the mind of the decision maker.

59. To this end the 3<sup>rd</sup> Respondent's further indication of his reasons for arriving at the penalty that he determined was the most suitable penalty in all the circumstances must be carefully considered. His explanation was detailed in the record of the proceedings:

*"Mr. Lavis reconvened the hearing to announce the penalty for the 6 charges laid against Ms. Scott alleging that she was negligent of her duties and falsified documents while on duty on the 22:30 – 06:30 shift, January 6, 7 and 8.*

*Mr. Lavis explained the delay in the (sic) resuming the hearing. He heard the evidence in the charges against all 3 persons being charges from the investigation. He reviewed to (sic) relevant CCTV footage to confirm the evidence presented. And, he sought advice on the case and the circumstances presented during the adjudications.*

*Mr. Lavis considered the seriousness of the charges. The critical question or test is whether the trust between the organization and the employee has broken down beyond repair. In this case, the important responsibility that staff is assigned is the care and custody of a prisoner who demonstrated significant risk of self-harming. Not making the required checks and falsifying the documentation to avoid detection was grossly dishonest but in doing so, the life of a prisoner was put in danger.*

*Mr. Lavis stated that the facts are that Ms. Scott failed to make the proper checks and specifically the prisoner on ACCT Regime as required. She then proceeded to document that the checks had been done and false statements of findings entered. These actions on Ms. Scott's part demonstrate a lack of integrity and the trust between the organization and Ms. Scott had been lost.*

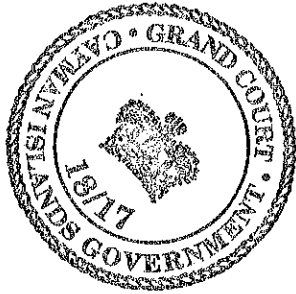
*Mr. Lavis stated that he had no other recourse but to terminate Ms. Scott from employment with the Prison Service."*

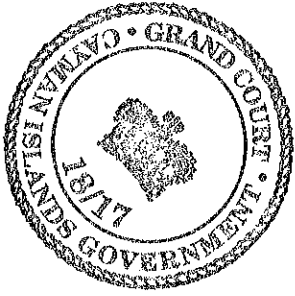
60. In his reply to the Governor's query the 3<sup>rd</sup> Respondent stated explained further.

*"Excessive Award*

*The Prison Officers (Discipline) Regulations do give me several options of awards when charges have been proven for any number of offences against the law from minor to major. In this instance, I considered several factors when deciding what was appropriate for Ms. Scott's actions. Ms. Scott committed an offense not just against the Prison Services but also against the profession and against the Penal Code (fraud) but falsifying what is considered a legal document implemented for the purpose of protecting the very lives the prisoners entrusted in our care. Failing to make the required checks on a prisoner who was a serious threat to herself was inexcusable but falsifying a legal document was the action that brought the employment relationship to a point beyond repair.*

...





*As the Director of Prisons, it was my decision that the only suitable award for Ms. Scott's actions, despite her apology after her actions were discovered, her claims that she was unwell and her assurances that such would not reoccur, was termination of her employment on the grounds that she could no longer be trusted to act responsibly as an officer of this service. A repeat of this action could not be tolerated."*

61. In light of these indications of the matters going to his decision, the 3<sup>rd</sup> Respondent appears to have taken into account all relevant matters in arriving at the penalty that he imposed. It is not for this court to assess the relative weight of these relevant or material considerations. I do not find that there is anything that has been presented by the Applicant to come to the conclusion that the decision was irrational in all the circumstances.
62. This ground of review fails.

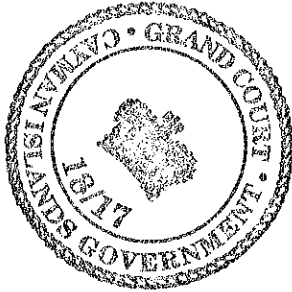
**GROUND 6: THE APPEAL TO THE GOVERNOR – NO PROPER CONSIDERATION/INADEQUATE REASONS**

63. The applicant appealed the 3<sup>rd</sup> Respondent's decision pursuant to Regulation 8 wherein the Governor has a discretion to "*confirm, set aside or vary the finding and confirm, set aside, reduce, suspend or otherwise vary the punishment*".
64. The applicant filed grounds of appeal:
- a. Excessive penalty (in light of the alternatives);
  - b. Unreasonable failure to consider mitigation (service record, full and frank admission and illness at the time of breach);
  - c. Irrational decision to dismiss after Ms. Scott had continued to work for several months after the discovery of the offences; and
  - d. Legitimate expectation that Ms. Scott would keep her job.
65. Other supplementary grounds were also filed for the Governor's consideration:
- e. Illegally constituted "*panel*";

- f. Breaches of procedural fairness at the sentencing hearing;
- g. Unlawful/*ultra vires* termination by Chief Officer;
- h. The Director misdirected himself in law (in relation to the penalties available);  
and
- i. Failure to take into account mitigation.

66. Her Excellency the Governor dismissed the Applicant's appeal. The full text of her letter conveying her decision is set out below:

*"I would like to thank you for sending through your written representations regarding your appeal against the Director of Prisons' decision to dismiss you. I would like to assure you that I have read your representations and all the information which has been provided to me about your case and have considered the matter very carefully.*



*Key aspects of your appeal were based on the proportionality of the punishment that was given by the Director of Prisons and on the process of how the dismissal was conducted. I have decided not to allow your appeal. In making this decision I have concluded that the seriousness of your offences warranted the most severe punishment, and that this was reasonable in the circumstances. I have taken into full account your mitigating circumstances but I do not consider that they are strong enough to allow your employment to be reinstated, even with sanctions.*

*Regarding the other arguments made in your grounds of appeal, I find that your termination was lawful and I am satisfied that your dismissal was not inconsistent with other disciplinary action taken by the Director of Prisons."*

67. The Applicant complained that the Governor's indication of her decision was wholly inadequate – stating as follows:

*"The Governor conveyed her decision by means of a short, one page letter dated 29 June 2016 [RS/24]. The Governor dismissed the appeal. The letter was wholly inadequate and failed in the following respects:*

- a. *There is no evidence that the Governor read, let alone applied, the Prisons Law or Regulations;*
- b. *As a result of "a", there is no evidence that the Governor acquainted herself with:*



- i. *the proper procedure for conducting a disciplinary hearing;*
  - ii. *the duties of the Director;*
  - iii. *the available penalties; or*
  - iv. *the proper procedure for conducting an appeal.*
- c. *Having failed to acquaint herself with the law, there is no evidence that the Governor properly reviewed the actions of the Director and the panel measured against the statutory requirements;*
  - d. *It is not known with any certainty what information the Governor did or did not consider on appeal...*
  - e. *The Governor failed to refer, let alone adjudicate on, the Appellant's complaint that the disciplinary 'panel' was unlawful;*
  - f. *The Governor failed to address the complaint that Ms. Scott had not been given the opportunity to speak to the issue of termination prior to the imposition of the penalty;*
  - g. *The Governor failed to refer, let alone respond to, the complaint that the decision to terminate on the grounds of lack of trust was irrational and inconsistent with the decision to allow Ms. Scott to work for 3 months following the breach of discipline;*
  - h. *The Governor failed to refer, let alone respond to, the complaint that Ms. Scott had a legitimate expectation that she would keep her job in light of the continued trust placed in her to continue work for some 3 months pending adjudication;*
  - i. *The Governor failed to take into consideration the fact that Ms. Scott had continued to work (without incident) as a point of mitigation;*
  - j. *The Governor fails to refer, let alone consider, other sentencing options available under the law;*
  - k. *The Governor failed to set out the mitigating circumstances which she took into account."*

68. The basis underlying this submission is that there was no evidence that the governor had taken reasonable steps to acquaint herself with all relevant material, leading to her not having taken into

account relevant matters to which she should have directed her mind including certain of the grounds of appeal.

69. The Respondents submit that the Governor provided adequate and proper reasons and that the record of appeal indicated the Governor considered all evidence before her, upholding the dismissal after such consideration. The respondents submit that there need not be an exhaustive list of all factors when providing reasons for a decision or that the decision maker deal with every point that has been raised. They conclude that this court should not interfere with the Governor's decision on appeal, there being no evidence that the decision arrived at was so irrational or perverse that no reasonable person would arrive at it.

70. In *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*<sup>6</sup> Lord Diplock set out what is now referred to as the "*Tameside duty*", the duty of sufficient inquiry:



*"the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly."*

71. It has been established that *"it is for the decision maker and not the court, subject ...to Wednesbury review, to decide upon the manner and intensity of enquiry to be undertaken into any relevant factor..."*<sup>7</sup>

72. In this matter the Governor had before her the Applicant's appeal and perfected grounds of appeal. The Governor was also furnished with a letter from the 3<sup>rd</sup> Respondent in which he gave his responses to the matters raised by the perfected grounds of appeal. Her decision references all of these and specifies that she had considered the mitigating circumstances advanced by the

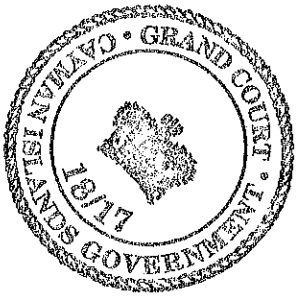
<sup>6</sup> [1977] AC 1014 at Page 1065

<sup>7</sup> R(Khatun) v London Borough of Newham [2004] EWCA Civ 55, per Laws LJ.)

Applicant, the proportionality of the punishment imposed by the 3<sup>rd</sup> Respondent and other matters, “*other arguments made in your grounds of appeal*”.

73. The Applicant’s perfected grounds of Appeal referenced the relevant sections of the Law and the Regulations with which the appeal was concerned. It referenced the options available to the 3<sup>rd</sup> Respondent with regard to the punishment or award as well as the Applicant’s complaints relating to the composition of the panel.

74. It is difficult to conclude that there were further inquiries that the Governor could have undertaken. This is not a matter in which the Governor was being required to make findings of fact as to what had transpired at the disciplinary hearing. She considered the issues raised by the Applicant and responded to these. The duty of fairness dictated that she provide reasons for her decision. There is no requirement that she go into a lengthy examination of all points in detail or to address every point raised. The Governor’s decision was clear and intelligible outlining the reasons therefor. I do not agree with the Applicant that she did not acquaint herself with the relevant law or that she failed to take into account relevant considerations.



75. This Ground of Review fails.

### CONCLUSION

76. The burden of proof on this application is on the Applicant. This court finds that the decision of the 3<sup>rd</sup> Respondent to dismiss the Applicant was reasonable in all the circumstances. None of the grounds of challenge to that decision succeed. The challenge to the Governor’s decision on the Appeal to her Pursuant to Regulation 8 also fails. Consequently, there is no basis for challenge by way of Section 19 (1) of the Constitution. Both decisions are confirmed.

77. The Applicant is represented by way of a Legal Aid Certificate. In the circumstances, the court will make no order as to costs.

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**HON. JUSTICE MARLENE I. CARTER**  
**JUDGE OF THE GRAND COURT (ACTG.)**

