IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G0064/2021

BETWEEN

(1) THE ROYAL CAYMAN ISLANDS POLICE ASSOCIATION
(2) SENIOR CONSTABLE MARK MILLER
(3) SENIOR CONSTABLE RODRICK EVANS

APPLICANTS

AND

(1) THE COMMISSIONER OF THE ROYAL CAYMAN ISLANDS POLICE SERVICE
(2) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

RESPONDENTS

Before	Hon. Justice Kirsty-Ann Gunn (Actg)
Appearances:	Mr G. Dilliway-Parry of Priestleys for the Applicants Mr J. Alcock and Miss M Brandt of the Attorney General's Chambers for the Respondents
Heard:	22 September 2021
Draft Judgment Circulated:	23 November 2021
Judgment Delivered:	8 December 2021

HEADNOTE

Judicial Review – Uniform Shift Policy - Decision to change the way annual leave is calculated – challenge on the grounds of illegality, irrationality and breach of legitimate expectation – legitimate expectation arising from a regular practice

JUDGMENT

1. The Applicants, being the Royal Cayman Islands Police Association and Senior Constables Miller and Evans ("the Applicants"), challenge the decision of the First Respondent, the Commissioner of the Royal Cayman Islands Police Service ("the Commissioner"), to adopt a policy which the Applicants assert reduced officers' annual leave entitlement from that which they had previously enjoyed. The Attorney-General is joined as the Second Respondent by virtue of section 11(2) of the Crown Proceedings Act (1997 Revision) requiring civil proceedings against the Crown to be instituted against the Attorney-General.

2. The decision being challenged is contained in a policy document entitled "*Royal Cayman Islands Police Service: Uniform Shift Policy*" ("the USP") authorised by the Commissioner and published to all police personnel in December 2020 and which came into effect on 1 January 2021. The USP sets out the adoption of an 8-day, 12-hour shift cycle. Officers working to the USP are required to work 2 day shifts, 2 night shifts followed by four rest days. Paragraph 6.1 of the USP provides that constables shall be entitled to 15 days leave per annum. Prior to the introduction of the USP constables had been receiving 22 days of annual leave. The difference in entitlement arises from the way annual leave was previously calculated and how it is now calculated under the USP.

3. The Applicants challenge the decision to recalculate annual leave entitlements for constables on the grounds that it is illegal, irrational and in breach of a legitimate expectation and seek the following relief :

> *"1. A Declaration that the decision and actions of the First Respondent in implementing the USP Revised Leave Calculation in accordance with the Uniform Shift Policy were/are unlawful;*
> 2. *An order of Mandamus that the First Respondents immediately revoke the Uniform Shift Policy as far as it relates to the USP Revised Leave Calculation;*
> 3. *An Order of Mandamus that the policy in place prior to the implementation of the Uniform Shift Policy remains in place;*
> 4. *Damages sustained due to unlawful implementation of the Uniform Shift Policy*
> 5. *Such further, consequential or other relief that this Honourable Court deems just; and*
> 6. *An order that those costs of and incidental to this application be paid by the First and Second Respondents."*

The Factual Matrix

4. I have before me a number of affidavits which are uncontentious. Detective Inspector Gordon's affidavits provides the backdrop to these proceedings as well as an outline of the legislative history of annual leave entitlement for RCIPS shift workers. He exhibits the USP. The USP sets out the shift cycle at paragraph 5–

"The work-day authorised by this policy is 7:00 AM to 7:00 PM for the day shift and 7:00 PM to 7:00 AM for the night shift. The work-day includes a total of 12 hours, including a minimum of one hour of unpaid meal break and two 15 minute rest breaks. Under this policy RCIPS shift-based employees are required to work 44 hours over a period of 8 days, which comprises the shift-cycle. The 8-day shift cycle is made up of 2 days and 2 nights on, followed by four days-off (2+2+4). This shift cycle is a total of 2007.5 hours or 182.5 days of work per year, before extracting holidays or annual leave."

5. The annual leave entitlements are set out in paragraph 6.1 of the USP –

"Personnel Regulations (2019 Revision), Schedule 1, section 5, subsection 1b & 1c require that annual leave days for shift based police officers are calculated as:

- *Inspectors: 210.0 hours per year = 210.0/11 = 19 days per year*
- *Sergeants: 187.5 hours per year = 187.5/11 = 17 days per year*
- *Constables: 165.0 hours per year = 165.0/11 = 15 days per year*

6. Detective Inspector Gordon also exhibited a number of shift rosters for himself as well as Senior Constables Miller and Evans from 2018 to 2021 to illustrate the manner in which leave was calculated in the past.

7. Senior Constable Miller's evidence is that he has been a Police Constable with the RCIPS for almost 40 years and that up until the introduction of the USP he had always received 22 days leave per annum and that it is his expectation that he will continue to receive leave at that rate.

8. Senior Constable Evans stated that he has been a Police Constable with the RCIPS for 20 years and that during this period he has always received 22 days annual leave. It is also his expectation that he would continue to receive that level of leave in future.

9. Commissioner Byrne's first affidavit explains the purpose of the UPS which is to enshrine the 12-hour/8-day shift policy which allows the RCIPS to provide a better service to the community and meet the organisation's overarching goals while at the same time providing

officers with a better work-life balance. He outlines the application of the new shift policy. The Commissioner also sets out the results of the USP survey commissioned by his office. Finally, the Commissioner discloses the methodological foundation for calculating annual leave entitlement under the USP –

> *"The "RCIPS" treats 165 hours/year vacation in the eleven hour a day (shift) system as 15 days (which is calculated by dividing 165 by 11 = 15). This accords with section 5 of the Personnel Regulations (2019 Revision). Section 5(1)(c) specifies hours (not days) for making the calculation. The methodology conforms to the Personnel Regulations (2019 Revision)…*
>
> *The "USP" interprets the Personnel Regulations as 165 hours of vacation per year for police constables which equates to 15 working days per year. Additionally, for every day of vacation that constables receive while on shift, they also receive a day-off. This means that a constable who takes 15 vacation days per year will be on vacation for 30 days. Tellingly the current eleven hours shift rotation (2x2x4) exceeds the Government minimum standard for annual leave allocation by 19 hours. A shift based officer on a 12 hour shift system in accordance with the "USP" will receive similar time away from work on vacation as an officer on the 7.5 hours workday x 5 days per week and 2 days off rotation. These calculations are operative for all ranks who operate the "USP" (with the exception of Chief Inspectors who do not perform shift work). Police Constables on the "USP" work for 5 months and two weeks each year while those who do not work the "USP" work an additional 82 days each year."*

10. The Commissioner's supplemental affidavit exhibits literature speaking to the benefits of the 12-hour shift system.

11. The Applicants have traced the annual leave entitlements back 27 years. The Cayman Islands Government Public Service General Orders as revised on 1st January 1994 provide that constables are to receive 30 calendar days of leave per annum. The General Orders, which came into force on 10 May 2005, expressed leave entitlement in hours, stipulating

constables shall receive 165 hours of annual leave. The General Orders were replaced in 2006 by the Personnel Regulations issued pursuant to the Public Service Management Law. In all versions of the Personnel Regulations up to and including the most recent 2019 revision, they provided that constables shall receive 165 hours of annual leave. Neither the General Orders nor the Personnel Regulations expressly provide for how the allocated hours are to be calculated into days. According to the evidence of Senior Constables Miller and Evans, they have received 22 days annual leave throughout their employment. The Commissioner accepts that under the old regime officers were working 8 hour shifts and annual leave was calculated by a factor of 7.5 hours per day resulting in an annual entitlement of 22 days.

12. In March 2020, the Commissioner first introduced the 12-hour/8-day shift cycle for his officers to manage the policing requirements during the early stages of the COVID-19 pandemic. Between March 2020 and December 2020, constables were working the new cycle while retaining their entitlement to 22 days annual leave. During September and October of that year the RCIPS conducted a survey of shift officers seeking their views on the benefits and disadvantages of the 12-hour shift pattern versus the earlier 8-hour pattern and to assess the overall level of support for a permanent introduction of the new shift policy. The vast majority of officers preferred 12-hour shifts. It is of note that the consultation did not disclose that the USP would alter the manner in which leave was calculated and that the recalculation would lead to a reduction in calendar days allowed. In November 2020 the Commissioner circulated the draft USP to which the RCIPA submitted a reply in December 2020 setting out its objections. The new USP came into effect on 1 January 2021 cementing the new shift pattern together with the revised calculation for annual leave.

13. The Commissioner's case is that because officers are working 12-hour shifts, of which one hour is unpaid for lunch, he was bound to calculate the annual leave entitlement by using a factor of 11 hours per day to comply with the legislation which set the entitlement at 165 hours. The Commissioner also explained that those staff on 7.5 hour 7 day cycle (5-on + 2-off) received a total of 30 days annual leave. In order to ensure equality between shift and static working personnel, those constables on shift receive an additional 15 days 'off' in addition to their statutory (recalculated) 15 days, giving them a total of 30 days off of work.

Mr Alcock accepted that this practice of granting additional 'time off' was not documented in the USP, nor in employment contracts or elsewhere and was not, therefore, guaranteed.

14. Mr Alcock spent considerable time outlining the benefits of the 12-hour shift cycle for business performance as well as the work and private lives of the staff involved. He also drew my attention to the policy statement itself which provides that –

> *"The RCIPS maintains a uniform police presence throughout the Cayman Islands to prevent and investigate crime, respond effectively to incidents relating to safety and security, manage safety in the public space along with other stakeholders and reassure the public. These objectives are pursued within the strategic organisational goal of Securing the Cayman Islands, Ensuring Safer Communities, and Delivering a Professional Service by working with and for our communities to make the Cayman Islands safer. The policy determines how uniform police officers on shifts at police stations, the Police Detention Centre, Government House and the Community Police Department will be deployed to cover the Cayman Islands to deliver the services and responses necessary to achieve the strategic goals."*

15. The Applicants do not dispute that the 12-hour shift cycle has many benefits and do not challenge the lawfulness of the USP in general. Their complaint is limited to the manner in which annual leave is calculated under the USP. A review of the literature which was provided to the court as to the benefits of the new cycle is, therefore, unnecessary. The focus of the judgment will be entirely on whether the manner in which the leave calculation is done under the USP is unlawful, unreasonable or in breach of a legitimate expectation. The Respondents' case is that the use of either method of calculation is reasonable, and that, consequently, it was reasonable and lawful for the Commissioner to choose the one he did. Alternatively, they assert that there has been no representation made to the Applicants or their colleagues which the Commissioner breached.

Illegality and Irrationality

16. Article 19 of the Cayman Islands Constitution Order 2009 provides that -

> *"All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair."*

17. Article 24 governs the duty of public officials which includes the Commissioner –

> *"It is unlawful for a public official to make a decision or to act in a way that is incompatible with the Bill of Rights unless the public official is required or authorised to do so by primary legislation, in which case the legislation shall be declared incompatible with the Bill of Rights and the nature of that incompatibility shall be specified."*

18. Finally, Article 25 provides that -

> *"... where the compatibility of primary and subordinate legislation with the Bill of Rights is unclear or ambiguous, such legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with the rights set out in the Bill of Rights."*

19. The forgoing are fundamental principles and are relevant to how this court considers the Applicant's objections. I will return to consider their impact shortly.

20. It has long been recognised that it is the duty of the court to investigate and scrutinize the circumstances under which an impugned administrative decision was taken. The starting point for the question of irrationality is the well-known decision of **Associated Provincial Picture Houses Ltd v. Wednesbury Corp. [1948] 1 KB 223** in which Lord Green M.R. stated at 230-231–

> *"It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the court can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming ... It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers*

unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind … The effect of the legislation is not to set up the court as the arbiter of the correctness of one view over another. It is the local authority that are set up on that position and, provided they act … within the four corners of their jurisdiction, this court, in my opinion cannot interfere."

21. The law has evolved considerably since the **Wednesbury** decision. In **Council of Civil Service Unions v. Minister for Civil Service** *("*the GCHQ case*")* [1985] A.C. 374 Lord Diplock examined the principles of irrationality and illegality in more depth at pages 410-411 -

"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'….It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standard that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow … of irrationality as a ground for a court's reversal of a decision by ascribing to it an inferred though unidentifiable mistake of law by the decision-maker. 'Irrationality' by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

As for illegality, a succinct and authoritative definition can be found in de Smith, Woolf & Jowell, Judicial Review of Administrative Action, 5th ed., para. 6-001, at 295 (1995)

> *"An Administrative decision is flawed if it is illegal. A decision is illegal if:*
>
> *(1) It contravenes or exceeds the terms of the power which authorise the making of the decision; or*
>
> *(2) It pursues an objective other than that for which the power to make the decision was conferred.""*

22. The legal concepts of illegality and irrationality as enunciated by Lord Diplock in the GCHQ case were adopted by Chief Justice Smellie in **Streeter and K Coast Development v Immigration Board and Governor-in-Council [1998 CILR 366]**. He observed that irrationality and illegality are now separate grounds for review and that "*the test of irrationality is a high and stringent test*".

23. Subsequently, in **Re Hutchinson-Green [2015(2) CILR 75]** the learned Chief Justice considered the issue of irrationality in the context of constitutionally protected rights, such as those which feature in the present case and concluded that a more stringent test applies in such circumstances -

> *"41 Propounding what has since come to be called a "heightened scrutiny test" (see R. (Daly) v. Home Secy. (14) ([2001] 2 A.C. at 547, per Lord Steyn)), an even more stringent kind of judicial activism was encouraged by Bingham, M.R. in R. v. Ministry of Defence, ex p. Smith (12), where, in relation to irrationality, he stated ([1996] Q.B. at 554):*
>
> > *"Mr. David Pannick, who represented three of the applicants, and whose arguments were adopted by the fourth, submitted that the court should adopt the following approach to the issue of irrationality:*
> >
> > *'The Court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.'*
>
> *This submission is in my judgment an accurate distillation of the principles laid down by the House of Lords in Reg. v. Secretary of State for the Home*

Department, Ex parte Bugdaycay [1987] A.C. 514 and Reg. v. Secretary of State for the Home Department, Ex parte Brind [1997] 1 A.C. 696."

42 This duty of "anxious" (per Sir Thomas Bingham, M.R. in Ex p. Smith ([1996] Q.B. at 554–555), quoting from the judgment of Lord Bridge in Bugdaycay v. Home Secy. (5) ([1987] A.C. at 531)) or "heightened" scrutiny, or, as it is further described, the "super-Wednesbury treatment" (per the European Court of Human Rights in HL v. United Kingdom (9)), was recognized by this court in Axis Intl. Ltd. v. Civil Aviation Auth. (3) (2014 (1) CILR 12, at paras. 208–221). It is a duty that will arise depending on the context of the case, so as to place the focus more closely upon the details of the decision-making of the authority whose decision is brought into question. In such cases—which will more readily arise in the human rights context—the court should not necessarily be looking for an extreme degree of unreasonableness, capriciousness or absurdity on the part of the decision-maker before intervening: something less will do (ibid., at para. 213).

24. In the case before this court Article 19 and 24 are engaged and, therefore, the heightened scrutiny test applies.

25. My attention was also drawn to the recent Privy Council decision in **RCIPA v Commissioner of Police and another [2021] UKPC 21** in which the Board reiterated that even a policy made with the best intentions can be irrational. Mr Dilliway-Parry submits that the USP, while intended to provide better working conditions for shift officers, is in fact irrational and therefore unlawful in the manner it seeks to achieve that.

26. As I have already stated, the relevant Regulations do not expressly provide any calculation to be used to convert the 165 hours leave into leave days. Mr Dilliway-Parry submits that on analysis of the historical way in which the leave was calculated demonstrates the intention of Parliament. He started with the initial 30 calendar day entitlement. He explained that this month of leave would include 4 weekends, the same as 8 working days, leaving the equivalent of 22 weekdays to be taken as leave. This is consistent with Senior Constable Miller's evidence that almost 40 years ago he had received 22 days leave per annum. Mr

Dilliway-Parry highlighted that while the General Orders expressed leave in terms of hours for the first time, the Orders did not purport to be substantially changing the entitlement:

> *"Although sections relating to terms and conditions of a civil servant's employment have been rewritten and simplified, the substantive content of these sections is not significantly different from that applying previously" (Preface to General Order (2005 Revision).*

7.5 is the only factor which leads to a round number, namely 22. It is noteworthy that the same can be said of the leave allocations for more senior officers too. Consequently, Mr Dilliway-Parry submits that the legislature had intended the factor of 7.5 to be used to reach the equivalent days as any other conclusion would result in a change of entitlement which was expressly excluded by the General Orders. This rationale would equally apply to the subsequent Personnel Regulations which do not change the leave entitlement. Mr Dilliway-Parry argues that these calculations demonstrate that the legislature had intended a factor of 7.5 to be used and that, consequently, the Commissioner's decision to use a factor of 11 was contrary to legislation and not one which he was authorised to take.

27. Mr Alcock submits that the USP is compliant with the Cayman Islands Constitution Order (2009), the Police Act, the Police Regulations (1996), The Public Service Management Act and the Personnel Regulations. He specifically drew my attention to section 6(1)(c) of the Police Act (2021 Revision) which provides that the Commissioner may make such rules of practice and procedure for the efficient operation of the Act as he deems fit. He argued that in the absence of express legislative provisions as to calculations it was within the Commissioner's discretion, to adopt any method he deemed appropriate when seeking to achieve his overarching objective.

28. I find that the very fact that the leave entitlement is expressed in hours rather than days to be significant; the legislature clearly intended a per hour leave calculation to be adopted and left it open for the Commissioner to determine how that would be applied. If the legislature had intended to maintain the 22 days plus 4 weekends entitlement then there would have been no need to express leave entitlement in hours. The fact that they do so is an acknowledgment that leave should be directly linked to the number of hours worked. By

converting the leave entitlement based on the 12-hour shift pattern, the Commissioner is complying with the plain and unambiguous intention of the Regulations. The Commissioner's decision neither contravenes nor exceeds the terms of his power, nor does it pursue an objective other than that for which the power to make the decision was conferred. There was no need to amend the legislation before the Commissioner issued the USP as he was not seeking to change the law. Consequently, the Commissioner's decision does not meet the *de Smith* definition of illegality. That ground of objection fails.

29. I turn to the question of irrationality. Mr Alcock asserts the Appellant's method as well as the Commissioner's method for converting leave entitlement into calendar days are reasonable. While the results may differ, they are both legitimate approaches and therefore the Commissioner cannot be faulted for proceeding the way he has. Mr Alcock underpins the reasonableness of the decision on the fact that the Commissioner has made arrangements for additional leave to be awarded so as to ensure parity with static workers. As had been conceded by Mr Alcock, these 15 additional days are intended to be available for officers but are not guaranteed in any lawfully binding way. The Commissioner also prays in aid of the facts that during a consultation undertaken with officers in the final quarter of 2020, the overwhelming majority of officers supported the continued use of the 12-hour shift patterns. Mr Alcock argues that the Commissioner's decision is therefore supported by the persons the decision directly affects. Mr Dilliway-Parry pointed out that while the respondents to the RCIPS survey supported the implementation of the USP in principle, the responders were not told that the implementation of the USP would result in a reduction of leave entitlement which may have materially altered their support of the USP.

30. I find that the Commissioner's decision to use a factor of 11 to calculate annual leave falls within the reasonable range of responses in light of the change in shift pattern. He has sought to comply with the strict application of the Regulations. While the USP reduces the number of calendar days afforded by the Regulations this does not in and of itself make the decision unreasonable. Even with the heightened scrutiny test applied, the decision fails to meet the threshold for irrationality.

Procedural impropriety and legitimate expectation

31. Mr Dilliway-Parry argues that the consistent calculation of leave entitlement using a factor of 7.5 (resulting in 22 days annual leave) by the numerous police commissioners over the past 25 years, including Commissioner Byrne, constitutes a representation made by those commissioners to shift workers and over time gave those shift workers a legitimate expectation that they would continue to enjoy this level of entitlement. Mr Alcock submits that no commissioner, including Commissioner Byrne, made an express representation that leave would only be calculated on a factor of 7.5; in the absence of such a representation there could be no legitimate expectation. Mr Alcock observed that while the authorities cited in submissions spoke to the existence of the principle of legitimate expectation, the argument rarely succeeded.

32. In the **GCHQ case** Lord Fraser identified "legitimate expectation" as falling within the third ground of objection, namely "procedural impropriety" and one which the court will protect (at pages 943-944) –

> *"But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law....Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of an authority or from the existence of a regular practice which the claimant can reasonably expect to continue."*

33. Lord Diplock in that same decision set out the principle of legitimate expectation in more detail at page 949 -

> *"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:*
> *(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or*

(b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

34. The Court of Appeal in **R v North and East Devon Health Authority, ex p Coughlan [2001] QB 241** looked at the principle of legitimate expectation in more detail. Lord Wolf MR stated –

"Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."*

35. Lord Woolf then went on to consider the relevance of fairness in the court's considerations –

"71 Fairness in such a situation, if it is to mean anything, must for the reasons we have considered include fairness of outcome. This in turn is why the doctrine of legitimate expectation has emerged as a distinct application of the concept of abuse of power in relation to substantive as well as procedural benefits, representing a second approach to the same problem."

36. Lord Carnwath in **United Policyholders Group and others v Attorney General of Trinidad and Tobago [2016] UKPC 17** reviewed the history of the principle of legitimate expectation and in particular spent some time considering Coughlan. He summed up his review at paragraph 121 in these terms –

"... the trend of modern authority, judicial and academic, favours a narrow interpretation of the Coughlan principle, which can be simply stated. Where a promise or representation, which is "clear, unambiguous and devoid of relevant qualification", has been given to an identifiable defined person or group by a public authority for its own purpose, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reason, judged by the court to be proportionate, to resile from it. In judging proportionality the court will take into account any conflicts with wider policy issues, particularly those of a "macro-economic" or "macro-political" kind."

37. The Grand Court in this jurisdiction has considered the issue of legitimate expectation twice. First, in **Mohanty v Health Practitioners Board [2001 CILR 459]** Smellie CJ found that a legitimate expectation of a future benefit derived from the existence of a regular practice of a public body was a potential basis for judicial review. He concluded, however, that for such a claim to succeed, the earlier conduct had to be attributable to the decision maker from which the future benefit was expected. The second case was **Thompson (T/A Peppa's Production) v Chief Immigration Officer [2006 CILR Note 10]** in which Henderson J confirmed the principle that for a legitimate expectation to be created, there must have been a clear and unambiguous representation on which it was reasonable to rely. In both instances the applications were dismissed.

38. I draw from the various authorities that the initial burden lies on the Applicants to prove the legitimacy of their expectation. The legitimate expectation may arise from a representation, promise or practice which must have been clear and unambiguous and devoid of relevant qualification. Once that element has been proved by the Applicant the onus shifts to the Commissioner to justify the frustration of the legitimate expectation. It is for the Commissioner to identify any overriding interest on which he relies to justify the frustration of the legitimate expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.

39. As I have already stated, the Applicants argue that a 40-year practice of awarding 22 days annual leave whether by virtue of the General Orders or Personnel Regulation constitutes a

representation that the entitlement expressed in the Regulations would continue to be calculated using the factor of 7.5 hours per day. Mr Alcock has argued that no presentation to that effect has ever been made. There is no evidence before this court that the Commissioner or any of his predecessors made an express representation that officers would receive 22 weekdays plus 8 weekend days off. What the Applicants' evidence does establish, which the Commissioner does not dispute, is that there was such a practice in place for some 40 years. The authorities are clear that a regular practice can give rise to a legitimate expectation. In this case, I find that a practice developed over more than 15 year to use a factor of 7.5 to calculate annual leave does give rise to a reasonable expectation, and that the officers did rely on that expectation throughout their employment.

40. The Commissioner does not deny that the strict mathematical calculation using the revised 11 hours per day calculation causes a loss of entitlement "on paper" but points to the granting of an additional 15 days off as evidence that he has acted fairly. By adopting a system whereby, at the Commissioner's discretion, shift officers will be granted 1 day off for every annual leave day taken is inherently an acknowledgment by the Commissioner that officers have a legitimate expectation to be treated the same way as their non-shift working colleagues who receive 30 days annual leave. The Commissioner by his actions is seeking to meet their expectation. However, the Commissioner's intentions do not sufficiently address the shortfall created by the recalculation as he has failed to guarantee the additional time off. By proceeding on a discretionary basis the Commissioner has, in practice, reduced the officers' actual entitlement by 7 days without adequately compensating for the shortfall. An amendment to the Personnel Regulations would have been one way of ensuring that officers still received the intended 30 days off. Another option would have been to include the additional 15 days leave into the USP thereby securing a legal basis upon which officers could then seek to enforce their entitlements. In this case neither was done. The only conclusion I can come to is that the Commissioner's actions of recalculating the leave entitlement did breach Senior Constables Miller and Evans' legitimate expectation without justification and that the result, although well-intended, is ultimately unfair. However, the issue does not end with those two officers. The legitimate expectation that 22 days annual leave would be afforded extends to any shift officer employed prior to 1 January 2021 as they became beneficiaries of this long-standing policy upon joining the RCIPS. The decision to change the formula thereby reducing leave entitlement is, therefore, an abuse of power

and in breach of Article 19 in respect of all officers employed before 1 January 2021. The decision must be quashed and the previous policy reinstated with respect to all officers employed prior to 1 January 2021. Whether officers who joined the RCIPS on or after 1 January 2021 have a legitimate expectation to be treated equally to their colleagues employed prior to that date is beyond the scope of this judgment as it has not be addressed by either party. Consequently, I make the following orders -

It is hereby declared that the decision and actions of the First Respondent in implementing the USP Revised Leave Calculation in accordance with the Uniform Shift Policy were unlawful as it relates to all officers employed prior to 1 January 2021;

It is ordered that the First Respondent immediately revokes the Uniform Shift Policy as far as it relates to the USP Revised Leave Calculation for officers employed prior to 1 January 2021;

It is further ordered that the policy previously in place calculating annual leave using a factor of 7.5 shall be reinstated with respect to officers employed prior to 1 January 2021.

41. I will hear the parties on the matter of damages and costs at a further hearing.

Kirsty-Ann Gunn
Acting Judge of the Grand Court

GRAND COURT CAYMAN ISLANDS