IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. 148 OF 2013

BETWEEN:

SHELLEY WARE

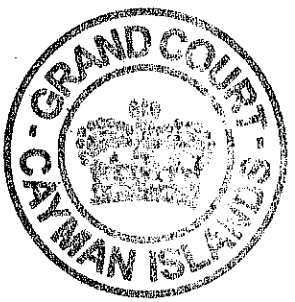
Plaintiff

AND

CAYMAN ISLANDS AIRPORT AUTHORITY

Defendant

Appearances:	Mr. Paul Murphy of Stuart Walker Hersant for the Plaintiff Mr. Edwin Gomez of Ritch and Conolly for the Defendant
Before:	Hon. Justice Richard Williams
Heard:	12 September 2014, 24 February 2015
Additional written submissions	24 September 2014
Draft Judgment circulated:	21 May 2015
Date of Judgment:	27 May 2015



JUDGMENT

Background

1. Ms. Ware was appointed as the Financial Controller of the Cayman Islands Airport Authority ("CIAA") from 16 November 2009. The contract of employment setting out the terms and conditions of the appointment was signed

on 11 November 2009 by Ms. Ware and the then Chief Executive Officer ("CEO") of the CIAA, Mr. Jeremy Jackson. The named parties in the contract of employment were the CIAA and Ms. Ware. Ms. Ware submits that she was employed by the CEO, with the Board's approval on 11 November 2009.

2. The CIAA is established by section 3 of the Airports Authority Law (2005 revision) ("the Airports Law"). The functions of the CIAA are set out in section 5 of the Airports Law. Section 5(4) of the Airports Law states that the CIAA "*shall perform its functions through the Chief Executive Officer.*"

3. The CIAA has a Board of Directors ("the Board") who pursuant to section 10 of the Airports Law are responsible for the policy and general administration of the CIAA's affairs and business.

4. The CIAA contends that the Board delegated its function to Mr. Richard E. Arch, Chairman of the Board of the CIAA, pursuant to section 16(2) of the Airports Law. Therefore, by a letter dated 7 December 2012 Mr. Arch purported to terminate for "*gross negligence*" Ms. Ware's appointment "*in accordance with sections 51 and 52 of the Labour Law (2011 Revision).*" Mr. Arch lists Ms. Ware's alleged breach of trust, failure to disclose to the Board relevant and pertinent information relating to theft and sub-standard management and oversight of the Finance Department as amounting to gross negligence. The CIAA

contend that the decision was made after the Board, pursuant to a duty under section 10(2)(b) of the Airports Law to *"oversee the effective performance"* of the Authority, had carried out an investigation.

5. In the letter Mr. Arch informed Ms. Ware that, pursuant to the Labour Law and clause 3 of the contract of employment[1], she would receive one month's salary in lieu of notice and be paid for any accrued annual leave. He therein stated that she would also be paid severance at the rate of one week's basic wage for each of her four completed years of service.

6. The letter was handed to Ms. Ware at a Board meeting. The CIAA contends she was given an opportunity to reply to the allegations at the meeting but failed to provide an explanation about each of the allegations. Ms. Ware stated in a Complaint to the Director of Labour that she was simply handed a copy of the letter and that no discussion took place. At paragraph 5 on page 6 in her Application for leave she states that she was given no opportunity to respond to the findings of the report or to address the Board of Directors.

7. Pursuant to section 12(1) of the Labour Law (2011 Revision) ("the Labour Law") where an employer has terminated the employee's employment it shall, upon request being made by the employee at any time within fourteen days after the

[1] Clause 3 provides that "the notice period for termination of this contract for either party is 30 days."

termination of the employment, provide him within fourteen days with a written statement of the reasons for its action. The attorneys then representing Ms. Ware made such a request on 20 December 2012. On 4 January 2013 Mr. Kerith McCoy, the then Acting Chief Executive Officer of the CIAA, sent a letter to Ms. Ware entitled "Statement of reasons for termination from the Cayman Islands Airports Authority." In the letter he reiterated the basis of termination which had been set out in the 7 December letter, elaborating on the factual background of Ms. Ware's alleged conduct. Mr. McCoy referred to Clause 15 of the employment contract which provided that nothing in the contract prevented the CIAA from dismissing the employee summarily, without warning, if the employee is guilty of serious misconduct. He concluded that "*although the CIAA sought to rely on Clause 3 of the Agreement as the basis to terminate your employment with the CIAA with notice, it reserves the right to rely on your conduct, described above, as a basis to support a finding of serious misconduct justifying immediate dismissal in any event.*"

8. On 15 January 2013, in accordance with section 54 of the Labour Law and following advice from her then attorneys, Ms. Ware filed a Complaint to the Department of Labour and Pensions. In the Complaint she sought "*compensation for unfair dismissal.*"

9. On 23 January 2013 the Director of Labour and Pensions wrote to the CIAA informing them of the Complaint and Ms. Ware's claim for "*unfair dismissal and any other benefits that she may be entitled to under the Labour Law.*" The Director invited the CIAA to submit the evidential material by 14 February 2013. Regrettably, this letter was not served on the CIAA until 8 February 2013.

10. In accordance with section 75 of the Labour Law, the CIAA sent a detailed written response to the Department on 28 February 2013. In that letter they made it clear that they contested the allegation of unfair dismissal, and contended that if they were wrong, Ms. Ware was not entitled to any compensation as all due payments had been made, including severance.

11. Ms. Ware indicated that in early March she decided to "*sack*" her former attorneys and instruct her present attorneys on 5 March 2013. It is clear that the attorneys took a different view to Ms. Ware's previous attorneys about the nature of any claim and how it should be made. In her affidavit she indicates that she was then advised that the appropriate claim to bring was one for judicial review, something which her previous attorneys had never mentioned to her.

12. On 10 April 2013, just over a month after Ms. Ware had retained her current attorneys, they sent a letter before action containing proposed terms for settlement to the CIAA. In the letter it was contended that the Board had no authority to

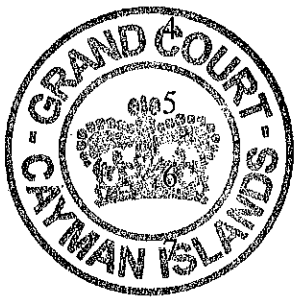
terminate her employment and that she would *"be seeking a declaration that the Board's decision of 7 December 2012 was ultra vires and unlawful."* Interestingly in this open letter her attorney indicated that on certain specified grounds Ms. Ware was willing "*to undertake not to pursue any further court action, including an action at the Labour Tribunal."*[2] This is a clear indication that Ms. Ware still viewed a Complaint in the Labour Tribunal as a possible avenue for redress. The letter demanded a reply within seven days, indicating that if one was not received or if there was a failure to accept proposals of the settlement, an application for judicial review, an application for damages would be issued. It is important to note that this is the first warning of an intended application for judicial review, and it is well outside of the three month period.

13. The attorneys for the CIAA duly responded on 17 April 2013. They pointed out that any claim for judicial review was, having regard to GCR Order 53(4), already "*out of time*" as it had not been filed by 7 March 2013. In the letter they also contended that there was no right to judicial review as the relationship between Ms. Ware and the CIAA was of a private law nature and that no element of public law was involved.

14. Despite the CIAA's refusal of the proposed settlement terms, the attorneys for Ms. Ware did not then issue the proceedings. Instead, almost two weeks later, on

[2] My underlining for emphasis.

30 April 2013, they sent a letter in reply to the CIAA. In the letter they stated that their client had no alternative remedy available save for those under judicial review. It was contended that there was no recourse to the Labour Tribunal, because the client was considered as an employee of the Government. The CIAA were informed that if no indication about entering into settlement negotiations was received from them within four days, namely by or on 3 May 2013, then an application for judicial review would be made without any further notice.

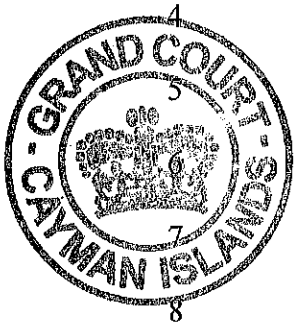


15. On 8 May 2013 Ms. Ware filed and issued an Ex Parte Application for Leave to Apply for Judicial Review of the decision of the CIAA to terminate Ms. Ware's employment, made five months earlier, on 7 December 2012[3] and its decision on 4 January 2013 to reserve the right to dismiss her for serious misconduct. An Amended Ex Parte Application was filed on 12 June 2013. During these proceedings Ms. Ware has concentrated on the earlier decision, contending that if the Court agrees that the decision is susceptible to judicial review then it is unnecessary to consider the latter decision.

16. The Application came before me ex parte on 12 June 2013. Upon reading the papers and after hearing from counsel for Ms. Ware it was evident to me that there were issues as to delay, alternative remedies and whether this was a claim in

[3] The Court has been informed that, despite the content of the amended application, the Applicant does not seek a review of the "(2) Decision to reserve the right to dismiss the applicant for serious misconduct on 4 January 2013 (exhibit SW-2).

private law rather than public law. This concern was expressed in my Ex Tempore Ruling. Having regard to the cases of (i) ***IRC v National Federation of Self - Employed and Small Businesses*** [1981] A.C. 617; (ii) ***R v Secretary of State for the Home department Ex Parte Rukhshanda Begum Ex Parte Angur Begum and Others*** [1990] Imm A.R. 1; and (iii) ***Reg v Camden London Borough Council ex parte Marten*** [1997] 1 W.L.R. 359, I felt it appropriate to adjourn the application to enable the proposed respondent to attend the leave hearing.



17. In the Ex Tempore Ruling I expressed my view that it appeared that Ms. Ware had a sufficient interest. That part of the rules was established to prevent busybodies with no direct interest taking up someone else's case. This is Ms. Ware's own case, she has sufficient standing to bring it.

18. Although a transcript of my written ruling was provided to Ms. Ware's attorney at Court on 12 June, they did not write to the CIAA's attorneys until 27 June 2013 to notify them that the hearing had taken place and about what I had ordered. In the letter they mentioned that, if the Court at the inter-partes hearing was persuaded that a private law remedy existed "*thereby distinguishing an application for judicial review,*" Ms. Ware would still be entitled to an award of damages for breach of contract, presumably in a claim for wrongful dismissal. This again seems to suggest an acceptance at that time by Ms. Ware that there may be an alternative remedy. In written submissions it was contended on Ms. Ware's behalf

that she has no recourse pursuant to the Labour Law. The letter contained a repeated offer of settlement on the same terms, coupled with the threat of seeking costs on the indemnity basis if Ms. Ware was successful in her claim. The CIAA were again given seven days to reply to this letter, failing which the relevant court documents would be issued to enable the application to be brought.

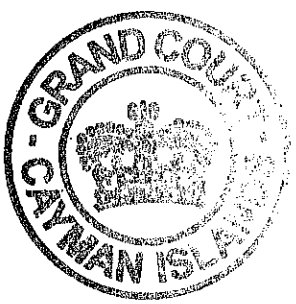
19. The CIAA's attorneys promptly emailed and telephoned Ms. Ware's attorneys on 28 June 2013. An extension of time for a reply was agreed by the parties to enable Mr. Gomez to review the correspondence and take instructions after his return into the jurisdiction on 8 July. The CIAA's attorneys requested a copy of the judicial review proceedings to enable them to consider this Court's suggestion that they may be heard at the permission stage.

20. On 9 July 2013 a further request was made for a copy of the application for judicial review and a note of the hearing. A copy of the transcript of my Ex Tempore Ruling was not provided to the CIAA's attorney until 13 July 2013 when the time for the reply was extended to 19 July. I am not clear why this judgment from a hearing held a month earlier was not provided sooner. Although I accept this was not a case in which an ex parte order had been made against proposed respondents, I am still of the view that best practice determines that a copy of the Ex Tempore Ruling should have been provided much sooner, at the latest with the letter of the 28 June 2013. I should add for future cases that may

come before me, where the Court makes an ex parte order, the applicant is obligated to provide the evidential and other persuasive materials used to obtain the order to the respondent as soon as practicable. Additionally, a proper and full court attendance note of what was put before the Court and said to the Court should also be served.[4]

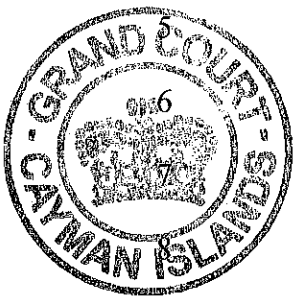
21. On 18 July 2013 the attorneys for the CIAA requested a further extension until 2 August 2013 to enable them to provide an informed reply. On 31 July 2013 Ms. Ware's attorneys wrote back providing some additional information. They also reiterated that the CIAA had terminated their client's contract of employment *"contrary to the terms of the contract*[5] *and/or outside the remit of their authority."*

22. On 7 August 2013 the CIAA's attorneys provided Ms. Ware with a sealed summary of the grounds for contesting the claim. Their attorneys acknowledged receipt of the same and indicated their hope to provide a response of proposed directions by 12 August 2013. On 28 August 2013 Mr. Gomez suggested to Mr. Murphy that the matter be listed for hearing and that the parties should agree the directions.



[4] Re S (Ex Parte Orders) [2001] 1 FLR 308.
[5] Underlining is my emphasis.

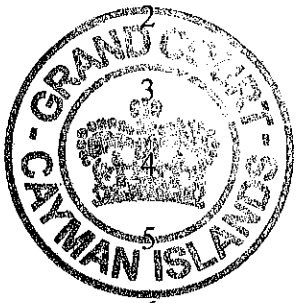
23. Ms. Ware has not moved this case on in an expeditious fashion since August 2013. It was listed for hearing on 5 August 2014, but due to a lack of court time it was vacated and this 12 September 2014 date allocated. Mr. Murphy indicated that if the Court intended to take the period of time post the June hearing into account when considering the issue of delay he wished to make further submissions and provide further documentary evidence which he did not have to hand during the hearing. I indicated that I would not be having regard to it, save that I noted that it could not be submitted that CIAA had done anything to delay the hearing of this matter.



24. Following the hearing, on 17 September 2014 I provided the parties with details of the case of ***The Queen (on the application of) Sharon Shoesmith v Ofstead & Others*** [2011] EWCA Civ 642. I thereafter provided the parties with an opportunity to comment upon the same. Both parties decided they did not wish to make any further oral submissions, but they submitted additional written submissions for the Court's consideration on 24 September 2014.

25. On 24 October 2014 the Applicant filed a Summons seeking leave to adduce and rely upon the third affidavit of Ms. Ware exhibiting a report entitled "AG Report on Statutory Authorities & Government Companies" ('the Report") which had been published by the Office of the Auditor General of the Cayman Islands on 21 October 2014. The application was opposed and regrettably the Summons was not

heard until 24 February 2015. Prior to the hearing date the Court provided the parties with a copy of my judgment in ***AG v Martin Bridger*** Cause No. 486 of 2011 in which I reviewed the case law applicable to such applications and in which I concluded that the three principles in ***Ladd v Marshall*** [1954] 1 WLR at 1491 to be applicable in this jurisdiction.



26. Upon hearing from Counsel, as the Report was published after the permission hearing in September[6], for obvious reasons, the first ***Ladd*** criteria requiring the Court to consider whether the report could have been obtained with reasonable diligence for use at the hearing was met.

27. The Respondent challenges the credibility of the evidence, contending that it is based on the wrong premise that the Applicant was summarily dismissed when having regard to the content of the termination letter dated 7 December 2012. This credibility would be something tested at a hearing, as would the basis upon which the Auditor General reached his conclusion and why he felt it appropriate and within his remit to, in this report, actually deal with Ms. Ware's situation. Unlike most hearings where the ***Ladd*** principles are being considered, this is not a final hearing where the Court makes findings about credibility. Therefore, at any later hearing it may turn out that the evidence is found to be not credible.

[6] I note that a reference was made, in the letters from Ms. Ware's attorney dated 10 April 2013 & 27 June 2013, to the Auditor General's purported preliminary view reported in the Cayman Compass newspaper that the Board had *"overstepped its bounds with regard to management authority employees."*

28. I had to think very carefully about the second criteria about whether the evidence would probably have an important influence on my decision whether to grant leave to apply for judicial review or not. Of course, if leave were given then it would be a matter for the Applicant, even if the evidence was not admitted at this stage, whether she chose to admit it for consideration at any judicial review hearing. I considered that it only just got over that threshold, as it should form a part of the Court's overall review at this early stage, but I made it abundantly clear that I was not fettered by the Auditor General's, on the face of the relevant document, unreasoned opinion.

29. I gave leave for the affidavit to be filed. I indicated to the parties, and they accepted, that the evidence did not impact on the issues of delay or of alternative remedy. I indicated that save for considerations surrounding Mr. Murphy's submissions concerning the Board's decision being ultra vires, it may be of limited significance in relation to whether there is a public law element. I made clear that it may be relevant, if Ms. Ware satisfies the Court about the above matters, as a part of the less in depth review of the evidence as a whole to see if there is an arguable case for granting relief. The parties were given the opportunity to make oral submissions about how that evidence may impact the decision I am required to make.

The Application

30. In the Amended Application dated 12 June 2013 the following orders are sought by Ms. Ware:

(1) an order of certiorari to quash the decision of the CIAA made on 7 December 2012 to terminate Ms Ware's employment;

(2) an order of mandamus requiring the CIAA to:-

(i) reinstate Ms. Ware as financial controller of the CIAA

(ii) remove any finding of misconduct, improper behaviour and/or poor performance from Ms. Ware's employment record;

(iii) pay any salary Ms Ware would have earned between the date of the termination of employment of the date of her re-instatement;

(iv) pay any pension contributions to Ms. Ware's pension provider from the date of the termination of employment to the date of her re-instatement; and

(v) issue a public statement to the effect that, inter alia, the CIAA wrongfully terminated Ms. Ware's employment, that she has been reinstated to her former position, that any findings of misconduct or wrongdoing were incorrect and that she was an exemplary employee.

(3) a Declaration that the CIAA acted ultra vires in terminating Ms. Ware's employment;

(4) a Declaration that the CIAA acted ultra vires in declaring that they would have terminated Ms. Ware's employment for serious misconduct; and

(5) a Declaration that the decision was unreasonable and contrary to the principles of natural justice.

31. In the Application it is claimed that Ms. Ware has suffered loss and damage. A claim is made for:

(i) payment of her salary and pension contributions from the date of the termination of employment to the date of her reinstatement or date of permanent employment in the job with a comparable salary; and (ii) payment of any difference between her salary and pension contributions when employed as financial controller in any position she has undertaken from the date of the termination of employment.

(ii) In the application Ms Ware pleaded the grounds upon which relief is sought as being *"the Respondent was not lawfully entitled to reach the said Decisions and, in so doing, erred in law and in fact, acted, ultra vires, unfairly and procedurally improperly. Further, the said Decisions were unreasonable in all the circumstances."*

32. The application also contains a claim for damages for defamation, contending that a report containing defamatory statements prepared by the CIAA was disclosed by someone in the CIAA to a Member of the Legislative Assembly who went on to disclose its contents to the public. In ***Darkoh-Ageyman v Director of Legal Studies, Cayman Islands Law School, Chief Secretary, Chairman of Public Service Commission and Governor*** 1998 CILR 266 an application was made for judicial review of the decision by the Law School to dismiss the law lecturer and claiming damages for breach of contract. There was also a claim for defamation and it was clear that there were, as in this matter, disputed matters of fact which would need to be resolved at a full hearing. Graham J. stated at page 274 line 10:

".... had I been satisfied that there was a sufficient public law interest to permit this application to proceed, I would in my discretion have refused it on the grounds that the real issues can only properly be determined in the defamation action and the potential wrongful dismissal action. In the defamation action the defendant alleges that the complaints were true, so that the truth of the allegations will have to be determined in those proceedings and/or in the proceedings from wrongful dismissal. It may be that those actions can conveniently be tried together although I express no final view on the matter. What is clear is that those matters could be not resolved in these proceedings."

I share Graham J.'s view, the claim for defamation in the matter before me is not well-suited for judicial review proceedings and is best addressed in a claim by writ.

Submissions Made and the Law

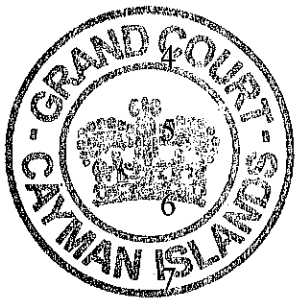
33. I bear in mind that ordinarily leave should be granted if, on the material available to the Court, there is an arguable case for granting relief. However, this hearing is still an integral part of the process, often wrongly viewed by some as being a 'rubber stamping exercise.' It is an important judicial filter introduced right at the outset of what can thereafter turn out to be costly and time consuming proceedings. The purpose of the requirement for leave is to eliminate at an early stage any applications which are frivolous or hopeless and to ensure that the matter only proceeds to a substantive hearing if there is a case fit for

consideration. Unusually, in the leave hearing before me, I received a great deal of detailed argument supported with affidavit evidence from both parties and, in such circumstances, a Court may look to an applicant to demonstrate a reasonably good chance of success in the substantive hearing.

34. The Applicant's case is that her employment was summarily terminated by the Board on 7 December 2012. It is contended that the CIAA must operate within the legal framework provided in the Airports Law. It is argued that Ms. Ware's dismissal was an unlawful exercise of the Board's power, taken contrary to the provisions in that Law and thereby amenable to judicial review.

35. The Applicant's case is that the Board, a statutory authority, was not entitled to dismiss her pursuant to section 51 or 52 of the Labour Law for gross negligence. The Applicant contends that this amounted to an error in law, rendering the Board's decision "ultra vires and/or illegal." The Applicant also contends that section 16(3) Airport Law grants a statutory right of appeal to the Board arising from any disciplinary action. It is submitted that only the CEO is responsible for any disciplinary action such as summary dismissal and it is not for the Board to usurp that function, for they should only get involved on an appeal from the CEO's decision. The Applicant argues that as the decision was taken by the Board rather than the CEO, she had been deprived of any appeal process rendering the Board's decision ultra vires as they did not have the authority to make it. It is

contended that this amounts to a circumvention of the statutory protection afforded to her and/or it was a decision taken on a misdirection in law. The Applicant submits that, as this matter deals with the issue of whether the Board had the authority to make the decision, this is not as Ms. Ware's first attorneys had approached it, a simple employment dispute, and that the CIAA is wrong to contend that there is an adequate alternative remedy flowing from her complaint to the Labour Board.



36. Mr. Murphy in his studious and full written submissions summarises his interpretation of the background as follows. Firstly, it is the CEO who is given a statutory power to employ staff subject to the Board's approval; secondly, the CEO, with the Board's approval, employed her; thirdly, the CEO determined the disciplinary procedures in relation to her and reproduced them in her contract of employment; fourthly the disciplinary procedures provided that only the employer had the power to terminate her or dismiss her; fifthly, the CIAA is not her employer; sixthly, there is no contractual relationship between her and the CIAA and; lastly, the CIAA did not have the power to terminate her contract of employment or dismiss her.

37. Referring to the letter from the Chairman of the Board dated 7 December 2012, Ms. Ware notes that it indicates that the employment was being terminated in accordance with sections 51 and 52 of the Labour Law. Section 51 sets out the

reasons for a dismissal which will be considered to have been for good cause and not unfair, providing that under the circumstances the employer acted reasonably. Section 52 sets out the circumstances in which an employer may terminate summarily for misconduct. The Applicant also points out that the letter stated that the employment had been terminated based on allegations of breach of trust, failure to disclose to the Board relevant and pertinent information relating to theft and substandard management and oversight of the finance department all of which amounted to gross negligence on her behalf. It is submitted that this decision was contrary to the Labour Law and was a misdirection in law.

38. The Applicant highlights that in the letter of 4 January 2013 from the then CEO, written in response to a request for the reasons for her termination, neither gross negligence or sections 51 or 52 of the Labour Law were mentioned. The Applicant contends that the purported reliance placed in the latter letter upon Clause 3 of her contract of employment was a "*cynical attempt*" to try to remedy the error made for the grounds set out in the previous letter. It is suggested that the second letter sought to change the grounds for the dismissal and that it was not possible to dismiss her twice, and therefore the legal basis must be regarded by the Court to be under section 51 and 52.

39. It is submitted on behalf of Ms. Ware that a decision to terminate in accordance with Sections 51 and 52 of the Labour Law for gross negligence is susceptible to

judicial review as the CIAA is a body created by statute. The Applicant relies upon the Privy Council decision in the Cayman case of ***McLaughlin v Governor*** [2007 CILR 321]. That case resulted in what is sometimes now termed a McLaughlin-type order. The Privy Council decided that if a public authority dismissed a holder of a public office [7] in excess of its powers, in breach of natural justice, or unlawfully, that dismissal is "*null, void and without legal effect.*" The Applicant states that the application to apply for judicial review is made pursuant to the same general statement of principle given by Lord Bingham at paragraph 17 when he said:

> *"It is a settled principle of law that if a public authority purports to dismiss the holder of a public office in excess of its powers, or in breach of natural justice, or unlawfully (categories which overlap), the dismissal is, as between the public authority in the office – holder, null, void and without legal effect, at any rate once a court of competent jurisdiction so declares orders. Thus the office/holder remains in office, entitled to the remuneration attaching to such office, so long as he remains ready, willing and able to render service required of him, until his tenure of office is lawfully brought to an end by resignation or lawful dismissal."*

40. The ***McLaughlin*** case was referred to in the ***Shoesmith*** case.[8] The latter case followed the extremely sad circumstances surrounding the death of Baby P in England. Mrs. Shoesmith had been the Director of Children's Services at

[7] Underlining is my emphasis.
[8] See paragraph 26 above.

Haringey London Borough Council when Baby B, who had been on Council's child-protection register, died after month of abuse. She was an employee of Haringey but was also an office holder, namely the Director[9]. A day after the convictions of Baby P's mother, her boyfriend and his brother for his death, the then Secretary of State for Children, Schools and Families commissioned OFSTED to conduct a Joint Area Review ("JAR") to review the role of the agencies and make findings and recommendations. The OFSTED report criticised a lack of managerial oversight and control by officers and councillors at Haringey. However, consistent with JAR practice, the report did not name individuals. A day after the report was provided to him, the Secretary of State held a press conference in which he announced that that he had appointed[10], on a temporary basis, a new Director to replace Mrs. Shoesmith. No notice had been given to Mrs. Shoesmith of his decision. Just under three weeks later, he appointed another Director for a three year term. The Secretary of State added at the press conference that Haringey would be reviewing her employment relationship. A week later, following her immediate suspension, Haringey summarily dismissed Mrs. Shoesmith without notice or payment in lieu of notice on the basis of fundamental breach of trust and confidence. Her internal appeal was turned down.

[9] The post exists as a consequence of section 18 Children Law 2004 which obliges local authorities to appoint a director.

[10] A direction he made pursuant to 497A94B) Of the Education Act 1996, which applied to the children's service authority by section 50(1) of the Children Act 2004.

41. Mrs. Shoesmith challenged her dismissal by way of judicial review of (i) the lawfulness of the Secretary of State's directions, (ii) the findings of the OFSTED report, and (iii) Haringey's decision to dismiss her. She also applied to an Employment Tribunal for unfair dismissal, but those proceedings were stayed pending the outcome of the judicial review proceedings.

42. The Secretary of State's decision to dismiss Mrs. Shoesmith from her post as Director was held to be unlawful. Mrs. Shoesmith successfully appealed the decision of the Administrative Court to dismiss her application for judicial review of Haringey's decision to dismiss her. The Court of Appeal was not dealing with an unfair dismissal case but one alleging that the public authorities had failed to follow the correct procedures. When considering whether there was a public law element in the decision made by Haringey, the Court of Appeal followed the reasoning in ***R v East Berkshire Health Authority Ex Parte Walsh*** [1985] Q.B. 152 and ***Ridge v Baldwin*** [1964] A.C. 40, cases also brought to my attention by Counsel during this hearing. Those cases support a contention that if an office holder's post is created by statute that a decision pertaining to the post is sufficiently public and amenable to judicial review. The Court of Appeal importantly found that the "statutory underpinning" (a specific statute creating the post) was the important ingredient, and that merely working in a senior position for a public body was not sufficient in itself to raise a public law element.

43. The Secretary of State's direction was declared unlawful and void. Mrs. Shoesmith had not been afforded the opportunity to address the criticisms made of her upon which he had grounded his directions and this was found to be in breach of natural justice. It is contended by Mr. Murphy that the ***Shoesmith*** case is irrelevant as there was no issue in relation to whether or not Haringey had the authority to dismiss the applicant and the issue was whether there was procedural unfairness as part of the disciplinary procedure that was used.

44. Importantly, there is no such statutory underpinning in the matter before me as the post of financial controller is not one created by statute. Ms. Ware could not be regarded as being a public officer holding public office, and should not be regarded as being akin to Mrs. Shoesmith who argued that she was an office holder, as well as being an employee and that, in her capacity as an office holder she was entitled to seek judicial review of the decision by public bodies which had led to her summary dismissal without compensation. It was accepted by the Court that Mrs. Shoesmith was an office holder, and the Court's decision is referred to as being one that extends the circumstances in which judicial review proceedings may be used to challenge the dismissal of office holders within public sector organisations. This same extension cannot be given to Ms. Ware as she is not an office holder, but an ordinary employee, albeit one in the senior post.

45. It is contended that the CIAA had no authority to dismiss the Applicant in accordance with the Labour Law. Section 3 of the Labour Law provides that it does not apply to the public service. Public service is not defined in the Labour Law. In the absence of this definition in that Law, the Applicant seeks to rely upon section 2(1) of the Public Service Management law (2011 Revision) which defines public servant as covering employees of statutory authorities and government companies.

46. In light of the above, the Applicant contends that the CIAA terminated her employment in accordance with section 51 and 52 of the Labour Law on the grounds of gross negligence, which is not a ground for dismissal in either of those sections.

47. However, during the hearing I provided the parties with a copy of the full judgment of Henderson J. ***In The Matter of the Complaints Commissioner Law (2006 Revision)*** Cause No 303 of 2008.[11] The Learned Judge was dealing with the question of the proper construction to be given to the provisions of the Labour Law (2007 Revision) and the Public Service Management Law (2007 Revision). The issue was whether the Complaints Commissioner had jurisdiction to investigate complaints made against the Health Services Authority by former employees of the Authority. Henderson J. recognised that section 3(a) of the

[11] A copy of the case note having been provided to the Court - 2008 CILR N [15].

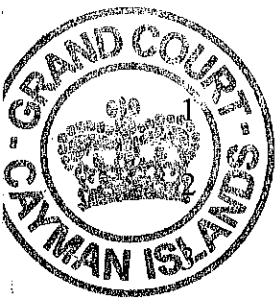
Labour Law provided that the Law did not apply to the public service. It was clear, up until July 2006, that employees of the Authority had been treated as not being members of the public service and could enforce their employment rights under the Labour Law. However, section 2 of the revised Public Service Management Law included statutory authorities and government companies as being public service. As a consequence, the Director of Labour took the view that the employees of the Authority would no longer be able to seek redress under the Labour Law. Unlike in the Airport Law (the pertinent law before me), section 54 Public Service Management Law set out in some detail a clear right of appeal[12] for staff members which means a civil servant which in turn means a person employed by the government. As employees of the Authority were employed by a statutory authority, Henderson J. found that the appeals process in the Public Service Management Law was "*by its terms*" intentionally made not available to them, as the definition in the Law showed a "*clear intention*" to distinguish between public servants (a term which includes employees of a statutory authority) and civil servants (a term which does not). Henderson J found on page 4 that there was nothing in the Public Service Management Law suggesting "*an intention on the part of the Legislative Assembly to remove from HSA employees the important procedural right (the right of appeal under the Labour law) which they enjoyed up to that point.*" Henderson J. indicated that he felt that the Legislative Assembly would not have intended for employees of statutory

[12] Appeal to the Civil Service Appeals Commission.

authorities to have no rights of appeal, and he was reluctant to construe the Law as having extinguished their right to do so under the Labour Law, except in the face of clear and explicit language in the legislation. Henderson J. made it clear that the Acting Director of Employment Relations was wrong to assume that the phrase "public service" in section 3 of the Labour Law must be given the same meaning as it is assigned in the Public Service Management Law. He stated there was no compelling reason to adopt a definition found in the latter Law when construing an undefined phrase in the Labour Law.

48. Having carefully reviewed the full ruling from Henderson J., and after carefully considering both parties' submissions on the same, I am satisfied that Henderson J.'s approach is right. Employees of statutory authorities are not engaged in the public service within the meaning of section 3(a) of the Labour Law and are entitled to use the procedures set out therein. Therefore, as I view the Applicant as being an employee of the CIAA, I reject the Applicant's contention that the CIAA has no authority whatsoever to dismiss her in accordance with the Labour Law. Having reached this conclusion, I am also satisfied that she does have an alternative remedy pursuant to the more recent Labour Law (2011 Revision), in which the relevant definitions have not changed.

49. The existence of an alternative remedy may be a powerful factor when it comes to the question of whether discretion to review should be exercised. Therefore the



principle rightly brought to the fore by Mr. Gomez is that the power to grant judicial review would ordinarily not be exercised where there are alternative remedies open unless there are exceptional circumstances.

50. Mr. Gomez referred me to the statement of Scarman L.J. in ***R v Inland Revenue Commissioners, Ex Parte Preston*** [1985] 2 All ER 327 that judicial review *"is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal."* A sentiment repeated in ***R (Sivasubramaniam) v Wandsworth County Court*** 1 WLR 475 at 46.

51. In the ***Shoesmith*** case the court considered the alternative remedies when deciding that she should not be required to abandon her judicial review application. Unlike in ***Shoesmith***, Ms. Ware was dismissed with compensation being already paid. In ***Shoesmith***, the Court, when finding there to be exceptional circumstances, had regard to the complexity which was involved in her suing three public bodies, Haringey, OFSTED and the Secretary of State for education. The Court felt that it made sense to keep all of the proceedings in one court to avoid duplication of costs and because it was convenient to do so.

52. As mentioned in paragraphs 35 and 36 above, the Applicant contends that the Board acted ultra vires as it did not have the authority to dismiss her. In relation to

this contention it is argued on Ms. Ware's behalf that it matters not whether she was an office holder and that the decision in ***McLaughlin*** applies. It is wrongly contended that, in any event, as Ms. Ware had been a former employee of the Civil Aviation Authority when later employed by the CIAA it was envisaged under section 17(1) of the Airports Law that she would be regarded as a public officer.

53. Reference is made to section 16(1) of the Airports Law which states:

> *"Subject to the approval of the Board,*[13] *the Chief Executive Officer may employ, at such remuneration and on such terms and conditions as may be approved from time to time by the Board, such employees and engage under contract for services such professional, technical or other assistance, as the Chief Executive Officer considers necessary carry out the functions of the Authority."*

54. Section 16(3)(c) of the Airports Law provides that the CEO will also determine *"disciplinary procedures (including a right of appeal to the Board) for employees of and for persons under contracts for services with the Authority."*

55. It is contended that the contract of employment dated 11 November 2009 is signed by the CEO where it requires the employer's signature. The Applicant points out that it does not state that it is signed on behalf of the Board. The Applicant therefore contends, also having regard to the section 16 provisions, that

[13] My emphasis by underlining.

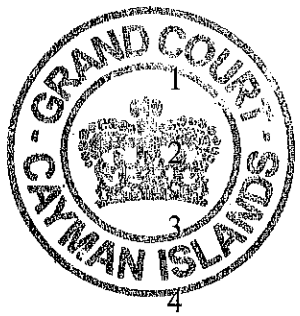
the contract of employment was between her and the CEO, and that he is her contracted employer who is the only one empowered to take disciplinary action. This is submitted despite the wide responsibilities for the policy and general administration of the affairs of business of the CIAA set out at section 10 of the Airports Law. It is contended by Ms. Ware that section 16(3)(c) provides a right to appeal from the CEO's disciplinary action, and that because the Board took the disciplinary action they acted outside of their authority.

56. However, the contract clearly states that the contracting parties are the CIAA and Ms. Ware, Employee #CIAA218. The contract refers to parties, who are clearly also referred to as being the employer and employee. At paragraph 4 it is stated that "*the general responsibilities and duties of the Employee are to perform the duties which the Board and the CEO may from time to time properly assign and which are in connection with the business of the employer.*" It is clear that the employer is the CIAA. Section 14(2) and (3) of the Airports Law makes it clear that the CEO is an employee of the CIAA and an ex officio member of the Board, answerable to the Board for his acts and decisions.

57. The contract of employment of 11 November 2009 contained the terms and conditions of employment agreed between the parties. Paragraph 3 of the contract provided that the latest period for the termination of the contract by the parties was thirty days. Paragraph 15 addresses the powers of the employer to dismiss,

and subsection (1) states that nothing in the contract prevents the employer from dismissing an employee summarily if the employee is guilty of serious misconduct. Therefore, the CIAA is entitled to enter into contracts with employees, it can determine the terms and conditions between the parties and this includes provisions in relation to dismissal. As stated by Sir John Donaldson M.R. in ***Regina v East Berkshire Health Authority, Ex parte Walsh*** [1985] 1 Q.B. 152 at 165 G if a public authority gives an employee contractual protection in the form of private law right, *"a breach of that contract is not a matter of "public law" and gives rise to no administrative law remedies."* In other words it is better dealt with as a wrongful dismissal claim or unfair dismissal action. The principal claim in question before me is not a claim for infringement of a right protected by public law. Other means of redress are conveniently available to Ms. Ware. In the matter before me Ms. Ware could commence proceedings for wrongful dismissal relating to the contract of employment with the CIAA. That is an alternative remedy, and the determination of factual issues involving a breach of contract are better dealt with in a wrongful dismissal action rather than in the judicial review.

58. Section 10(1)(b) of the Airports Law provides that the Board "*is responsible for overseeing the effective performance of the authority and section 10(3)(b) provides that the Board has the power to delegate any of its daily administrative duties and powers from time to time.... To any of their own number and to employees and agents of the Authority.*" Section 15 of the Law provides that the



CEO is responsible for the day-to-day management and administration of the CIAA to the extent of the authority delegated to him by the Board and Section 15(2) provides that when he is managing the civil aviation services on behalf of the authority the CEO does so subject to the directions of the Board. This section gives the Board the power to direct the CEO to dismiss an employee.

59. Section 16(2) of the Airports Law enables the Board "*to determine the executive, management and administrative structure of the Authority for the necessary and proper discharge of the functions of the authority including, without limitation, delegation of functions to directors.*" This means that it could delegate to the Chairman of the Board the power to dismiss an employee.

Delay

60. Even if I am wrong, even if there is a decision that is amenable to judicial review and there is no alternative remedy, the application for leave must be made promptly. I mentioned to the parties at the hearing that little consideration would be given to the delay that had occurred since the filing of the application[14], and no detailed submissions were received on that point.

61. GCR O.53 r.4(1) reads:

> *"An application for leave to apply for judicial review shall be made promptly and it any event within three months from the date*

[14] See Hutchinson J. in R v Birmingham City Council, ex p Dredger (1994) 6 Admin LR 553 at 577E.

when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

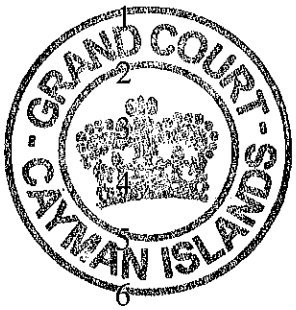
62. The note at 53/14/58 in the Supreme Court Practice 1999 under the heading "Delay in applying for relief (r.4)" states:

> *"It is sometimes thought that an applicant for judicial review is always allowed three months in which to make his application for leave, provided that he lodges it with in that period leave cannot be refused on the grounds of delay. That is not so. The primary requirement laid down by the rules (r.4(1)) is that the application must be made "promptly," followed by the secondary provision "... and in any event within three months..." Thus, there can be cases where, even though the application believe is made within the three- month period, leave might be refused because, on the facts, the application had not been made promptly."*
>
> .....
>
> *On the other hand, the court does have power to extend time for applying for leave to move for judicial review, but only if it considers there is "good reason" for doing so."*

63. The relevant part of section 31 Supreme Court Act 1981[15] in England and Wales provides that:

> *"(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may*

[15] Quin J. found in Rupert Ackermon v Government of the Cayman Islands & National Roads Authority G85/2013 that the Act applies the Cayman Islands by virtue of section 11 of the Grand Court Law (2008 Revision).



refuse to grant (a) leave for the making of the application; or (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person would be detrimental to good administration.

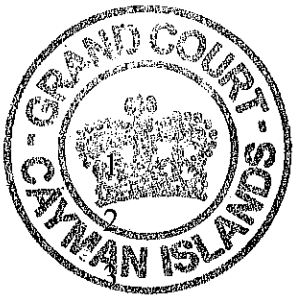
(7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made."

64. Lord Goff in *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 AC 738, 746H stated that he read that the effect of Ord. 53. r.4(1) was:

> *"... to limit the time within which an application for leave to apply for judicial review may be made in accordance with its terms, i.e. promptly and in any event within three months. The court has however power to grant leave to apply despite the fact that an application is late, if it considers there is good reason to exercise that power; this it does by extending the period..... Furthermore, the combined effect of section 31(7) and rule 4(1) is that there is undue delay for the purposes of section 31(6) whenever the application for leave to apply is not made promptly and in any event within three months from the relevant date."*

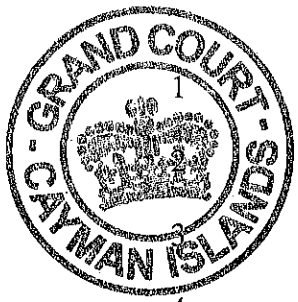
65. Lord Goff went on to say at page 747B:

> *"It follows that, when an application for leave to apply is not made promptly and in any event within three months, the court may refuse leave on the ground of delay unless it considers that there is good reason for extending the period; but, even if it considers that there is such good reason, it may still refuse leave... If in its*



opinion the granting of the relief sought would be likely to cause hardship or prejudice (as specified in section 31(6)) or would be detrimental to good administration."

66. On 8 May 2013 Ms. Ware filed and issued her Application for leave to apply for Judicial Review of the decision of the CIAA to terminate her employment made on 7 December 2012. This means that the application was made five months after the date of the decision, that being the operative date. For completeness sake, I note that an amended application was filed just over a month later on 12 June 2013, but the relevant application for the purpose of delay is the initial application. The chronology of events from the date of the decision to the date of the application are set out earlier herein between paragraphs 6-15. Briefly, Ms. Ware's former attorneys did not seek judicial review but brought proceedings for unfair dismissal under the Labour Law. Ms. Ware decided to "sack" her former attorneys and she retained her current attorneys on 5 March 2013, almost 3 months after the relevant decision made by the CIAA. It was not until 4 months after the decision, on 10 April 2013, that her attorneys wrote to the CIAA indicating that, the absence of a reply after seven days, an application for judicial review of the Board's decision would be made. The CIAA acted promptly by sending its reply on the seventh day indicating that any application for judicial review was already out of time and misconceived. There was then a further thirteen day gap, namely to 30 May 2013, before Ms. Ware's attorneys again wrote to the CIAA stating that, if no indication of a willingness to enter settlement



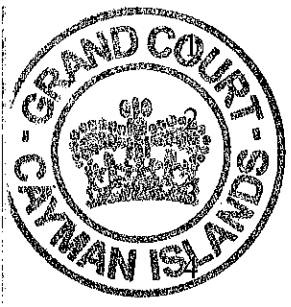
proceedings was reached within four days, the intended application for judicial review would be made. The application was eventually filed on 8 May 2013, about nine weeks (just over two months) after the current attorneys had been retained by Ms. Ware and over twenty-one weeks (five months) after the challenged decision.

67. It is clear that there has been undue delay in this matter. The three month period was expiring by the time that Ms. Ware decided to 'sack" her former attorneys. It is important to remind oneself that just because an application is brought within three months it does not mean that it has necessarily been made promptly. If this is an application that is amenable to judicial review, and Ms. Ware's former attorneys failed to recognise that, and as a consequence failed to issue an application then some of the fault for the delay will lie at their door. When the current attorneys came on record they would have realised that three months had already passed since the making of the relevant decision. In such circumstances, the attorneys should have ensured that, if this was potentially a judicial review matter, they acted very promptly. Even allowing for some time for them to advise Ms. Ware in an informed manner after reviewing the file and also having regard to the requirements under the Pre-Action Protocol for Judicial Review[16], it should not have taken five weeks for contact to be made by them with the CIAA, and then a further month to issue the application. What is clear, is that no fault for the

[16] Practice Direction No. 4 of 2013.

delay can be laid at the door of the CIAA who replied in a timely manner to Ms. Ware's attorney, not only pointing out that they felt that this was not a matter amenable to judicial review but also that any proposed application would be out of time.

68. It is contended by Mr. Murphy that, having regard to the Cayman Islands Constitution Order 2009, Schedule 2, Part 1 Sections 7, 19 and 26, the three-month requirement should now be read as being twelve months where it is contended that a public authority has made an unlawful, irrational, disproportionate or procedurally unfair decision. It is submitted that, although it is accepted that an applicant must show a good reason for extending the period within which to make an application, that any such consideration should have regard to an applicant's rights pursuant to the Bill of Rights. This is not a submission that I find to be meritorious where the relevant time limit is three months. A three month period does not raise the same concerns seen, for example, in Eire when the Illegal Immigrants (Trafficking) Act 2000 was introduced as part of the response to the delays resulting from judicial reviews of decisions taken under the asylum process, arising out of the growth in numbers of immigrants coming to that country. It was argued there that retaining the only fourteen day time-limit may give rise to a violation of rights under the European Convention on Human Rights (ECHR), in particular Article 6, which provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent



and impartial tribunal established by law. The long established three month period does not "*restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired*", a requirement set out in ***Stubbings v UK*** [1997] 23 EHRR 213 for the time limitations to be in accordance with Article 6(1) of the ECHR.

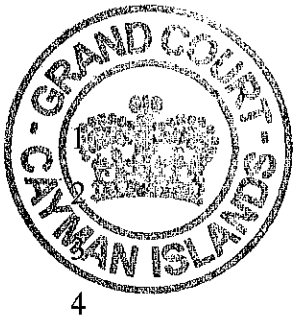
69. It is well-established that public law remedies in particular must be pursued in a timely fashion. The note at 54/5/1 of the Supreme Court Practice 1999 states:

> *"The courts always recognise that public law claims are unlike ordinary civil litigation and require strict adherence to the time limits contained in the rules governing judicial review (R. v Institute of Chartered Accountants in England and Wales Ex p. Andreou (1996) 8 Admin L.R. 557)."*

70. I note that the authors of Clive Lewis Judicial Remedies in Judicial Review Fourth Edition stated at paragraph 9-016:

> *"The House of Lords has left open the question of whether the use of the concept of promptness as the test for delay is compatible with European Convention or EU law.*[17] *The time limit for judicial review is likely to be compatible with both legal regimes. The European Court of Human Rights has rejected a challenge to the former provisions dealing with time-limits which are materially identical to the current provisions of the CPR as it considered that*

[17] "See R.(Burkett) v Hammersmith and Fulham London Borough Council [2002] 1 W.L.R. 1593. No detailed reasoning was given and claimants should operate on the basis that the rule its compatible until it is declared incompatible: see R. (Young) v Oxford City Council [2002] EWCA Civ 990, judgment on June 27, 2001)."

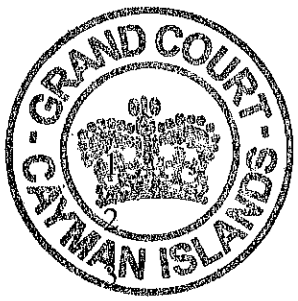


the requirement was a proportionate measure taken in pursuit of legitimate aim which did not deny the claimants access to the courts but ensure they acted quickly in the public interest of avoiding prejudicing the rights of others.[18]"

71. At this leave stage, as the application has been made out of time, I may refuse to grant leave for lack of promptness if Ms. Ware fails to satisfy me that there is a good reason for extending the time. At a leave hearing, I have discretion whether to then go on and consider the separate factors, namely the combined effect of delay and the likely hardship, prejudice or detriment to the CIAA due to the delay. The CIAA is entitled to promptly restructure and budget in an organised and timely manner. I note that one of the orders pleaded by Ms. Ware is reinstatement as financial controller. The uncertainty caused by delay is prejudicial and to the detriment of the CIAA.

72. Mr. Murphy, in his written skeleton argument dated 8 September 2014, accepts that Ms. Ware must show a good reason for extending the period within which the application should be made. The reason for the delay is stated to be Ms. Ware placing reliance on and acting upon the advice of her previous attorneys. Reliance is placed upon the following passage from the judgement of Andrew Collins, Q.C., where he said:

[18] Application no. 4167/98 Lam v United Kingdom decision of July 5, 2001.



> *I am bound to note here that it seems to me that there has been what in another jurisdiction would be considered to be inexcusable delay by both sides. The council has failed to answer the letters that were written to it[19]; the applicant's solicitors have failed to get on with pursuing her claim. If one is approaching it on the basis of weighing up responsibility, for delay, there is not a lot to be said between the applicant and the respondents.[20] But when all is said and done, this applicant has not herself been responsible for what has happened. She has to some extent been let down by those advising her, I see no reason why she should suffer, unless it can be shown that there is established a real detriment, a real harm, positive harm, to good administration."*

73. Mr. Murphy emphasises the final sentence of the above passage where blame for the delay was placed on the applicant's attorney and not the applicant. However, it is clear that the learned judge felt both parties to be equally at fault for the delay and he placed great weight on the *"inexcusable delay by both sides"*, in particular the failure of the Respondent to answer letters written to it. In the matter before me, as I have already mentioned, no blame for the delay can be directed to the CIAA who responded to correspondence in a timely fashion. It is also important to note that a part of the total pre-application delay has also occurred after Ms. Ware's current attorneys were retained.

[19] My emphasis by underlining.
[20] My emphasis by underlining.

74. If the delay is caused by an applicant's attorneys' failure to apply promptly, that, in itself, would not be a good reason for the Court extending the time. The reasons for the delay have to be satisfactorily explained. The "good reason" given and explanation made on Ms. Ware's behalf is that her previous attorneys voluntarily and wrongly decided to bring and pursue a claim by a different route, namely under the Labour Law. The current attorneys also explain that the additional delay after their involvement was due to them having to take instructions, to review the "*complicated and involved area of law*" and gather evidence. I am not satisfied that these amount to satisfactory explanations or good reasons. There is nothing to show that the delay has been caused by any factors outside of Ms. Ware's attorneys' control. This is not a claim that is of general public importance.

Conclusions

75. Having found that there has been undue and excessive delay, and for the reasons stated above, I would not grant leave to file this application out of time. Despite making this finding, having regard to the detailed submissions I received at the hearing, I felt it appropriate in this judgment to also go on and consider whether this would otherwise have been an application amenable for judicial review, so that all matters could be ruled upon at the same time. When considering delay, I of course have to consider the nature of the claim being brought on the issues raised.

76. If this were a matter in which there had not been delay and/or the alternative remedies, for the reasons stated above I would still be of the view that it is not amenable to judicial review for what is a dispute of a private law nature.

77. I conclude by thanking both Counsel for their careful and well-argued presentation of their clients' respective cases, which I have found to be a further example of their professionalism and approach to the task in hand experienced by me from them during my tenure in the jurisdiction. I also thank the parties for their extreme patience in awaiting this decision.

Dated this 27 day of May 2015.

GRAND COURT · CAYMAN ISLANDS

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The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT