

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CIVIL DIVISION

Cause No G0060 of 2014

3
4
5 IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW OF THE
6 DECISION OF THE CHIEF OFFICER, PORTFOLIO OF LEGAL AFFAIRS DATED
7 28TH JANUARY 2014 ON THE APPLICANT'S REQUEST FOR PERMISSION TO
8 ENGAGE IN PRIVATE GAINFUL ACTIVITY

9
10 BETWEEN

11
12 BILIKA SIMAMBA

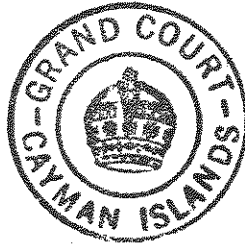
13 APPLICANT

14
15 AND

16 CHIEF OFFICER PORTFOLIO OF LEGAL AFFAIRS

17
18 RESPONDENT

19
20
21 Appearances:



The Applicant In Person

22
23 Mr. Tom Lowe QC and Mr. David Collier
24 for the Respondent

25
26 Before:

Hon. Mr. Justice Malcolm Swift (Actg.)

27 Heard:

14th November 2014

28
29 JUDGMENT

30
31 *FACTUAL BACKGROUND*

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35 1. The Applicant is employed by the Respondent as Senior Legislative Counsel in
36 the Legislative Drafting Department of the Portfolio of Legal Affairs. He is
37 permanently resident in the Cayman Islands.

38
39 2. The Applicant's employment is governed by his (most recent) employment
40 agreement dated the 11th December 2012¹ and by his job description dated 3rd
41 March 2007². His employment is by virtue of s.42(1) of the Public Service

¹ Bundle 1A - Tab 3 page 15

² Bundle 1A - Tab 3 page 20

1 Management Law (2013 Revision)³ and s.43(3) further provides that *'terms and*
2 *conditions of staff of a civil service entity shall be agreed from time to time*
3 *between the chief officer (or person with delegated authority) and the staff*
4 *member concerned'*. The minimum terms and conditions of employment are
5 set out in Regulations 34 and 37 and Schedules 1⁴ and 4⁵ to the **Personnel**
6 **Regulations** (2013 Revision)⁶ which make clear that, subject to compliance with
7 and incorporation of the minimum terms and conditions specified by the
8 Regulations, additional terms and conditions may be agreed between the parties.
9 It is a requirement of the Regulations in paragraph 4(k) of Schedule 4 that the
10 employment agreement with the Applicant must contain *'a requirement that the*
11 *employee must not engage in any private gainful activity that conflicts with the*
12 *employee's duties (or might be reasonably perceived to conflict with those duties*
13 *or impinges upon the employee's ability to complete his/her duties diligently and*
14 *conscientiously, and without the written agreement of the chief officer'*.

15
16 3. Accordingly the Applicant's employment agreement provided at clause 12⁷ that
17 *'the employee agrees not to, without the written agreement of the Chief Officer,*
18 *engage in any private gainful activity that conflicts with the employee's duties, or*
19 *might be reasonably perceived to conflict with those duties or that impinges upon*
20 *the employee's ability to complete duties diligently and conscientiously in a*
21 *manner that would normally be expected by a principal employer'*. To all intents
22 and purposes the Applicant's employment agreement reflects the regulatory
23 requirement.

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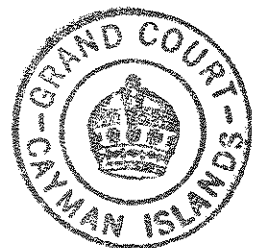
³ Bundle 3 – Tab 1 (extracts)

⁴ Bundle 3 – Tab 1 page 42

⁵ Bundle 3 – Tab 1 page 62

⁶ Bundle 3 – Tab 1 page 1 et seq.

⁷ Bundle 1A – Tab 3 page 17



1 8. On the 28th January 2014, the Respondent wrote to the Applicant¹⁰ denying his
2 requests for written agreement to allow him to engage in private gainful activity.
3 In letters dated 7th October 2013¹¹, 13th December 2013¹² and 23rd December
4 2013¹³, the Applicant had asked for approval to teach certain courses set out in
5 that correspondence. The titles of the courses are contained in those letters
6 together with a brief description of the courses (eg: '1-day introductory, 2-day
7 advanced'). It is to be noted that the titles of the courses changed in December
8 2013 and brief general descriptions of the courses were provided but, as the
9 Applicant agreed in the course of his submissions, the course materials and
10 contents were not provided to the Respondent. The Applicant made adaptations
11 to his proposed courses to '*cater to members of the public and not to the public
12 service in particular*' (13th December 2013 letter) and set out his arguments in
13 support of his proposals in the letter dated 23rd December 2013. It is clear that
14 discussions took place between the parties prior to the 23rd December 2013 as the
15 Applicant requested a formal decision in his letter of even date. It is also clear
16 that the Applicant requested that the Respondent should, in reaching a formal
17 decision, take into account the provisions of s.19 of the *Cayman Islands
18 Constitution Order 2009*¹⁴ ('CICO') which provides that:

19 *"all decisions and acts of public officials must be lawful, rational,
20 proportionate and procedurally fair' and that 'every person whose interests
21 have been adversely affected by such a decision or act has the right to
22 request and be given written reasons for that decision or act"*.
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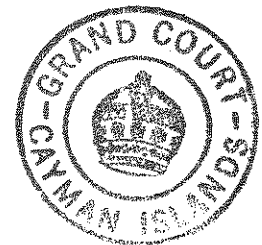
¹⁰ Bundle 1A - Tab 3 page 13

¹¹ Bundle 1A - Tab 3 page 2

¹² Bundle 1A - Tab 3 page 5

¹³ Bundle 1A - Tab 3 page 7

¹⁴ Bundle 3 - Tab 2 page 7



1 9. It is common ground, accepted by the Applicant in the course of his oral
2 submissions, that he did not show his course materials to the Respondent who
3 therefore was obliged to make her decision based upon the descriptions of the
4 courses in the correspondence and in discussions with the Applicant. He further
5 agreed that he was at liberty to submit his materials to the Respondent for
6 consideration whether or not she requested them and said that he would have
7 been happy to discuss the content if asked. He has also drawn my attention to his
8 Affidavit in Reply¹⁵ in which he asserts that the Respondent and the First
9 Legislative Counsel declined an opportunity to review the book (written by the
10 Applicant) upon which at least part of the proposed teaching was based.

11
12 10. The Applicant has addressed me on the effect of s.19 of the *CICO 2009* and I
13 shall return to that issue later in this judgment.

14
15 11. The Respondent's refusal on the 28th January 2014 to grant the Applicant's
16 requests ("the decision") contained the following:

17 *"I have given detailed consideration to the various proposals and*
18 *representations in the (letters dated 7th October 2013, 13th December 2013*
19 *and 23rd December 2013) and wish to commend you on the initiative you*
20 *have taken to address what you consider to be a lacuna in the training needs*
21 *of the public service and to raise the awareness of the public at large. While*
22 *I understand the assertions in your letter of 23rd December 2013 that training*
23 *per se is not a function of the Legislative Drafting Department, the area that*
24 *you have identified for training falls within the scope of your work as Senior*
25 *Legislative Counsel. As such I am of the view that the proposals conflict, or*
26 *may reasonably be perceived to conflict, with your duties. In the*
27



¹⁵ Bundle 1A – Tab 8

1 *and the First Legislative Counsel to fight this attempt to share knowledge*
2 *with the public”.*

3

4 The Respondent rejects those assertions and says:

5 *“there is no intention to thwart his efforts to share his knowledge What*
6 *divides us is whether those efforts should be explored and executed as part of*
7 *his work and under the auspices of the Policy Co-ordination Unit or through*
8 *his engagement in private gainful employment”¹⁹.*

9

10 15. The Respondent’s submissions to the Commission (dated 4th April 2014²⁰)
11 contained the following (at para 9 et seq.):

12

13 *“9. In my discussions with (the Applicant) on the first proposal, I*
14 *explained that to a large extent the courses appeared to be designed*
15 *specifically for public servants and to facilitate their work in relation*
16 *to the work of the Legislative Drafting Department. I indicated that I*
17 *was not comfortable with his proposal to offer the courses on a*
18 *private basis for reward, as in my opinion, this would pose a conflict*
19 *of interest or a potential conflict of interest.*

20

21 *10. I discussed the second proposal with him and advised him that*
22 *the adjustments and permutations that were made were not*
23 *significant enough to alleviate my concerns”*

23

24 16. The Commission rejected the appeals for the reasons set out in their letter dated
25 23rd April 2014²¹. In short, the Commission found that there was no evidence of
26 unfairness or bias in the decision making process of the Respondent and that
27 reasons for the Respondent’s decision had been provided to the Applicant.

¹⁹ Bundle 1A – Tab 7 – Affidavit Respondent para 27

²⁰ Bundle 1A – Tab 7 – JW/1 page 18

²¹ Bundle 1A – Tab 3 page 32

1 17. The Respondent replied by letter also dated the 4th April 2014²² in answer to the
2 Applicant's letter of the 29th January 2014 and agreed to provide expanded
3 reasoning which included the following:-

4
5 *"You will recall that in our discussions on your letter of October 7th 2013, I*
6 *indicated that the courses stated therein appeared to be designed specifically*
7 *for public servants and to facilitate their work in relation to the work of the*
8 *Legislative Drafting Department. I indicated that, in the circumstances, your*
9 *proposal to offer the courses on a private basis for reward would pose a*
10 *conflict of interest or a potential conflict of interest.*

11 *You then revised the proposal in an effort to address the concerns that I had*
12 *raised and submitted a second proposal on 13 December 2013. I discussed*
13 *the second proposal with you and advised you that the changes that were*
14 *made were not significant enough to alleviate my concerns regarding a*
15 *conflict of interest or potential conflict of interest.*

16 *In my view, a conflict of interest arises because there is a clear connection*
17 *between the areas that you have identified for training and the duties and*
18 *functions that fall within the scope of your work as Senior Legislative*
19 *Counsel".*

20
21 18. On the 27th April 2014²³, after receiving the decision of the Civil Service Appeal
22 Commission, the Applicant wrote to the Respondent suggesting further
23 amendments and adjustments to the proposed teaching courses and requesting
24 that reasons should be provided for any decision to reject this amended
25 application. It does not appear that, before the commencement of these
26 proceedings, the Respondent specifically replied in writing to that further
27 proposal but it is clear that the reasons stated for the earlier decision applied

²² Bundle 1A – Tab 3 page 59

²³ Bundle 1A – Tab 3 page 34

1 20. The Applicant says, and of course I accept, that his sole aim in seeking to teach
2 the courses is to give back to society what it has given to him and to share the
3 product of his achievements. He points out that he has lived in Grand Cayman
4 for 11 years, his wife is a local government officer and his children are at school
5 here. The Applicant is generally highly regarded.

6
7

IS JUDICIAL REVIEW THE APPROPRIATE REMEDY?

8
9 21. The Respondent submits that this application for Judicial Review is
10 misconceived. It is pointed out that the Applicant has a clear course of private
11 law action open to him in the civil courts without resorting to a public law
12 procedure requiring a court to review the process by which the decision was
13 reached. He is not being dismissed from public office or being subjected to a
14 public adjudication. As a public servant, he is in no different position to that of a
15 person in private employment. The Applicant, it is said, may sue for a
16 declaration, for loss of the opportunity to obtain additional employment or for
17 breach of contract, the court could examine the decision-making process in the
18 course of the evidence unrestrained by the procedural and evidential limitations
19 of Judicial Review and could assess the course contents in order to examine in
20 depth the assertion of the existence of conflict. The civil court could resolve
21 comprehensively the various factual issues which I have had to determine on the
22 basis of affidavit evidence alone. Issues of unfairness, unreasonableness and
23 proportionality would take a back seat in the court's examination of the facts
24 because they would be superseded by the court's own assessment of the case.
25 The remedy of damages would be available in addition to a declaration. It is,
26 says the Respondent, inappropriate for the Administrative Court to police the
27 operation of Clause 12.

28



1 22. My attention has been drawn to the decision of the Court of Appeal in *Regina v.*
2 *East Berkshire Health Authority ex parte Walsh*²⁵ where the Master of the Rolls
3 said:

4
5 *“The ordinary employer is free to act in breach of his contracts of*
6 *employment and if he does so his employee will acquire certain private law*
7 *rights and remedies in damages for wrongful dismissal, compensation for*
8 *unfair dismissal, an order for re-instatement or re-engagement and so on.*
9 *Parliament can underpin the position of public authority employees by*
10 *directly restricting the freedom of the public authority to dismiss, thus giving*
11 *the employee ‘public law’ rights and at least making him a potential*
12 *candidate for administrative law remedies. Alternatively it can require the*
13 *authority to contract with its employees on specified terms with a view to the*
14 *employee acquiring ‘private law’ rights under the terms of the contract of*
15 *employment. If the authority fails or refuses to thus create ‘private law’*
16 *rights for the employee, the employee will have ‘public law’ rights to compel*
17 *compliance, the remedy being mandamus requiring the authority so to*
18 *contract or a declaration that the employee has those rights. If, however, the*
19 *authority gives the employee the required contractual protection, a breach of*
20 *that contract is not a matter of ‘public law’ and gives rise to no*
21 *administrative law remedies”.*

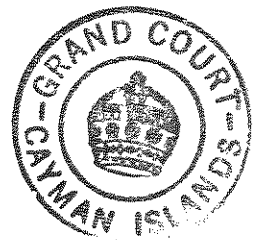
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24 It is to be observed that, although in the present case the complaint of the
25 Applicant is that he is being denied his freedom to teach, his case is that the
26 restrictions are being imposed under the terms of his contract of employment and
27 that, under those terms, the Respondent had no right to restrict his activities.

28
29 *“There is a danger of confusing the rights with their appropriate remedies*
30 *enjoyed by an employee arising out of a private contract of employment with*
31 *the performance by a public body of the duties imposed upon it as part of the*
32 *statutory terms under which it exercises its powers. The former are*
33 *appropriate for private remedies inter partes whether by action in the High*
34 *Court or in the appropriate statutory tribunal, whilst the latter are subject to*
35 *the supervisory powers of the court under R.S.C Ord. 53” (per Purchas LJ at*
36 *page 176).*

37
38 23. That distinction and the decision in *Ex parte Walsh* have been applied locally in
39 the Grand Court in the *Darcoh-Agyeman*²⁶ case in which Graham J. held in
40 regard to a contract of employment of a law lecturer that:

²⁵ 1985 1 QB 152 at page 165

²⁶ 1998 CILR 266



1 *“its termination ... therefore involved no public law right susceptible to*
2 *judicial review even though the employment arising from it had ‘statutory*
3 *underpinning’. In the application for judicial review, the applicant has*
4 *sought damages for breach of contract. In my judgment he should pursue*
5 *that claim, if he wishes to do so, by writ, because the essence of that claim is*
6 *a factual dispute Such a dispute can only be resolved by hearing the*
7 *witnesses after the delivery of pleadings, the answer to requests for*
8 *particulars and meticulous and full disclosure of all relevant documents”* (at
9 page 273).

10
11
12 24. The Applicant has conceded in argument that employment contracts are generally
13 inappropriate for judicial review but submits that, if the facts are not in dispute,
14 judicial review may be applied for especially where no remedies are required
15 other than orders of certiorari, mandamus and a declaration. However he further
16 stated that there would be a potential claim for damages based on loss of income
17 stemming from the decision but that the quantum of damage would be difficult to
18 assess. He did not suggest that a declaration would be unavailable to him in
19 seeking a private law remedy. I note of course that, contrary to the Applicant’s
20 contentions, there are issues of fact in dispute notably, for example, the conflict
21 between the courses and the Applicant’s work duties, the extent of those duties
22 and the correct interpretation to be placed on the content of the courses
23 themselves.

24
25 25. I have no hesitation in finding that the Applicant’s contract of employment
26 provides him with an adequate and comprehensive private law remedy. He may
27 issue proceedings claiming damages to reflect his potential lost income which is
28 capable of being assessed either as special damages or, failing sufficient
29 particularity, as general damages based on lost opportunity. He may claim a
30 declaration that there is in fact no conflict between his teaching course and his
31 employment duties. The civil court would hear evidence and see documentation
32 (including no doubt the Applicant’s course materials) and determine those issues
33 far better equipped and informed than a Judge in the Administrative Court.



1
2 26. For those reasons, I decline jurisdiction to entertain this application and dismiss
3 the Applicant's claims.

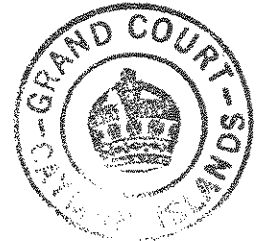
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5 27. Notwithstanding the finding I have made in the preceding paragraph of this
6 Judgment, I shall nevertheless proceed to consider the grounds of the application
7 for judicial review and to indicate my findings in the event that, contrary to my
8 above finding, the Applicant's claims have in fact been properly brought in this
9 court and that the remedies sought had been properly available to him in these
10 proceedings.

11
12 *A PRELIMINARY ISSUE*

13
14 28. A preliminary issue arose namely whether the Applicant should be entitled to
15 argue grounds 6 and 11 set out in the Notice of Originating Motion as those
16 grounds had not been included in the ex parte application for leave and no
17 application to amend had been made. It has now sensibly been agreed that these
18 additional grounds are in fact subsumed in the Applicant's other grounds and
19 may therefore be argued.

20
21 *DOCUMENTATION*

22
23 29. I have of course been referred to the skeleton arguments²⁷ on both sides, to the
24 Applicant's speaking note, to the Affidavits of the Applicant²⁸ and that of the
25 Respondent²⁹ together with the exhibits attached thereto and to such of the
26 authorities³⁰ as are relevant to the submissions.



²⁷ Bundle 2
²⁸ Bundle 1A - Tab 3 and Tab 8
²⁹ Bundle 1A - Tab 7
³⁰ Bundle 3

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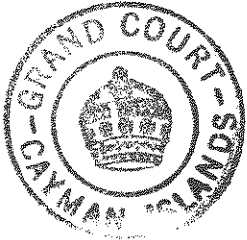
THE ARGUMENTS AND FINDINGS

Errors of Law

30. The Applicant contends³¹ that there are 4 errors of law in the Respondent’s decision-making process. They can be summarized as follows:

- i. taking into account a perceived need for an entity within Government to request the teaching of the courses;
- ii. deciding that conflict arose if the Applicant performed any task outside the office which he could be asked to perform within the office;
- iii. holding that use of knowledge gained in the course of employment would give rise to conflict, and
- iv. not recognizing that conflict – real or perceived – must amount to something that, in the eyes of the reasonable man, undermines the Applicant in the performance of his duties.

31. As the argument proceeded, it became clear that the “errors of law” were no more than another way of expressing the contention that there was no proper basis for the decision that the courses were or might be in conflict with the Applicant’s employment duties.

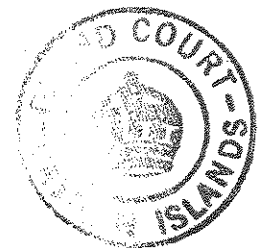


³¹ Skeleton Argument – Applicant - para 1 (i) to (iv)

1 32. In so far as (i) is concerned, it is clear from paragraph 7 of the Applicant's
2 Affidavit that the Respondent is alleged to have indicated in the course of
3 discussions with the Applicant that she 'may' take into account, in reaching her
4 decision, a request by a Government entity for the provision of any particular
5 course. That seems to me to be a perfectly rational and sensible approach to the
6 performance of the Respondent's duties and one which cannot properly be
7 categorized as an 'error of law'. The Respondent was not, according to the
8 Applicant himself, insisting on such a request as a pre-condition but merely as a
9 factor to be considered.

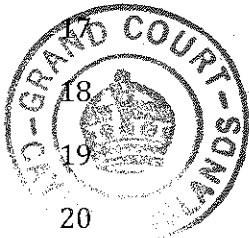
10 33. As to (ii), paragraphs 5 and 6 of the Applicant's Affidavit explain that the
11 Respondent is alleged to have taken into account that the majority audience for
12 the courses would be public officials and that the Applicant might be requested to
13 teach the courses as part of his duties. The Respondent, at paragraph 39 of her
14 Affidavit, agrees and asserts that she was entitled to take into account that the
15 target audience for these privately remunerated courses was "*essentially the*
16 *public service*". The Respondent also states that she relied upon the "*clear*
17 *correlation or nexus between the areas identified for training and the duties and*
18 *functions that fall within the scope of the Applicant's work*". Again I can see
19 no reason why the Respondent should not, in the exercise of her discretion, take
20 such issues into account in the decision-making process and therefore no reason
21 why such matters should be deemed to be "errors of law".
22

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1 34. The suggestion in (iii) that reliance by the Respondent on use of knowledge
2 gained in the course of employment should not have been taken into account is
3 met by the Respondent in paragraph 36 of her Affidavit where she states that the
4 concern was whether the Applicant “*would be put in a position to exploit his*
5 *professional or official capacity in some way for personal benefit*”. It must be
6 kept in mind that there is no suggestion that the Applicant would necessarily
7 exploit his position only that the risk of doing so would be created. Bearing in
8 mind the extent of the duties set out in the Applicant’s job description, I have no
9 doubt that the risk of exploitation, however remote the Applicant may deem it,
10 was a proper consideration for the Respondent to take into account and I reject it
11 as an “error of law”.

12
13 35. As to (iv), the Respondent submits, and I accept, that paragraph 4(k) of Schedule
14 4 to the Personnel Regulations (2013 Revision)³² provides that the requirement of
15 reasonableness for the purposes of this paragraph applies only to the perception
16 that conflict might occur in future. Accordingly, it is clear that, although the
17 decision maker must act reasonably (in the *Wednesbury* sense – see *infra*), in
18 deciding (i) whether an employee is engaging in private gainful activity, or (ii)
19 whether that activity impinges on the employee’s diligent and conscientious
20 completion of his duties, the only function of the Respondent which is required to
21 be reasonable under the terms of the contract of employment is the formation of
22 the perception that the activity might conflict with the employee’s duties in
23 future. I therefore reject the interpretation placed on paragraph 4(k) of Schedule
24 4 by the Applicant. It is clear from the wording of the decision itself that the
25 Respondent did in fact take reasonableness into account in deciding whether there
26 might be future conflict and, accordingly, the making of that decision did not
27 involve any “error of law”.



³² Bundle 3 – Tab 1 page 62

1 36. In general terms, the decision maker must be shown to have correctly understood
2 the law that regulates the decision-making power and must give effect to it (per
3 Lord Diplock in *CCSU v. Minister for Civil Service*³³. No errors or
4 misconceptions of law are established in the present case.

5
6 37. The Applicant argues that the decision was biased³⁴, was made for improper
7 motives³⁵, was discriminatory³⁶, was made in bad faith³⁷, imposed unduly
8 onerous conditions³⁸ and took into account irrelevant considerations³⁹. It became
9 clear in the course of argument that all of these matters properly fall for
10 consideration within the submissions made regarding *Wednesbury*
11 unreasonableness and I intend so to treat them.

12
13 *Wednesbury Unreasonableness*

14
15 38. The Applicant submits that the decision was *Wednesbury* unreasonable. He cites
16 the matters set out seriatim in the preceding paragraph of this Judgment, further
17 argues that his courses could not be or reasonably be perceived to be in conflict
18 with his duties and points to the cases of other Government employees who have
19 been permitted to carry on private gainful activity.

20
21 39. In *Associated Provincial Picture Houses Limited v. Wednesbury Corporation*⁴⁰,
22 the Court of Appeal held that, whilst the exercise of a discretion is an absolute
23 one and cannot be questioned in a court of law, it must be a 'real' exercise of the
24 discretion, it must disregard irrelevant collateral matters, it must pay due regard
25 to public policy, it must apply the law correctly, it must consider all matters

³³ 1985 AC 374 at page 410

³⁴ Skeleton Argument – Applicant - para 2 page 4

³⁵ Skeleton Argument – Applicant - para 4 page 6

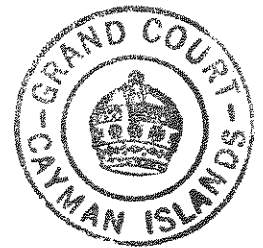
³⁶ Skeleton Argument – Applicant - para 5 page 7

³⁷ Skeleton Argument – Applicant - para 9 page 9

³⁸ Skeleton Argument – Applicant - para 10 page 9

³⁹ Skeleton Argument – Applicant - para 8 page 8

⁴⁰ 1948 1 KB 223



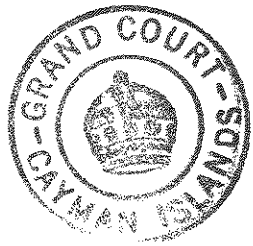
1 which should be taken into account and must be exercised in good faith. Only if
2 the decision is “*so unreasonable that no reasonable authority could ever have*
3 *come to it*” (per Lord Greene MR at page 230) is a court able to interfere. The
4 court is not setting itself up as an arbiter of the correctness of one view over
5 another and will not interfere with a decision reached within the four corners of
6 the jurisdiction of the decision-maker.

7
8 *“The court is entitled to investigate the action of the (decision-maker) with a*
9 *view to seeing whether they have taken into account matters which they ought*
10 *not to take into account, or, conversely, have refused to take into account or*
11 *neglected to take into account matters which they ought to take into account.*
12 *..... it may still be possible to say that they have nevertheless come to a*
13 *conclusion so unreasonable that no reasonable authority could ever have*
14 *come to it. In such a case again I think the court can interfere.”* (per Lord
15 Greene MR at page 233-4).
16

17 Clearly the court will take into account the sorts of issues set out seriatim in the
18 Applicant’s Affidavit if they fall into the category of unreasonableness as defined
19 by *Wednesbury*.

20
21 40. The Respondent points out that the Applicant must establish, in a gloss on
22 *Wednesbury*, that the decision was so perverse as to amount to

23 *“a decision which is so outrageous in its defiance of logic or of accepted*
24 *moral standards that no sensible person who had applied his mind to the*
25 *question to be decided could have arrived at it”* (per Lord Diplock in *CCSU*
26 *v. Minister for Civil Service – supra – at page 410G).*
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1 41. I also accept that, as part of the enquiry into the reasonableness of the decision,
2 the court is entitled to take into account established illogicality in the decision or
3 misapplication of reasoning (*Tavelli v. Minister for Immigration, Local*
4 *Government and Ethnic Affairs*⁴¹) and matters to which manifestly inappropriate
5 weight has been given (*Mohanty v. Health Practitioners Board*⁴² – a decision in
6 this jurisdiction) although those decisions add little if anything to the established
7 principles in the cases cited earlier in this Judgment.

8
9 42. The Respondent submits that unreasonableness cannot be established by
10 comparing the instant case with other separate decisions reached for other
11 differing reasons (indeed we do not know the reasons) and points out that, in any
12 case, the examples given are of remunerated work being outsourced as part of the
13 core functions of a Government Department. The Respondent further submits
14 that the decision cannot be challenged as unreasonable or perverse because:

- 15 a. the Respondent has explained why she has decided that the proposed courses
16 cannot be the subject of private gainful employment;
17
18 b. the Respondent has explained why the courses should more properly be
19 taught unremunerated under the supervision of the Policy Co-ordination Unit;
20
21 c. unremunerated training is frequently provided by employees of the Portfolio
22 of Legal Affairs (whether or not such activity is set out in the terms and
23 conditions of their employment) to other Government Departments as part of
24 the normal activities of the Portfolio for reasons of efficiency and to assist the
25 civil service generally⁴³;
26

⁴¹ 1989 86 ALR 435

⁴² 2001 CILR 459

⁴³ Bundle 1A – Tab 7 – Affidavit respondent paras 31 to 34



- 1 d. the Respondent was entitled to reflect in her decision her concerns that the
2 Applicant might be enabled to exploit his professional or official role for
3 personal gain and without supervision and that is why the Respondent sought
4 unsuccessfully to persuade the Applicant that his teaching should be overseen
5 by the Policy Co-ordination Unit;
- 6
7 e. the courses were at least in part related to the work of the Portfolio and
8 specifically to the work of the Applicant as the Applicant appeared to agree
9 in the course of his submissions;
- 10
11 f. the target audience was mainly the public service and the courses were
12 related or linked to the duties and functions of the Applicant whose job
13 description requires him to communicate with the public and private sectors
14 in the course of his employment;
- 15
16 g. the Applicant is involved in sensitive areas of work and has knowledge of
17 many matters surrounding his work which are not and should not be in the
18 public domain. It is important for a public servant in the position of the
19 Applicant to be subject to conditions underlining and enforcing his duty of
20 loyalty to his employer and ensuring that he does not exploit his position for
21 private gain.

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43. The Applicant argues that:

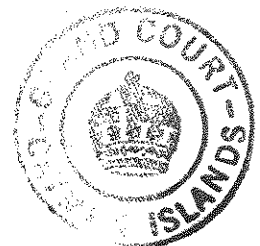
- a. there are examples of other civil servants performing work for other
Departments and in the outside world and the decision in his case is therefore
biased⁴⁴ and discriminatory⁴⁵;

⁴⁴ Skeleton Argument – Applicant - para 2 page 4

⁴⁵ Skeleton Argument – Applicant - para 5 page 7 and para 3 at page 6



- 1 b. a predecessor of the Respondent had expressed interest in a course teaching
2 the legislative process to civil servants⁴⁶;
- 3
- 4 c. the decision was reached against a background of serious disagreements
5 between the Respondent and the First Legislative Counsel and was borne out
6 of a desire to display power⁴⁷;
- 7 d. the decision was reached (and influenced) by the preference of the First
8 Legislative Counsel for public officers to rely on materials available on the
9 Portfolio website⁴⁸;
- 10
- 11 e. the decision does not take into account the adjustments made by the
12 Applicant to his courses;
- 13
- 14 f. there has been no attempt to grant permission subject to conditions to avoid
15 the perceived mischief created by the proposed courses;
- 16
- 17 g. the Respondent should have taken into account the limited pool of expertise
18 available in these islands; and
- 19
- 20 h. no adequate explanation or reasons have been provided for the decision.
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⁴⁶ Skeleton Argument – Applicant - para 4(i) page 6

⁴⁷ Skeleton Argument – Applicant - para 4(ii) page 6-7

⁴⁸ Skeleton Argument – Applicant - para 3 page 5 and Speaking Note para 4(b)

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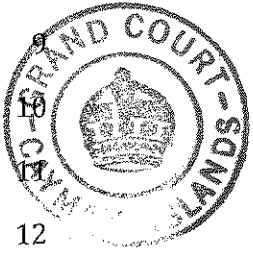
44. I find that:

- a. the examples of other civil servants performing work for other Departments and in the outside world are irrelevant to this application as the reasons for those decisions are essentially unknown and the decisions themselves are individually arrived at and quite separate from the decision-making process in this case. I know nothing of the terms of the contracts of employment and the job descriptions of those employees. There is no evidence before me that the Respondent did not apply the same or similar criteria to all of the decisions reached in the cases of the other employees but simply reached a different conclusion for independently justifiable reasons. Proper and adequate reasons have been provided for those decisions⁴⁹. There is a dearth of information available about those suggested comparators. It follows that those examples do not support the allegations of bias and discrimination;

- b. the fact that a predecessor of the Respondent may have expressed interest in a course teaching the legislative process to civil servants does not establish that the decision made by the Respondent is to be categorized as unreasonable and I do not know the exact reasoning behind the predecessor's interest;

- c. the allegations of serious disagreements between the Respondent and the First Legislative Counsel and the belief on the part of the Applicant that the decision was borne out of a desire to display power are, on the evidence before me, unfounded and speculative;

- d. the preference of the First Legislative Counsel for public officers to rely on materials available on the Portfolio website is not established to have been a factor in or a reason for the decision;

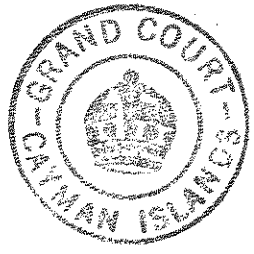


⁴⁹ Bundle 1A – Tab 7 – Affidavit Respondent paras 42-49

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- e. the Respondent did in fact take into account the adjustments made by the Applicant to his courses;
- f. the refusal to grant permission subject to conditions was because the Respondent relied upon a fundamental objection to the teaching of the courses namely the conflict between the courses and the work of the Applicant. Also the offer to reconsider the decision if the Applicant agreed to submit to oversight was tantamount to suggesting the imposition of a (reasonable) condition;
- g. there was no requirement for the Respondent to have taken into account the limited pool of expertise available in these islands;
- h. as I shall set out later in this Judgment, adequate explanations or reasons have been provided for the Respondent's decision;
- i. the target audience for the courses was in the main the public service; and
- j. unremunerated training courses are provided between Government Departments notwithstanding the lack of specific provision for training in the contracts of employment of the course providers;

45. I also take into account that the Court must not, in any event, substitute its own views of the facts for those of the Respondent. The test of unreasonableness has a high threshold.



1 46. Accordingly I find that the decision was not *Wednesbury* unreasonable and
2 further that there is no illogicality or misapplication of reasoning in the decision
3 and the Respondent did not manifestly give undue weight to any particular factor
4 in her decision. The decision was not oppressive.

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Proportionality

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47. The Applicant makes a further separate submission that the court should consider whether the decision was proportionate. He argues, and I accept, that the decision must comply with s.19 of the *CICO*. However that is arguably another way of saying that the decision must not be unreasonable in the *Wednesbury* sense. I must be mindful of the risk of watering down the *Wednesbury* test by substituting disproportionality for unreasonableness. The Respondent refers to the 7th edition of *De Smith's Judicial Review* at 11-010 where the following appears:

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“Proportionality in the sense of achieving a ‘fair balance’ has always been an aspect of unreasonableness. There are also aspects of the structured test of proportionality which are inherent in traditional notions of unreasonableness (such as the requirement that there be a ‘rational connection’ between the means of a decision and its ends)” but I note that the authors go on to say *“there are aspects of the ‘unreasonable’ decision that do not fit the concept of proportionality such as the uncertain decision, or a decision which violates a principle such as equality or consistency”*.

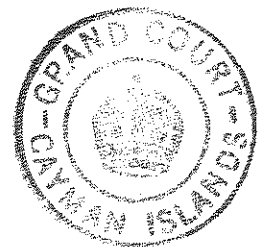
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However issues such as equality and consistency do not arise on the established facts in this case.

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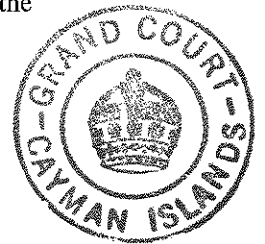
1 48. The Applicant has drawn my attention to various authorities including *Regina v.*
2 *Barnsley Metropolitan Borough Council ex parte Hook*⁵⁰; *De Freitas v.*
3 *Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*
4 *and Others*⁵¹ and a decision of the Canadian Supreme Court *Regina v. Oakes*⁵²
5 all of which make clear that decisions to which the principle of proportionality
6 applies must be rational, must not limit fundamental rights and freedoms to any
7 unnecessary degree and must seek to minimize any necessary limitations on the
8 rights of the Applicant, and must be required in order to satisfy a sufficiently
9 important objective. This is no more than is set out in s.19 of the *CICO* namely
10 that decisions of public officials must be lawful, rational, proportionate and
11 procedurally fair.

12
13 49. In finding that the decision was not *Wednesbury* unreasonable, I have taken into
14 account the requirements of s.19 of the *CICO*. The decision was lawful, in other
15 words it was one the Respondent was lawfully entitled to make. The decision
16 was rational namely one for which valid supportable reasons could be and were
17 given (I will deal with the adequacy of the reasons for the decision later in this
18 judgment). The decision was proportionate because it was one the Respondent
19 was entitled to reach in order to protect a legitimate object and did not unduly or
20 unnecessarily limit the Applicant's freedom to teach on the basis of the extent of
21 the information provided about the courses by the Applicant. The decision was
22 procedurally fair as the Respondent allowed the Applicant every opportunity in
23 written form and in discussions to explain his proposals, to modify them, to
24 accept oversight and conditions and to hone his teaching in order to avoid the
25 conflict the nature of which, as I find, was explained to the Applicant.
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⁵⁰ 1976 WLR 1052

⁵¹ 1999 1 AC 69

⁵² 1986 1 SCR 103



1 50. The Respondent has submitted that the proportionality test is inappropriate in this
2 case because we are dealing here with the interpretation of a contract of
3 employment and the test set out in s.19 is intended to deal with decisions
4 affecting qualified constitutional rights such as the right to privacy, to a fair trial
5 and so forth. I do not find it necessary to reach any decision on that submission
6 as my findings are that the requirements of s.19 are satisfied in any event.

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The Decision and the Reasons

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51. There remain 2 further matters to be determined in relation to the substantive
issues raised in this application for Judicial Review of the decision, namely (i)
did the Respondent correctly identify a conflict or potential conflict between the
courses and the work of the Applicant and (ii) did the Respondent provide proper
or adequate reasons for her decision.

52. The conflict is clearly explained at paragraphs 11, 16, 19, 20, 28, and 35 to 39
inclusive of the Respondent's Affidavit and the various documents provided to
the Applicant by the Respondent in the form of letters and memoranda to which I
have already made reference earlier in this Judgment. The essential nature of the
conflict appears in paragraph 39 of the Respondent's Affidavit and the risk of
exploitation at paragraph 36. Those explanations do not require further
elucidation. The decision was a conclusion reached after considering the
available evidence of what the courses entailed. The Applicant's summaries of
the course contents provided a more than adequate basis for the decision that a
conflict existed.



1 53. The reasons provided by the Respondent for her decision are submitted to be
2 inadequate or insufficient. Those reasons can be summarized succinctly in the
3 finding that there was “*a clear connection between the areas that (the Appellant*
4 *had) identified for training and the duties and functions that fall within the scope*
5 *of (his) work*”.

6
7 The Applicant says that the reasons given fail to provide the real gist of how the
8 teaching of each of the courses will or might (in the estimation of reasonable
9 people) be perceived to undermine the performance of his duties. That
10 submission is based on the speech of Lord Mustill in *Regina v. Secretary of State*
11 *for the Home Department ex parte Doody*⁵³ where he said

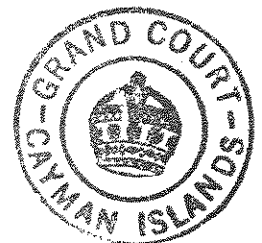
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13 *“Fairness will very often require that a person who may be adversely affected*
14 *by the decision will have an opportunity to make representations on his own*
15 *behalf either before the decision is taken with a view to producing a*
16 *favourable result; or after it is taken with a view to procuring its*
17 *modification; or both. Since the person affected usually cannot make*
18 *worthwhile representations without knowing what factors may weigh against*
19 *his interests fairness will very often require that he is informed of the gist of*
20 *the case which he has to answer”.*
21

22 This concept of fairness is now well entrenched in the law as exemplified in the
23 later authorities to which the Applicant has referred⁵⁴.

24
25 54. The Respondent submits that the decision is not a notification or adjudication
26 procedure and that she is not therefore required to give reasons. In any event it is
27 submitted, notwithstanding that she is not required to provide reasons, the
28 Respondent has done so and the reasons given are sufficient. Mr Lowe Q.C. has
29 helpfully drawn my attention to the decision in *Regina v. City of London*

⁵³ 1993 3 All E R 92 at P560F

⁵⁴ Skeleton Argument - Applicant - paras 12 (b) and (c)



1 *Corporation ex parte Matson*⁵⁵ in which the Court of Appeal held that, although
2 the decision-maker (the Court of Aldermen), in refusing to confirm the valid
3 election of Mr. Matson as an Alderman, was not in the exercise of its wide
4 discretion required to provide reasons for its decision which was procedurally
5 fair, nevertheless fairness and natural justice required an explanation to be given -
6 for the reasons set out at P776G to P777D.

7 The Court said (per Neill L.J.):

8 “the articulation of short reasons will enable the court (of Aldermen) to
9 ensure that their decisions in every case are sound and manifestly just and in
10 the interests of the city.” (P777D).
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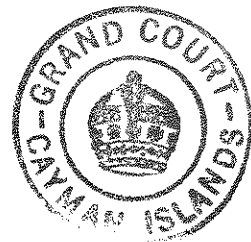
12 I have also been referred to *Regina v. Secretary of State for the Home*
13 *Department ex parte McAvo*y⁵⁶ in which the Court of Appeal held that, in
14 reviewing a prisoner’s security categorization, it was only necessary for a prison
15 to provide a prisoner with the gist of the reports relied on (in the interests of the
16 proper running of a prison). Finally I was provided with a transcript of the recent
17 decision of the CICA in the local appeal of *Civil Aviation Authority of the*
18 *Cayman Islands –v- Axis International Limited*⁵⁷ in which the Court said (at
19 para 57) that the CAA was under no obligation to give reasons for its decision to
20 grant an aerodrome certificate. I did not find that this decision added greatly to
21 the sum total of learning on this topic.

22
23 55. On balance, I have not been persuaded that the Respondent was entitled to give
24 no reasons at all for her decision. On the contrary the authorities suggest that the
25 gist of the reasons for a decision such as this should be provided to the Applicant
26 as a fair and sensible demonstration that the decision is sound and just. I must go
27 on to consider whether that is what the Respondent did in fact do.

⁵⁵ 1997 1 WLR 765

⁵⁶ 1998 1 WLR 790

⁵⁷ G0056 of 2012, (judgment delivered on the 26th March 2014)

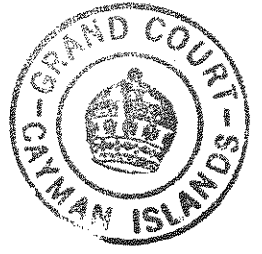


1 56. I set out the reasons provided in writing by the Respondent earlier in this
2 judgment. It is to be noted that the courses were discussed with the Applicant.
3 He had the opportunity to present his case in the course of the decision-making
4 process and after the decision was made. He was able to modify his proposals. It
5 was made clear that the decision was based on a perceived conflict between the
6 teaching and the performance of the Applicant's duties. The Respondent was
7 thereby providing the gist of her decision and demonstrating that the basis of the
8 decision was sound, was clearly just in its procedural fairness and was in the
9 public interest because teaching the courses would have conflicted with the
10 Applicant's duties. He was after all seeking to work for reward in both the public
11 and private sectors using knowledge and expertise gained in the course of his
12 employment and in daily use. I do not accept that the decision has the effect, as
13 the Applicant asserts, of preventing him from teaching at all here in Grand
14 Cayman as the recent concession in relation to the 'plain English' course
15 establishes.

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17 57. On the basis as set out above I find that reasons were stated for the decision and
18 that the reasons for the decision reached by the Respondent were adequate and in
19 sufficient detail for the Applicant to understand why permission had been
20 refused.

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22 58. It follows that, for the reasons provided in the body of this Judgment, even if
23 Judicial Review had been properly available to the Applicant, I find that there is
24 no basis to grant the remedies the Applicant seeks and his application fails.

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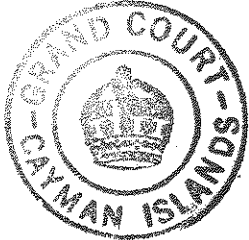



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Costs

59. I indicated at the hearing that costs would follow the event but that I would be willing to hear further submissions from the Applicant if he failed in his application. Subject to any further argument at a time to be agreed, the order I make is to award costs to the Respondent against the Applicant. That order will take effect unless the court is informed that costs are agreed between the parties or a costs hearing is to be arranged in order to determine the appropriate order to be made in respect of costs.

Dated this the 21st day of November 2014



Honourable Mr. Justice Malcolm Swift (Actg.)
Acting Judge of the Grand Court