IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. 161 OF 2014

BETWEEN:

ROSWORTH MCLAUGHLIN

Plaintiff

AND

MINISTRY OF HOME AFFAIRS
EX PARTE Eric Bush, Chief Officer

First Defendant

AND

THE CIVIL SERVICE APPEALS COMMISSION

Second Defendant

Appearances: Dr. Barnett instructed by Murray & Westerborg for the Plaintiff
Ms. Anne-Marie Rambarran, Crown Counsel, for the First Defendant
Ms. Deborah Bodden attends as observer for the Second Defendant

Before: Hon. Justice Richard Williams

Heard: 10th December 2014

Further arguments provided to Judge: 23rd December 2014

Draft Judgment circulated: 12th March 2015

Date of Judgment: 16th March 2015

JUDGMENT

Background

1. Mr. McLaughlin ("the Plaintiff") has been employed with the Cayman Islands Fire Service ("CIFS") since 1979. He rose through the ranks and was promoted to

the post of Deputy Chief Fire Officer. On 25 March 2013 he was appointed as Acting Chief Fire Officer.

2. On 3 July 2013 the Cayman Islands Government announced a voluntary separation policy for qualified members of the Civil Service. On 31 October 2013 the Plaintiff submitted an application pursuant to the policy. The application was refused by the Voluntary Separation Committee as the Plaintiff did not fulfil the requisite criteria.

3. The Plaintiff has been on health leave since 14 February 2014 and has been providing medical certificates in the interim when requested to do so by the employer. It appears that this health leave was caused by injuries received in the line of duty.

4. On 24 February 2014 the Plaintiff submitted an application for the advertised post of Chief Fire Officer.

5. On 25 February 2014 the Plaintiff was informed in writing by the First Defendant that, following a review conducted by the Chief Fire and Rescue Adviser in the United Kingdom ("the Adviser"), the CIFS was to be restructured. He was informed that the post of Deputy Chief Fire Officer would be removed as a part of

the restructuring of the management, whilst the post of Chief Fire officer would remain.

6. The First Defendant went on to say in the letter that, having considered the Plaintiff's wish to voluntary separate from the public service and the recommendations from the Adviser for restructuring, he was exercising his powers pursuant to section 44(6) of the Public Service Management Law (2011 Revision) ("the Law"). That section enables the Chief Officer to retire a staff member in order to improve the efficiency of the civil service entity, but in accordance with the procedures established in personal regulations for retiring civil servants. The First Defendant stated in the letter that pursuant to section 44(1)(b) of the Personnel Regulations (2011 Revision) ("the Regulations") that he was giving the Plaintiff written notice of his intention to retire him from the CIFS to improve the organisation. Section 44(1)(b) of the Regulations provides that before determining whether to require a staff member to retire under section 44(6) of the Law the staff member must be advised of the intention to require his retirement to improve the organisation, and to provide him with an opportunity to explain his position. Section 44(1)(c) of the Regulations requires the appointing officer to then re-evaluate the effect of retiring the staff member in light of the explanation provided by the staff member, and thereafter notify the staff member of the results of the re-evaluation. Section 44(2) of the Regulations provides that after the section 44(1) procedure has been completed, if the appointing officer is

still of the view that retiring the staff member will improve the efficiency of the civil service entity, then he may retire the staff member pursuant to section 44(6) of the Law and when doing so must comply with Section 44(3) of the Regulations. Accordingly, in the letter the First Defendant provided details of the benefits the Plaintiff would receive and properly invited a response pursuant to section 44(1)(b) of the Regulations by 3 March 2014.

7. On 3 March 2014 the Plaintiff replied in writing to the First Defendant. The Plaintiff indicated that the offer was being *"seriously contemplated"*, but explained that he wished to have further discussions and time before reaching a final decision. In light of the content of the letter the First Defendant extended the response period to 10 March 2014.

8. On 9 March 2014 the Plaintiff again wrote to the First Defendant. In the letter he indicated that he was prepared to retire early from the CIFS, but he sought to address a number of issues. He highlighted that his application for voluntary separation in 2013 should not be viewed as a relevant consideration in what amounted to an *"involuntary termination of service by the employer."* The Plaintiff indicated that he did not agree with the rationale for his early retirement based on the Adviser's recommendations and the First Defendant's decision to restructure the organisation.

9. In the 9 March letter the Plaintiff also complained that he was being denied the opportunity to be interviewed and considered for the post of Chief Fire Officer saying that the circumstances seemed to be "*unfair, biased and unreasonable,*" especially as he had been acting in that post for the past year. However, the First Defendant contends that this is not so. The Plaintiff was informed on 18 June 2014 that he had been shortlisted for the post. He was, along with all the other applicants for the post, asked to submit a five-year strategic plan in support of his application within a stipulated time. The First Defendant contends that this has still not been done by the Plaintiff despite him and his attorneys requesting several extensions of time for him to do so. In fact, it is contended that he was given a more favourable opportunity to apply, for by giving these extensions he had been afforded more time than the other applicants to prepare.

10. In the 9 March 2014 letter the Plaintiff indicated his upset at being personally served with the 25 February letter by the First Defendant and by the letter then being read out to him in full. However, it appears that the Plaintiff has failed to recognise that section 44(1)(b) of the Regulations requires the staff member to be advised both orally and in writing. He also complains that notification should have waited until after his return to work, although it appears that he is still off work at this time.

11. In the 9 March 2014 letter, the Plaintiff went on to decline the offer made by the First Defendant. He highlighted that this was not a voluntary separation but it was now an involuntary termination of service. He made a counter-offer in relation to benefits that would be acceptable for him if he were to retire. I pay no regard to the detail of the counter offer because the 9 March 2014 letter is headed "without prejudice."

12. On 20 March 2014, the First Defendant replied to the Plaintiff. He stated (as required by section 44(1)(c) of the Regulations) that he had given full consideration to the representations made in the 9 March letter and had re-evaluated the effect of retiring the Plaintiff to improve the efficiency of the CIFS. As permitted under section 44(2) of the Regulations, the First Defendant reiterated that he was of the view that retiring him would improve the efficiency of the CIFS. However it is evident that a decision was not finalised or moved on to the section 44(3) stages because the First Defendant then made an increased "*final offer*" of settlement terms. The First Defendant requested confirmation of acceptance of this offer by or on 24 March 2014.

13. On 21 March 2014 a letter was sent by the First Defendant to the Plaintiff confirming that when the Ministry of Home Affairs assumed responsibilities for the Fire Department on 1 July 2013 it continued the Plaintiff's appointment as Acting Chief Fire Officer from 12 July 2013 until further notice. It also noted that,

as he was on sick leave from 14 February until 31 March 2014, the acting appointment would cease during that time and that the Deputy Chief Fire Officer was appointed as the Acting Chief Fire Officer.

14. On 24 March 2014 the Plaintiff wrote to the First Defendant seeking an extension of time to reply to the offer of settlement contained in the 20 March 2014 letter. By letter dated 25 March 2014 the Acting Chief Officer of the Ministry acceded to that request granting an extension until 9 April 2014.

15. On 9 April 2014 the Plaintiff wrote to the First Defendant, declining the offer of settlement, and indicating that his legal advisers had told him that what he viewed as being a decision to terminate his services in the letter of 20 March 2014 was "*illegal, ultra vires, irrational, procedurally irregular and in breach of the rules of natural justice.*" He added that there was no credible evidence or rational basis in support of the decision to abolish any of the two posts of Deputy Chief Fire Officer and that the exercise of statutory power to abolish the post which he holds was "*irrational and void.*"

16. On 29 April 2014 a further without prejudice letter was sent by the Acting Chief Officer of the Ministry to the Plaintiff. It indicated that full consideration had been given to the above-mentioned letters sent by the Plaintiff and that a "final offer" of settlement was made. I note that the term final offer had also been used

by the First Defendant in his letter of 20 March 2015, and despite this, there were ongoing negotiations and an increased revised offer. It appears that final does not mean final in these negotiations. Again, I pay no regard to the substance of the offer, as it appeared in a without prejudice letter. The letter required confirmation of acceptance of the latest "final offer" on or before 23 May 2014.

17. On 22 May 2014 the Plaintiff lodged an appeal dated 21 May 2014 with the Civil Service Appeals Commission ("the Commission") against the decision of the Chief Officer, Ministry of Home Affairs which he contends had been taken on 29 April 2014. I note with interest that the Notice of Appeal was filed on the same day that Plaintiff wrote to the First Defendant stating that the latest final offer communicated in the 29 April 2014 letter was unacceptable and that remedies pursuant to the Law would now be sought. It was clear that the parties were in negotiations which had already included the First Defendant increasing "final offers" of settlement. With hindsight it would have been wise for the Plaintiff to have communicated his non-acceptance of the offer, his intention to appeal to the Commission and allow a short but reasonable period of time for a reply from the First Defendant before lodging the appeal. This would have enabled the First Defendant to have either made a further offer or, if both parties agreed they had met an impasse, to finalise and formalise a decision to retire the Plaintiff by following the section 44(3) of the Regulations procedure. The First Defendant quite rightly had not initiated the Section 44(3) procedures as the parties were still

negotiating and it would have been wrong for him to have done so whilst they were doing so. By lodging the appeal in this hasty manner the First Defendant was not afforded the opportunity to consider whether he wished to move on to the final part of the process, namely the section 43(3) procedure.

18. On 28 May 2014 the Plaintiff lodged an Amended Notice of Appeal to the Commission. The Amended Notice of Appeal contained the grounds of the appeal and asked the Commission to set aside the decision of the Chief Officer and award monetary compensation. It is of course right that this alternative remedy should be exhausted before any application for judicial review is made.

19. On 6 June 2014 the Acting Chairman of the Commission wrote to the Plaintiff's attorney and to the First Defendant. The letter queried whether a relevant decision was taken and, if it was, whether it was on 29 April 2014 or on 25 February 2014. This was important because, pursuant to section 54(1) of the Law, any appeal to the Commission has to be brought within 30 days of the relevant decision. The Acting Chairman required the parties to, within 10 days, submit written submissions concerning the date of the decision that was being appealed, whether the Plaintiff is employed by the Ministry and, if his retirement has taken place, the date each party state as being the effective retirement date.

20. The Plaintiff's attorneys wrote to the Acting Chairman of the Commission on 10 June 2014, making it clear that the decision could not be said to have been made in February as the letter was ambiguous. They forcefully submitted that the final decision was only contained in the 29 April 2014 letter.

21 On 17 June 2014 the Attorney General's Chambers wrote to the Acting Chairman of the Commission on behalf of the First Defendant. They understandably stated that the lodging of the appeal was premature as no final decision had yet been made because the parties were in the process of conducting negotiations with a view to agreeing a settlement package. They made it clear that the 25 February letter referred to an intention to retire and that the Plaintiff remained unretired from the civil service and was currently employed on full pay as Acting Chief Fire Officer despite being on sick leave on 14 February 2014. The letter noted that a sick certificate had been provided by the Plaintiff to them on 5 June 2014 which covered the period 2 June 2014 to 4 July 2014. They also stated that the letter dated 29 April 2014 was a without prejudice letter containing an offer of settlement and it did not state or contain a formal decision by the Acting Chief Officer to retire the Plaintiff and therefore could not be the subject of an appeal. They commented that it was highly inappropriate for without prejudice letters to form the basis of an appeal, especially as they were drafted in the context of genuine settlement negotiations. The Acting Commissioner was informed that the

negotiations were ongoing and it was inappropriate to use oral offers of compromise in proceedings before statutory tribunal.

22. I again note that the First Defendant has not undertaken the procedure set out in section 44(3) of the Regulations[1], which requires the appointing officer at the earliest opportunity upon deciding to retire staff member to notify the staff member that he is being retired to improve the organisation under the terms of his employment agreement and provide the staff member with three months' notice of the retirement. I note that up until 29 April 2014 the Plaintiff had carefully followed the procedure set out in section 44(1) of the Regulations. The fact that the First Defendant had not reached the stage of the section 44(3) procedure as negotiations were still ongoing and the appeal was lodged, without warning and without affording the First Defendant an opportunity to reply, on the same day that the then current offer was refused by the Plaintiff is a clear indicator that a final formal decision had not been taken or communicated.

23. On 19 June 2014 the Plaintiff's attorney again wrote to the Acting Chairman of the Commission. He confirmed that both parties agreed that the letter of 25 February 2014 did not contain a final decision. He reiterated his view that the letter of 29 April 2014 did communicate a final decision as it commented that full consideration had been given to the Plaintiff's representations and that the terms

[1] See paragraph 17 above.

were a final offer. It was submitted that the fact that he was still employed by the civil service was irrelevant, since it was the decision and not the fact of retirement (which may only come into effect at a future date) which is the subject of appeal. However, when I consider the submissions I note that when giving the decision to retire staff member section 44(3) of the Regulations requires three months' notice of the retirement to be given and therefore if a final decision to retire had been made and communicated to the Plaintiff on 29 April 2014, one would reasonably expect the retirement to have come into effect on or around 29 July 2014. In fact there is no evidence of the existence of any retirement date, which would be communicated at the time of the final and formal decision to retire the staff member.

24. By letter dated 15 July 2014 the Acting Chairman of the Commission communicated to the Plaintiff that after considering the submissions at its meeting on 1 July 2014, the Commission Members had unanimously concluded that there had not been *"a final determination of the question whether the appellant is to be retired in the interest of the public service*" and decided that the Appellant's appeal was premature. The Commission rightly refused to accept the appeal.

25. On 23 July 2014 the Plaintiff filed and issued an Ex Parte Application for Leave to Apply for Judicial Review ("the Application") of (i) "the decision" of the First Defendant made on 29 April 2014 to retire the Plaintiff from his post of Deputy

Chief Fire Officer; and (ii) the decision of the Commission made on 1 July 2014 not to proceed with the hearing and determine the Plaintiff's appeal against "the decision" of the First Defendant.

26. The Plaintiff in his application sought:

(i). a declaration that the First Defendant made a final decision on 29 April 2014 to retire the Plaintiff on the purported ground that it was in order to improve the efficiency of the CIFS and in so doing acted contrary to section 44(6) and 44(8) of the Law, Regulation 44 of the Regulations and the Constitution;

(ii). an order for Certiorari to quash the decision of the First Defendant made on 29 April 2014 to retire the Plaintiff from his position of Deputy Chief Fire Officer and to deny him compensation and/or damages payable to him in the circumstances;

(iii). an order for Certiorari to quash the decision of the Second Defendant made on 1 July 2014 not to hear and determine the appeal of the Plaintiff against the decision of the First Defendant to retire the Plaintiff; and

(iv). an order to set aside the said decision and/or grant to the Plaintiff monetary relief against the Crown for the unlawful and unconstitutional action taken against him and that such damages should reflect loss of income, loss of prospects of promotion, contravention of the Plaintiff's

rights, disadvantage in the employment market, smear of the Plaintiff's reputation, loss of opportunities and emotional distress.

27. The Application came before me on 23 September 2014. Upon reading the papers prior to the hearing it was evident to me that there were issues upon which I would likely be assisted in my task by hearing from the Defendants. This view about inviting the Defendants to attend the leave hearing and the relevant case law was notified to the Plaintiff's attorneys about five days prior to the hearing. At the same time, their attention was drawn to the Pre-Action Protocol for Judicial Review 4/2013.

28. At the hearing it was evident that the Defendants had become aware of the proceedings, not by the Plaintiff notifying them of the same, but by seeing the case appearing in the published Court List and thereafter obtaining a copy of the application from the Court's Office. The Defendants did not attend the hearing but the Second Defendant's attorneys indicated to the Plaintiff that they wished to be heard at the leave hearing.

29. Although Dr. Barnett forcefully submitted that this was not one of those cases where a defendant may be invited to attend because an interim remedy or order was being sought, it was evident to me that there was an issue as to whether a decision existed which was amenable for judicial review. There was also a

possible issue as to delay. It was clear to me, and remains so, that there was no issue as to the Plaintiff having a sufficient interest.

30. 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 Defendants to attend the leave hearing. I felt that I required clarification about the Defendants' position(s) regarding the application and felt that they would likely possess factual information that could have a material influence on whether or not I granted leave. Before the end of the ex parte hearing I reiterated the purpose of the Pre-Action Protocol for Judicial Review and expressed a concern that it had not been followed in this case. For the avoidance of future doubt, I reiterate the importance to parties in all judicial review applications of fully complying with the Pre-Action Protocol.

31. Following on from the hearing the Plaintiff's attorneys submitted a draft order for my approval. Paragraph 3 of the order specifically required service of the application and affidavit in support upon the Defendants. A copy of the transcript of my written ruling had been provided to the Plaintiff's attorneys at Court on 23 September 2014. Although the order prepared by the Plaintiff's attorneys did not

include a provision requiring them to disclose their written submissions or the transcript of my judgment, I am of the view that they should also have supplied those, as they had a duty to give full and frank disclosure about what had occurred at the adjourned ex parte hearing. They were wrong to view paragraph 3 of the order as the Court authorising them to refuse to provide their submissions despite a request for them in writing from the attorney for the Second Defendant. I expressed this view to the parties in writing prior to the hearing. Although I accept this was not a case in which an ex parte order had been made against the Defendants, I am still of the view that best practice determines that a copy of the ex tempore judgment should have been provided. I should add for future cases that may come before me, where the Court makes an ex parte order, an 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.[2]

32. At the on notice hearing the parties agreed that the Attorney General, who had been named as the Third Defendant, should be removed as a party to these proceedings. I made that order.

[2] Re S (Ex Parte Orders) [2001] 1 FLR 308.

Submissions Made and the Law

33. At this stage my function is not to determine issues that are properly raised by the affidavits before me. I bear in mind that leave should be granted if on the material available the Court thinks, without going into the matter in depth, that 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.

34. The First Defendant's case is straightforward; it contends that no decision has been made. It contends that the content in the series of letters written in ongoing without prejudice negotiations were intended to see if a settlement could be reached and were not intended to formalise a final decision. It is contended that a final decision has still not been made or communicated, as negotiations are still ongoing and that is the reason why, at the time of this hearing in December 2104, 7 ½ months after 29 April 2014, the Plaintiff is still employed. I note that it is submitted that even following 29 April 2014 negotiations have still been ongoing.

35. It was submitted on behalf of the Plaintiff that there are a series of decisions that are amenable to judicial review. It is contended that these are: (i) the decision to restructure the CIFS; (ii) the action of embarking on the process of retiring the Plaintiff on the ground of seeking to improve the organisation; (iii) the decision to conduct and the act of continuing to conduct the process exclusively by correspondence; and (iv) the decision to bring to finality the process of communication and consultation on proposed retirement without having satisfied the statutory preconditions.

36. It is noted on behalf of the Plaintiff that where challenges are as to process, the better option is to await a final or determinative stage before applying for judicial review. It is contended that in this matter there is an ongoing process and that the relevant decision is not one fixed in time. It is submitted that acting on the commencement of the process, which it is appears is being submitted as being around the time of the February 2014 letter, the continuation of that process as well as the affirmation of its finality are each and all amenable to judicial review. It is argued that the decision of 29 April 2014 is amenable to judicial review as it is an "*operative and significant*" decision reached following a process which it is contended has been in breach of statutory requirements.

37. The Court was referred to Judicial Remedies in Public Law by Clive Lewis 1992 Edition pages 287-288 in support of the above and a contention that an

application may be made to review an error in the decision-making process before that process is completed and a final decision reached. As the author rightly note the issue is whether the Court will refuse to grant leave because it requires the individual to wait until the final decision has been reached before mounting a challenge, relying on the error at the preliminary stage as a ground for validating the final decision. I am conscious that premature applications for judicial review should be the exception rather than the norm and that the parties should ordinarily await the final outcome. As the author rightly states at page 288:

> "*There are strong arguments against allowing premature challenges. The error might be corrected during the decision-making process, the error might not affect the final decision or the individual might not be dissatisfied with the final decision. It could be a waste of judicial time to review preliminary decisions rather than awaiting the final decision.*"

This consideration becomes even more important and relevant when the parties are conducting the type of ongoing negotiations seen in this case.

Conclusion

38. I am not satisfied that there is a decision amenable for judicial review in this matter. As made clear by the Plaintiff in its 10 June 2014 correspondence with the Commission, the 25 February 2015 letter from the First Defendant was "*ambiguous.*" The Plaintiff in that letter also made it clear that the February letter was the Chief Officer providing the Plaintiff with written notice of his intention to

retire him and was not written notice of a decision. It is clear that the Plaintiff was telling the Commission that the spirit behind the letter was one of negotiation, inviting a response, prior to making a decision about whether the staff member should retire. The tenor of the correspondence is that at the February letter did not include a decision and was following the appropriate process. It is clear that in the ultimate paragraph of the letter of 25 February 2014 that the First Defendant was affording the Plaintiff the opportunity to respond and explain his position about the First Defendant's intention to require him to retire. It is evident from the correspondence that follows, especially his without prejudice letter of 9 March 2014 that the Plaintiff took that opportunity. So no decision was made at that stage, but pursuant to the Regulations simply an intention expressed and an invitation to negotiate and respond made.

39. The 29 April 2014 letter importantly was written without prejudice and clearly formed part of the ongoing negotiations and was referring solely to the discussion about compensation. The Plaintiff places great reliance upon the words "*final offer*" contained in the letter; however the same wording was also used in the 20 March 2014 letter from the First Defendant, yet negotiations continued and that "*final offer*" was varied by the April letter. It is not unusual for parties when negotiating to give an impression that they are being firm and as a consequence comment that an offer is a final offer yet, as in this case, go on to later change the offer as the negotiations progress.

40. It is evident that the First Defendant is contending that he had evaluated the effect that retiring staff member would have on the performance of the civil service entity, that he had advised the staff member orally and in writing of the intention to require him to retire to improve the organisation, that he had provided an opportunity for the staff member to explain his position, that he had re-evaluated the effect of retiring the staff member in light of the explanation provided and had notified the staff member of the results of the re-evaluation. This all appears in the correspondence. However, what he had not done was to complete the process set out at section 44(3). If he had notified the Plaintiff that it was no longer an intention and his formal decision was that he was being retired to improve the organisation under the terms of his employment agreement and provided the staff member with notice, whether that be three months or more, then a decision would have been made. The First Defendant was not given an opportunity to consider whether this is what he wanted to do before the matter moved on to the significant next and final stage, as the Plaintiff lodged his appeal dated 21 May 2014 with the Commission on the same day that he notified the First Defendant that he did not accept the 29 April Offer, namely on 22 May 2014. Importantly, in this matter, the Plaintiff remains employed 7 ½ months after the date upon which the Plaintiff contends the decision had been made to retire him and there still remains no notice date for any retirement. This is a clear indication that a final decision had not been reached and that the negotiations about the retirement and the settlement

proposals, which were intrinsically linked to any such decision, were still ongoing when the Plaintiff lodged his appeal with the Commission.

41. The appeal to the Commission and the application for judicial review were both premature. This is not one of those cases for reviewing the decision making process before that process is completed and a final decision reached. Accordingly I am not satisfied that there is a decision amenable to judicial review and I do not grant leave to apply for judicial review.

Costs

42. My preliminary view is to make no order for costs, however if either party wishes to make submissions, they should contact the Court within five working days of receipt of the certified final judgment.

.....

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