

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS.

Civil Appeal No. 9 of 2001.

Grand Court Cause No. 519 of 2000.

BETWEEN DR. ASTLEY MCLAUGHLIN

Appellant

And

**HIS EXCELLENCY THE GOVERNOR
OF THE CAYMAN ISLANDS**

Respondent

**BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President.
The Honourable Mr. Justice Ira D. Rowe, J. A.
The Honorable Mr. Justice Martin Taylor, J. A.**

Appearances:

**Douglas S. Schofield of Hunter & Hunter for the Appellant.
Stephen Hall-Jones, Sr. Crown Counsel for the Respondent.**



Heard: July 29th & 30th, 2002 Delivered: November 29th, 2002.

JUDGMENT.

ROWE, J. A.

1. The Cayman Islands (Constitution) Order 1972, came into operation on 22 August 1972. Sections 54 and 55 of the Constitution provide as follows:

"54. The Governor, in Her Majesty's name and on her behalf may constitute such offices for the Islands as may lawfully be constituted by Her Majesty and, subject to the provisions of any law in force in the Islands, may make appointments (including appointments on promotion and transfer) to any such office; and any person so appointed shall, unless it is otherwise provided by any such law, hold office during Her Majesty's pleasure.

55 (1). Subject to the provisions of any law in force in the Islands, the Governor may for cause shown to his satisfaction dismiss or suspend from the exercise of his office any person holding a public office or take such disciplinary action as may seem to him to be desirable.

(2) The reference in this section to the power to dismiss any person holding a public office shall be construed as including a reference to any power to require or permit a person to retire".

2. On December 21, 1998, Graham Wood, Acting Permanent Secretary (Personnel) wrote to the Appellant and advised him that His Excellency the Governor, acting on the advice of the Public Service Commission had approved the retirement of the Appellant on grounds of abolition of office. The letter further stated that the retirement would take effect from April 1, 1999, however the Appellant would be paid for three months in lieu of notice and he would effectively cease to be at work from December 31, 1998.

3. Paragraph 2 of the letter stated, inter alia, "I regret that the Service has not been able to provide you with suitable alternative employment". Indeed, the extract from the Minutes of the Public Service

Commission of December 8, 1998, show that the Commission had stated that it felt that it had no option but to recommend abolition of the Appellant's post. The Commission further stated: "It is unfortunate that there are no suitable vacancies to which Dr. McLaughlin can be transferred. In cases where abolition of office arises and there is no suitable vacancy to which the post holder can transfer, retirement on the grounds of abolition of office is appropriate ...". It then recommended the abolition of the office of the Appellant.

4. On June 1, 2000 the Appellant was granted leave to seek judicial review of the decision of His Excellency The Governor (hereinafter "the Respondent") on the ground that his retirement from the public service was unlawful in that the purported abolition of his office was arrived at by unfair means. The court below dismissed the application on March 9, 2001 and this appeal was taken. The Appellant in the Notice of Appeal seeks the following remedies: (a) that the judgment of the court below be set aside; (b) that he be reinstated to the office which he held; alternatively damages; (c) that he be awarded costs in this court and in the court below.

BACKGROUND TO THE PROCEEDINGS.

5. The Appellant is a Caymanian. In 1977 he graduated from the State University of New York with a double major in Chemistry and Mathematics. He went on to Indiana University where in 1980 he graduated with a Masters Degree in Chemistry. In 1981 he obtained his Doctorate in Chemistry/Biochemistry from Indiana University. From 1981 to 1989 he worked for Eastman Kodak Company as a Senior Scientist at its research laboratories in Rochester, New York. He returned to the Cayman Islands in 1989 and between February 13, 1989 and December 31, 1998 he was continuously employed in the public service of the Cayman Islands.

6. Positions held by the Appellant in the Cayman Islands public service are set out below:
 - (a) 13 February 1989 to June 1991 - Assistant Secretary in the Ministry of Communications, Works and Agriculture;
 - (b) July 1991-March 1993 - Deputy Director (Supernumerary) Mosquito Research & Control Unit ("MRCU") in the Ministry of Communications Works & Environment until 1992 and then with the Ministry of Tourism, Environment and Planning until April 1993;

(c) April 1993 to May/June 1995 - MRCU ceased to exist as a discrete organization between April 1993 and June 1995. In the meantime the Appellant was appointed Assistant Director of Research, Department of Environment, Ministry of Tourism & Planning;

(d) July 1995 to December 1995 - The MRCU was re-instituted and the Department of the Environment was transferred to the Ministry of Agriculture, Environment, Communications and Works;

(e) January 1996 to December 1998 - Administrative Officer 1, in the Ministry of Agriculture, Environment, Communications and Works. He was in the pay scale of SSI.

7. On September 28, 1998, the Permanent Secretary of the Ministry of Agriculture, Environment, Communications & Works, ("AECW"), wrote to the Chief Secretary and recommended the Abolition of the post of Administrative Officer in that Ministry. He wrote:

"The subjects assigned to the Administrative Officer do not justify having such a highly paid post and results in a considerable amount of idle time. It would be much more advantageous to have the subjects distributed amongst other senior staff and the post abolished.

It may be possible to transfer the post and the individual to another Ministry/Department. The Ministry would have no objections if this could be done. Failing this approach then the final option would be to consider early retirement".

8. At the time of the September letter from the Permanent Secretary AECW to the Chief Secretary, the responsibilities assigned to the Appellant were:

COM:	Communications (General) & Cable & Wireless;
D VES:	Department of Vehicles & Equipment Services;
E911:	Emergency Communications
LEG:	Heavy Equipment Importation
PWD:	Public Works Department
RDS:	Roads General
UTL:	Utilities (CUC).

9. On November 11, 1998, the Respondent announced certain Ministry Changes that involved changes in the names of Ministries and reassignment of certain responsibilities. It was announced that "Responsibility for the department of Public Works and Vehicle and Equipment Services are to be transferred from the AECW to the Ministry of Tourism, Commerce and Transport". As will be seen later, this proposed transfer did not materialize.

10. Mr. Graham Wood, then Acting Permanent Secretary (Personnel), received a request in November 1998 from the Permanent Secretary of ACEW to provide a report to the Chief Secretary of vacant positions at the same salary level of Administrative Officer I and SSI as his Ministry was considering the abolition of the position of Administrative Officer then held by the Appellant. Mr. Wood did his research and provided a list of seven (7) positions. In his covering memorandum, Mr. Wood wrote on November 17, 1998:

"I enclose vacancy reports detailing 2 vacant posts at SSI and 7 at AP3-4. The two Administrative Officer 1 vacancies require individuals with specific experience and skills. It appears that none of these 9 positions will be suitable for transfer purposes".

11. On December 1, 1998, the Chief Secretary recommended to the Public Service Commission for its consideration and recommendation to the Respondent that the Appellant be retired because of abolition of office pursuant to regulation 28 (Public Service Commission Regulations 1985). Two paragraphs of the letter from the Chief Secretary to the Public Service Commission are of significance. They contain the following information:

"I have considered the list of vacancies at Dr. McLaughlin's level and at the grade of SSI as he is paid this higher salary on a "personal to holder" basis. It is my opinion that these vacancies require specialist and particular experience and/or qualifications. Consultations with relevant Permanent Secretaries have taken place and I have concluded that Dr. McLaughlin does not have the required experience and/or qualifications for the vacant positions.

I have advised Dr. McLaughlin of the situation and the only option is to retire him on grounds of abolition of office. Re-deployment is not an option".

12. In answer to the Appellant's application for judicial review, Mr. Kearney Gomez ("Gomez"), Permanent Secretary, Ministry of Agriculture, Environment, Communications and Works, filed an affidavit on August 22, 2000. At paragraphs 14-15 thereof, he swore as follows:

"Prior to the Applicant's retirement, I informed him that the post of Assistant Director, Research, in the Department of Environment was available and he indicated that he was not interested in the post. In July, 1991, the Applicant was promoted Deputy Director Mosquito Research Unit (hereinafter referred to as ("MRCU")) and he held this position until his transfer to ACE&NR in December, 1995. The title of that post was

subsequently changed to Assistant Director, Research, in the Department of Environment.

If the Applicant had reverted to his former post of Assistant Director, Research, this would have involved him working in a junior position to the present Deputy Director, William Petrie whom the Applicant had previously supervised when he held the post of Assistant Director several years ago. In addition, in January 1998, the Applicant had applied and was interviewed for the post of Director, MRCU. The interview was, however, unsuccessful".

13. The Appellant filed an affidavit on September 11, 2000 in which he responded to all the points made by Mr. Gomez in his affidavit. At paragraph 60, the Appellant said:

"None of the positions listed in "Exhibit G.W.1" were offered to me nor made known to me by the Chief Secretary, Gomez, or personnel. I was qualified for and would have accepted, if offered, the following offices:

- (1) Assistant Chief Environmental Health Officer;
- (2) Assistant Director of MRCU;
- (3) Assistant Director of Agriculture."
- (4)

14. No Affidavit was filed by the Chief Secretary. At paragraph 8 of his affidavit sworn in August 2000, Mr. Kearney Gomez, said that consequent upon the announcement of the Respondent on November 11, 1998, the responsibilities of the Appellant for (a) Department of

Vehicles and Equipment Services and (b) Public Works Department were transferred to the Ministry of Tourism, Commerce, Transport and Works. This transfer had not taken place up to May 5, 1999 when Mr. Colford Scott, Chief Engineer, Public Works Department and Mr. Philip Tatum, Acting Director, Department of Vehicle & Equipment Services were still listed under the Ministry of Agriculture, Communications, Environment and Natural Resources. In addition, the position of Administrative Officer held by the Appellant was not abolished from the Ministry of Agriculture, Environment, Communications and Works. Mr. Gomez advised the Solicitor General on January 31, 2001 that: "Whilst the Ministry petitioned the Chief Secretary to have the post abolished, Finance Committee voted in favour of retaining it in 1999".

15. On November 19, 1998, the Ministry of Agriculture, Environment, Communications and Works, under the signature of William D. Petrie, Head of Department, and the Permanent Secretary, advertised Overseas the Vacancy for an Assistant Director, Grade AP 3-4 in the Department of Mosquito Research & Control Unit. The vacancy was

said to arise on 17 November, 1998 and was to be filled in 1999. The advertisement was not placed in the Cayman Islands.

THE APPLICABLE LEGISLATIVE REGIME.

16. The rules governing the conditions of service of public officers of the Cayman Islands Government are contained in General Orders of 1987, as revised in 1994. General Orders 22 and 49 were discussed in argument before us. They provide as under:

"22. **ABOLITION OF OFFICE.** The office held by an officer is not abolished simply because one particular office is cancelled from the Estimates. Government does not consider an office is abolished unless it is impossible to offer the officer continued employment in an office of broadly similar duties (they do not have to be exactly the same) in at least the same Grade and at least the same salary. An officer's career prospects must fail completely for abolition of office to occur.

49. **ABOLITION OF OFFICE.** If a public office is abolished the Head of Department shall proceed in accordance with Reg. 28 of the PSC Regulations".

17. The Public Service Commission Regulations, 1985 were made pursuant to the Public Service Commission Law of 1975. Under Part IV of the PSC Regulations, Reg. 26, the Commission has the duty to advise the Governor about matters relation to the appointment and

extension of probationary service of public officers. Regulation 28 is captioned Abolition of Office and it provides:

"28. Where an office which is one of a number of such offices has been abolished but one or more offices remain, the Head of Department shall make a report through the Chief Secretary recommending with reasons, which substantive holder of such office should have his appointment terminated. The Chief Secretary shall forward such report to the secretary with his own recommendations and the Commission shall give its advice there on to the Governor".

18. Regulation 29 – "Retirement to improve organization", is in these terms:

"29(1) If it appears to the Head of Department that there is reason why a public officer in his department, who holds a pensionable office, should be called upon to retire from the public service for the purpose of facilitating improvement in the organization of the department by which greater efficiency or economy may be effected, the Head of the Department shall report the matter with a full statement of his reasons to the Chief Secretary who shall, if he considers that there is on first appearance a case for such retirement arrange for the Head of Department to inform the public officer in writing of the intention to recommend his retirement.

(2) The public officer shall be given the opportunity to forward representations about the intention to retire him compulsorily and such representations

shall be transmitted to the Commission by the Chief Secretary with his own observations and all other relevant papers and documents. The Commission shall advise the Governor whether or not such public officer should be called upon to retire.

- (3) The Governor may at any time inform a public officer who holds a pensionable office that he wishes him to retire from the public service for the purpose of facilitating improvement in the organization of his department and if the officer agrees in writing so to retire, the provisions of sub-regulation (1) and (2) shall not apply".

It is plain from a reading of the Regulations as a whole that a meaning must be given to "abolition of office" as used in Regulation 28, which distinguishes that concept from "retirement to improve organization", the subject of Regulation 29.

THE GROUNDS OF APPEAL.

19. Mr. Schofield reduced his grounds of appeal into four broad propositions:

- (a) Before an officer can be dismissed on ground of abolition of office, the office must first be abolished. Since that was not done, the officer was unlawfully dismissed from office;
- (b) Before an officer can be dismissed on ground of abolition of office, he must be afforded a reasonable opportunity to make

representations on his own behalf and in the instant case the power was exercised in an unfair and unreasonable manner;

- (c) The appellant was not afforded a reasonable opportunity to make representations on his own behalf;
- (d) Inferences of fact unfavourable to the Appellant's position should not have been founded upon confused and self-contradictory affidavit material

20. In relation to proposition (a) above, it is not easy to demonstrate, from the evidence that was available in the court below, whether the position of Administrative Officer in the Ministry of Agriculture, Environment, Communications & Works was ever abolished in 1998. A position can be abolished where there is no further need for the functions formerly performed in that position. A good example is where a regime that required Exchange Control existed in the governance of a country and the government later abolishes exchange control regulations in the liberation of the economy. There will be no work for those officers who were exclusively assigned to exchange control matters. Their positions can be abolished. There may be cases where there are several positions of the same status in an organization, such as a police force. If there was freedom of movement for persons from all nations, some present Immigration Officers would become redundant and their positions would be abolished. In this case, there was nothing to suggest that the responsibilities being performed by the

Appellant would cease to be performed by the Government in the public service. The responsibilities could be redistributed and it was intended that they should be redistributed. In our view the facts shown in the background material set forth herein did not give rise to the situation contemplated by Regulation 28 of the Public Service Commission Regulations.

21. There must be doubt as to whether the Ministry of AECW intended to abolish the position of Administrative Officer in the Mosquito Control Unit. Its advertisement outside of the Cayman Islands for such a position on November 19, 1998 to commence in 1999 would belie this intention. As to this position it could never have been said that the Appellant was unqualified for appointment thereto. Finance Committee retained this position in the Estimates and thereby provided money for its continued maintenance.
22. The Permanent Secretary of AECW wanted to save money and to make his department more efficient. Although he wished for the transfer of some departments from his Ministry, it became obvious that at least two of the major functions remained with his Ministry for several months of 1999. It is without doubt that power exists in the

Respondent to abolish any office which he has power under Section 54 of the Constitution to constitute. However, it is the policy of the Government, as enunciated in General Order No. 22, that an office is not abolished unless it is impossible to offer the Officer continued employment in an office of broadly similar duties, (they do not have to be exactly the same) in at least the same Grade and at least the same salary. That General Order states that an officer's career prospects must fail completely for abolition of office to occur. The mere cancellation of the appellant's office from the Estimates would not lead to the automatic abolition of his office and in this case the evidence is that his office was not cancelled from the Estimates. We did not receive any explanation for the fact that the Government had advertised overseas on November 19, 1998 for a Research Officer in the pay scale of AP 3-4, in the Mosquito Research Department, (the area of expertise of the appellant) while on December 1, 1998, the appellant was told by the Chief Secretary that there was no possibility of re-deploying him.

23. Because of what we propose to say in relation to propositions (b) and (c) above, it is unnecessary for us to make a definitive finding as to

whether or not the circumstances had arisen for the abolition of the office of the appellant.

24. Mr. Schofield submitted that the appellant was entitled to a reasonable opportunity to make representations on his own behalf before he could be dismissed on the ground of abolition of office and that he was not afforded such an opportunity. It is settled law that a decision leading to compulsory retirement is of a judicial character and must conform to the rules of natural justice. The person concerned is entitled to a fair opportunity of correcting or contradicting any statements made to his prejudice and in this exercise to call witnesses, if considered necessary. **Re Godden**, [1973] 3 ALL ER 2, 25. We respectfully accept the formulation attributed to Mr. Stephen Sedley QC as reported in **R. V. Devon County Council, ex parte Baker** [1995] 1 ALL ER 73, 91, that (a) consultation must be at a time when proposals are still at a formative stage; (b) the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response; (c) adequate time must be given for consideration and response and (d) the product of consultation must be conscientiously taken into account in finalizing the proposals.

25. Regulation 29 of the Public Service Regulations prescribes a procedure that provides fairness to a pensionable public officer whose compulsory retirement is desired to facilitate improvement to the organization and greater efficiency of his Department. That procedure fully expresses the need for early consultation with the affected officer and the right of that officer to make representations on his own behalf to the Public Service Commission through the Chief Secretary. It appears to us that at all times there was a concentration of effort on the part of the responsible public officers on the provisions of Regulation 28 and, in the process, unfortunately overlooked the protections that were afforded the appellant under Regulation 29.
26. Some evidence was put before the trial judge, which he accepted, that the Appellant had been made aware of the intention to recommend his compulsory retirement from the office he then held and that another position in the public service had been offered to him which he declined. The Appellant swore that he had not been offered an alternative position and that had he been offered the position referred to in the affidavit of Mr. Gomez, he would have accepted it. The case before the court below was decided on affidavit evidence only. No witness was called to be cross-examined. While we are bound to give

due weight to the finding of the trial judge that such an offer was made to the appellant, in a case such as this which was tried wholly on affidavit evidence, we are in as good a position to evaluate the affidavit evidence as the trial judge and as Lord Reid said in **Benmax v. Austin Motor Co. Ltd**, [1955] 1 A.C. 370, 376, "we ought not to shrink from that task".

27. Mr. Gomez did not indicate the time or place at which he informed the Appellant of the availability of the post of Assistant Director, Research, in the Department of Environment. It is to be recalled that Mr. Wood, the Acting Permanent Secretary (Personnel) had informed the Chief Secretary on November 17, 1998, that although there were 2 vacant posts at SSI and 7 at AP3-4:

"The two Administrative Office 1 vacancies require individuals with specific experience and skills. It appears that none of these 9 positions will be suitable for transfer purposes".

Mr. Wood attached a list of the vacant posts to his correspondence.

One position was shown as "30 ENVIRONMENTAL HEALTH

8572 ASST. CHIEF ENV. OFF AP3-4 3005511". That position,

held the trial judge, was the position that Mr. Gomez had offered the

Appellant and which the Appellant refused. There was no explanation as to how a position that Personnel did not consider suitable for transfer to the Appellant could have been offered to him by Mr. Gomez.

28. As we recited at paragraph 11 (supra), the Chief Secretary recommended the retirement of the appellant because of abolition of office. We refer again to what he said in his memorandum to the Public Service Commission:

"I have considered the list of vacancies at Dr. McLaughlin's level and at the grade of SSI as he is paid this higher salary on a "personal to holder basis. It is my opinion that these vacancies require specialist and particular experience and/or qualifications. Consultations with relevant Permanent Secretaries have taken place and I have concluded that Dr. McLaughlin does not have the required experience and/or qualifications for the vacant positions.

I have advised Dr. McLaughlin of the situation and the only option available is to retire him on grounds of abolition of office. Re-deployment is not an option".

29. In this memorandum the Chief Secretary did not tell the Public Service Commission that there had been consultations with the Appellant concerning the abolition of his position at an early stage of

the proceedings, or the reasons therefor, and that the Appellant had been given the opportunity to consider and to formulate representations to the Public Service commission on his own behalf in respect the abolition of his office. The evidence is that the Chief Secretary had called the Appellant to his office at about 4 o'clock on December 1, 1998 and had told him that his retirement from the public service was being considered. As the Chief Secretary said in his memorandum, " I advised Dr. McLaughlin of the situation". The appellant was brought in when the matter had been settled and the administrative decision had been taken. He was only being advised of what was going to happen. The recommendation of the Chief Secretary to the Public Service Commission was made on the same day that the Chief Secretary had the conversation with the Appellant.

30. We think that it is of great significance that this memorandum of December 1, 1998 to the Public Service Commission did not contain one word about an alternative position having been offered to the appellant. It did not say that the position offered was comparable to the position that was being abolished. It did not say that the appellant had nevertheless rejected the alternative position offered. What the memorandum said in the most positive and emphatic terms were (a)

there was no suitable vacancy available in the public service in the "Grade" of the appellant and (b) re-deployment of the appellant was not an option for the consideration of the Public Service Commission.

31. In our view therefore, the finding of the learned trial judge that an alternative position, identified by him as No. 30 on Mr. Wood's list of vacancies, was offered to the Appellant cannot be allowed to stand.
32. For the reasons expressed above, the procedure through which the compulsory retirement of the appellant was conducted, was in breach of the rules of natural justice.
33. The facts and circumstances of this case are somewhat different from those presented in the case of **Perinchief v. Governor of the Island of Bermuda and Ors. [1977] 1 LRC 171**. This was the clear cut case of an abolition of office and was to be followed by the need to determine which of a number of the holders of positions in the same grade in the public service, that is to say, Assistant Commissioner of Police, should be retired. If the facts in this case were of that clear cut variety, Regulation 28 and General Order 22 would be the controlling administrative provisions. However, as we have said, this case fell to

be decided pursuant to Regulation 29 of the Public Service Regulations.

34. It is conceded by the Appellant that Regulation 29 was not brought to the attention of the learned trial judge. The Respondent has not been prejudiced in any way by the appellant's reliance on Regulation 29 before us, in that the procedure for the compulsory retirement of the Appellant was commenced by the Respondent pursuant to the Public Service Regulations and General Orders.
35. For the reasons contained herein, we are of the view, that the judgment of the Court below must be set aside and we make the declaration sought by the appellant that the decision to dismiss him and his dismissal were void.
36. The Appellant has sought relief that he be reinstated in the office which he held at the time of his retirement. Mr. Hall-Jones submitted that courts in judicial review proceedings are loathe to order the reinstatement of employees as such an order borders on the usurpation of the powers of the decision maker and because of the practical problems which such an order would present. For this proposition he relied on Judicial Remedies in Public Law by Clive Lewis, paragraph

11-021. The appellant has not been in the public service for approximately four years. We have no knowledge of the state of the requirements of the public service for personnel and in what capacities and for no other reason, we do not consider reinstatement as an appropriate remedy.

37. We are not prepared to say, as has been submitted by Mr. Hall-Jones, that even if the proper procedure under Regulation 29 had been carried out, the decision of the Respondent would have been the same. The spirit of the General Orders and of the Public Regulations is that the position of a public officer should not be abolished until it becomes absolutely clear that his career path had failed. There is no evidence before us that could lead us to such a conclusion.
38. The remedy available to the Appellant lies in damages. We therefore remit the case to the Grand Court for assessment of damages. The Appellant is awarded his costs in this Court and in the Court below to be taxed if not agreed.
39. We wish to express our gratitude to counsel on both sides for the admirable manner in which they presented their submissions before us.