

No. 6

Notice of Originating Motion (0.8, r.3)



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 100 OF 2010

In the matter of Public Service Management Law, 2005 (Law 27 of 2005) (the "Law") and the Personnel Regulations 2006 (the "Regulations").

And in the matter of the termination of employment of Claudette Mundle from the Cayman Islands Government (Cayman Islands Audit Office).

NOTICE OF ORIGINATING MOTION

TAKE NOTICE that the Court at the Law Courts, George Town, Grand Cayman will be moved on 2010 at or as soon thereafter as counsel can be heard, by counsel on behalf of Claudette Mundle (the Applicant) for an order that the decision of the Chairman, Colin Ross MBE JP, of the Civil Service Appeals Commission ("Commission"), following a hearing on 29 October 2009 to dismiss an appeal by Claudette Mundle to the Commission to overturn the decision of her employer, The Auditor General, Mr. Dan Duguay, to terminate her employment on 27 May 2009 is wrong as a matter of Law and fact and that Claudette Mundle be reinstated as provided under the extant Law and Regulations.

And for an order that the costs of and incidental to this appeal may be paid by The Cayman Islands Government (Cayman Islands Audit Office).

AND FURTHER TAKE NOTICE that the grounds of this appeal are as follows:

1. The Commission has failed to properly consider the facts, the evidence, the Law and the Regulations. The applicant denies and considers that the same is supported by evidence that she is guilty of significant inadequate performance. The applicant considers that the Auditor General has acted contrary to section 2 of the Public Service Management Law, (2007 Revision) (the "Law") and/or has acted unfairly. Issues concerning time management of audits were experienced across the entire department. There is clear documentary evidence including a note recording the Cayman Islands Audit Office Retreat held on 4 May 2009 that raised, inter alia, concerns of the staff generally including the setting of unrealistic budget times and costs.
2. The Commission's conclusion viewed broadly and fairly, that the Respondent's decision to dismiss Ms Mundle for significant inadequate performance was carried out in accordance with and in a manner consistent with the Law and Public Service Regulations, is one that no reasonable tribunal, properly directing themselves in Law could have reached on the material before them.
3. The Commission has acknowledged that a fundamental disagreement arose as to whether a meeting referred to in a letter dated 29 May 2008 ever took place and erred in that it found that it was for the Appellant to ensure that such a meeting should take place or that the Appellant should have provided a written response which finding is contrary to section 44 of the Law which clearly states "Subject to the provisions of this section and the requirements of personnel regulations may -(b) dismiss staff;". There is no

requirement for the Appellant to arrange such a meeting but in any event the Appellant did try to arrange such a meeting. It is to be noted however, although this is not expressly stated, that the Commission accepts that no meeting took place on 19 June 2008 which it is submitted is a prerequisite to giving a warning under the Regulations.

4. The Commission erred in that it failed to note that in accordance with the Regulations no warning was given following the letter of 29 May 2008 from the Respondent to the Appellant and further that no warning was provided following the written responses of the Appellant dated 30 September and 7 October 2008 to the Respondent. It is clear on a construction of the Law and the Regulations that a warning could not be given until after a response was received from the Appellant. The Appellant did not as a matter of law receive a warning either in May, September or October 2008 as the Respondent never provided a response to the Appellants letters dated 30 September and 7 October 2008 either warning or suggesting corrective action that the Appellant must take and a time period within which to complete it. The Appellant did not receive a warning letter following her letter dated 8 May 2009.
5. It is clear on the face of the evidence, the Law and Regulations that Respondent cannot give a warning before the Appellant has had a chance to respond to any material provided to her by the Respondent. The Tribunal has erred in that it found that the Respondent in providing a letter setting out its concerns by making reference to the fact that such concerns may be a cause for dismissal amounted to a warning when it is clear on the face of the Regulations that such a warning could only follow after receipt of a response from the Appellant. No warning(s) were ever provided to the Appellant which could only arise if the Respondent was dissatisfied with the representations of the Appellant.
6. In fact, the letter of 29 May 2008 from the Respondent to the Appellant refers to "inadequate performance" which under section 44(3) would amount to discipline only and not dismissal. The letter dated 4 September 2008 describes the Appellant's conduct as being "less than satisfactory" and "alleged continued poor performance". No annual performance assessment (see section 50 of the Law) had been carried out since October 2007. It is not clear what performance level as stipulated by section 44 (3) or (4) "...compared to performance agreements..." the Commission found the Appellant had not achieved to support the finding of the Respondent.
7. If and to the extent that the Commission reviewed the evidence, it failed in its review of the evidence in that there was no evidence to support a warning being given to the Appellant following the first letter of 29 May 2008 from the AG to the Appellant in accordance with Regulation 42 (1) (b) and that the purported second warning was based on information that was provided by Mr. Persad in a letter dated 22 August 2008 which letter was clearly contradicted by a letter dated 7 October 2008 from the Appellant and in particular an e-mail attached to the aforementioned letter from Mr. Persad to the Auditor General dated 25 August 2008 which submitted to the Auditor General the very work that was provided to Mr. Persad on 22 August 2008 by the Appellant which on the same day Mr. Persad falsely represented that he has "...not been provided with any concrete evidence to the PFE closure."
8. The Appellant will rely on the Legal Submission as set out before and relied on at the Commission which essentially are that there was no significant inadequate performance and further that the Auditor General failed to comply with the Law and Regulations which provisions are mandatory.

9. The Commission has erred in that it has confirmed the decision of the employer. The employee was not provided an opportunity before her dismissal to review any documents or "significant analysis" purportedly carried out by the Auditor General. There is no evidence of significant inadequate performance.
10. The applicant was not provided with an opportunity to review the material supposedly reviewed by the Auditor General which is unfair and contrary to the rule of natural justice.
11. The Commission erred in that section 44(4) provides that the Respondent shall comply with the Regulations.

[Signature of Attorney]

TO: The Clerk of the Court.

AND TO: The Civil Service Appeals Commission, P.O. Box 32115, Grand Cayman KY1-1208,
CAYMAN ISLANDS

AND TO: The Respondent: c/o Mr. McCann, Campbells, Attorneys-At-Law, P.O. Box 884 GT,
Scotia Centre, Grand Cayman, Cayman Islands.

This **Originating Motion** was filed by Clyde H. Allen, Chambers on behalf of the Defendant whose address for service is P.O. Box 31076 SMB, 2nd Floor, Suite 9, Jack & Jill Building, 19 Fort Street, KYI-1205, George Town, Grand Cayman, Cayman Islands.

Acknowledgement of service of originating motion (0.10, r.5)

**DIRECTIONS FOR ACKNOWLEDGMENT OF SERVICE
OF ORIGINATING SUMMONS**

The accompanying form of Acknowledgment of Service should be completed by an Attorney acting on behalf of the Defendant or by the Defendant if acting in person. After completion it must be delivered or sent by post to the Law Courts, P.O. Box 495G, George Town, Grand Cayman.

Notes for Guidance

1. Each Defendant (if there are more than one) is required to complete an Acknowledgment of Service and return it to the Courts Office.
2. If you wish to defend claims made in the originating summons, or intend to attend the proceedings and to participate in them so far as necessary (although not necessarily in an adversarial manner) you should tick the "Yes" box in paragraph 2 of the acknowledgment of service.
3. For the purpose of calculating the period of 14 days for acknowledging service, a writ served on the Defendant personally is treated as having been served on the day it was delivered to him.
4. Where the Defendant is sued in a name different from his own, the form must be completed by him with the addition in paragraph 1 of the words "sued as (the name stated on the Originating Summons)".
5. Where the Defendant is a FIRM and an attorney is not instructed, the form must be completed by a PARTNER by name, with the addition in paragraph 1 of the description "Partner in the firm of (.....)" after his name.
6. Where the Defendant is sued as an individual TRADING IN A NAME OTHER THAN HIS OWN, the form must be completed by him with the addition in paragraph 1 of the description "trading as (.....)" after his name.
7. Where the Defendant is a LIMITED COMPANY the form must be completed by an Attorney or by someone authorised to act on behalf of the Company, but the Company can take no further step in the proceedings without an Attorney acting on its behalf.
8. Where the Defendant is a MINOR or a MENTAL PATIENT, the form must be completed by an Attorney acting for a guardian ad litem.
9. A Defendant acting in person may obtain help in completing the form at the Courts Office.

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ACKNOWLEDGMENT OF SERVICE
OF ORIGINATING MOTION

If you intend to instruct an Attorney to act for you, give him this form IMMEDIATELY.

Important. Read the accompanying directions and notes for guidance carefully before
completing this form. If any information required is omitted or given wrongly, THIS
FORM MAY HAVE TO BE RETURNED.

1. State the full name of the Defendant by whom or on whose behalf the service of the
Originating Motion is being acknowledged.

2. State whether the Defendant intends to contest or otherwise participate in the proceedings
(tick appropriate box)

yes

no

Service of the Originating Motion is acknowledged accordingly

(Signed).....

[Attorney] for

Please complete overleaf

Attorney: where the Defendant is represented by an attorney, state the attorney's place of business in the Cayman Islands. A Defendant may not act by a foreign attorney.

Defendant in person: where the Defendant is acting in person, he must give his post office box number and the physical address of his residence or, if he does not reside in the Cayman Islands, he must give an address in Grand Cayman where communications for him should be sent. In the case of a limited company, "residence" means its registered principal office.

Indorsement by plaintiff's Attorney (or by plaintiff if suing in person) of his name, address and reference, if any, in the box below.

Clyde Allen
Clyde H. Allen, Chambers,
P.O. Box 31076 SMB,
2nd Floor, Suite 9,
Jack & Jill Building,
19 Fort Street, KYI-1205,
Grand Cayman, Cayman Islands.

Indorsement by defendant's Attorney (or by defendant if suing in person) of his name, address and reference, if any, in the box below.

[Empty box for defendant's attorney indorsement]