G0171 |2010

Application for Leave to Apply for Judicial Review (O.53, r.3)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

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).

JUDICIAL FINANCE $200.00 APR 21 2010 PAID C.I. GOVERNMENT

CLERK OF COURT APR 21 2010 CAYMAN ISLANDS GOVERNMENT

BETWEEN:

CLAUDETTE MUNDLE — APPLICANT

AND

CIVIL SERVICE APPEALS COMMISSION — DEFENDANT

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

To the Clerk of the Court, Law courts, George Town, Grand Cayman.	
Name, address and description of applicant.	Claudette Mundle, 39 Sunset Retreat, Grand Cayman, Cayman Islands.
Judgment, order, decision or other proceeding in respect of which relief is sought	Decision of the Civil Service Appeals Commission on 20 January 2010 to uphold the decision of the Auditor General to terminate the employment of Claudette Mundle.

GRAND COURT - CAYMAN I'

Relief Sought

Leave to apply to the Grand Court for the issue of a Declaratory Order against the Civil Service Appeals Commission to uphold the decision of the Cayman Islands Audit Office's decision to dismiss the applicant from her employment is null and void, Order of certiorari to quash the decision and for damages.

Name and address of applicant's attorneys, or, if no attorneys acting, the address for service of the applicant	Clyde H. Allen Clyde H. Allen, Chambers Cayman Islands Attorney-At-Law PO Box 31076 SMB, Grand Cayman, Cayman Islands
Signed	Dated 21.4.2010

GROUNDS ON WHICH RELIEF IS SOUGHT

1. The applicant, Claudette Mundle (the Applicant) seeks relief by way of a court 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 the Applicant be reinstated as provided under the extant Law and Regulations.

2. 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).

3. The relevant Law is as follows:

42. (1) Before determining whether to dismiss a staff member on the grounds of serious misconduct or significant inadequate performance under section 44(4) of the Law, an appointing officer shall -

(a) collect evidence of the actions or omissions of the staff member which are the subject of concern;
(b) advise the staff member of the concerns (both orally and in writing) including providing him with a copy of the evidence collected, allow him to provide an explanation, and (if the explanation is not satisfactory) provide a warning that if there is not corrective action dismissal could result;
(c) provide a reasonable period of time (being not less than one month), and a reasonable amount of support for the staff member to take corrective action;
(d) if insufficient corrective action is taken, advise the staff member of the ongoing concern, (both orally and in writing), and issue a second warning that if corrective action is not taken dismissal could occur;
(e) provide a further reasonable period of time (being not less than one month)and a reasonable amount of support for the staff member to take corrective action;
(f) assess the actions of the staff member after the second period of time to determine whether sufficient corrective action has been taken, and notify the staff member, (both orally and in writing), of the results of the assessment.

(2) If, after the process specified in paragraph (1) has been completed, the appointing officer is of the view that the grounds for dismissing the staff member on the basis of serious misconduct or significant inadequate performance under section 44(4) of the Law have been proven the appointing officer may dismiss the staff member.

(3) If, after the process specified in paragraph (1) (c) or 1(f) has been completed, the appointing officer is of the view that the staff member has undertaken sufficient corrective action, the appointing officer shall advise the staff member, (both orally and in writing), of that fact and either that-

(a) the warning has expired and is being removed from his personnel file;

or

(b) the warning will remain in place for a further period of time (such period to be specified) and that any further instances of serious misconduct or significant inadequate performance during this period will result in dismissal.

(4) If, after the process specified in paragraph 3(b) has been completed, there is no serious misconduct or significant inadequate performance during the further warning period, the appointing officer shall advise the staff member, (both orally and in writing), that the further warning period has expired and the warning is being removed from his personnel file.

(5) If, after the process specified in paragraph 3(b) has been completed, there is a further instance of serious misconduct or significant inadequate performance during the further warning period, the appointing officer may dismiss the staff member provided that the appointing officer first-

(a) collects evidence of the actions or omissions of the staff member which are the subject of concern;

(b) advises the staff member of the concerns (both orally and in writing) including providing him with a copy of the evidence collected, and allows him to provide an explanation.

(6) Upon deciding to dismiss a staff member under paragraphs (2) or (5), the appointing officer, at the earliest opportunity, shall -

(a) notify the staff member that he is being dismissed under the terms of his employment agreement; and

(b) arrange for the dismissal to take effect at an early opportunity.

5. 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 as there is absolutely no evidence 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 for reasons which had nothing to do with the competence of the other staff members. 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.

6. 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.

7. 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 the tribunal erred because 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 is submitted is a prerequisite to giving a warning under the Regulations.

8. 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 the 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.

9. 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 if 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 or response of the Appellant.

10. 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". Contrary to the provisions in the Law, 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.

11. 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). 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. The court will note that an e-mail attached to the aforementioned letter from Mr. Persad to the Auditor General dated 25 August 2008 wherein he 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." That representation is clearly wrong.

12. 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.

13. 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.

14. 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.

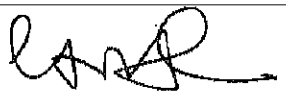
15. I refer the court to the Public Service Management Law, 2005 at section 2 for the definition of "open and fair employment process". Mr. Duguay stated that he has ".....reviewed all of the documents provided and also done significant analysis on my own regarding Ms. Mundle's work for the last year and a half.". It is submitted that he has fallen foul of a very fundamental rule of law which is that set out ***In Kanda –v- Government of the Federation of Malaya (Privy Council) AC 1962 p322*** on the issue of fairness and the right to be heard where it was said:

> "If the right to be heard is to be real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn L.C. in ***Board of Education v Rice*** down to the decision of their Lordships' Board in ***Ceylon University –v- Fernando***."

16. The above case and the principle derived from it - ***audi alteram partem*** – is fundamental rule of natural justice. Unfortunately, the Applicant was never afforded a reasonable opportunity of being heard on these matters.

17. The Commission erred in that section 44(4) provides that the Respondent shall comply with the Regulations and it is for that reason that it is considered that there decision is *ultra vires* and thus null and void.

18. The decision to dismiss the applicant was contrary to natural justice. The applicant seeks a Declaration that the decision of the Civil Service Appeal Commission to dismiss her is therefore null and void, that the decision be quashed and set aside or the Applicant be permitted to resume her employment and for damages.



Clyde H. Allen, Chambers
21 April 2010