

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 124 **OF 2013**

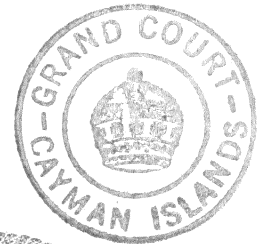
IN THE MATTER OF THE POLICE LAW (2010 REVISION)

AND IN THE MATTER OF AN APPEAL against the decision of the Commissioner of Police to retire Senior Constable Osbert Smith in the public interest and to improve the efficiency of the organization

AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW pursuant to Order 53 of the Grand Court Rules 1995

BETWEEN: OSBERT WHITFIELD SMITH - APPLICANT
AND: COMMISSIONER OF POLICE - DEFENDANT

NOTICE OF EX PARTE APPLICATION
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
Section 21(4)(a) and (c) of the Police Law (2010 Revision)



TO : The Clerk of the Court
Law Courts Building
George Town
Grand Cayman



Name, address and description of Applicant :

Mr. Osbert Whitfield Smith
No. 66 Randyke Gardens
George Town
Grand Cayman, KY1-1104
Cayman Islands

Decision in respect of which relief is sought :

The Defendant's decision which was purportedly communicated to the Applicant on the 2nd May 2011 that :


- (1) He was retiring him pursuant to section 21(4)(a) of the Police Law (2010 Revision) which states that "*The Commissioner may – (a) in the public interest call upon any police officer, other than a police officer referred to in subsection (3), to retire on pension.*"; and
- (2) He was retiring him pursuant to section 21(4)(c) of the Police Law (2010 Revision) which states that "*The Commissioner may – (c) to improve the efficiency of the organization, call upon any police officer, other than a police officer referred to in subsection (3), to retire on pension.*"

Relief sought :

- (1) An order of certiorari to quash the Defendant's decision on the grounds that it was procedurally unfair, unreasonable, oppressive and therefore unlawful;
- (2) A declaration that the Defendant's decision to retire the Applicant without giving reasons under Section 21(4)(a) and (c) of the Police Law (2010 Revision) was unlawful and therefore a nullity and of no effect;
- (3) An order for the Applicant's immediate reinstatement as a police officer in the Royal Cayman Islands Police Service together with the immediate payment of all of his back pay, pension and other pecuniary entitlements on the basis of a legitimate expectation by the Applicant that his contract of employment would have been renewed but for his premature retirement;
- (4) General and Special Damages in respect of the Applicant's premature retirement by the Defendant and the consequential reputational damage, financial loss and hardships and emotional distress to the Applicant;
- (5) Costs; and
- (6) Such further, consequential, or other relief as this Honourable Court deems just.

Name and address of Applicants attorneys :

CLIFFORD LAW ASSOCIATES
Attorneys-At-Law
P.O. Box 190, KY1-1601
5th Floor, Genesis Building
George Town



CLIFFORD LAW ASSOCIATES
Attorneys at Law for the Applicant

Dated : 10th April 2013

Grounds on which relief is sought :

1. **Errors in law :** The Defendant erred in law in applying Section 21(4)(a) and (c) of the Police Law (2010 Revision) –
 - (a) when he purportedly notified the Applicant on 2nd May 2011, before his mandatory retirement age and without giving the Applicant the opportunity to comment or without giving reasons for his decision, that he had retired him pursuant to section 21(4)(a) and (c) of the Police Law (2010 Revision) which states that *“The Commissioner of Police may - (a) in the public interest and (c) to improve the efficiency of the organisation, call upon any police officer and other than a police officer referred to in subsection (3), to retire on pension.”*;
 - (b) when he made this decision he was in breach of the rules of natural justice or procedural fairness and therefore his decision is a nullity and of no effect. As Lord Bridge stated in the House of Lords decision in *Lloyd v McMahon* [1987] A.C. 625, *“the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.”*; and
 - (c) when he made this decision to take such action without providing any reason whatsoever as to why he felt it was appropriate to retire the Applicant pursuant to Section 21(4)(a) and (c) of the *Police Law (2010 Revision)* or without rationalizing why these provisions were applicable to the Applicant’s employment with the Royal Cayman Islands Police Service. This clearly not only breached the well-established rules of natural justice but indeed, in the absence of reasons, was *Wednesbury* unreasonable in accordance with settled authorities.
2. At common law, *“there is a presumption that procedural fairness is required whenever the exercise of a power adversely affects an individual’s rights protected by common law or created by statute. These include rights in property, personal liberty, status and immunity from penalties or other fiscal impositions. The duty to afford procedural fairness is not, however, limited to the protection of legal rights in the strict sense: it also applies to more general interests, of which the interest in pursuing a livelihood and in personal reputation have received particular recognition: Ridge v. Baldwin* [1964] A.C. 40; *McInnes v. Onslow-Fane* [1978] 1 W.L.R. 1520 at 1527-1528; *Rees v. Crane* [1994] 2 A.C. 17.”
3. Applying the above principle to the circumstances at hand, it is submitted that the Defendant was subject to a duty to ensure that procedural fairness was maintained in reaching a decision of whether or not to retire the Applicant pursuant to Section 21(4)(a) and (c) of *The Police Law (2010 Revision)*. This is so because a decision to retire the Applicant on either ground would clearly affect the Applicant’s vested financial interests in receiving a salary, health insurance coverage and pension contributions; his interest in pursuing a livelihood; and, in maintaining his, up until that point, unblemished personal and professional reputation.

4. If the preceding submission is accepted, what must necessarily follow is a consideration of what particular procedures the Defendant was required to abide by in order to ensure procedural fairness was maintained considering all of the relevant circumstances surrounding the decision of whether or not to retire the Applicant. Some decisions require full adjudicative-type hearings in order to ensure procedural fairness has been maintained, whereas others only narrowly permit the mere right of notice of the decision under consideration.
5. At common law, there are no rigid rules governing what type of procedures a decision-maker will have to follow in order to ensure procedural fairness has been maintained. In Russell v. Duke of Norfolk [1949] 1 All E.R. 109 at 1188, Tucker L.J. noted-

"There are in my view no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter under consideration and so on."

6. Given the flexible nature of this principle, at times it has been difficult to ascertain what procedures would be considered necessary to follow in order to ensure the requirement of procedural fairness has been met by a decision-maker regarding a particular decision. Fortunately, there is a large amount of reported cases concerning the dismissal of office holders which provides considerable assistance in determining what procedures are sufficient or, as the case may be, insufficient to meet the standard of procedural fairness required in the making of such decisions.
7. In the House of Lords decision in Ridge v. Baldwin [1964] A.C. 40, one of the leading cases on the boundaries of procedural fairness, it was held that the decision of a Watch Committee to dismiss a Chief Constable could not be lawfully exercised *"until the Watch Committee have informed the constable of the grounds on which they propose to proceed and have given him a proper opportunity to present his case in defence."* This was held despite the absence of any such express statutory provisions to this effect. The Watch Committee were acting pursuant to s. 191 (4) of the Municipal Corporations Act, 1882 which provided that-

"The watch committee, or any two justices having jurisdiction in the borough, may at any time suspend, and the watch committee may at any time dismiss, any borough constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same."

8. Arguably, the wording of section 191 bestowed even wider discretion upon the Watch Committee than Section 21(4)(a) and (c) of *The Police Law (2010 Revision)* bestows upon the Defendant yet even in the former case it was held that such power was not absolute and essentially could not be lawfully executed prior to providing the Chief Constable with the reasons for their proposed course of action and giving him a chance to make representations on his behalf.

9. In R v. Smith (1844) 5 Q.B. 614 it was held that even personal knowledge of the offence was no substitute for hearing the officer: his explanation might disprove criminal motive or intent and bring forward other facts in mitigation, and in any event delaying to hear him could heighten the risk of yielding too hastily to first impressions.
10. The principle enunciated in Ridge v Baldwin was applied by the House of Lords in R v Chief Constable of North Wales, ex p. Evans [1982] 1 WLR 1155 where it was held that the decision by a Chief Constable to give an Officer the choice to either resign or be dismissed was made contrary to the rules of natural justice due to the failure of the Chief Constable to give the officer an opportunity to be heard in relation to allegations made against him, some of which were later proved to be factually inaccurate. As Lord Hailsham opined at p. 1157-

"The Chief Constable should have directed his mind to the criteria laid down in the Regulation in accordance with the appropriate principles of natural justice. He did not do so, and I think it only too likely that it was precisely this belief that his discretion was absolute which led to the cavalier treatment to which, in the event, the respondent was subjected."

11. It has been noted that *"in our system of law surprise is regarded as the enemy of justice."* Per Lord Steyn in R. (on the application of Anufrijeva) v Secretary of State for the Home Department [2004] 1 A.C. 604 at para. 30. The draconian manner in which the Defendant chose to reach his decision to retire the Applicant and the consequential damage both financially and to the Applicant's otherwise impeccable professional and personal reputation is a regrettable example of this observation.
12. The cited authorities clearly require that despite the absence of express statutory provisions to this effect, the rules of natural justice required the Defendant to:
 - a) give the Applicant notice of the fact that he was considering retiring him early in the public interest and in order to improve the efficiency of the service;
 - b) the reasons why he felt retiring him early was in the public interest and why doing so would improve the efficiency of the service;
 - c) give the Applicant a proper opportunity to respond to these reasons; and
 - d) consider the Applicant's response in a fair and unbiased manner in order to determine what effect, if any, the Applicant's response had on the merits of the reason for retiring him early in the public interest and to improve the efficiency of the service.
13. It is a settled principle at common law that a failure by a decision-maker to ensure that procedural fairness has been maintained will result in the decision being considered unlawful, furthermore, it is also a settled principle that where a decision was made unlawfully, it is to be considered a nullity and of no effect. Applied to the matter at hand, if the decision to retire the Applicant is indeed deemed to have been made unlawfully, and thus was not an effective retirement of the Applicant, it necessarily follows that he was never in fact retired by the Defendant and he is thus entitled to his salary and any other benefits he would have enjoyed as an officer of the R.C.I.P.S. up until his contract expired on 18 September 2011 on this basis.

14. Specifically in relation to the Defendant's failure to provide reasons why he felt it was in the public interest and would improve the efficiency of the organization to retire the Applicant, as stated at par. 7-114 of *De Smith's Judicial Review, Sixth Edition*-

"Usually, the remedy given in a case of breach of duty to give reasons or adequate reasons is an order quashing the unreasoned decision, rather than an order to require provision of the reasons. The former remedy is usually deemed preferable as it reflects the purpose of reasons to encourage focused decision-making and avoids the risk of reconstruction of reasons after the decision."

15. In *R. (on the application of D) v Secretary of State for the Home Department* 1 F.L.R. at [18], Maurice Kay J. noted the danger of remedying a failure to give reasons

"It is well-established that the court should exercise caution before accepting reasons for a decision which were not articulated at the time of the decision but were only expressed later, in particular after the commencement of proceedings."

16. For the foregoing reasons it is therefore submitted that, in accordance with the authorities on the point, if the court accepts that the Defendant's failure to provide reasons why he thought it would be in the public interest and would improve the organization to retire the Applicant breached the established rules of natural justice, the correct course of action is to quash the decision.

17. Unfortunately and as mentioned earlier, the Defendant's decision to retire the Applicant four (4) years prior to when he would have otherwise been subjected to mandatory retirement seems to have fallen below the standard by which the lawfulness of the decisions of public authorities are adjudged in another respect.

18. It has long been a settled principle at common law that decisions which are "*so unreasonable that no reasonable authority could ever come to it*" - *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223 *per Lord Greene M.R.* are unlawful. In the *Wednesbury* case, Lord Greene M.R. provided a non-exhaustive list of administrative shortcomings which would be covered by this notion of unreasonableness. These included: bad faith, dishonesty, attention given to extraneous circumstances, disregard of public policy, wrong attention given to irrelevant considerations and failure to take into account matters which are bound to be considered.

19. It has been noted that the threshold of unreasonableness or irrationality (as it has at times been referred to) in this sense is "*notoriously high*" and any claimant making a challenge under this principle has "*a mountain to climb*". Recently, it has been held by the English Court of Appeal that decisions will not be held to be unreasonable in the *Wednesbury* sense provided the decision was "*within the range of reasonable responses*".

20. Applying this test to the Defendant's decision to retire the Applicant early, it is submitted that the Defendant's decision to retire the Applicant without providing reasons as to why he felt it was "in the public interest" to do so and why he felt doing so would "improve the efficiency of the organization" was a decision that no reasonable authority could ever have come to. At this point we must note that had the Applicant been a mediocre type of Police Officer it would be very difficult to challenge the reasonableness of the Defendant's decision in such a case although it is submitted he would still have had to provide the reason whether mediocrity or otherwise why he felt it would be in the public interest or would improve the efficiency of the organization to retire such an individual early.
21. The service the Applicant tirelessly provided to the R.C.I.P.S. for twenty-six (26) years could not in any way be described as mediocre. In fact, exceptional would seem to be a suitable description. The Applicant received various commendations over the years for the exceptional contribution he provided to the service, in one such commendation written to the Applicant, the Deputy Commissioner opines "You are a fine example of what RCIP represents and expects of its members." In another commendation letter a former Commissioner of Police expresses his gratitude to the Applicant for providing service over and beyond his assigned duties. A few more examples of the Applicant's achievements during his more than a quarter of a century of service with the R.C.I.P.S. are listed below:
- i. In 1984, he passed his Constable to Sergeant Promotional examination and acted successfully as a Sergeant for eight months when none of the other constables in the Traffic Department at the time which were otherwise eligible for the promotion passed the exam;
 - ii. He was the first ever Police Constable selected to be the Driving Examiner.
 - iii. He received commendations from Chief Superintendent David Gooding for what he described as his sterling service to the district of North Side;
 - iv. He was trained to relieve the Police Case File Administrator on any occasion in which this was necessary and successfully did so on a few occasions;
 - v. For a period he was transferred to the Criminal Investigation Department where he became skilled at solving burglaries and was involved in Murder and Attempted Murder investigations which led to the successful conviction of individuals;
 - vi. He was the first Police Constable to be trained and assigned to the Complaints and Discipline Department (now renamed "The Professional Standards Unit");
 - vii. He provided considerable assistance to the Chief Inspector responsible for establishing the licensing regime for Private Security Firms under the provisions of the Private Security Law 2007; and
 - viii. He was commended by former Magistrate Peter B. Jackson for his investigative skills in relation to a fatal accident which he investigated on the Airport Road.
22. The aforementioned examples are by no means an exhaustive list of the Applicant's exceptional contributions to and achievements in the R.C.I.P.S. during his 26 years of service. The fact that the Applicant's employment contract was renewed biennially thirteen (13) times since his employment commenced in September 1983 also serves as an objective acknowledgment of the satisfaction of the standard of service the Applicant has provided to the R.C.I.P.S. during his tenure.

23. It is on this basis that it is respectfully submitted that no reasonable authority could have reached the conclusion that it would be in the public interest and would improve the efficiency of the organization to retire such a Police Officer early, particularly when there is no evidence whatsoever which suggests that the Applicant in any way lowered the high professional standard which he has held himself to since he commenced his tenure of service with the R.C.I.P.S. Accordingly, it is respectfully submitted that the decision must be considered *Wednesbury* unreasonable and the decision should consequently be quashed.
24. **The Legitimate Expectation Arguments:** At common law, an individuals' legitimate expectation of the provision of a benefit or advantage to be conferred by a public authority is protected under certain circumstances: *Council of Civil Service Unions v Minister for the Civil Service [1965] A.C. 374.*
25. In *Council of Civil Service Unions v Minister for the Civil Service* (supra) at pg. 408-409 Lord Diplock stated that, for a legitimate expectation to arise, the decision:
- “must affect [the] other person... by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that the benefit or advantage will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”*
26. It is respectfully submitted that on this basis the Applicant indeed had a legitimate expectation that his contract would be renewed in September 2011 as it had been biennially thirteen (13) times over the past twenty-six years. It is further submitted that since no apparent rational grounds for retiring him early pursuant to *Section 21(4)(a) and (c) of the Police Law (2010 Revision)* or for the non-renewal of his contract have to this day arisen, the Applicant should be immediately reinstated to the R.C.I.P.S. Although the Applicant has sought alternative employment since the Defendant's decision, he nevertheless remains ready, willing and indeed desires to return to the job which he clearly loves doing and has done exceptionally well for over a quarter of a century.
27. **Damages –** It is respectfully submitted that in appropriate cases and where the circumstances require it, that damages should be awarded on a successful Judicial Review application. Sometimes the circumstances are such, as they were in *McLaughlin v His Excellency the Governor of the Cayman Islands [2007] UKPC 50*, that reinstatement without more is not enough to ensure that justice is done. We accordingly submit that given the unlawful decision of the Defendant and the consequences to the Applicant that this is a case which justifies the award of damages.
28. Accordingly and for all of the foregoing reasons, the decision taken by the Defendant to retire the Applicant is, in our respectful submission, unlawful and must be quashed in the interest of justice.