

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO: OF G0060 of 2014

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW OF THE
DECISION OF THE CHIEF OFFICER, PORFOLIO OF LEGAL AFFAIRS, DATED
28TH JANUARY, 2014, ON THE APPLICANT'S REQUEST FOR PERMISSION TO
ENGAGE IN PRIVATE GAINFUL ACTIVITY

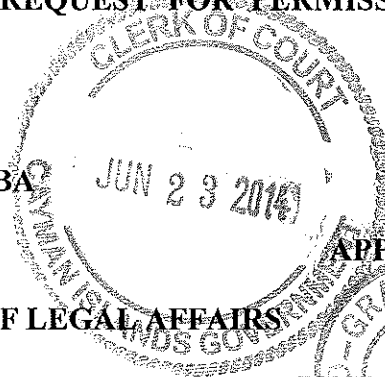
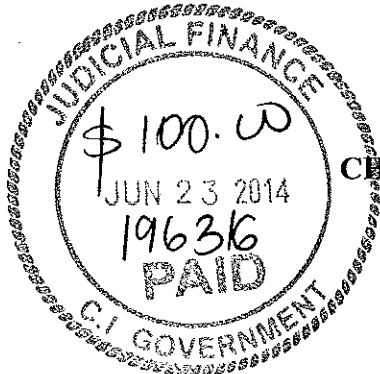
BETWEEN:

BILIKA SIMAMBA

CHIEF OFFICER, PORTFOLIO OF LEGAL AFFAIRS

APPLICANT

RESPONDENT



NOTICE OF ORIGINATING MOTION

TAKE NOTICE that the Honourable Mr Justice Charles Quin at the Law Courts Building, George Town, Grand Cayman will be moved on the.....day of....., 2014 at or as soon thereafter as Counsel can be heard, by the Applicant In Person, for the following relief, namely:

- (1) An order of *certiorari* to quash the decision contained in the Respondent's letter dated 28th January, 2014 and send the matter back to the Respondent to be reconsidered and decided in accordance with the findings of the Court;
- (2) An order of *mandamus* directing the Respondent to reconsider and decide, in accordance with the findings of the Court, (i) whether the teaching of the following courses or any of them falls within the terms and conditions of the Applicant's employment: *Original Set of Courses: (a) How to Make Effective Legislative Proposals (b) How to Exercise Statutory Powers Properly (c) How to Write and Apply Legislation; First Alternative Set of Courses: (a) The Legislative Process in Cayman (b) Statutory Powers and the Public (c) Plain English and the Law; Second Alternative Set: How to Write Cabinet*

Papers (b) How to Write in Plain English. (ii) whether their teaching would in law be in conflict or may be perceived as being in conflict with his duties as Senior Legislative Counsel;

- (3) An order that the Respondent furnish the Applicant with reasons for the decision, as requested by the Applicant under section 19 of the Constitution of the Cayman Islands, and that such decisions be sufficient in law in terms of the details required as may be ordered by the Court;
- (4) An Order that the reasons aforesaid be given in respect of each of the courses specified in paragraph 1 above;
- (4) Costs; and
- (5) Such further, consequential, or other relief as this Honourable Court deems just.

And for an order that the costs of and incidental to this be costs in the application and the application for leave be paid by the Respondent.

AND FURTHER TAKE NOTICE that the grounds of this application are:

1. Errors of Law:

(i) The Respondent erred in law in stating (as set out in paragraph 7 of the Affidavit in Support) that for permission to be granted under paragraph 8 of the Annex to the Schedule 4 of the Personnel Regulations, 2011 Revision (which constitutes part of the Applicant's terms and conditions of employment as agreed under section 4(3) of the Public Service Management Law, 2011 Revision, that the Applicant had to show that an entity within Government had to request for him to teach the courses concerned, for no such requirement is stated or implied in that paragraph or anywhere in the terms and conditions or the Law or Regulations.

(ii) The Respondent further erred in law in holding (as recounted in paragraphs 5 and 6 of the Affidavit in Support) in effect that the doing of anything outside the office which the Applicant could even remotely be asked to perform in the office, is necessarily in conflict with his duties in the office. It would certainly not be in conflict since there is a policy in the Legislative Drafting Department that no course on the legislative process will be taught, and by extension, no other course that is even more removed from the functions of the department.

(iii) The Respondent further erred in law in holding (as recounted in paragraphs 5, 6 and 7 of the Affidavit in Support) in effect that anything done outside of the Applicant's duties in Government which draws on my knowledge from the office would be in conflict with my terms and conditions of service or be perceived to be so. In particular, the quotes reproduced in paragraph 11 and 26 of the Affidavit in Support of this application are wrong in law in that regard.

(iv) The Respondent erred in law in not recognizing that conflict, be it real or perceived, must amount to something that, in the eyes of reasonable people, undermines an employee in the performance of his duties, which teaching of courses does not. In this respect it is admitted that the drafting of legislation or giving of legal advice outside of the office may be seen to cause conflict but not the teaching of courses.

2. **Bias:** The decision is biased considering that the same Chief Officer has granted permission for two other officers to engage in gainful activity outside their normal duties namely, Kim France, Chief Financial Officer, who does accounting work, for example, the Information Commissioners' Office, and Christine Cooke, Paralegal, who on a temporary basis undertook compilation work for legislation for the Judiciary and now maintains the Judicial and Legal Information website on an on-going basis. Also, the Chief Officer, as per **Exhibit BHS 13** to the Affidavit in Support, granted other authorizations, including for a Crown Counsel to perform legal services. Further and in the alternative, there is at the very least, perceived bias, making the decision in relation to the Applicant liable to judicial review as per the principles in, among many cases: *R v Sussex Justice ex parte McCarthy* [1924] I KB 259; and *Metropolitan Properties Co Ltd v Lannon* [1969] I KB 577.

3. **Unreasonableness:** The decision is *Wednesbury* unreasonable. In the short chain of emails attached to **Exhibit BHS 3** to the Affidavit, the chain of emails involving Myrtle Brandt, First Legislative Counsel (FLC), the FLC categorically states that she did not want:

‘members of [the] department [to] lecture, from time to time, on “the legislative process in Cayman” ’.

That was in response to a request made by a Government department for a talk on the legislative process. Then the Respondent, in **Exhibit BHS 4**, her decision to deny permission, she says:

“ I . . . wish to commend you on the initiative you have taken to address what *you consider* to be a lacuna in the training needs of the public service” (Emphasis added).

This agrees with the FLC in that both do not consider that teaching of the legislative process is important anyway and yet the same letter goes on to say that, if I were to teach this course (which is seen by the Respondent and FLC as being irrelevant to Government anyway) it would be, or be perceived to be, in conflict with my duties and therefore I must be stopped. Even if for the sake of argument a course on the legislative process may be seen to raise issues of conflict, such perception would be unreasonable and it is difficult to see how teaching one-day courses on, effectively, administrative law, interpretation of statutes, plain English, can be in conflict with my duties, making the decision itself unreasonable. (*Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223.)

Further, in the Federal Court of Australia case of *Tavelli v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 86 ALR 435 at 453 Wilcox J said “[p]robably the ground has its most frequent application in cases in which the challenger can demonstrate an illogicality in, or misapplication of, the reasoning adopted by the decision-maker; so that the final result is perverse, by the decision-maker’s own criteria” and went on:

“There may be cases . . . in which all the factors germane to a particular decision point in one direction. Is such a case arose, it would seem proper to brand as unreasonable a decision to the contrary effect.”

The suggestion by the Chief Officer that benefit to government justified grant of permission in the case of the CFO and paralegal, while stating that a course meant for the benefit of government amounts to conflict with respect to teaching of courses, falls in this category. Other factors germane to the matter (in addition to benefit to Government) are: (a) that the Chief Officer has given permission in a varied number of cases ranging from persons running a security company or an auto repair shop to persons allowed to even render legal services; (b) that other Chief Officers (Education and the Judiciary) do not seem to share her view of conflict; (c) that she has refused to give permission regardless of the adjustments I have given to eliminate conflict as defined to me by her, including refusing to allow essentially the teaching of English; (d) the fact that generally in Government up to 151 persons are authorized to carry on outside

activity, including some owning companies doing business with Government; (e) she has not even tried to give limited permission pending clarification of government policy, an exercise on which she has been working; (f) she has not tried to give limited permission subject to conditions; (g) not taken into account a well-known fact that in the Cayman Islands, even in cases of genuine conflict, emphasis is more on managing conflict, all because of the limited pool of expertise living in the Islands; (h) in light of all this, has not explained how teaching the courses in issue would undermine my work or how I am perceived.

4. Improper motives: The decision is occasioned by improper motives in that, quite apart from the fact that it is difficult to see whose interests it is serving, one can reasonably draw the inference that:

(i) it is motivated by the fact that the FLC and the Respondent trying to avoid a situation where, if the course is taught by a private company, questions may be asked as to why the Legislative Drafting Department did not conduct the said courses;

(ii) it is motivated by the fact that since a previous Chief Officer had allowed workshops to be conducted in Government on the legislative process and that decision was made on the suggestion of the Respondent in the past (over the vehement objection of the FLC) at a time when there were serious disagreements between the Respondent and the FLC, the FLC and the current Chief Officer wish to display their power. (*Porter v Magill* (2002) 2 AC 357 and *Margeston v Attorney General* 91968) 12 WLR 469, generally on improper motives.)

5. Discrimination: To the extent that my friends and colleagues Kim France, the Chief Financial Officer, and Christine Cooke, the Paralegal, have been allowed to undertake private gainful activity outside the office, the decision is discriminatory contrary to section 16 of the Constitution and I have not been given any reason that would make it, in terms of the derogation in that section, reasonably justifiable or reasonably proportionate.

6. Irrationality: Section 19(1) of the Constitution of the Cayman Islands requires, among other things, that all “decisions and acts of public officials must be . . . rational . . .”. The statements from the Chief Officer reproduced in paragraphs 11 and 26 of the Affidavit in Support are irrational in that they imply that every person in government (or outside) who wishes

to impart any knowledge as a part-time lecturer, he or she has to find a profession or trade in which they do not practice, in other words, one in which in all probability have no expertise.

7. Disproportionality: Section 19(1) of the Constitution also requires that all decisions of public officials be “proportionate” to any purported interest that is being safeguarded. Even if for the sake of argument we were to accept for a moment that the decision was not entirely irrational or unreasonable or that there *could be* a slight conflict of some kind, it is not proportionate to say that all the courses *including those that will teach guidelines on how not to abuse statutory powers or how to write in plain English*, are all in conflict with the Applicant’s duties as a legislative counsel. The operation of the principle of proportionality (where a disproportionate decision was quashed) can be seen from, among many cases, in *Barnsley Metro Borough Council ex parte Hook* [1976] WLR 1052.

8. Irrelevant considerations: The decision has taken into account irrelevant matters. The Applicant was verbally informed by the Respondent (as recounted in paragraphs 5, 6 and 7 of the Affidavit in Support) that if he could get an institution to request his services, then he could be authorized. This consideration is clearly extraneous to clause 8 of the standard terms and conditions. Indeed, the Respondent is sure that there were no requests from third parties in relation to the authorizations given with respect to all or any of the 151 civil servants who have been authorized under that paragraph, which figure comes from **Exhibit BHS 14** of the Affidavit in Support. That clause does not require a request from a third party as a condition precedent. One Caymanian case (among many local and UK cases) that speaks to irrelevant considerations is *Graham Thompson and Associates v Liquor Licensing Board* (1988-89) CILR 25, GC.

9. Bad faith: The reasons set out above also indicate bad faith. Further, a formal, written, request from the Director of the company to me (which the Applicant gave to the Respondent as part of the request for permission) was not considered enough by the Chief Officer.

10. Unduly onerous conditions: The Respondent’s insisting that there must be a request before the Applicant could be granted permission is an unduly onerous condition which does not relate to the relevant issues. (See *Pyx Granite v Ministry of Housing* [1958] 1 QB 554; and *R v Hillingdon London Borough Council ex parte Royco*. [1974] QB 720.)

11. **Failure to give reasons:** Section 19(2) of the Constitution specifies that a person affected by a decision can request reasons, which I did, but I was not given reasons as to how the teaching of any of the 8 courses would cause a conflict of interest, properly conceived.

12. **Insufficiency of reasons:** Even if what the Chief Officer gave me can in some sense be seen as reasons, the purported reasons are not sufficient in law as they fail to give the real gist of the reasons as to how the teaching of the courses will undermine the Applicant's performance of his duties and how he is perceived in that role by reasonable people (*R v Criminal Injuries Compensation Authority ex parte Leatherland and others* [2000] TLR, 12 October.) Failure to give sufficient reasons that bring the Applicant's mind to bear on exactly what conflict the courses would bring is tantamount to failure to give reasons at all, placing the Chief Officer in violation of the Constitution. Further, if I had requested to draft legislation for, or give legal advice to, the private sector, there would be cogent reasons as to how that might result in conflict or perception of conflict. Teaching of courses does not.

Dated the 23rd day June of 20¹⁴.



Signature of Applicant in Person

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

AND TO: **Chief Officer, Portfolio of Legal Affairs**, Ground Floor, DMS House, 20 Genesis Close, P.O. Box 907, Grand Cayman KY1-1103, Grand Cayman. This Notice of Originating Motion was issued by **Bilika Simamba**, In Person, whose address for service is No. 17 Mystic Retreat, John Greer Boulevard, P O Box 1393, Grand Cayman, KY1-1110.