IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: G218 OF 20 15

IN THE MATTER OF SECTION 44(4) OF THE PUBLIC SERVICE MANAGEMENT LAW (2013 REVISION)

AND IN THE MATTER OF THE CAYMAN ISLANDS CONSTITUTION ORDER 2009 pursuant to Part 1, Section 7(1)

AND IN THE MATTER OF THE CAYMAN ISLANDS CONSTITUTION ORDER 2009 pursuant to Part 1, Section 7(2)(a)(e)

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

BETWEEN: MARLENI RIVERS — APPLICANT

AND: THE CIVIL SERVICE APPEAL COMMISSION — FIRST RESPONDENT

AND: THE CHIEF OFFICER (Home Affairs) — SECOND RESPONDENT

AND: THE ATTORNEY GENERAL — THIRD RESPONDENT

JUDICIAL FINANCE $200 JUN 16 2016 247/16 CAYMAN ISLANDS GOVERNMENT

NOTICE OF ORIGINATING MOTION

TAKE NOTICE that the Court at the Law Courts, George Town, Grand Cayman will be moved on 31st August 2016 at 9.30 Am or as soon thereafter as counsel can be heard, by counsel on behalf of Marleni Rivers for an order of Certiorari to quash the decision of the Civil Service Appeal Commission to uphold the decision of the Chief Officer for Home Affairs in dismissing the Applicant Marleni Rivers from her employment with the Fire Services.

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

1. Breach of Natural Justice and *Procedural Non-compliance*

a) The Appellant should have been presumed innocent of any wrongdoing until any such wrongdoing was proven. The tenure of his letter was one of guilt before any investigations, if any, had begun. This was in breach of Part 1, Section 7(2)(a) of the Constitution.

b) Absent any independent supporting evidence for the Complaint's account, her account should not have been believed over the word of the Appellant. If there was any such supporting independent evidence, it remains to be seen.

c) The Chief Officer failed to give the Appellant an opportunity to be heard orally together with the complainant (as he should have done pursuant to the Personnel Regulations 39 (1)(c)) and allow the Appellant the opportunity to be able to challenge the complainant and have her examined in accordance with Part 1, Section 7(2) (e) of the Constitution which guarantees a fair trial.

d) The Chief Officer found support for his termination decision from the sole evidence of the complainant which the Appellant was not given the opportunity to challenge via cross examination. If the 'additional' reports that he received are formal incident reports of

having received the complaint, then they add very little probative value to the allegations, and should have added nothing probative to the Chief Officer's decision making process.

e) The Chief Officer failed to advise the Appellant of her right to have witnesses called, and failed to secure their attendance even though he could have secured their attendance for the purpose of questioning them himself to improve the integrity of his decision making process or making them available for the Appellant, especially given that he was their Chief Officer and could have done so in the interest of justice.

f) The Chief Officer erred by wrongly interpreting the Appellant's written defense to be an admission of guilt (see page 2 paragraphs 1 and 6 of his Memorandum dated 26 June 2015). His interpretations appear to 'fit' into his already made up mind about the 'guilt' of the Appellant.

g) He cites a breach of the 'Draft Workplace Sexual Harassment Policy' in his second 'dismissal' Memorandum without any real consideration of its implications or intent. Little regard is given to the fact that the parties had a history of hugging and kissing socially

before and that that part of the Applicant's defense remains unchallenged. Less regard is paid to the fact that once the Complainant voiced her objection, in the complainant's version of events, the particular behavior complained of ceased. That fact by itself ought to have alerted the Chief Officer to the possibility of a genuine mistake of fact on the appellant's part and awakened his intellect to the other options available to addressing the problem.

2. 'Wednesbury' Unreasonable

The allegations did not support the decision that she was guilty of gross misconduct and did not therefore support the decision that she must be terminated. Whether the Complainant's evidence would have withstood cross examination is still unknown. It was therefore unreasonable and irrational for him to have relied solely on such untested evidence. He had not yet completed his investigation but dismissed her nonetheless. That again was unreasonable and irrational. Further the Chief Officer failed to consider any other options available to him despite the nature of the evidence and the absence of any explanations by the Appellant at the time of her dismissal on the 5th of June 2015.

3. Inconsistency and Bias

It is sufficiently clear that the Chief Officer had made up his mind about her guilt before his investigations had begun let alone completed. It is difficult not to see the bias on his part in her being dismissed before his investigation began. The reinstatement back to her post by the CSAC did not cure the bias exhibited by The Chief Officer in his premature dismissal. Her temporary reinstatement by the CSAC itself is evidence of its awareness (and disapproval) of the Chief Officer's biased actions. Further, the Appellant has been treated differently to other persons in previous similar circumstances within the fire department. In further support of her case for bias, one of the Applicant's witnesses Margaret Dixon was prepared to testify that she is a Fire Officer and that she made a report against a male Caymanian Fire officer of sexual harassment in the Cayman Brac, and that she was the one who was transferred to the Fire Department in Grand Cayman after having made the report against him. This was after admissions had been made by him and written apologies had been given to her by him. He was since been promoted. It is not unlikely that her evidence would be

corroborated by records which ought to be available and accessible to the Chief Officer. It cannot go unnoticed that the Appellant is female and Honduran.

Submissions

1. The Appellant submits and maintains that the established procedures were not correctly followed by the Chief Officer. In its appellate jurisdiction, the Civil Service Appeals Commission (CSAC) failed to appreciate that the Chief Officer via his written instructions had approached the process of enquiry with an already pre determined mind as to the guilt of the Appellant. In the first instant his memorandum of June 1st 2015 is entitled '**Allegations of Misconduct**', a presumption that there had been no findings of fact as yet and that a response would be needed from the Appellant in order to continue the investigation. However, in his second paragraph, the Chief Officer states:

'Having received additional reports relative to this matter and reviewed the same, copies of which are attached for your review

and response, I must advise you that I am considering your actions to be a form of misconduct and under the circumstances, it is my view that the threshold for Gross Misconduct, which is referenced in Section 44(4) of the Public Sector Management Law (2013 Revision) and Section 39 of the Personnel Regulations(2013 Revision), has been met'

It can't be without wonder if those additional reports to which he refers are in ***addition*** to the two reports from the complainant, or whether they are the reports from the fire Officer J. Thompson, along with another report from CFO Bodden, in the chain of command, both of which serve to confirm that a report had been made by the complainant, but which are of little further probative value as to the truthfulness or otherwise of the allegations. Further in his memorandum he states:

'Your alleged inappropriate conduct during your interactions with Trainee Fire Officer Richards on May 28th 2015 and June 1st, 2015 were in direct contravention of this. The fact that the alleged misconduct was perpetrated against a junior member of staff is an aggravating factor.'

It would appear that the '**alleged inappropriate conduct**' and '**alleged misconduct perpetrated against the junior member of staff**' was already a proven '**fact**' in the mind of the Chief Officer. Notwithstanding that the response of the Appellant has not yet been received. He nonetheless continues that he '***would like to give you an opportunity to respond to the above and the attached evidence in writing...'.*** Not yet being in possession of the Appellant's response, and inviting her to respond, the Chief Officer concludes that:

'***In the light of the above I am hereby advising you of my decision to terminate your employment with the Cayman Islands Fire Service with immediate effect under the terms of your employment and as per Section 44(4) of the Public Sector Management Law (2013 Revision) and Section 39 of the Personnel Regulations(2013 Revision)***'

The Chief Officer therefore in his letter on the 5th of June 2015 seems to have found enough 'light' to have come to the conclusion that the allegations in the report were already irrefutable proof of misconduct and that his decision to terminate was already well founded. This decision can only be described as irrational and unreasonable, even reckless.

On the 26th of June 2015, in his 'second dismissal' letter he states;

` ***Having reviewed all of the facts presented in this matter including your written and verbal explanation, I have re-assessed the situation and am of the view that you have engaged in gross misconduct and that the grounds for dismissal for this level of misconduct have been proven..'***

By this time, he seems merely to repeat his conclusions of June 5th 2015, notwithstanding his assertions of having now **'reviewed all the facts'** and having'**re-assessed**' the situation. Inherent in this letter is an inference that he had not had the full facts at the time of the first letter and as such had already jumped to conclusions as to the Appellant's guilt, an obvious inference of bias on his part. Whatever the Appellant had to say in response would be irrelevant. In either event, the appearance is that the Appellant was 'fired' twice. Clearly this is illogical and as such she would have been effectively dismissed from the Fire Service on the 5th of June 2015. Such inherent pre judgment and bias seemed to have escaped the consideration of the CSAC who would appear to only have 'rubber-stamped' the decision of the Chief Officer. What evidence did he rely on to purportedly dismiss her on the first occasion and more importantly, what additional evidence did he rely on, having now '**reviewed all the facts'** to 'dismiss' her a second time? The decision lacks reason and is thus irrational, predetermined and biased.

As such, the other processes including that of placing the Appellant on required leave were merely to give the impression and appearance of full compliance with the provisions of Schedule 1 Section 8(2) of the Personnel Regulations (2013 Revision) and that a full, impartial and a fair approach was being given to the investigation of the allegations of the Complainant and the response of the Appellant. The burden of proof must rest with the complainant. It does not appear that the Chief Officer applied his mind to this concept at all. This is a procedural error in itself.

2. The CSAC failed to observe this error of natural justice was not cured by its attempt to reinstate the Appellant from the 27th June 2015. The Appellant maintains her assertion that the tenor of the Chief Officer's Memorandum of 5th June 2015, compounded by his failure to give her a true opportunity to advance her case (see below), suggests that he had arrived at a decision (of guilt) prior to hearing from the Appellant and that he did no more than pay lip service to the Appellant's right to a fair and impartial hearing. The CSAC appear to have invited the Chief Officer's response but did not critically examine his decision making process and the inherent 'conclusiveness of guilt' in its tenure. In her application to the CSAC for review, the Appellant's counsel had outlined the bases and grounds on which the decision of the Chief Officer should not have been upheld. It is

submitted that the response of the Chief Officer failed to address the substance of the Appellant's grounds for appeal and perhaps not surprisingly so, given his(twice) clear intention of dismissing the Appellant in letters addressed to her both before he had had the full facts.

3. Had the Chief Officer correctly applied his mind to the burden of proof, the Chief Officer would have been able to appreciate the true evidential state of the circumstances, whereby (given that it was one written account against another) the case could not be proven against Ms Rivers in the absence of supporting evidence or, at the very least, a careful assessment of both the Complainant's and the Appellant's demeanor under questioning or tested under the 'fires of cross examination'. It is noteworthy that in his Response dated 31 July 2015, the Chief Officer has still not explained what evidence justified his decision to prefer the Complainant's word to that of Ms. Rivers as it has to be accepted that her account in no way suggests an admission of guilt. The CSAC appears not to have taken that fact into account while under deliberation of the Chief Officer's decision to dismiss, and the fact that a person cannot be guilty unless their mind is guilty (excepting cases of strict liability, an example of which this is not). Further it is clear that the Appellant has denied the context of her interaction with the complainant as being sexual, the central issue.

4. The Appellant presented the names of two witnesses who she informed would be able to provide relevant evidence (see written accounts of the Appellant dated 8 June 2015). The Chief Officer failed to contact these persons and, having failed to do so, further failed to give the Appellant the opportunity to produce the witnesses herself. Furthermore, the Chief Officer failed to make any enquiries with the potential witnesses named by the Appellant, even though they were available and under the command of the said Chief Officer. To further compound that error, the CSAC did not appear to have appreciated that the Chief Officer had failed to make contact with them and by so doing would have denied the Appellant a fair hearing where evidence that might have supported the Appellant,(and especially in circumstances where he had the power to secure their cooperation) was missing though available. A fair hearing would have obviously been denied. Given the lack of corroborating evidence for the complainant, such steps should have been taken by the Chief Officer on his own initiative.

5. It is no excuse for the Chief Officer to attempt to shift this responsibility to the Appellant for securing potential witnesses. In performing the dual role of both investigator and decision maker, the Chief Officer was under a duty to consider potentially relevant evidence, the existence of which he was on notice and which could have been readily obtained without

unreasonable delay or costs implications. The CSAC under Section 61(4) of the Public Service Management law has the power of the Grand Court in the summoning of witnesses and the production of documents, yet failed to cause the Appellant's witnesses to be called, even though it became aware of that fact, so that it could properly and fully determine the lawfulness of the Chief Officer's actions. On the face of the record, the failure of the Chief Officer to call the witnesses which had been provided by the Appellant should have raised the threshold for bias in the mind of the CSAC.

6. It would appear from the Chief Officer's response that there is a difference in recollection between the parties as to whether Ms Rivers was given the opportunity to be heard orally. Even if the Chief Officer's recollection is indeed correct (which is not accepted by the Appellant) the CSAC ought to have appreciated that Ms Rivers is a firefighter, not a lawyer. She was to be deemed wholly unfamiliar with the fact finding and disciplinary process. In contrast, the Chief Officer was or should have been fully familiar with the process and should have explained to her in far clearer terms the procedure which was being followed.

7. The Chief Officer states ***"The Appellant made no request for the Chief Officer to produce any witnesses for cross-examination."*** This is hardly surprising since Ms Rivers had no idea that she was permitted to do so nor was she aware of the consequences of failing to ask for this to be done. Had the Chief Officer explained the procedure (and explained that Ms Rivers was entitled to request such cross-examination) Ms Rivers would no doubt have requested it. The Chief Officer also states ***"The Appellant did not request to be allowed to bring any witnesses to give evidence on her behalf."*** Again, Ms Rivers had no idea that it was her responsibility to do so. Had the Chief Officer explained the procedure in a clear and precise way, no doubt Ms Rivers would have requested this. Having provided the names of witnesses, Ms Rivers was entitled to think that the tribunal would make

the necessary independent inquiries of these persons, especially where they ought to have appreciated that Chief Officer had not.

8. The Respondent alleges that it was the Appellant's duty to produce such witnesses and evidence as she thought useful. It is submitted in response that the Chief Officer has a duty to investigate such matters on his own initiative once the names of such witnesses are provided. The Chief Officer in the process of his investigation, if he embarked on one, does not appear to have had any intention of ascertaining whether the witnesses were willing to cooperate and whether they had information pertinent to the investigation. It is now perhaps clearer to infer why they may not have been contacted, given the nature and content of the evidence they were likely provide. Further, it is unfair to expect the lay Appellant in the absence of any warning from the tribunal to know it was her responsibility to contact and produce witnesses. In either event, the result is the same: the hearing was devoid of pertinent relevant evidence in the determination of the matter.

9. The Chief Officer examined the Appellant's letter of June 8, 2015 addressed to Ms Brianna Ebanks,(but which appears to have been meant to address the complainant) where she states:

' I have been doing since I met her in 2011. She never tell me that she does not want me to hug her so I assume everything was o.k. with us...I did not know that I was making Mrs. Jessica unhappy or offended because she never tells or shows me that I was doing her something she did not appreciate. In fact she hugged me back....Mrs. Jessica I did not know I offended you. I wish you had said it so that I could avoid this mess. I am extremely sorry and ask from the bottom of my heart that you forgive me I promise that it will never happen again as long as we live. It was not my intention to display misconduct, and I am sorry you saw it that way'.

Notwithstanding the clear attempts of the Appellant to explain her actions and which were clearly not an admission of guilt, the Chief Officer still went on to find that:

'the conduct that you engaged in is contrary to this(the Public Service Management Law(2013 Revision)section 4(d) and unfortunately is not sufficiently mitigated by your written admission to wrongdoing and apology which was noted in your written response received on June 9th 2015'.

10. This was an unreasonable and unjustified construction of the Appellant's written response. It is plain from her response that the Appellant denied those parts of the complaint which would have amounted to misconduct. It is further submitted that the Chief Officer failed to consider the Appellant's cultural, language and ethnic background in his consideration of the Appellant's actions and how those expressions of affections are interpreted. In his 'dismissal' letter of June 26th he quotes from Section 4 of the draft Workplace Sexual harassment policy in support of his decision. Would the fact that a male officer complained about another male officer patting him on the shoulder in an otherwise friendly gesture, and who later made a written complaint about his disapproval of being patted, amount to misconduct simply because the report was made? Would it be the complaint that would make it misconduct or just the fact of the physical touching?

11. It is apparent that the complainant made two complaints, on the second of which the complainant made a clear indication of disapproval to the Appellant. There were no further unwanted touching by the

Appellant and no further complaints. As such an indication or warning from her superior officer might have sufficed. The action of the Chief Officer it is submitted was therefore disproportionate and the failure of the CSAC to appreciate that fact is regrettable.

12. As set out earlier and above, the conduct alleged by the Complainant is denied. The Complaint's allegation is uncorroborated in substance and the alleged behavior is arguably not sufficient as to warrant termination, especially given the options open and available to the Chief Officer, and especially in light of her explanations and termination of the particular behavior after being told by the Complainant. But for the Appellant's acknowledgement of having been in physical contact with the Complainant, albeit in a context which she has explained, there would have been little, if any, evidence on which to proceed. She might have denied the allegations in their entirety and possibly provided no real opportunity for a thorough enquiry. She has been forthright and clear in her account and the context in which she was deemed to have offended. In those circumstances the Appellant ought to have been given the benefit of the doubt.

13. The Respondent appears to be alleging that previous decisions (in which male firepersons were not disciplined similarly following allegations of sexual discrimination in the workplace) were made by a different person within Cayman Islands Government and that such decisions are not therefore relevant to the present case. It is submitted that this attempt at distinguishing between these cases is misconceived. The Cayman Islands Government was the decision make in each instance albeit with different agents acting on its behalf. The Appellant has been treated differently from these males and this creates the appearance of bias and partial sexism. An examination of these other cases should have been conducted. In the absence of such inquiry, the message being broadcast is that female employees who may be culpable of sexual harassment against other female employees are treated differently and more harshly than their male counterparts.

14. It is submitted that the Chief Officers decision to terminate the Appellant for these isolated and minor misinterpreted infractions after 10 years of service (and indeed following an apology from the Appellant to the Complainant for any unintentional discomfort or embarrassment caused) was a gross overreaction. There is no evidence that the Chief Officer considered alternative disciplinary measures short of dismissal

including reprimand, warning, further corrective training, relocation of the Appellant to another station(as was done in the case of male employees accused similarly) or even a period of suspension without pay. The decision to terminate was manifestly excessive and therefore disproportionate. The Appellant has been treated unreasonably harshly and unfairly. It is respectfully submitted that the Appellant had provided ***'evidence to the CSAC to show that the chief officer acted in an unfair or biased manner or in a manner inconsistent with requirements of this Part.'*** Part 54(2)PSML.

15. By any stretch of the imagination, the actions of both Respondents were Wednesbury unreasonable, in all the circumstances. Lord Mustill in **Ex-parte Doody (1994)1 AC 531** stated that...***'where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances...fairness very often will require that a person who may be adversely affected...will have an opportunity to make representations...before...or after it is taken with a view to procuring its modification..'*** The Appellant now seeks to rely on such a right.

16. It is further submitted that...***'the court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account or***

conversely have refused to take into account or neglected to take into account matters which it ought to take into account'...'they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere..' Associated Provincial Picture Houses Ltd. V Wednesbury Corporation (1974) 2 ALL ER 680,685 by Lord Green M. R., at pages 233-234. It is submitted that this matter begs for similar considerations by this court and it is submitted; that such considerations are wholly appropriate in the given circumstances.

In the circumstances, it is submitted that on the basis of these authorities and arguments outlined herein, that an Order of Certiorari quashing the decision of the First Respondent be made on the grounds aforementioned and that there was no lawful or reasonable basis for either decision.

Dated the 25th day of Feb 2016

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Crister Brady, Attorney-at-law

CRISTER ANDRÉ BRADY
Attorney-at-Law

TO: The Clerk of the Court

AND TO: The Attorney General

This Notice of Originating Motion was issued by **Brady, Attorneys-at-law for the Applicant whose address for service is that of her said Attorneys, Building B6, Trinity Square ,71b Eastern Avenue, George Town, Grand Cayman.**