



IN THE GRAND COURT OF THE CAYMAN ISLANDS



CAUSE NO: 39 of 2018

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW pursuant to Order 53 of the Grand Court Rules 1995 (Revised).

IN THE MATTER OF A DECISION AND ORDER OF THE CIVIL SERVICE APPEALS COMMISSION MADE PURSUANT TO SECTION 54 OF THE PUBLIC SERVICE MANAGEMENT LAW (2017 REVISION) between Mrs. Shena Ebanks, Appellant, and The Chief Officer, Ministry of Education Youth, Sports, Agriculture and Lands, Respondent.

BETWEEN

CHRISTEN SUCKOO, THE CHIEF OFFICER OF THE MINISTRY OF EDUCATION, YOUTH, SPORTS, AGRICULTURE AND LANDS APPLICANT

AND

CIVIL SERVICE APPEALS COMMISSION

RESPONDENT

NOTICE OF EX PARTE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

*3rd May, 2018 eq: 30 AW*

To the Clerk of the Court, Law Courts, George Town, Grand Cayman	
Name, address and description of applicant(s)	Christen Suckoo, the Chief Officer of the Ministry of Education, Youth, Sports, Agriculture and Lands, Government Administration Building (the "Ministry"), 133 Elgin Avenue, Grand Cayman, KY1-9000.
Judgment, order, decision or other proceeding in respect of which relief is sought.	The Decision of the Civil Service Appeals Commission, dated 12 December 2017 (the "Decision"), and the related Order, dated 20 December 2017, (the "Order"), addressed to the Chief Officer.

Relief sought.	
1) A Declaration that the Decision and Order are a nullity; or 2) An order in the nature of certiorari setting aside the Decision and the Order. 3) Such further and other relief as this Honourable Court may deem appropriate; and 4) Costs.	
Name and address of applicant's attorneys	Ian Paget Brown QC Boundary Hall, Cricket Square, P.O.Box 2578, KY1-1103, Grand Cayman, Cayman Islands AND The Attorney General's Chambers. 4th Floor, Government Administration Building, 133 Elgin Avenue, George Town, P.O.Box 136, KY1-9000, Grand Cayman, Cayman Islands.
Signed	Dated
Attorney General's Chambers	9th March 2018

## **GROUNDINGS ON WHICH RELIEF IS SOUGHT**

### **Introduction**

#### **Name, address and description of applicant**

1. Mr. Christen Suckoo (the "Chief Officer") is the Chief Officer of the Ministry of Education, Youth, Sports, Agriculture and Lands, of the Cayman Islands Government. He makes this application on his own behalf and on behalf of the Ministry. His address is Government Administration Building, 133 Elgin Avenue, Grand Cayman, P.O.Box 108, KY1-9000.

#### **Name, address and description of interested person**

2. Mrs Shena Ebanks, P.O. Box 53, 31 Bonsai Crescent, KY1-1301, Grand Cayman.

#### **Details of the Decision and Order**

3. This is an application for leave to apply for judicial review of the Decision of the Civil Service Appeals Commission ("CSAC"), dated 12 December 2017 (the "Decision"), and the related Order, dated 20 December 2017, (the "Order"), addressed to the Chief Officer.
4. Section 54(1) of Public Service Management Law (2017 Revision) ("PSML") provides: "A staff member or civil servant may appeal to the Civil Service Appeals Commission about any decision of a chief officer made under this Part [Part VII]."
5. Pursuant to the provisions of section 54 of the PSML, Mrs Shena Ebanks appealed the decision of the Chief Officer, communicated verbally on 22 September 2017 and in writing on 29 September 2017, not to appoint her to the position of Human Resources Director (HR Director) with the then Ministry of Education, Employment and Gender Affairs.
6. CSAC held that the submissions made by Mrs Shena Ebanks pursuant to her appeal "may have provided evidence that the Respondent [the Chief Officer] acted unfairly or in a biased manner, and/or acted in a manner inconsistent with the requirements of Part VII of the PSML, during the recruitment process for the post of HR Director in the then Ministry of Education, Employment and Gender Affairs.
7. Mrs Shena Ebanks is a Caymanian. Her evidence before CSAC showed that there were 13 applications for the post and that she was one of five candidates short listed and interviewed. The Ministry's interview Panel Report, which she submitted as evidence to support her appeal, disclosed that although the Ministry was impressed with her Human

Resources (HR) background and enthusiasm, she did not have the required experience in managing large HR teams or an in-depth knowledge of the crucial budget management, that the preferred and successful candidate, a Non-Caymanian, had.

8. Section 41(7) of Part VII of the PSML provides all candidates on the shortlist are to be interviewed by an interview panel using a comparable interviewing approach to establish who was the preferred candidate, being the candidate with the best mix of qualifications, skills, knowledge and experience for the position based on –
  - i. the information provided by the applicants;
  - ii. the results of the interviews;
  - iii. the personal knowledge of the persons on the interview panel; and
  - iv. any other information the interview panel considers relevant.

Where, after applying the criteria, two or more persons rank broadly at the same level, Caymanians shall be given preference.

9. On her CSAC Appeal Form, Mrs Shena Ebanks stated, “it is my opinion that the Chief Officer has significantly discounted my leadership skills and professional experience so more favour could be awarded to the Non-Caymanian candidate.” She also alleged “the Chief Officer had also disregarded the Public Service Management Law (2017 Revision) and the Personnel Regulations (2017 Revision)” which provides that preference shall be given to a Caymanian where the qualifications, skills, knowledge and experience rank broadly at the same level as that of a Non-Caymanian.
10. The appeal was accepted for determination by CSAC on 22 November 2017 on the basis that Mrs Shena Ebanks’ submissions may have provided evidence that the Respondent acted unfairly or in a biased manner, and/or acted in a manner inconsistent with the requirements of Part VII of the PSML, during the recruitment process for the post of HR Director in the then Ministry of Education, Employment and Gender Affairs.
11. The PSML does not set out the appeals procedure, and CSAC regulates itself. In Section H of CSAC’s published guidance notes, it states: “Following acceptance of the appeal, the Commission will then forward the Appeal Form and all supporting documentation submitted by the Appellant to the Chief Officer ...requesting a considered response to the allegations ...within 10 calendar days.” Although there is no definition of the word “forward” it can be taken to mean “serve” since the Chief Officer is a party to the appeal.
12. Under section 61(4) of the PSML, the CSAC has all the power of the Grand Court in relation to summoning witnesses and the production of documents. There is no provision in the Grand Court Rules for the service of proceedings by email.

13. On 23 November 2017, CSAC caused to be sent an email to the Chief Officer to which was attached copies of the appeal and supporting documents filed by Mrs Shena Ebanks. The Chief Officer was requested to provide a detailed response answering the allegations made in the Appellant's submissions by the close of business on 4 December 2017.
14. Section 54(3) of the PSML provides: "The Civil Service Appeals Commission shall render a decision on the appeal within thirty days, and such decision shall be based on the information provided by the appellant together with information provided by the chief officer and any other information that the Commission considers relevant, and its decision shall be final."
15. On page 2 of the Decision, CSAC wrote: "The Commission has not received an acknowledgement of the appeal, nor a substantive response. Follow-up phone calls were attempted on 23 and 24 November to the Respondent but were unsuccessful and have not been returned."
16. On page 4 of the Order, CSAC wrote "In addition the Commission states its disappointment in the Respondent for failing to acknowledge or reply to the request of the Commission to provide a detailed response answering the allegations made in the Appellant's submissions."
17. On page 2 of the Decision, under the heading 'Findings', the CSAC states: "The Commission finds that there is evidence to suggest that the Respondent acted unfairly towards the Appellant during the selection phase of the recruitment process."
18. By a letter dated 22 December 2017, attached as Exhibit "C.S.2" in the supporting affidavit of the Chief Officer, the Chief Officer advised the CSAC that the reason CSAC did not receive an acknowledgment or a detailed response to their email was that he did not see the email and attachments purportedly sent to his email address on the 23 November 2017, until he received a copy of the CSAC's Decision and Order on the 21 December 2017. He also confirmed that he had not been served with a hard copy of the appeal correspondence by mail. The record shows that the CSAC based their Decision and Order, not on the evidence, but on the perceived failure of the Chief Officer to acknowledge the appeal served by email, which the Chief Officer did not see. CSAC focused on the CSAC's Guidance Notes at Section J, which states: "It should be noted that responses by either party seeking to claim lack of instruction will be treated by the Commission as failure to answer. Likewise, failure of either party to attend the Hearing, or provide their legal representative with the necessary information/instructions to answer the Commission's questions, will be treated as a failure to provide the Commission with the information necessary to determine the appeal."

### **Documents in Support.**

19. This application for leave to apply for judicial review of the Decision, and the Order made by the CSAC, dated 20 December 2017, (the "Order") is supported by the affidavit of the Chief Officer and the documentary exhibits to the affidavit.

### **Standing**

20. The Chief Officer has been prejudiced by the CSAC's failure to observe the accepted rules for service of proceedings. The Chief Officer has standing because he has a sufficient interest. The consequences of the Decision and Order are very serious and harmful unless remedied. Contrary to interests of justice, CSAC determined the appeal in the absence of the Chief Officer. The Chief Officer had not been served with the proceedings as required by Grand Court Rules. By section 69(1)(b) of the PMSL a person who, without reasonable excuse, fails to appear before the CSAC when required to do so or who fails to comply with any request made by the Commission to produce any information that is in that person's possession or under that person's control; or provide answers or explanations when required to do so by the Commission commits an offence and is liable to imprisonment for six months.
21. Had the CSAC lawfully served the proceedings on the Chief Officer, correctly considered the evidence, adopted the required standard of proof, and given the Chief Officer a fair hearing, CSAC would have determined that the evidence provided by Mrs Shena Ebanks herself conclusively showed that far from supporting her case, the Panel Report showed that the Chief Officer did not act in an unfair or biased manner; to the contrary he complied with Part VII of the PSML. As a result, CSAC would not have made the unlawful and irrational orders of 20 December 2017.

### **Ground 1: Illegality – Unlawful Procedural Irregularity – Failure to serve proceedings**

22. The Order and the Decision are void and procedurally unlawful due to the fact that the CSAC failed to properly serve notice of the proceedings with the appeal bundle on the Chief Officer by leaving a hard copy with him or sending it to him by mail. The service by email, purportedly on 23 November 2017, was not an agreed procedure as between CSAC and the Ministry and was therefore invalid. Service by email is not an accepted method of service under the Grand Court Rules.

23. The CSAC is a quasi-judicial body. The CSAC is subject to the rules of natural justice. To comply with their own procedure set out in the Guidance Notes requiring CSAC to forward the Appeal Form and all supporting documentation to the Chief Officer, CSAC ought to have complied with the Grand Court Rules regarding service of the proceedings on the Chief Officer.
24. Service by e-mail was not proper service and the inadequacy of the notice by service of process invalidates the subsequent proceedings. The risk of an email going unseen is too great and, as in this case, causes uncertainty. Uncertainty promotes confusion; inflexibility promotes harsh outcomes, such where CSAC in effect gave a “default judgment” by noting disappointment that the Chief Officer, as Respondent to the appeal, failed to acknowledge or reply to the request of the CSAC to provide a detailed response answering the allegations made in Mrs Shena Ebanks’ submissions. The Order and the Decision upon which it is based violate common law rights and constitutional principles governing the exercise of official power. The Cayman Islands Constitution Order section 19(1) provides:
- “All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.”
25. The most important purpose of service is to ensure that the appeal documents are brought to the attention of the person to be served. There is a second important general purpose, namely, to notify the recipient that the proceedings have not merely been formulated but actually commenced as against the defendant, and upon a particular day. As in the present case, a party who fails to respond to service, in the specified way and at the right time, will be vulnerable to the imposition of judicial penalties. Failure by the CSAC to observe the rules of service have the effect of invalidating the subsequent proceedings.
26. The inadequacy of notice to the Chief Officer was unlawful and invalidated the Decision and the Order. Although the CSAC may adopt its own rules it must follow similar procedure as the Grand Court to ensure due process. The CSAC, by section 61(4) of the PSML, has all the powers of the Grand Court in relation to the summoning of witnesses and the production of documents, and should have, so far as is practical, followed the Grand Court Rules.
27. The Grand Court Rules (O.32, r.5) provide: Before proceeding in the absence of any party the Court may require to be satisfied that the summons or notice of the time appointed for the resumed hearing was duly served on that party.

28. What ought to have happened is that notice of the appeal, the appeal bundle, and related documents ought to have been served on the Ministry by leaving a hard copy with the Chief Officer at his offices or by service upon the Chief Officer through the post. It is to be noted that the CSAC appears to have had concerns on whether the email and the attachments had gone through, because the records show that follow-up phone calls were attempted on 23 and 24 November 2017. They were unsuccessful and were not returned. The Chief Officer has since checked his voicemail and there were no messages left.

29. Under the Grand Court Rules, the permitted methods of service as per O.65, r.5 (1) are:

“Service of any document, not being a document which by virtue of any provision of these Rules is required to be served personally, may be effected -by leaving the document at the proper address of the person to be served; by post; by facsimile, in accordance with paragraph (2) [i.e. with the agreement of attorneys acting for the parties;] or in such other manner as the Court may direct.”

30. There is no provision for service by e-mail. Furthermore, by section 5(3) of the Electronic Transactions Law (2003 Revision) no person dealing with a Ministry of Government or portfolio shall be entitled, with an electronic record, to satisfy a requirement to process a record. Under section 12 of the Crown Proceedings Law (1997 Revision):

“All documents required to be served on the Crown for the purpose of or in connection with any civil proceedings by or against the Crown shall be served on the prescribed officer.” By section 2, “prescribed” means prescribed by rules of court and “rules of court” means rules made by the Rules Committee of the Court.

31. Although the CSAC intended to follow the correct procedure to allow the Chief Officer to appear and give evidence, it failed to do so, because of either incorrect legal advice or an administrative slip, because it forwarded the Appeal documents as email attachments instead of the correct procedure by personal service or service by mail.

32. CSAC failed to implement its own intention and denied the Chief Officer the opportunity it intended to give him. CSAC dealt with the matter in the belief that the Chief Officer had nothing to say by way of explanation of the selection process for the post of HR Director within the Ministry of Education and did not wish to provide a detailed response answering the allegations made in the Appellant’s submissions.

33. It follows:

- CSAC failed to discharge its statutory function and proceeded in breach of the rules of natural justice; and

- CSAC's Order, and the Decision on which it was based, was therefore not a lawful decision but a nullity and of no legal effect.

**Ground 2: Illegality – Error of Law – CSAC ignored Evidence**

34. CSAC Guidance Notes provide that after an appeal submission has been lodged with the CSAC, they will review the submission and determine whether:
- i. it falls within the CSAC's jurisdiction in accordance with section 54(1) of the PSML; and
  - ii. it provides clear and sufficient evidence to satisfy the requirements of section 54(2) of the PSML.
35. If the appeal does not fall within the CSAC's jurisdiction and/or provide clear and sufficient evidence the appeal will not be accepted by the CSAC and the appellant shall be notified accordingly.
36. The Decision and the Order are unlawful because CSAC failed to consider Mrs Shena Ebanks' own clear and sufficient evidence, which notwithstanding her allegations against the Chief Officer conclusively showed that the Chief Officer complied with Part VII of the PSML. As a result, CSAC unlawfully came to the Decision and made the Order with no evidence to support them. A Decision and an Order made without evidence is not valid. It amounts to an error of law and not an error of fact.
37. The evidence such as it was, did not authorize the Decision and the Order, and each is devoid of legal validity having been made in disregard of uncontroverted evidence. The Ministry's interview Panel Report, which Mrs Shena Ebanks submitted as evidence to support her appeal to the CSAC evidenced that although the Ministry were impressed with her HR background and enthusiasm, she did not have the required experience in managing large HR teams or an in- depth knowledge of budget management, which is crucial for the role. This was in contrast to the experience in managing large HR teams or an in- depth knowledge of budget management that the preferred and successful candidate, a non-Caymanian, had.
38. Section 54(2) of the PSML provides: "Where a staff member or civil servant appeals under subsection (1), the staff member shall provide evidence to the Civil Service Appeals Commission to show that the chief officer acted in an unfair or biased manner, or in a manner inconsistent with the requirements of this Part."

39. Mrs Shena Ebanks' opinion that the Chief Officer had "significantly discounted" her leadership skills and experience "so more favor could be awarded to a non-Caymanian candidate" did not constitute evidence that the Chief Officer had disregarded the PSML and the Personnel Regulations (2017 Revision), which provide that preference shall be given to a Caymanian where the qualifications, skills, knowledge, experience and integrity rank broadly at the same level as that of a Non-Caymanian.
40. Mrs Shena Ebanks applied to CSAC for these remedies:
- (a) To have the recruitment audited for compliance with the law; and
  - (b) To be appointed in the role of HR Director with the Ministry if she was the next best Caymanian candidate or alternatively to have another Caymanian in the role.
41. She signed a declaration stating: "I hereby declare that the statements made in this appeal and any attachments are true and correct to the best of any knowledge and belief." But no documents she submitted constituted evidence to support her opinion that the Chief Officer was unfair or biased or acted in a manner inconsistent with Part VII of the PSML.
42. To the contrary, on or about 15th November 2017 Mrs Ebanks submitted to CSAC the Ministry's "Panel Report" regarding the appointment of the HR Director, which evidenced:
- 13 applications were received for the post of HR Director, 5 of which were Caymanian
  - 5 Applicants were short listed and interviewed
  - Each candidate was requested to make a (15) minute presentation to the panel on "Leadership strategies essential for the successful change in management."
43. The Panel Report specifically stated that Mrs Ebanks "does not possess experience in managing large HR teams" and that she expressed to the interview panel "that Budget is an area she would need improvement on." Further, the Panel Report expressly stated that "although the panel was impressed with her background and enthusiasm she unfortunately lacked the experience in managing large HR teams and in-depth knowledge of budget management, which is a crucial aspect of this role."
44. The Panel Report was clear and convincing evidence that the Chief Officer had complied with Part VII in a fair and unbiased manner.
45. The chief Officer prepared a shortlist of suitable candidates for interview; all candidates on the shortlist were interviewed by an interview panel established by the appointing officer and using a comparable interviewing approach for each applicant; the interview panel established the candidate with the best mix of qualifications, skills, knowledge and experience for the position based on -the information provided by the applicants; the

results of the interviews; the personal knowledge of the persons on the interview panel as declared to the panel; and any other information the interview panel considers relevant, as the preferred and successful candidate.

46. The Panel Report evidences that, as between the preferred candidate and Mrs Shena Ebanks, after applying the above criteria, Mrs Shena Ebanks and the Preferred Candidate did not rank broadly at the same level, which would have required Mrs Shena Ebanks as a Caymanian to be given preference. CSAC makes no mention on the record they had considered the Panel Report.
47. The wrongful rejection of evidence by CSAC amounted either to a failure to consider a relevant consideration or a failure to afford procedural propriety and renders the Decision and Order unlawful.
48. By failing to have any regard for the Panel Report, CSAC unlawfully denied themselves the opportunity to consider if there was clear and sufficient evidence to satisfy the requirements of section 54(2) of the PSML. CSAC unlawfully failed to satisfy itself that there were sufficient legal grounds for the appeal to give it jurisdiction to make the Decision and the Order.

**Ground 3: Illegality – Error of Law – CSAC ignored Statutory Burden of Proof**

49. CSAC's failure to base the Decision and Order upon any or adequate evidence was unlawful. In all cases the PSML places the onus of proof on the Appellant by requiring evidence to support the appeal. Mrs Shena Ebanks did not provide any evidence of bias, she merely stated it was her "opinion" that the Chief Officer was unfair and biased. Mrs Shena Ebanks' opinion was clearly insufficient for CSAC to reach the finding which states: "The Commission finds that there is evidence to suggest that the Respondent acted unfairly towards the Appellant during the selection phase of the recruitment process."
50. It is improper to bring forward an unsubstantiated claim of bias; it is not enough to be suspicious, there must be a factual basis upon which one can establish a ground of bias. The accepted test for bias is whether a reasonable and fair-minded observer would conclude that there was a real possibility that the decision-maker was biased.
51. Mrs Shena Ebanks had the burden to prove her case to meet the civil standard, namely to satisfy the Commission that on balance of probabilities, that it was more likely than not that the Chief Officer had acted in an unfair and biased manner and in a manner inconsistent with the requirements of Part VII of the PSML. The record shows that she failed to discharge this burden on her own evidence and as a result that the Commission

should have dismissed the Appellant's appeal but instead acted unlawfully in reaching the Decision and making the Order based on improper considerations.

52. In the Decision under the heading "Findings" it is stated: "The Commission finds that there is evidence to suggest that the Respondent acted unfairly towards the Appellant during the selection phase of the recruitment process." This sentence shows that the Commission unlawfully adopted a lesser standard of proof than is required in civil cases. The Commission's responsibility for ascertaining the facts is limited to a decision based on the evidence presented. The burden of proof is not whether there is evidence "to suggest that the Respondent acted unfairly" but rather the burden of proof is met only if the Commission was satisfied that the Appellant had proved that the Chief Officer, more likely than not, behaved in an unfair manner in that she and not the successful candidate had the best mix of qualifications, skills, knowledge and experience for the position of HR Director.
53. The record shows that the CSAC was improperly focused on the "Commission's disappointment in the Respondent for failing to acknowledge or reply to the request of the Commission to provide a detailed response answering the allegations made in the Appellant's submissions," caused by their own failure to serve the documents in accordance with the Rules, that they also committed another procedural error in ignoring their own Guidance Notes at Section D which states that "in all cases the PSML places the onus of proof on the Appellant by requiring evidence to support the appeal."

#### **Ground 4: Illegality – Right to a Fair Hearing**

54. Cayman Islands Constitution Order 2009 - Bill of Rights, Freedoms and Responsibilities Fair trial provides:

'7. (1) Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time.'

55. Fairness demands that the CSAC should never act so unfairly that it amounts to an abuse of power. The Decision and the Order is unlawful because it was "fettered" by a self-imposed policy to treat the Chief Officer as the one in default and rule against him without a fair hearing. The record shows that the CSAC was improperly focused on the "Commission's disappointment in the Respondent for failing to acknowledge or reply to the request of the Commission to provide a detailed response answering the allegations made in the Appellant's submissions," caused by their own failure to serve the documents in accordance with the Rules.

56. If CSAC, after considering the Panel reports, had felt that further proceedings were required, procedural fairness required that the Chief Officer and persons liable to be directly affected by proposed administrative acts, decisions or proceedings should be given the opportunity to appear at a hearing. The CSAC's Guidance Notes Section J state under the heading "Hearings":

"A Hearing is generally an exceptional event as opposed to a normal part of the Appeal procedures and a hearing date is only arranged if, following all submissions, the CSAC determines that it requires further information which can only be gleaned from a Hearing. In such an event both parties will be contacted, provided with a copy of the final bundle of submissions, and a hearing date arranged at a mutually convenient time generally within 15 calendar days."

57. Hearings are conducted in the same manner as formal Court proceedings. Each party will be sworn in and invited to make verbal representations on the final bundle of submissions. Parties will be expected to provide answers to questions posed by the CSAC which it considers that either the Appellant or Respondent should be able to answer. In the interest of natural justice, prior to the Hearing both the Respondent and the Appellant may acquire representation (including legal representation) if they have not already done so.

58. Had a Hearing on a date been arranged at a mutually convenient time to the parties, the Chief Officer would have expanded on the notes of the Panel Reports and provided the CSAC with a 347-page Recruitment file.

#### **Ground 5: Decision and Order – Unlawful and Irrational**

59. The Decision and the Order are unlawful because CSAC took irrelevant considerations into account. It is only in the case where, after applying the criteria set out in section 41(7) of the PSML, two or more persons rank at the same level, that Caymanians shall be given preference. The Decision and Order were unlawful because they were made contrary to the intended outcome of the PSML, the statute which gives them those powers.

60. CSAC unlawfully, without regard to the evidence or their duties and functions under the PSML, allowed its judgment to be clouded because of its disappointment in the Respondent for failing to acknowledge or reply to the request of the Commission to provide a detailed response answering the allegations made in the Appellant's submissions. The Decision and the Order blindly granted the remedies Mrs Shena

Ebanks' sought from her appeal without regard to the evidence or the purpose of the PSML. In addition, CSAC failed to give adequate reasons for their Findings which were unlawful in two ways. First, such a failure is procedurally unfair. Second, a failure to give adequate reasons indicates that a decision is irrational.

61. When a public body is entrusted with an apparently unfettered discretion, it must exercise its power reasonably and in accordance with the relevant statutory purpose. CSAC acted unlawfully in interfering with the Ministry's decision on inadequate information.
62. CSAC's order that the contract of employment with the preferred and successful candidate be rescinded by no later than 29 December 2017, effective 14 February 2018, was so outrageous in its defiance of logic and of accepted legal standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. CSAC made not one mention of the evidence in the Panel Report. The Director of HR for the Ministry must be capable of managing the entire HR function, with all of its complexities in the largest Ministry of the Government, placing that person ultimately in a position to be responsible for recruitment, strategic HR and operational HR for over 1,000 staff and managing a core team of 9 employees. Therefore, recruitment to this post is of critical significance to the success of the Ministry, and its Departments, most notably the Department of Education Services.
63. On 27 September 2017, the Preferred candidate was appointed pursuant to a contract of employment executed by the Ministry and the Preferred Candidate, for a fixed term ending 26 September 2019, in the position of HR Director Ministry of Education, Youth, Sports, Agriculture and Lands, duly approved and executed by the Head of the Civil Service that the Commission had in evidence. It is noted that the terms of the Delegation from Her Excellency the Governor to the Chief Officer dated the 17 May 2018 expressly requires the Chief Officer to obtain the approval from the Deputy Governor in relation to certain appointments, including the appointment of the Chief Human Resources Officer or their equivalent. It is therefore wholly inaccurate and inappropriate for the Commission to state at page 4 of the Decision that "the Commission notes that the Deputy Governor reviewed and endorsed the appointment of the current post holder. The Commission is unaware of any statutory or other basis on which this review and endorsement were conducted and accordingly gave no significance to it."
64. The order to rescind the contract of employment was irrational and not proportionate because implementing the Commission's order would effectively require the Ministry to terminate that contract of employment and impact the legitimate expectations of the parties to it. There being no basis for termination of the Preferred Candidate's contract on the stated grounds provided in the PSML or Personnel Regulations, such termination

would cause the Ministry to be in breach of contract with significant legal and financial implications, since the termination would be without cause.

65. The Decision and Order are unreasonable because they are unduly oppressive because they subject the Chief Officer's Ministry to an excessive hardship or an unnecessarily onerous infringement of its rights or interests.
66. The PSML does not require a Caymanian to be hired whatever the qualifications might be. The Decision and the Order offend the section 16 of the Bill of Rights by requiring the discriminatory treatment of the preferred and successful candidate on the ground of his national origin notwithstanding that he is the most qualified and experienced candidate of the post of HR Director.
67. By section 24 of the Bill of Rights, it is unlawful for CSAC to make a decision or to act in a way that is incompatible with the Bill of Rights.
68. The Order should be held by the Grand Court on judicial review as unreasonable since the orders are unduly oppressive because they constitute an unnecessarily onerous infringement of the role of the Ministry and the rights of the Preferred Candidate under the employment agreement. The principle of proportionality directs itself to evaluating the permitted infringement of rights or interests. The Commission has deployed powers it enjoys under section 60 of the PSML in so draconian a fashion causing such hardship to the Ministry in the management of its affairs and suffered by the Preferred Candidate, as the affected individual, that the Court will be justified in condemning the exercise as irrational and perverse.
69. The order that "the Appellant be offered the post effective 15 February 2018 by no later than 29 December 2017 with a deadline for response by 15 January 2018" is irrational in that on her own evidence she does not have qualifications, skills, knowledge and experience of the Preferred Candidate so there was never an issue as to her and the Preferred Candidate ranking at the same level, and therefore, for her as a Caymanian to be given preference.
70. The Order that the Ministry send a "conditional offer letter to the Appellant to be supplemented with an offer of financial compensation in the form of lost salary and pension earnings from the time of the current post-holders appointment to 14 February 2018 (or such other future commencement date as mutually agreed between the Appellant and the Respondent), provided the Appellant accepts the post" is neither rational nor proportionate given the evidence. It follows that the order that the Appellant be provided with any applicable financial compensation of any allowances paid to the Preferred

Candidate, the current post-holder, for the period which the Appellant would have been entitled to should she have been awarded the post, is also neither rational nor proportionate, but on the evidence absurd.

71. The order that should the Appellant not accept the post, the Respondent should offer it to the Caymanian who scored the next highest score behind that of the Appellant within five (5) days of the Appellant's declination, with a response period of fourteen (14) days and an effective start date of forty-five (45) days from the date of the offer, is ultra vires the Commission as is the order that should neither the Appellant nor the Caymanian applicant who scored the next highest score accept the post, the Respondent re-advertise the post, is also ultra vires the Commission. No person other than the Appellant appealed to the Commission. The Commission Order flies in the face of the PSML requiring the Commission to take into account a range of lawful considerations in the PSML as matters to which regard may be had, namely qualifications, skills, knowledge and experience for the position based on:

- (i) the information provided by the applicants;
- (ii) the results of the interviews;
- (iii) the personal knowledge of the persons on the interview panel as declared to the panel; and
- (iv) any other information the interview panel considers relevant.

72. The remaining orders on providing correspondence and the outcome of the ultra vires steps required by the Order fall away as being ultra vires, irrational and not proportionate. The focus of attention on judicial review will be the impact of the decision upon the Ministry and the Preferred Candidate. The outcome or end-product of the decision-making process will be assessed by the Court, rather than the way the decision was reached (although the factors considered in reaching the decision may also be—or may be assumed to be—incorrectly weighed). It is a claim of abuse of power, in the sense of excessive use of power considered in the nature of the decision, the function of the particular power and the nature of the interests or rights affected.

73. The Grand Court should intervene to quash the Decision and Order because they are so demonstrably unreasonable as to constitute 'irrationality' or 'perversity' by CSAC.

Ian Paget Brown QC  
Attorney at Law for the Applicant  
9 March 2018

Attorney General's Chambers

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This EX parte Application FOR LEAVE TO APPLY FOR JUDICIAL REVIEW was FILED by Attorney at Law for the Applicant, Mr. Ian Paget Brown QC, Boundary Hall, Cricket Square, P.O.Box 2578, Grand Cayman, Cayman Islands.