

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 51 OF 2019

BETWEEN:

CRYSTAL McFIELD-BALDWIN

THE CIVIL SERVICE APPEALS COMMISSION

Applicant

Respondent



APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

To the Clerk of the Court, Law Courts, George Town, Grand Cayman	
Name, address and description of applicant	<p>The Applicant is:</p> <p>Crystal McField-Baldwin Former Senior Customs Officer</p> <p>5 Eldon Street Savannah PO Box 30778 Grand Cayman KY1-1204 Cayman Islands</p>
Name, address and description of the respondent	<p>The Respondent is:</p> <p>The Civil Service Appeals Commission</p> <p>2<sup>nd</sup> Floor Artemis House P.O. Box 391 Grand Cayman Cayman Islands KY1-1106</p>

<p>Judgment, order, decision or other proceeding in respect of which relief is sought</p>	<p>The Applicant was dismissed from her position as Senior Customs Officer for gross misconduct by the Collector of Customs (<i>"the Collector"</i>) on 2 May 2018. She appealed that decision to the Chief Officer pursuant to section 53 of the The Public Service Management Law (2018 Revision) (<i>"The PSML"</i>), and thereafter further appealed to the Respondent pursuant to section 54 of The PSML.</p> <p>By decision dated 10 January 2019, the Respondent refused a request for the Applicant to be represented by her attorneys at an oral hearing on the basis that full and detailed submissions had been received. The Respondent held the that the Chief Officer had acted :</p> <ol style="list-style-type: none"><li>1. Unfairly; and</li><li>2. In a manner inconsistent with the requirements of Part VII of the PSML</li></ol> <p>But nevertheless upheld the decision of the Collector to dismiss the Applicant, on the basis that on balance of probabilities had the Chief Officer complied with Part VII of the PSML his decision would not have been any different.</p> <p>Relief is sought in respect of the Respondent's decision not to allow the Applicant's to be represented by her attorneys at the hearing of her appeal before the Respondent, to uphold the dismissal, and failing to provide full and proper reasons for doing so.</p>
	<p style="text-align: center;"><b>Relief Sought</b></p> <ol style="list-style-type: none"><li>(i) An order of certiorari quashing the decision of the Respondent.</li><li>(ii) an order of Mandamus requiring the Respondent to reinstate the</li></ol>

<p>Applicant to the civil service, or alternatively remitting the matter to a reconstituted tribunal of the Respondent, requiring that the Applicant be permitted to be represented at the hearing.</p> <p>(iii) Costs.</p> <p>(iv) Such further or other orders or declarations as the court deems just.</p>	
<p>Name and address of applicant's attorneys, or, if no attorneys acting, the address for service of the applicant</p>	<p>The Applicant is represented by Nelson &amp; Company, 31 The Strand, PO Box 2075, Grand Cayman KY1-1105.</p> <p>Ref ND6348-55</p>
<p>Signed</p>	<p>Dated 9<sup>th</sup> April 2019</p>

### GROUNDS ON WHICH RELIEF IS SOUGHT

#### Background

1. On 2 May 2018, The Applicant was dismissed from her position as Senior Customs Officer for gross misconduct by the Collector. Her dismissal followed an internal investigation and disciplinary procedure in respect of an incident on 22 September 2017 at the Customs Collections Office.
2. The circumstances that led to the Applicant's dismissal arose from an altercation between the Applicant and a customer, Mr Brian Welcome. The Applicant was suspended on 28 September 2018 in respect of a corruption allegation by Mr Welcome, and an internal investigation was commenced. The statements and CCTV gathered in the investigation were collated and provided to the Applicant under covering correspondence dated 8 March 2018 from the Collector, warning the Applicant that dismissal was being considered and she was invited to provide a response. The Applicant provided a witness statement dated 5 April 2018 in that investigation and written submissions by way of correspondence dated 5 April 2018.
3. The subsequent dismissal letter dated 2 May 2018 from the Collector set out seven findings and reasons for the Applicant's dismissal. In summary they were:

- i) The agreed facts constituted serious breaches of the PSLM;
- ii) The Applicant's representations did not lessen her culpability for her conduct;
- iii) But for the intervention of the Applicant's colleagues, she would have attacked the customer;
- iv) Civil Servants often face aggressive and abusive customers but are nevertheless expected to act professionally and courteously at all times;
- v) The Applicant's conduct, where the police were called, brought the department, Ministry and Civil Service into disrepute and was a significant departure from the conduct expected;
- vi) Notwithstanding that the Applicant sought the assistance of the Assistant Collector to deal with the disruptive customer, she was nevertheless expected to conduct herself professionally, and ought to have referred the matter back to the Assistant Collector; and
- vii) The response of the Assistant Collector was a separate issue and did not change the view of the Collector as to the Applicant's conduct.

The Applicant was advised of her right of appeal to the Chief Officer pursuant to section 53(2) of the PSLM.

4. Pursuant to the avenue of appeal to the Chief Officer, by correspondence dated 30 May 2018, the Applicant filed detailed grounds of appeal against the Collector's decision with specific reference to the evidence. The correspondence in particular rebutted the seven reasons and findings set out above in turn, submitting in summary:
  - i) As to Reason 1, dismissal is a sanction of last resort, and is appropriate where there is no other reasonable alternative. The Collector needed to take a holistic view and take proper account of the exceptional circumstances and significant mitigation. Doubt as to whether the conduct was "serious" or "gross" should be resolved in the Applicant's favour;
  - ii) In respect of Reason 2, the Collector took no issue with the Applicant's case that she had been physically threatened by a customer she perceived to be dangerous; that before the threat she had been behaving courteously, she had received no training as to how to deal with aggressive or abusive customers; that the Applicant became tearful, distressed, frightened and subject to adrenalin; and that she had been utterly exposed by the failure of her superiors to intervene or assist notwithstanding her specific request that they do so. A finding that these matters did not lessen her culpability was

beyond the ambit of reasonable discretion, and created the impression of bias in favour of the Applicant's superiors;

- iii) As to Reason 3, upon the Collector's finding that the Applicant attempted to physically attack the customer, this would necessarily mean that the Collector suspected the Applicant of committing a criminal offence (such as section 164 or Section 88 of the Penal Code). Section 40 of the regulations to the PSML required the Collector in those circumstances to suspend her and advise the police. In the absence of charge or conviction (which is unlikely to have been the outcome *see R v Peart* 28 March 2017), the Applicant would have had to have been reinstated pursuant to section 40 (5) of the regulations;
- iv) Reason 4 merely repeated Reason 1 and was subject to the same rebuttal;
- v) The finding that the Applicant had brought the department into disrepute in Reason 5 was neither accurate nor fair where the antagonist customer who instigated the matter called the police to make mischief, and where the incident took place after hours in any event and was not reported;
- vi) The Collector's finding at Reason 6 that the Applicant should have persisted with her attempt to seek the intervention of her superiors where they had failed to intervene was perverse. The Applicant was entitled to work in a safe environment and with the support of her senior colleagues, and to visit their shortcomings on the Applicant was manifestly unfair.; and
- vii) No explanation was given at Reason 7 as to why the response of the Assistant Collector did not change the Collector's findings as to the conduct of the Applicant where they are plainly related.

Upon filing the appeal, it became clear from the that the Chief Officer had previously sanctioned the dismissal in breach of his appellate role under Part VII of the PSML. He then delegated the appeal to a deputy, who heard submissions from the Applicant at a meeting in 27 June 2018, but failed without reason to deliver a decision. The Applicant was left with no choice but to file a complaint with the Respondent pursuant to section 54 of the PSML, and did so on 19 November 2018 ("*The Complaint*"). This was referenced by the Respondent as Appeal 11 of 2018.

- 5. In the Complaint, The Applicant invited the Respondent to use its broad powers under section 60 of the PSML to declare that the Chief Officer had acted in a manner that was

unfair and / or bias, and / or inconsistent with Part VII of the PSML. The Applicant further invited the Respondent to use its section 60 powers to adjudicate upon the merits of the appeal to the Chief Officer dated 30 May 2018 against the decision of the Collector to dismiss her, to reinstate her and repay lost wages and benefits, and to grant monetary relief.

6. The Complaint was sent under correspondence dated 20 November 2018 wherein the Applicant requested a hearing where she would be represented by her attorneys pursuant to section 61 (5) of the PSLM.

#### **The Decision (Appeal 11 of 2018).**

7. The Respondent's decision and order were given on 10 January 2019. In the decision, it refused the request for a hearing on the basis that it was unnecessary in light of the full and detailed submissions received.
8. The Respondent upheld the Applicant's contention that the Chief Officer had acted in a manner contrary to Part VII of the PSML, and granted monetary relief of 50% of her costs in the appeal.
9. However, the Respondent found on the balance of probabilities that the decision of the Chief Officer would have been the same as that of the Collector if he had conducted himself in accordance with the requirements of Part VII of the PSML, as both the Collector and the Chief Officer had "ample evidence" to terminate the Applicant on the grounds of gross misconduct.

#### **Letter Before Action**

10. Pursuant Practice Direction 4 of 2013, on the basis of the matters which are set out below, The Applicant through her attorneys wrote to the Respondent on 6 March 2019 challenging the decision. The Applicant required that within 14 days, the Respondent set aside the decision and order; arrange for the hearing to be relisted before a new tribunal; and confirm that the Applicant could be represented at the hearing.
11. No reply was ever received to this letter.

## Grounds of Appeal

### Ground 1

12. The Decision not to allow the Applicant to be represented by an attorney at a hearing of the Respondent was wrong in law. Section 61 (5) of the PSML is mandatory rather than directory. It does not confer a discretion on the Respondent, rather it confers a right upon The Applicant, which may only be waived at the discretion the Applicant. Section 61 (6) makes it clear that the Respondent's powers to establish its own rules of meeting are expressly subject to section 61 (5). While there is no need to establish prejudice where the language is mandatory rather than directory, prejudice is demonstrable where it is clear from the minutes of the meeting that the Respondent took its own legal advice without hearing from the Applicant's attorneys on the point that concerned them.

### Ground 2

13. Contrary to section 19 of the Constitution, the Respondent failed to give any adequate reasons for upholding the decision of the Collector. This was both irrational and unreasonable where the Respondent is an appellate body. The Respondent was required to address and scrutinize the appeal dated 30 May 2018 to the Chief Officer, and with particular attention to each of the seven specific rebuttals. The Respondent was required to give proper reasons for accepting or rejecting those grounds. The Respondent failed to demonstrate in its decision that it had properly considered the letter of 30 May 2018.

## Conclusion

14. Accordingly, the Applicant seeks orders of certiorari quashing the decision of the Respondent to uphold the Applicant's dismissal.
15. The Applicant further seeks an order of mandamus requiring the Respondent to reinstate the Applicant, or alternatively to remit the matter to a reconstituted tribunal of the Respondent, requiring that the Applicant be permitted to be represented at the hearing.