

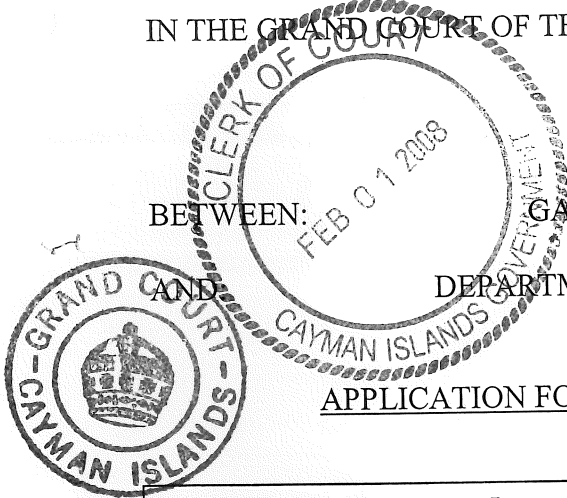
Application for Leave to Apply for Judicial Review (O.53, r.3)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: ¹⁰⁵⁰¹ OF 2008
LEGAL AID NO: 200/07

BETWEEN: GARY WATLER PLAINTIFF
AND DEPARTMENT OF IMMIGRATION DEFENDANT

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.	Gary Curtis Watler, 238 Victory Avenue Grand Cayman, Cayman Islands.
Judgment, order, decision or other proceeding in respect of which relief is sought	Decision of the Department of Immigration on 18 May 2007 to dismiss the applicant from his employment.
<p align="center">Relief Sought</p> Leave to apply to the Grand Court for the issue of a Declaratory Order against the Department of immigration that the decision to dismiss the applicant from his Employment is null and void, Order of certiorari/mandamus and for damages.	
Name and address of applicant's attorneys, or, if no attorneys acting, the address for service of the applicant	Clyde H. Allen Clyde H. Allen, Chambers Cayman Islands Attorney-At-Law PO Box 31076 SMB, Grand Cayman, Cayman Islands
Signed <i>[Signature]</i>	Dated 30.1.2008

GROUND ON WHICH RELIEF IS SOUGHT

- a. That the Public Service Management Law, 2005 (Law 27 of 2005) (the "Law") sections 44 states, inter alia, subject to the provisions of this section and the requirements of the personnel regulations, a chief officer may –
 - (a) discipline staff;

- (b) dismiss staff;
 - (e) otherwise terminate the employment of staff.
- b. That the personnel regulations referred to above are the Public Service Management Law, 2005 (Law 27 of 2005) Personnel Regulations, 2006 (the "Regulations").
 - c. On 28 February 2007 the Department of Immigration notified the applicant that it had sought and obtained a ruling from the Legal Department that criminal charges could be laid as a result of certain allegations levelled at the applicant.
 - d. The applicant was invited by letter to respond to the complaint.
 - e. The applicant responded to the complaint on 2 March 2007. The applicant was provided with additional evidence on 12 March 2007 and further requested to respond to it. The applicant provided an additional response on 16 March 2007.
 - f. The Department of Immigration responded by letter dated 18 May 2007 ("the letter of termination") and, in short, found that the applicant employed a Mr. Auckland Adamson to work for Mr. G. Construction and also on his private home without a work permit. The Acting Chief Immigration Officer found that this was a breach of the Immigration Law and as the applicant was an officer responsible for enforcement such conduct amounted to a gross misconduct.
 - g. The Acting Chief Immigration Officer dismissed the applicant with immediate effect from the Public Service on grounds of gross misconduct apparently in accordance with section 44(4) of the Public Service Management Law, 2005 as read regulation 39 of the Regulations.
 - h. The letter of termination notified the applicant that if he were dissatisfied with the decision of the Chief Officer that he was entitled to appeal under section 54(1) of the Law to the Civil Service Appeals Commission within 30 days.
 - i. By letter dated 15 June 2007 Mr. Watler wrote to the Civil Service Appeals Commission notifying it of his intention to appeal the decision of the Chief Officer.
 - j. By letter dated 19 June 2007 the Executive Director, Clyde Linwood, wrote on behalf of the Civil Service Appeals Commission to acknowledge receipt of the applicant's letter of appeal. However, she directed the applicant to appeal to the Chief Officer of Internal and External Affairs "...for a ruling, prior to making an application to the CSAC."
 - k. By letter dated 5 July 2007 the Civil Service Appeals Commission were notified that the applicant was advised that it was considered that the Deputy Chief Immigration Officer failed to comply with the Law and the Regulations in that she applied regulation 39 instead of 40 or 41. Further, clarification was sought of the basis in Law for suggesting that the appeal should first be lodged with the Chief Officer of Internal

and External Affairs. Notwithstanding that request for clarification, a letter dated 5 July 2007 was sent to Chief Officer of Internal and External Affairs.

1. By a letter dated 17 July 2007 the Chief Officer of Internal and External Affairs responded essentially stating that he did not consider himself “eligible to serve as an appellate person...” but notwithstanding that conclusion reached by himself he proceeded to suggest that my client was notified of the ruling of the legal department merely to substantiate the Chief Immigration Officers view. Somehow, and without reasoning, Ms Clyde Linwood has found at paragraph 2 of her letter dated 31 July 2007 “...that the Chief Officer has confirmed his support of the dismissal...” If one reads the contents of his letter of 17 July 2007 it will immediately be seen that that conclusion is simply not correct.

m. Although the issues were addressed in earlier letters, by letter dated 13 September 2007 (“Letter of Appeal”) the applicant’s grounds of appeal were therein set out. A section from the Letter of Appeal is set out below for ease of reference as follows:

“39. (1) Before determining whether to dismiss a staff member on the grounds of gross misconduct (other than gross misconduct involving criminal activity where regulations 40 and 41 apply) under section 44(4) of the Law, an appointing officer shall-

- (a) collect evidence of the actions or omissions of the staff member that are the subject of concern;
 - (b) advise the staff member of the concerns (both orally and in writing) including providing him with a copy of the evidence collected, and advise him that the actions or omissions may be grounds for instant dismissal;
 - (c) provide an opportunity for the staff member to explain his position (orally and in writing); and
 - (d) reassess the situation in light of the staff member’s explanation and notify the staff member, (both orally and in writing), of the results of the reassessment.
- (2) If, after the process specified in paragraph (1) has been completed, the appointing officer is of the view that the grounds for dismissing the staff member for gross misconduct under section 44(4) of the Law have been proven, the appointing officer may dismiss the staff member with immediate effect.
- (3) Upon deciding to dismiss a staff member under paragraph (2), the appointing officer, at the earliest opportunity, shall-
- (a) notify the staff member that he is being dismissed under the terms of his employment agreement; and
 - (b) arrange for the dismissal to take immediate effect.
- (4) Upon dismissing a staff member on the grounds of gross misconduct, the appointing officer shall notify the Head of the Civil Service in writing of the dismissal, the grounds, and the process followed.

40. (1) Before determining whether to dismiss a staff member on the grounds of gross misconduct, and that gross misconduct involves alleged criminal activity in the work place, an appointing officer shall-
- (a) collect evidence of the staff member's alleged criminal activity and satisfy himself that such activity is significant enough to fall within the definition of gross misconduct;
 - (b) advise the staff member of the concerns (both orally and in writing) including providing him with a copy of the evidence collected, and allow him an opportunity to provide an explanation (both orally and in writing).
- (2) If, after the process specified in paragraph (1) has been completed, the appointing officer is of the view that there are reasonable grounds to believe that the staff member has been involved in criminal activity in the workplace, and that activity is significant enough to fall within the definition of gross misconduct, the appointing officer-
- (a) shall advise the police at an early opportunity; and
 - (i) advise the staff member of this fact orally and in writing; and
 - (ii) arrange for the suspension on half-pay to take immediate effect.
- (3) If the staff member is subsequently charged with a criminal offence by the Police, and that offence is significant enough to fall within the definition of gross misconduct, the appointing officer may suspend the staff member without pay from the date charges are laid, in which case he shall -
- (a) advise the staff member of this fact in writing; and
 - (b) arrange for the suspension without pay to take immediate effect
- (4) If the staff member is subsequently convicted of a criminal offence, and that offence is significant enough to fall within the definition of gross misconduct, the appointing officer may dismiss the staff member from the date of conviction in which case, at the earliest opportunity, he shall-
- (a) notify the staff member that he is being dismissed under the terms of his employment agreement; and
 - (b) arrange for the dismissal to take immediate effect.
- (5) If-
- (a) after the process specified in paragraph 2 has been completed the staff member is subsequently not charged; or
 - (b) after the process specified in paragraph 4 has been completed the staff member is subsequently not convicted or if convicted the conviction is set aside wholly and the period of any appeal has expired, the staff member shall be reinstated to his position, or to a similar position within the civil service entity and any pay withheld from the staff member during the period of suspension shall be paid to the staff member as soon as practicable.

41. (1) Before determining whether to dismiss a staff member on the grounds of gross misconduct, and that gross misconduct involves alleged criminal activity outside the work place, an appointing officer shall -

- (a) establish that the staff member has been charged with a criminal offence by the Police;
 - (b) establish whether the criminal offence -
 - (i) involves such disrepute as is referred to in section 5(2)(e) of the Law; and (ii) is significant enough to fall within the definition of gross misconduct; and
 - (c) advise the staff member of the concerns, (both orally and in writing), and allow him an opportunity to provide an explanation.
- (2) If, after the process specified in paragraph (1) has been completed, the appointing officer is of the view that the conditions specified in sub-paragraph (1)(b) have been proven, the appointing officer may suspend the staff member without pay, in which case he shall -

- (a) advise the staff member of this fact in writing; and
 - (b) arrange for the suspension without pay to take immediate effect.
- (3) If the staff member is subsequently convicted of a criminal offence, and that offence is significant enough to fall within the definition of gross misconduct, the appointing officer may dismiss the staff member from the date of conviction in which case, at the earliest opportunity, he shall -
- (a) notify the staff member that he is being dismissed under the terms of his employment agreement; and
 - (b) arrange for the dismissal to take immediate effect.
- (4) If after the process specified in paragraph 2 has been completed the staff member is subsequently not convicted or if convicted the conviction is set aside wholly and the period of any appeal against acquittal has expired, the staff member shall be reinstated to his position, or to a similar position within the civil service entity and any pay withheld from the staff member during the period of suspension shall be paid to the staff member as soon as practicable.

This is a case where allegations have been made concerning alleged criminal activity. This matter was investigated internally and the papers were placed before the Legal Department for review. My client was suspended on half pay in accordance with the provisions. My client denied any and all allegations. This matter never came before the Court as my client was never charged. I therefore draw your attention to section 40(5)(a) and 41(4) of the Regulations. No conviction has been recorded against my client. The provisions therefore provide that in such circumstances my client should be reinstated

I have written requesting the reinstatement of my client but that has not occurred. I have also requested that my client be re-instated (section 54(4)(a) of the Law) until such time as this matter can be resolved and again that has not been either done or offered. In the meantime, my client continues to suffer economic loss.”

- n. By Letter dated 22 September 2007 Mr. Colin Ross on behalf of the Civil Service Appeals Commission responded to the aforementioned Letter of Appeal again insisting, in short, that "...section 39 allows a person to be dismissed if an appointing officer is of the view that the grounds for dismissing the staff member for gross misconduct other than that involving criminal activity have been proven." (**his underlining**)
- o. By letter dated 16 October 2007 further efforts were made to direct the Civil Service Appeals Commission to the applicant's grounds of appeal. They could either accept them or reject them. A letter dated 8 November 2007 was received from the Civil Service Appeals Commission again requesting that the applicant set out his grounds of appeal. A further response was provided by letter dated 27 November 2007.
- p. The applicant seeks the assistance of this court to determine whether this matter should have been dealt with under sections 40 and 41. It is clear on the facts that at no time did the Department of Immigration dismiss the applicant pursuant to either of the two aforementioned sections and it is for that reason that it is considered that there decision is *ultra vires* and thus null and void.
- q. The decision to dismiss the applicant was contrary to natural justice. The applicant seeks a Declaration that the decision to dismiss him is therefore null and void, that the decision be quashed and set aside or the requisite officer charged with a public duty to carry out its duty and an order that he be permitted to resume his employment and for damages.

Clyde H. Allen, Chambers
30 January 2008