

Notice of Originating Motion (0.8, r.3)


IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: ⁰²⁶⁵ OF 2008

In the matter of Public Service Management Law, 2005 (Law 27 of 2005) (the "Law") and the Personnel Regulations 2006 (the "Regulations").

And in the matter of the termination of employment of Gary Watler from the Cayman Islands Government (Immigration Department).

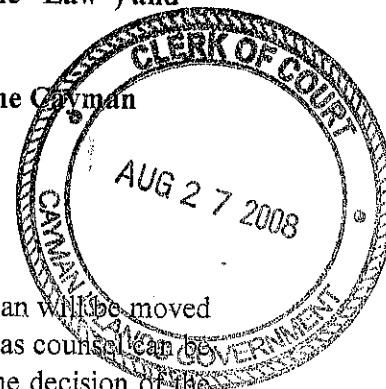
NOTICE OF ORIGINATING MOTION

 TAKE NOTICE that the Court at the Law Courts, George Town, Grand Cayman will be moved on *24th October* 2008 at *9:30 am* or as soon thereafter as counsel can be heard, by counsel on behalf of Gary Watler (the Applicant) for an order that the decision of the Colin Ross MBE JP, Chairman of the Civil Service Appeals Commission ("Commission"), following a hearing on 17 July 2008 to dismiss an appeal by Gary Watler to the Commission to overturn the decision of his employer, The Cayman Islands Government (Immigration Department), to terminate his employment on 18 May 2007 is wrong as a matter of Law and fact and that Gary Watler be reinstated as provided under the extant Law and Regulations.

And for an order that the costs of and incidental to this appeal may be paid by The Cayman Islands Government (Immigration Department).

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

1. The Commission has failed to properly consider the facts, the evidence, the Law and the Regulations. The applicant denies that he is guilty of gross misconduct involving criminal activity either in or outside the workplace. The applicant considers that he has not acted contrary to section 5(2)(e) of the Public Service Management Law (2007 Revision).
2. The Commission in reaching its decision has made a fundamental error as a matter of Law. Prima facie evidence is not evidence beyond a reasonable doubt of criminal activity and/or guilt and under the Law and Regulations the proper forum to determine that issue is a Court of Law as is clearly envisaged by the Law and Regulations.
3. The Commission has erred in that it has substituted its opinion as to the meaning of the Law and Regulations and the intention of the Legislative Assembly and in line with the employer has acted in a manner to circumvent regulations 40 and 41 of the Regulations and instead applied regulation 39. The Commission has failed to apply the rules of construction to the Law and Regulations.
4. The Appellant will rely on the grounds of appeal as set out before and relied on at the Commission which essentially are that the employer could not dismiss him pursuant to regulation 39. The Commission has failed to understand and thus exercise its role in that the proper question to ask is whether the employer has acted lawfully. The employer's failure to act in a timely manner as fixed by the Law and Regulations, which failure is acknowledged by the Commission, was prejudicial and thus unfair to the Applicant. No



reasonable Commission could have found that an employer acting in these circumstances acted fairly and such a procedural impropriety is so fundamental that the decision to dismiss should be reversed and the applicant reinstated. The Commission accepts that confusion prevailed but still considers that the right decision was reached. This so-called confusion prevailed at a time when the applicant did not have any legal representation but the employer was being instructed by the Legal Department.

5. If, which is denied, an unlawful act occurred it clearly did not occur within the workplace. At the time the alleged criminal offence was supposed to have taken place the applicant was not at his place of work. Further and of paramount importance is that Regulation 41 of the Regulation is mandatory in nature by virtue of the requirement that prior to any dismissal of a member of staff "an appointing officer shall (a) establish that the staff member has been charged with a criminal offence by the Police;". (My emphasis). That simply did not take place here.
6. It is accepted that the allegations are very serious. The Commission has failed as a matter of Law to acknowledge the significance of the failure to prosecute the appellant by way of bringing criminal proceedings in the time stipulated. Such a failure is considered to be a fundamental procedural irregularity. The end result of this failure to comply with the Law and Regulations was to prevent the applicant from having, in short, the right to a fair hearing, properly investigated by an independent third party, here the police, as prescribed under the Law and Regulations and, if and when necessary, prosecuted by way of criminal proceedings before a Court of Law at which time the applicant would have an opportunity to hear all of the evidence against him and rebut it accordingly.
7. On the day of the hearing the employer's attorney presented the tribunal with a lever arch file full of documents some of which had not been seen by the Commission or the Applicant or his attorney. The applicant's attorney never exchanged any correspondence with the employer's attorney without notifying the Commission. It was clearly unfair to present documents for the first time to the applicant and the Chairman of the Commission during the hearing.
8. The Commission has erred in that it has confirmed the decision of the employer. If the applicant was not convicted in accordance with the Law and Regulations then it is submitted that regulation 41(4) requires that the applicant should have been reinstated to his position.



[Signature of Attorney]

TO: The Clerk of the Court.

AND TO: The Civil Service Appeals Commission, P.O. Box 32115, Grand Cayman KY1-1208, CAYMAN ISLANDS

AND TO: The Respondent: c/o Mr. Jones, Ritch & Connolly, Attorneys-At-Law, P.O. Box 2075 GT, West Wind Building, Grand Cayman, Cayman Islands.

This **Originating Motion** was filed by Clyde H. Allen, Chambers on behalf of the Defendant whose address for service is P.O. Box 31076 SMB, 2nd Floor, Suite 10, Jack & Jill Building, 19 Fort Street, KYI-1205, George Town, Grand Cayman, Cayman Islands.

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ACKNOWLEDGMENT OF SERVICE
OF ORIGINATING MOTION

If you intend to instruct an Attorney to act for you, give him this form IMMEDIATELY.

Important. Read the accompanying directions and notes for guidance carefully before completing this form. If any information required is omitted or given wrongly, THIS FORM MAY HAVE TO BE RETURNED.

1. State the full name of the Defendant by whom or on whose behalf the service of the Originating Motion is being acknowledged.

2. State whether the Defendant intends to contest or otherwise participate in the proceedings (tick appropriate box)

yes

no

Service of the Originating Motion is acknowledged accordingly

(Signed).....

[Attorney] for

Attorney: where the Defendant is represented by an attorney, state the attorney's place of business in the Cayman Islands. A Defendant may not act by a foreign attorney.

Defendant in person: where the Defendant is acting in person, he must give his post office box number and the physical address of his residence or, if he does not reside in the Cayman

Please complete overleaf

Acknowledgement of service of originating motion (0.10, r.5)

**DIRECTIONS FOR ACKNOWLEDGMENT OF SERVICE
OF ORIGINATING SUMMONS**

The accompanying form of Acknowledgment of Service should be completed by an Attorney acting on behalf of the Defendant or by the Defendant if acting in person. After completion it must be delivered or sent by post to the Law Courts, P.O. Box 495G, George Town, Grand Cayman.

Notes for Guidance

1. Each Defendant (if there are more than one) is required to complete an Acknowledgment of Service and return it to the Courts Office.
2. If you wish to defend claims made in the originating summons, or intend to attend the proceedings and to participate in them so far as necessary (although not necessarily in an adversarial manner) you should tick the "Yes" box in paragraph 2 of the acknowledgment of service.
3. For the purpose of calculating the period of 14 days for acknowledging service, a writ served on the Defendant personally is treated as having been served on the day it was delivered to him.
4. Where the Defendant is sued in a name different from his own, the form must be completed by him with the addition in paragraph 1 of the words "sued as (the name stated on the Originating Summons)".
5. Where the Defendant is a FIRM and an attorney is not instructed, the form must be completed by a PARTNER by name, with the addition in paragraph 1 of the description "Partner in the firm of (.....)" after his name.
6. Where the Defendant is sued as an individual TRADING IN A NAME OTHER THAN HIS OWN, the form must be completed by him with the addition in paragraph 1 of the description "trading as (.....)" after his name.
7. Where the Defendant is a LIMITED COMPANY the form must be completed by an Attorney or by someone authorised to act on behalf of the Company, but the Company can take no further step in the proceedings without an Attorney acting on its behalf.
8. Where the Defendant is a MINOR or a MENTAL PATIENT, the form must be completed by an Attorney acting for a guardian ad litem.
9. A Defendant acting in person may obtain help in completing the form at the Courts Office.

Islands, he must give an address in Grand Cayman where communications for him should be sent. In the case of a limited company, "residence" means its registered principal office.

Indorsement by plaintiff's Attorney (or by plaintiff if suing in person) of his name, address and reference, if any, in the box below.

Clyde H. Allen, Chambers,
P.O. Box 31076 SMB,
2nd Floor, Suite 10,
Jack & Jill Building,
19 Fort Street, KYI-1205,
Grand Cayman, Cayman Islands.

Indorsement by defendant's Attorney (or by defendant if suing in person) of his name, address and reference, if any, in the box below.