IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No. G 462 of 1998

BETWEEN

PATRICIA EBANKS

Applicant

AND

HIS EXCELLENCY, THE GOVERNOR OF THE CAYMAN ISLANDS

Respondent

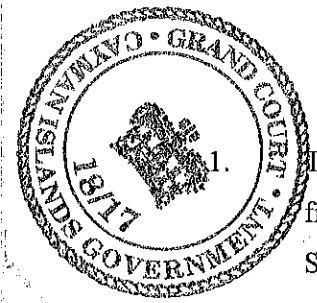
IN CHAMBERS AS OPEN COURT

Appearances:	**Mr. S McField, Attorney-at-Law on behalf of the Applicant** **Ms. C Allen and Mr. N Gayle, Crown Counsel from the Attorney General's Chambers on behalf of the Respondent.**
Before:	**The Hon. Mme Justice Margaret Ramsay-Hale**
Heard:	**29 January 2020**
Draft judgment circulated:	**11 February 2020**
Judgment delivered:	**18 February 2020**

HEADNOTE

Administrative Law - public officers – dismissal - if dismissal void remains public and pensionable office - damages to be assessed by reference to salary and pension lost - No duty on public officer to mitigate loss by seeking or accepting alternative employment while remains public officer after invalid dismissal

JUDGMENT



1. This is the decision on the Applicant's application for assessment of damages consequent upon a finding by Murphy J on the 16 November 1998 that the Applicant's employment within the Civil Service as a Senior Labour Officer had been unlawfully terminated.

BACKGROUND

2. The Applicant was employed as a Senior Labour Officer with Cayman Islands Government ("**CIG**"). Disciplinary proceedings were initiated against the Applicant, pursuant to the then Regulation 47 of the *Public Service Commission Regulations, 1985* ("**Regulations**") in 1987. The Applicant was interdicted from her duties on 5 February 1997 and formally charged with misconduct by the Chief Secretary in a letter dated 26 February 1997.

3. A Tribunal was subsequently set up under Regulation 47(2) of the Regulations to inquire into the matter and a report was made to the Secretary to the Public Service Commission (**"PSC"**). At a subsequent hearing before the Tribunal on 12 January 1998, the proceedings were dismissed on the ground that the charges were defective. The hearing was adjourned *sine die*, with no hearing on the merits.

4. On 3 February 1998, the PSC met and considered the Tribunal's Report, formed its own view on the merits, and recommended to the Governor that the Applicant be dismissed from the public service. This recommendation was acceded to and the Applicant's dismissal was authorised by the Governor and formal notice of it given to the Applicant by letter dated 4 May 1998.

5. On 29 July 1998, the Applicant filed an Application for Leave to apply for Judicial Review, challenging the decision of His Excellency the Governor of 4 May 1998 to dismiss the Applicant (Applicant herein) from her employment within the CIG. On 11 August 1998, Murphy J. granted Leave to apply for Judicial Review pursuant to Grand Court Rules ("**GCR**") Order 53 rule 3(1). Consequent upon leave being granted, the Applicant sought and obtained a declaration that the decision to dismiss her was null and void as the dismissal was in breach of the Regulations and contrary to natural justice.

6. The Applicant also sought compensatory damages which the parties accepted, in the hearing in front of me, were available in the Judicial Review proceedings. We, therefore, proceeded on the basis that this is the hearing on the assessment of damages within the Judicial Review proceedings begun before Murphy J, and not in the proceedings subsequently commenced by way of a specially

endorsed Writ by counsel for the Applicant, in response to the Order of Murphy J that there be a trial on *liability and damages.* [1] The Writ action, such as it is, is struck out.

THE LAW

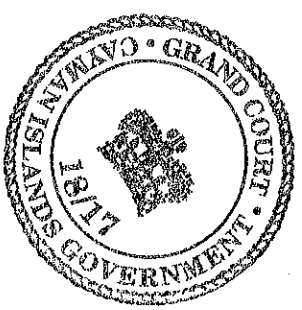
7. The parties agree that the case of the *McLaughlin v HE The Governor of Cayman Islands*[2] is applicable to the issues which are before me for decision. In that case, Dr. McLaughlin was purportedly dismissed by HE The Governor. The Privy Council held that his dismissal from a public office was unlawful and ineffective and that he remained entitled to his full salary and other benefits until he was lawfully terminated or resigned.

8. Lord Bingham, giving the decision of the Board, said at paragraph 14 of the judgment that,

> *"It is a settled principle of law that if a public authority purports to dismiss the holder of a public office in excess of its powers, or in breach of natural justice, or unlawfully (categories which overlap), the dismissal is, as between the public authority and the office-holder, null, void and without legal effect, at any rate once a court of competent jurisdiction so declares or orders. Thus the office-holder remains in office, entitled to the remuneration attaching to such office, so long as he remains ready, willing and able to render the service required of him, until his tenure of office is lawfully brought to an end by resignation or lawful dismissal."*

THE APPLICANT'S CASE

9. The Applicant says that she has always been ready, willing and able to return to work and says further that, in the circumstances where her employment was never lawfully terminated by CIG and she did not resign from her post, she is, like Dr. McLaughlin, entitled to all the remuneration attached to the office of Senior Labour Officer, including the pension and health benefits attached to the post and any increments or increases in salary up to the date of her retirement at age 60, which age she reached on the 6 November 2019.



[1] Paragraph 2 of Minute of Order dated 16 November 1998

[2] [2007] UKPC 50

THE RESPONDENT'S SUBMISSIONS

Applicant not ready willing and able to return to work

A. Refusal of Offer on day of Hearing

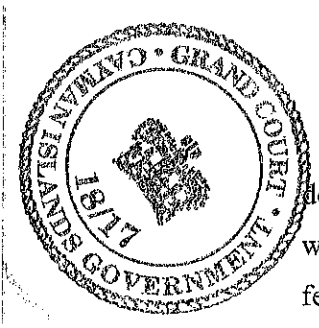
10. Ms. Allen accepts that, as in the *McLaughlin* case, the Applicant remains in office but submits that she is entitled to the remuneration attaching to such office only if it can be shown that she has remained "*ready, willing and able to render the service required of [her], until [her] tenure of office is lawfully brought to an end by resignation or lawful dismissal.*"

11. Ms. Allen asserts that on 16 November 1998 an offer was made by CIG to the Applicant inviting her to return to work which offer the Applicant refused. Counsel invites the Court to find that, at that date, the Applicant she was no longer ready or willing to remain in office.

12. In support of that submission, Ms. Allen relies on the Applicant's evidence in her affidavit sworn on the 11 August 2016 at paragraph 2 where she states,

> "*At the outset, I think it may be of importance to note that the very day in Nov., 1998 that Mr. Clyde Allen and myself went to court regarding the matter of the dismissal, the lawyer representing the Crown approached me, through my Lawyer and in my presence. To offer me the job back - at the top of the court-house* (sic) *steps, immediately before entering the building. I refused the offer because it appeared obvious to me that the real concern, at this late stage, was trying to keep the matter from going before the Courts, and not in retaining me as an employee, having had so much opportunity to have done so earlier, if they were indeed sincere. This rather suspect action, combined with contemptable* (sic) *treatment of me up to this point, caused me to no longer have confidence in their integrity and effectively precluded me from giving any serious consideration to their offer.*"

13. The Applicant's refusal to entertain this offer, such as it was, and her decision to pursue her application for a declaration, in which she ultimately succeeded, is not evidence of her unwillingness to return to work. It is evidence only of her unwillingness to compromise the proceedings she had instituted and her desire to have the Court vindicate her claim that she had been unlawfully dismissed. It seems to me that there was little or no good reason for her, at the



door to the Courthouse, to abandon her claim for an offer hastily made on the Courthouse stairs, which did not also include an offer of compensation for the losses she had suffered and her legal fees, and that there was every good reason for her not to do so.

14. The evidence simply cannot be relied on as showing that she was unwilling to return to work as the Respondent contends.

B. Failure to Return to Work

15. Ms. Allen submits, in the alternative, that the Applicant had a duty to show up for work once her dismissal by the Governor had been declared void and that her failure to do so meant she was absent without leave and liable to be summarily dismissed. If the PSC had appreciated that she remained an employee and had instructed her to return to work or be summarily dismissed, I doubt we would be here today. I reject Counsel's invitation to treat the Applicant as being so dismissed.[3]

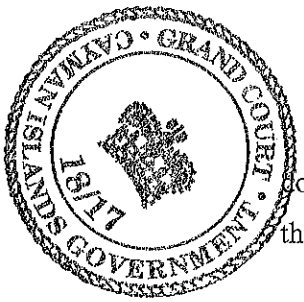
16. Ms. Allen, in her oral submissions, submitted further that the Applicant's failure to contact her supervisor or her line manager about returning to work is evidence from which the Court should infer that she was neither willing nor ready to return to work. This proposition was put to the Applicant in cross-examination who said in reply,

> *"I would have been delighted to return to work. I would have been eager to return to work. I was not out there living a pleasant life. I would have been glad for employment."*

17. In her affidavit sworn on 11 August 2016, the Applicant gave details of the hardship she experienced because of the difficulty she had finding steady work after her purported dismissal from the CIG. I accept her evidence that she would have been happy to return to work and put an end to the financial insecurity she had endured since she was dismissed from her post.

18. While she gave no direct explanation for not returning to work, I consider that, had CIG made it clear, subsequent to the decision of Murphy J that she should return to work she would have, but it

[3] Skeleton Argument at para 16



doesn't seem from the records available, or the evidence in front of me, that either side appreciated the import of the judgment at that time.

19. Indeed, there may have been some doubt about the effect of the decision. It may have been believed that the Applicant's dismissal, though wrongful, was effective and that her remedy lay in damages. The decision of the Court of Appeal in *McLaughlin,* which refused Dr. McLaughlin's application for reinstatement and held that his remedy was in damages, suggested that dismissal of a public officer, though unlawful, might be effective. The position was clarified by the decision of the Privy Council in the *McLaughlin* which stated that in public law cases, where a purported termination is a nullity, the employee remains in employment until he is lawfully terminated or resigns and that,

> *"There is no analogy with wrongful dismissal, where a dismissal may be unlawful but nonetheless effective."*[4]

20. In the case at Bar, the simple fact is that the PSC, which had earlier formed the view that her employment should be terminated, made no subsequent attempt to lawfully terminate the Applicant's employment and she did not resign. I can see no reason to hold that the Applicant is not entitled, as was Dr. McLaughlin, to salary and other benefits so long as she continued to be available for service and her employment was not terminated throughout the period of her claim.

C. Delay

21. Although there has been a 21-year delay between the filing of the proceedings for judicial review and the hearing for the assessment of damages, in the absence of any relevant prejudice[5], there is no question of striking out the Applicant's claim as Ms. Allen suggests though, in fairness to Ms. Allen, she did not argue very strenuously for that result. The fact is that CIG engaged in negotiations for the settlement of the Applicants' claim for some 9 years after the decision of Mr. Justice Murphy and, when those negotiations ceased, they chose to let the matter stay in abeyance.

22. When the Applicant's new attorneys filed a Summons for Directions in 2016, the Respondent met her summons with its own for dismissal for want of prosecution. It appears from the record,

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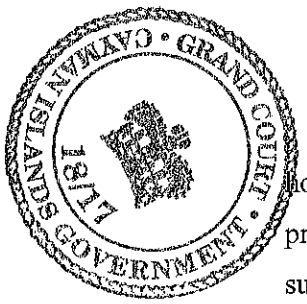
[4] Lord Bingham at para 17

[5] See decision of Malone CJ in *Executive Securities Corporation v Bland Investments SA & Ors* (1992-93) CILR 286, at p289 line 22 and p 290 lines 25, 39 and 40: Risk that fair trial not possible or other prejudice. In *Bland,* held fair trial no longer possible because of unavailability of evidence and defendant prejudiced as had been kept out of his money.



however, that they did not press their application as the Court subsequently gave directions for the prosecution of the Applicant's claim for damages and made no order on the Respondent's summons.[6] The Respondent did not relist the adjourned application and took no further steps to have the matter dismissed. Nothing further transpired until 11 January 2019 when Richards J gave directions for the assessment of damages on the Applicant's application for a Case Management Conference.

23. The Respondent accepts that both parties were in breach of the Overriding Objective of the GCR which seeks to deal with proceedings in a *"just, expeditious and economical way"* but asserts that it was *"ultimately for the Applicant to pursue her claim."*[7]

24. The Applicant explains that the matter was in her Attorney's hands and, from correspondence that was exhibited and her evidence, it would appear that the delay was attributable to her lawyer's exercise of his own judgment as to whether the time was right to pursue the claim after the Applicant was charged with causing death by dangerous driving. A failure to pay fees may also have played a role, although this is less clear from the evidence.

25. In my judgment, however, the Applicant's failure to advance her cause is not something the Respondent can rely on as the Respondent also failed to take any steps to deal with the extant claim.

26. The PSC did not seek to lawfully terminate the Applicant's employment following the decision of Murphy J nor later, when it had the benefit of the learning in the *McLaughlin* judgment. It still has not done so to this date. If the consequence is that the CIG remains liable to the Applicant for her salary and benefits, the Respondent has only its own failure to heed the guidance in *McLaughlin* to blame.

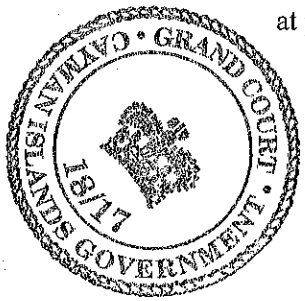
27. It is indeed an extraordinary and censurable result that this state of affairs has been allowed to persist for 21 years, if I may borrow a phrase from the learned Chief Justice in his 2005 decision in the *McLaughlin* matter.[8] The proposition that a public officer who is unlawfully dismissed can render no services to the public yet continue to be entitled to her salary and other benefits indefinitely into the future seems contrary to principle. The Privy Council, however, made clear in

[6] Order of Quin J dated 12 May 2016
[7] Respondent's skeleton at para 3
[8] At para 48

its decision that, notwithstanding the financial implications, a public officer who is unlawfully terminated is entitled to recover arrears of salary and to the payment of pension contributions on his behalf, making allowance for his earnings elsewhere, until he resigns or his tenure of office lawfully comes to an end.

Discretionary Remedy

28. That said, remedies in public law cases are discretionary, as Lord Bingham observed in *McLaughlin* at para 16 of the judgment,



> *"Since public law remedies are, for the most part, discretionary, it necessarily follows that a claimant may be disabled from obtaining the full relief he seeks whether on grounds of lack of standing, delay or his own conduct, or grounds pertaining to the facts of the particular case."*

29. The question then remains if there are any factors which should limit the Applicant's claim. In *McLaughlin*, the Board cited two instances which are illustrative of the principle. One was the case of *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 in which the House of Lords was unwilling to treat the claimant, a probationary police constable who elected, under pressure, to resign, as remaining in the police force. The other was *Jhagroo v Teaching Service Commission* (2002) 61 W1R 510 where the Privy Council was unwilling to treat the claimant as remaining in office because he was physically disabled and regarded his employment as effectively terminated.

30. These examples are not exhaustive as each case will turn on its facts but, given the over 16 years that the Applicant had been employed as a Senior Labour Officer, there is no suggestion that she would not have continued to work with CIG in that capacity so long as she was able to perform services for the state.

The Effect of the 2011 Conviction

31. With that in mind, I turn to consider the effect of the Applicant's conviction for reckless driving causing death arising out of a fatal accident in September 2007 for which she was sentenced on 4 November 2011, *inter alia*, to *"house arrest"* for one year.

32. Although Ms. Allen says it is unclear whether this sentence would have allowed the Applicant to attend her employment, I cannot see how house arrest can have any but its plain meaning nor can I see how being placed under house arrest would be compatible with going to work. I, therefore, hold that, as at the date of her sentence, she was no longer able to work as a Senior Labour Officer and that her entitlement to the full benefits of her position within the CIG, which until then continued in force, came to an end.

QUANTUM

33. In February 1997, the Applicant's salary was CI$3,032 per month or CI$36,384 per annum. In 1999 there was a conversion of all positions to new salary scales. At this time the position of Senior Labour Officer was placed on "Grade L". The point within the grade that most closely aligned to the Applicant's salary was point 4, being CI$36,720 per annum. She proposes that from 1 January 1999 until 1 April 2008 the Applicant's pay would be calculated with reference to the sum paid at Grade L point 4. I accept that proposition.

34. From 1 April 2008 the position was re-evaluated to Grade K. Ms. Allen submits that the Applicant's pay could be calculated with reference to Grade K point 3, which is nearest to what was earned on her earlier Grade L point 4. Given her years in service, which was over 16 years at the time she was unlawfully dismissed, and would have been 27 years in April 2008, it seems to me right that she should be allowed salary at the slightly higher Grade K point 4.

35. She is also entitled to the pension payments not made by the CIG up to 4 November 2011.

36. As a result of her dismissal, the Applicant lost the benefit of the government insurance scheme which covers all CIG employees and had to acquire insurance from CINICO in 2007 for herself she has stage 3 kidney disease which requires quarterly visits to the doctor. From 2016, she insured her daughter with CINICO as well. She now claims $25,000 for health expenses and a further $17,983 as and for insurance premiums paid to CINICO.

37. While I accept her evidence that she has an illness which has necessitated regular visits to the doctor to slow the progression of the disease, her claim, for what I assume are out-of-pocket health expenses, was not particularised in her pleaded case nor set out in either her written or oral evidence and no supporting documents were placed before the Court. In the circumstances, her claim for health expenses in the sum of $25,000 is disallowed.

38. With respect to her claim to be reimbursed for her health insurance premiums, Ms. Allen submits the Court should dismiss these claims as well as no proper disclosure was made by the Applicant. With respect to the two documents in the Bundle which relate to the claims for insurance premiums, Ms. Allen notes that they were not included in the List of Documents or the accompanying documents for inspection which were provided by the Applicant in 2019 nor after, in response to the Respondent's letter to the Applicant's attorney on 13 February 2019, but had simply been included in the Applicant's bundle for this hearing on 24 January 2020.

39. No objection was taken to the documents before the hearing commenced and Ms. Allen did not ask for time to consider the new evidence. There is no suggestion that the information in the documents is inaccurate and that the Applicant would have to acquire health insurance is self-evident. The late disclosure has not affected the Respondent's ability to deal with the substantive issue, which is whether the Applicant is entitled to claim such relief until the date of the hearing or her putative date of retirement or at all. I reject Ms. Allen's submission and say that the Applicant may rely on the documents. She is therefore entitled to the premiums paid up to the end of October 2011. I assess those costs as totalling $3030. [9]

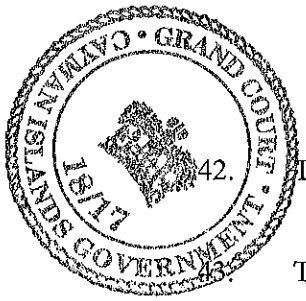
40. In her skeleton argument, Ms. Allen submits that the Applicant had a duty to mitigate loss. Mr. McField, in response, relies on the statement of the Chief Justice in support of his submission that no such duty exists where a public servant has been unlawfully dismissed.

41. In his decision on the quantum of damages that should be awarded[10] to Dr. McLaughlin, the learned Chief Justice held, that

> *"(2) Although the contract for service strictly by the statutory regime which afforded the Plaintiff the protection of public office, certain general common law principles relating to contracts of employment were applicable. Where his status was a public officer subsisted, he was* ***not under any duty to mitigate his losses by seeking or accepting other employment."***

[9] All sums paid between Feb 2001 and December 2010 plus $685 for 2011 (7 months at $67 per month and a further 3 months at $72 per month)

[10] Astley McLaughlin v HE The Governor (CILR) 2005



42. This statement of principle was not challenged in any of the subsequent appeals.

43. The principle that the public officer must give the government credit for any sums earned over the period is intended to avoid overcompensating the employee for his losses.

44. In her affidavit, the Applicant stated that she worked for very brief periods of time after her dismissal in an effort to make ends meet, finding employment with Ms. Ella Archibold as a process server and then with Ms. Zoe Ann Bodden in the period immediately after her dismissal and latterly, with her family as a *de facto* property manager of rental properties owned by her father.

45. Cross-examined by Ms. Allen, the Applicant said that with Ms. Ella Archibold she earned between $200 - $400 a month over a period of 3 months, for an average total sum of $900. She was employed by Zoe Ann Bodden for 5 days and earned approximately $50.00. She was also briefly employed by a church sister for 3 months at $600 a month, a total of $1800. After Hurricane Ivan, she moved into property owned by her father and in return for the financial assistance they gave her to cover expenses related to her daughter's schooling, her own health expenses and cash in the sum of $500 a month for food and other necessaries, she provided *de facto* management services for the property, keeping the place clean for tenants, doing repairs, gardening, collecting rents and depositing the rents so collected to her father's account. From her evidence, that period would have run from sometime after Hurricane Ivan to 4 November 2011 at which date she was confined to her house. That is a period of just over 86 months during which she earned $500 per month, a total of $43,000. Her total income earned over the period is $45,750 to be discounted against the final award for salary.

46. Ms. Allen also established in cross-examination that the Applicant earned an income, so to speak, from renting a room in her own home but that is passive income which is more properly viewed as a return on her investment and not earnings from employment which should be taken into account.

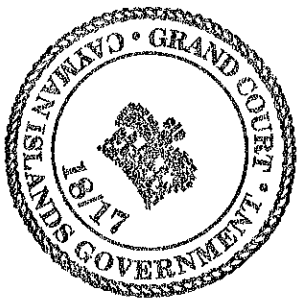
47. Ms. Allen also elicited from the Applicant the fact that she had also received assistance from Social Services. This assistance remains unquantified both as to amount and duration, but that she had to get assistance from Social Services because she could not find employment following her unlawful dismissal is not something, in my judgment, for which she need give CIG credit in any event.

ORDER

48. The Applicant's salary from the date of her dismissal to 4 November 2011 is to be computed and agreed by Counsel by reference to the judgment and the salary scales provided by Mr. Howell, discounted by the sum of $45,750 being income earned by her over the period. She is also entitled to all pensionable entitlements lost during the relevant period. She is also entitled to recover the $3,030 paid for insurance premiums.

49. The Court will hear the parties on costs.

DATED THE 18th FEBRUARY 2020



MME. JUSTICE RAMSAY-HALE
JUDGE OF THE GRAND COURT