IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS CIVIL DIVISION

CICA (Civil) Appeal No 8 of 2020
(G 462 of 1998)

BETWEEN:

VERAMAE PATRICIA EBANKS

Appellant

AND

HIS EXCELLENCY THE GOVERNOR OF THE CAYMAN ISLANDS

Respondent

BEFORE:	**The Hon John Martin QC, Justice of Appeal** **The Hon. Sir Richard Field, Justice of Appeal** **The Hon. C Dennis Morrison, Justice of Appeal**
Appearances:	**Ms Natasha Bodden of BB Attorneys for the Appellant** **Ms Claire Allen Deputy Solicitor General and Mr Nigel Gayle Crown Counsel for the Respondent**
Heard:	**2nd November 2021**
Judgment delivered:	**30th November 2021**

JUDGMENT

The Hon. Sir Richard Field, Justice of Appeal:

Introduction

1. The issue of primary importance in this appeal is whether the principle of law enunciated by the Privy Council in *McLaughlin v HE The Governor of the Cayman Islands* [2007] UKPC 50 was correctly applied by the trial judge, Mme Justice Ramsay-Hale ("the judge"), in determining that the Appellant remained an officer of the Cayman Islands Government following the unlawful termination of her employment down to the point when she was sentenced on 4 November 2011 to a form of house arrest for one year upon being convicted of causing death by reckless driving.

2. Until the Privy Council's decision in *McLaughlin*, there was uncertainty whether damages for unlawful termination of employment by a public authority were to be assessed in the same way

as damages for wrongful termination of a contract of employment by a non-public authority, these latter damages being predicated on a duty on the dismissed employee to mitigate his or her loss by taking reasonable steps to look for and take alternative employment which in the circumstances it would be reasonable to accept.

3. In *McLaughlin*, Dr McLaughlin had been unlawfully dismissed by the Cayman Islands Government and it was held by Chief Justice Smellie that whilst this meant he was entitled to salary for so long as he continued to be available for service, after a reasonable time there came a point when, not having had any indication of any intention to reinstate him and having taken no steps to invoke the machinery of reinstatement, Dr McLaughlin must be regarded as having perceived yet a further repudiation of his employment contract which he had accepted, with the consequence that, thereafter, his entitlement to damages was the same as where an ordinary contract of employment had been terminated.

4. The Privy Council disagreed with CJ Smellie's approach. Giving the advice of the Board, Lord Bingham said:

> "*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.*****"** [Emphasis supplied]

This principle is referred to hereafter as "the *McLaughlin* principle".

The case below.

5. It was common ground that (i) it was held by Murphy J on 16 November 1998 in a judicial review application that the Appellant's dismissal from her employment with the Government as a Senior Labour Officer on 4 May 1998 was null and void; and (ii) it was only after Richards J had given directions and ordered a case management conference on 11 January 2019 that the Appellant's assessment of damages came to be heard in the Grand Court on 29 January 2020.

6. It was the Appellant's case that at all times since her dismissal she had been ready, willing and able to return to work in conformity with the *McLaughlin* principle. The Respondent's strongest contention at trial was that the Appellant had ceased to be available for work following the sentence imposed on her on 4 November 2011 of house arrest for 12 months in the aftermath of her conviction on a charge of causing death by reckless driving. On the evidence before the

judge, the circumstances of this offence were that the Appellant, who was without an income, had agreed for reward to carry some rocks in a trailer pulled behind her motor vehicle and the trailer had broken away from the vehicle and had collided with and killed a person in the vicinity. When considering what sentence to impose, the sentencing judge, Henderson J, had enquired whether the Appellant was employed and was told by her counsel that she was not.

7. It was suggested to the judge that it was unclear whether the sentence allowed the Appellant to attend her employment, to which the judge observed that she could not see how house arrest would be compatible with going to work; and on that basis the judge held that, as at the date of the sentence, the Appellant was no longer able to work as a Senior Labour Officer and her entitlement to the full benefits of her position came to an end in accordance with the *McLaughlin* principle.

8. The Respondent also contended below that, on 16 November 1998, the Appellant had refused an offer to return to work which demonstrated that she had not been ready and willing to return to work as required by the *McLaughlin* principle. The evidence in respect of this incident was that, as the Appellant and her counsel reached the top of the Court steps for the hearing of her judicial review application, the lawyer representing the Government told her counsel that the Government offered to have the Appellant back in her job. The Appellant deposed in her affidavit dated 11 August 2016 that she rejected this offer because it seemed obvious to her that the real concern of the Government at this late stage was to try keep the matter from going to Court and not in retaining her as an employee, given that they had had ample opportunity to make this offer before but had failed to do so. She accordingly regarded the offer as suspect and, given the Government's contemptible treatment of her, she no longer had confidence in their integrity which precluded her from giving the offer any serious consideration.

9. The judge rejected the Respondent's contention holding that the Appellant's refusal to entertain the offer and her decision to pursue her application for a declaration that her dismissal was unlawful was not evidence of her unwillingness to return to work. It was 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. There was little or no good reason for the Appellant, at the door of 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 was a very good reason for her not to do so.

10. The Respondent submitted in the alternative that, once the Appellant's dismissal had been declared to be null and void, the Appellant was under a duty to show up for work and her failure

to do so meant that she was absent without leave and liable to be summarily dismissed. She therefore should be treated as having been so dismissed. The judge rejected this submission.

11. The Respondent further contended that the Court should infer that the Appellant's failure to contact her supervisor or line manager about returning to work evidenced that she was neither willing nor ready to return to work. In rejecting this submission, the judge found on the evidence before her that the Appellant would have been happy to return to work and put an end to the financial insecurity she had endured since she was dismissed. In reaching this conclusion the judge noted that when the Respondent's proposition was put to the Appellant in cross-examination she had replied that she would have been delighted and eager to return to work. She was not living a pleasant life and would have been glad for employment. The judge also took into account the details the Appellant gave in an affidavit of the hardship she experienced because of the difficulty she had in finding steady work after her purported dismissal. In the judge's view, had the Cayman Islands Government made it clear after Murphy J's decision on the judicial review that the Appellant should return to work, she would have done so, but it did not seem from the records available or the evidence before the Court that either side appreciated the import of that decision. Indeed, it was possible that it was thought that although the dismissal had been wrongful, it was nonetheless effective and the Appellant's remedy lay in damages.

12. The Respondent also sought to rely on the 21-year delay between the filing of the judicial review application and the hearing for the assessment of damages. The Respondent accepted that both parties were in breach of the Overriding Objective of the Grand Court Rules but submitted that ultimately it was for the Appellant to pursue her claim. This contention the judge also rejected. In her view, the delay was not something the Respondent could rely on because the Respondent had also failed to take any steps to deal with the Appellant's damages claim. The Public Service Commission had not sought lawfully to terminate the applicant's employment after the decision of Murphy J or later when it had the benefit of the Privy Council's judgment in *McLaughlin.* The Respondent therefore had only its own failure to heed the guidance in *McLaughlin* to blame. It was an extraordinary and censurable result that this state of affairs had been allowed to persist for 21 years but the Privy Council had made it clear that, notwithstanding the financial implications, a public officer who is unlawfully terminated is entitled to recover arrears of salary and payment of pension contributions, making allowances for earnings elsewhere, until the officer resigns or the office lawfully comes to an end.

13. In the course of her judgment, the judge referred to paragraph 16 of Lord Bingham's judgment in *McLaughlin*:

> "*Mr Lynch also pointed out that even where a dismissal is invalid the court does not necessarily hold that the officer has remained in office throughout. This again is so. Examples are found in Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155 and Jhagroo v Teaching Service Commission (2002) 61 WLR 510, authorities on which Mr Lynch particularly relied. 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. In Evans, the House was unwilling to treat the claimant, a probationary police constable who elected, under pressure, to resign as remaining in the police. In Jhagroo, the Board was unwilling to treat the claimant as remaining in office, he being physically disabled (para 42) and regarding his employment as effectively terminated (para 43).*"

14. The judge then went on to observe that the question remained whether there were any factors which should limit the Appellant's claim and concluded that, unlike in the *Evans* and *Jhagroo* cases, the Appellant had been employed as a Senior Labour Officer and there was no suggestion that she would not have continued to work with the Caymans Islands Government in that capacity so long as she was able to perform services for the state.

15. One of the items for which the Appellant sought compensation was a claim for $25,000 in respect of out-of-pocket health expenses. The judge disallowed this claim on the ground that it was not particularised in the Appellant's pleaded case and no supporting documents had been placed before the Court.

16. The judge also held that the Appellant should give credit for a number of sums earned since her dismissal including a total of $43,000 she received from her family in exchange for providing management services for a property owned by her father that she was allowed to occupy after Hurricane Ivan. The judge based this finding on the evidence given by the Appellant in cross-examination.

17. The Respondent served a Respondent's Notice challenging:

    (a) the judge's finding that the Appellant's entitlement to full benefits did not come to an end as a result of her rejection of the Respondent's door of the Court offer made on 16 November 1998;

    (b) alternatively, the judge should have found that that the Appellant's entitlement to full benefits ended on or about 31 December 2007, this being

approximately six months after the decision of the Privy Council in *McLaughlin*;

(c) the quantum of damages awarded should be reduced to reflect the shorter period of employment under (a) or (b); and

(d) in the further alternative, if the Court were not minded to vary the finding as to the duration for which the Appellant was entitled to full benefits, the judgment should be varied to reduce the quantum of damages to reflect the delay.

18. When it came to her written and oral submissions on behalf of the Respondent, Ms Allen sensibly limited her argument in respect of the Respondent's Notice to submitting that:

(i) the judge should have held that the Appellant's refusal of the offer to return to work made at the door of the court evidenced an unwillingness to return to work, in consequence of which the duration of her entitlement to full benefits ceased on the date the offer was refused, 16 November 1998; and

(ii) the judge should have reduced the duration of the Appellant's entitlement to full benefits in the exercise of her discretion to take account of the prejudice to the Respondent and the public purse caused by the Appellant's delay in bringing her compensation claim to court.

19. In support of submission (i) Ms Allen argued that the judge erred in finding that the Appellant's evidence given in her affidavit dated 11 August 2016 explaining why she rejected the offer to return to work was not evidence of an unwillingness to return to work but evidence of an unwillingness to compromise the judicial review proceedings. In Ms Allen's submission, the judge's finding was unsustainable because it resulted in the outcome that an employee can choose not to return to work and then later claim compensation in the form of salary and benefits that would otherwise have been earned by performing the work he or she had been requested to do.

20. I decline to accept Miss Allen's submission. In my opinion, the judge was well entitled to have regard, as she did, to the terms of the offer and the context in which it was made at the door of the court where the Appellant's judicial review application was about to begin. The judge's finding was also consistent both with the evidence the Appellant gave in cross examination that she would have been delighted to return to work because she was not living a pleasant life and

with what she said in her affidavit about suffering considerable hardship because she could not find steady work.

21. Turning to submission (ii), Ms Allen argued that, contrary to the Overriding Objective of the Grand Court Rules, and in law, the judge erred in failing to consider the delay of which the Appellant was guilty in bringing her claim for compensation before the Court and failing properly to determine how this delay factored into any remedy to be awarded. The onus was on the Appellant to progress her claim and the prejudice to the Respondent and the public purse caused by her failure to do so should have been reflected in the overall sum of damages awarded. Ms Allen contended that, if the Appellant's damages were not to be reduced to reflect her refusal to accept the offer to return to work made on 16 November 1998, this Court should consider reducing the salary awarded to that payable until the end of 2007, this being approximately six months after the decision in *McLaughlin.*

22. In my judgment, submission (ii) must also be rejected. To my mind, the judge was well entitled to find that both sides were responsible for the long delay in this case. As the judge observed, the Respondent failed to take any steps to deal with the Appellant's claim by lawfully seeking to terminate the Appellant's employment both following the decision of Murphy J and later after learning of the Privy Councils' judgment in *McLaughlin*. Further, as Ms Allen was constrained to accept during her submissions to this Court, at all material times it had been open to the Respondent to take the obvious step of applying for an unless order, but this it had failed to do.

23. I turn now to the Appellant's appeal and take first her challenge to the judge's decision that the 12-month house arrest sentence rendered the Appellant unable to work, in consequence of which, pursuant to the *McLaughlin* principle, the period in which the Appellant could claim her full employment entitlements came to an end. Ms Bodden argued that, given the leniency of the sentence, if the sentencing judge had been alerted to the importance of the Appellant being available to work as a Senior Labour Officer he would have allowed her to work and, in any event, the Appellant's conviction should not be held against her because it was by reason of the unlawful termination of her employment that she was transporting the rocks on the highway.

24. Ms Bodden began this part of her case by seeking to introduce new evidence in the form of the transcript of the sentencing hearing presided over by Henderson J and his reasons for sentence. The Respondent objected strongly to Ms Bodden's application and the Court decided that it would receive this evidence *de bene esse*, leaving over the question whether the evidence was inadmissible in the face of Rule 17 (2) of the Court of Appeal Rules (2014 Revision) and the

requirements that have to be satisfied before fresh evidence can be adduced pursuant to the decision of the EWCA in *Ladd v Marshall* [1954] 1WLR 1489.

25. As it turned out, this new evidence was decidedly unhelpful to the Appellant's case. When sentencing the Appellant, Henderson J observed that there were exceptional mitigating features namely, an expert medical opinion that the Appellant's young daughter suffered from severe psychological problems and would be additionally vulnerable if she were forcibly separated from her mother and the fact that the accident was caused by a momentary lapse of judgment and happened whilst the Appellant was otherwise driving safely. It followed that the sentence would be a probation order for two years, plus 240 hours of community service and house arrest for the first year of probation during which the Appellant had to remain within her place of residence at all times with these exceptions: (1) she could be absent when she was performing the community service or when being driven to and from the relevant location; (2) she could be absent once per week for six hours to attend church and to purchase necessities.

26. It is clear to me from these sentencing remarks that Henderson J intended the house arrest to be close to a custodial sentence given the fact that the Appellant had been convicted of the very serious offence of causing death by reckless driving and I find that there is no real likelihood that he would have diluted the custody element of the sentence to the point of allowing the Appellant to work in her former employment if he had been requested to do so.

27. I also reject Ms Bodden's causation submission. Looking at the facts of the offence committed by the Appellant in a common sense way, I think that the real and substantial cause of the death suffered by the individual killed by being struck by the rock-laden trailer was not the Respondent's unlawful termination of the Appellant's employment but the Appellant's own serious error of judgment in concluding that the means by which the trailer was fixed to the rear of her vehicle was safe and secure.

28. In the course of argument, the Court raised the question whether, notwithstanding the Appellant's unavailability for work due to the 12 months' house arrest sentence, her entitlement to the full benefits of her employment might have continued after the end of the house arrest unless and until the Respondent dismissed her for that unavailability, which the Respondent had not done. In my judgment, the requirement stated in the *McLaughlin* principle that for the office-holder to be entitled to the remuneration attaching to the office he or she must remain ready, willing and able to render the service, implies that if he or she ceases to satisfy that requirement, his or her tenure of office automatically terminates without the need for the public authority employer to terminate the office. It is true that the Privy Council did not regard Dr McLaughlin's employment in the US for a year after his purported dismissal as bringing his

entitlement to the remuneration attaching to his office to an end and only required him to give credit for the salary he earned in this employment. However, it is clear that Dr McLaughlin took this employment at a time when it had been held at first instance that the termination of his office was not unlawful which I think fundamentally distinguishes Dr McLaughlin's case from that of the Appellant.

29. I would therefore uphold the decision of the judge that the Appellant was unavailable to work upon the imposition of the house arrest sentence and in consequence thereof the Appellant ceased as of the date of the sentence to be entitled to the full benefits of the employment that had been unlawfully terminated.

30. The Appellant also appealed against the judge's findings that: (1) she was not entitled to the claimed out-of-pocket medical expenses; (2) the Appellant must give credit for the remuneration she received for managing the property she moved into after Hurricane Ivan; (3) the Appellant was not entitled to be awarded the costs paid for herself and her daughter for health insurance premiums and health expenses.

31. In my opinion, the appeal in respect of the out-of-pocket medical expenses is hopeless. The judge was plainly entitled to dismiss this claim on the ground that it had not been pleaded and there was no documentary evidence to support it.

32. In support of the appeal against the judge's decision that the Appellant must give credit for the remuneration earned for managing the family property, Ms Bodden maintained that the money received was not by way of remuneration but was a loan that the Appellant had repaid after the judgment on her damages claim had been handed down. In support of this contention, Ms Bodden sought to rely on a copy of a cheque in the sum of $ 50,000 signed by the Appellant in favour of Maxine Kimball and dated 4 March 2021. In my view, this ground of appeal is also irredeemably hopeless and must be dismissed. It was never contended at trial that the $ 43,000 received from the Appellant's family was a loan rather than remuneration. Indeed, in cross-examination, the Appellant confirmed what she says in paragraph 26 of her affidavit dated on 11 August 2016, that she had continued to work for her family, with them providing the material while she contributed her labour by helping with construction and maintaining the property and after losing her home and source of income she got "in exchange" the use of a place to stay and subsistence support for herself and her daughter initially in the amount of $ 500 per month.

33. The Appellant's third ground of appeal overlaps with her first ground and I interpret the third ground to be a complaint that the judge did not award the Appellant the health insurance premiums that she was entitled to under the terms of her employment. In fact, in paragraph 39

of her judgment the judge awarded the Appellant the health insurance premiums totalling $3030 she had had to pay up to the end of October 2011 and I can discern no error in the approach the judge took to the health insurance premiums claim. The third ground of appeal therefore fails.

Conclusion

34. For the reasons I have given above, I would dismiss both the grounds advanced by the Respondent in support of the Respondent's Notice and the Appellant's appeal.

35. Each side having failed to establish their respective contentions I propose that there be no order of costs both on the Respondent's Notice and on the appeal.

The Hon C Dennis Morrison, Justice of Appeal

36. I agree.

The Hon John Martin, QC, Justice of Appeal

37. I also agree.