IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. GC177 OF 2021
& LACV0169/2021

BETWEEN:

JOHN SIDNEY BODDEN

Plaintiff

v

CIVIL SERVICE APPEALS COMMISSION

Defendant

THE CHIEF OFFICER, MINISTRY OF HOME AFFAIRS

Interested Party

IN CHAMBERS AS OPEN COURT

Appearances:	**Mr. Pramod Joshi of McGrath Tonner for the Plaintiff** **Mr. Rupert Wheeler, of KSG Law for the Civil Service Appeals Commission** **Ms Marilyn Brandt, Deputy Solicitor General, for the Chief Officer, Ministry of Home Affairs**
Before:	**The Chief Justice, the Hon. Justice Margaret Ramsay-Hale**
Heard:	**13 April 2023**
Draft Circulated	**4 September 2023**
Judgment Delivered:	**3 October2023**

HEADNOTE

Administrative Law - allegation of bias in the statutory recruitment process in s. 53 of the Public Service Management Act- whether test for apparent bias applicable to the statutory decision-making process - whether statutory tribunal making error of law - whether Court's jurisdiction ousted by clause stating tribunal's decision shall be final - whether tribunal proper Respondent to the application - remedies discretionary -principles governing exercise of discretion to quash decision of an inferior tribunal - when damages available as a remedy in judicial review

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JUDGMENT

Introduction

1. These proceedings have their genesis in a recruitment exercise to identify three candidates for appointment to certain posts within the Cayman Islands Fire Service ("CIFS"). The posts were for Deputy Chief Fire Officer ("DCFO") in three separate areas of operations: DCFO Administration, DCFO Aerodrome and DCFO Domestic.

2. The Applicant, Mr. John Sidney Bodden, who has been a Fire Officer since 1987 and has served as Acting Chief Fire Officer on four prior occasions, competed for all three posts in a recruitment exercise which began in December 2018. He was short-listed and subsequently interviewed by a Panel which included then Chief Officer in the Ministry of Financial Services and Home Affairs, Dr. Dax Basdeo ("the Chief Officer").

3. The Applicant was unsuccessful in his bid to be appointed to any of the posts and mounted a challenge to the recruitment exercise in an appeal to the Civil Service Appeal Commission (the "CSAC") in which he alleged, *inter alia*, that the Chief Officer was biased against him which rendered the recruitment process unfair and inconsistent with s.54 of the **Public Service Management Act** (the "PMSA").

4. The CSAC determined that, although errors were made within the recruitment process and that the Chief Officer had not appropriately responded to various grievances aired by the Applicant in the months preceding the recruitment exercise, taken together they did not rise to the level of establishing bias on the part of the Chief Officer or unfairness or any other breach of Part VII of the PSMA.

5. Leave to move for judicial review was granted on the ground that the Applicant had a case worth investigating at an *inter partes* hearing that the CSAC had made an error of law in failing to articulate and apply the test for apparent bias when determining the question of whether the Chief Officer was biased and had, therefore, come to the wrong conclusion.

Submissions *in limine*

6. Although not taking an adversarial stance in the proceedings, the CSAC raised two procedural points *in limine* for the consideration of the Court.

7. The first was that the proper Respondent to the proceedings was the Chief Officer and not the CSAC and the second was that the jurisdiction of this Court was ousted by s.54(3) of the PSMA which provides:

> *"(3) The Civil Service Appeals Commission shall render a decision on the appeal within thirty days, and such decision shall be based on the information provided by the appellant*

together with information provided by the chief officer and any other information that the Commission considers relevant, ***and its decision shall be final."***

8. Taking them in turn, the decision which is being challenged in this application is not the decision of the Chief Officer, but the decision of the CSAC. The CSAC is, therefore, the proper Respondent to the application. That said, Mr. Wheeler, who appeared on behalf of the CSAC, correctly submitted that the Chief Officer should have been made a Respondent to the proceedings as the issues in controversy were between the Applicant and the Chief Officer.

9. Authority for that proposition is to be found in the Grand Court Rules which sets out the procedure on judicial review: after leave is granted, the applicant institutes the substantive judicial review application by serving an originating motion on all persons directly affected: see GCR O53, r.5. The explanatory notes to the ***White Book*** state that, in addition to the court or tribunal whose proceedings are in question, the notice of motion should also bear the name, as respondent, of the other party to the proceedings before the tribunal: note *White Book* note 53/14/69 at p 920.

10. With respect to the role the adjudicative tribunal plays in a statutory appeal, which applies by analogy to judicial review proceedings, Henderson J in *Final Touch Ltd v The Labour Appeals Tribunal and Norman Wilkins* (Cause No.463 of 2008, unreported) said this at p. 6:

> *"The LAT… is not a party to the appeal in the fullest sense. As an adjudicative body whose decision is being questioned, the LAT should assume a neutral stance and not seek to advance arguments in support of its own decision…. It would be wrong in principle and might serve to taint the future independence of the tribunal for it to advance affirmative arguments in favour of its ruling or in particular, to supplement the reasons it has already given."*

11. Nothing turned, however, on the failure to name the Chief Officer as a Respondent as he was represented in the proceedings and the CSAC was not required to take an active role except to the extent it sought to assist the Court on matters of its procedure.

12. Turning to the second submission, that the supervisory jurisdiction of this Court is ousted by s. 53(4), the effect of a clause in similar terms was considered by the House of Lords in the seminal case of *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. Section 4(4) of the **Foreign Compensation Act** 1950 provided that,

> *"The determination by the commission of any application made to them under this Act shall not be called in question in any court of law."*

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13. The House of Lords decided by a majority held that a clause purporting to oust the jurisdiction of the courts to review any *"determination"* of the Commission was ineffective in respect of a decision tainted by legal error.

14. In *O'Reilly v Mackman* [1983] 2 AC 237 Lord Diplock, restating the decision of the Court in *Anisminic* said this at p. 278:

> *"…if a tribunal whose jurisdiction was limited by statute or subordinate legislation* ***mistook the law applicable to the facts as it had found them****, it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination', not being a 'determination' within the meaning of the empowering legislation, was accordingly a nullity."*
> [emphasis added]

15. In *R v Lord President of the Privy Council, ex parte Page* [1993] A.C. 682 the House of Lords, affirming the decision in *Anisminic,* said this at p.701:

> *"…the decision in [Anisminic] rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires. Thenceforward it was to be taken that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis: a* ***misdirection in law*** *in making the decision therefore rendered the decision ultra vires."*
> [emphasis mine]

16. The approach of the Court to ouster clauses was revisited by the Supreme Court in *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22. The clause under consideration there was:

> "*Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal* ***(including decisions as to whether they have jurisdiction)*** *shall not be subject to appeal or be liable to be questioned in any court."*

17. The majority held that there was no "ouster" of the High Court's jurisdiction to review a decision of the Tribunal for an error of law.

18. Citing *R (Cart) v The Upper Tribunal* [2011] UKSC 28, the majority noted that there is a strong interpretative presumption against the exclusion of judicial review, other than by *"the most clear and explicit words"* per Laws LJ in *Cart* at the Court of Appeal (at [37]). In his opinion in *Privacy,* Lord Carnwath made clear that this presumption against ousting the supervisory role of the High Court over

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other adjudicative bodies operated even where the Tribunals arguably had the *"equivalent status and powers to those of the High Court"* (at [99]).

19. Mr. Wheeler submitted that the authorities establish that judicial review was only available where the decision was vitiated by an error of law such that no legally valid *'determination*' had been made. He contended, however, that a failure to articulate the test for apparent bias was not a legal error and, therefore, the Court's jurisdiction was ousted.

20. That, with respect, is the very the issue before the Court for determination: whether the CSAC was required to articulate and apply the test of apparent bias. If it was, and it failed to do so, as alleged by the Applicant, then it would have fallen into reviewable error subject to correction by this Court.

The Evidence Relied on by the Applicant before the CSAC

21. Before the CSAC, the primary evidence on which the Applicant relied as raising the issue of bias was the evidence of the conduct of the Chief Officer prior to the recruitment exercise. The evidence did not consist of any positive acts but rather a number of failures to act on the part of the Chief Officer including the failure of the Chief Officer to,

    (i) respond to the Applicant's 2017 expression of interest in acting in one of the new roles;
    (ii) respond to emails sent to him by the Applicant setting out his grievances in respect of the Chief Officer's failure to appoint him to act in any of the new roles;
    (iii) respond to the Applicant's written appeal pursuant to s 53 of the PSMA made on 2 August 2018;
    (iv) appoint him to act as CFO in December 2018, before the Panel interviews were conducted, despite a recommendation made by the CFO that he be so appointed,
    (v) offer the same opportunities for acting in the new posts as the Chief Officer had given to the successful candidates, each of whom held a substantive rank lower than the Applicant's, as the Chief Officer failed to rotate the acting appointments;
    (vi) provide the training requested by the Applicant who was instead offered courses that were of lesser quality or contrary to the regulations while affording one of the other candidates appropriate training opportunities.

22. The Applicant argued before the CSAC that the Chief Officer should not have been a member of the Panel on the ground that he was the ultimate decision-maker. As I understand the challenge in the context of the complaint of bias against the Chief Officer, it was that the Chief Officer's conduct towards the Applicant in respect of his complaints - described in submissions before the CSAC as showing a blatant disregard for the Applicant and a refusal to engage with him on his concerns - gave rise to a real apprehension of bias that disqualified him from being a member of the Panel.

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23. It was the Applicant's case that the Chief Officer was likely to have been influenced by the fact that the Applicant had been charged with certain motoring offences notwithstanding his subsequent acquittal.

The Decision of the CSAC

24. In its decision, the CSAC canvassed these areas of concern fully.

25. Their decision records that after the Applicant - the Appellant in those proceedings - had sent his expression of interest in 2017 to act in one of the newly created posts and failed to be appointed to act in either, he had written the HR Manager for the CIFS and requested a meeting with the CFO and the Ministry,

> *"…to discuss why "junior officers" had been selected for acting positions instead of himself, his concern that his lack of appointment to acting positions maybe related to the criminal charges of which he had been acquitted and the lack of the CFO's response to a formal development plan he had previously submitted."*

26. Although the CSAC formed the view that there was no requirement to advise a person (who may otherwise be eligible) why they were not selected when another is appointed to an acting position, nor any obligation to advertise acting positions or even solicit interest, it considered that that the Applicant, in putting forward his concerns *"was clearly airing a grievance that a responsible employer ought to have responded to."*

27. The CSAC noted further that after his email was ignored, the Applicant instructed attorneys to write on his behalf. The letter from the attorneys described it as a s. 53 appeal against an appointment decision, rather than a grievance, and raised not only the question of why the Applicant had not been appointed to any of the acting posts but made *"further allegations"* regarding the Applicant's treatment which explained and formed the basis of the Applicant's view that *"the Chief Officer appeared biased towards him."* That letter too was ignored.

28. The CSAC made the following findings:

> *"CSAC considers that the Appellant should have received a ... substantive response even if the Chief Officer was of the view that the letter did not provide grounds for a valid s.53 PSMA appeal. The Chief Officer, if that is what he thought, should have communicated his view. Equally the Applicant should have been advised to address his concerns as a grievance, pursuant to Reg. 51 of the Personnel Regulations ("the Regulations"). The history of lack of responses to requests for meetings and the s. 53 appeal led the Appellant to the view that there was a bias against him and/or that he had been charged with criminal offences (of which he was acquitted) was hindering his progression. It was indeed*

most unfortunate that these matters were not properly addressed before the recruitment process for the three DCFO posts was commenced...CSAC sought to ascertain why a different person was appointed Acting CFO [in December 2018] *but no clear reasoning emerged from the witnesses."*

29. With respect to the recommendation made by the CFO in December 2018, that he be appointed to act as CFO, which was supported by the Deputy Chief Officer, the CSAC noted that no clear reasoning emerged from the witnesses as to why he was ultimately not appointed.

30. Having canvassed these matters, the CSAC formulated the issue they were required to resolve in this way:

> *"CSAC must by statute limit itself to one question:*
> *"Has the Appellant provided sufficient evidence to establish that this Chief Officer acted in an unfair or biased manner or in a manner inconsistent with the requirements of the Part VII of the PSMA." Other matters revealed whilst troubling do not provide a basis to appeal against the Decision actually made. The events prior to December 2018 can only be relevant if they support the assertion of bias, unfairness or show a failure to follow the PSMA Part VII in the recruitment process."*

31. The CSAC then moved to consider the evidence and made the following relevant findings of fact:

31.1 With respect to the allegation of bias made against the Chief Officer and the Applicant's assertion that he should not have been a member of the Panel as he was also the decision-maker, the CSAC said this:

> *"CSAC does not consider the Chief Officer's dual role as giving rise to bias or a conflict, actual or apparent. It is quite common for the Appointing Officer to be a member of the Panel and CSAC sees no reason to set aside the panel results or their recommendation of the preferred candidates on this basis."*

31.2 With respect to the Applicant's assertion that his acquittal of the criminal charges was not accepted by the Chief Officer which had resulted in him being given fewer training opportunities, having less qualifying experience and being placed at a disadvantage during the interviews, the CSAC accepted the Chief Officer's evidence that he knew about the Applicant's legal issues because they were in the public domain but it was not a matter he had taken into account when *"participating in the Panel process"* or when scoring the Applicant's performance in interview.

31. The CSAC also addressed allegations made by the Applicant with respect to the interview process which the Applicant considered manifested bias against his candidacy. The first was that he was only

asked one role specific question even though he had applied for three posts. The CSAC accepted the Chief Officer's evidence that the shortlisting process meant that only the applicants qualified for each position were interviewed, that that the emphasis of the interviews was not, therefore, on testing specific job knowledge. They also accepted that all candidates regardless of the number of DCFO posts for which they had applied were asked the same number of questions and concluded that the Applicant had not been put at a disadvantage as a result of the questions asked and that the process adopted ensured that the same number of points were available to each applicant.

32. The second was that the appointment and rejection letters were sent out before the Panel Report was signed by Panel members. Counsel for the Applicant submitted that, until the Panel Report was signed, it could not be said that a final decision had been reached as a member might have changed their mind and suggested that this was evidence that the Chief Officer had prejudged or predetermined the selection process before it was completed. The CSAC accepted the Chief Officer's explanation that the decision was made at the conclusion of all the interviews and the Panel Report only recorded the decision, thus rejecting the allegation that the decision was predetermined.

33. The CSAC also considered other issues with respect to the interview process affecting all applicants that became apparent during the course of the hearing including the fact that dates typed on the sheets did not correspond to the dates of the actual interviews, that certain questions were misnumbered on different interview sheets, that Panel members were unable to recall how the scores were determined or when the performance of the applicants in the interviews was discussed and that there were no clear written records of those discussions. Although none of the matters led the CSAC to consider the process was unfair, it prompted them to propose that the process set out in the PSMA be supplemented by a "Recruitment Procedure" document to provide guidance to Chief Officers.

34. Having reviewed all the evidence, the CSAC concluded that the Applicant had failed to discharge the burden of establishing that the Chief Officer acted in an unfair or biased manner:

> *"CSAC does not consider the Appellant has discharged the burden placed on him by s 54 to establish that the Chief Officer acted in an unfair or biased manner or in a manner inconsistent with the requirements of Part VII of the PSMA. The Appellant has established that there were errors made in the recruitment process … and in the handling of the Appellant's various grievances. However, these do not rise to the level of establishing bias on the part of the Chief Officer or unfairness…on a balance of probability."*

35. The CSAC went on to find, however, that the Chief Officer's conduct fell below the standard required by principles of good governance and that, had the Applicant's grievances been treated differently, the appeal and the cost of the appeal might have been avoided as the Applicant's perception of the process might have been different. As a result, they awarded the Applicant a substantial contribution to the costs he incurred in pursuing the appeal.

The Issues

36. In the course of his submissions on the effect of s. 54(3), Mr. Wheeler submitted that what constituted bias was a matter for the CSAC. I was not entirely clear what was intended by the submission but it appeared to raise the issue of whether the test for apparent bias was applicable to the statutory decision-making process set out in Part VII of the PSMA. That the test was applicable was not challenged by the Deputy Solicitor General, Ms Brandt who, in her submissions on behalf of the Chief Officer, accepted that it was. Ms Brandt framed the issue as whether the CSAC was right to decide that there was insufficient evidence to establish bias, real or apparent.

The Legal Framework

37. The Chief Officer's power to appoint staff is set out in Part VII of the PSMA. The process to be adopted when appointing staff is set out in s. 41 which provides at ss.15 that, in appointing a staff member, there is an obligation on the appointing officer - the Chief Officer in this case - "*to ensure that an open and fair employment process operates."*

38. The principle of procedural fairness being inconsistent with bias, Part VII also provides at section 54:

> *"54. (1) A staff member or civil servant may appeal to the Civil Service Appeals Commission about any decision of a chief officer made under this Part …*
>
> *(2) Where a staff member or civil servant appeals under subsection (1), the staff member shall provide evidence to the Civil Service Appeals Commission to show that the chief officer acted in an unfair or biased manner, or in a manner inconsistent with the requirements of this Part.*

Apparent Bias

39. As has been observed in the case law, there are few reported cases of actual bias no doubt due to the difficulty of proving the existence of a prejudiced mindset. Bias may be imputed to the decision-maker as in the well-known case of *Pinochet* (*R v Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No.2)* [2000] 1 A.C. 119), where Lord Hoffman's association with Amnesty International through a subsidiary organization, was considered to give rise to his automatic disqualification on the ground of bias, given Amnesty International's interest in the outcome of the case.

40. Confidence in the decisions of any tribunal requires not only that the decision-maker not be influenced *"by any factor that could prevent his bringing an objective judgment to bear"* but that it also *appears* that he is not: see Lord Bingham *Davidson v. Scottish Ministers* [2004] UKHL 34 at [7]. An appearance of bias is accordingly sufficient for a decision to be set aside.

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41. The modern law of apparent bias was definitively stated in the speech of Lord Hope of Craighead in *Porter v. Magill* [2002] 2 AC 357 at [103]:

> *"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

42. The test is an objective one. The fair-minded observer was described by Lord Hope in *Herlow v Secretary of State for the Home Department and another* [2008] UKHL 62 in this way:

> *"[2] The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509 para 53. Her approach must not be confused with that of the person who brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the company makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be and must be seen to be, unbiased…She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or…may make it difficult to judge the case before them impartially.*
>
> *[3] Then there is the attribute that the observer is informed. It makes the point that before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant… She is fair-minded so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."*

Discussion

43. The statutory scheme provides that an applicant who is qualified for promotion and has been short-listed, will be interviewed by an interview panel which will recommend the preferred candidate(s) for appointment and provide a reasoned analysis of the suitability of the candidate(s) for the post which is relied on by the ultimate decision-maker, in this instance the Chief Officer. The applicant for promotion has the right to have his application considered in a just and fair process. This necessarily involves an interview panel whose members are all impartial. To avoid the final decision being called into question, it is necessary that the interview panel is, and is seen to be, objective and free from bias.

44. Although the Panel does not make the final decision, the interviews are an important step in the process of identifying the preferred candidate for the consideration of the Appointing Officer. As was determined by the CSAC, despite their participation in several external assessments, the interview was in fact the only opportunity the applicants had to provide information and create an impression.

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45. The question of whether the Chief Officer was biased was critical to determining the fairness of the Interview process in the circumstances where the Chief Officer had appointed himself a member of the Panel.

46. The CSAC, however, construed the challenge to the Chief Officer's inclusion on the Panel very narrowly, noting that it was quite common or the Chief Officer to be both a Panel member and the ultimate decision-maker and that his performing the dual role of Panel member and Appointing Officer did not give rise to any bias, actual or apparent. I consider that they missed the mark.

47. The question of whether the Chief Officer acted in a biased manner by appointing himself to the Panel could only be answered by asking the question whether the fair minded and informed observer, having considered all the circumstances, would have concluded that there was a real possibility that he was biased. If the fair-minded observer would have so concluded, then the Chief Officer ought not to have participated in the Panel which ultimately determined who the preferred candidate for the DCFO posts would be.

48. The task of an appellate tribunal like the CSAC when determining an allegation of bias was set out by the English Court of Appeal in *In Re Medicaments* [2001] 1 WLR 700 at [85]:

> *"The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the Tribunal was biased. The material circumstances will include any explanation given by the Judge under review as to his knowledge or appreciation of those circumstances."*

49. There is force in the Applicant's submissions that the CSAC should not have accepted at face value the Chief Officer's assertion that although he was aware of criminal charges against the Applicant, it was not a matter he took into account when conducting the interviews or scoring the Applicant, because the test for apparent bias is a matter for the tribunal and not the person who it is said appears to be biased.

50. The point was made by the Court in *Locabail (UK) Ltd v Bayfield Properties Ltd (Leave to Appeal)* [2000] Q.B. 451 at [19]:

> *"Nor will the reviewing court pay attention to any statement by the judge concerning the impact of any knowledge on his mind or his decision: <u>the insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision."</u>*

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51. In its decision, the CSAC addressing the question of bias said (supra para 30) that *"the events prior to December 2018 can only be relevant if they support the assertion of bias, unfairness or show a failure to follow the PSMA Part VII in the recruitment process."*

52. In light of its own findings that,

(i) no satisfactory evidence was given for failing to appoint the Applicant to act in December 2018,
(ii) the Chief Officer's conduct, in failing to respond to the Applicant's grievance that he had not been afforded opportunities because of his brush with the law, fell so far short of what was required as to merit awarding costs against a successful Respondent,
(iii) that the history of lack of responses led the Applicant to the view that there was bias against him,

the CSAC, in my judgment, should have gone on to consider the question of whether, having considered the facts, a fair-minded and informed observer would have concluded that there was a real possibility that the Chief Officer was biased against the Applicant.

53. They did not and so fell into error.

The Relief Sought

54. The question which remains is what remedy if any, should be awarded to the Applicant. In his pleaded case, the Applicant puts his claim for relief in this way:

24. If leave is granted, the applicant will invite the Grand Court to quash the Decision insofar as it dismissed his appeal.
The applicant will not invite the Grand Court to set aside the award of costs since the award of costs was made notwithstanding the dismissal of the appeal (and not because of that decision) or for reasons unconnected with the legal substance of the appeal.

25. The applicant will invite the Grand Court to remit the matter to the CSAC for: (a) A fresh or further consideration, and
(b) Such further or other relief as may be necessary to give effect to the Court's judgment, and
(c) Costs.

26. The applicant will further seek an order for damages, to be assessed.

27. Had the applicant been asked, or had the question of remedies arisen during or after the decision of the CSAC, he would accept that given the passage of time between the recruitment process, the appointments of his three compatriots to the three positions that

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he had applied for, and the hearing of his appeal (over two years between February 2019 and the date of the Order made by the CSAC), it would be unreasonable and perhaps unrealistic to require the Chief Officer to belatedly appoint the applicant to one of the positions he applied for and in place of the incumbent (had the decision gone in favour of the applicant).

28. The applicant would instead have sought monetary compensation by way of damages for his losses to date and into the future. That is taken as the difference between his actual salary and the salary that he would have received in any one of the positions he had applied for and continuing into the future until such time as a future opportunity may have arisen for recruitment to one or other of those positions. The CSAC had heard evidence and had documentary evidence before it as to the salary of the applicant and the range of salaries on offer to the successful candidates and was empowered under s60 PSMA to give such monetary relief.

29. Further, with the evidence before it, the CSAC was in a position to make such an award of damages.

55. Having set out this position in paragraphs 25 to 29, however, the Applicant concludes by stating that,

The Grand Court will be invited to make that award of damages for the reasons set out."

The Law

56. No submissions were made with respect to the relief sought including the Applicant's claim for damages. I set out the following propositions of law which I regard as to be uncontroversial.

57. The first is that it is a principle of judicial review that remedies are discretionary. An applicant may be able to show that a decision-maker has acted improperly but the court may nevertheless decline to grant the remedy sought.

58. In *R v General Medical Council, ex parte Toth* [2000] 1 WLR 2209 at 2214C, Lightman J said:

"The general principle is well established that, if an applicant establishes in judicial review proceedings that the decision which he challenges is bad in law, he should be granted relief, and most particularly an order quashing that decision, unless there are strong reasons in public policy for refusing relief or unless to quash the decision would occasion so great an injustice either to the respondent or to a third party as to require some other course to be taken."

59. In *Credit Suisse v Allerdale BC* [1997] QB 306 at 355D, Hobhouse LJ said:

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"The discretion of the court in deciding whether to grant any remedy is wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, and the utility of granting the relevant remedy."

60. In *Baker v Police Appeals Tribunal* [2013] EWHC 718, Leggatt J, as he then was, observed at [23] that,

"To say that exercising a discretion not to quash an unlawful decision is "exceptional" or requires "strong reasons" indicates that the discretion is limited but does not by itself assist in elucidating the rules or principles which govern its exercise... [which begs] *the question of when, exceptionally, it is in principle right or in the interests of justice, or there is a sufficiently strong reason, to justify the refusal of a remedy."*

63. He then went on to say this at [27]:

"The consequence, therefore, of a court's refusal to quash an unlawful decision of a tribunal is to allow a purported decision which the tribunal had no power to make and which is in law no decision at all to have the same practical effect as a lawful and valid decision."

61. At [29] to [32], the learned Judge set out the four main categories of case where the Courts have refused to quash unlawful decisions:

"29. One ground on which relief may be refused is that the claim has not been properly pursued. Delay in applying for judicial review is an obvious example. Relief may also be refused where the claimant acquiesced in the decision or did not exhaust other remedies before seeking judicial review or has abused the court's process, for example by misrepresenting or suppressing material facts…

30. A second ground on which a remedy may be withheld is that granting it would cause substantial prejudice to the rights of third parties. This flows from the point already mentioned that people will reasonably act on the assumption that a decision of a public authority is valid unless and until a court determines otherwise. Where quashing the decision or declaring it a nullity would be unfair to people who have relied on the decision, this is a proper consideration for the court to take into account…

31. A third situation in which the court may refuse to grant relief is where the error of law made by the public authority was not material to its decision…

32. A fourth category of case in which the court may decline to grant a remedy is where it would serve no practical purpose."

Damages

62. Whilst there is no right in judicial review to claim damages for losses caused by an unlawful administrative action, it is possible to claim damages if there is another cause of action. If this established cause of action is separate to the grounds under which judicial review is sought, such as a breach of statutory duty or a private action in tort, then damages may be an available remedy.

63. The position was set out succinctly by Baroness Hale in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2006] 1 AC 529, who said this at [96]:

> *"Our law does not recognise a right to claim damages for losses caused by unlawful administrative action (although compensation may sometimes be available to the victims of maladministration). There has to be a distinct cause of action in tort or under the Human Rights Act 1998."*

64. With respect to the claim for damages, the Rules provide that,

> *"Claim for damages (O.53, r.7)*
>
> *7. (1) On an application for judicial review the Court may, subject to paragraph (2), award damages to the applicant if —*
> *(a) the applicant has included in the statement in support of the applicant's application for leave under rule 2 a claim for damages arising from any matter to which the application relates; and*
> *(b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making the applicant's application, the applicant could have been awarded damages.*
> *(2) Order 18, rule 12, shall apply to a statement relating to a claim for damages as it applies to a pleading."*

Discussion

65. The Applicant's claim for damages does not comply with O.53, r.7 as he has not identified a cause of action as required by O18 r 12. As made clear in *Quark*, a claim for damages can only be made if there is a cause of action in private law, separate from the grounds on which the application for judicial review was brought.

66. The ground on which judicial review has been sought is that the CSAC made an error of law in not applying the test of apparent bias to the facts that it found proved. What claim might arise *against the CSAC* in respect that error is not apparent. What is apparent is that the Applicant seeks compensation

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for not being promoted as a result of an interview process tainted by bias. The putative claim proceeds on the assumption that a finding by this Court that the CSAC misdirected itself on the law leads inevitably to the conclusion that the interview process *was* tainted by bias. It does not.

67. The Court has found that the CSAC asked itself the wrong question. It is not for this Court to answer it. Until it is determined that the process was tainted by bias, no question of compensation can arise.

68. The claim for damages in these proceedings is misconceived.

69. Compensation for breaches in the recruitment process are clearly contemplated by the PSMA which provides at section 60 provides as follows:

> *"Determination of appeals by Civil Service Appeals Commission*
>
> *On the appeal of any decision, the Civil Service Appeals Commission may make such determination as it considers appropriate and may, without limiting the generality of this power, grant monetary relief and make interim orders."*

70. If there were a breach by the Chief Officer of the Applicant's right to a fair and unbiased consideration of his application pursuant to section 53 of the PSMA, then the CSAC would be the proper body to award compensation for such a breach.

71. The question then is whether this Court should remit the matter to the CSAC to consider the Applicants' appeal again, applying the test of apparent bias.

72. I consider that it would not be appropriate in the circumstances of this case to remit the matter for reconsideration for the following reasons: Firstly, delay. The judicial review comes after the decision of the CSAC was rendered, which was so many years after the appointment decisions were made that the Applicant frankly acknowledged that even if he were ultimately successful in establishing that the process was tainted by bias, he could not be appointed to any of the posts for which he applied. The successful applicants have now been in post for some 4 ½ years.

73. Secondly, quashing the decision of the CSAC would be detrimental to good administration as the effect would be to put the question of whether the three incumbents were properly appointed back in issue. I respectfully decline to do so.

74. Thirdly, if this matter were remitted to the CSAC for reconsideration applying the appropriate test, the CSAC would be entitled to, and would very likely, reach the same decision again on the evidence before it. Quashing the decision would have no practical effect.

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75. Finally, I take into account that the Applicant did not raise any concern about the Chief Officer's inclusion on the Panel before the interviews were conducted, despite knowing all the facts on which he relied in his appeal to demonstrate that the Chief Officer was biased. It was only after the process was complete and the three applicants who, as he put it, had considerably less experience than him were appointed, that he determined that the only explanation for his not being appointed was that the Chief Officer was biased.

Conclusion

76. The Applicant has succeeded in establishing that the CSAC failed to articulate and apply the test for apparent bias and thus fell into error. The Court declines, however, to quash the decision of the CSAC and send the matter back for reconsideration for the reasons set out above.

77. As the Applicant was legally aided in these proceedings so no issue of costs arises for consideration.

DATED THE 3RD OF OCTOBER 2023

Hon. Justice Margaret Ramsay-Hale
CHIEF JUSTICE