In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 120

IN THE MATTER OF THE LABOUR DISPUTES ACT 1992

AND IN THE MATTER OF ORDER 29 OF THE RULES OF THE SUPREME COURT, 1985

AND IN THE MATTER OF THE COLLECTIVE BARGAINING AGREEMENTS BETWEEN THE GOVERNMENT OF BERMUDA AND BERMUDA INDUSTRIAL UNION BERMUDA PUBLIC SERVICES UNION AND THE BERMUDA UNION OF TEACHERS

BETWEEN:

THE MINISTER OF HOME AFFAIRS

Applicant

-v-

(1) BERMUDA INDUSTRIAL UNION ("BIU")
(2) BERMUDA PUBLIC SERVICES UNION ("BPSU")
(3) BERMUDA UNION OF TEACHERS ("BUT")
(4) PRISON OFFICERS ASSOCIATION
(5) FIRE OFFICERS ASSOCIATION

Respondents

RULING ON COSTS

(in Court)

Costs-partial success-matters relevant to allocation of costs- irrelevance of public interest in settling future disputes

Date of hearing: March 9, 2016
Date of Ruling: March 21, 2016

Mr Gregory Howard and Mr Richard Ambrosio, Attorney-General's Chambers, for the Applicant

Mr Delroy Duncan and Ms Lauren Sadler-Best, Trott & Duncan Limited, for the Respondents

Introductory

1. This Court's Judgment of January 15, 2016 at the conclusion of the substantive hearing of the Originating Summons in the present proceedings concluded in the following terms:

> "*100. Subject to hearing counsel as to costs and the final terms of the Order to be drawn up to give effect to the present Judgment, the Applicant's application for a permanent injunction is refused (for the reasons set out above) but the application for declaratory relief is granted (to the extent explained above). Because of the unusually strong public interest in the parties to the present litigation making an effective and sustainable fresh start to delicate and difficult negotiations which undoubtedly lie ahead, my strong provisional view is that each side should bear its own costs."*

2. The invitation to the parties to agree the costs of the present action with a view to resolving future potentially contentious disputes between them was not taken up. The Applicant was content that each side should bear its own costs; however, the Respondents sought to recover their costs on the basis that they had achieved substantial success overall.

3. Accordingly, this Court must determine the allocation of the costs of the present proceedings.

Public interest, promoting the settlement of future disputes and costs

4. Mr Duncan submitted that the Court had no discretion to deal with costs taking into consideration factors unconnected with the present case. He relied on the observations by Buckley LJ (delivering the judgment of the English Court of Appeal) in *Scherer-v-Counting Instruments Ltd.* [1986] 1 W.L.R. 615 at 621 on the nature of the considerations relevant to the judicial discretion with regard to costs:

> "*The grounds must be connected with the case. This may extend to any matter relating to the litigation and the parties' conduct in it, and also to the circumstances leading to the litigation, but no further.*"

5. As skeleton arguments were not exchanged in advance of the costs hearing the Applicant's counsel did not have the fullest possible opportunity to respond to this submission. Moreover, this statement of basic principle is entirely consistent with the way this Court ordinarily determines applications for costs. It makes sense because the central object of the costs rules is to impose a discipline on civil proceedings which would be wholly lacking if the Court was not obliged to apply the costs rules in a predictable manner. That discipline essentially operates so as to reward meritorious applications and punish both unmeritorious applications and unreasonable conduct in the course of litigation.

6. But *Scherer-v-Counting Instruments Ltd.* was, in any event, a case upon which the Applicant's counsel himself relied for the following proposition (at page 618E) regarding the scope of inquiry when assessing the way the parties had conducted the litigation. The relevant statement did not purport to empower a court to look beyond the confines of the case before it:

> "*The relevant field to be scanned is the whole battlefield of the action and the whole of the conduct of the parties in relation to the matter in dispute may be relevant.*"

7. The strong provisional views expressed at the end of the main Judgment in this matter that the parties should bear their own costs with a view to increasing the chances of their resolving future potential disputes in the public interest must accordingly be regarded merely as an entreaty rather than as a potentially valid legal articulation of the basis for a formal assessment of the present costs. Save in exceptional circumstances, the parties to civil litigation should be able to safely assume that they will be subject to the usual rules on costs.

8. While the public interest is often a relevant consideration in the context of determining the availability and/or scope of substantive relief, it will rarely operate to displace the usual costs rules. Recognised exceptions include my own decision on the granting of protective costs orders at the beginning of public interest litigation to

protect litigants with limited means from the usual costs consequences in litigation found by the Court to be in the public interest: *Bermuda Environmental Sustainability Taskforce-v-Minister of Home Affairs* [2014] Bda LR 68. Another illustration of the usual costs rules being displaced in the public interest is the instance of an individual of limited means bringing proceedings to enforce his fundamental rights: *Holman and Ors-v- Attorney-General (Costs)* [2015] Bda LR 93.

Have the Respondents achieved substantial success?

9. It is easy to state the well-known rule that costs follow the event in the sense that the unsuccessful party is usually required to pay their successful opponent's costs. It is difficult to apply the rule in a case where there are multiple issues and both parties have achieved some measure of success. Recent cases have illustrated the applicable principles according to which the Court determines:

    (a) which party should be viewed as the 'winner'; and

    (b) what account should be taken (if any) of the fact that the winner overall did not succeed on all major issues.

10. This approach was most authoritatively determined by the Court of Appeal for Bermuda through Sir Anthony Evans' judgment in *First Atlantic Commerce-v-Bank of Bermuda Ltd* [2009] Bda LR 18, applying the Judicial Committee of the Privy Council's decision in *Seepersad-v-Persad and Another (Trinidad and Tobago)* [2004] UKPC 19. All the cases demonstrate that the award of costs turns on the peculiar facts of each case.

11. Mr Howard's '*Costs Submissions of Applicant-the Minister*' concluded as follows:

> "*31. In all the circumstances, the Minister submits that the Court's exercise make no award of costs is reasonable. At the end of the day, the result was divided, there are strong public interest elements, and the Respondent's failure to agree to engage in discussion did not permit the efficient disposal of issues prior to the hearing.*"

12. Reliance was placed by the Applicant on the following factors for that conclusory submission:

    (a) the Applicant was not successful on one issue (permanent injunctive relief) which it abandoned at the start of the hearing, but was successful

on another issue (declaratory relief) save against the Prison Officers' Association, having previously abandoned any relief against individual employees;

(b) prior to the hearing there was no indication of the Respondents' legal position (which could not be understood from the Affidavit) so the Respondents bear responsibility for any inefficiencies in the way the case was argued;

(c) prior to the proceedings the Applicant acted reasonably whereas the Respondents ignored the dispute resolution procedure under the Act and ignored correspondence, spurning opportunities to avoid litigation.

13. The Applicant did not have the temerity to suggest that he was the winner in substantial terms. In the '*Respondents' Skeleton Argument on Costs*'(at paragraph 14(c)), Mr Duncan argued:

> "*On any discerning view of the litigation as a whole the Applicant's primary goal was to secure permanent injunctions against the Respondents. Why else would they seek relief in March 2015 when the matter had been settled on the 28th January 2015.*"

14. This was a pivotal submission. It is supported by the following findings in the Judgment:

(a) "*36. Although the Labour Disputes Tribunal was subsequently constituted (chaired by lawyer Mr Chen Foley) the Tribunal determined that the dispute referred to it had been resolved. This is unsurprising because the present proceedings are in reality about a far broader range of matters than the issues brought before the Court on January 28, 2015…*";

(b) "*85. The main impetus for the present proceedings was the Government's desire to obtain a permanent injunction in the face of the Respondents declining to give satisfactory undertakings.*"

15. Mr Duncan's submission was also supported, most clearly, by the way the Applicant's legal advisers themselves characterised the main purpose of the proceedings at the very outset. By letter dated March 24, 2015 under cover of which they served the Originating Summons and supporting Affidavits, they stated:

> "*The relief which the Applicant will be seeking in this matter is, essentially, a final injunction to restrain the Respondents from acting unlawfully, contrary to the Labour Relations Act 1975 and the Labour Disputes Act, 1992.*
>
> *We see no valid objection to your giving a formal undertaking to the Court to refrain, in future, from acting unlawfully…when labour disputes arise…*
>
> *Your undertaking to the Court would serve to avoid expensive court proceedings and the use of valuable Court time…*"

16. This correspondence clearly demonstrates what would otherwise be obvious having regard to the evidence filed in support of the Originating Summons. The declaratory relief sought by the Applicant was not sought as freestanding relief; rather it was sought primarily as a springboard for the grant of permanent injunctive relief.

17. In defeating the claim for permanent injunctive relief, I am bound to find that the Respondents achieved substantial success in the action.

Factors justifying depriving the Respondents of all their costs

18. The Respondents initially submitted that they had succeeded overall and sensibly conceded that they should be awarded only 50% of their costs. In oral argument, Mr Duncan suggested an alternative approach of awarding the Respondents all of their costs up to the beginning of the hearing (when Mr Howard suggested that the permanent injunctive relief was informally abandoned) and making no order as to the costs thereafter.

<u>Conduct</u>

19. I reject out of hand the subsequent contentions that the Applicant had acted in bad faith and that the Court should have regard to the Government's conduct before the litigation was started. Those matters were relevant to the merits of the relief sought, not to the allocation of costs relating to proceedings formally commenced weeks later. It is true the Judicial Committee of the Privy Council has criticised (in *Burgess and others-v-Stevedoring Services Ltd* [2002] 1 W.L.R. 2838) the practice of obtaining an interim injunction and not discharging it promptly when a dispute has been settled. But in the present case there is no question of the January 28, 2015 Ex Parte Injunction being enforced by the Applicant in relation to a subsequent dispute.

20. I accept the submission of the Applicant that the Respondents denied any wrongdoing from the outset and took no steps to avoid a situation whereby the Court was required to determine the application for declaratory relief independently of the application for permanent injunctive relief. However, the Applicant's own March 24, 2015 letter under cover of which the Originating Summons was served represented that the primary purpose of the proceedings was to seek permanent injunctive relief in the absence of satisfactory undertakings from the Respondents.

21. However, bearing in mind that the Applicant was seeking an unprecedented from of injunctive relief, the Respondents can hardly be criticised for failing to elaborate at an early stage precisely why they opposed such relief. No authorities could be found by the Applicant's advisers supporting the extraordinarily broad injunctive relief they sought; it is unsurprising that the Respondents' legal advisers could find no authorities explicitly refuting the availability of injunctive relief in such wide terms. It is also noteworthy that having apparently agreed for the purposes of eliminating the right of individual Union members to attend the hearing that no relief would be sought against members, the Applicant at the end of the day (somewhat tentatively) resurrected a plea for declaratory relief against them.

22. It is also important to remember, in light of the Applicant's belated attempts to downplay the importance of the role played by the application for permanent injunctive relief, that the Applicant never formally abandoned the application for permanent injunctive relief. What happened was, as a result of questions from the

bench during Mr Howard's opening submissions, that counsel orally indicated (at a precise point in the hearing which is unclear) that the Applicant would not be pressing for such relief. At the beginning of the hearing (November 24, 2015) Supplementary Submissions were filed which opened with the following words:

> "*These Supplementary Submissions are served on behalf of the Applicant in support of an application for declaratory relief and permanent orders extending an interim order granted by this Honourable Court on 28 January 2015 or, alternatively, a new order restraining the Respondents from contravening the Labour Relations Act 1975 or the Labour Disputes Act 1992 by taking part in, inciting or in any way encouraging, persuading or influencing strikes or irregular industrial action.*"

23. When Mr Howard closed his submissions the next day (November 25, 2015), he was still seeking permanent injunctive relief. At around 4.15 pm that afternoon, I indicated to Mr Duncan that he did not need to fully address the injunction issue. This was not because that limb of relief had been abandoned, but because the Applicant's counsel had conceded that the threshold for relief was a high one and no precedent had been found for as wide-ranging an injunction as the Applicant was seeking. In these circumstances I indicated that the Respondents' counsel did not need to fully respond on this issue. By the afternoon of November 26, 2015 when Mr Howard replied, he essentially emphasised the importance of the Court clarifying the legal effect of the statutory provisions the alleged breach of which formed the basis for the declaratory relief sought. This merely suggests that by the final day of the hearing he accepted that the Court was not likely to grant that limb of relief.

24. In summary, this was contentious high-pressure litigation in which, overall, each side did their best to conduct the litigation reasonably but understandably on occasion fell somewhat short of the ideal mark. The parties' litigation conduct has no relevance to the present costs award. For the reasons already stated above, the parties' pre-litigation and post-litigation conduct, and, indeed, general principles of public policy, are less relevant still.

The significance of the time spent on the legality of the Respondents' action

25. Although the main 'event' was the application for a permanent injunction, the application for declaratory relief was clearly a subsidiary 'event'. This is reflected in the fact that the Respondents insisted on defending the legality of their conduct even after it became apparent that the Court was not likely to grant the primary head of relief. This suggests that the Applicant achieved a measure of success which should reduce the award to which the Respondents would otherwise have been entitled, as the Respondents could not plausibly deny. It was conceded that 50% reduction of the Respondents' costs was appropriate.

26. In the course of the hearing I suggested to Mr Duncan that if the Court were minded to award the Respondents their costs, a broad-brush approach should be adopted to avoid expensive and time-consuming assessments of precisely how much time had been spent on what issues. He did not dissent from this proposition. This comment was made in direct reference to the application for the full costs to be awarded in favour of the Prison Officers' Association in relation to the time spent addressing its distinctive position. These costs would likely have been negligible. However, this broad-brush approach should in my judgment be a rule of thumb of general application.

27. In all the circumstances, in the exercise of my discretion, I award the Respondents 50% of their costs of the present proceedings, to be taxed if not agreed. Unless either party applies to be heard as to the costs of the present application within 21 days by letter to the Registrar, the Respondents shall be awarded 50% of their costs of the present application as well.

Dated this 21st day of March, 2015 _____

IAN RC KAWALEY CJ