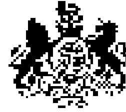
[2012] SC (Bda) 46 Civ (31 August 2012)



IN THE SUPREME COURT BERMUDA
CIVIL JURISDICTION
2008: No.259

IN THE MATTER OF an Application for Judicial Review
IN THE MATTER OF the Public Service (Delegation of Powers) Regulations, 2001

AND

IN THE MATTER OF the Twice Termination of Employment of LEYONI JUNOS by the MINISTER OF TOURISM AND TRANSPORT, first on 10 April 2008 and second on 22 May 2008, while the first termination was under Appeal

BETWEEN:

LEYONI JUNOS **Applicant**

-v-

THE MINISTER OF TOURISM & TRANSPORT

Respondent

RULING
(in Chambers)

Date of Hearing: July 31, 2012
Date of Judgment: August 31, 2012

The Applicant in person
Ms. Maryellen Goodwin, Attorney-General's Chambers, for the Respondent

Introductory

1. The Applicant was awarded the costs of a successful judicial review application where the decision in her favour was upheld by the Court of Appeal and by Summons dated May 11, 2012 seeks a review of the Registrar's taxation of costs which concluded on or about April 25, 2012.

2. Most of the review hearing concerned a point of law which I decided with the agreement of the parties should be determined before the hearing on the merits or quantum of the taxation resumes. This concerned the interpretation of Order 62 rule 18(2)-(3) of the Rules, sub-paragraphs which have seemingly not been previously considered by this Court.

Order 62 rule 18

3. Order 62 rule 18 provides as follows:

> "***62/18 Litigants in person***
>
> *18 (1) Subject to the provisions of this rule, on any taxation of the costs of a litigant in person there may be allowed such costs as would have been allowed if the work and disbursements to which the costs relate had been done or made by an attorney on the litigant's behalf together with any payments reasonably made by him for legal advice relating to the conduct of or the issues raised by the proceedings.*
>
> *(2) The amount allowed in respect of any item shall be such sum as the Registrar thinks fit but not exceeding, except in the case of a disbursement, two-thirds of the sum which in the opinion of the Registrar would have been allowed in respect of that item if the litigant had been represented by an attorney.*
>
> *(3) Where it appears to the Registrar that the litigant has not suffered any pecuniary loss in doing any item of work to which the costs relate, he shall be allowed in respect of the time reasonably spent by him on that item not more than $50.00 per hour.*
>
> *(4) A litigant who is allowed costs in respect of attending court to conduct his case shall not be entitled to a witness allowance in addition.*
>
> *(5) Nothing in Order 6, rule 2(1)(b), or in rule 17(3) of, or Part III to, this Order shall apply to the costs of a litigant in person.*
>
> *(6) For the purposes of this rule a litigant in person does not include a litigant who is a practising attorney.*
>
> *(7) This rule shall apply, with the necessary modifications, to the summary assessment of costs by the court under paragraph 4A of rule 7.*"
> [emphasis added]

Legal findings on the interpretation and application of Order 62 rule 18(3)

4. Ms. Junos argued that rule 18(2) in conjunction with rule 18(3) applied to her case and that she should be entitled to seek by way of taxation up to 2/3rds of what a lawyer would recover. Ms. Goodwin countered that in practical terms rules 18(2) and (3) were mutually exclusive in the Applicant's case because the Applicant was at all material times unemployed and suffered no pecuniary loss; accordingly rule 18(3) applied.

5. The Applicant cited cases on the English CPR which did not appear to be decisive as the CPR 48.6(4) wording makes it explicitly clear that the amount awarded under the equivalent of our rule 18(3) is "[s]*ubject to paragraph (2)*". Under paragraph (2) in particular, it may well be right "*to start with the cap…as to what this exercise would have cost, if it had gone to lawyers in the first place*": *R (on the application of Wulfsohn)-v-Legal Service Commission* [2002] EWCA Civ 250, per Schiemann LJ at paragraph [21]. But this was an unusual case where the trial judge had summarily assessed costs without reference to the hourly rate scale for non-pecuniary loss cases and the Court of Appeal was reviewing his summary assessment; it was not a review of an ordinary taxation. The limited assistance provided by this authority in the present context is not diminished by the fact that, as the Applicant pointed out, rule 18 (7) applies the provisions of the rule to summary assessments.

6. In terms of the English pre-CPR position, it is clear that when salaried public officers conduct litigation in person, they suffer pecuniary loss and are required to have their costs assessed by reference to what a lawyer would charge under the equivalent of our own rule 18(2): *Re Minotaur Data Systems Ltd; Official Receiver-v-Brunt et al*[1999] 3 All ER 122. The burden is on a litigant in person to establish his/her pecuniary loss: *Mainwaring et al-v- Goldtech Investments Ltd.* [1997] 1 All ER 467. These cases were only of background interest.

7. In *Hart-v- Aga Khan Foundation (UK)* [1984] 2 All ER 439, the English High Court had to consider specifically the interaction between paragraphs (2) and (3) in a case where some preparation occurred during working time and other preparation occurred during leisure time. Cumming-Bruce LJ (who sat with two assessors) stated (at page 446 in a passage on which Ms. Junos relied):

> "*The matter was considered in this court in Parikh-v- Midland Bank Ltd [1982] CA Bound Transcript 101. This court then decided that, having regard to the provisions of para (2), it provided an upper limit beyond which the taxing master could not go, so that, however many hours were reasonably spent by a litigant in person for the purposes of the exercise set out in para (3), the upper limit that a litigant may recover cannot exceed two-thirds of the sum which, in the taxing master's opinion, would have been allowed in respect of an item if the litigant had been represented by a solicitor.*"

8. This decision is highly persuasive and I am guided by it. It seems likely that the CPR was influenced by this approach in explicitly making the non-pecuniary loss applications subject to the two-thirds of a lawyer's fee cap applicable to pecuniary loss claimants. I accept Ms. Junos' submission that two-thirds of what lawyer would

have charged is the maximum that can be recovered by her under rule 18(3), but reject the suggestion that the starting point should be what lawyers would have charged. Ms. Goodwin fairly conceded, however, that the lawyers' tariff might be a useful reference point in general terms, but rightly insisted that the starting point under rule 18(3) was to consider whether the amount of time spent by the litigant in person with reference to the applicable hourly rate was reasonable for the litigant in person to have expended. The converse may well apply in cases where rule 18(2) is engaged.

9. The Applicant succeeded in demonstrating, with reference to Buckley J's judgment in *Mealing-McLeod –v- The Common Professional Examination Board*[2000] All ER (D) 436 that:

    (a) it may (based on a limited citation from an unreported judgment) be appropriate under rule 18(3) to calculate the amount recoverable at the prescribed hourly rate, compare that with two-thirds of what lawyers would charge and take the lower figure (paragraph 11); and

    (b) it may be appropriate to allow more time for a litigant in person to do things that a lawyer might be able to do with more administrative support (paragraph 13).

10. The pre-CPR English rules considered in the *Aga Khan* case were identical to our own and fixed a maximum hourly rate rather than a fixed rate. It appears from the cases cited in argument that the applicable rate from time to time has generally been viewed by judges as parsimonious so that no question of allowing a lower rate appears to have arisen. It has seemingly risen from £2 per hour at the time of the *Aga Khan* to £9.25 per hour at the time of *Re Minotaur* and finally to £18.00 in 2011[1]. However, paragraph 52.4 of The Costs Practice Direction made under the English CPR seemingly expresses the English rate as a fixed rate rather than as a discretionary rate with a cap as our own Rules do.

11. Whether the $50 maximum rate under Order 62 rule 18(3) ought to have been reduced by the Registrar falls to be determined when the merits of the assessment in terms of quantum are considered at the resumed hearing of the present application.

Conclusion

12. The resumed hearing of the review of the Registrar's taxation will proceed on the basis of the above legal principles.

Dated this 31st day of August 2012 ______________________

IAN R.C. KAWALEY CJ

[1] '*Update to the Civil Procedure Rules*', Law Society Gazette, September 1, 2011.