In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012: No. 188

IN THE MATTER OF ORDER 53 OF THE RULES OF THE SUPREME COURT AND IN THE MATTER OF A DECISION BY THE MINISTER OF ECONOMY, TRADE AND INDUSTRY MADE ON OR ABOUT 3 MAY 2012

KENTUCKY FRIED CHICKEN (BERMUDA) LIMITED

Applicant

-v-

THE MINISTER OF ECONOMY, TRADE & INDUSTRY

First Respondent

-and-

THE BERMUDA INDUSTRIAL UNION

Second Respondent

RULING ON COSTS

(In Chambers)

Date of hearing: April 26, 2013
Date of Ruling: May 1, 2013

Mr Jai Pachai, Wakefield Quin, for the Applicant ("KFC")
Mr Craig Rothwell, Cox Hallett Wilkinson, for the 1st Respondent ("the Minister")
Mr Delroy Duncan and Mr Kyle Masters, Trott & Duncan, for the 2nd Respondent ("the BIU").

Introductory

1. On March 22, 2013, I gave judgment on KFC's application for judicial review and concluded as follows:

> "*88. The Applicant's application for judicial review of the 1st Respondent's reference of the labour dispute between KFC and the BIU to the Tribunal established by her under the Labour Disputes Act 1992 is refused. This Court should only exceptionally review the legality of such a reference. Here, as will probably appertain in the vast majority of cases, the Tribunal is the appropriate forum for the precise parameters of the issues to be determined to be worked out. The Minister has no power under the Act to determine the Tribunal's terms of reference even though such terms of reference were drawn up in the present case (and possibly in past cases as well). Save in extreme cases, the courts are not competent to challenge the policy judgment of the Minister that a labour dispute sufficiently engages the public interest to warrant a reference to a tribunal under the Act.*
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> *89. Nor does the Tribunal have the 'draconian' powers which KFC's application, in particular its constitutional arguments, assumed it might deploy. It is empowered to determine existing and past disputes but cannot lawfully make binding determinations which have the effect of imposing a new bargain on the parties as regards future terms and conditions of employment. However, the Tribunal can no doubt encourage the parties to resolve disputes about future contractual terms and can probably make non-binding recommendations in this regard.*
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> *90. I will hear counsel as to costs and as to the terms of the Order to be drawn up to effect to the present Judgment. In particular, it may be that a formal declaration might assist the Tribunal with respect to its jurisdiction having regard to the legal findings set out above in substantially the following terms:*
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> *(1) It is hereby declared that in its determination of the dispute between KFC and the BIU referred to it by the Minister on or about May 3, 2012, the Tribunal shall not be bound by the terms of reference drawn up by the Minister on or about May 22, 2012;*
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> (2) *It is hereby declared for the avoidance of doubt that the Tribunal has no jurisdiction to make binding determinations with respect to the terms of any future agreements between the parties, whether with respect to a modification or replacement of the CBA or otherwise.*"

2. The Applicant and the Minister were content to have a declaration being made in the terms suggested. Mr. Duncan expressed concern that this would undermine the chances of similar disputes about expired collective bargaining agreements being referred to the Tribunal[1]. The question of costs was argued fully fortified by skeleton arguments and authorities with the unsuccessful Applicant contending that costs should not follow the event and, in particular that:

    (a) there should be a discount of any costs awarded to the 1st Respondent because the Applicant had achieved a significant degree of success in relation to the principle underlying its constitutional argument, the rejection of the pleaded case altogether notwithstanding;

    (b) the usual rule that two respondents ought not to be awarded costs in judicial review proceedings ought to be applied so that only the 1st Respondent (the Minister) and not the 2nd Respondent (the BIU) was entitled to recover costs in any event.

3. One interlocutory costs issue which was reserved was not open to serious argument on either side. The BIU's attempt shortly before the main hearing of KFC's judicial review application to have the Court adjudicate an issue under section 31 of the Employment Act 2000 was refused on the grounds that this was a private law matter which fell outside the scope of the present public law proceedings. It was obvious that KFC ought to be awarded its costs of successfully opposing that application and that the BIU ought not, in any event, be able to recover any costs in relation to an issue which was never argued at the main hearing.

4. The second question, whether or not both Respondents are entitled to recover costs, is most straightforward and will be considered first.

Was the BIU's active participation in the judicial review proceedings necessary?

5. Although I was initially somewhat sceptical about a point which the Bermudian courts somewhat strangely seem not to have dealt with in a considered judgment before, Mr. Pachai made good the following submission. The usual rule is that an unsuccessful applicant for judicial review ought only to pay one set of costs even if he has joined more than one respondent to his application. However, the second limb of this rule, which KFC's counsel somewhat skated over, is that two costs awards may be made where a party other than the primary respondent has some important personal interests to defend which the primary respondent (here the Minister) is not competent to address. The

[1] Having regard to the final sentence of paragraph 89 of the Judgment, I felt unable to attach any weight to these concerns.

authorities relied upon by Mr Pachai which supported both elements of this approach to costs in judicial review applications were the following: *Bolton Metropolitan District Council et al-v- Secretary of State for the Environment* [1996] 1 All ER 184; *R-v-Industrial Disputes Tribunal et al Ex parte American Express Co., Inc* [1954] 2 All ER 764 (Note); *R (Friends of the Earth Ltd) et al-v- Secretary of State for Environment Food and Rural Affairs et al* [2001] EWCA Civ 1950; HLB Kidsons (a firm)-v- Lloyds Underwriters [2007] All ER (D) 341, [2007] EWHC 2699(Comm); Supreme Court Practice 1999 Volume 1, paragraph 53/14/88. In addition he relied upon *dicta* in various authorities placed before the Court by the Respondents' counsel. In particular, he emphasised the following observation of Lord Lloyd at page 1178E of the *Bolton* case ([1996) 1 WLR 1176) which were reproduced in this Court's Judgment in *Binns-v-Burrows* [2012] Bda LR 3 at page 8:

> "*What then is the proper approach? As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule*…"

6. However, Lord Lloyd went on to state that when a claim is brought against a Minister and a second respondent appears, the second respondent "*will not normally be entitled to his costs unless he can show that there was likely to be a separate issue on which he was entitled to be heard, that is to say an issue not covered by counsel for the Secretary for State; or unless he has an interest which requires separate representation.*" The argument that the BIU's active participation was unnecessary was advanced with conviction but is wholly inconsistent with the reality of the present case. KFC's application sought to quash in whole or in part the Minister's reference of a dispute between the company and its unionised workers to the Tribunal under the Labour Relations Act 1992. The Applicant's constitutional point, which was only added by way of amendment on or about October 15, 2012, clearly only required the Minister's response. However, the Applicant also invited the Court to decide that certain terms and conditions of the Collective Agreement had not been incorporated into the relevant contracts of employment and, accordingly, could not form the subject of the Minister's reference.

7. The Minister could and did successfully address the Applicant's misconceived general legal proposition that the contracts of employment lapsed with the Collective Bargaining Agreement ("CBA") from which most of the relevant terms were derived. The pre-October 15, 2012 preparatory work in response to what was initially the primary argument (namely the assertion that there were no subsisting contractual terms and conditions capable of constituting a "labour dispute" capable of being referred to the Tribunal) contributed to the Applicant abandoning the point. Before this occurred, the initial hearing date was aborted to allow the Respondents to prepare to answer the Applicant's reconfigured case. Before this happened, the BIU in my judgment had its own distinct interests to defend (as representatives of the employees whose contractual rights were engaged by the reference) by responding, to some extent at least, to this pivotal point.

8. However, in my judgment it is self-evident that only the BIU was competent to address the issue of which parts of the CBA it had negotiated were incorporated into their members' contracts of employment with KFC. This analysis is only confirmed rather than undermined by my determination (Judgment, paragraph 8) that these issues were private law issues which the Tribunal and not the Court ought to determine. Any costs incurred by the Minister dealing with this private law issue would likely be duplicative.

9. The position is not in principle any different when it comes to consider the bias point which I also held ought properly to be determined by the Tribunal, in the first instance at least (Judgment, paragraphs 86-87). This ground of complaint (that the appointment of the BIU's nominee ought to be quashed on the grounds of apparent bias) was only added in October by way of amendment. George Baisden was the BIU's nominee for the Tribunal the Minister had merely administratively appointed. The BIU's interest in the composition of the Tribunal (as a party to the underlying labour dispute) is wholly different from the Minister's detached interest in ensuring the appointment of an impartial Tribunal. Mr. Duncan rightly poured scorn on the suggestion that his client had no interest in actively addressing these concerns which were central to its' members' interests.

10. It follows that, if one applies the principles established by the authorities Mr. Pachai relied upon to the facts of the present case, the BIU is entitled to recover its costs in respect of its response to the two broad issues it properly addressed at the eventual March 2013 effective hearing.

11. Having regard to the duty of parties to assist the Court to achieve the overriding objective of, *inter alia*, saving costs, in my judgment the logical time for a judicial review applicant (or, indeed any other civil litigant) to initially raise the question of a duplication of costs is when pre-hearing directions are ordered, or earlier in party and party correspondence out of court. This will enable all parties and the Court to focus at an early stage on the proper scope of the main hearing and the need for more than one respondent to play an active role in the proceedings as a whole. When an applicant first raises this issue at the end of proceedings after it has lost, the Court is of course still fully competent to restrict the recovery of duplicative costs and, where appropriate, to deprive a superfluous participant of its right to recover its costs altogether.

12. In the present case there is of course a need to ensure that no duplication of effort occurred between the two Respondents in the present case. Although it is not immediately obvious that any such duplication in fact occurred, that is a matter for taxation in the absence of agreement.

Should the Minister's costs be reduced because KFC achieved a substantial measure of success in relation to its constitutional ground of complaint

13. Mr. Pachai's most ambitious submission was the contention that the Minister's costs should be reduced to reflect the significant success the Applicant achieved in relation to its constitutional point. He faced two hurdles. Firstly, this Court's jurisdiction to make issues-based costs orders finds no express support in the Rules unlike the position under

the English CPR (paragraph 44.3(6)(f)); the Court of Appeal for Bermuda has cautioned this Court against playing fast and loose, as it were, with the basic principle that costs follow the event and that success should be measured in practical terms. In *First Atlantic Commerce-v- Bank of Bermuda Ltd* [2009] Bda LR, Sir Anthony Evans JA (giving the Judgment of the Court) opined as follows:

> "*65. The Judge rightly indicated that the fact that the recovery, regarded as equivalent to US$4 million was less that the amount claimed was not, of itself, a good reason for holding that the successful claimant could recover only a proportion of its costs (paragraph 29). However, he reduced the proportion to one-third on the ground that that was a generous estimate of the costs incurred in relation to the recoverable loss issue, as distinct from liability issues (paragraphs 30 and 32).*
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> *66. We do not follow why the costs recovery should be limited in this way. The recoverable loss issue was concerned with causation and the measurement of quantum, questions that did not arise unless liability was first established. The position was complicated in the present case by the fact that the outcome was essentially an agreed settlement, though embodied in the first Order (7 November 2007), and the Court could not assess the chances of success on that issue alone (Judgment para.7, ref. para. 48 above). In our judgment, however, if the claimant is entitled to costs on the basis that he has achieved substantial success, as FAC is, he should recover the costs of establishing liability, as well as causation and damages.*
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> *67. But it does not follow that he shall recover the whole of those costs. The award remains subject to the principle recognised in In re Elgindata Ltd. (No.2) [1992] 1 WLR 1207 : in short, the successful party's recoverable costs can be proportionately reduced when superfluous issues were raised unnecessarily, or for other good reason. The question here, in our judgment, is whether the principle applies in the present case.*
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> *68. In our judgment, it should be applied, and we hold that FAC shall recover two-thirds of its costs of the proceedings, including its costs of the Counterclaim 10 (if any, because this is subject to special costs orders already made). The essential reason for the one third reduction is that FAC never made it clear how it contended that its monetary claims were to be reconciled with the Refinancing Agreement, which it ignored in its claims, or with the Bank's shareholding. Even when FAC pleaded, in its Defence to Counterclaim, that the Financing Agreement was voidable (or later, void ab initio), it conspicuously failed to make clear what its position would be in relation to the shareholding, if those pleas were to succeed. It was only when the Bank made its offer that the shares came to be recognised as a central issue, as they could and should have been from the start. Neither party identified and isolated this issue at an early stage, and their costs undoubtedly were greatly increased by their failure to do so. Overall, we consider that a one-third reduction of FAC's costs is appropriate in the circumstances of this case." [emphasis added]*

14. In *Binns-v-Burrows* [2012] Bda LR 3, after considering the quoted passage and other authorities, I summarised the relevant Bermudian costs principles as follows:

> "*6. The above authorities suggest that, unless the Court or the parties have identified discrete issues for determination at the trial of a Bermudian action, the Court's duty in awarding costs will generally be to:*
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> > *i. determine which party has in common sense or "real life" terms succeeded;*
> >
> > *ii. award the successful party its/his costs; and*
> >
> > *iii. consider whether those costs should be proportionately reduced because e.g. they were unreasonably incurred or there is some other compelling reason to depart from the usual rule that costs follow the event.*"

15. In that case I reduced the costs awarded to the successful plaintiff because the monetary value of the claim which succeeded was a small proportion of the original claim the bulk of which was abandoned at a late stage. In so doing, I relied upon the above-quoted *dictum* of the Court of Appeal for Bermuda in the *First Atlantic Commerce* as well as the following similar *dictum* of the Privy Council in *Seepersad-v-Persad and Another (Trinidad and Tobago)* [2004] UKPC 19 (Lord Carswell):

> "24... *The general rule which should be observed unless there is sufficient reason to the contrary is that costs will follow the event. Where the party who has been successful overall has failed on one or more issues, particularly where consideration of those issues has occupied a material amount of hearing time or otherwise led to the incurring of significant expense, the court may in its discretion order a reduction in the award of costs to him, either by a separate assessment of costs attributable to that issue or, as is now preferred, making a percentage reduction in the award of costs: see, eg, In re Elgindata (No 2) [1992] 1 WLR 1207 ."*

16. Unarguably, the Minister succeeded in common sense or 'real life' terms overall. Moreover, the crucial question raised by KFC's counsel was whether the success he contended his client had achieved on the constitutional point engaged the exception to the general rule described by the Judicial Committee in *Seepersad* and the Court of Appeal for Bermuda in *First Atlantic Commerce*. By inviting the Court to consider whether KFC had won on the issue rather than whether the Minister had lost, Mr. Pachai was skilfully advancing an almost hopeless submission in the most persuasive way possible. But this framing of the question, carefully considered, entails looking at the question through the wrong end of the telescope. The proper question is whether the Minister although succeeding overall "*has failed on one or more issues, particularly where consideration of*

those issues has occupied a material amount of hearing time or otherwise led to the incurring of significant expense". It is ultimately obvious that this has not occurred, as Mr. Rothwell correctly submitted.

17. The constitutional point centred on the complaint that the reference ought to be quashed altogether because the Minister's reference was an unreasonable decision on the facts because it potentially interfered with the Applicant's constitutional property rights which included the right to freely bargain for a new CBA to replace the old one. One element of the argument was the implicit assumption (which the Respondent did not dissent from) that the Tribunal's powers under the Act included the power to impose a new bargain on the disputants. I concluded (see e.g. Judgment, paragraph 79), based on my own analysis of the structure of the Act and adopting a construction which neither party contended for, that the Tribunal did not have such intrusive powers. I indicated that the constitutional argument had helped to shed light on the true meaning and effect of the Tribunal's powers in an analysis which ran counter to what was apparently the previously accepted wisdom as to the terms and effect of the statutory regime.

18. The Minister did not fail in common sense terms on any issue which was directly in controversy and addressed in argument by counsel. The Minister succeeded on the constitutional point. The finding made by the Court (which allayed the Applicant's underlying concerns about the scope of the Tribunal's jurisdiction) was formulated as an additional ground for rejecting the Applicant's pleaded case. It requires intellectual contortions on a mind-numbing scale to characterise this aspect of the Court's decision as a success for the Applicant and a failure of the 1st Respondent on an issue which consumed a material portion of the overall costs.

19. The submission that the Respondent's costs should be reduced based on the Applicant's success on one issue must be rejected on these principled grounds. This conclusion is not intended to diminish in any way the validity of the Applicant's undoubted view that in commercial and/or strategic terms, this Court's incidental findings on the scope of the Tribunal's jurisdiction represent success on an important issue.

Summary

20. The Respondents are awarded the costs of the present application to be taxed if not agreed. The 2nd Respondent shall pay the Applicant's costs in respect of the cross-Summonses heard on February 27, 2011, also to be taxed if not agreed. Any questions of duplication of costs between the Respondents in relation to any issues their respective counsel both addressed and upon which they did not have distinct positions to advance (or interests to protect) shall, in the absence of agreement, be resolved upon taxation. A declaration is granted in terms of sub-paragraphs (1) and (2) of paragraph 90 of the Judgment.

Dated this 1st day of May, 2013 _____

IAN RC KAWALEY CJ