In The Supreme Court of Bermuda

CIVIL JURISDICTION
2009: No. 414

BETWEEN:

KAREN RAE CLEMONS

Plaintiff

-v-

MINISTER OF EDUCATION

Defendant

RULING ON COSTS

(in Court)

Costs-split trial on liability for personal injuries-appropriate level of discount for partial success

Date of hearing: November 14, 2016
Date of Ruling: December 19, 2016

The Plaintiff in person
Mr Norman MacDonald and Mr Michael Taylor, Attorney-General's Chambers, for the Defendant

Introductory

1. On November 14, 2016 I handed down a Judgment which concluded with the following main findings:

> "*115. For the above reasons, the Plaintiff's claim for negligence succeeds on the grounds that she has proven that she suffered an*

exacerbation of an existing hypertension condition because of a breach by the Defendant of its duty to exercise reasonable care to provide a safe system of work to the Plaintiff as an employee. The Plaintiff has liberty to apply for the hearing of the assessment of damages phase of the trial.

116. The Plaintiff's claim for damages for the intentional infliction of harm is dismissed.

117. I will hear the parties as to costs although it is difficult to see any reason why costs should not, as in the ordinary course, follow the event."

2. I heard oral argument on costs in which Mr MacDonald, never shy of resorting to hyperbole, argued (by reference to the particulars of injuries) that the Defendant had succeeded on 90% of the issues and that the Plaintiff should, if awarded any costs at all, be awarded only 10% of her costs while being required to pay 90% of the Defendant's costs[1]. I reserved judgment and afforded the parties, in particular counsel, an opportunity to tender supplementary submissions on the principles which should guide the Court when awarding costs. These were duly filed by both parties on December 5, 2016.

The Plaintiff's supplementary submissions

3. The Plaintiff referred the Court to English authorities explaining the approach to costs in public law cases, including *Tesfay & Others-v- Secretary of State for the Home Department* [2016] EWCA Civ 415. She also referred to the Court of Appeal for Bermuda decision in *First Atlantic Commerce Bank Ltd-v-Bank of Bermuda Ltd*[2009] CA (Bda) 5 Civ; [2009] Bda LR 18 and contended that as she had established liability she was entitled to her costs.

4. The Plaintiff complained about the manner in which the litigation had been conducted by the Defendant. She made reference to the fact that the Court encouraged the parties to pursue settlement because it appeared that the two expert reports were *ad idem* in agreeing that some psychological injury had been caused. She complained that no settlement efforts were pursued. She complained about the Defendant's attempts at the second pre-trial review hearing to obtain evidence of a pre-existing psychological injury and to explore her employment history in Texas, which were rebuffed by the Court. Finally, she legitimately complained about the personal attacks (mentioned at paragraph 101 of my Judgment) made on her in cross-examination which included suggesting she was a bad teacher and a lesbian.

[1] The usually understated Mr Taylor surprisingly sought 95% of the Defendant's costs in the Defendant's Submissions on Costs, however.

She sought indemnity costs by reference to *Siegel-v- Pummel* [2015] EWHC 195. She contended that she had conducted the litigation throughout in compliance with the overriding objective.

5. Finally, appreciating that the quantification of costs following a trial is for taxation in the absence of agreement, the Plaintiff indicated that her claim was currently $148,315 while seeking an Order for costs to be taxed and paid on an indemnity basis forthwith.

The Defendant's Submissions

The issues

6. The Defendant complained that although there were only two pleaded causes of action the Plaintiff's case was improperly pleaded and so the Defendant had to prepare to meet even unsustainable allegations. It is next submitted that "*it is a very technical win on a very narrow point*" and complained that the Court encouraged the Defendant's counsel to believe that without the PTSD claim the Plaintiff's case would fail. In addition, complaint was made that the Plaintiff acted unreasonably by, unknown to the Court, writing a letter during the trial to the Head of the Civil Service on September 7, 2016 suggesting that Kalmar Richards should be suspended, reiterating this request on November 19, 2016 after judgment had been delivered.

7. The submission that the Defendant succeeded on 95% of the issues is supported by reference to the following framing of the issues:

- the Defendant successfully rebutted allegations of workplace bullying;
- the Defendant successfully rebutted allegations of fraud and criminal acts;
- the PTSD injury consumed a significant period at trial, including two days cross-examination of the Plaintiff and two days cross-examination of Ms Adhemar;
- the hypertension injury represented "*at most 5% of the claim… The Defendant should therefore be entitled to 95% of its costs*".

The authorities

8. Mr Taylor relied upon the following authorities:

(1) *Medway Primary Care Trust-v- Marcus* [2011] EWCA 750: in this medical negligence case quantum was agreed before the liability trial which was all about the defendants' responsibility for an amputation. Both defendants also admitted a breach of duty and so the trial was all about liability for a specific injury. As an afterthought, the plaintiff's counsel claimed modest damages for additional pain and suffering under a general plea for pain and suffering. The plaintiff represented by Michael Mansfield QC, whom the Court of Appeal described as deploying "forensic hyperbole", was awarded 50% of his costs at first instance despite succeeding in recovering only 0.25% of his maximum claim. The Court of Appeal held that the plaintiff should pay the defendants 75% of their costs;

(2) *Magical Marking Ltd. and Phillips-v-Ware & Kay LLP* [2013] 4 Costs LR 535: the claim valued at £10 million succeeded only to the extent of £28,000. The defendant was awarded 85% of its costs. The limb of the claim which succeeded "*was only alleged, by way of amendment, on the very last day of the trial…It was introduced as an afterthought…and had nothing to do with her main grievance*" (Briggs J, paragraphs 20-21);

(3) *Oksuzoglu-v-Kay and another*[1998] 2 All ER 361: the defendants were awarded 90% of their costs because "*there is still no doubt that the defendants essentially won the trial on liability and causation*" (Brooke LJ, paragraph 55);

(4) *Matthie-v-Minister of Education and Commissioner of Education* [2016] SC (Bda) 95 Civ (18 November 2016): the Respondents were awarded 2/3rds of their costs of the substantive hearing where they won two out of three issues, with neither party succeeding on the third issue;

(5) *Harold Darrell and Hardell Entertainment Limited-v- The Bank of Bermuda Limited* [2000] Bda LR 70: L.A. Ward CJ cited with approval authority for the proposition that communications designed to force a party to settle litigation could amount to a contempt of court and (at page 3) ordered the plaintiffs to desist from communications with potential witnesses "*with the intention of persuading such persons to bring pressure to bear on the Defendant to settle the Plaintiffs' claim*".

Findings: governing legal principles

9. The starting assumption is that costs follow the event (Order 62 rule 1(3)) unless there is some reason to make another order. This requires the Court to determine which party has won overall although where a party who has won overall lost on issues which consumed a substantial amount of time, a proportionate discount may be made: *First Atlantic Commerce Limited-v-The Bank of Bermuda Limited*

[2009] Bda LR 18 (Court of Appeal). The authorities relied upon by the Defendant demonstrate that where a claimant has obtained a trifling success, when the issues in dispute are properly analysed, his opponent will be treated as having won and be awarded most of his costs.

10. Where a party has behaved unreasonably, the offending party may be deprived of their costs and/or ordered to pay their opponent's costs. Order 62 rule 10 provides:

> "(1) *Where it appears to the Court in any proceedings that any thing has been done, or that any omission has been made, unreasonably or improperly by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party.*"

11. The Court also has the power to award costs on an indemnity basis rather than the usual standard basis whenever a litigant has conducted the litigation (or any part of it) in an unreasonable manner.

Findings: which party has won overall?

12. Evans JA delivering the judgment of the court of Appeal for Bermuda in *First Atlantic Commerce Limited-v-the Bank of Bermuda Limited* [2013] Bda LR 18 defined the legal test to success as follows:

> "*The Judge directed himself, correctly in our view, in accordance with the judgment of Lightman J. in BCCI v Ali (No. 4) [1999] NLJ 1734 where he said*
>
> > *'success is not in my view a technical term but a result in real life, and the question as to who succeeded is a matter for the exercise of common sense',*
>
> *(adopted and followed by Bell J. in SCAL Ltd. v Beach Capital Management Ltd. [2006] Bda. LR 93).*

13. The Plaintiff has clearly won in 'real life' terms. The Court is tasked with awarding costs in relation to the "liability" limb of a split trial. The Plaintiff had two causes of action, dependent on essentially the same facts: (1) intentional infliction of harm; and (2) negligence. The first claim was never sustainable and was not seriously in issue because its elements required proof of either a physical assault or deliberately terrifying a victim in a way which was likely to cause physical or psychiatric harm. Be that as it may, the Plaintiff's negligence claim depended on the same facts and succeeded.

14. The elements of the claim which were in dispute were (1) breach of a duty of care, (2) damage, and (3) reasonable foreseeability of actionable damage. The Defendant disputed that any breach of duty of care occurred, disputed that the Plaintiff suffered any damage which was caused by any breach of duty, and with particular reference to the most serious of the injuries which were complained of, disputed that any such damage was reasonably foreseeable. It is wholly artificial and inconsistent with the way the litigation was contested to regard the main issue in controversy at trial as being whether the Plaintiff could establish that she suffered from complex PTSD by reason of the Defendant's breach of duty. For this framing of the issues in controversy to be apt, either the Defendant would have had to at some point before the trial began either:

    (a) admit breach of the employer's duty of care and nominal damage and dispute causation of PTSD and/or that PTSD was a reasonably foreseeable form of damage; or

    (b) make an open or without prejudice save as to costs settlement offer on terms that left only the PTSD issues in controversy.

15. It is difficult to identify any evidence which the Defendant would not have led (or cross-examined the Plaintiff and her witnesses on) if the intentional infliction of harm claim had not been pursued. The Plaintiff's broad case was that she had been injured by a hostile working environment as exemplified by specifically egregious incidents including her home room being assigned to a para-educator, being unfairly placed on review and having her car-towed and clamped. The Defendants broad case was that (1) no breach of the employer's duty of care occurred, (2) no damage was caused to the Plaintiff by any breach which occurred, and (3) if the Plaintiff was damaged by any breach of duty, the injuries she complained of were not reasonably foreseeable. The Plaintiff succeeded on all of these issues, it not being an essential element of her claim to prove any particular form of injury as long as she proved one of the particulars which had been pleaded from the beginning of the case.

16. The Plaintiff's case at the trial on liability did not address the question of quantum or causation of financial loss at all. The Court was not required to make any findings in relation to what general or special damages would be recoverable depending on what injury the Plaintiff proved she sustained. The Defendant makes reference to the fact that the Plaintiff claimed $2.2 million in damages, but the prayer to her Re-amended Statement of Claim merely seeks "*damages for negligence to be assessed*". So it is difficult to know (and premature to investigate) what is claimed by way of general damages and what by way of special damages, matters which will have to be particularised for the purposes of the quantum phase of the trial. It is fair to assume that by any measure the likely

recovery for the comparatively minor injury which has been proved in the context of establishing liability will be far lower. How does this impact on the question of success in a trial on liability alone? The present case is far removed from:

- *Medway Primary Care Trust-v- Marcus* where quantum and breach of duty had been agreed, the case was tried on the issue of liability for an amputation and the claimant only succeeded on a nominal award for additional pain and suffering before the amputation relied upon as an afterthought. The entire case there was about whether or not the claimant was liable to pay an agreed substantial sum if liability for a particular injury was established. It was 'all about money';

- *Magical Marking Ltd. and Phillips-v-Ware & Kay LLP* where the limb of the claim which succeeded was added by way of amendment at the end of the trial and "*it is settled that where a late amendment is made which proves to be the sine qua non for the claimant's eventual success, the defendant is generally entitled to its costs up to the date of the making of that amendment*" (paragraph 23). The claimant only won on the basis of a late amendment, far from the case here.

17. In my judgment it is wrong in principle to assess who has succeeded at the liability phase of a split trial on liability and quantum by reference to the likely award at the end of the quantum phase of the trial unless the course of the litigation makes the level of recovery a relevant litigation consideration. In a straightforward personal injuries case where there is a split trial on liability and quantum, the issue of damage would frequently not even be in dispute at the liability stage. This would usually be the case in claims involving obvious physical injuries whether sustained in a road traffic accident or an accident at work. That the defendant has caused an injury is usually irrefutable; whether a breach of duty occurred will be subject to dispute. The position is often different in medical negligence cases where complicated issues of causation of loss arise and it is not obvious who (if anybody at all) is responsible for an injury e.g. complications arising from surgery or a delayed operation. It may also be hotly contested what the future medical prognosis is. In such cases, the issues of liability and damage may be merged and the plaintiff will be required to prove that the defendant <u>caused</u> some injury or a particular injury. The defendant's claim will often be under the control of insurers who are very keen to monitor throughout the range of likely financial outcomes.

18. A recent example of a case where there was a split trial on liability and quantum where the liability phase turned primarily on what loss was caused is *Todd-v-Chelvam* [2016] SC (Bda) 106 Civ (2 December 2016). In this case it was effectively common ground that a breach of duty had occurred but disputed that any material damage flowed from the breach. The main controversy at the trial on

liability, with expert evidence deployed on either side, was whether the breach of duty made the plaintiff's pre-existing medical status any worse. I summarised the outcome in that case in the following terms:

> "*29. The Defendant breached his duty of care to the Plaintiff by failing to diagnose what his expert Mr Dyson described as a diagnosis which was "only obvious in hindsight". This occurred in relation initial presenting symptoms so unusual that Dr Chelvam would likely encounter them only "once in a career". This delayed the successful operation which the Plaintiff eventually had in London by no more than 10 days. The Plaintiff primarily complained of damage in the form of a substantially reduced recovery outcome. No such damage was proved. However, it was self-evident that the Plaintiff sustained additional pain and suffering through the duration of the additional time spent awaiting surgery.*"

19. Had the Defendant in the present case wished to make the trial on liability a trial about whether or not the Plaintiff could prove liability for complex PTSD, this approach could have been achieved through either without prejudice save as to costs correspondence or by admitting breach of duty and liability for a lesser injury at the outset. However, the present claim was in Bermudian terms a novel one and a claim with 'political' sensitivities. Not only was the damage complained of somewhat intangible. The very notion of admitting any liability for even minor harm caused to a teacher in a Government School by virtue of a negligent failure to maintain a safe place and/or system of work may well have seemed unpalatable to the Defendant's key actors. Accordingly, liability was vigorously disputed altogether, without exercising the option of admitting liability for a minor injury and denying liability for a more serious injury so that the trial became 'all about PTSD'. It is far too late for the Defendant, at the costs stage of a split trial on liability and quantum, to effectively seek to rewrite the entire litigation script he has helped to write since 2009. The present trial on liability was just that: a trial on liability with breach of duty and causation of damage both in issue. The causation of damage defence had two strings to its bow, each of which the Plaintiff 'broke':

    (1) the Defendant denied causing any injury; and

    (2) the Defendant denied that any injury was reasonably foreseeable.

20. The Plaintiff here succeeded on all disputed essential limbs of her main cause of action but simply failed to establish (for liability purposes at least) the primary injury of which she complained. The preponderance of the evidence called on

both sides was related to breach of duty and causation of loss, with the Defendant electing from the outset not to challenge the Plaintiff's evidence in relation to "*exacerbated hypertension*", the very first injury pleaded under her Particulars of Loss. The Defendant's 'Submissions on Costs' appear to complain that the Court misled counsel by indicating at the end of Ms Adhemar's evidence (on September 8, 2016) that it appeared that the Plaintiff could not succeed if she could not prove her complex PTSD injury, almost by way of arguing an appeal against my central factual findings. This was simply the expression of what in hindsight was a wholly erroneous provisional view, not a formal binding interlocutory ruling. My own failure to appreciate an important evidential aspect of a litigant in person's case before reserving judgment can have no bearing on the present analysis as to the allocation of costs.

21. The proven injury was addressed by the Plaintiff in her pleadings and her written evidence and was neither positively challenged by the Defendant in its written evidence prior to trial, nor by way of cross-examination during the trial. The Plaintiff gave evidence on May 16 and 17 and was then recalled on August 15, 2016 at the Defendant's request. This extended cross-examination was largely used to pursue what I would ultimately find to be red herrings. The Defendant cast his die on this issue long before I expressed the views complained of on September 8, 2016.

22. The easiest way of demonstrating that the trial primarily related to the overlapping issues of breach of duty, causation of damage and reasonable foreseeability of damage is by reference to the number of witnesses who testified primarily on matters unrelated to the complex PTSD injury:

    (a) **Plaintiff**: three out of four live witnesses and three out of four witnesses whose statements were read into evidence. Only Ms Adhemar was primarily called to deal with PTSD and only her father's witness statement did not deal primarily with breach of duty;

    (b) **Defendant**: most of the nine live witnesses and all 13 of the witnesses whose statements were read in dealt primarily with breach of duty, namely whether or not the Plaintiff had been treated in a way which placed her health at risk or, more broadly still, in an inappropriate manner at all. Many of these witnesses noted in passing that she made no complaints about stress or psychological injury. Only a minority (e.g. Mr Osborne, a rebuttal witness, Ms Cariah and Mr Jackson) primarily addressed the 'no complaints about psychological injury' issue. Even these witnesses were also relied upon for the wider purpose of contending that the Plaintiff's allegations that she was genuinely

traumatised by her working experience at CBA should be rejected as mere fabrication.

23. Finally, I reject the broad submission that because the most hyperbolic aspects of the Plaintiff's pleaded case were rejected this means that she did not win overall. Bearing in mind that the Defendant was effectively the Crown with the Minister of Education being the responsible Minister, it matters not in terms of outcome precisely how the duty of care was breached. Which allegations were proved and which were not are matters properly to be taken into account when considering whether a disproportionate amount of time was spent on issues which the Plaintiff ought not to have pursued. The Defendant's Submissions on Costs (at paragraph 3) also imply that the Plaintiff's negligence claim as a whole succeeded "*very narrowly*" by reference to paragraph 83 of the Judgment, which deals with the home-room assignment incident which did not in and of itself form the basis of the successful claim. The two subsequent incidents which I found involved a breach of duty which caused actionable damage were not based on similarly marginal findings.

24. The Plaintiff clearly won overall by establishing that her employer, primarily through three signature events, breached the duty to provide a safe place and/or system of work in relation to her. She proved that reasonably foreseeable physical damage was caused by two of those three events and that the working environment was generally (between 2000 and 2006) an unusually stressful one. The Defendant denied any wrongdoing and denied causing any reasonably foreseeable damage or injury. This was far from a "technical" victory. This was success in 'real life' terms.

Findings: should the Plaintiff's costs be proportionately reduced?

Costs relating to the PTSD injury: should the Plaintiff pay the Defendant's costs because of her own misconduct?

25. It is obvious that, if she had been legally represented, the Plaintiff's costs relating to the psychological injury would have to be disallowed and that she would probably be ordered to pay the Defendant's costs on this issue. She knew or ought to have known that although Ms Adhemar was willing to express an informal opinion in a letter, she was unwilling to give expert evidence at a trial. A lawyer would have known that the letter had no evidential value unless it was agreed and that this aspect of the claim would have to be abandoned or another expert found.

26. That punitive costs consequence (applying Order 62 rule 10(1)) is inappropriate in the unusual circumstances of the present case for two reasons. First, when the Defendant served its expert report from Dr Brownell in the prelude to the trial, it appeared that there was substantial common ground between the experts and that

only a nuanced difference existed as to whether the label complex PTSD could be applied to an injury caused by something less traumatic than the equivalent of a soldier being shell-shocked by military combat. It was reasonable for the Plaintiff as a litigant in person to believe, as she clearly, did expressing surprise when the Defendant elected not to call Dr Brownell, that she could have established some form of psychological injury through his evidence even if Ms Adhemar did not testify. The Defendant has thus far been quite fortunate that, due to the Plaintiff's impecuniosity, she was unable to afford either a lawyer or to retain a psychological expert specialising in diagnosis of psychological injuries and, as a result, unable to have a reasonable shot at substantiating this aspect of her claim[2].

27. It may still conceivably be possible for the Plaintiff to adduce further evidence of psychological injury for the purposes of her quantum claim as the psychological injury issue has arguably not been actually decided for all purposes by the liability Judgment. The doctrine of issue estoppel applies to different phases of a split trial and the test for deciding whether or not a point can be 'reargued' has been defined by Rimer J in *Pirelli Cable Holding NV-v-Commissioners for HM Revenue and Customs* [2007]EWHC 583(Ch) as follows:

> "*60…If the claimant succeeds on liability, it is potentially abusive for the defendant to seek to raise on the inquiry as to damages a point which goes to liability and which he could and should have raised at the liability trial….*"

28. It is far from clear that the PTSD injury necessarily relates to liability in the present case. Account must also be taken of the fact that any time wasted through actually examining Ms Adhemar was not attributable to the Plaintiff but the Court. After the trial started the Plaintiff indicated that Ms Adhemar was initially unavailable and then unwilling to testify because she did not have the requisite qualifications. The Plaintiff effectively signified that she did not propose to call her expert after all. I directed the Plaintiff to inform Ms Adhemar that if she did not attend she would be subpoenaed. It is quite clear that, left to her own devices, the Plaintiff would not (at the end of the day) have called her at all. Had the Plaintiff been legally represented, I would not have intervened in the conduct of her case in such a proactive way.

29. Ms Adhemar was in fact accepted as an expert, because I found she was obviously qualified to give expert evidence on psychological matters generally (and trauma in particular) even if she was unwilling to offer a formal diagnosis of the Plaintiff's condition. In light of her evidence-in-chief, she did not have to be cross-examined at all unless the Defendant was concerned that her evidence

would be relied upon to support some injury other than PTSD. Her evidence did form part of the backdrop of the Plaintiff's successful claim as I accepted Ms Adhemar's evidence that the Plaintiff was genuinely emotionally upset by the work-based experiences of which she complained to various professionals over the years. This supported the Plaintiff's own evidence that she suffered elevated blood pressure after two particularly stressful events. I concluded my findings on the causation of damage issue as follows:

> "*65. Bearing in mind that that the Plaintiff visited her doctor for work-related anxiety as early as 2003 and was prescribed medication for anxiety and hypertension in 2004 at a time when the Plaintiff could not conceivably have been contemplating the present litigation, I reject entirely the Defendant's suggestion that she is a malingerer who has deceived a series of doctors and an experienced psychologist over the years. I accept Ms Adhemar's expert opinion that are strong grounds for suspecting that the Plaintiff suffers from complex PTSD as a result of work-related stress. But I am unable to find that she actually sustained any such injury because there is no expert opinion evidence before the Court capable of supporting such a finding.*
>
> 66. *In summary I find that the Plaintiff has established that she suffered a physical illness (elevated blood pressure or hypertension) from which she suffered between 2004 and 2006.*"

30. My crucial finding was in effect not that the Plaintiff's evidence was considered and found wanting but that no evidence on the PTSD injury had been adduced at all with a view to establishing liability. Accordingly, I find that there are no grounds for ordering the Plaintiff to pay the Respondents' costs of the PTSD issue under Order 62 rule 10(1), nor do find grounds for disallowing all of her costs relating to this issue. This finding is without prejudice to taking into account the extent to which the costs recovered by the Plaintiff ought to be reduced to reflect the proportion of time expended on a significant issue which was not ultimately pursued and/or supported by the requisite expert evidence.

Should the Court make a punitive costs order because of the Plaintiff's correspondence with the Head of the Civil Service during and after the trial?

31. It was clearly inappropriate in a general sense for the Plaintiff to be writing to the Head of the Civil Service in the middle of the trial inviting him to take disciplinary action against an important witness in the case, Ms Kalmar Richards. The first letter was dated September 7, 2016 and was copied to the Acting Governor. It referred to a Royal Gazette article on the present case, quoted a

portion of Dr Jo Blase's evidence and implored the Head of the Civil Service to "*consider placing Kalmar Richards on leave pending the outcome of the proceedings*".

32. This letter (emailed on the evening of September 7, 2016) was written in the midst of Ms Adhemar's evidence when it had first become apparent (following the Psychologist's initial evidence on September 6-7 2016 and the Court's reaction to her testimony) that (a) she was unwilling to give a formal diagnosis of the Plaintiff's position, and (b) that the absence of her evidence might (based on my now found to be erroneous provisional views) be fatal to the Plaintiff's case. It was only three weeks after the Plaintiff had been recalled to be cross-examined quite aggressively, it being suggested that she had fabricated her psychological symptoms, with questions extending to her supposedly active social life (with a view to suggesting she could not possibly have any psychological problems) and (quite irrelevantly and improperly) her sexual orientation as well. Ms Richards' own evidence had been completed (she initially testified on May 18-19 and had been recalled on August 15, 2016). Only one peripheral Defence witness remained to be called who was not in the Defendant's employ. The letter was not drawn to the attention of the Court until after Judgment so it had no direct impact on the liability phase proceedings.

33. Dr Binns responded to the Plaintiff on November 19, 2016 indicating that his suspension powers could only be exercised in the context of disciplinary proceedings. This was after judgment had been handed down on November 14, 2016. The second communication was a follow-up email from the Plaintiff requesting a meeting to discuss the matter further in light of the Judgment in her favour and its findings. On the face of it Dr Binns' position seems legally correct so it is difficult to see what impact the Plaintiff's correspondence could have had in terms of pressurizing the Defendant to settle the case as the Defendant argued. The first communication had no <u>actual</u> impact on the integrity of the proceedings and was unlikely to result in disciplinary action against Ms Richards as the proceedings were widely publicised, had been pending for several years and Dr Blase's evidence could hardly justify disciplinary action before the trial had even ended. The second follow-up communication had more theoretical potential for triggering disciplinary action against Ms Richards because the Plaintiff was invoking the findings reached in the Judgment, but it seems inconceivable that the Plaintiff's partisan representations would have the slightest effect on an objective assessment of whether disciplinary action was required. So there is no or no credible suggestion that any actual impact on the conduct of the proceedings occurred, which was the suggested motivation for the letter.

34. I find no sufficient connection between the Plaintiff's communications and the proceedings to justify a costs penalty under Order 62 rule 10(1). The only authority which the Defendant's counsel invoked was a case where a defendant

merely sought an order restraining the plaintiffs (who were legally represented) from communicating directly with the defendants or third parties about the matters which formed the subject of the litigation. In *Harold Darrell and Hardell Entertainment Ltd-v- Bank of Bermuda Ltd* [2000] Bda LR 70, L.A. Ward CJ concluded (at page 3) as follows:

> "*After deep consideration I am not satisfied that the communications of the Plaintiffs with the directors and senior executive officers of the Defendant create a serious risk that the course of justice might be interfered with. I do not think that they are likely to be persuaded to settle the claim merely because of what the Plaintiffs wrote to them. The appeal to the Minister of Finance falls into a different category and is an invitation to him to take into account irrelevant matter in arriving at a particular decision concerning the Defendant so as to force the Defendant to be more responsive to the Plaintiffs' claims.*
>
> *I therefore direct the Plaintiffs to desist forthwith from communicating with potential witnesses who are not parties to the action with the intention of persuading such persons to bring pressure to bear on the Defendant to settle the Plaintiffs' claim. The Plaintiffs having chosen to place the dispute before the courts must allow the judicial processes to work."* [Emphasis added]

35. Although no harm was done by the Plaintiff's communications with the Head of the Civil Service, it does in a general sense undermine the integrity of legal proceedings if the parties are pursuing covert collateral remedies of this nature. It is conduct which could potentially amount to a contempt of court. Of the Court's own motion, I direct the Plaintiff to desist from communicating with third parties about the matters which form the subject of the present proceedings while her case is still pending before the courts.

Reduction of costs by reference to allegations which were not proved

36. The Defendant made some sweeping assertions about incurring costs to defend allegations which were not proved which do not withstand careful scrutiny. For example, reference was made to paragraphs 88, 107, 123, 124, 132 (allegations of fraud), paragraphs 100, 250, 259 and 278 (allegations of criminal acts) and 287 (CBA accused of theft), and the following assertion made: "*The Defendant was required to defend these issues in preparation of its Defence and at trial and did so successfully*". I find that:

    (a) the allegations of "fraud" in relation to the supposed alteration of the Plaintiff's evaluation in July 2004 were on their face wholly irrelevant to the Plaintiff's causes of action and not allegations which the

Defendant had to defend. If fraud was alleged and had to be proved in the legal sense, the allegations were wholly un-particularised and liable to be struck-out on that ground. No findings were even made in relation any alleged fraud. The main complaint was that the evaluation was unfair and caused the Plaintiff harm and this allegation was proved;

(b) the allegations of a criminal act and theft being committed by the Defendant clearly related to the car-towing incident. The Defendant's witness Mr Ross Smith admitted that immediately after the incident the view was formed that no lawful authority to remove the car existed. He insisted that later he was advised this initial view was wrong. Again, whether or not the removal was illegal was wholly irrelevant to the Plaintiff's central complaint (and her causes of action). The Plaintiff moreover succeeded in proving that the car-towing incident breached the employer's duty of care and caused her harm. No findings were made on the criminal law dimensions of the incident.

37. The submission that the Defendant succeeded on the allegations related to workplace bullying had more merit to it but again requires careful consideration. The main findings that the Court made were that (1) 'workplace bullying' appeared to be a term developed in the context of US jury litigation and was an inappropriate way of framing the relevant causes of action, and (2) in any event, the Plaintiff failed to prove that she was subject to treatment sufficiently egregious as to deserve the very pejorative label 'workplace bullying'. The Defendant did not even bother to call its own expert on workplace bullying. The Plaintiff's expert evidence was not rejected altogether, however. It was accepted as lending credence to the Plaintiff's complaints in a general sense:

> "*75.I find Dr Blase's evidence to be of general assistance in demonstrating that the matters of which the Plaintiff complains are not inherently improbable or unforeseeable because they have been used by American teachers as a basis for legal actions against their employers in the past. The term 'workplace bullying' seems inappropriate and overly pejorative for the present legal and factual context and conveys an image of far more harsh managerial conduct than the complaints which the Plaintiff has actually established or made out...*"

38. There was in reality no coherent 'workplace bullying issue' and at least three of the incidents relied upon by the Plaintiff as instances of 'workplace bullying' were accepted by the Court as proving a breach of duty even if only two were found to have caused actionable damage. The Plaintiff relied on various acts, incidents

and/or courses of conduct as supporting her two causes of action and the only question which is relevant to the allocation of costs is whether any particular factual elements of her claim which she failed to prove consumed so much time and effort that the Plaintiff's own costs recovery should be proportionately reduced. Examples of potentially relevant complaints pleaded in the RASC which were not substantiated at trial include:

- the failure to respond to the March 14, 2011 letter (paragraph 18);
- complaints about an evaluation by Dean Foggo (paragraph 20 *et seq*);
- complaints in relation to how the Camille Chase incident was dealt with (paragraphs 29-34);
- generalised complaints about 'mobbing' and dictatorial management style (e.g. paragraphs 43, 48), 'destructive criticism' (e.g. paragraphs 55-56), flawed management of the instruction of special needs students (e.g. paragraphs 61-65, 101-103) and 'malevolent workplace abuse' (paragraph 282).

39. These were all, even cumulatively, comparatively minor matters but the prolixity of the Plaintiff's pleading and evidence undeniably placed an excessive responsive burden on the Defendant in respect of matters which were largely peripheral. The Defendant did of course successfully address many of these issues through positive evidence, even though it was never likely that the Court would directly decide the merits of the competing theories of classroom management as regards special needs students. It was after all common ground that vigorous differences of opinion existed on these topics and that this conflict formed the background to the breaches of duty which occurred. It was also ultimately common ground and/or I found that CBA was extremely stressful during the period in question with staff unrest at times. The Plaintiff as an advocate for systemic change, I found, attracted greater scrutiny[3]. The evidence which ultimately supported the Plaintiff's case was often closely intertwined with evidence which undermined the aspects of the case which were not proven. The evidence in relation to the psychological injury which did not support a finding that the Plaintiff had suffered a serious psychological injury was closely linked to the Plaintiff's successful case that she was genuinely extremely distressed by working conditions and as a result of the Defendant's negligence suffered a stress-related injury. The same reasoning applies to the intentional infliction of harm claim. It is almost impossible to identify any evidence or submissions which did not overlap with the negligence claim.

[3] For the avoidance of doubt I reject the submission that I made findings of contributory negligence which should be reflected in the costs apportionment.

40. On balance, I would assess the proportion of the Plaintiff's costs which it would not be just for the Defendant to bear at 10% overall.

Costs implications of the conduct of the Defence at trial

41. The Plaintiff invited the Court to take into account the unreasonable manner in which at least part of the trial was conducted. This was because I made the following observations in the Judgment:

> "*101…The capacity of the Defendant to take retaliatory action when under attack was most chillingly demonstrated in the course of the trial when Mr MacDonald (a) purporting to have taken instructions from disgruntled evicted former tenants of the Plaintiff, sought to embarrass the Plaintiff by cross-examining her about wholly irrelevant aspects of her private life and (b) suggested that all of the Plaintiff's problems at CBA were attributable to her being unable to teach. The reiteration of the second line of argument in closing submissions prompted the Court to query whether it was necessary for the defence of a claim alleging institutional bullying to be conducted in such a bullying manner*."

42. Prior to the trial, Mr Taylor conducted the Defence in a proportionate and sensitive manner consistent with the fact that the Plaintiff was a litigant in person complaining of having sustained stress-related injuries as a result of an abusive working environment. At a pre-trial hearing in 2015, he seemingly accepted my encouragement to explore with the Defendant the possibility of settlement when it seemed difficult to see how the Defendant could avoid liability for causing damage based on apparently substantial agreement between Ms Adhemar and Dr Brownell that the Plaintiff was suffering from an anxiety-related disorder as a result (in part at least) of her CBA experience[4]. I also expressed concern about the implications for the professionals involved on the Government side of publically airing the on any view unattractive issues raised by the present litigation. Having regard to the fact that the Plaintiff was a litigant in person and the emotive nature of the litigation, it was in hindsight unrealistic to expect the parties to be able to negotiate an out of court settlement, certainly without deploying peace-making mediation efforts on a Nobel Peace Prize-winning scale . In the event, not only did any settlement overtures which were made fail to bear fruit. New lead counsel

[4] In his August 24, 2015 Report, Dr Brownell stated that he believed "*she suffers from an anxiety disorder brought about because of a mix of conditions that emerged in the process…I would not quibble with other professionals who prefer the diagnosis of PTSD (but not complex PTSD, because technically that diagnosis does not even currently exist…)*" He also implied that there was a need to more fully investigate the Plaintiff's history because other causes may have contributed to her post-CBA condition. The fact that Dr Brownell was not called and his Report was not formally entered into evidence at trial is immaterial for present purposes.

appeared at trial for the Defendant apparently briefed to adopt a 'take no prisoners' approach.

43. The governing principle of civil justice as expressed in the overriding objective (Order 1A/1(2)(a)) is "*ensuring that the parties are on an equal footing*". Not only is the Court duty bound to maintain a level playing field. Order 1A/3 provides: "*The parties are required to help the court to further the overriding objective.*" This imposes almost insuperable difficulties on both the Court and counsel in cases where one party is a litigant in person. The challenges are magnified when there is not only an inequality between the parties by virtue of one party being legally represented, but when one party is manifestly more powerful than the other. In such circumstances the lot of the Government lawyer is not a happy one. He is charged with vigorously contesting unambiguously hostile litigation brought by an ordinary citizen of modest means; yet he is also bound by the Rules to assist the Court to ensure the parties are on a level footing. Reasonable allowances must, of course, be given to counsel[5]. On any sensible view nonetheless, deploying aggressive litigation tactics on behalf of the State against a claimant appearing in person and alleging stress-related injuries from workplace abuse is a very high-risk strategy indeed. I am guided the principles discussed in *Siegel-v-Pummell* [2015] EWHC 195(QB), a case upon which the Plaintiff relied where Wilkie J held as follows.

> "*9.The Court of Appeal has declined to define the circumstances in which a court could or should make an order for costs on the indemnity basis. In Excelsior Commercial and Industrial Holdings v Salisbury Hamer Aspden and Johnson [2002] EWCA Civ 879 Lord Woolf, the then Lord Chief Justice, at paragraph 30, cited a judgment of Simon Brown LJ in Kiam v MGN Limited (No. 2) [2002] 2 All ER 242 who, at paragraph 12, had said:*
>
> > *'I for my part, understand the court there to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under Part 44 (unlike one made under Part 36) does I think carry at least some stigma. It is of its nature penal rather than exhortatory. ..."*
>
> *10. Lord Woolf at paragraph 32 said, in addition, as follows:*

[5] For instance, although I was not impressed with counsel's initial reluctance to accept my ruling on the admission of Ms Adhemar as an expert at the time, on reflection that minor 'clash' deserves to be treated as simply part of the hurly-burley' of hard-fought litigation.

> *'... there is an infinite variety of situations that can come before the courts and which justify the making of an indemnity order. ... I do not respond to Mr Davidson's submission that this court should give assistance to lower courts as to the circumstances where indemnity orders should be made and circumstances where they should not. ... This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement.'*

11. In the same case, at paragraph 39, Lord Justice Waller said:

> *'The question will always be: is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?"*

12. In Fitzpatrick Contractors Limited v Tyco Fire and Integrated Solutions (UK) Limited [2008] EWHC 1391 (TCC) Mr Justice Coulson, at paragraph 3 subparagraph iv, said as follows:

> *'Examples of conduct that have led to such an order for indemnity costs include the use of litigation for ulterior commercial purposes ... and the making of an unjustified personal attack on one party by the other ... "*[6]

44. In my judgment, taking into account the distinctive factual matrix of the present case in particular the nature of the successful claim and the disparate power relations between the parties, the conduct of the Defendant's case at trial crossed far over the reasonableness line in the following respects:

    (1) it was unreasonable to advance a positive case that the Plaintiff was a malingerer and had invented her psychological problems for the purposes of litigation, particularly since the Defendant himself had served and filed an expert report which agreed that the Plaintiff probably had psychological problems and merely disagreed on the label to attach to the relevant injury;

[6] This was a case where one expert witness attacked an opposing expert witness and indemnity costs were awarded in respect of a specific hearing.

(2) it was unreasonable to advance a positive case that the Plaintiff was an incompetent teacher when this did not form part of the Defendant's pleaded case and the Defendant's own evidence made it clear that the Plaintiff's main clashes with the CBA Administration related to alleged non-compliance with administrative policies rather than pedagogical shortcomings[7];

(3) it was unreasonable to fail to recognise that the Plaintiff was at least a potentially vulnerable witness and to cross-examine her accordingly;

(4) it was unreasonable in the social context of Bermuda, and stunningly so, to question the Plaintiff , a middle-aged black Bermudian professional woman, about her sexual orientation when this had no conceivable relevance to the facts in issue[8].

45. I find that the Plaintiff should be awarded her costs from the commencement of the trial until the present Ruling on an indemnity basis to reflect the strong disapproval of the Court.

Summary

46. The Plaintiff is awarded 90% of her costs of the action to date, which encompasses the trial on liability which she has won overall to be taxed (if not agreed) and paid forthwith. The 10% deduction is to take into account the fact that the Defendant succeeded in defeating the largely overlapping intentional infliction of harm claim and had success in rebuffing a variety of allegations advanced by the Plaintiff including her psychological injury claim.

47. The costs from the commencement of the trial until the date of the present Ruling are awarded to the Plaintiff on an indemnity basis because of the improper way in which the Defendant conducted significant aspects of his unsuccessful defence. The earlier costs are awarded on the standard basis.

[7] I regarded the surprising evidence of Mr Osborne that the Plaintiff (who was quite articulate in Court) was unable to correctly sound out words phonetically in a Primary School setting as corroborative of her testimony that by this stage she was in an emotionally fragile state when in a classroom setting. I made no formal findings on this in the Judgment, however.

[8] I was myself so discombobulated that the Plaintiff denied being a lesbian before I was able to rule the question impermissible on relevance grounds. I consider it to be a notorious fact that most, older black Bermudians have traditional and conservative views on sexual matters and as a result would find having their sexual orientation questioned in a public forum to be deeply embarrassing at best and humiliating at worst.

48. I will hear the parties if necessary on any matters arising from the present Ruling.

Dated this 19th day of December, 2016 _____

IAN RC KAWALEY CJ