In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No 182

IN THE MATTER OF
SECTION 30A OF THE TRADE UNION ACT, 1965

AND IN THE MATTER OF
THE BERMUDA CONSTITUTION ORDER, 1968

BETWEEN:-

(1) EDWARD E. BENEVIDES
(2) EARLSTON EUGENE FRANCIS
(3) ZOE ELIZABETH MULHOLLAND
(4) LINDELL ASHRETTA CHARMEE FOSTER

Plaintiffs

-and-

(1) THE ATTORNEY GENERAL
(2) THE CORPORATION OF HAMILTON

Defendants

RULING AS TO COSTS

(In Court)

Date of hearing: 22nd May 2014
Date of judgment: 12th June 2014

Mr Saul Froomkin, OBE, QC, Isis Law Ltd, for the Plaintiffs

Mr Gregory Howard, Attorney General's Chambers, for the First Defendant

Ms Juliana M Snelling and Ms Alsha Wilson, Canterbury Law Ltd, for the Second Defendant

1. On 28th March 2014 I gave judgment in favour of the Defendants. This is a ruling on the question of costs, which were the subject of a separate hearing.

2. The normal rule is that costs follow the event. See Order 62 rule 3 of the Rules of the Supreme Court 1985. That means that the unsuccessful party will normally be ordered to pay the costs of the party which has in common sense or "real life" terms succeeded. See, for example, Kentucky Fried Chicken (Bermuda) Ltd v Minister of Trade and Industry (Costs) [2013] Bda LR 34 SC at para 14.

3. However costs lie in the court's discretion. That discretion must be exercised judicially. The court may in its discretion depart from the normal rule, but the grounds for doing so must be connected with the case. They 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. See Scherer v Counting Instrument Ltd [1986] 1 WLR 615 EWCA at 621 F.

4. In the present case it is not disputed that in common sense or "real life" terms the successful parties were the Defendants. However Mr Froomkin QC, who appears for the Plaintiffs, invites me to depart from the normal rule and order that each party should bear its own costs. His arguments may be distilled into three submissions.

5. First, Mr Froomkin submits that it is the Defendants who were responsible for the situation: the First Defendant, because the Acting Director of the

Department of Labour and Training certified the Bermuda Public Service Union ("BPSU") as the exclusive bargaining unit for the non-unionized employees of the Second Defendant; and the Second Defendant, because it supported the application for certification and subsequently entered into a collective bargaining agreement with the BPSU in which the Second Defendant confirmed that it recognised the BPSU as the sole bargaining unit for the said employees.

6. There is force in this submission insofar as it relates to the First Defendant; less force insofar as it relates to the Second Defendant. Following the election of a new Board in 2012 the Second Defendant made its change of position on the validity of the certification very clear by declining to renew the collective bargaining agreement when it expired in December 2012.

7. Second, Mr Froomkin submits that the Plaintiffs were entitled to assume the validity of the certification. He invokes, if you will, a presumption of regularity. But the Plaintiffs could not reasonably have assumed that the Court would infer validity from the mere fact of certification. The Court, once seised of the matter, would be bound to consider it on its merits.

8. There were in fact strong reasons for doubting that the certification was valid. It was inconsistent with section 30A(2) of the Trade Union Act 1965 ("the 1965 Act"), which defines "*bargaining unit*" as excluding "*management persons*". The validity of the certification therefore depended upon the definition of "*bargaining unit*" in section 30A(2) being void for inconsistency with section 10 of the Constitution in that it hindered the Plaintiffs in their freedom to belong to a trade union by prohibiting them from becoming members of a bargaining unit. That in turn depended upon there being a constitutionally protected right to collective bargaining ("the constitutional issue"). The decision of the Privy Council in Collymore v Attorney General [1970] AC 538 cast, to put it no higher, significant doubt on the existence of such a right.

9. Confronted with this situation, there were various courses open to the Plaintiffs. They could have accepted that the certification was invalid and chosen not to litigate the matter. Alternatively, they could have accepted that Collymore was fatal to their claim, and sought a formal ruling from the Court on that basis, but with a view to appealing that ruling ultimately to the Privy Council, where the correctness of Collymore could be argued. In the event, they chose to try and distinguish Collymore. That was a legitimate litigation strategy, but it is not a good reason why the Plaintiffs should not have to pay at least the Second Defendants' costs.

10. Third, Mr Froomkin relies on the background which gave rise to this litigation. The BPSU issued a 21 day notice of industrial action against the Second Defendant. The notice was expressed to arise in part from the Second Defendant's failure to recognise the certification of the BPSU as the legitimate bargaining agent for the Second Defendant's managerial and administrative group of employees, including the Plaintiffs. The Minister of Home Affairs declared that a labour dispute existed between them and, pursuant to section 11 as read with section 5 of the Labour Disputes Act 1992 ("the 1992 Act"), referred the dispute to the Labour Disputes Tribunal ("the Tribunal").

11. However, under section 15 of the Bermuda Constitution, jurisdiction to determine whether a fundamental right protected by the Constitution has been contravened, and hence whether there was a constitutionally protected right to collective bargaining, lay solely with the Supreme Court and the Court of Appeal. The Tribunal would have had no jurisdiction to consider the issue. Therefore, if the labour dispute was to be resolved through the court and tribunal system rather than through industrial action, then, one way or another, the constitutional issue would have had to be brought before the Court.

12. In those circumstances, Mr Froomkin submits, the Court should adopt the same approach towards costs as the Tribunal would have done. The best evidence before the Court, which included information helpfully supplied at the Court's request by the Tribunal's Chairman, was that, although they have jurisdiction to do so under section 15 of the 1992 Act, Labour Disputes Tribunals seldom make orders for costs. Neither, Mr Froomkin submits, should the Court. The underlying policy justification would be to encourage parties to labour disputes to settle their differences peacefully through the courts and tribunals system so as to avoid industrial action, which is disruptive to the economy. The prospect that an order for costs would likely be made against a party should that party prove unsuccessful may, it is submitted, discourage parties from following this route.

13. I was initially attracted by this line of argument, but upon reflection I find it less persuasive. The decision to refer a labour dispute to a Tribunal rests with the Minister, not the parties. In any case, the Court is not a Tribunal. If the successful party was unlikely to recover its costs, that too might discourage parties to industrial disputes from litigating their differences. Moreover, the prospect of an order for costs should a party prove unsuccessful is an incentive for a party to consider carefully the merits of its case before going to court. In short, I am not persuaded that the chain of circumstances leading to these proceedings justifies an approach to costs that is any different from that applicable in any other piece of litigation.

14. The First Defendant accepted that as between the First Defendant and the Plaintiffs there should be no order as to costs. Accordingly I shall make none.

15. The Second Defendant submits that as between the Second Defendant and the Plaintiffs costs should follow the event. I find that there is no good reason why I should depart from the general rule, and accordingly I order that the Plaintiffs should pay the Second Defendants' costs on a standard basis, to be taxed if not agreed.

DATED this 12th day of June, 2014

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Hellman J