IN THE JUDICIAL COMMITTEE
ON APPEAL FROM THE COURT OF APPEAL OF
TRINIDAD AND TOBAGO

JCPC/2025/0085

BETWEEN

FAVIANNA GAJADHAR Appellant

and

THE ATTORNEY GENERAL Respondent

RESPONDENT'S CASE

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1. The Respondent respectfully submits that the appeal ought to be dismissed. The Court of Appeal was right to reverse the finding of the trial judge and to find that the Appellant had not been deprived of her property in breach of s.4(a) of the Constitution **[AB 1/EB1280]**. As for the Court of Appeal's decision on costs, it was well within the court's broad discretion as to costs and ought not to be disturbed.

Section 4(a) – deprivation of property

The law

2. The Respondent accepts that delay by the State in paying money to which the recipient is entitled can amount to a deprivation of the recipient's property, within the meaning of s.4(a) of the Constitution, where the delay is inordinate and unreasonable.

3. That proposition derives, in Trinidad and Tobago, from the case of Samuel Friday v Attorney General CV 2021-02843 **[AB 23/EB1902]**, in which the High Court found that delay in paying the pension entitlements of a retired police officer amounted, in the circumstances of that case, to a breach of s.4(a). At paragraph 48 of the judgment **[EB1917]**, the court (Rahim J) held that not every failure promptly to pay such entitlements would amount to a constitutional infringement, but found that in the case before it the delay *"was inordinate and unreasonable in the circumstances"* and that this constituted a breach of the retired officer's property rights under s.4(a).

4. This proposition finds support in the jurisprudence of the European Court of Human Rights in relation to Article 1 of Protocol 1 to the European Convention **[AB 3/EB1315]**. The European Court has ruled that delay by the state in paying sums due, or in enforcing payment, can amount to an interference with the enjoyment of property where the delay is unreasonable or disproportionate[1].

The period of delay

5. The Court of Appeal found, and the Respondent accepts, that the period of delay to be assessed began in April 2021 (lines 33 to 36 [**386**]), the date of the Court of Appeal's judgment in the previous proceedings brought by the Appellant, which concluded with the Court of Appeal [**736**] upholding the judge's decisions of 12 June 2019 (i) to quash the decision of the Public Service Commission (the "PSC") to declare the Appellant to have resigned her office and (ii) to remit the matter to the PSC to reconsider its decision [**760-761**].

6. It is apparent from his findings that the judge was assessing the same period of delay. His findings were directed towards the State's reasons for the delay in calculating and paying the Appellant's arrears after the decision of the Court of Appeal and after the PSC's subsequent decision to permit the Appellant to resume office (see para 23 [**158**] and para 28 [**160**]).

The judge's findings on delay

7. The judge rejected the State's explanations for the delay in paying the Appellant's arrears of salary and benefits and found that the delay was unjustified and unacceptable (para 28 [**160**]); the State's failure to address the arrears *"with dispatch"* breached her rights under s.4(a) (para 29 [**160**]).

8. In support of this overall finding he made certain other specific findings: the State's assertion of the need for an audit of the sums to be paid was likely a delay tactic, designed to prolong the payment process (para 23 [**158**]); the attempt to attribute the

[1] See, for example: Burdov v Russia (No. 2) 33509/04 at para 69 and 70 **[AB 8/EB1495-1496]**; Vladirimova v Russia 21863/05 at para 56 and 57 **[AB 27/EB32039]**; Khachatryan v Armenia 31761/04 at para 69 **[AB14/EB1687]**.

delay to the pandemic was devoid of merit (para 28 [**160**]); the evidence suggested that the system adopted was either grossly inefficient or designed to frustrate the Appellant (para 28).

The Court of Appeal's findings on delay

9. The Court of Appeal found that the basis of the judge's finding of breach of s.4(a) **[AB 1/EB1280]** was his finding that the system adopted was either grossly inefficient or designed to frustrate the Appellant (lines 14 to 19 [**386**]). It rejected this finding and overturned the judge's finding of breach.

10. With regard to the suggestion that the system was designed to frustrate the Appellant, the Court of Appeal found that there was no evidence of a design to frustrate (lines 20 to 26 [**386**]). With regard to the question of gross inefficiency, the Court of Appeal found that the State had recognised that there were errors in the process by which the arrears were computed, but there had not been culpable delay (lines 37 to 39 [**386**]). Concluding, the Court of Appeal found that the length of the delay had not been so egregious as to found a breach of s.4(a) (lines 40 to 41 [**386**]).

Respondent's submission in summary

11. The Respondent respectfully submits that the Court of Appeal was right: it correctly identified errors on the part of the judge; it was entitled to assess whether, in all the circumstances, the delay amounted to a deprivation of the Appellant's property; it made the right assessment in the circumstances (or an assessment that in any event was certainly open to it); and it expressed its conclusion in terms consistent with the test set out above.

The relevant history

12. In order to illustrate the factors material to the assessment, and the errors made by the judge, the Respondent will set out the chronology of relevant events following the Court of Appeal's decision on 1 April 2021 in the previous proceedings brought by the Appellant under claim number CV 2018-01818.

13. The Respondent does not intend, in this written case, to address the previous decisions of the PSC which were the subject of the claims and judgments of the court in claim number CV 2010-00326 (judgments at [**475**] and [**457**]) and CV 2018-01818 (judgments at [**737**] and [**688**]). The matters relevant to this appeal concern the State's actions after and in response to the Court of Appeal's decision in the latter case.

14. The Respondent submits that it is relevant that this history begins at a time when the COVID-19 pandemic began to pose a renewed danger to public health. On 15 May 2021 the government of Trinidad and Tobago declared a state of emergency and imposed a second national lockdown. The state of emergency lasted until 17 November 2021.

15. The Court of Appeal's decision was delivered on 1 April 2021. The result was that the PSC's declaration (pursuant to regulation 49 of the Public Service Regulations **[AB 5/EB1367]**) that the Appellant had resigned was quashed and the matter was remitted to the PSC with a directive that it reconsider its decision in accordance with the findings of the court.

16. The powers of the PSC are given to it by s.121 of the Constitution **[AB 1/EB1282]**: it is given the power to appoint persons to offices in the public service (including the Prison Service) and *"to remove and exercise disciplinary control over"* persons holding such offices. The task for the PSC upon the Court of Appeal's decision, therefore, was to decide whether there was material still before it for a decision under regulation 49 or, if not, whether it should take any alternative disciplinary measures in relation to any unresolved concerns arising from the Appellant's account of her absences.

17. On 15 June 2021 attorneys for the Appellant wrote to the Director of Personnel Administration (the head of the Service Commissions Department which is the administrative arm of the PSC) ("the Director") and the Chief State Solicitor's department to set out the effect of the courts' decisions in claim CV 2018-01818 [**763**]. They asserted that in the circumstances the only means by which the Appellant's term of office could be terminated was by disciplinary proceedings. They called upon the PSC to let good sense prevail and reinstate the Appellant with full

arrears of salary; and if the PSC was not so minded, they called upon it to provide details of its views and a timetable [**767**]. This letter was received by the Service Commissions Department on 10 August 2021 [**711**].

18. The Director replied on 12 October 2021 to say that the PSC's response was delayed as a result of the public health regulations in place [**771**]. Officers in some units were not required to report for duty, which presented a difficulty in recovering files and information housed in various units. The Director said that the Department anticipated being able to process a response once working restrictions were lifted.

19. On 18 March 2022 the Appellant filed a contempt of court application, in the previous proceedings under number CV 2018-01818, to enforce the orders of the court (see para 57 [**445**]).

20. On 29 March 2022 the PSC decided that the Appellant be permitted to resume duty as a prison officer, and that the Commissioner of Prisons should *"appropriately classify [the Appellant's] period of absence"* from June 2007 up to the date upon which she resumed her duties [**831-832**]. In other words, the PSC proposed to treat the period of the Appellant's absence from work as a form of authorised leave.

21. This decision was communicated to the Appellant and the Commissioner of Prisons on 4 April 2022 [**834**][**836**].

22. The Respondent accepts (and accepted before the courts below) that the PSC thus fell into error. When a decision to terminate a public officer's service is found by the courts to have been unlawful, the normal (but not inevitable) result is that the public officer is held to have remained in office, entitled to the remuneration attaching to such office, so long as she remained ready, willing and able to render the service required (see e.g. <u>McLaughlin v Governor of the Cayman Islands</u> [2007] UKPC 50 at [14] et seq.) **[AB 16/EB1707]**. The PSC's decision to treat the Appellant as having been on leave for the entire period of her absence, without further comment as to her entitlement to salary and benefits over that period, raised a doubt over whether the PSC was acknowledging the full effect of the courts' decisions.

23. By a letter dated 22 April 2022, the Appellant's attorneys sent a pre-action protocol letter to the Director, the Chief State Solicitor's department and the Commissioner of Prisons querying the PSC's decision [**776**]. They said that in the absence of an appropriate response the Appellant would file a claim to challenge the PSC's decision *"… to instruct the Commissioner of Prisons to take steps to appropriately classify Ms Gajadhar's leave of absence…"* during the said period [**780**].

24. By the same letter the Appellant made a Freedom of Information Act ("FOIA") request of the same recipients, seeking information as to: the various levels of salary, increments and other benefits that the Appellant would have received had she remained in office; what she would have received had she been promoted; the position, salary and benefits of her contemporary cohort of officers; and the policy and practice relating to the payment of arrears of salary to officers reinstated in her circumstances [**779**][**782**].

25. By a memorandum dated 29 April 2022 the Chief State Solicitor's department advised the PSC that its decision to treat the Appellant as having been on leave was an error, because the effect of the courts' decisions was that she was not on leave; it advised that she should be considered to have been on duty and entitled to her salary and benefits [**850**].

26. On 17 May 2022 the PSC acted on that advice and decided to rescind its decision to instruct the Commissioner of Prisons to classify the Appellant's leave. It communicated this decision to the Commissioner on 19 May 2022 [**858**].

27. On 20 May 2022 the Commissioner of Prisons provided a partial response to the Appellant's FOIA request, providing a list of officers from the Appellant's cohort and giving their current status [**785**]. As to the other requests – the details of those officers' salaries, etc; the Appellant's backdated entitlements; the policy with respect to arrears upon reinstatement – he said that this information was being sought and that the Appellant would be contacted when it was received [**788**].

28. By a letter dated 23 May 2022 the Director wrote to the Appellant's attorneys in reply to the pre-action protocol letter of 22 April 2022 and informed them that the PSC had

decided to rescind its decision to instruct the Commissioner of Prisons to classify the Appellant's leave of absence [**799**].

29. Unfortunately, the Appellant's attorneys did not receive this letter until 9 June 2022 [**800**]. In the meantime, they had issued the present proceedings, on 8 June 2022 [**10**]. They served the proceedings on 10 June 2022, the day after receipt of the PSC's response [**796**].

30. By letter dated 5 July 2022 the Service Commissions Department responded to the Appellant's FOIA request [**802**]. It said that the information requested did not fall within the purview of the Department: the requests for information about the Appellant's comparators, and about salary and benefits over the period since 2007, were matters for the Commissioner of Prisons; and the policy with respect to arrears of salary upon reinstatement was a matter for the Chief Personnel Officer in the Personnel Department of the Civil Service.

31. The claim came up for a CMC on 4 August 2022, at which the court asked that the matter proceed with urgency (see second para of memo at [**902**]). The court directed that the Respondent file its response by 30 September 2022.

32. On 5 August 2022 by a memorandum to the legal department of the Prison Administration [**899**], the Chief State Solicitor's department sought information from the legal department of the Prison Service seeking a breakdown in the salary and other benefits the Appellant would have received had she remained working in the period of her absence, and any opportunities for promotion she may have lost during that period. By a memorandum dated 11 August 2022 [**902**], the legal department forwarded that request to the Senior Superintendent of Prison Administration.

33. By an application dated 30 September 2022, the Respondent sought an extension of time, to 14 October 2022, in which to file some of its evidence in response. In her affidavit in support [**234**], state attorney Anala Mohan informed the court that much of the information requested was archived, and it was taking time for searches to locate accurate and reliable information. She said that the Appellant had consented to

this application on the condition that the Respondent filed at least one affidavit on the original date of 30 September 2022.

34. On the same date, the Respondent filed the affidavit of Martel Waldron, Deputy Director of Personnel Administration, in response to the claim [**804**]. He gave evidence as to the promotion exercises undertaken in the Second Division of the Prison Service during the period of the Appellant's absence (exercises which were the subject of the Board's decision in Gedeon Mahabir v Public Service Commission [2026] UKPC 3) **[AB 9/EB1517]**.

35. On 17 October 2022 the Respondent filed the affidavit of Christopher Vidale, the acting Senior Superintendent of Prison Administration [**882**]. He gave evidence as to the efforts to collate information about the salary and other benefits to which the Appellant would have been entitled during the period 1 March 2005 to 31 December 2022, in response to the request of 5 August 2022, and he set out internal correspondence of 15 September 2022 (para 15 [**887**]) and 12 October 2022 (para 17 [**888**]). He then set out the calculations, made by the accounts department of the Prison Service, of the arrears of salary, other benefits, and increments due to the Appellant (paras 18 to 28 [**888-890**]).

36. The Respondent points out that it is apparent from the worksheets exhibited by Mr Vidale at 'CV8' that they were designed, after preparation by one officer, to be checked and then certified or audited by another, and that checks and certification/audit had not yet taken place: see [**907**], [**915**] and [**919**].

37. After the exchange of evidence there was a further CMC on 1 November 2022, where the Appellant raised the possibility of an interim payment of the undisputed amounts of arrears, in light of the evidence of Mr Vidale. Senior counsel for the Respondent informed the court and the Appellant that before that could be done the sums referred to by Mr Vidale had to be audited (this information is referred to in the Respondent's submissions at first instance para 23(e) [**116**] and before the Court of Appeal para 33 [**211**]). The Appellant's counsel reserved his position on whether he would make an application for interim payment.

38. By the time of the judge's judgment on 26 October 2023, no approval of the sums for payment had been forthcoming and the calculated arrears had not been paid.

39. The arrears (save for arrears of increments and interest) were paid on 31 May 2024, in the sum of $1,572,160.68 (SFI para 21). A breakdown of this sum was provided under cover of a memorandum dated 25 September 2024 [**1199**].

40. The Respondent would make the following two observations about this payment. First, the judge recorded the total arrears (as calculated by the Prison Administration) before all relevant statutorily mandated deductions such as NIS, PAYE and Health Surcharge deductions as $2,821,744.54 [**186**]. The eventual payment above can be seen to be the result of a considerable adjustment for the said deductions. Further, figures for individual items in the Appellant's payslip [**1201**], such as arrears of salary and COLA, are different from those set out by Mr Vidale in his affidavit [**889**] (the calculations are made over the same period: see the worksheets at [**1202**] onwards). The Respondent suggests that it may be inferred that the process of auditing or verifying the initial calculations resulted in different (and more accurate) final results.

41. Second, the payslip identifies the paying party in the Appellant's case as the Ministry of National Security (as it was then known), and the Prison Service as one of the accounting "books" within that Ministry. The relevant accounting officer (for the purposes of the Exchequer and Audit Act and the Financial Regulations under that Act) will have been an officer in the Ministry (in the normal practice, the Permanent Secretary to the Ministry).

Trial judge's errors

42. In light of the history set out above, the Respondent now turns to identify errors made by the trial judge in his criticisms of the State's delay in paying the Appellant.

43. First, the judge was wrong to find that the Respondent's assertion that the sums were subject to audit was *"… likely a delay tactic, designed to prolong the payment process"* (para 23 [**158**]). The judge was entitled to feel and express concern about the fact that the payment to the Appellant had not yet been approved or made as of

October 2023. He was entitled to express a view about the fact that the State had informed him of the need for an audit only via senior counsel and not by way of an affidavit giving a fuller explanation (which would have to be accompanied by an application to adduce further evidence after the extended October 2022 deadline). But the Respondent respectfully submits that these matters did not permit the judge to find that this explanation was being put forward in bad faith.

44. Second, and perhaps as a result, the judge declined to give adequate or fair consideration to the reasons why an audit might be required. The relevant accounting officer would be required to authorise the payment of a very substantial sum of money to the Appellant[2]. The calculation of this sum would require detailed and accurate information, going back over a period of 15 years, as to the basic salary payable to a prison officer of the seniority of the Appellant, all the increments applicable to an increase in seniority and all the (potentially changing) allowances payable to such officers (cost of living, housing, meals, etc.); and it would require accurate calculation of deductions based on historic information as to the applicable income tax rates and thresholds, and the changing rates of National Insurance applicable. Senior counsel for the Respondent summarised these considerations, adverting to the public requirement of fiscal responsibility, in his submissions to the judge (para 23(e) and (f) [**116**]), but the judge simply pronounced himself *"at a loss as to the need for"* an audit and asserted, without more, that all the prescribed statutory deductions were all *"readily ascertainable"* (para 23 [**158**]).

45. Third, the judge erred in dismissing the pandemic as a factor in the delays. He found that significant aspects of the relevant verification and calculation exercises could have been engaged, even if the responsible officials had to work from home (para 28 [**160**]). That might be true once the officials had all the relevant data to hand. But, as is set out above, there was evidence that the early stages of the process had been hampered by the fact that information had been archived, and officials were not attending work in the places where information was stored.

[2] The responsibilities of an accounting officer are set out under Part I of the Financial Regulations made under the Exchequer and Audit Act 69:01 **[AB 4/EB1337-EB1338]**; the process of accounting is governed by Part II of those Regulations; the supervisory role of the Auditor General is set out under Part III of the Act itself **[AB 4/EB1339-EB1340]**.

46. Fourth, the judge was wrong to find that the evidence suggested that the system adopted by the State was *"designed to frustrate the Claimant"* (para 28 [**160**]). The Court of Appeal was correct to say that there was no evidence of a design to frustrate the Appellant's entitlement to her arrears (lines 20 to 26 [**386**]).

47. Fifth, on the question whether the system was *"grossly inefficient"* as the judge put it (para 28 [**160**]), the Respondent respectfully commends and adopts the differing view of the Court of Appeal (lines 37 to 39 [**386**]). As is set out above, the judge wrongly diminished, and failed to appreciate, the complexity of the task of calculation of arrears of salary and the numerous relevant allowances and deductions going back over a period of 17 years. The Court of Appeal was entitled to make its own assessment of (i) whether, in light of the tasks which the various State bodies had to undertake, the delays amounted to evidence of gross inefficiency by the standards of Trinidad and Tobago and (ii) whether this in turn constituted such unreasonable delay as to amount to a deprivation of property.

The Appellant's criticisms of the Court of Appeal

48. The Appellant's case (para 28) has identified four supposed errors on the part of the Court of Appeal:
    1) The Court of Appeal applied the wrong test to determine whether there had been a breach of s.4(a);
    2) The Court of Appeal failed to apply the "plainly wrong" test when overturning the judge's finding that s.4(a) had been breached;
    3) The Court of Appeal wrongly found that the delay in paying the Appellant's arrears did not amount to a breach of s.4(a);
    4) The Court of Appeal misconstrued the starting date of the period, for the assessment of the delay.

49. The Respondent will address each criticism in turn.

First criticism – the wrong test

50. The Respondent respectfully submits that the Court of Appeal did not err in this regard, for the following reasons.

51. The question before the courts was whether the State had deprived the Appellant of the enjoyment of her property. As has been set out above, the Respondent submits that delay in payment can amount to deprivation of property where the delay has been inordinate and unreasonable.

52. The questions the Court of Appeal asked itself – whether the delay was culpable; and whether the delay was so egregious as to amount to a breach of s.4(a) **[AB 1/EB1280]** – were apt to apply the right test.

Second criticism – failure to meet threshold for appellate intervention

53. The Appellant has submitted that a finding of a breach of s.4(a) is fact-dependent, and that the Court of Appeal in effect substituted its own view of the facts for those of the trial judge, thus overturning the judge's findings of fact without considering all of the judge's findings or explaining why they were "plainly wrong".

54. The Respondent accepts that a finding of a breach of s.4(a) is fact-dependent. In each case it is an evaluation, based on all the relevant factual circumstances. The appellate threshold for an evaluative determination is whether it was wrong: <u>Re B (A Child)</u> [2013] 1 WLR 1911 at [44] **[AB 20/EB1826]**.

55. The appellate court does not need to conclude that it was "plainly wrong" (the test for a finding of fact) or that the judge's assessment was one which no reasonable court would make (a test more apt for the exercise of a discretion).

56. The question whether the judge's determination was wrong is judged by standards which depend on the nature of the decision and the decision-making process: <u>ST Dupont v EI du Pont de Nemours & Co</u> [2006] 1 WLR 2793 at [94] **[AB 25/EB1962]** (referring also to <u>Reef Trade Mark</u> [2003] RPC 5 paras [17]-[30]) **[AB 21/EB1881-EB1884]**.

57. In the present case, the judge's evaluation was based upon documented and largely uncontested primary facts but also, importantly, upon a number of relevant supporting inferences and evaluations made by the judge. The judge made his inferences from the written evidence, or lack of it; he did not have the advantage of hearing and assessing oral evidence.

58. If the judge were to make a demonstrable error in a finding or inference material to his overall evaluation, then that would be sufficient to show that the evaluation was wrong. The appellate court would be bound to set aside and reconsider the evaluation.

59. In the present case, as is set out above, the judge made inferences for which there was no evidence, or which were not open to him. In particular, as found by the Court of Appeal, there was no evidence to support a finding that the process adopted by the State was designed to frustrate the Appellant. In addition, as submitted above, there was no evidence which would permit the judge to infer that the State's explanation that an audit was needed was put forward in bad faith to prolong the process. These inferences were highly material to the judge's overall evaluation.

Third criticism – wrong in any event not to find a breach of s.4(a)

60. The Appellant has submitted that, properly assessing the delay of three years in payment of the arrears following the Court of Appeal's April 2021 judgment in CV 2018-01818, the Court of Appeal was bound in any event to find that this amounted to a breach of s.4(a) **[AB 1/EB1280]**.

61. The Appellant bases this submission to a great extent upon the decisions of the High Court in Bernadette Hood-Caesar v Attorney General HCA 3015 of 1987 **[AB 6/EB1414]** and in Samuel Friday v Attorney General CV 2021-02843 **[AB 23/EB1902]**, in both of which a breach of s.4(a) was found after a lesser period of delay or deprivation.

62. Neither of those cases, however, lead to the conclusion that a breach must be found in the different circumstances of the present case.

63. In the case of Hood-Caesar, there was no need to calculate the sums due to the claimant and those in her position, because the sums in issue were known. The Minister of Finance had issued orders purportedly suspending until further notice the entitlements of civil servants to cost of living allowances and annual increase in salary, benefits to which they were contractually entitled. The court found that the Minister had no power to do so and that the claimant had been deprived of the enjoyment of her property without due process of law.

64. In that case, the court's discussion of the length of time for which the entitlement to payment had so far been suspended was in the context of an argument by the Minister that he had the power in an emergency to suspend any payment (p.24) **[EB1437]**. The court dismissed that argument, finding that such a measure could only be a temporary measure, and that the duration of the measures in the present case were acquiring "some degree of permanence" (p.24 to 26) **[EB1437-EB1439]**.

65. In the case of Samuel Friday the sums payable to him, pension entitlements upon retirement, did require ascertaining before they could begin to be paid. But, aside from the different factual circumstances of the claim, it is to be distinguished from the present case because the court found that the delay in that case was caused by a failure on the part of the Commissioner of Police to comply with specific obligations imposed upon him by the Police Service Regulations. Regulation 183 required him to furnish the Comptroller of Accounts with information about officers who are about to retire, not less than three months before the date of their retirement (para 13) **[EB1905]**. The Commissioner's failure to do so was an important factor in the court's decision that, in the circumstances of that case, the delay was not reasonable (para 46) **[EB1916]**.

Fourth criticism – wrong starting date for the period of delay

66. The Appellant has submitted that the period of delay to be assessed should be the whole period since the date the PSC had declared her to have resigned, 21 June 2007. The Respondent submits that this is wrong, for the following reasons.

67. The Appellant's right to arrears of salary was established by the judgments of the courts quashing the PSC's decision to declare the Appellant as having resigned (and confirmed by the PSC's subsequent decision not to pursue the matter further).

68. Until then, the right was in question. The PSC's decision was lawful until set aside. It is true that as a result of the courts' decisions the Appellant has been established as having been entitled to her salary from 2007. But it does not follow that the State thereby becomes culpable for the delay between 2007 and 2021.

69. The propositions that the PSC's decisions in December 2008 and November 2017 themselves deprived the Appellant of property are different propositions and the basis of different claims – claims which could have been but were not advanced by the Appellant in her claims under CV 2010-00326 and CV 2018-01818. They do not form part of the assessment before the judge and the Court of Appeal in this case. The judge, rightly, was focussed on the State's reasons for delay since April 2021.

The Court of Appeal's decision on costs

70. These arguments apply in the event that the Board upholds the Court of Appeal's decision on s.4(a) **[AB 1/EB1280]**. If that decision is overturned, then costs before the Court of Appeal are at large.

71. The Court of Appeal's decision on costs was an exercise of discretion, and it is therefore not one with which the Board will interfere unless the Court of Appeal has made a material error of law or has exceeded the generous ambit within which a reasonable disagreement is possible.

72. The Respondent respectfully submits that none of the grounds advanced by the Appellant amount to a good reason to interfere with the Court of Appeal's decision on costs.

73. First, the Appellant has submitted that she should be treated as the successful party. It is true that the Respondent failed in his other appeal, against the judge's award of damages; but it was well within the Court of Appeal's discretion, given that he had

succeeded on the question of a breach of s.4(a), to make an adjustment which recognised that both parties had achieved some measure of success.

74. Second, the Appellant has submitted that the Court of Appeal failed to take into account the principles expounded in the case of Jogee. But the Court did not act in a way inconsistent with those principles. The Appellant's reliance on the history of previous litigation is misplaced: she has been the beneficiary of costs awards in respect of each previous stage of the litigation; the Court of Appeal's decision was rightly concerned only with the costs of the appeal before it. The suggestion that the State disputed and continued to dispute *"the Appellant's rightful salary"* is wrong: the State accepted her entitlement to arrears of salary and benefits.

75. Third, the Appellant has submitted that while the Respondent's written appeal challenged the award of vindicatory damages, this was not pursued in oral submissions, where the Respondent challenged only the quantum of vindicatory damages. This criticism, even if correct, would lack substance, but it is in fact incorrect: the Respondent's written appeal submissions argued for a lesser award of vindicatory damages, not no award (see para 79 [**229**]). In any event, the Respondent's arguments on vindicatory damages failed and the Court of Appeal took this into account when it treated the Appellant as having been the more successful party.

76. Fourth, the Appellant has submitted that the Court of Appeal failed to take into account the Respondent's failure to comply with the Pre-Action Protocol. There is no substance to this complaint. Compliance with the Pre-Action Protocol might be relevant to costs at first instance, but not to the costs of an appeal.

Conclusion

77. Accordingly, for the reasons above, the Respondent respectfully asks the Judicial Committee to dismiss the appeal.

ROBERT STRANG

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