Hilary Term
[2015] UKPC 3
Privy Council Appeal No 0052 of 2012

JUDGMENT

Alleyne and others (Appellants) *v* The Attorney General of Trinidad and Tobago (Respondent)

From the Court of Appeal of Trinidad and Tobago

before

Lady Hale
Lord Wilson
Lord Reed
Lord Toulson
Sir Patrick Coghlin

JUDGMENT DELIVERED BY LORD TOULSON ON

21 January 2015

Heard on 13 October 2014

Appellants	*Respondent*
Peter Knox QC Ramesh Maharaj SC Robert Strang (Instructed by MA Law (Solicitors) LLP)	Alan Newman QC Anand Beharrylal (Instructed by Charles Russell Speechlys LLP)

LORD TOULSON:

Introduction

1. The Republic of Trinidad and Tobago has a national police service and a number of municipal police services. The appellants are 153 municipal police officers ("MPOs") from the cities of Port of Spain and San Fernando and the boroughs of Arima and Point Fortin. They are employed by their city or borough corporation. The corporations are established and governed by the Municipal Corporations Act 1990. They also fall within the provisions of the Statutory Authorities Act 1966.

2. As a group, the appellants comprise most of the Republic's MPOs. They complain that for over a decade they have unjustifiably been treated less favourably than regular police officers ("RPOs") particularly in terms of their remuneration. They claim that their rights under the Constitution have been violated. They rely on the right of the individual to equality before the law and the protection of the law (section 4(b)); and on the right, subject to qualifications which are not presently material, to such procedural provisions as are necessary for the purpose of giving effect and protection to their constitutional rights and freedoms (section 5(2)(h)).

The legislation

3. The national police service is governed by the Police Service Act 2006, the Police Service Regulations (made under section 78 of the Act) and the Police Service Commission Regulations (made under the 1962 Constitution, but now deemed to have been made under section 129 of the present Constitution). These provide a comprehensive code for the organisation and administration of the police service, including the appointment and promotion of officers, disciplinary procedure, salaries and allowances. Part VII of the Act and Part XIV of the Police Service Regulations contain provisions about police service associations. RPOs are not permitted to join a trade union, but they are permitted to form associations, which are to be recognised by the Minister of Finance as appropriate associations for consultation about remuneration and terms and conditions of employment.

4. Municipal police services are now governed by Part III of the Municipal Corporations Act 1990.

5. Section 60 provides:

> "The Commission may make Regulations providing for the classification of officers in a Municipal Police Service, including qualifications, duties and remuneration and providing generally for the discipline, good order and government of the Municipal Police Services and until such Regulations are made hereunder, Regulations made under the Police Service Act, insofar as the Commission deems them applicable to any matter concerning Municipal Police Services or Municipal Police Officers, shall apply mutatis mutandis."

6. The Commission is defined in section 2 as meaning the Statutory Authorities' Service Commission ("SASC") established under the Statutory Authorities Act.

7. The use of the word "may" in section 60 is readily understandable, because the section provides alternatives. The Commission "may" make regulations and in the interim it "may" apply the Police Service Regulations, insofar as it deems them appropriate. It was obviously envisaged that by one means or the other there should be regulations in place for municipal police services covering the matters identified in the section. At the time of the hearing of this appeal, the Commission had neither made any regulations under section 60 nor deemed any part of the Police Service Regulations to be applicable to municipal police services and MPOs. They remained in a regulatory limbo. This is part of the appellants' grievance.

8. As previously noted, the Police Service Regulations contain provisions for the recognition of a police service association with rights of consultation over the remuneration of RPOs. If after consultation the association and the Minister of Finance are unable to reach agreement, the Police Service Act provides a dispute resolution scheme (sections 30-32). The dispute must be referred to an independent Special Tribunal established under the Civil Service Act. In reaching its award the Special Tribunal is required to be guided by the considerations set out in section 20(2)(a) to (f) of the Industrial Relations Act 1972. These include the necessity to maintain and improve the standard of living of workers. An award of the Special Tribunal is final.

9. For MPOs, the Statutory Authorities Act envisages a parallel scheme for resolving pay disputes, involving a procedural route which is different in detail but serves a similar purpose. Section 14 provides for the President to establish a Personnel Organisation, headed by a Chief Personnel Officer, for the purpose of performing functions given to it under the Act; and that until it is established the

Personnel Department established under the Civil Service Act shall be responsible for those functions. The functions include conducting negotiations over remuneration and terms and conditions of employment with recognised associations of municipal employees. Section 22 provides for disputes between the Chief Personnel Officer and a recognised association to be dealt with in accordance with the provisions of the Industrial Relations Act. Part V of that Act contains a dispute procedure, under which the final decision rests with the Industrial Court.

10. Section 26 of the Statutory Authorities Act provides that the President may make regulations setting out the conditions to be satisfied and the procedure to be adopted for the recognition by a statutory authority of existing or new associations of employees. No such regulations had been made at the time of the hearing of this appeal.

11. The appellants are members of municipal police associations formed to represent the interests of MPOs serving in their respective municipalities. They have conducted or tried to have negotiations with the government, but because the regulations envisaged by section 26 of the Statutory Authorities Act had not been made, they did not have statutory recognition under the Act and so they did not have a right to the statutory scheme of consultation and dispute resolution. Consequently MPOs had no right of access to the Industrial Court through their representative organisations; and they had no right of access to the court as individuals, because RPOs and MPOs are excluded by section 2(3)(b) of the Act from the definition of a "worker".

The MPOs' complaints

12. The absence of a statutory scheme for the regulation of the municipal police services, and the lack of any right of access to an independent tribunal by MPOs through their police associations for the determination of pay disputes, caused considerable concern to the appellants, particularly in the light of events since 2000.

13. Until 2000 MPOs were paid the same basic salary as RPOs. Other allowances paid to MPOs, such as for food and housing, were about 60% of the equivalent allowances paid to RPOs. In 2000, as a result of a job evaluation exercise, the Ministry of Finance agreed to an increase in the salaries of RPOs by incorporating a new service allowance into the basic salary. No such job evaluation has been carried out in relation to the municipal police services, and there has continued to be a significant differential between the basic salaries of RPOs and MPOs. By way of illustration, the basic salary of a corporal in the

municipal services is $325 per month less than a corporal in the regular service, and for an assistant superintendent the differential is $500 per month.

14. In August 2001 the Chief Personnel Officer promised MPOs that a similar job evaluation would be carried out in relation to municipal police services by January 2002, but this did not happen. Representatives of the MPOs have written on repeated occasions to the government pressing their case, but without any effective response. On 18 June 2003 a minister in the Ministry of Finance wrote to Mr Neville Robinson, the president of the Port of Spain municipal police association, informing him that their concerns had been referred to the chief personnel office to determine a possible solution, but nothing more happened. On 4 September 2003 a letter before action was sent to the Prime Minister by 53 MPOs, but it failed to elicit a substantive response, and these proceedings were issued by a notice of motion dated 13 November 2003.

15. In the notice of motion the MPOs advanced three main complaints. They complained that the state had failed to equalise their salaries and associated benefits with those of RPOs (the equal pay complaint). They complained that no regulations had been made under section 60 of the Municipal Corporations Act for the classification of officers in the municipal police services or for the promotion of MPOs, which were dealt with on an ad hoc basis, and that this promoted unfairness, inequality of treatment and arbitrariness (the lack of service regulations complaint). And they complained that no regulations had been made under the Statutory Authorities Act enabling recognition of their associations for the purpose of representing them (the lack of equal right to representation complaint). They contended that in all these respects their constitutional rights to equality before the law had been violated.

16. The notice of motion was supported by affidavits sworn by all the applicants. For the purposes of this appeal, the parties have sensibly agreed that the affidavits of two MPOs, Mr Oswald Alleyne and Mr Robinson, may be treated as representing them all. Their affidavits narrated the facts already summarised and explained the consequences for MPOs of the lack of service regulations for the municipal services, the failure to carry out an evaluation of their jobs, as promised, and the lack of statutory recognition of the municipal police associations as representative bodies with rights of access to the Industrial Court for the resolution of pay disputes.

17. In response, affidavits were sworn by Mr Osborne Ashby, an official in the Ministry of Public Administration and Information who assisted the Chief Personnel Officer in carrying out the functions of the Personnel Department, and Ms Patricia Hypolite, a senior administrative officer with the SASC.

18. In his first affidavit, sworn on 25 February 2004, Mr Ashby said that in 1995 the Chief Personnel Officer began a comprehensive evaluation exercise, which was intended to extend to the entire public service. Because of the scale of the task, the exercise was being conducted in stages. The exercise had been completed in relation to teachers and the police, prison and fire services. The exercise was in its preliminary stages for the Civil Service and statutory authorities under the Statutory Authorities Act. He added:

> " … it is our view that the Statutory Authorities Service Commission is now responsible for determining terms and conditions of service for municipal police services. Notwithstanding our view in the matter, we are considering to conduct a job evaluation exercise for the Municipal Police Officers."

Ten years have since passed, but there has been no such exercise.

19. In her affidavit, sworn on 25 February 2004, Ms Hypolite's response to the applicants' complaint about the SASC's failure to make regulations for the municipal police services under section 60 of the Municipal Corporations Act, or to apply regulations made under the Police Act, was that no mechanism existed to enable the SASC to carry out such functions. She explained:

> "There are [not] and never have been any Personnel Technicians and/or Human Resource Advisers at the SASC Department. … It cannot classify posts and is not equipped to perform other related duties normally performed by Human Resource Advisers such as working out terms and conditions of service."

20. In a supplemental affidavit Mr Ashby said that the work of MPOs was in many ways different from that of RPOs. Mr Robinson took issue with this assertion in a further affidavit, in which he produced various records and statistics in support of his contention that the functions of regular and municipal police officers were closely comparable.

The judgment at first instance

21. The case came to trial in May 2004 before Tiwari-Reddy J. She delivered her judgment on 9 November 2005.

22. The judge dismissed the equal pay complaint. She found that the MPOs had not produced sufficient comparative statistical evidence to establish that the duties actually performed by them were the same as those of RPOs, and that their right to equality before the law therefore entitled them to receive identical salaries and other benefits.

23. The judge upheld the other two complaints and made the following declarations:

> "1) A declaration that the State in failing and/or refusing to make regulations under section 26 of the Statutory Authorities Act has and continues to deny the Applicants access to a court of justice for the determination of their rights and obligations in breach of their right to the protection of the law guaranteed under section 4(b) of the Constitution.
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> 2) A declaration that the State in failing and/or refusing to make regulations under section 60 of the Municipal Corporations Act and sections 6, 26 and 28 of the Statutory Authorities Act has and continues to deny the Applicants the right to such procedural provisions guaranteed to them by section 5(2)(h) of the Constitution for the purpose of giving effect to their rights and freedoms under the said section 4(b) of the Constitution."

24. The judge ordered that the respondent should pay compensation to the applicants for the contravention of their constitutional rights, to be assessed by a judge in chambers; but she rejected their argument that an additional award was needed, on top of compensation for quantifiable loss, "to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches" (in the words of Lord Nicholls in *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, [2006] 1 AC 328, para 19). The judge ordered the respondent to pay 80% of the applicants' costs.

The judgment of the Court of Appeal

25. The respondent appealed against all the adverse findings and orders of the judge. The MPOs appealed against her rejection of their equal pay complaint and her refusal to allow so-called vindicatory damages.

26. The judgment of the Court of Appeal (Mendonca, Jamadar and Bereaux JJA) was delivered on 20 December 2011. The leading judgment was given by

Bereaux JA, with whom Mendonca JA agreed. Jamadar JA delivered a concurring judgment.

27. The court upheld the judge's dismissal of the equal pay complaint. It also upheld her finding that in failing to make regulations under section 26 of the Statutory Authorities Act the state breached the MPOs' right to the protection of the law (the first of the judge's declarations). It did so on the basis that they were thereby denied such procedural provisions as they were entitled to, under section 5(2) of the Constitution, to protect their rights under section 4. Those parts of the court's decision are not now challenged by either side.

28. The court set aside the second of the judge's declarations. Bereaux JA's reasoning was that the failure to make any regulations under section 60 of the Municipal Corporations Act (or to decide what regulations under the Police Service Act should be deemed applicable in the meantime) did not result in any denial of access to the Industrial Court, and had not been shown to frustrate the proper functioning of the municipal police services or render their administration unworkable.

29. The court also set aside the judge's order for payment of compensation, to be assessed by a judge. Bereaux JA said that an order for compensation for breach of a section 4 right, which a judge has a discretion to make under section 14(1) of the Constitution, must be appropriate for securing the enforcement of the rights and freedoms enshrined in sections 4 and 5. He considered that a more appropriate and effective remedy would be a direction that the regulations be enacted within a period of six months from the date of the court's order. (Jamadar JA would have preferred to set a period of three months in all the circumstances including the time which had elapsed since the proceedings had commenced and since the trial judge's orders were made.) Bereaux JA said that any attempt at an assessment of compensation would be an exercise in speculation, and that compensation would be difficult if not impossible to compute. The MPOs had been deprived of access to the procedures set out in Part V of the Industrial Relations Act, but no one could predict whether a dispute over pay and conditions would have ended in a compromise or reached the Industrial Court and what would have been the outcome in financial terms.

30. The court upheld the judge's refusal to make an additional award of vindicatory damages (an expression which Bereaux JA aptly described as inelegant). Bereaux JA said that the judge's decision was a matter of discretion and that she had not been plainly wrong. He said that the failure to enact the appropriate regulations was "not so much a question of wilful neglect as it is one of administrative sloth and inertia".

31. On costs, the court reduced the judge's award in favour of the MPOs from 80% to 50% and directed that the parties should bear their own costs of the appeal.

32. The MPOs were granted leave to appeal to the Board by the Court of Appeal. The issues in the appeal are whether the Court of Appeal was right to set aside the judge's second declaration relating to the lack of service regulations; whether there should be an order for compensation, to be assessed; if so, whether it should or might include a separate "vindicatory" component; and whether the Court of Appeal was wrong to interfere with the judge's order for costs.

33. To complete the history of events up to the date of the hearing before the Board, the respondent was granted a temporary stay by the Court of Appeal of its order regarding section 26 of the Statutory Authorities Act, while considering whether to appeal against it. The respondent decided not to do so and the stay lapsed on 28 September 2012. Thereafter the state had failed to comply with the order despite the passage of two more years.

The lack of service regulations

34. No satisfactory explanation was given by the state for the failure to make any regulations under section 60 of the Municipal Corporations Act regarding the governance of municipal police services, or in the meantime to make any of the Police Service Regulations applicable, contrary to the plain purpose of the statute. Although the section used the word "may" and not "shall", it cannot be doubted that the Commission was under a duty to consider what regulations should be made and, if that involved any significant delay, what parts of the Police Service Regulations should be applied until such regulations were made. Underlying section 60 is the public imperative of ensuring that police forces operate under a proper system of public regulation. The apparent reason given for nothing having been done was that the Chief Personnel Officer regarded it as the responsibility of the SASC, which under section 60 it was, but only the Personnel Department had the personnel capable of performing the task. It is not a case of the left hand being ignorant of what the right hand is doing. Both the right hand and the left hand knew that the other was doing nothing.

35. This lamentable and longstanding state of affairs has affected the constitutional rights of MPOs. They have a right both to equality before the law and to the protection of the law. There has been inequality between RPOs and MPOs in that the former operate within a service which is governed by published service regulations but the latter do not. Mr Robinson testified to the fact that service promotions in the municipal services are dealt with on an ad hoc basis, and that this promotes unfairness, inequality of treatment and arbitrariness. His statement

was not contradicted. More generally, service regulations operate for the protection of both the public and police officers. Disciplinary provisions of the kind contained in the Police Service Regulations provide an example.

36. The declaration made by the trial judge in the terms set out in para 23(2) above was correct in law and she was right to make it. In the judgment of the Board, it would have sent a wrong message to the government and to the public if she had not done so, and the reasons given by the Court of Appeal for setting it aside are wide of the mark. The court referred to the fact that it was not the lack of regulations under section 60 of the Municipal Corporations Act which prevented the MPOs' associations from having access to the Industrial Court, and that it had not been shown that the administration of the municipal police forces was unworkable. But that is no reason to condone the lack of proper regulations.

Compensation

37. Section 14(1) of the Constitution provides:

> "For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion."

38. The section does not state what form such redress may take, but it may include an injunction, a declaration, a monetary award or a combination of remedies. The leading authority on an award of compensation is the judgment of the Board delivered by Lord Nicholls in *Attorney General of Trinidad and Tobago v Ramanoop*. Paragraphs 18 and 19 of Lord Nicholls' judgment have been cited so many times that they do not need further repetition.

39. In summary, the object of the jurisdiction is to uphold and give effect to the right which has been contravened. Sometimes the court may judge a declaration to be sufficient for this purpose, just as the European Court of Human Rights will sometimes treat a finding of violation of the European Convention on Human Rights as affording sufficient satisfaction to the applicant. But often the court will find that more than words are required to redress what has happened. There are no standard rules, but the fact that the injured party has suffered damage will obviously militate in favour of a monetary award. In assessing compensation in such a case, the common law measure of damages will be a useful guide, but no more than a guide (just as an award by the Strasbourg Court will not necessarily

be the same as the measure of damages at common law for conduct amounting to a tort). Other relevant factors would include the seriousness of the breach.

40. While an award under section 14 need not necessarily amount to the full financial loss which the injured party may have suffered, conversely in some cases it is right that an award should go beyond the amount of pecuniary damage which the injured party may be able to prove. Indeed the fact that it may be very difficult for the complainant to prove a loss measurable in strictly financial terms, in a case where there has been a serious violation serious of his constitutional rights, may be a good reason for adding an amount to mark the importance of respect for the constitutional right which he has been denied. Such an award has attracted the label "vindicatory", although any award is in a real sense intended to be vindicatory, but it has the character of a general award, in the sense used by Martin B in *Prehn v Royal Bank of Liverpool* (1870) LR 5 Ex 92, 99-100 (quoted in McGregor on Damages, 19th ed, 2014, at 3-003):

> "general damages … are such as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man."

41. The commonest instances of such awards for non-pecuniary injury, as noted by McGregor, are damages for injury to reputation in cases of defamation or pain and suffering in cases of personal injury, but there are other less common examples, such as damages for distress in a case where the object of a contract is to provide peace of mind (*Watts v Morrow* [1991] 1 WLR 1421, 1445 per Bingham LJ). In the present context an award of general damages is a tangible recognition of the value and importance of the complainant's constitutional rights and vexation caused by their denial, albeit incapable of measurement in financial terms by the use of a slide rule. The amount does not necessarily have to be large, but to award only a nominal or derisory sum would be liable to add insult to injury. It would be wrong to suggest a conventional figure, because much will depend on the facts of the particular case. If a court makes an award under this head, whether in addition to an award based on proof of measurable damage or not, it should explain what it is doing and why.

42. In this case the judge had good reason to make an order for payment of compensation to be assessed. The MPOs produced cogent evidence, based on similarities between their responsibilities and those of RPOs and the development of significant pay differentials as a consequence of a re-evaluation of the national but not the municipal services, to suggest that their inability to present their case on pay and conditions to an independent adjudicator was likely to have caused them loss. The denial of their rights was long standing.

43. The Court of Appeal considered that the assessment ordered by the judge was an inappropriate form of relief because any attempt at computing the MPOs' loss would be mere speculation, and that the appropriate way to redress their grievance was to direct the state to introduce appropriate regulations within six months. The premise on which the court reached that decision has been falsified by subsequent events. The court's unspoken assumption was that its order would be effective, but it has been disobeyed. For that reason, if for no other, it would be right for the Board now to reconsider the question of the appropriate redress, but there are also other reasons for doing so.

44. It is a general principle of the common law that if an injured party can establish a head of loss, which by reason of the wrongdoer's conduct it is difficult to quantify, the fact that there may be many speculative factors is not a reason for denying the assessment: see *Simpson v London and North Western Railway Co* (1876) 1 QB 274, 277, *Chaplin v Hicks* [1911] 2 KB 786, 792, *Davies v Taylor* [1974] AC 207, 212, *Gregg v Scott* [2005] 2 AC 176, paras 17 and 76-79, and *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486, [2011] QB 477, paras 22-23. A monetary award under section 14(1) is discretionary, but that is not in itself a reason to adopt a different approach.

45. In the Board's judgment, the Court of Appeal erred in setting aside the judge's order on the ground that any assessment was bound to involve a large amount of speculation. By doing so it left the MPOs with no redress for the past denial of their rights.

46. The Board nevertheless recognises that it is impossible to tell at this stage how difficult the process of assessment may be, and for that reason it considers that it should have been left open to the judge carrying out the assessment to be able to award general (or vindicatory) damages if at the end of the exercise they considered such an award to be appropriate. There are ample grounds on which the judge might reach that conclusion, particularly the lengthy time which the state has had to redress the situation and its shoddy treatment of the MPOs, which has been a combination of broken promises and stone walling. Two years passed between the issue of proceedings and the first instance judgment, and another six years between the first instance judgment and the Court of Appeal's judgment. The Court of Appeal's description of it being a case of "administrative sloth and inertia" was mild.

47. That leads to a further important factor. The failure of the state to obey the order made by the Court of Appeal was not merely a continued denial of the MPOs' rights but a denial of the rule of law. A private litigant who disobeyed such an order for a significant period could expect it to be enforced by various means. A court has no means of compelling the obedience of the government to its orders,

but a failure to do so brings the system of justice itself into disrepute. For those reasons the Board will direct that there should be an award of compensation specifically in respect of the failure by the state to comply with the order of the Court of Appeal from the date on which the stay of that order lapsed, 28 September 2012, in addition to whatever other award the judge who carries out the assessment may make. The Board will leave it to the judge to determine the amount of the additional award, taking into account the full facts as they may then appear.

Costs

48. In the opinion of the Board the order for costs made by the trial judge was properly within the wide discretion available to her, and the Court of Appeal was not justified in interfering with it. The Board will consider the parties' submissions on costs more broadly in the light of its decision on other issues.

Postscript

49. At the hearing of the appeal counsel for the respondent informed the Board that steps were being taken to meet the MPOs' regulatory concerns and to comply, belatedly, with the order of the Court of Appeal, but there was no evidence about this and counsel was not able to be more specific.

50. After the hearing the respondent submitted a note to the Board containing a chronology of the steps which had been taken towards the making of new regulations. It is not necessary to set out the details because, as the appellants commented, none of it justified the unconscionable delay in introducing appropriate regulations.

51. More significantly, the respondent also brought it to the Board's attention that on 24 October 2014 (11 days after the hearing before the Board) the SASC introduced the Municipal Police Service Regulations 2014. These regulations were made under section 60 of the Municipal Corporations Act, but the respondent's accompanying note stated that they were intended to achieve the objective of providing regulations as required both by that section and section 26 of the Statutory Authorities Act. The note referred in particular to regulations 172-177 as intended to provide for the recognition of the appropriate association(s) of MPOs. There are, however, a number of defects. For example, regulation 177 empowers "the Minister" (defined as meaning the Minister to whom responsibility for national security is assigned), if satisfied that an association satisfies section 34 of "the Act", to cause a notice of recognition to be published. But the regulations contain no definition of "the Act" and they

provide no indication of what rights follow from recognition. It is unclear what, if any, connection exists between recognition under regulation 177 and the provisions of the Industrial Relations Act. The Board put these and other questions to the respondent.

52. In a further note the respondent drew the Board's attention to section 14 of the Interpretation Act of Trinidad and Tobago which provides the references to "the Act" in subordinate legislation are to be taken as referring to the Act under which the legislation was made, ie the Municipal Corporations Act. But as the respondent recognises in the note, that Act contains no provision for the formation and recognition of municipal police associations. References to "the Act" in regulations 172-177 were therefore intended to be references to the Police Service Act, but the regulations do not say so and it is hard to see what power the SASC has under the Municipal Corporations Act to make regulations for the purposes of the Police Service Act. The respondent acknowledges in his recent note that there will have to be further legislation of some kind in order to correct the present deficiencies, but the Attorney General wishes it to be made clear that the new regulations were passed in good faith with the intention of complying with the orders of the Court of Appeal. This the Board fully accepts.

Conclusion

53. The appeal will be allowed. The Board invites the parties' written submissions about the appropriate form of order, including costs, within 21 days.