Easter Term
[2019] UKPC 18
Privy Council Appeal No 0031 of 2018

JUDGMENT

Singh (Appellant) *v* Public Service Commission (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Reed
Lord Briggs
Lady Arden

JUDGMENT GIVEN ON

13 May 2019

Heard on 25 March 2019

Appellant	*Respondent*
Anand Ramlogan SC Nicola Newbegin Alana Rambaran (Instructed by Alvin Pariagsingh)	Robert Strang (Instructed by Charles Russell Speechlys LLP)

LORD BRIGGS:

Introduction

1. This appeal is concerned with the court's discretion as to costs where an application is made for leave to apply for Judicial Review, but where no such proceedings are thereafter instituted, because the subject matter of the applicant's complaint is speedily resolved. Specifically, the issue concerns the effect upon what appears to be the usual practice of the courts of Trinidad and Tobago in such circumstances, namely to make no order as to costs, of a failure by one of the parties (in the present case the intended respondent) to comply with the provisions of the relevant pre-action protocol.

2. This is an appeal purely about costs. In *Fourie v Le Roux* [2007] 1 WLR 320, at 338, Lord Carswell said, in relation to appeals about costs, that:

> "This is peculiarly an area in which the principles should be developed and applied by the judges at first instance, with the oversight of the Court of Appeal, and that the House should not reverse a costs order without a strong reason in principle."

That observation, although made in the House of Lords, is fully applicable to the practice of the Board. Even where (as here) the appeal about costs is brought as of right, it will be a rare case where the Board will think it appropriate to intervene. Not only will issues as to costs generally fall within the discretion of the first instance judge, but the local circumstances (including the implementation of procedural reform) will generally be better adjudicated upon by the local courts, rather than by the Board. Nonetheless the Board cannot simply dismiss the appeal because it is merely an appeal about costs, since this would render the statutory right of appeal, conferred in this case by sections 23(1) and (2) of the Judicial Review Act, nugatory.

The facts

3. The appellant Mr Singh is a public officer. His case is that he was awarded a government scholarship to pursue a degree in forestry. Having been accepted by the neighbouring University of Guyana he says that he was advised by officials that a degree from that university would not be recognised because it did not meet international standards. He says that he was instead advised to pursue a degree in a

related subject at the University of Idaho. Having done so successfully, he says that he was then told that his Idaho degree was not recognised for the purpose of acting appointment and promotion as a forester in Trinidad and Tobago.

4. With a view to exploring possible remedies, on 27 January 2016 he made (through his attorneys) a Freedom of Information Request, under section 13 of the Freedom of Information Act (No 26 of 1999 as amended) (the "FOIA") for six classes of documents including his personal file, the personal files of two foresters who had obtained promotion and correspondence between various state agencies, including the Public Service Commission ("PSC") the respondent to this appeal, relating to the non-recognition of his Idaho degree. The request was addressed to the Chairman of the PSC. The letter concluded with a reference to the requirement, in section 15 of the FOIA, that:

> "A public authority shall take reasonable steps to enable an applicant to be notified of the approval or refusal of his request as soon as practicable but in any case not later than 30 days after the day on which the request is duly made."

It appears that Mr Singh may have sent an earlier request dated 1 December 2015, but nothing turns on it.

5. By letter to Mr Singh dated 11 March 2016 the PSC replied as follows:

> "Request Under the Freedom of Information Act 1999
>
> I acknowledge receipt of your requests dated 1 December 2015 and 27 January 2016 which was received in the Service Commissions Department on 18 December 2015 and 16 February 2016 respectively.
>
> Your requests will be granted in part.
>
> The information is being compiled and further communication would be forwarded to you when finalised.
>
> Yours faithfully."

6. Having received neither an indication which of his six classes of requested documents were to be granted, nor the documents themselves, Mr Singh's attorneys wrote a pre-action protocol letter dated 23 May 2016 threatening judicial review proceedings for a declaration that the PSC was in breach of its duty under the FOIA, for an order of mandamus to compel the PSC either to grant access to a copy of the documents requested, or to give reasons for refusing to do so and, in the alternative, a declaration that Mr Singh was entitled to access to all the requested information. The letter ("the PAP Letter") concluded by calling for provision of the required information within 14 days.

7. By letter in reply dated 9 June 2016 (the "PAP Reply") the PSC responded as follows:

> "Re: PROPOSED JUDICIAL REVIEW BETWEEN VIJAY SINGH AND THE PUBLIC SERVICE COMMMISSION
>
> I refer to the captioned subject and acknowledge receipt of your letter dated 23 May 2016, which was received in the Service Commission's Department on 6 June 2016.
>
> You will be duly informed once the matter has been finalised.
>
> Yours faithfully."

8. By letter dated 11 July 2016 the PSC provided copies of some of the documents requested by Mr Singh and gave reasons for its decision not to provide the remainder. This letter was not received by Mr Singh's attorneys until 19 July.

9. Meanwhile, on 18 July, Mr Singh filed an application for permission to apply for judicial review supported by affidavit. The application for leave came on for an ex-parte hearing before Charles J on 26 July. Having by then received a response to his FOIA request with which he was satisfied, although not the whole of what he had requested, Mr Singh asked the judge to give him permission to withdraw his application, but he sought, and obtained, an order for the costs of his application to be paid by the PSC in the sum of TT$7,500. The court's order to that effect was served on the PSC on 24 August.

10. The PSC applied to set aside that order in late September 2016. At an inter-partes hearing on 7 April 2017 Charles J set aside her ex-parte order and made no order as to the costs, either of Mr Singh's application for permission or of the PSC's application to

set aside. She rejected Mr Singh's submission that the PSC's set-aside application had been made too late, and rejected the PSC's submission that *Abzal Mohammed v Police Service Commission* 31 March 2010 (Civil Appeal No 53 of 2009) compelled her to make no order for costs. She continued:

> "Nevertheless, in light of the fact that the defendant was not yet a party in a substantive claim and the required information was handed over to the proposed claimant before the court made a determination as to whether leave would be granted, I am prepared to review my order for costs made on 26 July 2016 in favour of the proposed claimant. In all the circumstances of the case I have determined that I will vary the said order by setting it aside."

11. It is not clear whether any submission was made on that occasion for Mr Singh that he should have his costs of the application for leave by reason of the PSC's non-compliance with the applicable pre-action protocol. In any event, Charles J made no reference to such a submission, or to the protocol itself.

12. Mr Singh's appeal was heard in June 2017 before Smith JA, Pemberton JA and des Vignes JA. Some time was taken up during the hearing with the question whether there was any jurisdiction to make an order for costs of the withdrawn application for leave, no proceedings for judicial review having been commenced. That question was decided, during the course of argument, in Mr Singh's favour. On this occasion, reliance was placed on Mr Singh's behalf upon the PSC's failure to comply with the pre-action protocol.

13. In a short extempore judgment (with which his colleagues agreed) Smith JA decided as follows:

> "Okay. We have reached a decision and we are unanimous on this decision. We will just give an outline of our judgment.
>
> We are of the view that, first of all, the judge cannot be faulted for setting aside the original order to grant costs. The order was made without the application for leave or anything having been served on the respondent and the respondent was never given a chance to be heard in its defence to an order for costs.
>
> Secondly, we don't find that the judge was plainly wrong and, in fact, we don't fault her for extending the time to make the application. We find the reasons provided by Mrs O'Brady in her

> affidavit, at pp 120 and 121 of the record, we can't see that it was unreasonable or that there was no good reason for extending the time, so we can't see that the judge was clearly wrong there. However, we noted that in her judgment, the judge did not make explicit reference to the consideration of the pre-action protocol and that may have been - and we are not saying it is - an oversight on her part. We now have been invited to do so and look at the circumstances to see whether the failure to comply with the pre-action protocol was one that should be visited with costs.
>
> In summary, we agree with counsel for the respondent that, given the circumstances, it was proper and reasonable not to respond immediately to the pre-action protocol. In fact, it was not a case that the pre-action protocol was ignored; there were attempts to comply, but the depth and breadth of the request were indeed voluminous, and efforts were made to comply. We find that it was not unreasonable in these circumstances for there to have been an order for costs and not to follow - what we say is, as in our jurisdiction-the usual order-that in leave applications, especially at the ex parte stage, we make no order as to costs. In the circumstances, this appeal is dismissed."

Pre-Action protocols

14. Pre-action protocols, and the requirement to have regard to compliance or non-compliance with them when dealing with costs, were introduced to the civil procedure of Trinidad and Tobago as part of the ongoing modernisation of civil procedure which followed (although it did not precisely replicate) the implementation of Lord Woolf's procedural reforms in England and Wales. Their use is governed by a Practice Direction ("the PAP PD") issued by the Chief Justice pursuant to Part 4 of the Civil Proceedings Rules 1998 (as amended). By para 1.4 of the PAP PD the objectives of pre-action protocols are stated as being:

> "(1) to encourage the exchange of early and full information about the prospective legal claim,
>
> (2) to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings,
>
> (3) to support the efficient management of proceedings under the CPR where litigation cannot be avoided."

15. Under the heading "Compliance with Protocols" para 2.1 provides that:

> "The court may treat the standards set out in protocols as the normal reasonable approach to pre-action conduct. The court will expect all parties to have complied in substance with the terms of an approved protocol. If proceedings are issued the court may take into account the failure of any party to comply with a pre-action protocol when deciding whether or not to make an order under Part 26 (Powers of the Court) or Part 66 (Costs - General)."

16. The PAP PD continues as follows:

> "2.3 The court will expect all parties to have complied as far as reasonably possible with the terms of an approved protocol. If proceedings are issued and parties have not complied with this practice direction or specific protocol, it will be for the court to decide whether sanctions should be applied. The court is not likely to be concerned with minor infringements of the practice direction or protocol. The court is likely to look at the effect of non-compliance on the other party when deciding to impose sanctions.
>
> 2.4 If, in the opinion of the court, non-compliance has led to the commencement of proceedings which might otherwise not have needed to be commenced, or has led to costs being incurred in the proceedings that might otherwise not have been incurred, the orders the court may make include:
>
> > (a) an order that the party at fault pay the costs of the proceedings, or part of those costs, of the other party or parties;
> >
> > (b) an order that the party at fault pay those costs on an indemnity basis.
>
> 2.5 The court will exercise its powers under paragraph 2.4 with the object of placing the innocent party in no worse a position than he would have been in if the protocol had been complied with."

17. Under the heading "Non-Compliance with Protocols" para 3.2 provides as follows:

> "A defendant may be found to have failed to comply with a protocol in, for example, failing to:
>
> > (a) make a preliminary response to the letter of claim within the time fixed for that purpose by the relevant protocol
> >
> > (b) make a full response within the time fixed for that purpose by the relevant protocol;
> >
> > (c) …"

18. Under the heading "Pre-Action Conduct in other Cases" the PAP PD gives general guidance for cases not covered by a specific approved protocol. Para 4.4 provides that:

> "The defendant should acknowledge the claimant's letter in writing within seven days of receiving it. The acknowledgement should state when the defendant will give a full written response. If the time for this is longer than the period stated by the claimant, the defendant should give reasons why a longer period is needed."

19. Appendix D to the PAP PD provides an approved pre-action protocol for Administrative Orders, including claims for judicial review under Part 56 of the CPR. Under the heading "The Letter in Response" para 3 provides so far as is relevant as follows:

> "3.1 Defendants should normally respond within 30 days using the standard format at Annex B. Failure to do so will be taken into account by the court in exercising its discretion pursuant to Part 26 or Part 66 of the CPR.
>
> 3.2 Where it is not possible to reply within the proposed time limit the defendant should send an interim reply and propose a reasonable extension. Where an extension is sought, reasons should be given and, where required, additional information requested. This will not affect the time limit for making a claim for judicial review nor will it bind the claimant where he or she considers this to be unreasonable. However, where the court

considers that a subsequent claim is made prematurely it may impose sanctions.

3.3 If the claim is being conceded in full, the reply should say so in clear and unambiguous terms.

3.4 If the claim is being conceded in part or not being conceded at all, the reply should say so in clear and unambiguous terms, and -

…

(b) provide a more detailed explanation for the decision, if considered appropriate to do so ..."

20. Annex B is a template for a letter in response. It contains this guidance:

"5. Response to the proposed claim

(Set out whether the issue in question is conceded in part, or in full, or will be contested. Where it is not proposed to disclose any information that has been requested, explain the reason for this. Where an interim reply is being sent and there is a realistic prospect of settlement, details should be included)."

21. Part 66 of the CPR deals with costs. Rule 66.6(5) provides that: in particular the court must have regard to -

"(a) the conduct of the parties;"

22. Part 66.6(6) provides that:

"The conduct of the parties includes -

> (a) conduct before as well as during, the proceedings, and in particular the extent to which the parties complied with any relevant pre-action protocol; …"

The Freedom of Information Act

23. In *Sankar v Public Service Commission* 28 April 2014 (Civil Appeal No 58 of 2007), at para 34, Narine JA said this, about the importance of the FOIA in Trinidad and Tobago:

> "… the object of the Act is to make information freely accessible to the public with a view to promoting transparency and accountability in the decision-making of public authorities. It is an important piece of legislation in a post-colonial society in which bureaucrats have historically been reluctant to expose their decisions to the glare of public scrutiny. Freedom of access to information is also important in a society that is politically polarized along ethnic lines, and in which appointment to public office, and decisions involving the allocation of state resources are often the subject of speculation and mistrust. Against this historical and social background, the right to access information from public authorities must be jealously guarded, and must not be allowed to be whittled down. Information requested must be provided unless refusal of access to information is expressly permitted by the Act, and the public authority provides adequate and intelligible reasons for refusal."

This is an authoritative statement of public policy by the highest local court, by which the Board considers that it should be guided.

24. As noted above, section 15 of the FOIA requires a public authority to take reasonable steps to enable an applicant to be notified of the approval or refusal of his request "as soon as practicable but in any case not later than 30 days after the day on which the request is duly made". By contrast, section 23 enables a public authority to defer the provision of access to a requested document, even where it decides that the applicant is entitled to access.

25. In argument before the Board, there was briefly canvassed a question of construction, whether section 15 of the Act imposed an absolute 30 day time limit for the communication by a public authority of its decision whether to grant or refuse a request, having regard to the requirement that the authority "shall take reasonable steps …". For reasons given below, the Board does not consider it necessary on this occasion

to resolve that issue, or the more general question as to what a public authority must do to comply with section 15. It is sufficient for present purposes to note that the 30-day period from the date upon which the PSC acknowledged that it had received Mr Singh's FOIA request expired on or about 18 March 2016. Although by that date the PSC had indicated that it would grant Mr Singh's request "in part", no indication had been given as to which of the six classes of requested documents would be the subject of a grant of access, either by the time of his PAP letter, or before he made his application for leave to bring proceedings for judicial review, albeit that a response with which he was in due course satisfied was by that latter date in the post to him.

Analysis

26. It cannot be doubted that compliance with the pre-action protocols plays a significant part in achieving the important objective of avoiding unnecessary legal proceedings, by requiring the parties to identify in advance key aspects of their respective cases, so as to maximise the prospects of a resolution of any underlying dispute before proceedings are commenced.

27. Neither the PAP PD nor Part 66 compels the court in any case to impose a costs sanction for non-compliance with an applicable pre-action protocol. The extent of compliance (which must therefore include non-compliance) is part of the parties' conduct to which the court must have regard under Part 66.6(5) and (6). Further, paras 2.4 and 2.5 of the PAP PD do require the court to focus upon two particular aspects of non-compliance, namely first, to consider whether it has led to the commencement of proceedings which might otherwise not have needed to be commenced or to the incurring of unnecessary costs, and secondly, to consider exercising its powers (including a power to make the party at fault pay costs) with the object of placing the innocent party in no worse a position than he would have been in if the protocol had been complied with. Both these requirements pre-suppose that the court should first decide whether, in fact, there has been non-compliance with an applicable pre-action protocol.

28. In the present case there is an applicable pre-action protocol, namely the pre-action protocol for administrative orders in Appendix D to the PAP PD. It contains clear directions as to the content of the letter in response, namely that, normally, it should use the standard format at Annex B, which requires a statement whether the issue in question is conceded in part or in full or will be contested, whether requested information will be disclosed and a requirement for reasons (see para 5). In cases where a full response cannot be provided in time para 3.2 of Appendix D requires the respondent to send an interim reply, to seek a reasonable extension of time, and to give reasons why that extension is sought.

29. In the Board's view, the PSC's PAP Reply, dated 9 June 2016 (nearly three months after the expiry of the 30-day period prescribed in section 15 of the FOIA) did none of these things. It plainly did not provide a full reasoned response, as required by the Annex B standard form. Nor did it request a specific extension of time within which to do so, nor give reasons for the need for such an extension. In substance, it did not explain whether the PSC had decided, in respect of each of Mr Singh's six requested classes to grant or refuse access, but was still collating the relevant documents, or whether a decision whether to grant or refuse access had still to be made and, if so, whether this was because there were still outstanding documents which the PSC needed first to peruse. Nor did it suggest that the volume of the documents requested was such as to make Mr Singh's application one which could not realistically be dealt with fully within the 30-day statutory time limit.

30. It is now known (with the benefit of hindsight) that the PSC was by 9 June only just over a month away from being in a position to make a comprehensive response, so that it could have responded to Mr Singh's PAP Letter by seeking something in the region of a one month extension and, if necessary, offering to extend Mr Singh's time for bringing an application for judicial review, so as to make it unnecessary for him to make a leave application at any earlier date.

31. It follows in the Board's analysis that the very clear non-compliance by the PSC with its obligations under the applicable pre-action protocol did, in all probability, lead Mr Singh to make a leave application which would not otherwise have been needed, and therefore to incur costs that might not otherwise have been incurred, within the meaning of para 2.4 of the PAP PD. Furthermore it appears to the Board that, within the meaning of para 2.5, the court could have exercised its power to award Mr Singh his costs of the leave application so as to put him in no worse a position than he would have been in if the PSC had complied with the applicable pre-action protocol in its PAP Reply.

32. As the Court of Appeal rightly observed, the judge's reasons for making no order for the costs of Mr Singh's leave application made no mention of the pre-action protocol at all. Accordingly it fell to the Court of Appeal to exercise that discretion afresh. In passing, although the contrary was not argued, the Board agrees with the Court of Appeal's view that there was jurisdiction to make an order for the costs of the withdrawn leave application, notwithstanding that no judicial review proceedings were thereafter commenced.

33. In the Board's view, it therefore fell to the Court of Appeal to decide whether there had, or had not, been compliance by the PSC with the applicable pre-action protocol, to consider whether non-compliance had lead to Mr Singh making his leave application unnecessarily, to consider whether he was, within the meaning of para 2.5 of the PAP PD "the innocent party", and therefore whether an order for costs would

have put him in the position he would have been in, had the PSC complied with the applicable pre-action protocol.

34. It would, of course, nonetheless have remained a matter for the Court of Appeal's discretion whether to make such a costs order. But the Board considers that it was, with respect, wrong in principle for the Court of Appeal not to have undertaken that analysis. The analysis which it did conduct appears to have been as follows. First, it concluded that it was "proper and reasonable" for the PSC not to respond immediately to Mr Singh's PAP letter. The Board infers that the Court of Appeal considered that the PSC needed more time in which to provide a full response. That may or may not have been so but, if a full response was not to be provided, then the applicable pre-action protocol required the PSC to seek an extension of time, and to give reasons for doing so.

35. Secondly, the Court of Appeal noted, correctly, that the pre-action protocol had not been ignored by the PSC. Indeed, it responded in good time, but the content of its response was plainly deficient. Next, the Court of Appeal said that "there were attempts to comply" but by this the Board infers that the Court of Appeal was thinking principally of attempts to comply, not with the pre-action protocol, but with its underlying duties under the FOIA. This is because its perception was (rightly or wrongly) that Mr Singh's request was broad and voluminous. That may have been a reason for taking time to comply with the FOIA duty, but not a reason for failure to seek a reasoned extension of time within which to provide a pre-action protocol compliant response. On the contrary, if that was the reason for the delay, that should have been spelt out in clear terms in the PSC's PAP Reply, on 9 June, as the reason for a requested extension.

36. Finally, the Court of Appeal exercised its discretion not to order costs in accordance with what it perceived to be the usual practice in relation to ex-parte applications of this kind. The Board readily acknowledges that the question whether non-compliance with a pre-action protocol justifies a departure from what may be regarded as the usual order as to costs is a matter of discretion with which an appellate court would not lightly interfere. But in the present case that exercise of discretion was, in the Board's view, vitiated by the prior failure of evaluation, in which the Court of Appeal failed to determine whether there had been non-compliance with the pre-action protocol by the PSC, whether that had led to an unnecessary application for leave, and whether an order for the costs of that application for leave would achieve the objective stated in para 2.5 of the PAP PD.

37. An appellate court (and especially a court hearing a second appeal) will exercise disciplined restraint before departing from an evaluative decision by a lower court. In short, it will not do so merely because it would, considering the matter afresh, have reached a different evaluative decision. It will only do so if the lower court has made an error of law or of principle, or reached a decision which no reasonable court, applying law and principle correctly, could have reached. Even in such a case, the fact that the

issue is only about costs will give the Board pause for thought whether the case is sufficiently exceptional to warrant its intervention.

38. In the present case, for the reasons given, the Board considers that the Court of Appeal did err in principle in its approach to the evaluation of the question whether the PSC had failed to comply with the applicable pre-action protocol. Furthermore the present case may be said to be an important one in which to review the operation of the pre-action protocol regime. This is because the FOIA is designed to give ordinary people prompt access to documents about their affairs held by public authorities, at affordable cost to themselves, in circumstances where a failure to respond even with a decision within the statutory time limit leaves the applicant only with a judicial review remedy, which will inevitably involve the incurring of substantial legal costs. In such a case, compliance by the public authority with its obligations under the applicable pre-action protocol will, in a situation where the authority is only in need of further time, readily enable the expense of judicial review proceedings to be avoided. Furthermore the imposition of a costs sanction upon a public authority which just delays, rather than seeking an extension of time with reasons, ought to be a useful warning against unexplained official delay. This is therefore a rare exceptional case where the fact that the dispute is only about costs should not cause the Board to decline to intervene.

39. It therefore falls to the Board to consider the matter afresh. For the reasons given, there was plainly a serious failure by the PSC in its PAP Reply to take either of the courses prescribed, that is to provide a detailed reply, or to seek an extension with reasons given. That did cause Mr Singh to make his leave application, in circumstances where a reasoned request for an extension of time would have made it unnecessary. Clearly, an order that the PSC pay his costs of that leave application would go some of the way to putting him into the position in which he would have been if a reasoned request for an extension of time had been made.

40. The Board has carefully considered whether nonetheless the discretion should be exercised, as it was by the courts below, against making such an order for costs. The factors which have been advanced on behalf of the PSC amount, in summary to the following. First it is said that Mr Singh should have served the PSC, in advance, with his intended application for leave, before lodging it with the court. This would, or should, have produced the response that a substantive reply was already in the post. But the CPR in Trinidad and Tobago does not (in contrast with the practice in England and Wales) impose any such requirement, and Mr Singh would by then have incurred the costs of the preparation of the requisite draft application and supporting affidavit.

41. Secondly, it is said that the application by Mr Singh for his costs should not have been made ex parte. That may be so, but any injustice thereby caused to the PSC was fully remedied by the judge's decision to consider the matter afresh inter partes.

42. Thirdly it is said that the PSC was doing its best to comply with the substance of a broad and voluminous application for documents. Although this was put forward as a matter of submission to the Court of Appeal, there appears to have been no evidence from the PSC that the breadth or volume of the request was in fact causative of (by then) an almost three-month delay since the expiry of the statutory 30 day time limit. But more importantly, if that was the predicament of the PSC, then it should have been so identified as a reason for seeking further time in its PAP Reply.

43. Finally, there is the usual practice not to award costs of ex-parte applications for permission, if no substantive proceedings ensue. In the Board's view, that is only a starting point from which the pre-action protocol procedure requires the court to consider a departure. In the context of the FOIA, which at least contemplates a prompt response to a request, specifying whether it will or will not be granted (even though provision of documents may be deferred), and where the applicant's only means of recourse in the face of a protracted delay is the commencement of proceedings for judicial review, in which an ex-parte application for leave is a precondition, that starting point does not carry substantial weight, in the face of the non-compliance with the applicable pre-action protocol which is demonstrated by the agreed facts.

44. Accordingly, the Board has decided that the judge's original order in Mr Singh's favour for his costs of the application for leave, in the sum assessed, should be restored and that, therefore, this appeal should be allowed.