



Appeal No: Civ/2022/01

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS
ORIGINAL CIVIL JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2018: No. 381**

Date: 29 January 2024

Before:

**THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR ANTHONY SMELLIE
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER**

Between:

DAVID ANDERSON GREENIDGE

Appellant

- and -

THE COMMISSIONER OF POLICE

Respondent

Ms. Victoria Greening of Resolution Chambers, for the Appellant
Mr. Alan Doughty of MJM Limited, for the Respondent

Hearing date: 7 March 2023

JUDGMENT ON COSTS

SMELLIE, JA:

Introduction

1. By his Judgment of 26 April 2021, the Chief Justice refused the Appellant’s application by way of Judicial Review by which he sought to challenge the decision which deemed him ineligible to participate in the 2018 Inspector to Chief Inspector Promotion Process (“the Promotion Process”). By our Judgment of 24 March 2023, (“the Judgment”) we dismissed the Appellant’s appeal against the Chief Justice’s Judgment on the merits, while granting the appeal in relation to the Chief Justice’s finding that there was no jurisdiction to challenge, by way of Judicial Review, the decision of ineligibility to participate in the Promotion Process. We concluded the Judgment with an invitation to the parties to make their submissions on the costs of the appeal within 14 days in writing. Those submissions having been received and considered, this is our judgment on costs.
2. In his detailed and helpful submissions, Mr. Doughty relies upon three main points, each of which we will address below:
 - That costs should follow the event of the outcome of the appeal and as the Respondent was successful on the merits the arguments which took up the bulk of the time of the appeal, he should therefore have his costs of the appeal;
 - That the Appellant’s apparent success on the “jurisdiction issue” (described above) should not be taken into account because, in light of his unsuccessful challenge on the merits, it is clear that for the purposes of the dispute overall, the conclusion on the jurisdiction issue was academic and made no difference to the outcome; and
 - That there are no public interest grounds raised by the appeal that should affect the outcome on costs in favour of the Appellant, citing here the recent decision of this Court in *Dr. Gina Tucker v The Public Service Commission and The Board of Education* [2020] CA (Bda) 13 (“*Tucker*”).

3. In her brief but equally helpful response on behalf of the Appellant, Miss Greening relies on the following points:

- That the issues raised by the Appellant’s judicial review application included matters concerning the public interest and extended “*beyond the merely operational*”, citing the Judgment at [60]
- That the matters concerned the fair management of the Bermuda Police Service, in which the public as a whole has an interest which is affected and the Judgment at [63] confirms that the issues raised on appeal “*were neither merely spurious nor vexatious*”. As the Court of Appeal observed in the Judgment at [46], citing the concerns which came to light “*it is hardly surprising that misgivings abounded among those who were not successful in the Promotion Process*”. Indeed, following the Judgment being handed down and sent to the attention of the Respondent, at 10.14 a.m. on 30 March 2023, Miss Greening informs that the Respondent issued a service wide email with the subject- heading “*Appeals Court Judgment*” saying: “*Dear Colleagues, By now you may be aware of the recent ruling handed down by the Court of Appeal in relation to the promotion Judicial Review raised by Inspector Greenidge. Whilst the Court dismissed his case, the Appeal Court Justices expressed significant concern with the WhatsApp messages that came to light. These would no doubt have caused some discomfort for you, as it did for me. I have referred the matter to PSD and I assure you a review of the matter is underway. I ask that you be patient and allow for the process to be completed as we seek to ensure thoroughness and transparency to resolve the matter. Kind regards, Darrin Simmons, Commissioner of Police.*”
- As confirmed in the case law (see *Tucker at [47]*) a “no costs” order can properly be made in judicial review proceedings where the issues raised, albeit unsuccessfully by an applicant, involve an important concern of public interest. Such an order would be appropriate in this case as the ultimate goal of the Court in relation to an award of costs is to do what is just having regard

to the facts and circumstances of the case. Here Miss Greening cites *Affordable Medicines* [2005] ZACC 3, also approved and applied in *Tucker* at [17] although on the different but related question of costs in constitutional actions.

Discussion

4. The usual rule is of course, that costs will follow the results of the action. In this matter, the application of that rule would, *prima facie*, suggest a form of split costs order, having regard to the Appellant's success on the jurisdiction issue but failure on the more substantive costs and time consuming issue of the merits. It was in this latter regard that the Chief Justice, after detailed enquiry at trial, concluded that there was no policy of waiver of the PDR requirement for entry into the Promotion Process and that the Appellant had not been discriminatorily denied such a waiver. This conclusion was itself not challenged by the Appellant on the appeal. Instead, he changed tack, choosing instead to criticize the failure of his trial counsel to have cross-examined ACOP Weekes, the officer who oversaw the Promotion Process. He argued through Miss Greening, that had ACOP Weekes been cross-examined, the Chief Justice's conclusion on the waiver issue would have been different.

5. For the reasons explained in the Judgment, this Court did not accept that contention and Mr. Doughty now argues, understandably, that the appeal was ultimately an exercise in futility, and that while the Appellant enjoyed limited success on the jurisdiction issue, he was entirely unsuccessful on the merits. And further, that the issue of jurisdiction being merely academic so far as he was concerned, the Appellant did not pursue the appeal for that purpose. He pursued the appeal to vindicate his waiver argument with the hope of a declaratory order that he had been wrongfully denied the opportunity to compete in the Promotion Process. Having failed completely in that regard, he should be ordered to pay the Respondent's full costs without any diminution to reflect his academic success on the jurisdiction issue.

6. While we see the logic of that argument, it overlooks other circumstances of the case which we regard as properly to be taken into account in the exercise of discretion for an order for costs.
7. The underlying concern in the case was the integrity of the Promotion Process – were waivers or extensions of time for compliance with the PDR requirements being granted discriminatorily such that the Appellant (and it seems others who have complained) could reasonably have felt that they were being treated unfairly? For the reasons explained carefully in the Chief Justice’s judgment after full enquiry, it is now established that such concerns were unfounded but this does not mean that they were not genuinely held. Witness, for instance, as examined in the Judgment, the confusing emails about the PDR requirements and deadline for their compliance and the unwise WhatsApp exchanges which were suggestive of favoritism at play. This is why, in broad terms, we regarded the Appellant’s case, though unsuccessful, as being neither merely frivolous nor vexatious.
8. As Miss Greening observes, there is also some practical vindication of this point of view. This comes, albeit *ex post facto*, from the Respondent’s proper reliance upon the discussion of these issues in the Judgment, as a basis for reassuring the members of the BPS service-wide, that there will be an enquiry into the concerns, leading to any necessary reforms to ensure thoroughness and transparency of the Promotion Process.
9. These circumstances serve in our view, to distinguish this case from the circumstances of a case like *Tucker* relied upon by Mr. Doughty. In that case, the applicant’s purely personal quest, devoid of any merit or justifiable rationale, seeking unjustifiably to discredit not only the recruitment process but also the qualifications of the deservedly successful candidate with a view only to the advancement of her own candidacy, redounded to deny her the benefit of a no costs order.
10. Here we regard the circumstances of the case as justifying a no costs order. Not only did the Appellant enjoy some success however academic, on the jurisdiction issue, it is only fair to regard his sense of grievance as genuinely even if not justifiably held. He will have incurred significant personal costs in his quest for vindication and it would

seem to us disproportionate and unfair to impose upon him the official costs of the Respondent as well.

11. No order is therefore made in respect of the costs of the Appeal. To the extent that the costs in respect of the proceedings before the Chief Justice remain unresolved, we would also make no order in relation to them.

Clarke, P:

Gloster, JA: