



IN THE MATTER OF THE HUMAN RIGHTS ACT 1981

IN THE MATTER OF THE BERMUDA HUMAN RIGHTS TRIBUNAL

BETWEEN:

Andre Hypolite

Complainant

-v-

(1) The Commissioner of Prisons

1st Respondent

(2) Michael Christopher

2nd Respondent

(3) Philip Downey

3rd Respondent

COSTS ORDER

Mr Darrell Clarke, Darrell Clarke, for the Complainant

Mr Norman MacDonald, Senior Crown Counsel, for the 1st Respondent

Background

1. On 9 October 2014 a preliminary hearing took place which considered, inter alia, an application by the Respondents to strike out the Complainant's complaint for being vexatious and/or an abuse of process.
2. At the hearing the complaint against the 1st Respondent (initially incorrectly named as Westgate Correctional Facility and Commissioner Edward Lamb) was withdrawn by the Complainant and subsequently dismissed by the Tribunal in a Judgment dated 13 January

2015. The only remaining parties in the substantive matter (which is yet to be heard) are the Complainant and the 2nd and 3rd Respondent.

3. Following the Judgment, Mr MacDonald, on behalf of the 1st Respondent made an application for legal costs. Rather unusually, Mr MacDonald sought legal costs not only against the Complainant but also against the Human Rights Commission itself.

The Costs Hearing

4. On 18 March 2015 a costs hearing (“the Hearing”) was held and legal submissions were heard in respect of;

- (1) whether the Tribunal should award costs against the Complainant; and
- (2) whether the Tribunal has the jurisdiction to award costs against the Human Rights Commission itself, and if so, should costs be awarded in this case.

Following the costs hearing the parties were invited to provide further written submissions.

5. Mr MacDonald’s oral and written submissions focused on:

- (1) the fact that neither the original (nor amended) Particulars of Complaint contained any specific allegations against the 1st Respondent, and as such there was no reasonable prospect of the complaint ever succeeding; and
- (2) the Human Rights Commission’s decision to refer the complaint to this Tribunal was wrong and showed a lack of sufficient investigation (as if it had done so the matter would not have been referred to the Tribunal). It follows therefore that the Human Rights Commission is jointly and severally liable (with the Complainant) for the legal costs incurred by the 1st Respondent.

6. To this Tribunal’s knowledge it does not appear that these issues (particularly issue 2 above) have previously been dealt with in detail by a Tribunal (or the previous Boards of Enquiry). Certainly no precedent was put before us to suggest otherwise. As such, it is an

opportune time to consider what jurisdiction a sitting Tribunal has when considering costs applications.

Cost Jurisdiction

7. Once a matter is referred to a Tribunal by the Executive Officer (and heard) a Tribunal is given two specific powers under the Human Rights Act 1981 (“Act”) in respect of costs. In the first instance, pursuant to Section 20(1)(c), a Tribunal has the jurisdiction to:

“Order any party to the dispute to pay any other party or the Commission costs of the proceedings before the Tribunal, not exceeding in the aggregate \$1,000.”

8. This is a self-evident power with a wide range of discretion.

9. Section 20(3) of the Act goes somewhat further, in particular:

“In any case, where a Tribunal, after hearing a complaint, considers that the complaint is frivolous or vexatious and unjustified, the Tribunal may order the Complainant to pay compensation to the person against whom the complaint was made, not exceeding the reasonable costs of that person incurred in defending himself against the complaint.”

10. In other words, once the Tribunal has heard the complaint, if it is clear the Complaint was frivolous or vexatious and unjustified a Tribunal may order the Complainant to pay the legal costs incurred in defending against that complaint. The cap of \$1,000.00 as set out in section 20(1)(c) does not apply in these circumstances.

11. This is of course a different position to the Supreme Court where (generally speaking) the losing party pays the winning party’s costs (irrespective of whether there was evidence of frivolous or vexatious behavior).

12. There are no other references to costs either in the Act or in the Commissions of Inquiry Act 1935 (of which certain sections are incorporated into a Tribunal’s procedural powers further to Section 19 of the Act).

Costs against the Complainant

13. When a complaint is made to the Human Rights Commission the Executive Officer takes ownership of the matter further to sections 14J-16 of the Act. This involves both investigating the complaint and attempting to mediate.
14. A Tribunal only becomes involved once it is formally referred a matter by the Executive Officer further to Section 18 of the Act. The Executive Officer does have the power to dismiss a complaint prior to its referral under section 15 (8) and 15A of the Act but that is a matter for the Executive Officer. There is a clear separation between the Tribunal and the investigative/conciliation process in this respect, and any process and decision of a Tribunal is wholly independent to the investigation process of the Human Rights Commission itself. As was the case with the Complainant's complaint.
15. In the preliminary hearing the Tribunal made various findings, but of particular relevance is the finding at paragraph 39 of its Judgment dated 13 January 2015, where it noted the following:

"as a side note the Respondents' submissions that the Complainant's complaint should be dismissed as being vexatious and/or abuse of process are rejected. There is no evidence of any such conduct in front of the Tribunal."

The Tribunal had no evidence before it at the preliminary hearing that the Complaint was acting in a vexatious manner and/or there was an abuse of process. This finding neatly dispenses with any cost order under section 20(3) of the Act.
16. However the Tribunal sympathises to some extent with the fact that the 1st Respondent was incorrectly named and had to attend a preliminary hearing where it was confirmed that there was no claim against it (for vicarious liability or otherwise). We have therefore also considered our broader powers to award costs under Section 20(1)(c) of the Act.
17. When the Complainant made his complaint to the Human Rights Commission he did so from prison and without the assistance of an attorney. Further, a substantial part of his complaint was the allegation that he had been victimised for making (or trying to make) a

complaint to the Human Rights Commission. As a layman, without the assistance of an attorney (as we understand from Mr Clarke that he was only instructed in this matter a couple of days prior to the preliminary hearing) the issues of vicarious liability and its application is not one that a Complainant would be expected to understand when he initially made his complaint. Further, in this case (at first blush) given the circumstances of the allegations it was certainly not surprising that the 1st Respondent, given its direct authority over the 2nd and 3rd Respondent, should be included in the action. Indeed, based on the Amended Particulars of Complaint it was somewhat of a surprise that Mr Clarke made the submission that there was no claim against the 1st Respondent at the preliminary hearing.

18. It is therefore understandable that in discussing this matter with the Executive Officer (and investigative officers) of the Human Rights Commission the Complainant did not (or was unable to) articulate his position - and the fact remains that the substantive matter is still proceeding against the other two Respondents (albeit in a reduced form). It may or may not have been the case that the Executive Officer should have dismissed the complaint against the 1st Respondent prior to referring it to the Tribunal, but this is not for the Tribunal to consider when dealing with a costs application against the Complainant. In the specific facts of this case it would, in our view, be an incorrect exercise of our discretion to award costs against the Complainant further to section 20(1)(c).
19. As a general point, for obvious reasons, a Tribunal should be cautious on awarding costs (either under Section 20(1)(c) or 20(3) of the Act) at a preliminary hearing, before full evidence is heard in a matter.

Costs against the Human Rights Commission

20. Mr MacDonald submitted, in addition or in the alternative, that the Human Rights Commission itself should also pay the costs of the 1st Respondent as the referral to the Tribunal was a breach of procedural fairness (by the Executive Officer).

21. Setting aside the quandary that the 1st Respondent and the Human Rights Commission are both funded by the Government of Bermuda (so in effect the Government is applying for costs against itself) Mr Macdonald relied on, (amongst other cases) the interesting matter of *Tessia -v- NS Human Rights Commission et al 2014 NSSC 189*. In *Tessia* the Supreme Court of Nova Scotia held the Human Rights Commission breached the rules of procedural fairness and subsequently awarded costs against it.
22. In the case of *IRC Sandys Limited -v- Thomas* (also referred to by Mr MacDonald), the Supreme Court of Bermuda specifically refers to the jurisdiction of the costs in the Employment Act 2000 being a “*surgeneris*” one, which by extension, could apply to a costs under the Human Rights Act 1981. Further, the learned judge in *Thomas* left open the question of whether or not the Appellant can seek costs against the Tribunal (given the appeal was based on error of law made by an Employment Tribunal).
23. However the hole throughout all of the cases cited and discussed is that the Tribunal is not a Supreme Court and our jurisdiction is limited to dealing with matters referred to us by the Executive Officer, further to Section 18 of the Act, (i.e. in the case at hand the Executive Officer simply referred the matter to the Tribunal for the Tribunal to make a finding).
24. Whilst it is possible that the Human Rights Commission itself may be a party to a complaint (for example if one of its staff brings a claim against it) that clearly does not apply here. Simply put, the Tribunal has no statutory jurisdiction to step into the shoes of the Supreme Court and preside over a judicial review process as to whether or not the Executive Officer breached procedural fairness by referring the matter to us.
25. If the 1st Respondent’s position is that the Executive Officer acted outside of her office powers and/or incorrectly referred this matter to the Tribunal, it seems the correct route in that scenario would be by way of judicial review of the Executive Officer’s decision. The Tribunal has no powers to question the Executive’s Officer decision to refer the matter to us under the Act, and as such, cannot award costs against the Human Rights Commission based on the Executive Officers referral.

26. Whilst Mr Macdonald should be commended for his robust and persistent submissions on this point on behalf of his client, the Tribunal is not the correct legal jurisdiction for this application.

Order

27. There is no order as to costs against the Complainant

28. The Tribunal has no jurisdiction to award costs against the Human Rights Commission.

DATED this 28 day of July, 2015.



MICHAEL HANSON, CHAIRMAN



DONNA DANIELS, PANEL MEMBER



DWAYNE THOMPSON, PANEL MEMBER

