IN THE MATTER OF THE HUMAN RIGHTS ACT 1981

IN THE MATTER OF THE BERMUDA HUMAN RIGHTS TRIBUNAL

BETWEEN:

Andre Hypolite

Complainant

-v-

(1) Michael Christopher

(2) Philip Downey

Respondents

COSTS ORDER

Mr Darrell Clarke, Darrell Clarke, attorney for the Complainant.

Mr Peter Sanderson, Wakefield Quin, attorney for the Respondents.

Background

1. The background to this longstanding matter can be found in the Preliminary Judgment dated 13 January 2015 (**Preliminary Judgment**), the Costs Order dated 28 July 2015 (**First Costs Order**) and the Final Judgment dated 19 May 2016 (**Judgment**).

I HEREBY CERTIFY THAT the attached is a true and correct copy.

REGISTRAR

Dated: 23-JAN-2017

2. Following the Judgment, in which none of the Complainant's clams were upheld, the Respondents' attorney applied to the Tribunal for legal costs. On 29 June 2016 a costs hearing (**Cost Hearing**) was held and submissions were heard in respect of whether or not the Tribunal should award costs against the Complainant.

Preliminary Issue

3. At the outset Mr Clarke made an application to the Tribunal to stay the Cost Hearing on the basis that the Complainant was not present. Mr Clarke confirmed that the Complainant wished to attend but was not there as the relevant arrangements had not been made with Westgate Prison for his transportation and attendance.

4. The Tribunal asked Mr Clarke why, if that was the case, no application for a production order (nor indeed, communication of any kind) had been sent to the Tribunal or Westgate requesting the Complainant's attendance prior to the Cost Hearing. Mr Clarke had in fact (in the alternative) confirmed to the Tribunal that the proposed date for the hearing was acceptable.

5. Mr Clarke's response to this was that he didn't think it was his job to arrange his client's attendance.

6. As a general matter of conduct the Tribunal is concerned that an attorney does not think it is their responsibility to make the necessary arrangements for their client to attend a hearing (be it a costs hearing or otherwise), especially when that client has given the attorney a clear indication that they wish to attend. However, the Tribunal has no jurisdiction in respect of such matters.

7. Mr Sanderson submitted that the Cost Hearing should proceed as it is not normal or necessary for the parties to be present. It was the "usual course" for cost issues to be dealt with by attorneys alone.

8. On balance the Tribunal was of the view that the Cost Hearing should proceed on the basis that:

a. The Cost Hearing was simply a hearing applying the law of costs to the factual findings of the Judgment;

b. No further witness evidence was required from the Complainant; and

c. The Complaint was represented by his attorney Mr Clarke (who was in attendance and was instructed to deal with the matter).

The Hearing

9. Rather unusually, neither attorney relied on nor referred to any case law (including the First Costs Order handed down in these very proceedings).

10. Mr Sanderson's simple submissions focused on section 20(1)(c) and 20(3) of the Human Rights Act 1981 (**Act**), in particular, the Tribunal's jurisdiction to:

    20(1)(c) "*Order any party to dispute to pay any other party or the Commission costs of the proceedings before the tribunal, not exceeding the aggregate of $1,000.*"

    and

    20(3) "*In any case, where a tribunal, after hearing a complainant, 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.*"

11. In essence, Mr Sanderson's position was the Complainant was simply looking for an outlet for his grievance at being incarcerated. His case was always destined to fail and it was vexatious of him to bring his complaint through the Human Rights Tribunal simply because that was the one body that would receive it. More specifically, as the Complainant was an inmate serving a life sentence, it was quite possible that he made these complaints to *"make a nuisance"* of himself. This was exemplified when a large portion of the Complainant's complaint was initially struck out in the Preliminary Judgment, yet the Complainant continued with the claim nonetheless.

12. It was further submitted that even if we did not agree that the Complainant had acted in a vexatious manner we should follow the same framework of the Supreme Court, i.e. as the Complainant had lost his case the normal course is that costs must follow.

13. Mr Clarke's preliminary submission was that the costs argument in the human rights context had been argued *"over and over again in Canada"* and it was obvious that when people make human rights complaints they should not have to pay the costs.

14. Mr Clarke provided no precedent to validate this position save for a newspaper article which was of no relevance to the proceedings.

15. Mr Clarke's secondary argument was that the Complainant had not acted in a vexatious manner as, according to Mr Clarke, *"where there is smoke there is fire"* so *"something was going on"*. Mr Clarke submitted a Bermuda Judge had specifically told Mr Clarke that costs should not be awarded in such a set of circumstances - but Mr Clarke could not name the case or the Judge.

Findings

16. Clearly the Tribunal is guided by our discretionary powers contained in Section 20(1)(c) and 20(3) of the Act. We first deal with Section 20(3).

17. The Complainant's claim was built upon the foundation that he had been penalised as a direct result of communications with the Human Rights Commission and/or because the Respondents knew he intended to complain to the Human Rights Commission.

18. The form this penalisation took was alleged treatment he was subjected to from September to December 2011 **(Period)**. Specifically, during the Period he alleged the Respondents:

    (1) subjected him to more strip searches than other inmates (**Allegation 1**);

    (2) during a strip search, asked him to squat over a mirror that was placed on the Second Respondent's shoe (to observe his genitalia) (**Allegation 2**); and

(3) during a strip search, instructed him to bend over his prison bed and touched him in a sexual manner. Specifically they grabbed the his genitals, commented "my God Hypolite" and caressed his buttocks (**Allegation 3**)

(Collectively items (1) to (3) being defined as the **Allegations**).

19. None of these allegations were upheld by the Tribunal in our Judgment.

20. In respect of Allegation 1, the Tribunal found that the Respondents did not subject the Complaint to strip searches in response to any formal complaint or communication made to the Human Rights Commission. However, it was found the Complainant subjectively felt that he was targeted and it may well have been the case that he was searched more times than other prisoners but this was likely because he was a dangerous inmate with a history of infractions. Therefore Allegation 1 was not, in our view, frivolous or vexatious and unjustified. This does not therefore meet the threshold required under section 20(3) of the Act.

21. In respect of Allegation 2, none of the witnesses remembered the incident with any great clarity, but the Tribunal found that on the balance of probabilities, at some point the Respondents may have used a mirror to observe certain private body parts of the Complainant (though the Tribunal did not find this was as a result of the Complainant complaining to the Human Rights Commission). Therefore Allegation 2 was not, in our view, frivolous or vexatious and unjustified. This does not therefore meet the threshold required under section 20(3) of the Act.

22. Allegation 3 was the most serious of the Complainant's claims, in that it alleged the Respondents subjected him to physical sexual abuse. However, during the substantive hearing, which took place some years after the Complainant raised his complaint, the Complainant admitted that neither of the Respondents had grabbed him by the genitals or buttocks nor made the alleged comments. Allegation 3 was therefore unfounded, and was known to be unfounded by the Complainant - but was never withdrawn from proceedings in this matters long history.

23. Allegations of physical sexual abuse had therefore been hovering over the heads of the Respondents for a number of years. Bringing such unfounded claims in the first place and then failing to withdraw them was clearly vexatious and unjustified. In addition, whilst the Complainant was initially unrepresented he eventually instructed an attorney (Mr Clarke) who could advise him of the possible ramifications of proceeding with such serious yet completely unfounded claims. Therefore, there could be no plea of ignorance of the law by the Complainant (even if such a submission was made or relevant, which was not the case) as justification for proceeding with Allegation 3.

24. Given the above, in our view, by proceeding with Allegation 3 the Complaint was behaving in both a vexatious and unjustified manner.

25. Therefore, whilst it was our preliminary view that each party bear their own costs our preliminary view was, on reflection, incorrect. The balance we initially considered existed (given Allegations 1 and 2 were not vexatious and unjustified) did not take into account the fact that the Complainant proceeded with his most serious allegations of physical sexual abuse, despite clearly being cognisant of the fact the Respondents were innocent.

26. This matter therefore falls into the highly unusual circumstances (in our view) where a Tribunal should exercise its discretion under section 20(3) of the Act and we find that the Complainant is liable for the reasonable legal costs the Respondents incurred in defending the Complainant's claim.

27. In terms of our discretion under section 20(1)(c), given our findings in respect of Section 20(3) we make no finding that any other costs should be awarded in this matter.

Order

28. Further to Section 20(3) of the Act the Complainant is ordered to pay the Respondents the reasonable legal costs incurred in defending the Complainant's claim.

29. No order for costs is made under section 21(c) of the Act.

30. Given that an Order of the Tribunal, on correct application of Section 20B of the Act, becomes a Supreme Court Order costs shall be subject to taxation in the usual course if not agreed. To our knowledge the functioning of this provision in respect of taxation has not been considered previously, as such the Tribunal will hear counsel on this issue subject to any application being made within 7 days from the date of this Order.

DATED this 11 day of January 2017

MICHAEL HANSON, CHAIRMAN

DONNA DANIELS, PANEL MEMBER

DWAYNE THOMPSON, PANEL MEMBER