In the Supreme Court of St. Helena

Citation: SHSC 1/2014

Civil

Ruling on Costs

Attorney General

-v-

Nicola Chapman

Ruling dated 14th May 2014

The Chief Justice Charles Ekins

1. This was an appeal by the Attorney General against a decision of the Labour Regulator. With the consent of the parties I dealt with the appeal on paper and on 9th April 2014 I gave judgement dismissing the appeal. The Public Solicitor, who appeared for Dr Chapman both before the Regulator and on the appeal now applies for the costs incurred on the appeal against the Government of St Helena (SHG).

2. The costs which the Public Solicitor applies for are principally the costs incurred in instructing counsel to advise on the merits of the appeal and to draft the response to the Attorney General's grounds of appeal. The latter total some £1300.00. The Public Solicitor also seeks to recover costs calculated by reference to the time both she and the trainee Public Solicitor, Mr Garner, spent in preparing for the appeal. The total of the costs sought, therefore are some £1780.00.

3. The Public Solicitor submits that costs should be awarded in the present case on the following grounds: that the hearing before the Regulator was a hearing conducted over several days in which all issues were fully canvassed; the Regulator's judgement was reasoned and during the course of which he made findings of fact which he was entitled to make on the evidence which he had heard; that the decision he reached was a decision based on his findings of fact and to which he had correctly applied the relevant principles of law; that there was therefore no merit to the Attorney General's appeal a fact borne out by the result of the appeal. The Public Solicitor argued that this was nevertheless a matter of extreme importance to Dr Chapman herself. She submitted that although her own assessment of the merits of the appeal led her to the view that it would fail, nevertheless shortly after receipt of the Attorney General's grounds of appeal she had to travel to Ascension Island to appear in another case before the Supreme Court. She had no real opportunity herself to research the actual merits either in terms of the relevant law or in terms of conducting a detailed analysis of the

factual basis of the grounds of appeal. She felt it unfair both to Dr Chapman and to the trainee Public Solicitor to abandon the burden of this responsibility on to the latter; and that the decision taken therefore to instruct counsel was both a reasonable and responsible one. The Public Solicitor also submitted that she suspected from the way in which the grounds of appeal had been drafted, that the Attorney General's chambers had sought the assistance of specialist counsel. She submits that given her own view of the merits of the appeal, she made it plain to the Attorney General that in the event that the appeal failed, she would be seeking to recover the costs at least of obtaining counsel's opinion.

4. The Attorney General submits that there is no basis for suggesting that the appeal was without merit. This was the first case of its type heard on St Helena under the newly established Labour Regulation Authority. There were matters of principle of considerable consequence not only to SHG but to all employers on St Helena arising out of the decision of the Regulator which it was entirely appropriate to ask the Supreme Court to review. The fact that the appeal was in the event unsuccessful in no way undermines the validity of the exercise which the Supreme Court was asked to undertake. Furthermore, submits the Attorney General, the Public Solicitor made her own views of the merits of the appeal clear from an early stage. The subsequent decision of the Supreme Court to dismiss the appeal indicates that her judgement was sound. The Public Solicitor's decision to instruct counsel was therefore entirely otiose and the Court should not reward profligacy by an award of costs. As to the Public Solicitor's claim for costs reflecting the work she herself and the trainee Public Solicitor undertook, the Attorney General submits that Dr Chapman has not herself been charged for this work. This is precisely the sort of work which the Public Solicitor is paid by SHG to undertake. To award these costs, therefore, would put SHG in a situation of double jeopardy.

5. Before I deal with the Public Solicitor's application itself, I propose to try to give guidance as to how costs as a matter of general principle should be approached by the Courts of St Helena and Ascension Island. I am not aware that such guidance has been given in the past-certainly the issue has not come before me as Chief Justice.

6. In England and Wales, where parties are not legally aided generally costs will follow the event although ultimately it is a matter within the discretion of the trial judge. That is not to say that all costs incurred by the successful party will be recovered. In more straightforward cases the trial judge at the conclusion of the hearing will assess costs, disallowing those considered to be unreasonable, unnecessarily incurred or excessive. In more complex cases, and in the absence of agreement between the parties, costs will be taxed at a separate post hearing taxation hearing.

7. I have given careful thought as to whether a similar approach is appropriate to St Helena. I am clear that it is not. St Helena is very different to England and Wales in many respects, not least in terms of the affluence of St Helena's residents. Even in England and Wales aspiring litigants who do not qualify for legal aid and who cannot find a solicitor to undertake their case on a contingency fee basis are often deterred from seeking redress, however good their cases, through fear of ruin

should the case in fact fail, and they be ordered to pay costs. The theoretical principle of access to justice for all is thus in reality often illusory. Were this approach to be adopted on St Helena, then this illusion would be exacerbated many times over and the fear of costs might well effectively deny to all but a very small minority of residents of St Helena the undeniably desirable right of access to justice for all.

8. For the future, therefore, Courts should be loathe to make orders for costs against the unsuccessful party in civil litigation where the issue of costs might otherwise arise. Costs orders should only be made where one or other party has acted in a patently unreasonable fashion either in pursuing a wholly unreasonable claim or in maintaining an unsupportable defence. An order for costs should also be considered where one party has refused an offer made without prejudice save as to costs and subsequently recovers less than the offer made, or declines to accept a payment into court in circumstances where the award subsequently is less than the amount paid in. Even in these circumstances, however, each case will turn upon its own facts.

9. I am aware that this approach may give rise to hard cases. There may be cases for example where a successful litigant has privately funded the cost of an expert to assist whose fees will thus diminish the amount actually received by the litigant in his/her pocket. Careful thought will therefore have to be given as to whether the expert is in fact needed or whether a joint expert, instructed by both parties should be engaged to minimise such costs. The fact that such cases may arise however, seem to me to be outweighed by the general undesirability that a vast swathe of the population of St Helena should feel deterred from seeking proper redress through a fear of costs.

10. This approach should not be taken as set in stone for all time. If as hoped, the advent of the airport sees the St Helena economy develop rapidly and promotes the arrival of commercial lawyers on St Helena then no doubt a change will become necessary. For the time being however, the Courts should be guided by the principles outlined above.

11. I return then to the present application. I am satisfied that the Public Solicitor cannot properly be described as having been profligate in seeking counsel's advice. It is clear that the Public Solicitor felt that the appeal was without merit but I apprehend that the Public Solicitor would not usually consider herself to be a specialist in employment law. It is one of the challenges but also the terrors of a post like the Public Solicitor's that one is faced with a range of legal issues in scope far broader than one would normally encounter in practice in the UK where specialism is the order of the day. The same indeed can be said of those who work in the Attorney General's chambers. It is simply a fact of legal practice in a relatively small Overseas Territory. Given the importance of the issues at stake to Dr Chapman I entirely sympathise with the Public Solicitor's inclination to have her own view of the matter confirmed by counsel to ensure that she had not made some ghastly oversight of the sort that comes to haunt us all from time to time. I do not consider, therefore, that the Public Solicitor was acting either unreasonably or in a profligate fashion. Equally, however, I do not think that it can be said that the Attorney General was acting unreasonably in seeking to have the Supreme

Court review the Labour Regulator's decision. I accept that there were issues raised by the case of importance both to SHG and to the wider business community on St Helena. The fact that the appeal was dismissed does not per se suggest that it was entirely unmeritorious. Given the conclusions reached therefore, and applying the principles which I have outlined and by which the Court should be guided, it would not be appropriate in this case to make any award of costs and the application, therefore, fails.

12. Equally and for the reasons given I am satisfied that any retrospective application made by the Public Solicitor either to the Legal Assistance Fund or for special funding to cover the costs of counsel should be sympathetically considered. As I have said, I can quite understand why the Public Solicitor felt that counsel's opinion was justified and consider it entirely reasonable.

Charles Ekins, The Chief Justice

14th May 2014.

NB referred to in Bakos and Others v AG 2016 SHSC 551/2015, 511/2016 & 524/2016