IN THE SUPREME COURT OF THE TURKS AND CAICOS ISLANDS **ACTION NO. CL 35/23**

IN THE MATTER OF A REFERRAL FROM THE LABOUR TRIBUNAL BY WAY OF CASE STATED PURSUANT TO SECTION 98 OF THE EMPLOYMENT ORDINANCE (CAP. 17.08)

AND IN THE MATTER OF:

PATRICK EUGENE **APPLICANT**

-and-

INTERNATIONAL TRANSFER COMPANY LTD **RESPONDENT**

Before:	**The Hon. Mr Justice Anthony S. Gruchot**
Appearances:	**Ms Clemar Hippolyte, Principal Crown Counsel for the Labour Tribunal**
	Mr Oliver Smith KC and Ms Kimone Tennant for the Respondent
Hearing Date:	**10th October 2024**
Venue:	**Court 5, Graceway Plaza, Providenciales.**

COSTS DECISION

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1. On 10 April 2024 I handed down my decision with respect to 4 questions referred to the Supreme Court by the Labour Tribunal for determination ('the Reference') and said that I would hear the parties in relation to the costs of the Reference, Mr Smith KC appearing

on behalf of the Respondent at the substantive hearing. The Labour Tribunal ('the Tribunal') was represented by its President, Mrs. Doreen Quelch-Missick.

2. Submissions as to costs were made on 10 October 2024 and this is the decision.

3. The substantive application was somewhat unusual in that it was a Reference from the Tribunal after it had handed down its decision and arose from a compromise made between the Applicant and the Respondent, such that the Applicant received an amount less than the Tribunal award. As a result, the Respondent engaged in the Referral and seeks its costs against the Tribunal as a result, as Ms Tennant puts it:

> *"… a costs order should be in favour of International, it having succeeded on the issues raised in these proceedings, and there being no proper reason for any other order to be made. Further, and in any event, the Court disagreed with the positions taken by the Labour Tribunal in respect of all the issues raised, buttressing the position that International was the successful party."*

4. Additionally, the Respondent seeks its costs on the indemnity basis.

<u>The Law</u>

5. The Court's jurisdiction to hear this application rests in legislation and in the Rules of Court. Section 62 of the Civil Procedure Ordinance (Cap. 4.01) provides that "… *all costs of and incident to proceedings in the Supreme Court shall be in the discretion of the Court*."

6. Further, Order 62, Rule 3 of The Rules of the Supreme Court 2000 provides as follows:

> *"… (2) No party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the Court.*
>
> *(3) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.*

(4) The amount of his costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis where -

(a) an order is made that the cost of one party to proceedings be paid by another party to those proceedings, or

(b) an order is made for payment of costs out of any fund, or

(c) no order is required,

unless it appears to the court to be appropriate to order costs to be taxed on the indemnity basis."

7. Ms Hippolyte also directed me to **Bahamas Maritime Connexion Ltd -v- Calvin Missick**[1] a short decision of the Court of Appeal of The Bahamas in which Evans JA, delivering the judgment, said on the legal position:

"*3. There is no shortage of authorities relative to the award of costs in this jurisdiction. It is now well established that the general rule is that at the conclusion of a hearing, costs follow the event, with the result being that a successful party is awarded his costs of the proceedings unless there are special circumstances which may militate against the usual order being made. See: **SkyBahamas Airlines Limited v Southern Air Charter Company Limited** SCCivApp. No. 221 of 2017.*

*4. In the case of **Kelly v Albury** [1998] BHS J No.85, Strachan J set out the principles applicable to the exercise of the Court's discretion:-*

"(i). Costs are in the discretion of the court.

(ii). They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made.

(iii). The general rule does not cease to apply simply because the successful party raised issues or makes allegations on which he fails, but

[1] SCCivApp & CAIS No. 90 of 2021.

where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs.

(iv). Where the successful party raised issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs."

8. There is no dispute as to the basic principle and I do not need to elaborate further. It is upon this principle that Ms Tennant makes the submissions in paragraph 3 *supra*. However, Ms Hippolyte submits:

   "Costs orders are generally made against parties to litigation, not the tribunals or courts that adjudicate the disputes. Rule 64.2 of the Civil Procedure Rules 2000 (CPR) governs costs orders, and it applies to parties to the proceedings, not to the tribunal or the court exercising its judicial or quasi-judicial powers.

   The Tribunal in this case is not a party to the proceedings. It did not initiate or defend any litigation but merely performed its statutory function by referring a legal question to the Supreme Court for its opinion. Therefore, it is inappropriate for the Tribunal to bear the burden of costs in these proceedings."

9. She continues:

   "It is well-established that tribunals and quasi-judicial bodies are not generally subject to adverse costs orders except in cases of misconduct, bad faith, or ***acting outside their jurisdiction***[2]. *The Tribunal submits that no such conduct is present in this case, and therefore costs should not be awarded against it.*" (Emphasis added)

10. Ms Hippolyte directs me to **<u>Sirros -v- Moore and others</u>**[3]. In that matter, a claim for damages for assault and false imprisonment was brought by the Plaintiff against Moore, a police officer, the Commissioner of Police and HH Judge MacLeay, one of Her Majesty's

[2] See paras 26 to 30 *infra*.
[3] [1974] 3 All ER 776.

circuit judges. The claim arose from an appeal from the Magistrates, who had recommended that the Plaintiff, a Turkish national, be deported. The Magistrate went on to direct that the Plaintiff should not be detained pending the decision of the Home Secretary as to whether the Plaintiff should, in fact, be deported. The Plaintiff appealed to the Crown Court against the recommendation.

11. At the appeal, the judge (wrongly) accepted the prosecution's submission that the court had no jurisdiction to hear an appeal against a recommendation for deportation and dismissed the appeal. As the Plaintiff was leaving court, the judge called him back. An application for bail then arose and the judge remanded him in custody. He was released on bail the following day following an application by way of writ of *habeus corpus*. Nine days later, the Divisional Court granted the writ on the ground that when the judge had ordered the detention, the court was *functus officio*. Having dismissed the appeal, the Magistrate's order was unaffected and the direction for the plaintiff not to be detained stood.

12. The Court of Appeal held that there was no action against the judge in respect of the unlawful detention and, in consequence, against the police officer acting on the instructions of the judge. Ms Hippolyte directs me to the judgment of Denning MR, where he held:

    "Every judge of the superior and inferior courts, including a justice of the peace, was entitled to protection from liability in damages in respect of what he had done while acting judicially and under the honest belief that his act was within his jurisdiction, although, in consequence of a mistake of law or fact, what he had done was outside his jurisdiction. The judge was therefore protected since, although he had been mistaken in his belief that he had power to detain the plaintiff, he had acted judicially and in good faith."[4]

13. I am of the view that **Sirros** is distinguishable from the instant matter. In **Sirros,** a claim was brought against the defendants personally for damages, i.e. it was a separate cause of

[4] See p 784 e and f, p 785 a to d, f h and j.

action. What is at issue in this matter is the costs of the Reference. There is no claim against the Tribunal for any civil or criminal wrongdoing.

14. In support of her argument for costs, Ms Tennant directs me to **Regina (Davies) v Birmingham Deputy Coroner**[5] where the Court of Appeal of England and Wales considered issues relating to the liability of an inferior court or tribunal to pay the costs of the other side and, conversely, to recover costs from the other side. The Court of Appeal held[6]:

> *"(1) that the established practice of the High Court had been , make no order for costs against an inferior court or tribunal unless it had behaved improperly or unreasonably or, by appearing at the hearing to contest the application being made, had made itself an active party to the litigation; that the same principles applied to cases involving coroners; that although the court would not normally make an order for costs either in favour of or against an inferior court or tribunal whose appearance was intended to be by way of neutral assistance, a number of important considerations might tend to make the court exercise its discretion in a different way, so that a successful claimant who was obliged to finance his own litigation might be fairly compensated out of public funds and not be put to irrecoverable expense in asserting his rights where a coroner or other inferior tribunal had gone wrong in law and there was no other obvious candidate to pay the costs; and that the coroner could avoid the risk of such costs by submitting instead a written statement setting out the relevant facts surrounding an inquest and answering any specific points made by the claimant, although the court might then feel obliged to seek the assistance of an advocate to the court.*[7]

15. As per Brooke LJ[8]:

[5] [2004] 1 WLR 2739.
[6] As summarised in the headnote.
[7] Paras 27–28, 37, 43, 44, 47, 49, 53, 55, 59. *R v Coroner for Lincoln, Ex p Hay* [2000] Lloyd's Rep Med 264, DC considered. *R (Touche) v Inner London North Coroner* [2001] QB 1206, CA distinguished.
[8] At para. 48.

"I do not regard this outcome as at all satisfactory, but it stems from Parliament's unwillingness to allow a successful applicant to be reimbursed from central funds for the expense to which he has been put when there is no other potential source of public funds available for this purpose."

16. Ms Tennant submits that:

    "The Labour Tribunal did not simply appear in these proceedings; it initiated these proceedings and advanced contentious arguments. Accordingly, it cannot be denied that its role was as an active party to the litigation."

17. It cannot be gainsaid that the Tribunal not only participated and argued the matter but did so vociferously. This was not a case where the Tribunal simply put questions forward to be considered by the Court and appeared as *amicus curiae* or to offer neutral assistance. The Tribunal had formed a view which it urged me to follow. It was open to the Respondent not to participate actively, but I am cognisant of the fact that the Court was assisted by the submissions of Mr Smith KC

18. Whilst it is arguable that by the Tribunal adopting the correct procedure by bringing the Reference by way of case stated, it has perhaps resulted in a difficulty that the Respondent has become entwined in the Reference notwithstanding it has no real interest in the outcome. Likewise, the complainant/Applicant had no interest in the outcome of the Reference and took no part in the proceedings before the Court. As I said in the substantive judgment:

    "A referral to the Supreme Court by way of case stated arises when some disputed point of law arises between the parties during the progress of a case. The Tribunal can then, of its own volition refer that question of law to the Supreme Court by way of originating motion. It is then for the parties to argue the issue before the Supreme Court for a decision on that point of law. The Tribunal has a right to appear and be heard at the hearing of the originating motion."

19. Ms Tennant submits:

"International was made to join these proceedings given the contents of the Questions of Law document. International was drawn into expensive litigation in which it had no other interest than the issues that arose in these proceedings. The dispute between International and Patrick Eugene had come to an end. International was not seeking to protect any right or legal entitlement.[9]"

20. Whilst I understand why the Respondent is aggrieved at being brought into the proceedings, I refer to O.56 r.9[10] which provides:

    "(1) A case stated by a tribunal must be signed by the chairman or president of the tribunal, and a case stated by any other person must be signed by him or by a person authorised in that behalf to do so.

    (2) the case must be served on the party at whose request, or as a result of his application to the Court, the case was stated; and if a Minister, tribunal, arbitrator or other person is entitled by virtue of any enactment to state a case, or ***to refer a question of law by way of case stated, for determination by the High Court without the request being made by any party to the proceedings before that person, the case must be served on such party to those proceedings as the Minister, tribunal, arbitrator or other person, as the case may be, think appropriate."*** (Emphasis added)

21. The target of the Reference was the action taken by the Respondent after the Tribunal's decision. The Respondent was, therefore, in my view, an appropriate party to be served with the case.

22. Ms Tennant refers me to **<u>Excelsior Commercial & Industrial Holdings Ltd -v- Salisbury Hamer Aspden & Johnson (a firm) and another</u>**[11]. Whilst the case is referenced with respect to the claim for indemnity costs, and whilst it was decided under the Civil Procedure Rules in England and Wales, Woolf LCJ said[12]:

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[9] Nor was Mr Eugene.
[10] As to the importation of O.56 into the Civil Procedure Rules 2000, see para. 6 *et seq*. of the substantive decision.
[11] [2002] EWCA Civ 879
[12] At para. 12.

"Equally it is made clear that, in exercising its judicial discretion, it is the obligation of the court to look at the circumstances of the case in general, and here I make particular reference to the wide terms of para 44.3(5)."

23. Para 44.3(5) provides:

    "(5) The conduct of the parties includes –

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

    (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

    (c) the manner in which a party has pursued or defended his case or a particular allegation or issue;

    (d) whether a Claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

24. Notwithstanding that the above is a provision from the Civil Procedure Rules now applicable in England and Wales, this illustrates the wide discretion the Court has in awarding costs.

25. Woolf LCJ went on:

    "An indemnity order may be justified not only because of the conduct of the parties, but also because of other particular circumstances of the litigation. I give as an example a situation where a party is involved in proceedings as a test case although, so far as that party is concerned, he has no other interest than the issue that arises in that case, but is drawn into expensive litigation. If he is successful, a court may well say that an indemnity order was appropriate, although it could not be suggested that anyone's conduct in the case had been unreasonable."

26. I am of the view that if being drawn into litigation can give rise to an indemnity costs order, the fact that a party has been drawn into litigation in which he has no interest could be sufficient to give rise to an award of costs where the circumstances are such that,

ordinarily, no costs order would be made. Ms Tennant adopts the position (albeit in relation to her submissions in respect of an indemnity costs award) that:

> *"21. Having decided to pursue the matter, the Labour Tribunal should not have included International. Unusually, the Questions of Law were filed in the Supreme Court after the proceedings in the Labour Tribunal between International and Patrick Eugene had concluded. As highlighted by this Court at paragraph 11 of the Decision herein "[a]referral to the Supreme Court by way of case stated arises when some disputed point of law arises between the parties during the progress of a case." The Tribunal proceedings having come to an end, there was no need to involve International.*
>
> *22. Furthermore, the issues raised in the Questions of Law could have been raised in a neutral fashion, without reference to International, which would have obviated the need for International to be party to these proceedings."*[13]

27. Ms Hippolyte resists an order for costs on the basis that costs should not be awarded against a Tribunal acting within its jurisdiction. She submits with reference to section 98(1) of the Employment Ordinance (Cap. 17.08) that the provision:

> *"…ensures that complex or unclear legal issues can be referred to a higher court, which has the expertise and authority to resolve those questions. By referring the matter to the Supreme Court, the Tribunal was acting fully within its statutory authority.*
> *5. The referral was made in good faith and* ***in accordance with the statutory scheme laid out by the Ordinance****.* ***The Tribunal has no vested interest in the outcome of the dispute and acted neutrally*** *to seek judicial clarification on legal issues that arose in the case."* (My emphasis)

28. I unhappily cannot agree. As I held in the substantive matter, the Tribunal was *functus officio* once it had handed down its decision[14]. In advancing the substantive matter, it was acting outside its jurisdiction. The Tribunal was wrongly of the view that it had a

[13] But see paras. 19 to 21 *supra*.
[14] See para. 65 of the decision.

jurisdiction to enforce its award. This is supported by its written submission, where it is said:

> *"The duty of the Labour Tribunal did not end at the dispensing of its Decisions and [has] mechanisms in place to ensure that the Compensation Awards are complied with."*

29. It is perhaps worth revisiting section 98(1) of the Employment Ordinance (Cap. 17.08):

> *"The Tribunal may, on its own motion or on the application of any party, refer **any question of law arising on a cause or matter** for decision to the Supreme Court by way of case stated for its opinion thereon."* (Emphasis added)

30. If, as I held, the matter before the Tribunal concluded on the handing down of its decision, the Reference was not in respect of a question of law arising on a cause or matter that was before it.

31. Ms Hippolyte also takes the position that there is no legal or factual basis for imposing costs on the Tribunal in the absence of misconduct or abuse of power and submits that there is no allegation that the Tribunal acted improperly, in bad faith, or beyond its jurisdiction. Whilst I am of the view that there was no bad faith in the Tribunal's actions, for the reasons I have already given, I do not agree that the Tribunal was not acting outside of its jurisdiction and that had been asserted since before the Reference was made, as detailed at paragraph 14 of the Reference where the Tribunal states:

> *"The Respondent [Applicant] claimed that the Labour Tribunal became **'functus'**, and had no redress to ensure that the Order was/is upheld…"* (Emphasis in original)

32. I am of the view that the Respondent's claim for costs is not without good foundation. However, Ms Hippolyte raises a further issue that carries some force. She suggests that there is a good public policy reason why costs should not be awarded in this matter and submits:

> *"13. It is submitted on behalf of the Tribunal, that the imposition of costs on tribunals for referring legal questions to higher courts would have a chilling effect on the ability of such bodies to perform their functions. If tribunals fear*

that they may be subject to costs orders for making lawful referrals under their statutory powers, they may be deterred from seeking necessary judicial clarification on legal issues.

14. The statutory scheme of the Employment Ordinance was designed to allow the Tribunal to refer legal questions to the Supreme Court in appropriate cases, without fear of financial repercussions. It is not in the public interest to impose costs on the Tribunal for following this procedure, as it would undermine the purpose of section 98(1) and hinder the proper administration of justice.

33. No authority was provided for such public policy consideration, but I accept the same. The function of the Tribunal and, in consequence, the administration of justice can only be fortified by such references, and this matter has allowed this Court to put on record, hopefully in clear terms, how such references are made.

34. The Court is left to balance this public policy consideration against the interests of the Respondent "*who was obliged to finance [its] own litigation.*"[15] Whilst the principle behind cost recovery is to indemnify (generally to an extent) a successful party in respect of legal costs incurred and not to punish the losing party, I am mindful that an award of costs has the potential to appear penal in nature.

35. The award of costs is at the discretion of the Court and notwithstanding the general rule that costs follow the event, as discussed in *inter alia*, in **Bahamas Maritime Connexion Ltd.**[16]. I refer again to O. 62 r.3(3) of the Rules of the Supreme Court:

"*(3)* ***If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings****, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.* (Emphasis added)

[15] *Regina (Davies) -v- Birmingham Deputy Coroner supra.*
[16] *Supra*.

36. The general rule, therefore, only arises if the Court exercises its discretion to make an order for costs and, in considering whether to exercise such discretion, as per Woolf LCJ,[17] the Court must look at all the circumstances of the case in general. In doing so, my decision is, perhaps in the circumstances of this matter, unenthusiastically, to make no order as to costs.

37. The primary reason is that I would not want to discourage questions of law being referred to the Supreme Court, whether by statutory reference, as in this matter, or by way of case stated under the Rules. I am of the view, given my reasons for the substantive decision, that making an order for costs against the Tribunal would likely weigh heavily on the mind of the Tribunal when considering making any further reference.

38. Whilst acknowledging Ms Tennant's submissions set out in paragraph 3 *supra*, the outcome of the Reference has brought clarity to issues on which the Tribunal was unclear, and on that basis, it cannot be said to have been fruitless.

39. I am also mindful that there is no power in the Employment Ordinance (Cap. 17.08) to award legal costs to a successful party. To move away from that principle emphasises the potential that, to award costs in this matter, could be perceived as penal

40. Having made the above decision, it is not necessary for me to consider the issue on which costs should be assessed.

41. In closing, it would be remiss of me not to thank all counsel for their learned assistance and submissions.

Disposition

42. The Court makes no order as to costs.

28th February 2025

The Hon. Justice Anthony S. Gruchot
Judge of the Supreme Court

[17] *In Excelsior Commercial & Industrial Holdings Ltd. supra.*