**[2022] JMSC Civ. 73**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. SU 2021 CV 03679**

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| **BETWEEN** | **DALE AUSTIN** | **CLAIMANT** |
| **AND** | **THE PUBLIC SERVICE COMMISSION** | **FIRST RESPONDENT** |
| **AND** | **THE ATTORNEY GENERAL OF JAMAICA** | **SECOND RESPONDENT** |
| **AND** | **MARLENE ALDRED** | **THIRD RESPONDENT** |

**IN CHAMBERS VIA ZOOM**

Mr Hugh Wildman and Miss Indira Patmore instructed by Hugh Wildman and Company for the Applicant.

Mr Garth McBean, QC and Miss Dian Johnson instructed by Garth McBean and Co. for the first respondent.

Mr Allan Wood, QC and Miss Analeise Minott instructed by Livingston Alexander and Levy for the second and third respondents.

Heard: May 6, 2022 and June 3, 2022.

**Whether costs of application for leave to apply for judicial review should be awarded to applicant**.

PETTIGREW COLLINS J

**INTRODUCTION**

**[1]** The substantive application was one for leave to apply for judicial review and it was determined in the applicant's favour, in that leave was granted to him. He did not however succeed in establishing his right to a grant of leave on all of the grounds

raised in the application. The applicant's position is that costs should follow the event and he is entitled to his costs, since he is the successful party as far as the application is concerned.

**[2]** The respondents on the other hand, argue that the applicant is not entitled to his costs at this stage of the proceedings and that the question of costs should abide the outcome of the claim for judicial review since costs are not generally awarded in favour of a successful applicant in an application for leave to claim judicial review.

**Applicant's submissions**

**[3]** The applicant takes the view that there is no reasonable basis in this case to depart from the general rule. He insists that the only stipulated basis for departing from the general rule is the provisions of Rule 56.15 and that the policy rationale implicit in this rule was designed to benefit applicants who are usually individual citizens or private parties challenging potential state abuse and potential unlawful decisions by organs of the state. Further, there is often a power imbalance as well as great disparity between the resources of the private party and that of the state. He argues that the rule exists so as not to punish such applicants with the prospect of unbearable costs with the effect of discouraging potential applicants from pursuing applications for redress. He further contends that this is one case where there is such disparity.

**[4]** It is also the submission that the matter has raised a number of significant novel and nuanced legal issues and so significant research and legal arguments were required and therefore counsel ought to be compensated for his time and work involved.

**[5]** It is also contended that the 'event' which must be in contemplation at this point is the hearing of the application for leave and essentially that the court would not be deviating from the general rule that costs follow the event if it makes an order for costs in favour of the applicant. The applicant further submits that he made his application with reasonable promptitude and has not exaggerated the basis for his application in circumstances where there was a failure to consider him for promotion

over a period of 10 years. He asked the court to consider that one of the principal factors that must be taken into account in deciding on costs is the conduct of the parties both before and during the proceedings. He says that the conduct of the respondents before the proceedings was unreasonable. He pointed to the fact that he sought clarity on the process and reasons for the decision not to promote him, yet he received no response. He says also that there was a potential opportunity to resolve the matter without the need for litigation.

**[6]** It is the final submission of the applicant that when exercising its discretion, the court should consider that he succeeded on the question of whether the test for granting leave was met. Thus to the extent that Rule 64.6 allows the court to take into consideration whether a party has succeeded on all or only some of the issues, it should be considered that he has succeeded on the only issue.

**First respondent's submissions**

**[7]** The first respondent directed the court's attention to the case of **Natalia Psaras and Marie Lue v Minister of National Security and the Attorney General** [2016] JMSC Civ. 22, which was a successful application for leave to apply for judicial review where Wint Blair J ordered that costs should be costs in the claim.

**[8]** The Court's attention was also directed to a case from the High Court of Northern Ireland, **In the Matter of an Application by Saeed Ullah for Leave to Apply for Judicial Review** [2007] NIQB 45, where Gillen J awarded costs in a case he regarded as an exceptional one. Gillen J made the following observations at paragraphs 6 to 9 of the judgment:

> ***6. Mr. Mc Taggart, who appeared on behalf of the applicant, today sought an order from the court granting costs against the respondent from 5 February 2007 onwards. Whilst he recognized that it was only in exceptional cases that cost should be awarded against a respondent in applications for leave, he submitted that this was one such case given the exchange of correspondence with the Home Department. Ms. Connolly, who appeared on behalf of the respondent argued that it was not such a clear case and that there had been some delay occasioned by the respondent seeking a psychiatric report on the applicant.***

7. ***I have come to the conclusion that this is one of those exceptional cases where it was appropriate to order costs against the respondent for failing to concede what amounted to a well-founded case until the application for judicial review had been lodged. I came to that conclusion for the following reasons. In R v Royal Borough of Kensington and Chelsea ex p. Ghebregiogis [1995] 27 HLC 602 such an award was made in circumstances where an applicant who had arrived in the United Kingdom with his two children from Sudan. He was, with the assistance of the Law Centre, seeking accommodation under Section 75 of the Housing Act 1995. The respondents had declined to provide such accommodations. The Law Centre sent a letter to the respondent which clearly set out the facts of the case and the relevant propositions of law in support of the applicants' claim that the respondent had a duty to provide accommodation for both himself and his family. The letter made it plain, that in the absence of such a concession, the applicant would have to apply for leave to judicially review their decision. In the absence of such a concession, the applicant did proceed to apply for leave to move to judicial review. Before the matter came before the single judge, the respondent considered the applicant's claim and agreed to provide such accommodations.***

8. ***In the course of his judgement on the question of cost, Brooke J. said:***

   > ***"It was only in a very clear case that the courts should exercise the power under Section 51 of the Supreme Court Act 1981 to order costs against respondents in relation to judicial review proceedings which had been lodged but had not yet proceeded to the leave stage."***

9. ***However, in the court's judgment, this was an exceptional case. The letter before claim set out the facts and the law with admirable clarity. There was no doubt that the applicant's case was well founded as a matter of law and if the respondent had given proper attention to its merits when it received a letter before action, it would have come to the conclusion which it had eventually reached when it received notice of the proceedings. This was a clear case and simple point.***

**[9]** It is also the submission of the first respondent that an application for leave for judicial review is part of the administrative procedure established and governed by the Civil Procedure Rules and the procedure is conducted in order to determine whether the proposed claim is sufficiently grounded so that it can proceed to a hearing. Further, that since the grant of leave is conditional upon the filing of the claim within a stipulated time after which the claim is heard on its merits, the

appropriate order is costs in the claim as the hearing for leave is a mandated part of the procedure for initiating the claim.

**Second and third respondents' submissions**

**[10]** The second and third respondents make the similar point in the preceding paragraph by saying that costs should follow the event and there is presently no claim is before the court.

**[11]** Both respondents argue that the applicant was only partially successful which is a factor underscoring the reasonable and appropriate conduct of the respondents.

**[12]** The second and third respondents observed that the rule governing judicial review claims is silent on how orders relating to costs should be dealt with. Further it was said that at the leave stage of judicial review, there is no in depth hearing.

**[13]** It was also the submission of Mr Wood, QC that the proceedings are unique in that the cause does not commence until permission is granted and the claim is filed. Counsel cited the **UK Practice Statement (Judicial Review: Costs**) 2004 1WLR 1760 which provides as follows:

> "***It is necessary in judicial review claims to obtain permission and it has sometimes been suggested that a successful claimant cannot recover the costs of obtaining permission unless the court has made a specific order. It has never been the practice in the Administrative Court or its predecessor, the Crown Office, to make any costs order in granting permission because it was assumed that costs would be costs in the case. To avoid any arguments, a grant of permission to pursue a claim for judicial review, whether made on the papers or after oral argument, will be deemed to contain an order that costs be costs in the case. Any different order made by a judge must be reflected in the court order granting permission.***

**[14]** Mr Wood, QC also submitted that the non-application of Rule 56.15(4) and (5) at the leave stage was confirmed by Sykes J (as he then was) in **Danville Walker v The Contractor General** [2013] JMFC Full at paragraph 5. Where he said

> ***"I am not convinced that this is the correct starting point. This rule occurs in 56.15 which deals with costs at a full judicial review hearing. It would seem to me that rule 56.15(4) and (5) does not***

> ***apply to the current situation because it speaks to costs in the context of a full hearing after leave has been granted and the claim has been heard. There is nothing in part 56 dealing with costs at the leave stage…"***

**[15]** The decision of **Golding v Simpson Miller** SCCA 3/08 was cited for the purposes of explaining the specialized nature of part 56. Mr Wood pointed out that the Court of Appeal dismissed the argument that the court was empowered to grant an extension of time to apply for judicial review. It was there said that Part 11 of the CPR provides general rules whereas part 56 deals specifically with administrative law and further, that where it is intended that the special rules are to be affected by other rules, it is so stated. It was submitted that the silence in part 56 on costs at the leave stage calls into question whether a costs order should be made at all prior to the substantive hearing. I understand the query as to whether a costs order should be made at all prior to the substantive hearing to be a query whether an order awarding costs to one party or the other should be made.

**[16]** Dicta in the **Danville Walker** case which points to the application of the general rules set out in part 64 relating to costs was alluded to. It was said in paragraph 19 of the judgment that

> ***"the point being made is that despite the fact that judicial review are civil proceedings and applications for leave are governed by the costs regime in Part 64, I am of the view that the special nature of these proceedings makes them sui generis and not to be thought in the same way as private law civil proceedings between private citizens."***

**[17]** The case of **R (Corner House Research) v Secretary of State for Trade and Industry** [2005] 1WLR 2600 was also cited on behalf of the first and second respondents. That case also highlights some of the distinctions between a regular civil claim and a public law claim. Reference was made to the public interest in the elucidation of a public law claim and to the fact that the principles governing such a claim may be different in areas such as the award of costs.

**[18]** On the point that it is only in exceptional cases that a court will exercise its discretion to make an award of costs against an unsuccessful party at the leave stage, the case of **R (Mount Cook Land Ltd and Another v Westminister City Council** [2017] PTSR 1166 was cited. It was said at page 1194 of the judgment that

> "***A court in considering an award against an unsuccessful claimant or the defendant's and/or any other interested party's costs at a permission hearing, should only depart from the general guidance in the practice direction if he considers there are exceptional circumstances for doing so."***

Further at paragraph 4, it was said that:

> **"*A court considering costs at the permission stage should be allowed a broad discretion as to whether, on the facts of the case, there are exceptional circumstances justifying the award of costs against an unsuccessful claimant"***

**[19]** And at paragraph 5 that:

> "***Exceptional circumstances may consist in the presence of one or more of the features in the following non exhaustive list***
>
> ***(a) hopelessness of the claim,***
>
> ***(b) the persistence in it by the claimant having been alerted to facts and /or the law demonstrating the hopelessness;***
>
> ***(c) the extent to which the court considers that the claimant, in the pursuit of his application, has sought to abuse the process of judicial review for collateral ends-a relevant consideration as to costs at the permission stage, as well as when considering discretionary refusal of relief at the stage of substantive hearing if there is one and***
>
> ***(d) whether as a result of the deployment of full argument and documentary evidence by both sides at the hearing of a contested application, the unsuccessful claimant has had, in effect, the advantage of an early substantive hearing of the claim"***

**[20]** It was also a part of the submission of the second and third respondents that the applicant has not given any reason for a departure from the general rule. Counsel also alluded to the grounds on which the applicant did not succeed and the fact that the Solicitor General was joined late.

## LAW AND ANALYSIS

**[21]** The application was brought pursuant to Rule 56. The only provisions relating to costs in rule 56 are set out in rule 56.15 (4) and (5) which states:

**(4) The court may, however, make such orders as to costs as appear to the court to be just including a wasted costs order.**

**(5) The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the applicant has acted unreasonably in making the application or in the conduct of the application.**

**[22]** It is true as the respondents advanced, that the Civil Procedure Rules do not mandate that the applicant in a case such as this one, is entitled to costs on a successful application. However, there is nothing in Rule 56 to indicate that the general rule should not apply except to the extent that it is made clear by Rule 56.15(5). This provision it is noted, is for the benefit of an unsuccessful applicant. As the respondents also observed in their submissions, the instances in which an order for costs may be made against an applicant for leave are restricted to circumstances where the applicant's conduct is considered to be unreasonable.

**[23]** As is clear from the rules and fully recognized by all parties to this application, an application for leave is, by virtue of our rules of court, a necessary precursor to the proper filing of a Fixed Date Claim Form seeking the relief of judicial review. There is thus no question whether an application for leave must be regarded as proceedings within the meaning of Rule 64.6. It seems clear enough as Mr McBean accepts, that it remains within the judge's discretion to decide whether an award of costs should be made in favour of the applicant, pursuant to the provisions of Rule 64.6.

**[24]** In the case of **In the Matter of An Application by Saeed Ullah For Leave To Apply For Judicial Review** cited of by Mr Mc Bean QC, the position was stated as an accepted and recognized one that it was only in exceptional cases that cost is awarded against a respondent in applications for leave. That position is borne out in other cases cited. In the case of **Natalia Psaras and Marie Lue v Minister of National Security and the Attorney General,** where the court ordered that costs be costs in the claim for judicial review, there is no indication that there were any arguments presented on the question of the award of costs. There are a number of cases within this jurisdiction where costs were awarded to a successful applicant for leave. The case of **Nerine Small v the Director of Public Prosecution** which was cited in the substantive application, is an example. It is also fair to say that there is

no indication from the judgment that the matter of cost was contested or in any manner discussed.

**[25]** The provisions of the **UK Practice Statement** in no way indicate that a cost order is never to be made. It merely speaks to what is a usual practice. In many instances, hearings are ex parte and are not contested. There is no differentiation made in the Practice Statement between those instances and matters which are strongly contested and hence require a great deal of preparation as happened in the instant case.

**[26]** I do not find reference to the excerpts in **Danville Walker** (supra) case to be helpful to the respondents' position. The learned judge merely explained that rule 56.15 (4) and (5) are applicable to costs in the hearing of the claim for judicial review and not to the hearing of the application for leave. He also discussed the sui generis nature of judicial review claims, a factor which would serve to alert a court to the fact that there may be certain distinctions to be drawn between such an application and any ordinary application under the Rules, and in particular to the liklihood that the general position that costs follow the event may not necessarily be the appropriate order. Hence the need to appreciate that special consideration should be given to the question of what order as to costs should be made.

**[27]** It was made plain that the factors stipulated in case of **R (Corner House Research) v Secretary of State for Trade and Industry** (supra) are not an exhaustive list. I believe it to be of relevance and a factor which may lend credence to the need for consideration as an exceptional feature, the fact that there was a "*deployment of full argument and documentary evidence"* by all parties, (to borrow the words from **R (Corner House Research) v Secretary of State for Trade and Industry**) and particularly so by the respondents in this fully contested hearing.

**[28]** Whereas it is true that in an application for leave to apply for judicial review it is not necessary that detailed arguments be presented, the fact is that it happened in this particular instance. The hearing lasted a full day and a half, a further fifteen minutes or so on the occasion of the delivery of the judgment and another hour for the hearing of the submissions relating to costs. The respondents understandably utilized a very significant portion of that time. I also accept the applicant's position

that an explanation could potentially have averted litigation. I say this particularly in relation to the first respondent. As was observed in the judgment, the applicant had set out in much detail the basis of his complaint when he launched his appeal. He was met with a terse response. That is a factor which although by itself might not necessarily have tipped the scale, must be weighed in the balance.

**[29]** I do believe that this is such a case where the court should consider making an award of costs to the applicant.

**[30]** Rule 64.6 provides that if the court decides to make an order about the costs of any proceedings, the general rule is that the court must order the unsuccessful party to pay the costs of the successful party. It is also provided that the court may order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs. In order to decide who should pay costs, Rule 64.6(4) dictates that the court must have regard to all the circumstances which include:

> **a. The conduct of the parties both before and during the proceedings;**
>
> **b. Whether a party has succeeded on particular issues, even if that party has not been successful on the whole of the proceedings;**
>
> **c. Any payment into court or offer to settle made by a party to settle which is drawn to the court's attention (whether or not made in accordance with Parts 35 or 36;**
>
> **d. Whether it was reasonable for a party:**
>
> > **i. to pursue a particular allegation and/or**
> >
> > **ii. raise a particular issue**
>
> **e. The manner in which a party has pursued:**
>
> > **i. that party's case;**
> >
> > **ii. a particular allegation or**
> >
> > **iii. a particular issue.**

**[31]** Rule 64.6(5) provides as follows:

**The orders which the court may make under this rule include orders that a party must pay-**

1. **A proportion of another party's costs;**
2. **A stated amount in respect of another party's costs;**
3. **Costs from or until a certain date only;**
4. **Costs incurred before the proceedings have begun;**
5. **Costs relating to particular steps taken in the proceedings;**
6. **Costs relating only to a distinct part of the proceedings;**
7. **Costs limited to basic costs in accordance with rule 65,10; and**
8. **Interest on costs from or until a certain date, including a date before judgment.**

**[32]** I am unable to agree with the applicant that the court should consider that he has succeeded on the only issue. The applicant has simply identified the overarching issue. But subsumed under the broad issues were the sub issues, each of which took time to research and argue. A number of issues were raised. These included:

1. Whether the application was premature;
2. The unconstitutionality of delegation instrument and invalidity of the accountability agreement;
3. Irrationality and unreasonableness, having regard to the alleged failure to consider Regulation 17 (1) provisions when considering the applicant for promotion and the alleged failure to consider him for promotion over a ten years' period;
4. Bias;
5. The right to a hearing and to be given reason for the decision; and
6. Legitimate expectation.

**[33]** I was not of the view that the applicant had made out an arguable ground on the basis of bias against any of the parties. I also did not take the view that he had

made out an arguable ground against the third respondent in relation to the alleged failure to consider Regulation 17 (1) provisions when considering him for promotion. Further, I did not take the view that she failed to provide him with a reason as to why he was not recommended for promotion. My finding was that she in fact provided him with a reason. To the extent that the concluding paragraph of the judgment might have implied that my finding was that the applicant was not given a reason by the Solicitor General, it was inaccurate. It is the first respondent who is impugned for the failure to give a reason as to why the applicant's appeal was unsuccessful. A reading of the relevant aspects of the judgment would have made that translucently clear.

**[34]** The other grounds which involved any conduct on the part of the Solicitor General could easily have been pursued without joining her as a respondent. I say that because it is by virtue of provisions in Regulation 15 and the Accountability Agreement that she was designated the individual to carry out the interview, and should therefore bear no responsibility in her capacity of Solicitor General for her involvement in the process. The question of whether there was evidence of the breach of the constitutional rights was not a necessary part of the discussion as no leave was required in respect of any claim to be pursued in that regard. That fact was made clear in the judgment and the issue was therefore not elaborated on. With the exception of the ground of bias, the applicant made out the grounds against the first and second respondents.

**[35]** The first and second respondents made the point that the fact that the applicant was not successful on all the grounds advanced is demonstrative of the reasonable and appropriate conduct of the respondents. The position is also that where an applicant unreasonably pursues a point, such conduct may lead to a cost order adverse to him. That is also true of a respondent, although not by virtue of any provision in rule 56. I would also make the observation that the view is not taken that the applicant was unreasonable in pursuing any of the grounds raised. Neither am I necessarily of the view that the respondents unreasonably opposed the application or any aspect of it. The only issue that seemed reasonably clear to me was the question of the entitlement of the applicant to reasons when his appeal was denied. Even so, one can fully appreciate that a different view could well be taken of

the matter. It might not have been necessary however, to advance full and detailed arguments on some issues.

**[36]** It is inaccurate to say as the applicant did, that the respondents engaged *"multiple counsel, including multiple queens counsel and multiple law firms to oppose every single order being sought by the applicant"* without conceding any point. It is a fact that no point was conceded. It was not in the remotest way unreasonable for the first respondent to engage one queen's counsel and one supporting counsel in the matter. Neither was it for the second and third respondents together to be represented by one queens counsel and one supporting counsel.

**[37]** The fact that the applicant was not successful on all the grounds is also a very relevant consideration. For the reasons explained, there should not be an award of costs against the Solicitor General. Further, although I am of the view that the claimant should be awarded costs against the first and second respondents, he should not recover 100% of the costs against them.

**[38]** Being mindful of the factors to take into consideration as set out in Rule 64.6, in particular 64.6(4) (b) and (d) and 64.6(5)(a) and (b), the respondent will recover the greater portion of his costs against the first and second respondents.

**CONCLUSION**

**[39]** In the final analysis, the court has a discretion to award costs in an application for leave to apply for judicial review, although the usual order is that costs be costs in the claim. I consider that this case has exceptional features which takes it outside of the accepted general position as far as applications for leave to claim judicial review are concerned. The court takes into consideration that the applicant was not successful on all the grounds raised and was unsuccessful in most if not all of the grounds which required that the Solicitor General be made a party to the application.

**[40]** In all the circumstances, the applicant will recover 80% of his costs against the first as well as the second respondent. Such costs are to be taxed if not sooner agreed. There will be no order as to costs as it relates to the third respondent. Leave to appeal is granted to the first and second respondents.

**……..**
**A. Pettigrew-Collins**
**Puisne Judge**