THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2016-00679

BETWEEN

NISHA RAMNARINE SINGH

Applicant

AND

MINISTRY OF HEALTH

Respondent

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: 13th June 2016

Appearances:
Mr. Anand Ramlogan S.C. instructed by Mr. Kent Samlal and Ms. J. Lutchmedial for the Claimant
Ms. Tamara Toolsie for the Defendant

REASONS

1. Before the Court is a standard Part 56 application for leave to apply for judicial review made pursuant to section 39(1) of the FOIA[1]. On the hearing of the application for leave, the Respondent agreed to provide the information requested by the Applicant consisting of an unedited seniority list for Public Health Inspector II which existed at the time her FOIA request was made (the unedited seniority list) and a revised seniority list for Public Health Inspector II in the Ministry of Health following a decision of the Permanent Secretary on January 2016 to backdate the Applicant's appointment to Public Health Inspector II.

[1] Freedom of Information Act Chapter 22:02

2. It is noted that the revised seniority list was not the subject of the Applicant's original FOIA request made on 22nd October 2015. The provision of these documents were made by the Respondent without prejudice to its position that the application for Judicial Review was misconceived. The parties agree that the substantive matter is now at an end and the only issue that arises for determination is the question of costs, that is, the incidence of costs and its quantification.

3. The Respondent contends inter alia that the list requested in its FOIA request was not of any assistance to the Applicant and that it was the unedited revised list which would be of greater benefit for the Applicant which was not the subject of the FOIA request. The Applicant is therefore not entitled to her costs. The Applicant contends that it was the Respondent's unhelpful response to the pre-action letter which prompted the litigation and therefore she is entitled to her costs. She has submitted that her costs should be assessed as $54,950.00 for 23 hours of work.

4. In dealing with the incidence of costs the Court must consider all the circumstances[2]. Generally, pursuant to Part 66.6(1) Civil Proceedings Rules (CPR) costs follow the event and the successful party is entitled to his or her costs. Rule 66.6 (3) CPR provides that the Court may order a proportion only of those costs to be paid. The discretion is a wide one and the Court will consider all the circumstances which include pre-action conduct, conduct during the proceedings, success on issues, reasonableness of the party to pursue issues, the manner in which the issues were pursued and notice of the proceedings.

5. In **Abzal Mohammed v Police Service Commission**[3] the Court of Appeal held that costs are not generally awarded against the Respondent at the leave stage even when the Respondent opposes the grant of leave[4]. At para 31 Court of Appeal noted:

> "...the costs should be reserved to the substantive hearing but generally they should be the claimant's costs in the cause. If leave is refused, it is unfair to the

[2] See Rule 66.6 (4) of the Civil Proceedings Rules 1998.
[3] Civil Appeal No.53 of 2009.
[4] Ibid at para 31. See also para 36 of Respondent's Submission filed herein on 18th April 2016.

claimant to have to pay costs to the proposed defendant. In the first place, the proposed defendant is not yet a party and secondly it was brought to Court, not by the claimant but by the Court itself for assistance. I would think the proposed defendant would again have to bear its own costs."

6. In this case, the provision of the documents brought an end to the proceedings. However, it does not eliminate the fact that the Respondent's conduct will be under scrutiny in causing the proceedings to be commenced in the first instance as well as the merits of the application for leave itself.

7. In quantifying costs under Rule 67.2(1) of the CPR, the receiving party is not entitled to a full indemnity on the costs expended. The principle to guide this assessment of costs is primarily what appears to be reasonable within the meaning of Rule 67.2(1) CPR. To lend further assistance to the Court in determining the quantum of the "reasonable fee," the Court is provided with a shopping list of factors to consider in 67.2(3) CPR. Finally, the ultimate outcome of the assessment must further the overriding objective and the Court's discretion exercised on the assessment must fulfil the principles of proportionality and fairness as espoused in Part 1 CPR. The practice guide to the assessment of costs introduced in 2007[5] to a great degree has assisted in the task of creating some certainty in the assessment of costs. In this case, the first issue to be determined of course is whether there was a successful party.

8. To resolve the issue of the incidence and quantification of costs, if any, the Court must consider the nature and history of the proceedings and conduct of the parties.

9. The facts leading up to the filing of this application are not in dispute. The Applicant is a Public Health Inspector II in the Ministry of Health and she complains that a seniority list which was published by the Ministry had included officers who were junior to her and listed as senior to her on a seniority list. By letter dated 1st October 2015 to the Ministry of Health she requested among other things a copy of the current seniority list for Public Health Inspectors II. She was given a copy of a redacted or edited version of the list by letter dated 12th January 2016. Also on that date, she was notified that her date of appointment was

[5] Practice Direction on Practice Guide to the Assessment of Costs 2007.

backdated so that the five (5) persons ahead of her were now placed after her. On 28th January 2016 a pre action protocol letter was issued seeking the full unedited version of the list that was supplied to her on the basis that there was a breach of the duty of full and frank disclosure and there was no reason to redact the information. The Respondent refused to do so on the basis that the unedited list was an exempt document under the FOIA.

10. It is in these circumstances that the judicial review proceeding was launched. Usually, on these applications for leave to apply for Judicial Review in FOIA applications, this Court has adopted the approach of issuing an order to the Respondent at the leave stage in the following terms:

> "The Respondent do file a notice indicating (1) whether it consents or objects to the application for leave to apply for Judicial Review (2) whether it consents or objects to the provision of the further information requested and if it so consents setting out the time within which the said further information can be provided to the Applicant."

In this Court's view this is a practical mechanism to obtain from the Respondent at the earliest opportunity either (a) the information requested under the FOIA (b) the Respondent's objection to providing the same. The Court can therefore be better prepared at the leave stage to either dispose of the matter by consent, summarily by examining the reasons advanced or give directions for hearing which includes the grant of leave. In this case ordinarily the Court would have granted leave without hearing from the Respondent and give directions for the filing of a Fixed Date Claim Form and set a Case Management date. Those costs were averted by the Court adopting this managerial approach to FOIA requests and the Judicial Review apparatus utilised to pursue such requests[6]. Unfortunately however where the matter is disposed of at this stage even before the grant of leave by using this managerial approach, the issue of costs, where parties cannot agree,

[6] See **The Sanatan Dharma Maha Sabha of Trinidad and Tobago v The Minister of Finance** Civil Appeal No.123 of 2004.

becomes a convoluted exercise in determining who is the successful party or the "winner of the cause". In this respect the circumstances are different from **Abzal Mohammed**[7].

11. In my view the Claimant is entitled to two thirds of her assessed costs for the following reasons:

    (a) The claim was in relation to the unedited seniority list which was the subject of her October 2015 FOIA application. The Respondent had redacted certain personal information which they viewed as confidential. Obviously the Respondent felt strongly that such information could not be released as it was an exempt document as confirmed in its response by letter dated 12th February, 2016. For this reason the Applicant filed her application for Judicial Review to obtain the unedited version of that seniority list. It is the Respondent's response on 12th February 2016 which reasonably prompted the launch of these proceedings.

    (b) There is no duty or burden on an Applicant under the FOIA legislation to prove that the information requested is helpful to her or material to any cause of action that she may have. The Applicant has a general "right to know[8]" and the case law has established that there is no additional burden on the Applicant to demonstrate why the information is needed. See **Vishnu Jugmohan v Teaching Service Commission** H.C.A. No.1055 of 2004. In fact, the obligation is on the Respondent to demonstrate why access is to be denied, whether the information is as an exempt document and whether it is in the public interest to withhold it. See **Vishnu Jugmohan v Teaching Service Commission** H.C.A. No.1055 of 2004, **Ashford Sankar v Public Service Commission** CV2006-00037. It was reasonable therefore for the Applicant to have instituted these proceedings and it is not for the Respondent to submit that the unedited list would not have been "helpful" to the Applicant or that the revised unedited list would be more helpful.

[7] Ibid.
[8] **Ashford Sankar v Public Service Commission** CV2006-00037.

(c) The Applicant ultimately would have been granted leave to apply for judicial review and would have succeeded in the substantive hearing as there was no arguable defence to the Applicant's request for the documents under the FOIA.

(d) The Respondent's letter in response dated 12th February, 2016 did not comply with the pre-action protocol[9] nor its FOIA obligations under the Act.

(i) It did not provide reasons why the document was an exempt document. See **section 23 of the FOIA Act**, **Vishnu Jugmohan v Teaching Service Commission** H.C.A. No.1055 of 2004.

(ii) It was not in fact an exempt document which was conceded by the Respondent. See **Part IV sections 23-35** of the FOIA Act.

(iii) It did not assist the Applicant with information that a further list was being prepared which may assist the Respondent.[10]

(e) At the hearing for leave the Applicant finally obtained what was the subject of her original FOIA request. However, at the hearing, the Applicant also got the benefit of an additional list of a revised seniority list subsequent to January 2016. It cannot be denied that the more helpful list to her is the latter list and that the later list was not the subject of the FOIA request. She has therefore by bringing this action got the benefit of an additional list which she would not have obtained through her original FOIA request.

(f) I would give the Respondent therefore credit in its conduct on these proceedings by adopting a non-adversarial approach, abandoning reasonably its claim of exemption at the earliest possible opportunity, facilitating the request of the Applicant for an additional list and not unnecessarily prolonging the proceedings.

(g) Clearly costs must follow the event and there are no circumstances to deprive the Applicant of her costs, but to the Respondent's credit, the manner in which it acted

[9] See Practice Direction on Pre-action Protocol for Administrative Orders para 3.4, 3.4 (c), Annex B para 5.
[10] Ibid.

after the proceedings were launched as discussed above would be a factor which the Court will consider appropriate and just to order a proportion of the costs of the Applicant to be paid.

(h) The Respondent had contended that the proper party against whom the claim should be made is not before the Court. The Respondent's submission is that the proper party to these proceedings should be the Permanent Secretary and not the Ministry of Health. The Ministry of Health is not a corporate sole. See **Manning v Administrator General** (1962) 5 WIR, 266. The Applicant, on the other hand, contended that the request was made to the Ministry of Health, a public authority[11] which responded by denying the request. Furthermore, the Applicant submitted that the decision to deny the requested documents although not made by the Minister, may be deemed to be that of the Minister[12]. This Judicial Review process is a mechanism to implement the provisions of the FOIA and must be read together within the framework of that Act. Although the "default" provision of sec 22(2) FOIA is that the Minister is deemed to have made the decision, it is not entirely unreasonable for proceedings to be launched against the "Ministry" which although not a corporate sole is equally recognised by the Act as a public authority pursuant to section 4(d) of the FOIA. In my view, this does not deprive the Applicant of her costs as the issue of the proper party can in any event be easily dealt with by amendment at the leave stage or even during the course of proceedings. See Rules 20.1 and 56.12 of the CPR.

12. In assessing costs I will follow my reasons in **Keegan Gomez v The Commissioner of Police** that costs on these types of FOIA applications should reflect a reasonable and proportionate sum.[13] In that case a base line figure was proposed for those types of applications. What is different in this case however is that the Respondent appeared to have been prepared to contest the application by stating that the documents requested were exempted documents. The Applicants would had to therefore be in some state of readiness to

[11] See section 4 (d) of the FOIA Chap. 22:02

[12] See **The Sanatan Dharma Maha Sabha of Trinidad and Tobago v The Minister of Finance** Civil Appeal No.123 of 2004, Mendonca JA at para 9.

[13] See **Keegan Gomez v The Commissioner of Police** CV2009-00611.

deal with this issue. It is not an application that justifies Senior Counsel but unlike **Gomez** it justifies the cost of a Junior Counsel and instructing attorney at law to appear at the hearing of application for leave. Additionally, costs are recoverable for the time taken for the preparation of their written submissions on the issue of costs. I would allow costs for two (2) attorneys, junior in band B and instructing attorney in band A for a total of fifteen (15) hours.

13. The total assessed costs would be in the sum of $18,000.00. The Respondent shall pay to the Applicant 2/3 of her assessed costs in the sum of $12,000.00.

Vasheist Kokaram
Judge