REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2019-00331**

IN THE MATTER OF THE INTERPRETATION OF THE CONTRACT OF EMPLOYMENT OF PERSONS OCCUPYING THE OFFICERS OF TEACHER I, II, III, HEAD OF DEPARTMENT (Secondary), DEAN (Secondary), IN THE TEACHING SERVICE OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF THE INTERPRETATION OF THE MEMORANDUM OF THE CHIEF PERSONNEL OFFICER DATED 27 JUNE 2018

BETWEEN

THE TRINIDAD AND TOBAGO UNIFIED TEACHERS ASSOCIATION

First Claimant

EMELENE HASSANALLY

Second Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Tuesday 5 November, 2019

Appearances:

Mrs. Deborah Peake S.C. leads Mr. Ravi Heffes-Doon instructed by Ms. Kenniesha Wilson, Attorneys at Law for the Claimants.

Mr. Fyard Hosein S.C. leads Mr. Rishi Dass instructed by Ms. Savi Ramhit, Ms. Anala Mohan and Mr. Vincent Jardine, Attorneys at Law for the Defendant.

JUDGMENT-COSTS

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1. This judgment deals with the question whether the Defendant, as the successful party in

these proceedings, is entitled to its costs of the proceedings or is liable to pay to the Claimants a portion of their costs. In my view, for the reasons set out in this judgment, notwithstanding that the Defendant has succeeded in defending this claim, it will pay to the First Claimant[1] 50% of its assessed costs and there will be no order as to costs with respect to the Second Claimant[2]. This allocation of costs in the main part has been determined based upon the parties' pre-action conduct.

2. This judgment highlights the importance of the parties' conduct prior to the commencement of litigation and demonstrates how such conduct can have a significant impact on the recoverability of the costs of the proceedings making pre-action conduct as important a feature in civil litigation as the proceedings themselves.

3. The general rule of course is that the successful party in a claim is entitled to its costs. See Rule 66.6 (1). However, the Court can depart from the general rule after considering all the circumstances. Rule 66.6 provides as follows:

> "**66.6** (1) If the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.
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> (2) The court may, however, order a successful party to pay all or part of the costs of a unsuccessful party.
>
> (3) This rule gives the court power in particular—
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> *(a)* to order a person to pay only a specified proportion of another person's costs;
>
> *(b)* to order a person to pay costs from or up to a certain date only; or
>
> *(c)* to order a person to pay costs relating only to a certain distinct part of the proceedings, but the court may not make an order under paragraph 3*(b)* or 3*(c)* unless it is satisfied that an order under paragraph 3*(a)* would not be just.
>
> (4) In deciding who should be liable to pay costs the court must have regard to all the circumstances.

[1] The Trinidad and Tobago Unified Teachers Association (TTUTA)
[2] Ms. Emelene Hassanally

(5) In particular it must have regard to—

(a) the conduct of the parties;

(b) whether a party has succeeded on particular issues, even if he has not been successful in the whole of the proceedings;

(c) whether it was reasonable for a party—

(i) to pursue a particular allegation; and/or

(ii) to raise a particular issue;

(d) the manner in which a party has pursued—

(i) his case;

(ii) a particular allegation; or

(iii) a particular issue;

(e) whether a claimant who has won his claim caused the proceedings to be defended by claiming an unreasonable sum; and

(f) whether the claimant gave reasonable notice of his intention to issue a claim.

(6) The conduct of the parties includes—

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

(b) whether either or both parties refuse unreasonably to try an alternative dispute resolution procedure.

4. With respect to pre-action conduct the Court can then take that into consideration in determining whether a successful party will recover all of its costs or a portion of it or indeed be liable to pay the other party its costs or a portion thereof. It is indeed an unusual order to make such an "adverse costs order" where a successful party pays the costs of a losing party. However, in making such costs orders the Court should give effect to the overriding objective by applying the principles of equality, economy and proportionality.[3] In this case it is

[3] Rule 1.1 of the Civil Proceeding Rules 1998 provides:

"**The overriding objective**

1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.

(2) Dealing justly with the case includes—

appropriate to make this adverse costs order to highlight the significance and importance of pre-action conduct which should be properly utilised by parties prior to the commencement of proceedings. I first turn to examine briefly the nature of the claim by way of context before examining the relevant obligations of the pre-action protocols and then assess the pre-action conduct of the parties in this case.

Brief Overview of The Claim

5. In this claim the Claimants commenced an administrative law action by Fixed Date Claim for the determination of questions surrounding their terms and conditions of employment as teachers in the teaching service, in particular, whether marking SBAs form part of their contract. They were facing disciplinary action if they withheld their services from marking SBAs for their students. They held the strong view that the marking of SBAs, as distinct from other tasks associated with SBAs, did not fall within the terms and conditions of employment. As a consequence they were entitled to extra remuneration if they did perform such duties. The Chief Personnel Officer (CPO) by a memorandum dated 27th June 2018 appeared to make the case that the marking of SBAs fell within the teachers' job descriptions and so clearly they were in breach of their contract of employment in failing to perform that task. The Claimants, both the Trinidad and Tobago Unified Teachers Association (TTUTA) the recognised majority union and Ms. Emelene Hassanally in her personal capacity as the Head of Department (Secondary) in the Teaching Service of Trinidad and Tobago (Teaching Service) and Acting Principal to the Morvant Laventille Secondary School (MLSS) commenced these proceedings seeking a determination principally as to whether the contract of employment included such a requirement. In my judgment delivered on 11th September, 2019 I pointed out the

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(a) ensuring, so far as is practicable, that the parties are on an equal footing;
(b) saving expense;
(c) dealing with cases in ways which are proportionate to—
(i) the amount of money involved;
(ii) the importance of the case;
(iii) the complexity of the issues; and
(iv) the financial position of each party.
(d) ensuring that it is dealt with expeditiously; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

importance of this question to both Claimants:

> "9. Both Claimants view a determination of this question as important for them to properly and effectively discharge their functions in the teaching service. For TTUTA, the claim is important as the representative body of teachers in the teaching service, as it is periodically engaged in consultation and negotiation with the Personnel Department in respect of grievances and terms and conditions of employment.[4] For the Second Claimant, Ms. Emelene Hassanally, as Head of Department and Acting Principal of the Morvant Laventille Secondary School, the claim is important so that the threat of disciplinary action is not hanging over her head and the heads of other teachers if they choose not to mark the SBAs."

6. Ultimately, the Defendant succeeded in the main litigation by contending that the Claimant used the wrong procedure to articulate its claims and that the better forum for deciding this matter was the Special Tribunal:

> "185. The claim is therefore misconceived and is ill suited for determination by this Court. The matters of workloads and reasonableness of expectations are to be addressed formally in the collective bargaining process and by the Special Tribunal. The question of discipline would be a matter for that tribunal ultimately to determine. In light of the long standing practice, it is difficult to determine in the face of the conflicting evidence that the marking of SBAs do not feature as a component of the responsibility of the teacher."

Parties' Pre-Action Conduct

7. Prior to the commencement of the claim, TTUTA had issued a pre-action letter in accordance with pre-action protocols Appendix D (Pre-Action Protocol for Administrative Orders). Ms. Hassanally did not. Although the Claimants make the case that the issues with respect to both Claimants are the same it is clear that there can be no issue of compliance with a pre-action protocol by a Claimant who does not, in her own name, issue such a letter or it is made specifically clear in the letter that was issued that she was also joining in such a

[4] Pursuant to sections 14, 16, 17 and 18 of the Civil Service Act Chapter 23:01

communication as a proposed Claimant.

8. The pre-action letter featured in the main proceedings. See paragraph 35 of the Affidavit of Lynsley Doodhai[5]. In paragraph 7 of the main judgment I stated:

> "The Claim was issued following the issue of a pre-action protocol letter in December 2018 to which there was no response by the Defendant. The failure of the Defendant to comply with the pre-action protocols under the CPR is undoubtedly a matter which this Court will take into account in its final determination on the question of costs in these proceedings as explained at the end of this judgment."

9. By this pre-action letter TTUTA made the following clear points with respect to their case:

   (i) Teachers' duties do not extend to marking SBAs and the provision of such services to or on behalf of CXC.

   (ii) The marking of SBAs is the main focus of the pre-action protocol letter.

   (iii) TTUTA would be approaching the Court and not the Special Tribunal to have the issue resolved expeditiously.

   (iv) The precise terms of the issue that TTUTA would be approaching the Court to have determined and the basis upon which it would seek to do so.

10. They also advised that any failure to respond will result in their taking legal action. There was no response by the CPO to the letter and no reply by the CPO to the statements made in the proceedings that they failed to comply with the pre-action protocols.

11. The Defendant has argued it ought not to be penalised for its pre-action conduct for the following reasons: (a) TTUTA did not in fact issue a letter in conformity with the practice direction as it failed to address the Attorney General, failed to identify the relief which TTUTA was seeking and there was no draft claim (b) the CPO's office did respond by letters dated 8th October 2018 and 25th October, 2018. The fact that the CPO responded has now been raised for the first time and is denied by TTUTA's attorneys. No mention of it was made in these

[5] Filed 24th January 2019.

proceedings. It is not uncommon at this stage for parties to refer to unfiled letters on the question of costs. Indeed "Calderbank letters" are expressly stated to be without prejudice save as to costs. However, in this case the issue of the failure of the Defendant to respond was a material issue "pleaded" in the case.

12. The Defendant also submitted that having regard to the conduct of TTUTA any response with respect to the preliminary point would still have resulted in litigation and litigation was inevitable.

The Obligations Under the Pre-Action Protocols

13. There are three important pillars upon which the pre-action protocols are based: information exchange, identification and narrowing of issues for determination in litigation and discussions towards an amicable resolution of the dispute. Pre-action conduct must be focused to achieve any or all three endeavours prior to the commencement of litigation. However, where there is silence from the opposing party it makes the exercise futile and litigation inevitable which is inconsistent with the objectives of the pre-action protocols as it is inconsistent with the overriding objective and reforms of our civil process.

14. Notably, pre-action protocols were viewed as an important feature of the reforms of our civil rules. Lord Woolf commented[6]:

> "1. These (pre-action protocols) are intended to build on and increase the benefits of early but well-informed settlements which genuinely satisfy both parties to a dispute. The purposes of such protocols are:
>
> a) To focus the attention of litigants on the desirability of resolving disputes without litigation;
>
> b) To enable them to obtain the information they reasonably need in order to enter into an appropriate settlement; or
>
> c) To make an appropriate offer (of a kind which can have costs consequences if

[6] Access to Justice (Final Report) By The Right Honourable the Lord Woolf, Master of Rolls, July 1996, paragraphs 1 and 6.

litigation ensues); and

d) If a pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings.

6. Pre-action protocols will be an important part of the new system. They are not intended to provide a comprehensive code for all pre-litigation behaviour, but will deal with specific problems in specific areas. They will set out codes of sensible practice which parties are expected to follow when they are faced with the prospect of litigation in an area to which a protocol applies. Protocols will make it easier for parties to obtain the information they need, by the use of standard forms and questionnaires wherever possible. This will be assisted by wider powers for the courts to order pre-action disclosure. (See chapter 12 of this report). Protocols will also be an important means of promoting economy in the use of expert evidence, in particular by encouraging the parties to use a single expert wherever possible. Unless this happens before the commencement of proceedings, it will frequently be too late because the parties will already have established an entrenched relationship with their own expert. In addition, protocols will encourage the use of any appropriate alternative mechanisms for the resolution of disputes. If litigation proves necessary, observance of protocols should put the parties in a good position to meet the timetable imposed by the court. This will be particularly important on the fast track, with its tight standard timetable."

15. Dick Greenslade observed the need to ensure that the steps taken by attorneys prior to the issue of proceedings "accord with rather than contradict the system of case management."[7]

[7] See Judicial Sector Reform Project Review of Civil Procedure, Dick Greenslade, Chapter 6, Pre-Action Protocols:
"Much work will be done by attorneys prior to the issue of proceedings and there is a need to take whatever steps are possible to ensure that such steps accord with rather than contradict the system of case management that is proposed.
……
The aim would be:
- To ensure early and sufficient notification of potential claims.
- To encourage joint instruction of experts
- To encourage defendants to make clear admissions of liability where appropriate, or
- If liability disputed to give reasons for the dispute
- To progress with disclosure of basic documents.

More importantly, in his preface to the CPR, Sharma CJ noted:

> "The CPR are founded on a system of caseflow management with active judicial case management: [Parts 25 and 26]. This new procedural code is buttressed by a plethora of rules which create several in-built mechanisms to foster settlement at the earliest and every stage of the proceedings: [Part 25.1*(c)*, *(d)*, *(e)*]. Pre-action protocols have been introduced by means of a Practice Direction and are an important feature of this reformed process. They lay the foundation for compromise by establishing a format for pre-action negotiations. As Lord Woolf stated in his Final Report, "Access to Justice" (1996) that the main purpose of pre-action protocols is to ensure that prospective litigants focus their attention on the desirability of resolving disputes without litigation but if pre-action settlement is not achievable, then to lay the foundation for expeditious conduct of proceedings. This highlights the imperative that under the CPR litigation must be the last resort."

16. Recently, Lord Jackson in his report "Review of Civil Litigation Costs- Final Report" made the following observations on pre-action protocols in Judicial Review claims:

> "5.1 Judicial review claims are subject to the Pre-Action Protocol for Judicial Review. I have received no complaints about this protocol.
>
> 5.2 Research has shown that in approximately 60% of cases in which a letter before claim was sent, the dispute was resolved before issue of proceedings. Furthermore, "solicitors generally value the [Pre-Action Protocol] and believe that it plays a positive role in enabling early settlement by improving channels of communication between the parties and helping to clarify issues".
>
> 5.3 Concern has been expressed by the Public Law Project that some judicial review claims are settled too late, despite the protocol. But this is not the fault of the protocol. The suggested remedy is to revise the Boxall principles. This topic is addressed in chapter 30 above, concerning judicial review."

17. Turning to the Practice Direction itself, it is structured into general obligations and followed by specific obligations in certain areas of practice. Appendix A (Pre-Action protocol for claims

for a specified sum of money), B (Pre-Action protocol for road traffic accidents and personal injury claims), C (Pre-action protocol for Defamation) and D (Pre-Action protocol for administrative orders). The relevant appendix in this case being Appendix D. It is hoped that further protocols can be added to others areas of practice where useful pre-action activity would be important such as land, medical negligence and estate claims. Paragraph 1.4 sets out the objectives of pre-action protocols:

> "1.4 The objectives of pre-action protocols are:
>
> (1) to encourage the exchange of early and full information about the prospective legal claim,
>
> (2) to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings,
>
> (3) to support the efficient management of proceedings under the CPR where litigation cannot be avoided.

18. The Court will expect all parties to have complied in substance with the terms of the protocols:

> "2.1 The court may treat the standards set out in protocols as the normal reasonable approach to pre-action conduct. The court will expect all parties to have complied in substance with the terms of an approved protocol. If proceedings are issued the court may take into account the failure of any party to comply with a pre-action protocol when deciding whether or not to make an order under Part 26 (Powers of the Court) or Part 66 (Costs—General).
>
> 2.3 The court will expect all parties to have complied as far as reasonably possible with the terms of an approved protocol. If proceedings are issued and parties have not complied with this practice direction or specific protocol, it will be for the court to decide whether sanctions should be applied. The court is not likely to be concerned with minor infringements of the practice direction or protocol. The court is likely to look at the effect of non-compliance on the other party when deciding to impose sanctions.

19. The sanctions for non-compliance include the following:

- The Court may take into account the failure of any party to comply with a pre-action protocol when deciding whether or not to make an order under Part 26 (Powers of the Court) or Part 66 (Costs-General).
- The Court may make an order that the party at fault pay the costs of the proceedings or part of those costs, of the other party or parties.
- The Court may order that the party at fault pay those costs on an indemnity basis. (See Practice Direction 2.4)

20. Conceptually, a Court can, given the appropriate circumstances, utilise it powers to strike out under Part 26 for a party's failure to comply with the pre-action protocols. The Court will however "exercise its powers under paragraph 2.4 with the object of placing the innocent party in no worse a position than he would have been in if the protocol had been complied with." (See Practice Direction 2.5).

21. Practice Direction 3 provides where a claimant and defendant have failed to comply with the protocols:

"3.1 A claimant may be found to have failed to comply with a protocol in, for example, failing to:

(a) provide sufficient information, or

(b) follow the procedure required by the protocol to be followed.

3.2 A defendant may be found to have failed to comply with a protocol in, for example, failing to:

(a) make a preliminary response to the letter of claim within the time fixed for that purpose by the relevant protocol;

(b) make a full response within the time fixed for that purpose by the relevant protocol;

(c) disclose documents required to be disclosed by the relevant protocol."

22. In Administrative Law matters the Claimant should send a letter to the Defendant before

making a claim which identifies the issues in dispute and establishes whether litigation can be avoided. The letter should state the Claimant's interest in the decision being challenged and how he/she is affected by it. It should contain the date and details of the decision being challenged and a clear summary of the facts on which the claim is based. They should also specify the relief claimed. A copy of the letter should be sent to the Solicitor General. The Defendant should respond within 30 days to the letters and failure to do so will be taken into account by the Court in exercising its discretion pursuant to Part 26 or Part 66 of the CPR.

Assessing the Parties' Pre-Action Conduct

23. In this case the pre-action letter was addressed to the CPO, although legally distinct from the Attorney General, had the CPO responded, there would have been compliance with the protocols. The letter was in fact copied to the Solicitor General's department. Furthermore, even where a response was not forthcoming after the launch of proceedings and before the hearing of the proceedings a letter could still have been issued.

24. The Practice Direction makes it clear that the Court is not concerned with minor infringements of the protocols. In my view, the letter was in substantial compliance with the protocols being addressed to the CPO and copied to the Solicitor General. It identified the issues in dispute and established how litigation could be avoided. It set out the main question for determination in the proceedings and informed the Defendant in precise terms the issue that TTUTA would be approaching the Court to have determined. It was also expressly noted in the letter that it was being issued in compliance with the pre-action protocols.

25. The obligation fell squarely on the CPO and the Defendant to respond pursuant to these protocols.

26. In the absence of a response, the misleading impression it created is that reliance was being placed on the memorandum which states that the job description contains the teachers' terms and conditions of employment. The Claimants ultimately only became aware that the Defendant was not adopting the memorandum after the affidavits were filed and then later in its written submissions. While some comment was made in the first hearing of raising a preliminary point, that was at an early stage with preliminary instructions and there was no

unambiguous statement that the Defendant's case would rest upon a preliminary objection.

27. It is counterproductive for the Defendant to contend that had they pointed it out in a pre-action response TTUTA would have still filed the claim. This is certainly not the purpose of pre-action conduct that a party would say to itself "well if I respond to let the other side know my case they will still file the claim". Again I stress that pre-action conduct does not necessarily involve discussions with a view to resolution, nor for one side to capitulate to the other's point of view. It is conduct engaging the other party with information so that ultimately the litigation once filed, if it must, would be done with all cards on the table, with issues narrowed for determination and the Court armed with the appropriate information to properly assess how best to treat the claim to give effect to the overriding objective including giving the appropriate directions to resolve the dispute.

28. Instead, the Defendant should ask what would have happened if it had made it clear to TTUTA at the pre-action stage that the matters ought better to be resolved by a Special Tribunal. A number of options and pathways could have emerged if parties had then seriously engaged the protocols. First, the parties could have engaged each other substantially on the question of terms and conditions of employment and resolved for themselves to invoke the disputes process under the Teaching Service Act. Second, alternatively, the parties could have engaged the Court consensually on that first question whether the Special Tribunal is the appropriate process and that could have been the first question on the Fixed Date Claim Form. Third, even further, if for the very least the Defendant's response contained an appropriate pre-action response and there was no further engagement, the Court would have seen on the papers presented the real prospect of the live preliminary issue and would not have been left guessing, waiting for affidavits and submissions to be filed to then understand what the Defendant's case will be. Ultimately, in the face of silence, the process itself lingered for months before it was made clear what the positon of the Defendant would be. This cannot be condoned. It is inconsistent with the objectives of the rules and the protocols. Even taking into account the CPO's letters which are now being revealed for the first time, it fails to properly articulate why the proposed claim is an abuse. It is a blanket statement and an unhelpful response to properly engage the protocol.

29. Further, the Defendant appears to place some emphasis on TTUTA's resistance of the hearing of a preliminary point and the Court "rushing to trial" on TTUTA's insistence. This submission is fundamentally flawed and betrays a lack of understanding of the protocols. First, it is understandable for a party to resist the hearing of any preliminary point if in fact it is for the first time being raised in the face of silence to its pre-action letter. The question must be legitimately asked, why was this never stated before? Indeed, at the first hearing, it was not equivocal whether it was to be the Defendant's position. Second, these proceedings was not "rushed to a trial". The Court managed this case to an expeditious disposition bearing in mind the serious nature of the dispute and the constraints in the timetables for both the CPO, the teaching service and the teachers. It was an issue that needed to be resolved as soon as possible. Indeed that is the nature of most public law matters. I make no excuse for the fact that under this new dispensation parties must assist the Court to give effect to the overriding objective. One of those objectives is to assist in the economical and expeditious resolution of disputes. As a standard every public law matter must be determined within six (6) months from the date of filing or even less. Questions that arise in public law are very serious ones and impact large sections of our community and society. Our society would become very unforgiving if our legal system leaves such important questions to fester in our legal system for a protracted period of time. In this case I commended the parties for keeping on track towards an expeditious resolution and in no case was this "rushed" but rather the parties and Court's resources were economical and proportionately utilised to determine an important question in public law.

30. I take the point of the Claimants that Ms. Hassanally's issues were joined in the letter, however, not having issued a letter she cannot avail herself of the benefit of it. Save for this, in all the circumstances faced with proceedings which are the same and noting the Defendant's failure to articulate its case in an important matter such as this, I would order that for Ms. Hassanally each party bear their own costs. However, with respect to TTUTA, the Defendant should bear a portion of their costs. For their silence and even if I take their responses into account, for failing to make clear prior to action that another option existed to resolve the dispute or identified that the real controversy is better left to the Statutory

Tribunal, it is proportionate for them to bear 50% of its costs.

Adverse Costs Order

31. For the reasons set out in this judgment, there will be no order as to costs with respect to the Second Claimant. The Defendant shall pay to the First Claimant 50% of its costs to be assessed by this Court in default of agreement.

Vasheist Kokaram

Judge