REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

SAN FERNANDO

CLAIM NO. CV 2007-00828

BETWEEN

DENNIS GRAHAM

Claimant

AND

POLICE SERVICE COMMISSION

AND

MINISTRY OF NATIONAL SECURITY

Defendants

DECISION

Before The Honourable Madam Justice Pemberton

Appearances:

For the Claimant: Mr A Ramlogan instructed by Ms C Bhagwandeen

For the Defendants: Mr F Hosein S.C. leading Ms P Jadoo and Ms C Seenth instructed by Ms C Mohammed-Carter

[1] This matter raised the issue whether costs ought to be awarded, to whom those costs are to be awarded and the quantum of such costs. Mr Ramlogan contends that the Police Service

Commission's ("PSC's") and the Ministry of National Security's ("MNS's") failure to make a full response to their Pre-Action letters and for late filing of their affidavits would entitle them to a costs order. Mr Hosein counters that the PSC and the MNS are entitled to their full costs to be assessed or at least to a reduced costs order in their favour to reflect the non-compliance with the pre-action protocol. They did not consider the disobedience to the Court Order given at the Case Management Conference to be of any consequence to my deliberations. As is therefore evident, both Counsel approached the matter from slightly different perspectives. I shall examine each issue.

[2] According to Mr Ramlogan, I have to examine the effect of Pre-Action Protocols, the letters exchanged in purported compliance with them and the breach of the Case Management Order with respect to the time for filing affidavits in response by the Defendants and the effect on an award of the costs of the Affidavits so filed. These affidavits were late, without leave from the Court and without the appropriate request for relief from sanctions.

[3] In Mr Hosien's opinion, I have to consider that this action was similar to a previous one filed by Mr Graham, In fact full explanations surrounding one of his claims were in fact given by the PSC in that case and were at the material time well known to Mr Graham. The action sought to invoke the Court's advisory jurisdiction and was an injudicious waste of funds for this court to grant the relief sought. Mr Hosien further asks me to consider that Mr Graham discontinued these proceedings and that "even on a superficial reading on the merits Mr Graham was bound to fail at least on the allegation that his staff reports were downgraded".

[4] **FACTS**

I shall not belabour the facts, save to say that on March 14 2007, Mr Dennis Graham, (Mr Graham) now a retired Assistant Commissioner of Police approached this court for leave to file judicial review proceedings against the PSC and the MNS. Mr Graham had two complaints:

(1) Downgrading of his staff reports for the years 2003, 2004 and 2005;

(2) Inaction on his request for disciplinary action against Assistant Commissioner of Police, Glen Roach.

Mr Graham's affidavit was sufficient to allow him entry to the wide gates of filing an application for judicial review. The relief claimed involved the following declarations, to wit:

(1) That the PSC had jurisdiction to deal with the complaint that his staff reports had been downgraded;

(2) A legitimate expectation that the PSC would have addressed and/or acted upon his complaints;

(3) Unreasonable delay on the PSC and MNS in making a decision to take action on his complaints;

(4) Unfair treatment by the PSC and the MNS in breach of the principles of natural justice and contrary to the provisions of section 21 of the JUDICIAL REVIEW ACT.

Mr Graham sought an order for mandamus directing the PSC to act on and/or determine his complaints.

[5] In deciding whether to award costs or not, to whom the award should be made and the quantum, it is necessary to consider the background to this matter. I shall consider each issue in turn.

[6] 1. **DOWN GRADING OF STAFF REPORTS**

PRE-ACTION STEPS – LETTERS PASSING BETWEEN THE PARTIES

In keeping with the Pre-Action Protocols, Mr Graham caused his attorneys-at-Law to write to the PSC on November 20 2006 outlining his complaint with respect to the downgrading of his staff reports for the years 2003, 2004 and 2005. This letter referred to the staff reports completed by ACP Roach that were attached to previous proceedings – H.C.A. No. 2727 of 2004. Among them, there were those countersigned by COP Paul who had given a lower rating in two of the years without, notification to Mr Graham. The time limit to respond to this letter was 21 days.

[7] There was no response and another letter was dispatched to the PSC. This was dated December 12 2006. The PSC was given 14 days to respond. The PSC responded by letter of December 27

advising that they were not the proper addressees and further that Mr Graham's complaints may be directed to the Permanent Secretary, MNS.

[8] On January 4 2007, Mr Graham through his Attorneys-at-Law directed correspondence to the Permanent Secretary, MNS as he was advised to do. Attached to this letter was a copy of the letter sent to the PSC. This letter instructed the Permanent Secretary to "Kindly proceed to take the necessary action and advise me of the outcome within the next 21 days". Attorneys-at-Law voiced their disagreement to "the reference of this complaint to your (the) office and have so informed the Police Service Commission". The correspondence ended with the stricture that the Permanent Secretary should be "guided accordingly".

[9] On February 5 2007, another letter was sent in the nature of a warning giving the Permanent Secretary 21 days to respond on pain of litigation, without further reference. Another letter of even date was forwarded to the PSC, the time for response here being 14 days on similar pain of litigation.

[10] This letter elicited responses from the Permanent Secretary MNS of February 14 2007 begging to revert by February 28 2007 and from the PSC informing that the "Director of Personnel Administration has been directed to submit the matter to the PSC for its consideration". On March 03 2007, the PSC confirmed its original stance that Mr Graham's complaint should be directed to the Permanent Secretary, MNS. Thereafter there was no response and this action was born.

[11] In response to the letter of January 04 2007, the Manager Legal Services at the Ministry of National Security proffered a response to Mr Graham's Attorney-at-Law. The Manager explained that the appraisals are not "deemed 'adverse' as suggested by your client as his performance was rated as 'good'.

[12] Further, the Defendants supplied affidavit evidence to the court to explain their position. I shall not embark on an examination of this evidence for reasons which I shall explain later. The summary of the Defendants' position is that Mr Graham "therefore cannot complain of any 'artificial lowering of any grades given to him by Deputy Commissioner Roach' or about any unfairness or that his 'staff report was changed behind his back without any prior consultation or notification'".

[13] **ANALYSIS**

There are several issues arising from the parties' actions and understanding of the role and function of the Pre-Action steps and what responsibilities fall to them. I shall take some time to detail my thoughts on the matter. First, the Pre-Action Protocols form part of a Practice Direction given by the Honourable Chief Justice. The CPR empowers the Chief Justice to make these Practice Directions for the better functioning of the CPR and be extension fulfilling the Overriding Objective of dealing with cases justly.[1] For that reason, the Pre-Action protocols in our jurisdiction cover such areas of litigation as Personal Injury Actions, Claims for a specified sum of money and more relevant to this matter, claims for Administrative Orders.

[14] **USE OF PRE-ACTION PROTOCOLS MANDATORY**

Further, the Practice Direction mandating the use of Pre-Action Protocols states at paragraph 1.4 that the objectives are early and full exchange of information, avoidance of litigation by settlement of matters and to support the efficiency of the CPR[2]. Paragraph 2.1 of the Protocol is of telling importance to these proceedings as they stand. It provides in part that "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 66 (Costs – General). To this I attach the meaning that the Court may take the non-compliance with a protocol to decide whether to award costs or not or to make a reduced order for costs.

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[1] Part 1.1 of the CPR:

"The overriding objective of these Rules is to enable the court to deal with cases justly".

[2] 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.

[15] **COURT EXPECTS PARTY TO COMPLY WITH RELEVANT PROTOCOLS**

Part 2.3 continues that the court expects parties to comply with the protocols but is not likely to be concerned with "minor infringements" of the practice direction or the protocols.

[16] **POWERS OF THE COURT WHEN THERE IS NON-COMPLIANCE WITH PROTOCOL**

Part 2.4 details what are its powers if the court forms the view that had the protocols been complied with, there may not have been litigation. These powers include ordering the party at fault to pay the costs of the proceedings or part thereof, or order the party at fault to pay the costs on an indemnity basis subject to placing the innocent party in no worse position than he would have been had there been compliance.

[17] **WHAT IS CONSIDERED NON-COMPLAINCE WITH A PRE ACTION PROTOCOL**

When a claimant has not complied with the procedure required by a protocol, Part 3.1 states that he has failed to comply with that protocol. When the Defendant fails to make a preliminary response to the letter of claim within the time limited by the particular protocol or has failed to make a full response within the time stipulated by the protocol for that purpose, he is found to have failed to comply with that protocol.[3]

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[3] See Part 3 of the Practice Direction:

3. NON-COMPLIANCE WITH 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.

[19] **THE REQUIREMENTS OF THE PROTOCOL WITH RESPECT TO ADMINISTRATIVE ORDERS**

This provides that where appropriate, the court will expect **all** parties to have complied with the protocol, and will consider compliance or non-compliance in the award of costs.[4] The Claimant is expected to send a letter to the defendant to identify the issues in dispute and "establish whether litigation can be avoided". The letter should specify as well the relief claimed. The letter in response should follow from the Defendant within 30 days of the receipt of the Claimant's letter. Where it is not possible to reply within the time limit, the Defendant should send an interim reply and propose a "reasonable extension" accompanied by reasons for the request for the extension.

[20] **THE EVIDENCE IN THIS MATTER**

The contents of the letters sent by Mr Graham through his Attorneys-at-Law and the response received have been detailed above.[5] The time limit given for response for the letters sent by Mr Graham's Attorneys-at-Law did not comply with the 30 day period as required by this specific protocol. In fact the responses received from the Defendant were late and gave directions as to the proper addressee. When the proper addressee was contacted, again with shorter than prescribed time limits, Mr Graham received a response asking for time to revert by a specific date. Needless to say, the self imposed deadline was not met without any correspondence. As I stated before a response was proffered by the MNS indicating to Mr Graham that he had no complaint.

[21] **EFFECT OF THIS PURPORTED RESPONSE ON THIS ISSUE**

There are three issues that spring to mind. First, there is the lateness of the response, second, whether that response reached Mr Graham and/or his Attorney-at-Law in a timely manner and third, whether the court should take cognizance of that response in coming to its decision. I shall deal with the third point later.

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[4]See Appendix D Paragraph 1.5:

> All claimants will need to satisfy themselves whether they should follow the protocol, depending upon the circumstances of his or her case. Where the use of the protocol is appropriate, the court will normally expect all parties to have complied with it and will take into account compliance or non-compliance when making orders for costs.

[5] See para. …. infra

[22 a) **THE LATENESS OF THE RESPONSE**

There is no comment that can be made on the lateness of the responses. The dates speak for themselves. Although Mr Graham's Attorney-at-Law did not observe the times prescribed by the protocol, I disagree that that is sufficient to deem these pre-action letters defective. They were clear as to the issues in dispute.

[23] b) **MNS's RESPONSIBILITY TO ENSURE THAT MR GRAHAM'S ATTORNEYS-AT-LAW RECEIVED THE RESPONSE**

With respect to whether the response reached Mr Graham and /or his Attorney-at-Law in a timely manner, or at all, I think again that this is obvious. The MNS have not supplied any information as to whether the letter was sent by post or hand delivered, or who received the letter if it was hand delivered so as to indicate that the MNS did all it could or ought to have done to ensure that Mr Graham and/or his Attorney-at-Law received the letter.

[24] I daresay that the MNS gave scant care and attention to the serious nature of impending court proceedings and the significance of the new method employed by the CPR to conduct litigation. Whilst it may be true, it is not enough to say that this is the same issue raised in earlier proceedings. I think that this point made it more than telling to respond in a timely manner. I am afraid that I cannot condone this approach to the public's business. All Heads of Department should be mindful of the public purse and the need to avoid litigation, especially when they seek to argue that the litigation is useless. I therefore find that the MNS is in breach of the protocol in not providing a timely response so as to do all that it could have done to avert litigation.

[25] 2. **ALLEGATIONS OF MISBEHAVIOUR RAISED BY MR GRAHAM**

CLAIMANT'S EVIDENCE

By letter dated November 24 2006, Mr Graham wrote to the PSC complaining of alleged misconduct by a senior police officer. The PSC acknowledged this letter by return dated December 01 2006. They informed that the PSC had directed the Director of Personnel Administration to submit a report. On January 05 2007, Mr Graham's Attorney-at-Law issued a pre-action letter

indicating that there has been no word on the complaint. The time limited for reply was 28 days. On February 09 2007 we have a curious response to the letter of January 05. I shall set it out in its entirety:

> Dear Sir,
>
> Re: Withdrawal of adverse staff reports on Mr Dennis Graham
>
> I refer to correspondence on the subject ending with your letter dated January 5 2007 addressed to the Chairman, Police Service Commission.
>
> The matter will be submitted for the consideration of the Police Service Commission at its meeting of February 22 2007.
>
> You will be informed of the decision taken in the matter by February 26 2007.
>
> Yours sincerely
>
> ……

[26] Mr Graham alleges that up to the time of filing, there was no response as promised.

[27] The PSC and MNS have alleged that a response was sent, but I shall leave this for discussion later.

[28] **ANALYSIS**

I do not need to repeat the same analysis on this issue. Suffice it to say that the situation at the time of filing was that neither Mr Graham nor his Attorney-at-Law received a response. Why then was there the claim for delay?

[29] **ALL AFFIDAVITS IN RESPONSE WERE FILED OUT OF TIME THEREFORE THERE COULD BE NO CONSIDERATION OF THE MERITS OF THE CASE**

The issue here is whether I should have any regard to the contents of the affidavits filed by the PSC and the MNS. These affidavits were filed late, without the court's permission and without asking for relief from sanctions. That alone attracts an order for costs against both the PSC and the

MNS. Not only that, but there is a more serious issue, whether these affidavits can be used at all to defend the PSC's and MNS's case? In the conduct of litigation under the CPR, the court may take the position that since the affidavits were filed out of time that they ought not to be used in evidence, save where permission is granted by the court. That permission can be granted provided that there is good and sufficient reason for the delay and extension or enlargement.

[30] Nothing remotely resembling this happened in this matter. I therefore am constrained not to take any cognizance of the affidavits filed. I therefore can do no proper analysis on the merits of the case. As a consequence, the contents can form no part of my deliberations on the issue of costs.

[31] **DISCONTINUANCE OF THE CLAIM**

Notwithstanding this, by the time the matter came before me again, the parties had discussions and resolved a certain position. Mr Ramlogan agreed to forego the staff report issue, since Mr Graham had retired from the service. On the issue of the alleged misconduct by a senior officer, the position of the PSC was that the matter was *sub judicie* and they were therefore constrained. Let me place on record that I do not agree with that opinion. The judicial review application was based on delay and delay alone. Any indication that the PSC was prepared to consider and deal with the complaint would have brought an end to the matter. In fact, such indication, had it been communicated in a timely manner may have avoided the need for litigation in the first place.

[32] Mr Graham's discontinuance therefore has to be seen in that light. It is my view that the filing of the action precipitated the PSC's and MNS's actions instead of the pre-action protocols as is the intention under the CPR. My conclusion is that Mr Graham traded his right to pursue the action for delay against the PSC for discontinuing the action.

[33] **ORDER FOR COSTS TO BE MADE**

The general rule is that costs follow the event. Since I do not consider that there was a winner or a loser in this case, what must I do? I must therefore look to what the justice of the case requires. It is true that in making an award for costs in public law matters that the court must be mindful not to make such an award as to discourage early settlement of matters. Ms Seenath helpfully listed some of the factors that can guide my deliberations. One of them is stated above. The others are that the overriding objective is to do justice between the parties and the circumstances of each

case. In the absence of any good reason to make any other order the fallback position is to make no order as to costs.

[34] In this case, I think that the major issues will be to do justice between the parties. I have outlined above what my thoughts are on the treatment of Mr Graham's claims and the scant regard for time limits, whether imposed by the pre-action protocols or the CPR. That conduct I think weighs heavily against the PSC and the MNS. On the other hand, save for the delay complained of with dealing with the alleged misconduct complaint, I do think that on the very face of it, the complaint about the downgrading of the staff reports may not have met with success. Taking all things into consideration, I am minded to give a reduced order for costs in Mr Graham's favour. This order will be based on the Costs Budget set by this court, (the hearing of which was not attended by the PSC or MNS) and order that a statement of costs be submitted by Mr Graham to cover the period from the time of filing to the date of the filing of the notice of discontinuance, to be assessed.

ORDER:

1. That the Defendants do pay the Claimant's costs of this action reduced by 60%;
2. That the Claimant do file a statement of his costs to cover the period from the time of filing to the date of the filing of the notice of discontinuance;
3. That the Claimant do file that statement on or before September 16 2008;
4. That the hearing do take place on **10th November 2008** at **10.45 am** in courtroom **SF02.**

Dated this 27th day of June 2008.

/s/ CHARMAINE PEMBERTON

HIGH COURT JUDGE