IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G0064/2021

BETWEEN

(1) THE ROYAL CAYMAN ISLANDS POLICE ASSOCIATION
(2) SENIOR CONSTABLE MARK MILLER
(3) SENIOR CONSTABLE RODRICK EVANS

APPLICANTS

AND

(1) THE COMMISSIONER OF THE ROYAL CAYMAN ISLANDS POLICE SERVICE
(2) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

RESPONDENTS

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| Before | Hon. Justice Kirsty-Ann Gunn (Actg) |
| Appearances: | Mr G. Dilliway-Parry of Priestleys for the Applicants<br>Mr J. Alcock and Miss M Brandt of the Attorney General's Chambers for the Respondents |
| Heard: | 13 May 2022 |
| Draft ruling circulated: | 23 May 2022 |
| Ruling: | 31 May 2022 |

**RULING ON COSTS**

1. This is the costs application arising from my judgment delivered on 8 December 2022 dealing with this judicial review of the First Respondent's decision to change the manner in which leave for Uniform Shift Officers is calculated under a new Uniform Shift Policy ("USP") introduced in January 2021.

*The Application*

2. In the application for leave to apply for judicial review, the Applicants had sought the following relief –

   (a) A Declaration that the decision and actions of the First Respondent in implementing the USP Revised Leave Calculations in accordance with the Uniform Shift Policy were/are unlawful;

(b) An order of Mandamus that the First Respondents immediately revoke the Uniform Shift Policy as far as it relates to the USP Revised Leave Calculation;

(c) An order of Mandamus that the policy in place prior to the implementation of the Uniform Shift Policy remains in place;

(d) Damages sustained due to the unlawful implementation of the Uniform Shift Policy;

(e) Such further, consequential or other relief that this Honourable Court deems is just; and

(f) An order that the costs of and incidental to this application be paid by the First and Second Respondent.

3. Following a one-day trial I made the declaration sought by the Applicant as well as the two orders of Mandamus in the terms sought by the Applicants with one qualification, namely that the USP annual leave calculation was only illegal as it relates to officers employed before 1 January 2021. Items (d)-(f) were adjourned.

*The Judgment*

4. The Applicant's case at trial had three components: The decision to change the leave calculation was

(i) Illegal;

(ii) Irrational;

(iii) In breach of a legitimate expectation.

5. On the issue of illegality I concluded that *"the very fact that the leave entitlement is expressed in hours rather than days to be significant; the legislature clearly intended a per hour leave calculation to be adopted and left it open for the Commissioner to determine how that would be applied. If the legislature had intended to maintain the 22 days plus 4 weekends entitlement then there would have been no need to express leave entitlement in hours. The fact that they do so is an acknowledgment that leave should be directly linked to the number of hours worked. By converting the leave entitlement based on the 12-hour shift pattern, the Commissioner is complying with the plain and unambiguous intention of the Regulations. The Commissioner's decision neither contravenes nor exceeds the terms of his power, nor does it*

*pursue an objective other than that for which the power to make the decision was conferred. There was no need to amend the legislation before the Commissioner issued the USP as he was not seeking to change the law. Consequently, the Commissioner's decision does not meet the de Smith definition of illegality. That ground of objection fails."*

6. On the matter of irrationality I held that *"the Commissioner's decision to use a factor of 11 to calculate annual leave falls within the reasonable range of responses in light of the change in shift pattern. He has sought to comply with the strict application of the Regulations. While the USP reduces the number of calendar days afforded by the Regulations this does not in and of itself make the decision unreasonable. Even with the heightened scrutiny test applied, the decision fails to meet the threshold for irrationality."*

7. It was only on the third limb, namely legitimate expectation, that the Applicants succeeded. I found that *"[t]here is no evidence before this court that the Commissioner or any of his predecessors made an express representation that officers would receive 22 weekdays plus 8 weekend days off. What the Applicants' evidence does establish, which the Commissioner does not dispute, is that there was such a practice in place for some 40 years. The authorities are clear that a regular practice can give rise to a legitimate expectation. In this case, I find that a practice developed over more than 15 year to use a factor of 7.5 to calculate annual leave does give rise to a reasonable expectation, and that the officers did rely on that expectation throughout their employment."* I concluded that *"the Commissioner's actions of recalculating the leave entitlement did breach Senior Constables Miller and Evans' legitimate expectation without justification and that the result, although well-intended, is ultimately unfair. However, the issue does not end with those two officers. The legitimate expectation that 22 days annual leave would be afforded extends to any shift officer employed prior to 1 January 2021 as they became beneficiaries of this long-standing policy upon joining the RCIPS. The decision to change the formula thereby reducing leave entitlement is, therefore, an abuse of power and in breach of Article 19 in respect of all officers employed before 1 January 2021. The decision must be quashed and the previous policy reinstated with respect to all officers employed prior to 1 January 2021."*

*The Costs Application*

8. Mr Dilliway-Parry for the Applicants argues that the court having made the orders sought by the Applicants they are the successful party and so are entitled to recover their costs of the proceedings. Mr Alcock, for the Respondents argues that the Applicants were only partially successful as they failed on the irrationality and illegality limbs and the finding that there was a legitimate expectation was limited to officers employed prior to 1 January 2021. He proposes that the court look at the proceedings as a whole and find that on legal points the Respondents won on more points than the Applicants and that, consequently, a cost neutral order should be made.

*Discussion*

9. I start by way of clarification of a preliminary point. Mr Alcock expressed some concern that Ramsay-Hale J. sought to make an order for "*costs in the cause*" at a directions hearing which was intended to cover the entire proceedings. If that had been her intention, it would have been so unusual that I would have expected her to express it in the clearest of terms. In the absence of express provisions the only reasonable conclusion is that the sole issue Ramsay-Hale J. was seeking to address was the costs pertaining to the directions hearing which she is perfectly entitled to do. I do not consider my hands to be tied as it pertains to costs of the proceedings.

10. The starting point when considering the award of costs is GCR, O.62,r.4(2) and (5) which provide that –

> *"(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the court.*
>
> *…*
>
> *(5) If the Court in exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except*

*when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."*

*11.* Section 24(1) of the Judicature Law (2021 Revision) provides that, subject to the rules of court *"costs of an incidental to all civil proceedings in …(b) the Grand Court, shall be in the discretion of the relevant court."*

12. The Court of Appeal in **McTaggart v McTaggart** [2015(1) CILR 123] addressed the issue of the courts discretion to award costs in this manner –


*"the position in this jurisdiction remains that set out in GCR, O.61, r.4: if the court in the exercise of its discretion sees fit to make any order as to costs… it shall order costs to follow the event (save where there are some special circumstances)."* (at paragraph 21)

13. The Applicants submit that O.62, r.4 and the decision in **McTaggart** speak to a presumption that a successful party will recover their costs unless there are exceptional circumstances. They submit that there is nothing unusual about these proceedings that would justify treating this case any differently. The Applicants argue that it is not unusual for a party to win on some points and lose others, but that the ultimate question, when looking at the case in the round, is *"who was the successful party?"* They say that they obtained the orders they sought, the qualification being only marginally restrictive (if at all) as the proceedings were commenced in March 2021, and so they are the successful party.

14. Mr Alcock advocates for an issues-based approach which would determine success by how many issues each party successfully argued. On that basis he says that the Respondents successfully argued two points (illegality and irrationality) while the Applicants only succeeded on one (legitimate expectation), which in any event only led to qualified declaration and orders. Mr Alcock drew my attention to examples of legalisation and case law from around the Commonwealth where the courts have taken an issue-based approach (**Shirley v Carswell, The Independent, 24 July 2000 CA; Macquarie International Health Clinic Pty v Sydney South West Area Health Service (No.2) [2011] NSWCA 171; Camertown Timber Merchants Ltd v Sabrinder Singh Sidhu [2011] EWCA Civ 104; Violia Water UK Plc v Fingal County Council (No.2) IEHC 240, [2007] 2 IR 81; Sirketi v Kupeli [2018] EWCA 2164).** In **Sycamore Bidco Ltd v**

**Breslin [2013] EWHC 174** Mann J. summed up the principles to be applied in England and Wales for commercial litigation -

*[11]The principles on which I should determine this dispute were not themselves disputed. Many are set out in the judgment of Jackson J in Multiplex v Cleveland Bridge [2009] Costs LR 55:*

*"(i) In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.*

*(ii) In considering how to exercise its discretion the court should take as its starting point the general rule that the successful party is entitled to an order for costs.*

*(iii) The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.*

*(iv) Where the circumstances of the case require an issue-based costs order, that is what the judge should make. However, the judge should hesitate before doing so, because of the practical difficulties which this causes and because of the steer given by Rule 44.3(7).*

*(v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order.*

*(vi) In considering the circumstances of the case the judge will have regard not only to any Part 36 offers made but also to each party's approach to negotiations (insofar as admissible) and general conduct of the litigation.*

*…*

*(viii) In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs."*

*[12]In addition:*

*(i) The fact that a party has not won on every issue is not, of itself, a reason for depriving that party of part of its costs.*

*"There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially*

*complex litigation such as the present case, any winning party is likely to fail on one or more issues in the case. As Simon Brown LJ said in Budgen v Andrew Gardner Partnership [2002] EWCA Civ 1125 at paragraph 35: "the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues". (Gloster J in Kidsons v Lloyds Underwriters [2007] EWHC 2699 (Comm)).*

*(ii) The reasonableness of taking a failed point can be taken into account (Antonelli v Allen The Times 8th December 2000 per Neuberger J).*

*(iii) The extra costs associated with the failed points should be considered (Antonelli).*

*(iv) One still has to stand back and look at the matter globally, and consider the extent, if any, to which it is just to deprive the successful party of costs. (Antonelli).*

*(v) The conduct of the parties, both before and during the proceedings, is capable of being relevant (CPR 44.3(5)).”*

*Conclusion*

15. While I accept that in some cases an issue-based approach is warranted, I find that this case is not one such occasion. The Applicants sought a declaration and orders for Mandamus. These were granted. The qualification that the declaration and orders only applied to officers hired before 1 January 2021 is so minor given that the proceedings were commenced in March 2021 that I do not consider it to detract from the Applicants’ success. There are often multiple avenues of arguments put forward by counsel, and not all of them will necessarily be successful. But in this instance the question of who is successful is uncomplicated: either the court makes the declaration and orders or it does not. In this case the court made the orders sought and so the Applicant is the overall successful party. The illegality and irrationality points were arguable points and, therefore, not frivolous or unreasonable points to take. This was a one day trial and I do not consider either party to have wasted any court time. Stepping back and looking at the proceedings globally, the Applicants achieved their goal. I find that they are the successful party and there are no reasons to depart from the position that as the successful party they should be awarded their costs. The Respondents shall pay the

Applicants' costs of the entire proceedings, including the costs of and incidental to the costs hearing on 13 May 2022.

16. Given that the hearing of the appeal of my substantive decision is to be heard in September of this year, taxation of costs shall be postponed until after the conclusion of the proceedings in the Court of Appeal.

*Orders*

**IT IS ORDERED THAT -**

1. The Respondents shall pay the Applicants' costs of and incidental to the proceedings on a standard basis, including the costs hearing on 13 May 2022.
2. Costs shall be taxed if not agreed.
3. Taxation shall be stayed until the conclusion of the proceedings before the Court of Appeal.


The Honourable Mrs Justice Kirsty-Ann Gunn
Acting Judge of the Grand Court