[2021 Gib LR 367]

CASSAGLIA v. STAGNETTO and GIBRALTAR HEALTH AUTHORITY

SUPREME COURT (Yeats, J.): July 1st, 2021

2021/GSC/18

Employment—Employment Tribunal—appeals—costs—court has power to award costs in appeal against decision of tribunal—as general rule, costs follow event (CPR 44.2)

Employment—Employment Tribunal—appeals—costs—employee whose appeal against tribunal's finding of bullying succeeded on two of three grounds entitled to 80% of costs

The first respondent brought a claim that he had been bullied at work.

The first respondent, Mr. Stagnetto, was a senior biomedical scientist in the Gibraltar Health Authority's pathology laboratory. He brought a claim against the GHA in the Employment Tribunal alleging that whilst at work the appellant, Dr. Cassaglia (the GHA's medical director at the time), had bullied him by physically pushing him into a room; shouting and swearing at him; and accusing him of interfering with an internal investigation being conducted by Dr. Cassaglia himself.

The Employment Tribunal found that Dr. Cassaglia's actions amounted to bullying for the purposes of the Employment (Bullying at Work) Act 2014, and that those actions were attributable to the GHA as employer.

The GHA initially intended to appeal against the tribunal's decision, but withdrew its appeal. Dr. Cassaglia then brought judicial review proceedings against the tribunal's decision, which the court ordered should proceed as an appeal pursuant to the Employment Tribunal (Appeals) Rules 2005 (that judgment is reported at 2020 Gib LR 123).

The Supreme Court (Yeats, J.) allowed the appeal against the Employment Tribunal's decision (that judgment is reported at 2021 Gib LR 148). Dr. Cassaglia was successful on two grounds of appeal relating to whether his conduct amounted to bullying and whether the GHA was liable for that conduct, but he was unsuccessful on a third ground of appeal relating to whether his right to a fair trial had been breached. Although he had a right to a fair trial, that right had not been breached because he had failed to apply to join or participate in the proceedings.

The court now had to consider the order to be made as to costs.

Dr. Cassaglia claimed that Mr. Stagnetto should pay all of his costs, as he was the successful party. It was submitted that (a) there was nothing in the Appeals Rules which restricted the court's powers to award costs; (b) in any event, Mr. Stagnetto's analysis linking r.12 of the Rules to the costs regime in the Small Claims track was wrong; and (c) the court's power to award costs was that regulated by CPR Part 44.

Mr. Stagnetto agreed that he should pay Dr. Cassaglia's costs on the first and second grounds of appeal, but said that Dr. Cassaglia should pay Mr. Stagnetto's costs on the third ground of appeal, as well as Mr. Stagnetto's costs incurred before the judicial review proceedings were reconstituted into an appeal. Mr. Stagnetto submitted that (a) the court had no power to award costs in an appeal from the Employment Tribunal save in exceptional circumstances which did not apply in this case; (b) CPR 44 did not apply to appeals from the tribunal because r.12 of the Appeals Rules provided that "in any matter not provided for by these rules the practice and procedure in an appeal from a Master to a judge shall be followed as nearly as may be"; and (c) a Master could only hear cases which had been allocated to the Small Claims track, in respect of which costs were limited. Mr. Stagnetto submitted that there should be no order as to costs in relation to the GHA.

Held, ordering as follows:

(1) The court had the power to award costs in an appeal brought against a decision of the tribunal. As there was no express provision as to costs in the Employment Tribunal (Appeals) Rules 2005, the court adopted the English High Court's powers. The High Court's powers to award costs derived from s.51(1)(b) of the English Senior Courts Act 1981, which provided that "subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in . . . the High Court . . . shall be in the discretion of the court." Rule 50 of the Supreme Court Rules 2000 provided that "costs may be awarded in accordance with the practice, procedure and scales from time to time in force in the High Court in England." The court therefore followed the English Civil Procedure Rules. Costs were in the court's discretion. The exercise of this discretion was regulated by CPR Part 44.2. If the court decided to award costs, the general rule was that costs followed the event but that this need not necessarily be so. The court's power to award costs was not limited to the costs regime which applied in the Small Claims track (paras. 3–14).

(2) Mr. Stagnetto would be ordered to pay 80% of Dr. Cassaglia's costs. It was beyond argument that Dr. Cassaglia had been the successful party in the appeal. The tribunal's order had been set aside and Dr. Cassaglia should have his costs. In relation to the third ground of appeal, on which Dr. Cassaglia was not successful, he succeeded in establishing that he had a right to a fair hearing and that had he participated as a party the tribunal's outcome might well have been different, but the ground of appeal failed

because he had not applied to join the proceedings. Technically, however, Mr. Stagnetto was not the successful party either. A 20% reduction of the costs payable to Dr. Cassaglia would fairly balance his success in the appeal with the fact that he did not wholly succeed on a matter which occupied a large part of the parties' and the court's time. An issue-based costs order was not appropriate. The ground of appeal was not improperly brought; Dr. Cassaglia successfully argued important aspects of the ground; and Mr. Stagnetto's counter-arguments did not succeed (paras. 31–33).

(3) The GHA should bear its own costs. The GHA's conduct was to be taken into account as provided for by CPR 44.2(4) and (5). Principally, the fact that it had appealed and then withdrawn its appeal. This had forced Dr. Cassaglia to take action himself and the GHA had then decided to support the arguments being advanced by Dr. Cassaglia resulting in there being two parties on the same side of the argument when originally, had it not withdrawn its appeal, there would have been only one. It would be unfair to order Mr. Stagnetto to pay two sets of opposing parties' costs (paras. 35–37; para. 39).

Case cited:

(1) *Sycamore Bidco Ltd.* v. *Breslin*, [2013] EWHC 583 (Ch); [2013] 4 Costs LO 572, considered.

Legislation construed:

Civil Procedure Rules, r.44.2(2): The relevant terms of this provision are set out at para. 14.

r.44.2(5): The relevant terms of this provision are set out at para. 15.

r.44.2(6): The relevant terms of this provision are set out at para. 16.

Employment Tribunal (Appeals) Rules 2005, r.12: The relevant terms of this rule are set out at para. 6.

Senior Courts Act 1981 (c.54), s.51(1)(b): The relevant terms of this provision are set out at para. 4.

Supreme Court Act, s.38B: The relevant terms of this section are set out at para. 7.

Supreme Court Rules 2000, r.50: The relevant terms of this rule are set out at para. 5.

G. Licudi, *Q.C.* and *D. Martinez* (instructed by Hassans) for the appellant;
A. Cardona (instructed by Phillips) for the first respondent;
N. Cruz and *G. Tin* (instructed by Cruzlaw LLP) for the second respondent.

1 **YEATS, J.:** On April 29th, 2021, I handed down judgment (reported at 2021 Gib LR 148) in an appeal brought by Dr. Daniel Cassaglia against a decision of the Employment Tribunal in which the Gibraltar Health

Authority had been found liable in a bullying claim made by Mr. Lawrence Stagnetto. I allowed the appeal on two grounds which involved the interpretation of certain key provisions of the Employment (Bullying at Work) Act 2014. I dismissed a third ground of appeal which related to Dr. Cassaglia's assertion that his right to a fair trial before the Employment Tribunal had been breached. As the parties were not agreed on the order that I should make on costs, I adjourned this for a hearing and directed that written submissions be filed. There are features in this case which have required careful consideration of the arguments advanced on costs on behalf of all three parties.

2 Although not a position which had originally been taken by any of the parties, it is now said on behalf of Mr. Stagnetto that this court does not actually have the power to award costs in an appeal from an Employment Tribunal—save in certain exceptional circumstances which do not apply in this case. For obvious reasons, I shall deal with this submission first.

Court's power to award costs

3 Rule 62 of the Employment Tribunal (Constitution and Procedure) Rules 2016 contains an express provision as to the tribunal's powers to make a costs order. (In effect, limited to cases where a party has behaved unreasonably.) However, there is no such express provision in the Employment Tribunal (Appeals) Rules 2005 ("the Appeals Rules"). What power then does the Supreme Court have to order costs in an appeal?

4 The starting point is that there is no statutory provision in Gibraltar granting the Supreme Court a substantive power to award costs. The court consequently adopts the English High Court's powers, as provided for by s.12 of the Supreme Court Act. The High Court's power to award costs derives from s.51(1)(b) of the English Senior Courts Act 1981. This states as follows:

> "(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—
>
> . . .
>
> (b) the High Court . . .
>
> shall be in the discretion of the court."

5 In terms of the procedure to be followed, r.50 of the Supreme Court Rules 2000 says that:

> "50. Costs may be awarded in accordance with the practice, procedure and scales from time to time in force in the High Court in England."

The effect of this is that we follow the English Civil Procedure Rules and ordinarily costs are awarded in accordance with Part 44 of those Rules.

6 Mr. Cardona, however, submitted that Part 44 does not apply to appeals to this court from the tribunal. This, he says, is because the Appeals Rules require us to look at what power this court has to order costs in an appeal from a decision of a Master. This is what r.12 of the Appeals Rules provides for. This states:

> "12. In any matter not provided for by these rules the practice and procedure in an appeal from a Master to a judge shall be followed as nearly as may be."

He follows this by arguing that a Master is only able to hear cases which have been allocated to the Small Claims track.

7 The basis for this submission is s.38B of the Supreme Court Act. This sets out the jurisdiction of a Master. It provides as follows:

> "38B.(1) The small claims jurisdiction of the court (as defined in the Civil Procedure Rules), may be exercised by a judicial officer to be known as a Master.
>
> (2) The Chief Justice may direct such other matters as he may determine to be heard by a Master, but such matters shall be limited to those which may be heard by a Master or district judge in England and Wales.
>
> (3) A Master shall also have jurisdiction to hear and determine any summons issued under section 5 of the Debtors Act 1869 in respect of any judgment or decree, irrespective of the amount concerned.
>
> . . .
>
> (5) An appeal from a decision of a Master shall lie to the Chief Justice or an additional judge."

8 As far as this court is aware, no direction has been made by the Chief Justice pursuant to s.38B(2). The effect of that, according to Mr. Cardona, is that a Master only deals with cases which have been allocated to the Small Claims track (the reference to summonses issued pursuant to the Debtors Act 1869 being irrelevant). Therefore, if the procedure to be followed in an appeal from the tribunal to the Supreme Court is the same as the procedure to be followed in an appeal from a Master to a Supreme Court judge, this can only refer to the procedure to be followed in an appeal from the Small Claims track to a judge. In that regard, CPR Part 27.14(2) provides that costs in any appeal shall be limited to costs that could be awarded at first instance. Costs in the Small Claims track are limited principally to fixed costs and costs awarded in cases where a party has behaved unreasonably. The upshot would then be that this court only has those limited powers to award costs.

9 Mr. Licudi replied by saying that there is nothing in the Appeals Rules which restricts the Supreme Court's powers to award costs. In any event, he submitted that Mr. Cardona's analysis linking r.12 of the Appeals Rules to the costs regime in the Small Claims track was wrong. This, he said, was giving too narrow an interpretation to s.38B of the Supreme Court Act. A Master's powers are not limited by statute to sitting in the Small Claims track. A Master can deal with any matter which he may be directed by the Chief Justice to deal with (as long as it is a matter which could be heard by a Master in England). All that is required is for the Chief Justice to direct the Master to do so. No rules or regulations are necessary. The Act has already conferred this wider jurisdiction on the Master. CPR Part 2.4 provides that, except as may be expressly limited by a rule, a Master can perform any act in the High Court. Therefore, Mr. Licudi submitted, a Master in Gibraltar could perform any function in the Supreme Court that the Chief Justice may direct him to perform, as long as it is not excluded by any express provision. Any appeal from a decision of a Master acting under a direction from the Chief Justice would still lie to a Supreme Court judge. The power of the court to award costs would be the powers the Supreme Court ordinarily has (as regulated by CPR Part 44 or other specific rules). Mr. Cruz, on behalf of the GHA, supported Mr. Licudi's submissions.

10 It seems to me that Mr. Licudi's analysis must be correct. A Master in Gibraltar has the powers of a Master in England. The fact that he can only exercise these powers once the Chief Justice has made a direction does not change that fact. Therefore, when we look at appeals from a Master to a judge we are not restricted to appeals from a Master sitting in the Small Claims track.

11 I would also observe that it would make very little sense for the law on costs in an appeal such as this to depend on whether or not the Chief Justice has made a direction under s.38B(2). That would mean that today the law would be that costs were limited but tomorrow, if for example, a Master is asked to sit to cover for the absence on leave of one of the Puisne Judges, the law would then, for evermore, be different. That would be an illogical situation which would make the law uncertain and perverse.

12 Mr. Cardona highlighted how in England an appeal from the Employment Tribunal lies to the Employment Appeals Tribunal. The costs regime on an appeal replicates that of the first instance tribunal. Before both, costs are limited. He also submitted that there is a clear policy consideration for a limitation on costs in employment claims, namely that employees should be allowed to bring their claims without being discouraged by the prospect of having costs orders made against them if they are unsuccessful. However, as pointed out by Mr. Licudi, it has long been the law in Gibraltar that this court awards costs on an appeal from the tribunal.

Examples of reported decisions by Chief Justices Kneller, Schofield and Dudley were cited. If there were strong policy considerations against the granting of costs on an appeal from a tribunal's decision, then it seems to me that the legislature would by now have acted to implement the policy.

13 In my judgment, this court has the power to award costs in an appeal brought against a decision of the tribunal and is not limited to the costs regime which applies in the Small Claims track.

CPR Part 44.2

14 The award of costs is in the court's discretion. The exercise of this discretion is regulated by CPR Part 44.2. The general rule is contained in 44.2(2) which states:

"(2) If the court decides to make an order about costs—

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order."

So, if the court decides to award costs, the general rule is that costs follow the event but that this need not necessarily be so.

15 Rule 44.2(4) provides that the court must have regard to all the circumstances of the case including to the following factors: the conduct of the parties; whether a party has succeeded in part; and to offers to settle. As to conduct, Part 44.2(5) provides as follows:

"(5) The conduct of the parties includes—

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction—Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."

16 The different orders that a court may make include the type of orders set out at Part 44.2(6). These are the following:

"(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment."

17 Part 44.2(7) however provides that before making an order under Part 44.2(6)(f), it must first consider whether it is practicable to make an order under Part. 44.2(6)(a) or (c) instead.

18 I have set out these provisions because it is said on behalf of Mr. Stagnetto that this is a case in which the general rule as to costs should be departed from, and that an order under CPR Part 44.2(6)(f) should be made.

The parties' submissions

19 A summary of the parties' respective positions is the following:

(i) Dr. Cassaglia says that Mr. Stagnetto (who is funded by Unite the Union) should pay all of his costs. He does not seek any costs from the GHA.

(ii) The GHA also says that Mr. Stagnetto should pay all of its costs.

(iii) Mr. Stagnetto agrees that he should pay Dr. Cassaglia's costs on grounds one and two but says that Dr. Cassaglia should pay Mr. Stagnetto's costs on ground three. Further, that the costs incurred by Mr. Stagnetto prior to June 26th, 2020 (that is the costs prior to the reconstitution of the judicial review into an appeal), be paid by Dr. Cassaglia.

(iv) Mr. Stagnetto says that there should be no order as to costs with the GHA.

20 Mr. Licudi submitted that Dr. Cassaglia had been wholly successful in the appeal. He referred to my comment in the principal judgment (2021 Gib LR 148, at para. 75) where, having decided limb one of ground one, I observed that this disposed of the appeal. I need not have gone further. In any event, Mr. Licudi submitted that if we were to look at the judgment as a whole, it is clear that Dr. Cassaglia was the successful party. He had succeeded on the preliminary point on locus; he succeeded on ground one (although not on the second limb of the arguments advanced); he succeeded on ground two; and in respect of ground three, even though the ground was not made out, the court agreed with most of his arguments.

21 Specifically on ground three, it was said that Dr. Cassaglia had successfully argued that he was entitled to a fair hearing before the tribunal.

Mr. Licudi then pointed to the principal judgment (*ibid.*, at para. 194). There, I said the following:

> ". . . [A] person in Dr. Cassaglia's circumstances should have been afforded a fair hearing before the tribunal. To be afforded a fair hearing, he should have had full disclosure of the pleadings, witness statements and documents in the case, he should have been afforded the right to be represented and examine the witnesses at the hearing, and he should have been able to call his own witnesses in support. It seems to me that had that happened, and had Dr. Cassaglia's case been fully advanced before the tribunal, the conclusion reached by the Chairman on the facts may well have been different."

22 I then found that the fact that Dr. Cassaglia had not applied to join the proceedings before the tribunal meant that he could not say that his right to a fair trial had been violated. That, it was submitted, was the only point on which he had not been successful. But this was not a point which had been argued by Mr. Stagnetto. The case for Mr. Stagnetto was that Dr. Cassaglia was not entitled to take part at all. Therefore, Mr. Licudi submitted, Mr. Stagnetto should not be entitled to his costs of that ground. It would be wrong as a matter of principle for Mr. Stagnetto to benefit from a point he argued against. Mr. Cardona replied by saying that in the appeal Mr. Stagnetto had not actually taken that position and referred the court to extracts of his skeleton argument for the appeal hearing. I have re-read those extracts. My understanding of those written submissions and of Mr. Stagnetto's position in the appeal on this point was the following. Mr. Stagnetto was saying that any application by Dr. Cassaglia to join the proceedings before the tribunal would have failed and that he was not entitled to appeal to this court. However, if that was wrong, then the fact that Dr. Cassaglia was unaware of his right to join the proceedings should not be relied on to overturn the tribunal's findings.

23 Mr. Licudi also referred to the English High Court case of *Sycamore Bidco Ltd.* v. *Breslin* (1) as authority for the proposition that not being successful in every point does not have to result in a departure from the general rule (as per the judgment of Mann, J. ([2013] EWHC 583 (Ch), at para. 12)). He also referred to two authorities referred to in the commentary to the *White Book* at para. 44.2.8 where judges had made percentage deductions in cases where the successful party had not succeeded on all issues. The note states as follows:

> "In *Budgen* v *Andrew Gardner Partnership* [2002] EWCA Civ 1125, where the claimant recovered significantly less than was claimed, the trial judge ordered the unsuccessful defendant to pay the claimant's costs, reduced by 25% because C had failed on one issue, being an issue which had taken up a substantial part of the trial and which (as the judge found) should not have been pursued.

. . .

In *Grupo Hotelero Urvasco SA* v *Carey Value Added SL* [2013] EWHC 1732 (Comm) a complex case where the losing claimant succeeded on three important issues, the trial judge concluded that the costs orders should reflect, in a substantial way, the defendant's failure to make good a particular argument and, at least to an extent, the outcome of two other issues, and ordered that the defendant's costs should be reduced by 25%."

24 As to costs prior to June 26th, 2020, Mr. Licudi referred to my order of that day which has the following relevant paragraphs:

"(1) The judicial review claim against the First Defendant is dismissed, with no order as to costs.

. . .

(5) The remainder of the costs of the judicial review are deemed to be costs in the appeal proceedings.

. . .

(12) Costs reserved."

This, it was submitted, means that it has already been decided that the costs incurred prior to June 26th, 2020, other than those incurred or payable by the tribunal itself who was the first defendant at the time, are costs in the appeal. (It appears that the reservation of costs in para. 12 related solely to costs incurred in the making of directions for the progress of the appeal which were also contained in the order.)

25 Mr. Cruz submitted that there had been two clear winners. Dr. Cassaglia and the GHA. That there needs to be a good reason to depart from the general rule and here there is none. Mr. Cruz also pointed to the original draft order prepared by Mr. Cardona for the hand down of the principal judgment on April 19th, 2021. There, Mr. Stagnetto was agreeing to pay the GHA's costs on grounds one and two. Mr. Cruz had subsequently tried to make efforts to settle the question of costs but these were not accepted by Mr. Stagnetto. It was therefore argued that the GHA should have all of its costs including costs incurred in addressing ground three.

26 When I raised with Mr. Cruz the fact that the GHA had initially withdrawn its appeal and the impact this could potentially have on costs, Mr. Cruz submitted that withdrawing the appeal was a reasonable stance to take at the time. The GHA had received advice that the appeal should not be pursued and they therefore chose to withdraw. Then, when Dr. Cassaglia sought to judicially review the tribunal's decision, the GHA was added as an interested party. The GHA was therefore brought into the proceedings

and participated. Apart from making submissions on the law, the GHA had incurred significant costs in providing disclosure which had assisted the parties in the appeal and in preparing witness statements on matters relating to ground three.

27 Mr. Cardona criticized Dr. Cassaglia's application for costs. First, he submitted that it was unfair for him to claim costs in this court when, in accordance with my decision on ground three, he should have applied to join the tribunal's proceedings. Had he done so, the litigation would have been undertaken in a costs-free arena (presumably with the same result). Why then should he benefit from his own failing? Mr. Licudi replied by referring to the fact that Unite the Union made public statements disapproving of my substantive decision and saying that they would appeal and take this case wherever they had to. This did not therefore sit well with Mr. Cardona's submission that the matter could have been simply resolved in the costs-free arena of the tribunal. Furthermore, if Mr. Stagnetto was concerned about being unfairly exposed to costs, he should have applied for a protective costs order and he did not do so.

28 Secondly, Mr. Cardona said that the principal relief sought by Dr. Cassaglia was that which was contained in ground three. He wanted the findings made by the tribunal overturned and that has not happened. All that he achieved was that the findings of fact are no longer categorized as "bullying." The majority of the costs were incurred on the right to a fair trial point. Evidence was filed, disclosure made, and it took up a significant part of the court's time. Mr. Cardona reminded the court that Mr. Stagnetto had conceded at an early stage that the materiality evidence may have made a difference in the tribunal but that Dr. Cassaglia nevertheless went on to file all his extensive evidence on this and argue the point fully. On this submission, Mr. Licudi argued that this had to be considered in light of my comments in my principal judgment (2021 Gib LR 148, at para. 194, quoted above) which says that had Dr. Cassaglia participated in the tribunal, its findings may well have been different.

29 As to the GHA's application for costs, Mr. Cardona pointed out that it was not Mr. Stagnetto who had added the GHA as a party. Further, that its conduct has to be taken into account, namely: its abandonment of the initial appeal; its *volte face* on the merits of grounds one and two; the failure to ensure the disciplinary proceedings were completed prior to the tribunal hearing; and its failure to make clear to Dr. Cassaglia that they were adopting a neutral position before the tribunal. To the extent that the GHA incurred costs on ground three, Mr. Cardona submitted that this was as a result of the ambiguous nature of Dr. Cassaglia's evidence.

30 Mr. Cardona also relied on the *Sycamore Bidco* case (1) (it was a case which in fact he brought to the court's attention). There, the claimant had succeeded in recovering a large sum but had failed on a number of

important issues, including on a misrepresentation claim in which even larger sums had been sought. In his judgment, Mann, J. said the following ([2013] EWHC 583 (Ch), at para. 16):

> "16. In my view the misrepresentation claim was a significant enough 'loss' to justify its being treated as a separate issue whose loss should be reflected in an issue-based costs order (transformed if appropriate into a percentage costs order) and not to leave it to lie as one of those losses that should be taken on the chin. The claimant went for the big prize, spent a lot of money and time on it, and caused the defendants to spend a lot of money and time on it. The defendants should not have to pay for that privilege. It matters not that I made no findings on what the consequences would have been had the representation been established. I made no findings because the points were irrelevant once there had been a finding against the representation; but the costs in relation to these irrelevant points were still incurred, and the claimant's claim was the cause of their being incurred."

He therefore submitted that there should be an issues based costs order under CPR Part 44.2(6)(f). If the court preferred a percentage order then Mr. Cardona proposed that Dr. Cassaglia pay Mr. Stagnetto 40% of his costs. (Mr. Cardona also relied on the policy consideration on limits on costs in the tribunal to say that this could tilt the balance in favour of Mr. Stagnetto in this case.) Alternatively, it was submitted that there should be no order as to costs.

Costs as between Dr. Cassaglia and Mr. Stagnetto

31 It is beyond argument that Dr. Cassaglia was the successful party in the appeal. The tribunal's order was set aside and he should have his costs. That said, how should this court treat his failure to make good his assertion that the tribunal did not afford him a fair hearing? It is apparent that, to him, this was an important aspect of the appeal. He succeeded in establishing that he had a right to a fair hearing and that had he participated as a party the tribunal's outcome may well have been different. It was his failure to apply to join the proceedings which caused the ground of appeal to fail. Technically, however, Mr. Stagnetto was not the successful party either. Indeed, as to Mr. Cardona's argument that this case could have been litigated in the costs-free arena of the tribunal, I cannot accept that this should have any impact on costs. Mr. Stagnetto made it abundantly clear at the time that he considered that Dr. Cassaglia should be taking no part in those proceedings. He cannot now pray in aid that the position in law has been found to be different to that which he was arguing.

32 A large part of the work undertaken by the parties and of the court's sitting time was taken up by ground three—although it is fair to say that some of the matters overlapped with the preliminary point on Dr.

Cassaglia's right to appeal. In my judgment, there has to be some account for the fact that Dr. Cassaglia did not wholly succeed on ground three when this was a significant aspect of the appeal. It seems to me that it can properly be dealt with by a percentage reduction of the costs payable to Dr. Cassaglia. I shall reduce the costs payable to Dr. Cassaglia by 20%. This is a reduction which in my view fairly balances his success in the appeal with the fact that he did not wholly succeed on a matter which occupied a large part of the parties' and the court's time.

33 I should add that I do not consider that an issue-based costs order would have been appropriate in this case in any event. The ground of appeal was not improperly brought; Dr. Cassaglia successfully argued important aspects of the ground; and Mr. Stagnetto's counterarguments did not succeed.

34 The payment of costs by Mr. Stagnetto is to include payment of those costs incurred by Dr. Cassaglia from the date Mr. Stagnetto was added as a party to the judicial review proceedings—as provided for in the order of June 26th, 2020.

Costs as between the GHA and Mr. Stagnetto

35 I agree with Mr. Cardona that the GHA's conduct in this appeal has to be taken into account as provided for by CPR Part 44.2(4) and (5). Principally, the fact that it appealed and then withdrew its appeal. The basis for the withdrawal was that they had received advice that there was no merit in the appeal. This forced Dr. Cassaglia to take action himself, initially by way of bringing a claim for judicial review. The GHA then decided to support the arguments being advanced by Dr. Cassaglia. This resulted in there being two parties on the same side of the argument when originally, had they not withdrawn, there would only have been one. Why then should Mr. Stagnetto have to pay two sets of costs?

36 At the permission hearing for the judicial review, the GHA argued against permission being granted. They relied principally on the question of the delay by Dr. Cassaglia in bringing the claim. However, its position was also that it had acted in a manner before the tribunal which safeguarded the interests of all its employees and that it was not right to subject the tax-payer to further expense when they had been advised that there was no merit in the appeal. To that submission, I said as follows in my judgment of April 2nd, 2020 (2020 Gib LR 123, at para. 43):

> "I will simply observe that the GHA could stand back if it does not wish to challenge the tribunal's conclusion. Mr. Stagnetto has his own representation."

37 Thereafter the GHA continued to participate in the appeal and decided to argue in favour of the appeal being allowed. Mr. Cruz says that it was

the court that required the GHA to file its written submissions and take a position on the law. That arose at the case management hearing of February 2nd, 2021. Mr. Cruz stated at that hearing that the GHA was still undecided as to whether to file skeleton submissions for the substantive hearing and that its main focus was to assist with the facts and information. I indicated that I thought that if the GHA wished to participate and assist that it should set out its position on the law. Ultimately, it was a decision for the GHA whether to participate in the appeal or not.

38 As to Mr. Cruz's point that Mr. Stagnetto was initially prepared to pay the GHA's costs of grounds one and two, this was in the context of a proposed order/agreement on costs which included payment of Mr. Stagnetto's and the GHA's costs on ground three by Dr. Cassaglia. (Mr. Stagnetto says that his costs on ground three far outweigh Dr. Cassaglia's costs on grounds one and two and this would therefore have been a net gain for Mr. Stagnetto.) I do not regard the proposed order as a concession that binds Mr. Stagnetto to paying the GHA's costs. In any event, it is a matter for me as to how I exercise my discretion to award costs in the absence of agreement.

39 In my judgment, it would be unfair to order Mr. Stagnetto to pay two sets of opposing parties' costs. This eventuality arose only because the GHA withdrew its initial appeal. The GHA should bear its own costs.

Conclusion

40 Mr. Stagnetto shall pay 80% of Dr. Cassaglia's costs.

41 There shall be no order as to the payment of the GHA's costs.

Order accordingly.