[2022 Gib LR 64]

STAGNETTO v. CASSAGLIA and GIBRALTAR HEALTH AUTHORITY

COURT OF APPEAL (Kay, P., Elias and Davis, JJ.A.): March 4th, 2022

2022/GCA/02

Employment—Employment Tribunal—appeals—costs—as general rule, costs follow event (CPR 44.2)—employee whose actions Employment Tribunal found, in proceedings brought by allegedly bullied employee against employer (Gibraltar Health Authority), to constitute bullying appealed successfully to Supreme Court—GHA participated in appeal—successful appellant awarded costs but no order as to costs of GHA—judge's decision that unjust to require unsuccessful respondent to pay two sets of costs upheld on GHA's appeal to Court of Appeal

The appellant claimed to have been bullied at work.

The Employment Tribunal found the Gibraltar Health Authority liable for an act of bullying by the first respondent (the GHA's medical director) against the appellant, another employee of the GHA. The tribunal found that the first respondent had pushed the appellant and spoken to him in a raised voice using inappropriate language. The tribunal found that the act constituted an act of bullying within the meaning of s.4 of the Employment (Bullying at Work) Act 2014 for which the GHA was liable. The first respondent was not a party to the proceedings before the tribunal but he gave evidence about the incident. The appellant was awarded damages of £7,000 plus interest against the GHA.

The GHA initially lodged an appeal against the decision, which was later withdrawn. The first respondent then applied for permission to bring judicial review proceedings in respect of the decision, which the Supreme 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). Yeats, J. found that the incident in question could not amount to bullying within the meaning of s.4 because it was a single incident. He also found that even if the incident did constitute bullying by the first respondent within the meaning of the Act, the GHA was not legally liable for it.

The Court of Appeal dismissed the appellant's appeal and upheld Yeats, J.'s judgment (that judgment is reported at 2022 Gib LR 30).

The Supreme Court had ordered that the appellant pay 80% of the first respondent's costs and that the GHA should bear its own costs on the basis that it would be unfair in the circumstances to order the appellant to pay two sets of opposing parties' costs (that decision is reported at 2021 Gib LR 367).

The GHA appealed against the costs order made by Yeats, J., submitting that (a) it had been successful in the Supreme Court and there was no justification for departing from the usual rule that the successful party should receive its costs; and (b) even if it was appropriate to allow some reduction to take account of its decision to withdraw its appeal, it was unfair to refuse to allow it any costs, which was a disproportionate sanction for its alleged unreasonable conduct. The GHA also sought its costs of the appeal to the Court of Appeal, submitting that since it was again in substance (together with the first respondent) the successful party in the appeal, it should receive its costs in full.

In respect of the first respondent's costs, there was no appeal against Yeats, J.'s order that the appellant should pay 80% of the first respondent's costs in the Supreme Court. The appellant accepted that he was liable to pay all of the first respondent's costs in the Court of Appeal.

Held, ruling as follows:

(1) The GHA's appeal against Yeats, J.'s ruling on costs would be dismissed. CPR 44.2 conferred on a judge a wide discretion as to costs, although the general rule was that the successful party would be awarded his costs. When considering an appeal against a judge's costs order, an appellate court must respect the fact that the judge who heard the case was in the best position to determine how costs should be allocated. An appellate court would not readily interfere with a judge's exercise of discretion and would ask itself whether the judge's order was one which he was entitled to reach in all the circumstances. Yeats, J.'s reason for refusing to grant GHA its costs was that it would be unjust to impose a second burden of costs on the appellant given that it was the GHA's own decision not to pursue its appeal which had caused the first respondent to challenge the tribunal's ruling. GHA had not been obliged to participate in the appeal to the Supreme Court. Yeats, J. was fully entitled to have regard to these matters in the exercise of his discretion and to consider that in the circumstances the GHA should bear its own costs. It was an entirely proper basis for departing from the general rule that a successful party should receive its costs. The GHA's submission that even if it was appropriate to allow some reduction to take account of the GHA's decision to withdraw its appeal, it was unfair to refuse to allow it any of its costs because it was a disproportionate sanction to impose for its alleged unreasonable conduct, was based on a false premise. Yeats, J. did not find that the GHA had acted unreasonably. There was no criticism of the GHA for deciding, once the appeal was on foot, that it would like to participate. However, it did not

follow that it could do so at the expense of the appellant. If the GHA had continued its appeal, it was doubtful that the first respondent would have become a party to that appeal and, even if he had, it might well have been on terms that he should bear his own costs. It was very unlikely that the appellant would have faced claims for two sets of costs. Yeats, J. made no error of law in his ruling on costs and gave cogent reasons for his conclusion (para. 6; paras. 10–13).

(2) In respect of the costs of the appeal to the Court of Appeal, the court would also make no order as to costs with respect to the GHA essentially for the same reasons as persuaded Yeats, J. to make that order in the Supreme Court. The argument that it would be unjust in all the circumstances to require the appellant to pay two sets of costs applied equally here. It would be churlish not to acknowledge the helpful and constructive contribution the GHA made to the legal argument, for which the court was grateful, but that did not justify requiring the appellant to pay the GHA's costs. Where interested parties chose to be involved in substantive judicial review proceedings, for example, they were often denied their costs. There was some analogy between the role played by the GHA in these appeals and an interested party, particularly since the GHA was seeking to assist the court and had resolved to take a neutral stance as between the parties (paras. 15–16).

Cases cited:

(1) *Adamson* v. *Halifax*, [2002] EWCA Civ 1134; [2003] 1 W.L.R. 60; [2003] 4 All E.R. 423, referred to.

(2) *Bolton Metrop. District Council* v. *Environment Secy.*, [1995] 1 W.L.R. 1176; (1995), 71 P. & C.R. 309, referred to.

(3) *Islam* v. *Ali*, [2003] EWCA Civ 612, referred to.

(4) *Roache* v. *News Group Newspapers Ltd.*, [1998] EMLR 161, applied.

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132), r.44.2: The relevant terms of this rule are set out at para. 5.

R. Clayton, *Q.C.* assisted by *A. Cardona* (instructed by Phillips) for Mr. Stagnetto;

G. Licudi, *Q.C.* assisted by *D. Martinez* (instructed by Hassans) for Dr. Cassaglia;

N. Cruz assisted by *G. Tin* (instructed by Cruzlaw LLP) for the Gibraltar Health Authority.

The arguments were by written submissions.

JUDGMENT ON COSTS

1 **ELIAS, J.A.:** This is the judgment of the court consisting of Sir Maurice Kay, Sir Nigel Davis, and myself. It deals with two issues on costs arising out of the litigation concerning an alleged act of bullying by Dr.

Cassaglia against Mr. Stagnetto, both of whom were at the material time employed by the Gibraltar Health Authority (GHA). The Employment Tribunal held that an act of bullying had been committed by Dr. Cassaglia and that the GHA was legally liable for that act. Yeats, J. upheld an appeal against that ruling, and we have in turn dismissed Mr. Stagnetto's appeal and upheld the judgment of Yeats, J.

2 The first issue is an appeal by the GHA against the costs order made by Yeats, J. The judge held that in the particular circumstances of the case, there should be no order as to costs in favour of the GHA; in other words, the GHA was to bear its own costs. Mr. Cruz, counsel for the GHA, contends that this was not a legitimate order to make: the GHA had been successful in the appeal and there was no proper justification from departing from the usual rule that the successful party should receive its costs. It was agreed between the parties that the costs appeal should not be heard until after the substantive appeal itself had been determined because, had the appeal been successful, it would almost inevitably have affected the justification for Yeats, J.'s costs order. In the event the appeal was unsuccessful.

3 The second issue concerns the costs of the appeal to the Court of Appeal. The GHA contends that since it was again in substance (together with Dr. Cassaglia) the successful party in the appeal, it should receive its costs in full.

4 There is no outstanding issue as to the costs to be awarded to Dr. Cassaglia. Yeats, J. ordered that Mr. Stagnetto should pay to Dr. Cassaglia 80% of the latter's costs of the appeal before him, a decision which was not challenged by either Mr. Stagnetto or Dr. Cassaglia; and Mr. Stagnetto accepts that he is liable to pay all Dr. Cassaglia's costs incurred in defending the appeal before this court.

The appeal against Yeats, J.'s costs order

5 The relevant principles for awarding costs are laid down in CPR 44.2 which are applicable in Gibraltar. In so far as they are material, they are as follows:

"**44.2**—(1) The court has discretion as to—

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(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.

. . .

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful . . .”

6 In short, there is a wide discretion conferred on the judge, although the general rule is that the successful party will get his costs. Moreover, when considering an appeal against a judge’s costs order, the appellate court must respect the fact that the judge who heard the case is in the best position to determine how costs should be allocated. It will not readily interfere in the judge’s exercise of discretion. The question the appellate court has to ask itself is whether the judge’s order was one which he was entitled to reach in all the circumstances. The classic test, which has been cited in numerous subsequent cases, was expressed by Murray Stuart-Smith, L.J. in the following terms in *Roache* v. *News Group Newspapers Ltd.* (4) ([1998] EMLR at 172):

> “Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale.”

(That *dictum* was in a case decided prior to the introduction of the Civil Procedure Rules, but it has been adopted by the Court of Appeal in post-CPR cases: see *e.g. Adamson* v. *Halifax* (1) ([2003] 1 W.L.R. 60, at para. 16) and *Islam* v. *Ali* (3) ([2003] EWCA Civ 612, at para. 20).)

The decision of Yeats, J.

7 In order to appreciate the judge’s reasons, it is important to have regard to the history of this litigation. The Employment Tribunal found that there was bullying by Dr. Cassaglia for which the GHA was liable and damages were awarded to Mr. Stagnetto. The GHA appealed that decision but withdrew its appeal after receiving advice that it was likely to fail. It was after the GHA had taken that step that Dr. Cassaglia took it upon himself to challenge the decision, initially by way of judicial review. As we explain in the substantive judgment, Yeats, J. held that it would be more appropriate for the challenge to be pursued by way of a statutory appeal, and the proceedings were converted from judicial review proceedings into appeal proceedings. The GHA had been named as an interested party in the judicial review action but became a defendant in the appeal proceedings. Its stance before the Employment Tribunal had been a neutral one. As

Yeats, J. made clear in the course of his judgment when he restructured the proceedings, there was no obligation on the GHA to participate in the appeal if it did not wish to do so.

8 In view of this background, the judge felt that it would not be appropriate for Mr. Stagnetto to be required to pay the costs of two sets of submissions. The key paragraphs of his costs judgment on this point were as follows (2021 Gib LR 367, at paras. 35–37 and 39):

> "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?
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> 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):
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> > '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.'
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> 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.
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> . . .

> 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."

9 Mr. Cruz contends that this was not a proper basis for refusing to grant his costs. He formally raised four grounds of appeal but accepted that the first three grounds could be summarized as an assertion that there was:

> "firstly, on the one hand, a lack of recognition by the learned judge that the GHA was the successful party (or at least one of the two successful parties); and secondly, that in all the circumstances of the case there was no material conduct or good reason to depart from the general principle that the successful party should recover his costs."

10 Although there was some limited degree of argument as to how successful the GHA had been, we would accept that it was in substance successful in most of the arguments advanced before Yeats, J. and might in the usual case expect to receive at least the lion's share, if not all, of its costs. We do not doubt that the judge was fully alive to that. His reason for refusing to grant the GHA was not that it had been unsuccessful; it was that the judge considered that it would be unjust to impose a second burden of costs on Mr. Stagnetto given that it was its own decision not to pursue the appeal which had caused Dr. Cassaglia to challenge the Employment Tribunal's ruling. Indeed, it had opposed Dr. Cassaglia being granted leave, and had that submission been successful, there would have been no appeal. Furthermore, it was not obliged to participate in the appeal, as the judge had pointed out in the original permission proceedings.

11 In our judgment the judge was fully entitled to have regard to these matters in the exercise of hish discretion and to take the view that in the circumstances the GHA should bear its own costs. This was an entirely proper basis for departing from the general rule that a successful party should receive its costs.

12 Mr. Cruz advanced a further argument that even if it was appropriate to allow some reduction to take account of GHA's decision to withdraw its appeal, it was unfair to refuse to allow it any of its costs. This was a disproportionate sanction to impose for its alleged unreasonable conduct. We reject that submission. In our view it is based on a false premise. The judge was not saying that the GHA had acted unreasonably. It was fully entitled to take the view that once an appeal was on foot, its interests would be better served if it were to be represented (even if it were adopting a neutral position as between the other two parties). There can in our view be no criticism of the GHA for deciding, once the appeal was on foot, that it would like to participate. But it does not follow that it should be allowed to do so at the expense of Mr. Stagnetto. That was in essence all that the judge was saying. Had the GHA determined to carry on with the appeal

before Yeats, J., it is doubtful whether Dr. Cassaglia would either have wanted or would have been permitted to become a party to the appeal because of the obvious duplication of representation; and even if he had been allowed to join the proceedings, it might well have been on terms that he should bear his own costs. It is very unlikely that Mr. Stagnetto would have faced claims for two sets of costs.

13 For these reasons, we would uphold the judge's ruling on costs. He made no error of law and gave cogent reasons for his conclusion.

The costs of the appeal before us

14 Mr. Cruz has rightly submitted that the fact that we have dismissed the appeal against Yeats, J.'s order on costs does not necessarily mean that we should reach the same conclusion. Then we had a reviewing function whereas now we are having to exercise our own discretion as to how costs should be allocated as between Mr. Stagnetto and the GHA in the appeal before us.

15 Even so, in our view we think that the same order—that is, no order as to costs—is the appropriate order in all the circumstances, essentially for the same reasons as persuaded Yeats, J. to make that order in the appeal before him. The argument that it would be unjust in all the circumstances to require Mr. Stagnetto to pay two sets of costs applies equally here. It would be churlish not to acknowledge the helpful and constructive contribution which Mr. Cruz made to the legal argument, for which the court is grateful, but that is not of itself a justification for requiring Mr. Stagnetto to pay the GHA's costs. Where interested parties choose to be involved in substantive judicial review proceedings, for example, they are often denied their costs: see the observations of Lloyd, L.J. in *Bolton Metrop. District Council* v. *Environment Secy.* (2) ([1995] 1 W.L.R. at 1178). In a loose sense there is some analogy between the role played by the GHA in these appeals and an interested party, particularly since the GHA was seeking to assist the court and had resolved to take a neutral stance as between the parties.

16 For these reasons, therefore, we would also make no order as to costs with respect to the GHA.

Conclusion

17 We dismiss the appeal against the costs order of Yeats, J. and we make no order as to costs between Mr. Stagnetto and the GHA with respect to the appeal before us.

Judgment accordingly.