COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2021/PUB/jrv/00003

IN THE MATTER of an application by **DR. GAURI SHIRODKAR** for Judicial Review.

AND

IN THE MATTER of the Decision of the Respondent made and dated the 30th day of December A.D. 2020 that: "*The Bahamas Medical Council has reviewed your application for registration in Radiology. We regret to inform that your application was denied. The Council is unable to verify your specialist qualification in Radiology*." (***the Decision***)

AND

IN THE MATTER of the Medical Act 2014 (***the Act***).

BETWEEN:

DR. GAURI SHIRODKAR

Applicant

v.

THE BAHAMAS MEDICAL COUNCIL

Respondent

Before:	The Hon. Mr. Justice Loren Klein
Appearances:	Mr. Kahlil Parker, Ms. Roberta Quant for the Applicant Mr. Raynard Rigby, Ms. Asha Lewis for the Respondent
Hearing Dates:	Heard on written submissions

RULING

Klein, J.

Costs—Discretion of the Court—Circumstances justifying departure from 'costs follow the event principle'—Judicial review—Applicant succeeding on claim for judicial review of decision of Medical Council refusing to register her as a specialist in radiology—Court not granting all of the declarations sought—Whether applicant should receive full or partial costs—Issue-based costs order.

INTRODUCTION

[1] This reserved ruling deals with the costs of these judicial review proceedings, in which the Court quashed the decision of the Medical Council refusing to register the applicant as a radiology specialist. As remarked in the main ruling, despite the applicant's success in having

the decision quashed, it had "*not all gone her way*". I therefore requested brief written submission from the parties on how costs were to be dealt with.

[2] In the judicial review action the applicant applied for a number of declarations and orders, which I summarized at paragraph 6 of the ruling as follows:

(i) *certiorari* to quash the decision;
(ii) mandamus to direct the Council to register the applicant as a specialist in radiology in accordance with the Act;
(iii) a declaration that the refusal to register the applicant without affording the applicant due process or without lawful justification was *ultra vires* and unlawful;
(iv) a declaration that the refusal to register the applicant was irrational or '*Wednesbury unreasonable*';
(v) a declaration that the decision was taken in bad faith, and/or constituted an intentional and/or malicious failure or refusal by the Council to perform its statutory duty;
(vi) a declaration that the Council's conduct was arbitrary, discriminatory and otherwise "unconstitutional";
(vii) a declaration that the Council is estopped from refusing to register the applicant as a specialist in radiology; and
(viii) damages, including aggravated, exemplary and vindicatory damages for the alleged constitutional claim.

[3] At paragraph 113, I set out the court's disposition of the claims as follows:

(i) I grant the declaration that the decision of the Council was *ultra vires* and unlawful.
(ii) I grant the declaration that the decision was irrational and unreasonable.
(iii) I refuse the declaration that the decision was taken in bad faith, and or constituted an intentional and/or malicious failure or refusal by the Council to perform its statutory duty.
(iv) I refuse the declaration that the Council's conduct was discriminatory and/or unconstitutional.
(v) I refuse the declaration that the Council is estopped from refusing to register the applicant as a specialist in radiology.
(vi) I refuse the claim for damages, including aggravated, exemplary and vindicatory damages.
(vii) I grant the order for *certiorari* quashing the Council's decision.
(viii) I grant an order of mandamus requiring the Council to rehear and reconsider the application of the applicant according to law.

Costs Principles

[4] The general principle governing costs are not in dispute and the Court need not trouble itself with any great exposition. They are derived from s. 30 of the Supreme Court Act ("SCA") and Order 59 of Rules of the Supreme Court (R.S.C. 1978). I only attempt a summary here, but a fuller exposition may be found in my ruling in *Lucayan Towers South Condominium Association v. Grand Bahama Utility Company Limited* (2018/CLE/gen/1490)) ("*Costs*").

[5] *First,* costs are in the discretion of the court, and the court has "*full power to determine by whom and to what extent costs are to be paid*" (s. 30, SCA). *Second,* although the discretion

to award costs is broad, the cardinal principle is that the party who is successful in any proceedings or application should usually be paid its costs from the unsuccessful party—i.e., '*costs follow the event*' principle (Ord. 59, r. 3 (1), (2)). *Third*, the court may depart from the general rule where justified by the circumstances of the case, such as where a party does anything or omits to do something which causes unnecessary costs or delay in the proceedings (RSC Ord. 59, rr. 7(1), (2); *Ritter v. Godfrey* [1919] 2 K.B. 47. This may involve the court making either a percentage reduction reflecting the overall outcome, or making appropriate deductions from the successful party's costs for loss on particular issues, or ordering the successful party to pay the costs of the issue incurred by the unsuccessful party.

[6] I must therefore be satisfied that there are circumstances that would justify my departing from the general rule, and make some other order, such as an order apportioning any part of the costs.

The parties' positions

[7] The applicant's essential argument is that there is no basis for departing from the ordinary rule that costs follow the event. As was indicated at para. 3 of her written submissions:

> "This case was principally about the impugned decision of the respondent and having it set aside, which was achieved, the Court having found that the respondent's conduct and decision demonstrated: "illegality", "procedural impropriety and ultra-vires", a "lack of due process", a "lack of reasons" and "irrationality". The applicant was overwhelmingly successful and ought to receive her costs without deduction, which costs are to be taxed if not agreed."

[8] For the respondent, it was argued that because the applicant did not prevail on all of the reliefs set out in the claim, the court should either make no order as to costs or alternatively the respondent should only be made to pay 25% of the applicant's costs.

[9] In support of its arguments, the defendant commended to the court the observations of Nourse LJ, in the UK Court of Appeal case of *In re Elgindata* (No. 2) [1993] 1 WLR 1207. This was an appeal against a costs order requiring the petitioner, who was overall successful in a company petition alleging unfair prejudice and seeking the buy-out of their shares to, pay three-quarters of the costs of the second respondent. The basis for this was that the petitioner failed to make good many of the allegations made in the application.

[10] The Court of Appeal allowed the appeal on the grounds that the judge had erred in ordering the petitioner to pay an apportioned part of the respondent's costs based on the degree of the petitioner's success in establishing the various categories of their complaints, and ordered that one-half of the petitioner's costs be paid second respondent. In delivering the leading judgment, Nourse LJ said [pg. 1214, 1215]:

> "…The principles are these. (i) Costs are in the discretion of the court. (ii) They should follow the event, except where it appears to the court that in the circumstances of the case some other order should be made. (iii) The general rules does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs.

> […]
>
> For a long time I was of the view that we could not properly award the petitioners more than one-quarter of their costs. That, it would seem, is the fraction that would have been adopted by the judge if he had applied the correct principles. It seemed to me that we could not properly go behind his assessment of the effect of the petitioners making allegations which have failed. However, on reflection I have come a clear view that we should award the petitioner's a half of their costs. I will explain my reasons as briefly as I can. It is to be noted that in making his rough and ready apportionment on the basis of the parties' respective degrees of success in regard to the four categories of complains, the judge did not express any estimate of the time and costs of which they had respectively been the cause. Moreover, he did not say that that was the only fair basis for an apportionment. He said that it was as fair a basis as any other. In my judgment the only fair basis for deciding the part of their costs of which the petitioners should be deprived is to ask how much time and expense was taken up in dealing only with the allegations on which they failed."

DISCUSSION AND ANALYSIS

[11] As set out above, the applicant was the successful party in the proceedings and the challenged decision was quashed. However, as correctly observed by the defendant, the court refused the declarations and orders sought at "iii" to "vi" (para. 3 above), and it was therefore submitted that the court should award costs on an issue-based approach.

[12] No authority other than *In re Elginata* was cited to me in support of the issue-based approach, but I have found quite instructive the summary of principles by Stephen Jourdan QC, sitting as a deputy High Court Judge, in *Pigot v The Environment Agency* [2020] EWCH 1444 [at 6], where he said:

> "(1) The mere fact that the successful party was not successful on every issue does not, of itself, justify an issue-based cost order…
>
> (2) Such an order may be appropriate if there is a discrete or distinct issue, the raising of which caused additional costs to be incurred. Such an order may also be appropriate if the overall costs were materially increased by the unreasonable raising of one or more issues on which the successful party failed.
>
> (3) Where there is a discrete issue which caused additional costs to be incurred, if the issue was raised reasonably, the successful party is likely to be deprived of its costs of the issue. If the issue was raised unreasonably, the successful party is likely also to be ordered to pay the costs of the issue incurred by the unsuccessful party…
>
> (4) Where an issue-based costs order is appropriate, the court should attempt to reflect it by ordering payment of a proportion of the receiving party's costs if that is practicable.
>
> (5) An issue-based costs order should reflect the extent to which the costs were increased by the raising of the issue; costs which would have been incurred even if the issue had not been raised should be paid by the unsuccessful party.
>
> (6) Before making an issue-based costs order, it is important to stand back and ask whether, applying the principles set out in CRP44.2, it is in all the circumstances of the case the right result. The aim must always be make an order that reflects the overall justice of the case".

[13] Applying these principles, I am of the view that a modest deduction to the applicant's costs entitlement would be fair in all the circumstances and reflect the overall justice of the case. I have come to this conclusion for the following reasons. I accept that the mere fact that the applicant did not succeed on all of her allegations does not justify an issue-based cost order. And there is certainly nothing to suggest that any of the issues raised by the applicant were unreasonable.

[14] However, as I note in the ruling, the parties expended a considerable amount of time addressing the issue of damages and both filed supplemental submissions in this regard. Although it is permissible to claim damages in a judicial review action, it is still not the norm. The objective of judicial review is not to punish maladministration but to encourage good decision making. Consequently, a claim for damages may be considered a discrete or distinct issue. I accept further that additional time and costs would have been expended by the defendant in responding to the damages claim, as is evident in the filing of supplemental submissions.

CONCLUSION

[15] In my judgment, a fair deduction would be in the region of 15 percent, and I therefore would award the applicant 85 percent of the costs of the application, to be taxed if not agreed.

23 April 2023

Klein J.