

THE HIGH COURT

[2021] IEHC 365

[Record No. 2020/154 JR]

BETWEEN

RAY O'SULLIVAN

APPLICANT

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

RULING ON COSTS of Mr. Justice Barr delivered electronically on the 20th day of May, 2021

1. In a written judgment delivered on 27th of April, 2021, the court refused all of the reliefs sought by the applicant against the respondent. That judgment is reported at [2021] IEHC 282. This ruling deals with the terms of the final order; the issue of costs and the question of a stay on both the continuation of the investigation into the applicant's conduct on 4th and 5th September, 2018 and whether there should be a stay on the judgment of the court in the event of an appeal.
2. The respondent has submitted that as it was entirely successful on all grounds put forward by the applicant, it is entitled to an order that its costs should be paid by the applicant.
3. The respondent accepts that even where a party has been entirely successful in an action, there can be circumstances where a court in its discretion can decline to award the successful party some or all of its costs: see s. 169 of the Legal Services Regulation Act, 2015; *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183 and *Higgins v. Irish Aviation Authority* [2020] IECA 277. The respondent submits that none of these countervailing circumstances apply in this case so as to deprive it of some or all of its costs.
4. The applicant submitted that the court should make no order as to costs. That submission was put forward on two grounds: (i) because the court left open the possibility of the applicant making a further stand-alone application to the HSE to reconsider the decision to place him on administrative leave in light of further information that had come to hand; to wit the report furnished by Dr. O'Hare in December 2019; it could not be said that the respondent had been entirely successful on the administrative leave issue; (ii) the case involved the resolution of an issue of considerable importance being the issue on prematurity, where the court resolved the conflict between the decisions in *Rajpal v. Robinson* [2004] IEHC 149, [2005] IESC 39, and the decision of the Supreme Court in *Rowland v. An Post* [2017] 1 I.R. 355.
5. The applicant stated that having regard to both these submissions and in addition having regard to the fact that the applicant had suffered substantial loss of earnings since being put on administrative leave and due to his not working, and he faced the possibility of becoming de-skilled as a result; it was an appropriate case in which the court should make no order as to costs.

6. The applicant also made submissions in relation to the imposition of a stay. Firstly, the applicant sought the continuance of the stay on the further progression of the investigation, which had been put in place by Meenan J. when granting the applicant leave to proceed by way of judicial review in February 2020. The applicant submitted that that stay should continue in the event that a notice of appeal was lodged, and if lodged, should then continue until the final determination of the matter by the Court of Appeal.
7. The applicant also sought a stay on any order for costs that may be made against him, in the event that an appeal was lodged by the applicant against the judgment and the costs order.
8. In response, the respondent submitted that the case did not raise any questions of general public importance, nor any question of constitutional importance, nor was there any novel point in the case. It was submitted that there was no basis for the court to depart from the usual rule that costs follow the event.
9. The respondent objected to both of the stays sought by the applicant. The respondent pointed out that no grounds have been put forward by the applicant as to why the court should impose either of the stays sought by him. It was submitted that there was no legal or rational basis for either of the stays sought by the applicant.

Conclusions

10. The principles governing the award of costs generally, are set out in O.99 RSC and in ss. 168 and 169 of the 2015 Act, as explained in the *Chubb Europe Group and Higgins* cases. These principles are well known, so it is not necessary to set them out here. The court has had regard to these principles in reaching its conclusions herein.
11. In the present case, the respondent was entirely successful in resisting the application for reliefs brought against it by the applicant. In these circumstances, the respondent is prima facie entitled to an order for its costs, unless there are circumstances which would justify the court departing from the general rule that costs follow the event.
12. The applicant has submitted that there should be no order as to costs. The applicant states that there are two circumstances in the case which should persuade the court not to award costs to the party who was entirely successful in the substantive proceedings.
13. Firstly, the applicant has submitted that on the administrative leave issue, as the door was left open for him to make a further application to have that decision reviewed, this would justify the court making no order as to costs. The court does not agree with that submission. The only administrative leave issue before the court was the lawfulness of the decision made by the CEO of the respondent to place the applicant on administrative leave as and from 6th August, 2019. The court resolved that issue in favour of the respondent.
14. The fact that the court made certain obiter dicta statements in relation to the possibility of the applicant making a further request to the CEO to review that decision, in light of certain further opinion evidence that had come to hand since the original decision was

made, did not affect the decision that had been made by the court on the core issue concerning the placing of the applicant on administrative leave in August 2019. This does not constitute a valid reason to depart from the general rule that the party who was entirely successful is entitled to its costs.

15. The second submission made by the applicant in support of his contention that there should be no order as to costs, was to the effect that this action involved the resolution of important issues and therefore came within the realm of what is known as public interest litigation. This submission was based on the fact that the court ruled on a legal submission in relation to the prematurity issue, which ruling was in favour of the respondent. In so doing, the court adopted the ruling of the Supreme Court in the *Rowland* case, rather than the authority cited on behalf of the applicant. That the court had to resolve an argument based on differing legal authorities, does not convert the action into public interest litigation; courts resolve such disputes in their judgments all of the time.
16. In *McEvoy v. Meath County Council* [2003] IEHC 31, Quirke J. referred to the decision of Dyson J. in *R. v. Lord Chancellor, ex-parte Child Poverty Action Group* [1998] 2 All ER 755, where the essential characteristics of a public law challenge were described in the following way:-

"The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, these are cases in which the applicant is seeking to protect some private interest of his or her own."
17. The court has also had regard to the principles set out by the Divisional Court of the High Court in *Collins v. Minister for Finance* [2014] IEHC 79. However, the examples given therein relate primarily to issues of statutory or constitutional interpretation that were novel and were of exceptional public importance. The issues that were raised in the present application, cannot be seen as being in the same category.
18. Accordingly, the court holds that the present appeal cannot be seen as coming within the general exception known as public interest litigation, wherein an unsuccessful party might be awarded his or her costs against the successful party. A further difficulty with that proposition is that in the examples given in the *Collins* case, the order for costs was generally against the State. It is difficult to see how the same principle could be applied where the paying party would be a private entity, or a statutory body which has its own limited budget. However it is not necessary to decide that issue on this application.
19. There were no points of law of exceptional public importance, or of exceptional constitutional importance involved in this case. Nor was there any novel issue in the case. The applicant's argument on this ground does not succeed. Accordingly, the court rules that the costs of the proceedings are awarded to the respondent against the applicant.

20. In relation to the application for a stay on the investigation, the court is acutely aware that the investigation herein stalled as of February 2020, due to a stay being placed on it by order of Meenan J. on the application of the applicant. The hearing of the substantive proceedings was delayed until March 2021 due to the onset of the Covid-19 pandemic. This has had two undesirable consequences: (i) the applicant has been unable to work as a gynaecologist in the public hospital system and as a result has incurred a substantial loss of earnings and has possibly become de-skilled; (ii) the hospital where he works has been short of one consultant gynaecologist in its public wards for a prolonged period of time.
21. In considering this aspect, the court is of the view that it is better for all concerned that the stay on the investigation should be lifted. This will enable the matter to be brought to a conclusion, which is in the best interests of the applicant, the respondent and the general public.
22. The court will accede to the applicant's application for a stay on the order for costs for a period of 28 days and if a notice of appeal is lodged within that time, the stay will continue until the final determination of the matter before the Court of Appeal.
23. The final order of the court shall be in the following terms:-
 - a) The court refuses all the reliefs sought by the applicant in his notice of motion.
 - b) The court awards the costs of the proceedings to the respondent, to include all reserved costs; such costs to be adjudicated upon by the legal costs adjudicator in default of agreement.
 - c) The court lifts the stay imposed by Meenan J. on the further investigation of the applicant's conduct on 4th and 5th September, 2018.
 - d) There shall be a stay on the order for costs for a period of 28 days, and if a notice of appeal is lodged within that period, the stay is to continue until the final determination of the matter before the Court of Appeal.
 - e) Each of the parties is to lodge a copy of their written legal submissions in the proceedings to date, with the Central Office of the High Court within four weeks, pursuant to Practice Direction HC 101.