APPROVED **[2021] IEHC 454**

THE HIGH COURT

2020 No. 195 MCA

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 46 OF THE WORKPLACE RELATIONS ACT 2015

AND IN THE MATTER OF THE PROTECTION OF EMPLOYEES (FIXED-TERM WORK) ACT 2003

BETWEEN

MAURICE POWER

APPELLANT

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 23 July 2021

INTRODUCTION

1. The principal judgment in these proceedings was delivered on 15 June 2021 and bears the neutral citation [2021] IEHC 346. This supplementary judgment addresses the appropriate costs order to be made.

2. As appears from the principal judgment, the appellant, Mr. Power, has been entirely successful in his appeal against the determination of the Labour Court. Were the general

rule in relation to costs to apply, namely that costs follow the event, then the appellant would be entitled to an order for costs as against the respondent to the appeal, the Health Service Executive.

3. Matters are complicated by the fact that the costs of these proceedings are governed by Order 105, rule 7 of the Rules of the Superior Courts. This rule provides, in effect, that no costs shall be allowed in respect of a statutory appeal from a determination of the Labour Court, save by special order of the High Court.

4. The parties filed very helpful written submissions on the question of costs. These were elaborated upon at a short hearing on 2 July 2021. Thereafter, the parties were each directed, pursuant to Order 99, rule 7(3), to provide an estimate of the costs incurred in respect of the statutory appeal to the High Court, to include, in approximate terms, the costs likely incurred by that party in respect of the following items: (i) solicitors general instructions fee; (ii) brief fee for counsel; (iii) written legal submissions; and (iv) all other drafting, e.g. affidavits, pleadings etc. This exercise has allowed the court to gauge the scale of costs associated with the appeal.

LEGISLATIVE REGIME

5. The jurisdiction to award costs in civil proceedings is now regulated, principally, by the Legal Services Regulation Act 2015 ("***LSRA 2015***"). Part 11 of the LSRA 2015 draws a distinction between a party who is "entirely successful" in proceedings, and a party who has only been "partially successful". The default position is that a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings unless the court, in the exercise of its discretion, orders otherwise. The reasons for such an order must be stated. A non-

exhaustive list of the factors to be taken into account by a court in exercising its discretion are enumerated under section 169(1).

6. No such default position applies in respect of a party who has only been "partially successful". However, as explained by Murray J. in *Higgins v. Irish Aviation Authority* [2020] IECA 277 (at paragraph 10), such a party may nevertheless be entitled to recover all of their costs in an appropriate case.

7. The Court of Appeal has confirmed in *Lee v. Revenue Commissioners* [2021] IECA 114 that the courts retain an exceptional jurisdiction to depart from the general rule that costs follow the event where the proceedings raise issues of general public importance. See paragraphs 6 and 7 of the judgment as follows.

> "Fourth it is clear that the Court retains an exceptional jurisdiction to exempt a litigant from the consequence of this principle where proceedings were of general public importance. That jurisdiction continues following the enactment of the Legal Services Regulation Act 2015. The essential factors guiding it were, I think, well summarised recently by Simons J. in *Corcoran and anor. v. Commissioner of An Garda Siochana and anor*. [2021] IEHC 11 at para. 20. Having referred to the balancing exercise involved in reconciling the objective of ensuring that litigants are not deterred from pursuing litigation which serves a public interest with the aim of not encouraging unmeritorious litigation, Simons J. continued:
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> > '*In carrying out this balancing exercise, it will be necessary for the court to consider factors such as (i) the general importance of the legal issues raised in the proceedings; (ii) whether the legal principles are novel, or, alternatively, are well established; (iii) the strength of the applicant's case: proceedings might touch upon issues of general importance but the grounds of challenge pursued might be weak; (iv) whether the subject-matter of the litigation is such that costs are likely to have a significant deterrent effect on the category of persons affected by the legal issues; and (v) whether the issues touch on sensitive personal rights.*'
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> As this description suggests, the 'public interest' cases in which the court absolves the losing party from the cost consequences that usually follow the failure of their litigation may cover a wide terrain. In their purest form, they will involve significant issues of Constitutional or European law of general importance that have been

> pursued by the claimant to advance a public concern rather than to obtain a private and personal advantage. In some such cases the public interest in the underlying issue has been such as to justify the grant to the unsuccessful claimant of orders for the payment by the successful respondent of a proportion, or all, of their costs. The circumstances in which orders of this kind have been made are comprehensively examined in the decision of the Divisional Court in *Collins v. Minister for Finance* [2014] IEHC 79."

8. The provisions of the LSRA 2015 are complemented by a revised version of Order 99 of the Rules of the Superior Courts. Order 99 does not modify the underlying principle that the successful party is normally entitled to their costs. Rather, it fleshes out matters of detail, and addresses, for example, the costs of interlocutory applications.

9. The within proceedings take the form of a statutory appeal to the High Court against a decision of the Labour Court pursuant to section 46 of the Workplace Relations Act 2015. As such, the proceedings are regulated by Order 105 (as amended on 7 August 2020). The parties are both agreed that the amended version applies because the appeal to the High Court had been instituted subsequent to that version coming into effect on 7 August 2020. This is so notwithstanding that the appeal to the Labour Court predated the revised rule.

10. Order 105, rule 7 reads as follows.

> "No costs shall be allowed of any proceedings under this Order unless the Court shall by special order allow such costs."

11. There was some discussion at the hearing before me as to the interrelationship between Part 11 of the LSRA 2015 and Order 105, rule 7. The innovative feature of the LSRA 2015 is that it provides a statutory underpinning to the costs jurisdiction of civil proceedings in general. Prior to its enactment, the courts' jurisdiction to award costs had been regulated, for the most part, under the Rules of the Superior Courts. The Rules Committee has power to make rules to provide for pleading, practice and procedure

generally, including liability to costs. (As to the inherent jurisdiction of the court, see *People (Attorney General) v. Bell* [1969] I.R. 24).

12. There were a small number of legislative interventions which introduced particular provisions in respect of certain types of proceedings. The most notable example is, perhaps, that of the special rules governing costs in certain types of environmental litigation. These are embodied in primary legislation under section 50B of the Planning and Development Act 2000 ("***PDA 2000***").

13. It is only with the enactment of the LSRA 2015 that a detailed set of criteria governing the costs of civil proceedings has been prescribed under *primary legislation* for the first time. Whereas the LSRA 2015 refers to the making of rules of court in respect of other aspects of costs, there is no express provision to the effect that the criteria under Part 11 of the Act can be amplified or modified by rules of court.

14. On one view, there is a potential conflict between the LSRA 2015 and Order 105. This is because the starting position of each is different. Under the LSRA 2015, the successful party is normally entitled to costs; whereas under Order 105, the default position is that each side should bear its own costs. Of course, the court has discretion to depart from the starting position in each instance.

15. In circumstances where the primary legislation appears to prescribe an exhaustive set of criteria governing the costs of civil proceedings, it is at least arguable that those criteria prevail in the event of a conflict between the LSRA 2015 and the Rules of the Superior Courts. As against this, section 169(1) of the LSRA 2015 expressly envisages that a departure from the default position may be justified having regard to the "particular nature and circumstances of" the case. The introduction of a specific rule for appeals in employment law disputes might be considered as complementing, rather than cutting against, the statutory criteria.

16. Happily, it is unnecessary to address this potential conflict any further for the purpose of resolving the within proceedings. This is because I am satisfied that the appropriate costs order to be made in the within proceedings is the same irrespective of which costs regime applies. The appellant is entitled to recover his costs either on the basis that he has been entirely successful in his appeal, or on the basis that the exigencies of the case are such that a "special order" is justified. I propose, therefore, to work on the assumption that the proceedings are subject to Order 105, rule 7, and to address the requirements of that rule. Both parties were agreed that the court should take such a pragmatic approach.

ORDER 105, RULE 7

17. The rationale underlying Order 105, rule 7 is that parties to an employment law dispute should not normally be on hazard of having to pay the costs of the other side in the event of a statutory appeal to the High Court. The decision-maker at first instance, i.e. the Labour Court, does not have jurisdiction to award costs against a party under the Workplace Relations Act 2015. It would be anomalous were the costs position to change dramatically in the event that either side invoked its statutory right of appeal to the High Court under section 46 of the Act.

18. The legal costs of an appeal to the High Court could run to tens of thousands of euro. The parties to the within proceedings have each provided the court with an estimate of their legal costs pursuant to Order 99, rule 7(3). The appellant's costs are estimated at approximately €80,000; the respondent's at approximately €45,000. Even allowing that the full amount would not be recoverable on an adjudication under Part 10 of the LSRA 2015, it is readily apparent that the risk of having to pay the other side's costs of even a one-day appeal before the High Court would be prohibitive for most employees. An employee (and indeed many small employers) might well be deterred from either

pursuing or defending a statutory appeal were the normal rule on costs to apply. The legal costs would be equivalent to the annual salary of many employees appearing before the Labour Court. Even in the present case, where the appellant continues to occupy a very senior position within the Health Service Executive, the liability to pay his own costs and those of the other side would represent a significant financial burden.

19. Order 105, rule 7 introduces a form of costs protection. The general position is that no costs order will be made. Each side will, instead, bear its own costs of the appeal. This is subject to the court's discretion to make a "special order".

20. The form of costs protection afforded under Order 105 operates differently from that provided, for example, under the planning legislation. There, the weaker party is afforded costs protection against an adverse costs order, but is generally entitled to recover their own costs if they succeed in the proceedings. (See section 50B of the PDA 2000).

21. There does not appear to be much case law on the meaning and effect of Order 105, rule 7. The judgment closest in point appears to be that of the High Court (Hyland J.) in *Conway v. Department of Agriculture and Food* [2021] IEHC 503. Hyland J. identified the rationale underlying the rule as being to ensure that a similar approach to costs as applies before the Labour Court will apply in the event of an appeal (subject to the court's discretion to make a special order).

22. *Conway* did not directly involve Order 105. This is because the court held that the revised version of Order 105 did not apply to the proceedings as the appeal had been initiated *prior to* the amendment of the Order on 7 August 2020. Nevertheless, the court, in the exercise of its discretion under Part 11 of the LSRA 2015, had some regard to the rationale underlying the revised rule. Having regard to the special nature of an appeal from the Labour Court and the approach that now prevails in that respect, the court

decided to make no order as to costs. In so doing, the court rejected an argument on behalf of the unsuccessful party to the effect that he should be awarded his costs, saying that the appeal did not involve a public interest challenge or a test case.

23. As explained presently, the within proceedings are distinguishable from the facts of *Conway* in that the principal judgment in this case does entail a point of law of general public importance.

DECISION

24. For the reasons which follow, I have concluded that, in the very particular circumstances of the present case, the appropriate order is to allow the appellant to recover his reasonable legal costs as against the Health Service Executive. The quantum of costs is to be adjudicated, i.e. measured, under Part 10 of the Legal Services Regulation Act 2015 in default of agreement between the parties.

25. First and foremost, the appeal raised a point of law of general public importance in respect of the scope of the Protection of Employees (Fixed-Term Work) Act 2003. The specific issue for determination had been whether an *existing* employee of an organisation, who fulfils a more senior role within the organisation on a temporary basis, is excluded from the benefit of the legislation.

26. The Labour Court, relying on a number of its earlier determinations, had decided this point of law against the appellant. The Labour Court held that the scope of the Protection of Employees (Fixed-Term Work) Act 2003 is confined to those employees whose relationship with their employer is coterminous with the fixed-term contract under which they are employed. An existing employee, who reverts to their substantive grade and whose employment continues at the end of a fixed-term assignment, was held not to enjoy the protection of the Act.

27. This court, in the principal judgment, held that the Labour Court had erred in law in its interpretation of the Protection of Employees (Fixed-Term Work) Act 2003. Subject only to an appeal to the Supreme Court, the effect of the principal judgment is that the longstanding approach taken by the Labour Court to the legislation has been found to have been incorrect. This finding transcends the specific facts of the present case, and has implications for other employment disputes.

28. It is in the public interest that, where required, a definitive ruling may be obtained from the High Court in respect of the correct interpretation of legislation which seeks to protect employment rights. This is especially so where, as in the present case, the questions of statutory interpretation are complex and require careful consideration of the underlying EU legislation and case law.

29. An overly rigid application of the principle that no costs order should be made might well deter parties, especially employees, from pursuing a statutory appeal. Whereas the default position under Order 105 has the practical benefit of shielding an employee from an adverse costs order in the event that an appeal is decided against them, it does not address the separate issue of the employee's liability to pay their own legal team. As illustrated by the costs estimates provided by the parties in the within proceedings, the costs of an appeal are of such a scale that, even with the limited costs protection provided, the pursuit of a statutory appeal will be out of the reach of many employees. Even if successful in the appeal, the employee would remain liable to pay their own legal team. The legal fees might exceed any compensation awarded.

30. Such a deterrent effect would be unfortunate, not only for the parties immediately involved, but also in terms of the public interest in ensuring that employment protection legislation is properly interpreted.

31. In this regard, an analogy might be drawn with the approach taken under Part 11 of the LSRA 2015. As appears from the judgment of the Court of Appeal in *Lee v. Revenue Commissioners* (cited at paragraph 7 above), the courts retain an exceptional jurisdiction to depart from the general rule that costs follow the event where proceedings raise an issue of general public importance.

32. Not all of the criteria identified by the Court of Appeal in *Lee* can be "read across" to the present case, in that those criteria are directed to a scenario whereby costs are to be awarded to a party who has been *unsuccessful* in proceedings. Here, of course, the appellant has been successful. Nevertheless, two of the remaining criteria in *Lee* are fulfilled in the present case as follows. The legal issues raised in these proceedings are of general importance; and the subject-matter of the litigation, i.e. an employment dispute, is such that costs are likely to have a significant deterrent effect on the category of persons affected by the legal issues.

33. The Health Service Executive itself recognises that the principal judgment involves a matter of general public importance. Indeed, it is their intention to apply to the Supreme Court for leave to appeal on precisely this basis. Counsel on behalf of the HSE submits, however, that Mr. Power's interest is entirely personal, based on his own employment relationship. It is said that the public interest only arises on the part of the Health Service Executive and other large public service employers who are going to be affected in how they conduct their employment affairs.

34. With respect, this submission tends to confuse the private interests of the parties in the statutory appeal, with the public interest in ensuring that the underlying legislation is properly interpreted. There is no doubt that Mr. Power pursued the appeal in an attempt to advance his own private interest. Mr. Power sought redress for what he alleges is a breach of the Protection of Employees (Fixed-Term Work) Act 2003. The question of

the public interest arises because, in order to resolve the specific dispute between the parties, it had been necessary for this court to rule upon the interpretation of the legislation.

35. It is precisely because the correct interpretation of the legislation has implications for *other* employment relationships that the public interest is engaged. The fact that the Health Service Executive, as a large public service employer, is more likely to be affected by the ruling than Mr. Power does not give the HSE a monopoly in asserting the public interest in the proceedings. Just as the HSE is entitled to rely on the public interest for the purpose of its application for leave to appeal to the Supreme Court, so too is Mr. Power entitled to rely on the public interest for the purpose of his costs application. It is sufficient to attract a modified approach to costs that the significance of the ruling transcends the facts of the case and that the clarification of the law is in the public interest. That Mr. Power personally may have no greater interest in the ruling, other than insofar as it advances his own employment claim, is irrelevant.

36. Crucially, the effect of the principal judgment is to correct a longstanding error on the part of the Labour Court in its interpretation of the legislation. Were the presumptive position under Order 105, rule 7, i.e. that the parties to appeals from the Labour Court should bear their own costs, to apply in cases which raise points of law of general public importance, this might have the unintended consequence that appeals raising such points might not be brought before the High Court.

37. The second reason for making a costs order relates to the litigation history between these two parties. There is ongoing litigation, separate from this statutory appeal, between the parties arising out of the employment relationship (*Power v. Health Service Executive* High Court 2019 No. 1637 P). Those proceedings take the form of a plenary action, and, accordingly, do not attract the costs rule under Order 105.

38. Mr. Power had brought an unsuccessful application for an interlocutory injunction in the plenary proceedings, and the costs of that application were awarded against him by the High Court. That order was subsequently modified by the Court of Appeal, and the Health Service Executive's costs are now "costs in the cause". It would be anomalous were the parties to be entitled to recover costs in one context, but not the other, arising out of precisely the same employment relationship. It is in the interests of justice, therefore, that the appellant is entitled to recover the costs of this leg of the overall litigation. The various costs orders can then be netted off against each other.

CONCLUSION AND FORM OF ORDER

39. I have concluded that, in the very particular circumstances of the present case, it is appropriate to make a "special order" as to costs for the purpose of Order 105, rule 7. The successful appellant, Mr. Power, is to recover his reasonable legal costs as against the Health Service Executive.

40. The rationale for making this "special order" is set out in detail at paragraphs 24 to 38 above. The reasons might be summarised as follows. First and foremost, the appeal raised a point of law of general public importance in respect of the scope of the Protection of Employees (Fixed-Term Work) Act 2003. The appellant was entirely successful in his appeal. Crucially, the effect of the principal judgment is to correct a longstanding error on the part of the Labour Court in its interpretation of the legislation. Were the presumptive position under Order 105, rule 7, i.e. that the parties to appeals from the Labour Court should bear their own costs, to apply in cases which raise points of law of general public importance, this might have the unintended consequence that appeals raising such points might not be brought before the High Court. The second reason for making a costs order relates to the litigation history between these two parties.

41. The quantum of costs is to be adjudicated, i.e. measured, under Part 10 of the Legal Services Regulation Act 2015 in default of agreement between the parties. The costs are to include the costs of senior and junior counsel; two sets of written legal submissions; the costs of the "costs" application; and all reserved costs. There will be a stay on the execution of the costs order pending the determination of the intended application for leave to appeal to the Supreme Court. In the event that leave to appeal is granted to the Health Service Executive, then the stay will continue until the appeal is heard and determined.

42. The formal order in these proceedings can now be drawn up. This will include an order, pursuant to section 46 of the Workplace Relations Act 2015, setting aside the Labour Court's determination of 5 August 2020. A consequential order will be made remitting the matter to the Labour Court for reconsideration having regard to the findings in the principal judgment. A similar stay applies.

Appearances

Oisín Quinn, SC and Ray Ryan for the appellant/employee instructed by MacSweeney & Company

Marguerite Bolger, SC and Padraic Lyons for the respondent/employer instructed by Byrne Wallace LLP

Approved Gerrett Simons