

APPROVED

[2021] IEHC 753



THE HIGH COURT
JUDICIAL REVIEW

2020 No. 521 J.R.

BETWEEN

FIONA ROCHE

APPLICANT

AND

TEACHING COUNCIL OF IRELAND

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 10 December 2021

INTRODUCTION

1. This judgment addresses the appropriate costs order to be made in respect of these judicial review proceedings. The application for leave to apply for judicial review was refused for the reasons set out in a written judgment delivered on 25 November 2021 (“*the principal judgment*”). The principal judgment bears the neutral citation [2021] IEHC 712.
2. The parties made submissions on costs at a short hearing on 2 December 2021. Counsel on behalf of the Teaching Council applied for costs on the basis that his side had been “*entirely successful*” in the proceedings, within the meaning of section 169 of the Legal Services Regulation Act 2015.

3. In response, counsel on behalf of the Applicant submitted that the court should make no order, and that the parties should, instead, bear their own costs. This submission was advanced under three broad headings as follows. First, it was submitted that the Applicant had been partially successful in the proceedings. The Applicant had secured a stay on the implementation of the impugned decision on an *ex parte* basis on 27 July 2020. It was suggested that this represented an “*event*” in respect of which the Applicant had been successful.
4. Secondly, it was submitted that there is a significant public interest in how the teaching profession is regulated, and that the proceedings raised important legal issues in this regard. Reference was also made to the fact that there had been media coverage of the various court applications.
5. Finally, it was submitted that the nature of the legal issues raised in the proceedings is such that the operation of the general rule on costs would have a deterrent effect on other similarly situated teachers.

DISCUSSION AND DECISION

6. The default position under section 169 of the Legal Services Regulation Act 2015 is that a party who has been “*entirely successful*” in proceedings will ordinarily be entitled to recover their costs against the unsuccessful party. Importantly, however, the court retains a discretion to make a different form of costs order.
7. There is no doubt in the present case as to which side won the “*event*”. The Teaching Council has been entirely successful in resisting the application for leave to apply for judicial review, and the proceedings stand dismissed.

8. This analysis is not affected at all by the fact that the Applicant had managed to secure a temporary stay on the implementation of the impugned decision. This interim order was obtained at a time prior to the Teaching Council's participation in the proceedings. As explained in the principal judgment, the application for leave to apply had, initially, been made on an *ex parte* basis on 27 July 2020. On that date, a stay was imposed upon the Teaching Council's decision. The High Court then directed that the application for leave be made on notice to the Teaching Council. It was only from this point forward that significant costs would have been incurred by the Teaching Council. In all the circumstances, the interim order, which had been obtained in the absence of the other side, cannot be characterised as an "*event*" for costs purposes.
9. In determining the allocation of costs, the court is to have regard to the conduct of the parties, both before and during the proceedings (section 169). The striking feature of the present case is that the Teaching Council had raised the delay issue well before the proceedings were ever instituted. The Teaching Council had emphasised throughout the course of the pre-litigation correspondence that any legal challenge should have been brought within three months. Thereafter, the delay issue was raised, full square, in the replying affidavit filed on behalf of the Teaching Council. The Applicant was thus on notice that the time-limit objection would be taken against her. Had the Applicant withdrawn her proceedings at that point, prior to the costs of a hearing having been incurred, there would have been strong grounds for saying that each side should bear its own costs. Instead, the Applicant, as she was fully entitled to do, chose to pursue the leave application to hearing. The delay issue was ultimately adjudicated upon by this court, and, for the reasons set out in detail in the principal judgment,

leave to apply for judicial review was refused. Having fought and lost, the Applicant is *prima facie* liable for the costs incurred.

10. 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 Síochána 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:

‘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.’

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.”

11. No such considerations apply to the present proceedings. First, the proceedings have not resulted in the clarification of any legal issue of general importance. Rather, the proceedings were determined on the narrow ground of delay. The case was disposed of on a standard application of the well-established principles governing time-limits in judicial review. The principal judgment delivered in these proceedings has no wider significance.
12. Secondly, the public interest is not served by condoning the pursuit of stale claims. The three month time-limit prescribed for judicial review proceedings is intended to facilitate good administration by ensuring that any challenges to decisions made by regulatory authorities are brought promptly. This is tempered by the existence of a discretion to extend time for good and sufficient reason. To relieve a party, who has brought a claim out of time, of any liability for costs would have the consequence that the regulatory authority responding to the proceedings would be out of pocket.
13. Thirdly, even if the proceedings had not been dismissed on grounds of delay, no point of law of general importance would have arisen for consideration in any event. This is because the grounds of judicial review were so fact-specific. As appears from the comprehensive statement of grounds, the legal challenge is almost entirely predicated on the Applicant’s own particular employment history and educational experience. There is also an alleged breach of legitimate expectation, and this too is founded on the Applicant’s own circumstances, and the course of dealing between the Applicant and the Teaching Council. There

was a point raised in relation to the alleged retrospective effect of the Teaching Council (Registration) Regulations 2016. This point is misconceived, however, in that the impugned decision had been made in respect of a request for a new route of registration, i.e. as a post-primary teacher rather than a teacher in further education. Put shortly, an adjudication on none of these various grounds would have transcended the facts of the case.

14. Finally, I turn to consider the submission that the subject-matter of the proceedings is such that the costs will have a deterrent effect on other similarly situated teachers. To elaborate: one of the considerations to be taken into account in allocating costs is whether the risk of exposure to the other side's costs may have a deterrent effect upon the category of person likely to be affected by the legal issues arising. This might occur, for example, where the legislation at issue is intended to benefit a category of persons of limited financial means, such as, for example, the social welfare legislation. A costs order might be financially ruinous for such a person.
15. Relevantly, this principle can also arise in an employment law context. This point is illustrated by *Zalewski v. Workplace Relations Commission* [2020] IEHC 226. That case concerned a constitutional challenge to the legislation underpinning claims for unfair dismissal. Having observed that the legal costs incurred would be a multiple of the maximum amount of damages recoverable by the applicant under his claim for unfair dismissal, I stated as follows (at paragraphs 33 and 34):

“Were the general rule that costs follow the event to be applied in this context, it might have the unintended consequence that proceedings, which raise legitimate questions as to the constitutional validity of the statutory procedures under the Workplace Relations Act 2015, would not be brought for the want of a litigant with a large enough

financial interest in the outcome of the proceedings to justify his or her incurring the risk on costs. This might skew constitutional litigation towards cases the outcome of which have significant financial implications for the litigants, such as, for example, cases asserting property rights in land or in commercial contracts. Those with more modest concerns might not be able to afford to litigate.

This would be unfortunate: the importance of constitutional rights cannot be measured in monetary terms. The issues raised by the Applicant in this case touch upon fundamental questions in respect of the separation of powers, and, in particular, seek to identify the precise contours of the judicial power. These are hugely important issues and it is in the public interest that these issues be clarified.”

16. It should be emphasised, however, that consideration of the financial circumstances of the class of potential litigants will merely be one aspect of the overall assessment of the “*particular nature and circumstances of the case*” for the purposes of section 169 of the Legal Services Regulation Act 2015. There is no question of there being a blanket exemption from the default costs rule in favour of litigants of limited means. Rather, the fact that proceedings have raised a point of law of general public importance, when coupled with financial considerations, may justify a modified costs order in a particular case.
17. No such considerations arise in the present proceedings. The proceedings do not involve any point of law of general public importance, and a person, such as the Applicant, who has been employed as a teacher for many years cannot be said to be a person of limited financial means.

CONCLUSION AND FORM OF ORDER

18. The Applicant chose to pursue these proceedings in the knowledge that the Teaching Council would be objecting, on the grounds of delay, to leave being

granted. The objection was upheld and leave to apply for judicial review was refused.

19. The Teaching Council has been “*entirely successful*” in the proceedings within the meaning of section 169 of the Legal Services Regulation Act 2015. There are no features of the case, such as, for example, public interest, which would justify the court exercising its discretion to make a different form of costs order.
20. The Teaching Council is entitled to recover its costs of the proceedings as against the Applicant. The costs of one counsel only will be allowed: this is to reflect the fact that the application was an application for leave, and that the Applicant had been represented by one counsel. The costs order will include the costs of the written legal submissions and of the costs hearing on 2 December 2021.
21. The costs are to be adjudicated under Part 10 of the Legal Services Regulation Act 2015 in default of agreement between the parties. The costs order will be stayed in the event of an appeal to the Court of Appeal.

Appearances

James Lawless for the applicant instructed by Burns Nowlan
Conor Feeney (with Remy Farrell, SC) for the respondent instructed by Fieldfisher

Approved
Gareth S. Mans