

APPROVED

[2022] IEHC 45



THE HIGH COURT
JUDICIAL REVIEW

2021 No. 671 JR

BETWEEN

AMMI BURKE

APPLICANT

AND

AN ADJUDICATION OFFICER
THE WORKPLACE RELATIONS COMMISSION

RESPONDENTS

ARTHUR COX LLP

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 4 February 2022

INTRODUCTION

1. This judgment addresses the allocation of the costs of the within judicial review proceedings. The principal judgment was delivered on 11 November 2021, and bears the neutral citation [2021] IEHC 667. As appears, the judicial review proceedings were dismissed in their entirety.
2. Following delivery of the principal judgment, the parties exchanged written legal submissions on costs. These were supplemented by oral submissions at three short hearings on 16 December 2021, 19 January 2022 and 26 January 2022. (A second

NO REDACTION REQUIRED

hearing had been necessary in circumstances where the first costs hearing had to be adjourned because of technical difficulties; and a third hearing had been arranged to allow the Applicant time to address a specific issue).

CONDUCT OF THE LITIGATION

3. Section 169 of the Legal Services Regulation Act 2015 indicates that one of the factors to be considered in the exercise of the court's discretion in respect of costs is the manner in which proceedings were conducted. The court is entitled to have regard to conduct both before and after the commencement of proceedings. In many instances, there will be a causal link between the litigation conduct complained of and the incurring of additional unnecessary costs by the other side. In such a scenario, there is a logic to censuring the litigation conduct by way of a costs order against the offending party. Put otherwise, if a party, by its behaviour, has caused the other side to incur additional unnecessary costs, then it may be in the interests of justice to seek to reconcile the balance by requiring the reimbursement of those costs. This is so even where the offending party has been successful in the overall outcome of the proceedings.
4. Both the Workplace Relations Commission and the notice party employer have been critical of the manner in which the Applicant conducted these judicial review proceedings. Specifically, attention is drawn to the fact that the Applicant chose to make serious and unfounded allegations against the adjudication officer assigned to determine the claim for unfair dismissal. These allegations were ultimately withdrawn on the second day of the hearing; the Applicant having been afforded time to consider the transcript of the first day's hearing.
5. The Applicant sought to contend at the costs hearings that she had not, in fact, made any allegations of impropriety. The Applicant stated that she wanted to stress that she did

not formally plead either bias or impropriety in these proceedings, i.e. in her statement of grounds or her legal submissions (Transcript, 26 January 2022, page 4).

6. With respect, the Applicant's attempted characterisation of her case is not accurate. In truth, the Applicant's case was predicated on allegations to the effect that the adjudication officer had made a number of procedural rulings in order to facilitate and favour the other side in the unfair dismissal claim. It had been expressly pleaded in the statement of grounds that the adjudication officer had "*blatantly favoured Arthur Cox*" (ground E. 40); that "*the only possible explanation*" for the adjudication officer's refusal to direct the disclosure of documents had been "*a desire to protect the interests and position of Arthur Cox*" (ground E. 45); and that the respondents "*operated in a manner entirely to the benefit of Arthur Cox by aborting the WRC proceedings and refusing to direct disclosure of the emails*" (ground E. 47).
7. It is contrived for the Applicant to seek to rely on the fact that the word "*bias*" is not used in the statement of grounds to suggest that no impropriety had been alleged against the adjudication officer. It is readily apparent from the foregoing pleas that the adjudication officer was being accused of acting in favour of the Applicant's former employer, in breach of her obligations of independence and impartiality. In short, the adjudication officer was being accused of a particular species of bias.
8. The Applicant doubled-down on these allegations at the hearing of the application for judicial review on 20 October 2021. The following extracts from the transcript of the hearing on that date provide a flavour of her approach.
9. The Applicant, at the outset of her oral submission, had summarised her case as follows:

"And, fundamentally, these judicial review proceedings arose because, during a hearing at the WRC, Mr. Kevin Lynch, an equity partner at Arthur Cox and a chief witness for the employer, gave false testimony. And, by doing so, he put the employer into deep water as regards successfully defending the dismissal. The Adjudication Officer understood this and the difficulties it raised for the Notice

Party, Arthur Cox, and so she refused to direct disclosure of crucial e-mails which would establish the facts regarding the matter that Mr. Lynch had testified about. And unwilling to direct disclosure, the Adjudication Officer wrongly interpreted, [in] my case, a recent Supreme Court judgment to give her the opportunity to recuse herself, thus allowing Arthur Cox an opportunity simply to start again and tell a different story the second time around. And the facts in this judicial review tell the story of an Adjudication Officer at the Workplace Relations Commission acting, I say, in the interests of a major law firm. This is contrary to law and any basic or preliminary understanding of justice and that is why the Court needs to intervene and that is why the Court needs to intervene and that is why these judicial review proceedings are before us today.”

10. This allegation had later been put in even starker terms as follows:

“I am here today solemnly because Mr. Lynch told lies and then an adjudication officer acted in such a way as to facilitate him, to help him get out of a hard spot, and give Arthur Cox an opportunity to start again and tell a different story the second time around.”

11. The Applicant stated that the adjudication officer’s refusal to direct the disclosure of certain documentation “*blatantly favoured Arthur Cox*”, and that the “*only possible explanation*” for the refusal “*would be a desire to protect the interests and position of Arthur Cox*”. The Applicant, at a later point, stated that the adjudication officer was “*unwilling to direct disclosure of e-mails because of the consequences that they would have for Arthur Cox*”.
12. The Applicant further alleged that the adjudication officer’s subsequent decision to recuse herself and to direct that the claim for unfair dismissal be heard by a different adjudication officer “*is proof that she was more concerned about the other party and the interests of the other party*”.
13. The allegation made against the Workplace Relations Commission as an entity had been that the publication of amended guidance on its website was “*an ‘after the fact’ clean-up, a whitewashing of the decisions*” that had been made by the adjudication officer. The Applicant specifically alleged that the Commission “*made decisions, including the*

decision to change their guidance, to frustrate and prevent [her] WRC unfair dismissal proceedings being heard to completion” under the original adjudication officer.

14. As appears from the foregoing extracts from the transcript, the Applicant chose, on the first day of the hearing, to make a number of grave allegations against the adjudication officer personally, and against the Workplace Relations Commission as an entity. It is difficult to think of a more serious allegation which could be laid against an individual, who is charged with performing a judicial function under Article 37 of the Constitution of Ireland, than that they blatantly favoured one party to a dispute and made procedural rulings in order to facilitate that party and to help it out. These allegations were entirely without foundation, and the Applicant, having been given an opportunity to reflect on the matter by the court, withdrew the allegations on the second day of the hearing (26 October 2021).
15. The making of these allegations will have had the consequence of increasing the costs incurred by the other parties. The Workplace Relations Commission and the Applicant’s former employer, Arthur Cox LLP, were entitled to respond to these allegations. A large part of the hearing of the proceedings was taken up with these allegations and the response thereto. The hearing time was thereby prolonged, and instead of finishing within the one day allocated, the case spilt over into a second day. This was so notwithstanding that the court sat late on the first day. The other parties will also have incurred additional costs in having to address the Applicant’s unfounded allegations in their affidavits and written legal submissions.

ASSERTED IMPECUNIOSITY OF THE APPLICANT

16. The Applicant has submitted that she is of very limited financial means and that were an order for costs to be made against her, she would find it very difficult, if not impossible,

to pay. The Applicant has explained that she has been unsuccessful in seeking alternative employment as a solicitor since her dismissal in November 2019, and remains unemployed, save for several hours a week offering private tuition. The Applicant seeks to attribute her inability to find alternative employment as a solicitor to the actions of her former employer, Arthur Cox LLP.

17. The fact, if fact it be, that a litigant is of limited financial means is not a reason for not applying the ordinary rules in relation to costs. The criteria to which the court is to have regard in the exercise of its discretion on costs are prescribed at section 169 of the Legal Services Regulation Act 2015. As explained by the Court of Appeal in *McFadden v. Muckno Hotels Ltd* [2020] IECA 153, impecuniosity is not included as one of the prescribed criteria. See paragraphs 11 and 12 of the judgment as follows:

“Thirdly reliance is placed on the respondent’s financial circumstances, which it is submitted this court can take into account. The proceedings were taken because his employment at the time was threatened, and he has since been dismissed; the WRC has found his dismissal to be unfair, although that decision is currently under appeal. It is said that he is currently unemployed and that a costs order would lead to ‘financial hardship’. It is submitted that this is a factor that can be taken into account even if a litigant has legal representation – it is not reserved to lay litigants.

No binding or persuasive precedent is cited to support the proposition that the court should take into account the possibility that a costs order against the respondent would lead to financial hardship. Section 169 (1) at (a) - (g) sets out a non-exhaustive list of matters that the court can take into account if departing from the normal rule. Impecuniosity is not one of the matters listed. It is something that may engender sympathy for an unsuccessful litigant, and it may be that a costs order against the respondent will affect his ability to continue to engage legal representation, although this is not in fact said and indeed there is no evidence before the court to show financial hardship. I do not consider that it is a good reason for not granting the appellant its costs in the instant case. Were this court to decide to make no order as to costs of the appeal solely on the ground of impecuniosity in my view it would run contrary to the intent of the legislature as expressed in s.169. However I would leave to another occasion the question of whether there may be circumstances in which impecuniosity may be taken into account.”

18. The default position under the Legal Services Regulation Act 2015 is that a party who has been entirely successful in legal proceedings is entitled to recover their costs against the unsuccessful party. This reflects the longstanding principle that the interests of justice will usually require that a party who has successfully pursued, or has successfully defended, a claim should not be out of pocket. The authoritative statement of the rationale for this approach is to be found in *Godsil v. Ireland* [2015] IESC 103; [2015] 4 I.R. 535. McKechnie J., writing for the Supreme Court, stated as follows (at paragraph 20 of the reported judgment):

“A party who institutes proceedings in order to establish rights or assert entitlements, which are neither conceded nor compromised, is entitled to an expectation that he will, if successful, not have to suffer costs in so doing. At first, indeed at every level of principle, it would seem unjust if that were not so but, it is, with the ‘costs follow the event’ rule, designed for this purpose. A defendant’s position is in principle no different: if the advanced claim is one of merit to which he has no answer, then the point should be conceded: thus in that way he has significant control over the legal process, including over court participation or attendance. If, however, he should contest an unmeritorious point, the consequences are his to suffer. On the other hand, if he successfully defeats a claim and thereby has been justified in the stance adopted, it would likewise be unjust for him to have to suffer any financial burden by so doing. So, the rule applies to a defendant as it applies to a plaintiff.”

19. It would be contrary to this rationale to carve out a non-statutory exception in the case of impecunious litigants. The pursuit of unsuccessful litigation puts the other parties to the cost and expense of defending same. It would be unfair to such parties were a person to have a free run at litigation merely on the basis that they were of limited means.
20. This is especially so in the context of a claim for unfair dismissal. The Oireachtas has put in place a dedicated statutory regime whereby such claims can be pursued without the risk of an adverse costs order. The parties to such claims each bear their own costs. It is only because the Applicant chose to break out from the statutory regime, and brought the matter before the High Court by way of an application for judicial review, that she

has incurred an exposure to legal costs. Put otherwise, it had been open to the Applicant to pursue her claim for unfair dismissal to completion in a “no costs” environment. Having chosen instead to pursue judicial review proceedings, and having failed, she cannot now assert her impecuniosity to avoid a costs order.

LITIGATION RAISING POINTS OF GENERAL PUBLIC IMPORTANCE

21. 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:

‘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.”

22. As appears, one of the factors to be considered in the allocation of costs is the subject-matter of the litigation. In particular, it is necessary to consider whether the risk of having to pay the other side’s costs is likely to have a significant deterrent effect on the category of persons affected by the legal issues. Here, the judicial review proceedings have been brought in the context of a statutory claim for unfair dismissal. An overly rigid application of the default costs position, namely, that the unsuccessful party must pay the costs of the other side; in the context of claims for unfair dismissal is likely to deter many claimants from instituting judicial review proceedings before the High Court. The legal costs of High Court proceedings may well be disproportionate to the monetary value of the underlying claim for unfair dismissal. The statutory compensation recoverable under a claim for unfair dismissal is limited: it cannot exceed a figure equivalent to two years’ remuneration in respect of the employment from which the claimant was dismissed.
23. This deterrent effect might have the undesirable consequence that important points of law remain unresolved for the lack of a party with the financial wherewithal to pursue same before the High Court. As against this, the court must be mindful of the fact that the principle underlying the legislation is that claims for unfair dismissal should generally be disposed of under the auspices of the Workplace Relations Commission and the Labour Court, and that each party should bear its own costs.
24. Of course, a party is entitled, in principle, to break out of the statutory framework and to bring the matter before the High Court by way of an application for judicial review. This may, however, result in the decision-maker and the other party to the claim for unfair

dismissal incurring additional costs. If the judicial review proceedings prove to be unfounded, then it is not unreasonable for the successful parties to seek to recover their costs against the unsuccessful applicant. A balance needs to be struck between ensuring that a fear of costs exposure does not deter proceedings which would clarify points of law of general public importance, while at the same time ensuring that the rights of the other parties are not prejudiced by the pursuit of unmeritorious and costly litigation.

DECISION ON COSTS

25. I am satisfied that the within proceedings, in part, presented an issue of general public importance. In particular, the proceedings required consideration of the practical consequences of the landmark decision of the Supreme Court in *Zalewski v. An Adjudication Officer* [2021] IESC 24; [2021] E.L.R. 213. The Supreme Court had held that the statutory procedures prescribed for the determination of claims of unfair dismissal did not comply with constitutional justice. The Oireachtas then introduced amending legislation in an attempt to give effect to the decision of the Supreme Court. This legislation does not contain any express transitional provisions addressing the position of part-heard claims for unfair dismissal.
26. The principal judgment in these proceedings addresses the implications of the Supreme Court's decision and, more generally, the amending legislation, for part-heard claims. The principal judgment provides guidance which is of relevance not only to the Applicant's claim for unfair dismissal but also to other part-heard claims. To this limited extent, these judicial review proceedings transcend the facts of the present case.
27. Tellingly, the Workplace Relations Commission itself had initially struggled to address the fallout of the Supreme Court's decision. The public notices posted by the Commission on its website went through several iterations, and it was only towards the

end of July 2021, that is a number of months following the Supreme Court's decision, that a final version of the comprehensive statement was published. These judicial review proceedings have had the benefit of confirming that the approach ultimately settled upon by the Commission is correct as a matter of law.

28. It is true to say that the Applicant was not a disinterested party and that she sought to achieve a personal benefit from the outcome of the proceedings. More specifically, the Applicant is of the view that some unarticulated procedural advantage would be conferred upon her former employer were the hearing of the claim for unfair dismissal to be recommenced before a fresh adjudication officer. The Applicant does not, therefore, constitute the classic exemplar of a public-spirited litigant who is seeking to clarify the law without any personal gain. The case law indicates, however, that the existence of a personal interest is not necessarily fatal to a claim that litigation raises issues of general public importance. Indeed, were it otherwise, a litigant could find themselves in a Catch-22 situation whereby for the purposes of complying with the "*sufficient interest*" requirement prescribed under Order 84 of the Rules of the Superior Courts, they must normally demonstrate a direct interest in the outcome of the proceedings, yet might find this factor would then tell against them for the purposes of a costs application.
29. It is also relevant to the allocation of costs to note that the Workplace Relations Commission does not normally participate in judicial review proceedings. The Workplace Relations Commission's approach in this regard is informed by its view that the position of an adjudication officer is analogous to that of a judge of the District Court or the Circuit Court in respect of whose decisions judicial review proceedings have been taken. The Workplace Relations Commission relies in this regard on, *inter alia*, the judgments of the Supreme Court in *Noonan Services Ltd v. Labour Court*, unreported,

14 May 2004, and *Miley v. Employment Appeals Tribunal* [2016] IESC 20; [2018] 1 I.R. 787.

30. In the ordinary course, therefore, an applicant who institutes judicial review proceedings in the context of a claim for unfair dismissal will have a potential liability to pay only one set of costs, i.e. the costs of the other party to the claim for unfair dismissal who will act as *legitimus contradictor* to the judicial review proceedings. In the present case, however, the Workplace Relations Commission chose to participate in the judicial review proceedings, albeit on a limited basis only. The submissions made on its behalf were directed principally to standing over the correctness of the guidance published on the Commission's website. It was largely left to the notice party, i.e. the Applicant's former employer, to respond to the other grounds of challenge.
31. Had the judicial review proceedings been chiefly confined to the question of the implications of the decision in *Zalewski* and of the subsequent amending legislation, I would have made no order for costs in favour of the Workplace Relations Commission. As explained, I am satisfied that there was a public interest in having this question clarified. It would be inappropriate—and likely have a deterrent effect for others—to impose what would, in effect, be an *additional* liability for costs on a litigant who had raised a point of law of general public importance. The Workplace Relations Commission does not normally participate in judicial review proceedings, and to make a costs order in its favour in a case where it participated to respond to important issues which transcended the facts of the case would be inappropriate. Such an approach would, in many instances, result in the unsuccessful litigant having to pay two sets of costs, i.e. those of the Workplace Relations Commission and those of the other party to the claim for unfair dismissal.

32. A more nuanced approach is, however, called for in the present case. This is because the ambit of the judicial review proceedings went far beyond the points of law of general public importance identified above. The proceedings were directed, in part, to an earlier procedural ruling said to have been made by the adjudication officer, which was entirely unrelated to the Supreme Court's decision in *Zalewski*. This aspect of the proceedings did not give rise to any point of law of general public importance. As explained at paragraphs 109 to 115 of the principal judgment in the within proceedings, it is inappropriate to seek judicial review of interim procedural rulings made by an adjudication officer in the context of a claim for unfair dismissal. Moreover, the Applicant chose to make very serious allegations against both the individual adjudication officer and the Workplace Relations Commission generally. All of this added to the length of the hearing and to the costs incurred by the other parties in having to address these issues by way of affidavit, written submission and oral submission.
33. In the circumstances, it is appropriate to make a partial costs order against the Applicant. The Applicant is directed to pay the Workplace Relations Commission one-third of its measured costs. Ordinarily, the Commission, having been entirely successful in the proceedings, would have been entitled to recover the full of its measured costs. The discount is intended to reflect the fact that there was a general public interest in one of the issues raised in the proceedings, and that most of the costs incurred by the Commission will have been in relation to that issue. The Commission will, however, also have incurred costs in respect of the unfounded allegations of impropriety made by the Applicant. I estimate that these issues account for approximately one-third of the Commission's overall costs. It is proper and just that the Commission should recover this portion of its costs. The fact that proceedings, to a limited extent, raise an issue of

general public importance does not confer a licence upon an applicant to conduct the litigation in an undisciplined manner, i.e. by making unfounded and improper allegations.

34. I turn next to consider the position of the notice party, the Applicant's former employer, Arthur Cox LLP. The general approach to be taken to the costs of a notice party has been summarised in *Murphy v. Chief Appeals Officer (Social Welfare Appeals Office)* [2021] IEHC 711. The factors to be considered in deciding whether a notice party is entitled to its costs will include, *inter alia*, whether it had been reasonable for a notice party to defend the proceedings independently of the respondent. Whereas a notice party, who is directly affected by the outcome of judicial review proceedings, is entitled to participate, it does not automatically follow that they are entitled to recover their costs of so doing. If a notice party could safely have left the defence of the proceedings to the respondent, then the appropriate order may be that the notice party must bear its own costs, rather than visiting two sets of costs upon an unsuccessful applicant.
35. Applying these principles to the circumstances of the present case, the Applicant is directed to pay two-thirds of the notice party employer's measured costs. The burden of defending the judicial review proceedings fell largely on the notice party in circumstances where the Workplace Relations Commission elected to participate in the proceedings to a limited extent only. The Commission's role was confined chiefly to standing over the correctness of the guidance published on its website. It was the notice party, not the Commission, who acted as *legitimus contradictor* to most of the arguments advanced on behalf of the Applicant. In particular, the notice party was left to defend the various procedural rulings made by the adjudication officer.
36. The discount of one-third is intended to reflect the fact that there was some duplication in the submissions made by the Commission and the notice party, respectively, in relation to the implications of the Supreme Court's decision in *Zalewski*.

CONCLUSION AND FORM OF ORDER

37. An order will be made, pursuant to section 169 of the Legal Services Regulation Act 2015 and Order 99 of the Rules of the Superior Courts, directing that the Applicant is to pay one-third of the Workplace Relations Commission's measured costs, and two-thirds of Arthur Cox LLP's measured costs. The costs are to include all reserved costs; the costs of the written legal submissions; and the costs of two counsel for each party. The costs are also to include the stenography fees; given the shifting sands of the Applicant's case, it was reasonable and appropriate to arrange for a transcript of the hearing. The costs are to be adjudicated on the basis of a one day hearing on 20 October 2021. The costs of the short hearing on the morning of 26 October 2021 are not included.
38. Insofar as the costs of the costs hearings are concerned, the Applicant has been unsuccessful in resisting an order for costs. The Applicant must therefore pay the costs incurred in this regard by the Workplace Relations Commission and Arthur Cox LLP, respectively. The costs of the costs are confined to the costs of the first hearing on 16 December 2021. The necessity for a second and third hearing on costs was largely as the result of circumstances outside the Applicant's control. The costs are to include the costs of the separate written legal submissions on costs.
39. Unless otherwise directed, all costs to be adjudicated by the Office of the Chief Legal Costs Adjudicator in default of agreement between the parties. The intent of my order is that the respondent and notice party should recover between them the equivalent of one full set of costs. It might be a useful benchmark for the Adjudicator to consider what the measured costs would have been had the case been defended by a single legal team. The aggregate costs to be shared between the two parties should roughly approximate to this amount.

40. The parties have liberty to apply to this court, if necessary, for additional clarification of the precise basis upon which the costs are to be measured. Alternatively, the parties may apply, pursuant to Order 99, rule 7, to have a sum in gross measured by this court in lieu of adjudicated costs.

Appearances

The Applicant represented herself
Catherine Donnelly, SC and Sharon Dillon-Lyons for the respondents instructed by the
Workplace Relations Commission
Peter Ward, SC and Mairead McKenna for the notice party instructed by Daniel Spring & Co.

Approved
Gemma S. Moss