Unapproved
No redactions required

AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2022:000140

Neutral Citation [2024] IESC 27

O'Donnell C.J.

O'Malley J.

Hogan J.

Collins J.

Donnelly J.

BETWEEN

SEAMUS MALLON

Appellant

AND

THE MINISTER FOR JUSTICE, IRELAND, AND THE ATTORNEY GENERAL

Respondents

RULING of the Court delivered on 2nd July 2024 (Costs)

Introduction

1. For the reasons set out in the judgment of Collins J (with which the other members of the Court agreed), the Appellant, Mr Mallon, was unsuccessful in this appeal: [2024] IESC 20. This ruling deals with the costs of the appeal.

2. The High Court (Phelan J) made no order for costs in respect of the proceedings in the High Court. None of the parties seeks to disturb that order and so this ruling is concerned only with the costs of the appeal before this Court.

3. Despite the fact that they were the successful parties in the appeal, the State Respondents are not seeking their costs, proposing instead that the Court should make no order as to costs, thus leaving each side to beat their own costs.

4. Notwithstanding the dismissal of his appeal, Mr Mallon says that he should be entitled to his costs. He says, firstly, that he prevailed on the issue of his entitlement to bring declaratory proceedings in court (rather than pursuing a complaint to the WRC) and that, accordingly, the State Respondents were not "*entirely successful*" for the purposes of section 169 of the Legal Services Regulation Act 2015. Secondly – and this in truth is the main plank of his application – Mr Mallon says that the appeal involved issues of public importance such as to engage the Court's "*exceptional jurisdiction*" to make a costs order in favour of an unsuccessful party.

5. Framing his submissions largely by reference to the decision of the Court of Appeal in *Lee v Revenue Commissioners* [2021] IECA 114, Mr Mallon says that, as in *Lee*, his appeal presented a number of legal issues that were not straightforward and which involved complex EU legislation and jurisprudence, which went to the core powers and functions of an important statutory body – in this case the Workplace Relations Commission – and, he says, the resolution of these issues benefits the State Respondents by clarifying the law relating to mandatory retirement in the public sector and the ability of the State to set retirement ages for its employees and office-holders and by making it clear that the Employment Equality Directive does not impose any general requirement for case-by-case or individual assessment.

6. The State Respondents oppose Mr Mallon's application. They cite this Court's decision in *Smith v Cunningham* [2023] IESC 33 in which the Court drew a distinction between the circumstances which may justify making no order for costs and the "*very particular circumstances*" warranting an award of costs against the successful party. The Respondents emphasise the fact that Mr Mallon was unsuccessful and that the normal rule is that costs should follow the event. Insofar as there are any countervailing factors, the Respondents contend that, at most, they warrant the making of no order as to costs and do not warrant any order for costs in favour of the Appellant. They observe that Mr Mallon had a personal interest in the proceedings, noting that he had amended his pleadings to claim *Francovich* damages and noting also that an order for costs would benefit the Appellant personally in that his own firm acted as his solicitors. Citing *MD v Board of Management of a Secondary School (No 2)* [2024] IESC 18, they say that the fact that the appeal involved issues of public importance is not, of itself, a basis for

making an order for costs in favour of the unsuccessful Appellant. Citing *Friends of the Irish Environment v Legal Aid Board* [2023] IECA 190, they contend that the appeal did not raise any "*foundational issues of constitutional or European law*". The WRC issue was not, according to the Respondents, a significant issue in the appeal and provides no basis for an order for costs in Mr Mallon's favour.

Assessment and Decision

7. In *Smith v Cunningham*, the Court stated that:

> *"5. It is necessary when considering applications of this kind to bear in mind three propositions, and a distinction that follows from them: (a) the normal rule is that a party that is successful in legal proceedings will recover their costs from their unsuccessful opponent, (b) there are exceptions to that principle resulting in some cases in no such order being made, and (c) in some very particular circumstances (and most relevantly, where the proceedings involve a substantial issue of significant public interest) the Courts will award costs in favour of an unsuccessful party against the successful party.*
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> *6. The relevant distinction is between (b) and (c): as explained in the course of the judgment in Friends of the Irish Environment v. The Legal Aid Board [2023] IECA 190 (' Friends'), while litigation will often involve important points of law which it is in the public interest to determine, this does not of itself mean that such a case can be characterised as a 'test case', nor does it mean that a party*

who brings such proceedings can expect, even if they lose, to recover their costs. While the categories of case in which an unsuccessful party might obtain their costs are not closed, they have (as it was put it in Friends) 'by and large tended to involve foundational issues of constitutional or of European law'. They have also, almost invariably, comprised proceedings taken against the State or State bodies."

8. Unlike the position in *Smith v Cunningham*, this appeal is one in which the successful Respondents are the State. As the Respondents acknowledge, the appeal involved legal issues of public importance. However, as the Court explained in *MD*, that is a general feature of appeals to this Court and does not, in itself, provide a sufficient basis for departing from the normal costs rule in section 169(1) of the 2015 Act: para 10. While the appeal raised issues of undoubted general importance regarding the mandatory retirement regime in the public sector, in the Court's view those issues cannot be characterised as "*foundational*." Ultimately, the determination of the appeal involved the application of well-established principles of EU law derived from the jurisprudence of the CJEU.

9. It is also a material consideration that the proceedings were brought to advance the personal interests of the Appellant in that, in the event that he was successful, he would presumably have sought restoration to the office of sheriff and/or damages by way of compensation. In the Appellant's submissions, the proceedings are referred to as a "*test case*". However, while no doubt other sheriffs (a relatively small cohorts of persons)

would have benefitted from any finding in favour of Mr Mallon, the proceedings were brought by and for the benefit of Mr Mallon.

10. As to Mr Mallon's contention that the State Respondents benefit from the clarification provided by the Court's judgment, that is not, in the Court's view, a factor of significant weight in the circumstances here. The retirement age for sheriffs has been statutorily prescribed for almost 80 years. The relevant statutory provision – section 12(6)(b) of the Court Officers Act 1945 - is clear in its terms and effect (unlike the position in *Lee*, which in any event was concerned with whether the court should make no order for costs, rather than any question of requiring the successful party to pay the costs of the unsuccessful party). Prior to these proceedings brought by Mr Mallon, it appears never to have been challenged or questioned. It was, of course, challenged by Mr Mallon. He was unsuccessful in the High Court and appealed to this Court where again he was unsuccessful. The State Respondents are paying a significant price for the clarification that this Court's judgment brings by agreeing to bear their own costs. It would be wholly unreasonable to impose on the State Respondents the further burden of paying any of Mr Mallon's costs simply because, in rejecting his challenge, the Court has provided clarity as to the lawfulness of mandatory retirement regimes in the public sector.

11. As regards the WRC issue, that was not a significant issue in the appeal and cannot, in the Court's view, be characterised as one that "*went to the core powers and functions of the WRC*". Any suggested parallel with *Lee* is misconceived. The scope of the Appeal Commissioners' jurisdiction was the central issue in *Lee*. Here, in contrast, no

issue arose as to the jurisdiction of the WRC. That the WRC cannot set aside an enactment of the Oireachtas, and that only the Superior Courts have such a jurisdiction, was not in dispute in this appeal. The issue was whether the High Court correctly decided to determine Mr Mallon's claim notwithstanding the availability of an alternative remedy by way of complaint to the WRC. While the Court upheld the Judge's decision on that point, it was not the significant issue in the appeal, did not add materially to its length or complexity and, at most, Mr Mallon's success on that point might have provided a basis for departing from the general rule that costs follow the event and does not justify any award of costs in his favour.

12. In the Court's view, the matters relied on by Mr Mallon, individually and cumulatively, might well have persuaded the Court to exercise its discretion to depart from the default costs position if the State Respondents had sought an order for its costs but do not provide any adequate basis for going further, and directing the State Respondents to pay any part of Mr Mallon's costs.

13. Accordingly, the Court will make an order in the terms proposed by the State Respondents i.e. that there should be no order for costs in respect of the appeal.