THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 641 JR]

BETWEEN

BRIDGET DELANEY

APPLICANT

AND

THE PERSONAL INJURIES ASSESSMENT BOARD, THE JUDICIAL COUNCIL, IRELAND, AND THE ATTORNEY GENERAL

RESPONDENTS

RULING of Mr. Justice Charles Meenan delivered on the 22nd day of July, 2022

Introduction

1. I refer to the judgment delivered in this matter on 2 June 2022. For the reasons stated therein, I concluded that the applicant was not entitled to the reliefs which she sought. The issue that now remains to be determined is costs. Although successful, the first named respondent (PIAB) and the second named respondent (the Judicial Council) do not seek their costs against the applicant.

2. The applicant seeks her costs against the third and fourth named respondents (Ireland and the Attorney General) including a certificate from this Court for three Senior Counsel who appeared on her behalf.

3. The third and fourth named respondents did not press for an order for their costs but, rather, argued that the applicant ought not be given her costs submitting that various authorities under which the applicant might recover her costs did not apply. The fallback position of these respondents was that the applicant should only recover a portion of her costs.

Costs

4. The standard rule that *"costs follow the event"* is now provided for in s. 169 of the Legal Services Regulation Act 2015 ("the Act of 2015"), which provides: -

> "(1) 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 orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—
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> (a) conduct before and during the proceedings,
>
> (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
>
> (c) the manner in which the parties conducted all or any part of their cases,
>
> …"

5. The wording of s. 169 that *"unless the court orders otherwise having regard to the particular nature and circumstances of the case …"* recognises the well-established jurisdiction of a court to award costs in favour of an unsuccessful applicant in certain circumstances. These circumstances were referred to by Murray J. in the decision of the Court of Appeal in *Lee v. Revenue Commissioners* [2021] IECA 114 where he stated: -

> "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. ...

… There is, in practical terms, a sliding scale guided by the importance and application of the issues, but also by the strength and difficulty of the claimant's case. …"

Consideration of issue of costs

6. Insofar as the provisions of s. 169 of the Act of 2015 are concerned, I am satisfied that both the applicant and the various respondents conducted these proceedings effectively and efficiently within the narrow timeframe permitted by the Court.

7. The third and fourth named respondents have been *"entirely successful"* in defending these proceedings and so, without more, would be entitled to their costs. However, as referred

to, the Court has a wider discretion on costs provided a number of criteria are satisfied. Firstly, I have to consider the general importance of the legal issues involved. There was no dispute but that the Guidelines reduced the level of damages that may be awarded for a very broad category of injuries. This will undoubtedly have a very significant effect on litigation in this area. It was stated in the applicant's submissions on costs that: -

> ".. these proceedings clearly relate to a matter of considerable public importance. … As explained by PIAB during the hearing, in the period following the introduction of the Personal Injury Guidelines up to the end of September 2021 assessments of General Damages by PIAB were down by an average of 46% as compared to assessments in 2020. Whether or not the new system is lawful is of core importance to anyone injured in the State and to anyone who has injured someone else and to that person's indemnifier, if any. …"

8. All parties were anxious to secure an early hearing given the effect of the Guidelines on personal injuries litigation. These effects go beyond litigation and must influence the settlement of claims before even the *"PIAB stage"* is reached. Further, there were numerous other similar type applications and it was agreed that this application be the *"lead case"*.

9. There is a further matter in that the reduction in damages referred to was not brought about by a new Book of Quantum but by Guidelines passed under the provisions of the Judicial Council Act 2019 ("the Act of 2019"). There can be little doubt but that the Act of 2019 has considerably developed and enhanced the role of the judiciary.

10. I am satisfied that these proceedings were brought in the public interest and were of general public importance.

11. The next matter which I have to consider is whether the legal principles considered in this application were *"novel, or, alternatively, are well established"*. In broad terms, the application concerned issues of delegated legislation (principles and policies) and the

separation of powers. These principles have been fully considered and elaborated on in numerous authorities so, to that extent, there was little degree of novelty. However, what was novel was the application of these principles to the Act of 2019.

12. A further matter which I have to consider is whether the applicant had a personal or material interest in the outcome. Clearly, as the application concerned a level of damages that she ought to have been awarded, she did have such an interest. It is difficult to conceive of litigation that does not have, in some sense, an aim of improving a plaintiff or applicant's position. I believe that the important factor is that though an applicant/plaintiff's position may be improved following the proceedings so too is many others. I refer to the following passage of Simons J. in *Zalewski v. The Workplace Relations Commission* [2020] IEHC 226 where he stated: -

> "To treat the existence of a personal interest as precluding a departure from the general rule that costs follow the event would create the following paradox. An applicant for judicial review would find themselves in a type of 'Catch-22' situation whereby, first, it is necessary for them to establish a personal interest in the proceedings, but secondly, the existence of such an interest would prevent them from availing of a relaxation of the general rule that costs follow the event."

I do not hold that the applicant's personal or material interest in the outcome of her application is a factor which weighs against her on the issue of costs.

13. Though the applicant has met the criteria referred to above, the fact remains that her application was unsuccessful. Though the application of the well-established principles may have been novel, the principles themselves were not. I was satisfied that the provisions of s. 90 of the Act of 2019 clearly set out *"principles and policies"* for the purpose of drawing up the Guidelines. I was also satisfied that certain provisions of the Act of 2019 preserved judicial independence.

14. In summary, balancing the factors for and against the applicant on the issue of costs, I am satisfied that the justice of the situation would require that the applicant be awarded 60% of her costs associated with the hearing of the application. As for the instruction of three Senior Counsel, I feel that this is not a matter which I can fairly rule on and so leave this issue to be adjudicated in default of agreement.

15. The applicant made an interlocutory application that I recuse myself from hearing the application on the grounds that I attended and voted at the meeting of the Judicial Council that adopted the Guidelines. I did not accede to that application. I am satisfied that, though unsuccessful, this was an appropriate application to make which raised an issue which was going to have to be dealt with sooner or later. I will therefore award the applicant 60% of the costs relating to that application.

Conclusion

16. By reason of the foregoing, I will award the applicant 60% of her costs in relation to the application (to include reserved costs and the costs of the application for recusal) such costs, including the number of Senior Counsel instructed, are to be adjudicated in default of agreement.

17. I will list this matter before me on 29 July 2022 for the purpose of making final orders.