[2019] IEHC 644

THE HIGH COURT
JUDICIAL REVIEW

2018 No. 835 J.R.

BETWEEN

HUGH MCELVANEY

APPLICANT

AND

THE STANDARDS IN PUBLIC OFFICE COMMISSION

RESPONDENT

NOTE OF EX TEMPORE RULING of Mr Justice Garrett Simons delivered on 10 September 2019.

1. This is an application for a costs order in relation to judicial review proceedings. The principal judgment in the proceedings was delivered last week, *McElvaney v. Standards in Public Office Commission* [2019] IEHC 633. The application for judicial review was dismissed in its entirety for the reasons set out in the principal judgment. Notwithstanding this, counsel for the applicant suggests that the appropriate order in this case is that there should be no order as to costs. Counsel advances two particular arguments. First, it is suggested, and the proceedings were dismissed on the basis that they were premature, and it is said that this is, in fact, contrary to the position which was adopted by the respondent in its opposition papers wherein the respondent argued that, in fact, the proceedings were delayed and had not been brought within time.

2. A "no costs" order is also sought on the basis that there was extensive discovery, and that it was only when that discovery came to light that the applicant was aware of the precise involvement of an employee of the respondent in the making of the television programme which is the subject- matter of the proceedings.

3. On behalf of the respondent, counsel submits that the ordinary rule that should apply that costs follow the event. Counsel also points out that, in fact, whereas there is a finding in relation to prematurity, the judgment also contains findings on the substantive issues in the case, and also indicates by reference to the discretionary of the court that the applicant should have engaged further with the respondent before seeking judicial review.

4. For the reasons which I will now outline, I have decided that the appropriate order is an order for costs against the applicant. The costs are to include all reserved costs, the costs of the hearing before me, and, for the avoidance of any doubt, the costs of the discovery and costs of the written legal submissions filed in the case.

5. The general rule as set out by the Supreme Court in its judgment in *Godsil v. Ireland* [2015] IESC 103; [2015] 4 I.R. 535 is that costs follow the event. In this case, there is absolutely no difficulty in identifying the "event". The judicial review proceedings were dismissed in their entirety. This is not a case where, for example, an applicant has exceeded in one or other of the grounds but has been ultimately unsuccessful. The applicant failed in his application in its entirety.

6. Therefore, the starting position would normally be that costs follow the event. In relation to the argument as to prematurity, I accept the submission made by leading counsel on behalf of the respondent, Mr. James Doherty, SC, that in fact that was only one of the findings which the court made. The finding of prematurity was in relation to a specific complaint, which is a complaint of alleged entrapment. The court found that the Commission, as had been set out in its written ruling of 17 September 2018, had deliberately left open that issue for further submission. But the principal judgment dealt with a lot more than that. It is perfectly clear from the judgement that in relation to the other grounds of challenge advanced, in particular, in relation to the allegation that there should have been a right to cross-examine the undercover journalist, that the court found substantively against the applicant. Those arguments were rejected.

7. It is true that the respondent had raised an issue in relation to delay, and that did not find express favour with the court in that the proceedings were dismissed (in relation to that one ground at least) by reference to prematurity. But as is clear from the discussion of the court's discretion in the principal judgment, the court was critical of the fact that the applicant had failed to engage with the commission. The commission had written to the applicant on several occasions and, for reasons which pass understanding, the applicant and his solicitors never responded in any substantive way to those letters. I am satisfied that had there been engagement, the entire necessity—or the perceived necessity—to have brought the judicial review proceedings, could have been avoided.

8. In addition to that, it is also evidenced from the judgment that the court was critical of the conduct of the proceedings, and this is something that the court is entitled to take into account in relation to costs. The court was particularly concerned that a serious allegation of actual bias was mooted against the Standards in Public Office Commission, notwithstanding that this was not pleaded and did not form part of the case.

9. The court was also concerned with the fact that the solicitor acting on behalf of the applicant filed an affidavit which did not comply with the rules and, in particular, engaged entirely inappropriately with legal submissions. The court must maintain discipline over its proceedings and it seem to me that in a case such as this where the applicant and its legal advisors have behaved in manner which the court has been critical of, it would be entirely inappropriate to reward that behaviour by departing from the ordinary rule that costs follow the event.

10. So, in summary, therefore, I am satisfied that this is a case where costs should follow the event. The application for judicial review was dismissed in its entirety, and there was no factor which would indicate that anything other than the ordinary rule should apply. In addition to that, I am satisfied that, given the conduct of the applicant and its legal advisors, it would be inappropriate, as I say, to reward this behaviour.

11. Finally, in relation to the issue of discovery, it is true that there was an application for discovery and certain documentation turned up in discovery but, tellingly, no application was ever made by the applicant to amend his proceedings arising out of that discovery. So, in the circumstances, it seems to me that the discovery was ultimately unnecessary

or did not advance matters in the proceedings. In fact, as I say, the applicant did not even bother to seek to amend the proceedings to rely on that discovery. So, I cannot see any basis for treating discovery other than by reference to the other costs in the case.

12. So, accordingly, for the reasons outlined, I order costs against the applicant to the respondent. The order will be drawn up dismissing the judicial review proceedings in their entirety, costs will be dealt with in the manner outlined to include reserved costs and the cost of discovery.