Neutral Citation [2012] IEHC 599

THE HIGH COURT

[2012 No. 194 J.R.]

BETWEEN/

AMJAD HUSSEIN

APPLICANT

AND

THE LABOUR COURT

RESPONDENT

AND

MOHAMMAD YOUNIS (No.2)

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on 26th October, 2012

1. In the aftermath of my judgment delivered on 31st August, 2012, in *Hussein v. Labour Court* [2012] IEHC 364, I am now required to consider the questions of costs. It may be recalled that in that judgment I set aside a substantial award which had been made by the Labour Court in favour of Mr. Younis on the ground that the contract of employment between Mr. Hussein and Mr. Younis was substantively illegal by reason of the fact that the latter, a Pakistani national, lacked the requisite work permit in the manner required by the Employment Permits Act 2003 (as amended). Given that the contract of employment had been rendered illegal in that fashion, I concluded that neither the Rights Commissioner nor, by extension, the Labour Court had any jurisdiction under the Terms of Employment (Information) Act 1994, the Organisation of Working Time Act 1997, and the National Minimum Wage Act 2000, to entertain this claim for arrears of wages. It was for that fundamental reason that I held that I must accordingly quash the award which had been made in favour of Mr. Younis.

2. It is important also to stress that the Labour Court did not appear at the hearing before me, but simply wished to be heard on the question of costs. Counsel for the Labour Court, Mr. Jeffers, informed me at the outset that as his client considered that as it enjoyed what amounted to an immunity from costs orders in those cases where it does not participate at the hearing, it did not propose so participate in the present case. While accepting that cases of alleged impropriety fell into a different category – although nothing of the kind arose in the present case – he contended that the Court was in the same position as judges of the Circuit Court and the District Court. The Labour Court thus sought to avail of the quasi-immunity in question.

3. Mr. Hussein originally confined his costs application to seeking costs against Mr. Younis but he later extended the application in order to seek costs as against the Labour Court. Mr. Younis sought costs as against the Labour Court and Mr. Hussein. The Labour Court submitted that there should be no order for costs against it.

The position of Mr. Younis

4. I propose to commence this consideration of the costs question by examining the position of Mr. Younis. In strict law, he has lost his case and he should therefore be subject to a costs order. But this bears no relationship at all to the underlying merits – both legal and moral – of Mr. Younis' case. As I noted in my judgment, the Rights Commissioner found that Mr. Younis was the victim of appalling treatment in the workplace. I appreciate that Mr. Hussein has always disputed this and, in fairness to him, it should be acknowledged that (as I pointed out in my first judgment) he was not legally represented before the Rights Commissioner and it may that if he had been so represented a different picture would have emerged.

5. Nevertheless, given the findings which were made, it would simply add insult to injury if a costs order was made against Mr. Younis. The court has a discretion to depart from the standard costs order where there are special and unusual circumstances (*cf*. the judgment of the Supreme Court in *Mahon v. Keena (No.2)* [2009] IESC 78). In my judgment, these underlying facts as found by the Rights Commissioner constitute such a special circumstances and I would not accordingly countenance the making of any costs order against Mr. Younis.

6. Indeed, were the matter *res integra*, I would consider that Mr. Younis' case for costs against the Labour Court would be an exceptionally powerful one. If I believed that I had such a jurisdiction, I would undoubtedly exercise it in his favour. Consider the underlying facts. The State has welcomed this migrant from Pakistan, but, judged by the findings of the Rights Commissioner, he fell victim to appalling exploitation for which he has no adequate redress by reason of the underlying policy of the Employment Permits Act 2003. The Rights Commissioner and the Labour Court nonetheless entertained his application without addressing the fundamental policy questions underlying the 2003 Act. He has then been subsequently forced to bear the burden of defending a case of transcendent public importance in circumstances where it might have been expected that a State body would have shouldered that task and assisted this Court. I will return presently to the question of jurisdiction.

The position of Mr. Hussein

7. Whatever be the position of Mr. Hussein qua employer – and here we may recall again that he was not legally represented before the Rights Commissioner – he has nonetheless won a very important legal victory in complex legal proceedings lasting several days. It seems intolerable that the State agency responsible for bringing this situation about should be effectively immune from costs. Again, if I considered that I had a jurisdiction to award costs against the Labour Court, I would undoubtedly exercise that jurisdiction in Mr. Hussein's favour.

8. While I do not propose to make a costs order against Mr. Younis, nor do I consider it appropriate that Mr. Hussein should bear Mr. Younis' costs in view of the fact that he has succeeded in these judicial review proceedings. I will accordingly make no order *inter se* as between employer and employee. Accordingly, the real question is whether the Labour Court should bear the costs of either Mr. Younis or Mr. Hussein or whether there exists a jurisdictional bar (or something equivalent to this) which precludes this course of

action. It is to that issue to which we may now turn.

The position of the Labour Court

9. At common law, the judges of the lower courts were generally personally immune from costs order, save in cases of clear impropriety: see, e.g., the judgments of the Supreme Court in *McIlwraith v. Fawsitt* [1990] 1 I.R. 343, *O'Connor v. Carroll* [1999] 2 I.R. 160 and the judgment of O'Neill J. in *F. v. Judge O'Donnell* [2009] IEHC 547. There were (and are) important public policy considerations supporting that rule, as otherwise judges could be personally bankrupted if costs orders were made against them arising from the course of judicial review proceedings. Quite apart from the fact no rational person would assume a judicial position absent such protections, the existence of such a rule is plainly necessary to support judicial independence. Without such a protection no judge could safely discharge judicial functions "without fear or favour" in the manner required by Article 34.5.1 of the Constitution.

10. The rationale for the rule was accordingly set out in the following terms by O'Neill J. in *F.*:-

> "It need hardly be said that a judiciary could not function if exposed to that kind of risk. Hence, I have no doubt that not only are these rules proportionate to the aim of protecting the independence of the judiciary, they, or to be more specific, the rule prohibiting costs is essential to maintain a functioning independent judiciary.
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> The rule excluding a judge from being sued in these circumstances, prevents the judge being drawn into dispute with one or more of the parties whose case he or she has heard and may have judged, and hence it preserves, protects and enhances the independence of the judiciary and, in particular, the public perception of that independence and impartiality. As no advantage whatsoever accrues to the applicant who seeks judicial review of a judge's order if the judge is joined in the judicial review, in the sense that the impugned order may be judicially reviewed but no order for costs may be made against the judge, conversely there is no disadvantage to that applicant if the judge is excluded from the proceedings because the order can still be judicially reviewed and there cannot be an order for costs against the judge."

11. As this passage indicates, the general context in which this issue potentially arises is that of an application for judicial review. Not untypically the applicant will seek to quash a decision of the District Court or the Circuit Court in which the other party to the proceedings appears as a form of *legitimus contradictor* seeking to defend the decision. While formally a respondent, the judge invariably takes no part in the proceedings and if successful, the applicant can obtain costs against the notice party. In such circumstances this situation has been (largely) brought about by the notice party. It was, after all, that party which applied to the judge to make the order in question and if that order is subsequently quashed by the High Court, then the notice party cannot generally be held to complain.

12. It is perhaps less clear that the special considerations which apply to judges of the District Court and the Circuit Court should apply more generally to institutions (such as the Labour Court) which enjoy quasi-judicial powers. After all, any award of costs would be made as against the *institution* and not the judge personally, a critical difference. Long established practice and tradition might also suggest the contrary. Up to recent times it had never been suggested that bodies as diverse as the Refugee Appeals Tribunal, the Private Residential Tenancies Board, the Competition Authority, the Employment Appeals Tribunal or An Bord Pleanála might enjoy such a quasi-immunity in respect of costs orders, even though all of these bodies discharge functions which might well be characterised as quasi-judicial in nature. Insofar as there were special rules in relation to costs, these were provided for by Rules of Court or by statute. Thus, for example, Ord. 106, r. 5 provides that in certain cases involving a statutory appeal from decisions of the Labour Court to the High Court, "no costs shall be allowed of any proceedings under this Order unless the Court shall by special order allow such costs".

13. Yet the entire matter cannot be regarded as *res integra* since in *Casey v. Private Security Appeals Board* [2009] IEHC 547 Dunne J. held that the position of bodies exercising quasi-judicial functions must be regarded as analogous to that of members of the judiciary so far as costs orders of this kind are concerned. She applied the rules developed in cases such as *McIlwraith, O'Connor and F.* to a regulatory body exercising quasi-judicial powers, in this instance, the Private Security Appeals Board:-

> "Bearing in mind the nature of the Appeals Board, methods of its appointment and its statutory remit, it clearly is a quasi judicial body. It is in a similar and analogous position to that of a judge. For the proper functioning of the Board, it seems to me that it is appropriate that it should generally have immunity from costs in circumstances where it has acted without mala fides and without impropriety. One cannot say that the Board must always be immune from an order for costs. There may be occasions when a complete immunity might be unjust but in the circumstances of this case I think it is appropriate to make no order for costs against the Board in this case."

14. In view of this statement of principle, it seems to me that I have no alternative but to apply it by analogy to the position of the Labour Court. After all, the position of the Labour Court as an independent body discharging (in this instance) what amounts to quasi-judicial powers is indistinguishable from the point of view of this principle from that of the Private Security Appeals Board, even if the Labour Court is largely acting through the medium of the Rights Commissioner.

Conclusions

15. It follows, therefore, that by reference to Casey, the Labour Court must be regarded as enjoying a quasi-immunity in respect of costs orders of this kind, at least where (as here) there is absolutely no suggestion whatever of impropriety and where the Court has taken no active step in the main proceedings.

16. It is for these special reasons that I have concluded that I cannot award the costs of the judicial review proceedings in favour of either Mr. Younis or Mr. Hussein as against the Labour Court.