Neutral Citation: [2014] IEHC 703

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 203JR]

BETWEEN

N.L.

Applicant

AND

THE HEALTH SERVICE EXECUTIVE

Respondent

Judgment of Mr. Justice Keane delivered on the 8th day of April 2014

Introduction

1. In a judgment given on the 20th March 2014, the Court refused the application of a national school board of management ("the school board"), the employer of the applicant in this case, to be joined as a notice party to these proceedings. The proceedings involve a challenge by N.L., a national school teacher, to the investigation and finding by the Health Service Executive ("the HSE") in respect of its inquiry into certain allegations of child sexual abuse in that school that have been made against N.L.

2. On the 28th March 2014, the Court heard argument on the appropriate orders to be made in respect of the costs of the school board's unsuccessful application to be joined as a notice party to the proceedings.

Submissions on costs

3. The positions adopted on the issue of costs by the parties involved in that application are as follows. N.L. submits that he is entitled to his costs of the school board's application on the basis that he was successful in resisting it and that costs should follow the event. The HSE seeks its costs against the school board by reference to the same principle. The school board contends that it is entitled to its costs of the application against N.L. or, in the alternative and on a subsidiary basis, against the HSE, even though – on one view - the event went against it. The school board does so on a number of identified grounds.

4. Dealing with its application against the HSE first, the school board points to the refusal of the HSE (in common with N.L.) to make a copy of the papers in the underlying proceedings available to the school board when requested to do so. The school board also relies on the neutral stance that the HSE adopted on the school board's application to be joined, whereby it neither objected nor consented to it, which approach the school board characterises as unusual, given the HSE's legal responsibilities. The school board says that it is entitled to its costs against the HSE on those two grounds.

5. In seeking the costs of its unsuccessful application primarily against N.L., the school board lays emphasis on the following matters. First, it is submitted that, while N.L. was entitled to resist the school board's application to be joined to his proceedings against the HSE, he never explained his motivation for doing so and was never obliged to do so, despite his assertion to the contrary.

6. Second, the school board cites the fact that, in the underlying proceedings, N.L. is challenging the investigation and finding of the HSE on foot of which the school board, as N.L.'s employer, rescinded the administrative leave upon which it had placed N.L. several years earlier. The school board asserts that N.L. would have been aware that its decision was based on the HSE's finding. The school board submits that, in those circumstances, N.L.'s refusal to apprise it of the details of his challenge to the HSE's investigation and findings or to provide it with a copy of the papers in that case is significant, as is the similar refusal of the HSE.

7. Third, the school board contends that, in the circumstances just described, it took the only procedural step available to it to discover the details of those proceedings by applying to be joined as notice party.

8. The school board points to the fact that a significant portion of the hearing of the motion was directed towards the issue of whether the school board, as proposed notice party, should have sight of the papers in the case for the purpose of advancing its arguments in that regard, in circumstances where it was submitted on behalf of N.L. that the board had no such entitlement. The Court resolved that issue by directing that the school board should be furnished with a copy of the papers in the case for the purpose of its application to be joined. The hearing was adjourned to enable that to be done.

9. The school board contends that this was particularly significant in light of the contents of N.L.'s Statement of Grounds and of the Order granting leave to seek Judicial Review made by Peart J. on the 15th March 2013. Specifically, the school board notes that one of the twenty substantive reliefs that N.L. was given leave to seek is the following:

> "(r) such other relief as this Honourable Court as (*sic*) may seem fit and just and necessary or appropriate and including such directions to ensure that the allegations of sexual abuse at issue in these proceedings are expunged from the Applicant's personnel file at [the national school concerned]…."

10. The school board points out that in arguing that the school board was not entitled to have sight of the papers in the case, it was several times reiterated both on affidavit and in submissions on behalf of N.L. that no claim was being made that was capable of directly affecting the school board. When the relief described at paragraph (r) of the Order of Peart J just described was directly raised on behalf of the school board at the hearing of the present application, after the papers in the case had been furnished to it on the direction of the Court, it was immediately conceded on behalf of N.L. that his claim may have been "over-pleaded" in that regard, and an undertaking was furnished not to pursue that relief at the substantive hearing.

11. The school board submits that, in the circumstances just described, quite plainly it would have been vitally interested in, or very clearly affected by the result of, an application seeking "directions to ensure that the allegations of sexual abuse at issue in these proceedings are expunged from [N.L.'s] personnel file at [the national school concerned]." In light of the undertaking provided on behalf of N.L. not to seek the relief concerned, the Court was not required to determine the issue, but the Court did acknowledge, at paragraph 69 of its judgment on the application to be joined, that the school board's submission in that regard was not without some force.

12. In essence, the school board submits that, at the time that it issued the necessary motion papers in support of its application to be joined as a notice party to these proceedings, it was a party directly affected by the application for judicial review, which fact would, or should, have been evident to the existing parties, neither of whom consented to (and one of whom actively opposed) that application.

13. For these reasons the school board submits that it should be entitled to its costs against N.L. or, on an alternative and subsidiary basis, against the HSE.

14. In response on behalf of N.L., it is submitted that it has at all times been made clear that N.L.'s motivation in opposing the school board's application to be joined as a notice party to these proceedings relates to the potentially greater difficulty, complexity and cost of conducting multi-party litigation in circumstances where the unlawful conduct alleged by N.L. is that of the HSE solely and not that of the school board. N.L. contends that, insofar as he is attempting to protect his own rights and interests in that regard, he was obliged to oppose the notice party's application and that, subject to the provision of an undertaking by him not to pursue just one of the twenty separate substantive reliefs that he is claiming against the HSE, he has done so successfully. For that reason he contends that costs should follow the event.

15. In relation to the suggestion that it should have been evident to N.L. that the school board, as his employer, had rescinded the administrative leave upon which N.L. had been placed several years earlier solely in reliance on the decision of the HSE which N.L. is now challenging, and that this made it somehow incumbent on N.L. to furnish the school board with details of that challenge, it seems to me that the relevant facts and circumstances have already been addressed at some length in the judgment that the Court has delivered. Accordingly, it does not seem to me appropriate to consider that issue afresh for the purpose of the present application.

Conclusion

16. Since the application for the directions identified at paragraph (r) of the Order granting leave only fell out of the case in the face of the school board's application to be made a notice party to the proceedings, the first question presented is how is the issue of costs to be determined in relation to an issue or event that became moot between the inception of the relevant application and its conclusion.

17. In that regard, I have concluded that the appropriate test is one analogous to that applied by the High Court in *Garibov v Minister for Justice, Equality and Law Reform* [2006] IEHC 371 to the costs of an application for judicial review, where the relief sought had become moot after leave to seek judicial review had been granted with the result that it was no longer necessary or appropriate to consider the merits of the underlying claim. The test applied by Herbert J. was whether the decision to commence those judicial review proceedings was a proportionate reaction by the applicants in that case to the situation arising from the decisions and actions of the respondents.

18. On that point, I have come to the conclusion that the decision of the school board to apply to be joined as a notice party to the present proceedings was a proportionate reaction to the situation in which it found itself. One aspect of that situation was that, although N.L.'s *ex parte* application for leave to seek judicial review had been made, as the law requires, in open court on the 15th March 2013 in reliance on the relevant grounding papers and although that application was the subject of an Order made by Peart J on that date, both N.L. and the HSE elected not to accede to the subsequent request of the school board that they disclose the relevant material to it. While neither of the parties was under any legal obligation to make such disclosure, the reasonableness (or otherwise) of their refusal to do so does seem to me a relevant consideration for the purpose of the present application.

19. Nonetheless, the Court is mindful that the ultimate event went against the school board in that, even after N.L. had undertaken not to pursue any relief in relation to the personnel file on him held by the school board as his employer, the school board elected to press ahead with its application to be joined as a notice party on the basis that, even absent a claim by N.L. for that particular relief, it remained a person directly affected by the present proceedings. In that application the school board was wholly unsuccessful.

20. In light of the foregoing, in my view this is a suitable case in which to adopt the approach to the issue of costs set out by Clarke J. in *Veolia Water UK plc v Fingal County Council (No. 2)* [2007] 2 I.R. 81. That approach involves acknowledging and applying the following principles to the facts as I have found them:

(a) That an award of costs is discretionary under Order 99, rule 1(1) of the RSC.

(b) That the costs of every issue of fact or law raised upon any claim or counterclaim shall, unless otherwise ordered, follow the event, pursuant to Order 99, rule 1(4) of the Rules.

(c) An application such as the present may appropriately be viewed as a stand alone matter in that the provision of an undertaking by N.L. limiting the nature and extent of the relief that he is seeking, in conjunction with the Court's decision that the school board is not otherwise directly affected by the proceedings, has terminated the school board's involvement in these proceedings.

(d) The combination of the two matters just described renders the determination as to what the "event" was in this application a matter of some complexity.

(e) That, if it were reasonably clear as to which party in such circumstances was successful overall, then, in that eventuality, it would be appropriate to award costs to that party, adjusted to reflect the extent to which the hearing had been lengthened by any issues raised by that party on which it was unsuccessful.

(f) However, where, as here, there are two equally valid ways of looking at which party might be said to have been successful, then it is appropriate to base the award of costs on an assessment of how much of the hearing might be said to be attributable to the issues upon which each party succeeded.

(g) In this case approximately half of the duration of the hearing, which took place over various parts of three days, was devoted to the question of whether the school board was entitled to have sight of the papers in the underlying case for the purpose of its application to be joined and, once the Court directed that those papers be furnished to the school board for that purpose, whether the school board was directly affected by the relief sought at paragraph (r) of the Order granting leave. On that analysis, I am satisfied that a roughly equal allocation of time is attributable to the issues on which each of the parties prevailed.

(h) In those circumstances, I take the same view as that adopted by Clarke J. on the particular facts of *Veolia*: that the justice of this case is met by making no order as to costs, whether between the school board and either N.L. or the HSE, or between the HSE and either the school board or N.L.