Neutral Citation: [2014] IEHC 297

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 671 J.R.]

BETWEEN

HEALTH SERVICE EXECUTIVE

APPLICANT

AND

TAXING MASTER, DECLAN O'NEILL

RESPONDENT

AND

GEORGE BRIDGES

NOTICE PARTY

JUDGMENT of Mr. Justice Birmingham delivered on the 4th day of June 2014

1. In this case, the applicant, the Health Service Executive, having been granted leave by McGovern J. on 10th September, 2013, is seeking, by way of an application for judicial review, an order quashing a decision of Master O'Neill. The background to the present application is long and complex and is, in some ways, an unfortunate one.

2. The notice party, Mr. Bridges, issued a plenary summons against the applicant on 5th August, 1999, alleging that he had been subjected to harassment and bullying during the course of his employment with the applicant. On 11th June, 2010, the case was settled. The settlement saw the applicant agreeing to pay the notice party the sum of €50,000, together with legal costs to be taxed in default of agreement. The order for costs provided as follows:

> "The defendant will pay the plaintiff's legal costs (to include the costs of making discovery) the said costs to be taxed in default of agreement. The parties hereto acknowledge for the purposes of the said taxation that the damages paid to the plaintiff is in the sum of €50,000.00, and that the plaintiff shall only be entitled to recover for one Senior and one Junior Counsel."

At taxation, DFG Legal Costs Accountants represented the interests of the applicant, while Fergus Dunleavy & Company Solicitors represented the notice party.

3. In a ruling delivered on 11th March, 2011, Taxing Master Flynn directed that the solicitor for the notice party, Mr. Dunleavy, should produce a breakdown of the work done and the time spent on each item and directed that a further oral hearing should take place. He recommended that a payment on account should be made by the applicant of the amounts not disputed in the Bill of Costs, as well as the sum of €70,000 on account in respect of the instruction fee. The amount of €70,000 was the lower figure in a range contemplated by the applicant. The current dispute between the parties is very largely, if not indeed, entirely confined to the amount of the instruction fee.

4. In accordance with the recommendation of Taxing Master Flynn, a sum of €159,440.25 was paid over by the applicant to the notice party.

5. Mr. Dunleavy undertook the task that he had been requested to do by the Taxing Master and further submissions were made. There was a further oral hearing and on 28th October, 2011, Taxing Master Flynn taxed the solicitors' instruction fee at €187,000, the instruction fee had been claimed in the amount of €235,000 plus V.A.T. In doing so, Taxing Master Flynn noted that the applicant had revised upwards its range for the appropriate instruction fee from €70,000/€95,000 to €110,000/€115,000. He directed that a further interim payment should be made, bringing the amount paid against the instruction fee up to €115,000, the upper amount of the figure the applicant accepted constituted the appropriate range.

6. Both sides lodged objections to the ruling by Taxing Master Flynn and a further oral hearing took place on 5th December, 2011. The matter was next back before Taxing Master Flynn on 20th December, 2011, when he indicated that he was not going to change his ruling as no new evidence or arguments had been presented to him.

7. At this stage, a degree of confusion enters the picture. The solicitor for the applicant, who was not present for the listings before Taxing Master Flynn on 5th December, 2011, and 20th December, 2011, states that both parties "sought a reasoning" from the Taxing Master and that the Taxing Master Flynn indicated a written judgment would be forthcoming. However, the recollection of the solicitor for the notice party, Mr. Dunleavy, differs. He says that after the applicant lodged his objection on 9th November, 2011, there was discussion about a written judgment, but that while the Taxing Master indicated that he hoped to deliver a written judgment, he did not commit himself to delivering one. Mr. Dunleavy says that for his part, at the conclusion of taxation, he was not expecting a written judgment.

8. A matter of central significance to this controversy is that the Taxing Master was scheduled to retire and did, in fact, do so on 21st December, 2011, the day following his decision not to amend his ruling.

9. The applicant did not take up a final Certificate of Taxation at that stage. The applicant says that the confusion to which I have referred was compounded by a lack of agreement between the parties in relation to the exact nature of deductions and awards made. It appears that there was some uncertainty as to whether the figure taxed by Master Flynn at €187,000 was inclusive of a fee

attributable to a period of five days spent in the Four Courts when the case was listed for hearing but was not called on, and there was also a question about the costs of two motions. However, any uncertainty may have been more apparent than real, in that Taxing Master Flynn had indicated, at the initial taxation, that the amount he was taxing was inclusive of what has been described as waiting around time. Furthermore, the solicitor for the notice party has indicated in correspondence that he was prepared to forego the motion fees.

10. The applicant's advisors proposed that the matter should be brought before the respondent, Taxing Master O'Neill, to give such directions as he regarded as appropriate, but this was to be without prejudice to the rights of either party to review the matter.

11. The matter was listed on numerous occasions in 2012. Eventually, on 30th October, 2012, the applicant's advisors applied for an extension of time within which to have the matter reviewed by the High Court. Taxing Master Mulcahy refused to extend time on the grounds that there was no decision for the High Court to review. Mr. Dunleavy deals with this aspect in his affidavit in the following terms:

> "I say that the case came before Master Mulcahy on 24th April, 2012, and on that date Master Mulcahy indicated her view *inter alia* that because Master Flynn did not give a written ruling after hearing objections, that the taxation process was lacking, and that there was nothing for the High Court to review even if so wished by the parties. Master Mulcahy ruled that the applicant was out of time for seeking a review anyway."

12. On that occasion, Taxing Master Mulcahy decided that the entire Bill of Costs should be taxed again.

13. However, on 9th November, 2012, when the *de novo* hearing was listed, the hearing was discontinued because some material, regarded as inadmissible or inappropriate, was introduced, thus causing Taxing Master Mulcahy to recuse herself.

14. The matter then came before the respondent, Taxing Master O'Neill. On the second day that the matter was before him, on 25th June, 2013, he took the view that without an order from the High Court directing a *de novo* hearing, he did not have jurisdiction to deal with the matter. In these circumstances, the applicant's advisors made an application to extend the time for review which was resisted by the notice party. Having considered this issue on 8th July, 2013, the respondent permitted a late review up to 31st July, 2013.

15. The applicant did not proceed with the review, but instead has sought to judicially review the decision of the respondent not to proceed with a further hearing.

16. The respondent has not taken an active part in these proceedings. However, in a letter to the parties, dated 28th February, 2014, Mr. Dan O'Neill, Registrar to the respondent, provided the parties with certain information. In that letter, Registrar O'Neill stated that he was advised that Taxiing Master Mulcahy, in deciding to enter upon taxation of part of the bill *de novo*, was not aware that former Taxing Master Flynn had endorsed his final determination of the objections to his initial taxation on the original Bill of Costs and that Bill of Costs had not been placed before Taxing Master Mulcahy and, accordingly, there was no evidence of a determination having been made in relation to the notice party's objections. This, the letter stated, was the crucial element which enabled Taxing Master Mulcahy to enter upon a process which it appeared had not been concluded.

17. The letter went on to state that when declining jurisdiction, the respondent made it clear to the parties that he did not possess jurisdiction to set aside a determination of a Taxing Master, such function being reserved to the High Court. The respondent made it clear that, in his view, if a notice of motion to review the taxation was issued (he extended time in that regard), the High Court would, in all probability, have no difficulty, in the circumstances of the case, setting aside the previous determination of Taxing Master Flynn and ordering a taxation *de novo* of the relevant costs.

18. The respondent, according to the letter, made it clear to the parties that he had fully read and considered the plaintiff's solicitors' file and papers and would be in a position to proceed with the matter pursuant to an order of the High Court. However, given that no such order had been sought or obtained, the taxation process was concluded when the Certificate of Taxation was signed by the respondent on 13th August, 2013.

19. The reference to the endorsement on the original Bill of Costs is to the fact that in what appears to be the handwriting of former Taxing Master Flynn, there appears the words "[d]isallow objections & affirm taxation". The note is dated 20th December, 2011, and it is initialled by former Master Flynn. Central to the question of whether the decision of the respondent should be quashed, is to identify with precision what transpired before Master Flynn. The fact that Master Flynn brought the parties before him on his second last day of service, told the parties that he would not alter his earlier decision on the taxation of the instruction fee, and made the notation on the Bill of Costs, is consistent only with the situation where Taxing Master was giving a final ruling.

20. The situation that has developed is an unfortunate one. There is no doubt that any review of the decision of Master Flynn will be made more difficult by the absence of a written decision. However, the question is whether, in the absence of a written decision or the furnishing of detailed reasons, the decision of Master Flynn is rendered so flawed that the respondent was obliged to treat what occurred before his colleague as a complete nullity.

21. In my view, there is no basis for suggesting that one Taxing Master can quash or set at nought the decision of another. Master Mulcahy was incorrect insofar as she might be regarded as having taken a view that the deficiency in Master Flynn's decisions were such that she could regard it as having no effect, as was her decision not to consider extending time for review because of a belief that there was no decision to review. In fairness to her, it may be that she had not actually formed that view and that she was acting as she did without sight of the notation made by Master Flynn on the Bill of Costs.

22. The situation, as I have already said, is an unfortunate one. The amount claimed by way of instruction fee, and the amount actually allowed, in a case that settled for €50,000 was a substantial one and, it must be said, unusual.

23. I am not concerned, in the course of these judicial review proceedings, with identifying what would be the appropriate amount to allow by way of an instruction fee. However, counsel for the notice party has taken the opportunity to point out, with some force, that the case was an unusual one which required the solicitor involved to invest huge amounts of time and effort over a 12-year period. I acknowledge that the case may very well have been a difficult and unusual one. The plaintiff had pre-existing difficulties and a key element of the bullying and harassment alleged involved a theatrical production which is alleged to have depicted him as a sexual predator, so certainly not a run of the mill case. Information on the fees charged by the solicitor for the notice party, which was provided to Master Flynn, would suggest that this was far from a routine personal injuries case that settles for €50,000. Again, the fact that the case was called on for hearing for two weeks would support the view that this was far from an ordinary case. While

fully acknowledging all of that, it seems that this was a case where the paying party would have a keen interest in knowing why it was being called on to pay that amount, whether that amount was reasonable and whether there was a realistic prospect of securing a reduction on review.

24. Order 99, r. 38(2) of the Rules of the Superior Courts contemplates that a decision may be given in cases where the parties do not require a written statement of reasons and that it will be effective nonetheless. It is in these terms:

> "Upon such application the Taxing Master shall reconsider and review his taxation upon such objections, and he may receive further evidence in respect thereof, and, if so required by any party, he shall state in writing the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto. The Taxing Master may, if he thinks fit, tax the costs of such objections and add them to or deduct them from any sum payable by or to any party to the taxation." [Emphasis added]

The rule contemplates that there may be cases where no party requires that the Taxing Master should state in writing the grounds and reasons for his or her decision.

25. Furthermore, O. 99, r. 38(3) of the Rules of the Superior Courts makes provision for a 21-day time period for the initiation of a High Court review. That 21-day period runs from the date of the determination of the hearing of the objection. The date of determination and the date on which reasons will be furnished will not necessarily be the same, and reasons may be given later, but the determination itself is effective to start the clock ticking.

26. The provisions of O. 99, r. 38(2) and (3) of the Rules of the Superior Courts lend further support to the view that what occurred on 20th December, 2011, was the taking of a concluding step by Master Flynn which was not amenable to review by a fellow Taxing Master.

27. There is further reason why, in my view, this is an inappropriate case for judicial review. An alternative, more appropriate, and, in all likelihood, cheaper remedy, has been provided by O. 99, r. 38(3) of the Rules of the Superior Courts. In that regard, it is of particular significance that the respondent, having made the decision that he did on 25th June, 2013 and which is now the subject of this challenge, went on to extend the time for an application pursuant to O. 99, r. 38(3) to 31st July of that year.

28. The question of whether judicial review is an appropriate remedy when an alternative remedy exists has been considered by the courts in many different contexts. In this case, the alternative remedy provided is a review by the High Court. In my view, turning one's back on the remedy specifically provided by the Rules of the Superior Courts would ordinarily be sufficient grounds on which to dispose of the matter. The only reason why I am not adopting that position is that in a situation where the applicant had at one stage sought to go down that route but had been dissuaded, and, indeed, prevented from doing so by Taxing Master Mulcahy, it would be harsh to allow the existence of an alternative remedy decide the case.

29. I understood counsel for the applicant to indicate that if it was not possible to quash the decision of the respondent that the applicant would wish, even at this time remove, to have a review of the decision of Master Flynn. The fact that an extension of time was offered but not acted upon does not assist the applicant. Nonetheless, the fact that the applicant has been required to pay very substantial, even unusually substantial, sums without details of how the figures have been determined, leans heavily in favour of allowing a review pursuant to O. 99, r. 38(3), notwithstanding the passage of time.

30. However, the court must not lose sight of the legitimate interests of the notice party. On foot of the interim ruling of Master Flynn, an amount of €159,440.25 was paid to the notice party. On 2nd November, 2011, Master Flynn gave an oral direction in relation to a further interim payment. Master Flynn did not sign interim certificates at that stage, but that was because the representative of the applicant indicated that a further payment in the amount of €61,341.15, which was the amount being sought at that stage, would be paid without the necessity for lodging interim certificates. The payment in question was eventually made, though not in accordance with the promised timetable. Had Master Flynn provided interim certificates, and the only reason that he did not was that it was indicated by the applicant that this was unnecessary, the provisions of O. 99, r. 38(3) of the Rules of the Superior Courts would have been relevant. The relevant sentence of that rule was as follows:

> "All interim certificates of the Taxing Master shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid and save as provided by this rule, the Taxing Master shall not be at liberty, after a certificate is signed, to review his taxation or amend his certificate, except to correct a clerical or manifest error before process for recovery or payment of the costs."

31. The interim payments that have been made were on the basis of an acceptance by the applicant, or at least an acquiescence on the part of the applicant, that an instruction fee of €115,000 was not inappropriate. It seems to me that it would not be just or equitable if the applicant could now seek to resile from what had previously been conceded, perhaps seeking to avail of a changed climate in relation to taxation of costs. In circumstances where monies have long since been paid, and no doubt dispersed in large measure, it would be unfair if the applicant was allowed re-open matters with the possibility, at least in theory, of the notice party's solicitor being called on to repay portion of the monies that had been paid to him, something that he could never have expected.

32. Accordingly, while I am prepared, even at this late stage, to extend time pursuant to O. 99, r. 38(3) of the Rules of the Superior Courts, it would be a condition of doing so that an undertaking is provided by the applicant that there will be no question of seeking to re-open matters dealt with by way of interim payments, and no question of the notice party being called upon to make any repayment. Unless that undertaking is forthcoming, time will not be extended.

33. In summary, the application for judicial review fails and I am refusing the relief sought by way of judicial review. However, I will extend the time for seeking a review of the decision of Master Flynn, subject to the undertakings to which I have referred being forthcoming.