Neutral Citation: [2017] IEHC 198

THE HIGH COURT

[2014 No. 191 SP]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 327 OF THE SOCIAL WELFARE CONSOLIDATION ACT 2005

BETWEEN

THE NATIONAL MUSEUM OF IRELAND

APPLICANT

AND

THE MINISTER FOR SOCIAL PROTECTION

RESPONDENT

AND

LORNA BARNES

NOTICE PARTY

JUDGMENT of Ms. Justice Murphy delivered on the 27th day of March, 2017.

1. This costs application arises from the Court's judgment in the above matter delivered on 7th March, 2016 in which the respondent's decision on the employment status of the notice party was set aside and the issue of her status was remitted to the SCOPE section of the Department of Social Protection for further consideration. There were three issues before the Court for determination. The first was whether the notice party's employment status was *res judicata* as a consequence of a prior decision of a rights commissioner that the notice party was not an employee of the applicant. The second issue raised in the alternative by the applicant was a want of fair procedures and in particular the respondent appeals officer's f ailure to have regard to all of the relevant evidence placed before him and his failure to give reasons for his decision. The third issue raised by the applicant was the breach of the principle of *audi alteram* partem arising from the failure to allow the applicant address a matter of evidence to which the appeals officer had material regard in arriving at his decision.

2. For the reasons set out in its earlier judgment the Court held against the applicant on the question of *res judicata* on the basis that it did not arise on the facts of the instant case, but held in favour of the applicant both on the issue of fair procedures and the failure to comply with the principle of *audi alteram partem* in respect of material evidence.

3. The applicant now seeks an order that the costs of these proceedings be awarded against the respondent. The respondent has submitted that there should be no order as to costs in circumstances where the applicant failed on one issue before the Court while succeeding on the alternative claim. The notice party seeks her costs essentially on the grounds that her presence and participation was necessary both to ensure prompt disposal of the matter and to protect her position *vis-à-vis* the applicant.

Actions in which both parties are emanations of the State

4. Both the applicant and the respondent are emanations of the State and the Court requested the parties to address it on the relevance of that fact for the Court's decision on costs. In recent decades the State has devolved functions previously administered directly by the State to a multiplicity of statutory agencies. A perhaps unintended, by-product of this policy is the phenomenon of statutory agencies suing the State or each other in expensive litigation before our courts. In such cases the costs of both state parties are ultimately paid from the public purse regardless of the outcome of the litigation. Unlike private litigants, these state parties do not have the concern that if unsuccessful in litigation, they will be saddled with costs which will have to be met from their own resources. In private litigation the prospect of a hefty costs order is a potent incentive to reasonableness, both in the conduct of litigation and in the settlement of actions. Such incentive is entirely absent where the competing parties know that whatever the outcome of the action their costs will be met from the public purse. This strikes the Court as being an undesirable state of affairs both because of the burden placed on the public purse and the burden placed on the resources of the courts. Intra-state disputes should be resolved by the State and one arm of the State should not be suing another arm of the State in our courts. The fact that this occurs demonstrates, in the Court's view, a lack of proper governance.

The law

5. The applicant has made cogent submissions on this issue. Having reviewed the jurisprudence on costs including *Grimes v. Punchestown Developments Company Limited* [2002] 4 I.R. 515, *Dunne v. Minister for the Environment* [2008] 2 I.R. 775 and *Godsil v. Ireland* [2015] IESC 103 the applicant set out what it claims to be the core principles in relation to costs as follows:-

> (a) The successful party in proceedings will normally be entitled to the costs of bringing those proceedings. This is the general rule and all other rules are subordinate to, or are informed by, the general rule.
>
> (b) A successful party in proceedings has a legitimate entitlement to expect that it will recover the costs of those proceedings. This expectation is an equitable one and should only be departed from where justice demands it.
>
> (c) It is possible to depart from the general rule where "*special circumstances*" exist.
>
> (d) A decision to depart from the general rule may only be exercised on a reasoned basis stating the reasons for doing so.
>
> (e) The parameters of special circumstances are not fixed, however in order to exist there must be a difficulty, a complexity or an impossibility in following the general rule.
>
> (f) The burden of proof in demonstrating the existence of such special circumstances, rests on the party seeking to depart from the general rule.

This seems to the Court to be an accurate summary of the current jurisprudence on this issue.

6. Having outlined the general rule that costs follow the event, the applicant poses the question whether the fact that both the applicant and the respondent are emanations of the State might amount to a "*special circumstance*" so that the general rule might be departed from. The applicant submits that it is not on the following basis:-

7. The applicant is an independent body corporate established pursuant to the provisions of the National Cultural Institutions Act 1997. Its funding comes overwhelmingly from the State by means of a grant from the Department of Arts, Culture and the Gaeltacht. The National Museum of Ireland is responsible for operating five museum sites nationwide. It points out that since 2008 the value of its state grant has diminished from almost €19 million a grant a little in excess of €11 million in 2016. The applicant maintains that were it deprived of what it asserts to be its entitlement to costs then it would have an unwarrantedly negative effect on its annual budget and the independent statutory functions which are part of its remit. The Court observes that that is something that should have been factored into its decision to challenge the ruling of the appeals officer in the first place.

8. It has also been submitted on behalf of the applicant that the decision making process of an appeals officer in the Department of Social Welfare and Protection is a statutory one and the fact that the applicant is an emanation of the State places it in no different position to that of any other private person or company in the State. The applicant trenchantly summarises its submission at para. 24 of its submissions:-

> *"In this context it should be noted that it is by no means unique that one emanation of the State should find itself in opposition to a decision of another emanation of the State or indeed that such differences may end in litigation. This is a natural and perhaps unavoidable consequence of the fact that specific statutory bodies are established in order to discharge functions of a public nature on behalf of the people of the State. Where such independent bodies are established the potential for conflict between different bodies will always exist. Notwithstanding this there is no statutory mechanism by which the costs or expenses incurred by those bodies can be set off or otherwise credited against the fact that both are emanations of the State. Absent such a system, it is not a matter for the Court to devise one".*

In support of this submission the applicant cited Murray C.J. in *Dunne v. Minister for the Environment* at para. 26 where he held that:-

> *"If there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation since it is not for the Courts to establish a cohesive code according to which costs would always be imposed on certain successful defendants for the benefit of certain unsuccessful plaintiffs."*

The applicant submits that the observation of Murray C.J. in *Dunne* applies with equal force to the point raised in this case. It submits that it is not the function of the courts to devise a method for equalising or setting off costs incurred by the State as to do so would ultimately be a matter for legislation. In fact, it submits, no such policy or principle has been enacted nor is it possible to point to any legal precedent for the implementation of such a policy. It submits that the respective rights and obligations of the applicant and respondent as separate legal entities must be adjudicated upon on the basis that they are and were at all material times distinct entities and that accordingly the status of the applicant and the respondent *vis-à-vis* the State is not a special circumstance that would displace the normal rule that costs follow the event.

9. The submissions of the respondent on this issue were not helpful to the Court. The submissions offer nothing other than to state that there is little authority on the issue. They refer to the decision in *CA & Anor. (costs) v. Minister for Justice & Equality & Anor.* [2015] IEHC 432 in which MacEochaidh J. refused to award costs to the State against a largely unsuccessful but impecunious litigant. That case is not germane to this issue.

Decision

10. While the Court remains of the view that it is undesirable that public funds and public resources be expended on the resolution of disputes between state bodies/agencies, the Court is compelled on the authorities to hold that the resolution of the issue is a matter for the executive and the legislature. Until such time as the executive and legislature see fit to enact an alternative method of dispute resolution among state agencies or to debar state agencies from suing each other within our courts, independent statutory bodies will continue to have an entitlement to sue each other in our courts with the entire cost being met from the public purse. As matters stand, the status of the parties to the litigation does not amount to a special circumstance such as would allow the Court to depart from the general rule.

Application of general rule on costs

11. It follows from the Court's decision above that the costs in this case fall to be determined according to the normal rule that costs follow the event in accordance with O. 99 r. 1(4) of the Rules of the Superior Courts.

12. The applicant argues that when one examines the case overall it is abundantly clear that the applicant has won and the respondent has lost and that any other construction of the matter is untenable. It submits that notwithstanding the fact that it lost on the issue of *res judicata* this is not a case in which a split order as to costs is appropriate. It suggests that the matter of *res judicata* formed a very small part of the preparatory work in the case. This is not surprising since it is a matter for legal argument on the facts.

13. The respondent submits that there should be no order as to costs on the basis that the Court's decision on *res judicata* is "*an event*" in which it was successful and that its entitlement to costs in respect of that event should be set off against the applicant's entitlement to costs in respect of the other issues. The respondent relies on *Veolia Water v. Fingal County Council (No. 2)* [2007] 2 I.R. 81 at p. 85 where Clarke J. states:-

> *"…the overriding starting position should remain that costs should follow the event. Parties who are required to bring a case to court in order to secure their rights are, prima facie, entitled to the reasonable costs of maintaining the proceedings. Parties who successfully defend proceedings are, again prima facie, entitled to the costs to which they have been put in defending what, at the end of the day, the court has found to be unmeritorious proceedings."*

The respondent states that in determining which "*event*" to follow the Court can in appropriate cases consider each issue raised, in accordance with O. 99 r. 1(4). The respondent contends that the applicant was unsuccessful on its main argument which the respondent suggests took up the majority of court time being the *res judicata* issue. The respondent also points to unnecessary prolixity of grounds where the applicant abandoned 17 of the pleaded 42 alleged errors on the first morning of the hearing.

Decision on costs

14. The Court is satisfied that the gravamen of the applicant's claim was that the deciding and appeals officers in the SCOPE section had erred in law in determining that the notice party was in insurable employment. In maintaining that position, one argument advanced was that the issue was *res judicata* based on a prior decision of the rights commissioner service. That attack on the legal validity of the appeals officer's decision was unsuccessful but an alternative attack based on fair procedures and *audi alteram partem* was successful. On the core issue of the lawfulness of the decision the applicant succeeded. As such it is entitled to its costs.

15. That said, a significant part of the hearing (though not the majority of it as suggested by the respondent) was taken up with the plea of *res judicata* upon which the applicant failed. The first two reliefs sought in its special summons were:-

> *(i) An order that the employment status of the Notice Party was determined by the decision of the Rights Commissioner Service dated 28 September 2012;*
>
> *(ii) An order that the Respondent is bound by the decision of the Rights Commissioner Service dated 28 September 2012 and that the Notice Party is estopped from seeking to revisit the issue determined therein;*

Indeed as is clear from the special summons, the other reliefs were claimed as an alternative to that primary relief. The Court can confirm having had the DAR checked, that of a total hearing time of 370 minutes, 90 minutes of legal argument and submission related to *res judicata*. Again quoting Clarke J. in *Veolia Water* at para. 2.14:-

> *"The fact that such an additional issue was raised should only affect costs where the raising of the issue could, reasonably, be said to have affected the overall costs of the litigation to a material extent."*

It appears to the Court that the fact that a quarter of the hearing time of this case was spent on an issue on which the applicant was unsuccessful can reasonably be said to have affected the overall costs of the litigation to a material extent. For that reason and because of the abandonment by the applicant of 17 grounds of alleged error on the morning of the hearing the Court proposes to reduce the costs order in favour of the applicant by 25%.

Costs of the notice party

16. The notice party was joined to the proceedings by the applicant. It is her status that is at the core of the dispute between the applicant and the respondent. The applicant contends that at all material times she was a contractor with the National Museum of Ireland. The respondent, on the notice party's application, had held that for most of her time working in the National Museum of Ireland she was an employee in insurable employment. The outcome of this application was clearly of direct concern to the notice party as it affects her rights into the future.

17. The very fact of the challenge to the respondent's determination left her in limbo since 2014 when the applicant's challenge was initiated. In an affidavit filed in respect of the issue of costs she avers that she intervened to ensure a prompt hearing and to protect the finding of the respondent in her favour. Those two matters of themselves might not have persuaded the Court to grant a costs order in her favour. Inherent in her application to the SCOPE section was the potential that any determination would be subject to an appeal to this Court by the applicant. The Court also takes into account that in deciding to initiate that application she abandoned an appeal to the Labour Court of the decision of the rights commissioner service that she was a contractor and not an employee. In the circumstances, a decision in her favour by the respondent was always likely to give rise to an appeal on a point of law to this Court.

18. What persuades the Court to grant a partial costs order in her favour is the plea by the applicant that her employment status was *res judicata*. Had that plea been upheld it would have had a severely detrimental impact on the notice party's interests. She would have been fixed with the earlier finding of the rights commissioner service that she was a contractor and would have been debarred from pursuing any claim that she was in insurable employment for the relevant period. That plea alone justifies her participation in the proceedings. It is a plea that is extraneous to the appeal process envisaged in the Social Welfare Consolidation Act 2005. The Court having already determined that the hearing of the issue of *res judicata* took 25% of the hearing time, it appears to the Court to be appropriate that the notice party should be awarded 25% of her costs. As her participation is deemed appropriate and necessary, because of the unsuccessful plea of *res judicata* by the applicant it follows in the Court's view that in accordance with the principle that costs follow the event, the applicant should be responsible for the notice party's costs.