

THE HIGH COURT

JUDICIAL REVIEW

2019 No. 83 J.R.

BETWEEN

STUDENT A.B.

(A MINOR SUING BY HIS FATHER AND NEXT FRIEND C.D.)

APPLICANT

AND

THE BOARD OF MANAGEMENT OF A SECONDARY SCHOOL

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 21 June 2019.

INTRODUCTION

1. This supplementary judgment addresses the question of which party should be liable for the costs of these judicial review proceedings. The applicant is a student in a fee-paying secondary school ("*the student*"). The student, through his next friend, had sought to challenge disciplinary proceedings which had been taken against the student arising out of his alleged possession and supply of a controlled drug on the school premises. The substantive hearing took place over three days in April 2019. Judgment was delivered on 17 April 2019. See *Student A.B. v. Board of Management of a School (No. 1)* [2019] IEHC 255 ("*the principal judgment*").

2. The application for judicial review was dismissed in its entirety. In brief, the application was refused for the following reasons. First, the statutory right of appeal under section 29 of the Education Act 1998 represented an adequate alternative remedy to judicial review. Secondly, the application for judicial review was, in any event, premature in circumstances where the disciplinary process was still in train, and no substantive hearing had yet taken place before the board of management.

3. Notwithstanding this outcome, leading counsel on behalf of the student has applied to have at least part of the student's costs paid by the school. This application is predicated on an argument that the student obtained a benefit from the proceedings. Specifically, it is said that, at the eleventh hour, the school conceded an important point of principle in relation to the interpretation of the school's code of behaviour. This point of principle concerned the question of whether expulsion was *automatic* where a student was found to have supplied illegal drugs to other students in the school even in the case of a first-time offence. A proper understanding of this argument requires careful consideration of the relevant provisions of the code of behaviour. For introductory purposes, however, it is sufficient to note that the student's position is that the student should be regarded as having won this "event". This, it is said, is sufficient to trigger an entitlement to an order of costs by reference to the general rule that costs follow the event.

4. For the reasons set out herein, I cannot accept this argument. It would be inconsistent with the rationale of the principal judgment to hold that the student had been *justified* in instituting the proceedings, and that this should be reflected in even a partial order for costs in his favour. The entire thrust of the principal judgment is that the student should not have brought judicial review proceedings at the time that he did.

DISCUSSION

5. The disciplinary process, the subject-matter of the judicial review proceedings, had been carried out pursuant to the school's code of behaviour. This code of behaviour is modelled, in large part, on guidelines issued by the (former) National Education Welfare Board pursuant to section 23 of the Education (Welfare) Act 2000 ("*the NEWB Guidelines*"). One of the complaints made by the student is that the code of behaviour is ambiguous. This, it is suggested, has arisen from the fact that the school failed to appreciate that the NEWB guidelines set out various alternatives, and that the school mistakenly included all of these in its own code of behaviour.

6. One issue of particular concern to the student was in respect of the requirement for "automatic expulsion" where a pupil has been found to have supplied illegal drugs to other pupils in the school. The student contended that it was unclear as to whether the requirement for "automatic expulsion" applied even to a first offence.

7. A proper understanding of this argument requires careful consideration of the relevant provisions of the code of behaviour. The key provisions are the rules in respect of "automatic expulsion" and "expulsion for a first-time offence", respectively. The provisions can be summarised as follows. (I have omitted the numbering and some of the idiosyncrasies of the school's code of behaviour lest reference to same might inadvertently allow the school to be identified).

Grounds for expulsion

Expulsion will be a proportionate response to the student's behaviour, it is recognised that is a very serious step.

A student may be expelled where

1. The student's behaviour is a persistent cause of significant disruption to the learning of others or to the teaching process and
2. The student's continued presence in the school constitutes a real and significant threat to safety
3. The student is responsible for serious damage to property.

Automatic expulsion

The Board of Management has decided as part of the School's policy on sanctions, and following the consultation process

with the principal, parents/guardians, teachers and students, that particular named behaviours incur expulsion as a sanction as follows:-

1. supplying illegal drugs to other students in the school
2. sexual assault

The Board of Management will follow due process and fair procedures.

Expulsion for a first offence

There may be exceptional circumstances where the Board of Management form of the opinion that a student should be expelled for a first offence. The kinds of behaviour that might result in a proposal to expel on the basis of a single breach of this Code could include:

1. A serious threat of violence against another student or member of staff
2. Actual violence or physical assault
3. Supplying illegal drugs to other students in the school
4. Sexual assault.

8. A detailed list of the range of factors which can be taken into account in deciding whether to expel a student are set out under the next rule. These include *inter alia* the nature and seriousness of the behaviour; the context of the behaviour; the impact of the behaviour; and the interventions tried to date.

9. The solicitor acting on behalf of the student, in pre-litigation correspondence sent to the school, highlighted the fact that there appears to be inconsistency between the two rules summarised above. The first rule appears to suggest that the expulsion of a student is automatic in the case of a finding that the student has supplied illegal drugs to other students in the school. However, the next rule appears to envisage that, in the case of a first offence, the board of management would have to consider the various factors identified and that any decision to expel would have to be proportionate.

10. The student, through his solicitors, sought to clarify the position in relation to first-time offences of supplying illegal drugs. Prior to the institution of the proceedings, the correspondence rested with a letter dated 6 April 2019 from the school. The school's position was put as follows:

"As expressly stated in the code and previously advised, due process and fair procedures apply in such circumstances and, prior to any proposal to expel, the Board of Management undertakes a detailed review of factors including those set out at paragraph 26.7 of the code that are relevant and appropriate to the particular circumstances. The Code of Behaviour makes specific provision for expulsion for a first offence and for an automatic expulsion, these are not mutually exclusive as your letter appears to suggest. In each case, the Board will consider each of the factors in order to determine whether it is applicable in a particular case, in a case in which expulsion for a first-time offence and an automatic expulsion applies, the interventions tried to date and whether expulsion is a proportionate response, will not be applicable."

11. The *ex parte* application for leave to apply for judicial review was made on the following Monday. The hearing of the proceedings was expedited, and the matter came on for hearing before me on 11 April 2019. On the eve of the hearing, the solicitors acting on behalf of the school wrote in to the solicitors acting on behalf of the student. This letter confirmed that the school would not apply the rule in relation to automatic expulsion.

DECISION

12. The argument that the student should be awarded at least part of his costs is advanced on the basis that the concession made by the school in relation to the "automatic expulsion" rule represents an "event" for the purposes of costs.

13. The general position under Order 99 of the Rules of the Superior Courts is that costs follow the event. Normally, this will involve the court having made a finding in favour of one of the parties on an issue as part of its formal determination of the proceedings. In principle, however, the fact that a party had conceded a point at an earlier stage, with the consequence that the court did not have to adjudicate on the point, is something which can be taken into account for the purposes of a costs ruling.

14. Leading counsel for the student makes an attractive argument that one consequence of the student having issued these proceedings is that he secured a benefit, in terms of a concession on the part of the school as to the non-applicability of the rule requiring automatic expulsion. Whereas the making of this concession meant that it was not necessary for the court to adjudicate on this issue, counsel argues cogently that it is nevertheless a benefit of the proceedings and should be taken into account in determining liability for costs.

15. With respect, such an approach would be inappropriate in the present case for the following reasons. It would be inconsistent with the rationale of the principal judgment to hold that the student had been *justified* in instituting the proceedings, and that this should be reflected in even a partial order for costs in his favour. The entire thrust of the principal judgment is that the student should not have brought judicial review proceedings at the time that he did. The student should instead have engaged with the disciplinary process and awaited a decision by the board of management of the school. If dissatisfied with that decision, the student should have invoked his statutory right of appeal under section 29 of the Education Act 1998 as an alternative remedy to judicial review.

16. The self-same logic applies to the argument in respect of the interpretation of the rule on automatic expulsion. Had this issue not been the subject of a concession on the part of the school, but had instead been pursued at the hearing in April 2019, this court would have declined to deal with the merits of the argument for the same reasons as the judicial review proceedings were dismissed. The rationale of the principal judgment is that the student should have engaged with the board of management on all issues, including the "automatic expulsion" issue, and should not have resorted to legal proceedings at that time. To make a costs award in favour of the student would be entirely inconsistent with the principal judgment. This is because an order of costs would involve an implicit acknowledgment that the student had been right to bring the proceedings.

17. I am satisfied, therefore, that no order of costs should be made in favour of the student. Instead, the normal costs rule applies, namely that costs follow the event. In circumstances where the judicial review proceedings were dismissed in their entirety, the school as respondent is entitled to its costs. As no single issue was resolved in favour of the student, this is not a case where an apportionment of costs of the type envisaged by *Veolia Water UK Plc v. Fingal County Council* [2007] 1 I.R. 69, is required.

PROPOSED ORDER

18. I propose to make an order directing that the applicant herein do pay to the respondent school the costs of the within proceedings (with the exception of the costs of the interlocutory injunction application which are the subject of a separate order made by Barrett J.). Such costs to include the costs of the written legal submissions and all reserved costs. In default of agreement, the costs are to be taxed.

19. A stay will be imposed on the costs order pending the determination of the applicant's appeal to the Court of Appeal (Appeal 2019 No. 227).