THE HIGH COURT

[2017 No. 196SP]

IN THE MATTER OF SECTION 47 OF THE TEACHING COUNCIL ACTS 2001 - 2015 AND

IN THE MATTER OF A REGISTERED TEACHER AND

ON THE APPLICATION OF THE TEACHING COUNCIL OF IRELAND

BETWEEN

TEACHING COUNCIL OF IRELAND

APPLICANT

AND

MP

RESPONDENT

JUDGMENT of Mr. Justice Kelly, President of the High Court delivered on the 15th day of December, 2017.

Introduction

1. This judgment deals with an application for costs sought against the applicant (the Council). The respondent (MP) seeks those costs in respect of an application made by the Council pursuant to s.47 of the Teaching Council Acts (2001-2015) (the Act) to suspend his registration as a teacher. It is the first time that such an application has been made.

2. Section 47 insofar as it is relevant provides:-

> *"(1) Where the Council is satisfied that it is in the public interest, the Council may, in relation to a registered teacher, apply to the High Court for an order that during the period specified in the order his or her registration shall be suspended.*
>
> *(2) An application under this section may be made in a summary manner and shall be heard otherwise than in public.*
>
> *(3) The High Court may, on an application being made to it under this section, make such interim or interlocutory order (if any) as it considers appropriate.*
>
> *(4) Following a decision under this section by the High Court, the Council shall, as soon as practicable, by notice in writing, inform the teacher, the Minister and, where the teacher is employed as a teacher, his or her employer, of the decision."*

3. In order to understand how the application comes to be made it is necessary to set out the background to the case.

Background

4. The Council is a statutory body established under the Act. It exercises regulatory functions over teachers. For that purpose it maintains a register of teachers. MP is a teacher registered on the register.

5. On 21st March, 2017 the Council received a complaint from the headmaster of the school where MP had been employed. The complaint related to allegations made by two students in respect of the conduct of MP.

6. Student A alleged that he had been drinking one evening with MP. He alleged that during the evening MP made a sexual advance towards him. He also alleged that both he and student B had been brought by MP to his private home for a weekend on three occasions. Student A also alleged that he drank alcohol on a regular basis and also smoked "weed" with MP.

7. Student B made his own separate allegations that he regularly drank substantial quantities of alcohol and smoked "weed" in MP's house. He alleged that this occurred at least three times per week.

8. Student A declined to make a complaint against MP when requested to do so by the Garda.

9. Once these allegations were made to the school authorities they took action. MP was suspended on full pay pending the outcome of an investigation to be conducted by the school.

10. The actual complaints of the students were much more detailed than what I have set out but it is not necessary to recite that detail for the purposes of this judgment.

Disciplinary hearing

11. MP's employer, having suspended him on full pay on 29th November, 2016 proceeded to a disciplinary hearing which took place on 22nd December, 2016. MP attended that hearing and made submissions. In all, seven allegations against MP were considered by the disciplinary hearing.

12. Four allegations were found to be substantiated and findings were made that each of those allegations constituted gross misconduct on the part of MP. One allegation was not upheld. There was insufficient information on the other two allegations to make a finding.

13. MP, having been found to be guilty of gross misconduct, was dismissed with immediate effect.

14. On foot of the findings the headmaster made a formal complaint to the Council on 21st March, 2017.

Action by the Council
15. Ten days later, MP was written to and informed that a meeting of the Executive Committee of the Council would be held on 10th April, 2017 where consideration would be given to an application being made to this court to suspend him from the register of teachers pursuant to s.47 of the Act.

16. At MP's request the meeting of 10th April, 2017 was adjourned until 24th April, 2017. An undertaking not to teach during the period of adjournment was given by MP.

17. On 24th April, 2017 the Council's Executive Committee (to which the Council's function of deciding whether to apply to the High Court under s.47 of the Act had been delegated) met. MP did not attend but was represented by solicitors.

18. The Executive Committee of the Council had before it the complaint from the headmaster of the school together with supporting documentation which included copies of statements from students A and B as well as statements provided by MP to the school during its disciplinary investigation. Some admissions were made by MP in the course of those statements but not in respect of the most serious aspects of the allegations.

19. Written and oral submissions were made to the Executive Committee of the Council and an undertaking was proffered by MP that he would not teach in any recognised school for the following three months in order to allow the Council's Investigation Committee time to undertake its investigation.

20. Having regard to the material before it, the Executive Committee, notwithstanding that undertaking, decided that it was appropriate to make an application to this court pursuant to s.47 of the Act.

21. It is common case that the Council's director did not contact either student A or student B in advance of the s.47 application.

These proceedings
22. On 28th April, 2017 these proceedings were commenced. They were made returnable for 8th May, 2017 and came on for hearing on 16th May, 2017.

23. On that occasion MP offered a voluntary undertaking in the following terms to the court.

> *"(1) Not to teach or seek to teach in any school, recognised or otherwise, whether in this jurisdiction or in any member state of the European Union;*
>
> *(2)To consent to the applicant making a notification of the terms of this order to the relevant bodies (competent authorities) identified under the EU Directive 2005/36/EC, as amended by Directive 2013/55/EU."*

24. That undertaking was acceptable to the Council and the court and was given until further order of the court.

25. Legal argument took place concerning the entitlement of the Council to notify the complainant to it, i.e. the school, of the undertaking so given. I determined that there was no entitlement to notify the complainant since it was no longer MP's employer.

26. Legal argument also took place concerning obligations that might arise under s.19 of the National Vetting (Children and Vulnerable Persons) Act 2012 but that issue was resolved by the Council undertaking in the following terms to the court that:-

> *"(a) Advance reasonable notification will be given to the respondent solicitors should the applicant decide in the course of its investigation that the statutory obligations of s.19 of the National Vetting (Children and Vulnerable Persons) Act 2012 are applicable and it decides to inform the National Vetting Bureau of this matter.*
>
> *(b) Should the aforesaid investigation be determined in favour of the respondent the applicant will give notification of same to all relevant parties even if there is no express statutory obligation to do so."*

27. The order also permitted the Council to respond frankly and honestly to any inquiry received from any individual or body regarding the registration status of MP and to communicate to the persons inquiring the terms of the undertaking provided by him. I also gave liberty to MP to file an affidavit and apply if it were to be alleged that there were delays on the part of the Council in progressing with the investigation against him.

The Investigation
28. It is common case that the Council has been in correspondence with the parents of student A and student B. Both students reside outside the jurisdiction. That correspondence commenced on 15th August, 2017. Thereafter there was correspondence seeking to ensure that both would attend at the inquiry in order to give evidence. Notwithstanding the endeavours of the Council to persuade the students to attend, both have declined to do so. In the case of one student his father by a voicemail of 8th November, 2017 indicated that his son would not participate in the inquiry. When that information came to hand it was notified to MP's solicitor on the following day. In the case of the second student his mother confirmed by telephone on 15th November, 2017 that her son would not participate. That fact was notified to MP's solicitors on 17th November, 2017.

29. In the light of these developments it is clear that a major part of the case against MP cannot be pursued. Nonetheless, the Council intends to proceed with its investigation insofar as it can by reference to the admissions made by him and by relying on other material and witnesses. It is accepted, however, that the most serious elements of the complaints against him cannot be pursued.

30. In the light of these developments these proceedings returned to court at which stage MP indicated that he was not prepared to continue the undertaking which he had given. In turn the Council indicated that it would not seek a suspension order against him. It could not do so in circumstances where the most serious allegations could no longer be investigated.

31. The Council indicated that it would not be seeking any costs against MP but he sought the costs of the proceedings against it. It is because of the dispute on his application for costs that this judgment results.

The costs application
32. MP argues that the normal rule that costs should follow the event is applicable to this case. The "event" was the Council not proceeding with the suspension application. Reliance is placed on a judgment of Ní Raifeartaigh J. in *Dowling & Anor v. The Nursing and Midwifery Board* [2017] IEHC 641 in support of that application.

33. A number of criticisms are made of the Council.

34. First, it is said that the Council moved too quickly in proceeding under section 47. Second, it is said that it ought to have accepted the undertaking proffered to it by MP. Third, the relief sought in the proceedings was too wide. Fourth, the Council was tardy in going about the task of ascertaining whether the two students would come back to Ireland to give evidence.

The Council's position
35. In opposing the costs application the Council rejected these criticisms made of it. It pointed out that it performs a regulatory function and is responsible for conducting inquiries and, where appropriate, imposing sanctions in relation to the fitness to teach of registered teachers. In such context it argued that the normal rule that costs follow the event has no application. It cited in support of that argument the decision of the Court of Appeal in England in *Baxendale-Walker v. Law Society* [2007] EWCA Civ. 233 and Kearns P. in *T. v. Medical Council* (Unreported, 25th July, 2011). It argued that the application was brought because of a *bona fide* concern as to the suitability of MP to continue teaching pending an inquiry and that the s.47 application was made in good faith on the basis of the information available to the Council at that time.

Discussion
36. Neither the *Dowling* case cited in support of MP's costs application nor the *Baxendale-Walker* case cited by the Council are precisely on point. Neither case deals with the principles applicable to the awarding of costs in an application made by a statutory regulator to suspend a regulated party. Counsel informed me that their researches were unsuccessful in finding any such case in this jurisdiction or elsewhere.

37. The *Dowling* case dealt with a costs application made by successful appellants against the Nurse and Midwifery Board's decision to erase their names from the nursing register. In their respective appeals they did not challenge the findings of the Fitness to Practise Committee of the Board that there had been misconduct on their part. Rather they appealed against the sanction imposed. Ní Raifeartaigh J. found in their favour, quashed the sanction of erasure and directed the Board to reconsider the question of sanction. Both nurses raised a question concerning the appropriate quorum required by statute when imposing sanction. They failed on that issue.

38. Ní Raifeartaigh J. considered a great number of authorities cited to her including *Baxendale-Walker* and concluded that:-

> *"… There is no clearly established practice or firm line of jurisprudence to the effect that costs should not be awarded against a body such as the Board in respect of court proceedings successfully brought by way of statutory appeal by a plaintiff. Further, it seems to me that, if the intention of the Oireachtas had been to circumscribe the discretion to award costs in respect of proceedings brought pursuant to s.39(3) of the Act of 1985 in such a fundamental manner, this would have been explicitly stated in the legislation. …. Accordingly, it seems to me that the matter falls to be considered in accordance with the usual principles concerning the award of costs in court proceedings."*

39. She then went on to apply those usual principles and concluded that the nurses should be entitled to 80% of their costs because of their substantial success as to the inappropriateness of the sanction of erasure. She refused them the remaining 20% of their costs because of their failure on the quorum point.

40. The *Baxendale-Walker* case cited by the Council is a decision of the Court of Appeal in England (the President of the Queens's Bench Division, Laws and Scott Baker L.JJ.) [2007] EWCA Civ. 233. That case arose out of a finding by the Solicitors Disciplinary Tribunal (SDT) that the appellant was guilty of conduct unbefitting a solicitor. The SDT suspended him from practice for three years and held that the Law Society should pay 30% of his costs of the proceedings before it.

41. In the High Court (Moses L.J. and Burnton J.) the appellant's appeal against the SDT's decision to suspend him from practice was dismissed. The cross appeal by the Law Society against the SDT's decision on costs was allowed and the appellant was ordered to pay 60% of the Law Society's costs of the disciplinary proceedings.

42. Moses L.J. identified the third of three issues for decision by the Divisional Court as being "*whether the Tribunal erred in law when it ordered the Law Society to pay 30% of the appellant's costs of the disciplinary proceedings*".

43. In bringing the proceedings against the appellant the Law Society was acting as a disciplinary body, or regulator, and took proceedings in the public interest in the exercise of its public function. Accordingly, Moses L.J. concluded that the principles relating to costs differed from those which applied in ordinary civil litigation. He said:

> *"Absent dishonesty or a lack of good faith, a costs order should not be made against such a regulator unless there is good reason to do so. That reason must be more than that the other party had succeeded. In considering an award of costs against a public regulator the court must consider on the one hand the financial prejudice to the particular complainant, weighed against the need to encourage public bodies to exercise their public function of making reasonable and sound decisions without fear of exposure to undue financial prejudice, if the decision is successfully challenged".*

44. The decision of the Divisional Court was upheld by the Court of Appeal. In the course of delivering the judgment of that court the President of the Queen's Bench Division said:

> *"Disciplinary proceedings supervise the proper discharge by solicitors of their professional obligations, and guard the public interest, as the judgment in Bolton makes clear, by ensuring that high professional standards are maintained, and, when necessary, vindicated. Although, as Mr. Stewart maintained, it is true that the Law Society is not obliged to bring disciplinary proceedings, if it is to perform these functions and safeguard standards, the Tribunal is dependent on the Law Society to bring properly justified complaints of professional misconduct to its attention. Accordingly, the Law Society has an independent obligation of its own to ensure that the Tribunal is enabled to fulfil its statutory responsibilities. The exercise of this regulatory function places the Law Society in a wholly different position to that of a party to ordinary civil litigation. The normal approach to costs decisions in such litigation – dealing with it very broadly, that properly incurred costs should follow the 'event' and be paid by the unsuccessful party – would appear to have no direct application to disciplinary proceedings against a solicitor."*

45. Later in the judgment it was said:-

> *"Unless the complaint is improperly brought, or, for example, proceeds as it did in Gorlov, as a 'shambles from start to finish', when the Law Society is discharging its responsibilities as a regulator of the profession an order for costs should not ordinarily be made against it on the basis that costs follow the event. The 'event' is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. One crucial feature which should inform the Tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage".*

46. No more than the *Dowling* decision this case is not on all fours with the present one either. However, insofar as the exercise of the statutory power of suspension is concerned I am of the view that the approach of the Court of Appeal in England in *Baxendale-Walker* is the appropriate one to adopt. In that regard I gain support from the decision of Kearns P. in the case of *T. v. The Medical Council* (unreserved, 25th July, 2011) where he allowed an appeal and cancelled the decision of the Medical Council that the doctor in question was guilty of professional misconduct. In the course of his ruling he stated that he was "*satisfied insofar as the regulation of complaints against medical practitioners is concerned that the Medical Council has a vital regulatory function" and that "the Medical Council had no option but to take the steps they (sic) did and pursue it as they (sic) did pursue it*". He went on to say:-

> *"I am very taken and impressed by the principles enunciated in the case of Baxendale-Walker v. The Law Society, which is reported at [2008] 1 WLR, as indeed was my learned colleague, Mr. Justice Finnegan, in a case which he had to deal with, namely O'Connor v. The Medical Council [2007] IEHC 304. He was of the view that there should be no order as to costs, not least because the Medical Council in defending an appeal of this sort are (sic) doing no more than fulfilling their (sic) regulatory function against a background of increasing public demands for inquiries in almost every circumstance, and I would think it would have far reaching and highly undesirable consequences for the Council if I were to make an order for costs against the Medical Council. So, in all those circumstances I propose making no order as to costs".*

47. In this case I do not accept that the ordinary rule of costs following the event is applicable for the reasons that follow.

48. I have already set out s.47 insofar as it is relevant. It is contained in Part 5 of the Act which deals with fitness to teach.

49. The long title to the Act provides inter alia that it is an Act

> *"To maintain and improve the quality of teaching in the State;*
>
> *to provide for the establishment of standards, policies and procedures for the education and training of teachers and other matters relating to teachers and the teaching profession;*
>
> *to provide for the registration and regulation of teachers and to enhance professional standards and competence."*

50. Section 47 is the final section of that part of the Act which deals with investigations into teachers concerning their fitness to teach.

51. An application under s.47 is one which is brought in the public interest. It is one of the regulatory functions of the Council to make such an application in an appropriate case. The exercise of the function under s.47 places the Council in a different position to that of a party to ordinary civil litigation. An award of costs on the ordinary principle of costs following the event where such a suspension is refused or the application not pursued would surely have the chilling effect on the exercise of the Council's functions identified in the *Baxendale-Walker* case. Such an adverse consequence is highly undesirable in circumstances where the Council will often have to consider a s.47 application as a matter of urgency and on a limited amount of information. The public interest would not be served by the application of the ordinary costs rule to such applications.

52. In the case of a regulator such as the Council applying for a statutory suspension order in respect of a registrant I conclude that an order for costs should not be made against it on the basis that costs follow the event. It would only be in circumstances where the application was improperly brought for whatever reason such as a malicious intent, dishonesty or gross negligence in the preparation of the application or the case being a "shambles from start to finish" that a costs order would fall to be considered.

This case

53. I turn now to a consideration of the criticisms made of the Council in this case. Do they amount to circumstances which, on the application of these principles, a costs order should be made?

54. First, I do not consider that any legitimate criticism can be levelled against the Council for moving too speedily. The allegations made were extremely serious. They resulted in the dismissal of the teacher from the school. They concerned allegations of conduct which is wholly inconsistent with a teacher's obligations as somebody in *loco parentis* to his students.

55. The Council adopted a procedure whereby it gave MP an opportunity to be represented before it. He availed himself of this entitlement. Whilst the hearing was convened speedily, speed was required. The procedure adopted took into account any entitlements or rights which MP might have before the remedy was sought in court. Not merely was a full entitlement given to MP to be heard and represented at the hearing which decided to bring the application but the Council also retained an independent Senior Counsel to advise it on the matter. In the course of his advice to the Council he said:

> *"The Teaching Council Act 2001, s.47(1) gives you the jurisdiction to make the application that has been made, and the content of that has been brought to your attention. But it is an unusual procedure. In fact it is a very unusual procedure because you are being asked to make a significant decision without resolving disputed issues of fact, and you must not resolve any disputed issues of fact and in a circumstance in which you are taking a very important decision on the basis of information which to a greater or lesser extent is incomplete and is inevitably so because this is an application made on the footing that there is an urgency about the matter and you may need to move before the full investigation of the complaint has been made."*

56. He also advised the Council that:

> *"The teacher is entitled to fair procedures and natural justice. And they may be afforded in the investigation of the complaint and in the hearing when it takes place in due course of the substantive complaint. But because this is an urgent application on the basis of incomplete information, it is not expected of this committee that you will be able to provide the full panoply of fair procedures to the teacher. So, for example, you are acting, if you do act, in part upon written statements only of student (student identified). At the hearing you would not be entitled to act on written statements only of (student identified) because he would have to be produced for cross-examination and Mr. Lynch correctly makes the observation that there has been no testing of (student identified) evidence in cross-examination."*

57. He also tendered advice to the Council concerning the undertaking which MP proffered to it.

58. Thus, it can be seen that the Council was fully advised as to the task being undertaken by it in the context of an *inter partes* hearing.

59. I do not accept that the criticism of undue speed made against the Council is one of substance. For the sake of clarity I do not believe there was any obligation on the part of the Council to hear from either student A or B when considering the s.47 application.

60. Neither do I believe that there is any legitimate criticism to be made of the fact that the undertaking proffered by MP was not accepted. There is no obligation on the Council to accept such an undertaking. If it decides to accept such it must of course take account of the fact that such an undertaking does not and cannot have the same effect as an undertaking to the High Court. An undertaking to this court is enforceable as though it were an order of the court. No such enforceability attaches to an undertaking given to the Council. In any event, the undertaking ultimately given to this court was, in my view, in wider terms than that offered to the Council.

61. It was argued that the relief sought by the Council was too wide particularly concerning issues of notification. Whilst it is correct to state that on the hearing before me I made a determination to the effect that there was no entitlement on the part of the Council to notify MP's former employer having regard to the statutory provisions, I do not believe that that issue would be sufficient to warrant an order for costs of any sort being made against the Council. The question concerning the application of the provisions of the National Vetting (Children and Vulnerable Persons) Act 2012 was effectively dealt with by compromise in the form of the undertaking which I have already recited.

62. The final criticism which is made is that the Council was tardy in taking steps to ascertain the willingness of the students to give evidence. Such endeavours began in August 2017. The suspension hearing was in this court on 16th May, 2017. It must be borne in mind that in the interim both students sat the Leaving Certificate examination. At the conclusion of that examination they returned to their home country. Whilst it might be said that perhaps somewhat greater alacrity might have been demonstrated in endeavouring to obtain a firm undertaking that they would return to give evidence, I do not believe that such delay (if delay it be) would come anywhere near the sort of conduct that would be required to justify a costs order against the Council.

Conclusion

63. The ordinary rule that costs follow the event has no application in this case. The exercise by the Council of the suspensory function prescribed under s.47 places it in a wholly different position to that of a party to ordinary civil litigation.

64. There can be no question of a costs order being made against the Council in a case such as this in the absence of evidence that the application was improperly brought. There is no such evidence in this case. None of the criticisms made of the Council have been borne out. Even if they were it is difficult to see how they could be said either alone or collectively to amount to an "improper" application.

65. Even if the ordinary rule of costs following the event were applicable I still would not award them to MP. The suspension was properly sought. The only reason why the Council did not seek to continue it was because the two complainants declined to return to this jurisdiction to participate in the statutory inquiry which awaits hearing. In their absence the most serious complaints against MP cannot be considered. Their absence is the sole reason why those aspects of the complaints will not be proceeding. One view might well be that MP is fortunate not to have to face an inquiry in respect of those very serious allegations. Such good fortune could not be regarded as a basis for awarding costs of the suspension application in his favour. In no longer seeking to pursue the suspension, the Council acted properly since it accepted that the remainder of the complaints which fall to be dealt with in the inquiry are not of such a serious character as to have warranted a suspension in the first place.

66. MP's application for costs against the Council is refused.