THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 502 J.R.]

BETWEEN

JOSEPH HUGHES

APPLICANT

AND

THE REVENUE COMMISSIONERS

AND

THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM

RESPONDENTS

JUDGMENT of Mr. Justice Allen delivered on the 8th day of March, 2019

1. The applicant in these proceedings is a legal executive who is, and since August, 2002 has been, employed in what is now officially called the Revenue Solicitor's Division of the Revenue. That division was previously called, and is still often referred to as, the Revenue Solicitor's Office.

2. The applicant was initially employed as a law clerk. In 2007 he was regraded to legal executive officer and in March, 2008 was promoted to higher legal executive officer.

3. In 2002 the Revenue undertook a comprehensive review of the Revenue Solicitor's Office. The staff there were divided into three streams: the professional stream, made up of qualified solicitors; the legal technical stream, made up of legal executives; and the administrative stream, made up of general civil servants.

4. The technical staff, and IMPACT trade union on their behalf, were dissatisfied with the review and there were threats of industrial action. In about November, 2004, under the aegis of Mr. Tom Pomphrett, a process was agreed which was satisfactory to the staff in the legal technical stream and the IMPACT trade union. This was recorded in a collective agreement between IMPACT, representing the legal technical grades in the Revenue Solicitor's Office, and the Corporate Services Division of the Revenue. This collective agreement was styled the Legal Technical Agreement.

5. The restructuring package and its implementation were expressly contingent upon the continued cooperation of the staff with the then current and more general restructuring of the Revenue.

6. The 2004 agreement provided that the old grades of Chief Legal Clerk, Principal Legal Clerk, Senior Legal Clerk and Legal Clerk were to be reclassified and regraded to mirror the grades in the Chief State Solicitor's Office, which had been restructured in 2001. Clause 9 of the Legal Technical Agreement provided that:

> *"The legal technical stream, to be introduced over time and subject to Government policy on staff numbers, will comprise the following grade structure.*
>
> *1 Revenue Principal Legal Executive Officer*
>
> *4 Assistant Principal Legal Executive Officers*
>
> *6 Higher Legal Executive Officers*
>
> *7 Legal Executive Officers."*

7. There was a delay first in finalising and then implementing the 2004 agreement, but in 2007 the regrading provided for took place and was back-dated to 2004. The applicant was regraded as a legal executive officer and, as I have said, in March, 2008 promoted to higher legal executive officer.

8. Between 2009 and 2015 there was a moratorium on recruitment and promotion in the public service, with limited exceptions for positions assessed to be critical. All four positions of assistant principal legal executive officer in the Revenue Solicitor's Division became vacant between 2008 and 2010 and were not filled.

9. In 2009 and 2010 there was some correspondence from IMPACT to the human resources division of the Revenue, complaining of non-adherence to the 2004 agreement to which the answer, variously, was that the agreement specifically provided for deployment *"as business priorities and the exigencies of the service demand"* and that there was a Department of Finance moratorium on recruitment and promotions.

10. In November, 2015, following the lifting of the moratorium, there was a meeting between IMPACT and management. That meeting resulted in an agreement that there would be a review of the staffing requirements of the Revenue Solicitor's Division. That review was carried out in 2016 by the Manpower Advisory Services unit in Revenue. The Manpower Advisory Services ("*MAS*") had been established in 2002 at the same time as a restructuring programme was established for the Revenue, and had since completed a number of reviews and reports on several geographical regions and divisions.

11. The MAS report on the Revenue Solicitor's Division was completed on 16th March, 2017. It concluded that the technical resource allocation recommended in the 2004 agreement was no longer viable. MAS proposed that the Revenue Solicitor's Division *"progress from the 2006 recommended allocation and, at present, retain the existing legal technical staff allocation with no proposed increase".* (The 2004 agreement was finalised in 2006, hence the reference to the 2006 allocation.)

12. The applicant was dissatisfied with the MAS report and, by his solicitors, by letter dated 12th May, 2017 complained that the report was artificial, superficial and completely unsatisfactory and had left him with no alternative but to challenge the matter by way of judicial review. That letter did not spell out precisely what the applicant wanted, save that he wanted to condemn the MAS review and recommendations. His statement required to ground application for judicial review, however, left no room for doubt: he wanted the four assistant principal legal executive officer positions filled.

13. On 21st June, 2017 (by leave of Noonan J. given on 19th June, 2017) the applicant applied for 16 substantive reliefs, the first of which was an order of mandamus compelling the Revenue to maintain four assistant principal legal executive officer positions within the legal technical stream. Besides, the applicant claimed a variety of declarations to the same end, including a declaration as to his entitlement to rely on the Legal Technical Agreement, and a number of declarations directed to the conduct and conclusions of the MAS review.

14. There was quite a long delay in the filing and service of the statement of opposition but it eventually came on 4th December, 2017. The respondents objected that the applicant ought to have availed of the Conciliation and Arbitration Scheme for the Civil Service, and robustly rejected the applicant's criticisms of the MAS review and recommendation.

15. An affidavit of Ms. Janice Dempsey, who lead the MAS review, was filed on behalf of the respondents. Ms. Dempsey explained the genesis and evolution of the MAS and refuted the applicant's criticisms of the review of the Revenue Solicitor's Division. An affidavit of Mr. Paul Dempsey, Assistant Secretary of the Corporate Services Division for Revenue, was filed, the substance of which was that for the duration of the moratorium the assistant principal legal executive officer positions which had become vacant were not regarded as critical, and that following the lifting of the moratorium, so much had changed in the Civil and Public Service generally, and in the office of the Revenue Solicitor's Division in particular, that the legal resource allocation in 2004 agreement was no longer viable. Mr. Dempsey expressed his surprise and disappointment that the applicant had applied for judicial review rather than availing of the Conciliation and Arbitration Scheme.

16. A further affidavit of the applicant was filed on 14th February, 2018 and further affidavits of Ms. Dempsey and Mr. Dempsey on 8th March, 2018, upon which it is not necessary to dwell.

17. The application was listed for hearing on 22nd March, 2018.

18. On the morning of 12th March, 2018 there was a development. Mr. Dempsey contacted Ms. Geraldine O'Brien, Assistant General Secretary of Fórsa (a new trade union formed by the amalgamation of IMPACT, the Civil, Public and Services Union (CPSU) and the Public Service Executive Union (PSEU)). Mr. Dempsey advised Ms. O'Brien of a decision made on 19th February, 2018 by Mr. Daniel Murphy, an adjudicator under the Conciliation and Arbitration Scheme, on a claim made by the PSEU in respect of the promotion system in Revenue, generally. Mr. Dempsey indicated that on the basis of that decision, he was prepared to accept a claim from Fórsa for the creation and filling of one assistant principal legal executive officer position. Mr. Dempsey confirmed his proposal by email of 13th March, 2018 and added:- *"If Fórsa agrees Revenue would expect Mr. Hughes to drop his action."* This was discussed by the applicant with Ms. O'Brien and the Revenue Solicitor and on 15th March, 2018 the hearing date was vacated by consent.

19. In due course, the one position of assistant principal legal executive officer was created and filled. I will need to return to the precise circumstances in which that happened.

20. The case now made is that the first respondent's proposal to create and fill, and the creation and filling of, one position of assistant principal legal executive officer was made in response to these proceedings and that the creation and filling of the position rendered the proceedings moot: save as to costs, which the applicant contends the respondents should pay.

21. The principles to be applied in determining what, if any, order should be made in respect of the costs of a judicial review application which has become moot are set out in two decisions of the Supreme Court.

22. *Cunningham v. President of the Circuit Court* [2012] 3 I.R. 222 was an application by way of judicial review for an order prohibiting, on the grounds of delay, the prosecution of the applicant on criminal charges. The application was refused by the High Court and the applicant appealed. While the appeal was pending, the Director of Public Prosecutions entered a *nolle prosequi* in the criminal proceedings, rendering moot the question of whether it would have been appropriate to prohibit the criminal trial. The only question remaining for the Supreme Court was costs.

23. Clarke J. (in a judgment with which Denham C.J. and Hardiman J. agreed) recalled the principles to be applied in relation to the costs of a moot issue which he had set out in his decision in *Telefonica 02 Ireland Limited v. Commission for Communications Regulation* [2011] IEHC 380. At para. 24 he said:

> *"In summary, and for the reasons set out in that judgment, a court, without being overly prescriptive as to the application of the rule, should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot."*

24. Clarke J. in *Cunningham* continued, starting at para. 26:-

> *"The mere fact, therefore, that a statutory officer or body adopts a changed position which renders judicial review proceedings moot does not, of itself, necessarily mean that it is appropriate to characterise the proceedings as having become moot by reason of a unilateral act of one party.*
>
> [27] If there were no change in underlying circumstances and if the statutory officer or body had simply changed his or its mind or adopted a new and different view, then such a characterisation might be appropriate. Where, however, there is an underlying change of circumstance, it is necessary to consider the extent to which it can properly be said that the proceedings have become moot by reason of the unilateral act of one party, on the one hand or, in reality have become moot by reason of a change in underlying circumstances outside the control of either party, on the other hand. The result of any such analysis should play an important role in the court's consideration of the justice of where the costs of proceedings rendered moot should lie.
>
> *[28] It does, however, seem to me that, where the immediate or proximate cause of proceedings becoming moot is the action of such a statutory officer or body but where it is sought to argue that the true underlying reason is an external*

factor outside the control of that officer or body, it is incumbent on the officer or body concerned to place before the court sufficient evidence to allow the court to assess whether, and if so to what extent, it can fairly be said that there was a sufficient underlying change in circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances."

25. In *Godsil v. Ireland* [2015] 4 I.R. 535 the plaintiff commenced proceedings challenging the validity having regard to provisions of the Constitution of s. 41(k) of the Electoral Act, 1992 which provided that a person who was an undischarged bankrupt was not eligible for membership of Dáil Éireann or, by extension, membership of the European Parliament. While the proceedings were pending, the Oireachtas repealed the impugned provisions, rendering the action moot. The plaintiff appealed to the Supreme Court against a refusal of the High Court to award her the costs of the proceedings.

26. The Supreme Court held that, even when the substantive point in proceedings had become moot, the first inquiry that a court was required to make on a costs application was whether or not there existed an "*event*" to which the general rule that costs followed the event could be applied. The court found that the repeal of the impugned provision could only be understood as being in direct response to the proceedings as issued, and could only be regarded as an explicit acknowledgment and admission of the legal validity of the plaintiff's challenge.

27. McKechnie J. (with whom Dunne and Charleton JJ. agreed) said that he would agree with the general approach to the issue of costs in the circumstances outlined in *Cunningham v. President of the Circuit Court.* In *Cunningham* Clarke J. had given as an example of a change of underlying circumstances, the death of an essential witness. In *Godsil* McKechnie J. suggested that a dead or missing witness might be identified with the prosecution so that his or her availability should not be considered as an external factor and, to that extent, appeared to qualify his endorsement of *Cunningham*. For present purposes however nothing turns on the caveat.

28. Bearing in mind the established principles of law, I need to return to the circumstances in which the hearing date was vacated and the one position of assistant principal legal executive officer filled.

29. On 15th October, 2018 a third affidavit of the applicant was filed, which was to be read in conjunction with his earlier affidavits but was specifically directed to the issue of costs.

30. In his third affidavit, the applicant pointed to the supplemental affidavits of Ms. Dempsey and Mr. Dempsey filed on 8th March, 2018. These affidavits, he suggested, represented the first response to his letter of complaint of 12th May, 2017. I do not believe that that is correct. The supplemental affidavits filed on behalf of the respondents were directed to issues raised by the applicant in his supplemental affidavit. The first affidavits of Ms. Dempsey and Mr. Dempsey addressed the grounds and reliefs sought and, with the voluminous documents exhibited, ran to 623 pages. More to the point, perhaps, the applicant deposed that had his initial letter been replied to, the proceedings and the costs could have been avoided. There was a gap of about five weeks between the originating letter on 12th May, 2017 and the date of the leave application on 19th June, 2017 but I do not think that it is unfair to say that the letter of 12th May, 2017 did not invite an answer but rather declared that the applicant had no alternative but to challenge the matter formally by way of judicial review.

31. In his second affidavit the applicant took the position that the Conciliation and Arbitration Scheme for the Civil Service (which the respondents said he should have resorted to) did not provide an effective and timely avenue for redress. He pointed to the delays in finalising and implementing the 2004 Legal Technical Agreement. In his third affidavit he took the position that he was not entitled to have recourse to the Conciliation and Arbitration Scheme, which, he said, was not open to him. As far as I can see, the Conciliation and Arbitration Scheme was not a means by which the applicant could air his personal grievance.

32. It was the applicant, in his third affidavit, who brought the attention of the court to the conversation between Mr. Dempsey and Ms. O'Brien on 12th March, 2018. The applicant deposed to having been advised (presumably by Ms. O'Brien) that Mr. Dempsey's suggestion of a claim by Fórsa for the creation and filling of one position of assistant principal legal executive officer was "*… being done in order to address the issues raised in the within proceedings and was being undertaken in direct response to the within proceedings.*" Although that averment is not contradicted on affidavit, I do not believe that it stands scrutiny.

33. The Adjudication Finding of Mr. Murphy was issued on 19th February, 2018. The applicant, and inferentially at least, Ms. O'Brien, were unaware of it until the morning of 12th March, 2018. Following the filing of the applicant's second affidavit on 14th February, 2018, an application was made to the High Court on 27th February, 2018 to vacate the hearing date to allow the respondents time to reply. There was no mention then of the adjudicator's award. Noonan J. refused to adjourn the case and fixed a time within which any further affidavits were to be filed.

34. The applicant is critical of the fact that Mr. Dempsey did not refer to the adjudicator's award in his affidavit sworn on 8th March, 2018. That omission, it seems to me, is perfectly consistent with the respondents' position on this application, which was that the award had nothing to do with the case.

35. Mr. Murphy's award was made on a claim by the PSEU to revive the application of an Arbitration Board Finding on 25th May, 2004 on the system of internal promotion within the Office of the Revenue Commissioners, which had been applied for some years but suspended by the moratorium. Mr. Murphy found that the 2004 Arbitration Board Finding had been overtaken by the terms of subsequent collective agreements but that the matter needed an industrial relations solution which met the requirements of Revenue, while also taking account of the misgivings and expectations of the PSEU members: thereby drawing a line under the previous arrangements and practices. That industrial relations solution was to hold two special competitions to fill eight posts at higher executive officer level and six at principal officer level.

36. It is highly significant, I think, that Mr. Dempsey's conversation was with Ms. O'Brien and not the applicant. It is common case that the MAS review was agreed in November, 2015 by IMPACT and Revenue in the hope of progressing a long outstanding claim to fill long vacant posts. The common intention of the parties to that engagement, IMPACT, on the one hand, and Revenue, on the other, must have been that the claim would be revisited when the outcome of the MAS review became known. The MAS review was finalised on 16th March, 2017. The recommendation of the MAS, as far as I can see, gave little or no scope for progress on the IMPACT claim to fill four assistant principal legal executive officer positions, but the Revenue Departmental Council Report of May, 2018 shows that after the MAS review had been finalised, there was an exchange of correspondence in relation to the claim in the last week of March, 2017, and a meeting between IMPACT and the Corporate Services Division on 13th April, 2017.

37. The suggestion floated by Mr. Dempsey on 12th March, 2018 was formally put to Fórsa as a proposal on 23rd April, 2018 and accepted by Fórsa on 1st May, 2018. The agreement was that one position would be filled by competition, open to higher executive officers or equivalent with ten years' service and relevant legal experience or qualification, and that all future posts in the Revenue

Solicitor's Office would be filled on the basis of critical business needs only.

38. The applicant, in his third affidavit, describes Mr. Dempsey's suggestion of proposal of 12th and 13th March, 2018 as an agreement but it is clear that there was then no agreement. As the applicant explains, the "*implementation*" of the agreement required the concurrence of all four serving higher legal executive officers in the Revenue Solicitor's Office, the approval of the Revenue Departmental Council, the submission by Fórsa of a claim for the creation and filling of one post, and the acceptance by the Revenue of the claim.

39. The applicant's position on 14th March, 2018 was that if the post were created and filled, it would meet the main issues raised by him in the proceedings and he instructed his solicitors to take the case out of the list for 22nd March, 2018. In fact, the post was created and filled: but not until after the date on which the case would otherwise have been heard. As witness what transpired, there was a good prospect that what Mr. Dempsey suggested might happen would happen, but as of the date on which the application was listed for hearing, it was not moot.

40. Mr. Kinsley makes much of the fact that Mr. Dempsey, in his email of 13th March, 2018, said that:- "*If Fórsa agrees Revenue would expect Mr. Hughes to drop his action*." This, and the very suggestion made by Mr. Dempsey to Ms. O'Neill, is said to show that the "*agreement*" to create and fill the one post was brought about by these proceedings and intended as a direct response to the proceedings. Again, this is not formally contested by the Revenue on affidavit but again, I am afraid, I do not think that it withstands scrutiny. As I have said, it seems to me that such agreement as there was when the case was taken out of the list was that if the one post was created and filled, the applicant would not press his claim that the respondents were obliged by law to fill four. The applicant had made it clear that if the one post was created and filled, he would be applying for his costs of the proceedings. In my view, the proposal first suggested on 12th March, 2018 was a proposal by an employer to a union of an industrial relations solution to an industrial relations problem, and an industrial relations claim which dated back to 2014. It makes perfect sense that Revenue would not make a collective agreement for one post while there was an ongoing legal claim by the applicant that it was obliged to fill four. It seems to me that the requirement for the applicant's concurrence in the proposal was not a great deal different to the requirement for the concurrence of his colleagues of the same rank in the Revenue Solicitor's Office: and, no less, of Fórfas, to whom, after all, the offer had been made.

41. The applicant makes the point that the need for an additional assistant principal post was expressly denied by Ms. Dempsey and Mr. Dempsey in their replying affidavits. So it was. But the applicant misses the point that the solution was devised to balance the essential requirements of the Revenue against the misgivings and expectations of the union members. The Revenue Departmental Council Agreed Report recorded the recommendation of the MAS review that there was no business requirement for additional posts. The agreement ultimately reached, and recorded in the Revenue Departmental Council Agreed Report, settled the industrial relations claim and drew a line under the 2004 agreement by providing that all future posts in the Revenue Solicitor's Office would be filled on the basis of critical business needs only.

42. The applicant, in his third affidavit, avers, more than once, that the suggestion that one post might be created and filled was made "*in order to address the issues raised*" in these proceedings. I do not believe that that is correct. It is true that the applicant agitated the question of unfilled positions and that ultimately a position was created and filled but it seems to me that the issue in the proceedings was whether (if the applicant was entitled to seek to enforce a collective agreement) the respondents were bound to fill four positions. The industrial relations solution which was found was to create and fill one position, rather than to simply fill even one of the four which the applicant's case was the respondents were obliged to fill.

43. Mr. Kinsley argues that the creation and filling of the one post, despite the respondents maintaining earlier in the proceedings that no post was warranted, cannot be described as "*an occurrence outside the control of the parties*." I agree. In the first place it is clear that the one post was created and filled notwithstanding the fact that no post was warranted. In the second place, it is quite clear that the "*occurrence*" was within the control of both parties, in particular that of the applicant, without whose concurrence it was not going to happen, at least in the short term.

44. Mr. Kinsley's key argument, citing *Cunningham*, is that the respondents have not provided sufficient evidence to the court to allow it to assess whether, and if so to what extent, it can fairly be said that the proceedings have become moot by reason of an underlying change in circumstances. The difficulty with that argument is that in this case the immediate or proximate cause of the proceedings becoming moot is not the unilateral action of the Revenue, but a collective agreement between Revenue and Fórsa, in which the applicant expressly concurred. The application was opposed, *inter alia*, on the ground that the creation or filling of four posts (or any post) was not warranted. The respondents never relented on that position. One of the applicant's grounds was the MAS review failed to take account of the applicant's reliance of the 2004 Legal Technical Agreement. That was admitted. Promotional opportunities were not part of the MAS terms of reference. Expectations, were, however, part of the proposal first suggested by Mr. Dempsey on 12th March, 2018 and signed off on 1st May, 2018.

45. This is not a case to which is comparable to *Godsil* or *Benloulou v. Minister for Justice and Equality* [2016] IECA 181. I cannot accept the argument that the creation and filling of one assistant principal legal executive officer is an "*event*" which rendered moot a claim for the filling of four.

46. Mr. McBride, for the respondents, agrees that the proceedings are moot, but for a different reason to that suggested on behalf of the applicant. Mr. McBride argues that the proceedings became moot because the decision to create and fill the one position took away any standing on the part of the applicant to make any complaint in respect of the 2004 agreement. The crucial event, he submits, was the adjudication in February, 2018 on the PSEU claim. This, it is said, is not a case in which the applicant has indirectly got what he asked for.

47. On the evidence, the creation and filling of the one position was not the unilateral action of the first respondent and was not undertaken in direct response to these proceedings. The creation and filling of that post was by agreement, to which the applicant was a party.

48. I do not accept that the respondents failed to sufficiently engage with the applicant's complaints regarding staffing in the legal technical stream and thereby forced the applicant to commence these proceedings. The only complaint by the applicant, personally, before the leave application was a single solicitor's letter which did not call for engagement but declared that the applicant had no option but to seek judicial review. When the respondents' explanation came, it made no difference. What eventually persuaded the applicant to postpone, and later abandon, his judicial review proceedings was the prospect that Revenue might create at least one post.

49. For these reasons, it seems to me that this is a case which, by the time the costs argument came before me, was moot, but at

the time when it might have been heard, probably was not. The cause of the mootness was not, strictly speaking, either the unilateral act of one of the parties or an underlying external change of circumstance. The catalyst which gave rise to the result, however, was a factor outside the control of the parties.

50. In my view the justice of this case will best be met if there is no order as to costs.