

THE HIGH COURT
JUDICIAL REVIEW

[2018] IEHC 199
[2017 No. 146 J.R.]

BETWEEN

TOMASZ ZALEWSKI

APPLICANT

AND

ADJUDICATION OFFICER (ROSALEEN GLACKIN), THE WORKPLACE RELATIONS COMMISSION, IRELAND AND THE ATTORNEY
GENERAL

RESPONDENTS

AND

BUYWISE DISCOUNT STORE LIMITED

JUDGMENT of Mr. Justice Meenan delivered on the 13th day of March, 2018.

NOTICE PARTY

Introduction

1. On 8th February, 2018 I delivered judgment in this matter. The respondents by letter dated 4th April, 2017 conceded that the applicant was entitled to an order of *certiorari* quashing the decision of the first named respondent dated 16th December, 2016. This letter also consented to an order for the costs of the proceedings up to the date of the said letter.
2. The issue to be determined by this Court was whether the applicant had *locus standi* to maintain a constitutional challenge to the relevant legislation. I found that the applicant did not have *locus standi* and thus was precluded from continuing his constitutional challenge.
3. The explanation given by the respondents for the decision of 16th December, 2016 was that it was "an administrative error". In my view, this explanation lacked creditability and given the importance of the decision for those involved made the explanation for the decision unacceptable.
4. The issue now before this Court is the determination of costs. The respondents, though successful in the motion, have informed the court that they are not seeking an order for costs against the applicant and consent to an order for costs in favour of the applicant up until the 4th April, 2017, the date of the said letter. The applicant seeks the costs of the entire proceedings.

Principles to be Applied

5. O. 99 r. 1(1) of the Rules of the Superior Courts provides:-

"(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively."

6. O. 99 r. 1(4) of the Rules of the Superior Courts provides:-

"(4) The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."

7. The "event" in the proceedings before this Court was that the applicant is now precluded from maintaining his constitutional challenge to the legislation in question. Thus, applying the general rule, the respondents would be entitled to their costs.
8. However, as is clear from the said order, the court has a discretion which may be exercised to make a costs order in favour of a losing party. The court has been referred to a number of authorities as to how it should exercise this discretion.
9. The matter was considered by the Divisional Court in *Collins v. The Minister for Finance and Other* [2014] IEHC 79:-

"11. The starting point for any consideration of this question is to be found in the judgment of Murray C.J. in *Dunne v. Minister for the Environment* [2007] IESC 60, [2008] 2 I.R. 755 where he observed ([2008] 2 I.R. 755, 783-784) that:

"The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party has an obvious equitable basis. As a counterpoint to that general rule of law the Court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction..."

and

"Where a Court considers that it should exercise a discretion to depart from the normal rule as to costs it is not completely at large but must do so on a reasoned basis indicating the factors which in the circumstances of the case warrant such a departure. It would neither be possible or desirable to attempt to list or define what all those factors are..."

10. In the *Collins* case, the Divisional Court summarised the principles concerning the award of costs to unsuccessful litigants in constitutional cases. These principles can be stated as:-

Costs (either full or partial) have been awarded against the State in

- (i.) Cases where the constitutional issues raised were fundamental and touched on sensitive aspects of the human condition. Such issues have included homosexuality, the constitutional status of human embryos and assisted suicide;
- (ii.) In constitutional cases of conspicuous novelty;
- (iii.) Where the issue was one of far reaching importance in an area of law with general application;
- (iv.) Where a court decision has clarified an obscure or unexplored area of law;
- (v.) Where the litigation has not been brought for personal advantage and where the issues raised are of "special and general public importance or factors which may be taken into account."

11. The discretion to award costs to a losing party was considered by the Divisional Court in *Kerins v. McGuinness and Others* [2017] IEHC 217. In that case, at para. 34 of the judgment, the court awarded the applicant "two thirds of her taxed costs against the first to fifteenth respondents together with 100% of the costs of the transcript." In making such an award, the court had regard to:-

- (i.) The manner in which the applicant was treated by the respondents (the PAC) which was set out in detail in the principal judgment in the case;
- (ii.) That the applicant had raised "issues of special and general public importance and of some novelty. "

Application of the Principles

12. In this case, the possibility of an award of costs in favour of the applicant has arisen in circumstances where this Court has expressed the view that the explanation given by the respondents for the decision which gave rise to these proceedings was both unacceptable and lacked creditability. Were I to award costs on this basis I would, in effect, be making an order penalising the respondents. Although such may have been a factor in the *Kerins* case, I do not think the circumstances of this case would warrant such a costs order. I have had regard to the fact that in the letter of 4th April, 2017 the respondents conceded that the decision in question could not be stood over despite the deficiencies of the explanation given. Further, there was consent to an order of *certiorari* quashing the decision and for payment of the applicant's costs up to the date of the letter.

13. Further, I refer to the principles set out in the *Collins* decision. There can be no doubt but that the constitutional right to fair procedures being asserted by the applicant is a matter of great importance. However, I have found that the failures which gave rise to the decision in question were not as a result of a flaw in the relevant legislation but rather a failure of the first and second named respondents to follow their own guidelines. Had these been followed the applicant would have had an opportunity to both present his own evidence and challenge that of the notice party.

14. For these reasons, I will not make an order for the entirety of the costs in favour of the applicant as has been sought. Rather, I will grant the applicant the costs of these proceedings up until the 4th April, 2017, the date that the letter issued.