THE HIGH COURT
JUDICAL REVIEW

APPROVED **NO REDACTION NEEDED**

[2021] IEHC 400

RECORD NO: 2018/785JR

BETWEEN:

DAVID MCDONALD

APPLICANT

- AND–

IRISH PRISON SERVICE, MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

RECORD NO: 2019/27JR

BETWEEN:

DAVID MCDONALD

APPLICANT

-AND-

IRISH PRISON SERVICE
THE MINISTER FOR JUSTICE AND EQUALITY,
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

RECORD NO: 2018/831JR

BETWEEN:

JAMES BEN BUCKLEY

APPLICANT

-AND-

IRISH PRISON SERVICE
THE MINISTER FOR JUSTICE AND EQUALITY
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

RECORD NO. 2018/963JR

BETWEEN:

GERALD DOWLING

APPLICANT

-AND-

IRISH PRISON SERVICE
THE MINISTER FOR JUSTICE AND EQUALITY,
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of the Court delivered on the 28th day of January, 2021, by Ms Justice Ní Raifeartaigh

1. By judgments delivered on 3 March 2020, I refused the applications for Judicial Review brought by the Applicants in each of their (separate) proceedings. On 19 June 2020, in light of the restrictions in place during the Covid-19 Public Health Emergency, the parties were directed to file written submissions addressing costs and the final orders to be made in the proceedings.

2. The Respondents filed one set of submissions dated the 2 July 2020 to encompass all four sets of proceedings. After some delays on the part of the Applicants, which arose from logistical problems posed by the Covid-19 pandemic, three separate sets of submissions

were filed on their behalf on the 4 December 2020. The authorities and principles relied on were identical in each of these three submissions. I propose to deal with all four cases in this single judgment.

3. The legal framework in respect of which a decision on the costs of the proceedings is to be made is now contained in sections 168 and 169 of the Legal Services Regulation Act, 2015 and the recast Order 99 of the Rules of the Superior Courts (as amended by S.I 584 of 2019). However, the relevant sections of the 2015 Act did not come into force until the 7 October 2019 and the new provisions of O.99 took effect from 3 December 2019. The present proceedings were heard in June, July and September 2019 and therefore the work in respect of which costs arise pre-date the coming into force of either provision.

4. The question of whether the new statutory framework governing the award of costs together with the recast Order 99 of the Rules of the Superior Courts might operate retroactively was mentioned by the Court of Appeal (judgment of Murray J.) in *Chubb European Group SE v. Health Insurance Authority*. In *Chubb*, Murray J noted that one party had referred exclusively to the 'old' costs regime while the other party had referred exclusively to the 'new' costs regime. He did not consider it appropriate to consider the issue of retroactivity in the absence of argument from the parties on the issue and where he believed the application of the different regimes would not in any event produce a materially different result in the case before him (paras. 7 and 8). In the present case, no argument as to retroactivity was made and since the entirety of the proceedings pre-dated the coming into force of ss. 168 and 169 of the 2015 Act (with the exception of the judgment), I propose to deal with the costs under the 'old' costs regime. This may not make much difference in any event, although I note Murray J's comment at para. 20 that one of two potential differences between the two regimes may be that the *Veolia* approach is applied under the old regime, arguably, only to "complex" cases whereas the new regime contains no such limitation. I will refer to this again in the course of this judgment.

5. The Applicants rely upon *Dunne v. Minister for the Environment* and the principle that the Court has discretion to depart from the normal rule that costs follow the event "if, in the special circumstances of a case, the interests of justice require that it should be so" and cite the court's statement in that case that there was "no predetermined category of cases which fall outside the full ambit of that jurisdiction". The Respondents point out that the discretion referred to by the Chief Justice in the *Dunne* case is not "completely at large" and that the Court may only depart from the normal rule "on a reasoned basis, indicating the factors, which in the circumstances of the case, warrant such a departure".

6. The Applicants also refer to an extract from Delaney and McGrath on Civil Procedure 4th ed at paras. 24-35 where an extract from the decision of Cooke J in *Bupa Ireland Ltd v. Health Insurance Authority* is set out, describing three broad approaches that may be adopted when a court considers it appropriate to depart from the primary rule that costs follow the event. They refer also to *Aforge Finance S.A.S. v. HSBC Institutional Trust Services (Ireland) Limited)* and *Veolia Water UK plc v. Fingal County Council (No.2)* , for

the appropriate approach to be adopted "when proceedings may have been lengthened by virtue of an otherwise successful party raising unmeritorious points thereby significantly increasing the costs". They refer to *Dardis v Poplovka* as an example of the application of this approach. In referring to these various authorities, they appear to invite the Court either to view their case as one raising special or exceptional circumstances under the *Dunne* line of authority and/or one requiring a departure from the normal rule under the *Veolia* principles.

Mr. McDonald's case

Context

7. At para. 1 of my judgment I explained the background and purpose of this Applicant's proceedings in the following terms:

> "This case has its origins in a decision made within the Irish Prison Service ("the IPS") to effect a temporary transfer of the Applicant out of one particular unit within the prison service following complaints of bullying made by two prison officers and while investigation of those complaints was underway. The Applicant is a prison officer of the rank of Assistant Chief Officer and the unit out of which it was intended to transfer him is the Operational Support Group ("the OSG"). The question of whether the entirety of the case is now moot is now a central issue because the temporary transfer of the Applicant did not take place and is no longer envisaged. This is because the prison officers who had made the complaints of bullying voluntarily agreed to a change in the rostering arrangements, with the result that the complainants and the Applicant would no longer be working together, and the transfer was then deemed by the IPS to be unnecessary. The Applicant, who had instituted these proceedings after the transfer decision had been made but before it had been implemented, refused to discontinue the proceedings when the new rostering arrangement was arrived at, and contended at the hearing before me that although certain reliefs were moot, the other reliefs that he had sought were not."

8. The first set of judicial review proceedings were brought by Mr. McDonald after a decision to transfer him (temporarily) was made on the 24 August 2018. In reasonably early course, the IPS accepted that the Applicant should have been allowed to make submissions concerning the fact of, and potential location, the transfer and, on that basis, consented to certiorari being granted in respect of that first transfer decision. The High Court (Noonan J.) granted certiorari on the 9 October 2018. The Respondents point out that in *McDonald (No. 1)*, by letter of 2 November 2018, they then sought to resolve the proceedings on the basis that they would be struck out with an order for the Applicant's reasonable costs to be taxed in default of agreement. That offer was rejected by Mr. McDonald and the first case remained live.

9. A process was then engaged in, resulting in a second decision to the same effect, namely to transfer the Applicant. This decision was communicated to him by letter dated 19 December 2018. The Applicant then commenced a second set of judicial review

proceedings challenging that decision, being highly critical of numerous aspects of the process leading to the decision.

10. Following the Applicant's return to work on the 22 December 2018 after having been on sick leave for some months, the prison officers who had made the allegations of bullying agreed to work on a different side of the roster to the Applicant. The IPS then decided that it was not necessary to transfer the Applicant and he was so notified by letter dated the 11 February 2019.

11. The Respondent contended that in those circumstances, both sets of proceeding were entirely moot as each were designed to prevent and quash a transfer decision; the first decision had been quashed by *certiorari¸* and the second withdrawn upon the change of circumstance described above. The Applicant maintained that certain parts of both cases remained live, including his challenge to the procedures employed thus far in the process of dealing with the allegations of bullying, as well as certain declarations relating to the procedures leading up to the transfer decisions. My conclusions in this regard were as follows:

    a) At paragraphs 67-71 of my judgment I held that the declarations in respect of the procedures leading up to each of the transfer decisions were moot for the same reasons as those which applied to the *certiorari* and injunctive reliefs sought in respect of the transfer decision themselves.

    b) At paragraphs 75-77 I explained why I would not rule against the Applicants in respect of their complaints concerning the *O'C* and *M* allegations on the basis that they were not amenable to judicial review but instead proceeded to consider whether there had been a breach of fair procedures.

    c) I concluded that there had been no breach of fair procedures in the manner in which these complaints had been dealt with (paras. 78-85)

12. I also commented at paragraph 87 that upon the second transfer being rescinded or abandoned by the IPS in February 2019, '*the Applicant should have terminated these legal proceedings and engaged with the investigation by Raise a Concern into the complaint of prison officer O'C where he could have set out his case fully before the investigators with a view to persuading them that the complaints of bullying made by prison officer O'C completely lacked substance'*. Instead of doing that, he sought to '*prolong and bring to trial proceedings which had originally been brought for a very different purpose (namely to prevent his transfer) and sought to shoe-horn what was essentially a moot case into the remaining reliefs sought, most of which was attempted by conflating issues relating to the transfer decision and issues relating to the bullying complaints/Dignity at Work procedure, and by seeking to import a preliminary procedure under the Policy standards of procedural rigour more suited to an investigated or disciplinary process'*.

Submissions on Costs

13. The Respondents submit that they are entitled to their costs on the normal basis that costs follow the event.

14. Mr. McDonald submits that that there should be no order for costs or, in the alternative, that the costs should be limited to one-third of the costs by reason of the fact that three Applicants' cases were heard together in the High Court. He requests that, if costs are to be awarded, they be measured by the Court. He also seeks a stay on any costs order pending the determination of any appeal.

15. He points out that he is a senior prison officer with an unblemished record of employment who at all times acted in good faith and upon the belief that he was being subjected to an unfair process without regard to his legal rights and entitlements and his rights to natural and constitutional justice.

16. He refers to the fact that the Respondents did not plead that the decision was not amenable to judicial review but does not develop the point any further.

17. The Applicant refers at paragraph 2.5 to a large number of matters which were the subject of argument at the substantive hearing concerning the role of Mr. Fergal Black and the process leading to the second transfer decision as well as the change in rostering arrangements which led to its withdrawal.

18. He also submits that in a case such as the present, he is required to confront an organ of the State with "unlimited resources, personnel and finances" and that it would be unjust for this reason also to subject him to the costs of the entire hearing.

19. Having cited the authorities described above concerning the various circumstances in which the normal rule as to costs may be departed from, the Applicant does not engage to any great degree with the principles identified in those authorities in the context of his own cases or explain how the Respondents' conduct of the cases might be said to attract the application of any of the principles. Nor does he engage with the limitation appearing (at least on one view) in the *Veolia* case that the power to reduce the costs of the successful party in respect of parts of the case which that party lost was confined (prior to the 2015 Act) to "complex" cases, or perhaps even more importantly, with the principle that the losing party must establish that the winning party was unsuccessful on a part of the case which materially added to the costs of the case. All that is said in the written submissions, having cited *Veolia, Aforge Finance, Dardis v Poplova*, and the extract from Delaney and McGrath described above, is: "This factor is all the more prevalent where there were many issues raised by the Respondent in the High Court". I do not understand what this is intended to mean, but if it is being suggested that an unsuccessful litigant is entitled to his costs on the basis that the successful litigant raised many issues, this is a very long way from the principles set out in the *Veolia* line of jurisprudence. I do not consider this case to have been particularly complex in the sense envisaged by *Veolia*; but more importantly (lest I am wrong that the requirement of complexity does not apply), I do not believe that the Respondents were unsuccessful on any issue or issues

which materially increased the costs of the case, which is the test set out in *Veolia* for departing from the ordinary rule.

Decision

20. On the issue of special circumstances, it will be recalled that the *Dunne* case identified a number of cases which might warrant a departure from the normal rule as to costs:

    i. Where the constitutional issues raised were fundamental and touched on sensitive aspects of the human condition;

    ii. Constitutional cases of conspicuous novelty, often where the issue touched on aspects of the separation of powers between the various branches of government;

    iii. Where the issue was one of far-reaching importance in an area of law with general application;

    iv. Where the decision has clarified some otherwise obscure or unexplored area of the law;

    v. Where the litigation has not been brought for personal advantage and the issues raised were of special and general public importance.

    None of these apply in the present case.

21. I cannot see any other factor in this case which would reach the threshold of a "special factor" warranting the departure from the normal rule that costs follow the event. The fact that an individual in judicial review proceedings is facing the State which undoubtedly has far greater resources is not a factor which the Court may take into account when awarding costs. It is a situation which arises frequently in judicial review cases and to lay special emphasis upon it in this case would not be consistent with the usual approach of the Court nor in accordance with the principles set out in the authorities on costs. I appreciate that the Applicant is a senior prison officer with an unblemished professional record and strongly believes that he has been mistreated. However, his complaints did not translate themselves into a successful judicial review application with the exception of the granting of the order of *certiorari* in respect of the first transfer decision, which I will now address.

22. I do take account of the fact that Mr. McDonald was successful in obtaining *certiorari* in respect of the first transfer order; it will be recalled that the State consented to the making of this order and wrote to the Applicant on the 2 November 2018 inviting him to discontinue proceedings. It seems to me that he should awarded his costs up to that date if that has not yet been the subject of any order as to costs.

23. Accordingly, I will award costs in favour of the Applicant in respect of costs incurred up to the 2 November 2018, to include reserved costs; I will award costs to the Respondents from that date onwards, to include reserved costs; with the two sets of costs to be set-off against each.

24. It seems to me more appropriate that a legal costs adjudicator should rule on the costs in the event of disagreement and I decline the invitation to measure the costs.

25. I note the suggestion that the award of costs be apportioned between the Applicants, and I agree that each Applicant should only bear the costs relating to his own case. In this regard I note that the pleadings and submissions in each case were tailored to the individual circumstances of each of the Applicants. The Respondents' also insisted at the hearing that the three cases were distinct and that the Court should not "cross-fertilise" evidence from one case to another. There was a clear demarcation at the hearing in terms of each of the three cases both in terms of the Applicants' presentations and the State's response. It seems to me that a legal costs adjudicator would have little difficulty in fairly separating out the hearing costs of each individual case, both in terms of the pre-trial costs and the hearing costs. The costs of the hearing in the High Court should be determined on an apportionment of the time Mr. McDonald's cases took at hearing as distinct from those of Mr. Dowling and Mr. Buckley. If the parties cannot agree on the apportionment of time at the hearing, they have liberty to the Court to apply to take up the DAR if necessary.

26. I will accede to the application to place a stay on the costs pending the determination of any appeal. However, in the event of no appeal having been lodged with the prescribed period from the perfection of my order, the stay shall expire 7 days after the expiration of that period.

Mr. Dowling's case

Context

27. In the substantive proceedings, the Applicant sought to quash the contents of a report prepared by a person fulfilling the role of "designated person" under the Dignity at Work policy currently operating within the Irish Prison Service ("IPS"). The report was prepared after a complaint of bullying was made against the Applicant and after certain steps had been taken by the designated person in accordance with the Policy, which sets out the procedures to be followed upon a complaint of bullying being made. In her report, the designated person recommended that the Complainant and the Applicant should engage in mediation. As I said at paragraph 2 of my judgment in the case:

> "The case was heard by me at the same time as the case of *McDonald v. IPS* and *Buckley v IPS.* Unlike those cases, there was never any question of transferring this Applicant, Mr. Dowling, from one position to another within the IPS. Also, unlike the McDonald case, no question of any further investigation of a bullying complaint arises. What happened in the present case was simply this: a complaint of bullying was made against the Applicant; a designated person was appointed; having carried out her duties, she wrote a report recommending mediation which was accepted by the Director of Human Resources; and that was where matters rested until this judicial review was commenced. The Applicant takes issue with her report and, in particular, her view that the complaint was made in good faith, and its recommendation as to mediation, as well as the acceptance of the report by the Director. The Applicant says that she failed to take certain crucial matters into

account and that these might have affected her conclusion. It has to be said that the submissions on behalf of the Applicant frequently came close to the proposition that the Court itself should view the bullying complaint against the Applicant as being without merit. Of course, the Court can express no view whatsoever on this matter as this would be to enter into the merits of the complaint which this Court in exercising its judicial review function is not entitled to do."

28. In my judgment, I decided that the decisions purported to be challenged by Mr. Dowling were not amenable to judicial review, a point which had been clearly pleaded by the Respondents; and that he did not establish any breach of fair procedures and/or natural or constitutional justice in the manner in which the bullying complaint made against him was considered. I refer in particular to paragraph 33 of my judgment in which I said:

> "Taking all of the above into account, I have reached the conclusion that the present case does not fall within the parameters of judicial review. The Irish Prison Service is undoubtedly a body which carries out many functions of a public law character, but what is impugned in the present case is a step taken in respect of an employee which is neither an adjudication on a disputed fact nor a sanction of any kind, such as dismissal, demotion, or warning. Nor is it a finding in the course of an investigation preliminary to a disciplinary process. There is little or no nexus between the statutory or public law context of the Respondent and the matter impugned, being a report of a designated person into an allegation of bullying as a preliminary exercise under the Dignity at Work procedure. The Applicant was not removed or suspended from his position. The height of the Applicant's case is that the designated person formed the view that a complaint had been made in good faith against him; an opinion which was embedded in a report to her superior, the Director of Human Resources, and which would not have been generally publicised if he had not brought these judicial proceedings. The designated person was performing functions in the most preliminary phase of a phased structure set out in a policy agreed between the employer and the trade unions. I cannot see how, on any of the tests described in the authorities, the Applicant can bring himself within the parameters for judicial review and I therefore conclude that the Applicant should be refused the reliefs sought on this preliminary basis".

29. I also went on to hold, in the alternative, that I would refuse the reliefs in any event on the grounds that the rules of natural and constitutional justice were not breached on the facts of the case (paras. 34-37).

Submissions on Costs

30. The Respondents submit that they are entitled to their costs because they were successful in defending the proceedings.

31. The Applicant Mr. Dowling submits that that there should be no order for costs or, in the alternative, that the costs should be limited to one-third of the costs by reason of the hearing together of the cases of the three Applicant, with the costs to be measured by the Court. He also seeks a stay on any costs order pending the determination of any appeal.

Decision

32. I do not think there is a basis from departing for the normal rule in this case. The case was not particularly lengthy or complex, and it has not been established that the Respondents were unsuccessful in parts of the case which materially added to the costs. Accordingly I see no basis for the *Veolia* line of authority to apply. I would make the same comment as I made in the McDonald case with regard to the submission that the Respondent had raised "many issues" in the High Court; this is not the relevant test as established by *Veolia*, even assuming that decision to apply in this case.

33. Nor can I see any factor in this case which would reach the threshold of a "special factor" or set of circumstances within the *Dunne* line of authority which would warrant the departure from the normal rule that costs follow the event. The type of circumstances which attract this approach are set out above. The Applicant submits that the Court should take into account that he is a senior prison officer with an unblemished record of employment who at all times acted in good faith and upon the belief that he was being subjected to an unfair process without regard to his legal rights and entitlements and his rights to natural and constitutional justice. Further, his original role was to admonish two more junior prison officers and arose from the discharge of his lawful duties as a senior officer within the prison service. He submits that the most equitable result would be no order for costs and that it would be unjust for the defendant to be visited with the costs of the entire hearing. He also submits that in a case such as the present, he is required to confront an organ of the State with "unlimited resources, personnel and finances" and that it would be unjust for this reason also to subject him to the costs of the entire hearing.

34. In my view, the latter factor has not one which the Court may take into account when awarding costs. It is a situation which arises frequently in judicial review cases and to lay special emphasis upon it in this case would not be consistent with the usual approach of the Court or the authorities. While I appreciate that the Applicant is a senior prison officer with an unblemished professional record and that his role in the events which ultimately gave rise to these proceedings was the administering of an admonishment to more junior officers in the course of his duties, any litigant who launches judicial review proceedings must be aware not only of the limited legal parameters of such proceedings and also of the risks in terms of costs if the proceedings are unsuccessful.

35. Accordingly, I will award costs to the Respondents (including reserved costs), to be adjudicated upon in the absence of agreement, but the costs should be those relating to the Applicant Mr. Dowling's case only (both in terms of the pre-trial matters and the portion of the hearing allocated to the Applicant's case). The same comments apply with respect to the taking up of the DAR if necessary in order to establish the proportion of time at hearing spent on Mr. Dowling's case.

36. I will accede to the application to place a stay on the costs pending the determination of any appeal. However, in the event of no appeal having been lodged with the prescribed period from the perfection of my order, the stay shall expire 7 days after the expiration of that period.

Mr. Buckley's case

Context

37. In my judgment I held that the Applicant failed to discharge the burden of proof placed on him to bring his transfer within the ambit of judicial review and that he did not establish that the transfer of which he complained had the quality of a sanction which might bring it within the scope of judicial review.

38. Mr. Buckley's case consisted of a challenge to a decision to transfer him from the Operational Support Group to the Prison Service Escort Corps within the Irish Prison Service in circumstances where he had not applied for the transfer, did not wish to be transferred and was given 7 days' notice of the transfer. He took early retirement from the Service after and as a consequence of the transfer. Unlike the other two cases, the Dignity at Work Policy did not come into the picture. The reasons for Mr. Buckley's transfer were in dispute; the IPS maintained that it was for ordinary operational purposes, while the Appellant disputed this and speculated over a series of affidavits as to the real reason for his transfer. Common to all his theories was that the motivation for the transfer was not one of operational need and that the true reason had been concealed from him and that the transfer was in effect a sanction. He maintained that there was an inextricable link between the decision to transfer and the events which had given rise to Mr. McDonald's proceedings.

39. The Respondents pleaded mootness, but I was not prepared to find in their favour on this point.

40. The Respondents did not formally plead non-justiciability but they made submissions and referred to authorities which implicitly raised the point. Having considered some authorities, I came to the conclusion that in general, transfer decisions in an employment context do not attract constitutional rights on the part of the transferee, but that the position might be different if the transfer amounted to a sanction. I went on to consider the circumstances of the transfer. Of course it did not on its face purport to constitute a sanction, but I noted that I had some reservations about the evidence put forward on behalf of the Respondents (see the matters enumerated at para. 89). At para. 90, I concluded that "I am left with an impression that there may be more to the transfer of the Applicant than a simple transfer for operational need without regard to any other considerations…[but] It is for the Applicant to satisfy the Court that his transfer falls within the ambit of judicial review. I am of the view that the Applicant has failed to reach the necessary standard of proof in this regard". I said that while the Respondent did not clearly plead non-amenability to judicial review, it ultimately mattered little "whether one characterises the present situation as one which is not amenable to judicial review or one in which there was no breach of fair procedures because the two issues seem to me to stand or fall together in the present context". My conclusion was that the Applicant had failed to establish that his transfer was of a type which either fell within the scope of judicial review or attracted entitlements under natural and constitutional justice.

Submissions on Costs

41. Mr. Buckley submits that that there should be no order for costs or, in the alternative, that the costs should be limited to one-third of the costs by reason of the hearing together of the cases of the three Applicant, with the costs to be measured by the Court. He also seeks a stay on any costs order pending the determination of any appeal.

42. In his submissions, the Court is invited to depart from the normal rule as to costs on the basis that the Respondent sought to transfer the Applicant "suddenly and without warning" in circumstances where: (i) no operational grounds were established by the Respondent during the hearing of the proceedings for the transfer; (ii) The Respondent could not furnish to the Court the minutes of the meeting where the operational reasons and justification for the transfer were discussed and adopted by the IPS; (iii) The transfer was sudden, arbitrary and not in keeping with standard and accepted IPS practices for such transfers; (v) The position within the IPS to which Applicant was being transferred did not exist at the time the said transfer was effected and "the *bona fides* of the Respondent is challenged".

Decision

43. Taking into account how the proceedings ran before me as well as the manner in which I arrived at my conclusions, I propose to make no order for costs in Mr. Buckley's case for the following reasons; (a) the Respondents' main contention was that the proceedings were moot, which I rejected; (b) the primary reason for the Court's refusal of the relief was a ground not explicitly pleaded or clearly signposted by the Respondents; (c) there may be some utility to the State in having some clarification of the position concerning transfers within the State employment sector; (d) some shortcomings in the evidence on behalf of the respondents, as referenced in the judgment on the substantive issues; and (e) the fact that Mr. Buckley's distress at the summary nature of the transfer was such that he resigned from his position. In all the circumstances of the case, I consider that my discretion should be exercised so as to make no order for costs in this case instead of awarding costs to the successful party (the Respondents).