THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 224
[2020 No. 655 JR]

BETWEEN

FREDDY SHERRY

APPLICANT

AND

THE MINISTER FOR EDUCATION AND SKILLS, THE MINISTER FOR FURTHER EDUCATION AND HIGHER EDUCATION, RESEARCH, INNOVATION AND SCIENCE, IRELAND, AND THE ATTORNEY GENERAL

RESPONDENTS

RULING of Mr. Justice Charles Meenan delivered on the 26th March, 2021

Introduction

1. For reasons of public health, the traditional Leaving Certificate in 2020 could not be held as normal. An alternative system to provide calculated grades was required to be put in place as a matter of urgency. The system that was devised had two phases. Firstly, a school phase; and, secondly, a phase undertaken by the Department of Education and Skills whereby the estimated marks submitted by various schools were subjected to a standardisation model. The various features of the standardisation model were the subject of documentation and information notices from the said Department.

2. In August/September two decisions were taken. Firstly, that school historical data (SHD) would not be used; and, secondly, that national historical data (NHD) would not be subject to the "*mapping tool*". These decisions were taken notwithstanding certain commitments that had been given in the documentation which I have referred to. The consequences of these decisions gave rise to the instant proceedings and in excess of 60 others.

3. The applicant maintained that the effect of these decisions was that, firstly, the calculated grades which he received were unfairly downgraded from the estimated marks submitted by his school; and, secondly, that there was significant "*grade inflation*", which put his third level courses of choice beyond reach.

4. Given the number of proceedings issued, and the approaching dates for Leaving Certificate 2021, the Court directed that the parties identify a "*lead*" case to have these issues determined. The issue was: -

> "That the decision of the first and fifth named respondents of 19 August 2020 and/or the decision of the first named respondent of 21 August 2020 and/or the confirmation of the said decision by the sixth named respondent on 1 September 2020 to alter the standardisation model so as to exclude the use of all school by school historical data (SHD) on the performance of students in past cohorts in each subject was arbitrary, unfair, unreasonable, irrational and unlawful and in breach of the applicant's legitimate expectations."

5. In the course of the hearing, the second decision not to apply the "mapping tool" to NHD came into play and so the Court had to make a determination as to the lawfulness or otherwise of: -

   (i) The exclusion of SHD; and

   (ii) That NHD was not subject to the "*mapping tool".*

6. On 2 March 2021, the Court gave its judgment and held: -

   "104 …that the decision of the respondents not to apply school historic data (SHD) and not to apply the '*mapping tool'* to national historical data (NHD) in the standardisation model for the award of calculated grades was not arbitrary, unfair, unreasonable, irrational and unlawful and in breach of the applicant's legitimate expectations."

7. This ruling concerns the issue of costs. These costs relate to not only the substantive hearing which took place over some five weeks but also an interlocutory application dealing with a number of matters that was heard and determined over a number of days in November, 2020.

8. At the conclusion of the judgment I stated: -

   "117. On the matter of costs, I would ask the parties to consider that this was the *'lead case'* for the purposes of determining a central issue that is common to numerous other applications."

Position of the parties

9. By open letter, dated 10 March 2021, the Chief State Solicitor, on behalf of the respondents, stated that the respondents "*are amenable to paying 50% of [the applicant's] reasonable legal costs, on a party-and-party basis, to be adjudicated in default of agreement".* This applied not only to the substantive hearing but also to the interlocutory applications. The letter also stated that the respondents assumed liability to pay the full stenography costs and "*TrialView*" costs, amounting to just short of €110,000.

10. In a reply, dated 12 March 2021, this offer was rejected and , on the matter of stenography costs and the costs of "*TrialView*", the following was stated: -

    "You reference to the costs of '*Trial View'*. Whereas obviously it was of some benefit to have '*Trial View'* in the case, it was only necessitated by virtue of one of the State's witnesses being unavailable to travel to Dublin.

    As regards the costs of stenography services, we do note that the State wished to have an overnight transcript and although happy to have had access to same, this was prepared very much at the request of the Minister."

11. As no agreement was reached, the parties made written submissions to the Court on the matter of costs. As these written submissions were comprehensive, helpfully setting out

the relevant authorities and statutory provisions, I am satisfied that I can determine the issue of costs based on these submissions.

Submissions of the parties

12. The applicant maintains that there were a number of factors that, despite the judgment, lay in favour of a full order for costs being made in favour of the applicant, on the grounds: -

    (i) The issues raised involved points of exceptional public importance;

    (ii) The proceedings involved matters which were in the most part *sui generis* and had not been previously considered by the Superior Courts;

    (iii) That there was urgent public interest in the challenge being brought expeditiously;

    (iv) That the application involved difficult and complex issues of law and fact, necessitating testimony from expert witnesses; and

    (v) That the Court held that the respondents were in breach of certain commitments that had been given both to students and to teachers.

13. In their submissions, the respondents maintained: -

    (i) Given the applicant's lack of success, under the relevant statutory provisions, he was not strictly entitled to any costs;

    (ii) That where unsuccessful parties had been awarded costs in cases of "*public importance"* courts have often tended to award partial rather than full costs;

    (iii) That although the case was a lead case, the applicant was pursuing his personal interest and account should be taken of this; and

    (iv) The application did not involve complex or novel issues of law but rather was determined on the application of well-established principles.

14. Both the applicant and the respondents supported their submissions by relying on numerous authorities.

Relevant statutory provisions

15. The jurisdiction of the court to award costs has been the subject of some change. Since December, 2019, the relevant provisions of the Rules of the Superior Courts (RSC) are contained within O. 99, r. 2: -

    "2. Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:

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

(2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.

(3) The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.

(4) …

(5) ...

3.(1) The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable.

(2) …"

The relevant provision of the Legal Services Regulations Act 2015 (the 2015 Act) is s. 169, which provides: -

"(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

(a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

…"

Legal authorities

16. These two statutory provisions have been considered in a number of recent decisions by both the Court of Appeal and the High Court. I refer to the decision of the Court of Appeal in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183 where Murray J. stated: -

"Relevant principles post-December 2019

19. I have included in an Appendix to this judgment the relevant provisions of O.99 as it stands since December 3 2019, as well as the relevant parts of s.168 and 169 of the Legal Services Regulation Act 2015. Reading these in conjunction with each other, it seems to me that the general principles now applicable to the costs of proceedings as a whole (as opposed to the costs of interlocutory applications) can be summarised as follows:

(a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and O.99, r.2(1)).

(b) In considering the awarding of costs of any action, the Court should '*have regard to*' the provisions of s.169(1) (O.9, r.3(1)).

(c) In a case where the party seeking costs has been '*entirely successful in those proceedings'*, the party so succeeding '*is entitled'* to an award of costs against the unsuccessful party unless the court *orders otherwise* (s.169(1)).

(d) In determining whether to 'order otherwise' the court should have regard to the '*nature and circumstances of the case'* and 'the conduct of the proceedings by the parties' (s.169(1)).

(e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).

(f) The Court, in the exercise of its discretion may also make an order that where a party is *'partially successful'* in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).

(g) Even where a party has not been '*entirely successful'* the court should still have regard to the matters referred to in s.169(1)(a)-(g) when deciding whether to award costs (O.99, r.3(1)).

(h) In the exercise of its discretion, the Court may order the payment of a portion of a party's costs, or costs from or until a specified date (s.168(2)(a)).”

In the High Court decision in *Corcoran v. Commissioner of An Garda Siochana* [2021] IEHC 11 Simons J. stated: -

"19. The courts have a discretion, to be exercised on a case-by-case basis, to depart from the general rule that a successful party is entitled to its costs. One of the factors to be considered, under section 169(1), is the 'particular nature and circumstances of the case'. The statutory language is broad enough to allow the court to consider whether the issues raised in the proceedings were of general public importance, and, if so, whether this justifies a modified costs order. In exercising its discretion in respect of costs, a court must seek to reconcile (i) the objective of ensuring that individuals are not deterred by the risk of exposure to legal costs from pursuing litigation of a type which—although ultimately unsuccessful—nevertheless serves a public interest, with (ii) the objective of ensuring that unmeritorious litigation is not inadvertently encouraged by an overly indulgent costs regime.

20. In carrying out this balancing exercise, it will be necessary for the court to consider factors such as (i) the general importance of the legal issues raised in the proceedings; (ii) whether the legal principles are novel, or, alternatively, are well established; (iii) the strength of the applicant's case: proceedings might touch upon

issues of general importance but the grounds of challenge pursued might be weak; (iv) whether the subject-matter of the litigation is such that costs are likely to have a significant deterrent effect on the category of persons affected by the legal issues; and (v) whether the issues touch on sensitive personal rights."

17. I also refer to the decision of the Supreme Court in in *Dunne v. Minister for the Environmen*t [2008] 2 I.R. 775, where Murray C.J. stated: -

> "Accepting that the plaintiff brought the proceedings in the interests of promoting compliance with the law and without any private interest in the matter, I do not consider that the issues raised in the proceedings were of such special and general importance as to warrant a departure from the general rule. Undoubtedly, it could be said that issues concerning subject matters such as the environment or national monuments have an importance in the public mind, but a further factor for the court is whether the legal issues raised, rather than the subject matter itself, were of special and general public importance. In this case nothing exceptional was raised in the issues of law which were before the court so as to warrant a departure from the general rule."

Consideration of the issues

18. Clearly, the applicant has not been successful so, in the normal course, would not be entitled to costs. However, the respondents have appropriately recognised "*the particular nature and circumstances of the case*" and have made an offer to pay 50% of the applicant's costs on a party-and-party basis.

19. In reaching a decision on costs it is necessary for the Court to carry out a "*balancing exercise*" identifying various factors, and the weight to be attached to them, which favour an award of costs to the applicant and those that do not.

20. Factors in favour of the applicant: -

    (i) It cannot be doubted that these proceedings were in the public interest. There was considerable controversy when the calculated grades were awarded. Nearly 70 separate legal proceedings were initiated. I have no doubt that many of those whose calculated grades fell short of expectations felt aggrieved and were most likely of the view that the system was legally suspect but had neither the inclination nor appetite to initiate legal proceedings. Given the importance of the Leaving Certificate in the working and educational life of the country, it was essential that the issues that arose concerning the decision not to apply SHD and to permit a degree of "*grade inflation*" be determined in advance of Leaving Certificate 2021;

    (ii) It is the case that the applicant had a clear personal interest in these proceedings and potentially may have gained had the outcome been different. However, I do not think that this is a factor against the applicant in that the purpose of his proceedings, from his perspective, was to establish that he ought to have been

awarded higher calculated grades, which he maintains he was entitled to in the first place given the commitments given by the first named respondent; and

(iii) Given that the commitments which had been given concerning the operation of the standardisation model had been breached, it was not at all unreasonable that there would be a response by way of the initiation of legal proceedings.

21. Factors in favour of the respondent: -

(i) The matters in issue in these proceedings were determined by the application of well-known and established legal principles. The Constitution clearly provides for the "*separation of powers*". Decisions of both the Supreme Court and the Court of Appeal, relied upon by this Court, have clearly established that the courts have neither the competence nor the jurisdiction on matters of policy. This applies as much to cases taken in the area of education as it does to every other area;

(ii) Notwithstanding the legal principles that were applicable, the statistical evidence adduced in the course of the hearing did not establish any material unfairness suffered by the applicant in the calculated grades he was awarded;

(iii) The respondents assumed the liability to pay the full stenography costs and the "*TrialView*" costs, amounting to just short of €110,000. This was undoubtedly to the benefit of the applicant. Indeed, the applicant, in the course of the hearing, relied heavily on the overnight transcripts that were provided by the respondents. I have to say that the applicant's response to this in their letter of 12 March 2021 was unreasonably dismissive; and

(iv) Though the commitments referred to were breached by the first named respondent, this breach has to be mitigated by the requirement that the calculated grades system had the support of those involved in third level education, future employers of the class of 2020 and the public in general.

Conclusion

22. In considering the various factors set out above, I am satisfied that the applicant ought to be awarded 65% of his costs, on a party-and-party basis, in respect of the substantive hearing, such costs to be adjudicated in default of agreement.

23. As regards the interlocutory applications that were heard in November, 2020, I am satisfied that the respondents' offer to pay 50% of the costs of those motions is more than reasonable. In reaching this conclusion, I have, in particular, taken into account the decision of the Court and the reason for it on the respondents' application to exclude the affidavit of Ms. Alice Lynch of St. Killian's German School. Arising from this it should also follow the applicant is entitled to 50% of the costs associated with the within application for costs.

24. In conclusion, I will make the following orders: -

(a) An order dismissing the application;

(b) An order that the respondents do pay the applicant 65% of the costs of the substantive hearing of the application (to include any reserved costs), on a party-and-party basis, to be adjudicated in default of agreement; and

(c) That the respondents pay the applicant 50% of the costs of the interlocutory motions heard in these proceedings in November, 2020 and the within application for costs, such costs to be adjudicated in default of agreement.