THE HIGH COURT

[2024] IEHC 18

[Record No. 2023/681P]

BETWEEN

JOHN FRANCIS LAWLESS

PLAINTIFF

AND

TECHNOLOGICAL UNIVERSITY OF THE SHANNON MIDLANDS

FORMERLY ATHLONE INSTITUTE OF TECHNOLOGY,

THE GARDA COMMISSIONER, SINÉAD CASEY AND

WESTMEATH COMMUNITY DEVELOPMENT LIMITED

DEFENDANTS

JUDGMENT of Mr Justice Kennedy delivered on the 18th day of January 2024

1. In my judgment dated 27th November 2023, I dismissed the Plaintiff's applications for injunctive relief and for the consolidation of these proceedings and the proceedings bearing record no. 2023/1895P, naming the Minister for Social Protection, Ireland and the Attorney General. Accordingly, the Plaintiff has failed in each of his applications. This judgment concerns the costs of those applications.

2. Sections 168 and 169 of the Legal Services Regulation Act 2015 ("the LSRA") and the current Order 99 rule 2(3) of the Rules of the Superior Courts lay down the principles to be applied by the Courts. The relevant provisions of the LSRA are as follows:

"*168. (1) … a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings—*

(a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings…

(2) Without prejudice to subsection (1), the order may include an order that a party shall pay—

(a) a portion of another party's costs,

(b) costs from or until a specified date, including a date before the proceedings were commenced,

(c) costs relating to one or more particular steps in the proceedings,

(d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings…

169. (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…

(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order."

According to O. 99, r. 2:

"*(3) The High 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.*"

O. 99, r. 3(1) provides that the High Court shall have regard to the matters set out in section 169(1) of the LSRA, where applicable.

3. The courts have determined how these principles should be applied in decisions such as *McFadden v Muckno Hotels Ltd* [2020] IECA 153, *Daly v Ardstone Capital Ltd* [2020] IEHC 345, *Pembroke Equity Partners Ltd v Corrigan and Anor.* [2022] IECA 142 and *Smith v Cisco Systems Internetworking (Ireland) Ltd* [2023] IECA 238, to which I have had regard for the purposes of this decision. They, inter alia, confirm the applicability of section 169(1) to cost applications in interlocutory proceedings.

4. Written submissions were received from the successful Defendants to the effect that:

a. It is possible to justly adjudicate upon liability for costs on the basis of the interlocutory applications in this case.

b. Oral submissions were made to the Court from the very outset when the Plaintiff brought these applications before the Court, both before O'Moore J. and Dignam J., that it was clear that the applications were bound to fail. The Plaintiff nevertheless persisted with the applications. They were unnecessary and unwarranted applications.

c. Accordingly, the general "follow the event" rule should apply. There were no grounds which would warrant the Court from departing from the normal rule by not awarding costs to the successful Defendants. The issues do not raise issues of public importance. There was nothing novel in the applications.

d. The Plaintiff's relative impecuniosity is not a reason to depart from the presumptive costs order in this case.

e. The fact that the Plaintiff is a lay litigant does not absolve him from the obligation to comply with normal rules of evidence and procedure or from liability for costs where motions have been unsuccessful.

f. The Plaintiff has brought completely unmeritorious motions which were not reasonable for him to issue in the circumstances.

5. The Plaintiff submitted that the general rule that costs follow the event should not apply for three reasons:

a. Firstly, by reference to my findings in relation to the second named Defendant's acknowledged error in the initial vetting report and the delay in rectifying it.

b. Secondly, the Plaintiff's submission that the Garda vetting procedure had still not been correctly applied and that my judgment gave no regard to the Plaintiff's "uncontroverted Affidavit evidence" that the fourth named Defendant's vetting procedure was fundamentally flawed and was in fact conducted by the third named Defendant who was not the person authorised to perform that function.

c. The Plaintiff's submission that the litigation raised issues of general public importance as to how Garda vetting applies to persons with criminal convictions and how that interacts with their employment prospects.

Discussion

6. As a starting point, the Defendants have been wholly successful on their applications and are therefore presumptively entitled to their costs.

7. It is extremely unfortunate that the Plaintiff did not engage with the Defendants about the proposed applications before issuing them. It is generally unwise to issue legal proceedings or applications without first seeking to engage with the other parties save in exceptional circumstances (which do not apply here). If he had engaged with the defendants, which would have been prudent as well as courteous, they would have warned him that the applications would be opposed and that they were likely to fail, exposing him to a significant costs risk.

8. It appears that the Defendants made their position clear in any event once the applications were issued. The Plaintiff nevertheless chose to proceed with the applications. The normal rule is that he is responsible for the costs occasioned thereby. The authorities show that, of itself, impecuniosity is not a reason to refrain from making a costs order on the usual "follow the event" basis. It might be different if the issues raised on the applications were of general public importance or if the applicant had reasonable grounds for bringing the applications, even if they were unsuccessful. However, as appears below, I do not believe that to be the case. The Plaintiff had no reasonable basis for any of the applications.

9. Dealing in reverse order with the points raised by the Plaintiff, I consider:

a. The appropriate balance in terms of disclosure of criminal convictions, vetting procedures and the application of such principles in the context of employment applications may well be a matter of public interest. However, that does not mean that these individual applications were necessary or appropriate or that the applications needed to be determined in the public interest. I do not consider that the particular applications had any merit or raised issues of public importance. In those circumstances there is no reason to depart from the normal rule just because the broader issue of disclosure of convictions is a matter of general public interest.

b. As appears from my earlier judgment, I disagree with the Plaintiff's second point. He is entitled to exercise his right to appeal my decision, but I see no basis to depart from the normal order as to costs at this stage, since my decision stands unless a higher court was to overrule or vary my decision in that regard.

c. I have far more sympathy for the Plaintiff's first submission. It is unsatisfactory that the second Defendant's original vetting report was incorrect and the second Defendant should have rectified the issue more quickly once the issue emerged.

d. That said, no evidence has been presented to suggest that the issue actually affected the outcome of the Plaintiff's employment application (that it would be qualitatively different if the vetting report had stated the correct position, identifying two rather than three convictions). Nor did those past issues logically necessitate the bringing of the various applications.

e. I do not think that this issue necessitated the bringing of the motions or that it assists the Plaintiff in terms of most of the factors identified in section 169 above. Indeed, two of the factors noted above clearly militate against the Plaintiff (in that, the error in the original report did not necessitate or render it reasonable for him to bring the applications and the Plaintiff chose to pursue the applications without having a reasonable basis to do so).

f. However, the Court is also entitled to have regard to the parties' conduct before and during the proceedings, and the fact is that the second Defendant made an error in discharging its statutory duties and did not immediately rectify the error. I do not agree that that error necessitated or justified the bringing of either set of proceedings or the various applications and I appreciate that the Plaintiff may not be able to establish that he has suffered any legally recoverable loss. Nevertheless, in fairness, it is appropriate to make a "one off" deduction from the costs award that the second Defendant might otherwise be entitled to expect, to reflect the unfortunate issue which arose and any part it played in leading to the litigation. My approach in this regard is influenced by the reality that the plaintiff may otherwise be left without an effective remedy since it may be difficult for him to prove an entitlement to substantial damages which would justify the cost and risk involved in the continued pursuit of this litigation. It would be unfair for the plaintiff to be liable for all of the second defendant's costs on these applications in the circumstances.

g. At the risk of being unduly benevolent to the Plaintiff, I consider that the justice of the situation will be met on this occasion by applying a 50% reduction to the award of costs

that would otherwise be made to the second Defendant. The reduction is for this occasion alone – while this will be a matter for determination at the appropriate time, the Plaintiff should not expect similar reductions in the event of future unsuccessful steps in the litigation. In that event, the normal rules are likely to be applied, on the basis that the conduct issue has been sufficiently addressed by the significant reduction to the second Defendant's costs which I propose on this occasion. I should also make clear that the reduction is entirely without prejudice to the Plaintiff's ability to claim damages in the normal way and subject to the normal principles and evidential challenges.

10. Accordingly, I direct that the Plaintiff should pay the respective Defendants' costs (on a party & party basis) on the respective motions in the usual way, save that the costs otherwise payable to the second Defendant will be reduced by 50%. The amount payable to each Defendant will be determined by adjudication in the usual way in default of agreement.