



THE SUPREME COURT

[Appeal No: 66/2020]

**The Chief Justice,
O'Donnell J.,
McKechnie J.,
MacMenamin J.,
Dunne J.,
Charleton J.,
O'Malley J.**

Between/

Tomasz Zalewski

Applicant/Appellant

And

**An Adjudication Officer , The Workplace Relations Commission,
Ireland and the Attorney General**

Respondents

And

Buywise Discount Store Limited

Notice Party

Ruling of the Court delivered on 15th of April, 2021.

1. On April 6, 2021 judgment was delivered on the appeal in these proceedings (see – *Zalewski v. Adjudication Officer & ors* [2021] IESC 24). The appeal was put in for mention on Tuesday April 13 for the purposes of making final orders including determining any question concerning costs. The parties were invited to attempt to reach as much agreement as possible on those matters. While a certain amount of agreement was reached, a number of issues remained outstanding and were the subject of argument before the Court. This ruling is directed towards those issues which remained outstanding.

2. The first question was as to whether, as was suggested on behalf of Mr Zalewski, this Court should make a declaration arising out of the determination of all of the members of the Court that the adjudicative function which gave rise to these proceedings involved the administration of justice for the purposes of Art. 34 of the Constitution. It was accepted on behalf of Mr Zalewski that, in the event that such a declaration found favour with the Court, it would also be necessary to include a second declaration, consistent with the view of the majority of the Court, to the effect that the functions concerned were limited, within the meaning of Art. 37 of the Constitution, and thus their conferral on an adjudication officer was constitutionally permissible.

3. Counsel for the respondents (“the State”) argued that the judgment of the majority of the Court was clear in its terms and cautioned against the possibility that there might be unintended consequences which could flow from the granting of a declaration in the form sought. This was so, it was said, because the range of functions potentially affected was very large, while this Court had only been concerned in these proceedings with a substantive claim for unfair dismissal under the

Unfair Dismissals Act, 1977 (as amended) together with an ancillary claim under the Payment of Wages Act, 1991.

4. Having considered the matter, a majority of the Court is of the view that it would not be appropriate to make any declaration of the type sought on the basis that these matters are dealt with in the judgment and there would be a risk of unintended consequences if a declaration were to be made without detailed consideration of each of the potential functions which might be affected, directly or indirectly, by any such declaration. The Court will not, therefore, make either of the declarations sought on behalf of Mr Zalewski in that regard. However, it should be emphasised that the absence of a declaration does not in any way detract from the importance of the unanimous decision of all of the members of the panel to the effect that, in the context of this case, the Adjudication Officer was engaged in the administration of justice.

5. Next it is important to note that the parties were agreed that, in light of each of the judgments already delivered, it is appropriate that the Court should declare s.41(13) of the Workplace Relations Act, 2015, together with s.8(6) of the Unfair Dismissals Act, 1977, to be inconsistent with the Constitution. Those sections require relevant proceedings to be conducted in private and, for the reasons set out in the judgments of the Court, are inconsistent with the Constitution by virtue of removing the possibility, in appropriate cases, of a public hearing.

6. At the level of principle, it was agreed between the parties that there should also be a declaration to the effect that the legislation was inconsistent with the Constitution by reason of the absence of any provision concerning the administration of oaths or affirmations or providing for a penalty for giving untruthful evidence. As is clear from the judgments of the Court already given, the principal constitutional

concern in this context relates to the absence of any penalty for the giving of untruthful evidence. Counsel for the State did make the point that this requirement might not necessarily apply in respect of all of the functions of an adjudication officer.

7. The Court agrees with those latter submissions and would propose making a declaration in respect of this issue in the terms suggested on behalf of the State.

8. Next it will be recalled that the Court did make certain observations concerning the need for enhanced independence on the part of adjudication officers in circumstances where their actions were determined to amount to the administration of justice albeit of a limited nature so as to be permissible under Art. 37 of the Constitution. However, it was also pointed out that this issue had not been a specific area of challenge in the proceedings. In those circumstances it does not appear to the Court to be appropriate to make any declaration in that regard although the Court is sure that its observations in that context will be taken on board.

9. The next two matters which arose derived from the concession which had been made at an early stage in these proceedings on behalf of the State to the effect that the original decision in Mr Zalewski's case ought be quashed and the matter remitted back to the Labour Court to be determined by a different officer. It was suggested that this Court should make an order of *certiorari* and an order of remittal back in those circumstances. However, it is clear that such orders were made by the High Court without any opposition and that no appeal had been brought to this Court from that decision of the High Court. In those circumstances the Court does not consider it either necessary or appropriate to itself make orders of the type suggested where there

are already orders of the High Court in place which stand in the absence of any appeal having been brought in respect of same.

10. The final matter which requires to be considered concerns costs. It should be noted that the High Court, having regard to what was considered to be the significant public interest element in these proceedings, awarded Mr Zalewski 50% of his costs in that court notwithstanding the fact that the High Court had found fully against Mr Zalewski. He has now succeeded in at least part of his claim before this Court.

11. The Court agrees with the trial judge that there was a significant public interest in this matter which would have warranted a partial award of costs in the light of the well-established case law in respect of public interest claims. When to that is added the fact that Mr Zalewski succeeded in significant part in his claim before this Court, it is urged on his behalf that he should now be awarded his full costs. Counsel for the State suggested that a more appropriate order would be that Mr. Zalewski be awarded 75% of the full costs. In passing it should be noted that, as the State itself was represented by four members of the bar before this Court (including the Attorney General in person), it was accepted by counsel for the State that it was reasonable that this Court should certify that it was appropriate that Mr Zalewski should have been represented by two senior and two junior counsel in these proceedings.

12. While it is true that Mr Zalewski did not persuade this Court that the regime which he challenged was inconsistent with the Constitution by reason of an impermissible conferring of a judicial function on a non-judicial body, nonetheless the fact that this Court was persuaded that the administration of justice was involved formed an important part of the ultimate conclusion of this Court concerning the process which required to be followed in that context. As the Court pointed out, the

fact that the administration of justice is involved, even if it be of a limited nature so as to be permitted by Art. 37 of the Constitution, nevertheless carries with it enhanced obligations concerning the process which must be followed. Thus the finding in favour of Mr Zalewski to the effect that the administration of justice was involved was of real significance.

13. In the view of the Court the combination of the public interest nature of the proceedings and the significant success which Mr Zalewski achieved on appeal to this Court makes it appropriate that he should be awarded his full costs in both courts. The Court will, therefore, order that Mr Zalewski should be entitled to such costs, to be adjudicated in default of agreement, and will certify, as requested, for two senior and two junior counsel.