Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters

Established by the Minister for Justice and Equality under the Tribunals of Inquiry (Evidence) Act 1921, on 17th February 2017 by instrument

The Hon Mr Justice Peter Charleton

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Ruling as to costs application of Garda Keith Harrison

The tribunal sat on Friday the 1st of November 2019 to hear an application for the tribunal to discharge the costs of Garda Keith Harrison from public funds. This is the tribunal's ruling on that application.

Law as to costs at a tribunal

Section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 gives a tribunal express power to make an order for costs (either in favour of or against a party to the tribunal) when the tribunal is "of opinion that, having regard to the findings of the tribunal and all other relevant matters there are sufficient reasons rendering it equitable to do so." Section 6 of the 1979 Act was considered in *Goodman International v Hamilton.*[1] Hederman J in his judgment said it was clear that the various amendments contained in the 1979 legislation were made "to give tribunals set up under the relevant legislation further efficacy."[2] McCarthy J, in his judgment, said that the 1979 Act as a whole "must be construed as subject to the constitutional framework and, in particular, involving fair procedures."[3] A tribunal is not a contest between parties. It is a public inquiry that is called by the Oireachtas into matters of public moment. A person represented before a tribunal is there because he or she has something to answer to, or is a witness to a public issue, or is an expert. If a person claims that some dreadful wrong has been committed by a public institution, the Oireachtas is the party setting up the inquiry. If a person sues the public institution, that individual is a litigant. Costs are awarded at the discretion of the court depending on the outcome. If the person is a witness at a tribunal, he or she is there because of what he or she said. That person is obliged to tell the truth, in accordance with an oath or affirmation. To fail to tell the complete truth is to put the public inquiry nature of the tribunal in jeopardy of not finding where the truth lies. Tribunal costs are not dependent on whether a person did something wrong but rather on cooperation, central to which is telling the truth. As McCarthy J said:

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[1] [1992] 2 IR 542.
[2] [1992] 2 IR 601.
[3] [1992] 2 IR 605.

> The liability to pay costs cannot depend upon the findings of the Tribunal as to the subject matter of the inquiry. When the inquiry is in respect of a single disaster, then, ordinarily, any party permitted to be represented at the inquiry should have their costs paid out of public funds. The whole or part of those costs may be disallowed by the Tribunal because of the conduct of or on behalf of that party at, during or in connection with the inquiry. The expression "the findings of the tribunal" should be read as the findings as to the conduct of the parties at the tribunal. In all other cases the allowance of costs at public expense lies within the discretion of the Tribunal.[4]

The above fits in with the rationale behind costs orders in the first place. In litigation, for the reasons set out above, costs orders follow the event, that is the finding of criminal or civil responsibility. But as tribunals are set up in the public interest by the Oireachtas, the public should bear the costs of same subject to what findings the tribunal makes about the conduct of a particular party before it. Such reasoning is consistent with what Denham J said in *Murphy and Others v Mahon and Others*[5] as follows:

> Ordinarily any party permitted to be represented at a tribunal should have their costs paid out of public funds. However, this may be lost if the party fails to cooperate with the tribunal. Thus a chairman has to consider the conduct of, or on behalf of, a party before a tribunal. The power to award costs is affected by a lack of cooperation, by non-cooperation with a tribunal. Non-cooperation could include failing to provide assistance or knowingly giving false or misleading information.
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> Fundamentally the issue is whether a party has cooperated with a tribunal so as to be entitled to his or her costs. A person found to be corrupt who fell on his sword and fully cooperated with a tribunal would be entitled to assume, unless there were other relevant factors, that he would obtain his costs. This is to facilitate the running of a tribunal.[6]

A subsequent amendment was made to section 6 of the 1979 Act by the Tribunals of Inquiry (Evidence) (Amendment) Act 1997. This added to section 6 of the 1979 Act by providing what "relevant matters" a tribunal could have regard to when making orders for costs. The relevant matters include the terms of reference of the tribunal, failing to co-operate with or provide assistance to the tribunal, or knowingly giving false or misleading information to the tribunal. Section 6(1) of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 which deals with costs now reads as follows:

> Where a tribunal, or, if the tribunal consists of more than one member, the chairperson of the tribunal, is of opinion that, having regard to the findings of the tribunal and all other relevant matters (including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the tribunal or failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to, the tribunal), there are sufficient reasons rendering it equitable to do so, the tribunal or the chairperson, as the case may be, may, either of the tribunal's or the chairperson's own motion, as the case may be, or on application by any person appearing before the tribunal, order that the whole or part of the costs

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[4] [1992] 2 IR 605.

[5] [2010] IR 136; see also dicta of Hardiman J at paragraph 176 of the judgment, page 189.

[6] ibid at 164; see also Fennelly J at paragraph [358], at 229-330.

> (a) of any person appearing before the tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order:
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> (b) incurred by the tribunal, as taxed as aforesaid, shall be paid to the Minister for Finance by any other person named in the order."

The effect of the above amendment was considered by the Supreme Court in *Murphy and Others v Mahon and Others.*[7] Here an order for costs was quashed on the basis that the tribunal made findings of obstruction, hindering and substantive findings of corruption which are criminal offences and used same to ground a costs order. As to whether the 1997 amendment changed the view held up to then that the phrase the "findings of the tribunal" did not mean the findings of the tribunal relating to the subject matter of the inquiry, but rather the conduct of the parties before the tribunal, the court was of the view that it did not. In this regard Fennelly J said at paragraphs 125 to 127 as follows:

> If it be the case that the amendment to s. 6(1) has the effect of investing in the Tribunal the power to refuse to award costs by reason of the substantive findings it has made, it is difficult to see how its findings could any longer be described as being devoid of legal consequence, made in *vacuo* or sterile. I cannot accept the submission made on behalf of the respondents that the necessary intervention of the Taxing Master or of processes of execution alters that fundamental fact. It is incumbent on this Court to address, only in the last resort, a question as to the constitutional validity of a statute. To that end, the Court must, so far as the words used by the legislature so permit, interpret those words so that they do not conflict with the Constitution. In the present case, that task is simplified by the availability of the judgments in *Goodman v. Hamilton* The link created by s. 6(1) of the Act of 1979, as interpreted by the Tribunal and as upheld by Smyth J., appears to empower the Tribunal to penalise a witness before it in respect of costs by reason of its substantive findings. Clearly, this Court, when delivering judgment in that case did not contemplate any such possibility. The *dictum* of McCarthy J. avoids conferring that power on the Tribunal. If this Court had thought otherwise, the result of *Goodman v. Hamilton* might well have been otherwise. At the very least, the reasons given by Finlay C.J. would of necessity have had to be different.
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> The Oireachtas can be taken to have been aware in 1997 of the decision in *Goodman v. Hamilton* . If the legislature had intended to negative the effect of the judgment of McCarthy J., it could have adopted clear wording to that effect. In fact, it has left intact the words which were interpreted by McCarthy J. I agree that if the section, in its present form, were the only matter to be interpreted, it is at least open to the meaning that the Tribunal may have regard to its substantive findings when deciding on costs. The matter is not, however, *res in tegra.* This Court has said, *per* McCarthy J., that a tribunal may not have regard to its substantive findings when deciding on costs. The words which he interpreted are still in this section. The additional words interpolated in 1997 do not inevitably reverse the principle enunciated by the court in 1992. It is possible, without doing violence to language, to interpret the words in parentheses as qualifying both "the findings of the Tribunal" and "all other relevant matters". In the light of the decision in *Goodman v. Hamilton* and the

[7] [2010] IR 136.

> obligation to interpret in conformity with the Constitution, I think that is the correct interpretation.
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> I am satisfied, therefore, that the Tribunal, in making a decision as to whether to award costs is not entitled to have regard to its substantive findings on the subject matter of its terms of reference.

It is accepted by all the parties making submissions that deceit before a tribunal can entitle it to discount an award of costs or to refuse costs to a party. In that regard, a tribunal report should not be parsed or analysed to seek gradations of acceptance or rejection of a witness's evidence. If evidence is rejected but not described specifically as mistaken, it comes within the comment of Geoghegan J in *Haughey v Moriarty*[8] as follows:

> As the question of costs does not really arise yet, I am reluctant to make any comments on it but as it has featured so prominently in the arguments I think I should say this. In my opinion, power to award costs under the Act of 1997 is confined to instances of non-co-operation with or obstruction of the Tribunal but that of course would include the adducing of deliberately false evidence and that is why the statutory provision specifically requires regard to be had to the findings of the Tribunal as well as all other relevant matters. However, I merely express that view by way of *obiter dicta*...[9]

It is part of the exercise of judicial restraint not to take the character of a witness beyond what is necessary to the decision. Instead a clear choice as between evidence is to be made, or in accepting as true or rejecting evidence. For a judge, and tribunal chair-people are judges or retired judges in modern times, to say that evidence is rejected or not accepted is to indicate that that test is met. If testimony is described as mistaken or as a failure of recollection, then the test is not met. In construing a tribunal report, the entire report needs to be considered to give the necessary context.

Tribunal letter of 19th October 2018

On the 19th October 2018, the tribunal wrote to the solicitors representing Keith Harrison as follows:

> Dear Sirs,
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> We refer to previous correspondence and to your representation before the tribunal. We also refer to correspondence concerning costs in the above terms of reference. The tribunal notes your submissions received in this connection dated 21 December 2017.
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> However, in light of the report of the tribunal published on 11th October 2018 which is available on www.disclosurestribunal.ie and has been since publication the Chairman has directed me to write to you in the following terms.
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> The tribunal intends dealing with any issue as to legal costs arising from representation before the tribunal at the earliest possible time. Accordingly, the tribunal would be obliged if you would indicate the following:

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[8] [1999] 3 IR 1.
[9] ibid at 14.

1. Whether your client seeks an order for costs from the tribunal;

2. Whether your client intend seeking an order for costs against any other party or parties to the tribunal - in which case please identify that party or those parties;

3. Whether your client intends making submissions that any other party or parties should not receive costs or that such costs ought to be reduced to a stated percentage of costs;

4. In the case of paragraphs 1 and 2 above, please furnish brief submissions setting out the basis upon which your client argues that there is an entitlement to such orders;

5. In the case of paragraph 3 above, please furnish brief submissions as to why such other party or parties should not receive costs or should only receive a stated percentage of their full costs.

6. In all such submissions, please state clearly the facts, circumstances and principles of law upon which you propose to rely.

The tribunal now regards it as essential that all orders related to its work should be finalized. The tribunal would therefore be much obliged to receive submissions within 21 days from the date of this letter.

Yours truly,

Elizabeth Mullan
Solicitor to the Tribunal

Submissions as to costs

By letter dated the 4th December 2017 the solicitors on behalf of Keith Harrison sought costs in these terms:

Dear Madam,

Further to the publication of the Chairman's second Interim Report on the 30th of November las, on behalf of our client, we formally apply to the Chairman for our costs.

Yours sincerely,

Trevor Collins
Kilfeather & Company

At the request of the Tribunal the following outline legal submissions were made on behalf of Garda Harrison:

1. These submissions are filed on behalf of Keith Harrison in support of his application for his legal costs and expenses arising from his evidence to the Disclosures Tribunal of Inquiry. These submission can be supplemented by oral submission if necessary at any oral hearing on costs.

2. The basis upon which Keith Harrison apples for his costs is premised on the following matters.

   (i) Keith Harrison submitted a statement of evidence to the Tribunal on the 13th of March 2017 to assist the Tribunal in its inquiry in respect of terms of reference (N)

   (ii) Keith Harrison attended before the Tribunal on all days relevant to eth terms of reference (N)

   (iii) Keith Harrison co-operated with the Tribunal at every stage and did not obstruct and/or seek to unnecessarily prolong the inquiry

   (iv) Keith Harrison did not knowingly give false evidence or misleading information to the Tribunal

3. Relevant Law

   Section 6(1) of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979, as amended by s.3 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997 provides:-

   > Where a tribunal, or, if the tribunal consists of more than one member, the chairman of the tribunal, is of the opinion that, having regard to the findings of the tribunal and all other relevant matters (including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the tribunal or failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to, the tribunal), there are sufficient reasons rendering it equitable to do so, the tribunal or the chairman, as the case may be, may by order direct that the whole or part of the costs
   >
   > (a) of any person appearing before the tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order:
   >
   > (b) incurred by the tribunal, as taxed as aforesaid, shall be paid to the Minister for Finance by any other person named in the order.

   Section 1(2) of the Tribunals of Inquiry (Evidence) Act 1921, as amended by s.3 of the act of 1979 provides, inter alia:-

If a person –

(c)wilfully gives evidence to a tribunal which is material to the inquiry to which the tribunal relates and which he knows to be false or does not believe to be true,

or

(d) by act or omission obstructs or hinders the tribunal in the performance of its functions…the person shall be guilty of an offence.

Submissions

4. It is submitted that the Tribunal ought to exercise its discretion in favour of Keith Harrison and grant him his costs appearing before the tribunal to date.

5. It is submitted that any findings of the Tribunal, which reflect negatively on Keith Harrison in the field under investigation are not matters which should form the basis upon which the Tribunal should decide his entitlement to costs.

6. In *Goodman International v. Mr. Justice Hamilton* [1992] 2 IR 542 McCarthy J. notes at p. 605 in respect of section 6 Tribunals of Inquiry [Evidence] Amendment Act 1979, as amended:

> The liability of pay cost cannot depend upon the findings of the Tribunal as to the subject matter of the inquiry. When the inquiry is in respect of a single disaster, then, ordinarily, any party permitted to be represented at the inquiry should have their costs paid out of public funds. The whole or part of those costs may be disallowed by the Tribunal because of the conduct of or on behalf of that party at, during or in connection with the inquiry. The expression " the findings of the tribunal" should be read as the findings as to the conduct of the parties at the tribunal. In all other cases the allowance of costs at the public expense lies within the discretion of the Tribunal, or where appropriate, its chairman"

7. The Supreme Court in *Murphy v Flood* [2010] 3 IR 136, at 164 Denham J. held that in applying the principles of constitutional justice to the construction of s. 6(1) of the Act of 1997:

> I am of the opinion that the issue for a chairman is whether a party has cooperated with a tribunal. Ordinarily any party permitted to be represented at a tribunal should have their costs paid out of public funds. However, this may be lost if the party fails to cooperate with the tribunal. Thus a chairman has to consider the conduct of, or on behalf of, a party before a tribunal. The power to award costs is affected by a lack of cooperation, by non-cooperation with a tribunal. Non-cooperation could include failing to provide assistance or knowingly giving false or misleading information.
>
> Fundamentally the issue is whether a party has cooperated with a tribunal so as to be entitled to his or her costs. A person found to be corrupt who fell on his sword and fully cooperated with a tribunal would be entitled to assume, unless

there were other relevant factors, that he would obtain his costs. This is to facilitate the running of a tribunal. The distinction between the administration of justice and the authority of a tribunal has to be drawn clearly. A tribunal is not administering justice, it is a fact finding inquiry, reporting to the legislature. A decision on costs grounded on a substantive finding of a tribunal would import liability for a party. I am of the opinion that s.6(1) of the Act of 1997 should be construed in light of the well established case law, and that consequently a chairman may not have regard to the substantive findings of a tribunal when determining the issue of costs.

8. While, the Tribunal has rejected assertions may by Keith Harrison's and has found same to be "entirely without any validity", it is submitted that the findings of the Tribunal, which may be adverse of Keith Harrison, fail to reach the threshold to warrant an adverse costs Order against him. Moreover, it is submitted that it would be manifestly unjust and inequitable to make such a costs order in favour of any other party appearing before the tribunal and/or the Tribunal itself against Keith Harrison.

9. It is submitted that there are insufficient reasons and/or findings to refuse to grant Keith Harrison his costs of appearing before the Tribunal.

10. It is submitted that the Tribunal's comment that this part of the Tribunal started in good faith extends to Keith Harrison's motive in making his disclosures.

11. It is submitted that there was no *mala fides* on the part of Keith Harrison and/or that he acted with reckless disregard in making his disclosures.

12. For the reasons as set out above, Keith Harrison hereby seeks his costs for appearing before the tribunal to date, as against the Minister for Finance.

Tribunal gives notice as to concerns

In accordance with the requirements of natural justice, the tribunal gave notice of its concerns as to why it might consider not awarding Garda Keith Harrison costs or only a percentage of his costs. That was done by letter dated 22nd of October 2019 and was in the following terms:

Dears Sirs,

Thank you for your submissions in respect of your application for costs dated the 21st of December 2017 and 7th November 2018 respectively.

As you are aware Section 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1997 provides as follows:

"(1) Section 6 of the Tribunals of Inquiry (Evidence) Amendment Act 1979, is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) Where a tribunal or, if the tribunal consists of more than one member, the chairperson of the tribunal, is of opinion that, having regard to the findings of the tribunal and all other relevant matters (including the terms of the resolution passed by each House of the Oireachtas relating to the establishment of the tribunal or failing to co-operate with or provide assistance to, or knowingly giving false or misleading information to, the tribunal), there are sufficient reasons rendering it equitable to do so, the tribunal, or the chairperson, as the case may be, may, either of the tribunal's or the chairperson's own motion, as the case may be, or on application by any person appearing before the tribunal, order that the whole or part of the costs -

(a) of any person appearing before the tribunal by counsel or solicitor, as taxed by a Taxing Master of the High Court, shall be paid to the person by any other person named in the order;

The Supreme Court (Denham J.) in Murphy –v- Flood [2010] 3 IR 136 and others has held as follows;

"30. Further, section 6 of the act of 1979, as inserted by section 3 of the Tribunals of Inquiry (Evidence) (Amendment) Act 1997, gives to the statutory power in relation to costs. This includes a specific reference enabling regard to be had to a failure to co-operate with the tribunal…

37. The power and authority of the Tribunal is limited to that given to it by the terms of reference and the law, and so the tribunal may make findings of a lack of co-operation, from minor to major. I would not attempt a list of activities or omissions which may be deemed to be a lack of co-operation…"

Later in that judgement Ms. Justice Denham endorsed the following paragraph of Geoghegan J"s judgement in Haughty v Mr. Justice Moriarty and Others [1999] 3 I.R. 1 (at page 14);

"As the question of costs does not really arise yet, I am reluctant to make any comments on it but as it has features so prominently in the arguments I think I should say this. In my opinion, power to award costs under the Act of 1997 is confined to instances of non-co-operation with or obstruction of the Tribunal but that of course would include the adducing of deliberately false evidence and that is why the statutory provision specifically requires regard to be had to the findings of the Tribunal as well as other relevant matters";

Furthermore, commencing at paragraph 63 of the judgement, Ms. Justice Denham said as follows:

"…I am of the opinion that the issue for a chairman is whether a party has co-operated with a tribunal.

Ordinarily any party permitted to be represented at a tribunal should have their costs paid out of public funds. However, this may be lost if the party fails to co-operate with the tribunal. Thus a chairman has to consider the conduct of, or on behalf of, a party before a tribunal. The power to award costs is affected by lack of co-operation, by non-cooperation, with a tribunal. Non-co-operation could include failing to provide assistance or knowingly giving false or misleading information.

Fundamentally the issue is whether a party has co-operated with a tribunal so as to be entitled to his or her costs."

In view of the above, the position would appear to be that the duty to co-operate with a tribunal includes the duty to give truthful evidence to the tribunal and that the giving of untruthful evidence to the tribunal is something the tribunal can have regard to in making any order as to costs.

As you are aware the third interim report of the tribunal was published in October 2018. We draw you attention to the following paragraphs contained in pages 6 to 7 of same which are set out hereunder:

'The Tribunal is exercising the High Court discretion in relation to costs, as limited by that principle and informed by the relevant legislation.

Truth in that regard remains paramount. Even though a person is required in the public interest to appear and testify as to matters of public importance before a tribunal of inquiry, those giving evidence are still obliged to be witnesses of truth. If a person has engineered a situation unfairly or deceitfully which results in public expense of a tribunal of inquiry, that fact should be capable of being reflected in a costs order. Where a person makes serious and unjustifiable allegations against another party to the tribunal, an order as between those parties may be made, allowing also for an order, if appropriate, in a proportionate way against the Minister for Finance."

You will no doubt be familiar with the second interim report of the tribunal. What follows should be read in the context of the entire report. In relation as to whether or not your client co-operated with the tribunal by telling the truth the following is a concise indication as what would appear to be relevant matters:

- Garda Harrison maintained to the Tribunal that TUSLA intervened in his family life as the Gardai had manipulated social services to that end. Furthermore, Garda Harrison accused TUSLA of going along with this Garda manipulation. These allegations were completely rejected by the tribunal as false. The following is the relevant extract from the tribunal report:

  "In particular, it was alleged that Donna McTeague had apologised on the telephone for having to do a home visit. It was claimed that in the aftermath of the meeting Donna McTeague apologised to Marisa Simms, claiming that "she didn't have any choice in the matter that her team leader had been in contact with the Guards and as a result had to do the visit". It was further claimed that after the visit "before leaving" Donna McTeague was "again apologising but guaranteeing this was the end of it....

  There is no mistaking any of these matters. The fact that at the hearing they were reduced by Marissa Simms to some kind of feeling which she had in consequence of the meeting when the allegations as made were specific and the fact that Garda Keith Harrison, notwithstanding this reduction, claimed he had been told in the immediate conversations surrounding the alleged events by Marisa Simms that social services has admitted to acting discreditably demonstrate their

determination to persist in damaging and hurtful allegations notwithstanding the fact that they knew that they were untrue.
(Tribunal report page 18, 19, page 90 ,91)

- The tribunal found that answers given by Garda Harrison to the tribunal in relation to PULSE checks on Marissa Sims were 'evasive and at time senseless". Furthermore, the tribunal did not accept the evidence of Garda Harrison that no meeting over the PULSE system checks on Ms. Sims ever took place. The tribunal was of the view that it was an example of Garda Harrison "tailoring his evidence to what suits his purpose at the time" [Tribunal report page 28, 29]

- The tribunal categorised Garda Harrison' s evidence in relation to facing a hostile reception and being discriminated against in Donegal town garda station as "nonsense". When dealing with same, the tribunal noted as follows: "As the Tribunal proceeded with its hearings, his position would shift in accordance with what was perceived to be the drift in the evidence and the clear allegations which he was making would be unmentioned if these did not apparently suit. (Tribunal report, page 30)

- The tribunal rejected Garda Harrison evidence in connection with texts on the phone of Marissa Sims as "ridiculous" and "nonsense". (Tribunal report, page 57).

In light of all of the above, the tribunal is presently considering what, if any, portion of costs should be ordered should be paid to you and in that regard, is inviting you to make oral submissions prior to making any decision on the matter.

To that end a hearing has been convened for the 1st of November 2019 next at 9.30 am at High Court No. 10, at the Four Courts, Dublin 7.

Yours faithfully,

Elizabeth Mullan,
Solicitor to the Tribunal

Hearing of 1st November 2019

The tribunal held an oral hearing on the issue of costs and heard representations on behalf of Keith Harrison. The transcript of the hearing is on the tribunal's website at www.disclosurestribunal.ie and should be considered in full as to the ruling in this case together with the foregoing correspondence and the entirety of the tribunal report.

Decision

This ruling should be read in its entirety and should also be read in the context of the report of the tribunal published on 30 November 2017. While there follows a summary of the argument presented at the oral hearing on costs on 1 November, all of what was said on behalf of Garda Keith Harrison has been considered. The full transcript is posted on www.disclosurestribunal.ie which is the tribunal's website.

The issues relevant to Garda Keith Harrison are those stated in the tribunal's letter of the 22nd of October 2019, identified as part of the overall context of the tribunal's report, but should again be repeated:

- Garda Harrison maintained to the Tribunal that TUSLA intervened in his family life as the gardaí had manipulated social services to that end. Furthermore, Garda Harrison accused TUSLA of going along with this Garda manipulation. These allegations were completely rejected by the tribunal as false. The following is the relevant extract from the tribunal report:

  > In particular, it was alleged that Donna McTeague had apologised on the telephone for having to do a home visit. It was claimed that in the aftermath of the meeting Donna McTeague apologised to Marisa Simms, claiming that "she didn't have any choice in the matter that her team leader had been in contact with the Guards and as a result had to do the visit". It was further claimed that after the visit "before leaving" Donna McTeague was "again apologising but guaranteeing this was the end of it...."
  >
  > There is no mistaking any of these matters. The fact that at the hearing they were reduced by Marissa Simms to some kind of feeling which she had in consequence of the meeting when the allegations as made were specific and the fact that Garda Keith Harrison, notwithstanding this reduction, claimed he had been told in the immediate conversations surrounding the alleged events by Marisa Simms that social services has admitted to acting discreditably demonstrate their determination to persist in damaging and hurtful allegations notwithstanding the fact that they knew that they were untrue.
  > (Tribunal report page 18, 19, page 90 ,91)

- The tribunal found that answers given by Garda Harrison to the tribunal in relation to PULSE checks on Marissa Sims were 'evasive and at time senseless". Furthermore, the tribunal did not accept the evidence of Garda Harrison that no meeting over the PULSE system checks on Ms Sims ever took place. The tribunal was of the view that it was an example of Garda Harrison "tailoring his evidence to what suits his purpose at the time" [Tribunal report page 28, 29]

- The tribunal categorised Garda Harrison's evidence in relation to facing a hostile reception and being discriminated against in Donegal town garda station as "nonsense". When dealing with same, the tribunal noted as follows: "As the Tribunal proceeded with its hearings, his position would shift in accordance with what was perceived to be the drift in the evidence and the clear allegations which he was making would be unmentioned if these did not apparently suit. (Tribunal report, page 30)

- The tribunal rejected Garda Harrison evidence in connection with texts on the phone of Marissa Sims as "ridiculous" and "nonsense". (Tribunal report, page 57).

In terms of substance, the most damaging allegations were made by Garda Keith Harrison against the gardaí generally, against the social work system and against individual members of An Garda Síochána and individual social workers and, on an overall basis, he claimed a conspiracy against him orchestrated through Garda Headquarters, or said that the evidence should lead to that inference. It is unnecessary to repeat the entirety of the tribunal report since that document speaks for itself. It was necessary for the tribunal over several weeks of preparation, the

distribution of and analysis of thousands of pages of documents, and over about four weeks of hearing to consider all of the allegations of Garda Keith Harrison. The tribunal could not find any basis for finding that these allegations were true. Were there any truth to those allegations, it would be a national scandal of resounding proportions. Garda Headquarters did not cause collusion between social work services and the Donegal Division, nor any individual member of our police force, and did not bring about a situation where attention by social workers was directed to the home of Garda Keith Harrison and his domestic partner Marisa Simms causing a brief home visit. Nor was that home visit as described initially by Marisa Simms and nor was there any damage to their family circumstances. Rather, as the tribunal report indicates, the nature of what was being told to the gardaí by social services was understated. Had it been forwarded in full, social services would have done much more than the minimal intervention which was in fact made. That intervention was made for good reason and was not in consequence of any deceit, conspiracy, exaggeration or any irresponsible or wrong behaviour by anyone. Nonetheless, a myriad of people were blamed in the wrong. In terms of national import, the wider claim that social workers would be manipulated by sinister forces and would not, instead and as professional people, simply do what was right, was a staggering allegation. It was clear to the tribunal, sitting throughout the entirety of the hearings, that it was stressful and deeply hurtful for all of those wrongly accused.

The tribunal accepts, and the case law indicates, that if a person makes an allegation in public and the Oireachtas decides to set up a public inquiry, the person making the allegation in coming to the tribunal is entitled to costs provided he or she cooperates. In that respect cooperation must involve telling the truth as an objective reality. Any other interpretation, to the effect that turning up and repeating whatever wrong allegations led to the formation of the tribunal in the first place amounts to cooperation, is contrary to any reasoned interpretation of the law and of the administration of justice. Let it be clear: justice is based on first of all finding out the truth. Awards of damages, or judicial review remedies, or declarations of wrongdoing, the latter only being relevant to a tribunal, are as random as a lottery result unless the justice system first searches for the truth as diligently as possible.

As was said in *Ó Gríofáin v Éire* [2009] IEHC 188 at paragraph 10: "Is é an ceartas an aidhm atá le gach imeacht dlíthiúil. Is í an fhírinne an cuspóir atá ag gach cleachtas breithiúnach." Or as translated: "Justice is the aim of every legal proceeding. Truth is the objective of every judicial exercise." If a person makes an allegation and a tribunal of inquiry is set up in consequence and if the individual tells the tribunal that the allegation was wrong, or based merely on what they thought, or that they made it up, or that they were badly mistaken, a tribunal can still conclude for their being awarded costs. Furthermore, the tribunal could very quickly report and many months or years of public time would be saved and the expenditure of public funds would be minimised. It is a very different situation indeed for a person to make a series of allegations and to persist in the allegations where these have no foundation in reality and take serious work and costs to analyse and to find as being baseless. The example given at the costs hearing was of a person proclaiming on the media airwaves that public representatives had taken bribes to vote on legislation in Dáil Éireann. That person, wrongly persisting in such an allegation, may give the appearance of cooperating by turning up over months to a tribunal of inquiry and of giving wrong evidence. If the evidence is rejected where the person could have cooperated with the tribunal by withdrawing baseless allegations and perhaps saying what motivated the allegations, the tribunal work is required to continue over months and those at the receiving end of the allegations would be required to contest testimony and documents and to be represented. That is not cooperation. On the other hand, where the person, as Denham J states, says that the allegations are false and perhaps says what brought about his or her conduct in the first place, that is cooperation. What is involved here is not that situation. Clearly, there is also the situation

where a person has serious allegations to make and while others contest his or her testimony, it turns out that the person should be vindicated. In that case, costs go to the person the truth of whose allegations is vindicated.

Counsel for Garda Keith Harrison argued that the tribunal rejected his evidence because the tribunal "did not like" it. That submission should not have been made. Nothing could be more incorrect: this was a scrupulously conducted judicial exercise. It is also asserted on behalf of Garda Keith Harrison that because some allegation causes hurt that wronging other people or hurting their feelings is neither here nor there. That is completely wrong. Once an allegation of fact is made, it is up to a tribunal to find facts, it is claimed on behalf of Garda Keith Harrison, and just because facts are not accepted as true, testimony still involves cooperation. That is not backed up by the case decisions. Equity of award of costs is the test, it was said on behalf of Garda Keith Harrison, and taking a merciful view has nothing to do with anything. To not award costs, the submission went, there must be a situation of knowing lies which are made for the purpose of undermining the work of the tribunal. What was involved here, it was claimed, was a protected disclosure. The tribunal's procedures were said on behalf of Garda Keith Harrison to be unfair since a mechanism for reducing costs should have been notified in advance of the hearing on costs so that it would have been analysed by counsel for Garda Keith Harrison and criticised. Despite invitation, no alternative means of analysing costs was put forward during the course of this submission. This could have been addressed in the light of the recent decision in *Lowry v Mr Justice Moriarty* [2018] IECA 66, but was not. Costs, were a matter of all or nothing, according to the argument put forward by counsel for Garda Keith Harrison. Garda Keith Harrison had a view of facts found by the tribunal to be wrong but that was no different to many situations; a person can be wrong but yet be subjectively right. This, according to his counsel, was exemplified by the film Rashōmon, the 1950 masterpiece by Akira Kurosawa starring Toshiro Mifune cited by counsel for Keith Harrison, not by the tribunal, where a crime takes place but in telling it through the lens of several of the actors in the drama a different pattern of fact emerges. The tribunal report needs to be read in full for any reasonable person to realise that this submission is not relevant to this extraordinary matrix of hard fact.

In contrast to the submissions made on behalf of Garda Keith Harrison, counsel for Marisa Simms accepts that there is no such thing as a mathematical formula for going about reducing costs, or only awarding a portion of costs. That is correct. These are decision, it must be remembered, that the courts are called upon to make every day and in the interests of justice. These decisions are taken, as this decision is taken, by taking all relevant factors into consideration and doing the best that is possible in all the circumstances. A mathematical model would not assist that process since what is required is a common sense view of what the overall fairness of the situation requires on a shrewd appraisal of where and what the end result is. But, this is not an instance of where the approach of a party shows some substantial benefit in terms of the revelation of where the facts actually lay. It is thus not a case where a fractional, half or three-quarters, or as expressed in percentages 30% or 70% or whatever, is appropriate. In substance all of the allegations with which the terms of reference, (n) and (o), were substantially concerned were unfounded. These should simply never have been made. In so far as they were initiated outside the tribunal, the reality remains that the tribunal was nonetheless set up and the tribunal must search to consider if there is some basis for awarding costs up to and including the brief fee on the first day of the tribunal when at that point the allegations should have clearly been not persisted in after legal advice.

The tribunal cannot find any basis for the award of costs based on cooperation within the meaning of the decisions which are outlined above. This was an instance where dreadful allegations were made against multiple individuals and as against the social work structures of the

State and as against the integrity and direction of the national police force. In reality, the situation of turmoil that then existed in Garda Keith Harrison's domestic circumstances, about which the relations of his domestic partner Marisa Simms complained and with good reason, as did she, caused completely proper and moderate interventions by gardaí and social services. The evidence of Garda Keith Harrison exhibited almost no sense of the harm that was being done by his allegations but what is important is not that the allegations hurt, because the truth can hurt but telling the truth can be justified, but that he had the means to back away from them, which was done to a minimal extent by Marisa Simms, but that he persisted fully in them when they were wrong. The tribunal does not ascribe any motivation to him as the tribunal's only task is to find facts and to report on what was a series of allegations of public moment but which had no substance whatsoever to them.

The submission made on behalf of Garda Keith Harrison that the award of costs by the tribunal is a matter of all or nothing, yes or no, is incorrect. This was a dreadful circumstance of allegations being made without basis. But it remains the duty of the tribunal, despite the wrong done by Garda Keith Harrison in making these allegations, and the obvious hurt and stress this caused to many individuals, to search for a basis on which some humane and lawful award of costs can be made. To return to the example of Denham J, quoted above, this was a case where incorrect allegations of a most hurtful kind were made against multiple parties and against the State apparatus of social work and policing. It was the Oireachtas which initiated the public tribunal. There could have been a scoping exercise. If, during that exercise, the astonishing texts exchanged between Marisa Simms and Garda Keith Harrison had come out, any basis for holding an inquiry might have dissipated. But the Oireachtas, having set up the tribunal, notwithstanding the baseless nature of the allegations, it might be argued that Garda Keith Harrison was entitled to consult solicitors, that solicitors would instruct counsel and that the very extensive disclosure made by the tribunal would have to by analysed and that the opening speech of counsel for the tribunal, factual and analytical in its objective nature, would have had to be considered. Hence, it is possible, though the tribunal has serious doubts which are not resolved fully on the case law, that in the particular circumstances of national scandal that this series of allegations involved, that an award of costs should be made on a limited basis to the person making these scandalous allegations.

The tribunal, with considerable doubt, therefore rules that Garda Keith Harrison is entitled to representation up to and including the opening day of the tribunal substantive hearings but not any further costs beyond that point. All legal practitioners and judges will be familiar with situations where sense is achieved on the steps of the court. All will be familiar with situations where allegations can be withdrawn in a brief court hearing on the basis of a serious consideration of where the facts are. This helps if backed by legal advice. That should have happened here: but did not. But, that is not at all to suggest that there was anything wrong in any legal advice given. The opposite is assumed. Normally, in a civil case the party withdrawing an allegation will have to pay his or her own costs and that of the opposing party, but on occasion that can be compromised. Here, the Oireachtas set up the tribunal, so it is arguable that such a principle does not fully apply. The tribunal cannot make any award beyond that first day of the tribunal substantive hearing and it is for the taxing master, in default of agreement, to sort out the costs measure that the tribunal ruling entails on a party and party, and no other, basis. Therefore the award of costs is limited to all preparation and up to and including the first day of the tribunal's substantive hearings, but only that. For the avoidance of doubt, that includes counsel's brief fee and such solicitor's fees as that entails. As of day 2 on; no costs.

All of the costs rulings of the tribunal are on a party and party basis: no other. Any default of agreement as to the measure of costs will be referred to taxation.

Approved
Peter Charleton
4 December 2019