



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

Dublin Castle
Aberdeen Suite
Dame Street
Dublin D02 Y337
Ireland

+353-87-2584378
admin@disclosuretribunal.ie

Ruling as to costs application of Detective Garda John Kennedy

The tribunal sat on Thursday 16 May 2019 to hear an application for the tribunal to discharge the costs of Detective Garda John Kennedy 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 the 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:

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 “findings of the tribunal” should be read as 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 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.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 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:

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.

(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 defendants 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 International v. Mr. Justice Hamilton* [1992] 2 I.R. 542. 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 International v. Mr. Justice 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.

The Oireachtas can be taken to have been aware in 1997 of the decision in *Goodman International v. Mr. Justice Hamilton* [1992] 2 I.R. 542. 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 integra*. 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 International v. Mr. Justice Hamilton* and the obligation to interpret in conformity with the Constitution, I think that is the correct interpretation.

⁷ [2010] IR 136.

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 18 October 2018

On 18 October 2018, the tribunal wrote to the solicitors representing Detective Garda John Kennedy as follows:

Dear Mr Hegarty,

We refer to previous correspondence and to your representation before the tribunal. The report of the tribunal was published on 11th October 2018 and you have been furnished with a copy of the report on behalf of your client or clients. The tribunal report, in any event, appears on www.disclosuretribunal.ie and has done since publication.

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:

1. Whether your client or clients seek an order for costs from the tribunal;
2. Whether your client or clients 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;

⁸ [1999] 3 IR 1.

⁹ *ibid* at page 14.

3. Whether your client or clients intend 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 or clients argue 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

18th October 2018

Submissions as to costs

By letter dated 7 December 2018, the solicitors on behalf of Detective Garda John Kennedy sought costs in these terms:

INTRODUCTION

Garda John Kennedy was classified as a “C” witness in relation to the above module.

GARDA KENNEDY’S STATEMENT

It is submitted that Garda Kennedy’s statement to the Tribunal was of fundamental importance in resolving important issues of fact having regard to the terms of reference of module (1).

His statement was not only relevant in relation to the allegations he personally faced but was also relevant in relation to the overall context of events surrounding Mr. Pat Rabbitte’s appearance on and statements made on a programme broadcast by RTE.

His statement was frank and detailed and addressed thoroughly two important aspects in respect of the above:

1. Relationship with Pat Rabbitte

Garda Kennedy provided comprehensive details in respect of his relationship with Pat Rabbitte since joining the labour party in 2007.

2. Alleged meeting with Pat Rabbitte

Garda Kennedy provided in-depth details in respect of an alleged meeting he had with Pat Rabbitte regarding Sergeant Maurice McCabe in or around February 2014.

He co-operated at all times with the work of the Tribunal. In advance of the public hearings, he also assisted the Tribunal in its investigation by making discovery of documentation relevant to this module.

INSPECTOR O'CONNELL'S EVIDENCE (sic)

Garda Kennedy gave evidence to the the (sic) Tribunal which was of fundamental importance in resolving important issues of fact having regard to the terms of reference of this module.

Garda Kennedy gave evidence on day 66. His evidence was not only relevant in relation to the allegations he personally faced but was also relevant in relation to the overall context of events surrounding Mr. Pat Rabbitte's appearance on and statements made on RTE Primetime.

His evidence was frank and detailed. He co-operated at all times with the work of the Tribunal and dealt with each question from the Tribunal legal team and from any party present at the Tribunal. In advance of the public hearings, he assisted the Tribunal in its investigation:

- a) By making extensive discovery of documentation relevant to this module;
- b) By submitting a comprehensive report.

During the course of his evidence Inspector O'Connell (sic) was queried on issues of fundamental importance by Ms. Kathleen Leader, SC for the Tribunal:-

1.1. Relationship with Pat Rabbitte

During the course of Garda Kennedy's evidence he provided a thorough synopsis of his relationship with Pat Rabbitte.

1.2. Interactions with serving Gardai

During the course of Garda Kennedy's evidence he provided thorough detail in respect of his interactions with serving members of An Garda Siochana, once he had retired from the force.

1.3. Conversation with Pat Rabbitte in respect of Sergeant McCabe

During the course of Garda Kennedy's evidence he gave specific detail in respect of any conversations he allegedly had with the then Minister for Communications, Energy and Natural Resources, Mr. Pat Rabbitte, in respect of Sergeant McCabe.

1.4. Alleged special meeting with Pat Rabbitte in respect of Maurice McCabe

During the course of Garda Kennedy's evidence he provided comprehensive facts in respect of the alleged special meeting he sought with the then Minister for Communications, Energy and Natural Resources, Mr. Pat Rabbitte, in respect of Sergeant McCabe.

1.5. Alleged rumours in respect of Maurice McCabe

During the course of Garda Kennedy's evidence he provided thorough detail in respect of any rumours that he would have been aware of in respect of Sergeant McCabe.

Queries from the Chairman

During the course of his evidence Garda Kennedy was directly asked a number of queries by Mr. Justice Charleton.

1.6. Conversation with Pat Rabbitte in respect of Sergeant McCabe

During the course of Garda Kennedy's evidence the Chairman specifically asked and addressed the issue of rumours in respect of Sergeant Maurice McCabe.

1.7. Interactions with serving Gardai

During the course of Garda Kennedy's evidence the Chairman thoroughly addressed the issue of Garda Kennedy's interactions with serving members of An Garda Siochana.

1.8. Alleged special meeting with Pat Rabbitte in respect of Maurice McCabe

During the course of Garda Kennedy's evidence the Chairman asked specific questions and addressed the issue of the alleged special meeting with Mr Pat Rabbitt.

THE TRIBUNAL REPORT

The Tribunal, in its Third Interim Report relied upon Garda Kennedy's evidence to determine contested allegations.

Mr Justice Charleton's commentary

Mr Justice Charelton in his report contrasts the evidence of Garda Kennedy and Pat Rabbitte in regard to the alleged special meeting which allegedly took place.

He quotes Garda Kennedy's evidence in his report:-

"I never discussed Sergeant McCabe with Mr. Rabbitte at all. Never. Secondly, the perception out there is that, oh, Kennedy said to Mr. Rabbitte that Mr. McCabe was involved with sexual abuse, which is completely wrong, I didn't say it, never said it, nor never would say it. Now, if somebody came to me, and we're not talking about Sergeant McCabe here, we're just talking about just in your neighbourhood or whatever, I'd be very slow to say to anybody, and I would go to the property authorities, meaning the Health Board, the Garda Siochana, or whoever, the people, and that's where I would go. I certainly wouldn't -- it's too sensitive, it's too horrible to suggest that anybody, with no - - with absolutely no proof. And I know what you're saying, that you're led that I didn't specifically say it but I heard it from someone else. No, I never heard it from anyone else. I didn't hear it doing the rounds and I certainly didn't say it". [footnote reads as follows: Page 224 to 225 Third Interim Report of the Tribunal of Inquiry into Protected Disclosures Act 2014 and certain other matters.]

CONCLUSION

In the circumstances, it is respectfully submitted that Inspector O'Connell (sic) is entitled to an order for costs of his legal representation.

DATED: 7 December 2018

SIGNED: Reddy Charlton Solicitors, 12 Fitzwilliam Place, Dublin 2

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 Detective Garda John Kennedy costs or only a percentage of his costs. That was done by letter dated 8 May 2019 and was in the following terms:

Dear Mr Tarrant,

Thank you for your submission on costs received by the tribunal on the 7th of December 2018.

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 judgment Ms. Justice Denham endorsed the following paragraph of Geoghegan J's judgment in *Haughey v Mr Justice Moriarty and Others* [1999] 3 IR 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 judgment, 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. This 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-cooperation 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. The following paragraphs appeared at pages 6 to 7 thereof:

“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 third interim report of the tribunal. In relation to whether or not your client co-operated with the tribunal by telling the truth, the following would appear to be relevant:

- The tribunal did not accept all of the evidence of Mr. Kennedy. In particular, the tribunal did not accept that Mr. Kennedy never had a conversation with Pat Rabbitte about Maurice McCabe or indeed that Mr. Kennedy knew nothing about rumours of a sexual assault allegation against Maurice McCabe. (page 243 of the report)

In light of the above, the tribunal is presently considering what, if any, portion of costs should be ordered to 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 Thursday the 16th of May next at 10am at the Hugh Kennedy court in the Four Courts.

Yours truly,

Elizabeth Mullan
Solicitor to the Tribunal

8th May 2019

Hearing of 16 May 2019

The tribunal held an oral hearing on the issue of costs and heard representations on behalf of Detective Garda John Kennedy. The transcript of the hearing is on the tribunal's website at www.disclosuretribunal.ie and should be considered in full as to the ruling in this case.

Decision

The issues relevant to Detective Garda John Kennedy are those stated in the tribunal's letter of 8 May 2019 but should again be repeated:

The tribunal did not accept all of the evidence of Mr. Kennedy. In particular, the tribunal did not accept that Mr. Kennedy never had a conversation with Pat Rabbitte about Maurice McCabe or indeed that Mr. Kennedy knew nothing about rumours of a sexual assault allegation against Maurice McCabe. (page 243 of the report)

For the reasons set out above, evidence which is mistaken remains evidence which does not impact on entitlement to costs. Evidence which is rejected does.

For Detective Garda John Kennedy that argument was made; that before anyone could be denied costs the tribunal would have to call that person a perjurer. It was also said that this was possibly a case of bad memory. The tribunal, it was argued, went out of its way to reassure a very worried witness that he was not to be regarded as a gossip. It is unnecessary to repeat the report as reading it in full is required for the appropriate context. It is on the tribunal's website at www.disclosuretribunal.ie and may be read there.

The plain reality is that the conversation happened and evidence to the contrary was rejected. It was helpful to the tribunal to see this witness and to discover his embarrassment. In no sense was he a gossip. It was disappointing to hear his evidence which was flatly contradicted by the other party to it whose evidence was accepted. What he did, however, was not malicious but an attempt to protect his Minister from falling into error. Taking into account cooperation and the usefulness of hearing both sides of the conversation, it is a pity that the tribunal was put in the position that it was. Doing the best that is possible and in the knowledge of having sat through all of the evidence and having considered all of the documents, in the context of the report and of the entirety of this document and the concerns therein expressed, taking all of the factors into account, it has to be noted how little of reality was reflected in this evidence. In light of the

tribunal report and all that is in this ruling, the tribunal cannot award Detective Garda John Kennedy more than one third of his costs.

All of the costs rulings of the tribunal are on a party and party basis, no other. In default of agreement on costs, same are to be referred to taxation.

Approved 31 July 2019

Peter Cunningham