Neutral Citation No. [2010] NIQB 50 | Ref: **HIG7793**

Judgment: approved by the Court for handing down (subject to editorial corrections) | Delivered: **26/3/10**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

HAROLD ANDREWS, WILSON ELLIOTT, RAYMOND FERGUSON, BASIL JOHNSTON, BERTIE KERR, DEREK NIXON, CECIL NOBLE, JOE DODDS and BERT JOHNSTON

Appellants;

-and-

W A McDONALD LOCAL GOVERNMENT AUDITOR

No. 2

Respondent.

HIGGINS LJ

[1] This is an application under Section 82(7) of the Local Government Act 1972 that provision be made for expenses incurred by the respondent in his investigations of the conduct of the appellants and in the defence of their statutory appeal from a decision of the respondent as Local Government Auditor. By that decision the respondent, under the terms of section 82(1)(b) of the Local Government Act (Northern Ireland) 1972, as substituted by article 28(1) of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985, certified that the sum of £38,178 was due, jointly and severally, from the respondents to Fermanagh District Council, being the amount of loss incurred by their wilful misconduct. This court allowed the appeals of all nine appellants against that decision and under the inherent jurisdiction of the court and Order 62 of the Rules of the Court of Judicature of Northern Ireland, awarded the appellants the costs of their appeal against the respondent. The respondent does not seek to review or vary that order but seeks an order that his expenses incurred in connection with the appeal be met by Fermanagh District Council.

[2] Following a recruitment process for the appointment of a new Chief Executive of Fermanagh District Council claims were lodged with the Fair Employment Tribunal by two unsuccessful candidates alleging religious and political discrimination. Senior Counsel advised the Council that in view of the terms of the Fair Employment legislation it was unlikely that the claims could be successfully resisted and that the Council might be held to have discriminated against the unsuccessful candidates. In consequence of this advice the claims were settled in the total sum of £17,500 together with legal costs of £20,678, making a total sum of £38,178. Following the investigation by the Respondent Local Government Auditor it was certified that £38,178 was due to the Council from nine councilors jointly and severally, being the amount of a loss incurred by the wilful misconduct of the nine councilors. The wilful misconduct alleged related to the conduct of the nine councilors when exercising their marking and voting rights during the interviews of the candidates for the post of Chief Executive and in the selection of the candidate to be appointed. The then Deputy Chief Executive was appointed. It should be made clear that these proceedings reflect in no way upon the ability or integrity of the person appointed Chief Executive who all parties have acknowledged to be a successful appointment.

[3] This is the first case in which Councillors have been successful in appealing against a certificate issued under the Local Government Act 1972, as amended, by a Local Government Auditor in Northern Ireland. In all other previous cases the Auditor's certificate has been upheld and the Auditor was successful in recouping the costs of the appeal and his investigation from the unsuccessful appellants. As a result this is the first occasion that a court has had to consider whether central government or the local Council concerned should bear the expenses incurred by the Auditor in carrying out his investigation and in defending his decision on appeal, wherein his findings and decision to issue a certificate have not been upheld. In this case the Auditor seeks an order that the costs of the investigation, his legal costs on the appeal and the costs awarded in favour of the successful appellants should be borne by Fermanagh District Council rather than central government.

[4] It was alleged that the nine councillors, who were Ulster Unionists and Democratic Unionists, had voted in favour of the successful candidate in order to prevent another candidate who was perceived to be a Roman Catholic and a Nationalist, from being appointed Chief Executive. The successful candidate was the Deputy Chief Executive who was known to all the Councillors. They claimed they voted for him as he was the best candidate and that he had a commitment to Fermanagh. They rejected the suggestion that they voted in favour of him on grounds of religious or political beliefs. With one exception (who voted for the Deputy Chief Executive) the Nationalist members voted in favour of one of the unsuccessful candidates, who was perceived to be a Roman Catholic and thereby a Nationalist. The Chief Executive of the Local Government Staff Commission attended the

Council meeting at which the appointment was made, as an observer. Later in the course of the respondent's investigation he commented that those who voted did so in order to appoint the person they perceived to be the best person for the job, even if they voted along party lines. This court found that the Auditor did not take account or sufficient account of the explanations given by the appellants for voting in the manner in which they did [see paragraph 34 of the judgment]. In addition the Court expressed concern at the absence from the Auditor's Report of the exchange of correspondence with the Chief Executive of the Local Government Staff Commission as well as views that he expressed, as set out above. [see paragraph 35 of the judgment]. The Court set out its conclusions between paragraphs 36 and 40 of the judgment in these terms –

> "[36] A court of law, and an auditor carrying an audit who exercises a quasi judicial function, are entitled to take into account matters of common knowledge which are too notorious to be capable of serious dispute. In the field of politics and religious belief it is wise to proceed cautiously. I will simply say this. It does not follow that if a person is perceived to be a Protestant that he is either a unionist or a loyalist. Equally it does not follow that if a person is perceived to be a Roman Catholic that he is either a nationalist or a republican. It is clear that the nationalist councillors voted for Mr McSorley who was perceived to be a Catholic and, if the reasoning be correct, a Nationalist. It is also clear that the Unionists were alert to what they perceived to be the Nationalists' intention. If the Unionists voted to prevent the Nationalists elect a person whom they believed their political opponents perceived to be 'one of them ' in political terms, then it might be argued that the Unionists voted on grounds of political belief. But the political beliefs of the various candidates were not known nor were they or the political beliefs investigated. It might be said that to vote against your political opponents is to do so on grounds of political belief, but that is the cut and thrust of politics. When it occurs it does not follow that it amounts to wilful misconduct. Such a situation might be, for some councillors, equally consistent with them voting with their colleagues out of party loyalty, which might be characterised as imprudence, lack of judgment, misplaced enthusiasm or even zeal, but is it irresistibly wilful.

[37] The auditor found misconduct on the part of the Ulster Unionist councillors in that they, in concert, voted in favour of appointing Mr Connor. The Oxford English Dictionary definition of the word 'concert' is "agreement of two or more persons or parties in a plan, design or enterprise". There is no evidence of a plan to deliberately vote for Mr Connor. It was not alleged that the DUP councillors voted in concert either between themselves or with the Ulster Unionists. The finding that the Ulster Unionists voted 'in concert' is not justified.

[38] Senior counsel advised the Council on the fair employment claims and they were settled. It does not follow from either the advice or the settlements that discrimination in fact occurred. Legal cases are frequently compromised but it does not follow from it that liability is admitted nor can it be inferred. The suggestion by the councillors that the decision to settle was based on economic grounds was, in effect, dismissed by the auditor. However there is a clear undertone in counsel's advice to this effect. In addition counsel suggested that if the Council failed to accept his advice that failure might expose them to a surcharge. I do not think the suggestion that the decision to settle was taken on economic grounds, or the others made by the councillors, can be ignored on the basis that the auditor both 'saw and heard' the councillors.

[39] The auditor has crafted his reasoning and conclusion with great care. He has set out a number of steps or findings that led to that conclusion. I have given those findings anxious thought and have commented on the difficulties and limitations I find in relation to them. When I consider them individually and in combination I feel a sense of unease that they should lead to the irresistible conclusion that the seven Ulster Unionist and two Democratic Unionist councillors were guilty of wilful misconduct in the manner in which they voted that they caused a loss or deficiency to the Council accounts. I do not consider there was sufficient evidence to justify that conclusion, the more so when there was evidence of considerations taken into account in the voting other than religious belief and/or political opinion, which

> other considerations should have been considered and not dismissed. The circumstances were consistent with and equally explicable by, selection of the candidate they knew. As one councillor described it – "better the devil you know than the devil you do not know". That is not to condone such approach. There is much about this whole process that can be characterised as unedifying. But if that was the reasoning, and I do not consider it can be discounted, it did not amount to wilful misconduct involving discrimination on grounds of religious belief and political opinion. The auditor stated that it should take a lot of evidence to tip the balance in favour of wilful misconduct. I agree, but I do not consider that the cogent evidence required for such a finding was present.
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> [40] For all these reasons, while an investigation into the circumstances was justified, I do not consider the findings of the auditor can be sustained and the appeals must be allowed."

[5] Three critical findings were made. Firstly, that the investigation by the Auditor was justified. Secondly, that his investigation revealed much that "was unedifying" about the conduct of the appellants (not excluding other councillors). Thirdly, that the evidence was insufficient on which to find wilful misconduct. Mr McEwan appeared on behalf of the Council in the present application. The Council was not a party to the appeals but counsel held a watching brief on its behalf. Mr McEwan submitted that the Auditor should have ceased his investigation once he received the opinions of the Chief Executive of the LGSC and thereby avoided the further costs of the investigation and the appeals. In addition he submitted that the Auditor was at fault in failing to take into account the reasons put forward by the appellants for voting the way they did. He submitted that the Auditor's decision could not be characterised as a "line-ball" decision but that the evidence fell well short of what was required for a finding of wilful misconduct. He contended that once the Auditor commenced his investigation he owed a duty of care to the Council in the manner in which he conducted that investigation and in any subsequent legal proceedings. Having lost the appeal he could not turn to the Council and say you should bear the cost.

[6] Mr Brangham QC who appeared on behalf of the Auditor submitted that the Council had incurred substantial losses arising from the Fair Employment claims. Senior Counsel had advised that the conduct of the Councillors (including the appellants) could not be "stood over" and that the

claims should be settled. It was the duty of the Auditor to protect the ratepayers of the Council from undue losses. The Fair Employment legislation has been in place since 1976 and councillors would be well aware of it. They should have had the potential implications of that legislation in mind when they voted in the manner in which they did. If the Auditor was successful in the appeals he would have recovered his costs and expenses from the unsuccessful appellants. Where he is not successful he is entitled to recover them either in whole or in part from the Council account, the subject of the audit.

[7] Section 74 of the Local Government Act (Northern Ireland) 1972 empowered the [Department] to appoint persons (local government auditors) to audit the accounts of District Councils. Section 75 provides that the remuneration and expenses of local government auditors may be paid out of money provided by [Parliament]. Section 75(2) provides that District Councils should contribute to the remuneration and expenses of Auditors by way of a charge on the Council. Audits are held annually and section 78 empowers a local government auditor to require the production before him of all books and documents which he considers necessary for the audit and the appearance before him of any person holding or accountable for such books and documents. Sections 81 to 86 of the 1972 Act were repealed by the 1985 Order and substituted by new sections 81 and 82. The original Section 81 empowered the local government auditor to disallow any items of account which were contrary to law or unfounded and to surcharge the councillor or officer responsible for such sums incurred or other sums not brought into account or such losses or deficiency incurred by negligence or misconduct. Section 86 provided –

> "(1) Any costs incurred by a local government auditor in the defence of any allowance, disallowance or surcharge made by him shall, so far as not recovered from any other party and except as is otherwise ordered by the High Court or the Ministry, as the case may be, be reimbursed to him out of the fund to which the accounts subject to the audit relate and the Court of Ministry may make such order as seems fit in regard to the payment out of that fund of the costs incurred by the appellant or applicant or any other party to the proceedings.
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> (2) Subject to the approval of the Ministry, the costs incurred by a local government auditor in any legal proceedings taken by him or under his direction shall, so far as not recovered from any other source, be paid out of the fund to which the accounts subject to the audit relate.

> (3) The costs of a local government auditor in any proceedings to which subsection (1) or (2) applies shall include reasonable compensation for loss of time incurred by him in the proceedings."

Thus the legislation as originally drafted made provision for the auditor's costs, so far as not recovered from any other source, to be paid out of the account to which the audit related. No references was made to expenses,

[8] The new Section 81 empowers the local government auditor to apply to the court for a declaration that an item of account is contrary to law and makes provision for appeals to the court where the local government auditor refuses to seek such a declaration. Section 81(5) enables a court to make orders in respect of expenses incurred in connection with the application or appeal. It provides –

> "(5) On an application or appeal under this section relating to the accounts of a council, the court may make such order as the court thinks fit for payment by that Council of expenses incurred in connection with the application or appeal by the auditor or the person to whom the application or appeal relates or by whom the appeal is brought, as the case may be."

[9] Section 82(1) enables the local government auditor to recover amounts not brought into account and to certify any loss or deficiency caused by wilful misconduct. This was the provision under which the respondent local government auditor certified the amount due jointly and severally by each of the nine appellants. Section 82(3) provides for appeals to the court by any person aggrieved by the issue of a certificate. The court may confirm the decision or quash it and give any decision that the auditor could have given. Section 82(7) empowers the court to make orders relating to the expenses incurred in connection with such an appeal. It provides -

> "(7) On an appeal under this section relating to the accounts of a Council the court may make such order as the court thinks fit for the payment by that Council of expenses incurred in connection with the appeal by the auditor or the person to whom the appeal relates or by whom the appeal is brought as the case may be."

Thus the court is empowered to make an order for the payment of expenses by the Council whose account is the subject of the audit and the proceedings. "Expenses" are not defined. The court may make any order it thinks fit and

thereby has a wide discretion whether to make an order or not. The expenses must be incurred in connection with the appeal. The order for payment by the Council of expenses may be made whether the appeal is brought by the auditor or some other person or by the person to whom the appeal relates, for example, a person to whom a certificate was issued. The order for payment by the Council is not made dependent on the result of the appeal or on who wins or loses the appeal. Therefore an order that the Council pay the expenses incurred can be made in favour of the auditor, the person to whom the appeal relates or the person who brings the appeal, without reference to the outcome of the appeal. The Court is empowered to make such order "as the court thinks fit" for payment to be made by the Council.

[10] Section 82(8) makes provision for the payment of the Auditor's expenses incurred in the recovery of sums certified where they have not been recovered from any other source. This subsection makes payment by the Council mandatory except where the expenses have been recovered from another source. Section 82(8) provides-

> "Any expenses incurred by an auditor in recovering a sum or other amount certified under this section to be due in connection with the accounts of the Council shall so far as not recovered from any other source be recoverable from that Council unless the court otherwise directs."

Neither Section 82(7) or (8) makes reference to costs.

[11] The function of the auditor is to superintend the accounts of the Council and to protect the ratepayers of the district from improper expenditure by the Council or failure by the Council to bring monies into the account. When he defends or brings proceedings in the High Court the local government auditor is not in the same position as any other litigant. He is performing a public function on behalf of the ratepayers. Clearly the actions of the Council or individual councillors will have a significant bearing on the outcome of any application by the auditor for expenses to be paid by the Council. In this case the actions of the Council (or a number of councillors) resulted in two Fair Employment Tribunal cases in which the Council was required to pay out £38,178 in damages and legal fees. That is a significant matter, as is the fact that the cases involved allegations of discrimination, even though there was no admission of liability. The claims related to the appointment of the most senior executive to the Council. Furthermore, this Court has found that there was much that was "unedifying" about the appointments process. It was not all one-sided as there was, with one exception, block-voting by the non-unionist members of the Council. The investigation by the respondent auditor was justified, even though the evidence, when analysed, did not support his final conclusion. The comments

of the Chief Executive of the Staff Commission were relevant and to be considered. Mr Brangham QC argued that they did not affect the propriety of the investigation. However they could not be determinative of the issue as the decision under Section 82 was that of the local government auditor. It is in those circumstances that the application for expenses to be borne by the Council has to be considered. The expenses sought are not only the costs of the investigation but also the respondent's costs of the appeal and the appellant's costs of the appeal as awarded against the respondent.

[12] In Local Government Audit Law (2nd Edition 1985) the author Reginald Jones, a barrister and former Auditor, wrote at 9.43. –

> "Statues before 1972 (eg. Section 234 of 1933) provided that expenses incurred by a district auditor in defending appeals should be reimbursed by the body concerned unless the Court otherwise ordered."

The author went on to comment that the practice was for the whole of the auditor's expenses to be paid by the council concerned. There were only two cases in which such an order was not made. One concerned the auditor's own costs when acting as parish solicitor (R v Great Western Railway Co and Drury's case). The other, R(Inglis) v Drury 1898 2 Ir R 527, was a case in which the High Court of Ireland held that the auditor had acted entirely in excess of his authority. In another Irish case, R (Kennedy) v Browne 1907 2 Ir R 505 Gibson J said that it required an extremely strong case for such an order not to be made. In R (Bridgman) v Drury 1894 2 Ir R 489 an application was made by Mr Bridgman for writs of certiorari and mandamus to compel the Local Government Board Auditor, Mr Drury, to quash certain orders made by him relating to the accounts of Dublin Corporation. Those orders allowed some expenditure by the Corporation and disallowed others. Among the items of expenditure were floral decorations, the building of an extension to the supper room and what was known as Vartry's luncheons (or picnics). The Court held that the Auditor had improperly allowed some of the expenditure and improperly disallowed others. In the course of his judgment the Chief Justice Sir Peter O'Brien commented, with uncharacteristic judicial knowledge of vinaceous matters, on items disallowed in connection with the Vartry luncheons, when members of the Corporation engaged in inspections of the Vartry Waterworks. At page 494 he said -

> "Now I think it is relevant to refer to the character of this luncheon. I have before me the items in the bill. Amongst the list of wines are two dozen champagne, Ayala, 1885 – a very good brand - at 84s. a dozen; one dozen Marcobrunn hock – a very nice hock; one dozen Château Margaux – an excellent claret; one dozen fine old Dublin whiskey – the best whiskey

> that can be got; one case of Ayala; six bottles of Amontillado sherry – a stimulating sherry; and the ninth item is some more fine Dublin whiskey! Then Mr Lovell supplies the '*dinner*' (this was a dinner, not a mere luncheon!) including all attendance, at 10s. per head. There is an allowance for brakes; one box of cigars, 100; coachmen's dinner; beer, stout, minerals in siphons, and ice for wine. There is dessert, and there are sandwiches, and an allowance for four glasses broken – a very small number broken under the circumstances.
> In sober earnestness, what was this luncheon and outing? It seems to me to have been a pic-nic, on an expensive scale. What authority is there for it? No statutable authority exists. By what principle of our common law is it sustainable? By none that I can see."

The reasonableness of the auditor's disallowance is immediately obvious. Much of the case concerned technical matters relating to writs of certiorari and mandamus. Although Mr Bridgman was only partially successful in his application, the Court considered he was entitled nonetheless to his costs. As regards the costs of the Auditor O'Brien J had this to say at page 513 -

> "With respect to the costs of the auditor, as he has not the absolute right which the statute gives him, in case his decision is maintained, yet as he is required by the Act to attend and defend his proceedings, and is entitled to costs even where his decision is reversed, unless the Court should make an order to the contrary, I cannot say that the conduct of Mr Drury, who was represented by counsel in his own personal character, presents any reason for making an order to the contrary, and I think that the auditor therefore is entitled to costs out of the Corporation funds."

The decision of the auditor was upheld on certain items only. Despite this the Court considered that he was entitled to his costs. O'Brien J seems to have gone further and found that even if his decision (generally) was reversed he was nonetheless entitled to his costs. While O'Brien CJ was silent on the issue of the Auditor's costs, the other three members of the Court each agreed with the orders as to costs.

[13] More recent legislation in England and Wales required a positive order of the court before the auditor's expenses would be paid by the account in question. In his book Reginald Jones stated at 9.44 –

> "The 1972 Act differed from the earlier provisions in that a positive order of the court became necessary for the auditor's expenses to be reimbursed. This is repeated in the 1982. Act. However the continued existence of special provisions indicates that they are intended to serve some other purpose than the normal award of costs for which power already exists. Together with the continued use of the word expenses rather than costs this suggests that the provisions like their predecessors , are concerned with the question whether the auditor's unrecouped expenses should be borne by the ratepayers on whose behalf he was acting. It is of course to be expected that in the ordinary way the auditor's expenses not reimbursed under Section 19(5) or 20(7) or by the award of costs will be met by the Audit Commission which is in turn funded by fees charged generally to local authorities and other audited bodies. The real question to be decided by the court under Section 19(7) or 20(7) is thus whether it is appropriate that expenses not otherwise recovered are met by the ratepayers of the particular authority or ultimately by the generality of ratepayers in England & Wales. "

[14] In Pickwell v Camden L.B.C. 1983 QB 962 an application was made by the District Auditor for a declaration that certain wage payments made in settlement of a strike were unlawful. The application was dismissed as the auditor had failed to show that the Council was acting outside its powers when the strike was having serious effects on the local inhabitants, services and the administration of the borough. The court considered that the auditor was correct to make the application but dismissed it with costs. In his book R Jones comments that the Court rejected a submission, without detailed argument, that despite having lost his case the auditor was nevertheless entitled to have his expenses borne by the Council. (The rejection of this argument is not recorded in the Queen's Bench report).

[15] In R (on the application of Comninos) v Bedford Borough Council and Others 2003 EWHC Admin 121 the claimant auditor challenged, by way of judicial review, the legality of the respondent Council providing funding and indemnity for Council officers in defamation proceedings against a newspaper. The auditor's application failed principally on the ground that he had not acted promptly in issuing the judicial review proceedings. Applications for costs and expenses were made. Sullivan J ruled –

> "90. So far as costs are concerned, dealing firstly with the position vis-à-vis the Council: the starting

> point, it seems to me, is that in the great majority of cases the auditor can reasonably expect, if, in the discharge of his statutory duties, he is concerned about the lawfulness of an item of account and brings it to the attention of the court, that he will not be penalised in costs, but, indeed, in the exercise of the court's powers under section 24(3), it is likely that the court will order the audited body to bear the costs of the application. I am satisfied that it would be right to depart from that normal rule on the facts of the present case, firstly because it does seem to me, as I have indicated in the judgment, that there was, indeed, extreme delay in bringing this application; secondly, there were allegations which were made which were then abandoned, but not until some considerable stage into the proceedings, and this is against the background that the auditor had, indeed, been kept abreast of matters and had been provided with the relevant documents by the Council as matters had progressed; and, thirdly, there was the very belated application to amend, which did cause a great deal of unnecessary expense. For all of these reasons, I am satisfied that it would be just in the present case that the Audit Commission should bear its own costs in making this claim.
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> 91. I am not satisfied, however, that the auditor's conduct of the matter is such that he ought to be ordered to pay any part of the Council's costs, so I propose to make no order as to costs in relation to the Council's costs and the auditor's costs."

This suggests that, exceptional cases apart, and for which there is sufficient reason, the general rule that the Council bears the costs of an appeal will hold good. In the Bedford Borough Council case the judge set out three reasons for departing from the rule.

[16] In the instant case the comments of the Chief Executive of the LSGC were matters to be considered but could not be determinative of the issues which the auditor had under consideration. I do not think the evidence fell "well short of a line-ball decision" as suggested by Mr McEwan. There was much substance in the issues uncovered by the respondent in the course of his investigation.

[17] It was submitted by Mr Brangham that 'expenses' covered the legal and professional costs of the investigation and the appeal. No definition of

expenses is provided in the legislation. Order 62(4) of the Rules of the Court of Judicature provides that references to costs shall be construed as including references to fees, charges, expenses and remuneration and in relation to proceedings includes reference to costs of or incidental to those proceedings. The word "expenses" is a more general term. The Oxford English Dictionary defines it as "the charges, costs, items of outlay, incurred by a person in the execution of his duty". It means actual disbursements (see Jones v Carmarthen 10 L.J. Ex. 401) but is not confined to moneys actually paid but includes sums which a person or body is bound to pay (see R v Marsham 1892 1 Q.B. 379 and observations of Esher M.R.)

[18] The respondent auditor has expenses relating to the conduct of his investigation, the legal costs of defending the appeal before this court and the legal costs of the successful appellants. The expenses relating to the conduct of the investigation have not been incurred in connection with the appeal, though the other expenses have been. In what circumstances is he entitled to have those expenses paid by the account the subject of his investigation? What factors should the Court consider in determining whether to make an order under Section 82(7). If wilful misconduct is proved there is no difficulty. An auditor should not be entitled to have his expenses paid by the account in every case. For example, it would be inappropriate to do so where he has exceeded his statutory powers. A relevant factor must be whether the investigation was justified even though no finding is made against the Council or councillors. In this case the investigation into the process of appointing the new Chief Executive was entirely justified in the circumstances. What was uncovered during the investigation must also be a relevant factor. What was uncovered in this instance fell short of wilful misconduct but was sufficient to justify settling two fair employment claims. It was at best prima facie discriminatory and certainly unedifying. All those factors justify an order under section 82(7) that the auditor's expenses relating to the appeal, including the appellants' costs of the appeal, should be paid out of the account of Fermanagh District Council. Accordingly I will make the order sought.