

No. 2

O. 58, r. 18(1)



SUPREME COURT



Record No:

55/2019

Respondent's Notice

Part I

The information contained in this part will be published. It is the respondent's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court

1. **Title of the Proceedings:** *[As in the Court of first instance]*

TONYA MARTIN

APPLICANT

-v-

THE MINISTER FOR SOCIAL PROTECTION

RESPONDENT

2. **Name of Respondent:** THE MINISTER FOR SOCIAL PROTECTION

3. **Application to extend time:**

Yes

No

If an application is being made to extend time for the filing of this Notice, please set out concisely the grounds upon which it is contended time should be extended.

N/A

4. Do you oppose the applicant's application to extend time:

Yes No

If an application by the applicant to extend time is being opposed please set out concisely the grounds on which it is being opposed.

N/A

5. Do you oppose the applicant's application for leave to appeal:

Yes No

6. Matter of general public importance:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is contended, that the matter does not involve a matter of general public importance. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that the matter involves a matter of general public importance.

This section should contain no more than 500 words and the word count should appear at the end of the text.

The decision in respect of which leave to appeal is sought does not involve a matter of general public importance and does not meet the constitutional criteria as set out by O'Donnell J in *PwC (A Firm) v Quinn Insurance Limited (Under Administration)* [2017] IESC 73:

- (i) The appellant's contention is that the Court of Appeal erred and did not apply correctly well-established principles to the individual facts of the case is without merit. In any event, this cannot, of itself, lead to the Supreme Court concluding that the Constitutional threshold is met (*O'Brien v Red Flag Consulting* [2018] IESCDT 25)
- (ii) The issue raised by the appellant has been conclusively determined by the Court of Appeal on a full appeal which upheld the decision of the High Court.
- (iii) In an attempt to obtain leave the appellant incorrectly asserts that the Respondent has delegated public functions to a private body and that therefore

the decision of the Tolka Area Partnership (to dismiss the Applicant from an employment scheme for stated misconduct) was essentially a decision of the Respondent. The Court of Appeal correctly applied well-established principles to the facts of this case and determined that the decision to remove the appellant derived exclusively from the power vested in the Partnership and that a remedy for breach of fair procedures could not lie against the Minister or the Partnership by way of Judicial Review.

- (iv) The appellant in her grounds of appeal refers to a number of errors but, as previously, the appellant fails to identify the portions of the judgment that are in error. The appellant asserts that the Court of Appeal failed to have adequate regard to a number of factors however it is clear from the judgment that adequate regard was given to each and every ground advanced and argued on the appellant's behalf.
- (v) Even if the underlying point may involve an issue of general public importance, there is no stateable basis that leave should be granted, and the appellant has failed to put forward a sufficient argument to satisfy this Court that there is a realistic possibility that the Court of Appeal was wrong (*Douglas v DPP* [2016] IESCDT 46)

Word count – 368

7. Interests of Justice:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is alleged, that the interests of justice do not require an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended, that the interests of justice require an appeal.

This section should contain no more than 300 words and the word count should appear at the end of the text.

The applicant's arguments as to why it is necessary in the interests of justice that leave should be granted do not meet the required constitutional threshold, in circumstances where:

- (i) The applicant issued judicial review proceedings against the Respondent Minister and did not disclose in the leave application, or thereafter, that she had in fact entered into a private employment contract with the Partnership.
- (ii) The applicant's sole motivation for issuing judicial review proceedings was to seek an injunction restraining the Minister from implementing the decision to disqualify her from job-seekers' allowance, yet the applicant did not seek a certiorari of that decision at that time or thereafter.
- (iii) The applicant did not explain at any stage throughout the proceedings why she did not issue Judicial Review proceedings against the Partnership or proceedings for breach of contract or wrongful dismissal.
- (iv) It is simply incorrect for the applicant to suggest that the Court of Appeal erred in fact or law. The Court of Appeal upheld the decision of the trial judge and the findings underpinning both decisions are based on the application to the

facts of the within case of well-established principles as to what decisions fall within the realm of private law as opposed to public law and are therefore not amenable to judicial review

(v) The applicant has had the benefit of a full appeal to the Court of Appeal and a detailed judgment was delivered which considered and determined each ground of appeal. The applicant raises the same identical grounds of appeal and is simply seeking to reargue a lost point already determined by both courts.

(vi) The Court of Appeal provided the appropriate remedy and the interests of justice require certainty and finality to proceedings as opposed to a further review.

Word count - 295

8. Exceptional Circumstances Article 34.5.4.:

Where it is sought to apply for leave to appeal direct from a decision of the High Court pursuant to Article 34.5.4, please set out concisely, in numbered paragraphs, the grounds upon which it is contended that there are no exceptional circumstances justifying such an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that there are exceptional circumstances justifying such an appeal.

This section should contain no more than 300 words and the word count should appear at the end of the text.

N/A

Word count -

9. Respondent’s grounds for opposing an appeal if leave to appeal is granted:

Please set out in the Appendix attached hereto the Respondent’s grounds of opposition to the Grounds of Appeal set out in the Appellant’s Notice of Appeal.

10. Cross Application for Leave:

If it is intended to make a cross application for leave to appeal please set out here precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance or the interests of justice justifying a cross appeal to the Supreme Court.

If it is sought to make a cross application for leave to appeal direct from a decision of the High Court, please also set out precisely and concisely, in numbered paragraphs, the exceptional circumstances upon which it is contended that such a course is necessary.

This section should contain no more than 500 words and the word count should appear at the end of the text.

N/A

Word count -

11. Additional Grounds on which the decision should be affirmed and Grounds of Cross Appeal

Please set out in the Appendix attached hereto any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court and / or the grounds of cross appeal that would be relied upon if leave to appeal were to be granted.

12. Priority Hearing:

Yes

No

If a priority hearing is sought please set out concisely the grounds upon which it is alleged that such a hearing is necessary.

This section should contain no more than 100 words and the word count should appear at the end of the text.

N/A

Word count:

13. Reference to CJEU:

If it is contended that it is necessary to refer matters to the Court of Justice of the European Union, please identify the matter, and set out the question or questions which it is alleged it is necessary to refer.

This section should contain no more than 100 words and the word count should appear at the end of the text.

N/A

Word count:

Part II

The information contained in this part will not be published.

14. Respondent's Representatives:

If not provided in the application for leave to appeal please identify the solicitor and counsel for the respondent, with contact details for the solicitor dealing with the matter including an

email address for the solicitor and lead counsel or in the case of a respondent in person please provide contact details including telephone and email.

15. Legal Aid:

In the case of an application by the DPP from an order in a criminal trial please confirm that a Legal Aid (Supreme Court) certificate has been granted by the Court below and please provide a copy of same.

Signed:



**Maria Browne
Solicitor for the Respondent
Chief State Solicitors Office
Ship Street Little
Dublin 8
D08 V8C5**

Date: 16th April 2019

**To be served on: Rogers Law
Solicitors for the Applicant
Unit 2 Kingscourt
48 -49 North King Street
Dublin 7**

Please file your completed Notice in:

**The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin 7**

Appendix
Grounds of Opposition (and Cross Appeal)

1. Title of the Proceedings: *[As in the Court of first instance]*

TONYA MARTIN

-v-

MINISTER FOR SOCIAL PROTECTION

2. Respondent's grounds for opposing an appeal if leave to appeal is granted:

Please list concisely in numbered paragraphs, the Respondent's ground(s) of opposition to the grounds of appeal set out in the Appellant's Notice of Appeal.

The grounds of appeal as set out by the applicant/appellant to this Court are exactly the same grounds as set out in her appeal to the Court of Appeal with the addition of one ground set out at paragraph 4. The Court of Appeal was correct to uphold the decision of the trial judge and dismiss the appeal on each of the grounds as advanced by the applicant.

1. The Court of Appeal did not err in law and fact by applying the wrong test or standard in determining the impugned decision was a private law dispute and therefore not amenable to challenge by way of Judicial Review. The Court of Appeal in upholding the trial judge's conclusion (that the decision of the Partnership is in the realm of private law) at paragraph 36 of its judgment distinguished the facts of this case from established case law including *Patrick O'Donnell v Tipperary (South Riding) County Council* [2005] IESC 18 and relied on the correct test as set out in *Beirne v Commissioner of An Garda Siochana* [1993] I.L.R.M. 1 which same is set out at paragraph 37 of its judgment. The Court of Appeal was correct at paragraph 42 of its judgment to determine that there was nothing in relation to the power of the Partnership to remove the applicant from the programme which could bring the decision within the ambit of *Beirne* and that the decision to remove the applicant derives solely and exclusively from the power vested in the Partnership by virtue of the Implementing Agreement with the Minister and the Rules and Conditions of the Tus programme.
2. The Court of Appeal did not give undue weight to the fact that the applicant's contract of employment was with the Scheme, and not the Respondent, in the particular circumstances of the case. The Applicant stated this same ground in their appeal to the Court of Appeal which was categorically rejected at paragraph 35 of its judgment. In this regard the Court of Appeal held that the trial judge was correct to rely on the existence of the contract of employment and to reject the contention that the particular circumstances of this case (including the nature of the back to

work scheme, its funding by the respondent, the respondent's other links to the scheme) were sufficient to create a relationship of agency between the Partnership and respondent. The applicant could have named the Partnership as a party to the within proceedings but, as the Court of Appeal stated, failed to do so and did not adequately explain why. The Applicant could alternatively have sought to impugn the decision of the respondent (to disqualify her from job-seekers' allowance) but chose not to do so. Furthermore, the applicant had a civil law remedy available to her in respect of the alleged breach of her contract or wrongful dismissal which she also chose not to exercise. Importantly, at no stage during the leave application or indeed later in the proceedings did the applicant disclose the existence of a contract of employment between herself and the Implementing Body ("The Partnership").

3. The Court of Appeal had adequate regard to the fact that the applicant was required by the respondent to take up employment with the Partnership as this may affect her eligibility for job seekers allowance. The Court of Appeal was correct at paragraph 35 of its judgment to uphold the reliance by the trial judge on the existence of a contract of employment and his rejection of the contention that the nature of the back to work scheme, its funding and other links to the scheme by the respondent was sufficient to create a relationship of agency, such that the Minister was responsible for the decision of the Partnership. Furthermore, the Court of Appeal was correct to determine at paragraph 33 of its judgment that despite the programme being a government initiative for the long term unemployed, and being funded by the Minister, this is not sufficient even when aggregated with the other matters set out by the applicant in relation to the Tus Conditions and Rules to impute the decision of the Partnership to be that of the Minister.
4. The Court of Appeal did not fail to have adequate regard to the fact that the breach of fair procedures, dismissal and penalty were inextricably linked to the respondent. The Court of Appeal correctly determined at paragraph 26 of its judgment that it is not accepted that simply because the Minister funds the programme and is referenced in the Implementation Agreement that the Minister is any way liable for the any fault or breach of rights on the part of the Partnership in relation to the applicant's dismissal, or renders her dispute a matter of public law. The decision of the respondent to disqualify the applicant from receiving job-seekers' allowance for nine weeks was not the subject of an application for judicial review by the appellant.
5. The Court of Appeal correctly determined that the breach of fair procedures or natural justice in respect of the impugned decision was properly a matter to be laid at the door of the decision-maker and not the respondent. The Court of Appeal at paragraph 42 of its judgment correctly states that a remedy first of all did not lie against the Minister but against the Partnership, but secondly did not lie in any event against the Partnership by Judicial Review, since that decision was not amenable to judicial review.

6. The Court of Appeal did not err in the manner alleged at ground 6 of the grounds of appeal. The decision of the respondent to disqualify the applicant from her entitlement to jobseekers allowance was not the subject of an application for leave for judicial review by the applicant. Instead, the applicant exercised her right of appeal within the Department of Social Protection and was unsuccessful. The applicant's loss of job seekers allowance was ameliorated by the applicant receiving emergency social welfare payments which reduced her losses significantly.

3. Additional grounds on which the decision should be affirmed:

Please set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court.

It was argued for the first time by the Applicant's legal team during the appeal, that what the Applicant was now seeking was an expunging of the social welfare file entry which records that the Applicant was dismissed from the scheme for misconduct. It is contended that the response of the Court of Appeal to this submission encapsulates the misconceived nature of the within proceedings ab initio, namely that if the Applicant had successfully pursued either of her private law remedies (of breach of contract or wrongful dismissal) she could have then called upon the Respondent to correct the records of which she complains, and that in respect of a failure or refusal to do so, a Judicial Review might *then* be appropriate.

4. Cross Appeal

Please set out in numbered paragraphs the Grounds of Cross Appeal relied upon if leave to cross appeal were to be granted.

N/A

5. Order(s) sought

Please set out in numbered paragraphs the order(s) sought if the Cross Appeal were to be successful.

N/A