THE HIGH COURT

[2020] IEHC 597

RECORD NUMBER: 2020 180 JR

BETWEEN

KEITH HARRISON

APPLICANT

AND

PETER CHARLETON

RESPONDENT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 18 November 2020

Summary of Decision

1. This is an application for discovery and interrogatories. It is brought in the context of proceedings challenging a costs decision made in respect of the applicant's participation at the Disclosures Tribunal. For the reasons set out, I find the discovery and the interrogatories sought are neither relevant nor necessary. In this respect, some of the material sought is already available to the applicant from the material in his possession, including the transcript of the 19 days hearing on the terms of reference (n) and (o), the second interim report of 30 November 2017 of the Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters (the "second interim report"), the correspondence between the applicant and the Tribunal in respect of costs prior to the making of the costs decision, the transcript of the hearing in respect of costs of 1 November 2019, and the costs decision of 4 December 2017 itself (the "costs decision").

The Disclosures Tribunal

2. On 17 February 2017, the Oireachtas established the Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act, 2014 and certain other matters (the "Disclosures Tribunal") under the Tribunals of Inquiry (Evidence) Act 1921 and appointed the respondent sole member. The Tribunal's terms of reference were primarily concerned with investigating allegations involving two garda "whistle-blowers", Sergeant Maurice McCabe and Superintendent David Taylor. While most of the terms of reference concern Sergeant Maurice McCabe, two of them concerned the applicant. Term (n) requires the tribunal to investigate contacts between the gardaí and TUSLA in relation to Garda Keith Harrison and term (o) requires the investigation of any pattern of the creation, distribution and wrongful use by TUSLA of files containing allegations of criminal misconduct against gardaí who made allegations of wrongdoing.

3. The applicant had made protected disclosures under the 2014 Act. In short, the applicant's disclosure under the 2014 Act related to his treatment in the Donegal division and the notification by An Garda Siochana to Tusla arising from disputed domestic violence concerns in relation to the applicant and his partner, Ms. Marisa Simms, insofar as those matters might have affected Ms. Simms's children.

4. Following an oral hearing lasting 19 days in respect of terms of reference (n) and (o), the Tribunal reported on those terms of reference in its second interim report. The Tribunal concluded that the allegations of Garda Keith Harrison and Marisa Simms that they had been the victims of a malicious procession of events were entirely without any validity.

The respondent rejected Ms. Simms's allegation that a statement had been coerced from her. The respondent also criticised the applicant in relation to his conduct in moving back to Donegal to serve as a garda in the station in Buncrana, in order to be with Ms. Simms, where that station was investigating the involvement of Ms. Simms's brother for the manslaughter of Garda Gary McLoughlin.

Interaction between the parties prior to the costs decision

5. On 4 December 2017 the applicant formally applied to the respondent for his costs following the publication of the second interim report.

6. The solicitor to the Tribunal replied on 12 December 2017 requesting that the applicant send in submissions to the Tribunal setting out the basis for and all relevant matters on which he sought to apply for costs.

7. The applicant furnished the requested legal submissions on 21 December 2017, which were acknowledged on 28 December 2017.

8. The applicant wrote to the Tribunal on 22 May 2018 enquiring as to when the costs decision would be made, this letter being acknowledged on 18 June 2018 by the solicitor to the Tribunal.

9. Following the publication of a third interim report, the solicitor to the Tribunal wrote to the applicant on 19 October 2018 stating that the Tribunal was in a position to deal with costs and asked the applicant to indicate his position in terms of costs and to furnish submissions to that end.

10. On 22 October 2019 the Tribunal wrote to the applicant setting out its proposed approach in respect of costs stating that it was presently considering what portion, if any, of costs should be ordered and inviting the applicant to make oral submissions on that issue.

11. An oral hearing took place on 1 November 2019 and a transcript of that hearing is exhibited in these proceedings.

Costs Decision

12. On 4 December 2019 the Tribunal gave its decision on the costs of the applicant. The approach of the Tribunal is summed up on the first page of the decision, where it is observed that: *"Tribunal costs are not dependent on whether a person did something wrong but rather on cooperation, central to which is telling the truth".*

13. A significant portion of the decision is taken up with summarising the law on costs, including s.6(1) of the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 and relevant case law. The decision also sets out in some detail the contact between the Tribunal and the applicant prior to the cost decision in respect of the proposed decision. The submissions made on behalf of the applicant are summarised.

14. Certain summaries of, and extracts from, the second interim report are set out, including that Garda Harrison maintained to the Tribunal that TUSLA intervened in his family life as the gardai had manipulated social services to that end, that Garda Harrison accused

TUSLA of going along with this Garda manipulation and that those allegations were completely rejected by the Tribunal as false (Tribunal report page 18, 19, 90, 91).

15. The decision also referred to the Tribunal finding that Garda Harrison tailored his evidence to what suited his purpose at the time (Tribunal report pages 28, 29), that Garda Harrison's position *"shifted in accordance with what was perceived to be the drift in the evidence and the clear allegations he was making would be unmentioned if these did not apparently suit"* (Tribunal report page 30), and that the Tribunal rejected Garda Harrison's evidence in connection with texts on the phone of Marissa Simms as "*ridiculous and nonsense*" (Tribunal report page 57).

16. The Tribunal noted that the most damaging allegations were made by Garda Harrison against the Gardaí generally, the social work system and individual members of An Garda Siochana and individual social workers, including a conspiracy against him orchestrated through Garda headquarters. The Tribunal noted that after several weeks of preparation, distribution and analysis of thousands of pages of documents and four weeks of hearing to consider these allegations, the Tribunal could find no basis for a finding that those allegations were true.

17. The Tribunal noted 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 co-operates but that cooperation must involve telling the truth as an objective reality. The Tribunal went on to say that, if baseless allegations are made and persisted with throughout the hearings of the Tribunal, where the person turns up and gives wrong evidence, that may give the appearance of cooperation but is not cooperation. On the other hand, if a person makes an allegation and a Tribunal is set up and the individual tells the Tribunal that the allegation was wrong or they made it up or were mistaken, that is cooperation.

18. The arguments of counsel for the applicant were addressed, including the issue in relation to awarding only a portion of the costs. The Tribunal found this was not a case where awarding a proportion of the costs was appropriate where all the allegations with which the terms of reference (n) and (o) were concerned were unfounded. The Tribunal found that after the first day of the Tribunal "*the allegations should have clearly been not persisted in after legal advice".* The Tribunal concluded that it could not find any basis for the award of costs based on cooperation within the meaning of the case law. The Tribunal concluded there was proper and moderate interventions by gardai and social services, noting that Garda Harrison persisted fully in the allegations made by him when they were wrong.

19. The Tribunal went on to consider whether, despite this finding, there was a basis upon which a "*humane and lawful award of costs*" could be made, noting that there could have been a scoping exercise by the Oireachtas which initiated the public tribunal and had the texts exchanged between Marisa Simms and Garda Harrison come out, the basis for holding an inquiry might have dissipated. However, the Tribunal concluded that the Oireachtas having set up the Tribunal, Garda Harrison was entitled to instruct solicitors

and counsel, that the disclosure made by the Tribunal had to be analysed and the opening speech of counsel for the Tribunal had to be considered. The Tribunal noted that the allegations should have been withdrawn on "*on the basis of a serious consideration of where the facts are"* but that did not happen. Reference was made to the fact that cases are often settled in litigation on the day of the hearing and that allegations can be withdrawn in a brief court hearing.

20. Accordingly, the Tribunal ruled that Garda Harrison was entitled to representation up to and including the opening day of the Tribunal's substantive hearings but that no order for costs was to be made for the remainder of the days of the hearing, being day 2 to day 19.

The proceedings

21. An *ex parte* docket for leave for judicial review was filed by the applicant on 2 March 2020. The Statement of Grounds was dated 2 March 2020 and the affidavit of verification of the applicant sworn 2 March 2020. An affidavit was also sworn by Trevor Collins, the applicant's solicitor, on 2 March 2020. On 2 March 2020, Meenan J. granted leave on notice to the respondent to bring the within proceedings.

22. The applicant filed a notice of motion on 10 March 2020. By Order of the President of 8 May 2020 it was ordered on consent that the application for leave would be treated as the hearing of the substantive application for judicial review. On 12 June 2020, the respondent provided his Statement of Opposition accompanied by a verifying affidavit sworn by Peter Kavanagh, registrar to the Disclosures Tribunal, on 12 June 2020. A replying affidavit of the applicant was sworn on 15 July 2020.

Nature of the case made by the applicant

23. The Statement of Grounds requires careful consideration since it is this, along with the Statement of Opposition, that circumscribes the boundaries of the case. The necessity and relevance of the discovery and interrogatories can only be tested as against the case made. At paragraph 9 of the Statement of Grounds, it is pleaded that in contra-distinction to the other two members of the force who had made protected disclosures, the respondent never sought to have the applicant interviewed prior to the applicant being called to give evidence at the public hearing. At paragraph 10, it is pleaded that the applicant was provided with material and statements from other witnesses, was invited to furnish an additional statement if he wished, that the Tribunal did not seek clarification of any particular issue from the applicant and that the applicant's statement to the Tribunal (of 13 March 2017) had been furnished to other witnesses "*at a much earlier stage*" and they were invited to comment on particular issues.

24. At paragraphs 20 to 25 the applicant pleads that at no point did the respondent:

- State the applicant had failed to provide assistance or knowingly give false or misleading information;

- Invite the applicant to address the approach he intended to take in relation to costs;

- Invite the applicant to withdraw his statements or allegations prior to the public hearings;
- Indicate the allegations should be withdrawn prior to the public hearings;
- Seek to interview the applicant prior to public hearings;
- State the applicant did not make a protected disclosure.

25. At paragraphs 26 to 40 the legal grounds are set out. These may be broadly summarised as follows:

- The respondent did not correctly apply the law in respect of the entitlement to legal representation before a Tribunal, *inter alia* in making a finding that costs are only to be awarded to persons whose allegations are found to be true; in failing to have regard to the applicant's assistance to the Tribunal; in applying litigation costs principles; in depriving the applicant of costs without a finding that the applicant knowingly gave false and misleading information; and in imposing a penalty on the applicant by depriving him of costs;
- The respondent failed to give the applicant an opportunity to address the basis which he intended to use to limit the applicant's entitlement to costs;
- The respondent erred in law in finding that the matters which the Oireachtas had required him to inquire into ought not to have been inquired into;
- The respondent erred in law in failing to have regard to the fact that he, as inquisitor and adjudicator in full control of a Tribunal, determined what evidence if any ought to be called before the public hearings (paragraph 29).

26. In the Statement of Opposition, it was denied that the applicant was entitled to relief on any of the legal grounds identified. It was pleaded that the pre-public hearing sequencing of the provision of statements and documentation to the Tribunal and witnesses was irrelevant to the costs decision. Certain pleas in respect of factual matters are dealt with below.

The application for discovery and interrogatories

27. By Order of 14 July 2020 the applicant was given liberty to bring a motion for interrogatories and discovery and by motion of 11 August 2020 the applicant brought the within motion seeking discovery and interrogatories. The motion was grounded on the affidavit of Trevor Collins, solicitor for the applicant, sworn 21 July 2020.

The categories of discovery sought were as follows:

a. All correspondence, notes, records or memoranda concerning the furnishing of the statement of the Applicant and/or Marisa Simms to third parties before the 8th August 2017;

b. *All documents, notes, records and/or memoranda created prior to the 18th September 2017 concerning the decision not to interview the Applicant prior to the public hearings in respect of Module N;*

c. *All correspondence from or to the Tribunal concerning the application for costs and/or grant or refusal of costs in respect of Module N or O in the Terms of Reference.*

28. The applicant also sought leave to deliver interrogatories and to that end a Notice of Interrogatories proposed to be delivered should leave be granted was exhibited to the grounding affidavit of Mr. Collins. The Notice was in the following terms:

"NOTICE OF INTERROGATORIES ON BEHALF OF THE PLAINTIFF FOR THE EXAMINATION OF THE RESPONDENT

1. *Did the respondent determine what matters were required to be inquired into in accordance with the terms of reference?*

2. *Did the respondent determine that Module N in the terms of reference meant that it was to investigate "all interaction between any member of the Gardaí and Túsla in relation to Garda Keith Harrison howsoever first initiated and any contacts thereafter"?*

3. *Did the respondent determine which parts of the applicant's protected disclosure fell to be considered within the terms of reference of modules N and O?*

4. *Did the respondent consider the necessity for public hearings in relation to the issues covered by modules N and O?*

5. *Did the respondent exclude consideration of significant portions of the applicant's protected disclosure and statement to the tribunal for the purposes of modules N and O?*

6. *Did the respondent consider matters and issues relating to the Applicants time in the Donegal Division which were not alleged by the applicant to be relevant to modules N and O?*

7. *Did the respondent call evidence which was not contained or referred to in the statement of the applicant or his partner?*

8. *Did the respondent consider the statements of other witnesses in determining whether or not to interview the applicant?*

9. *Did the respondent direct the interview of other witnesses for the purpose of modules A to O?*

10. *Did the respondent direct the interview of witnesses for the purpose of module N or O?*

11. *Did the respondent, his servants or agents, in interviewing witnesses, direct their attention to evidence contained in the statements of other witnesses?*

12. *Did the respondent consider calling on the applicant to withdraw his "allegations" prior to the public hearings?*

13. *Did the respondent form the view prior to the public hearings of module N that the applicant's "allegations" ought to be withdrawn by the applicant?*

14. *Did the respondent furnish copies of the applicant's statement to witnesses to any party prior to the 8th of August 2017?*

15. *Did the respondent direct the attention of any of those witnesses to particular parts of the applicant's statement for the purpose of specific comment?*

16. *Did the respondent grant full orders for cost in respect of all applications made to him regarding module (n) and/or (o), save for the applications made on behalf of the applicant and Marissa Simms?*

17. *Is the quote from page 23 of the report related to evidence concerning "interaction between any member of the Gardaí and Túsla".*

18. *Did Chief Superintendent Sheridan give evidence of any interaction on his part with TUSLA concerning the applicant?*

19. *Did the "allegations" referred to in page 45 of the report involve any person other than the Applicant or Marissa Simms?*

20. *Apart from the applications made by Keith Harrison did the respondent accede to all applications for costs made to him in respect of Module N and/or O?*

21. *Did the respondent accede to an application for costs on behalf of Ms Rita McDermott?*

22. *Did the respondent accede to an application for costs on behalf of Chief Superintendent McGinn?*

23. *Did the respondent accede to an application for costs on behalf of Inspector Sheridan?*

24. *Did the respondent accede to an application for costs on behalf of Inspector Durkin?*

25. *Did the respondent accede to an application for costs on behalf of behalf of Sergeant McGowan?*

26. *Did the respondent accede to an application for costs on behalf of Superintendent English?*

27. Was an application for costs made on behalf of the Commissioner of An Garda Siochana?

28. Was an application for costs made on behalf of TUSLA?"

29. A replying affidavit was sworn by Mr. Kavanagh, registrar, on 31 July 2020, whereby he set out what he described as a short chronology of the flow of witness statements to the Tribunal. It was stated same was provided in order to address paragraph 10 of the Statement of Grounds. An additional replying affidavit was also sworn by Mr. Minogue, solicitor, of the Chief State Solicitor, on 31 July 2020, where he identified the material already available to the applicant. In respect of the interrogatories sought, he noted that responses to same would provide no material assistance to the court in determinating the lawfulness of the costs decision. In respect of discovery, he averred that the categories sought were irrelevant and appeared to be directed at matters concerning the running of the substantive portion of the Disclosures Tribunal hearings rather than the issue of costs.

Application for discovery

30. There is no need to rehearse the law on discovery. The principles are clear. If the discovery sought is neither relevant nor necessary, it should not be ordered. The case law invoked by the applicant in respect of the necessity for transparency in public law matters, and the necessity for litigation to be conducted with the cards facing upwards on the table, including *RAS Medical Ltd. v. RCSI* [2019] 1 I.R. 63, does not alter that fundamental principle. Taking the analogy employed by Lord Donaldson in *R v. Lancashire County Council, ex parte Huddleston* [1986] 2 All E.R. 941 a little further, if the cards are either already face up on the table or are facedown but quite irrelevant to the matters requiring to be determined, then discovery of those metaphorical cards, or interrogatories of the matters contained therein, is not appropriate.

31. With those principles in mind, I turn to the categories sought. Category A of the motion for discovery seeks documents concerning the furnishing of the statement of the applicant and/or Marisa Simms to third parties before 8 August 2017. The reason given for this category in the affidavit of Trevor Collins is that the applicant is put on full proof of when his statement was furnished to other witnesses and because it is relevant to the respondent's decision that the applicant ought to have withdrawn the allegations and in relation to the fairness of treating the applicant differently from other witnesses to the Tribunal.

32. The chronology of events averred to by Peter Kavanagh in his affidavit of 31 July 2020 makes it clear that the applicant's statement was received on 14 March 2017, Ms. Simms's statement on 15 March 2017, and a statement made by Chief Superintendent Terry McGinn on 13 March 2017, that those statements were provided to various people mentioned in the statements on 19 April 2017, that non Garda witnesses were written to in July 2017 by the Tribunal asking that they meet with Tribunal investigators, that material including the statements and additional documentation were sent to the applicant on 8 August 2017 and that he was invited to furnish an additional statement if

he wished in response to the material sent out. There is no dispute about any of those events.

33. A point was made during the hearing that the statements of the applicant and Ms. Simms were sent out earlier than the statements subsequently received from third parties. This is unsurprising given that it was the applicant's allegations that were being investigated, and therefore it seems logical that the Tribunal took a statement from him and Ms. Simms first and then sought statements from the persons mentioned by him and Ms. Simms in their statements.

34. But irrespective of whether another approach may have been more desirable, the manner in which the Tribunal proceeded in this respect is not the subject of challenge in these proceedings. The Statement of Grounds discloses neither any factual complaint nor legal error alleged in respect of the provision of the statements of the applicant and Ms. Simms to the third parties prior to 8 August 2017 and the opportunity given to third parties to comment on those statements.

35. In the written submissions filed on behalf of the applicant in this motion, it is submitted first that the applicant was put on full proof in the Statement of Opposition that the furnishing of his statement to their parties "*was at a much earlier stage*" and therefore discovery was necessary to prove this. However, as identified above, the respondent has now admitted by way of affidavit that this pleaded fact is true. There is therefore no controversy about this and no need for discovery on this basis.

36. Next, it is submitted that the applicant was deemed not to have co-operated because of his failure to withdraw his allegations on the opening day of the hearing and that other witnesses were given an opportunity to consider their evidence in light of the applicant's statement at an earlier stage. It is argued that the respondent did not seek to furnish these witness statements to the applicant for specific comments or seek to interview him despite the conclusion that he ought to have withdrawn the allegations. It is said that the applicant must be able to assess "*whether, how or why*" other witnesses were provided with an opportunity to consider the statements of the applicant and Ms. Simms and Garda McGinn prior to being requested to submit their own statements. I should observe at this point that it is clear from the chronology of Mr. Kavanagh and the sample letter exhibited by him to the witnesses, that the witnesses were indeed given an opportunity to consider the relevant statements, since they were asked for their comments on same.

37. At the oral hearing of the motion, the applicant's counsel argued that the respondent must show that an opportunity was given to the applicant to withdraw his allegations and that the same approach was taken to all witnesses.

38. On the pleadings, there is no plea of inequality of treatment between the applicant and other witnesses in how the hearings were managed or an assertion that they ought all have been treated in the same way in respect of the provision of statements or withdrawal of allegations. Nor is there a plea of an obligation on the part of the respondent to invite the applicant to withdraw his allegations.

39. But even leaving aside this (considerable) difficulty for the applicant, in any case, as noted above, there is no dispute as to any of the relevant facts. The factual sequence in respect of the provision of statements is set out in the chronology of Mr. Kavanagh in his replying affidavit to this motion. It is admitted in the Statement of Opposition that the respondent did not invite the applicant to withdraw any part of his statements or allegations, and that at no point did he indicate that the allegations should be withdrawn prior to public hearings and prior to hearing the applicant give evidence (paragraph 16).

40. In conclusion, given that (a) the facts in relation to the provision and sequencing of statements, and withdrawals of statements are uncontroverted and (b) there is no plea of illegality in respect of same, I have no hesitation in concluding that Category A is neither relevant nor necessary for the determination of these proceedings and I refuse it.

41. Category B seeks documents prior to 18 September 2017 concerning the decision not to interview the applicant prior to the public hearings in respect of terms of reference (n) and (o). Unlike the previous category, the Statement of Grounds contains a plea that is at least somewhat relevant to the category sought, being the plea referred to above at paragraph 29 of the Statement of Grounds i.e. that the respondent acted unlawfully "*in failing to have any or any adequate regard to the fact that it was the respondent as inquisitor and adjudicator in full control of a Tribunal determined (sic) what evidence if any ought to be called before the public hearings"*. The meaning of this plea is not entirely obvious, but it may be related to the argument of the applicant identified above, i.e. that there was some duty on the respondent to take steps to test the case before going to public hearings given the applicant's contention that the respondent refused costs because the case ought to have been withdrawn.

42. It is accepted by all that the Tribunal did not interview the applicant prior to public hearings. This decision is explained at paragraph 4 of the Statement of Opposition as follows:

> *"It is admitted that the Respondent never sought to have the Applicant interviewed prior to the Applicant giving evidence at the public hearing. This occurred in circumstances where the Applicant and his domestic partner had submitted comprehensive statements and material. The Applicant's statement and alleged protected disclosure collectively amounted to approximately 40 pages of relatively dense text containing a significant level [sic] detail of a large number of serious allegations. The length and detail of the statements provided to the Tribunal was such that the Tribunal determined that further interview prior to the public hearings was unnecessary. In any event, the Applicant's pleas in relation to representation and interviews are irrelevant to the Respondent's decision on costs".*

43. In oral submissions, counsel for the applicant submitted that although Mr. Kavanagh, registrar to the Tribunal, swore an affidavit verifying the Statement of Opposition, he cannot give evidence to support the plea in respect of the reason for not interviewing the applicant as he was not part of the decision-making process, that the respondent has not sworn an affidavit because he is a sitting judge of the Supreme Court, and that therefore

the applicant has no way of testing this averment. Counsel for the applicant submitted the duty of candour was vital in this respect.

44. The submission that Mr. Kavanagh cannot give evidence to support the plea appears to be incorrect as Mr. Kavanagh averred at paragraph 2 of his affidavit that so much of the Statement of Opposition as relates to the respondent's acts and deeds is true and at paragraph 3 that he is authorised in his capacity as the registrar to the Disclosures Tribunal to swear the affidavit by the respondent to the proceedings and he does so with the respondent's full knowledge and consent and for the purpose of verifying the facts contained in the Statement of Opposition. Accordingly, it seems to me that Mr. Kavanagh can indeed make the averment that supports the plea in the Statement of Opposition explaining why the applicant was not interviewed.

45. Returning to the pleadings, it seems likely that the applicant will seek to allege at the hearing that the respondent acted unlawfully in failing to interview him prior to public hearings, although this has not been explicitly pleaded. The facts are clear; the respondent interviewed certain people prior to public hearings; he did not interview the applicant. The applicant is free to make whatever legal argument he wishes as to the consequences of the decision not to interview. The applicant does not need discovery to do that.

46. But the applicant now seeks discovery on the basis that a reason has been given in the Statement of Opposition as to why the applicant was not interviewed and the applicant wishes to test the factual accuracy of that plea by looking at the underlying documents. The applicant has neither identified in his pleadings that an unlawful and/or incorrect reason for not interviewing the applicant was provided nor provided any factual basis for suggesting that the reason given is untrue. The sole reason discovery is stated to be necessary in this regard is because the applicant cannot interrogate the decision maker by way of cross examination because of his position. But this cannot be used as a spring board for what is clearly a fishing exercise. Assuming the deponent of the affidavit could in principle be cross examined, such an application would very likely be refused where the applicant has given no reason to justify any such cross examination. Cross examination of a deponent in respect of an averment will not be permitted where there is no basis for supposing an averment is untrue and no factual or legal basis has been advanced to justify an interrogation of the deponent in this respect. The mere unavailability of the respondent for cross examination cannot be used as the basis for obtaining documents by way of discovery that would not otherwise be available.

47. Counsel for the applicant also submitted that it ought to have been put to the applicant that he should withdraw his allegations. This argument can of course be made without recourse to the discovery sought since there is no dispute as to the facts in respect of withdrawal.

48. Accordingly, the discovery sought at Category B is neither relevant nor necessary to any issue raised in the proceedings and I refuse it.

49. Finally, Category C seeks all correspondence from the Tribunal concerning the application for costs and/or grant or refusal in respect of terms of reference (n) or (o). In the affidavit grounding this motion sworn by Mr. Collins, the reason given for Category C is as follows:

> *"I say that the initial reason given for the refusal to grant the applicant his costs was that the applicant had made allegations which were false with regard to a number of matters. The Applicant, in his submission to the Respondent, advised that other witnesses had made false allegations against the Applicant. Discovery in this regard is necessary to deal with this issue and determine the vires in the exercise of his discretion and in particular whether he applied the same approach to all Parties."*

50. All the correspondence between the applicant and the Tribunal in respect of costs is referred to extensively in the costs decision and in fact is exhibited to the grounding affidavit sworn by the applicant of 2 March 2020. At the oral hearing, it became clear that Category C was in fact directed to correspondence with other persons involved in terms of reference (n) and (o). In response to an inquiry as to whether it was pleaded that there had been inequality of treatment between the applicant and other persons involved in terms of reference (n) and (o), it was contended that was a part of the case and paragraph 26 of the Statement of Grounds was identified as containing the relevant plea. That reads as follows:

> *"The Respondent acted ultra vires and in breach of the principles of natural and constitutional justice in failing to award the Applicant his costs in respect of the entirety of the proceedings before the Tribunal."*

51. Counsel for the applicant argued that this included a plea that the Tribunal had acted in a discriminatory fashion in respect of the way it had treated the applicant's costs on the one hand, and those of other parties before the Tribunal on the other hand, in respect of terms of reference (n) and (o).

52. I fully accept that a failure to treat persons equally in relation to costs could potentially be a legitimate ground for seeking to quash a costs decision. In *Lowry v. Mr. Justice Moriarty* [2018] IECA 66, the applicant claimed that that he was treated by the Tribunal in a discriminatory way compared to two other persons who had appeared before the Tribunal. The Court of Appeal held, *inter alia*:

> *"This is an administrative matter and a party is entitled to look for consistency in the exercise of an administrative decision-making power, including a discretion. The administrative process should be fair and reasonable and it should broadly be consistent" (paragraph 73).*

53. Indeed, in that case, in a judgment on discovery (*Lowry v. Mr. Justice Moriarty* [2015] IEHC 39), Mr. Justice McDermott directed discovery of material that would identify how two other persons participating in the Moriarty Tribunal, Mr. Haughey and Mr. Dunne, had

been treated in respect of costs. Discovery was ordered in circumstances where it had been pleaded that similar adverse findings had been made in respect of their conduct in the substantive decision of the Tribunal as those made against Mr. Lowry, but that they had been treated differently from a costs point of view (see paragraphs 31 to 34).

54. In this case, the question of the treatment of other persons arose at the hearing on costs in this case, albeit fleetingly (see page 43 and 48 of transcript of 1 November 2017). But despite that, the Statement of Grounds does not include any complaint of inconsistent treatment or lack of equality of the applicant, either as compared to others appearing in the hearings on terms of reference (n) and (o), or generally. There is no identification of any persons differently treated and the nature of their treatment. There is no affidavit evidence sworn on behalf of the applicant identifying any of those matters or no exhibits relevant to same. The assertion of unlawful discrimination is simply not in the case.

55. Accordingly, any discovery of the treatment of any other persons insofar as costs are concerned is not relevant to the disposal of the issues the High Court will be called upon to determine. The very bald and boilerplate type plea at paragraph 26 identified by counsel for the applicant cannot be considered to be a sufficient specification of a plea of discrimination. The mere fact that a failure to treat persons the subject of an administrative decision equally may in certain circumstances be *ultra vires* a decision-making body does not mean that a plea that a decision is *ultra vires* or in breach of natural and constitutional justice equates to a plea of an absence of equal treatment. For that reason, I refuse discovery of Category C.

Interrogatories

56. I accept the principles governing the grant of interrogatories are as set out in the decision of Simons J. in *Allied Irish Banks PLC v. Doran* [2020] IEHC 210. Interrogatories may be delivered for two distinct purposes, (a) to obtain information from the interrogated party about the issues arising in the action and (b) to obtain admissions from the party interrogated. Insofar as relevance is concerned, as with discovery, it must be determined by reference to the issues framed in the pleadings and the interrogatories must relate to such issues. Unlike in discovery, material facts only and not evidence may be sought. Moreover, interrogatories are not available as to facts which support the opponent's case (see *Money Markets International Ltd. v. Fanning* [2000] 3 I.R. 215).

57. Here, as identified above, a significant number of interrogatories have been sought. In the affidavit grounding the motion, the deponent, Mr. Collins, solicitor for the applicant, did not identify differentiated reasons for each of the extensive interrogatories. Rather his explanation was one framed in general terms, being that the interrogatories would narrow the issues to be determined, would assist the applicant in proving his case, that the respondent had information in his possession not available to the applicant, that in the absence of disclosing the information sought risk of an injustice arose in that the applicant was deprived of information relevant to the proceedings. He averred that proving the facts sought was either impossible or presented undue difficulty.

58. At the hearing, counsel for the applicant frankly conceded that some of the interrogatories related to matters to be found in the Tribunal's second interim report, or in the transcript of the hearings preceding same, but that it would be more convenient for them to be provided by way of interrogatory. Other interrogatories were stated to be necessary to understand what was in the respondent's mind when he made certain decisions. Many of the interrogatories appeared to relate to conclusions reached in the second interim report rather than the costs decision.

59. Interrogatories 1 to 7 were described by counsel for the applicant as relevant to the plea contained at paragraph 29 of the Statement of Grounds, i.e. that the respondent acted unlawfully "*in failing to have any or any adequate regard to the fact that it was the respondent as inquisitor and adjudicator in full control of a Tribunal determined what evidence if any ought to be called before the public hearings*". However, the interrogatories in this section ranged far and wide and were largely referable, not to the costs decision but to the conduct of the terms of reference (n) and (o) generally. I set them out in full below:

1) Did the respondent determine what matters were required to be inquired into in accordance with the terms of reference?

2) Did the respondent determine that Module N in the terms of reference meant that it was to investigate "all interaction between any member of the Gardaí and Túsla in relation to Garda Keith Harrison howsoever first initiated and any contacts thereafter"?

3) Did the respondent determine which parts of the applicant's protected disclosure fell to be considered within the terms of reference of modules N and O?

4) Did the respondent consider the necessity for public hearings in relation to the issues covered by modules N and O?

5) Did the respondent exclude consideration of significant portions of the applicant's protected disclosure and statement to the tribunal for the purposes of modules N and O?

6) Did the respondent consider matters and issues relating to the applicant's time in the Donegal Division which were not alleged by the applicant to be relevant to modules N and O?

7) Did the respondent call evidence which was not contained or referred to in the statement of the applicant or his partner?

60. None of these interrogatories appear to be in any way relevant to the pleas identified above in the applicant's Statement of Grounds. The plea at paragraph 29 of the Statement of Grounds quoted above, which itself fails to identify any alleged illegality but is apparently a criticism of how the respondent managed evidence prior to the public hearings, cannot be used as a justification for any of the above interrogatories, which

seek to probe a wide variety of decisions made in respect of the running of terms of reference (n) and (o). There is no explanation as to how they are relevant to the alleged illegality of the costs decision. In oral submissions, counsel for the applicant submitted it was important to have the basic facts established by interrogatories. The facts relating to the decision under challenge, the costs decision, are established by the material available to the applicant relating to that decision identified in the first paragraph of this decision. There is no necessity to compel replies to interrogatories in respect of matters not at issue in these proceedings.

61. In addition, I note that the answer to interrogatory no. 7 can presumably be obtained by considering the statements made to the Tribunal and the evidence called by the Tribunal. Accordingly, I refuse interrogatories 1-7.

62. Interrogatories 8 and 9 were stated to be relevant to the decision not to interview the applicant. They are as follows:

    8) Did the respondent consider the statements of other witnesses in determining whether or not to interview the applicant?

    9) Did the respondent direct the interview of other witnesses for the purpose of modules A to O?

63. Interrogatory 8 returns to the theme discussed above in the context of discovery, i.e. the thought process of the Tribunal in deciding not to interview the applicant. As already set out, on the pleadings there is no issue in the case either about the decision not to interview the applicant or the legality of the reason for same. Further, there are no factual matters identified contradicting the explanation for the decision not to interview the applicant in the Statement of Opposition. I therefore refuse interrogatory no. 8 for the same reasons as I refused discovery relating to the decision not to interview the applicant: it is not relevant to the case to be decided and it constitutes fishing i.e. an attempt to obtain responses that might give rise to some new complaint.

64. It is impossible to understand the relevance of the part of no. 9 that addresses terms of reference (a) to (m) as they were not the subject of the second interim report. In respect of whether other witnesses were interviewed for terms of reference (n) and (o), an affidavit has been sworn in this motion by Mr. Kavanagh identifying the four people who were asked to meet with Tribunal investigators and thus that information is within the knowledge of the applicant already.

65. Interrogatories 10 to 11 were identified by counsel for the applicant as being relevant to the decision to interview other witnesses. They are as follows:

    10) Did the respondent direct the interview of witnesses for the purpose of module N or O?

    Question 10 has already been answered by the averment in the affidavit of Mr. Kavanagh referred to above, identifying the persons who met with Tribunal investigators.

11) Did the respondent, his servants or agents, in interviewing witnesses, direct their attention to evidence contained in the statements of other witnesses?

Question 11 has no possible relevance to the within proceedings and no attempt has been made to identify any such relevance.

12) Did the respondent consider calling on the applicant to withdraw his "allegations" prior to the public hearings?

13) Did the respondent form the view prior to the public hearings of module N that the applicant's "allegations" ought to be withdrawn by the applicant?

66. Interrogatories 12 and 13 relate to the contention of the applicant that the respondent ought to have called on the applicant to withdraw his allegations discussed above in the context of discovery. I refuse these interrogatories for the same reason given in the context of discovery: it is admitted in the Statement of Opposition that the respondent did not invite the applicant to withdraw any part of his statements or allegations (paragraph 16). The thought process of the respondent leading to his approach in this respect is quite irrelevant both because the legality of that approach is not part of the case and even if it was, what would be tested would be the decision itself and not the thought process leading to same.

14) Did the respondent furnish copies of the applicant's statement to witnesses to any party prior to the 8th of August 2017?

67. The material sought to be obtained by this interrogatory has been provided in the chronology at paragraph 6 of Mr. Kavanagh's affidavit and is therefore unnecessary.

15) Did the respondent direct the attention of any of those witnesses to particular parts of the applicant's statement for the purpose of specific comment?

68. It is impossible to understand the relevance of this interrogatory having regard to the pleadings in this case and I therefore refuse it.

69. Interrogatories 16 and 20 to 28 all relate to the treatment of cost applications made by other parties in terms of reference (n) and/or (o). For the reasons I identify in the context of the discovery application above, I do not consider these are relevant to any issue in the proceedings and so refuse these.

70. That leaves interrogatories 17-19 as set out below. Counsel for the applicant accepted that these could all be answered by considering the transcript of the hearing over 19 days but submitted it would be more efficient to obtain the answers to same by interrogatories and referred to the case law on the efficient disposition of litigation by the use of interrogatories.

16) Is the quote from page 23 of the report related to evidence concerning "interaction between any member of the Gardaí and Túsla".

17) Did Chief Superintendent Sheridan give evidence of any interaction on his part with TUSLA concerning the applicant?

18) Did the "allegations" referred to in page 45 of the report involve any person other than the Applicant or Marissa Simms?

71. Interrogatories are used to obtain admissions or as to facts in issue. The interrogatories sought above do neither since the facts sought to be ascertained are not at issue in these proceedings. Moreover, interrogatories will not be regarded as necessary where the information sought is within the knowledge of and capable of proof by the interrogating party. The applicant was legally represented throughout the 19 days hearing and his legal team undoubtedly are well familiar with the issues arising and insofar as these interrogatories are intended to ascertain objective facts, are perfectly placed to ascertain those facts by considering the transcripts and/or the second interim report. However, to the extent that these interrogatories are designed to go behind the reasoning of the Tribunal and/or to interrogate that reasoning, they are impermissible. For all those reasons, I refuse them.

Position of the respondent in respect of interrogatories

72. Finally, submissions were made about the extent to which the respondent could respond to the interrogatories personally, given his status as a Supreme Court judge, or whether they could be responded to by the registrar on his behalf. These issues do not arise since I have considered the application by reference to the concepts of relevance and necessity and have concluded that the applicant has failed to show that the interrogatories sought are relevant or necessary to the determination of these proceedings.