

**IRISH FINANCIAL SERVICES APPEALS TRIBUNAL**

**REGISTER NUMBER: 022/2016**

**IN THE MATTER OF THE CENTRAL BANK ACT 1942**

**BETWEEN:-**

**MR. "A"**

**APPELLANT**

**AND**

**CENTRAL BANK OF IRELAND**

**RESPONDENT**

**APPEALS TRIBUNAL:**

The Hon. John D. Cooke, Chairperson

Conor Power

Paul Brennan

**DECISION**

1. By applications dated 9 September 2016 the Appellant appealed against two related decisions (the Contested Decisions) of the Respondent taken together on 27 July 2016 which had refused applications made by "W" Ltd of 19 November 2015 and "X" Ltd (the "Proposing Entities") of 24 November 2015 for pre-approval of the appointment of the Appellant to particular posts within the financial services sector.
2. The refusals of the Contested Decisions were based upon the fitness and probity criteria of the Central Bank Reform Act 2010 (the 2010 Act), and defined in the Code Regulations and Guidance. The background facts and events related to alleged irregularities at "Y" Limited where he had been employed in 2009. At the time of the above applications to the Respondent the Appellant was employed with "Z" Limited.

3. On 12 October 2016 the Respondent filed a Response to the appeal. On 14 November 2016 the Appellant filed a Reply to that response and on 9 December 2016 the Respondent filed a rejoinder.
4. A directions hearing under Rule 6 of the Irish Financial Services Appeals Tribunal Rules 2008 (the “IFSAT Rules”) was held on 9 December 2016 at which directions were given by the Tribunal. Factual submissions on foot of those directions were lodged by the Appellant on 16 January 2017 and by the Respondent on 6 February 2017.
5. On 21 February 2017, the Tribunal was notified on behalf of the Appellant that “...unfortunately as Mr. “A” has lost his job he has decided to withdraw his appeal because of his uncertain financial situation....”. The withdrawal was also notified to the Respondent.
6. On 27 April 2017 the Respondent made an application for its costs of the appeal under Section 57AH of the Central Bank Act 1942 and Rule 24 of the IFSAT Rules. The Respondent’s claim for costs was measured in the sum of €22,230.35 as follows:

Fees of Senior Counsel (VAT Incl.)	6,083.35
Fees of Junior Counsel (VAT Incl.)	14,698.00
Professor Moloney	1,500.00
Stenographer	<u>50.00</u>
Total	22,230.35

On 2 June 2017 the Appellant filed a response to the application for costs in which he also applied for refund of the appeal fee of €5000 which had been lodged with the appeal application.

**(i) Ruling: The application for refund of the appeal fee.**

7. Rule 5(4) of the IFSAT Rules provides: “*In addition to and without prejudice to, any order as to costs which it may make, the Appeals Tribunal may direct the refund, in*

*whole or in part, of the Appeal Fee where the proceedings terminate in a manner favourable to the appellant.”*

8. The Tribunal notes that while a query was raised on behalf of the appellant with the Registrar on 8 August 2016 as to whether the appeal fee would be non-refundable if the appeal was withdrawn, no application for a waiver or reduction in the amount of the fee was made on the occasion of the lodging of the appeal.
9. In circumstances where an appeal is withdrawn after the close of pleadings and the holding of a directions hearing, so that the adverse Contested Decisions remain in place, the Tribunal considers that it cannot be said that the proceeding has terminated in a manner favourable to the Appellant. The application for refund must therefore be refused.

**(ii) Ruling: The application for costs.**

10. The Respondent relies primarily upon the principle that costs should follow the event as the fairest and most equitable basis for the determination of its application. It submits that the appeal was withdrawn after the Respondent had incurred significant costs. It points out that it is not claiming for the considerable costs which it incurred internally in preparing to defend the appeal.
11. The Appellant, in opposing the application for costs, points out that in his factual submissions he had sought to explain the circumstances in which he became caught up in the irregularities at “Y” Ltd (see paragraph 2 above). The Contested Decisions have resulted in his loss of employment and since his termination date he will be effectively living off his wife’s salary. He has had to rely upon and expend savings to discharge his own legal costs and a fine imposed upon him by the Financial Reporting Council.
12. In reply to the Respondent’s legal submissions, the Appellant asserts that as the withdrawal of the appeal did not involve a recognition that the appeal was unfounded or bound to fail because it had been rendered moot by his loss of employment, there was no “event” to which the rule should apply. (He relies on the judgment of the Supreme Court in *Nearing v. Minister for Justice*, [2008] 2 IR 775.)

13. He further submits that in any event the costs claimed are excessive when the matter did not proceed to a hearing. Any equitable award should take account of his reduced circumstances.
14. Rule 24 requires the Tribunal to consider whether there are “*sufficient reasons rendering it equitable*” to award an order for the payment of costs either in whole or in part “*having regard to its determination of ... the appeal and all other relevant matters...*”
15. It is noted that the Rules do not provide that costs would ordinarily follow the event.
16. In the judgment of the Tribunal, just as there has been no favourable termination of the appeal for the purpose of Rule 5(4) as above, there has been no “event” to attract the mandatory application of the normal rule given that the appeal has been withdrawn without reaching any final determination.
17. Nevertheless, a challenge has been made to the Contested Decisions as a result of which expense has been incurred by the Respondent over and above the normal internal costs of its enforcement responsibilities.
18. The Tribunal has regard to the fact that once the Appellant had challenged the validity of the Contested Decisions, the Respondent had no option but to defend the appeal and thus to incur costs which have now been rendered unnecessary by the withdrawal.
19. Having regard to the following factors: the absence of an actual determination of the issues raised by the appeal; the fact that the Respondent has not been put to the additional expense of a hearing; the absence of a basis to refund the appeal fee to the Appellant it is determined that it is appropriate to make an award of costs in favour of the Respondent.
20. Having regard to the nature of the Tribunal’s jurisdiction, the stage reached in the appeal, the reduced circumstances of the Appellant and the fact that the Contested Decisions are taken in the Respondent’s statutory duties of enforcement and, as such,

susceptible of appeal as a matter of constitutional entitlement, the Tribunal considers that an equitable award of costs in the sum of €5,000.00 (inclusive of VAT) is appropriate.

Date: 11 July 2017

Signed:

John D Cooke

Chairperson

Treasa Kelly

Registrar