THE HIGH COURT

[2024] IEHC 208

Record No. 2023 3330 P

ENOCH BURKE

Plaintiff

-v-

SEÁN Ó LONGÁIN, KIERAN CHRISTIE & JACK CLEARY

Defendant

Ruling on Costs of Mr. Justice Dignam delivered on the 22nd day of March 2024.

1. This is my ruling on the question of the costs of the plaintiff's application for an interlocutory injunction restraining the defendants from holding a Disciplinary Appeal Panel hearing of his appeal against a decision of his employer to dismiss him.

2. I refused to grant that relief. I delivered my substantive judgment on the 20th December 2023 and indicated my provisional view that the defendants were entitled to their costs but that if either side wished to make submissions as to why this proposed order should not be made they should advise the Court and that written submissions may be delivered. The plaintiff indicated that he wished to make submissions in respect of costs. Separately, it was brought to my attention that there were two errors in my judgment. I determined that it was appropriate that I should correct my judgment. I delivered a ruling to that effect on the 15th February 2024 and delivered the corrected judgment on the

same date, following which both parties delivered written submissions on the question of costs. The defendants seek their costs (paragraph 2 of their written submissions). The plaintiff does not seek his costs and submits that there should be no order as to costs (paragraph 1 of his written submissions).

3. Order 99 Rule 1(4A) of the Rules of the Superior Courts provides:

> "*The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.*"

4. It has not been submitted by either party that it is not possible justly to adjudicate upon the liability for costs. I am, in any event, satisfied that it is possible to do so.

5. The defendants' position is that the plaintiff applied for and was refused interlocutory injunctive relief and was therefore entirely unsuccessful in his application and that (a) costs follow the event, and (b) none of the factors which might warrant the costs of the application being reserved are present. They point to section 169 of the Legal Services Regulation Act 2015 which provides, inter alia:

> "*(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including –*
>
> *(a) conduct before and during the proceedings,*
>
> *(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,*
>
> *(c) the manner in which the parties conducted all or any part of their cases,*
>
> *(d) whether a successful party exaggerated his or her claim,*

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order."

6. Neither side submits that the costs should be reserved. Nonetheless, section 169(1) is relevant and governs the exercise of the Court's discretion. It is not limited to whether or not costs should be reserved.

7. Section 168 of the 2015 Act is also relevant. It provides, inter alia:

"*(1) Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings –*

(a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings, or

(b) …

(2) Without prejudice to subsection (1), the order may include an order that a party shall pay –

(a) a portion of another party's costs,

(b) costs from or until a specified date, including a date before the proceedings were commenced,

(c) costs relating to one or more particular steps in the proceedings,

(d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, and

(e) interest on costs from or until a specified date, including a date before judgment."

8. The plaintiff does not dispute that the general principle is that costs should follow the event and, indeed appears to accept that to be the case (see paragraph 12 of his written submissions). Rather, he submits at paragraph 12 of his written submissions that the grounds set out earlier in his submissions "*constitute substantial reasons of an unusual kind that strongly dictate that the Court should depart from the general principle in the matter of costs*", and when read with paragraph 1 of his submissions, his position is that these grounds should cause the Court to depart from this general principle and to make no order. He essentially sets out two reasons: firstly, the injunctive relief was originally sought on two grounds – (i) the allegation of bias and (ii) the refusal or failure of the Disciplinary Appeals Panel ("the DAP") to request or obtain a WhatsApp recording from the school - and it was not necessary to proceed with the second ground because the DAP ultimately obtained the WhatsApp recording and provided it to the plaintiff but only after the institution of the proceedings; and, secondly, the Court's judgment in respect of the ground that was proceeded with, i.e., the case based on the allegation of bias, is, inter alia, wrong, contradicted by the evidence and is rested on a lie.

9. Proceedings were issued by the plaintiff on the 6th July 2023 (the day before the appeal hearing before the defendants was due to take place). He sought two declarations and an injunction, restraining the holding of the appeal hearing. The two declarations were:

"*1. A declaration that the Second Named Defendant's acceptance of the nomination to the Disciplinary Appeals Panel and his subsequent refusal to recuse himself therefrom is in breach of Circular 49/2018, unfair, unreasonable, unlawful and contrary to natural justice and fair procedures;*

2. A declaration that the refusal and/or failure of the Defendants to request or obtain the audio or video attached to the WhatsApp exchange on 23rd June 2022 between Principal Niamh McShane and Chairperson of the Board of Management of Wilson's Hospital School John Rogers, and to convey the same to the Plaintiff, is in breach of Circular 49/2018, unfair, unreasonable, unlawful and contrary to natural justice and fair procedures."

10. The declarations are separate and distinct and concern different issues.

11. An interim injunction was sought on these two separate bases by ex parte application and granted on the same date, the 6th July 2023. The interlocutory application was listed for hearing on the 27th July 2023 (and in the event was heard on that date). As matters transpired (to which I return), the relief sought in respect of the WhatsApp recording was withdrawn shortly before that date. Therefore, the only ground advanced for the interlocutory injunction at the hearing was the allegation of bias.

12. The defendants were entirely successful in this. I see no basis in the factors set out in section 169(1) to depart from the general principle that they should therefore be awarded the costs of defending that application. The submissions made by the plaintiff in paragraphs 6, 7 and 8 of his written submissions which lead to the submission that the Court has rested its judgment on a lie, "*i.e. has engaged in a conscious and deliberate denial of the truth*", are matters which go to the merits of the substantive decision and are therefore matters for any appeal that he may wish to bring against the

substantive decision and does not go to the question of the defendants' entitlement to costs (subject to appeal). It would be illogical and not open to me to conclude that the defendants should succeed in defending the application and then to decide that they should not get their costs because that conclusion is incorrect on the grounds set out in paragraphs 6 to 8.

13. However, I accept that account must be taken of the fact that the element of the application in relation to the WhatsApp recording did not proceed because the recording was provided before the hearing but after the institution of the proceedings.

14. There was extensive correspondence about this spanning the period prior to the institution of the proceedings up to shortly before the hearing. A significant number of issues were raised in this correspondence. It is not necessary to set this out in detail or to deal with the substance of this correspondence or to express any view on the merits of the positions taken or points raised in order to determine the question of costs.

15. By email of the 20th June 2023, i.e., in advance of the hearing of his appeal which was set for the 7th July 2023, the plaintiff asked the DAP to request that the Board of Management of the school furnish certain material, including screenshots of a WhatsApp exchange between the Principal and Chair of the Board of Management on the 22nd and 23rd June 2022 and the audio or video attached to it (the material referred to in the second declaration in the Plenary Summons). There followed correspondence between the DAP and the Board of Management. The upshot was that the requested material was not furnished to the plaintiff before the 5th July (it appears that it was not furnished to DAP by the Board). On that date, the plaintiff wrote to the DAP pointing out that the failure to request or obtain this material was a breach of fair procedures and that if confirmation was not given by 6.30pm that the hearing scheduled for the 7th July would be postponed until this and other matters were addressed he reserved the right to apply for an injunction. It seems there was no reply and the plaintiff applied for and obtained the injunction the following day. There continued to be exchanges of correspondence between

the plaintiff and the DAP or solicitors acting for them and between the DAP and the Board or solicitors acting for the Board following this. Ultimately, the video was provided by the Board to the DAP. The DAP expressed the view on the 17th and 20th July (in emails to the solicitors for the Board) that the video footage "*constitutes potentially relevant evidence*" and that it should be furnished to the plaintiff in accordance with due process and fair procedures. The Board disagreed with the assessment that it was potentially relevant and also raised issues in relation to data and privacy rights of minors and third parties but the DAP provided the material to the plaintiff. It seems to have been provided at some stage before the 24th July because, according to the plaintiff's written submissions, he wrote on the 24th July stating:

> "*Without prejudice to the foregoing, following my initiation of High Court proceedings on 6 July 2023, the DAP has now obtained from the School board a video which purports to be the WhatsApp recording in issue. In light of this, I confirm that I am withdrawing in full paragraph 2 of my General Indorsement of Claim herein in these proceedings and it will therefore not be necessary to have any legal argument over the matter of the WhatsApp recording.*
> *In withdrawing this part of the proceedings I note for the record that the DAP failed and/or refused to request or obtain the WhatsApp recording at any time prior to the DAP hearing schedule for 7 July 2023 and that any developments that have taken place since that time in relation to this matter have taken place only after I initiated these High Court proceedings.*"

16. There are a number of key features arising from these exchanges which are not in dispute and which seem to me to lead to the conclusion that I should make no order as to costs in respect of the element of the application concerning the WhatsApp recording:

    (i) The defendants ultimately accepted that the recording "*constitutes potentially relevant evidence*". Of course, the defendants will have to determine whether or not it is relevant

but for present purposes the important point is that they decided that it was potentially relevant and therefore should be provided to the plaintiff;

(ii) The plaintiff had asked the defendants to obtain a copy of the WhatApp recording and to provide it to him before the scheduled hearing date;

(iii) It was not obtained by the defendants and not provided to the plaintiff and the plaintiff sought that the scheduled hearing be postponed until the issue had been addressed, failing which he would have to seek an injunction;

(iv) The defendants did not indicate that the hearing would be postponed and the plaintiff instituted proceedings and sought and obtained the injunction;

(v) The recording was then obtained by the defendant some time after that and was provided to the defendant.

17. In summary, the defendants were proceeding with the appeal hearing without first finalising the question of the provision of what they have described as "*potentially relevant evidence*" and this issue was only resolved after the initiation of proceedings by the plaintiff. Of course, there may be a variety of issues arising from this, including, for example, whether the defendants could compel the production of the recording, but it seems to me that, in circumstances where the school provided the recording, the central issues in respect of costs are (i) that the defendants were proceeding with the hearing without "bottoming out" this issue one way or the other and (ii) they ultimately obtained and provided the material. If the hearing had been adjourned to allow that to occur then the plaintiff would not have had to apply for the injunction on the 6th July on this basis.

18. I am satisfied that whether the matter is considered under section 168 of the 2015 Act (subsection (2)(d) - that the defendants were partially successful in the proceedings and should only obtain the costs relating to the successful element), or section 169 (subsection (1)(a) and (b) - that the defendants were entirely successful but regard should be had to their conduct and whether it

was reasonable for the plaintiff to raise the issue of the WhatsApp recording) the defendants should not be entitled to their costs of dealing with this aspect of the plaintiff's application. The plaintiff does not seek his costs. Therefore, it seems to me that the appropriate way of dealing with the costs is that the defendants should obtain their costs in relation to defending the application on the basis of the allegation of bias but should not obtain their costs of dealing with the WhatsApp issue.

19. Thus, in circumstances where the application only ran on the allegation of bias point (the first declaration sought in the Plenary Summons) (on which the defendants were entirely successful), the appropriate Order is an Order for the defendants' costs of defending the injunction application excluding any costs relating to the application on the basis of the WhatsApp recording referred to in the second declaration in the Plenary Summons.

20. As I refused the application for an injunction in my substantive judgment I will make an Order dismissing the plaintiff's application for an interlocutory injunction and will make an Order for the defendants' costs of that application in the terms set out above (paragraph 19).