THE COURT OF APPEAL

Neutral Citation Number: [2021] IECA 265
Record Number: 2018 420

Faherty J.
Haughton J.
Power J.

BETWEEN/

JOHN O'CONNELL

PLAINTIFF/
APPELLANT

- AND -

BUILDING AND ALLIED TRADES UNION, EDWARD MORRIS, PATRICK O'SHAUGHNESSY AND MICHAEL MCNAMARA

DEFENDANTS/
RESPONDENTS

JUDGMENT of Ms. Justice Power delivered on the 15th day of October 2021

1. This is an appeal against a judgment and order of the High Court [2018] IEHC 815 in which O'Connor J. made an award of damages arising from a breach of the appellant's constitutional right to earn a livelihood. It raises the question of the nature and measure of appropriate damages for the breach that occurred in this case.

Background

2. The appellant is a block layer by trade. For several years, he operated as a sub-contractor to different builders within the State and was the holder of a C2 certificate from the Revenue Commissioners ('Revenue'). This certificate entitled him to work as a **self-employed** sub-contractor on building sites.[1]

3. For a certain period, which shall be considered later in this judgment, the appellant was refused membership of the Building and Allied Trades' Union, the first-named respondent (hereinafter, 'BATU' or 'the respondent union'). According to the appellant, this union held a monopoly position in the Limerick area where he had sought to earn his livelihood. It was BATU's policy that the union existed to protect workers who were in direct

[1] Emphasis here and throughout the judgment is mine unless otherwise stated.

employment (or unemployment) and to limit its membership to **employees** of building contractors who could provide confirmation from Revenue that they did not hold a C2 certificate.

4. In the 1970s and 1980s, BATU was rather lax in its application of its policy. In the 1990s, however, it adopted a stricter approach and refused trade union membership to holders of a C2 certificate. At the time when BATU's policy had not been strictly applied, the appellant had been a member of the union. However, when he left in the 1990s to work abroad, he did not pay his union dues and, thus, his membership lapsed. Upon his return to Ireland in 1997, he sought to re-join the union as building contractors in the Limerick area would only engage block layers who were members of BATU. By this time, of course, BATU was applying its membership policy, strictly.

5. As noted, the stricter approach adopted by BATU meant that membership was open only to *'workers'*, defined in its Rules as *'persons in direct employment or unemployment'* and not those holders of a C2 certificate. From 1997 to 1999, the appellant was unwilling to provide a statement from Revenue confirming that he did not hold a C2 certificate. As it later transpired, this was because he did, indeed, have a C2 certificate at that time.

6. When his C2 certificate expired in 1999, the appellant applied, again, for membership of BATU, this time furnishing the requisite confirmation from Revenue. He was granted union membership for a probationary period, commencing on 1 November 1999. However, when his probation period ended on 31 December 1999, he was not granted full membership status.

Procedural History

7. The appellant commenced these proceedings against BATU and three named officials (the second, third and fourth respondents herein) by way of plenary summons dated 16 October 2002. Later, on appeal to the Supreme Court, the Construction Federation of Ireland ('CIF') was joined to the proceedings [2012] IESC 36, [2012] 2 I.R. 371.

8. When the trial came on for hearing before the High Court in April 2018, the appellant claimed that BATU had conspired to prevent him from working, that he had been intimidated by its officials, and that he had been blacklisted as an employee. He also claimed that his constitutional right to work had been infringed. Being refused membership of BATU meant that he could not find work in the Limerick area and he claimed that it was essential for him to work locally as he had a child with additional needs. At that time, the appellant was represented by solicitors.

9. Delivering judgment on 17 July 2014 ([2014] IEHC 360), the High Court (Ryan J.) held that the case against the CIF failed. However, it found that the appellant had been wrongly excluded from BATU, that it had perpetrated conspiracy and intimidation against him and that it had breached his constitutional right to earn a livelihood. Important in this appeal is the fact that the Ryan J. judgment determined only the issue of liability observing (at para. 139) that the assessment of damages was to be held over for a later date. He stated:

"There will be a separate hearing to assess the plaintiff's damages taking into account the impact of the defendants' wrongs on the plaintiff's earning capacity and his rights. It does not follow from my findings that the plaintiff is entitled to be compensated for all the time from when the wrongs were first done to him. It will be for him to prove all the elements of loss actually sustained and properly recoverable, subject to any legally appropriate reductions. That hearing will also consider injunctive and ancillary reliefs."

10. The respondents appealed the judgment on liability and the High Court's assessment of damages was, accordingly, postponed.

11. On 17 November 2016, the Court of Appeal (Peart J.) [2016] IECA 338, upheld the High Court's finding of a breach of the appellant's constitutional right to work but did not find sufficient evidence to support the findings of conspiracy and intimidation. It then remitted the matter to the High Court for an assessment of damages.

12. On 12 April 2018, O'Connor J. assessed general damages in the sum of €15,000 for the established breach of the appellant's constitutional right to earn a livelihood and refused all other claims for damages. It is in respect of that judgment of O'Connor J. that the appellant brings this appeal.

Established Findings on Liability

13. To determine this appeal in respect of damages, it is necessary to examine with some precision the established findings made in respect of liability. For that reason, the judgment of the Court of Appeal (Peart J.) on the issue of liability requires some scrutiny.

The 'wrongful exclusion' claim

14. In relation to the claim that the appellant had been prevented from joining the union, Peart J. considered that this fell to be assessed in respect of two distinct periods: the first was the period prior to the appellant's probationary membership, namely, from December 1997 to October 1999 ('the pre-probationary period') and the second was the period of the appellant's probation, namely, from 1 November 1999 to 31 December 1999 ('the probationary period'). After this, the trial judge noted that the appellant never received a full membership card after the probationary period had ended ('the post-probationary period').

15. The Court of Appeal was satisfied that the appellant's non-admission to BATU in the pre-probationary period was not due to a refusal to allow him to join the union but was based rather on the fact that the appellant, as the holder of a C2 certificate, did not qualify for membership. Peart J. noted that during cross-examination it was elicited from the appellant that he had, indeed, held a C2 certificate at the relevant time. As it was BATU's policy to protect workers in direct employment or unemployment only and not self-employed sub-contractors, the Court of Appeal was satisfied that the appellant had not been wrongfully excluded from membership of BATU during the pre-probationary period.

16. Upon furnishing BATU with a letter from Revenue confirming that he no longer held a C2 certificate, the appellant commenced a probationary period of union membership on 1 November 1999. His probation ended on 31 December 1999. He had complained that during this period, a site on which he was working was visited by Mr. McNamara (from BATU) and that he was told that he was breaking union rules without being informed of the precise rules in respect of which, allegedly, he was in breach. He also claimed that he had suffered intimidation and was coerced or forced into leaving various jobs.

17. Peart J. was satisfied that on 11 October 1999 (which preceded the probationary period) Mr. McNamara, then BATU branch secretary in Limerick, had visited the Stephen Finn Construction site where the appellant was working and that following this visit, the appellant had been 'let go'.[2] When this happened, the appellant had made several attempts to contact Mr. Morris (the area manager) but his calls had not been returned. When the appellant called to Mr. Morris' home on the 13 October 1999, an altercation ensued. That altercation was resolved but it resulted in a condition of 'no contact' being inserted into the probationary agreement.

18. Whereas the High Court had found in favour of the appellant's claims of wrongful exclusion pertaining to his probationary period, the Court of Appeal concluded that the evidence did not support a finding that anything of an illegal nature had occurred during this time. As noted, it accepted (at para. 82) that Mr. McNamara had called to the Finn Construction site in October 1999 but there was nothing to suggest that he had issued an ultimatum that unless the appellant was 'let go' the other masons would stage a walk-off. Moreover, contrary to the view of the trial judge, Peart J. found that there was no evidence to support a finding of conspiracy or intimidation on the part of BATU.

19. Having examined the evidence that had been adduced before the High Court, the Court of Appeal concluded that during the probationary period the appellant had not been wrongfully excluded from union membership because at that time he was, in fact, the holder of a valid probationary membership card.

Wrongful Exclusion Post-Probation

20. At the end of the 8-week probationary period, the appellant was not admitted as a union member. According to BATU, it was the appellant's responsibility to apply for full membership when his probationary period ended. Neither the High Court nor the Court of Appeal accepted BATU's contention in this regard. Peart J. was of the view that once an applicant had completed his service, it was incumbent upon the union to assess his suitability for membership pursuant to rule 3(g) of BATU's own rules. Rule 3(g) stated that during the probationary period, the applicant's suitability for full membership 'shall be assessed'. No such assessment of the appellant's suitability took place. When his

[2] Peart J. found that Ryan J. had erred in relying on a memo from the Department of Social Welfare as corroborative evidence of the appellant having been '*let go*' on a later date. The memo in question had, in fact, pre-dated the probationary period (it was dated 26 October 1999) and thus related to a time when the appellant was not, in fact, eligible for membership of the union.

probation ended, he was not informed of any decision taken by the union nor was he given a full union card. Peart J. held (at para. 93): -

> *"The union was obliged under its rules to complete the application process by making that assessment and reaching a decision one way or the other, which would then have to be communicated to the plaintiff. They failed to do this, and, in my view, it is incorrect for the union to place the onus upon the plaintiff to follow up his own application at the end of the probationary period. I would therefore uphold the trial judge's finding that the plaintiff was wrongfully excluded from membership of the union after his probationary period ended by reason of the fact that the union did not complete the application process as it was obliged to do in accordance with rule 3(g)."*

21. The Court of Appeal then considered whether any harm had fallen upon the appellant by reason of his wrongful exclusion from the union after his probation had ended. He had claimed that having been wrongfully excluded from BATU, he was prevented from gaining or keeping employment on building sites in Limerick. His evidence was that Mr. McNamara had called to various sites after 1 January 2000 and that these visits had led to his losing employment. Mr. McNamara denied this claim.

22. In support of his claims of being unable to find or retain work due to his wrongful exclusion from the union, coercion and intimidation, the appellant had called three of his former employers: (i) Michael Cusack & Son; (ii) Davins; and (iii) Frank McGrath Construction. Ryan J. had preferred their evidence over Mr. McNamara's (on behalf of BATU). Peart J. scrutinised the evidence to see if, taken at its height, it supported all of the appellant's contentions in respect of the post-probationary period. His analysis may be summarised thus.

23. The evidence of Kieran Cusack was that the appellant had been hired by his father and had worked on his site from early December 1999 until August 2000. Mr. Cusack stated that he always had a good relationship with BATU. He testified that union people had visited sites in order to make sure that everything was in order, but that he had never experienced any pressure. When cross-examined as to whether the appellant had been forced to leave his employment, he said that when the job in question was completed, the appellant had left to commence work with Davins. His evidence, according to Peart J., did not support a finding that the union had coerced the appellant's employers *'to let him go'* because he was not a member of BATU.

24. On behalf of Davins, Mr. Gallagher testified that when he took on the appellant, he had not realised his non-union status. When approached by Mr. McNamara about this issue, the appellant's position was clarified. According to Mr. Gallagher, Mr. McNamara had acted reasonably and had said that the appellant could finish the job he was on but that he could not be employed thereafter. This position was based on an ongoing agreement between Davins and BATU and the appellant had not been singled out in this regard. Peart J. was satisfied that the termination of the appellant's employment in this instance

was not as a result of threats and intimidation, but he did note that the appellant would, however, have been able to remain on had he possessed a union membership card.

25. The third employer, Frank McGrath, gave evidence that the appellant had started working with him on 5 July 2002. This employment ended three days later following a visit from Mr. McNamara to the site. There was some discussion or disagreement over whether he would have to be paid for the three days' work that he had done. Ultimately, the appellant was paid for this work and he moved on. Peart J. did not consider this testimony supported a finding of coercion or intimidation.

26. Having examined the relevant periods and having assessed the evidence relating to each, respectively, Peart J. found (i) that the appellant had not been excluded from union membership in the pre-probationary and probationary period and (ii) that he had not been the victim of intimidation and conspiracy. He did, however, uphold the finding in respect of a breach of the appellant's constitutional rights in the post-probationary period.

27. Addressing the core complaint, namely, the breach of the constitutional right to earn a livelihood, Peart J. was satisfied that at the end of the appellant's probationary period, the union had failed to decide upon his membership and that such failure was contrary to its own rules. He found that from January 2000, BATU had informed employers that the appellant was not a member of the union and that this had led to those employers not employing the appellant.

28. In upholding a breach of the appellant's constitutional right, Peart J. recalled what had been stated by Walsh J. in *Murphy v. Stewart* [1973] I.R. 97 (p. 117): -

> *"The question of whether the[sic] right is being infringed or not must depend upon the particular circumstances of any given case; if the right to work was reserved exclusively to members of a trade union which held a monopoly in this field and the trade union was abusing the monopoly in such a way as to effectively prevent the exercise of a person's constitutional right to work, the question of compelling that union to accept the person into membership (or, indeed,[sic] breaking the monopoly) would fall to be considered for the purposes[sic] of vindicating the right to work."*

29. Peart J. was satisfied that there was nothing unlawful in the union obliging employers to employ only union members; nor was there anything unlawful in employers making union membership a condition of employment. What was unlawful, however, was the union's insistence that only members could be employed on sites in Limerick—where it enjoyed a monopoly position—and *at the same time* refusing membership to the appellant in circumstances where there was no evidence that he had failed to satisfy the conditions of

his probation. It was this conduct on the part of BATU that constituted the interference with the appellant's constitutional right to earn a livelihood.[3]

30. Although the constitutional right to earn a livelihood is sometimes described as an unenumerated personal right for the purposes of Article 40.3.1° (*Murtagh Properties Ltd. v. Cleary* [1972] I.R. 330), Peart J. observed (citing *Hand v. Dublin Corporation* [1991] 1 I.R. 409, *Cox v. Ireland* [1992] 2 I.R. 503 and *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321) that it could also be said to be a dimension of the right to own property as protected by Article 40.3.2°. As the appellant's right to earn a livelihood had been breached, its protection and vindication thus fell to the courts.

31. The Court of Appeal was satisfied that the breach of the appellant's constitutional right gave rise to an entitlement in damages, to be assessed in the light of the losses actually sustained. Such an entitlement to redress for an infringement of a constitutional right was recognised by the Supreme Court in *Meskell v. C.I.E.* [1973] I.R. 121. That a person can sue for breach of constitutional rights where the ordinary law is inadequate was confirmed in *Hanrahan v. Merck, Sharpe & Dohme Ltd.* [1988] I.L.R.M. 629.

32. The ordinary law on intimidation or conspiracy not being applicable to the facts of this case, Peart J. summarised his conclusions (at para. 117) in the following terms: -

> *"It follows, therefore, that where the union wrongfully excluded the plaintiff from membership of BATU after 31st December 1999 by failing to determine his application for membership by not deciding upon it as it was required to do under its own rule-book and in circumstances where he was prima facie qualified for membership, its actions, in informing employers that he was not a member, leading them to dismiss him or not to employ him further because he was not a member of BATU are sufficient to constitute a breach of his constitutional right to earn a livelihood. In so far as the plaintiff suffered losses which are properly attributable to such breach, he is entitled to claim damages."*

The Court of Appeal considered that the issue of quantum would fall to be determined by the High Court. The appellant would thus have to establish that he suffered an actual loss by reason of the infringement of his rights and, naturally, the ordinary rules governing the assessment of damages for civil wrongs would apply.

The High Court's Findings on Quantum

33. As noted, the quantum claim was heard by O'Connor J. on 11 and 12 April 2018. Over the course of this module of the trial, the appellant had testified in person and had called one witness, a Professor O'Moore, Head of the Anti-Bullying Department of Trinity College, Dublin, to testify on his behalf. The respondent union's witnesses were Ms. Ruth

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[3] Peart J. was satisfied that, at all times, the second, third and fourth named respondents had been acting in their capacity as officers of the union and, consequently, should not be held personally liable. This finding, he considered, was 'particularly appropriate' in the light of his findings on conspiracy and intimidation.

Nugent (an officer of the Department of Social Protection), Mr. Kevin Devlin (from the 'Revenue Inspectorate') and Mr. Ger Kennedy (an official from SIPTU).

34. The trial judge delivered an *ex tempore* judgment on the afternoon of the second day. At the outset, he observed that the appellant was not in court although he had been reminded earlier that day that judgment would be delivered that afternoon.[4] He also noted that the terms of the order of the Court of Appeal (2 December 2016) concerned an assessment of damages for breach of a constitutional right. Observing the appellant's delayed compliance with a subsequent order (Costello J.) that he furnish particulars of losses allegedly incurred, the trial judge considered that the approach to categorising the heads of damage was '*rather unfocused'*.

35. The trial judge then began his assessment by summarising the evidence in respect of each head of claim. In respect of ***loss of earnings***, the trial judge noted that the appellant had received advice from a person in the Citizens' Advice Bureau about formulating his claim. Before the Court, the appellant had read out specific claims for losses from January 2000 to December 2008 with a gross loss for those years totalling €368,689.72 (inclusive of an unspecified claim for pension loss). Essentially, the appellant had claimed that but for the breach of his right, he would have been a full-time employee of Davin Builders, Frank McGrath *'or another builder'*, based on wages identified in a number of P45s which he produced. The transcript shows that under the heading *'December 2001 - December 2002'*, for example, the appellant had calculated potential earnings (from Davins and from Frank McGrath) and then subtracted the amount recorded in a *'Notice of Assessment'* and had arrived at the figure of €40,710.50 for that period. That process was repeated up to December 2008 and, in this way, when lost pension was included, the total sum claimed was €390,049.36[5]. The trial judge observed that Notices of Assessment generated by Revenue *'ranged . . . from €3,491.78 in 2001, €15,184 in 2002, €16,500 in 2003, and €20,085 in 2004, and lower sums for other years.'*

36. As to ***loss of opportunities***, the trial judge observed that the appellant had testified that he lost out on job opportunities, but he had not given any particulars or specifics to advance that claim. On the issue of *future loss*, the appellant had accepted that from 2008 onwards, times had been bleak due to the collapse in the building industry. Nevertheless, he had asserted a claim in this regard, although he admitted that he was not able to quantify or give evidence about a loss either for that bleak period or for future losses.

37. The trial judge also observed that the appellant had testified that the respondent union should *'be shown up by an award of* ***exemplary damages*** *for bringing the trade union movement into disrepute'* and that it had abused its privileged monopoly position causing him career and pension entitlement damage. Additionally, the appellant testified that he

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[4] The appellant apologised, subsequently, to the Court explaining that he was obliged to leave early due to a family emergency. The judge accepted his apology. Transcript, 7 June 2018, page 5, lines 22 – 25.
[5] Transcript, Day 1, page 43, line 12 to page 44, line 7.

was also seeking ***aggravated damages*** because of the conduct of the respondent union and, in particular, its continued failure to provide an apology.

38. The trial judge observed that the appellant had been unable to explain and failed to include unemployment assistance of over €14,000 received during 2001, evidence in respect of which had been given by Ms. Ruth Nugent, Department of Social Protection. He noted the appellant's cooperative and polite nature but detected some *'coyness'* on his part in terms of the C2 certificate. He recognised and accepted that he was and remains *'very dependent on the property market for work opportunities'*.

39. Having reviewed the evidence, O'Connor J. found that the appellant had failed to satisfy the court as to his specific net *loss of earnings* and that no assessment thereof could be made based on the evidence adduced. In his view, the claim for loss of earnings was *'speculative'*. He found that the impact of the breach of the appellant's right to earn a livelihood was confined to Limerick and that it *'ran from 2000 to 2003'*. The appellant had also failed to satisfy the Court that he had taken any action to offset his perceived loss by seeking work outside of Limerick.

40. On the claim for *loss of opportunities*, the trial judge found that the appellant had failed to adduce evidence that he had lost out on any particular opportunity. As to *future loss*, he found that this claim had been, effectively, abandoned based on the appellant's admission of his inability to formulate same. On the question of exemplary damages, O'Connor J. considered that he was not in a position to adjudicate on the degree of *'oppression or arbitrariness of the breach'*, noting that these were two elements relevant to a consideration of exemplary damages. The onus, he observed, rested on the appellant to satisfy the Court in that regard. O'Connor J. noted the submission of counsel for the respondent union that exemplary damages had not been pleaded or particularised before the assessment hearing. In considering the appellant's claim for *aggravated damages*, the trial judge regarded the absence of an apology for the breach which had occurred in a confined market and so long ago as hardly meriting *'any noting'* notwithstanding the appellant's understandable distress about such events. In his view, there came a time for an aggrieved person to *'lose out on the expectation for an apology'* over events that occurred so many years ago.

41. When assessing the claim for damages for ***distress***, the trial judge recalled that the appellant had been given leave to call Professor O'Moore who testified to the fact that the appellant had been bullied. He stated that he had admitted this evidence *'in the interests of bringing closure'* but without *'disregarding'* the respondent union's right to be prepared to test, interrogate and challenge that evidence. Having granted leave to allow Professor O'Moore to testify, O'Connor J. stated that he would *'disregard her evidence'*—and he did. No damages were awarded for distress, and the trial judge regarded the appellant as being the author of his own downfall in this regard.

42. Having refused to award damages under any of the above headings, the trial judge finally considered ***general damages***. He identified three authorities as being of *'possible assistance'* for assessing general damages for breach of the appellant's constitutional

right. He referred to *Kearney v. Minister for Justice* [1986] I.R. 116, *Kennedy v. Ireland* [1987] I.R. 587, and *Sullivan v. Boylan Contractors (No.2) IEHC 104*, [2013] 1 I.R. 510 [2013]. Having regard to the sums awarded in those cases and noting that the breach in the instant case was *'far less severe'* than in *Kennedy* and *Sullivan* but *'significantly more severe'* than in *Kearney*, O'Connor J. awarded €15,000 for general damages for the breach of the appellant's constitutional rights.

Grounds of Appeal

43. In a detailed Notice of Appeal, the appellant sets out several grounds of appeal. He contends that the trial judge's decision was tainted and biased by charges that were *'manipulated'* on the first day of hearing. With reference, apparently, to an inference that he had been working while receiving unemployment assistance, he claimed that his right to a fair hearing was breached because he was *'charged with a criminal offence without prior notice'*. He claims that the respondents' previous solicitor had a serious grievance against him. He contends that the trial judge erred in refusing to allow evidence that was relevant to the distress he had suffered by reason of the respondents' conduct. In his view, the trial judge failed to follow closely the Court of Appeal's directions on how he should engage with the evidence.

44. The appellant submits that the trial judge also erred in finding that he was not entitled to damages under various categories claimed, including, loss of wages, loss of opportunity, aggravated and exemplary damages. He had further erred in so far as he had found that the respondents' witnesses *'had any knowledge of the Appellants[sic] personal circumstances or even attended the High Court hearings'*. The trial judge had failed to order a remedy for the breach of his right to join a trade union and he (the appellant) was prejudiced by not having the original judge (Ryan J.) determine the quantum aspect of his claim. He also complained that the third witness for the respondent union, a SIPTU official, had a vested interest and/or was biased.

45. Four grounds of appeal relate to the question of costs. The appellant contends that the trial judge erred in fact and in law by finding that he was not entitled to his legal expenses when he had won the bulk of his case; in refusing his application for a cost over order; in holding that liability for costs of the second, third and fourth named respondents should be 'deducted' from his costs; and in failing to take into account the appellant's prior undertaking to pay his former legal advisors.

The Respondent Union's Notice

46. In its reply to the Notice of Appeal, the respondent union rejected the appellant's contention that the trial judge was biased, stating that he was entitled to draw inferences from the evidence. It submitted that the appellant's right to a fair hearing was not breached. The trial judge did not deny the appellant an opportunity to be heard and had reached his determination having heard all relevant evidence. He had followed closely the Court of Appeal's directions regarding the case and the appellant had not been prejudiced by having a different judge hear the quantum aspect of the case. It also

stated that the accusation regarding the respondents' previous solicitor was *'unfounded, extremely vexatious and wholly distasteful.'*

Damages for breach of the constitutional right to earn a livelihood

47. It is well settled law that in the absence of a common law or statutory cause of action, a person may sue, directly, for breach of a constitutional right. Liability in damages for such a breach will only arise where the common (or, indeed, statutory) law does not provide for an adequate or effective defence or vindication of the constitutional right in issue (see *Hanrahan v. Merck, Sharpe & Dohme Ltd.* [1988] I.L.R.M. 629, *McDonnell v. Ireland* [1998] 1 I.R. 134 and *MC v. Clinical Director of the Central Mental Hospital & Anor* [2020] IESC 28). This principle was confirmed recently by this Court (Murray J.) in *G. E. v. The Commissioner of An Garda Síochána & Ors* [2021] IECA 113 (Unapproved) where Murray J. explained (at para. 90) the rationale therefor in the following terms: -

> *"It lies in the view that it is the Oireachtas that has the initial function through its laws (including, by default, the common law) of implementing the obligation of the State in the defence and vindication of constitutional rights by means of actions for the recovery of damages. The courts intervene to supply such a remedy only where there has been a failure by the legislature to obtain adequate protection via statute or the common law."*

48. That an action in damages for such a breach of constitutional rights may be invoked against the first respondent was recognized by Peart J. in observing that the right in question would not be appropriately vindicated unless the courts were allowed to grant appropriate relief against private parties. In this regard, he confirmed a long line of authorities beginning with the Supreme Court's judgment in *Meskell v. CIE* [1973] I.R. 121 and applied in subsequent case law (*Conway v. Irish National Teachers Organisation* [1991] 2 I.R. 305 and *Lovett v. Grogan* [1995] 3 I.R. 132) which recognizes that liability for breach of a constitutional right may be invoked not only against the State and its agents but also, *'horizontally'*, against private parties.

49. As the appellate judge noted, the right to earn a livelihood has a multi-faceted constitutional provenance— whether viewed as a personal right under Article 40.3.1° or as an aspect of the right to property under Article 40.3.2°. Whereas the precise source of the right in the Constitution may be debateable, what is important is that when the right has been identified and a breach thereof established (as in this case), it becomes the duty of the courts to defend and vindicate that right. The European Court of Human Rights adopts a similar approach to violations of the European Convention on Human Rights. The Convention does not explicitly refer to the right to work or to earn a livelihood. Nevertheless, the Strasbourg Court has through its case law, vindicated various aspects of that right, such as, the right to seek employment or to combat discrimination or an unfair dismissal. (See, for example, *Thlimmenos v. Greece* (App. no. 34369/9) (2000) 31 E.H.R.R. 15, and *Lallement v. France* April, (App. no. 46044/99) (2002) ECHR 413, *Paulet v. the United Kingdom* (App. No. 6219/08) (2015) 61 E.H.R.R. 39.

50. A constitutional right *'carries within it its own right to a remedy or for the enforcement of it'* (*Meskell v. Córas Iompair Éireann* [1973] I.R. 121 at p. 133). At the core of this appeal, is the question of the type and level of damages that arise in respect of the breach of the appellant's right to earn a livelihood. Whilst a considerable part of the hearing before O'Connor J. focused on the proof (or absence) of pecuniary losses incurred by the appellant, there is nothing in the case law to suggest that the remedy for a breach of a constitutional right is confined, in principle, to the recovery only of losses that are vouched or verifiable. As noted by Hamilton P. in *Kennedy v. Ireland* [1987] I.R. 587, in assessing the damages available for an unjustified infringement of a constitutional right, the court has jurisdiction to award damages that are *'compensatory, aggravated, exemplary or punitive'* (p. 593).

51. In assessing damages for the infringement of a constitutional right, such a right may be vindicated through an award of damages that is relative to the gravity of the breach. A minor breach may result in nominal or no damages being payable, such as occurred, for instance, in *Kearney v. Ireland* [1986] I.R. 116 and *Redmond v. Minister for Environment (No. 2)* [2006] 3 I.R. 1. Different factors may fall to be considered. Nor is there any obligation on the courts to award substantially higher damages so as to reflect what Murray J. refers to as the *'inherent value of the right'* that has been violated (see G.E. para. 120).

52. For the purpose of assessing what constitutes vindication of a constitutional right, the Supreme Court in *Simpson v. Governor of Mountjoy Prison & Ors* [2019] IESC 81, [2020] 1 I.L.R.M. 81, approved the test set out by Irvine J. (at para. 5.10) in *Pullen v. Dublin City Council* [2009] IEHC 452, notwithstanding that in *Pullen* the violation in issue was of a Convention right. The basic principles were, nevertheless, useful as a guideline. These include:

> *"(i) that a successful claimant should as far as possible be placed in the same position as if his […] rights had not been infringed;*
>
> *(ii) that the court should be disinclined to award damages for what can be considered to be solely a procedural error;*
>
> *(iii) that the court's approach should be an equitable one having regard to the particular facts of the individual case and where appropriate should have regard to the seriousness of the violation;*
>
> *(iv) that the court should award, where appropriate, damages under three heads: pecuniary loss, non-pecuniary loss and costs and expenses. Within the non-pecuniary loss, compensatory damages have been awarded for pain, suffering, psychological harm, distress, frustration, inconvenience, humiliation, anxiety and loss of reputation; and*
>
> *(v) that punitive damages are not awarded as a matter of practice."*

The relevant applicable principles governing the award of different types of damages will be considered in due course.

Assessing the Appellant's claim

53. As the trial judge considered various categories of pecuniary damages before moving to an assessment of general damages, I propose, for the sake of consistency, to adopt the same approach. Before doing so, however, one issue of principle might be mentioned at this point. Whilst the respondent union places considerable emphasis on the appellant's failure to quantify his losses, it is important to recall that such a requirement arises only in the context of assessing his claims for pecuniary damages. For the avoidance of doubt, I want to put to rest, at this stage, any contention that the right to earn a livelihood concerns only, or even primarily, the right to generate an income. This is a matter to which I shall return, presently.

54. In its submissions, the respondent union directed the Court's attention to the fact that the appellant was obliged by the High Court and by the Court of Appeal to particularise his claim in order to prove his loss. These directions, it submits, are to be found in the judgments of both courts. It refers to the fact that in the High Court, Ryan J. stated (at para. 139) that: -

> *"It does not follow from my findings that the plaintiff is entitled to be compensated for all the time from when the wrongs were first done to him. It will be for him to prove all the elements of loss actually sustained and properly recoverable, subject to any legally appropriate reductions. That hearing will also consider injunctive and ancillary reliefs."*

In the order of the Court of Appeal of 2 December 2016, it is recorded: -

> *"AND IT IS FURTHER ORDERED that […] the Plaintiff is to provide to the Solicitors for the First named Defendant full and detailed particulars of the loss and damage he claims to have arisen after the 1st day of January 2000 and to be caused by the said breach of his constitutional right to earn his livelihood from the 1st day of January 2000 and to set out the facts relied upon in support of such alleged loss and damage."*

55. It is true that the ruling of Ryan J. directed that the issue of quantum be determined, separately, with the appellant being obliged to prove all elements of loss actually sustained. However, there is nothing in his judgment to suggest that damages were to be confined **solely** to *'special damages'*, quantified and proven. Likewise, the order of the Court of Appeal contained no such limitation. On the contrary, that order is set out in two distinct parts. The first directs that the matter be remitted *for an assessment of the quantum of damages <u>to which the appellant was entitled by reason of the breach</u> of his constitutional rights* by BATU. The second part of the order requires the appellant to quantify all losses flowing from that breach. It is only this second aspect of the order that deals with *'special damages'*, that is, those damages that flowed from the breach and which the appellant *'sought to recover'*. These were required to be specified in detail.

Any suggestion that the appellant was confined to recovering only quantifiable and proven *'special damages'* is untenable.

Categories of Damages Claimed

- *Loss of earnings*

56. In considering damages under this heading, the trial judge noted that notwithstanding the specific terms of the Court of Appeal's order, the appellant had not furnished particulars of losses until after directions had been given by Costello J. in January 2018. Those particulars were then refined further following O'Connor J.'s request on the first day of trial *'because of the rather unfocussed approach'* taken by the appellant in categorising the headings for assessment. Observing that the appellant had *'rather summarily, read out […] the specific claims for loss of earnings for the period from January 2000 to December 2008, which he compiled'*, he noted a gross loss claim of €368,689.72 in this regard (see para. 35 above).

57. In coming to his decision on loss of earnings, the trial judge had regard to evidence, given by Mr. Kennedy, a SIPTU official, concerning the construction industry in and around Limerick at the time in question. He had testified to the limited life span of work for block layers, the increased introduction of work opportunities through agencies as distinct from previous employers, the effect of a lockout in Limerick in 2003, the limited influence of BATU outside Limerick city, the reduced demand for block layers, the slowdown in Limerick that began around 2003, and the absence of new residential developments since the 2008 crash.

58. In exploring the claim for loss of earnings, O'Connor J. put several questions to Ms. Nugent who had testified as to the appellant's receipt of social welfare benefits, including, for the year 2001. As part of his analysis, he found that the impact of BATU's breach of the appellant's right to earn a living was confined to Limerick and that its duration was from 2000 to 2003. Having considered the evidence before him, O'Connor J. concluded that he was not in a position to award any damages to the appellant for the loss of earnings claimed, accepting counsel's submission that the claim under this heading was *'speculative'*. He was, he said, *'tracking the wording of Ryan J.'* who had concluded that his findings did not entitle the appellant to be compensated for all the time from when the wrongs were first done to him. The appellant still had to prove all the elements of loss actually sustained. O'Connor J. considered that the appellant had failed to challenge the evidence of the respondent. Nor had he satisfied the Court as to any net loss suffered or any taken action to offset his perceived loss. To this end, he had not adhered to the directions given by Ryan J. and by the Court of Appeal and by Costello J. in January 2018. O'Connor J. concluded (at para. 15): -

> *"It is unfortunate that the plaintiff is a lay litigant because it contributed to his apparent inability to present what is needed for this Court to quantify the specific net loss which he's obliged to prove on the balance of probabilities. This Court is not a court of inquisition but administers justice within an adversarial process. The*

Court cannot take a guess or go off to do its own calculations. To this end, the plaintiff has failed to satisfy the Court as to his specific net loss…"

The Court's assessment

59. The first matter to be addressed is the appellant's complaint about how certain matters evolved at the hearing on quantum and how this, in turn, impacted upon the trial judge's assessment of his claim. His submission to the effect that O'Connor J. had taken the view that something was 'amiss' when evidence of social protection payments he received in 2001 came to light (in circumstances where his assessment of taxes due for that year was in the sum of €3,491.78) is somewhat understandable when viewed in context.

60. Before leaving the stand, Ms. Nugent was asked by O'Connor J. whether *'Social Welfare'* were interested in the Notices of Assessment. He noted that there was a letter of 18 July 2006 from the Social Welfare Regional Office to the solicitors in Limerick which identified that for the calendar year following 16 January 2001 there had been a payment of nearly €15,000 to the appellant.[6] He then asked Ms. Nugent whether she could confirm that this figure should have appeared in the Notice of Assessment. Ms. Nugent indicated that she could not speak for the Notice of Assessment or for the Revenue Commissioners. The exchange continued:

> O'CONNOR J: Do the Social Welfare, are the Social Welfare interested in the Notice of Assessment for that year?
>
> MS. NUGENT: Well, we should have been notified if there was employment taking place when a customer is in receipt of unemployment assistance.
>
> O'CONNOR J: And now you're aware of that.
>
> MS. NUGENT: Yes.
>
> O'CONNOR J: Very good. Thank you. You're free to go thank you very much.

61. The record shows that following this exchange the appellant returned to court the following day having checked correspondence which, he claimed, showed that there had existed at the time a pilot *'Back to Work'* scheme whereby social welfare recipients were permitted to earn a limited income whilst maintaining receipt of welfare benefits. In his view, the DEASP (Department of Employment Affairs and Social Protection) in Limerick had an arrangement which allowed him to earn some income during 2001 whilst at the same time receive unemployment assistance, thus demonstrating that there had been no element of dishonesty on his part.

62. There is nothing in the transcript to show that this 'defence' to what the appellant perceived to be a questioning of his integrity was considered by the trial judge. There is

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[6] Transcript, Day 1, page 113, line 4.

no reference to it at all in the judgment. The appellant contends that an unfavourable view of his evidence was taken (based on a misunderstanding of the permitted pilot scheme) which, in turn, coloured how the trial judge approached the assessment of damages.

63. Even if the appellant is correct in his contention that the trial judge had, perhaps mistakenly, taken a dim view of the fact that he was receiving social welfare benefit whilst simultaneously earning an income, it does not detract from the fact that the appellant was obliged to prove the financial losses he claimed, and that he failed so to do. He did not adduce evidence that satisfied the trial judge as to his net lost income arising from the breach of his right to earn a livelihood. His *'unfortunate'* position as a litigant in person was noted by O'Connor J. who considered that this self-representation gave rise to an *'apparent inability'* on the part of the appellant to quantify his loss. Notwithstanding his status as a litigant in person, the trial judge was correct to consider that the appellant must be held to the same standard of proof as any other litigant when it comes to proving his claim. Though articulated in the context of a personal injury action, the principle that loss of earnings must be proved was confirmed by the Supreme Court in *Long v. O'Brien & Cronin Ltd* [1972] (Unreported, Supreme Court, 24 March 1972)[7] at para. 15: -

> *"It has been laid down several times in this Court that it is the duty of the plaintiff to adduce evidence sufficient to go to the jury when he sets out to establish that the result of his injuries will be to cause him pecuniary loss in the future as in this case loss of future earning capacity."*

64. Since the period under scrutiny was a time of particularly intense activity for the construction industry in Ireland (the so-called 'boom years'), it is reasonable to assume that there was some basis to the appellant's contention that, having been denied union membership and, thus, opportunities to work on building sites, he was caused to suffer a loss of earnings. However, something more than an assertion of such loss is required. Admittedly, the appellant made an attempt to quantify his claim for lost earnings based upon what he claimed he had been receiving prior to his having been 'let go'. The document he created was his effort at calculating what he could or would have made, had the union not acted as it did. Unfortunately, however, it was not supported by corroborative evidence. Such evidence might have included, for instance, the testimony of a wages' clerk employed by one of the appellant's former employers. Such a witness may have substantiated the appellant's claim as to what he had, in fact, been earning at the time when he was 'let go'. He could also have called witnesses to testify to the likelihood of his being retained had the union not acted as it did and to the duration of any such period of engagement.

65. The appellant argues, at least implicitly, that the judgment of the High Court in *Da-Silva & Ors v. Rosa Constructors S.A. t/a RAC Contractors* [2018] IEHC 732 supports the view that O'Connor J. could have adopted a more proactive approach to the figures submitted,

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[7] This case is reported as [1972] 3 JIC 2401.

referring the Court in particular to a passage of the judgment wherein Stewart J. (at para. 54) stated: -

> *"The quantum of damages in respect of each plaintiff is set out in Appendices 1 and 2 to this judgment. Those sums come to a total of €818,081.58. However, judgment in that amount cannot be entered against the defendants. The deduction under the rule in Gourley's case needs to be applied. A monetary figure of the s. 22 interest owed to each plaintiff also needs to be added to that reduced amount. While this may seem to be a complicated and burdensome exercise, it is the only avenue open to the Court through which it can arrive at a legally sound and evidentially certain figure in damages, given the lack of reliable evidence submitted to the Court."*

66. Even if O'Connor J. had probed further to ascertain the *probable* or likely income of block-layers in the Limerick area at the time in question in order to see if the appellant's returns were significantly lower than other comparable returns, it is unlikely that such further probing would have allowed him to arrive at an accurate sum as to the actual losses incurred in this case. Moreover, Stewart J. in *Da-Silva* expressly stated that it was not the court's role to mathematically analyse the figures or to extrapolate therefrom (albeit in that case with reference to periods of recovery when assessing general damages).

67. Notwithstanding the sympathy one may have for the appellant, particularly in 2001, one cannot escape the fact that the burden to prove his actual loss of earnings rested upon him. He had received directions to this effect on three occasions before the hearing on quantum.[8] If he wanted to recover the alleged loss of earnings that flowed from the breach of his constitutional right, then he had to prove rather than assert those losses. In circumstances where he had failed so to do, the trial judge was entitled to find that the court lacked the evidence to enable it to make an accurate assessment of his actual net loss of earnings. Absent evidence to substantiate his claim for lost earnings, I cannot say that O'Connor J. fell into error in reaching the conclusion he did, namely, that the court could not *'take a guess or go off to do its own calculations'*.

- *Loss of opportunity*

68. The trial judge dealt with the appellant's claim for loss of opportunity in one sentence. He stated: *'The plaintiff testified that he lost out on job opportunities, also without giving any particulars in advance or without specifics, in evidence yesterday.'* Based on that brief assessment, he decided that no damages should be awarded for lost opportunity. This was problematic. The brevity of the trial judge's analysis of this aspect of the claim is all the more striking in circumstances where he had expressly referred to the finding of the

[8] See Ryan J. in the High Court, at para. 139, emphasising that '[it] will be for him to prove all the elements of loss actually sustained and properly recoverable'. See also the Court of Appeal in its order dated 2 December 2016 and the subsequent order of Costello J. directing the appellant to furnish particulars of losses allegedly incurred.

Court of Appeal (Peart J.) upholding the trial judge's finding of a breach of the appellant's constitutional right and observing that: -

> *"The trial judge was entitled to find that the Union…had infringed the plaintiff's right to earn a livelihood by excluding him from membership in circumstances where it enjoyed an effective monopoly control of access to the relevant* ***market and by then informing employers that he was not a member, leading them to dismiss him or not to employ him further because he was not a member of BATU.****"*

The Court's assessment

69. To my mind, O'Connor J. erred in dismissing the appellant's claim for lost opportunities. The dismissal appears to have been founded on the erroneous understanding that the appellant was obliged to furnish additional evidence in respect of this claim over and above that which he had already furnished to the original trial judge (Ryan J.) and which had grounded that judge's finding, as upheld by the Court of Appeal. The appellant points out that there was, indeed, evidence before Ryan J. (which, clearly, he had accepted) to the effect that he had lost a number of jobs on the basis of his non-membership of BATU and he refers, in particular, to the evidence of Mr. Cusack, Mr. Gallagher and Mr. McGrath (see paras. 23 – 25 above).[9]

70. The respondent had submitted that the appellant was obliged to bring evidence over and above that which had been adduced at the trial of the liability module in order for an assessment of damages based on lost opportunity to be established. I do not accept this contention. Firstly, it is clear from the transcript of the judgments of Ryan J. and Peart J. that the finding of lost opportunity was affirmed **as a fact** by both the High Court and the Court of Appeal. The quotation of Peart J. cited above refers not only to the fact that the appellant's constitutional right to earn a livelihood had been infringed by exclusion from membership of BATU, but it also refers, expressly, to the fact that BATU had then informed employers that the appellant was not a member *'leading them to dismiss him or not to employ him further'*. There was, thus, a clear and indisputable link between the union's exclusion of the appellant and the cessation of his employment with several builders. That was a finding reached *on the basis of the evidence* which had been opened at trial and which had been reviewed and upheld on appeal.

71. Moreover, while the Court of Appeal did, of course, rule that the assessment of damages was a matter for determination by the High Court upon remittal, there is nothing in its judgment to suggest that the same evidence as to lost opportunity that had previously been given to the High Court was required to be recalled and repeated, once again, for the purpose of assessing damages. Had this been a unitary trial, it is difficult to envisage such a recall being imposed. The trial judge would simply have referred to the evidence

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[9] Whereas Peart J. did not consider that the evidence of these employers was sufficient to substantiate a claim for 'conspiracy' or 'intimidation' on the part of the union, he accepted the finding that the appellant had lost out on employment opportunities due to his non-union status. See, in particular, his reference to the evidence of Mr. Gallagher and Mr. McGrath.

of lost opportunities which she or he had heard at an earlier stage and would have made an assessment, accordingly.

72. In view of the fact that the quantum aspect of the appellant's case was, effectively, the continuation of a trial that had been commenced and progressed before Ryan J., I am satisfied that O'Connor J. was not entitled to disregard the evidence of lost opportunity that had previously been adduced before the High Court, evidence which, as noted, was accepted and upheld **as a finding of fact**. Whereas the appellant did not quantify the sum of money he was obliged to forego as a consequence of lost opportunities, I do not accept that he had failed to give evidence or particulars as to the fact of such loss. Not only had he given such evidence before Ryan J., but he had expressly directed the attention of O'Connor J. to that evidence.[10] He referred, for example, to the affidavit he had sworn, and he directed the attention of the court to his evidence in respect of his previous employers. Notwithstanding the appellant's efforts in this regard, it is clear from the transcript and from the judgment that O'Connor J. did not assess or consider that evidence. Rather, he concluded, perhaps somewhat hastily, that no particulars had been given in advance of the assessment module of the trial. If by 'particulars' the trial judge had in mind the kind of vouched receipts or documentary proof that would be required for recovering other items of special damages, then, in my respectful view, he was mistaken in this regard. The case law is clear. It does not stipulate that the same requirement for vouched particulars as is necessary, say, for a loss of earnings claim applies with equal force to a claim for loss of opportunity.

73. There is ample authority for the proposition that a loss of opportunity may be taken into account and considered by the court when making a general assessment of damage. In *Leidig v. O'Neill* [2020] IECA 296, Noonan J. found that the trial judge's award in a personal injury action was excessive to the degree that rendered it disproportionate and an error of law. He substituted the order of the High Court with an order for a lower award. Notably, however, he found that a sum for loss of opportunity was to be added to the award of general damages. In assessing lost opportunity, Noonan J. cited from the Supreme Court judgment in *Rossiter v. Dun Laoghaire Rathdown County Council* [2001] 3 I.R. 578 to support his finding that such loss must be considered as a part of general damages. The young plaintiff in Rossiter had lost the sight of his eye in an accident. The trial judge had found that the injury *'may or may not interfere with his income but undoubtedly will interfere with his job opportunities in the future'*. Consequently, he awarded a specific sum in damages for loss of opportunity. Noting that it was 'helpful' that the trial judge had set out this award, separately, Fennelly J. in *Rossiter* confirmed that loss of opportunity is to be considered as part of a general damages claim stating (at p. 582) that: -

> *"Undoubtedly, the effects on future employment prospects are an element that must be taken into account in assessing the Plaintiff's damages. However, in my view, it should be considered as an element of the general damages."*

[10] Transcript, 11 April 2018, page 45 - line 27, and page 51 - line 25.

74. In the instant case, the appellant had already proven to the satisfaction of the High Court and the Court of Appeal that he had suffered a loss of opportunity by reason of the respondent union's breach of his constitutional right. The fact that these proceedings involved two separate judges—one dealing with liability and the other with damages—perhaps discloses, rather starkly, the weakness that may, sometimes, be inherent in a modular trial. Indeed, this may well be the type of case that Clarke J. (as he then was) had in mind when, in *Cork Plastics v. Ineos Compounds* [2008] IEHC 93, he was considering the weaknesses of departing from what he considered to be the default and preferable position of having a single trial of all issues at the same time. Having so held, he went on to address the issue of overlapping or repeated evidence in assessing whether modular proceedings are appropriate. Although he considered it *'unlikely'* that the evidence relevant to quantum would be the same as evidence relevant to liability, he nevertheless observed that it may be the case that many of the same witnesses may be required to be called in respect of both. In such an eventuality, he observed, the advantages of a modular trial would be diminished.

75. I do not consider that, as a matter of principle, a witness who has testified to the ***fact*** of a loss of opportunity at one stage of a trial, is required to be recalled for the purpose of repeating such evidence when the court, at a later stage, is considering an award of damages for that very loss. Even if I am wrong, the appellant in this case had specifically directed the trial judge's attention to the evidence which the High Court had earlier received and accepted. If O'Connor J. was of the view that this was insufficient for him to award damages for loss of opportunity then, respectfully, I believe that he should have said so and should have signalled to the appellant that a recall of those same witnesses as to fact was required so that their evidence could be repeated before him. As I have said, I do not believe that such a recall was necessary on the facts of this case. Both Ryan J. and this court (Peart J.) had found that BATU breached the appellant's constitutional right and had further found that the union, by informing employees of the appellant's non-union membership, *had caused him to be dismissed or not employed further*. In these circumstances, I am satisfied that O'Connor J. was obliged, at the very least, to review and consider the evidence previously given to the court in respect of lost opportunity when making his assessment as to damages under that heading.

76. There is nothing in the judgment of O'Connor J. which indicates that any scrutiny was directed to the previously accepted evidence when assessing damages for loss of opportunity. It is recalled that in *Rossister* damages for lost opportunity were awarded without the trial judge requiring of the plaintiff the same degree of particulars that O'Connor J. appears to have required of the appellant in this case. To the extent that he found that the appellant had not given *any particulars* of his claim for loss of opportunity, I am satisfied that the trial judge fell into error by failing to have regard to the evidence of such loss that had already been furnished to the High Court and accepted by that court and the Court of Appeal at an earlier stage of the proceedings.

- *Exemplary damages*

77. In respect of the claim for exemplary damages, the appellant, when asked by the judge whether aggravated and exemplary damages fell to be considered under the same heading, was quite clear in his reply. His answer was a direct *'No'*. He went on to set out what his claim for exemplary damages entailed. In his view, the union's dominant position meant that its issuing of a union card was akin to the issuing of a work permit. When it was withheld, it affected a person's career, considerably. The conduct of BATU, the appellant claimed, caused damage not only to himself but also to his family. He testified that he would not wish his experience to be visited upon anybody else and that the respondent should be punished for how it behaved towards him. It should be treated in such a way as to deter others who might be tempted to engage in similar conduct.[11] His sworn evidence before O'Connor J. was as follows:

> *"What I am saying, the behaviour of the defendants more or less ruined my career, like, you know, and I was blacklisted in the industry, which the judge in the High Court commented in his findings."*[12]

78. The appellant also referred the trial judge to the fact that, during the liability module, the conduct of the respondent union was such that it required Ryan J. to intervene when Mr. Shaughnessy, under cross-examination, had claimed that the appellant was *'not a good trade union person'* and not a *'genuine trade union person'*. Finally, the appellant argued that if the Court of Appeal had intended to direct the High Court to limit its assessment of damages only to loss of earnings, then it would have said so. On the contrary, it directed that *'damages'* were *'to be assessed'*.

79. On behalf of the respondent union, it was submitted that the appellant was obliged to give further evidence of the conduct for which that respondent should be punished.

80. The trial judge decided not to award exemplary damages to the appellant. He stated (at para. 25) that he was not in a position to adjudicate on the degree of oppression or arbitrariness involved, these being the two elements to be assessed when exemplary damages fall to be considered. He recalled that the onus lay with the appellant to satisfy the court in this regard and he further observed that the respondent had emphasised that the claim for exemplary damages was never pleaded or particularised by the appellant before the assessment hearing.

The Court's assessment

81. It has long been established in Irish law that a breach of constitutional rights may result in an award of exemplary damages, it being one of three types of damages that may arise from a constitutional breach—the others being compensatory and aggravated damages (see *Meskell v. Córas Iompair Éireann* [1973] I.R. 121; *Kennedy v. Ireland* [1987] I.R. 587 and *Conway v. Irish National Teachers Organisation* [1991] 2 I.R. 305). The

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11 Transcript, Day 1, page. 33, line 25.
12 Transcript, Day 1, page 44, line 11.

circumstances grounding the court's jurisdiction to award exemplary damages were identified by Finlay C.J. in *Conway v. Irish National Teachers Organisation* [1991] 2 I.R. 305. Exemplary or punitive damages, as they are sometimes called, *'are intended to mark the court's particular disapproval of the defendant's conduct in all the circumstances of the case'* (p. 317). They represent a public demonstration of the court's punishment of the defendant for such conduct and are distinct from its obligation, where it may exist in the same case, to compensate a plaintiff for the damage which he or she has suffered. Recalling the high degree of protection enjoyed by constitutional rights, Finlay C.J. (at p. 122) observed that, in the words of Ó Dálaigh C.J. in *The State (Quinn) v. Ryan* [1965] I.R. 70: -

> *"[…] it follows that no one can with impunity set these rights at nought or circumvent them, and that the Courts' powers in this regard are as ample as the defence of the Constitution requires."*

82. That an award of exemplary damages may be considered by the court irrespective of whether the constitutional breach was committed by an agent of the executive or a private entity, was affirmed in *Conway* and applied by the courts in subsequent cases (see, for example, *Sullivan v. Boylan and Others (No. 2)* [2013] 1 I.R. 510). Of course, not every wrong that amounts to a constitutional breach will require the court to consider and/or award exemplary damages (see *Simpson v. Governor of Mountjoy Prison & Ors* [2019] IESC 81, [2020] 1 I.L.R.M). What is relevant is the **nature of the conduct** of the defendant. In *Herrity v. Associated Newspapers (Ireland) Ltd.* [2008] IEHC 249, [2009] 1 I.R. 316, Dunne J. described as *'outrageous'* the behaviour of the defendant newspaper in making use of transcripts of the plaintiff's private conversations indicating her relationship with a priest and she awarded exemplary damages in the sum of €30,000. In *Sullivan*, *'objectionable'* is how Hogan J. described a debt collector's behaviour in watching and besetting the plaintiff's home. *What 'brought it to the point of constitutional transgression - was its persistent, premeditated, unyielding and oppressive character'*. Labelling the behaviour as *'oppressive, arrogant and contumelious'*, he awarded exemplary damages in the sum of fifty per cent of that awarded as compensatory damages.

83. An award of exemplary damages should not be excessive but should be sufficient to punish the impugned behaviour (see *Crofter Properties Ltd v. Genport Ltd (No. 2)* [2005] IESC 20, [2005] 4 I.R. 28, p. 37). In considering whether to award exemplary damages, the court will have regard to the seriousness of the wrong and the degree of distress caused thereby. In *Kennedy v. Ireland* [1987] I.R. 587, whilst no specific loss had been identified, the court nevertheless held that the plaintiffs were entitled to substantial damages, whether they be labelled aggravated or exemplary. Hamilton P. (at p. 594) stressed the affront to the dignity of the plaintiffs caused by the constitutional breach observing that: -

> *"The action of the executive . . . in 'tapping' the telephones of the plaintiffs without any lawful justification and in interfering with and intruding upon the privacy of the*

plaintiffs constituted an attack on their dignity and freedom as individuals and as journalists and cannot be tolerated in a democratic society such as ours (…)."

84. In the light of the foregoing principles, it seems to me that the trial judge paid insufficient attention to the seriousness of the respondent union's wrongdoing in this case and failed to have due regard for the attack upon the appellant's human dignity that was intrinsic thereto. The judgment discloses that little or no account was taken of the obvious humiliation visited upon the appellant nor was the union's conduct regarded as an affront to his person. Far from marking the court's disapproval of what Ryan J. had found to be the audacious and stigmatising conduct of the union and its *'capricious abuse of power'*, O'Connor J. held, somewhat summarily, that he could not assess the degree of oppression or arbitrariness attaching to such conduct.

85. I appreciate that the assessment of damages occurred in the context of a two-day hearing on quantum that took place at some remove from the 'liability module' in which extensive evidence had been opened to the court. Admittedly, O'Connor J. acknowledged that he knew very little about the trial.[13] However, in my view, the judge fell into error in failing to review, adequately, the basis for the appellant's claim for exemplary damages which, in turn, led to a failure to assess, comprehensively, that claim in all the prevailing circumstances. In particular, the judgment discloses that when considering the issue of exemplary damages, the trial judge failed to have sufficient or any regard to the unseemly aspects of the respondent union's conduct notwithstanding that such conduct was amply set out in the judgment of Ryan J.

86. As already noted, this case may be illustrative of the difficulties attendant upon certain litigation being conducted by way of separate modules, particularly, where different judges are assigned to determine the liability and quantum elements of a trial. Whereas such difficulties may be inevitable, they are not insurmountable. They do require of the judge assigned to the quantum module that she or he pay close attention to the transcripts of the earlier part of the trial and to the judgment delivered thereon. This may be particularly challenging where judges are faced with heavy lists and have little, if any, time to read papers in advance of a hearing.

87. Nevertheless, this was a case in which careful scrutiny of the claim for exemplary damages was required. Whilst an extensive review of all of the evidence may not have been possible, a closer reading of the judgment of Ryan J. would have enabled the trial judge to adjudicate upon the findings made in respect of the respondent union's conduct. This is all the more so in circumstances where the judge's attention had been expressly drawn to the specific findings and relevant paragraphs of the trial judge's ruling on liability.

88. As is clear from the judgment in *Kennedy*, the appellant was not required to identify a specific loss before the court could award exemplary damages based on the respondent union's conduct (see para. 83 above). To my mind, the findings of Ryan J., upheld on

[13] Transcript, Day 1, page 111, line 28,29.

appeal, were more than sufficient to enable the trial judge to adjudicate upon the degree of oppression inflicted upon the appellant and the arbitrariness of the union's transgression. Indeed, arbitrariness was intrinsic to the infringement of the constitutional right in this case, since both the trial and appellate courts found that no solid reason had been given for the union's exclusion of the appellant from membership in circumstances where he was demonstrably qualified for same. Moreover, this arbitrary treatment of the appellant was accompanied by the union's proactive measure in then proceeding to inform employers of his non-union status which led those employers to dismiss him or not to employ him further (see para. 32 above). This conduct, to my mind, is indicative of a significant and demonstrable degree of oppression on the part of BATU.

89. The union's conduct was all the more egregious in circumstances where it enjoyed a monopoly position in the relevant market. Where a union exercises a significant degree of control over an individual's ability to exercise the right to earn a livelihood and holds such power in pursuit of the aim of protecting workers' rights, it cannot act with impunity when, through its activities, it violates the very foundation of the rights it exists to protect. Infringing the constitutional right to earn a livelihood runs counter to the *'telos'* of a trade union.

90. As to the trial judge's reference to the omission of a claim for exemplary damages in the pleadings, this Court was referred, helpfully, to the judgments of the Supreme Court in *Dawson and Dawson v. Irish Brokers Association* [1998] IESC 39, and *McIntyre v. Lewis* [1990] IESC 5, [1991] 1 I.R. 121. In *Dawson*, O'Flaherty J. held (at para. 28) that contrary to the requirement in the rules of the courts of England, it is not necessary to plead exemplary damages in this jurisdiction. Whilst acknowledging that advance notice of such a claim might be *'desirable'*, the absence of any requirement to plead such claim had already been confirmed earlier by the same court in McIntyre (at p. 134).

91. Having regard to the foregoing, I am satisfied that the High Court judge erred in his failure to have sufficient regard for the findings of Ryan J. in respect of the respondent union's conduct. Whilst such conduct was insufficient to support a finding of conspiracy or intimidation, it was, nevertheless, in clear violation of the appellant's constitutional right to earn a livelihood and it was found so to be both by the trial judge and on appeal. The appellant, to my mind, had a strong basis for claiming that the respondent union should be punished for its conduct. In all the prevailing circumstances, this case was one which called for the Court to signal, unequivocally, its disapproval of the union's conduct by making an award of exemplary damages. To the extent that the trial judge failed to assess, adequately, the claim for exemplary damages, he fell into error.

- *Aggravated damages*

92. In seeking damages under this heading, the appellant complained that, to date, he has not received an apology for the manner in which he was treated by the respondent union. He also submitted that the union officials were unjustified in seeking an injunction against him arising from the incident involving Mr. Morris (see para. 17 above). In relation to aggravated damages, the appellant referred O'Connor J. to several findings of Ryan J. in

support of his claim that the conduct of the respondent union merited an award under this category.[14] For example, he pointed to the fact that in the judgment on liability, Ryan J. had found that the appellant, had been treated as a *'pariah'* from early 2000 and that he had been *'prevented from working'* (para. 125); that the appellant had kept up a struggle to free himself from the blackening that BATU had imposed upon him (para. 126); that he had protested his treatment to the Irish Congress of Trade Unions and to the CIF (para. 126); that the appellant had not progressed to full membership of BATU although he had done nothing to disqualify himself therefrom (para. 118); that BATU had sought to enforce a closed shop for brick layers and, at the same time, had excluded the appellant (para. 122); that it was a matter of inference from the evidence as a whole that the union policy would have prevented the appellant from getting work or retaining it; that it was logical and just to condemn *'as unlawful the capricious abuse of power by an association when it achieves exclusivity for its members, and then excluded qualified tradesmen' (para. 130); that the union had 'audaciously' objected to the appellant's presence and prevented him from working or restricted his opportunities to provide for his family* (para. 130); and that BATU was not entitled to *'stigmatise the plaintiff'*, nor to have him removed from a site on the grounds that he was not a member (para. 132). It was the appellant's contention that Ryan J. had taken the view that BATU *had 'bullied him out of the union'* and had then engaged in a campaign against him and, further, that he had acknowledged the frustration of the appellant who had lost his job because of union pressure (para. 114).

93. The respondent union contends that while the appellant had sought aggravated damages by way of submission, the assessment of damages was required to be limited to such damages as arose on foot of the breach of his constitutional right to earn a livelihood. They submit that while 'aggravated damages' was listed as a heading in the booklet furnished by the appellant, all such damages and losses claimed therein did not fall within the ambit of the Court of Appeal's order of 2 December 2016. Moreover, they assert that the appellant had not included a claim for aggravated damages in his pleadings.[15]

The Court's assessmen

94. Unlike exemplary damages, aggravated damages are an augmented form of ordinary compensatory damages and arise, for the most part, by reason of the manner in which the wrong was committed and the conduct of the wrongdoer (see *Shortt v. Commissioner of an Garda Síochána* [2007] IESC 9, [2007] 4 I.R. 587). In *Conway*, Finlay, C.J. gave an indication of the type of reasons that may ground a court's decision to increase compensatory damages offering examples such as (at p. 217): -

"(a) the manner in which the wrong was committed, involving such elements as oppressiveness, arrogance or outrage, or

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[14] See Transcript, Day 1, page 47, line 11 – page 50, line 25.

[15] Transcript, Day 1, p. 33 line 9 and p. 97, line 17.

(b) the conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or

(c) conduct of the wrongdoer and/or his representatives in the defence of the claim of the wronged plaintiff, up to and including the trial of the action."

95. Whereas exemplary damages may be used to mark the court's disapproval of a defendant's conduct, aggravated damages compensate for the manner in which a defendant either commits the wrongdoing or approaches the defence of its impugned conduct. That aspect of *'making matters worse'* might be said to mark the difference between aggravated and exemplary damages. Whereas a failure to apologise was recognised in *Conway* as, possibly, forming part of an assessment of aggravated damages, the absence of an apology, on its own, is insufficient to entitle a plaintiff to an award of aggravated damages (see *Kessopersadh v. Keating* [2013] IEHC 317, para. 106).

96. It is open to this Court, as it was open to the High Court, to consider awarding the appellant aggravated damages even if a claim for such has not been pleaded, specifically, (*Stokes v. South Dublin County Council* [2017] IEHC 229.) The appellant's evidence was that at no time did anyone in the union ever apologise to him or try to reconcile with him for the conduct in issue. It is, at least, arguable that the union's behaviour post exclusion of the appellant might be considered to come within the ambit of conduct that could warrant an award of aggravated damages.

97. However, I am not persuaded that it does. There is, of course, an obvious overlap in this case between the offensive nature of the respondent union's unlawful conduct—which, to my mind, ought to have given rise to an assessment of exemplary damages—and the manner in which that conduct was committed. It would be disproportionate, in my view, on the facts of this case, to find that an award of both exemplary and aggravated damages is warranted. Without in any way diminishing the shameful nature of the conduct of the respondent union, I cannot conclude that a failure to apologise should, in itself, give rise to an award of aggravated damages. Such a failure forms part of the regrettable history of antagonism between the appellant and the union. Moreover, there is nothing to which the appellant has drawn this Court's attention which would alert it to the respondent union having 'made matters worse' by the manner in which the proceedings were defended. I am satisfied that in all the circumstances of this case, it is more appropriate for the court to signal its unequivocal disapproval of the conduct in question than make an award of aggravated damages either for the manner in which the impugned conduct was committed or the proceedings herein defended.

Damages for distress

98. The appellant claims that the trial judge erred in fact or in law by refusing to consider the evidence of the witness he had called (Professor O'Moore) to support his claim for damages for distress caused by the respondent union. This witness, it is recalled, was an

expert in anti-bullying research and testified to the fact that the appellant had been bullied (see para. 40 above). She had testified that, in her view, the appellant was suffering from psychological symptoms following his having been *'targeted'* to the extent that he was over a protracted period of time.[16]

99. The respondent union disagreed that the trial judge had erred in how he had approached the evidence of distress and pointed to the fact that Professor O'Moore had not given evidence before Ryan J. during the liability module.

The Court's assessment

100. That an expert who testifies for the purpose of assessing quantum has not given evidence in the liability module is not, in itself, a reason to reject his or her evidence. Much depends upon the purpose for which any given witness is called. Once a causal link has been established between a defendant's wrongdoing and the damage or suffering that flowed therefrom, a litigant is entitled to call an expert witness to testify to the extent of damage caused or suffering imposed by reason of a defendant's conduct.

101. The trial judge approached the evidence of Professor O'Moore in a rather unusual manner. He indicated, clearly, that while he permitted this expert to be called and to testify, he would proceed to disregard her evidence. That is exactly what he did. It seems to me that O'Connor J.'s approach in this regard was flawed. If he considered that this expert's evidence was inadmissible because it breached an important principle of a fair trial (in this case identified by the trial judge as the right to test, interrogate and challenge evidence) then it should not have been admitted. To my mind, allowing Professor O'Moore to testify in circumstances where the trial judge had already decided to disregard her evidence was unwise. In any event, it is clear from the transcript that the respondent union received and availed of the opportunity to cross-examine Professor O'Moore and to test her evidence and, in such circumstances, it is difficult to say that its rights were disregarded. That said, the appellant had failed to observe the requirements of O. 39, r. 46, RSC (S.I. No. 391 of 1998) which sets out the obligations of parties in respect of the advance disclosure of reports and statements. The fact that Professor O'Moore's report was included in the appellant's discovery of documents does not discharge him of his procedural obligation to list her report in a schedule and to furnish it to the respondent union prior to the trial.

102. Having admitted and then disregarded the evidence of Professor O'Moore, O'Connor J. declined to grant the appellant any damages for the distress. In his view, it was the appellant's own fault for not furnishing particulars or giving sufficient evidence about his alleged mental distress. Observing that the appellant as a litigant in person cannot put himself in a better position than one who is represented by lawyers, he held that the appellant had been the author of his own downfall. Although the trial judge approached the evidence of Professor O'Moore in a somewhat unusual manner, I cannot conclude that

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16 Transcript, Day 2, page 27, line 13.

his ultimate decision in respect of the claim for damages for distress was one vitiated by error.

- *General damages*

103. In assessing general damages, O'Connor J. referred to three cases in which awards for breaches of constitutional rights were made. The first was *Kearney v. Minister for Justice* [1986] I.R. 116 in which £25 was awarded by the High Court for an infringement of the plaintiff prisoner's right to communicate arising from a failure to deliver his letters, promptly. The second was *Kennedy v. Ireland* [1987] I.R. 587, where £20,000 was awarded to each of two journalists—political correspondents—for the unauthorised 'tapping' of their telephones. The third was *Sullivan v. Boylan Contractors (No. 2)* [2013] 1 I.R. 510 in which €22,500 was awarded for a breach of the constitutional right to the inviolability of the dwelling. Without providing any particular rationale or reasoning for his finding, O'Connor J. held that the breach of the appellant's constitutional right to earn a livelihood was *'far less severe'* than the breaches in *Kennedy* and *Sullivan* and *'significantly more severe'* than the breach in *Kearney*. Bearing in mind the awards made in those three cases, he concluded that the appellant was entitled to €15,000 in general damages for the breach of his constitutional right.

The Court's assessment

104. Whilst acknowledging that a trial judge enjoys a discretion when making an award of general damages, it is a discretion that must be exercised carefully and by reference to the nature of the case (*Conway*). As already noted, the contention that the right to earn a livelihood concerns, essentially, the right to earn money, is a contention that cannot be sustained. Through vocational endeavours an individual does far more than generate an income. In and through work, an individual may advance human understanding, express creativity, safeguard mental health, contribute to community and support the common good. To work is to manifest an intrinsic aspect of human nature and to deliberately deprive a person of the opportunity to exercise such a fundamental right is an affront to human dignity—the dignity which the Constitution seeks to assure. As recalled by Hamilton P. in *Kennedy*, in citing the observations of Henchy J. in *Norris v. The Attorney General* [1984] I.R. 36 (at p. 71): -

> *"[…] there is necessarily given to the citizen, within the required social, political and moral framework, such a range of personal freedoms or immunities as are necessary* ***to ensure his dignity and freedom as an individual*** *in the type of society envisaged. The essence of those rights is that they inhere in the individual personality of the citizen in his capacity as a vital human component of the social, political and moral order posited by the Constitution."*

Depriving a person of the fundamental right to earn a livelihood constitutes an attack upon human dignity and an interference with an individual's liberty.

105. It seems to me that the trial judge's decision on what was required when making an award of general damages falls short on two fronts. First, it appears that he failed to have sufficient regard to the full scope of what is involved where an infringement of the right to earn a livelihood occurs. The infringement in question is not just an interference with a person's capacity to earn money but, more particularly, involves an undermining of the value of the individual as 'a worker being' and the value and meaning of work for the individual. Not only was there inexcusable arbitrariness in the union's exclusion of the appellant from its membership in this case, but there was the added indignity inflicted upon him of its informing employers of his non-union status which, in turn, led to his dismissal or non-engagement. Its unlawful conduct constituted a serious wrong. Second, the trial judge's failure to explain why a breach of the constitutional right to earn a livelihood in this case was *'far less severe'* than an infringement of the right to privacy or the inviolability of the dwelling, creates the impression of a certain randomness in pitching the value of the appellant's claim for general damages where he did. On both fronts, in my respectful view, the judge fell into error.

106. Moreover, whilst O'Connor J.'s finding that the appellant's claim for loss of earnings had not been made out cannot be impugned, his omission to factor in the established loss of opportunity to his overall assessment of general damages was problematic. The appellant's claim for such loss was not required to be calculated and proven in the same manner as his claim for lost earnings and it ought to have been given some weight in the assessment of general damages. There is nothing in the judgment of the trial judge to indicate that it was.

107. Bearing in mind the guiding principles articulated by Irvine J. in *Pullen* (see para. 52) and adopting an equitable approach that has regard to the particular facts of an individual case, I consider that the appellant's established loss of opportunity should have been reflected in the court's assessment of general damages in this case. An award of €15,000 does not reflect, adequately, the magnitude of the non-pecuniary loss caused to the appellant by reason of the respondent union's breach of his right to earn a livelihood during the relevant period —a period of some significance for the construction industry in Ireland.

Alleged Bias

108. For the sake of completeness, one final matter requires to be considered. The appellant complained that the decision of the trial judge was tainted and biased in his assessment of his claim for damages. In this regard, he pointed to the adverse implication that was drawn by the suggestion that he was both claiming social welfare benefits and earning money at the same time. He relied upon principles enunciated in *O'Callaghan v. Mahon* [2008] 2 I.R. 514 in respect of his claim of bias.

109. The respondent union submitted that the trial judge was entitled to draw inferences from the evidence available to the Court, including, the evidence of Ms. Nugent and Mr. Devlin. It rejected the contention that the trial judge was biased by charges 'manipulated' on the first day of hearing, as the appellant suggests.

110. I have already found that even if the appellant were correct in his contention that the trial judge, mistakenly, took a dim view of his receipt of social welfare payments whilst earning anything at all, that, in itself, did not detract from the fact that all claims for lost earnings were required to be proven.

111. The trial judge addressed the issue of unemployment assistance as follows: -

> *"13. On cross examination by Mr. Sweeney, counsel for BATU,* ***the plaintiff was unable to explain the unemployment assistance of €14,831.70 for the period January 2001 to January 2002****, which Ms. Ruth Nugent, Officer with the Department of Social Protection, verified. In other words, the plaintiff's claim for 2001 omitted to include this sum to show mitigation of the loss which he advanced."*
>
> *[. . .]*
>
> *"15. […] the plaintiff has failed to satisfy this Court as to his specific net loss* ***and the Court remains curious, if not sceptical, about the claim for 2001 in particular, given the unemployment assistance of nearly €15,000 with some €24,000 in earnings from PAYE and self employment block laying services*** *identified in the Notice of Assessment for the year ending the 5th April, 2001."*

112. It seems to me that the appellant's apprehensions that the trial judge regarded him as a *'dole fraudster'* and that this led to an incorrect approach to the decision on damages and costs are without foundation. The extracts cited demonstrate that the trial judge was considering the appellant's receipt of unemployment assistance in the context of a failure to satisfy the court as to a net loss of earnings claim. That he was *'curious'* if not *'sceptical'* about the loss of earnings claim for 2001 was based on the fact that it did not appear to him that the appellant had factored in to his own assessment of lost earnings, his receipt of €14,831.70 in social welfare benefit for that year. Of course, the appellant may well have been entitled to earn a limited income whilst claiming benefit and this did not result in his being a *'dole fraudster'* as he put it but, rather importantly, the court never made such a finding.

113. Objective bias is established if *'a reasonable and fair-minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision-maker will not be fair and impartial'* (see Fennelly J. in *O'Callaghan v. Mahon* [2008] 2 I.R. 514, at p. 672). The appellant's own apprehensions are not relevant. Moreover, it is necessary to show that the trial judge brought to bear *'something external'* to the decision-making process. To the extent that the appellant submits or suggests that statements made by the trial judge *'effectively decided'* the issue or showed *'prejudice, hostility or dislike'* towards him or his witnesses, that contention does not withstand scrutiny. The observation of the trial judge that the appellant had failed to include the unemployment assistance as a measure that mitigated an asserted loss or, indeed, his curiosity or even scepticism in respect of the claim for

2001, comes nowhere near meeting the legal test for objective bias. Without making any adverse finding as to the appellant's character, O'Connor J. was entitled to observe that a lawfully obtained social welfare payment was not included in the appellant's calculation of losses for 2001. If it had been included, the claim for loss would have been reduced, accordingly. His observation went no further than that. The appellant's submission that the trial judge's bias tainted his assessment of the claim for damages is not sustained.

Conclusions

114. For the reasons set out above, I would allow the appeal on the trial judge's failure to award damages for loss of opportunity and/or for his failure to factor in such a loss to his award of general damages.

115. I would also allow the appeal on the failure to consider and assess, adequately, the claim for exemplary damages.

116. In view of the foregoing, I would substitute the trial judge's award of €15,000 in general damages with an award to the appellant of €22,500 in general damages in order to reflect the established loss of opportunity that was visited upon him by reason of the respondent union's breach of his constitutional right.

117. Having regard to the objectional nature of the breach in issue, I would also award €7,500 in exemplary damages as an indication of the Court's disapproval of the conduct of the respondent union in its treatment of the appellant herein.

Costs

118. The High Court (O'Connor J.) was called upon to determine the issue of costs, which included, not only the costs of the two-day hearing on quantum but also the six-day hearing on liability that had taken place in February 2014. That liability hearing had resumed for a further two days on 27 March 2014 and 16 May 2014, apparently, to deal with the claim against the CIF.[17] As noted (at para. 10 above), following the hearing on liability, the judgment of Ryan J. was appealed by the respondent union. This court (Peart J.) upheld the finding that BATU had breached the appellant's constitutional right to earn a livelihood and thus that part of its appeal was dismissed. The balance of the appeal was allowed resulting in the appellant's claims founded on the torts of intimidation and conspiracy being dismissed against all respondents.

119. In his ruling on costs, Peart J. made no order as to the costs of BATU's appeal. However, the costs between BATU and the appellant in the High Court up to the 25th day of July 2014 were reserved to the trial judge in the High Court. Further, he made no order as to the costs of the appeal of the second, third and fourth named respondents. However, the costs as between them and the appellant in the High Court up to the 25th day of July

[17] In the High Court (Ryan J.) order of 25 July 2014, it records earlier directions that had been issued by the High Court which included that the hearing of the action would resume on the 27 March 2014 and that the fifth named defendant (the CIF) should attend on that date.

2014 were also reserved to the trial judge. On the same day (2 December 2016), the Court of Appeal dismissed an appeal in respect of the High Court's dismissal of the claim against the CIF with costs and directed the appellant to pay the costs of the CIF in that appeal.

120. Before making an Order on 21 June 2018, O'Connor J. outlined the history or *'unusual path'* which the litigation had taken following the commencement of proceedings in 2002. Taking the first relevant 'event' as being the awarding of damages, he found that the second to fourth named respondents had no liability as to costs because the issue of their liability was dealt with by the Court of Appeal. The judge continued:

> *"Now, having considered the matter and the plaintiff represented himself and* ***candidly admitted that he was surprised by the judgment of Mr Justice Ryan****, how successful he was and then went on (sic) to deal with the Court of Appeal,* ***that the six-day hearing before Mr Justice Ryan dealt with issues which were not all dealing with the constitutional rights of the plaintiff. Taking that into account and the fact that the same firm of solicitors were on record for all of the defendants****, I think the most just way of dealing with this is to direct the first-named defendant to pay three days' expenses of the hearing in 2014 because it's the expenses of Mr O'Connell and then in respect of the assessment hearing that the plaintiff is entitled to all of his expenses, which must be taxed in default of agreement." [18]*

121. By Order dated 21 June 2018, the High Court determined that the second to fourth named respondents had no liability as to costs. The appellant was awarded his 'costs and expenses' against the respondent union for just three of the six days of the hearing on liability in 2014.[19] He was also awarded the costs and expenses of the two-day hearing on quantum. However, his application for a 'cross over order' in respect of the High Court's direction (Ryan J.) that the appellant do pay the costs of the CIF, the fifth-named respondent to these proceedings, was refused (see para. 119 above).[20]

122. Whilst it is well settled law that an appellate court will be slow, or indeed *'very reluctant'* to interfere with a trial judge's discretion in awarding costs (see *M.D v. N.D* [2016] 2 I.R. 438, p. 458 and *W.Y.Y.P v. P.C.* [2013] IESC 12, para. 39), such a discretion must be exercised *'within jurisdictional criteria established in law'* (see MacMenamin J. in *Child and Family Agency v. O.A.* [2015] 2 I.R. 718, p. 721). An appellate court may determine or overturn a costs order where it considers that the trial judge failed to take into account relevant factors (see *Dunne v. Minister for the Environment & Ors* [2008] 2 I.R. 775, p. 783). A trial judge is not completely at large in exercising the discretion on costs.

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[18] Transcript, 21 June 2018, page 3, line 28 to page 4, line 3.

[19] The order lists the six days of the hearing on the 4th, 5th, 6th, 18th, 19th and 20th February 204 but it thereafter refers to the 27th day of March 2014 and the 16th day of May 2014. The order of Peart J. of 2 December 2016 reserved all costs up to the 25 July 2014.

[20] Transcript, 21 June 2018, page 7, Line 17.

123. The trial judge identified three matters which he had 'considered' in determining the question of costs on liability, namely, (i) the appellant's self-representation and surprise at his success; (ii) that issues other than the constitutional right of the appellant had been canvassed before Ryan J.; and (iii) that the same firm of solicitors was on record for all of the respondents.

124. It seems to me that in exercising his discretion on costs in this case, the trial judge took into account certain matters which were not relevant to the issue of costs and failed to consider other factors which were. For instance, the fact that the self-represented appellant was *'surprised'* at his own success in the proceedings, whilst understandable in the face of having negotiated with experienced legal opponents, was entirely irrelevant when it came to where the justice of matters lay in terms of costs.

125. In limiting the appellant to recovering just three out of the six days of the hearing on liability, the trial judge also had regard to the fact that issues other than the constitutional right of the appellant were canvassed before Ryan J. Whilst it is true that the Court of Appeal allowed BATU's appeal on the claims of intimidation and conspiracy, there was no evidence before O'Connor J. to demonstrate that fifty per cent of the entire hearing on liability was devoted to evidence relating, exclusively, to these torts. Indeed, the evidence given in respect of the impugned conduct of the union, whilst found, on appeal, not to constitute conspiracy or intimidation, was, nevertheless, relevant to the High Court's finding of a breach of the appellant's constitutional rights, a finding which was upheld on appeal.

126. That is not to ignore the fact that the Court of Appeal considered that some of the evidence did not support a finding of a breach of the appellant's constitutional right to work in the period prior to the ending of his probation. Nevertheless, even where some evidence adduced was not relied upon, directly, to find a breach of the appellant's constitutional right to work, it seems to me that, in general, the evidence at trial was relevant in terms of providing the context in which the appellant's claim for a breach of his constitutional right to earn a livelihood arose. In this regard, I note that Ryan J. in his judgment (para. 122) had observed that it is *'a matter of inference* ***from the evidence as a whole*** *that the Union policy would have prevented him from getting work or of retaining it when the officials became aware that he was on a building site'*. It is also significant, in my view, that Peart J., who had scrutinized, carefully, the evidence that had been before Ryan J. did not consider that BATU's 'success' on appeal in defeating the intimidation and conspiracy claims should result in any costs being awarded in its favour. In these circumstances, the correctness of the trial judge's decision to reduce by half the appellant's costs and expenses in respect of the liability module must be called into question.

127. In coming to this view, I have taken on board the fact that the trial judge did not award any costs to the second, third and fourth respondents notwithstanding that it had been found that they had no personal liability to the appellant. The High Court costs (up to 25 July 2014) as between those respondents and the appellant had been reserved to the trial

judge (see para. 119 above). I consider, however, that the decision of O'Connor J. to make no order for the costs of the second to fourth respondents was a reasonable one in the circumstances that obtained. To my mind, it was entirely appropriate for him to make no order for costs in their favour having regard to the fact that the same firm of solicitors was on record for all of the respondents.[21] It is worth recalling that in the Court of Appeal, Peart J. had made no order as to their costs notwithstanding their 'success' on appeal. O'Connor J.'s decision to make no order as to the costs of those respondents was correct, in my view.

128. Bearing in mind all of the above, I find that the decision to allow the appellant just three out of six days of his costs and expenses was disproportionate, particularly, where there was nothing to indicate that half of the trial time was spent or 'wasted' on the matters that were not relevant to the ultimate outcome of the proceedings.

129. In considering the question of costs, this Court is obliged to 'have regard' to the provisions of s. 169(1) of the Legal Services Regulation Act, 2015 (Order 99, Rule 3.1.) which 'entitles' the entirely successful party to an award of costs against the unsuccessful party, unless the court orders otherwise. In establishing a breach of his constitutional right to work, the appellant has, undoubtedly, won the substantive part of his claim against the respondent union. He was not, of course, *'entirely successful'* and some account should be taken of that fact.

130. The record shows that the appellant had instructed solicitors at the commencement of these proceedings and that he had indeed changed solicitors during the course thereof. As of January 2011, the appellant was representing himself. Given the considerations outlined above, I consider that the appellant is entitled to recover from the first-named respondent 85% of the costs, including reserved costs, and 85% of the expenses he incurred in prosecuting his claim. For the avoidance of doubt, this includes 85% of all solicitors' and counsel's costs up to the point of their discharge. I would also propose to make no order for costs against the appellant in respect of any of the respondents. As this Court has previously made an order in respect of the costs of the CIF, the terms of that order remain extant. The appellant is also entitled to recover the full amount of all expenses he incurred in respect of the two-day hearing on quantum.

131. As to the costs of this appeal, it well established law that litigants in person are not entitled to recover costs for preparatory work undertaken before a trial on the same basis as solicitors.[22] Keane C.J. in *Dawson v. Irish Brokers Association* [2002] IESC 36 noted (at para. 11) that it is only legal costs that the court can measure that can be allowed. He stated that while it may come across as unjust that *'a person who has been wrongfully obliged to institute or defend proceedings should be unable to recover any costs in respect of time which he has spent in the preparation of his case'*, that is a matter that *'must be for the legislature, and the legislature alone, to redress [. . .]*'.

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[21] Transcript, 21 June 2018, page 3, line 33. See also page 4, lines 13 to 21.

[22] See Biehler, McGrath and McGrath, *Delaney and McGrath on Civil Procedure,* 4th ed. Thomson Reuters Ireland, 2018, Chapter 24.

132. Although, the appellant was not *'entirely successful'* on every aspect of his appeal either, (a relevant consideration if *costs* were to be awarded in his favour), I consider that, in view of the overall outcome, he is entitled to recover the expenses he incurred in prosecuting this appeal. I would, therefore, make a provisional order in those terms and, again provisionally, make no order in respect of the respondents' costs.

133. In summary and for the avoidance of any doubt, the terms of the order that I would propose to make are as follows:

- allow the appeal on general damages to include damages for loss of opportunity;
- allow the appeal on the claim for exemplary damages;
- award the appellant €22,500 in general damages against the first respondent;
- award the appellant €7,500 in exemplary damages against the first named respondent;
- award the appellant 85% of the costs, including reserved costs, and 85% of the expenses he incurred in the High Court before Ryan J., to include 85% of all solicitors' and counsel's costs up to the point of their discharge;
- award the appellant 100% of his expenses in respect of the hearing on quantum;
- make no order for High Court costs against the appellant in respect of any of the respondents;
- award the appellant 100% of his expenses in prosecuting the appeal; and
- make no order in favour of the respondents for the costs of this appeal.

This, I should stress, is my provisional view in respect of the costs' orders.

134. If the parties wish to argue for an alternative order, they may apply within seven days to the Office of the Court of Appeal to have the matter listed for a short hearing in relation to costs. At the same time, they should furnish the Court with a draft of the terms of the Order that they propose should be made. If a hearing on costs is requested and if, having heard the parties, the Court makes the order that it has, provisionally, indicated, then the party or parties who sought the costs' hearing may be at risk of having to pay the additional costs and expenses incurred as a result thereof.

135. As this judgment is delivered electronically, Haughton J. and Faherty J. have indicated their agreement with the reasoning and the conclusions reached herein.