APPROVED **[2023] IEHC 530**

THE HIGH COURT

Record No.: 2023/2003 P

Between:

RM

Plaintiff

-and-

SHC

Defendant

RULING of Mr. Justice Rory Mulcahy delivered on the 24th day of July 2023

Introduction

1. On 19 July 2023, I delivered judgment in the Plaintiff's application for an interlocutory injunction seeking to restrain the Defendant from terminating her employment. I granted an injunction in the terms set out at paragraph 67 of that judgment ("**the Judgment**").

2. This ruling addresses the Defendant's application for a stay on the Judgment pending her potential appeal to the Court of Appeal. It also deals with the costs of the injunction application.

Stay Pending Appeal

3. In **Okunade v Minister for Justice [2012] IESC 49, [2012] 3 IR 152**, the Supreme Court made clear that similar principles apply to the question of whether a stay should be granted pending an appeal as apply to the question of whether to grant interlocutory relief. Where a Court has granted an interlocutory injunction it will already have reached a conclusion on where the least risk of injustice lies. It is apparent, therefore, that a prospective appellant will face considerable hurdles in persuading the Court to grant a stay in a case where an interlocutory injunction has been granted. Matters may be different, of course, if and when an application is made to the appellate Court for a stay. However, *per*¸ Order 86, Rule 7 of the Rules of the Superior Courts, the application must nonetheless be made to this Court first.

4. As stated in *Delaney and McGrath on Civil Procedure (4th ed. 2018)*, the grant of a stay pending an appeal is a balancing exercise:

> *"The nature of the balancing exercise which the appellate court must carry out deciding whether to grant a stay was considered by Ryan P in* Star Elm Frames Ltd v Fitzpatrick *[2016] IECA 234. He stated that in seeking to balance the rights and interests of the successful and unsuccessful parties, the court has to recognise the entitlement of the unsuccessful party to appeal and at the same time acknowledge the right of the successful party to the benefit of the judgment obtained.*

5. In order to obtain a stay, therefore, it is necessary for an appellant to establish that he or she has arguable grounds for an appeal and that the balance of convenience lies in favour of granting the stay. In this regard, counsel for the Defendant identified, without prejudice to any further grounds of appeal that may be advanced in due course, a number of grounds which he says give rise to arguable grounds of appeal.

6. Firstly, he argues that the Court failed to have regard to all relevant matters in determining that it was premature to conclude that the relationship of trust and confidence had broken down between the parties and, in particular, factors which suggest that the relationship has broken down from the Plaintiff's point of view. In this regard, he pointed to the contents of the letter of 15 June 2022, the fact that the Plaintiff had considered it necessary to record the encounter with the Defendant on that date (which, of course, may be a factor which undermines trust and confidence on both sides), and the Plaintiff's objection to the application pursuant to s. 27 of the Civil Law (Miscellaneous Provisions) Act 2008.

7. I accept that all of these are factors which may ultimately be relevant to any relief which may be granted at the hearing of the action, but, in setting out certain other matters which might be relevant to that question at paragraph 65 and 66 of my judgment, it was not intended to suggest that there were no other factors relevant, only that I considered it would be premature to refuse an injunction which would otherwise be available on the basis that the employer/employee relationship is at an end such that the only relief which might be granted at trial is damages. Moreover, as pointed out by counsel for the Plaintiff, one of the reliefs sought by her is an injunction to prohibit reliance on a flawed disciplinary process. A permanent injunction to that effect may be obtained irrespective of the ultimate conclusion as to whether reinstatement is possible.

8. Secondly, counsel for the Defendant contends that the Court erred in concluding that the Plaintiff had established a strong case likely to succeed in circumstances where, as he put it "the Plaintiff got every procedure she asked for". That is an argument addressed at paragraphs 49 – 52 of the judgment.

9. Thirdly, he argues that the Court erred in concluding that there was not a clear distinction between the investigative procedure and disciplinary procedure to which the Plaintiff was subject. This seems addressed to an observation at paragraph 53 of the judgment.

10. For the purpose of dealing with this application, I am prepared to accept that the Defendant has met the threshold of establishing arguable grounds for appeal. However, there is nothing in the grounds of appeal identified which suggests an error so

fundamental that it affects my conclusions on the balance of justice already reached in the course of determining the injunction application.

11. In determining that a limited form of injunction should be granted, I formed the view that the least risk of injustice would be achieved by the Order proposed. If a stay were granted pending the appeal, then the Plaintiff would lose all the benefit of the injunction obtained. It is very clear, therefore, that in balancing the rights and interests of the parties, the application for a stay pending appeal should be refused.

Costs of the injunction application

12. The Plaintiff seeks an Order for her costs and relies in that regard on Order 99, Rule 3(1) of the Rules of the Superior Courts.

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

13. Reliance is also place on ss. 168 and 169 of the Legal Services Regulation Act 2015.

14. The Plaintiff says that she has won 'the event' and that costs should follow, and that it is possible "justly to adjudicate upon" liability for the costs of the interlocutory application at this stage. She refers to the decision of Butler J in **Thompson v Tennant [2020] IEHC 693**, in which the Court awarded the costs of an interlocutory injunction application notwithstanding that it appears to have accepted that the trial judge may be in a "better position" to assess the issue of costs. Butler J concluded that that did not mean that it was not possible for her to justly adjudicate the costs of the interlocutory application.

15. Counsel for the Plaintiff says that the issues which were relevant to the grant of the injunction will not be revisited at the full hearing and therefore costs should be dealt with now.

16. The Defendant, by contrast, states that it would be a manifest injustice if she ultimately won the case but was still required to pay the costs of the injunction application. She therefore asks that costs be reserved.

17. Although it is clear that a Court is now required to decide on the question of costs at the conclusion of an interlocutory application where it is possible to "justly" decide the issue, there is some authority for the proposition that interlocutory injunction applications are atypical interlocutory applications where it may *not* be possible to justly adjudicate on costs.

18. In **ACC plc v Hanrahan [2014] IESC 40**, the Supreme Court (Clarke J, as he then was) noted that the provisional nature of any conclusions on an interlocutory application created the possibility that some conclusions on such an injunction application would inevitably be revisited:

> *"3.5 However, the point made in Diamond is that those facts may well be the subject of detailed analysis at trial resulting in a definitive ruling as to where the true facts lie. In substance a plaintiff may well secure an interlocutory injunction by putting forward evidence of facts which, if true, would give him an arguable case and by succeeding on the balance of convenience test thereafter. However, if the facts on which the plaintiff's claim is predicated are rejected at trial, then the justice of the case may well lead to the conclusion that the interlocutory injunction was wrongly sought. It may be that, on the basis of the evidence before the Court at the interlocutory state, the injunction was properly granted. However, with the benefit of hindsight, and after the trial, it may transpire that the case for the granting of an interlocutory injunction was only sustained on the basis of an assertion that the facts were other than the true facts finally determined by the Court at trial. It follows that in such cases there may well be good grounds for not dealing with the costs at the interlocutory stage for the trial court may be in a better position to assess the justice of the costs of an interlocutory hearing when it has been able to decide where the true facts lie. It is not necessarily just that a plaintiff who secures an interlocutory injunction on the basis of putting up false facts should get the costs*

of that interlocutory injunction even if it was fairly clear that an injunction would be granted on the basis of the facts as asserted."

19. The Defendant also points to the fact that, as reflected at paragraph 41 of the Judgment, the Plaintiff modified her position at the hearing of the injunction application, and suggests that as a factor weighing in favour of costs being reserved.

20. In my view, I can justly adjudicate the issue of costs. In this regard, it seems to me that the Defendant's basis for seeking an order that costs be reserved seeks to conflate the question of whether she might ultimately succeed at trial with the question of whether she should be exposed to the costs of the injunction application. That is not the correct approach. The question of to whom costs should be awarded on an interlocutory application should be determined primarily by reference to that application.

21. In this case, I concluded that the Plaintiff had met the high threshold necessary to obtain the injunction she was seeking, that of establishing a strong case likely to succeed. I also concluded that the balance of justice lays in favour of the grant of an injunction. That conclusion was reached on the basis of a fiercely contested hearing, but not, for the most part, fiercely contested facts. The 'headline' evidence on the application was not in dispute at all. It seems to me that the question of whether costs can be justly adjudicated must be judged by reference to the state of the evidence which grounded the injunction application, albeit with a weather eye to the possibility that that evidence will prove to have been unreliable.

22. The Plaintiff has inarguably, therefore, 'won the event'. As noted by the Defendant, she has won it on narrower grounds than pleaded, having modified her position on the first day of the three-day hearing of the injunction application. In circumstances where the Defendant opposed the application *as modified,* it does not seem to me that this makes any difference.

23. If it emerges at trial that the Defendant was entitled to dismiss the Plaintiff then her remedy will be in damages – hence the requirement for an undertaking as to damages.

24. In all the circumstances, it would in my view be an injustice if the Plaintiff was not able to recover the costs of the injunction application. I will, therefore, make an Order for the Plaintiff's costs of the interlocutory injunction application to be adjudicated in default of agreement.

25. However, in order to best do justice between the parties in the circumstances, I will place a stay on the Order for costs so that, at the very least, the Order for costs in the Plaintiff's favour should be available for the purposes of set off to the Defendant should she succeed at trial.