THE HIGH COURT

[2023] IEHC 619
Record No. 2023 1059 P

BETWEEN

MARIA NESBITT

PLAINTIFF

AND

KEFRON LIMITED

DEFENDANT

Judgment of Mr. Justice Brian O'Moore delivered the 10th day of November 2023

1. This is my judgment on an application made by the plaintiff for her costs of these proceedings. It is agreed that the action became moot some short time after its initiation. Counsel for the plaintiff submits that in the very unusual circumstances of this case, she is entitled to her costs for a defined period (namely between the 17th of January 2023 and the 17th of April 2023). These proceedings were initiated on the 9th of March 2023, and served on that date.

2. This judgment will be arranged under the following headings: -

(a) the facts;

(b) the legal principles;

(c) decision

The facts

3. The plaintiff, Ms. Nesbitt, was and remains an employee of the defendant ("Kefron"). On the 3rd of January 2023 Ms. Nesbitt was asked to attend "an investigation meeting" (to be held on the 5th of January) for the purpose of discussing certain allegations against her. She was advised that the outcome of the meeting "could result in disciplinary action up to and including dismissal…".

4. Ms. Nesbitt was provided with documentation in advance of the meeting, which went ahead on the 5th of January. On the 11th of January 2023, Ms. Nesbitt was informed that Sarah Arthurs (who bears the title of "Head of People and Performance" in Kefron) had determined that there was a need to proceed to the next stage of the disciplinary process, and that a disciplinary hearing would be held on the 13th of January 2023 at 11: 30 a.m. with Ms. Arthurs and with Brian Coyle (head of commercial at Kefron). That meeting proceeded and on the 17th of January 2023 Mr. Coyle notified Ms. Nesbitt that the outcome of the disciplinary process was her dismissal, that her effective date of termination would be the 14th of February, and that she had a right to appeal the decision to dismiss her, but that must be done within five working days of her date of dismissal.

5. In fact, the following day, Ms. Nesbitt invoked the appeal procedure and stated that: -

"I would like to make a formal appeal to yourself, in relation this decision".

6. Ms. Nesbitt's notice of appeal was delivered by her on the 20th of January 2023, at which stage she had obtained legal advice. Ms. Nesbitt's notice of appeal sets out complaints about a failure to comply with natural justice and fair procedures during the disciplinary process, as well as other significant complaints about the way in which the process had been run. On the 23rd of January 2023, a further submission was made which included an appendix entitled: -

"Re: Haughey and Article 6 EHCR request".

7. On the same day, the 23rd of January 2023, a data access request was made by Ms. Nesbitt.

8. Also, on the 23rd of January 2023 Mr. Paul Kearns, the managing director of Kefron, noted Ms. Nesbitt's request for a complete rehearing in respect of the allegations upheld against her, stated that he could not make "an informed and fair decision" about this request until he had "a full and final submission of your appeal and until I have listened to your side of the story at an appeal hearing".

9. Mr. Kearns also gave a commitment that Ms. Nesbitt would remain on payroll for the duration of the appeal and until he had made his decision. She had been suspended since late 2022.

10. On the 30th of January 2023, Ms. Nesbitt sent a lengthy letter setting out a wide range of legal arguments about the disciplinary process. This had been facilitated by a decision by Mr. Kearns to extend the period within which Ms. Nesbitt could set out her position on the appeal. The letter, clearly prepared with the assistance of her solicitors, ran to eleven pages. The following day, the 31st of January 2023, Mr. Kearns notified Ms. Nesbitt that the appeal hearing would take place on Friday the 3rd of February 2023.

11. The day before the intended appeal hearing, on the 2nd of February 2023, Donal Reilly and Collins (Ms. Nesbitt's solicitors) wrote indicating a range of concerns about the fairness and legality of the process and required certain undertakings to be provided (such as, for example, that the appeal was a *de novo* hearing) by the 7th of February 2023. It was stated that if these undertakings were not provided by 5 p.m. on the 7th of February 2023, injunctive relief (including possibly interim injunctive relief) would be sought against Kefron. This letter, slightly confusingly, refers to the appeal hearing being fixed for the 10th of February 2023. In fact, Ms. Nesbitt did not attend the appeal hearing of the 3rd of February 2023, and on that same date (in other words the date after the first letter from the solicitors for Ms. Nesbitt) Mr. Kearns

of Kefron wrote suggesting that the rescheduled appeal hearing would take place on the 8th of February 2023.

12. On the 6th of February 2023, Donal Reilly and Collins wrote to Kefron stating that the 8th of February 2023 was "no longer a suitable date" for the appeal hearing, sought a reply to Ms. Nesbitt's letter of the 30th of January 2023 and to their own letter of the 2nd of February 2023, and suggested that (subject to replies to this correspondence) the 10th of February "is still feasible".

13. On the 7th of February 2023, Ms. Nesbitt made a further data access request to Kefron. On the same day, she wrote a letter (running to five pages to include the appendix) seeking specific classes of documentation from Kefron.

14. On the 7th of February 2023 Mr. Kearns wrote to Donal Reilly and Collins, pointing out that Ms. Nesbitt had not attended the appeal hearing on the 3rd of February 2023, and that she had also not attended the scheduled appeal hearing of the 8th of February 2023.

15. Mr. Kearns continued: -

> "I am the appointed appeals officer for the hearing and to date, I have not been involved in any stage of the investigation or disciplinary process. I can therefore assure you that Maria is being provided with a fair and unbiased appeal hearing. Allegations pertaining to the breaches of policies are clearly stipulated in the investigation invitation and also in the investigatory outcome report which was attached to the invitation to the disciplinary hearing on 11th of January 2023".

16. The response from Donal Reilly and Collins of the 9th of February 2023 completely dismissed the contention that Ms. Nesbitt was being provided with a fair and unbiased appeal hearing. Once again, a series of undertakings were sought by Donal Reilly and Collins about the nature of the appeal hearing and the ability to cross – examine the person making allegations

against her. In addition, questions were raised about the "standard and burden of proof (Ms. Nesbitt) is required to address in her submissions….".

17. The letter concluded: -

> "Our client, as you are aware, is still collecting evidence, including that as referred to above and in her Data request of the 7th February 2023, and respectfully, it appears you may need legal advice on fair procedures and natural justice requirements. Our client still requires the clarity she has sought. At this point assuming there will not be undue delay with the evidence we would suggest the 20th or the 21st of February 2023 to give both parties required time to prepare. This is the first day our client is scheduled and as you can see it gives you ample time to resolve the outstanding matters".

18. A further letter was sent by Donal Reilly and Collins on the 14th of February 2023, stating that Ms. Nesbitt "does not consent to a hearing proceeding for which she is not prepared, but at the same time insists on the hearing happening as soon as possible". In a way, this summarises the nature of the correspondence which took place around this time. Ms. Nesbitt (or her solicitors) are insisting on assurances, clarifications and documents, whilst simultaneously insisting that the appeal hearing not go ahead though maintaining that Ms. Nesbitt wants the appeal dealt with without delay.

19. On the 16th of February 2023, and referring to Ms. Nesbitt's solicitors' letters of the 9th and 13th of February 2023, Mr. Kearns fixed yet another date for the hearing of the appeal. The appeal was to be heard on Monday the 20th of February; this was the fourth scheduled appeal hearing. In his letter of the 16th of February, Mr. Kearns made certain proposals (which I need not go into in detail here) as to how the concerns of Ms. Nesbitt's solicitors might be addressed. In their response of the 17th of February 2023, and while rejecting certain of the proposals made by Mr. Kearns, Donal Reilly and Collins agreed to attend a hearing on the 23rd of February 2023. This, they proposed, would be a "Preliminary Hearing on the relevant points….". This

letter went on to make a number of complaints about the way in which the entire disciplinary process (in particular the appeal hearing) had been handled by Mr. Kearns.

20. The preliminary hearing proceeded on the 20th of February 2023. At it, Ms. Nesbitt read out a submission which ran to 32 typewritten pages. This hearing was followed, two days later, by a letter from Donal Reilly and Collins of the 22nd of February 2023 again complaining about the disciplinary process, purporting to add grounds of appeal to the effect that the entire disciplinary process was an abuse of process and was "calculated to defame Maria Nesbitt" but further noted that Mr. Kearns had closed the meeting on the 20th of February by saying the following: -

> "I have listened to it clearly. I am taking all this on board. I will get back to you with a decision. Our DPO is still gathering the information you were looking for. We did say it would take 30 days. As soon as we get this, we will send it on to you".

21. On the 7th of March 2023, Donal Reilly and Collins once again wrote to Mr. Kearns, asking for the information which was to be provided under the Data Protection Regime, and stating: -

> "We trust we have made your decisions on procedure, and furnished us with the outstanding evidence, we will this time be given sufficient time to prepare for the hearing".

22. On the same day, the 7th of March 2023, Mr. Kearns gave his decision on procedure. He concluded: -

> (i) it was not necessary for a third party to hear the appeal and, as a matter of a fair procedures, it was not necessary to have a rehearing of evidence;
>
> (ii) Ms. Nesbitt had been provided with the relevant statements from employees as part of the investigation and had this information prior to the original disciplinary hearing.

She did not request the attendance of any witnesses at the disciplinary hearing or seek the right to cross – examine any witnesses at that stage;

(iii) the request to cross – examine was not limited to asking specific questions of a small number of witnesses. Instead, it was the right to cross – examine eleven named witnesses (including Mr. Kearns). He felt this was not a reasonable request in the circumstances and was not necessary or appropriate for a fair appeal hearing;

(iv) Ms. Nesbitt had admitted to wrongdoing as part of the investigation, the disciplinary hearing, and in her submission of the 20th of February. This is something which, in terms of analysis, Mr. Kearns could determine without the need for the examination of witnesses;

(v) he concluded: -

> "At this stage, I have received a lot of information from you and your solicitor related to her appeal. I am satisfied that I have received sufficient information to conclude the process, but I also want to ensure that you have had appropriate opportunity to discuss your grounds of appeal with me directly as your statement at the hearing on 20th February appeared to mainly address procedural issues. If you wish to meet with me again, I am willing to schedule a further meeting on 15th of March 2023…. please let me know by COB 9th March 2023 if you wish to attend a meeting on that date. If I do not hear from you by 10th March date, or if you confirm you wish me to proceed to finalise my decision without a further meeting, I will proceed to finalise the appeal outcome. No adverse inference will be drawn by you not wishing to attend a further meeting. For the avoidance of doubt, any further meeting will not involve a full rehearing (*de novo* hearing) as requested by you and your solicitors".

23. On the 9th of March 2023, these proceedings issued and a notice of motion returnable for the 27th of March 2023 was also served. Specific undertakings were sought, which unless given would result in an application for either short service of the motion or interim injunctive relief. These undertakings were: -

> "(i) not take any steps in the determination of the plaintiff's appeal of her dismissal pending the hearing on the return date:
>
> (ii) continue making payments to the plaintiff as you have heretofore pending the hearing on the return date".

24. On the 10th of March 2023 Byrne Wallace, the solicitors for Kefron, stated they would take instructions and asked that no further steps be taken in advance of those instructions being provided.

25. On the 13th of March 2023, Ms. Nesbitt's solicitors extended to 4 p.m. that day the period within which the sought undertakings were to be provided.

26. Late on the 13th of March, it was indicated by Byrne Wallace that the appeal meeting proposed for the 15th of March would not take place, and that Ms. Nesbitt would receive reasonable notice in advance of any further appeal meeting "which may be proposed".

27. The response from Donal Reilly and Collins, the following day, was to the effect that: -

> "If you change your mind, and decide to furnish the undertaking requested, please furnish same by 4 p.m. on Wednesday the 15th of March 2023. Please note that in the event that your client fails to give the said Undertakings by 4 p.m. on the 15th of March 2023, we will apply on an *ex parte* basis without further notice to you or your client for an advance return date and/or a short service in respect of same and/or injunctive relief from the terms of your letter of the 9th of March 2023 and this letter and our previous letters will be relied on to fix your client with the costs of same".

28. On the 15th of March, Mr. Kearns wrote to Ms. Nesbitt informing her that her appeal should be upheld, other than in relation to matters to which she had admitted. Those matters are set out in the letter. They are as follows: -

> "I note that you admitted having a pretend meeting with Paula Carvahlo, although you provided a reasoning for doing so which is noted. I note that you also admitted to putting your fingers up behind Mark Sutcliffe's back on 9th of December 2022. You also gave reasoning for your behaviour stating that this was a 'one off'. I note that you have also offered an apology to Martin Gorman".

29. Taking all this into account, Mr. Kearns came to the view that this was not a case that should result in dismissal, and that the conduct of Ms. Nesbitt "does not amount to gross misconduct or gross indecent behaviour".

30. Mr. Kearns went on to state that a meeting would take place on the 23rd of March 2023 to determine what, if any, sanction should be imposed on Ms. Nesbitt and also to discuss her return to the workplace.

31. Also on the 15th of March 2023, Byrne Wallace communicated to Donal Reilly and Collins that the proceedings were now moot and should be struck out with no orders to costs.

32. The response, on the 16th of March 2023, was that it was "too early for us to discuss the issue of costs because we are not satisfied that your client's letter disposes of the matters in dispute". Donal Reilly and Colins also stated the following: -

> "You will note that we are seeking damages from your client for defamation in our client's plenary summons. You have not made any proposals in respect of those damages. We identify the words complained of for you in this letter pending delivery of our statement of claim as we understand that you are operating in a vacuum in this regard. We intend to join the individual publishers of these statements personally to the

proceedings in due course unless you were instructed that the company will indemnify the individual publishers of the publications set out below….".

33. Ultimately, this suggestion that the proceedings would continue (and, indeed, involve the joinder of further parties) in order to ventilate Ms. Nesbitt's rights with regard to the alleged defamation of her was not pursued. The letter, responding to a simple communication to a simple communication to the effect that Ms. Nesbitt would not be dismissed and that her appeal to that extent at least had been upheld, runs to five pages and concludes: -

> "We hereby formally call on you to undertake an open correspondence by 4 p.m. on 20 inst that your client will, pending the determination of our client's application for an interlocutory injunction: -
>
> (i) vacate the finding that she engaged in behaviour that was 'not appropriate'; and
>
> (ii) not take any further steps in the disciplinary process against her.
>
> Please note that, in the event that the above undertakings are not given by that deadline, our client will apply on an *ex parte* basis that further notice to you for an advance return date and/or short service in respect of same and/or injunctoral relief in the above terms and this letter will be relied on to fix you with the costs of same".

34. By letter of the 23rd of March 2023 Ms. Nesbitt agreed to attend a meeting. Unfortunately, this confirmation was provided too late for the meeting to proceed on the 23rd of March itself. On the 24th of March, Mr. Kearns proposed a meeting on the 3rd of April and asked Ms. Nesbitt to confirm by the 29th of March she would attend that meeting. In fact, it was not until the 31st of March that Ms. Nesbitt, through her solicitors, and after a reminder from Mr. Kearns sent earlier that day, stated that she would attend the meeting with Mr. Kearns.

35. The meeting of the 3rd of April 2023 went ahead, notwithstanding the lateness of Ms. Nesbitt's confirmation that she would attend. The meeting appears to have been a productive one, and on the 12th of April 2023 Mr. Kearns determined that the appropriate outcome was "a

first written warning". Mr. Kearns informed Ms. Nesbitt that he had arranged a meeting for the 17th of April 2023 to discuss the practicalities of her return to work. Notwithstanding correspondence from Donal Reilly and Collins expressing unhappiness about the date of this meeting (which coincided with the listing on a Monday of Ms. Nesbitt's application for injunctive relief) the meeting proceeded, and Ms. Nesbitt was to return to work on the 2nd of May 2023. This occurred and a costs hearing was listed for the 15th of May 2023.

36. I am not impressed by the reasons given by Donal Reilly and Collins for their unhappiness about Kefron's suggestion that the meeting should take place on the 17th of April. It is simply fanciful to suggest (as Donal Reilly and Collins did in the correspondence of the 17th of April 2023) that the court would have required her lawyers to take urgent instructions from her about anything, in circumstances where the issues agitated in the proceedings were effectively resolved and where Ms. Nesbitt was unavailable because she was attending a meeting about her return to work.

37. While this summary of the facts is lengthy, it is a bare distillation of the information to be found in the booklet of correspondence provided to the court for the purpose of the costs argument. That booklet runs to 264 pages. While its contents are reflected in this summary all of the correspondence has been carefully considered by me for the purpose of this judgment, as have the contents of the papers seeking interlocutory relief.

The legal principles

38. Ms. Nesbitt's counsel provided written submissions for the purpose of the application for costs. There was also a book of legal authorities put together by Ms. Nesbitt's counsel. At the oral hearing, the submissions focused on the judgment of Murray J. in *Heffernan v. Hibernia College Unlimited* [2020] IECA 121. Counsel was unable to argue that the facts of *Hibernia* were analogous to the facts of this case. He did, however, rely upon the principles to be taken from *Hibernia*, and in particular the fact that the Court of Appeal granted a plaintiff the costs

of an application for interlocutory relief up to and including the date by which an offer from the defendant (effectively conceding much of the reliefs sought at the interlocutory stage by the plaintiff) remained open for acceptance.

39. It seems to me that the principle of general application to be taken from *Heffernan* is seen in para. 37 onwards in the judgment of Murray J. In this portion of the judgment, Murray J held : -

> "37. This leads to a second consideration which falls to be taken into account. A party who has invested significantly in bringing an interlocutory application and who as a consequence obtains a concession from his opponent that would not otherwise have been tendered is entitled in many circumstances to expect that it will recover the costs it has incurred in securing that concession. This is particularly the case if the offer is made at a very late stage in the process (see Irish Bacon Slicers Limited v. Weidemark Fleischwaren GmbH).
>
> 38. In this case, the offer which the trial judge determined to be dispositive of the application for an injunction was made two working days before the hearing, and after the first listing of the application for an injunction. If the reason the injunction was not being entertained was not consequent upon any appraisal of the merits of that application but simply because of the benefit obtained by the appellant by virtue of the offer and given in particular that the respondent decided to abandon its suggestion that the costs be reserved to the hearing, the Court ought to have taken account of the cost incurred by the appellant in obtaining that offer. The offer would not have been made but for the proceedings and the application for an injunction. It was made at a very late stage, and after the application for an injunction had been listed for hearing on 27 August (with the consequence that significant costs had already been incurred by the appellant)".

40. On this analysis, the question therefore is whether or not the decision of Mr. Kearns on appeal is something that resulted from the bringing of the application for injunctive relief. I am not satisfied that such a finding can be made. Mr. Kearns had, for many weeks, been seeking to get on with the appeal. The submission made to me by counsel for Ms. Nesbitt, to the effect that the process had dragged on from mid – January and was only determined in mid – March (presumably, it is argued, as a result of the bringing of the proceedings) ignores entirely the fact that constant deferrals of the appeal hearing arose from a number of factors. These included not only the repeated and growing demands on the part of Ms. Nesbitt for assurances and documentation, but also (on at least one occasion) Ms. Nesbitt simply not turning up for an appeal hearing.

41. Counsel for Ms. Nesbitt also lays stress on the fact that the full nature of her case had been set out in the grounding affidavit seeking interlocutory relief and implicitly asked me to draw the conclusion that it was in consideration of this documentation and Mr. Kearns decided to allow the appeal as communicated by him in his letter of the 15th of March. However, the grounding affidavit was little more than to set out the arguments and facts which can be found in the correspondence commencing in January 2023. I have not been directed to some further fact or argument deployed in the grounding affidavit from which I can deduce that Mr. Kearns found himself compelled to allow the appeal.

42. Finally, in his oral submissions, counsel for Ms. Nesbitt referred to Mr. Kearns' decision as being a "complete volte face" and a capitulation on the part of Kefron. I do not think this is a fair or accurate characterisation of how Kefron behaved. Kefron afforded Ms. Nesbitt her right of appeal, it kept her on the payroll until that appeal was concluded, it engaged with Ms. Nesbitt's request for information (though ultimately nothing appears to have come of that, given Mr. Kearns' decision) and it conducted a preliminary procedural hearing to consider Ms. Nesbitt's complaints about the disciplinary and appeal processes. I am not asked to determine

the underlying merits of Ms. Nesbitt's action and, even if I were, I would hesitate to do so; see the authorities cited by Murray J. in *Heffernan*, at para. 41 and following.

43. Finally, and indeed reflective of the comments by Murray J. in *Heffernan* at para. 42 of his judgment, counsel for Ms. Nesbitt submits that of the reliefs sought in the motion Ms. Nesbitt succeeded in obtaining all (or almost all) of these as the result of the decision of Mr. Kearns and is therefore entitled to her costs. Again, were I to accept this argument it would involve me finding that the decision of Mr. Kearns was as a result of the bringing of these proceedings. For the reasons I have outlined earlier, I do not make such a finding. In addition, this submission of counsel ignores the important fact that the motion brought on behalf of Ms. Nesbitt (and the undertaking sought by her solicitors) essentially sought that the appeal process, be stopped dead in its tracks. As counsel for Kefron pithily and accurately put it, the reversal of Ms. Nesbitt's dismissal was achieved not because of the proceedings but despite them.

Decision

44. For the reasons set out during the course of the discussion of the authority relied upon most heavily by counsel for Ms. Nesbitt, I have decided that this is not a case in which Ms. Nesbitt is entitled to her costs of the proceedings. The proceedings were effectively at an end when Mr. Kearns gave his decision on the 15th of March 2023 allowing the appeal of Ms. Nesbitt against her dismissal. While there was some activity after that date, it did not in itself justify the maintenance of these proceedings. Certainly, had proceedings been issued after the letter of the 15th of March they would have been singularly difficult to justify. I view as equally difficult to justify any claim for costs for the maintenance of the proceedings after Mr. Kearns' letter of that date.

45. While not determinative, it is at least instructive to consider the reaction of Donal Reilly and Collins to the suggestion by Byrne Wallace (on the 15th of March 2023) that the proceedings were now moot. Rather than accept that Mr. Kearns' decision of the 15th of March

had fundamentally changed Ms. Nesbitt's position, instead (as I have already noted) there was a very lengthy explanation by Ms. Nesbitt's solicitors as why she was entitled to damages for defamation in the current proceedings, and also a reservation of rights to issue proceedings against Kefron in respect of "malicious falsehood pursuant to s. 42 of the Defamation Act 2009….". This futile effort to breathe life into the existing proceedings suggest a knowledge that they were, in fact, rendered utterly defunct as a result (ironically) of Ms. Nesbitt's successful appeal. Though not emphasised in the oral submissions, one argument raised by Donal Reilly and Collins in the letter to which I have just referred (and designed to justify the issuing of the proceedings in the first place) was that Mr. Kearns had reached a very different view about the merits of complaint against Ms. Nesbitt than had the person conducting the original disciplinary hearing. Donal Reilly and Collins argued, therefore, that it was the proceedings that had led to this different view being formed. Of course, this argument entirely ignores the whole point of an appeal, which is that an appeal officer can come to a different view than did the first instance decision maker, even on the same facts.

46. Finally, while in their correspondence Ms. Nesbitt's solicitors sought to justify the issuing of proceedings on the grounds that the appeal might have turned out differently (and a successful outcome for her could not have been presumed) it remains the case that Ms. Nesbitt invoked the appeal process in the first place and could be expected to see it through to its conclusion. Had the appeal process thrown up a different result, it would then have been open to Ms. Nesbitt to seek the immediate intervention of the court as her lawyers had threatened to do on numerous occasions prior to the issuing of these proceedings.

47. Having decided that Ms. Nesbitt is not entitled to her costs of the proceedings, the question arises at to what order should be made. The order proposed by counsel for Kefron at the hearing for costs appears to me (in the light of my finding) to be appropriate. While Kefron's formal position was that it sought its costs, there is much force in its counsel's

observation that the Court would be slow (given the continuing employment of Ms. Nesbit by Kefron) to make such an order. I will therefore make no order as to the costs of these proceedings.