[2020] IEHC 422

THE HIGH COURT

[2020 No. 3649 P.]

BETWEEN

JOHN MADDEN

PLAINTIFF

AND

LOUTH COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 21st day of August, 2020

1. On 30th June, 2020 for the reasons given in a written judgment, [2020] IEHC 319, I decided that I must refuse an application on behalf of the plaintiff for an interlocutory injunction restraining the defendant from making a promotion from a panel on which the plaintiff had not been included.

2. The defendant now asks for an order that the plaintiff should pay the costs of the motion. The plaintiff argues that the costs should be reserved to the trial judge, alternatively that they should be made costs in the cause. In the further alternative, as a last stand, as it were, the plaintiff urges that execution on foot of any costs order should be stayed pending the final determination of the action.

3. My judgment on the substantive application was delivered electronically and in accordance with the practice direction the parties made their arguments in relation to costs in writing.

4. Unusually, the plaintiff's arguments were made by letter addressed to the defendant's solicitors rather than in the form of a submission to the court. That letter deals in the main with the applicable legal principles but goes on to appeal to the defendant, as the plaintiff's employer, to take into account the impact an order for costs against him would have on what it said to be the plaintiff's modest enough level of earnings, which is known to the defendant. While there is no evidence of the plaintiff's earnings I accept that the financial burden on a fire-fighter of an order for the costs of a two day High Court injunction application would be very heavy. I understand the reference to the plaintiff's means to be an *ad misericordiam* appeal to the defendant rather than a submission to the court, but in case I am wrong in that, the means of the parties are not matters that can properly be taken into account in the exercise of my judicial discretion as to where the costs should lie.

5. The plaintiff's solicitors' letter sets out a long quotation from the judgment of Laffoy J. in *O'Dea v. Dublin City Council* [2011] IEHC 100 and refers to the judgments of McDonald J. in *Paddy Burke (Builders) Limited v. Tullyvarraga Management Company Limited* [2020] IEHC 199 and of Haughton J. in *McFadden v. Muckno Hotels Limited* [2020] IECA 110. Without saying why, it is submitted that "*at this juncture it is not possible for the court to 'justly' adjudicate on the issue of costs*." It is also submitted – or perhaps it is a complaint against the defendant – that the refusal of the defendant to give an undertaking not to make promotions from the panel left the plaintiff with no option but to

make the application. It is said that the plaintiff was unaware of the defendant's intention to establish a new panel in 2020 until the affidavits in response to his motion were filed.

6. The submission on behalf of the defendant was more focussed, pointing to the findings in my judgment that I was not satisfied that the plaintiff had made out a fair issue to be tried, still less a strong case, that the notice party's decision was invalidated by the fact that he spoke to Mr. O'Connor; or that the plaintiff had established a sufficient link between the interlocutory order and the substantive relief claimed in the action; and to the assertion by counsel for the plaintiff, which was noted in the judgment, that if the interlocutory order was not made the action was unlikely ever to come to trial.

7. The defendant's submission sets out the new framework in s. 169 of the Legal Services Regulation Act, 2015 and the new O. 99, r. 2(3) of the Rules of the Superior Courts and refers to the judgments of McDonald J. in *Paddy Burke (Builders) Limited v. Tullyvarraga Management Company Limited* [2020] IEHC 199 which approved the statement of the relevant principles set out in the judgment of Barrett J. in *Glaxo Group Ltd. v. Rowex Ltd.* [2015] 1 I.R. 185. Specifically, the defendant relied on the distinction made in those cases between, on the one hand, cases in which the interlocutory application turns on issues in respect of which a different picture may emerge at trial, and on the other, cases in which the application turns on matters such as the adequacy of damages or the balance of convenience which will not be addressed again at the trial.

8. In this case, it is said, all that there is to be known about the circumstances in which the impugned decision came to be made is known. Moreover, it is said, this is a case in which there will not be, or at least it is unlikely that there will be, a trial.

9. As to the plaintiff's submission that execution on foot of any order should be stayed pending the final determination of the action, the defendant argues that this is a tactical application which ought not to be acceded to in the absence of evidence of a *bona fide* intention on the part of the plaintiff to bring the action to trial.

10. The starting point is that the court is obliged by O. 99, r. 2(3) to 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.

11. This is a case which, for the reasons given in my judgment, is unlikely to come to trial. Even if it were to come to trial, it is not a case in which the trial judge would be in a better position to make a just decision as to where the costs should lie. I accept the submission on behalf of the defendant that the facts have been established and that as far as the facts are concerned there is no prospect that a different position will emerge at trial.

12. In my judgment of 30th June, 2020 I set out the facts in considerable detail. The essential facts are uncontested. In September, 2019 the defendant conducted a closed competition within the Louth Fire Service to establish a ranked panel of suitable candidates for promotion to the position of sub-officer. The plaintiff was one of eight

applicants, four of whom were put on the panel. The plaintiff was not one of those four. The panel was established on 4th October, 2019. The plaintiff appealed against the decision of the interview board not to put him on the panel, specifically against the departure by the interview board from the marking scheme which it had been asked by the defendant to follow. It is clear that the interview board did depart from the marking scheme. The plaintiff's appeal was decided against him on 18th March, 2020.

13. By these proceedings the plaintiff sought a declaration that the decision of the notice party was irregular and flawed, specifically on the ground that the notice party in the course of his consideration of the appeal spoke to the chairman of the interview board. It is clear that the notice party did speak to the chairman of the interview board and there is no contest as to what was said by each to the other.

14. In advance of the competition it was expected that three vacancies would arise over the twelve month life of the panel and one of those positions was more or less immediately filled. Promotions from the panel were suspended pending the determination of the plaintiff's administrative appeal and at the conclusion of that process a second position of sub-officer was filled. That left one position to be filled between May, 2020 and the anniversary of the establishment of the panel at the end of September or the beginning of October, 2020 and it was to the filling of that position that the motion was directed.

15. As I explained in my earlier judgment in this case, the position which the plaintiff sought to keep open was not a position for which he could assert any claim of right or even a probability that he would get it if it were kept open. That one position was one for which, irrespective of the outcome of his challenge to the notice party's decision, the plaintiff would have had to compete on an equal footing with all other qualified firefighters in the service. The eventuality against which the plaintiff sought to keep the position open was that he would win his action, somehow or other secure a rehearing of his administrative appeal, and win that new appeal. Thereafter he would have had to compete for inclusion on a new panel, succeed in the competition, and be placed second on the new panel. If the plaintiff were to be ranked first on the new panel, he would fill the new vacancy which is expected to arise in 2021 and if he were to be ranked third on the new panel, the position kept open would be filled by his colleague ranked immediately ahead of him. The variables were so many and the prospects so uncertain that I was wholly unconvinced that the balance of justice could be resolved in favour of keeping the position open on the off-chance.

16. The issue on the plaintiff's motion for an interlocutory injunction was whether the defendant should be enjoined from filling the position of sub-officer with Louth Fire Service which would arise in July, 2020. That was decided against the plaintiff. The position will by now have been filled and the issue will never be revisited. I must reject the plaintiff's submission that it is not possible to justly adjudicate upon the liability for costs.

17. For the reasons given in my judgment of 30th June, 2020 I concluded that the plaintiff had not established that there was a fair issue to be tried, still less a strong case which

was likely to succeed, that he would secure a permanent injunction. Separately, for the reasons then given, I was satisfied that the balance of justice would have been overwhelmingly against the making of the order sought. The defendant was entirely successful in its opposition to the application. I find nothing in the particular nature or circumstances of the case which would justify a departure from the general rule that the successful defendant is entitled to an award of costs against the unsuccessful plaintiff.

18. The defendant's refusal to give the undertaking sought has been vindicated. When the undertaking which the plaintiff sought was refused, the plaintiff had two options. He could apply for an inunction or he could recognise the position taken by the defendant. For the reasons given, I have concluded that he made the wrong choice.

19. I come now to the plaintiff's application for a stay on execution of the order for costs. The defendant's submission in relation to costs suggests that by the judgment of 30th June, 2020 the plaintiff's challenge to the decision of the notice party was dismissed. That is not correct. While the judgment identified a number of potential difficulties in principle with the challenge to the decision, not least having regard to how the action was constituted, and found that the plaintiff had not made out a *bona fide* issue as to his entitlement to a permanent injunction, he is perfectly at liberty to prosecute his action for a declaration and for damages. The wisdom of doing so is a matter for the plaintiff and his advisers.

20. The submission on behalf of the defendant refers to *Redmond v. Ireland* [1992] 2 I.R. 362 and *Irish Press plc v. Ingersoll Irish Publications Ltd*. [1995] I.L.R.M. 117 which concerned applications for a stay pending appeal. The point was not contested by the plaintiff but in principle I think that different considerations apply in the case of an application for a stay on execution of an order for costs on an interlocutory application than to a stay on execution of a final order, whether it be an award of damages or of costs, pending an appeal. It seems to me the practice in recent years in which awards of costs on interlocutory applications have been made has been to stay execution until the final determination of the action. This acknowledges the possibility that the losing party on the interlocutory motion may be the eventual victor in the action and forestalls any risk that interlocutory costs orders might be used to stifle actions.

21. Having regard to the plaintiff's declared intention in the course of the hearing as to the prosecution of the action if the motion were to fail, I agree that the plaintiff may hope to secure some tactical advantage by having execution of the order for costs stayed, but I do not see what that tactical advantage might be. If the plaintiff fails to deliver a statement of claim, the defendant is entitled to move to have the action dismissed for want of prosecution. It would be a very high wire strategy to bring the action to trial in the hope that the defendant – who would in the meantime have been put to further expense – might be prepared to waive the costs order it has.

22. I think that the stay application is probably of little practical consequence. If execution on foot of the costs order is stayed, and the plaintiff does not move the action on, the defendant has its remedy under the rules. If the costs order is not stayed, the plaintiff,

with moderate effort, could probably get the action on before the bill is drawn and adjudicated. I think that the balance of justice is in favour of a stay.

23. There will be an order for payment by the plaintiff of the defendant's costs of the motion with a stay on execution pending the final disposal of the action.