THE HIGH COURT

[RECORD NO. 2017/812P]

JOHN WARD

PLAINTIFF

-AND-

AN POST

DEFENDANT

RULING of Mr. Justice Heslin delivered on the 7th day of July, 2021.

1. This short ruling in relation to the issue of costs must be read in conjunction with the very lengthy judgement delivered by this court on 11 June 2021.

2. For the reasons set out in that judgment, the plaintiff's claim was dismissed in its entirety. The plaintiff was wholly unsuccessful and it can fairly be said that the defendant prevailed entirely in the defence of the claim which was commenced by way of a Personal Injuries Summons dated 08 September 2017. The issue of costs is dealt with in the Legal Services Regulation Act of 2015 (the "2015 Act") and in Order 99 of the Rules of the Superior Courts and I have had regard to both.

3. Written submissions, as regards costs, were furnished by both sides and I have carefully considered these. On behalf of the plaintiff it is submitted that this court should make no order as to costs.

4. The plaintiff's submissions refer *inter alia* to the manner in which the proceedings progressed and the securing by the plaintiff of injunctive relief, which remained in place for in excess of two years prior to the trial. Given the failure of the plaintiff's claim on all counts, the

fact that interlocutory orders were secured prior to the trial offers no support for the plaintiff's submission with regard to how costs should now be dealt with.

5. The plaintiff also submits that the defendant's conduct during the course of the proceedings increased the length of the litigation generally, as well as that of the trial. At this juncture it is appropriate to observe that there is nothing which would entitle me to take such a view.

6. On behalf of the plaintiff, particular emphasis is laid on this court's discretion in respect of costs and reference is made *inter alia* to the judgement of Mr Justice Murray in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183*,* wherein, at para. 19, the learned judge stated that the *"general discretion of the court in connection with the ordering of costs is preserved (s.168(1)(a) and O.99,r.2(1)".*

7. It is submitted that a successful party will not *ipso facto* be awarded the entirety of its costs, reliance being placed on the judgement of Twomey J. in *Byrne v. Revenue Commissioners* [2021] IEHC 415 in that regard. The submission is also made that the defendant failed to engage in mediation with the plaintiff and that this should also be taken into account, pursuant to section 169 of the 2015 Act.

8. On behalf of the plaintiff, reliance is also placed on the decision of Mr Justice Simon's in *Re Independent News and media plc* [2021] IEHC 232, wherein the learned judge observed that on occasion it will be necessary to depart from the default position that a successful party is entitled to their costs, where the "*constitutional right of access to the courts will, in some instances , be better served by making a different form of course the order."* In that case, the court cited the example of where the successful party had prolonged the proceedings unnecessarily by unreasonably pursuing or contesting certain issues. It is appropriate to stress, however, that no such consideration arises in the present case.

9. The submission is also made that the majority of employment-related litigation is captured by a no-costs regime, that the defendant had a significant litigation advantage and that to award costs in favour of the defendant has the potential to have what is described in the plaintiff's submissions as "*a serious chilling effect on other litigants who find themselves unable to avail of the statutory regime."*

10. The "*Conclusion*" section in the plaintiff's submissions regarding costs summarises, as follows, the reasons why this court is urged to make no order for costs or, in the alternative, to award the defendant only a portion of its costs:

> *(i) The defendant refused to engage in mediation.*
>
> (ii) *Even when the plaintiff secured an injunction restraining the process the subject of these proceedings the plaintiff chose to pursue a rigid defence strategy notwithstanding the many requests by the plaintiff to engage in either mediation or operate an amended version of the ASMP that would take account of and facilitate his condition.*
>
> (iii) *he matter is an employment law one where traditionally each party bears its own costs."*

11. With regard to the foregoing submissions, the fact that the plaintiff is employed by the defendant does *not* make the proceedings an *"employment law"* claim. These proceedings were personal injuries proceedings commenced by means of a Personal Injuries Summons. Bullying and harassment were said to have caused the plaintiff to suffer injury and the defendant was also said to have breached obligations to the plaintiff, including under statute, contract and at common law, resulting in injury and loss to the plaintiff, including as regards the operation by the defendant of the relevant Attendance Support & Management Process (i.e. "ASMP" policy). All such claims were dismissed, having regard to the facts which emerged from an

analysis of the evidence and the outcome of the case turned on same, having regard to well-established legal principles.

12. The plaintiff was entirely unsuccessful in substantiating any claim. In circumstances where the defendant had no liability whatsoever to the plaintiff, the defendant cannot fairly be criticised for refusing to engage in mediation. It is clear, however, that on numerous occasions the defendant made its position as regards costs very clear and the defendant draws attention, in its submissions, to the contents of certain correspondence (copies of which accompanied the submissions) as follows.

13. In a letter dated 7 September 2017 which was sent to the plaintiff's solicitors, the defendant stated *inter alia*: "*...we fail to see the necessity or urgency for a High Court application which will once again expose both your client and An Post to burdensome and unnecessary costs".*

14. In a letter sent by the defendant to the plaintiff's solicitors on 11 October 2017, the defendant stated *inter alia*:

> *" There is no reason for unnecessary costs to be incurred but we regret to note that thus far, despite repeated averments to the contrary, your client insists that the ASMP process is something that it is not.*
>
> *This letter will be relied upon together with previous correspondence and the Affidavits already sworn by our client in respect of the question of costs of the said interlocutory application."*

15. In a letter dated 2 April 2019 to the plaintiff's solicitors, the defendant made an "open offer" proposal in the following terms:

> "*In one final effort to attempt to find a resolution our client is willing to consider the following:-*

1. *That upon the withdrawal of the proceedings claiming damages for personal injuries, each party agreeing to bear their own costs to date, our client will engage the services of a facilitator to attempt to deal with Mr Ward's grievances in accordance with the normal grievance procedure and during that time the ASMP will be suspended but that suspension will depend exclusively upon Mr Ward's full cooperation with the facilitator.*
2. *We suggest that a facilitator might be someone with appropriate experience in employee relations matters and we are amenable to some discussion with you as to who the person might be. We wish to emphasise however that this is not an offer or a proposal to negotiate terms with Mr Ward or for the purpose of agreeing any sum by way of damages and it is important that Mr Ward fully understands the nature of the engagement that is proposed.*

16. By letter dated 19 December 2019 to the plaintiff's solicitors, the defendant stated*, inter alia*, the following:-

"Lest there be any misunderstanding as to our client's position it is trying to find a way in which your client may be enticed back into the contractually agreed process that we are confident will be upheld by the Court at full hearing but that also affords your client an opportunity we do feel opportunity both to put forward any legitimate grievance he may have and to otherwise secure assistance from the Company and its Occupational Health Service.

The inevitable consequence of the successful defence of the proceedings is that all of the costs, including the costs of several unnecessary interlocutory applications, are likely to be visited upon your client who clearly does not have the means to discharge them. Our client has no desire whatsoever to put your client in that position. For the avoidance of any doubt our client's open offer to your client is as follows:-

1. *The proceedings herein to be withdrawn on the basis that both parties bear their own costs. That proposal, in itself, represents a significant concession by our client in the circumstances of this case.*
2. *That your client re-enters the ASMP, with immediate effect but he is assured that any cogent medical evidence, preferably from a treating psychiatrist, will be treated sensitively and the guidance of the acting Chief Medical Officer will be immediately sought in respect of your client's continuing capacity. No assurance can be given as to the outcome but your client's position will be explored sympathetically.*
3. *If, as part of that process, the assistance of a facilitator might be in aid of your client's full participation in the said process then our client will exceptionally allow it but your client should be under no misapprehension. This is not some adjustment of position in the context of the continuing proceedings. Instead it is a measure proposed as part of an overall resolution.*

Given the proximity of the trial date and the necessity to streamline the books of papers that you have submitted, we request your response no later than Monday, 13 January 2020 so that, if your client is not willing to accept the offer that is made herein, preparations for the trial can be completed on a timely basis."

17. By letter dated 17 January 2020 the defendant stated, *inter alia,* the following to the plaintiff's solicitors:-

"While we very much regret that you choose to characterise our offer as nothing more than a statement of a position maintained from the outset, you must advise your client

correctly of its constituent elements. For the avoidance of any doubt we repeat the central elements.

1. *Your client has instituted proceedings that from the very outset have involved unnecessary and costly applications. It is our client's firm belief that your client will not succeed in the substantive proceedings. It follows that the offer to go 'back to back' on costs is very significant. Yet, you dismiss it and further suggest that our correspondence is cynical and disingenuous.*
2. *Our client's offer to your client to re-engage in the Attendance Support & Management Process (ASMP) is both genuine and substantive in circumstances where it is clear beyond doubt that your client has a contractual obligation to engage with the ASMP but has failed to do so. Our client is not trying to 'entice' your client into the process. It is our client's position that your client is in breach of his contract of employment in failing to engage in the process and in failing to provide cogent medical evidence in the context of that process so that whatever supports and accommodations your client requires to return him to work or to support his future employment can be put in place.*

   You maintain the position that the process is 'not fit for purpose', an argument our client strongly refutes. However, you also ignore the fact that it was the product of significant negotiation before agreement and is contractually binding. In this regard we have pointed out the fact that Ms Justice Pilkington made no criticism of the ASMP in granting your client limited relief on foot of his injunction application. She particularly addressed this issue when dealing with your application. Your client must therefore be fully advised as to the risk he incurs in challenging that process.

3. *The offer that was made included immediate access to the CMO, on the basis of production of cogent medical evidence, preferably from a treating psychiatrist. Your suggestion that our client refused your client access to the CMO, in response to your letter of 6 September 2017, is not only erroneous but a misstatement of the known position. In our letter of 7 September 2017 we urged the plaintiff to engage and cooperate with the ASMP process which allows access to the CMO.*

As for the question of delay, we iterate that any delay in these proceedings being heard cannot be attributed to any act on the part of our client.

Your rejection of our offer to allow your client to withdraw his High Court proceedings with no order in relation to costs is noted. It is, however, not fully comprehended how you can suggest this is not a significant concession in circumstances where liability is fully contested in this matter and where your client has already incurred costs to date in respect of which he is at significant risk.

We also note your rejection of our offer of a facilitator on the basis that the plaintiff is currently unfit. This is quite remarkable as it is precisely because of the plaintiff's current medical condition that we offered a facilitator in the first place.

We respectfully request that your client reconsider the offer made."

It is clear, including from the foregoing correspondence that, at all material times, the plaintiff was aware that he was at risk in respect of costs should he continue to maintain his claim, being a claim which the plaintiff denied.

18. It is equally clear that, immediately before the commencement of the trial, the plaintiff was given the opportunity to withdraw his claim without having to face any liability in respect of the defendant's costs. The plaintiff obviously rejected that proposal and insisted on running

his claim as he was perfectly entitled to do. That decision, however, was made knowing that the plaintiff was at risk in respect of costs, unless successful. The plaintiff has been entirely unsuccessful.

19. There is no evidence which would entitle me to take the view that the length of time the case took to get to court or the duration of the trial itself resulted from any inappropriate act or omission, on the part of the defendant. Nor can the defendant be criticised for not entering into mediation, in circumstances where the defendant had no liability to the plaintiff. The defendant was perfectly entitled to run its defence, just as the plaintiff was entitled to run its claim.

20. Before this Court was asked to determine matters, however, the defendant made a meaningful proposal out of an expressed, and no doubt *bona fide*, desire on the defendant's part to try and assist the plaintiff and to try and avoid a situation whereby the plaintiff would face a liability for the defendant's costs. That offer was something the plaintiff rejected at his peril. The plaintiff has not succeeded on any issue or in any respect. The plaintiff's claim for damages has been dismissed.

21. This Court undoubtedly enjoys a discretion with regard to the ordering of costs. The Court is not however entirely at large with regard to the exercise of that discretion. Rather, this Court must have regard to, *inter alia*, the provisions of section 169(1) of the 2015 Act, which provides that: *"A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties."*

22. I have had very careful regard to the nature and circumstances of the case and to the conduct of the proceedings by the parties. I have also carefully considered the provisions of s. 169(1) (a) - (g) of the 2015 Act. I have also had regard to the guidance offered by relevant

authorities, including the Court of Appeal's decisions in *Kellett v. ICL Cruises* [2020] IECA 287; in *Harrison v. Charleton* [2020] IECA 197 and in *Higgins v. Irish Aviation Authority* [2020] IECA 277*,* in addition to the Supreme Court's decision in *Dunne v. Minister for the Environment* [2008] 2. IR 755 and the oft-quoted decision, by Clarke J. (as he then was), in *Veolia Water UK plc v. Fingal County Council (No.2)* [2007] 2. IR 81.

23. As Mr Justice Noonan observed in *McCaffrey & Lunney v. Central Bank of Ireland, Ireland and the Attorney General* [2017] IEHC 659*: " It would appear clear … that there must be something exceptional about the circumstances of the case to warrant departure from the normal rule."*

24. Having taken all relevant matters into account, I am firmly of the view that it would be to create a serious and patent injustice if this Court were to depart, in the present case, from the *"normal rule"* or principle that costs should follow the event. The event is undoubtedly the complete success on the part of the defendant (in the manner explained in this Court's 11 June 2021 judgement).

25. It is uncontroversial to say that an unsuccessful party faces a high threshold which must be met in order to justify, by reason of exceptional circumstances, a departure from the general principle that costs should follow the event (this Court's decision in *Collins v. Minister for Finance, Ireland and the Attorney General* [2014] IEHC 79 being relevant in that respect). Such a threshold has certainly not been met in the present case and I am entirely satisfied that there are no reasons or exceptional circumstances which would entitle this Court to decide not to award costs to the successful party. It would, in my view, be fundamentally unjust if this court did not make an order for costs in favour of the defendant, to include all reserved costs and outlay associated with the proceedings, to be adjudicated in default of agreement. There is nothing which would entitle this court to order "*otherwise*" (in the context of s.169(1) of the 2015 Act).