

THE HIGH COURT

[2023] IEHC 560

Record No. 2022/535 JR

BETWEEN

AMMI BURKE

APPLICANT

AND

ADJUDICATION OFFICER

AND

WORKPLACE RELATIONS COMMISSION

RESPONDENTS

AND

ARTHUR COX LLP

NOTICE PARTY

Costs Decision of Ms Justice Bolger dated the 16th day of October 2023

1. The applicant was employed by the notice party until her employment was terminated, as a result of which she brought a claim for unfair dismissal to the Workplace Relations Commission. Her claim was dismissed and in May 2023 she was granted leave to bring judicial review proceedings relating to the dismissal of her proceedings, which were listed for hearing before me on 2 May 2023. On that date the applicant applied for me to recuse myself. By decision dated 3 May 2023 I refused that application and adjourned the question of costs to the end of the substantive hearing. The substantive hearing proceeded on 3 and 4 May. On 4 May I dismissed the proceedings due to the applicant's conduct on that day which I found was an abuse of process and I furnished reasons for that finding in my written judgment of 26 June 2023. The matter was put in on 21 July 2023 to allow submissions on costs. On that date the applicant sought to furnish the court with a contemporaneous note of the substantive hearing and on enquiry from the court, it became apparent that the

stenographer's transcript furnished to the court during the hearing had not been shared with the applicant. Counsel for the notice party referred to correspondence of February 2023 in which the applicant had been given the option to share the transcript upon partial discharge of the stenographer's costs, from which counsel said the applicant was aware of the terms on which the transcript was available to her. I adjourned the costs hearing to 11 October 2023 to allow the applicant to be furnished with copies of the transcripts. On the adjourned date the applicant made further submissions in which she took issue with the transcripts being furnished to the court without her knowledge or permission. The notice party's solicitor confirmed that the stenographer had furnished the transcripts to the court without instructions from the notice party or the respondent.

2. Pursuant to s.169 of the Legal Services Regulatory Act 2015, the successful party in the proceedings is entitled to an award of their costs unless the court orders otherwise. The respondent and the notice party has asked that costs be awarded against the applicant on a legal practitioner and client basis. O. 99, r. 10(3) allows the court, in any case in which it thinks fit to do so, to order or direct that the costs shall be adjudicated on a legal practitioner and client basis.
3. The applicant submits that she rendered a public service in instituting the proceedings, that the conduct of opposing counsel should be taken into account by the court and that she should not be subject to costs. The applicant also sought to revisit the issues on which I have already given judgment and asked the court to amend its judgement, which I refused.
4. Costs on a legal practitioner and client basis is a highly unusual jurisdiction for the court to exercise and is generally limited to circumstances where the court considers it necessary to indicate its disapproval of the conduct of a party. Barrett J. in *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 697, found that the entire proceedings were "*infected by the abuse of process that subtended their commencement*" (at para. 14) and awarded costs on a solicitor and client basis because he found an abuse of process in the institution of the proceedings given the applicant's collateral objective. In doing so he set out the following principles at para. 15:

"First, in making such an order the court departs from the normal measure of costs. Second, this being so, there has to be a reason why the court departs from

the usual order. Third, as indicated in Geaney, and accepted by the court as correct, the court will order costs on a solicitor and client basis when the court wishes to mark its especial disapproval and/or displeasure at how proceedings have been conducted and/or the basis on which proceedings have been brought.”

5. In the more recent decision of Barniville J. (as he was then) of *Trafalgar Developments Ltd v. Mazepin* [2020] IEHC 13 (cited with approval by Donnelly J. in *Fitzpatrick v. Behan* [2021] IECA 23) the court said, *inter alia*, that it,

“may exercise its discretion to order costs on the solicitor and client basis where it wishes to mark its disapproval of or displeasure at the conduct of the party against which the order for costs is being made”.

He went on to say that the conduct in question could include:

“Any other conduct in relation to the commencement or conduct of the proceedings, or any aspect of the proceedings, which the court considers merits be marked by the court’s displeasure or disapproval, such a particularly serious or blatant breach of a court order, the directions of the court or the Rules of the Superior Courts”.

6. I have made no finding critical of the institution of these proceedings and, indeed, I was the judge who granted leave to pursue the reliefs sought and in order to do so, I had to be satisfied that there was an arguable case for seeking those reliefs. I have found that the applicant’s conduct on 4 May was, for the reasons I set out in my substantive decision, a blatant abuse of process which rendered it impossible to continue with the hearing of the case and could not be objectively viewed as having had any other purpose or outcome.
7. Responsibility for the chaos that occurred in court on 4 May last rests with the applicant whose conduct I have found to have been an abuse of process, designed solely to collapse the hearing before opposing submissions could be heard in full. The applicant has not satisfied me that she rendered a public service in instituting the proceedings or that her recusal application was a *bona fide* and reasonable one or that the court’s actions or the conduct of opposing counsel caused the events of 4 May and/or are grounds not to make an order for costs against her. Neither does the fact I was furnished with a copy of the stenographer’s transcript without her permission during the hearing persuade me against

making a costs order against her (other than in relation to excluding the costs of those transcripts and the adjourned costs application of 11 October from the scope of the costs order, as set out below). I accept the explanation furnished by the stenographer, via the notice party's solicitor, that the transcripts were furnished to me without instructions from the notice party or the respondent. The applicant argued, without authority, that the court receiving and relying on the transcripts impugns the court's judgment and is a relevant matter in considering the application of s.169. I do not agree.

8. During the second costs hearing the applicant repeatedly accused opposing counsel of lying and misleading the court, allegations which were devoid of any merit but which the applicant and members of her family who were with her in court, chose to loudly repeat after I had made a finding that they were unfounded. The applicant's behaviour on that occasion was such that I was forced to terminate the hearing and to finalise my decision based on the written submissions, as I had repeatedly warned the applicant would occur if she sought to shout over me or opposing counsel as she had done previously. It is a matter of regret that the applicant, yet again, chose to conduct herself in an unacceptable way before the court.
9. The court can and should mark its disapproval of how the applicant chose to conduct herself during these proceedings. I direct that the applicant should discharge the costs of the respondent and the notice party in respect of the applicant's recusal application and the substantive proceedings on a legal practitioner and client basis, to be adjudicated upon in default of agreement but excluding; (1) the costs of the adjourned costs application on 11 October and (2) any costs relating to the engagement of the stenographer or the preparation of the transcripts. There is no stay on the execution of those costs in the event of an appeal, subject to the outcome of any application the applicant may choose to make to the Court of Appeal for any such stay.