THE HIGH COURT

[2018 No. 5452 P.]

BETWEEN

ALEXANDRA FIERARU

APPLICANT

AND

NOEL KELLY, SIMON KNOWLES, MARTIN O'DOWD

AND MARK MCGURRIN TRADING AS M.M.M.S. DEVELOPMENTS

AND TRADING AS ELM GREEN NURSING HOME AND ELM GREEN NURSING HOME LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 15th day of March, 2019

1. This is an application on behalf of the plaintiff for an order directing the defendants to pay the costs of a motion and action which are said to have become moot very soon after the action was commenced.

2. The plaintiff is a nurse who was employed by Elm Green Nursing Home, Castleknock, Dublin 15, from 15th August, 2016.

3. On the afternoon of 27th March, 2018, a daughter of one of the residents in the nursing home voiced to two members of staff a concern in relation to how the plaintiff had allegedly spoken to another resident on the night of 21st March, 2018.

4. The defendants' area supervisor, Ms. Martina Brennan, moved swiftly. On 28th March, 2018 the plaintiff was suspended on pay pending an investigation of the allegation. On the same day, the subject of the allegation was interviewed. The visitors who had raised the issue were asked to give a written account of what they had overheard, and they did so in a letter of 30th March, 2018.

5. On 4th April, 2018 Ms. Brennan and Ms. Barbara Kellet, quality and compliance manager, interviewed two carers who had been on duty on the night in question and made notes of the interviews. Transcripts of the interview notes were sent to the plaintiff by Ms. Brennan under cover of a letter dated 4th April, 2018. The plaintiff was invited to respond in writing before 4.00 pm on Friday 6th April, 2018; which she did. The plaintiff denied the allegations.

6. By letter dated 10th April, 2018 Ms. Kellet advised the plaintiff that the investigation was nearing a conclusion and asked her to attend a meeting with Ms. Kellet and Ms. Brennan at 11.00 am on Thursday 12th April, 2018. The plaintiff was asked to confirm her attendance by noon on 11th April and was asked to confirm, by then, whether she would bring a representative with her and, if so, who that representative would be.

7. The investigation meeting was held on 12th April, 2018. The plaintiff was not represented. Ms. Kellet and Ms. Brennan prepared a note of the meeting which was sent to the plaintiff under cover of a letter of 13th April, for review and comment.

8. On 18th April, 2018, Ms. Heather Carter, the director of nursing at the nursing home, wrote to the plaintiff to say that the investigation had been completed. The plaintiff was asked to attend a meeting on the following day at 3.00 pm with Ms. Carter and the assistant director of nursing, Roshny John, at which she would be informed of the outcome of the investigation and of any disciplinary action that had been recommended.

9. At the meeting on 19th April, 2018 the plaintiff was handed a letter, signed by Ms. Carter, informing her that she was summarily dismissed. The same letter informed the plaintiff that she had a right to appeal the decision by contacting Mr. Martin O'Dowd within seven days, in writing, stating the reasons for her appeal. The letter of 19th April did not give any contact details for Mr. O'Dowd. The plaintiff's uncontested evidence is that she was not then given any contact details but eventually managed to get an email address from the nursing home.

10. On 8th May, 2018 at 12:53 the plaintiff emailed Mr. O'Dowd to ask whether it was possible to apply for a late appeal. She said that she had been told that she must appeal to him but had not been given any way to contact him until that moment. Mr. O'Dowd replied promptly: "*That is fine. Let me know when suits next week*". On 11th May, 2018 (which was a Friday) at 18:38 the plaintiff emailed Mr. O'Dowd to say that her appeal would be sent to him by her solicitor next week.

11. On 15th May, 2018 the plaintiff's solicitor wrote to Mr. O'Dowd giving formal notice of an appeal against the decision, the sanction, and the manner in which the process had been conducted. He asked for details of the appeals procedure and a copy of the original notes taken in the course of the investigation. Subject to receipt of those documents, he said that he would forward detailed grounds of appeal by no later than the following Monday, 21st May. The plaintiff's solicitor asked for a reply by no later than the following Thursday, 17th May.

12. On the following day, 16th May, 2018, the plaintiff's solicitor wrote to the director in charge, Elm Green Nursing Home, asking for various copy documents and clarifications.

13. There was no reply to, or acknowledgement of, either letter and on 22nd May, 2018 the plaintiff's solicitor wrote to Mr. O'Dowd by certified post and email. The email address was different to that which had eventually been provided to the plaintiff, but it was the contact email address for Mr. O'Dowd which had been provided to the Health Information and Quality Authority, and there is no suggestion that Mr. O'Dowd did not get this letter, or, indeed, any of the other letters. In his letter of 22nd May, 2018 the plaintiff's solicitor set out 23 grounds of appeal.

14. In the meantime, on 4th May, 2018 Ms. Carter emailed the Nursing and Midwifery Board of Ireland to advise the Board that she had recently had cause to terminate the plaintiff's employment. Mr. O'Dowd was copied in. By email of 9th May, 2018 the head of the Preliminary Proceedings Committee of the Board asked Ms. Carter to confirm whether she was making a complaint in relation to the plaintiff and to provide all supporting documentation. By return, Ms. Carter confirmed that she did wish to make a complaint and would forward all relevant supporting documentation by the end of the week. Again, Mr. O'Dowd was copied in.

15. By letter dated 14th May, 2018 the Preliminary Proceedings Committee notified the plaintiff of the complaint and invited her to provide any information she believed should be considered by the Preliminary Proceedings Committee at the time of its preliminary assessment of the complaint, which would be made on 30th May, 2018.

16. On 1st June, 2018 the plaintiff's solicitor wrote again to Mr. O'Dowd: this time by registered post as well as email. The plaintiff's solicitor expressed surprise that there had been no response to his previous three letters. He observed that the plaintiff was unemployed, and protested that a complaint had been made to the Nursing and Midwifery Board before the plaintiff had been given an opportunity to exhaust all remedies available under her contract of employment. The plaintiff's solicitor advised Mr. O'Dowd that failing an adequate response to his correspondence within seven days, application would be made to the High Court to protect the plaintiff's legal rights, and for legal costs. Mr. O'Dowd did not reply to or acknowledge receipt of the letter, but does not contest that he got it.

17. On 12th June, 2018 the plaintiff's solicitor wrote again to Mr. O'Dowd, by post and email, expressing disappointment that his correspondence had been ignored. The plaintiff, he repeated, had no source of income and the complaint to the Nursing and Midwifery Board had seriously undermined her ability to obtain alternative employment for the time being. He said that counsel had been instructed to apply to the High Court for appropriate orders.

18. On 14th June, 2018 the plaintiff issued a plenary summons claiming a declaration that the failure, neglect and refusal of the defendants to carry out and determine the plaintiff's appeal was unfair, unreasonable, contrary to constitutional and natural justice and in breach of the plaintiff's contract of employment; an injunction requiring the defendants to carry out and determine the appeal forthwith; and "*if necessary and appropriate*" damages, including aggravated and exemplary damages. On the same day, an order was sought and obtained giving leave to effect short service of a motion for an interlocutory injunction directing the defendants to forthwith carry out and determine the plaintiff's appeal, returnable for 20th June, 2018. On 14th June, 2018 at 18:14 the papers were served by email to the address recorded by HIQA, and to the address which was given to the plaintiff on 8th May, 2018; and paper copies were posted on the following day.

19. On 15th June, 2018 at 09:08 the plaintiff's solicitor had an email from Ms. Brennan attaching a letter from Mr. O'Dowd, the original of which was said to be in the post, by registered mail. The attached letter was dated 14th June, 2018 and was addressed to the plaintiff's solicitors. Mr. O'Dowd's letter referred to previous correspondence between the plaintiff's solicitors and Alastair Purdy & Co., solicitors, and said that he could hold the plaintiff's appeal on any day apart from Fridays between 1st and 15th July. A few minutes earlier, at 08:55, an email had come in from Alastair Purdy & Co. attaching a letter, dated 15th June, the hard copy of which, it was said, would be put in the post later that day. The letter read:-

> *"We represent Elm Green Nursing Home. Firstly, we had written this letter yesterday and were awaiting approval of our client prior to sending same. It appears that your notice of motion overtook matters.*
>
> *In any event we understand that you wish to appeal the decision of our client to terminate your client's employment. We are instructed that our client will write to you separately today setting out a date and time of appeal. We note that you personally wish to attend the appeal on behalf of your client, this is agreed.*
>
> *Whilst our client will facilitate any witnesses that may wish appear at the appeal, please note that some witnesses do not actually work for our client and therefore this may not be possible. We would be obliged therefore if you set out a list of witnesses you wish to speak to at any appeal hearing herein.*
>
> *This now deals with your notice of motion and plenary summons, please therefore confirm by return that you will issue notice of discontinuance, that there is no need to enter an appearance on behalf of our client and that both parties will bear their own costs to date."*

20. The defendants' agreement, or confirmation, that an appeal hearing would be convened disposed of the interlocutory application, save as to the costs, and the motion was adjourned for argument as to what, if any, costs order should be made.

21. Ms. Reilly S.C., for the plaintiff, applies for the costs of the motion and of the proceedings on the basis that the motion and action are moot. The plaintiff relies on the decision of the Supreme Court in *Godsil v. Ireland* [2015] 4 I.R. 535, which held that the first enquiry on an application for costs is to be whether there existed an "*event*" to which the general rule that costs follow the event can be applied. It is argued that the "*event*" in this case is the defendants' agreement to convene the appeal, which, it is said, can only be understood as being an acknowledgement and admission of the validity of the plaintiff's claim, in direct response to the proceedings. Further, the plaintiff contrasts the speed with which the disciplinary investigation was conducted and concluded with the complete silence from the defendants between 8th May and 15th June.

22. The plaintiff also relies on the decision of the Supreme Court in *Cunningham v. President of the Circuit Court* [2012] 3 I.R. 222, which dealt, *inter alia*, with the situation where proceedings become moot by reason of the unilateral action of one of the parties.

23. Ms. Bruton, for the defendants, argues that *Godsil* is distinguishable. She suggests that the plaintiff's entitlement to an appeal was confirmed by Mr. O'Dowd's email of 8th May and was never in doubt. She points to the fact that the plaintiff's solicitor, in correspondence, had sought considerable documentation, which, it is said, caused a delay in replying.

24. The defendants rely on the decision of Laffoy J. in *O'Dea v. Dublin City Council* [2011] IEHC 100. That was a case in which an application for an interlocutory injunction was part heard and settled, save as to costs, during the adjournment. Laffoy J. held that the court had no function in determining where the liability for costs should lie. The only way that the court might rule on the question of costs would be to express a view of the probable outcome of the proceedings, which would be improper. The defendants rely, in particular, on a passage from the judgment in *O'Dea*, in which Laffoy J., citing the decision of the Supreme Court in *Callagy v. Minister for Education* (Unreported, Supreme Court, 23rd May, 2003), held that in a case in which a supervening event renders it unnecessary for the court to determine the issues, such as an offer made to the moving party by the respondent which is accepted, and which results in the substantive action as well as the motion being struck out, it is no function of the court to determine where liability for costs incurred up to that point lies. Laffoy J., on the authority of *Callagy*, held that if the parties have not agreed where the liability for costs should lie, *prima facie* the proper exercise of the court's discretion is that the plaintiff should be ordered to pay the costs of the motion and of the action.

25. The fundamental premise of the plaintiff's application for costs is that the action and the motion were necessary to get her appeal heard. It seems to me that there is substance in that.

26. It is now said that the plaintiff's entitlement to an appeal was never in doubt. I am unconvinced of this. It is true that at the time

of the plaintiff's dismissal she was told that she had a right of appeal. It is true that when she emailed Mr. O'Dowd on 8th May, 2018 he promptly confirmed that right: but between then and 14th June, 2018 the defendants had failed to respond to, or even acknowledge, correspondence for five weeks. No affidavit was filed on behalf of the defendants. Taking the defendants' solicitors' correspondence at face value, the defendants had not, on 14th June, 2018, approved a draft letter simply confirming that a date would be set for the appeal.

27. Mr. O'Dowd's letter dated 14th June, 2018 referred to correspondence between the plaintiff's and the defendants' solicitors: but there was no such correspondence.

28. Moreover, the plaintiff's claim was not simply that she was entitled to a right of appeal but that she was entitled to a prompt appeal. It seems to me that it can hardly be contested that the plaintiff was entitled to a prompt appeal. The plaintiff was summarily dismissed. Pending the hearing of her appeal, the plaintiff had no income. The disciplinary process from start to finish took three weeks, with Easter intervening. In the five weeks from the time the plaintiff confirmed that she wanted to appeal, nothing was done by the defendants to make the necessary arrangements and the plaintiff was given no assurance or comfort that anything was being done.

29. I think that the plaintiff's solicitor was entitled to express surprise that a complaint was made to the Nursing and Midwifery Board before the appeal was heard. While Ms. Carter could not have known of the plaintiff's intention to appeal when she sent her initial email to the Board on 4th May, it seems to me that she should have known on 9th May when she confirmed the defendants' wish to make a complaint.

30. Ms. Carter's emails to the Nursing and Midwifery Board were appended to the Board's letter to the plaintiff of 14th May, 2018. It is clear from the printouts of these emails that both were copied to Mr. O'Dowd. It seems to me that the defendants, generally, and Mr. O'Dowd in particular, must have known from 4th May and certainly from 9th May that the complaint against the plaintiff would be investigated by the Board. The declared reason for Ms. Carter's email of 4th May was that she had had cause to terminate the plaintiff's employment. That being so, a successful appeal might have prompted a re-evaluation of the necessity for a complaint. Alternatively, a successful appeal might very well have been a material consideration in the Board's assessment or investigation of the complaint. I cannot accept the argument that the complaint to the Nursing and Midwifery Board was a side issue. In my view, the making of that complaint and the inevitability that it would trigger an assessment and investigation by the Board goes to the issue of the speed and efficiency with which the plaintiff was entitled to expect that her appeal would be dealt with.

31. Mr. O'Dowd's letter sent on the morning of 15th June was dated 14th June. Taking this letter at face value, it may be that it was not sent in direct response to the plaintiff's motion but if it was not, it does seem to me that it belatedly acknowledged the right which the plaintiff contended for and amounted to a unilateral act which rendered moot the court application which had been set in train on the previous day.

32. One of the principles laid down in *Cunningham v. President of the Circuit Court* was that where the immediate or proximate cause of judicial review proceedings becoming moot is the unilateral action of a statutory officer but where it is sought to argue that the true underlying reason is an external factor outside the control of that officer, it is incumbent on the officer concerned to place before the court sufficient evidence to allow the court to assess whether, and if so to what extent, it can fairly be said that there was a sufficient underlying change in circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances. It was not contested that the same principle may be applicable in private law litigation.

33. Ms. Bruton argues that the letters of 14th and 15th June were always going to come and invites the court to infer that they came so soon after the motion papers were served that they must have been drafted before that. That, as I have said, may be so but the defendants have not attempted to explain on affidavit when or in what circumstances those letters came to be drafted, or why they were not sent long before they were. If those letters were always coming, it seems to me that the plaintiff was not to know that.

34. In my view, *O'Dea v. Dublin City Council* is distinguishable. This is not a case in which the plaintiff was offered and accepted part of which she claimed, or something different to what she claimed. The plaintiff got what she had been asking for for the previous six weeks. I cannot accept the argument that this is a case in which the plaintiff agreed not to pursue her injunction application. Rather, the defendants' correspondence meant that it was no longer necessary to do so.

35. Ms. Bruton points to the delay between the date of the plaintiff's dismissal and her notification of her intention to appeal. The plaintiff, however, has explained on affidavit that when she was advised of her right of appeal, she was not given any contract details for Mr. O'Dowd: and this is not contested. It is suggested that part of the reason for the delay in replying to the plaintiff's solicitors' correspondence was that he had asked for a considerable volume of documentation. I do not believe that the documentation sought is likely to have been all that extensive but if it was, there is no reason why the defendants could not have acknowledged the request and said that it would take some time to comply with it. In any event, neither the letter from Mr. O'Dowd nor the letter from the defendants' solicitors addressed the request for documentation.

36. In my view this is a case in which the plaintiff's application for an interlocutory injunction was rendered moot by the defendants' agreement to conduct the appeal to which the plaintiff was entitled.

37. I understand that the plaintiff is content that she has achieved substantially what she sought to achieve by the action as well as the motion and I understand that the defendants do not wish the litigation to go any further. That, however, does not mean that the action is moot. Theoretically, at least, the defendants may wish to stand over the delay carrying out the appeal. Theoretically, at least, the defendants' agreement to carry out the appeal does not dispose of the claim for damages for the delay in doing so.

38. After careful reflection I have concluded that the defendants should be ordered to pay the costs of the motion (including the costs of the application for short service on 14th June, 2018 for short service) but not the costs of the action.