

THE HIGH COURT

[2021] IEHC 640
[2021 No. 2148P.]

BETWEEN

DARREN KEOGH

PLAINTIFF

AND

A V POUND & CO. LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 8th day of October, 2021

Introduction

1. On 9th March, 2021 the plaintiff was suspended from work by his employer pending an investigation into an allegation that he had failed to follow company policy by failing to disclose a personal relationship between himself and his immediate manager. By notice of motion issued on 7th April, 2021 the plaintiff applied for interlocutory injunctions restraining the continuation of the suspension and investigation. On 20th April, 2021 the defendant lifted the suspension and on 28th April, 2021 notified the plaintiff that the investigation would not be proceeding.
2. In those circumstances the substantive motion did not proceed but each side argued that the other should have to pay the costs. Both parties contend that the interlocutory application became moot by the lifting of the suspension and the abandonment of the investigation but for very different reasons. The plaintiff's case is that the application was made moot by the unilateral action of the defendant in response to the motion. The defendant, however, argues that the motion was unnecessary and premature. The defendant contests the suggestion that the lifting of the suspension and the cessation of the investigation were precipitated by the motion and argues that this would have happened in any event.

The evidence

3. On 7th January, 2019 the plaintiff commenced employment with the defendant as a shipping coordinator. Before taking up his employment the plaintiff was provided with a four page document which he signed on 12th December, 2018. The plaintiff refers to this four page document as his Contract of Employment but on its face, it is entitled "*Statement of Main Terms of Employment*" and provides that "*This Statement, together with the Employee Handbook, forms part of your Contract of Employment and sets out particulars of the main terms on which AV Pound & Co Limited [address] employs Darren Keogh.*"
4. The Statement of Main Terms of Employment set out the plaintiff's job title as Shipping Coordinator reporting to the Group Financial Manager or his or her designate, and set out his place and hours of work, remuneration, holiday and sick pay entitlements and so on.
5. The Employee Handbook – which the plaintiff acknowledged he was provided with – was a 49 page booklet which addressed a number of matters such as employee training, performance and review, working time policy, study leave, behaviour at work and outside

work and so on. Paragraph G, under the heading Intra Company Personal Relationship, provided:-

"Due to the nature of these relationships, the Company requires that you inform the Group HR Manager if you are involved in a relationship with another employee of the Company. The Company needs to be aware of potential Conflicts of Interest or any other matters that can arise in such situations."

6. From at least January, 2021 the plaintiff was involved in a personal relationship with his line manager, Ms. Linda O'Brien. The plaintiff has deposed that the relationship started in January, 2021 but the defendant's HR manager has expressed the belief that it was ongoing for quite some time. On 22nd February, 2021 – in circumstances not spelled out by the plaintiff but to which I shall come – Ms. O'Brien reported the relationship to her manager, Ms. Michelle Bourke, who advised Ms. O'Brien to report it to Human Resources.
7. Between 25th February, 2021 and 8th March, 2021 the defendant's Group HR Manager, Mr. Mark Hele, conducted a series of five investigation meetings. On 9th March, 2021 the plaintiff was suspended on full pay pending what the defendant said was an investigation and the plaintiff insists was a purported investigation into a suggested failure by the plaintiff to follow company policy in disclosing the personal relationship. What was said in the defendant's letter of 9th March, 2021 was that the company had engaged the services of an independent professional to conduct the investigation and provide recommendations.
8. The plaintiff's case is that he was so shocked and distressed by the manner in which Mr. Hele had conducted the investigation and – as the plaintiff saw it – had prejudged his dismissal that he went on certified sick leave. The defendant contests the plaintiff's account or perception of what was said at those five meetings and categorically denies the suggestion of prejudgment. The defendant acknowledges that in the weeks immediately following the disclosure of his relationship the plaintiff was dealing with very personal and sensitive issues concerning his marital and romantic relationships and that the event was difficult for him but denies that it was responsible for the stressful issues in the plaintiff's private life.
9. By letter dated 16th March, 2021 the plaintiff, by his solicitors, demanded the immediate termination of what was said to be the purported investigation and his return to work: failing which he would apply for injunctive relief without further notice. The plaintiff asserted that the outcome of the investigation had been prejudged. He protested that he had been harassed, bullied and intimidated; that he had been defamed; that his contract of employment had been breached by a pre-determined investigation; and that the purported investigation was a sham and had been contrived with the sole purpose of terminating his employment. He also asserted that what was described as the purported requirement that he should report personal relationships breached his privacy rights, was discriminatory, and was wholly unjustifiable.

10. The plaintiff's solicitors' letter of 16th March, 2021 was acknowledged by the defendant by e-mail dated 19th March, 2021 by which Mr. Hele said that the defendant was seeking an independent opinion and would respond in due course. It was said that the plaintiff could rest assured that the company would handle the matter both fairly and equitably.
11. By letter dated 23rd March, 2021 the plaintiff's solicitors took the position that the defendant's response was wholly inadequate and failed to address any of the matters addressed in what they referred to as their initiating letter. They repeated the demand for the immediate cessation of what they characterised as the purported and contrived investigation and the plaintiff's immediate return to work, and the plaintiff's threat of a court application in the absence of confirmation by 29th March, 2021.
12. The defendant, as it had said it would, commissioned an external HR consultant to write a report on the potential impact of a personal relationship between a notional supply chain manager and a notional logistics coordinator on the working environment of a small and closely-knit team; the management of such a team; the handling by the manager of any complaints that might be made against the coordinator; the potential impact on other team members and so forth. The HR consultant expressed his opinion in a report of 23rd March, 2021. In short, his opinion was that the existence of a personal relationship between a manager and a subordinate could compromise judgment, decisions or actions in the workplace and so give rise to a conflict of interest. That report was sent to the plaintiff by e-mail on 24th March, 2021 with an invitation to him to make any observations on it and respond: which he never did.
13. At about the same time the defendant instructed solicitors who wrote to the plaintiff's solicitors on 26th March, 2021, in response to the latter's letters of 15th and 23rd March. The defendant's position was that the plaintiff was being, and would be, treated absolutely fairly; that the investigation was lawful and proper and was being conducted discreetly; and that the threat of an application for an injunction was premature and precipitous. The plaintiff's solicitors were asked for particulars of the alleged bullying and the nature of the plaintiff's medical absence. It was noted that the plaintiff had furnished a medical certificate and was on sick leave and it was said that the defendant would continue to pay him.
14. The plaintiff issued his plenary summons on 1st April, 2021 and on the same day applied for a series of *interim* orders as well as short service of a motion for interlocutory relief. Hyland J. gave liberty to the plaintiff to issue a motion returnable for 7th April, 2021. When the motion came before Butler J. on the return date it was adjourned to the chancery list to fix dates on 29th April, 2021 with directions for the exchange of affidavits in the meantime. There is a dispute as to precisely what was then said, the resolution of which is said to be necessary for the further progress of the action, but it was not argued by either party that the resolution of that issue is necessary to allow the court to rule on the costs applications.
15. The timetable agreed between the parties and approved by the court was that the defendant's affidavit in response to the motion would be filed and served by 21st April

and that the plaintiff would have a week thereafter, that is until 21st April, to file any response.

16. On 20th April, 2021 the defendant's solicitors wrote to the plaintiff's solicitors. They recalled that the plaintiff had been sent the HR consultant's opinion and had failed to respond. The board of the defendant, it was said, had considered the opinion of the independent expert and had decided that the plaintiff's suspension was no longer necessary and should be lifted with immediate effect. It was also said that the defendant would continue to investigate potential breaches by the plaintiff of his contract of employment and/or company policy as set out in the Employee Handbook and would afford the plaintiff fair procedures and natural justice.
17. On 21st April, 2021 quite a long affidavit of Mr. Hele was filed on behalf of the defendant. The defendant's position was that the plaintiff was bound by the terms of his employment to have disclosed the relationship with his manager and that it was necessary for the company to investigate the potential conflict of interest and the consequences of the relationship for its business. According to Mr. Hele, relationships between managers and junior employees can give rise to complaints of sexual harassment, bullying, or abuse of power, as well as favouritism and nepotism between colleagues at the same level if not transparent and fully disclosed and managed. Mr. Hele explained that when the relationship came to notice both parties were suspended until, he said, the matter could be investigated, and a solution found. Mr. Hele, on behalf of the defendant, rejected the suggestion that para. G of the handbook breached the plaintiff's right to privacy or was disproportionate, unjustified or unlawful and asserted that such clauses are necessary and perfectly common.
18. Mr. Hele confirmed that Ms. O'Brien had reported the relationship to Ms. Bourke on 22nd February, 2021, and that Ms. Bourke had advised Ms. O'Brien to disclose the relationship to Mr. Hele. What happened was that Ms. O'Brien sent a WhatsApp message to Ms. Bourke to say:-

"Hey! Just to give you a heads up, Amanda (Darren's wife) is saying she is emailing Gavin and HR and stating we were having an affair and that I abused my power as manager etc. She is talking to a solicitor etc! This is mental, if you want to chat after work can you ring me?"
19. The plaintiff's laconic averment in his grounding affidavit that he and Ms. O'Brien agreed to report their relationship to management might be thought not to convey the full picture.
20. There was no reply to the defendant's solicitors' letter of 20th April, 2021 and the plaintiff did not file any affidavit in response to that of Mr. Hele.
21. In the meantime, Ms. O'Brien had also commenced proceedings against the defendant and shortly after the first return date for a motion brought by her, there was engagement between Ms. O'Brien's lawyers and the defendant's lawyers which led to a settlement of

her proceedings on 23rd April, 2021 upon terms that she would not return to work. On 28th April, 2021 the defendant's solicitors wrote again to the plaintiff's solicitors to say that the defendant had decided that there was no need to continue with the investigation. The resolution with Ms. O'Brien, it was said, had resolved the potential conflict of interest and the defendant looked forward to the plaintiff's return to work. The plaintiff was invited to strike out his proceedings, in which event the company would not apply for costs. Otherwise, it was said, the defendant would defend the proceedings in full and would rely on that letter in support of an application for an order for costs against the plaintiff.

22. The plaintiff's solicitors acknowledged receipt of the defendant's solicitors' letter on 30th April, 2021 and on 10th May, 2021 wrote to say that the effect of the cessation of the suspension and investigation was that the plaintiff had achieved the same outcome as he had sought by his motion and would apply for his costs. It was noted that the defendant's "*flawed and unlawful investigation and suspension*" were not proceeding but it was made clear that the plaintiff's action would be proceeding "*with regard to, inter alia, the severe damage occasioned to [the plaintiff's] reputation and person*".
23. There followed a fairly sharp exchange of correspondence in relation to what was said to have happened before Butler J. on 7th April, 2021 and the basis for the plaintiff's continuing absence from work but, mercifully, it is not necessary to dwell on that. The thrust of the plaintiff's position appears to be that his suspension on pay – which by his motion he claimed was invalid and should not continue – should, by reason of something said to or by Butler J. on 7th April, 2011, continue even though the defendant had said that the suspension was lifted.

The arguments

24. In support of their respective applications for costs both parties filed written submissions and fairly extensive books of authorities.
25. I do not believe that it is unfair to say that the written submissions were not altogether dispassionate and objective in seeking to identify the issues. For example, the plaintiff's submissions asserted as a fact that there was no contractual basis for any investigation and/or sanction and that the plaintiff had been told by Mr. Hele on 8th March, 2021, that unless he accepted a termination payment his employment would be terminated. The plaintiff may ultimately succeed in establishing one or other or both of these propositions but for present purposes the position is that both are hotly contested. On the plaintiff's side, the lifting of the suspension and the cessation of the investigation were said to show that the defendant accepted that both were unlawful: which, of course, it did not. On the defendant's side, the interlocutory motion – which had not been pressed after the suspension had been lifted and the investigation abandoned – was said to have been brought and "*withdrawn*" in circumstances in which the defendant "*was lawfully and contractually entitled to suspend the plaintiff pending an investigation.*"
26. In the written submissions filed on behalf of the plaintiff in support of his application for the costs of the interlocutory motion the issues are identified as being (a) whether the

defendant has caused the mootness of these proceedings, (b) whether the plaintiff is entitled to costs when proceedings have been rendered moot, (c) whether the defendant's actions in response to the proceedings constitutes an "event", and (d) whether the plaintiff's application was necessary to vindicate his legal rights. The premise upon which those issues are said to arise is that the subject matter of the proceedings was rendered moot by the defendant's decision to compromise its proceedings with Ms. O'Brien and its consequential decision to cease the investigation and lift the plaintiff's suspension. It seems to me that the position is very much more complicated.

27. In the first place, it is clear that the proceedings – that is the action – is not moot. On 2nd June, 2021 – long after the suspension was lifted – the plaintiff delivered his statement of claim. By the prayer in the statement of claim the plaintiff claims:-
- (a) A declaration that his purported suspension was unlawful, in breach of contract, in breach of his rights to fair procedures and was a nullity;
 - (b) Damages for breach of contract, breach of duty (including breach of statutory duty), negligence and breach of the plaintiff's constitutional and European Convention rights including *inter alia* his right to privacy and to his private and family life and his right to his professional reputation;
 - (c) Exemplary damages for damage to reputation; damages for personal injury sustained by the plaintiff as a result of the intentional infliction of emotional suffering imposed on him and the manner in which he was subjected to foreseeable stress by the defendant's unlawful actions;
 - (d) Further and other relief.
28. It is evident from the exchange of affidavits that there is a sharp divergence in perception, at least, of what was said at the meetings which took place between 25th February and 8th March. It is not absolutely clear whether there is a conflict as to fact as to what precisely was said. The affidavit of Mr. Hele sworn on 21st April, 2021 paints a rather different picture to that painted by the plaintiff in his grounding affidavit sworn on 31st March, 2021 but it is significant that by the time the motion came back into the list on 29th April, 2021 the suspension had been lifted. Had it not been, I expect that a further affidavit of the plaintiff might very well have been filed. While the plaintiff had, and did not avail of, the opportunity to file a further affidavit in response to that of Mr. Hele, the fact that he did not do so cannot be taken to be an acceptance of all that Mr. Hele said.
29. In any event, it is clear from the affidavit of Mr. Hele that the defendant stands over the lawfulness of the investigation and suspension and it is no less clear from the statement of claim that these remain very much live issues.

Discussion

30. In *Lofinkakin v. Minister for Justice* [2013] 4 I.R. 274 at para 82, McKechnie J., following a comprehensive review of the authorities, distilled a number of principles, two of which are relevant for present purposes. They are:-
- "(i) a case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing;*
- (ii) therefore, where a legal dispute has ceased to exist, or where the issue has materially lost its character as a lis, or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined; "*
31. In my view, it is quite clear that there is an issue which remains to be decided as to whether the defendant was entitled to suspend the plaintiff when it did and for as long as it did and as to whether the defendant was entitled to undertake the investigation which it did for as long as it did. The plaintiff by his statement of claim attacks, and the defendant by its defence will surely seek to stand over, the lawfulness of a stipulation in a contract of employment that the employer must be informed of intimate relationships among staff and is entitled to consider what effect such relationships or such a relationship might have on his business. Separately, the plaintiff attacks, and the defendant stands over, the lawfulness and reasonableness of what was done in this case.
32. Moreover, in my view, there is clearly an issue to be decided as to whether – as the plaintiff asserts – the lifting of the suspension can fairly be characterised either as having been consequential to a decision on the part of the defendant to compromise Ms. O'Brien's proceedings or as a direct response to the plaintiff's proceedings. It is the fact that the plaintiff's suspension was lifted shortly before the compromise of Ms. O'Brien's proceedings but on Mr. Hele's version of events, the resignation by either the plaintiff or Ms. O'Brien was presented as a possible solution at the meetings of 26th February and 4th March. As far as the departure of Ms. O'Brien is concerned, it takes two to settle. There is no evidence as to whether or what difference there may have been between the terms of severance which were available to Ms. O'Brien in March and the terms ultimately offered and accepted and so, it seems to me, it cannot confidently be said whether the immediate cause for the settlement was the defendant's decision to pay or Ms. O'Brien's decision to accept. Nor am I satisfied that it can confidently be said that the settlement of Ms. O'Brien's action was a direct response to the plaintiff's action as opposed to Ms. O'Brien's action.
33. While the thrust of the plaintiff's written submission was that the motion was rendered moot by the unilateral action of the defendant in lifting the suspension, the thrust of the oral argument was that the motion was bound to succeed. Quite apart from the clear legal principle that I should not attempt to decide a case which has not been argued, I cannot accept the plaintiff's submission that the identification by Mr. Hele of the resignation or voluntary severance of either the plaintiff or Ms. O'Brien as possible

solutions to what the defendant saw as a problem, or the offer made to the plaintiff of resignation or voluntary severance, amounted to predetermination of the issue as to whether he would stay or go or that there is no contest as to what transpired at the meetings between 25th February, 2021 and 8th March, 2021,

34. It seems to me that the plaintiff's submission fails to engage with the difference between the practical necessity for the interlocutory relief claimed by the motion and the legal and factual issues presented by the motion and action. The authorities are clear that the task of assessing where responsibility for the costs of an interlocutory injunction application should justly lie is much more complicated than looking at whether the relief sought was granted or refused. Similarly, if the necessity for an interlocutory injunction is overtaken by events, that will by no means necessarily dispose of the underlying substantive dispute.
35. It seems to me that the plaintiff's reliance on *Cunningham v. President of the Circuit Court* [2012] 3 I.R. 222 and *Godsil v. Ireland* [2015] 4 I.R. 535 is misplaced. In both cases the substantive dispute had been rendered moot: in *Cunningham* by the entry of a nolle prosequi in the criminal prosecution which the applicant sought to prohibit, and in *Godsil* by the repeal of the impugned provision of legislation. In *Godsil* the change in the legislation could be seen to have been an explicit acknowledgement of the validity of the challenge and in *Cunningham* the decision not to proceed with the prosecution had not been shown not to have been precipitated by the application for judicial review. Similarly, *Hughes v. Revenue Commissioners* [2021] IECA 5 was a case in which the legal basis for the plaintiff's substantive claim has dissolved.
36. In this case, I quite accept that the plaintiff has a case to make that the lifting of his suspension and the cessation of the investigation were referable to his interlocutory application, but the defendant is adamant that the events were unrelated to the pending motion and that dispute is not one which the court can resolve at this stage of the proceedings. The problem identified by Clarke J. (as he then was) in *Cunningham* was that there would not be a decision on the substantive merits of the dispute. This is not such a case.
37. The plaintiff further argues that the court should enquire whether the application was necessary, that is whether it was reasonable for the plaintiff to have bought the application for interlocutory relief, to which question, it is submitted, the answer is that it was. Of that, on the evidence, I am unconvinced. In the ordinary run of employment injunctions the plaintiff's immediate object will be to ensure that he is paid *pendente lite*. It is only in the most exceptional circumstances that the court will contemplate making an order the effect of which would be to direct the employer to allow the plaintiff to go back to work. The effect of the orders sought by the plaintiff would have been that he should be allowed to return to work. Legal difficulties apart, on the evidence, the plaintiff was unfit for work by reason of illness at the time he moved for the orders sought, and he was still on certified sick leave when the suspension was lifted, and indeed well beyond that to the time at which the costs application was heard.

38. The same question, as Laffoy J. put it in *O'Dea v. Dublin City Council* [2011] IEHC 100, was "*whether it was necessary to vindicate the rights of the plaintiff*". The question so formulated, it seems to me, begs the question as to what the plaintiff's rights are. It seems to me that the plaintiff's submission that the defendant's refusal to give the undertakings sought left him with little option but to move for interim and interlocutory relief assumes – as the plaintiff's solicitors' letter of 16th March, 2021 asserted – that there was no lawful basis for the defendant's actions. That, as I have said, is something which remains to be decided.
39. As to the defendant's application that the plaintiff should be ordered to pay the costs of the motion, much of what I have said in relation to the plaintiff's application can be said conversely of the defendant's application.
40. By the time, probably before, the motion was ready for hearing the impugned suspension had been lifted and the impugned investigation abandoned. In those circumstances, I do not believe that the motion can sensibly be said to have been withdrawn.
41. The premise of the defendant's argument is that the requirement in the plaintiff's contract of employment that he should have reported his romantic relationship with his immediate superior was lawful and commonplace; that it was entitled and obliged to do what it did; and that it acted in accordance with fair procedures. In effect, although citing clear authority to the contrary – in *Cunningham* [2012] 3 I.R. 222, 233 approved in *Lufeyo v. Minister for Justice and Equality* [2018] IEHC 491, para. 7(e) – the defendant invites the court to decide the substance of the dispute.
42. It seems to me that the defendant's submission that had the plaintiff allowed the defendant to carry out its investigation within a reasonable time, his temporary suspension would have been lifted and an investigation carried out thereafter in compliance with fair procedures and natural justice is speculative, at best. On the defendant's case, the refusal of either or both of the plaintiff or Ms. O'Brien to resign or to agree to voluntary severance put it in a bind and on the evidence before the court it is difficult to see how the impasse or perceived impasse could have been broken otherwise than by some parting of ways or redeployment. Objectively, what gave rise to the resolution (as far as the defendant was concerned) was the resignation of or voluntary severance agreed with Ms. O'Brien rather than the progress of the investigation. The investigation having been brought to an end after the departure of Ms. O'Brien, I doubt that it will ever be possible to say – certainly it is not possible at this stage to say – what the outcome or consequences of it might have been.
43. I am quite satisfied that the lifting of the plaintiff's suspension at the time and in the circumstances in which it was lifted does not, by itself, go to show that it would have been lifted in any event or that the proceedings were entirely unnecessary.
44. Counsel pointed to what I believe to be two very relevant passages from the judgment of Clarke J. in *ACC Bank plc v. Hanrahan* [2014] 1 I.R. 1 where, in the context of considering the allocation of costs on a motion for summary judgment, the court had

something to say about the approach that should be taken to the costs of applications for interlocutory injunctions. Having first of all looked at motions for discovery and particulars and the like Clarke J. said, at paras. 10 and 11:-

"[10] Slightly different considerations seem to me to apply in cases where, at least to a material extent, some of the issues which are before the court at an interlocutory stage arise or are likely to arise again at the trial in at least some form. As I noted in Allied Irish Banks v. Diamond [2011] IEHC 505, [2012] 3 I.R. 549 and as approved by Laffoy J. in Tekenable Limited v. Morrissey & ors [2012] IEHC 391, (Unreported, High Court, Laffoy J., 1st October, 2012) somewhat different considerations may apply in cases where the interlocutory application will, to use language which I used in Allied Irish Banks v. Diamond [2011] IEHC 505 and which Laffoy J. cited in Tekenable Limited v. Morrissey & ors [2012] IEHC 391 'turn on aspects of the merits of the case which are based on the facts'. It is true that both of those cases concerned the costs of an interlocutory injunction. One of the issues which, of course, arises on an application for an interlocutory injunction is as to whether the plaintiff has established a fair issue to be tried and, indeed, whether the defendant has established an arguable defence. In many cases the argument for both plaintiff and defence on those questions is dependent on facts which will not be determined at the interlocutory stage save for the purposes of analysing whether the facts for which there is evidence give rise to an arguable case or an arguable defence.

[11] However, the point made in Allied Irish Banks v. Diamond [2011] IEHC 505, [2012] 3 I.R. 549 is that those facts may well be the subject of detailed analysis at trial resulting in a definitive ruling as to where the true facts lie. In substance a plaintiff may well secure an interlocutory injunction by putting forward evidence of facts which, if true, would give him an arguable case and by succeeding on the balance of convenience test thereafter. However, if the facts on which the plaintiff's claim is predicated are rejected at trial, then the justice of the case may well lead to the conclusion that the interlocutory injunction was wrongly sought. It may be that, on the basis of the evidence before the court at the interlocutory state, the injunction was properly granted. However, with the benefit of hind-sight, and after the trial, it may transpire that the case for the granting of an interlocutory injunction was only sustained on the basis of an assertion that the facts were other than the true facts as finally determined by the court at trial. It follows that in such cases there may well be good grounds for not dealing with the costs at the interlocutory stage, for the trial court may be in a better position to assess the justice of the costs of an interlocutory hearing when it has been able to decide where the true facts lie. It is not necessarily just that a plaintiff who secures an interlocutory injunction on the basis of putting up false facts should get the costs of that interlocutory injunction even if it was fairly clear that an injunction would be granted on the basis of the facts as asserted."

45. What this boils down to is that while the granting or refusal of an interlocutory injunction might be regarded as an event, it will often be necessary to look beyond the outcome of the motion to decide where responsibility for the costs should justly lie. The plaintiff's motion not having been argued, it would be inappropriate to speculate as to what the outcome would have been if it had, or even to decide – as the defendant submits I should – whether the plaintiff had raised a fair issue to be tried. What can confidently be said, however, is that the outcome of the motion would not have been definitive of the question of costs. It seems to me that irrespective of what the outcome of the motion might have been, the resolution of the core dispute as to the lawfulness of the impugned clause and the defendant's actions was one which would have had to go to trial. If the motion had been fought, the practical effect of the final determination of the matters in dispute might have been that the plaintiff would have secured interlocutory orders which he ought not have had, or might have failed to secure orders which he ought to have had. In my view, similar considerations apply in a case where the necessity for interlocutory orders can be said to have been overtaken by events between the time the application was made and the date on which the motion would otherwise have been heard.
46. I am satisfied that the principles which are to be applied in the case of actions or appeals which are discontinued or abandoned do not apply to a case, such as this, in which the necessity for interlocutory relief has been overtaken by events.
47. For the reasons already given, the lifting of the suspension and the abandonment of the investigation did not make the action moot.
48. While the defendant's primary submission is that the plaintiff ought to be ordered to pay the costs, it argues in the alternative that its costs should be made costs in the cause and that there should be no order as to the plaintiff's costs. In support of this alternative argument reference was made to *Paddy Burke (Builders) Limited v. Tullyvarraga Management Company Limited* [2020] IEHC 199 and *O'Neill v. Commissioner of An Garda Síochána* [2021] IEHC 112.
49. In my view, these cases are clearly distinguishable from the present. In each of the two cases relied on the plaintiff had failed on an application for interlocutory relief to bring forward any basis on which the orders sought might have been made, but the court was prepared to contemplate that the plaintiff might succeed at trial. The conclusion was that in that event it would not be just that the defendant should have the costs of refusing to do earlier what it might ultimately be decided it was bound to do, and ought to have done when first called upon.
50. The premise of the alternative costs order proposed by the defendant would be either that the plaintiff's interlocutory motion failed – which of course it did not – or that the motion, if fought, would have failed – which I could not possibly say. The effect of the proposed order, in the event that the plaintiff should succeed at trial, would be that he would not have the costs of seeking to prevent what might ultimately be established to have been an unlawful suspension and/or an unlawful investigation. That, in my view, would be to create rather than guard against a risk of injustice.

Conclusion

51. While the necessity for the interlocutory orders sought by the plaintiff on 1st April, 2021 was overtaken by the lifting of the plaintiff's suspension on 20th April, 2021 and the cessation of the defendant's investigation on 28th April, 2021, the core issue as to the defendant's entitlement to have suspended the plaintiff and initiate the investigation remains to be decided.
52. In my view the justice of the case requires that whichever of the plaintiff or the defendant ultimately prevails on that issue should have the costs of the interlocutory motion.
53. The costs of both parties of the interlocutory motion, and the plaintiff's costs of *the ex parte* application for short service, will be costs in the cause.