



**COURT OF APPEAL
CIVIL**

Neutral Citation: [2023] IECA 222

Record Number. 2022/122

Noonan J.

Ní Raifeartaigh J.

Binchy J.

BETWEEN/

JOHN BARRETT

APPLICANT/APPELLANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

AND

THE MINISTER FOR JUSTICE

RESPONDENTS

JUDGMENT of the Court delivered on the 31 August 2023 in relation to costs

1. This is an appeal in respect of which the Court delivered judgment on the 23rd May 2023, upholding the High Court’s refusal of an interlocutory injunction. While a large number of issues were argued and dealt with in considerable detail by the High Court judge and this Court, the Court held that the appellant’s delay in seeking interlocutory relief was in and of itself a valid reason for refusing the relief sought and that this issue was dispositive of the appeal. The Court went on to deal with the appellant’s protected disclosures arguments but made it clear that it was doing so because this was an area in which there was relatively little authority concerning the area of protected disclosures and that an important issue arose with regard to the burden and standard of proof in circumstances where the legislation provided for a reversed standard of proof on a particular issue and the High Court judge had erred in overlooking this at certain points in her judgment.

2. The parties have made written submissions in relation to the issue of costs. The appellant sought an oral hearing on costs, and this was opposed by the respondents. The Court determined that, having regard to the content of the written submissions, it was not necessary to hold an oral hearing to determine the issue of costs.

3. The appellant contends that he is entitled to the costs of the High Court and this Court for reasons described below. He submits in the alternative that costs should be either costs in the cause or reserved to the trial. The respondents contend that they are entitled to the costs in the High Court and this Court.

4. The arguments of the appellant may be summarised as follows. First, he argues that that the conclusion of the High Court on the delay issue was merely *obiter*, and that the appellant was successful in the appeal on other issues raised in the case which occupied the bulk of the argument, in particular in relation to the conclusion that there was an arguable case on the “protected disclosure” issue in respect of at least some of the communications. Secondly, he

argues that he obtained a real and tangible benefit on appeal, that the Commissioner's disciplinary process and recommendation was "*entirely undermined*" by the Court's judgment, and that the "*conclusion reached by this Court would make it inconceivable for the Minister to be willing or able to lawfully dismiss the Appellant pending the conclusion of the full hearing*". He adds that the Court "*has found that there is a prima facie case that the Commissioner has sought the dismissal of the Appellant as the result, inter alia, of the Appellant having made protected disclosures*". Thirdly, he argues that damages would not be an adequate remedy if he is successful at the trial. Fourthly, he argues that "*recent enhancement in protected disclosures law underscores the strong public policy against the penalisation of whistleblowers and leans against awarding costs against whistleblowers who have proven an arguable case at this stage*". Fifthly, he argues that the Court itself characterised the case as involving an important issue and that it was the first reported decision dealing with interim/interlocutory relief pursuant s.13 of the Protected Disclosures Act 2014. Sixthly, the appellant contends that the conduct of the respondents was such that it should affect the costs decision, including an absence of transparency in the process (as referred to by the Court at one point in its judgment), the nature of the arguments put forward on their behalf, and a refusal to attend mediation.

5. The respondents submit that the appellant mischaracterises the High Court's conclusion on delay as *obiter* when it was in fact a separate and standalone basis for the decision, and that it entirely overlooks this Court's conclusion on delay. The respondents submit that the delay on the part of the appellant was extraordinary. The respondents also submit that the appellant did not succeed in obtaining the injunction sought and did not obtain a real and tangible benefit, as he suggests. They accept of course that the Court found that there had been an error in the High Court's analysis of certain issues but point out that ultimately this did not affect the conclusion that the injunction should not be granted. As to the argument that damages would not be an adequate remedy, they submit that the appellant in effect seeks to re-argue aspects of

the substantive decision. They submit that the relative novelty of the protected disclosures regime would not justify a departure from the normal rule as to costs. They reject the suggestion that their own conduct should in any way disentitle them to their costs.

6. Having regard to the provisions of the Legal Service and Regulation Act 2015 and decisions in cases such as *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183 and *Higgins v. Aviation Authority* [2020] IECA 277, the Court is of the view that the costs of the appeal should be awarded to the respondents. In the Court's view, the respondents were entirely successful in that the appellant failed to overturn the High Court's refusal to grant the interlocutory injunction sought. The extraordinary delay on the part of the appellant in bringing the application was, the Court clearly signalled, a clear and stand-alone basis for dismissing the appeal. The fact that the Court went on to address certain other arguments by the appellant on the "protected disclosures" issue which may be of assistance in other cases and/or at the substantive hearing, and that the High Court's views on some matters were departed from, does not detract from the fundamental fact that the appeal was entirely unsuccessful with regard to the relief sought.

7. The Court does not agree that the conduct of the respondents would in any way justify a departure from the usual rule as to the costs of the successful party. Nor does it accept that the discussion of legal issues relating to "protected disclosures" could be said to reach the level of public importance that would warrant the departure from the usual rule as to costs. The fundamental point is that the Court clearly dismissed the appeal on the stand-alone point of delay, and the remainder of the judgment was clearly signalled as *obiter* which was, unusually, considered necessary in view of the High Court's erroneous treatment of the burden of proof issue, which may have had application more generally were it allowed to stand without comment.

8. In the circumstances, the Court will make an order that the costs of the appeal should be awarded in favour of the respondents. Likewise, the order of the High Court as to costs should be upheld.

9. The Court is, however, prepared to grant a stay on execution of those costs pending the outcome of the substantive hearing, on the basis that if the appellant were to be successful at that hearing, an issue of set-off of costs might arise. The issue of delayed execution is subject to any further views on this issue which the parties may wish to communicate by email to the Court before the 15 September 2023 and upon which the Court will rule in due course if necessary.