[2018] IEHC 832

THE HIGH COURT

[2018 No. 1303 P]

BETWEEN

GERARD FINNIN

PLAINTIFF

AND

TIZZARD HOLDINGS UNLIMITED COMPANY T/A ADARE MANOR HOTEL AND GOLF RESORT

DEFENDANT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 16th day of May, 2018

Introduction

1. Last Thursday, 10th May, 2018, this application by the plaintiff for interlocutory restraining and mandatory orders in a wrongful dismissal-type action was opened. The commitments of this Court and the demands on the Chancery List did not permit for the hearing to continue on into Friday. The plaintiff having finished opening on Thursday evening, the hearing resumed yesterday, Tuesday, 15th May, with the reply and closing submissions, ending yesterday evening.

Principles

2. The principles applicable for determining an interlocutory mandatory injunction-type application are well established and I quote from the *ex tempore* judgment of Fennelly J. in *Maha Lingham* v. HSE [2006] 17 ELR 137:-

> *"… first that according to the ordinary law of employment a contract of employment may be terminated by an employer on the giving of reasonable notice of termination and that according to the traditional law at any rate, though perhaps modified to some extent in light of modern developments, according to the traditional*
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> *interpretation, the employer was entitled to give that notice so long as he complied with the contractual obligation of reasonable notice whether he had good reason or bad for doing it. That is the common law position and it is an entirely different matter as to whether a person has been unfairly dismissed and a different scheme of statutory remedy is available to any person dismissed whether with or without notice under the Unfair Dismissals Act, but this is not such an application. This is an action brought at common law for wrongful dismissal in the context of which an injunction was sought. This is the first general principle.*
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> *The second is that the implication of an application of the present sort is that in substance what the plaintiff/appellant is seeking is a mandatory interlocutory injunction and it is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory. In such a case it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action. So it is not sufficient for him simply to show a prima facie case, and in particular the courts have been slow to grant*

interlocutory injunctions to enforce contracts of employment. None of this is to deny that there have been developments in the law in recent years and it is necessary to refer very briefly to the nature of these developments. The first is that, in this jurisdiction the development can be traced to the judgment of Costello J. in a case of Fennelly v Assiuanazioni [sic] Generali (1985) 3 I.L.T.R 73 in which an injunction was granted directing an employer to continue payment to the plaintiff, in that case pending the hearing of the action, and that type of jurisdiction was exercised in a number of subsequent cases. It is fair to say however, that there is a very strong trend in those cases to the effect that where a person has a clear right to either a particular period of notice or a reasonable notice or has a fixed period of employment, a summary dismissal or a dismissal without notice or without any adequate notice is a first step in establishing the ground for an injunction in those sort of cases." (pp. 140-141).

3. And then he goes on in the next paragraph:-

> *"A second element in cases of that sort is that, where a dismissal is by reason of an allegation of misconduct by the employee, the courts have in a number of cases at any rate imported an obligation to comply with the rules of natural justice and give fair notice and a fair opportunity to reply."* (p. 141).

4. Now, there is no difference between the parties as to those principles. Mr. Cush SC, for the defendant, acknowledged that his client needs to establish that the rules of natural justice were applied, notice given and a fair opportunity to reply afforded. Mr. Kerr SC, on behalf of the plaintiff, accepts that he must establish a strong case before mandatory relief can be granted.

Plaintiff's position

5. The plaintiff, until his summary dismissal in January 2018, was Engineering Facilities Manager at Adare Manor Hotel and Golf Resort ("the Resort"). It is undisputed that he was committed and worked hard. He himself expressed the belief that he was going to work for many years and that he would protect the long term best interests of the Resort.

6. The responsibilities of the plaintiff are described at para. 38 of his 34 page affidavit sworn on the 20th March, 2018, and included:-

   (i) Estate management of 84 buildings and 840 acres with roads and services;

   (ii) Security, including outsourcing security for events;

   (iii) Health and safety management for the Resort, its contractors and suppliers;

   (iv) Environmental compliance; and

   (v) IT infrastructure.

7. The Resort was owned by NAMA until 2014, when the defendant took it over with the support of Mr. JP McManus, according to information conveyed by counsel to the Court. It

opened for about a year before a building programme was commenced. The plaintiff's employment was confirmed and the parties executed what is called *"Updated contract of employment"* which stated that it took effect on 16th December, 2015. It provided for *inter alia:-*

(i) At clause 4a: "*Any lieu time outstanding at 15th December, 2015 will be removed from the system."*

(ii) Annual leave.

(iii) Public holidays and a minimum notice period of eight weeks and for payment in lieu of notice.

(iv) A disciplinary procedure and "the principles *of due diligence and fair process compliant with the Code of Practice SI No146 of 2000",* which is actually entitled Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures (Declaration) Order 2000.

Disciplinary Procedure

8. The disciplinary policy of the defendant at exhibit GF4 of the plaintiff's grounding affidavit commences with questions and answers and stated that the aim *"is to ensure that you are treated fairly and consistently in all disciplinary matters related to issues of conduct, behaviour and performance. This policy is intended to be positive rather than punitive … Formal sanctions may have to be applied in certain circumstances."*

9. The next question is answered by referring to five principles of natural justice which may be summarised as follows:-

(i) Right of employees to know allegations and complaints made against them;

(ii) Right to representation;

(iii) Right to defend;

(iv) Right to a fair and objective investigation and hearing;

(v) Right to appeal.

10. The policy refers to verbal and written warnings and then goes on to describe gross misconduct and the prospect of dismissal for serious misconduct such as *"wilful damage … breaches of trust … without recourse to the procedure"* of verbal or written warnings. It provides for suspension with pay where the defendant company is investigating serious breaches. It defines *"gross misconduct"* as not limited to wilful failure to comply with company procedures and breach of trust.

Relationship between the Plaintiff and the General Manager

11. The plaintiff reported to Mr. Paul Heery, who had been appointed General Manager in May 2017. Suffice to say at this stage that the plaintiff, at p. 21 of his 34 page supplemental affidavit sworn on 20th March, 2018, in reply to Mr. Heery's affidavit of 8th March, 2018, set out ten issues of potential regulatory non-compliance on the part of the defendant which Mr. Heery advised the plaintiff should be ignored prior to the relevant incident on

Christmas Eve 2017. These issues were not ostensibly taken into account in the disciplinary process. The defendant characterised the mention of these issues in the supplemental affidavit of the plaintiff as a belatedly suggested influence. Mr. Heery did not comment on these concerns of the plaintiff in any of his affidavits.

Chronology of critical facts which are not in dispute

12. Security officer Mr. Thomas Culliney reported that the CCTV of 22:45:15 on 24th December, 2017, showed a staff member removing two boxes which are now agreed to be boxes of beer.

13. Mr. Hussein, Night Manager, emailed a Mr. Nicholas Hill, who had been appointed Head of Security in November 2017 (but no longer works with the defendant) about the report at approximately 08:38 on Christmas Day.

14. Mr. Heery emailed Mr. Hill the following day at 15:17 on the 26th December, 2017: "*Has this been closed out – thanks for confirmation."* with the same heading which had been used in the email: 'Suspicious activity 24.12.17'.

15. Only yesterday, on 15th May, 2018, Mr. Heery's affidavit sworn last Monday was filed. This affidavit sought to explain his omission from his account of facts of an email from Mr. Hill to Mr. Heery of 26th December, 2017, at 15:39 which read as follows: "*Hi Paul, was going to speak to you tomorrow and not bother you at this time. Yes, everything has been clarified and all ok. I can give you a quick breakdown of the events tomorrow and talk about concerns I had regarding central stores."*

16. Mr. Nick Hill, then Head of Security, signed a witness statement dated the 28th December, 2017, which referred to a phone call from the plaintiff at 16:09 on the 26th December, 2017. The plaintiff outlined what had happened upon his noticing two boxes of beer having been left at the exit door of a store which had looked out of place. The plaintiff continued on to say to Mr. Hill that he was going to leave them at a building occupied by another employee, Mr. Lowe, but they would have been mistaken as Christmas gifts for sharing. Mr. Hill in his statement replied that this was *"really not the right way to do this*", to which the plaintiff replied: *"Don't worry, they are safe and secure in my car and will of course be returned."*

17. Following the return of Group Human Resources Manager, Ms. Yvonne O'Malley, from leave, she signed and sent a letter dated the 28th December, 2017, which required the plaintiff to attend a formal disciplinary meeting on Friday, 29th December, 2017, at 15:30, the purpose for which: *"... is to investigate that you allegedly removed two cases of alcohol from the central stores, placed them in your car & removed them from the resort without authorisation on 24th December 2017 at approximately 22:45pm. This serious breach of conduct is considered gross misconduct, which if proven may result in disciplinary action up to and including dismissal. Paul Heery will chair the disciplinary meeting … In line with our Company Disciplinary policy you will be given every opportunity to explain and account for your actions or highlight any mitigating factors …".*

18. On the 2nd January, 2018, the said meeting actually convened, with Ms. O'Malley taking notes. The plaintiff asked who was accusing him of gross misconduct and Ms. O'Malley merely said, according to her own note, "… *Paul Heery is representing the company and will investigate the allegation."* Mr. Heery, following questions and answers, suggested that the meeting reconvene on Friday, 5th January, 2018.

19. The plaintiff completed a statement on the 3rd January, 2018, which criticised the tone and focus of the investigation of the accusations as follows: *"… of gross misconduct on the basis of a non-existent policy when I feel from the facts it is abundantly clear that I was acting in the best interests of the company to prevent further loss."*

20. The plaintiff then emailed Ms. O'Malley at 17:05 on 3rd January, 2018, to identify the specific procedure or policy that required him "*to have permission to transport items off site".* Ms. O'Malley replied at 18:49 on 4th January, 2018: *"We do not have a policy that would specifically prohibit taking stock items & removing them from the resort without authorisation."*

21. On the 9th January, 2018, the 'disciplinary meeting' reconvened and Mr. Heery said that they would break, with a reconvening later at 11:30. When it reconvened, Mr. Heery, according to Ms. O'Malley's note, said he *"reviewed everything including the statements. Regretfully [the plaintiff] removed property off site and without informing anyone" before dismissing him on the grounds of misconduct: "The trust and confidence is gone. [The plaintiff] has the right to appeal."*

22. Mr. Heery spoke with the Chief Executive Officer, Colm Hannon, following the dismissal and in advance of the appeal hearing requested by the plaintiff, upon the grounds set out at para. 2 of Mr. Hannon's one and only two-page affidavit in these proceedings. Mr. Hannon told the plaintiff that Mr. Heery had told Mr. Hannon that there were differences in the plaintiff's version of events. Mr. Hannon said that the plaintiff denied the inconsistency and that Mr. Hannon listened carefully to the plaintiff but *"…was not satisfied that there was no evidence of wrongdoing on the part of the Plaintiff and … was not satisfied, upon review of the notes, that his version of events were consistent."*

23. He upheld the decision to terminate. Significantly, neither the CEO (Mr. Hannon) nor the plaintiff aver that they could not work together for the defendant. Mr. Hill has left the company and Mr. Heery has not commented on the regulatory safety and security issues raised by the plaintiff, albeit in his supplemental affidavit, and which were not advanced at his disciplinary hearing as a reason not to hear Mr. Heery's charge against the plaintiff.

Submissions

24. Counsel for the defendant correctly submitted that this Court is not tasked to determine whether it would have summarily dismissed the plaintiff at first instance or on appeal within the defendant company's disciplinary process. He was also right in accepting that the allegation made against the plaintiff is so serious as to require the full gamut of fair procedures. Not only has the plaintiff lost his sole source of income for his family but his

reputation and prospects have been dealt a devastating blow as a result of the defendant company's determination.

25. Counsel urged the Court to discount the plaintiff's belated attempt to challenge the allegedly impartial investigatory and adjudicating process and the exercise of the company's disciplinary power by Mr. Heery. He relied upon the Supreme Court judgment in Corrigan v. Irish Land Commission [1977] I.R 317 ("*Corrigan")* where the appellant there had been represented by experienced senior and junior counsel in an appeal tribunal which consisted of two lay commissioners who had signed the certificate which had been appealed. As counsel for the plaintiff observed, the analogy of Griffin J. to play the advantage rule in football no longer applies in football now. Advantage may be played in various sports but the penalty or free or whatever, is given if no advantage ensues.

26. That analogy should have no further part in considering this aspect of law in this Court's view. I fully accept and endorse the passage of Laffoy J. cited by counsel for the plaintiff in Doherty and Carroll v. HSE [2009] 20 E.L.R 131 at 141; [2008] IEHC 331 at [30], which differentiated *Corrigan:-*

> *"Those considerations do not apply to a situation in which a litigant, without legal representation, has participated in a process and after the process is completed, on the basis of legal advice, contends that the decision of the decision-maker was not properly made because he had no authority to make it or he exceeded his authority, or he acted in breach of the litigant's rights or for some other reason."*

27. The plaintiff has satisfied me that he has a strong case arising from the following at least:-

(i) Mr. Heery's role as investigator, accuser, adjudicator and contributor to the appeal decision maker.

(ii) A lack of transparency and particularly that of the request by the plaintiff for the detailed timeline of the process, of what had occurred and of the consideration given to sanctions and proportionality.

(iii) The standard of proof applied by Mr. Heery, and in this regard the Court relies upon the Supreme Court's phrase in *Georgopoulos v. Beaumont Hospital Board* [1998] 3 I.R. 132 at 150: "… *the degree of probability required should always be proportionate to the nature and gravity of the case to be investigated."* The consequences of the allegations require a high standard of proof. It is not readily evident from the rather brief account of the consideration given by Mr. Heery and then by Mr. Hannon that this proportionality high standard was applied.

(iv) The rather opaque process adopted by Mr. Heery in finding that *"Trust and confidence is gone"* despite the submissions of counsel for the defendant that the plaintiff was given a number of opportunities to explain inconsistencies which

occurred to Mr. Heery and mentioned without any detail by Mr. Hannon. It is further apparent at this stage without making any final determination that the plaintiff was not advised about the inconsistencies in a manner which could be adopted reasonably before depriving a person of their livelihood or their right to earn a living.

28. There was mention in the submissions by counsel for the defendant that cross-examination may not be required of the facts as the facts are agreed. That may transpire to be the case but I do not determine that issue now. The nub of the grievances engages the full panoply of fair procedures because of the obligations on an accuser in a serious case with devastating effects like this. The methods adopted by the defendant to advise the plaintiff of the charges, to investigate those charges prior to the adjudication and the independence of the appeal process are all in issue at this stage. It is not for this Court to adjudicate now on the reasonableness of the defendant in conducting business or maintaining a workplace environment. However, this Court has power to uphold the right of employees to fair procedures and to grant interlocutory relief based on the legal principles already outlined.

Adequacy of damages

29. Having determined the strength of the plaintiff's claim without deciding those issues, it now falls to consider whether there is a strong case that damages are an adequate remedy ultimately for the plaintiff or the defendant in respect of the revised reliefs sought in the interlocutory application. Damages may not be an adequate remedy for the plaintiff because it is reasonable to suggest that he has been dismissed for removing the boxes of beer for his own potential benefit. That is a most serious allegation which may affect his job prospects. The defendant if it succeeds will recover damages on foot of the plaintiff's undertaking and will be vindicated in its processes.

Plaintiff's situation

30. The plaintiff had health warnings due to stress which the plaintiff attributed to the onerous hours, commitment without holidays and frustration, for want of a better word, with the ignoring of his concerns expressed to Mr. Heery about safety, health, the environment and other regulatory issues for the Resort, its employees and contractors. Causation for the stress cannot be determined or taken into account in this application. He suffered a cardiac incident on the 29th January, 2018, but has been certified fit to return to work from last March.

31. The plaintiff at para. 58 of his grounding affidavit set out the financial ruination details inflicted by his dismissal. He has monthly bills associated with maintaining a family. His wife is not employed outside the home and he was in receipt of approximately €4,000 net income up to the date of his dismissal. He also has medical bills as a result of his cardiac incident.

32. The plaintiff has averred, without contradiction, to a continuing good relationship with Mrs. and Mr. Foley (daughter and son-in-law of Mr. JP McManus respectively, according to

counsel) who are responsible for the day to day operation of the company and there is no distrust between the Foleys and himself, according to the plaintiff. He is ready and willing to work. The defendant is ploughing ahead with its significant developments. The principal issues of contention between the plaintiff and the defendant other than his devastating dismissal related to concerns expressed to Mr. Heery and outlined in the plaintiff's supplemental affidavit.

33. In all of the circumstances, if the defendant succeeds in defending these proceedings at plenary trial it can recover from the plaintiff on foot of his undertaking as to damages and its development continues. The plaintiff needs his income to meet the described expenses. The defendant can always terminate the plaintiff's contract of employment by serving notice in accordance with the agreement, but that does not detract from the undoubted severe reputational damage inflicted by the summary dismissal and news of it however it was published. It appears to be in the interests of the parties to close the pleadings and finalise all discovery, issues about particulars, notices to admit facts, interrogatories or whatever is deemed necessary as soon as possible.

Statement of claim

34. The Court listened carefully to the complaint of counsel for the defendant about delay which he attributed to the plaintiff in the prosecution of these proceedings. Suffice to say that the plaintiff's heart incident, the time taken by both sides to complete their affidavits and submissions, the fixing of a hearing date to suit the schedules of the Court and counsel together with the ignoring of advice given by solicitors to the parties concerning mediation, about which I was assured last Thursday, I find that the said delays are understandable, excusable and reasonable. The statement of claim could have been delivered but that point was only taken without any advance warning or specific request during the hearing of this application. Indeed the memorandum of appearance requested a statement of claim but a copy of that was not made available to the Court until the point was made yesterday.

35. Much was made about the need of the defendant to replace the plaintiff. The Court was not impressed by the short affidavit of Mr. Heery, due to its scarce detail about terms and which was filed only yesterday. It referred to the advertising for and then the engagement of a successful candidate, who commenced on 23rd April, 2018, pursuant to a contract of employment. The affidavit did not identify or exhibit any particular term of the contract which precludes the defendant from re-engaging the plaintiff. The defendant is a company with significant assets and resources under its control and has had the benefit of legal advice. It ought not exacerbate a loss to the plaintiff by entering into contracts if it is aware of the risks of not successfully defending these proceedings at plenary hearing. Having said that, the Court is ever conscious of the rights of parties such as the new employee of the defendant who has taken up the position of Director of Engineering Facilities. In those circumstances it will moderate its order so as to maintain the *status quo* as far as possible until the determination of the proceedings.

36. Therefore, the Court will make the following orders, noting the undertaking given by the plaintiff as to damages:-

(i) An order restraining the defendant, with effect from today, from entering into any new contractual arrangement which will hinder the return of the plaintiff to the defendant as an employee if ultimately ordered following the plenary hearing of these proceedings.

(ii) An order directing the defendant to pay the plaintiff's salary and benefits under his updated contract of employment, which took effect from 16th December, 2015, from the 9th January, 2018, until the determination of these proceedings.

(iii) An order directing the plaintiff to deliver his statement of claim within seven days of a letter of request or reminder for same from the defendant's solicitors, which letter can be sent as soon as it suits the defendant's solicitors to do so.

(iv) Liberty to the parties to apply to this Court upon three days' notice in relation to directions, whether the proceedings have to be adjourned for an alternative dispute resolution process or to vary the mandatory salary and benefits order mentioned at (ii) above on account of delays caused by the plaintiff, on other equitable grounds or on agreed terms.

37. I will be the duty judge here on Monday, 28th May, if parties cannot wait until the new term to come before me in relation to any other application.

Postscript

38. On 1st June, 2018, this Court, upon hearing counsel for the parties, stayed the order made on 16th May, 2018, directing the defendant to pay the plaintiff's salary and benefits under the plaintiff's contract of employment until the determination of the appeal from the interlocutory order by the defendant on condition that the defendant pay to the plaintiff as soon as possible €12,000 and on condition that the defendant pay to the plaintiff the sum of €750 per week (said payments were not to deprive the Revenue Commissioners of pursuing any obligation that may arise on behalf of the defendant as employer or the plaintiff as employee).

39. On 8th March, 2019, following three days of hearing on 5th, 6th and 7th March, 2019, the Court (Allen J.) made an order by consent:-

(i) vacating the orders made on 16th May, 2018, and 1st June, 2018, together with all orders in respect of costs; and

(ii) striking out the proceedings with no order as to costs.