Neutral Citation Number: [2008] IEHC 331

THE HIGH COURT

2008 No. 6475 P

BETWEEN

STEPHEN DOHERTY AND ANTHONY CARROLL

PLAINTIFFS

AND
HEALTH SERVICE EXECUTIVE

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on the 1st day September, 2008.

The application
1. These proceedings were instituted by plenary summons which issued on 1st August, 2008. The application which was heard on 27th August, 2008 is an application for an interlocutory injunction. The notice of motion merely reiterates the relief claimed in the plenary summons. However, at the hearing counsel for the plaintiffs clarified that what the plaintiffs were seeking was an interlocutory injunction pending the trial of the action restraining the implementation of the disciplinary penalty of unpaid suspension of the plaintiffs' employment directed by the defendant on 22nd July, 2008.

The facts
2. Both plaintiffs are employees of the defendant at Ballydowd Special Care Unit (Ballydowd). Ballydowd, which is managed by the defendant, was established in September, 2000, to provide a secure civil detention unit for young persons with serious emotional and behavioural problems detained on foot of Court orders. The first plaintiff's employment commenced just short of eight years ago and he is currently employed as a social care worker. The second plaintiff's employment commenced four and a half years ago and he is employed as a general attendant.

3. The suspension of both plaintiffs which is the subject of these proceedings arose out of an incident which occurred on 9th February, 2007. The incident was the subject of a formal investigation which was conducted pursuant to the provisions of the Disciplinary Procedure for Employees of the Health Service Executive (the Disciplinary Procedure), which was adopted in January, 2007. The provisions which seems to me to be relevant for present purposes are the following:-

> • Clause 5, which governs formal disciplinary procedure and provides that, while disciplinary procedure will normally be operated on a progressive basis, in cases of serious misconduct the manager may bypass stages 1, 2 and 3 of the procedure. It also states that failure to meet the required standards of work, conduct or attendance will lead to a disciplinary hearing under Stage 4, which allows for sanction in the form of dismissal or action short of dismissal. It identifies the decision-maker as the relevant national director, who is given authority to delegate the function. Examples of serious misconduct which will be dealt with from the outset under Stage 4 are given and these include, *inter alia*, deliberate damage to property, gross negligence or dereliction of duty and serious breach of health and safety rules. The list is stated to be not exhaustive. There follow detailed provisions in relation to the manner in which allegations of serious misconduct are to be dealt with. An investigation is to be conducted by a person who is acceptable to both parties. If the findings of the investigation uphold the allegation of serious misconduct, a disciplinary hearing will follow. There are detailed provisions as to the convening, the conduct and the outcome of the disciplinary hearing. In relation to the sanction which may be imposed, examples are given of disciplinary action short of dismissal, one of the examples being suspension without pay.
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> • Clause 6, which provides for appeals under Stage 4 and states that an appeal against a disciplinary sanction short of dismissal will be heard by a manager at a higher level than the manager who made the original decision. The grounds on which the employee may appeal are set out and include, in addition to severity of sanction, *inter alia*, procedural deficiencies.

4. The incident which occurred on 9th February, 2007 was investigated by Conal Devine. Mr. Devine issued his final report in March, 2008. It sets out the chronology in detail. The plaintiffs had been informed by letter dated 10th July, 2007 that there was to be a formal investigation. The terms of reference of the investigation were settled in August, 2007. Mr. Devine issued a draft report on the 11th January, 2008 and his final report, which is comprehensive and runs to twenty-five pages, was issued on 25th March, 2008.

5. As appears from Section 1 of the report, Mr. Devine's terms of reference were to investigate certain allegations which were set out and "to determine whether such allegations are upheld and whether such allegations constitute serious misconduct under Stage 4 of the Disciplinary Procedure …". The conduct of three parties was being investigated: plaintiffs and another employee of the defendant in Ballydowd. The allegations being investigated may be summarised as: unauthorised entry of an ex-staff member; unauthorised entry of a staff member (the first plaintiff), who was not rostered for duty at the particular time on 9th /10th February, 2007; whether the relevant staff members left their work stations unattended, failed to monitor closed circuit security pictures, thus putting young persons and staff members at risk; whether the staff members were involved in an altercation within the unit or in the adjacent car park, thus placing themselves, young persons in care and other staff members at risk; and whether the staff members either individually, or as a consequence of their actions, caused damage to the reception area of Ballydowd on 9th/10th February, 2007.

6. Mr. Devine set out his conclusions in Section 8 of the report. In an introduction, he set out his approach to making the findings. The burden of proof was on the defendant. The standard of proof was the standard in civil litigation –"the balance of probabilities, bearing in mind that the degree of probability required should be proportionate to the nature and gravity of the issue being investigated". The report continued:-

> "Accordingly the evidence must point to it being more likely than not that serious misconduct occurred on the part of each of the staff individually or in conjunction with one or more other staff members. Where the probabilities are equal, or where it is less likely than not that incidents, acts or omissions occurred, a complaint cannot be upheld".

7. Mr. Devine identified the examples of serious misconduct set out in Clause 5 which he considered relevant as: deliberate damage to property; gross negligence or dereliction of duties; and serious breach of health and safety rules.

8. Mr. Devine then made findings in respect of each of the staff members against whom complaints were made.

9. The manner in which he dealt with the staff member who is not involved in these proceedings, whom he exonerated, is instructive

in understanding his approach to the plaintiffs. He made no adverse finding amounting to serious misconduct on the basis of the evidence available and he set out findings of fact which supported that conclusion. He dealt separately with the issue whether that employee had discharged his obligation under s. 13(1) (h) (iii) of the Safety, Health and Welfare at Work Act 2005 (the Act of 2005) to report to his employer as soon as practicable any contravention of the relevant statutory provisions which might endanger the safety, health and welfare at work of the employee or of any other person and stated that it was a matter of fact that he did not discharge that obligation. However, notwithstanding that finding, he stated that it was not considered that that failure to report or intervene in the matter constituted misconduct or serious misconduct on the part of that employee.

10. In relation to the first plaintiff he found, on the balance of probability, that he both failed to discharge his duty of care and breached the obligations placed on employees by the Act of 2005, and he set out the facts by reference to which he made that finding. He found that there was insufficient evidence to support the allegation that the first plaintiff had caused damage to property in the reception area. He then set out the following conclusions: that "it is more likely than not" that the first plaintiff's actions "both constituted breaches" of s. 13(1)(e) and (h) (iii) of the Act of 2005; and that it "is also more likely than not" that the first plaintiff's actions fell short of the standard and duty of care that should reasonably be expected of an employee working in Ballydowd. He continued:-

> "While the established behaviours can reasonably be stated to amount to misconduct on the part of [the first plaintiff], regard is had to the lack of evidence that [the first plaintiff] intentionally put anyone at risk on the night in question and accordingly, it is held that it is as likely as not that the behaviours amounted to serious misconduct".

11. In relation to the second plaintiff, on the basis of the established facts, Mr. Devine found that his actions "were below the standard of care which would reasonably be expected of a General Assistant with monitoring and gate-keeping responsibilities" and that it was "more likely than not" that his actions constituted "serious breaches of health and safety requirements as well as common law duty of care obligations". The established facts by reference to which he had arrived at that finding were itemised. He then went on to state his conclusions in precisely the same terms as he had stated his conclusions in relation to the first plaintiff: that "it is more likely than not" that his actions constituted breaches of s. 13(1)(e) and (h)(iii) of the Act of 2005; and that it is "also more likely than not" that his actions fell short of the standard of duty of care which would reasonably be expected of an employee in Ballydowd. There followed a finding in precisely the same terms as the finding he had made in relation to the first plaintiff, which I have quoted above, concluding that "it is held that it is as likely as not that the behaviours amounted to serious misconduct".

12. The core complaint made on behalf of the plaintiffs on the hearing of this application was that steps subsequently taken by the defendant were unlawful because, it was contended, Mr. Devine had not upheld the allegations of serious misconduct against the plaintiffs.

13. What followed was that a separate Stage 4 disciplinary hearing was held in relation to each of the plaintiffs on 10th July, 2008. Each of the plaintiffs was accompanied by a trade union official. The decision-maker was Hugh Kane, Assistant National Director. The outcome of the disciplinary hearings was communicated to the plaintiffs by letter dated 11th July, 2008. Having set out the matters which he had taken into account, Mr. Kane set out his decision, which, in each case, was that the plaintiff would be suspended without pay from employment for a period of six months. Each plaintiff was informed of his right to appeal.

14. The solicitors acting for both plaintiffs wrote to the defendant on 23rd July, 2008, alleging that each had been unfairly suspended and asserting that there had been a distinct and blatant absence of natural justice and fair procedures in relation to the suspension. Certain documentation was sought.

15. As I have outlined earlier, these proceedings were initiated when a plenary summons was issued on 1st August, 2008 and the plaintiffs were given leave to issue a notice of motion returnable for 6th August, 2008. In the period between the initiation of the proceedings and the hearing of the interlocutory application, the appeal by both plaintiffs against Mr. Kane's decision was heard. Despite an attempt by the plaintiffs' solicitors to appeal on broader grounds, the appeal was limited to the sanction only, the solicitors for the defendant asserting that that was all that was permitted under the Disciplinary Procedure. The broader bases on which the plaintiffs sought to appeal included the following grounds: that the Stage 4 disciplinary hearing and the penalty imposed were not available to the defendant and were in breach of the Disciplinary Procedure; that the sanction imposed was inordinate and disproportionate and was not expressly and specifically constituted as a permissible penalty available in the circumstances of the cases; that the delay of one year and six months since the incident giving rise to the proceedings together with the worry and stigma which resulted from the disciplinary proceedings, rendered the proceedings unlawful; and that the sanction imposed was inconsistent with the finding of misconduct falling short of serious misconduct.

16. The appeals were heard on 25th August, 2008 by Pat Dunne, who conveyed his decisions on the appeals to the plaintiffs by letter dated 26th August, 2008 in which he stated that he had come to the decision "that Mr. Kane's recommendation on this matter ought to be upheld", stating that he believed the recommendation appropriate having regard to the gravity of the plaintiffs' behaviour on the night in question. The correspondence which passed between the parties' solicitors in relation to the appeals was admitted in evidence, and the court was told of the fact that the appeals were concluded and their outcome. However, as I understand it, the conduct of the appeals is not in issue on this application.

17. Under Clause 5 of the Disciplinary Procedure, the defendant could have availed of protective measures pending the outcome of the investigation, for example, by re-assigning the plaintiffs to other duties, providing an appropriate level of supervision or putting the employees off duty with pay. The plaintiffs pointed out that it must be inferred that the defendant did not consider it necessary to avail of any of those measures.

18. The first plaintiff is the subject of a separate investigation in respect of a matter which is alleged to have occurred around October, 2007. He has been on administrative leave since 22nd October, 2007. The investigation of the complaint in question is external to Ballydowd. The defendant contended that there was a lack of candour on the part of the first plaintiff in his grounding affidavit, in that he did not disclose the fact that he has been on administrative leave, i.e. suspension with pay, since October, 2007. In particular, it was contended that an averment by the first plaintiff that the defendant was fully content to allow him to continue to work in his job for a very long time after the incident, and also after the investigation concluded, was untrue. It was untrue but I am not satisfied that the intention was to mislead the Court. The first plaintiff did not seek interim relief on an ex-parte basis. The defendant was always going to have an opportunity to apprise the Court of the true position in relation to the first plaintiff. Accordingly, I do not consider the untrue averment, which I accept was included by mistake, to be of significance in the determination whether the first plaintiff is entitled to the relief he claims.

Submissions on behalf of the plaintiffs

19. Counsel for the plaintiffs submitted that, although Mr. Devine had made a finding of misconduct against each of the plaintiffs, it

fell short of a finding of serious misconduct. Therefore, a Stage 4 disciplinary hearing was not open. The defendant, either through misunderstanding or deliberately ignoring the outcome of the investigation, had proceeded to a Stage 4 disciplinary hearing and the imposition of a sanction improperly. It was submitted that the defendant had acted contrary to its own procedure, and that the imposition of the sanction was unlawful. Not merely was there a fair issue to be tried on the illegality of the defendant's action, but the plaintiffs could make out a compelling case that the action was unlawful.

20. On the question of whether the balance of convenience lay in favour of the granting or the refusal of an injunction, counsel for the plaintiffs submitted that, not only would the implementation of the suspension without pay be seriously detrimental to the plaintiffs in the short term, but it would also have long-term damaging consequences for them. In relation to the short-term, each of the plaintiffs set out his own and his family's financial circumstances in his grounding affidavit and outlined the monthly expenses each incurs in relation to mortgage repayments, insurance and other living expenses. On the basis of the affidavit evidence, I can only conclude that the implementation of the suspension without pay will have serious financial consequences for each of the plaintiffs. As regards the long-term, it was submitted that the implementation of the suspension would be damaging to the reputations and career prospects of each of the plaintiffs. The damage would be irreparable and not compensatable by damages. On the other hand, it was submitted, the defendant would not be put in any great difficulty by the suspension without pay being deferred pending the trial of the action. This is not a case in which the defendant has lost trust and confidence in the plaintiffs, as it is intended that the second plaintiff will resume his duties in Ballydowd at the end of the six month period and the first plaintiff will revert to his administrative leave status.

21. As I have stated, the plaintiffs' core contention was that there had been no finding of serious misconduct. However, the plaintiffs' case was also based on their contentions that the sanction imposed on them was unlawful on the other grounds they had sought to advance on the appeal under the Disciplinary Procedure, for example, that the sanction was inordinate and disproportionate and that the delay rendered the process unlawful or, alternatively, the sanction excessive.

Submissions on behalf of the defendant
22. Counsel for the defendant submitted that what the plaintiffs were seeking was tantamount to a direction that they be reinstated in their respective positions and that such relief was rarely granted on an interlocutory application. In effect the plaintiffs were seeking mandatory relief, and that being the case, it was submitted that they had to make out a strong case, citing the following passage from the judgment of the Supreme Court (Fennelly J.) in *Maha Lingam v. Health Service Executive* [2005] I.E.S.C. 89:-

> "… 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".

23. It was submitted on behalf of the defendant that the plaintiffs had not established a strong case. Indeed, it was submitted that the plaintiffs had not established that there was a fair issue to be tried. It was pointed out that the plaintiffs had admitted misconduct, had apologised for it and had undertaken not to repeat it. It was submitted that Mr. Devine had made a finding of serious misconduct. Alternatively, if that was not the case, the defendant was none the less entitled to impose the sanction if health and safety consideratons arose and the defendant should not be confined to the strict wording of the Disciplinary Procedure.

24. An alternative argument was advanced on behalf of the defendant and that was that the plaintiffs were estopped from challenging the jurisdiction of Mr. Kane. They had participated with their trade union representative in the disciplinary hearing on 10th July, 2008. In their solicitors' preliminary letter of 23rd July, 2008, no issue was raised in relation to jurisdiction. Thereafter the plaintiffs had invoked their right of appeal, although it was acknowledged that they did so on a without prejudice basis. Counsel supported the estoppel argument in reliance on the decision of the Supreme Court in *Corrigan v. Irish Land Commission* [1977] I.R. 317, in particular, on the following passage from the judgment of Henchy J. (at p. 326):-

> "The rule that a litigant will be held estopped from raising a complaint as to bias when, with knowledge of all the relevant circumstances, he expressly or impliedly abandoned it at the hearing, is founded, I believe, on public policy. It would be obviously inconsistent with the due administration of justice if a litigant were to be allowed to conceal a complaint of that nature in the hope that the tribunal will decide in his favour, while reserving to himself the right, if the tribunal gives an adverse decision, to raise the complaint of disqualification. This is something the law will not and should not allow. The complainant cannot blow hot and blow cold; he cannot approbate and then reprobate; he cannot have it both ways."

25. It was submitted that the plaintiffs, with their trade union representation, endorsed the Stage 4 disciplinary hearing.

26. Counsel for the defendant acknowledged that, in assessing where the balance of convenience lies, a court tends to favour an employee who would be facing impecuniosity, but submitted that in this case damages would be an adequate remedy in the event that the plaintiffs were successful at the trial of the action.

Conclusions
27. This application, in my view, is qualitatively different to the usual type of application for an interlocutory injunction arising out of a contract of employment or an employer/employee relationship. This is not a case in which the employer has terminated or proposes to terminate an employee's employment. What the defendant has done and proposes to implement is the imposition of a sanction or penalty on the plaintiffs. I do not think that the relief the plaintiffs are seeking is properly characterised as mandatory relief. What they are seeking is to defer or postpone the imposition of the sanction or penalty pending the trial of the action. On that basis, it seems to me that the first issue which arises is whether the plaintiffs have established that there is a fair issue to be tried as to whether the defendant is entitled to impose the sanction, which has been affirmed on appeal, on the plaintiffs.

28. Two of the arguments advanced on behalf of the defendant can be readily disposed of for the purposes of this interlocutory application.

29. First, the proposition that, even if Mr. Devine did not make a finding of serious misconduct, the defendant was nonetheless entitled to impose the sanction of six months suspension without pay, having regard to the state of the evidence, is not correct. On the evidence adduced by the defendant, the Disciplinary Procedure applies to the plaintiffs. Mr. Devine's investigation was an investigation under Stage 4 of the Disciplinary Procedure. The Disciplinary Procedure clearly and unequivocally states that the upholding of an allegation of serious misconduct is a pre-condition to the holding of a disciplinary hearing which allows for sanction in the form of dismissal or action short of dismissal. If there was no finding of serious misconduct by Mr. Devine in relation to the plaintiffs, the defendant had no entitlement to proceed to a disciplinary hearing.

30. Secondly, in my view, the plaintiffs, by participation in the disciplinary process from its inception to its conclusion, are not estopped from contending that the defendant was not entitled to convene the disciplinary hearing and that Mr. Kane had no authority to impose the sanction he imposed. The defendant's reliance on the decision in *Corrigan v. Irish Land Commission* is misplaced. That decision, as the passage from the judgment of Henchy J. which I have quoted earlier clearly illustrates, governs a situation in which a litigant, with knowledge of the relevant facts on the basis of which he could assert bias on the part of the tribunal, refrains from so doing and participates in the process and, when the decision of the tribunal goes against him, seeks to rely on bias as a ground for overturning the decision of the tribunal. The public policy considerations which necessitate that the litigant should not be allowed to so do are outlined in the passage quoted above. 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. Each of the plaintiffs has averred that until it was applied to him, he was unaware of the contents of the Disciplinary Procedure and that it formed part of his terms and conditions of employment. Whether that is eventually established as a fact or not, in my view, there is no bar to the plaintiffs challenging the right of the defendant to impose the sanction which has been imposed on them by reason of their participation in the disciplinary hearing with trade union representation.

31. Therefore, the core question, as counsel for the plaintiffs contended, is whether Mr. Devine made a finding of serious misconduct against either or both of the plaintiffs. The evidence before the court indicates that the officers of the defendant, including Mr. Kane, were of the view that he made such a finding and I think it probable that the plaintiffs' trade union representatives were of the same view. On the other hand, counsel for the plaintiffs strongly urged that he did not.

32. All the court can do at this juncture is to consider how Mr. Devine's report is to be interpreted in the context of the Disciplinary Procedure. Section 8 of the report undoubtedly gives rise to difficulties.

33. Mr. Devine identified the examples of serious misconduct against which he was measuring the plaintiffs' conduct on the night in question. He found that the first plaintiff had failed to discharge his duty of care and had breached his statutory obligations but did not categorise the conduct as gross dereliction of duties or as a serious breach of health and safety rules. In the case of the second plaintiff, he found that his actions constituted "serious" breaches of health and safety requirements as well as his duty of care obligations. To the extent that he categorised the breaches on the part of the second plaintiff as "serious", he treated the plaintiffs differently. However, when he came to make what would appear to be his definitive finding as to whether either or both was guilty of "serious misconduct", he treated them in exactly the same way. The key question is what did he mean by the finding that "it is as likely as not" that the complained of behaviour amounted to serious misconduct. When one seeks to find a meaning for that phrase in the overall context of Section 8, one sees in the sentence of which it is part an explicit statement that the behaviour amounts to misconduct, followed by what appears to have been intended to be seen as a mitigating factor, that there was no evidence that the plaintiffs intentionally put anyone at risk on the night in question. That, it seems to me, raises the question whether what he was conveying was that the factor which would have elevated misconduct to serious misconduct was missing, which leads to the further question whether the terminology "it is as likely as not" was intended to connote that the probabilities were equal.

34. Having regard to the foregoing, I am of the view that there is a fair issue to be tried as to whether the pre-condition to the holding of a Stage 4 disciplinary hearing, that there be a finding of serious misconduct on the part of each of the plaintiffs, was fulfilled.

35. I am satisfied that the damage to the plaintiffs which would ensue from the wrongful imposition of the sanction on them, having regard to their personal and family circumstances, their position as persons continuing in the employment of the defendant in Ballydowd and all of the circumstances goes beyond what could properly be compensated for by an award of damages. Therefore, I do not think that damages are an adequate remedy. I am also satisfied that the balance of convenience lies in favour of granting the injunction.

Order

36. Noting the undertaking as to damages given by each of the plaintiffs, there will be an order that the defendant be restrained from implementation of the disciplinary penalty of suspension without pay from employment for a period of six months pending the trial of the action.