Neutral Citation: [2016] IEHC 237

THE HIGH COURT

[2015 3070 P]

BETWEEN

FINBARR O'LEARY

PLAINTIFF

AND

AN POST

DEFENDANT

JUDGMENT of Mr. Justice David Keane delivered on the 12th day of May 2016

Introduction

1. This is an application for various employment injunctions. The plaintiff seeks to restrain the defendant from giving effect to its decision to dismiss him from its employment. Unusually, the plaintiff also seeks to restrain the defendant from taking any further step to consider his appeal against that dismissal and, specifically, from conducting the oral hearing of that appeal that he has himself requested.

2. When the present application for interlocutory relief came on for hearing, the plaintiff had not yet taken any steps in the underlying action beyond the issue and service of a plenary summons. The general indorsement of claim set out in that summons identifies the core reliefs sought as a mandatory injunction directing the plaintiff's reinstatement as an employee of the defendant and damages for breach of contract and mental distress. While the plaintiff also seeks an order in the proceedings directing the payment to him of all salary and other emoluments due, to include any arrears, both sides acknowledge that the plaintiff, though suspended from work, remains in receipt of full pay pending the determination of his appeal against dismissal. Hence, it would seem that the present interlocutory reliefs are sought pending the determination of a claim by the plaintiff for full reinstatement in employment or for damages, or both.

Background

3. The plaintiff commenced employment with the defendant in 1993 in a temporary capacity. On the 11th February 1997, the plaintiff signed a contract of employment with the defendant as a "permanent post office clerk."

Disciplinary policy and procedure

4. That contract includes the following provisions:

> "12. Termination of Employment:
>
> …
>
> The Company reserves the right to terminate the contract of employment without notice or pay in lieu of notice in cases of serious misconduct.
>
> …
>
> 16. Integrity and Confidentiality: The Company requires that the employee's honesty and integrity be beyond doubt.
>
> …
>
> 18. Disciplinary Measures: Infringement of a term of this contract or of Company (sic), can lead, depending on the gravity of the breach, to a reprimand, a verbal or written warning, a transfer to other duties, loss of privileges, deferment of increment, reduction in pay, demotion, relocation, dismissal or other such action as the Company may determine. Persistent breaches of this contract or of Company rules or persistently inadequate work performance can lead to dismissal.
>
> A serious breach of this contract or of a Company rule can lead to dismissal on the first occasion such a breach occurs.
>
> 19. Disciplinary Procedures: Before any disciplinary action is taken by the Company the employee shall be notified of any alleged breach of discipline and shall be offered the opportunity of providing an explanation. The employee will be required to co-operate with the Company by providing written or oral information as requested to establish the facts of any matter which in the Company's view, warrants investigation.
>
> Where the dismissal of the employee is under consideration the employee will be given the particulars of the reasons why dismissal is under consideration and given the opportunity of making representations or having representations made on the employee's behalf by the a (sic) recognised staff organisation. These representations will be taken into consideration before any decision is made."

5. Appendix A to the said contract contains 14 itemised "examples of misconduct", one of which – no one could be surprised to learn – is "dishonesty." Another is "neglect of duty."

6. The defendant has a "Discipline Policy & Procedure", agreed by the defendant and the trade unions and staff associations representing its staff. The material iteration of that policy came into effect on the 17th December 2012. Those parts of the Discipline Policy of particular relevance to the present application include the following:

"4. Disciplinary action will arise in the following circumstances:

…

• specific incidents of a serious nature related to an employee's work performance, misconduct …

5. Although the aim of the disciplinary policy/procedure is remedial there are instances where an employee's action(s) will merit the application of a higher level disciplinary sanction in the first instance, reflecting the seriousness of the matter.

…

7. Where the disciplinary procedure is invoked the employee shall have the following entitlements:

• the right to be notified of the specific matters in respect of which disciplinary action is being considered at the time any proceedings are initiated and receive any relevant material, records or sources of data at that time, to the extent that they have been relied upon by management in initiating the proceedings

• the right to respond to the allegation(s) prior to any disciplinary decision being made

• the right to representation by a trade union representative at all stages of the procedure, including the appeal stage. Alternatively, the employee may choose to be represented by a fellow employee of his/her choice provided the fellow employee they nominate is immediately available or available within a reasonable period of time, so that proceedings are not unusually delayed

• The right to consideration of any matters he or she puts forward to the Company or is put forward on their behalf in the course of the disciplinary process

• The right to be advised of the outcome of the Company's disciplinary investigation

• the right to appeal against any disciplinary sanction decided by the Company"

7. The material provisions of the Disciplinary Procedure include the following:

"3.0 REPRESENTATION

3.1 At all stages of the procedure (including the appeal stage) employees will be advised of their entitlement to Union Assistance in making representations or responding to any matter raised with them under this procedure. In advance of attending any meeting held under the procedure the employee will also be advised of their right to be accompanied by a Trade Union representative or a fellow employee of his/her choice, provided any fellow employee they nominate is immediately available within a reasonable period of time, so that proceedings are not unduly delayed.

4.0 TIMEFRAME FOR CONDUCT OF DISCIPLINARY PROCESS

4.1 Each disciplinary case relates to a unique set of circumstances and, therefore, it is not possible to be prescriptive about the time frame in which individual cases should be completed. … In cases where a higher level sanction (second level written warning to dismissal) is a consideration without any related disciplinary sanction having been applied in the past the disciplinary process may be more extended but, in general, should not extend beyond four months unless a more extended period is required to adequately safeguard an employee's rights under the Company's Disciplinary Policy and this procedure.

4.2 It is the responsibility of the manager/supervisor, however, to ensure that matters are progressed as quickly as possible. Employees are expected to co-operate by responding promptly to any requests for information/explanation sought by the supervisor/manager during the course of the proceedings.

4.3. The employee will be given adequate opportunity to consider his/her position and take advice, before being required to respond to any allegations or requests for information/explanation.

…

6.0 PRELIMINARY ENQUIRIES

6.1 Prior to any disciplinary proceedings being initiated under these procedures a process of preliminary enquiry aimed at establishing basic facts and determining whether disciplinary proceedings against any individual is warranted will be undertaken. The extent of those enquiries will vary according to circumstance and will, generally, be more extensive in instances which may result in a higher level sanction being contemplated.

…

8.0 PROVISION OF INFORMATION DURING DISCIPLINARY PROCEEDINGS

8.1 At the time any disciplinary proceedings are initiated any relevant material records or sources of data, to the extent that they are relied upon by management in initiating proceedings, will be provided to the employee and he/she will be given the opportunity to comment.

…

8.2 The Company is not obliged to afford an employee the right of cross-examination of any person or persons who has (sic) given a statement which is relied upon in initiating or continuing disciplinary proceedings. In instances where a final written warning or dismissal is being considered, however the employee may raise questions which he would wish to have put to the party concerned and the Company will do so, within reason, as part of any process of further enquiry following the employee's initial response to the notice of disciplinary proceedings.

…

14.0 DISMISSAL

…

14.2 There may also be circumstances in which, because of the seriousness of the matter or matters in respect of which the employee comes under notice, that dismissal will be justified without recourse to the earlier stages of the [written warning] procedure. Such instances may relate to either of the following:

…

(ii) instances of serious misconduct, a non-exclusive list of which is set out hereunder.

Instances of Serious Misconduct

• Theft

• Fraud

...

• Negligence exposing Company property to significant damage

....

14.3 Ordinarily, prior to disciplinary proceedings being initiated where dismissal related to serious misconduct is a consideration, a process of preliminary inquiry aimed at establishing basic facts and determining whether disciplinary proceedings against any individual is warranted will be undertaken.

14.4 In any instance where consideration is being given to dismissal, the employee shall be advised in writing of the irregularity for which he/she has come under notice.

…

14.5 An employee who has been notified that their dismissal is under consideration shall be afforded a reasonable opportunity to respond (usually 10 working days) verbally and/or in writing to the notice of disciplinary proceedings and the irregularity(s) (sic) identified therein.

14.6 If further enquiries are necessary arising from the employee's response these will be undertaken. If as a consequence of these enquiries any matters arise which are likely to be relied upon in making a disciplinary decision the employee will be provided with appropriate written details and afforded a further reasonable opportunity (usually 5 working days) to respond verbally and/or in writing. Ultimately, if the employee's response is unsatisfactory, a decision to dismiss will be made.

…

15.0 APPEALS PROCESS

15.1 All disciplinary sanctions issued under this procedure may be appealed. When a disciplinary sanction is notified to an employee in writing he/she will also be advised of his/her right of appeal. If the employee intends appealing a disciplinary decision the Company must receive written notification of the fact in writing within three working days of the sanction being notified. The appeal must be received in writing by the Company within a further period of five working days.

In instances where a disciplinary sanction of second level warning or greater is issued the employee may, in addition, or as an alternative, to submitting a written appeal request an oral appeal hearing. In such instances an oral appeal hearing must be requested when written notification of the intent to appeal is submitted."

Investigation

8. In an affidavit sworn on the 30th April 2015 in opposition to the present application, Rory Delany, an employee relations manager in the human resources department of the defendant, avers that the investigation now at issue began in 2013. It followed a review by the defendant's retail operations and internal audit section of the Department of Social Protection ("DSP") payment transactions at the defendant's Cork branch office, which disclosed "several suspected irregularities." A computer generated schedule highlighted 39 "suspicious" customer payment transactions which were carried out under the plaintiff's unique computer user name and password between the 7th September 2009 and the 3rd October 2013, a period of just over four years.

9. A decision was taken on behalf of the defendant to interview a limited sample of the customers involved in the relevant transactions. In the event, an investigator with the defendant's Investigation Branch interviewed two identified customers. Those two customers signed cautioned witness statements on the 19th and 21st November 2013, respectively.

10. I pause here to note that the suspected irregularities or suspicious transactions at issue appear to involve cases where a customer who is owed multiple payments (whether comprising an entitlement to more than one type of state benefit or to a number of accumulated periodical payments in respect of a single type of state benefit, such as a pension) is recorded as obtaining those payments in two separate transactions a very short time apart, despite the ability of the defendant's system to process multiple payments as a single transaction. The obvious concern is that a fraud may be occurring whereby the customer only receives the payment in respect of one transaction, while payment in respect of the other is diverted to someone else.

11. The first witness signed a cautioned statement recording that she had been shown two receipts for payments made to her by way of widow's pension at Cork General Post Office ("GPO") on the 30th July 2013. The first such receipt was for a payment in the

sum of €476 at 28 seconds past 4.51 pm on that date. The second receipt was for a payment in the sum of €238 at 6 seconds past 4.51 pm on the same date i.e. 22 seconds earlier. The first witness stated that the signature on the first receipt was hers and she had indeed received the payment of €476, but that the signature on the second receipt was not hers and she had not received the payment of €238. The first witness stated that she had never gone to the counter in the post office twice in any one day and had never signed two receipts on any one day.

12. The second witness signed a cautioned statement confirming that she collects the state pension at the GPO in Cork. In that statement, the second witness explained that it is her habit to allow her payment entitlements to accumulate for two or three weeks before collecting them, relying on the post office clerk behind the counter to tell her how many payments (and, accordingly, what sum) she is due. She continued her statement by confirming that she had been shown two receipts, each dated the 30th August 2013. The first was for the sum of €476, received at 45 seconds past 2.13 pm. The second was for the sum of €238, received at 1 second past 2.14 pm. The second witness stated that she has never signed two receipts.

13. The plaintiff was interviewed in the course of the defendant's investigation on the 20th November 2013 and again on the following day, the 21st November 2013. At his request, he was permitted to have the branch secretary of his union present. He made signed cautioned statements at interview on each date. During those interviews, 16 separate instances were put to him, involving 16 different customers, in which two separate transactions occurred concerning the same customer on the same day, generally a very short time apart. In summary, the plaintiff's response was that, while he could not explain a lot of those transactions: he had never taken money; he had never defrauded customers; he had never signed a receipt in the name of a customer; he had never forged a signature; he had always provided a receipt for each transaction; and he had never deliberately destroyed a receipt.

14. At the conclusion of the second interview with the plaintiff on the 21st November 2013, he was given a written notice of suspension from duty with effect from 1.27 pm on that day "to allow further enquiries into suspected fraudulent Department of Social Protection payment transactions processed by you."

Disciplinary Process

15. On the 30th April 2014, the defendant wrote to the plaintiff, referring to the interviews that had been conducted with the plaintiff on the 20th and 21st November 2013. The letter summarised the statements that the defendant had obtained from the two witnesses already referred to and the response that the plaintiff had given at interview in respect of each. The letter went on to state:

> "In addition to the above, as per the attached summarised schedule, the Company raised concerns in relation to a number of Department of Social Protection transactions carried out by you between 07.09.2009 and 03.10.2013 at Cork Branch Office. Specifically, you were asked to explain why in each case second transactions were processed immediately after initial transactions. In respect of these matters, the Company does not believe that the explanations you provided were adequate or acceptable."

16. The letter went on to note the plaintiff's response at interview, as already summarised above, before continuing:

> "Your explanations were found to be unacceptable and you were suspended from duty with pay to allow for an appropriate period of time for an investigation into your potential involvement in matters of a serious nature i.e. the suspected fraudulent Department of Social Protection transactions processed by you.
>
> Having considered the matter the Company views your actions in relation to the above matters as being very serious and it has decided to pursue the matter through the disciplinary procedures.
>
> In the circumstances, the Company is considering the question of taking disciplinary action against you up to and including recommending your dismissal. In order to afford you a final opportunity of furnishing any explanation, making any union representation or other representations you may wish to offer, no further action will be taken for a period of ten working days i.e. 16 May 2014. If you fail to reply to this letter before that date, the Company will proceed on the basis that you have no explanation to offer.
>
> You are also being afforded an opportunity, if you so wish, of attending an oral hearing in addition to, or as an alternative to furnishing a written explanation. You may be accompanied at such a hearing by a union representative or by a friend."

17. On the 6th May 2014, the defendant wrote to both the plaintiff and his union representative enclosing copies of the documentation upon which the defendant proposed to rely for the purpose of the oral hearing that the plaintiff had requested. That documentation comprised: (i) copies of the records of certain Department of Social Protection transactions processed by the plaintiff, copies of which he had initialled at interview; (ii) a copy of a "Statement of Shortages" reported by the plaintiff; (iii) a copy of the statement of the first customer interviewed by the defendant; (iv) a copy of the statement of the second customer interviewed by the defendant; (v) a copy of the plaintiff's statement at interview of the 20th November 2013; (vi) a copy of the plaintiff's statement at interview of the 21st November 2013; and (vii) a copy of the notice of suspension issued to the plaintiff on the 21st November 2013.

18. An oral hearing took place on the 2nd July 2014 at which the plaintiff was accompanied by both a branch representative and a national officer of his union. The defendant was represented by two of its management representatives.

19. At that hearing, a number of submissions were made on behalf of the plaintiff. The delay between the suspension of the plaintiff on the 21st November 2013 and the commencement of the disciplinary process by letter dated the 30th April 2014 was criticised as unacceptable. The fact that the investigation was commenced by the defendant on its own initiative rather than in response to any customer complaint, much less a complaint from either of the two customers the defendant interviewed, was flagged as significant. The reliability of the statements made by each of the two customers interviewed was questioned, particularly in light of the fact that each was in her eighties and neither could remember the specific transactions at issue. The plaintiff's difficulty in responding to queries concerning a limited number of routine transactions, among a vast number of such transactions, at a considerable remove in time was highlighted. The conduct of the defendant's interview with the plaintiff was criticised as oppressive on the basis that the interviewers had been improperly aggressive and the plaintiff had not been afforded sufficient breaks.

20. It is appropriate to record one aspect of the submissions or representations made on behalf of the plaintiff exactly as it is recorded in the note of the hearing:

> "…[T]he issue at hand can be boiled down to 38 out of 100,000 transactions coming under notice in a four year period. [I]nitiating proceedings against [the plaintiff] is a ham fisted attempt to name a culprit, in this case in most dangerous

and spurious circumstances.

> [T]he Company also need to consider that, firstly, it is possible, not prohibited, that transactions are done with intervals of 18 seconds between handling each of them, dependent on the customer. [I]n circumstances six months after the event, it is almost impossible to recall isolated incidents.
>
> [T]here is a very plausible explanation. Errors in transactions of payments happen everywhere across the Company and therefore the need to tighten margins of error may well be a concern for the Company."

21. On the 26th November 2014, the defendant wrote to the plaintiff's union representative setting out its responses to the points made on the plaintiff's behalf. It acknowledged the length of time involved in commencing the disciplinary process but noted that the plaintiff had been suspended on full pay. It acknowledged that the investigation had commenced on foot of irregularities disclosed by the defendant's internal audit process, rather than by reference to any customer complaint, prompting the defendant to interview the two witnesses concerned as a limited sample of the customers involved in the transactions identified as suspicious. It acknowledged the questions raised concerning the reliability of the statements made by those witnesses but emphasised that each of them was adamant that she did not sign two receipts in respect of the transactions concerning her. It rejected the claims made on behalf of the plaintiff that the interviews with him were improperly conducted, insisting that they were not conducted aggressively; that reasonable breaks were afforded; and that, in the Company's view, the plaintiff's union representative had been improperly disruptive by calling for repeated and unnecessary breaks during those interviews.

22. The defendant's letter also specifically addresses that aspect of the plaintiff's response summarised in the portion of the note of the disciplinary hearing quoted above, by stating:

> "The Company accepts that [the plaintiff] would process a significant number of DSP transactions. To this end, Internal Audit has benchmarked him against similar large volume processing clerks. With the exception of a post office clerk who resigned and refunded the monies stolen from customers, there is no other person in the office with a similar level of exceptions. [The plaintiff] would have more than three times the frequency of exceptions of the next ranking person and over ten times and more the frequency of any other similar post office clerks in Cork Post Office.
>
> In addition and using a similar bench marking approach, [the plaintiff] is in the top three of frequency of exceptions across all Branch Offices. One of the individuals concerned was the post office clerk referred to in the previous paragraph and the other is an individual who was dismissed for other serious offences and whose case has been referred to the Gardaí for fraudulent activity."

23. The defendant's letter concluded by stating that the defendant would proceed to consider all of the information available to it and would make a decision in relation to the issues raised in its letter of the 30th April 2013 in line with the agreed disciplinary procedures.

Dismissal

24. An employee relations executive of the defendant wrote to the plaintiff on the 21st January 2015. That letter states in material part:

> "I now have to inform you that following consideration of your case, a decision has been taken by the Company to dismiss you. This decision is based on the grounds of loss of trust and confidence in you as an employee.
>
> Should you wish to appeal this decision, notice of appeal must be submitted to me in writing within three working days of receipt of this letter, and the appeal itself in writing must be submitted within a further five working days. Should you not indicate your intention to appeal this decision, it will become effective eight working days (02 February 2015) from the date of this letter."

Appeal

25. On the 23rd January 2015, the plaintiff wrote to the defendant to state that he wished to appeal the decision to dismiss him.

26. On the 30th January 2015, a firm of solicitors wrote to the defendant on the plaintiff's behalf. In that letter, they indicated that the plaintiff required an oral hearing of his appeal, presumably in the context of his entitlement to request such a hearing when submitting written notification of his appeal under the defendant's disciplinary procedure.

27. In that letter, the plaintiff's solicitors also requested, amongst other things, that the defendant provide them with: (a) a definition of the term "loss of trust and confidence" as that term had been used in the letter of dismissal; and (b) details of the benchmarking or comparison exercise between the plaintiff and other post office clerks referred to in the defendant's letter of the 26th November 2014 and the data – referred to by the plaintiff's solicitors as "a schedule of comparisons – which were the object of the defendant's analysis for the purpose of that exercise.

28. On the 11th March 2015, the defendant wrote in reply to the plaintiff's solicitors. That letter did not address the plaintiff's request in relation to the defendant's benchmarking exercise. In respect of the plaintiff's request for a definition of the term 'trust and confidence', it stated: "An Post does not have its own definition of 'Trust and Confidence.' The concepts of Trust and Confidence are widely understood."

29. The plaintiff's solicitors wrote again on 31st March 2015, repeating their request for the 'analysis and schedule of comparisons' used in the benchmarking exercise. They expressly invoked, as the basis for that request, paragraph 7 of the defendant's Disciplinary Policy and section 8 of its Disciplinary Procedure, both of which have already been quoted above. In the same letter, the plaintiff's solicitors agreed the 23rd April 2015 as the date for the oral hearing of the plaintiff's appeal.

30. On the 15th April 2015, the defendant wrote in reply to the plaintiff's solicitors. The relevant portion of that letter states:

> "Regarding the section of the Disciplinary Policy and Procedure and an employee's right to "receive any relevant material records or sources at that time to the extent that they have been relied upon by management in initiating proceedings", it should be noted that the Company did not rely upon the benchmarking exercise to initiate disciplinary proceedings against [the plaintiff]. The internal audit benchmarking exercise was conducted after the oral hearing in response to representations made on behalf of the [plaintiff] by [his union representative] at that hearing."

31. On the 21st April 2015, the plaintiff's solicitors wrote again to the defendant, requiring an undertaking that the proposed oral hearing would not proceed, pending agreement between the parties on a 'protocol' to govern the investigation, or more accurately, the disciplinary process. The defendant wrote back on the same date, stating that there was no question of the agreement of any protocol, "in circumstances where the Company has agreed Disciplinary Policy and Procedures, which indeed have been agreed with your client's union."

32. A plenary summons issued on behalf of the plaintiff on the same day, the 21st April 2015, and the present motion issued on the 23rd April 2015, returnable for the day following, grounded upon an affidavit of the plaintiff sworn on the 21st April 2015.

Grounds for injunctive relief

33. As previously noted, the proceedings have so far progressed no further than the issue and service of a plenary summons. The core reliefs sought by the plaintiff in his indorsement of claim are an injunction compelling the defendant to rescind its decision of the 21st January 2015 to dismiss the plaintiff and damages for breach of contract and mental distress.

34. As yet, the plaintiff has not delivered any pleading particularising his claim. From the averments contained in the affidavit that the plaintiff swore on the 21st April 2015 to ground the present application and in the supplemental affidavit that he swore on the 28th April 2015, it seems tolerably clear that the contract at issue is the plaintiff's contract of employment. The breach or breaches of that contract alleged by the plaintiff are not so easy to discern. It does not seem that any specific term of the contract (or of the defendant's Disciplinary Policy and Procedure) is identified as having been breached. Rather, the plaintiff relies upon the proposition that there is a duty upon an employer at common law to comply with the rules of natural justice in considering an allegation of misconduct against an employee, which stems from an implied term to that effect in the contract of every employee, such that a breach of that duty by an employer amounts to a breach of that contract. Clear authority for that proposition can be found in the decision of Clarke J. in *Bergin v. Galway Clinic Doughiska Ltd* [2008] 2 I.R. 205, at p. 214, and it is not in dispute in this application.

35. Approaching the plaintiff's claim in that way, two further questions immediately arise. First, what are the requirements of natural justice in the context of the present disciplinary process? Second, how is it asserted that any such requirement has been breached?

36. In addressing the first question, there is guidance to be found in the decision of the Supreme Court in the case of Mooney v. An Post [1998] 4 I.R. 288, in which Barrington J. (Hamilton C.J. and O'Flaherty J. concurring) explained:

> "The terms natural and constitutional justice are broad terms and what the justice of a particular case will require will vary with the circumstances of the case.
>
> …
>
> If the contract or the statute governing a person's employment contains a procedure whereby the employment may be terminated, it usually will be sufficient for the employer to show that he has complied with this procedure. If the contract or the statute contains a provision whereby an employee is entitled to a hearing before an independent board or arbitrator before he can be dismissed then clearly that independent board or arbitrator must conduct the relevant proceedings with due respect to the principles of natural and constitutional justice. If however the contract (or the statute) provides that the employee may be dismissed for misconduct without specifying any procedure to be followed, the position may be more difficult.
>
> Certainly the employee is entitled to the benefit of fair procedures but what these demand will depend upon the terms of his employment and the circumstances surrounding his proposed dismissal. Certainly the minimum he is entitled to is to be informed of the charge against him and to be given an opportunity to answer it and to make submissions."

37. Bearing those principles in mind, I must next consider the basis upon which the plaintiff asserts that the rules of natural justice have been (or are about to be) breached in the circumstances of the present case. As the plaintiff has not yet particularised his claim in that regard, it is necessary to attempt to glean the plaintiff's complaints from the affidavits that he has sworn and, more particularly, from the submissions made by Counsel on his behalf at the hearing of the present application.

38. While noting that issues have been raised concerning the manner in which the plaintiff was interviewed in the course of the investigation that preceded the commencement of the disciplinary process and that the plaintiff's solicitors have asserted in correspondence that the defendant is obliged to agree a protocol with them for the conduct of the oral hearing of the plaintiff's appeal against his dismissal prior to that hearing, it seems to me that the three principal complaints raised on behalf of the plaintiff are the following:

(i) That the plaintiff was wrongly deprived at the disciplinary hearing of the opportunity to cross-examine each of the two customers who had made a statement in the course of the defendant's investigation.

(ii) That, in dismissing the plaintiff on the stated ground that it had lost trust and confidence in him as an employee, the defendant failed in its obligation to provide the defendant at his request with a definition – or its definition - of the term "trust and confidence."

(iii) That the plaintiff has not been provided with the details of the benchmarking or comparison exercise between the plaintiff and other post office clerks referred to in the defendant's letter of the 26th November 2014 and the data – referred to by the plaintiff's solicitors as 'a schedule of comparisons' – that were the object of the defendant's analysis for the purpose of that exercise.

39. Before addressing each of those issues, it is appropriate to briefly consider two relevant aspects of the Court's jurisdiction to grant employment law injunctions. The first is the appropriate test to be applied to such an application and the second is the extent to which it is appropriate for the Court to intervene in an incomplete disciplinary process.

The test for interlocutory relief

40. The plaintiff submits that the test identified by the Supreme Court in Maha Lingam v. Health Service Executive [2006] ELR 137, whereby an applicant who seeks what is 'in essence' a mandatory injunction is required to show 'at least that he has a strong case', does not apply to the present application as that case can be distinguished on its facts. The basis for that submission was not made entirely clear. In any event, I do not accept it.

41. In *Bergin v. Galway Clinic Doughiska Ltd* [2008] 2 I.R. 205, Clarke J. stated:

> "[I]n any case in which an employee seeks to prevent a dismissal or a process leading to a dismissal, as a matter of

common law, and in whatever terms the claim is couched, the employee concerned is seeking what is, in substance, a mandatory injunction which has the effect of necessarily continuing his contract of employment even though the employer might otherwise be entitled to terminate it. In those circumstances it is necessary for the employee concerned to establish a strong case in order to obtain interlocutory relief."

Intervention in an incomplete disciplinary process

42. In *Becker v. Board of Management of St. Dominic's Secondary School* [2006] IEHC 130, when confronted with an application for an interlocutory injunction to restrain a disciplinary process that had been initiated by a school board against a teacher, Clarke J. made the following observations:

> "In approaching the grant or refusal of an interlocutory injunction in a case such as this a number of legal principles, it seems to me, need to be applied. Firstly, it is my view that a court should only intervene in the course of an uncompleted disciplinary process in a clear case. It does not seem to me to be consistent either with a proper invocation of the court's jurisdiction or the proper conduct of disciplinary processes in an employment context that the court should be invited to intervene at a variety of stages in the course of that process.
>
> This should not be taken to mean that there may not be circumstances where it is appropriate for the court to intervene. But I would wish to emphasise that in my view the mere fact that there may be an argument as to whether a particular disciplinary process has taken an appropriate course does not of itself justify the court in intervening (even where the proposition put forward by the Plaintiff is arguable) to prevent the process moving to its natural conclusion.
>
> In general terms it seems to me that the circumstances in which the court should intervene is where a step, or steps, or an act, has been taken in the process which cannot be cured and which is manifestly at variance with the entitlement to fair procedures.
>
> In coming to a view as to whether that stage has been reached, it is important to note that the Court should not assume that unfairness will occur in the future, nor should it make assumptions about the likely future course of the process. The court should intervene only where it has been demonstrated that the process has already been so tainted with an absence of fair procedures that it cannot be allowed to continue.
>
> Also I should emphasise that that the above approach does not mean that at the end of the day the process may not be the subject of an appropriate intervention by the court, if, at a full hearing, it can be demonstrated that the process failed to vindicate the legal entitlements of the person involved. The precise remedies that may be available in those circumstances are, of course, a matter of some debate. But it seems to me that very different considerations apply where it is sought to prevent a process being continued with on the one hand, and where the process has been completed and the Court is in a full position at trial to take a view as to whether it was properly conducted on the other hand."

Application of principles to the grounds advanced

43. I am satisfied that the plaintiff in this case is seeking what are, in effect, mandatory injunctions and is, therefore, obliged to establish a strong case. I am also satisfied that, since the present appeal is made while an internal disciplinary appeal is pending, the Court should only intervene if satisfied that a clear case for doing so has been made out.

44. The applicant has failed to make out a strong or clear case that the manner in which he was interviewed was oppressive. Mr Eamonn McArdle, a security manager in the investigation branch of the defendant who investigated the plaintiff's case, swore an affidavit on the 1st May 2015 in which he joins issue with each of the plaintiff's allegations in that regard. Needless to say, it is not a controversy that can be resolved in the context of the present application. This aspect of the case is, in any event, a little bit difficult to understand as there does not seem to be any suggestion on the plaintiff's part that he is seeking to have the statements that he made at interview excluded from consideration in the disciplinary process.

45. Similarly, the plaintiff has failed to make out a strong or clear case that the failure or refusal of the defendant to agree a 'protocol' for the conduct of the plaintiff's appeal against his dismissal, in substitution for (or in addition to) the relevant provisions of the applicable Disciplinary Procedure, amounts to a breach of the plaintiff's entitlement to fair procedures. No authority was cited in support of that proposition and I have been unable to identify any.

46. Beyond the matters I have just dealt with, I have identified earlier in this judgment what seem to me to be the three principal claims made by the plaintiff in support of the present application. I will now address each in turn.

(i) failure to permit cross-examination

47. The first such claim is that, at the disciplinary hearing, the plaintiff was wrongly deprived of the opportunity to cross-examine each of the two customers who had made a statement when interviewed in the course of the defendant's investigation.

48. The most obvious difficulty that confronts the plaintiff in advancing that argument is the fact, not in dispute, that he did not seek to invoke any such entitlement either before or during that hearing. Accordingly, when the plaintiff avers "I was not ever, either myself or through my [union representative], afforded the opportunity to cross-examine and/or confront either [of the two customers concerned]", his complaint is not that he sought, and was refused, such an opportunity, whether in advance of, or during, that hearing. Rather, it is that the defendant did not of its own volition tender those persons as witnesses during the hearing for the purpose of cross-examination.

49. Had the plaintiff sought to assert such a right to cross-examine at the disciplinary hearing, no doubt he would have been at once reminded of the terms of paragraph 8.2 of the defendant's agreed Disciplinary Procedure whereby it is acknowledged that the defendant is not obliged to afford an employee the right of cross-examination of any person who has given a statement which is relied upon in initiating or continuing disciplinary proceedings.

50. The same paragraph of that agreed Disciplinary Procedure goes on to stipulate that, in instances where dismissal is being considered, the employee affected may raise questions which he would wish to have put to the person concerned and the defendant will put those questions to that person, within reason, as part of any process of further enquiry following the employee's initial response to the notice of disciplinary proceedings. Again, it appears to be common case that the defendant did not seek to raise any

such question or questions.

51. In the particular circumstances just described, the plaintiff has failed to satisfy me that he has established a strong or clear case that he was wrongly deprived of his right to cross-examine the relevant witnesses at the disciplinary hearing, in breach of his contractual entitlement to natural and constitutional justice and fair procedures.

52. In view of the finding I have just made, it is unnecessary and, therefore, inappropriate to address in any detail the question of whether fair procedures require that the applicant be afforded an opportunity to cross-examine the relevant witnesses in this case. As Laffoy J. pointed out in *Shortt v. Royal Liver Assurance Ltd* [2008] IEHC 332, the authorities make it clear that, while an employee who is facing disciplinary action is entitled to the benefit of fair procedures, what these will demand depends on that person's terms of employment and the particular circumstances surrounding the disciplinary process concerned (per Barrington J. in *Mooney v. An Post* [1998] 4 I.R. 288 at p. 298). The important point is that the decision-maker must not act in such a way as to imperil a fair hearing or a fair result (per Hamilton C.J. in *Gallagher v. The Revenue Commissioners* (No. 2) [1995] 1 I.R. 55, at p. 76).

53. Any decision maker required to consider whether an entitlement to cross-examine witnesses arises on appeal as an aspect of the plaintiff's entitlement to natural justice, given the nature of the plaintiff's employment and the circumstances of the misconduct alleged, will inevitably wish to consider the close parallels between the present case and that which came before the Supreme Court in Mooney. There, the plaintiff was a postman in a position of trust; here he is a post office clerk in the same position. There the defendant had received complaints which caused it to have misgivings about the integrity of the postal service; here the same defendant has been presented with the results of an internal review that have caused it to have misgivings about the integrity of the state benefit payment system.

54. It might therefore be said of the defendant in this case, just as Barrington J. said of the same defendant in Mooney, that it was entitled to expect a candid response from the employee concerned when it put its misgivings to him. It might be said of the plaintiff in this case, as it was of the plaintiff in Mooney, that it was not sufficient for him in response simply to deny responsibility and profess to have no memory of any of the relevant incidents. Equally, it might be said, as it was in Mooney, that it is not sufficient in the context of an employment disciplinary process to metaphorically fold one's arms and say: "I'm not guilty; you prove it", while seeking to introduce the procedures of a criminal trial into an essentially civil proceeding.

55. It might also be said of the defendant, as it was of the same defendant in Mooney, that it was not in a position to set up an independent tribunal with a power to subpoena witnesses, even had it wished to do so, while at the same time it could not reasonably ignore the several suspected irregularities that had come to its attention as a result of an internal review, whether the customers concerned wished to become involved as witnesses in any internal disciplinary inquiry or not. Finally, therefore, it might be said of the plaintiff in this case, as was said of the plaintiff in Mooney, that the defendant was entitled to receive a proper explanation of the relevant events and did not receive one. It will be remembered that on the particular facts presented in Mooney the Supreme Court came to the conclusion that the appellant in that case was not entitled to cross-examine witnesses as part of the disciplinary process against him.

56. To the preceding observations I would add two more, specific to the circumstances of the present case. The first is this. Ordinary human experience confirms that the vast majority of us are naturally attentive in respect of whatever entitlement we may have to any income or benefit. The wrongful diversion of any such benefit is only likely to remain undetected – and, therefore, to succeed - where its rightful recipient is inattentive or confused, whether because of intellectual disability or the impairment of memory. It follows that victims in such circumstances are likely to be selected on the basis of a perceived inattention or confusion rendering them unlikely to complain, since that is what makes them vulnerable to the wrongful diversion of their lawful entitlements in the first place. For that reason, it is difficult to understand the suggestion, repeatedly advanced on the plaintiff's behalf both during the conduct of the disciplinary process and the conduct of the present application, that the commencement of the disciplinary process on the defendant's own initiative, rather than in response to the receipt by it of a specific customer complaint, in some way undermines the integrity or validity of that process.

57. The second observation that I would make is related to the first. While I do not purport to adjudicate on the matter, in so far as the plaintiff wishes to make the case that each of the two customers concerned is simply mistaken in asserting that she never signed two receipts - and, hence, never engaged in two separate transactions - in any one day, it is by no means clear to me that it is necessary to cross-examine each of those customers in order to make that case. If the reliability of the statements made by the two customers so far interviewed in the course of the investigation is being called into question, then, rather than insisting upon a right to cross-examine those persons as the plaintiff's 'accusers' using the borrowed vernacular and paraphernalia of a criminal trial, should it not be possible as an acceptable alternative to seek to have similar interviews conducted with some or all of the fifteen or so other customers involved in the Department of Social Protection transactions executed by the plaintiff that have been identified as similarly irregular?

58. Before leaving this issue, it is appropriate to note that, in the affidavit that he swore to ground the present application, the plaintiff avers that he has indeed interviewed two of those other customers and has obtained (and, now, exhibited) a statement from each to the effect that he or she did sign each of the two receipts evidencing, in the case of each, two separate state benefit transactions a very short time apart. The plaintiff avers that he furnished each of those two witness statements to his union representative prior to the disciplinary hearing but acknowledges that they were not brought to the attention of the defendant in the course of that hearing.

59. For the sake of completeness, it is also appropriate to note that the customer who was interviewed by, and provided a witness statement to, the defendant on the 19th November 2013, died of lung cancer on the 15th January 2014.

60. For the reasons I have already set out above, it seems to me that both of these matters can be appropriately addressed in the context of the plaintiff's appeal against dismissal. As Keane J. pointed out in his decision in the High Court in *Mooney v. An Post* [1994] ELR 103, citing Kiely v. Minister for Social Welfare [1977] I.R. 267, the person conducting the oral hearing will be obliged to adopt an even-handed approach in the reception of secondary evidence.

(ii) failure to provide certain documentation

61. The second ground upon which the plaintiff relies in support of the contention that there has been a breach of his entitlement to natural justice is the failure of the defendant to provide him with the details of the benchmarking or comparison exercise between the plaintiff and other post office clerks referred to in the defendant's letter of the 26th November 2014 and the data – referred to by the plaintiff's solicitors as 'a schedule of comparisons' – that were the object of the defendant's analysis for the purpose of that exercise.

62. It seems to me that the observations that I have already made in relation to the plaintiff's assertion of an entitlement to cross-examine certain witnesses apply, mutatis mutandis, to his assertion that he is entitled to require the disclosure of particular documents.

63. The defendant has exhibited, to the affidavit sworn on its behalf by Rory Delany on the 30th April 2015, the defendant's internal correspondence evidencing the circumstances in which the relevant benchmarking exercise was conducted. That correspondence comprises two e-mails. The first was sent by Anne O'Reilly of the defendant's investigations branch on the 28th October 2014. It is addressed to Frank Ennis, the defendant's Head of Internal Audit. It states in material part:

> "On 2/7/14 [the plaintiff] attended an oral hearing and a number of representations were put forward on his behalf by [his union representative].
>
> …
>
> The union stated that the issue at hand boils down to 38 transactions out of a total number of 100,000 transactions which were conducted by [the plaintiff] over a four year period. [The plaintiff's union representative] stated that initiating disciplinary proceedings against [the plaintiff] is a ham fisted attempt to name a culprit, in this case in most spurious and dangerous circumstances.
>
> Please advise as to
>
> a) The level of irregular transactions carried out by [the plaintiff] as compared to similar transactions carried out by other post office clerks in Cork branch office
>
> b) The level of irregular transactions carried out by [the plaintiff] as compared to similar transactions carried out by post office clerks in other branch offices."

64. On the 12th November 2014, Mr Ennis replied in relevant part as follows:

> "Apologies for the delay in responding however the query required the extraction and analysis of significant volumes of data. Obviously I will not be supplying any details of individuals but I can indicate the relativities as requested.
>
> 1. [The plaintiff] would process a significant number of [state benefit] transactions and I have benchmarked him against similar large volume processing clerks. With the exception of the post office clerk who resigned and refunded the value stolen from customers, there is no other person in the office with a similar level of exceptions. [The plaintiff] would have more than 3 times the frequency of exceptions of the next ranking person and over 10 times (and more) the frequency of any other similar post office clerks in the office.
>
> 2. Using a similar benchmarking approach [the plaintiff] is in the top 3 of frequency of exceptions across all branch offices. One of the other two individuals was the post office clerk referred to earlier and the other individual was dismissed for other serious offences and I believe Security Services have sent a file to the Gardai in respect of the fraudulent activity. The next closest individual proportionately would have less than half of [the plaintiff's] occurrences of exceptions. It should be noted that 98% of post office clerks analysed had 3 or less exceptions (over 70% in fact had none)."

65. In baldly asserting an entitlement to be furnished upon request with all extant details of the benchmarking exercise just described, as well as with all of the data underpinning it (whether in the form of a schedule of comparisons or otherwise), the plaintiff seems to me once again to be invoking entitlements directly analogous to those of an accused person in the context of a criminal trial, instead of seeking to engage with the issues of concern that the defendant has raised in the manner required under his contract of employment.

66. While the position might well be different were the plaintiff to assert that it is part of his explanation or response to the concerns which form the subject of the disciplinary process against him that the number of irregular transactions in which he has been involved are, in fact, statistically unremarkable or that he has some good or genuine reason to believe that the benchmarking exercise conducted on behalf of the plaintiff in that regard is fundamentally or, at least, significantly flawed, I cannot accept that the plaintiff has made out a strong or clear case that he is entitled to be furnished with the information and data he seeks, simply upon request, in reliance on an implied analogy with the 'Ward principles' that apply to disclosure in the context of a criminal trial.

(iii) failure to furnish a definition of trust and confidence

67. The third ground upon which significant reliance was placed at the hearing of the application arose from the asserted failure or refusal of the defendant to provide the plaintiff's solicitors at their request with a definition of the term 'trust and confidence' as that term had been used by the defendant in informing the plaintiff that his dismissal was based "on the grounds of loss of trust and confidence in you as an employee."

68. It seems to me that much breath and much ink was wasted in debating whether the entitlement to fair procedures extends to a right to have terms used by a decision maker defined and whether the use of the term at issue in this case by the defendant did or did not derive obviously from that train of jurisprudence culminating in the following dictum of Finnegan J. in *Berber v. Dunnes Stores Ltd* [2009] IESC 10:

> "There is implied in a contract of employment a mutual obligation that the employer and the employee will not without reasonable and proper cause conduct themselves in a manner likely to destroy or seriously damage the relationship of confidence and trust between them."

69. While I do not think that I could have been satisfied that the plaintiff has made out a strong or clear case that he has the entitlement contended for, that issue became moot in the course of the hearing before me when, to some degree at the prompting of the Court, the plaintiff altered his position to argue instead that there had been a breach of his right to fair procedures in that the defendant had failed or refused to inform him of the specific finding or findings of serious misconduct by reference to which the first instance decision to dismiss him has been made.

70. The decision of the Supreme Court in Mooney v. An Post [1998] 4 I.R. 288 is clear in identifying the minimum requirements of fair

procedures in a disciplinary process such as that now at issue. Those requirements were identified in two judgments of Walsh J. in *Gunn v. Bord an Choláiste Náisiúnta Ealaíne is Deartha* [1990] 2 I.R. 168 and Glover v. B.L.N. Ltd [1973] I.R. 388 to include informing the person concerned of the charges against him and, at the conclusion of the process, informing the person concerned of the grounds of his dismissal, if a decision is reached to dismiss.

71. In this case, it seems clear that, at the commencement of the disciplinary process, the plaintiff was informed that the allegation against him was that he had processed a number of identified fraudulent transactions between the 7th September 2009 and the 3rd October 2013 at the GPO in Cork and that, accordingly, the defendant was invoking that part of its agreed Disciplinary Procedure applicable to instances of serious misconduct (whether by reference to a suspicion of theft or fraud by the plaintiff or repeated negligence on the part of the plaintiff facilitating such theft or fraud on the part of others).

72. It seems to me to follow ineluctably that, if the determination of the employer at the conclusion of such a process is that serious misconduct is made out, it should specify the misconduct so found. After all, if a person facing a disciplinary procedure has a basic entitlement to know the charges against him, then it must follow that a person who wishes to appeal an adverse determination in that regard is entitled to know what charges his employer has found to be made out. In that context, it cannot be sufficient for an employer to state only that it has lost trust and confidence in the employee concerned, as though that was in itself a finding of serious misconduct that the employee concerned could meaningfully appeal.

73. In this regard it seems to me that the plaintiff has, however belatedly, made out a strong and clear case. For that reason, I propose to make an order analogous to that made by Clarke J. on the interlocutory application in *Carroll v. Bus Átha Cliath* [2005] 4 I.R. 184 at 192, which is to say, I will grant an interlocutory injunction restraining the defendant from hearing the plaintiff's appeal unless and until it provides the plaintiff with a statement of the serious misconduct by reference to which the decision to dismiss him has been made. I should add that I can see no reason why the necessary statement cannot be provided within a very short timeframe, thus facilitating the expeditious determination of the plaintiff's appeal.