Neutral Citation [2013] IEHC 126

THE HIGH COURT

[2013 No. 507P]

BETWEEN

MARK RYAN

PLAINTIFF

AND

ESB INTERNATIONAL LIMITED

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on 22nd day of March, 2013.

The proceedings and the application

1. These proceedings by the plaintiff, whose employment with the defendant commenced on 25th May, 1992, were initiated by a plenary summons which issued on 17th January, 2013. On the same day the plaintiff applied *ex parte* for injunctive relief against the defendant. By order of the Court (Gilligan J.) made on that day the plaintiff was given leave to bring a notice of motion returnable for 21st January, 2013 seeking interlocutory injunctive relief. This judgment is concerned with that application, which was heard on 8th March, 2012 and 12th March, 2012.

2. The interlocutory orders which the plaintiff seeks are in the following terms:

> (i) restraining the defendant from terminating or purporting to terminate the employment of the plaintiff with the defendant;
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> (ii) restraining the defendant from taking any steps to give effect to or purporting to give effect to the termination of the plaintiff's contract of employment pursuant to a letter of 21st November, 2011 (*recte* 22nd November, 2012?);
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> (iii) restraining the defendant its servants or agents from appointing or assigning any person to carry out the plaintiff's contractual responsibilities;
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> (iv) requiring the defendant to continue to pay the plaintiff's remuneration (including pension contributions) pending the trial of the action; and
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> (v) restraining the defendant from treating the plaintiff as other than continuing to be employed by the defendant.

The plaintiff also seeks, if necessary, an interlocutory injunction restraining the defendant its servants or agents from engaging in or permitting the harassment of the plaintiff. However, that relief was not pursued at the hearing of the application.

3. By the order of the Court (Gilligan J.) made on 17th January, 2013 the defendant was given interim relief in the terms set out at (ii) in the next preceding paragraph. As I understand it, that relief is still in place.

The plaintiff's contractual relationship with the defendant

4. The plaintiff was born in the United States of America and was educated there. He moved to Ireland with his Irish wife in 1990. As I have stated at the outset, his employment with the defendant commenced on 25th May, 1992. He was employed as a design engineer on a series of fixed-term contracts between 1992 and 1997. In 1997 he entered into a new contract, which he has described as a contract of indefinite duration, with the defendant and his job description was that of "Consultant Level 1". While the contract of employment which it is common case governed the plaintiff's employment with the defendant after 1st June, 2001 does not refer to the defendant's role, as I understand it, it is not disputed that he continued in the position of "Consultant Level 1".

5. That contract was dated 1st June, 2001 and was expressed to be effective from that day. It is only necessary to refer to two of its provisions for present purposes. First, termination of employment was dealt with in Clause 1.13 which provided:

> "Either party to this regular contract of employment may terminate the contract prior to the expiry date by giving one month's notice in writing to the other party. The company may give payment in lieu of notice."

There was no expiry date specified, so that the contract was for indefinite duration, although not using that expression in any technical sense. Secondly, Clause 1.9, which dealt with disciplinary and grievance procedures, drew the employee's attention to the procedures contained in the Employee Handbook which it was stated formed part of the employment contract.

6. It is common case that a document headed "Disciplinary Policy/Procedure", which has been exhibited in the plaintiff's grounding affidavit, governed disciplinary procedure as regards the plaintiff's employment at all times material to these proceedings. It is a remarkably concise document. The Disciplinary Procedure Document is set out in clauses lettered (a) to (h).

7. Clauses (a) to (f) address the situation where disciplinary action is necessary other than in cases "of misconduct attracting summary dismissal". Those clauses provide for representation of the staff member concerned and the issuing of warnings – verbal, written and final written. At the final written warning stage the staff member may be suspended and he is warned that if he commits a further breach or if his conduct, attendance or performance remains unsatisfactory, his employment will be terminated. If the final written warning is not complied with, the staff member will be dismissed. Clause (f) provides that a staff member who has gone through the warning/suspension process whose record remains clear for at least two years will revert to verbal warning stage of the procedures in the event of any further breach of discipline.

8. Clause (g) deals with summary disciplinary action and provides as follows:

> "In cases of misconduct such as theft or wilful damage to Company or staff property, assault and intimidatory behaviour including sexual harassment, reporting for duty under the influence of alcohol or drugs, or other serious misconduct, the Company may summarily dismiss the staff member concerned without recourse to the procedures contained in Clauses (b) and (f) above. In cases where the Company considers that summary dismissal is warranted, it may suspend the staff member concerned with pay in order to facilitate the investigation of the case.
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> Following investigation of any matter under this Clause, the Company may decide to impose another form of discipline, such as suspension without pay and/or a final written warning, without recourse to the procedures at Clauses (b) and (f) above."

9. Clause (h) provides that a decision by a disciplinary panel to impose a penalty may be appealed against by the staff member concerned or by his or her union to the next level of management. An appeal can be made if it is alleged that the penalty was not justified on the established facts of the case or that the initial procedure was not adequately observed.

10. In addition to the Disciplinary Procedure Document, after May 2009 the plaintiff's employment relationship with the defendant was governed by a document entitled "Respect and Dignity for the Individual in ESB". That document deals with harassment, which is given a very broad definition in the document. In the document, which I will refer to as the Harassment Procedure Document, very comprehensive processes are outlined for addressing complaints of harassment by an employee. The final stage in the process provided for is a formal procedure which, in broad terms, involves a formal investigation of a formal complaint. The document outlines what is to happen where, following the investigation, the complaint is –

> (a) not upheld, or
>
> (b) upheld,

both as regards the complainant and the person against whom the complaint was made.

11. If the complaint is not upheld, that finding is communicated to the complainant first and then to the person against whom the complaint was made and it is provided as follows:

> "Where a complaint was deemed to be malicious or vexatious it will be treated as misconduct and dealt with accordingly."

12. If the complaint is upheld, as regards the person against whom the complaint was made, it is provided as follows:

"If the investigation finds that bullying, harassment or sexual harassment has taken place the Investigating Manager meets the respondent first to inform him/her of the findings of the investigation and the decision of the Investigating Manager including whether disciplinary action is to be taken."

While that provision is not relevant to the facts here, it does help in understanding the import as to what is intended to ensue from the finding on an investigation, in that the document envisages that, if the complaint is upheld, unless it is decided that the circumstances are such that "the use of the Disciplinary Procedure may not be appropriate", which circumstances are also addressed, the next step is the initiation of disciplinary action.

Essential facts

13. The plaintiff has averred that from the commencement of his employment with the defendant he has "encountered difficulties with" the defendant as his employer. He has further averred that he first complained of bullying behaviour by his then line manager in March 1994. He has outlined subsequent complaints he made of bullying, which it is not necessary to outline and which I mention only by way of background. However, it is necessary to outline the manner in which the plaintiff utilised the Harassment Procedure Document after it was introduced in May 2009.

14. In November 2009 the plaintiff submitted fourteen formal complaints of bullying against his line manager and four formal complaints of bullying against the then Human Resource Manager of the defendant. Those complaints (the 2009 Complaints) were made in accordance with the Harassment Procedure Document. An investigating committee, which was comprised of two Human Resource Managers in the ESB network investigated the complaints and in their report issued in May 2010 they concluded that there was no evidence of bullying in any of the complaints. The plaintiff appealed those findings. The appeal was heard by Ms. Valerie Little, the Appeal Manager of the defendant. She issued her report on 22nd December, 2010 and in it she upheld the findings and conclusions of the report of the investigating committee. In January 2011, the plaintiff appealed Ms. Little's decision to the ESBI Tribunal, an internal adjudicating body. The plaintiff has averred that, as no progress was made in relation to that appeal, in April 2011 he withdrew the appeal and submitted a request for hearing to the Labour Court.

15. Following a hearing, the Labour Court issued its recommendation on 15th August, 2011. In its recommendation the Labour Court quoted from the section of the Harassment Procedure Document headed "Appealing the Investigation Report", which follows the section I have quoted from at paras. 11 and 12 above, and is to the following effect:

> "If the decision of the Appeals Manager is not acceptable to the individual concerned then a referral can be lodged as a personal case to the ESB Joint Industrial Council (which is binding on both sides and in line with section 9(a) of the constitution of the JIC) or other established and recognised procedures in ESB Subsidiaries within five working days of the appeal decision.

The words to which emphasis has been added in the above quotation will be commented on later. The Labour Court noted that the plaintiff had withdrawn his appeal to the JIC, so that the Harassment Procedure Document had not been exhausted and, consequently, the Labour Court had no industrial relations jurisdiction to consider the substantive issues between the parties. The Labour Court recommended that the dispute "be referred back to the JIC for consideration and decision". In fact, the plaintiff's appeal which had been withdrawn had been to the ESBI Tribunal.

16. The plaintiff has averred that in the course of the hearing before the Labour Court, Ms. Little "on behalf of the company submitted and gave evidence that the company policy entitled 'APPENDIX 1: Employee Relations in ESBI Limited. External Independent Adjudication' had been superseded by what she termed the 'Collective Agreement in place within ESBI'" and that, in consequence, the Labour Court had no jurisdiction to determine the matter. After the Labour Court recommendation the plaintiff sought to obtain a copy of the "Collective Agreement". He also sought to prosecute the appeal against Ms. Little's decision to the ESB JIC. There was communication back and forth between the plaintiff and Mr. Pat Naughton, Human Resources Manager of the defendant. The

defendant's position is that ultimately, by e-mail dated 25th October, 2011, Mr. Naughton confirmed to the plaintiff that he could not locate any copy of the signed Collective Agreement referred to by Ms. Little at the hearing before the Labour Court. Further, Mr. Naughton invited the plaintiff to have recourse to the ESBI Tribunal to prosecute his appeal against the decision of Ms. Little, as the plaintiff was not permitted to have recourse to ESB JIC as he was not an employee of the ESB but rather an employee of its subsidiary, that is to say, the defendant. The plaintiff was not satisfied with that response and on 2nd November, 2011 he made a formal complaint of bullying against Mr. Naughton (the Naughton Complaint), which encompassed three allegations: that Mr. Naughton breached the Harassment Procedure Document due to his failure to provide the plaintiff with work related information, that is to say, the Collective Agreement referred to by Ms. Little; in relation to Mr. Naughton's insistence and coercion that he avail of the ESBI Tribunal as an appellate forum in breach of the Labour Court recommendation; and that Mr. Naughton was in breach of company policy in refusing to supply him with the documentation in relation to the prosecution of his appeal via the JIC as recommended by the Labour Court.

17. On 9th December, 2011, the plaintiff made twenty two complaints against Ms. Little (the Little Complaints) alleging breach of the Harassment Procedure Document.

18. By 14th December, 2011 the following complaints made by the plaintiff under the Harassment Procedure Document, which are relevant to the issues before the Court, were pending:

> (a) the 2009 Complaints, the appeal against the decision of Ms. Little not having been progressed;
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> (b) the Naughton Complaint; and
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> (c) the Little Complaints.

Before summarising how those matters reached their current status, it is necessary to outline an event which occurred on 14th December, 2011, which might have been anticipated to be of seminal significance in the overall context of these proceedings, but in the event was not so.

19. On 14th December, 2011 the plaintiff was informed that Michael Fox had been appointed as the "investigating manager" into his complaints. The plaintiff has averred that this had "a devastating impact" on him and that he was extremely upset and distressed. He has averred that Mr. Fox had already previously found against him and he was of the view that Mr. Fox would not give due regard to his complaints. The defendant has contradicted that evidence and its evidence is that Mr. Fox was merely manager of the investigation into the appeal in relation to the 2009 Complaints and that he had no involvement in the finding made on the appeal, Ms. Little being the sole arbiter on the appeal. In any event, in the course of a telephone conversation with Mary Mangan, the Employment Assistance Program Officer with the defendant, the plaintiff informed Ms. Mangan that he was devastated by the appointment of Mr. Fox. He also stated, as he put it himself, as a "throwaway colloquialism", that he was glad he "hadn't come to work armed". That remark was overheard by other employees of the defendant and obviously gave rise to considerable concern.

20. By letter dated 16th December, 2011 from Orla Maher, Human Resources Manager of the defendant, to the plaintiff, the plaintiff was informed that as regards his comment on 14th December, 2012 "within earshot of a number of people", the defendant had no option but to take the "perceived threat extremely seriously". An Garda Síochána had been informed of the matter. Further, the plaintiff was formally requested to make an appointment to attend his General Practitioner for assessment and that he should ask his GP to contact the ESB Medical Officer, Dr. Jim O'Malley, for a joint assessment as to the plaintiff's medical fitness for work. The plaintiff was then informed:

> "Until there is consensus between the doctors as to your fitness for work you may not return to work or attend at any ESB Group premises.
>
> In the meantime you may continue to avail of EAP services by telephone and you will continue to be on full pay until further notice."

On 16th December, 2011, members of An Garda Síochána attended at the plaintiff's home and questioned him and searched the premises pursuant to a search warrant.

21. By further letter of 23rd December, 2011 from Ms. Maher to the plaintiff, the plaintiff was informed that Dr. O'Malley, following a discussion with the plaintiff's GP, had advised that he could not confirm the plaintiff's fitness for work without an appropriate specialist assessment by a consultant psychiatrist. The plaintiff was informed that an appointment was being made for him with Dr. Damian Mohan for early January 2012 for such assessment. He was informed that, in the meantime, he was not permitted on health and safety grounds to come to work or to attend at any ESB Group premises pending receipt and consideration of Dr. Mohan's report.

22. The plaintiff was examined by Dr. Mohan on 6th January, 2012. Dr. Mohan issued his report on 28th January, 2012. The plaintiff takes issue with what Dr. Mohan recommended, having regard to his version of what occurred at the consultation. In any event, for present purposes, what is of significance is that Dr. Mohan recorded in his report that the plaintiff had admitted that he made the comments regarding "coming into work armed today" and that he acknowledged that they were inappropriate, but did not appear to grasp the level of concern the comments had caused amongst his co-workers. Dr. Mohan concluded that the plaintiff was at low risk of physical harm to others. However, he recommended that the comments should be dealt with by way of disciplinary process. He opined that the plaintiff was well enough both physically and mentally to participate and engage in a disciplinary hearing, but that he should be advised to have the usual safeguards and protections in place at the hearing, such as his "Union Representative or Solicitor". Dr. Mohan also recommended that the outstanding complaints and disciplinary matters should be fully dealt with before the plaintiff was permitted to return to the workplace.

23. The plaintiff was informed of the contents of Dr. Mohan's report by letter dated 2nd February, 2012 from Ms. Maher. He was informed that –

> (a) the comment on 14th December, 2011 and "related comments" would be dealt with under the Disciplinary Procedure Document, in line with Dr. Mohan's report, and
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> (b) the plaintiff's complaints under the Harassment Procedure Document would also be dealt with in accordance with Dr. Mohan's recommendation before he was determined fit to return to work.

The plaintiff was informed that he would remain on full pay during those processes.

24. The disciplinary action was initiated on 14th February, 2012 when Ms. Maher furnished the plaintiff with a copy of a complaint which she had received from Mr. Fox in relation to the plaintiff's comments on 14th December, 2011. That letter stated:

> "Given the very serious nature of this complaint I am treating this as a Summary Disciplinary Action and suspending you with pay and without prejudice in order to allow this case to be fully dealt with under the ESBI Disciplinary Procedure (copy attached)."

The plaintiff was invited to comment on the complaint within five days. He was informed that a Manager would be nominated to deal with the case and would arrange "a disciplinary hearing" where he would be given an opportunity to respond to the disciplinary complaint. He would be notified of the outcome within five days of the hearing and, if the complaint was upheld and a sanction imposed, he would have a right of appeal in line with the Disciplinary Procedure Document. He was informed that he had a right of assistance and representation by a work colleague, family member or a staff association representative at all stages.

25. The Manager nominated to investigate the complaint of Mr. Fox was Mary O'Connor. Following her investigation, she issued a Disciplinary Hearing Report dated 13th June, 2012. Her conclusions were that the plaintiff made the comments complained of on 14th December, 2011 and that he appeared to have been suffering from stress at the time the comments were made. She concluded that the plaintiff's behaviour could reasonably be regarded as intimidating as it caused significant concerns for the safety of himself and other staff. She upheld the complaint. Her recommendation was that, given that the plaintiff had accepted responsibility for making the comments, had clearly set out that he regretted making them, and had explained that the events occurred during a period in which he was experiencing personal and family difficulties, the disciplinary sanction be confined to a formal written warning. The defendant's position is that the formal written warning was formally notified to the plaintiff by letter dated 20th June, 2012 from Ms. Maher to the plaintiff.

26. The plaintiff did not appeal Ms. O'Connor's finding, nor did he seek to return to work. The defendant's position is that, as he did not seek to return to his duties at this stage, he "effectively acquiesced to his continued suspension from employment". However, the reality is that the defendant, within six days, on 26th June, 2012, initiated a process which ultimately led to the plaintiff's dismissal. However, before dealing with that process, which is the core element of these proceedings and this application, I propose to summarise the outcome of the processes in relation to the plaintiff's complaints.

27. As regards the 2009 Complaints, the plaintiff was advised on 28th March, 2012 that he was being afforded an opportunity to progress his appeal against Ms. Little's decision, but he did not take up the opportunity, so the defendant's position is that the appeal is now out of time and closed. The defendant disputes the plaintiff's contention that the plaintiff would have been in breach of the Labour Court's recommendation had he prosecuted the appeal before the ESBI Tribunal, because by this time the Labour Court had issued a clarifying letter to which I will refer later, which had been copied to the plaintiff. However, the plaintiff's position is that by this time he was on "disciplinary suspension" and his focus was on trying to keep his job.

28. The Naughton Complaint was referred by the defendant to what the defendant has described as an "independent party", Baker Tilly Ryan Glennon. That firm issued a comprehensive report on 5th June, 2012. None of the three allegations of breach of the defendant's harassment policy investigated was upheld. However, the independent investigators made the following remarks at the conclusion of their report:

> "Having reviewed and considered a large amount of information that was provided to the investigation team, we conclude that the backdrop to this investigation rests in the confusion regarding the interpretation of a Labour Court recommendation. Having clarification of the Labour Court recommendation at an earlier stage would have addressed the ambiguity which contributed to an escalation of the dispute that was borne mainly out of [the plaintiff's] unwillingness to progress his appeal through the ESBI Tribunal. In view of the fact that further confusion regarding the basis of the agreement to implement the ESBI Tribunal has contributed to [the plaintiff's] complaints, it is recommended that [the defendant] review the policies and procedures in relation to the ESBI Tribunal to ensure its operation and standing is clear to all."

Although he did not participate in the independent investigation, a factor which the investigators found unhelpful, the plaintiff has commented on affidavit that those conclusions suggest that his complaints, although not upheld, were neither spurious nor baseless and were sufficiently significant and justifiable to warrant the recommendation made in the last sentence.

29. The plaintiff's contention is that the Little Complaints have never been investigated and remain extant. The defendant takes issue with that proposition and states that the plaintiff was informed by letter dated 28th March, 2012 that the defendant had determined that it was not appropriate to investigate the complaints against Ms. Little due to these being directed to "the internal Defendant industrial dispute resolutions procedures by the Labour Court" and that "the other complaints as against Ms. Little were not appropriate for investigation as it concerned the alleged conduct of Ms. Little during the Labour Court hearing", and that those determinations were made on the advice of Baker Tilly Ryan Glennon, which had been appointed independent investigator in relation thereto. The defendant's position was that no attempt was made by the plaintiff or his legal advisers at the time to contest those determinations.

30. Returning to the action taken by the defendant on 26th June, 2012, the plaintiff's interpretation of it is that the defendant, as a result of the decision of Ms. O'Connor, had discovered that terminating his contract of employment based on his "throwaway remark" to Ms. Mangan was not a viable option, and had resolved to terminate his contract on wholly different grounds. By letter dated 26th June, 2012, Oliver Brogan, Manager of the defendant, wrote to the plaintiff informing him that the defendant had reviewed the manner in which his complaints against his colleagues were advanced and particularly the types of allegations made against individual colleagues, none of which had been upheld. Mr. Brogan stated in the letter:

> "Upon a review of the complaints you have made and the documentation relating thereto, I believe [the defendant] has substantial grounds to justify questioning whether it can continue to repose trust and confidence in you as an employee and whether it is possible that normal working relations can be restored between you and the colleagues against whom you have made such accusations.
>
> In those circumstances, I propose to immediately convene the disciplinary procedure to establish whether the relationship of trust and confidence has been damaged beyond repair and given the potential serious nature of the allegations, the procedure will be undertaken pursuant to Part (g) of the procedure entitled 'Summary Disciplinary Action'."

Mr. Brogan then stated that the material that would be relied on was comprised in booklets attached to the letter. He referred to the plaintiff's correspondence and other documents containing allegations against colleagues including, but not limited to, the comments

directed at Ms. Little, whom the plaintiff had accused of having provided untruthful testimony before the Labour Court "which was a deliberate lie" and that she had "seriously perverted the course of justice". Four communications from the plaintiff, three e-mails to staff members and one letter to the Labour Court, were also itemised. Mr. Brogan stated that it was not intended to expose Ms. Little or, indeed, any other employee against whom the plaintiff had made such allegations to any further questioning. The plaintiff was informed that the documentary record together with the plaintiff's responses and any submissions made on his behalf would be considered by the defendant before reaching any conclusion in the matter. It was stated that the only documentation that would be relied on was the documentation in the booklets attached. The plaintiff was invited to furnish his comments within five days and he was informed that a Hearing Manager would then be assigned to hear the case and a disciplinary hearing would be scheduled without delay. He was informed that he had a right of assistance and representation by a work colleague, family member or a staff association representative at all stages.

31. John O'Gorman was appointed "Hearing Manager" in relation to the process initiated by the letter of 26th June, 2012. Mr. O'Gorman, has sworn the two replying affidavits on this application filed on behalf of the defendant, one on 30th January, 2013 and the other on 27th February, 2013. Mr. O'Gorman has described his position as "the Human Resources Manager in ESB Networks". The hearing took place on 28th August, 2012. It was attended by the plaintiff, who was not legally represented, and by Mr. Brogan. Neither side called witnesses. The plaintiff has averred that he sought permission to cross-examine Ms. Little but that application was refused. He sought discovery of the "Collective Agreement in place with ESBI", referred to in the Labour Court recommendation but his request was refused. He was precluded from being represented by a solicitor which, given the severity of the sanction, he has asserted, unfairly prejudiced him. Those are some only of the deficiencies which the plaintiff alleges were inherent in the process.

32. Mr. O'Gorman, by letter dated 2nd November, 2012, informed the plaintiff of his finding in the following terms:

"I find that the way in which you conducted yourself during the various processes outlined was completely unacceptable and amounted to serious misconduct. I further find that taking all the facts into account, there is a breakdown of trust and confidence entitled to be held by the [defendant] in you as an employee. I do not believe that it is likely that the relationship could be re-established. Accordingly I am recommending your dismissal from [the defendant]."

Mr. O'Gorman attached a detailed report outlining his reasons for coming to that decision to the letter. The plaintiff was informed that he was entitled to appeal Mr. Brogan's decision, but he must appeal within five working days of receipt of Mr. Brogan's letter.

33. In the report attached to the letter, Mr. O'Gorman addressed the issue whether the allegations he was investigating came within section (g) of the Disciplinary Procedure Document. On this point he stated:

> "The allegations made are of serious misconduct. My conclusion is that section (g) of the policy gives examples of reasons for summary disciplinary action. It is not intended to be an exhaustive list and that the term 'other serious misconduct' in this section (g) covers the complaint made in this case. The persistent and personal attacks on fellow colleagues and the sheer volume of them is by any standard unacceptable and for this reason I hold it comes under section (g) as serious misconduct."

Having reviewed some of the documentation before him and, in particular, the documents to which the plaintiff's attention was drawn in the letter of 26th June, 2012 from Mr. Brogan (the e-mails dated 14th December, 2011, 2nd November, 2011 and 7th February, 2012 sent by the plaintiff to three named employees of the defendant, and a letter dated 29th September, 2011 from the plaintiff to the Labour Court, in which Ms. Little was accused of "untruthful testimony", "deliberate lies" and "deliberate fabrication"), Mr. O'Gorman concluded as follows:

> "[The plaintiff] appears to be unable to accept the findings of the initial investigation and the subsequent appeal and the Labour Court. He has written to Directors in the company with unsubstantiated claims against staff involved in his case, with the apparent purpose of damaging their reputations and potentially their career prospects. His comments in regard to [the line manager the subject of the 2009 Complaints] in this regard are particularly aggressive.
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> A reasonable and objective individual could only come to the conclusion that the extraordinary and persistent behaviour exhibited by [the plaintiff] over the course of these cases has been totally unacceptable in a company that relies on good working relationships to prosper in a very competitive environment. It could only be seen as serious misconduct that has resulted in the irretrievable breakdown in the working relationship necessary to continue employment in [the defendant].
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> I recommend dismissal from the company."

34. The plaintiff did not appeal that decision. By letter dated 22nd November, 2012 from the defendant he was informed that the recommendation of Mr. O'Gorman was being followed and he was informed that his contract of employment would therefore terminate at the close of business on 17th January, 2013. He would remain on full pay up to that date.

35. By a further letter of 14th January, 2013 to the plaintiff, it was reiterated that the plaintiff's last day in the employment of the defendant would be 17th January, 2013. He was informed that his personal belongings would be delivered by courier to his home. He was informed that his final payslip had issued.

36. The plaintiff's response was the initiation of these proceedings. The defendant has contended that the delay between 22nd November, 2012 and 16th January, 2013 militates against the grant of any injunctive or equitable relief.

The issues

37. Counsel for the plaintiff acknowledged that the plaintiff is, at this interlocutory stage, seeking mandatory relief. Therefore, in accordance with the decision of the Supreme Court in *Maha Lingam v. Health Service Executive* [2006] ELR 137, in order to be entitled to such relief he must establish that he has a strong case that he is likely to succeed at the hearing of the substantive action.

38. If the plaintiff surmounts that first hurdle, the issues as to –

> (a) the adequacy of damages as a remedy for the plaintiff, if he is successful in the action, and
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> (b) whether, if he is not successful, the undertaking as to damages which he has given to the Court would adequately protect the defendant,

then arise. On the basis of the evidence put before the Court by the plaintiff of his personal and family circumstances and, in particular, his financial circumstances, I am satisfied that as of now he is in need of the continuance of income commensurate with his salary while these proceedings are pending, so that it is probable damages awarded at the substantive hearing would not be an adequate remedy for him. On the other hand, the same evidence does support the defendant's contention that the undertaking as to damages which the plaintiff has given is effectively worthless. That in employment injunction cases the undertaking as to damages is often "something of a fallacy" (*c.f.* Cox, Corbett and Ryan on *Employment Law in Ireland* at para. 24 – 29) is undoubtedly the case. In practice, however, that has not deterred the courts from granting interlocutory relief, including an order directing continuance of the payment of salary, to a plaintiff employee who is challenging the lawfulness of his dismissal. Accordingly, I do not consider it necessary to address those issues further.

39. The final issue to be addressed is whether the balance of convenience lies in favour of the grant or refusal of an injunction in the terms sought, which, in my view, it is crucial to address in relation to the various reliefs sought, having regard to the facts of this case.

Strong case?

40. Some general observations are apposite in relation to the nature of the plaintiff's claim. It is a claim at common law for wrongful dismissal. The core issue, accordingly, is whether the defendant, in terminating the plaintiff's employment is in breach of the plaintiff's contract of employment. There are only two ways in which the defendant can lawfully terminate the plaintiff's contract of employment. One is by giving notice in accordance with Clause 1.13, which is quoted at paragraph 5 above. Although, in effect, the letter of 22nd November, 2012 gave the plaintiff approximately eight weeks' notice of termination, the defendant did not, and did not purport to, terminate the plaintiff's employment in accordance with Clause 1.13. The other is to dismiss the plaintiff for misconduct in accordance with Clause (g) of the Disciplinary Procedure Document, which is incorporated in the plaintiff's contract. That is what the defendant purported to do in the letter of 22nd November, 2012. The position of the defendant is that it was entitled to invoke Clause (g) on the basis that the matters investigated by Mr. O'Gorman, as outlined in the letter of 26th June, 2012 from Mr. Brogan to the plaintiff, have been found to constitute "other serious misconduct" in accordance with Clause (g).

41. Even though the plaintiff's dismissal, as communicated by the letter of 22nd November, 2012, was solely on the basis of the defendant's implementation of the recommendation of Mr. O'Gorman, whether the defendant was entitled to dismiss the plaintiff cannot be determined by reference to the outcome of Mr. O'Gorman's inquiry alone, but has to be considered in the light of all of the facts which I have outlined under the heading of "Essential facts" above. The reality of the situation is that, as counsel for the plaintiff contended, everything that subsequently occurred flowed from the 2009 Complaints.

42. From the 2009 Complaints onwards, two distinct processes were in play between the parties in relation to the plaintiff's employment with the defendant. One was the invocation by the plaintiff of the provisions of the Harassment Procedure Document in relation to three complaints: the 2009 Complaints; the Naughton Complaint and the Little Complaints. The other was the invocation by the defendant of Clause (g) of the Disciplinary Procedure Document alleging misconduct against the plaintiff in relation to two matters: the comments made on 14th December, 2011 and the matters outlined in Mr. Brogan's letter of 26th June, 2012. In summary, by 26th June, 2012, the state of play was as follows:

> (a) the plaintiff had not pursued whatever ground of appeal was available to him against the decision of Ms. Little, which, on appeal, had not upheld the 2009 Complaints;
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> (b) the plaintiff had not appealed the decision of Baker Tilly Ryan Glennon, in which the Naughton Complaint was not upheld;
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> (c) for present purposes I think it is not unfair to characterise the Little Complaints as being "in limbo"; and
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> (d) the outcome of the summary disciplinary action taken by the defendant against the plaintiff in relation to the comments of 14th December, 2011 was a finding against the plaintiff, which was not appealed, and which merely merited a written warning effective from 20th June, 2012.

43. As regards the outcome of the complaints at (a) and (b) in para. 42, as the provisions of the Harassment Procedure Document quoted at paras. 11 and 12 above indicate, disciplinary action may ensue after an investigation of a complaint, whether the complaint is not upheld or upheld. Where, as in this case, the plaintiff's complaints which have been adjudicated on have not been upheld, if any of the complaints was deemed to be malicious or vexatious, it should be treated as misconduct. It was emphasised on behalf of the plaintiff that there was no such deeming or finding in relation to any of the complaints made by the plaintiff, which were investigated and adjudicated upon.

44. To focus on the disciplinary process which resulted in the determination by the defendant to dismiss the plaintiff, that is to say, the allegations made in Mr. Brogan's letter of 26th June, 2012, counsel for the plaintiff advanced some very fundamental objections in challenging the validity of the process and its outcome. First, counsel contended that the alleged "offence" was ersatz, and that the procedure followed was ersatz and neither was provided for in the plaintiff's contract of employment or in the Disciplinary Procedure Document or the Harassment Procedure Document. He went so far as to say that the alleged "offence" in the form relied on by the defendant, that is to say, the "offence" of using intemperate language in exercise of one's rights under a grievance procedure without investigating the underlying grievance, is not known in law. Whether a failure on the part of an employer of trust and confidence in an employee could be classified as misconduct so as to justify dismissal from employment was questioned. The alleged "offence" was characterised as a "made to measure charge" which was unfair and irrational in not addressing the truth of the underlying issues by, for instance, excluding cross-examination of Ms. Little. Counsel for the plaintiff took particular exception to an averment that what Ms. Little said at the Labour Court hearing on 21st July, 2011 is "irrelevant" for the purposes of these proceedings, when, it was contended, the effect had been to oust the jurisdiction of the Labour Court.

45. Apart from the foregoing fundamental objections, counsel for the plaintiff contended that the evidence disclosed clear bias on the part of the defendant and its officials, which, it was contended, was further tainted by animus on the part of a number of human resources personnel of the defendant, citing a number of examples throughout the process, including the fact that the plaintiff continued to be excluded from his place of work following the letter of 20th June, 2012 in which the written warning was issued, without attempting to justify such exclusion, save to say that the plaintiff did not press to be allowed to be return to work.

46. Counsel for the plaintiff relied on a Psychological Report on the plaintiff furnished by Mr. Robert Foley, which was dated 11th February, 2013 and was put in evidence to support his contention that the plaintiff's complaints were badly handled by the defendant and should have been handled differently. Nonetheless, he contended that, in general, the evidence indicated that the plaintiff had a satisfactory working relationship with most of his colleagues and that there was no reason why he should not be reinstated in his

position with the defendant, which is a large organisation. On the issue of reinstatement, it was submitted by counsel for the plaintiff that the situation here is analogous to the situation in *Carroll v. Bus Atha Cliath* [2005] 4 I.R. 184 and that, on that basis, the Court should conclude that the plaintiff has established a strong case, which, as I understand the argument means that at the hearing of the substantive action he will be able to convince the trial Judge that he should be reinstated in his position with the defendant. That submission ignores the observations of Clarke J. in the *Carroll* case (at p. 210), where he stated that, even if jurisdiction exists to make a mandatory order which would have the effect of entitling an employee to return actively to work after appropriate findings at a plenary hearing, it could, in principle, only arise in circumstances where it was clear that no other difficulties could reasonably be expected to arise by virtue of the making of an order. It is quite clear from what follows in the judgment that the type of difficulty Clarke J. had in mind was a situation where there is a serious breakdown in the relations between the parties.

47. Counsel for the plaintiff also rejected the defendant's submission that these proceedings are premature and precipitous because the plaintiff was afforded an opportunity to appeal the findings of Mr. O'Gorman and his recommendation that the plaintiff be dismissed. The plaintiff's position is that, on the basis of legal advice, an appeal in the circumstances would be a futile exercise. It was submitted that, where, as here, the first round of the process was so fatally flawed for the reasons outlined earlier, that the plaintiff is entitled to seek the intervention of the Court rather than go to the second round of the process.

48. Both in written submissions and in oral submissions, counsel for the defendant vigorously challenged every argument advanced on behalf of the plaintiff. The wisdom of the plaintiff coming to court rather than pursuing a statutory claim for unfair dismissal before the Employment Appeals Tribunal was questioned. Each of the assertions of the plaintiff, the purpose of which was to show that the disciplinary process which followed the letter of 26th June, 2012 was fundamentally flawed was rejected. It was submitted that the plaintiff has not established a strong case that the process was flawed or was not conducted in accordance with fair procedures. The allegations of bias were denied. It was submitted that there is authority for the proposition that in a suitable case an employer may rely upon the breakdown in trust and confidence as a substantial reason for justifying dismissal, citing a decision of the Court of Appeal of England and Wales in *Perkins v. St. George's Healthcare NHS Trust* [2005] IRLR 934. It is pertinent to observe that in that case, the Court of Appeal was considering the application of a statutory provision in force in the United Kingdom as to determination of whether the dismissal of an employee is fair or unfair. It was not concerned with wrongful dismissal at common law. Aside from that observation, it would not be appropriate at this juncture to attempt to express any definitive view on that core legal issue or, indeed, on any of the other legal issues which have been comprehensively addressed by counsel for the defendant in their submissions.

49. As should be obvious from the extent to which I have considered it necessary to outline what I consider to be the essential facts earlier, in my view, the disciplinary process which was initiated by Mr. Brogan's letter of 26th June, 2012 has to be considered against the backdrop of the outcome of the disciplinary process which preceded it and also the status of the investigation of the plaintiff's complaints under the Harassment Procedure Document. Further, regard has to be had to the reality that the plaintiff's pursuit of the 2009 Complaints was the genesis of what subsequently transpired. As regards the resolution of those complaints, there was undoubtedly confusion as to which internal process the plaintiff had recourse to following Ms. Little's decision. It would appear that that confusion was contributed to by the Labour Court. The only investigation carried out in relation to the plaintiff's complaints, or, indeed, the defendant's allegations of misconduct against the plaintiff, from 2009 onwards which was not carried out by personnel of the ESB Group was the investigation carried out by Baker Tilly Ryan Glennon. As the conclusions in the report dated 5th June, 2012 following that investigation, which I have quoted at para. 28 above, indicate there was "confusion" regarding the interpretation of the Labour Court recommendation. Indeed, the clarification issued by the Labour Court referred to in the conclusions, having regard to what is stated in the conclusions, appears not to have dispelled the confusion. The clarification of the Labour Court, which is quoted at para. 5.2 of the report, stated:

> "The issues before the Court concerned a worker and his employer, in this case ESBI. In recommending a referral to the Joint Industrial Council, the Court was referring to the appropriate internal dispute resolution institutions within the ESBI, i.e. the 'ESBI Industrial Council'. The court sees no nexus between the ESB Joint Industrial Council, the worker concerned and the issues in dispute."

I consider that it would be remiss even at this interlocutory stage not to observe that the words to which I have added emphasis in the quotation from the Harassment Procedure Document quoted at para. 15 above seem, on their face, to say that an employee of the ESB has recourse to the ESB JIC by way of appeal, whereas an employee of a subsidiary of the ESB has recourse to the other established and recognised procedures in the subsidiary, which, obviously, in the case of the defendant is the ESBI Tribunal. It is hard to comprehend why, as the independent investigator pointed out, the obvious slip made by the Labour Court could not have been clarified sooner and, following clarification, the position could not have been explained to the plaintiff in plain terms, so as to avoid the annoyance and frustration on the part of each party which subsequently ensued.

50. The disciplinary process initiated by the letter of 26th June, 2012 was, in reality, an investigation as to whether the plaintiff was guilty of misconduct in the making, and his mode of conduct, of the 2009 Complaints, the Naughton Complaint, and the Little Complaints, although the investigation of those complaints, which had been investigated to conclusion, had not resulted in any finding that the complaints were malicious or vexatious. Further, in the case of the Baker Tilly Ryan Glennon report, the independent investigator pointed to a possible explanation for the conduct of the plaintiff. More importantly, pursuant to the letter of 26th June, 2012, the defendant embarked on a fresh investigation which was merely an investigation of the documentation generated by the plaintiff in pursuing the complaints, but which was wholly divorced from any consideration of the veracity of the allegations made by the plaintiff in the documentation or the basis of his complaint and, in particular, whether there was any justification for the sense of grievance which the plaintiff harboured arising from the matters of which he complained, and how the complaints were addressed by the defendant. Of particular significance, in my view, is the plaintiff's view that the Little Complaints were never investigated on the merits.

51. For the foregoing reasons, and because I consider that there is substance in the submissions made on behalf of the plaintiff that the process which commenced with the letter of 26th June, 2012 was fundamentally flawed, both in substance and procedurally, I have come to the conclusion that the plaintiff has met the "strong case" test.

Balance of convenience

52. Although it was not cited by either party, the authority from which I have obtained most guidance in determining where the balance of convenience lies is the decision of the High Court (Clarke J.) in *Bergin v. Galway Clinic Doughiska Limited* [2008] 2 I.R. 205. In that case, the plaintiff's contract of employment as Chief Executive of the defendant was summarily terminated, in circumstances where there had been a breakdown in the relations between the plaintiff employee and the defendant employer. Clarke J. recognised (at p. 220) that the state of relations between an employer and, in particular, key senior personnel, is a weighty factor in assessing the balance of convenience. He found that any order which, either directly or indirectly, required that the plaintiff continue with his duties, would not meet the balance of convenience test. He recognised that someone had to carry out the duties of chief executive officer and that the defendant could not be prevented from appointing someone to carry out such duties, but he restrained the

defendant from appointing any person to carry out the duties of chief executive officer, save in circumstances where the appointment of such person would contain terms sufficient to permit the plaintiff to return to his duties should the Court, after a full hearing, be persuaded to make an order to that effect.

53. While appreciating that, an engineer at the first level in the defendant's personnel's structure, is not in the same position as a chief executive officer, nonetheless, having regard to the history of this matter, the balance of convenience, in my view, does not favour an order requiring the defendant to allow the plaintiff to return to work pending the trial of the action.

54. However, in line with a long line of authority going back to the decision of the High Court (Costello J.) in *Fennelly v. Assicurazioni Generali SPA* (the High Court, 12th March, 1985) [1985] ILTR 73, I am of the view that, because of his financial circumstances, the plaintiff should be paid the remuneration to which he would be entitled in accordance with his contract of employment pending the trial of the action. On the basis of what the Court was told, although this is not on affidavit, the plaintiff has never applied for membership of the ESB subsidiary companies' pension scheme. Accordingly, there will be no direction that the defendant pay the relevant employer's contribution to the scheme.

Delay

55. As is pointed out in Delany on *Equity and the Law of Trusts in Ireland* (5th Ed.) at p. 524, the defence of delay or laches arises if two conditions are satisfied: that there has been unreasonable delay on the part of the plaintiff in commencement and prosecution of the proceedings; and that, in view of the nature and consequences of that delay, it would be unjust in all of the circumstances to grant the specific relief that is in question, whether absolutely or on appropriate terms and conditions. In this case, the delay between receipt of the letter of 22nd November, 2012 and the initiation of these proceedings on 16th January, 2013, a period of approximately eight weeks, in my view, does not constitute unreasonable delay having regard to the intervention of the Christmas vacation. In any event, there is no evidence of any particular prejudice to the defendant and, in the circumstances, there is no just basis for precluding the plaintiff from equitable relief in this case.

Orders

56. The orders will be in the following terms:

> (a) an interlocutory injunction restraining the defendant from taking any steps to give effect to the termination of the plaintiff's contract of employment pursuant to the letter dated 22nd November, 2012 pending the trial of the action;
>
> (b) an injunction directing the defendant to continue to pay to the plaintiff his remuneration in accordance with his contract of employment pending the trial of the action; and
>
> (c) an injunction restraining the defendant from appointing or assigning any person to carry out the plaintiff's contractual responsibilities save in circumstances where the appointment or assignment of such person contains terms sufficient to permit the plaintiff to return to his duties as Consultant Level 1 should the Court, after a full hearing, be persuaded to make an order to that effect.

57. The foregoing orders are made on the basis of the undertaking of the plaintiff's counsel to facilitate the expedition of the trial of the action, which will be addressed with counsel for the parties when judgment has been delivered.