THE HIGH COURT

[2015 No. 9804 P]

BETWEEN:

LYNDSEY CONWAY

Plaintiff

AND

THE HEALTH SERVICE EXECUTIVE

Defendant

[2015 No. 9806 P]

BETWEEN:

CARMEL DOHERTY

Plaintiff

AND

THE HEALTH SERVICE EXECUTIVE

Defendant

[2015 No. 9805 P]

BETWEEN:

MARY PRENDERGAST

Plaintiff

AND

THE HEALTH SERVICE EXECUTIVE

Defendant

[2015 No. 9807 P]

BETWEEN:

VIDHYA MAVERLY

Plaintiff

AND

THE HEALTH SERVICE EXECUTIVE

Defendant

[2015 No. 9808 P]

BETWEEN:

MARIE KILCOYNE

Plaintiff

AND

THE HEALTH SERVICE EXECUTIVE

Judgment of Ms. Justice Murphy delivered ex tempore on the 5th day of February, 2016.

1. The plaintiffs in this application are psychiatric nurses who are employed by the HSE and who were at all material times assigned to Áras Attracta, a residential home for persons with intellectual disabilities based in Swinford, County Mayo. At present each of the plaintiffs is subject to disciplinary procedures initiated by the HSE at various dates between 27th November, 2014 and 13th August, 2015. These disciplinary procedures are purportedly being carried out under two policies of the defendant, namely a Trust in Care Policy and a Disciplinary Procedure. In essence, the claim of the plaintiffs is that those disciplinary procedures form part of their conditions and terms of employment and that the defendant has breached those terms by appointing a disciplinary investigation team without the prior agreement of the plaintiffs and further by conducting parallel investigations under the Trust in Care Policy and the Disciplinary Procedure. The plaintiffs seek the following interlocutory reliefs:

(i) An injunction restraining the defendant from taking any further steps in the investigation process pursuant to the Trust in Care Policy commenced in respect of each plaintiff;

(ii) An injunction restraining the defendant from continuing with the defendant's purported investigation against the plaintiff pursuant to the Trust in Care Policy;

(iii) An injunction restraining the defendant from conducting any disciplinary procedure against the plaintiffs unless the complaints against the plaintiffs are upheld pursuant to the Trust in Care Policy, including the purported commencement of a Stage 4 Disciplinary Process;

(iv) An injunction restraining the defendant from embarking on any investigation or disciplinary procedure against the plaintiff otherwise than in accordance with the plaintiffs' contractual entitlements and with the tenets of fair procedures and natural justice;

(v) An injunction lifting the purported suspensions of the first and second plaintiffs;

(vi) An injunction requiring that there will be no interference by the defendant with certain plaintiffs in undertaking their duties of employment;

(vii) An injunction, if necessary, restraining the defendant from terminating the plaintiffs' employment with the defendant.

Background

2. The investigation concerns seventeen members of staff at Áras Attracta. According to the affidavit of Mr. Pat Healy, National Director of Social Care with the HSE and Commissioner of the Investigation, the twelve other individuals are represented by another union. Those individuals have not made an application to this Court although they have made submissions to the HSE in respect of the process which are of a similar nature to those made by the plaintiffs in the current proceedings.

3. The relevant portions of those procedures are as follows:

"TRUST IN CARE: Policy for Health Service Employers on Upholding the Dignity and Welfare of Patient/Clients and the Procedure for Managing Allegations of Abuse against Staff Members

[…]

5.3 Conducting the Investigation

Steps in conducting the Investigation

The investigation will be conducted by the designated person(s) agreed between the parties.

[…]

The investigation will be governed by clear terms of reference based on the written complaint and any other matters relevant to the complaint. The terms of reference shall specify the following:

• *The investigation will be conducted in accordance with the Trust in Care Policy;*

[…]

• *Scope of investigation i.e. the investigation team will determine whether or not the complaint has been upheld and may make recommendations (other than disciplinary sanction) where appropriate;*

[…]

The investigation team will form preliminary conclusions based on the evidence and will invite any person adversely affected by these conclusions to provide additional information or challenge any aspect of the evidence.

[…]

If a complaint is upheld, the matter will be referred to the chief executive officer (or equivalent) or designated manager who is empowered to take disciplinary action up to and including dismissal.

DISCIPLINARY PROCEDURE

2. Purpose of the Disciplinary Procedure

Examples of conduct which may lead to disciplinary action under this procedure include:

[…]

• Poor work standards;

[…]

• Negligence;

[…]

• Abuse of patient/client (following a complaint being upheld under the Trust in Care policy).

4. Principles

[…]

• While the disciplinary procedure will normally be operated on a progressive basis, in cases of serious misconduct the manager may bypass stages 1, 2 and 3 of the procedure.

[…]

• The employee will be advised in advance of the disciplinary hearing of the precise nature of the complaint against him and will be given copies of any relevant documentation.

5. Formal Procedure

[..]

Stage 4 Dismissal or Action Short of Dismissal

Failure to meet the required standard of work, conduct or attendance following the issuing of a final written warning will lead to a disciplinary hearing under Stage 4. The decision-maker will be the relevant National Director. The National Director, Primary, Community and Continuing Care (PCCC) may delegate authority to the appropriate Assistant National Director. The National Director, National Hospitals Office (NHO) may delegate authority to a Hospital Network Manager. The outcome of the disciplinary hearing may be dismissal or action short of dismissal. The employee may appeal against dismissal decisions or disciplinary sanctions short of dismissal.

Serious misconduct

The following are examples of serious misconduct which will be dealt with from the outset under Stage 4:

[…]

• Gross negligence or dereliction of duties

[…]

• Serious abuse of a patient/client following a complaint being upheld under the Trust in Care Policy.

[…]

Allegations of serious misconduct will be dealt with as follows:

(i) Notifying the Employee of the Allegation

[…]

(ii) Investigation

An investigation will be conducted by person(s) who are acceptable to both parties.

Decision of the Court

5. There are many matters which are not in dispute between the parties. All are agreed that the events portrayed in the Prime Time Investigates programme aired on 9th December, 2014 gave rise to serious public disquiet as to the treatment of vulnerable people in the care of the HSE. All agree that the events portrayed require to be investigated for the purpose of establishing responsibility for such apparently cruel and inhuman treatment. There is no dispute that complaints arising against HSE personnel, be they frontline staff or management, arising from the contents of the programme itself, or the 197 hours of additional footage supplied to the HSE by RTÉ or from the investigation of the Review Group established by the HSE on a date prior to 12th December, 2014, render those personnel liable to investigation and if appropriate disciplinary sanction. There is no dispute that the applicable disciplinary processes are set out in two policy documents entitled Trust in Care Policy and Disciplinary Procedure. These policies were formulated after lengthy negotiations between all stakeholders and with input from appropriate experts. The policies are included in the Staff Handbook and are specifically referred to in a number of the plaintiffs' contracts of employment. The HSE accepts that it has not followed the procedures laid down in those documents and there lies the core of the dispute between the parties. The plaintiffs contend that the failure to follow the agreed procedures is a breach of their contractual rights and that the manner in which the HSE has in fact proceeded, is unlawful and denies them fair procedures. The HSE counter that its admitted breach is a mere technical procedural breach which is not a material interference with contractual rights nor a denial of fair procedures. Furthermore, the HSE submits that the delay of the plaintiffs in seeking interlocutory relief should debar them from such relief and that the Court should dismiss the

application on that ground alone. Alternatively they suggest that the delay is such that the balance of convenience has tilted decisively in favour of allowing the current investigation to proceed having regard to the volume of work done by the current panel and the fact that the panel is composed of people eminent in their respective fields.

Delay

6. The first issue in sequence is whether the plaintiffs should be precluded from seeking relief by virtue of their delay in instituting these proceedings.

7. The defendant submits that it is clear from the entirety of the evidence before the Court that there has been considerable delay on the part of the plaintiffs. It states that the investigation has been in place since December 2014, that the identities of the investigation team were formally confirmed as far back as March 2015 and that no objection was raised at that time about the make-up of the investigation team. The defendant further notes that the Psychiatric Nurses Association ("PNA"), on behalf of all of the plaintiffs, first threatened to take legal action against the HSE, by way of a threat of judicial review contained in a letter dated 1st April, 2015. It submits that in circumstances where almost eight months have passed since the first threat of High Court proceedings was made, the plaintiffs have been guilty of inexcusable and inordinate delay. The defendant notes that the affidavits of Mr. Healy set out that very considerable work has been undertaken at considerable cost since that time by the investigation team. It is not clear whether "that time" refers to December 2014 or March 2015. The defendant also points out that it remains under a duty of care to the vulnerable residents of Áras Attracta.

8. The defendant notes that it is a general principle developed by the courts that an interlocutory injunction is generally applied for where there is a measure of urgency which demands that a court intervene by making interlocutory orders prior to the substantive proceedings coming on for hearing. The defendant further referred to a number of cases on the issue of delay including *Lennon v. Ganly* [1981] ILRM 84; *Riordan v. Minister for the Environment* [2004] IEHC 89; *Dowling v. The Minister for Finance* [2013] IESC 37; *Nolan Transport (Oaklands) Ltd v. Halligan,* and, the English High Court decision in *Makhdum v. Norfolk and Suffolk NHS Foundation Trust* [2012] EWHC 3015; *Robert Hendy v. Minister for Justice* [2014] EWHC 2535; *Radley Gowns Ltd v. Costas Spyrou* [1975] FSR455 and; *Al-Mishlab v. Milton Keynes Hospital NHS Foundation Trust* [2015] EWHC 191 (QB). Most of these cases depend on their own facts but the principle which can be derived from them is clear.

9. That principle is as quoted by the defendant and as laid out in Kirwan, *Injunctions: Law and Practice, 2nd Ed.*, (Dublin, 2015) at page 131 in which the author examines the law on laches and states that:

> *"For a Defendant to establish laches successfully, he must show two elements: first, that the Plaintiff in question delayed unreasonably; and secondly that such delay means that it would be unjust to grant an injunction to the Plaintiff."*

10. Kirwan quotes the dictum of Lord Selborne L.C. in *Lindsay Petroleum Company v. Hurd* (1874) LR 5P.C. 221 as follows:

> *"Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or whereby his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material."*

11. The plaintiffs argue that the Court must look at any delay in the context of the significant and onerous efforts on the part of the plaintiffs' trade union to have the issues resolved internally prior to issuing these proceedings. This is an approach for which, it is submitted, the plaintiffs should not be criticised.

12. Ms. Conway was the first of the five plaintiffs against whom allegations were made. She was informed by Mr. Frank Murphy, Area Manager with the HSE, in her meeting pursuant to the Trust in Care Policy on 27th November 2014 (the minutes in respect of which were not received until May 2015) that the *"Unions will be sent a list of proposed investigators and terms of reference to sign off initially".* Mr. Des Kavanagh, General Secretary of the PNA then wrote on 18th December, 2014 to the defendant setting out his expectation that such consultation and agreement would take place. The plaintiffs note that ultimately no such consultation or agreement took place. At this point, December 2014, what is now the investigation team had been appointed in some capacity and were undertaking work as referred to at paragraph 11 of the Second Affidavit of Mr Healy being *"reviewing internal HSE policies, conducting a review of the draft terms of reference and coordination and scheduling of office time and investigation timetables".* The plaintiffs submit that it is clear, therefore, that the defendant would not accept any objections to the composition of the investigation team at any stage. They submit that that has been the defendants' position in spite of correspondence from the PNA in April 2015, objections at meetings in May 2015, further letters in June and July 2015 which were not responded to, and the ultimate referral of the issues to the Labour Relations Commission by the PNA in August 2015 for conciliation. This invitation was rejected by the defendant in September 2015 and thereafter correspondence issued from solicitors for the plaintiffs and their trade union.

13. Therefore, the plaintiffs submit that no delay arises as contended by the defendant. At all times the plaintiffs and their union sought to have the issues dealt with internally or by way of industrial relations machinery. It was only when all other options were exhausted that these proceedings issued. In this regard, reliance is placed on the decision of *O'Sullivan's Pharmacies and Beauticians (Sarsfield Street) Ltd v. HSE* [2008] IEHC 106 where Laffoy J. held that the plaintiff in that case had proceeded with "caution" such that no delay arose. Similarly in *Newport Association of Football Club Limited v Football Association of Wales* [1995] All E.R. 87. Jacob J. held there was no delay on the part of a plaintiff who had waited two years as it had during this time being actively seeking a solution to the problem. In *Cooke v. HSE* [2010] IEHC 503, the High Court rejected a delay on the basis of engagement on the part of the plaintiff with a view to resolving the matter, an approach, which the plaintiffs say was clearly adopted by them and by their trade union in the instant proceedings. The High Court, in Cooke commented as follows:

> *"It is clear there was continuing correspondence between the parties with the anxiousness to resolve the matter by agreement. As late as December 11, 2009, a lengthy letter was sent on behalf of the applicant in response to which the respondent's advisers replied that they hoped to be in a position to reply before Christmas. No reply appears to have been received to this letter. It was not unreasonable to expect a reply sometime in January 2010. The application commenced on March 3, 2010. In all the circumstances, I reject the submission that the application was not brought promptly."*

14. The plaintiffs further submit that the actions of the defendant in being resolute in its approach and refusing to take any account of the continued objections of the plaintiffs' union was unreasonable and should also be a factor in determining whether there was any delay on the part of the plaintiffs. They note that in *Ruffley v. Board of Management of Saint Anne's School* [2015] IECA 287 the Court of Appeal (Ryan P.) expressly criticised the failure on the part of the employer to reconsider the issues raised by a trade union

in the context of its member:

> *"The Trade Union official's letter was a reasonable one and should have resulted in reconsideration of the situation and perhaps a fuller investigation or an investigation in the first place."*

15. Therefore the plaintiffs submit no delay arises and that the actions of the plaintiffs' trade union in attempting to have the issues resolved internally or by the Labour Relations Commission were reasonable such that the plaintiffs were justified in coming before the Court only when no options were available.

Decision
16. Kirwan, Injunctions: *Law and Practice, 2nd Ed.,* (Dublin, 2015), quoted by the defendant, in relation to the law on laches states that:

> *"For a Defendant to establish laches successfully, he must show two elements: first, that the Plaintiff in question delayed unreasonably; and secondly that such delay means that it would be unjust to grant an injunction to the Plaintiff."*

17. What the Court must therefore consider in this case is whether, on the facts, the plaintiffs delayed unreasonably. It appears to the Court that such delay as occurred was not, in fact, unreasonable. The plaintiffs should not be criticised for endeavouring to resolve the dispute between the parties by agreement prior to invoking the assistance of the Court. In coming to this conclusion, the Court notes that contrary to the submissions of the defendant, the Investigation Team has not been in place since December 2014. What was in fact in place at that time was a Review Group. The Court also notes that the issue between the parties was fully joined as of 10th April, 2015. At that time, the defendant was maintaining an entitlement to conduct the investigation and disciplinary process in the manner set out in its letter of that date which consisted of parallel investigations under Disciplinary and Trust in Care to be conducted by an investigation team to which the agreement of the plaintiffs had not been sought. The plaintiffs had made it clear that such a process was not acceptable to them and was not in accordance with the agreed procedures. While the plaintiffs made reference, in their correspondence, to potential judicial review proceedings, the Court notes that, at that juncture, it must also have been clear to the HSE that there was an impasse. It was open to the defendant, with its considerably greater resources, to seek the *imprimatur* of the Court for the process which they had chosen to adopt despite the clear objection of the plaintiffs and their union representative. They did not do so.

18. The attitude displayed by the defendants to the efforts of the plaintiffs' representative to resolve the matter internally was, in the Court's view, reprehensible. On 22nd June, 2015 and 28th July, 2015, the plaintiffs' union representative Mr. Kavanagh wrote to Mr. Healy, National Director of Social Care and Mr. O'Brien, Director General of the HSE, respectively. Those letters' from the plaintiffs' union representative raised serious issues and contained reasonable enquiries. There was no response at all from Mr. O'Brien and the response from Mr. Healy issued three months later, on 22nd September, in response to complaints from Mr. Kavanagh that his correspondence had gone unanswered. No explanation has been offered to the Court for the failure of Mr. Healy and Mr. O'Brien to answer the reasonable enquiries made of them. In the Court's view those letters should have been responded to promptly. Having failed to engage as they should have, it sits ill with the Court to hear that the defendant now complains of delay. The failure to answer that correspondence led to the plaintiffs' invoking, unsuccessfully, the intervention of the Labour Relations Commission. Having regard to the unequal resources of the parties, in the Court's view, these attempts of the plaintiffs to resolve the issues internally were not unreasonable and the Court notes that throughout this period, the plaintiffs' union representative maintained, at all times, that the process put in place by the HSE was not acceptable and was not in accordance with the structure set out in the Trust in Care Policy and Disciplinary Procedure. There can be no suggestion, as was the case in a number of authorities opened by the defendant, that there was any waiver or conduct on behalf of the plaintiffs which suggested that the plaintiffs were waiving their rights to proper procedures. Having held that in the particular circumstances of this case the delay was not unreasonable, it is not necessary for the Court to go on to consider the second limb of the laches test.

Applicable Law
19. There is no dispute between the parties as to the principles of law to be applied in respect of injunctions relating to employment. The purpose of seeking an interlocutory injunction is to preserve the status quo between the parties pending the trial of the action. What the Court has to consider, on any such application, is whether there is a fair issue to be tried between the parties, whether damages would be an adequate remedy for the party seeking the injunction and where the balance of convenience lies. More recent jurisprudence has established that in employment cases, where relief which may be couched in terms of prohibitory orders is in fact an application for a mandatory order, a higher threshold applies, namely, that the plaintiff has a strong case that is likely to succeed at the hearing of the action, as per Gilligan J. in *Brennan v. Irish Pride* [2015] IEHC 665, and *Binchy J. in Joyce v Board of Management of Coláiste Iognáid* [2015] IEHC 809.

20. In order to determine whether the plaintiffs have a strong case the Court must come to a view on the status of the Trust in Care Policy and the Disciplinary Procedure of the defendant. The defendant maintains that those procedures do not form part of the terms and conditions of the plaintiffs' employment and that they are, in a sense, aspirational rather than mandatory. The plaintiffs, on the other hand, maintain that they form an integral part of their contracts of employment.

21. The defendant's Trust in Care Policy and the defendant's Disciplinary Procedure are the policies which underpin the current impugned investigation to which the plaintiffs are subject, arising from allegations of potential abuse in the course of their employment at Áras Attracta. The Trust in Care Policy sets out the relevant procedure for dealing with allegations of abuse of persons in care. It was implemented in 2005 following consultation and negotiation with all relevant stakeholders, including the PNA. At page 18 of the Trust in Care Policy, it is clearly stated that any investigation pursuant to the policy will be conducted *"by the designated person(s) agreed between the parties."* At page 17 of the Trust in Care Policy it is stated that "the investigation team will have the necessary expertise to conduct an investigation impartially and expeditiously". The Trust in Care Policy at page 17 also provides that protective measures such as an appropriate level of supervision, or putting the employee off duty with pay pending the outcome of the investigation may be put in place by the defendant. However the policy states that *"the views of the staff member should be taken into consideration when determining the appropriate protective measures to take in the circumstances but the final decision rests with management".* In the event that an investigation under Trust in Care results in a finding of abuse, the Disciplinary Procedure may then be invoked.

22. The defendant's Disciplinary Procedure was put in place in January 2007. It has a four stage process depending on the severity of the allegations. Stage 4 of the procedure, which is reserved for the most serious misbehaviour, includes conduct or behaviour being "serious abuse of a patient/client following a complaint being upheld under the Trust in Care Policy". The defendant, without having concluded an investigation under the Trust in Care Policy has put in place a stage 4 disciplinary procedure and an investigation which is parallel to the investigation being conducted under the Trust in Care Policy. The Disciplinary Procedures of the defendant, similar to

the Trust in Care Policy also requires that "an investigation will be conducted by person(s) who are acceptable to both parties".

23. The plaintiffs submit that the foregoing provisions are in place for the benefit of the plaintiffs, as employees of the defendant. In particular, they say the right to ensure consultation and agreement on the persons appointed to the investigation panel is a fundamental entitlement of the plaintiffs and, they claim, for rational and logical reasons.

24. The foregoing provisions of the two policies are expressed in mandatory terms and, the plaintiffs submit that the current investigation is in breach of these policies, unlawful and should be restrained from continuing. The plaintiffs submit that the absence of agreement to the composition of the investigation team constitutes a breach of contract. They say that the conducting of parallel investigations into abuse under Trust in Care and the stage 4 disciplinary procedure is also contrary to the relevant procedure and policies. The plaintiffs have averred to their wish to participate, but only in an investigation which correlates to the provisions of the relevant procedures and policies.

25. The defendant has averred in the Replying Affidavit of Pat Healy that the provisions of the Trust in Care Policy and the Disciplinary Procedure do not form part of the terms and conditions of the plaintiffs' employment. The plaintiffs submit that, factually and as a matter of law, this is incorrect. They point to the defendant's staff handbook, which refers to helping employees to understand their terms and conditions of employment. The employee handbook refers to both the Trust in Care Policy and the Disciplinary Procedure. Therefore, it is submitted that this envisages these procedures and their provisions having contractual effect. The contracts of employment of two of the most recently employed plaintiffs, Ms. Conway and Ms. Maverly refer to the handbook as forming an *"integral part"* of the terms and conditions of employment. The contracts of Ms. Prendergast and Ms. Kilcoyne also refer to the employee handbook.

26. The plaintiffs submit that they are all governed by the most recent terms and conditions of employment and that this is consistent with the employee handbook of the defendant stating that it includes terms and conditions of employment. They argue that the most recent contracts of employment clearly required the plaintiffs to comply with the policies and procedures in place within the HSE as does the employee handbook. It is submitted that this, therefore, recognises the contractual nature of the Trust in Care Policy and Disciplinary Procedure. The plaintiffs point to the fact that the defendant has clearly relied on these policies to place them on periods of suspension, a draconian and radical interference in the contractual relationship of employer and employee, and to the fact that the defendant expects and obliges the plaintiffs to partake and co-operate with these procedures. On that basis, it is submitted that the aforesaid policies are contractually binding in nature and form part of the terms and conditions of the plaintiff's employment.

27. In the most recent written judgment available involving an interlocutory injunction application in the context of an investigation in an employment situation, *Joyce v. Board of Management of Coláiste Iognáid*, the High Court restrained an investigation into allegations against a school principal where the investigation was effected in breach of certain provisions of the Revised Procedures for Suspension and Dismissal of Principals, the disciplinary procedure applicable to the plaintiff as principal of the defendant. The plaintiffs submit that the High Court, therefore, clearly saw this disciplinary procedure and its provisions as falling within the terms and conditions of employment of the plaintiff. It is therefore the plaintiffs' position that Joyce lends considerable support to their contention that the aforesaid Trust in Care Policy and Disciplinary Procedure clearly form part of the terms and conditions of their employment and any investigation purportedly conducted in breach of these procedures should be restrained from continuing by the Court.

28. The plaintiffs further point to section 14 of the Unfair Dismissals Acts 1977-2007 which requires an employer to provide an employee with a statement of the procedure that will be observed before and for the purpose of dismissing the employee, within 28 days of entering into a contract of employment with that employer. The plaintiffs submit that this section envisages that disciplinary procedures form part of the terms and conditions of employment and that this must equally apply to the Trust in Care Policy given that any findings of breaches of this Policy can apply to a dismissal pursuant to the Disciplinary Procedure.

29. The plaintiffs further point to the fact that the Trust in Care Policy was concluded following negotiations with all stakeholders and the defendant, including trade unions. In fact the PNA was consulted and partook in negotiations about this Policy. As such, the plaintiffs contend that it can be seen to be a collective agreement. The plaintiffs contend that their view is supported by the leading authority on the effect of a collective agreement on an individual worker, that being the decision of the Supreme Court in *Goulding Chemicals v Bolger* [1977] I.R. 211.

30. The plaintiffs submit that the Trust in Care Policy is an extremely important policy for the handling of allegations of abuse of persons in care which prescribes draconian steps such as suspension with pay from employment. They consider that, as a collective agreement, the Policy was intended to give rise to contractually binding obligations between the parties. They further consider that it was intended to create legal relations between the trade unions, their members and the defendant and that it is sufficiently certain, unambiguous and clear to be capable of having contractual effect. In particular, they point to the provisions relating to agreeing the members of the investigation team, which they say are clear and capable of giving rise to legal effect, in particular as no ambiguity could arise given the precise language contained within the policy and the mandatory language involved.

Decision of the Court

31. The Court is quite satisfied that the plaintiffs have made out a strong case that the Trust in Care Policy and Disciplinary Procedure of the defendant form part of their contractual terms. This is a policy put in place by the defendant. It meets the statutory requirement contained in s. 14 of the Unfair Dismissals Acts 1977-2007 to have such a policy and it cannot be adhered to or departed from at the whim of the defendant. The defendant's submission that the provision in Trust in Care to the effect that an investigation will be conducted *"by the designated person(s) agreed between the parties"* and the provision in the Disciplinary Procedure which provides that persons investigating would be *"acceptable to both sides"* are merely aspirational is, in the Court's view, unsustainable. The right of an individual, who is to be made subject to a disciplinary process, to have an input into the composition of the panel who are to conduct that investigation, is a right of real substance. In all such disciplinary investigations, there is a potential inequality of arms in that the power of the institution is ranged against the individual. The requirement that the investigation team be agreed between the parties redresses that potential imbalance and is a material safeguard for the right of the individual to have a fair, unbiased and impartial hearing. As such, the right to have an input into the composition of the investigation panel appears to the Court to be a core value of both the Trust in Care and the Disciplinary Procedures of the defendant. At the outset of this investigation, the defendant recognised this. According to the defendant's own minutes of the meeting with Ms. Conway on 27th November, 2015: *"Mr. Murphy stated that if this does progress to a formal investigation then the whole process will take some time. The unions will be sent a proposed list of nominated investigators and the proposed Terms of Reference to approve before the investigation can commence".*

32. For reasons best known to itself, and not disclosed to the Court, the defendant unilaterally decided to ignore this requirement and

to appoint an investigation team without reference to the plaintiffs. It offers as an excuse, the fact that serious allegations have been levelled not only at individual employees but at the entirety of the service provided by the HSE at Áras Attracta and in particular Bungalow 3, which according to Mr. Healy, at paragraph 34 his replying affidavit, meant that *"it was incumbent on the HSE to move with all due expedience to appoint appropriately qualified persons to conduct an investigation without delay and/or protracted debate/negotiation about the composition of any such investigation".* This is a bare assertion without explanation and the Court fails to understand how the seriousness of the issues and the urgency of the matter required the defendant to depart from the established procedures. In fact, it appears to the Court that it is precisely where issues are serious and urgent that scrupulous adherence to agreed procedure should be observed. Furthermore, on the facts, the offered justification of urgency does not stand up to scrutiny. It is clear that, because of the hiatus created by the Garda investigation, the defendant had four months from the time of the first complaint made, on 27th November, within which to agree the composition of the investigation team. No attempt to do so was made. No proper explanation for this failure has been advanced. On this basis, the Court is satisfied that the plaintiffs have demonstrated a strong case that the Trust in Care Policy and Disciplinary Procedure do form part of their contract of employment and that their contractual rights to have an input into the composition of the investigation panel have been unlawfully interfered with by the defendant. The Court also wishes to observe that the fact that the defendant's chosen panel may consist of eminent people to whom no reasonable person could object is irrelevant in circumstances where the plaintiffs agreement was not sought to their appointment.

Merging of Trust in Care and Disciplinary Procedures

33. The plaintiffs complain that the decision of the HSE to run a disciplinary process in tandem with the Trust in Care procedures is unfair and in breach of the procedures set out in the Trust in Care Policy and Disciplinary Procedure. To date the only complaints levelled against the plaintiffs are of potentially abusive interactions. The procedures provide for those to be investigated under Trust in Care and in the event that a complaint is upheld, empower the chief executive officer or designated manager *"to take disciplinary action up to and including dismissal"*. The defendant maintains that it is entitled to open parallel investigations so that it is in a position to deal with any issue which may come to light in the course of its investigation and maintains that such a parallel investigation is in fact in ease of the plaintiffs in avoiding the necessity of subjecting them to repeated investigations. However, the Court considers that the defendant, having failed to identify precise complaints warranting the invocation of stage 4 of the disciplinary proceedings, as required by the Disciplinary Procedure, could not be permitted to run such a process in tandem with the Trust in Care process *"just in case something might turn up in the course of the investigation".* It strikes the Court that such a process gives rise to a serious risk of unfairness in circumstances where, in the midst of the investigation of one complaint, an individual may be required to respond to additional complaints. The Court notes in that regard the assertion in Mr. Lynch's letter to the second, third, fourth and fifth plaintiffs on 26th August, 2015, to the effect that *"the provision of material [relating to allegations of abuse] prior to the [proposed] interview does not prohibit the Investigation Team raising other matters that it deems relevant to the investigation and within the scope of the Terms of Reference".* The procedures provide a mechanism and process for dealing with allegations of abuse and the order in which they should be considered and that process should be adhered to.

Fair Procedures

34. Counsel for the plaintiffs submits, in respect of the second group of employees, Ms. Prendergast, Ms. Kilcoyne and Ms. Maverly, that it is clear that the genesis of the complaints pursuant to the Trust in Care Policy of the defendant came from the investigation team. She considers that this is evident from paragraph 21 of the Replying Affidavit of Mr. Healy and particularly from the letter to Mr. Gerry O'Neill of the HSE from Mr Christy Lynch, Chairman of the Investigation Team, of 7th August 2015. This letter sets out in detail the allegations relating to each of these plaintiffs and shows that the investigation team, having viewed the footage in some detail, had formed the view that the footage was worthy of further investigation and then sought approval to conduct an investigation of the relevant plaintiffs. In this respect the investigation committee appears to hold three roles simultaneously. They are the gatherers and collators of the evidence, they are the complainants of abuse and they are the judges of whether or not the abuse occurred. The plaintiffs complain that it is a breach of fair procedures for the investigation team to act in these multiple roles and offends against the principal of *nemo iudex in causa sua.* The plaintiffs relied on the precedents of *Heneghan v. Western Regional Fisheries Board* [1986] I.L.R.M. 225 and *O'Donoghue v. Veterinary Council* [1975] I.R. 398 in this regard.

35. In response to the plaintiffs' submission the defendant relies on paragraph 4.1 of the terms of reference as authorising such action. That paragraph reads as follows:

> *"If any information comes to the attention of the Investigation Team at any stage of the investigation which the Investigation Team considers requires urgent attention by the HSE, the Investigation Team shall immediately provide this information to Mr. Pat Healy, as Commissioner of the Investigation".*

The Court is satisfied that the terms of reference cannot override contractual rights.

36. It does appear to the Court to be unwise to invest the evidence gatherers with the power to become complainants and thereafter to become judges in respect of those complaints. This conflation of roles could certainly give rise to injustice and contravene the principle of *nemo iudex in causa sua.*

37. On the basis of the evidence put before the Court, it appears that the conflation of roles occurred in the following way. Some time prior to 12th December, 2014, the defendants appointed what is described as a Review Group, consisting of four people, to investigate the events which had occurred in Áras Attracta. The HSE has not put any evidence before the Court as to the manner or basis of the appointment of this group. However given the outrage which the Prime Time Investigates programme generated it appears to the Court entirely appropriate that a Review Group was established. The HSE was fully entitled to appoint such a group and indeed it was certainly desirable and necessary that a proper investigation of all the circumstances surrounding the treatment of vulnerable people in Áras Attracta be conducted. The HSE was equally entitled to appoint whomsoever it wished to membership of that Review Group. The group, at that point, December 2014, refers to itself as a Review Group in correspondence. In communications with the Gardaí, Mr. Christy Lynch, Chairperson of the Group, describes himself, and is described as, Chairperson of the Review Group. At some time between December 2014 and March 2015, the date on which the Disciplinary Investigation Panel was announced, what had originally been set up by the HSE as a Review Group morphed into a Disciplinary Investigation Team. The Court has not been told how this occurred but thereafter, the Court notes that the Chairman no longer referred to himself as Chairman of the Review Group but rather Chairman of the Investigation Team. This change of status, as we know, was effected without the agreement of the plaintiffs. To have a Review Group collate and gather all relevant evidence strikes the Court as an extremely good idea and it would be entirely unobjectionable for such evidence as they gather to be furnished to the HSE to form the basis, if appropriate, of disciplinary proceedings against individual personnel. What, as already stated, does not appear to the Court to be wise, is to invest the evidence gatherers with the power to become complainants and thereafter to become the judges in respect of those complaints. Because the Court intends to grant relief under other headings which, in effect deal with this matter, the Court does not propose to make any order or determination in respect of this claim of breach of fair procedures.

Adequacy of Damages

38. What is at issue here are the reputations, both personal and professional, of the plaintiffs. The plaintiffs claim that damages would be inadequate to compensate them for the irreparable damage they would be subjected to if required to continue to participate in the current flawed investigation process. This is particularly the case given their continued suspensions and the serious nature of the allegations. In *McLoughlin v Setanta Insurance Services Limited* [2005] IEHC 170 Laffoy J. held that damages would not be an adequate remedy for the plaintiff "if she were summarily dismissed on foot of a flawed process, because of the reputational damage she would suffer". Clarke J. in *O'Sullivan v Mercy Hospital Cork Limited* [2005] IEHC 170 stated *"damages would not be an adequate remedy for someone in the position of the Plaintiff if her record were to be wrongly sullied as a result of a flawed legal process".*

39. The plaintiffs further noted that it has been held in decisions such as Giblin v. Irish Life & Permanent plc [2010] IEHC 36 that where damage to reputation or future career prospects is likely to arise, this cannot be adequately compensated by damages.

40. The Court is satisfied that the plaintiffs' submissions in this respect are well founded.

Balance of Convenience
41. The defendant submits that the following considerations should be borne in mind by the Court when determining where the balance of convenience lies:

(i) Seventeen employees are under investigation from the established investigation team.

(ii) The investigation team has been at work since December 2014.

(iii) The composition of the investigation team was formally notified to the plaintiffs in the present action in March 2015 in respect of the first two plaintiffs and August 2015 in respect of the other three.

(iv) A threat of judicial review of the investigation was first made on behalf of the PNA on 1st April, 2015.

(v) The investigation team has viewed over 190 hours of video footage and completed over 680 hours of investigative work.

(vi) The plaintiffs have been guilty of inexcusable delay in making application to this Honourable Court for injunctive relief.

(vii) The interests of all the parties concerned including the service users of Áras Attracta combined with the public interest demand that the investigation be brought to a conclusion as expeditiously as possible.

(viii) The plaintiffs have identified no substantive grounds of objection to any of the members of the investigation team.

(ix) The plaintiffs have established no prejudice from which they would suffer if the investigation team is permitted to continue with the present investigation.

(x) The plaintiffs are on administrative leave and in receipt of full pay.

(xi) The granting of the interlocutory relief sought would result in very significant additional delays in the completion of the investigation which would have to start again and result in very significant additional cost to the HSE.

(xii) The plaintiffs have failed to set out any grounds upon which this Court could conclude that they will not be afforded the full panoply of natural justice rights and all fair procedures in the course of the present investigation.

(xiii) The defendant must consider also the interests of the service users of the HSE and in particular in this case the residents of Áras Attracta.

42. The defendant submits that those factors point clearly to the balance of convenience lying in favour of the continuance of the administrative leave of the plaintiffs, the continuation of the present investigation and the preservation of the current investigation team, thus permitting that investigation team to continue its important work. The defendant further submits that the plaintiffs have singularly failed to establish any prejudice by reason of the continuation of the investigation and that in such circumstances there is no good reason why the current investigation team should be stood down. The investigation team has conducted over 680 hours of investigative work including the viewing of over 190 hours of video footage. The defendant submits that it would require a compelling case to be made for such an investigation to be stood down and replaced by a new investigation team with all of the additional time and cost that would be involved. The defendant further submits that it is clear that the balance of convenience favours the rejection of the plaintiffs' application for interlocutory relief in the present case.

43. The plaintiffs claim that the balance of convenience lies in favour of granting the relief sought. They note that Mr. Kavanagh has averred that the work of the current investigation team in reviewing the footage could be used by a correctly appointed investigation team. They further note that defendant is unable to demonstrate irreparable harm and that in light of the limited relief sought by the plaintiffs no issue arises in the context of the balance of convenience. They point to their indications on affidavit as to their willingness to participate in an investigation process but only one which conforms to their rights to fair procedures and natural justice. They submit that there is no legal impediment to the defendant appointing a new and properly appointed investigation team and withdrawing the invocation of the disciplinary procedure at stage 4. The disciplinary procedure could be invoked depending on the findings of the Trust in Care investigation. On that basis the plaintiffs contend that that there is no great inconvenience as asserted by the defendant and they argue that their fundamental entitlements to the correct application of the relevant procedures, in particular given the nature of the allegations they face, means the balance of convenience favours their application. The plaintiffs point to the decision of O'Sullivan v. Mercy Hospital Cork Limited in which Clarke J. held as follows:

> *"The fact that there may be difficulties for the hospital in dealing with the legitimate interests of all of the parties involved which difficulties are significantly compounded by the fact that this process would appear to have gotten off to a most inauspicious start does not alter the fact that the plaintiff is entitled to have her rights and her reputation dealt with in accordance with law. Where she has, as I have found, made out an arguable case that what is intended will be in breach of those entitlements I am satisfied that the balance of convenience would favour the granting of an interlocutory injunction unless some particular and exceptional countervailing injustice that would occur by reason of a delay could be pointed to. I am not satisfied that any such countervailing factor has been established and in particular I am not so satisfied provided that the full hearing of this action can, as I intend it will, be made ready for hearing in a relatively short period of time."*

44. In this regard the plaintiffs further submit that any inconvenience caused to the defendant in the short term by the granting of the relief sought will be alleviated by the plaintiffs' agreement to co-operate in relation to the earliest possible trial date.

45. Finally, the plaintiffs point to the recent dicta of the Gilligan J. in *Brennan v Irish Pride* [2015] IEHC 665, in which he held:

> *"Having regard to the plaintiff's contractual entitlements, I take the view that he makes out a strong case for the interlocutory relief as sought and I am adopting the course of action which carries the lower risk of injustice".*

On the basis that an investigation which correlates to the contractual entitlements of the plaintiffs can be put in place in the short term; that this investigation can use the work undertaken by the current investigation team in reviewing the footage, and that the stage 4 process can be abandoned at this juncture with no prejudice to the defendant as there will be no necessity for a further investigation, the plaintiffs submit that the granting of the relief sought carries the lower risk of injustice. Indeed, the Court notes, as pointed out by the defendant, that the most recent decision of the Supreme Court on the issue in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 IR 152 has focussed attention on the issue of seeking to minimise the risk of injustice.

Decision of the Court
46. On one side of the scales, the defendant has placed thirteen issues before the Court, one of which the Court has already ruled on. On the other side of the scales, there is the potential damage to the plaintiffs if their reputations were sullied by a flawed process. The Court does not accept, for the reasons set out above, that the plaintiffs would not be prejudiced were they to be subjected to a flawed process. Nor is the Court persuaded in light of the events that have occurred that the plaintiffs have, as alleged by the defendants, failed to set out grounds upon which the Court could conclude that they will not be afforded the full panopoly of natural justice and fair procedures in the course of the investigation. Nor does the Court consider that the interests of the services users of the HSE and in particular the residents of Áras Attracta could in any way be adversely affected by affording the plaintiffs their contractual entitlements. Since all of the concerns expressed by the defendant can in the Court's view be ameliorated, the Court comes to the conclusion that the balance of convenience is significantly tilted in favour of granting the relief sought. This is the course which appears to the Court to involve the least risk of causing injustice.

Reliefs
47. For the foregoing reasons, and adopting the words of Gilligan J. in *Brennan v. Irish Pride: "having regard to the plaintiff's contractual entitlements, I take the view that he makes out a strong case for the interlocutory relief as sought and I am adopting the course of action which carries the lower risk of injustice"*, the Court proposes to make an order restraining the current investigation and restraining the defendant from embarking on any further investigation otherwise than in accordance with the Trust in Care Policy and Disciplinary Procedure. The Court will hear the parties on the terms of the order to be made.

Suspensions
48. Each of the plaintiffs was suspended following notification of the complaint. The third, fourth and fifth plaintiffs, suspended in August 2015, accept that proper procedures were followed prior to the activation of their suspension. The first and second plaintiffs maintain that proper procedures were not followed in that they were not afforded an opportunity to make representations in accordance with the following term of the Trust in Care policy:

> *5.2 Protective Measures*
>
> *[…]*
>
> *The views of the staff member should be taken into consideration when determining the appropriate protective measures to take in the circumstances but the final decision rests with management.*

49. Implicit in the submission of the first and second plaintiffs is that had that procedure been complied with, the defendant was entitled to take the final decision in the matter and to suspend them. In circumstances where both of these plaintiffs were in fact represented at the meetings at which they attended pursuant to the Trust in Care procedure, the Court is not persuaded that it should grant an injunction lifting the suspension in circumstances where it is likely to be immediately reimposed.