Neutral Citation [2013] IEHC 615

THE HIGH COURT

[2013 No. 12018 P.]

BETWEEN

SEAMUS HARTNETT

PLAINTIFF

AND

ADVANCE TYRE COMPANY LIMITED TRADING AS ADVANCE PITSTOP

DEFENDANTS

JUDGMENT of Mr. Justice Ryan delivered 19th December 2013

This is an application for an injunction to set aside the purported dismissal of the plaintiff from his position with the defendants and to reinstate him at least for the purpose of receiving his salary in accordance with the principle enunciated by Costello J. in *Fennelly v. Assicurazioni Generali* [1985] 3 ILTR 73.

The legal principles to be applied in the case are broadly as follows:-

1. The constitutional principle of fair procedures applies to an employment contract such as this; the old distinction between an officer and another category of employee is no longer relevant and is not relied on by Mr. Howard.

2. The contract in this case did not exclude the constitutional principles and indeed could not have done and must be taken to have imported them by necessary implication. Indeed, the contract commits the company to carry out a full investigation which in my view has implications of thoroughness and fairness.

3. It is possible although unusual for an injunction to be granted in an employment case so as to restrain a dismissal or the effects of dismissal: see *Fennelly* above; *Maha Lingam v. HSE* [2006] ELR 137.

4. A plaintiff seeking an injunction must show not that he or she has an arguable case but rather a strong case which means a case that is likely to succeed at a full hearing.

5. Even if the plaintiff succeeds in doing so, he or she must still satisfy the court that the balance of convenience lies in granting the injunction. In this regard the defendant relies on a number of cases in the High Court holding that balance of convenience lay in refusing an injunction in circumstances where the relationship of trust had broken down between the parties and it was unthinkable to try to revive the relationship of employer and employee between them.

The Plaintiff's Grounds

The plaintiff claims to be entitled to an injunction because the procedure of investigation that led to his being found guilty of serious misconduct was effected in a manner that was in breach of his constitutional right to fair procedures. Specifically, the principal witness whose evidence in the form of a statement was the basis of the complaint was not made available for cross examination and the plaintiff was simply given the opportunity that his solicitor could talk to the witness on the phone and that was entirely unsatisfactory as the plaintiff submits. Mr. Callanan SC for the plaintiff says that he would have other points to make at the hearing but he confines his present application to this essentially simple proposition.

Mr. Howard SC for the defendant responds that it is not sufficient to have a good, legally arguable point. In saying this, he implicitly concedes that Mr. Callanan has raised a good legal arguable point. Mr. Howard's point is that you have to look at the case overall to see whether or not the plaintiff does indeed have a strong case, such that he is likely to win and it is necessary therefore to look at the facts of the case in order to arrive at a conclusion on this fundamental point.

I do not understand my function to be to look at the case as a whole and say whether the plaintiff ought to have been dismissed. This is a case about a process and whether the process was fair and reasonable and above all in conformity with the constitutional obligation to have fair procedures. There may be cases where it can be said that there was a breach of fair procedures but that the overall evidence is so clear that it would be absurd to set aside a dismissal on the ground alone of a breach of fair procedures I do not address that proposition and merely indicate that the facts of this case do not come into that category.

The Decision

The plaintiff was dismissed from his position as Head of Fleet Truck Sales with the defendant with effect from the 4th October, 2013 following an investigation and an appeal. The process that led to this decision began with a meeting in Limerick on the 15th August when the Human Resources Director, Mr McCormack, told Mr Hartnett he was suspended. The following day, Mr McCormack spelled out the allegations in a letter. The plaintiff was accused of misconduct in his job by seeking secret commission payments from a company supplier for tyres going to a competitor and to Advance and giving confidential information about tyre prices.

On the 14th August, 2013, the defendant company received an email from Germany from its parent company, Continental, referring to persons with whom they did business. The email recorded information from Sven Wehrmeyer, an employee of a company named Dikabo, who described a meeting that he had had in Cork on the 5th August, 2013 at Hayfield Manor Hotel with Mr. Hartnett the plaintiff. The email contained serious allegations against Mr. Hartnett as summarised above. The first two allegations are admittedly very serious but the third is in a lesser category and on its own would not amount, I think, to a ground for dismissal but that does not arise particularly.

This was an important message with serious allegations against Mr. Hartnett. The company decided that they would have to investigate this matter and they would suspend the plaintiff while they were doing so. Mr. Callanan S.C. makes some complaints about this process, but I do not think they arise at this stage. My view is that the company was justified in taking the view that these were serious complaints and that they deserved investigation and it was a matter of judgment for them whether they should suspend the plaintiff while the investigation was carried on. No issue arises at this stage on this application about the taking of any of those steps and it does not seem to me that there is anything wrong with what they did.

The company then presented the allegations to Mr. Hartnett and asked for his response. He consulted a solicitor and the latter took up the matter in correspondence with the company. The defendant wanted to get the plaintiffs account in response to the statement of Mr. Wehrmeyer but before that could be done there was a good deal of skirmishing of a procedural nature. In effect, the solicitor took the position that he wanted to get further and better particulars in relation to a series of matters concerning how the Wehrmeyer statement came about and other questions. My view for what is it worth is that the company was entitled to ask Mr. Hartnett to respond to the statement it had received. The matter dragged on through September with correspondence and dates being fixed and changed and an abortive disciplinary meeting, but ultimately the hearing proper took place on the 1st October, 2013, at the Radisson, Little Island, Cork.

At this hearing the plaintiff was accompanied by his solicitor, Mr McGee. The plaintiff denied that he had done anything wrong. He complained about the suspension and the disciplinary process and that the source of the complaints against him, namely, Mr Wehrmeyer, was not present. He agreed that he had met Mr Wehrmeyer on the occasion described in the statement but denied seeking commissions or any other wrongdoing and offered an innocent explanation of the encounter.

Mr McGee asked to cross-examine Mr. Wehrmeyer and other witnesses. As to the other witnesses, I do not think there is any case to be made. It is not all clear that there was any relevant issue to be debated, but that again does not have to be considered because we have the issue of Mr. Wehrmeyer. The company said that he was available on the telephone and apparently he speaks excellent English. Mr. McGee was in the position that he could phone Mr. Wehrmeyer and have a conversation with him. Maybe something would have come of that if he had availed himself of the opportunity, but he refused. He said that his client was entitled to have Mr. Wehrmeyer attend and be cross-examined.

I do not have to decide what facility regarding Mr. Wehrmeyer might have satisfied at the requirement of fair procedures. In other words, if a video link had been arranged, would that have been satisfactory - I would have thought yes, but that does not arise for consideration. Would it have been sufficient to have a conference call? The answer is more doubtful and I would think that the answer is probably no unless there was some other feature that is relevant. It could also be said that Mr. McGee should have taken up the opportunity and spoken to Mr. Wehrmeyer and he might have elicited some useful information that could have been presented to the investigating body, but that did not happen.

Mr. Hartnett disagreed with what Mr. Wehrmeyer said. At this meeting of the 1st October, which was the investigation of the complaint, he gave an explanation and an account of his meeting which he accepted had happened at Hayfield Manor on the 5th August, 2013. As to the contents of the meeting or what was discussed, there was complete disagreement between Mr. Hartnett and the statement supplied by Mr. Wehrmeyer. The inquiry concluded and considered the decision and they decided that they preferred the evidence of Mr. Wehrmeyer as contained in his statement to what Mr. Hartnett had told them. They therefore found that he was indeed guilty of the charges and they went on to consider penalty and decided that dismissal was the appropriate sanction.

Mr Hartnett appealed the decision to dismiss him and the matter was heard by Mr Paddy Murphy, a director of the company. Mr McGee had submitted in advance a letter setting out the basis of the plaintiff's appeal. In the course of this lengthy, 17 paragraph letter Mr McGee says at para 11 referring to the crucial meeting of the 5th August: "Mr Wehrmeyer provided a gratuity to Mr Hartnett for attending." When Mr Murphy asked about this at the appeal hearing on the 14th October, the plaintiff and his solicitor would not give details other than that it was a monetary gratuity, saying it was a matter for the company to take up with Mr Wehrmeyer. Mr Murphy did just that in a phone call on the 18th October when Mr Wehrmeyer denied doing anything for Mr Hartnett beyond buying him a coffee. Mr Murphy was not impressed by the plaintiffs reticence on this matter nor by its introduction at such a late stage. He made his decision affirming the dismissal and informing the plaintiff by letter of the 23rd October.

In his grounding affidavit, Mr Hartnett avers that at the meeting Mr Wehrmeyer passed an envelope to him which he opened after leaving the hotel. The envelope contained €1,500. The plaintiff says he did not ask for a gratuity or expect one. He argues that Mr Wehrmeyer's denial of the payment undermines the credibility of everything in his statement.

Discussion
It seems to me that the company fell into errors of procedure. They were entitled to suspend Mr. Hartnett and engage in an investigation. They may have become sidetracked and may have diverted their attention from the main issue by the procedural squabbling that took place, in which Mr. Hartnett's solicitor may have some responsibility. The problem was that when the inquiry sat eventually on the 1st October, 2013, they were receiving for the first time Mr. Hartnett's response to what was in the email with Mr. Wehrmeyer's statement. It would have been conducive to clarity if this had happened at an earlier stage and it would have been apparent what was then in issue.

If the inquiry had addressed itself properly to what was in contention, it could then have decided how it was going to go about deciding where the truth lay. It would and should have arranged for the plaintiff to have an opportunity in some satisfactory mode of cross examining Mr. Wehrmeyer. His evidence was crucial - it was the only evidence as to the alleged misconduct. The other witnesses had little or no relevance to the central issue, whatever their functions in establishing background facts. The fact is that Mr Wehrmeyer was saying that Mr. Hartnett had sought corrupt unauthorised payments at this meeting on the 5th August, at Hayfield Manor. That is what the case was about and that is the set of allegations that Mr. Hartnett was facing. It was down to Mr. Wehrmeyer versus Mr. Hartnett. There was no way that Mr. Wehrmeyer could avoid some form of cross examination by Mr. Hartnett's representative.

However understandable it may be that the company investigation went wrong, the fact is they did go wrong and seriously wrong. They made a decision on a basis on which they could not have made it. It was unfair to Mr. Hartnett. It was in breach of fair procedures as laid down by the Constitution. It was also, I think, a manifestly unfair and unreasonable way for an inquiry to arrive at a conclusion. When one appreciates that this could have meant and did in fact mean the dismissal of the plaintiff, the gravity of the error becomes even more apparent.

On the agreed facts therefore, it is clear that there was a breach of the plaintiff’s constitutional rights which must be implied into his contract if they were not already there. If follows from that, in my view, that he has a strong case to say that his constitutional rights were infringed. It also follows irresistibly as I think that he has a strong case that his dismissal was unlawful because it was

arrived at following a flawed process in one crucial respect.

I conclude therefore that the plaintiff does indeed have a strong case, not just in regard to some particular discrete legal topic, but as to the dismissal so that he satisfies the first leg of the requirements for an injunction.

Balance of Convenience
In a series of cases concerning employment injunctions, this court has held that it is inappropriate to enjoin dismissals where the relationship between the parties has broken down with loss of trust and other necessary features: "It is a question of trust, authority, loss of confidence and I think plain common sense" as McMenamin J said in *Joyce v HSE* [2005] IEHC 174.

The critical question on the balance of convenience is the importance to be attached to (a) the revelation or allegation by the plaintiff in his appeal submission for the first time that he had received a gratuity from Mr Sven Wehrrneyer at their meeting on 5th August 2013 at Hayfield Manor hotel, (b) his refusal to furnish details at the appeal, (c) his claim in his affidavit that he later discovered that the envelope contained €1,500 and his failure to disclose that to his employer, as the code of conduct as well as general employee duty and common sense honesty required. In those circumstances, if the plaintiff wins on the first leg can he satisfy the second test?

The company argues that the plaintiff has revealed evidence of serious misconduct in the matters that he admitted about his meeting with Mr Wehrrneyer, his failure to disclose the meeting to his superior or anybody else in the company and, above all, the money that he claims to have received at the meeting. There are two possibilities. If the plaintiffs account is true, it was a breach of his duty to the company and contrary to its code of conduct to accept the money and not to report it. Such a payment should also have alerted the plaintiff as a senior and trusted person that the meeting had an illicit purpose or at least the possibility thereof. On the other hand, if the story is untrue, it undermines the plaintiff's credibility just as he thought it would do for Mr Wehrrneyer. This is a dilemma but it is entirely of Mr Hartnett's making.

While the other revelations that came to light in the course of the inquiry as to what the plaintiff admitted having happened are undoubtedly serious, this allegation seems to me to remove any uncertainty I might have had about the balance of convenience.

In the circumstances, any residue of trust that might have existed between the parties cannot be considered to be intact. The plaintiff is accordingly not entitled to an injunction because he fails to satisfy the second test.