Neutral Citation: [2013] IEHC 328

THE HIGH COURT

Record Number: 2012 No. 9604P

Between:

Tom Kelleher

Plaintiff

And

An Post

Defendant

Judgment of Mr Justice Michael Peart delivered on the 16th day of May 2013:

1. Prior to the termination of his contract by An Post on the 27th October 2011, the plaintiff had been the Postmaster in Newcastle West, Co. Limerick for about 19 years. He also built and is the owner of the premises in which the post office operates. His wife and one of his sons, Ronan, are employed there. In these proceedings the plaintiff seeks, inter alia, certain declarations, including that the decision made to terminate his contract is null and void, and that the decision that the plaintiff should repay to An Post one half of its losses (i.e. €52,500) is also null and void.

2. Following the issue of these proceedings the plaintiff issued a Notice of Motion seeking an interlocutory injunction to restrain the defendant company from appointing a person to fill the position of postmaster and/or retail partner at Newcastle West pending the final determination of the substantive proceedings. All parties are now agreed upon a truncated trial procedure without formal pleadings, but on the basis of the affidavits filed in the proceedings.

3. On Monday 27th June 2011 the plaintiff and his wife flew to Spain for a week's holiday, leaving his son, Ronan, and two full-time employees in charge of the post-office.

4. On the morning of Tuesday 28th June 2011 their other son, Tommy, was kidnapped at gunpoint at his home. The kidnappers contacted the staff at the post office and demanded that money be paid over in order to secure his release. The kidnappers apparently stated also that if the money was not paid over by 12 noon that day, or if the Gardai were informed, Tommy would be found dead in the boot of a car.

5. It appears that, fearing for Tommy's life, the staff at the post office did as they were told, did not inform the Gardai, and dropped off a bag containing €105,000 which was available at the post office at the time. The papers in this case do not reveal where the bag was dropped but I presume that it was at a location specified by the kidnappers. At any rate, Tommy was released without physical harm, though no doubt he endured a very frightening few hours.

6. The moment the plaintiff and his wife heard of this incident they made arrangements to fly home immediately. They reached Dublin Airport at 12.55pm on the 29th June 2011, and thereafter made their way home to Newcastle West as quickly as possible.

7. Meanwhile, first thing on the morning of the 29th June 2011, An Post commenced an investigation into the incident. This included an audit carried out by An Post's Waterford audit team. At 8.30pm that evening after the plaintiff had reached home he was handed a Notice of Suspension of Contract by Liam Kelly, who is the Assistant Manager Fraud & Investigation with An Post. This notice stated the reason for the suspension as "*Misuse of company cash*". Nevertheless he contends that he was apparently asked to stay around the shop that day so that customers would see him around the shop that day so that he could assist the staff out of hours with what he terms in his affidavit "balances". He did that but on the following day, the 30th June 2011 his salary was stopped, and he has received no salary since.

8. The next relevant event is that on the 19th July 2011 the plaintiff was handed a lengthy 6 page letter, to which various appendices were attached. This letter was signed by J.J. Ryan, Manager Contractors. While Mr Ryan commenced with a welcome expression of sympathy for the ordeal that all concerned had been exposed to as a result of the kidnap, and an expression of hope that all had come to terms with the event and would fully recover from it, he went on to set out a number of serious issues which had come to light during the course of the investigation and audit and which were described as "*a serious failure in respect of compliance with Company procedures and overall management of the office*".

9. Four main issues were identified in the letter:

a. Failure to follow Company security procedures in the course of the kidnap incident on 28th June 2011 resulting in the loss of €105,000

b. Misuse of Company funds

c. Failure to process Business Deposits on day of receipt

d. Unauthorised access to Post Office and Counter Automation System.

10. This letter set out these issues in detail, and concluded by stating that they raised a serious question as to An Post's confidence in the plaintiff continuing to hold the Post Office Contract at Newcastle West, and warned that the company's deliberations may include a decision up to and including the termination of his contract. Mr Ryan concluded his letter by stating that An Post wished to afford the plaintiff an opportunity to furnish any explanation and/or to put forward any representations/assurances he might wish in relation to the above issues, and he also enclosed a copy of the Company process in respect of cases involving potential breach of contract "*which is the process being followed in this case*". He was afforded 14 days to submit his response if any.

11. The four issues raised:

a. Failure to follow Company security procedures in the course of the kidnap incident on 28th June 2011 resulting in the loss of €105,000:
In its letter dated 19th July 2011 An Post made it clear that its investigation was not in relation to the circumstances surrounding the kidnap of the plaintiff's son, and that their concerns related to the failure by the plaintiff to follow An Post's security policy. This is because the staff did not contact the Hostage Help Line in accordance with An Post's security policy, and further that the sum of €105,000 was handed over without any contact being made with An Garda Siochana, An Post's Regional Office, or the applicant himself. This was a major concern given that there would have been time to do so before a staff member left with the money. She left at 11.15am, and it was apparently not until about 3pm that day that the Gardai were contacted. It appears that when the staff were interviewed afterwards, they all stated that they had been unaware that there was a Hostage Helpline, and they stated also that they had never attended any security seminars. An Post took the view that even though the applicant was on holidays, it was incumbent upon him to have ensured that staff left in charge were made fully aware of security procedures, and aware that they must ensure compliance. This letter also noted that the applicant had stated during interview that he had not advised his staff of the Hostage Helpline number because he believed that it was for Postmasters only. An Post responded to that suggestion by stating that in such circumstances if he, the Postmaster, had himself been the person taken hostage, then nobody else would be able to alert the Hostage Helpline, thereby rendering it useless. An Post does not understand how the applicant could have been of that view, particularly since the applicant had attended a security seminar at Adare in September 2009 where it was made clear to all attending that the number should be made available to all staff.

The letter went on to state that An Post considered that this failure to follow security policy greatly facilitated the theft of €105,000 and significantly reduced the chances of recovery and the arrest of the culprits, and may even have increased the risk to the applicant's son who was taken hostage. The view was also expressed that this security failure represented not only a failure at Newcastle West "*but also significantly increases the threat to other offices which may be seen as a soft target*".

Finally this part of the letter concludes by stating that it is company policy that where losses from robbery/burglary are contributed to by the negligence of the Postmaster then he/she will be required to make good the appropriate loss in accordance with the conditions in the contract, and that in this case the company's view is that the applicant was negligent in not having trained his staff in the correct procedures and that this was viewed very seriously. The letter went on to state that the Company wished to give the applicant an opportunity to put forward any reasons why his contract should not be reviewed and why he should not be asked to make good some or all of the loss suffered.

I should say at this stage that one of the points urged on this application is whether, even though matters are only at an investigation stage, conclusions appear to have already been reached by the Company as stated by Mr Ryan. I will come back to that.

b. Misuse of Company funds
On the 29th June 2011 when this investigation started, the plaintiff informed Mr Tom O'Neill, Operations Manager, that he had taken a sum of €12,000 in cash from Company funds on the 27th June 2011 before his departure that day for his holiday to Spain, which meant that the office balance was short by that sum. He also is said to have explained that this was an advance on his monthly salary which was due to be paid three days later on the 30th June 2011. The letter went on in great detail to set forth what explanations the plaintiff provided for the fact that at the completion of the check of accounts the office was found to be short a total sum of €129,079.64, of which €105,000 was attributed to the amount paid to the kidnappers, a further sum of €12,000 attributed to the sum taken by the plaintiff in cash ahead of his holiday in Spain, and the final €12,000 was explained as having been hidden away by the staff after the €105,000 was removed for payment to the kidnappers, and was later found by the plaintiff in a bank cash bag on a shelf in the safe room. The letter goes into extensive detail also in relation to the explanation given by the plaintiff in relation to how the €12,000 cash taken by him on the 27th June 2011 was dispersed, and in relation to certain instructions which the plaintiff gave to his son, Tommy, for putting through the plaintiff's monthly payment on the Counter Automation system when it became due on the 30th June 2011. The letter notes everything which the plaintiff is noted as having stated to the investigation team sent in.

The letter went on to state how seriously all these matters were regarded by An Post, and referred to Section 2.33 (c) of the Postmaster's Manual which contains an express provision forbidding the postmaster from making use of their personal balance for any purpose other than the public service, and that under no circumstances could it be availed of for personal use, no matter how short the period of time involved.

The letter stated that the plaintiff had admitted the misuse of company funds, and that this was contrary to regulations and completely unacceptable. Again, I should mention at this stage that one of the submissions being made on this application is that these matters seem to reflect a concluded view by Mr Ryan even though matters are supposedly only at the stage of investigation.

c. Failure to process Business Deposits on day of receipt
Under this heading, An Post informed the applicant that during the investigation it had discovered that three business deposits from LIDL had not been processed since they had been presented on the 24th June 2011, and it was pointed out that all deposits should be brought to account on the day they are presented. An Post stated that this failure gave rise to a number of concerns, such as the possibility of theft/robbery of unprocessed deposits, breach of contract with corporate customers, lodgments going missing, misuse of cash between the time of receipt and processing, penalty payments, and possibly the loss of what was described in the letter as "*our strongest Business Deposit client*" i.e. Lidl.

An Post went on to state that this issue had previously been brought to the attention of the plaintiff in respect of deposits in March 2010, and that these delays in processing deposits were unacceptable, that the matter was being taken very seriously, and that the plaintiff was being afforded an opportunity to put forward any reason/explanation with regard to his failure to process the items when presented.

d. Unauthorised access to Post Office and Counter Automation System.
The final issue raised in this letter dated 19th July 2011 was that the plaintiff had instructed his son to put through his monthly payment on the Counter Automation system on the 30th April 2011, and then to "*run off and file away the corresponding POSB office report which would have shown the transaction details*". The letter pointed out that in order to comply with this instruction, the plaintiff's son would have to have accessed the post office area and the Computer Automation System. Not being a registered assistant this was unauthorised, and furthermore he would have had to use the identity and password of an authorised user. Again, it was pointed out that it was strictly prohibited to let anybody else use or even know one's password. A particular concern was expressed in the letter that such details would be given to someone unconnected with the running of the post office for the express

purpose of gaining unauthorised access to the system and conducting an unauthorised transaction. The letter stated that it was presumed that as it appeared that the intention was to conceal the transaction from staff, the plaintiff's son would have done this when no member of staff was present.

The letter went on to inform the plaintiff of a number of other issues which had come to light regarding access to the Counter Automation System. It appears that the investigation showed that during the absence of the plaintiff and his wife on the 28th June 2011 there was activity on that system for users recorded as THOMASK and GERALDK, which was presumed to refer to the plaintiff and his wife, thereby indicating that someone else was using their accounts. It was also seen that the only users who had logged onto the system over the previous 90 days were THOMASK, GERALDK and NORAENR, and that there was no record of any log on by the plaintiff's son, Ronan, or two named assistants, who were presumed to have been working over the period since they had been paid wages. It was presumed therefore that they must have logged on as someone other than themselves.

The plaintiff was required by the letter to explain these apparent breaches of procedure which the company viewed very seriously.

Under the heading "Conclusion", the Company informed the plaintiff that a serious question had arisen as to their confidence in the plaintiff continuing to hold the Post Office contract at Newcastle West, and that their deliberations "*may include a decision up to and including the termination of your contract*". It went on to state that before making any decision the Company wishes to afford the plaintiff an opportunity to furnish any explanation and/or to put forward any representations/assurances he might wish to make in relation to the issues outlined in the letter, and for his information, a copy of the Company process in respect of cases involving potential breach of contract was enclosed, and he was referred to Appendix 4 in that regard which he was told was the process being followed in his case.

12. The plaintiff replied to this letter by letter dated 29th July 2011. It is a very lengthy and detailed reply in which the plaintiff rejected the accusation that there had been serious failures by him as stated in the letter dated 19th July 2011, and further indicated that the plaintiff was contesting the suspension and the procedures being adopted. It is fair to characterise this reply as an indignant denial and traverse of all the issues levelled against him, and it contains extensive explanations and justifications in relation to the issues raised. The plaintiff stated in no uncertain terms that he wanted his suspension lifted, his name cleared and a full response to his letter. He ended by saying that unless his name was cleared and his good character restored, he would have no alternative but to pursue legal remedies.

13. An Post responded by letter dated 31st August 2011. An Post maintained its position that the plaintiff's suspension was warranted in the circumstances, and denied that it was misconceived or ill-founded, as the plaintiff had asserted in his letter. In addition, An Post responded in some detail to the responses given by the plaintiff in his letter, and maintained its concerns. This letter offered the plaintiff another opportunity to furnish explanations and/or to put forward representations/assurances in relation to the issues raised, and also offered a meeting if he wished to elaborate on any matters at such a meeting before the Company would make any decision.

14. The plaintiff replied to this letter by letter dated 7th September 2011. This again is a trenchant letter contesting all issues and providing further justification and explanations in relation to the issues raised, repeating the demand for his reinstatement to his position forthwith, and in the final paragraph stated that he required a meeting "*with an agenda list of prospective individuals proposed to be called at such meeting, confirmation of my right to call witnesses, to question such and all witnesses, at the proposed meeting*", and stated that he expected a reply by return.

15. Before receiving any reply, the plaintiff wrote again by letter dated 12th September 2011, this time expressing his concerns as to the procedures and policies being followed by An Post in relation to the conduct of the investigation. He expressed his concern that An Post had failed to conduct an unbiased investigation in a thorough, proper and competent manner. In that regard he was concerned at the tone of the letters from An Post, and that they had made "*predeterminations in relation to issues of concern*" which were the subject of the investigation, and predeterminations as to his guilt. He stated that the correspondence was replete with statements of fact in relation to matters which were still under investigation, and he exampled the alleged failure to adhere to security procedures. He stated that the correspondence contained many incorrect facts, and in that regard exampled an alleged admission by him as to the misuse of company funds, and he suggested in that regard that An Post had already reached flawed conclusions in relation to matters still in issue, and notwithstanding that the investigation process was still ongoing. This letter concluded by making a request for an appropriate assurance that in the future the investigation would be conducted without bias, and in a competent manner relying only on evidence and material properly gathered and having due regard for the plaintiff's rights, having particular regard to the consequences for him of an adverse finding as to his reputation and livelihood. He ended by stating that he would be obliged to receive details of the steps proposed by An Post to satisfactorily address these matters.

16. J.J.Ryan of An Post wrote yet another very lengthy letter to the applicant by way of response to the matters raised in the applicant's letters dated 7th and 12th September 2011. He joined issue with much of what is said by the applicant and maintained his position in relation to the various issues which were raised, and which were the subject of the previous correspondence.

17. A particular part of Mr Ryan's letter with which the applicant took issue in the present proceedings is one on page three thereof where Mr Ryan states:

> *"The Company remains of the view that you were seriously negligent in not having trained your staff in correct procedures. This is compounded by the fact that you absented yourself for a week leaving an Assistant in charge, who through your negligence, was not familiar with or properly instructed in the procedures to be followed in dealing with events which transpired".*

The applicant submits that it is not appropriate for a person who is representing the company as part of the investigation to have reached a concluded view as to what the Company's view is in relation to the matters he is investigating. He submits that this is an important finding made already since it underpins the finding of negligence against the applicant, and that this in turn leads to An Post's claim that the applicant should make good one half of the losses to An Post. It confirms the applicant's view that there has been a predetermination of the applicant's guilt even before the investigation has been concluded. This is said to render the entire process unfair and a denial of natural justice.

18. Each of the issues and the plaintiff's responses are dealt with in great detail. The letter again offers the applicant a further opportunity to put forward any reasons or explanations with regard to what is described as his breach of contract or breach of procedures, and reasons why his contract should not be reviewed, and why he should not be required to pay compensation to An Post.

19. Apart from addressing the various issues of concern, this very lengthy letter dealt with some other issues. Among others, it

addressed the applicant's request for a meeting with an agenda list of prospective attendees. It outlined the procedure for the oral hearing. It stated that at the meeting the applicant would be asked to respond to the company's letter dated 19th July 2011 and the issues raised, and that that letter would constitute the agenda for the hearing. It stated that there was no question of any person being "called to give evidence" as such, as it was an opportunity for the applicant to respond to the issues raised. It made clear that while the company would not have witnesses present, the applicant, if he so indicated, could request the presence of particular persons, provided they were relevant. It made clear also that the Company had no wish to follow what it describes as "Court like procedures", and that its procedures were inquisitorial. As part of the applicant's submissions before this Court, the applicant has submitted that this statement ought to mean that by this stage of the process nothing should have been decided or concluded upon, whereas it appears that the company had already concluded that the applicant had been seriously negligent and had been guilty of breach of contract and procedures.

20. The applicant was further informed in this letter that following the hearing the applicant would be provided with a written summary record of the oral hearing, and that he would be given seven days to review it and raise any matter that he may feel was not accurately represented in that summary.

21. A further letter followed from the applicant in which he raised a few issues which I need not address. The company responded again on the 4th October 2011, setting a date for the proposed oral hearing, namely 14th October 2011.

22. On the 12th October 2011, the plaintiff wrote a letter of crucial importance to the present application where, inter alia, the plaintiff is maintaining that the procedures adopted by An Post in relation to their decision to terminate his contract have been unfair.It would appear that before writing this letter the plaintiff had met with his Union It is clearly a letter of very different tone and content to the tone and content of what went before. One could view it as a conciliatory letter to J.J. Ryan of An Post which may have been designed or intended to mend fences in the hope that An Post would change its mind in relation to the termination of his contract. It expresses the hope in paragraph three thereof that "*when you consider the points that I will make in this letter you will come to the view that I should be reinstated as Postmaster and that between us any outstanding issues can be dealt with in due course*".

23. I will not set out everything which is contained in this letter. But it makes a number of concessions or admissions. While maintaining the view that even if his staff had been made aware of the Hostage Helpline phone number they would not have used it out of fear for his son's life, he accepted by this time that his understanding of the function and operation of the Hostage Helpline was incorrect, and he gave an assurance that immediately upon reinstatement as Postmaster he would ensure that all staff working in the post office would be fully conversant with all security procedures, including 'Tiger' kidnap and raid situations.

24. The applicant also fully accepted that he should not have drawn down €12,000 wages in advance of the due date. He stated that it was a foolish thing to have done, and pleaded that this was the first occasion on which he had done anything like that. He pleaded that he is a scrupulously honest man, and he assured An Post that he would never do such a thing again, and asked that his bona fides in that regard would be accepted.

25. In relation to the failure to lodge the Lidl deposits on the same day as they were received, the applicant accepted that these, where possible, should be processed on the same day, though he maintained that, as he had mentioned in previous correspondence, this was not always possible. But he gave an assurance that he would make every effort in the future to ensure that those deposits were processed without delay and on time.

26. With regard to the issue related to staff logging on at the Counter Automation System, he accepted that from the information contained in the company's letter to him dated 19th July 2011, the proper procedure regarding use of own login, username and password had not always been followed in recent times, and, again, gave an assurance that in the future the company's procedures in this regard would be fully adhered to.

27. The letter concluded as follows:

> *"In conclusion I would hope that you will accept my bona fides insofar as the matter of early progressing of wages is concerned and that my assurance with regard to never doing anything like that again will provide the company with the confidence that it requires. I also hope that upon reinstatement the company will clearly see that all security procedures will be effected and complied with at all times in the future.*
>
> *As I have stated previously the experience that myself and my family have endured since June has been traumatic and devastating and one which will haunt all of us for a very long time to come. At this stage I simply want to get back to work and try, as best I can, to restore some normality for myself and my family. In this context, I would regard this as my final reply (unless you have any further queries) and I am now not seeking an oral hearing." (emphasis added)*

28. That letter did not achieve the applicant's presumed intention. It was followed by a letter from Mr Ryan dated 27th October 2011, stating that the company, following a consideration of his case, and with regret as to its necessity, had decided to terminate the applicant's contract as postmaster with immediate effect. The reason stated was that the company had lost confidence in the applicant continuing to hold the contract as a result of the matters which had been addressed in what is described as "*the breach of contract process*". The letter stated that if the plaintiff wished to appeal the decision he should communicate his intention in that regard within 7 days, and that the necessary arrangements would be put in place. The letter went on to state that if no appeal was received within that time, the position would be advertised. The letter concluded by referring to the question of the loss to An Post arising from the kidnap incident, and stated the company's policy in that regard. It stated that the company believed that the applicant had been negligent in not having properly trained his staff in the correct procedures and that this failure had contributed to the success of the robbery, and further that the company had decided to hold him liable to the extent of 50%, and required him to pay the sum of €52,500 in accordance with the terms of his contract. They awaited his proposals in that regard.

29. The plaintiff's solicitors wrote to An Post on the 1st November 2011 stating that the applicant wished to appeal, and stated also that in these circumstances it was inappropriate to be calling upon the applicant to pay the sum specified. They went on to inquire who in An Post had instructed that such a letter be written and the contractual basis on which the company believed that the applicant was obliged to pay the sum.

30. In due course the applicant's solicitor was informed that Rory Delany, Human Resources Manager, had been appointed as Appeals Manager. Mr Delany wrote on the 11th November 2011 outlining the appeal procedure that was intended to be followed. He stated that the standard appeal procedure was that the applicant would write to Mr Delany setting out the grounds on which the appeal is being made and any mitigating factors which the applicant wished to have taken into account. He stated also that, if desired, an oral

appeal could be arranged, and in that regard, Mr Delany asked to be informed within 7 days.

31. In response to that letter, the applicant's solicitor wrote to Mr Delany on the 17th November 2011 stating that before reverting with the grounds upon which the applicant wished to appeal, he wanted "*copies of all material reviewed and considered by the Company in deriving [sic] its decision to terminate our client's contract and on which the Company's decision was based*".

32. An Post did not revert to the applicant's solicitor further in relation to these letters, despite reminders from time to time in November and December 2011 about the demand for payment of €52,500, and raising issues about the fairness of the decision-making process. By the 13th January 2012, no doubt the applicant's solicitor was getting somewhat impatient for a response to his letters and wrote again on the 13th January 2012 referring to the absence of reply, and stating that the silence of An Post served only to cause apprehension that the applicant did not get a fair hearing in the process leading to the termination of his contract, and that there was a possibility of bias affecting the decision. A response to the correspondence was urged.

33. That letter was sent by email on the 13th January 2012, because by letter of the same date Mr Delany wrote back. He refers to the solicitor's letter dated 17th November 2011 regarding the applicant's appeal, but goes on to state that within a few days of that letter indicating an appeal was sought, Mr Delany had received a letter from the applicant's doctor requesting that due to the applicant's medical condition all proceedings regarding the applicant "deferred at once", and stating also that the doctor would notify An Post when his patient's condition had improved. This letter went on to note that a letter from the doctor to the effect that the applicant was again fully fit to resume normal contact was received by Mr Delany on the previous day only, namely the 12th January 2012. In those circumstances, Mr Delany said he was preparing the documentation which had been requested in the solicitor's letter to Mr Delany dated 17th November 2011. The final paragraph of Mr Delany's letter states:

> "*Although Dr Fullam states that Mr Kelleher is fit for normal contact he also states that he remains under treatment for hypertension. With this in mind I would respectfully ask you to be aware that it is still open to your client to have his appeal dealt with by way of a written submission. The opportunity for your client to participate in an oral hearing of his appeal of course remains available and, if that is what is desired. I will contact you further at an early date regarding the arrangements for same.*

34. The documentation was sent by letter dated 26th January 2012. In that letter Mr Delany stated that the question of refund of losses arose under the terms of the plaintiff's contract as postmaster, but that the plaintiff could have that question dealt with also as part of his appeal and that he, Mr Delany, would consider any reasonable proposals in that regard. The plaintiff has stated that this was the first occasion upon which he had had an opportunity of seeing an internal memorandum sent by Mr Ryan to Mr Dunleavy on the 25th October 2011. His sight of this internal memorandum had led to the plaintiff raising concerns as to the fairness of the process by which the decision to terminate his employment was reached, and in due course in February 2012 his solicitor wrote to Mr Delany asking him to acknowledge that the determinations made against the plaintiff were made "*in the absence of fair procedures*" and that his dismissal was as a result "a nullity". He requested Mr Delany to acknowledge also "*that in accordance with the well-established principles of fair procedures the 'lack of natural justice in the first instance [can] not [...] be remedied by a sufficiency of that quality at the hearing of an appeal*' ". This letter went on to request that in advance of any further step being taken in the appeal the plaintiff be reinstated in view of the flawed process which had led to the decision to dismiss him. Needless to say, Mr Delany did not accede to these requests, and in his letter dated 24th February 2012 he wrote back to the plaintiff's solicitor stating that while he would take note of what had been said when considering the appeal, he was not willing to regard the process as a nullity, and went on to state that if he did not hear anything further in relation to making arrangements for the hearing of the appeal by the 2nd March 2012 he would assume that the plaintiff had nothing further to add, and that time would not be extended in this regard.

35. The appeal was fixed for hearing on the 4th April 2012 at which the plaintiff was represented by his solicitor. It was apparently agreed that the plaintiff's solicitor, Mr Casey, would make an oral presentation on the substantive issues, and that submissions related to fair procedures would be made in writing. Those supplemental written submissions were made in writing and furnished to Mr Delany by letter dated 24th April 2012.

36. At paragraph 26 of his grounding affidavit, the plaintiff states that "*at this juncture I presumed that the procedure adopted in the conduct of the appeals was that as set out in Appendix 4 to the defendant's letter of the 19th July 2011 under the heading 'Appeals Process'* ". He goes on to state that this appeals process in one in which "*the postmaster makes oral or written submissions to the Appeals Manager [Mr Delany] and the Appeals Manager 'then produces a report and makes a recommendation to the Director of Retail Operations, and the Director of Retail Operations then considers the report and recommendation and makes a final decision on the case*". He states that this process is analogous to that adopted at first instance. The plaintiff goes on to state that by letter dated 9th May 2012 his solicitor was sent by Mr Delany a summary report of the appeal hearing which took place on the 4th April 2012, and that he in due course responded with some suggested alterations. He refers also to a further letter from his solicitor dated 8th August 2012 where his solicitor requested confirmation as to whether or not a report and recommendation had been made to the Director of Retail Operations, and that if one was made a copy should be furnished. By letter dated 9th August 2012 Mr Delany confirmed that such a report had been sent to the Director of Retail Operations, but that he was unable to say when An Post would communicate the Director's final decision.

37. The report itself has not been provided to the plaintiff as his solicitor requested. In due course on the 20th August 2012 the plaintiff received a letter from an officer of An Post informing him that following a consideration of the report by the Retail Operations Director no reason had been found to alter the initial decision and that his appeal was therefore denied and his contract terminated with immediate effect. The plaintiff complains that he has not had sight of this report by Mr Delany to the Retail Operations Director, and that he has therefore been denied any opportunity to make any comments upon any conclusion that Mr Delany may have reached as to the merits of the appeal, either in relation to facts or matters of law. He states also that he has not had an opportunity to address whoever may have considered the report, and recommendations made by Mr Delany. The plaintiff believes and submits that he was entitled to be furnished with Mr Delany's report and recommendations before any final decision was made in relation to the termination of his contract and the refusal of his appeal.

38. The plaintiff's second affidavit filed in reply to the affidavit sworn by Mr Dunleavy on the 9th October 2011 makes it clear that the plaintiff is not seeking to rely on the merits of the issues which had been raised by and of concern to An Post (except in relation to An Post's entitlement to require him to pay €52,500 towards the losses incurred), but rather he impugns the process by which the decision to terminate his employment was arrived at, and the procedures adopted. Among his complaints, and as he sets out in this second affidavit, is one to the effect that the procedures adopted have not been in accordance with the terms of his contract. In this latter regard he complains that the applicable procedures to be applied to the disciplinary process undertaken by An Post are those set forth in Clause 2.39 of the Postmaster's Manual, and not Appendix 4. This argument was never raised by the plaintiff until it was raised in his affidavit sworn on the 12th October 2012. It will be recalled that at the outset of the disciplinary process the

plaintiff was informed that the procedure would be that referred to as the Appendix 4 procedure. The plaintiff never expressed any disagreement with that procedure either before it commenced or while it was ongoing. It did not form part of his appeal. But he has now brought up the argument at a late stage that the correct procedure was that provided for in Clause 2.39 of the Manual. He is able to at least put forward that as an argument because by signing the contract the plaintiff agreed, inter alia, that he would be "*bound by the rules contained in the rule books referred to overleaf, subject to any amendments or additions thereto duly notified*". The term 'rule books' comprises the postmaster's manual, rules for post(wo)men, cycle manual and counter transaction manual. The plaintiff therefore now submits that clause 2.39 of the postmaster's manual is what binds the parties, and that it was not, and ought to have been applied in this case.

38. Clause 2.39 provides:

> *"Any appeal against a disciplinary decision should be made without delay. The decision, or relevant form should at once be noted 'subject to appeal' and the appeal should be forwarded not later than 10 days thereafter, otherwise the right of appeal will lapse. If the punishment be not of a serious nature only one appeal is permitted. In "serious" cases up to three appeals are allowed; the first should invariably be made by the officer himself/herself, and if he/she is dissatisfied with the result, he/she has the option of making a second and third appeal to the Regional Manager either on his/her own behalf or through his/her Association. Where an appeal is being made by an Association, the officer must produce a communication from the Association, not later than 13 days after the rejection of his/her own appeal, signifying that an appeal is being lodged on his/her behalf. The Association must then forward its appeal within a further period of seven days. If this proves unsuccessful a final appeal may then be made within a further seven days."*

39. An Post has stated that Clause 2.39 is a clause which has never been applied in cases such as this. They say also that the defendant having been involved in union affairs over the years, would be fully aware of this, and that this accounts for the fact that the point was never raised by him as an objection even when he was informed that the Appendix 4 procedure would be adopted.

40. Quite apart from the fact that the plaintiff never himself raised any issue regarding the Appendix 4 procedure notified to the plaintiff in July 2011 by Mr Ryan, and participated in that procedure without demur on his part, it is clear to me at least that the Clause 2.39 procedure could not have been intended to cover matters of the complexity of the present case, and which required such a detailed investigation process, followed by the requirement to afford to the plaintiff every opportunity to respond to the issues identified as being of concern to An Post. Clause 2.39 provides a procedure of a much more summary kind in my view even though it speaks of three appeals. For example, there seems to be no opportunity provided for in Clause 2.39 for an oral hearing and an oral appeal. It seems to me that the procedures afforded to the plaintiff under Appendix 4 procedures were entirely appropriate given the issues involved in this case. In my view the plaintiff himself considered that procedure to be appropriate and participated in same, even though in his letter dated 12th October 2011 he stated clearly that he no longer required an oral hearing. He was afforded ample opportunity to address and respond to the issues said to be of concern. In fact at every hands turn he was informed that An Post was providing him with yet another opportunity to respond to issues raised and referred to in the correspondence being received from An Post, and he availed of those opportunities right up to his letter of said date when he altered his approach to the issues. Clause 2.39 strictly adhered to would have provided the plaintiff with far less opportunity to address and respond to the issues raised, and in my view might itself have been open to complaint with more justification that the complaints in the present case.

41. I am not satisfied that as a matter of fair procedures or constitutional justice the plaintiff is entitled to be furnished with the material of which he now complains, namely the report and recommendation made by Mr Delany to the Director of Retail Operations prior to the final decision made to refuse the appeal and terminate his employment. The plaintiff seems to think that fair procedures require that after the appeal hearing has concluded, the person hearing that appeal should, prior to making his report and recommendation, again revert to the plaintiff for his further comments, submissions and observations. That could not be the case in my view. The plaintiff had his appeal hearing. That was where his fair procedure rights are to be afforded to him. That is where he makes his points and arguments. Thereafter the appeal is closed and a decision falls to be made. There is no obligation to be inferred that the appeal officer must once again revert to the appellant.

42. A similar point was raised by the plaintiff in relation to not having been provided, in advance of any decision, with a copy of Mr Ryan's proposed recommendation to Mr Dunleavy in advance of the latter's decision to terminate the plaintiff's contract. It is contended that he ought to have been provided with that text so that he could make any submissions on it that he might consider appropriate ahead of any decision being taken. It must be remembered that up to that point the plaintiff had had more than adequate opportunity to make his submissions and responses to the issues being raised against him, and he availed of those opportunities right up to his letter dated 12th October 2011. One must ask, rhetorically, what more could the plaintiff have had to say at that stage, particularly given the contents of that letter dated 12th October 2011? But that aside, in my view fair procedures in a matter of this nature do not require that in advance of the decision the plaintiff ought to have been provided with the text of Mr Ryan's recommendation to Mr Dunleavy, so that he consider same and make further submissions.

43. In relation to bias/pre-judgment on the part of Mr Ryan, there is simply no evidence of pre-judgment or bias, and none from which to infer any. When raising the issues of concern to him following his investigation, Mr Ryan was perfectly entitled to inform the plaintiff of the issues he considered to exist following his investigation. It must be recalled also that each time he did so he specifically offered the plaintiff an opportunity for his comments on the issues raised. It is quite clear that in so far as Mr Ryan had reached a view or opinion in relation to the issues, such a view or opinion was of a prima facie nature, capable of revision or amendment in the light of any response or submission that the plaintiff might choose to offer. That cannot be classified as an impermissible form of pre-judgment, predetermination or bias as alleged.

44. In the plaintiff's third affidavit, he sets out, inter alia, the circumstances in which he wrote his letter dated 12th October 2011 to An Post, that being the letter in which the plaintiff adopted a more conciliatory approach to the issues raised against him than he had adopted previously. When dealing with that matter he goes on to say that on the 1st October 2011 he had attended a meeting with representatives of his union, namely Brian McGann and Sean Martin. He says that the meeting was arranged at the request of his union, and that it had taken place after there had been communications between Mr McGann and Mr Dunleavy. The plaimtiff has stated that it became apparent to him that Mr Dunleavy had had access to and knowledge of the correspondence which had passed between the plaintiff and Mr Ryan to which I have referred above, and that this was prior to the completion of Mr Ryan's investigation and prior to his issuing his report.

45. The plaintiff states in this third affidavit that it was as a result of these communications between Mr McGann and Mr Dunleavy that the letter dated 12th October 2011 was written by the plaintiff. It was apparently drafted for the plaintiff by Mr McGann.

46. The plaintiff states that it is now a matter of some concern to him that Mr Dunleavy was privy to communications between the plaintiff and Mr Ryan before Mr Ryan's investigation had been completed, and that he intervened in the ongoing process by having

discussions with Mr Ryan before he made his decision to terminate the plaintiff's contract on the recommendation of Mr Ryan. He goes on to say that these matters "*[have] the potential to visit an unfairness on me*". He states that Mr Dunleavy's intervention at that stage before the completion of Mr Ryan's investigation, "*had the potential, as was the fact here, to influence the representations actually made by me during the course of the investigation*". He submits that Mr Dunleavy ought not to have had any involvement whatsoever until such time as Mr Ryan's investigation was completed.

47. This is essentially a natural/constitutional justice argument based on the principle of *nemo judex in sua causa*. In that regard I refer to what was stated by Barrington J. in *Mooney v. An Post* [1998] 4 IR. 288:

> *"The terms natural and constitutional justice are broad terms and what the justice of a particular case will require will vary with the circumstances of the case. Indeed two of the best known precepts of natural and constitutional justice may not be applicable at all in certain circumstances. As the trial judge has pointed out the principle of nemo judex in sua cause seldom applies in relation to a contract of employment where the employer judges the issue and is an interested party. Likewise it is difficult to apply, to a contract of employment, the principle of audi alteram partem which implies the existence of an independent judge who listens first to one side then the other."*

48. These words seem apposite in the present case. It is of course the case that the plaintiff has submitted that the situation whereof he complains, namely that there was some communication between Mr Ryan and Mr Dunleavy before the completion by Mr Ryan of his investigation and the issuing of his report and recommendation, has the potential to visit unfairness upon him. He does not identify the unfairness which he fears occurred. It is purely speculative on his part. He is simply raising a hare. But in any event, as has been made clear by Barrington J. in Mooney, the *nemo judex* rule cannot apply in all its glory to all situations in the area of employment law. It is inevitable that often during an internal or in-house investigation leading to a dismissal the decision-maker and some or all of the investigators will have some form of contact, and that there may be communication of some kind about the issues involved. The fact in the present case that Mr Ryan was the person charged with investigating the issues, and interacting directly with the plaintiff in relation to the issues, and that Mr Dunleavy in his capacity as Head of Contractors had to make the final decision based on a recommendation by Mr Ryan, does not mean, and cannot in my view mean, that from the moment that investigation commences both Mr Ryan and Mr Dunleavy must be hermetically sealed from each other so that Mr Dunleavy may not have any knowledge or communication in relation to the matters under investigation. That in my view is to expect too much, and certainly in the circumstances of the present case was not a necessary requirement in order to ensure that fair procedures were afforded to the plaintiff in relation to this investigation and the decision to be made in accordance with the Appendix 4 procedure which was the agreed procedure in the case.

49. The plaintiff submits that he was denied fair procedures in relation to the adoption by Mr Dunleavy of Mr Ryan's recommendation that the plaintiff be made liable for a sum of €52,500, being one half of the company's losses arising from the incident. He makes the point that he was never given a first instance opportunity to consider and make submissions in relation to the basis and calculation of that figure before Mr Dunleavy adopted the recommendation, even though Mr Delany told the plaintiff that the item could form part of any appeal.

50. An Post is entitled under the contract to recover a proportion of losses incurred. It has determined that the conduct of the plaintiff has contributed to the losses to the extent of 50%. They have said that they will listen to any reasonable suggestions in that regard, which presumably means that the plaintiff can make a point such as that there is at least a possibility that the total amount of losses may be more like €65,000 given the recovery of cash in the sum of €40,000 from two men who have been arrested. There is some problem in relation to identifying that recovered cash as being part of the ransom, but maybe time will assist in that endeavour. I imagine that the plaintiff and An Post between them can come up with some arrangement which can recognise the possibility that the total losses may not in reality come to €105,000. But as far as the plaintiff complains that he was never given an opportunity to make submissions in relation to the damages claim now being made of €52,500, it must be remembered that in An Post's letter dated 29th June 2011 when it outlined the main issues of concern arising from the investigation, it made it clear that it considered that the plaintiff had been negligent and that in accordance with the terms of the contract An Post was entitled to give consideration to the continuance of the contract, and to whether the plaintiff should be required to make good some or all of the sum lost. Just as the plaintiff was invited to make submissions in relation to the other issues, he was invited to do the same in relation to this question. The plaintiff cannot now complain if he did not make adequate submissions in that regard or chose to concentrate on the other substantive issues which were raised. Clearly the contract says what it says. If the company made a finding of negligence against the plaintiff which resulted in a loss, the company was entitled to consider what part of that loss should be made good by the plaintiff. He was invited to comment upon this at an early stage. He decided to forego a first instance oral hearing, where he might have dealt with this issue along with the other issues. He could have addressed it in his appeal as well. In my view he has not been denied fair procedures in relation to it. Indeed, An Post has made it clear that it will listen to any proposals which he has in relation to it.

51. One must have enormous sympathy for the plaintiff, and indeed his family members and his staff, for the shock and trauma which no doubt they all suffered during and as a result of this kidnap. But this Court in these proceedings is addressing only the question of whether or not the plaintiff was afforded fair procedures in relation to the investigation which the kidnap triggered, and in relation to the procedures which were adopted leading to the termination of the plaintiff's contract with An Post. Clearly the Court's sympathy has no relevance to those questions. I have read and re-read the plaintiff's three affidavits, and have considered carefully the defendant's responses and all the exhibits and correspondence between the parties. I have taken careful account of the legal submissions made on the plaintiff's behalf by Louis McEntaggart BL, and those made in response by Mark Connaughton SC for An Post, and his written submissions. But I search in vain in this case for any unfairness in the process leading to the final decision made. Some issues have in fact been raised only at a very late stage, and where they could have been raised earlier if the plaintiff truly felt he was being exposed to an unfair process. But one way or another the evidence clearly points to the plaintiff having been afforded procedures that were fair in every respect. He was informed of the issues of concern in a very comprehensive manner. He was invited at every stage to give any responses or observations he wished, and he did so at length before his *volte face* on the 12th October 2011. He was afforded the opportunity of an oral first instance hearing which he at first indicated a wish for, but later declined. He was afforded an oral appeal hearing and a full opportunity to make both oral and written submissions. Taken in the round, this process was scrupulously fair.

52. For these reasons I must dismiss these proceedings.