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THE HIGH COURT

Record No. 2013/11947P

Record No. 2013/11946P

Record No. 2013/11948P

BETWEEN:

JOHN ELMES AND BRIAN KEADY AND SEAN CALLERY

PLAINTIFF

AND

VEDANTA LISHEEN MINING LIMITED, VEDANTA ZINC INTERNATIONAL, AFRICA AND IRELAND AND VEDANTA RESOURCES PLC

DEFENDANTS

JUDGMENT of Mr Justice Ryan delivered on the 21st February, 2014

Introduction

The plaintiffs are members of the senior management team employed at the Lisheen Mine in Co. Tipperary. Mr. John Elmes is the general manager, and employed by the first named defendant company, Vedanta Lisheen Mining Limited which operates the mine. Mr. Elmes was previously employed in the same role as he currently occupies by Anglo American plc, the company that owned the mine prior to its takeover by the third defendant, Vedanta Resources Plc. The second plaintiff, Mr. Brian Keady, is the mine manager and has occupied that role since 2002 and was also previously employed by Anglo American plc prior to the takeover by Vedanta. The third named plaintiff, Mr. Sean Callery, is the mine closure and site services manager and has been employed in that role since 2007.

The first defendant operates the mine at Lisheen, County Tipperary. The second defendant is a business division of the third named defendant and not a separate legal entity. The third named defendant is the parent company of the first defendant.

The plaintiffs are currently on sick leave from their positions as members of the management of Lisheen. Six weeks after the date at which each of the plaintiffs first certified themselves as unable to work due to illness or injury their sick pay was suspended. The plenary summons seeks a number of declaratory and injunctive reliefs in relation to disputes that have arisen in circumstances described below. This application comes before the Court by way of notice of motion seeking interlocutory relief in three areas, namely, sick pay, an inquiry into grievances and disciplinary action that the plaintiffs apprehend. It is necessary first to outline the nature and cause of the difficulties which have arisen between the parties before turning to the reliefs which have been sought by the plaintiffs on this application.

Background Facts

There is a history of suspicion and unease on the part of the plaintiffs going back to February 2011, when the defendant companies took over Lisheen mines in place of the previous owners, Anglo American plc. The spark that ignited the disputes giving rise to this application for interlocutory relief began on the 4th April, 2013 at approximately 16.30 when a tragedy occurred with the death of Mario Francis, a miner from the Philippines who had been working for twelve years at Lisheen mines. Vedanta headquarters in South Africa reacted swiftly to the tragedy. On the very day that the accident happened, Mr. Anton Lubbe had been appointed chief operating officer of Vedanta Zinc International. He was dispatched to the mine and arrived on the 10th April, 2013, and immediately began an investigation. Mr. Lubbe was accompanied on his visit to the mine by Stephen Godden, an expert in mining safety employed by a company named AMEC Americas Limited of Vancouver, British Columbia. Present in addition were Vedanta representatives from Black Mountain mine in South Africa. Mr. Lubbe spent a little over a day at the mine and completed his investigation and produced a draft report on the 11th April, which he presented to management on the next day. Mr. Godden's investigation was of a more technical and detailed nature and he carried out his inspection in the week beginning Monday 8th April, 2013, but it is not stated in Mr. Godden's report just how long he spent at the mine. His report which he made to Mr. Lubbe is dated the 30th April, 2013.

Mr. Elmes deposes in his affidavit that Mr. Anton Lubbe told him that he had been appointed to investigate not just the accident of the 4th April, 2013, but also a previous fatality at the site, but he was unaware that the latter event had happened a considerable time previously and had been determined as suicide. Mr. Elmes says that Mr. Lubbe told him that:

> "His investigations would find fault with senior management in respect of both fatalities". Mr. Lubbe expressly advised me that he had instructions from Mr. Kumar to find management responsible for failings in respect of both of the foregoing matters."

The unfortunate Mr. Francis was killed when there was a major fall of ground of around 500 tons when he was in the mine. He was operating a remote LHD/scoop and he had finished loading his last truck when he, to quote Mr. Lubbe's summary, "for an unknown reason, but probably to clean loose dirt, entered the stope with his LHD and he was fatally injured" when the fall of ground occurred. Mr. Lubbe's report is essentially a two page summary in which he lists what he calls substandard acts, a substandard condition, basic causes and remedial action. In this summary, Mr. Lubbe describes shortly things that the unfortunate deceased should not have done and also identifies a dangerous condition which had "high risk of falls of ground". He described contributory personal factors and job/system factors. Among the personal factors, he said that the employee's personal discipline was lacking and that management inadequately reinforced proper behaviour. Under jobs/system factors, he listed the following:-

> (a) Management inadequately reviewed potential loss exposures and systems
>
> (b) Management had inadequate controls in place and
>
> (c) Management inadequately monitored compliance and procedures.

He listed remedial actions under the heading "Immediate" of which the final one was:-

> "(g) Vedanta Lisheen Mining Limited should give consideration to whether or not it is appropriate to potentially invoke disciplinary procedure in respect of senior management at Lisheen for possible failure of control/discipline."

In Mr. Godden's more detailed technical report, he said that there was nothing intrinsically wrong with the production planning at the mine provided that there were appropriate operational systems and procedures in place, the support systems and strategies were appropriate for the prevailing ground conditions and safety and risk management were strongly and consistently reinforced. He did not find fault with the management, as I read his report, but he did emphasise the need for positive action:

> "Centred on the reduction or prevention of risk through awareness campaigns that counter complacency borne of familiarity, hence the taking of avoidable risk by individuals' underground; and coupled with the introduction of systems that reduce the potential for workers to take risks."

On the 16th April, 2013, a video link presentation to the executive committee of Vedanta Resources Worldwide was held. Mr. Elmes in his affidavit grounding the motion says that Vedanta is a huge multinational company with branches and subsidiaries all over the world and the executives of those units dialled into the conference and witnessed the events. Mr. Elmes had previously seen a slide referring to the fatal accident and understood that that would presented to the meeting, but the slide that was actually used and presented by Mr. Kumar, the chief executive officer, was different. This one said:

> "Specific remedial actions:-
>
> - Discipline of senior management at Lisheen for failure of control/discipline
>
> - Alignment of risk profile of retreat mining at Lisheen with Vedanta value system and
>
> - Meeting with Irish Government to discuss the interventions taken by Vedanta at Lisheen."

It had been stated that Mr. Elmes and other senior members of local management were party to the investigation that gave rise to this conclusion. This was the first time that Mr. Elmes or his colleagues had seen this particular slide. Mr. Elmes sought to intervene in the discussion, but the video link went on mute although he could still see the other executives discussing the issues raised by Mr. Kumar. Mr. Elmes says that:

> "Mr. Kumar resolutely stood by the allegations he had made and the fact that senior management were to be disciplined for breaches of discipline which he had apparently already determined had occurred. Thereafter the video link apparently failed completely for a substantial period before the meeting resumed by way of video link with full sound."

On the 23rd April, 2013, the company's Irish solicitors, Mason Hayes and Curran, sent an email to Mr. Elmes referring to his call earlier that day and the writer Mr. Brazil said:

> "I understand that a board meeting of Vedanta Lisheen Holdings Limited was held yesterday at which the recent fatal accident was discussed. I also understand that you were due to speak with Anton Lubbe tomorrow to discuss the matter further. You mentioned that Mr. Lubbe has suggested to you that local management carry out its own investigation into this unfortunate accident. This would be a separate investigation to the one carried out by VZI in the days following the accident and in respect of which a draft report has been prepared. I also understand that a possible conclusion of the latter investigation is that disciplinary action may be taken against local management at Lisheen."

Mr. Brazil advised that if there was to be another internal investigation for the company's own purpose there was "a potential issue in that this internal investigation would, most likely be carried out by the same senior management who could ultimately face disciplinary action under the VZI investigation". He said that there could be questions about the objectivity of that process and the validity of the conclusions.

On the 25th April, 2013, Mr. Elmes sent an email to Mr. Kumar, which he copied to senior management of the parent company. He declared that he was writing on behalf of Brian Keady, Terry McKenna, Stephen Wheston, Jim Dunne, Sean Callery and himself. Mr. Elmes complained that the use of the slide indicated that Vedanta had decided that disciplinary action was warranted against senior management at Lisheen, including Mr. Elmes, for alleged failure of control/discipline. He said that the outcome of the internal and external investigations had been predetermined, there was no formal notification to any of the management with respect to alleged failures, the company's disciplinary procedure had not been initiated or followed and no evidence had been produced of any misconduct. He said that it was not now possible to conduct a fair and proper review of any alleged breaches in the circumstances. He said Vedanta had made a decision as evidenced by the slide and he sought an immediate and unreserved withdrawal of any allegations against senior management, that such withdrawal should be notified to the parties present at the executive committee presentation or to whom the slides may have been circulated and reassurance that no such conduct by the company would take place in the future.

Mr. Kumar's reply is dated the 22nd May. Mr. Kumar expressed a number of concerns about safety at Lisheen. He noted that the deceased was one of the company's best miners in the last twelve years and was concerned that there would not be a similar accident in future with other experienced miners. He said that he "would like the investigations not to be biased by the initial summary findings". Then he went on:

> "The investigations carried out by Mr. Anton Lubbe (Chief Operating Officer) in the company of a multidisciplinary team and Experts, has brought to attention possible areas for introspection and improvements on the current standards and procedures followed in retreat mining. You must revisit the current standards and review the same with the Experts."

Then Mr. Kumar addressed Mr. Elmes' email. He said:-

> "I wish to assure you that Vedanta has not taken a decision that disciplinary action is warranted against senior management at Lisheen arising out of the tragic accident which occurred on the 4th April, last. The reference to 'discipline' in the in the slide you referred to is obviously subject to all relevant policies and procedures being followed by Lisheen if it should consider it appropriate to initiate the disciplinary process.
>
> Any decision as to whether or not to initiate a disciplinary process in these circumstances against any employee or

> employees would only be made following a thorough investigation of the situation by the Lisheen mine with due regard to the findings by the HAS/Union Representatives/COO/Report. The responsibility rests with the GM of the mine to take decisive steps to improve/correct and discipline the Mgmt team member responsible for the loss of life. There is no escape from taking stringent measures to secure lives in Lisheen.
>
> Obviously, Lisheen would apply its disciplinary procedure and any requirements raised by that where it is considered appropriate to consider potential disciplinary action against any employee(s).
>
> At this point, no specific allegations are being made against any one individual. You have no reason to presuppose.
>
> However, a very serious accident occurred on the mine and given that it is the management's responsibility to ensure the safety of employees on site, the statement to which you refer is no more than a general statement that issues need to be investigated & brought to book."

Mr. Elmes contends that this email that he sent on his and his colleagues' behalf constituted a grievance which meant he was invoking the company's grievance procedure. The company does not accept that and that is one of the issues that has to be considered. It is certainly a specific complaint so in that sense it can be considered a grievance, but it might more appropriately be considered a specific protest to Mr. Kumar and a demand for the matter to be remedied in a specific fashion. It seems to me that Mr. Elmes raised a specific issue with Mr. Kumar, namely, the question of discipline in particular reference to the slide that had been used at the video conference. Mr. Elmes complaint was that the company had reached a conclusion about the matter and had decided that the senior management at Lisheen had been in breach of discipline in respect of the tragic circumstances of Mr. Francis's death. Based on the contention, Mr. Elmes sought the remedies that he set out in his email. Mr. Kumar responded firstly, by expressing general concerns about safety and making comments that were not specific to any question of discipline and then by addressing particularly the matters raised by Mr. Elmes in his email. I do not see that as a grievance that meant that it was something that had to be explored or investigated. It was a matter of concern that was expressed by Mr. Elmes on behalf of his colleagues and himself and Mr. Kumar, in my view, addressed the specific issue that Mr. Elmes had raised. One view is that it left nothing more to be investigated. Another is that if the email is considered as invoking the grievance procedure, it was a matter for Mr Elmes to move to the next stage if he was dissatisfied with the response. This particular issue was ultimately superseded by a different bone of contention.

Mr. Elmes consulted his General Practitioner on the 26th April, 2013, presenting with chest pain over the previous 48 hours. The doctor found him to be extremely anxious and suffering from ongoing anxiety and stress which was work related. He recommended psychotherapy. On examination, Mr. Elmes had a systolic murmur and the doctor referred him to the medical assessment unit in Kilkenny for further investigation. Mr. Elmes continued to work until the 30th April, 2013, since when he has been absent because of work related stress.

Mr. Brian Keady says that his health began to deteriorate rapidly in April, 2013. On the 15th April, the Vedanta Vice-President of HR, Brian Migogo, asked for the Lisheen discipline procedure. On the 30th, he looked for copies of Mr Keady's contract and that of Mr Elmes. Mr Keady characterises that as being cynical. He attended the company doctor and took sick leave.

Mr. Sean Callery also complains of deteriorating health in the aftermath of the fatal accident report by Mr Lubbe. He has been certified as being unfit for work since the 24th May, 2013 because of "medical illness due to work-related stressors."

Another incident that should be mentioned in the sequence of events is a meeting that took place on the 15th May, 2013 between Mr Kumar and others of the Lisheen management with representatives of BEET Ireland. There had previously been discussions about use of the land occupied by the mine and its facilities when it was exhausted and no longer in use. The understanding of the Irish management was that the land would be given over for use in beet production and that had been discussed with the local organisation that was promoting beet cultivation. The expectation was that the mine would be closing within a small number of years and the land would then be available. However, at a meeting on the 15th May, 2013, Mr. Kumar, the CEO of the parent company, made clear to the representatives of BEET Ireland that that was not going to be the case and that the mine was going to continue for years into the future. At the time when this meeting and announcement took place, Mr. Elmes and Mr. Keady were on sick leave but Mr. Callery had not yet gone out sick and he was at the meeting. Mr. Elmes complains about this announcement, saying that it was "completely humiliating" to all of the local management, that it was "utterly bizarre" that the announcement was made without ever being discussed with Irish management and it severely damaged relationships with local interested parties.

Mr. Elmes exhibits in his affidavit a report dated the 23rd May, 2013, entitled "Report on how I have been unfairly treated, intimidated, bullied and discriminated against while working for Vedanta Resources over the past two years". This is a 25 page bill of indictment covering not only the fatal accident investigations, but many other incidents and episodes that this plaintiff cites as examples of bullying, intimidation, harassment and unfair treatment. The contents of this substantial report are summarised in a letter of the 6th June, 2013, from Mr. Elmes solicitor, Dr. Gerald Kean, to Mr. Kumar and to other executives of the parent company. The letter makes complaint about the investigation of the fatal accident and the video conference. It deals with the internal investigation carried out at Lisheen and the submission of the report to the relevant Government department. Then it goes back over six quite separate issues that arose in the past which Dr. Kean says "are just some of the extraordinary problems which my client faced over the past two years". He concluded his letter as follows:-

> "I am now formally requesting that you arrange for your Insurance Company and/or Lawyers to contact me in relation to this matter in order to discuss:-
>
> (u) Compensation.
>
> (v) Redundancy package.
>
> (w) Payment of monies due to my client.
>
> (x) References.
>
> (y) A mutually agreeable public statement to be issued when negotiations have completed (assuming they are in some way successful)
>
> I await hearing from you as a matter of urgency."

Dr. Kean's letter was replied to by Matheson, solicitors for the defendants, by letter of the 27th June, 2013. They refused to deal with the plaintiff's grievances in solicitors' correspondence. They said that the grievance procedure in the company was available to the plaintiff at all times and he had not pursued any complaint up to then, even though the matters that his solicitors raised went back a number of years. Nevertheless, the grievance procedure was still available to him, "as soon as your client is in a position to return to work". The letter did not accept that Mr. Elmes had been subjected to any intimidation, bullying or discrimination, nor did they accept that the plaintiff's health problems had been caused by his superiors. The letter also rejected the claim for compensation and/or redundancy and denied any entitlement in that respect and emphasised that there was no question of Mr. Elmes being made redundant.

By letter dated 24th June, 2013 Mr. Callery was asked to attend a medical appointment with Medmark on behalf of the defendants. Mr. Callery did not attend this assessment. No reason is provided in his affidavit for this failure. His pay was subsequently suspended, which he avers, was "without warning or notice" and was done so in spite of the fact that his grievance and complaint with the defendant remained unresolved. He then sought to have his complaint expedited but complains that by email of the 8th July, 2013, the defendant refused to investigate his grievance.

There was further correspondence then about the grievance procedure, with Dr. Kean insisting that the plaintiff had already invoked the grievance procedure in his email of the 25th April, 2013, and the defendants' solicitors denying that the email constituted an initiating step in that procedure. By letter of the 8th July, 2013, Matheson wrote saying that Mr. Elmes should furnish a copy of any grievances which he wished to raise to Mr. Terry McKenna, the HR Manager of Vedanta Lisheen Mining Limited, "who will ensure that a person of appropriate seniority is appointed in order to hear any grievance which he may wish to raise. In this respect, your client should set out details of his grievances in writing stating clearly what the issues are and whom the grievances are against (if relevant) as soon as he is in a position to do so in order that any issues which he wishes to raise may be dealt with." The reply of the 25th July was an acceptance:

> "Despite the fact that Mr. Elmes and others have lodged complaints in accordance with the grievance procedure previously as referred to above, I believe each and every one of them are again going to submit a list of their grievances to Mr. Terry McKenna as you suggested and in accordance with your letter received."

In their letter of the 7th August, 2013, Matheson's said that Mr. M. Eadie, Chief Sustainability Officer for Vedanta Resources plc had been appointed to conduct the grievance hearing and said that the President of Human Resources would attend any grievance hearing in order to provide HR support. The letter said that Mr. Eadie had no knowledge or involvement in any of the issues concerning Mr. Elmes. Dr. Kean objected to Mr. Eadie because he works within the Vedanta corporate structure and sought to have an outside independent person nominated. That was by letter of the 6th September, 2013. I should say that the correspondence that I am dealing with also ventilates other issues that are in contention between the parties, but I am concentrating on the specific issue of the grievances raised by Mr. Elmes. On the 10th September, 2013, Dr. Kean enclosed a list of his client's grievances "yet again". This document is a summary of old and new complaints, including one about the grievance procedure itself, and many of the grievances went back over a number of years. The document appears to contain essentially a summary of the catalogue of grievances compiled by Mr. Elmes in May 2013.

The correspondence prior to the institution of proceedings terminated with an exchange of letters on the 8th and 10th October, 2013. Dr. Kean's letter is prefatory to the institution of proceedings and complains first of the discontinuance of sick pay, which he alleges is "a gross derogation of your client's duty, both in contract and pursuant to legislation". He complains about the failure to investigate the grievance raised by Mr. Elmes and calls for an outside, independent investigator to be engaged to investigate the various grievances raised by Mr. Elmes which Dr. Kean summarises in twelve paragraphs with the caveat that it is not intended to be a complete list. The letter calls for a series of seven undertakings including that the company will pay and continue to pay Mr. Elmes's salary and other monetary entitlement, that it will not appoint anybody to replace Mr. Elmes, that it will appoint an independent investigator and other related demands. The reply of the 10th October was a consideration of some of the issues raised and a rejection of the request for undertakings.

The plaintiff's plenary summons is dated the 31st October, 2013. It seeks *inter alia* a declaration that the suspension of sick pay to the plaintiff on the 13th June, 2013, is void, in breach of contract and in breach of natural and constitutional justice. Secondly, it seeks to bar any disciplinary proceedings being taken against the plaintiff. Thirdly, it seeks mandatory orders directing that an investigation by an independent investigator be carried out in accordance with natural and constitutional justice and respecting the plaintiff's rights to fair procedures to investigate the plaintiff's grievance and complaint "in respect of bullying, victimisation and harassment". Fourthly, it seeks a variety of other orders by way of injunction to protect and preserve the plaintiff's employment position with the defendant. Then it seeks damages under a variety of headings and other reliefs.

By notice of motion dated the 5th November, 2013, the plaintiff seeks interlocutory relief in the same terms as the endorsement of claim, save for the claims for damages.

The three areas that fall to be considered in this motion and that were argued on the hearing are:-

(a) Sick Pay

(b) The claim for an independent investigation of the plaintiff's grievances

(c) Whether any disciplinary proceedings are in being or threatened and should be prohibited by way of injunction.

The Affidavits

The plaintiffs have sworn affidavits in broadly similar terms. They say that they have never had difficulties with any employer in the past and had no difficulties at this mine before the defendant took over in February 2011. They complain of stress, bullying, harassment and intimidation over a protracted period which is part of an orchestrated and deliberate campaign. So their problems did not arise with the tragedy that occurred on the 4th April, 2013, namely the death of Mr. Francis, but go right back to the beginning of Vedanta's period as owner of Lisheen mine.

The defendants' solicitors pointed out in correspondence that Mr. Elmes had not made any complaint or gone through the grievance procedure concerning any of the other complaints that he has cited now in addition to those that he protests about in relation to the events that followed Mr. Francis's death.

Mr. Callery and Mr. Keady refer to a number of contentious issues which are set out in the affidavit of Mr. Elmes that they say apply equally to their claims against the defendants. First is the investigation carried out by Mr. Anton Lubbe. Mr. Elmes does not mention, and perhaps was not aware, that there was a technical examination and report at the same time and perhaps going on after Mr. Lubbe left which was carried out by Mr. Godden, as I have mentioned above. It is also relevant to note that Mr. McKenna in a replying affidavit disagrees with Mr. Elmes when the latter says that he was not consulted in any way in relation to the investigation carried out by Mr. Lubbe. In fact Mr. McKenna indicates that Mr. Elmes was invited to participate in the Lubbe inquiry, but decided not to do so having consulted the company's solicitors, Mason Hayes and Curran. Therefore, he had the opportunity to participate but decided against it. The reasons for that are touched upon earlier in my discussion.

Mr. Elmes says that Mr. Lubbe told him that his instructions from Mr. Kumar, the Chief Executive Officer, were that he was to blame the senior management in respect of the death of the late Mr. Francis. Mr. Lubbe does not respond to this allegation, nor does Mr. Kumar, taking the position in each case that they do not want to ventilate the facts of the dispute in lawyers' correspondence or in affidavits on an interlocutory motion and that they will do so in detail in evidence at the trial.

Mr. Elmes makes a number of complaints about the Lubbe inquiry and its aftermath. First, he is listed on the report as part of the investigation team, but he said he was not consulted with respect to the reports findings and he did not have any input into the contents. He does not deny in saying this that he knew what was going on or what Mr. Lubbe was doing and he does not say that he had nothing whatsoever to do with it.

Second, he complains that a final version of the report was presented to the Department of Communications, Energy and Natural Resources, which should not have been done because of the objection that he and the other management personnel at the mine had made to the report. Third, his objections were not taken into account.

Fourth, the report "has done irreparable damage" to his reputation. He complains that he has been unable to get any meaningful response from the defendant in respect of his "real and significant concerns in this regard and despite being on notice of the potentially catastrophic impact their behaviour is having on my health".

Fifth, Mr. Elmes complains of the video link presentation on the 16th April, 2013, to the executive committee of Vedanta Resources worldwide with the offending slide presentation.

Sixth, he complains about the *modus operandi* adopted by Mr. Lubbe in his investigation and writing his report. They include the hasty manner of the investigation, the fact that witnesses were not interviewed, members of the investigation team were not consulted, expert evidence relied upon was self evidently inadequate and interim conclusions had to be expressly qualified owing to the lack of a completed investigation.

Seventh, he was deprived of fair procedures before being subjected to a summary finding of gross wrongdoing or breach of discipline.

Eighth, his email of the 25th April, 2013, was not satisfactorily responded to.

Finally, he says that his health now deteriorated far more rapidly after this incident which is a reference to the email exchange with Mr. Kumar. He felt that his integrity had been completely undermined, as had his reputation.

By this time, the question of the grievance has arisen. As noted and discussed above, Mr. Elmes has been contending since his solicitors correspondence in June that his email of the 25th April to Mr. Kumar constituted a reference to the grievance procedure. Mr. Callery also states this in his affidavit dated 31st October, 2013. The defendant rejected that proposition and ultimately the plaintiff's solicitors sent in a new complaint, without prejudice to their contention that the grievance procedure had indeed been appealed to in the email in question, and that complaint was accepted and acknowledged as being a complaint and an invocation of the grievance procedure and it was then that the defendant nominated Mr. Eadie to be the investigator, to act with the assistance of the HR president. But then a row developed about Mr. Eadie and the plaintiff through his solicitors insisted that there must be an outside independent investigator and there the matter stood as disputed by the parties and that is the basis of Mr. Elmes application to this Court for an injunction mandating the engagement of an outside inspector to examine the grievances that he has put forward.

Mr Elmes made many other complaints and allegations. His case is that the parent company management waged a campaign against him that was intended to undermine his position, to bully, harass and intimidate him.

For example, he complains of "a patronising and bullying racial slur 'are you Irish or Jihadi'" that is contained in an email from Mr. Kumar dated January, 2013. In August 2012, Mr. Elmes complains of issues that he says arose when persons that he chose as being particular stars from the senior and middle management at Lisheen did not take up jobs that were offered by the parent company and Mr. Elmes felt that he was under pressure to coerce successful people into taking up appointments elsewhere in the Vedanta Group.

Mr. Elmes complains of "ongoing bullying correspondence" from the chief operating officer, Mr. Lubbe. Emails and SMS messages were confrontational and bullying in nature and unreasonable demands were made with a response expected in a very short time.

During the course of the past two years, he complains that there have been repeated references to the proposed management buy out of the Lisheen mine that did not take place and that gave way to the Vedanta takeover. Mr. Elmes complains that the matter of the proposed MBO in which he was involved was brought up unfairly at business meetings. He refers to a meeting in March 2013.

He says that there were union issues in relation to redundancy in November 2012. Mr. Elmes and the management team raised concerns in November 2012, about the Lisheen mine redundancy fund.

There was an issue concerning US$90m in redundancy and closure funds held in escrow accounts. Mr. Elmes feels that his advice was ignored "and trampled on in a very public and humiliating way during a presentation to the Vedanta board at that meeting in Mumbai".

During the sale transition period in 2010/2011, Mr. Elmes was involved in a struggle to ensure that the terms of an agreement whereby the employees would be no worse off under the new management than they had been under the old and he found the whole period stressful because of the trouble he had to go to in order to ensure that this term was respected by Vedanta.

During April and May 2011, Mr. Elmes says that he was approached by another mining company about a business opportunity in Ireland. The fall out from Mr. Elmes's interest in this matter, which he candidly shared with his superiors in the company, was more pressure and criticism and questioning of his propriety. Mr. Elmes has information to indicate that the then Chief Operating Officer of the company had been seeking a replacement for him in a covert manner. That was confirmed, he says in February 2012, when he

confronted the CEO about the matter.

There are other undated and general complaints that Mr. Elmes makes, but the above are all the complaints that can be dated or referenced with specificity.

Mr Keady and Mr Callery also detail other incidents that they characterise as evidence of the offensive campaign that they say their employers and superiors have waged against them since the latter took over the mine.

Mr. Callery maintains that since the defendant acquired the mine, he has been subjected to a campaign of intimidation and bullying, has been ridiculed by management, has become increasingly isolated and his self esteem and confidence have been affected. He previously enjoyed good working relationships with employers throughout his long career and he avers that his reputation has been tarnished because of this campaign and the adverse findings of the investigation report which resulted in the sanction of members of the management team, of which Mr. Callery is a member.

Mr. Callery says that he was involved in stopping the defendant from diverting redundancy funds from the Irish operation, which he avers resulted in unfair impositions on Irish staff in 2012/2013 and was the subject of a complaint raised by a number of employees. Mr. Callery became too ill to work in and around mid May 2013 and he cites the oppressive nature of the work environment, the fear of victimisation, reprisals and retaliation as the reasons he has been unable to return. He is not satisfied that his complaint has been adequately handled and he refers to the correspondence he did receive from the company as being aggressive, threatening and intimidating.

Mr. Callery has at all time been certified as unfit to work by his doctor. He complains that Dr. Deirdre Fitzgerald of Medmark has assessed him as being fit to return to work, based only on one medical assessment on the 15th August, 2013. Mr. Callery states that his medical evidence makes it clear that he will be unable to return to work until appropriate changes and protocols are put in place by the defendant.

Mr. Keady in his affidavit of 31st October, 2013, made similar averments as outlined above. He states that having been in employment as a manager since 2002, his employment record had previously been unblemished and he had received the highest rating annually on his performance appraisal. After the fatal accident on April 4th, 2013, Mr. Keady was diagnosed by the company doctor with work related stress. Mr. Keady attributes this diagnosis to the alleged bullying, harassment, intimidation and attacks on his reputation by the defendant. Mr. Keady is concerned that the motivation of the defendant in refusing to investigate the grievances and complaints raised is to coerce Mr. Keady into resigning either by continued damage to his reputation or by stress related health issues.

It is unnecessary to trawl through all of the affidavit evidence. Much of it is covered in the correspondence and the factual background that I have set out above. A great deal of it also is concerned with argument, comment and debate to and fro between the deponents. They engage on the events surrounding the Lubbe investigation and its aftermath, the question of the grievance procedure and the entitlement to sick pay.

There are factual disputes which it is impossible to resolve on affidavit. They refer to previous practice in two areas, payment of sick pay and the appointment of outside investigators for complaints. On the sick pay question, Mr. Elmes and Mr. McKenna debate the matter pro and con and there is an unresolved factual question as to whether it is the practice or was the practice of the company to pay employees or salaried management personnel when they were out sick for reasons or conditions unrelated to their work or for work related injuries or conditions. Obviously, in those possibilities a person in a management position who has a work related condition that is keeping him out of work is in the strongest position. Mr. McKenna asserts in his affidavits that the company practice has involved decisions on humanitarian grounds to pay sick pay to some such employees, but in other cases is has not been paid. There is no general pattern, according to Mr. McKenna. Mr. Elmes disputes this and contends, perhaps a little confusingly, first, that as a matter of contract he is entitled to be paid sick pay for however long he is out, that that arises under the injury provision of the SIPTU agreement. Alternatively, he says that it was the practice to pay people in those circumstances. But the point is that there is a major dispute and it is simply not possible to make a decision on that question on affidavit. Is it the case nevertheless, that Mr. Elmes has made out a reasonable case on balance or a strong case as he appears to be required to do? It might be that he had established a fair case to be tried, which was the classic Campus Oil first question but it is another level to establish a strong case, i.e., a case that he is quite likely to win at trial.

Another fact dispute arises on the appointment of an outside inspector. Mr. McKenna's testimony in his affidavits is that this has sometimes happened, but it is by no means standard and there are as many cases where is has not happened than where it has. It all depends on the situation giving rise to the issue. I have cited above the provision in the last stage of the grievance procedure and I can understand why a meeting of employee representatives and management would find that an independent person would be a useful way to resolve the conflict. But again it is I think, impossible to decide at this point that the company is in breach of some obligation arising from an implied term because of its previous consistent practice.

Submissions of the Plaintiff
The plaintiffs submit that this application for injunctive relief, though it is made in unusual circumstances such that the plaintiffs are not currently the subject of disciplinary action brought by their employer, should be seen in the light of the great likelihood that if they return to work they will be subject to disciplinary proceedings. The plaintiffs submit that any such proceedings would be tainted in that they would lack independence and would be merely an *ex post facto* justification for a foregone conclusion; the dismissal or subjection to other disciplinary sanctions, of the plaintiffs.

The plaintiffs accept the "strong case" test in *Maha Lingham v Health Service Executive* [2006] 17 ELR 137 and say they have done enough to satisfy it and that this Court may grant orders of a mandatory nature as they seek in this application. An independent adjudicator to investigate the complaints made by the plaintiffs is mandated by the requirements of the implied rights of fair procedures, as decided in Glover v BLN [1973] IR 388 and *Giblin v Irish Life and Permanent Plc* [2010] IEHC 36.

The plaintiffs submit that they have not had the benefit of fair procedures in that they are the victims of prejudgment in relation to their management of the events surrounding the death of Mr. Francis and the preparation of the report of Mr. Lubbe.

In relation to the issue of prejudgment of any disciplinary process, which has not yet been commenced by the defendants, the plaintiffs submit, in reliance on the decision of Clarke J. in *Bergin v Galway Clinic Doughiska Ltd*, [2007] IEHC 386, [2008] 2 I.R. 205, that this is sufficient to meet the strong case test as in that instance Clarke J. held that the prejudgment of the plaintiffs' case by the board of the defendant in determining that he was guilty of misconduct without giving him an opportunity to make representations to the board and be heard by the board was evidence sufficient to meet the "strong case" test set out in *Maha Lingham*.

Failure to pay the plaintiffs on the same basis as other employees who have been unable to work due to illness is also contrary to fair procedures. The plaintiffs submit that according to Appendix E of the SIPTU Handbook there is a distinction between those who are absent from work due to non-work related illness and those who are absent from work due to a work related injury or illness. The plaintiffs submit that the terms of this document provide that the former are entitled to payment of "benefit", which is defined as being 100% of normal basic weekly pay less social welfare benefits, for a maximum of six weeks in any calendar year if they comply with sick certification requirements but that any payment beyond this six week period is at the discretion of the employer. It is the evidence of the plaintiffs that this discretion is normally exercised in favour of employees unless there is good reason not to do so.

However, employees absent from work for a work related injury or illnesses are in a different position. The Handbook contains no stipulation that the payment of salary during such period of absence is to be limited to six weeks. The category of employees suffering from a work related injury or illness must be seen as distinct because they contract with the employer to repay the gross amounts of the salary they receive during the period of absence, where the employee subsequently receives compensation for any loss of earnings incurred during his absence.

If there is any ambiguity in the terms of the contract the *contra proferentem* rule must apply and the terms of the contract must be interpreted against the defendant companies. See *Mills v Dunham* [1891] 1 Ch 576. The plaintiffs argue that it was the custom and practice of the management of the mine that they never exercised their discretion to suspend the pay of an employee who had sustained a work related injury or illness after the expiration of a six week period. The criteria for implying terms into a contract of employment by custom and practice are set out in *Albion Automative Ltd v Walker* [2002] EWCA Civ 946 at paragraph 15:

> "(a) whether the policy was drawn to the attention of employees;
>
> (b) whether it was followed without exception for a substantial period;
>
> (c) the number of occasions on which it was followed;
>
> (d) whether payments were made automatically;
>
> (e) whether the nature of communication of the policy supported the inference that the employers intended to be contractually bound;
>
> (f) whether the policy was adopted by agreement;
>
> (g) whether employees had a reasonable expectation that the enhanced payment would be made;
>
> (h) whether terms were incorporated in a written agreement;

whether the terms were consistently applied."

The plaintiffs submit that all of the above criteria have been met on the facts of this case. The employees were aware of the entitlement to sick pay beyond six weeks in the case of an injury or illness that was work related. This payment was not discretionary. The plaintiffs have provided evidence that this policy was consistently applied. The terms were incorporated into a written contract and have been applied to all employees over a number of years. The implying of terms into a contract by "established custom and practice" was also recognised in this jurisdiction by Clarke J in *Carroll v Bus Átha Cliath* [2005] 4 IR 184.

The plaintiffs also submit that the defendants have failed to address grievances and complaints made under the bullying and harassment procedures of the defendant companies in breach of the principles of natural justice and in breach of contract.

In relation to the adequacy of damages aspect of the test for the grant of an interlocutory injunction the plaintiffs submitted that damages could not in this instance be an adequate remedy given the circumstances in which the plaintiffs' reputations and standing within the mining industry are at stake. The plaintiffs rely on the decision of McMahon J in *Khan v. Health Service Executive* [2008] IEHC 234 in support of their submissions. In that case the Court held, in determining that damages were not an adequate remedy that the damage which would be done to the plaintiff's reputation and his standing within his profession must be taken into account in any such assessment. The plaintiffs also rely on the following comments of Laffoy J in *Giblin v Irish Life and Permanent* [2010] IEHC 36 in support of their submission that it is usual for a Court to consider that damages would not be an adequate remedy for the compensation of reputational injury caused in the context of an employment dispute such as that currently before this Court.

Submissions of the Defendants

Given that the interlocutory relief sought by way of notice of motion by the plaintiffs to these proceedings, in relation to the payment of the plaintiffs' salaries and the appointment of an independent adjudicator to investigate their complaints, is mandatory in nature, counsel for the defendant submitted that, rather than the usual "fair issue to be tried" test which is derived from *Campus Oil Ltd v Minister for Industry and Energy (No. 2)* [1983] I.R. 88, the test to be applied in this instance is the high threshold or "strong case" test set out by Fennelly J in *Maha Lingham v Health Service Executive* [2006] 17 ELR 137 at page 140. The mandatory nature of an injunction seeking that a dismissal or a process leading to a dismissal be prevented was confirmed by Clarke J. in *Bergin v Galway Clinic Doughiska Ltd* [2008] 2 I.R 205 at page 216.

The defendants submit that the sick pay policy of the defendant company is that an employee is entitled to a specified maximum of six weeks sick pay. There is no distinction between the sick pay entitlements of a person absent from work due to a work related illness or injury and a person absent from work due to a non-work related injury or illness but that in each case the defendant companies are only required to provide the employee with six weeks sick leave pay in any calendar year and any payments after that period, should the employee continue to be absent from work, are entirely at the discretion of the employer. There is no distinction between salaried employees and those paid at an hourly rate. The express terms of the contract cannot be overridden by implying a further term into the contracts and in this regard counsel for the defendants relied on the statement of Murray J. in the Supreme Court decision in *Sweeney v Duggan* [1997] 2 I.R. 531 at p. 539 to the effect that "…[a term] cannot be implied if it is inconsistent with the express wording of the contract." The defendants also rely on statements of Laffoy J in *McGrath v Trintech Technologies* [2005] 4 I.R. 382 in this regard.

In relation to any potential disciplinary action or procedure which may be taken against the plaintiffs, counsel for the defendants submits that this concern is premature and that the Court must be reluctant to interfere with the internal procedures of a company. *Morgan v Trinity College Dublin* [2003] 3 I.R. 157, held that the Court would not grant an injunction preventing the holding of a disciplinary hearing as this would be premature given that all matters remained to be dealt with by the disciplinary panel. Clarke J in

Caroll v Bus Átha Cliath [2005] 4 I.R. 184 also indicated that the Court should be reluctant to intervene in an incomplete disciplinary process. In *Becker v Board of Management of St Dominic's Secondary School* [2006] IEHC 130 Clarke J expanded on his reasoning in the previous judgment and indicated that the Court should only intervene in an incomplete disciplinary process in a "clear case" where a step had been taken in the process under review which could not be cured by a later step in that process and where this flaw was at variance with the entitlement of the person subjected to this process to fair procedures. Counsel for the defendant submits that in this instance no disciplinary process has in fact been invoked and any such process will be undertaken in compliance with the internal procedures of the defendant company.

The plaintiffs have no contractual right to an external independent investigation of their complaints. Laffoy J. in *Cribbin v PLC Ingredients Ltd* [2012] IEHC 390 at paragraph 29, held that such an application for an independent investigation as a form of interlocutory relief was misconceived and the application of the plaintiffs in this regard is not tenable. The terms of the plaintiffs' contracts of employment do not provide for an independent adjudicator but rather for an internal grievance assessment procedure. The defendants rely on the authority of *McGrath v. Trintech* in submitting once again that an express contractual term, such as the internal discipline procedure which is provided for by the employment contracts in this case, cannot be overridden by implying a contrary term into a contract.

Discussion

The SIPTU Agreement and Sick Pay
The parties are agreed that the terms of employment of the plaintiffs are set out in an agreement between the mining company and SIPTU, which contains the following terms:

Clause 35.0 –Sick Pay

> "100% of basic for six weeks – social welfare deducted from week two of absence. No pay for the first three days."

Appendix E to the agreement is headed "Sick Pay Scheme" and contains the following relevant provisions.

> • Under the heading "payment of benefit" it is stated that "Payment will be made in respect of certified absences only, up to a maximum of six weeks within the calendar year. Payment will not be made for the first three days of any illness."
>
> • Under the heading "injury" the agreement states inter alia that where "the absence is the result of an accident/illness which is subsequently the subject of a liability claim, where compensation for loss of earnings is received, the gross amount of any payments made under the sick pay scheme or otherwise for that illness must be refunded to the company."

The plaintiffs advance two arguments based on appendix E. In the first place, they argue that it was the almost invariable practice for the company to pay the wages of an employee who was absent due to illness for the duration of his absence, notwithstanding the limitation of six weeks contained in the agreement. This matter is debated in the affidavits and the company responds in the affidavits of Mr McKenna that the statistics tended to disprove the factual contention made by the plaintiffs. It does not appear to me as if the numbers support the argument made by the plaintiffs. The company's point is that decisions whether to extend that payment period beyond their contractual six weeks are discretionary matters for the management to decide in the circumstances of each case and that that is what has happened in fact. The cases where payments were made appear to be roughly equal to those where they were stopped. That would not be sufficient for the plaintiffs to satisfy the test for an implied term. It would be possible if the evidence went that far for a party to establish an implied agreement going beyond what was expressly provided for but the onus of proof in that circumstance would be higher than in a case where there was no specific contractual term.

The second argument by the plaintiffs is that this is not a case of sick pay for each of the plaintiffs but rather a case of inquiry/illness arising from work and that the six-week payment limitation is irrelevant in those circumstances. Instead, it is argued that the provision entails full payment for the period of absence from work that is subject to be refunded to the company in the event of a claim for compensation for the illness/injury being successful and including payment for loss of earnings. The weakness of this argument is that there is nothing in appendix E to justify this interpretation. It seems clear that the sick pay scheme applies in the same way to an injury or condition or illness that is non-work-related as it does when it happens at work. And it is worth observing that the provision relating to a claim is not expressed to be confined to claim arising in the employment of the defendant. It may be that such a condition is to be implied, although that does not strike me as being in any way obvious, and it does make sense as it stands because it could apply, for example, to somebody injured in a car accident or an injury that happened in some other circumstance or location where a third party was liable.

The Grievance Procedure
The procedure is embodied in a document entitled "Employee Grievance Guidelines" and sets out at the beginning the policy

> "To establish an efficient and fair procedure of the resolution of staff complaints and problems. It is envisaged that the majority of these issues or misunderstandings will be capable of being addressed informally in an efficient and effective manner. However, where such issues are unresolved they may become a grievance."

The purpose of the guidelines is expressed to be to provide employees with a readily accessible procedure, to provide fair, expedient and equitable treatment and to minimise potential causes of dissatisfaction.

The procedure envisages a number of stages from informal discussion between the employee and the relevant supervisor or manager, a stage one arises if that is not satisfactory and involves reference to the next higher level. Stage two is a more formal level again for still unresolved grievances and involves the appropriate head of department. Stage three goes to a meeting between the unions and the departmental head and general manager. The outcome of that process is final. There is however, a further stage, stage four, which is to apply to the conciliation services of the Labour Relations Commission or similar third party to attempt to achieve settlement. That service may refer the matter to the Labour Court and then there is a further body which is a joint forum for problem solving. That is comprised of equal numbers of representatives of management and other relevant employees.

Paragraph 5.3 of the Guidelines states:-

> "It is the intention that all other issues of critical importance remain in the JFPS, until resolved, such resolution may, by agreement, be facilitated, by the use of an independent chairperson, arbitration, binding arbitration or other appropriate mechanism."

The plaintiffs have lost faith in their superiors in the defendant parent company. The event that gave rise to the case brought by these three plaintiffs and their interlocutory motion was the inquiry into the tragic death of a worker. The initial complaints related to the aftermath of that investigation. However, it soon became clear that there was a powerful undercurrent of suspicion and distrust on the part of the local Irish managers of the mine towards their superiors in the international parent company. It is impossible to know at this stage whether there is substance in any of the allegations catalogued by the plaintiffs. Without taking a view one way or the other, it is possible to have sympathy for the plight of managers who find after years of working for a parent company that they think is agreeable, supportive and amenable, that fate brings new bosses with whom they believe the bonds of respect and sympathy are absent.

The plaintiffs have developed a deep sense of grievance. They were not happy with parts of Mr. Lubbe's report but it was sent to the Department of Communications, Trade and Tourism still. There was the publication within the whole international organisation of the company of the slide saying that they were going to be disciplined and carrying the implication that they deserved to be disciplined. They felt that they were being unjustly blamed for a tragic death that they were not responsible for and being so blamed because of a rushed, inadequate, unsatisfactory and unfair report. All of their previous suspicions of the attitude of the parent company management towards its small Irish subsidiary were justified, as they felt.

The plaintiffs recalled other grievances and issues. They concluded that the report on the death of Mr. Francis was not an isolated incident but was part of a pattern of hostility and disrespect towards them that was orchestrated from headquarters by the parent company management.

Mr. Elmes sent an email to Mr. Kumar protesting about the video conference and how they were being blamed and that the anticipated disciplinary process that would follow would be a prejudged sham. Mr. Kumar responded that there was no question as yet of any disciplinary action, that the slide was used in the video conference because there was no time to change it, that it did not mean anything of the kind that the plaintiffs suspected and if in fact disciplinary measures were to be invoked, there would be no question but that fair procedures would be observed.

Still the plaintiffs remained uneasy. They were anxious and stressed. Their doctors certified them unfit for work. They compiled lists of complaints going back over the years since the defendants took over. All the plaintiffs are certified medically unfit. The defendant employer is uneasy and perhaps sceptical of the prolonged and continuing incapacity and denies that any illness of the plaintiffs is connected with the actions or behaviour of senior managers.

The plaintiffs have been off work for a considerable time. They left at different times, but close together. The first thing they are looking for is to be paid their salaries while they are out sick. They have been paid for only six weeks, which the company says is their full and only entitlement. They contend that the almost invariable practice in the company has been to pay management or workers who are out sick for far longer periods than six weeks and the normal practice indeed has been to keep on paying them until they return to work. They acknowledge that there may have been some cases with particular issues when that has not happened but argue that those cases are exceptions. This is a major area of dispute that is debated at length in the affidavits, as described above. The company submits that there is an express contractual term that cannot be supplanted by an alleged implied practice to contrary effect.

The question may be asked: how long will these stress related illnesses persist and what treatment, if any or what events will bring them to an end? Suppose there is an independent investigation of the complaints made by the plaintiffs. The report may or may not find the allegations proven. If it does not, will the plaintiffs continue to suffer the illnesses? And if the report comes down in favour of the plaintiffs, and finds that management treated them unfairly, what then? Does the plaintiffs' prospect of recovery depend on the parent company management's response?

The letter of the 6th June, 2013, from Dr. Gerald Kean, the plaintiffs' solicitor, calling on the company to put forward proposals for compensation and redundancy for the plaintiffs may be reflecting the reality of the situation, but it may also have stiffened the resolve of the parent company's management to resist this pressure. It does seem to me that the plaintiffs are really making a case, perhaps without having expressly decided to do so, of constructive dismissal, i.e., that the parent company has made their lives so utterly miserable that it has undermined their authority and competence and made it impossible for them to do their jobs. But how can that avail them in this interlocutory application for injunctive relief?

The defendants point out that no disciplinary action has yet been initiated against the plaintiffs. As described above in the chronology and in the submissions, they do not rule out the possibility that it may happen but they insist that if it does it will comply with fair procedures and relevant legal requirements. Any decision on that will be made by the company and following appropriate investigations. The plaintiffs argue that the company is intent on blaming the plaintiffs for the tragedy of Mr Francis's death and imposing severe sanctions and that the rush to judgment by Mr Lubbe and the aftermath of his report are evidence of such blatant prejudgment that it would be impossible for the international management to oversee or carry out an impartial investigation of what happened and who might be deserving of criticism.

The defendants are agreeable to an investigation being conducted into the plaintiffs' grievances. The issue concerns the person who is to perform the task of inquiring. The plaintiffs want the Court to specify that it should be somebody from outside the defendant companies as there have been some previous cases where investigators came from outside.

Conclusions

The disciplinary process

The plaintiffs are not entitled to an injunction to stop disciplinary action, if any. They do not cite any authority in support of such an order being made at this preliminary stage, before any step has been taken to initiate even an investigation.

A company is entitled to subject workers to a disciplinary process. There may be a legitimate complaint or objection to the manner in which it is conducted or to the outcome or to any disciplinary sanctions that follow, but those questions come later.

Courts are reluctant to interfere in the internal affairs of a company in an area of legitimate corporate concern. The disciplinary process is governed by rules of law and contractual terms, express and implied, but until steps are taken, there is no basis or warrant for interference. It is relevant to note that it is proper for a company to be extremely concerned to establish all the relevant facts about a fatal accident and to want to look at how similar tragedies might be avoided in future. In that context, the people in charge of the location of the accident cannot expect to be immunised from criticism or sanction in advance by way of a court order.

The claim for an inquiry

Neither have the plaintiffs established a satisfactory case of any entitlement to an injunction ordering that an independent investigation be carried out, which would be a mandatory injunction. They are unable to point to any legal principle or authority that would entitle them to such an order. It would be very unusual on an interlocutory motion to give a mandatory injunction in any case. In the circumstances of this case, it would be entirely inappropriate and not consistent with the balance of convenience.

Just as with disciplinary matters, as to the claim for an inquiry, it is also obvious that how a company is managed is a matter for its own management and a court is not entitled, even if *prima facie* of opinion that an employee had a legitimate grievance or even a series of complaints, to dictate that there should be an independent or other sort of inquiry. Nor should the court supervise the process. If an employee exhausts a grievance procedure and is still dissatisfied, his options do not, in my opinion, include the right to demand an inquiry or specify its nature or to have a court impose that.

Grievances and complaints are a part of normal working environments. It is usual to have a grievance procedure such as is present in this case. The dispute as to whether it was invoked by Mr Elmes's email of the 25th April, 2013, was unnecessary. If he had actually considered it to be the initiation of the procedure, he would surely have followed up the response he thought unsatisfactory by going to the next stage. I think it is very doubtful whether that was a statement intended to initiate the grievance process. At any rate, I do not believe that the company can be faulted for not treating it as such. But I think that the company was wrong to insist that the plaintiffs had to return to work before they could report their grievances. In the result, however, all that became irrelevant when the solicitors took the sensible decision to furnish a grievance statement and to receive it as such, without prejudice to their positions on previous transactions.

On the nomination of a person to investigate the grievances, I think that a court will be very slow to interfere. It is impossible to lay down a general rule and none has been cited by counsel. No general statement will cover every situation. The issue here is whether the nominee is disqualified because he is an employee of the parent company. That could cause difficulty in some circumstances but I do not think that this court can assume that it will disable the investigator from doing his job. One must also bear in mind that there are legal protections in such a process on which the plaintiffs can rely.

Another point is that the court may be unable to satisfy the plaintiffs' demands for a nomination that will assure them of an impartial inquiry. If the company were to choose an outside investigator but the plaintiffs did not consent to the nominee, the court does not have jurisdiction to impose a person and does not have the capacity to find somebody to perform the task.

It is worth remembering also that the plaintiffs are not bound by the findings of an internal inquiry, otherwise than in their employment. They can still sue in the courts or under the unfair dismissal jurisdiction.

Since this is an interlocutory application for injunctive relief, it seems to me that even if the court found in favour of the plaintiffs on these two issues, in the sense that they established a fair case to be tried on either or both, the inquiry and discipline claims, the balance of convenience would lie overwhelmingly against granting injunctions.

Sick pay
The plaintiffs apply for an order compelling the employer to pay the employee's salary and all other emoluments under the contract of employment pending the determination of the substantive action, as occurred in *Fennelly v Assicurazioni* [1985] 3 I.L.T.R. 73. In this case Costello J made such an order given that without it the plaintiff would have been left without a salary and with nothing to live on. That shifted the balance of convenience in favour of the plaintiff as otherwise he would have been left virtually destitute. In *Harte v Kelly* [1997] ELR 125 Laffoy J noted that penury was not necessary for such an order to be made in favour of a plaintiff; the Court would make an order where to refuse it would result in injustice to the plaintiff.

There is a well-known series of cases in which this Court has addressed the difficult question of balancing the rights of employees and employers in regard to pay during absence of the former from work. Not all deal with sick pay but there are relevant precedents in which the Court has been prepared to find that payment of sick pay for a reasonable time was an implied term and that the prospect of damages at some remote future time was not an answer to the sick person's present need to provide sustenance for self and dependants. See for example *Mullarkey v. Irish National Stud Company Limited* [2004] IEHC 116.

The plaintiffs have been out of work since April and May, 2013 due to stress related illness, as they aver and as I accept for the purpose of this application. In May 2013, Mr. Elmes was in hospital with heart trouble that was exacerbated by stress and he has been out of work since the 30th April 2013; Mr. Keady has been absent since April 2013; and Mr. Callery since the 27th May 2013. They have not been receiving their salaries from dates that are six weeks after they left. The stress to which the illnesses relate is from conditions at work. The company has certified to the Department of Social Protection that the plaintiffs are out of work because of work related illnesses.

The plaintiffs submit that the refusal or stopping of sick pay is not in accordance with the plaintiffs' contracts of employment because "no one single salaried employee in the History of the Mine who has been absent from work has had sick pay stopped when unable to work, particularly in circumstances when absent for a work related issue."

The company's case is that the plaintiffs are entitled to six weeks only. That is as provided in the SIPTU agreement. That time has long since passed. The plaintiffs claim that in as far as the agreement with SIPTU provides for sick pay for six weeks, that has never been the practice. The affidavits debate this issue in some detail.

The affidavit evidence establishes that in previous cases, the company exercised a discretion whether to extend sick pay and it sometimes allowed it to continue and sometimes stopped it. The question arises in this case whether that would have happened. There is evidence that in a substantial number of cases sick pay continued for longer, and much longer, than the six weeks specified in the SIPTU agreement. It is clear that the company made a judgment and exercised a discretion in each case whether to continue payments and for how long.

The position in summary is that the SIPTU agreement provides employees not with a maximum but with a minimum entitlement of six weeks sick pay, subject of course to proper certification. Custom and practice in the employer company are that this is not the only payment that is made during absence for illness. There are cases where only six weeks pay was paid but they are exceptional. That is what would be expected of a good employer in the modern world. The company has discretion which it exercises in the particular case to draw a line and cease the payment. That is what was missing in these cases and which made them inconsistent and in conflict with the reasonable and sensitive practice normally followed by the employer. Payments of sick pay are of course subject to deduction as provided in the SIPTU agreement.

In these cases, the company did not exercise a discretion. It simply applied the specified term. But it seems to me that the plaintiffs

have made out a case on the affidavits that they were entitled to something more by way of consideration of their situations. They were entitled to have their cases considered in the same manner as other sick pay claimants but that did not happen. There was no exercise of discretion and the question is what entitlement the plaintiffs have, or they would have had, if that discretion had been exercised?

It seems to me that the plaintiffs have made out a case for a discretionary company practice of payment on a more generous basis than as provided in the SIPTU agreement. They satisfy the test of a strong case that the company should have considered whether to extend the period or periods and for how long, rather than simply relying on the specification in the SIPTU agreement.

I see no reason to think that the discretion would not have been exercised in the cases of the three plaintiffs to have extended sick pay for some significant or substantial time beyond the six weeks, in view of their seniority, service and records. In this regard, I believe that the plaintiffs have established a strong case.

The question then is for how long the payment would or should have continued. I do not think it can be open-ended. An obvious complication is that the plaintiffs claim that the actions of senior management have brought about their illnesses. There is no indication that the plaintiffs will recover until their complaints are resolved to their satisfaction. At the same time one cannot assume that an investigation will come down on their side so the possibility exists that this dispute will continue for a long time.

The decision on the interlocutory motion requires a balancing of interest between the plaintiffs and the defendants. It is impossible to be exact about this but having regard to the decided cases on this area, it seems reasonable considering the seniority of the plaintiffs, their work records, the nature of their illnesses and the past discretionary practice of the company to fix a period of six months.

As for any further period, the plaintiffs are entitled to apply for such to be considered but that is a matter for the defendants to determine on the merits of the applications in light of the above information, the prognosis in each case, the views of the defendants' medical advisers, the plaintiffs' co-operation with medical examinations and other material considerations.