Neutral Citation Number: [2011] IEHC 410

THE HIGH COURT

2011 8211 P

BETWEEN

DEIRDRE MCLOUGHLIN

PLAINTIFF

AND

SETANTA INSURANCE SERVICES LIMITED

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 8th day of November, 2011.

Factual background in outline

1. One of the few facts which is not in issue on this application for an interlocutory injunction is that the defendant is part of a group of companies, which has been referred to in the plaintiff's affidavit as "the Setanta Group of Companies". The parent company of the defendant is a Maltese registered company, Setanta Holdings Limited. In addition to the defendant it also has a Maltese registered subsidiary, Setanta Insurance Company Limited. The Setanta Group operates in the insurance sector providing general motor insurance products. The defendant operates in the Irish market, which I understand to mean that the defendant is in the business of providing general motor insurance products in the Irish market.

2. At issue in these proceedings is the plaintiff's contract of employment with the defendant and, in particular, her suspension and the commencement of an investigative process which is to lead to the implementation of a disciplinary process in relation to her employment. The affidavits sworn by the plaintiff are replete with allegations against persons associated with, using that expression in its broadest sense, companies in the Setanta Group, with reference to "conflict of interest", "power struggle", "an attempt to undermine and isolate" the plaintiff in her role, "an attempt to . . . find a way to get rid of" the plaintiff without complying with her contractual entitlements and so forth, all of which were denied by the deponent on behalf of the defendant. On the other hand, the deponent on behalf of the defendant, Emer Jordan, the Human Resources Manager of the defendant, has averred that the specific provision of her contract of employment on which the plaintiff relies is void by reason of, *inter alia*, the provisions of s. 28 of the Companies Act 1990 (the Act of 1990), as there is no evidence available to the defendant that the provisions of s. 28 were complied with in relation to the plaintiff's contract of employment. At the hearing of the interlocutory application, in addition to being referred to s. 28, the Court was referred to the decision of the House of Lords in *Criterion Properties Plc v. Stratford U.K. Properties LLC & Ors.* [2004] 1 WLR 1846 and the decision of the Court of Appeal of England and Wales in *Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation and Ors.* [1986] 1 Ch. 246.

3. It is obviously necessary to remind litigants and practitioners of what Lord Diplock stated in *American Cyanamid v. Ethicon Ltd*. [1975] 1 All ER 504, before outlining the criteria for the grant of an interlocutory injunction, which have been adopted in this jurisdiction. He stated (at p. 510) as follows:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

Hereafter, I propose merely to outline the essential facts which seem to me to be relevant to the application of the criteria on the basis of which an interlocutory injunction is granted or refused.

4. The contract of employment on which the plaintiff relies was dated 1st January, 2010. It stated that the plaintiff was to be employed primarily as general manager of the defendant. As regards the term and date of commencement, it was stated that the contract was concluded "for an indefinite duration" and the start date was 1st July, 2007. Clause 12 dealt with notice and provided that the plaintiff should be entitled to receive the appropriate period of notice set down in the Minimum Notice and Terms of Employment Acts, 1973 – 2001. However, it stipulated that the defendant, at its discretion, might elect to pay the plaintiff in lieu of notice. Further, it contained the allegedly void provision, which the plaintiff has characterised as a "generous" provision, which states as follows:

> "In case of loss of office, unless the [defendant] has cause to terminate, the [defendant] will pay you four times the remuneration package as outlined in clauses 7 and 8."

Clause 13 provided that, notwithstanding the notice period provided for in Clause 12, the defendant might, by written notice, terminate the plaintiff's employment immediately and without compensation, except for salary and holiday pay accrued due but unpaid, in the circumstances outlined. Those circumstances, *inter alia*, include "serious or repeated default by [the plaintiff] of [her] obligations of employment", and "gross or persistent misconduct, dishonesty or conduct tending to bring [the defendant] into disrepute". The defendant's grievance and disciplinary procedure was referred to in Clause 16. It is interesting to note that that clause stated that the plaintiff was not entitled to be accompanied by a legal representative to internal investigatory and/or disciplinary proceedings, although, as I understand the current position, the defendant would not enforce that restriction against the plaintiff. It was further stated that the company's disciplinary policy was set out in the "Employee Handbook". Clause 27 further provided that the plaintiff was subject to the procedures and rules laid out in the Employee Handbook. In fact, the Employee Handbook was not exhibited on affidavit until the day the application came on for hearing, 25th October, 2011, and at that stage counsel for the defendant objected to it being put in evidence. Obviously, the Court allowed it to be put in evidence because it is a crucial document, in that it deals with the procedures within the defendant's operations in relation to summary dismissal following investigation and a disciplinary process. It also deals with suspension.

5. While concerns were raised by the plaintiff with the defendant as to the manner in which she was being treated in her role as general manager from early 2011 onwards, her solicitors first became involved in late May 2011. At that stage, the plaintiff had gone

out on sick leave, her illness having been certified as "stress related illness" by her general practitioner. Her sick leave commenced on the 13th May, 2011. Her solicitors wrote to the defendant's solicitors on 30th May, 2011. In that letter the plaintiff's solicitors set out what her concerns were and they pointed out that she had attempted to raise her grievances in e-mails of 19th April, 2011, 21st April, 2011 and a reminder of 11th May, 2011, but the defendant had not responded to her genuine concerns. The plaintiff's solicitors requested that the defendant immediately address the grievances set out by the plaintiff. Despite a further letter of 21st June, 2011 from the plaintiff's solicitors to the defendant's solicitors, no response was forthcoming.

6. The plaintiff remained out of work on sick leave through May, June, July and August, 2011. On 12th August, 2011 at the request of the defendant, she attended the defendant's nominated medical practitioner for a medical evaluation. While the medical report which issued following that evaluation has not been put in evidence, the plaintiff has averred that, when she eventually managed to get a copy of the report, it was apparent to her that there was absolutely no obstacle in the way of her returning to work. Ms. Jordan has not taken issue with that averment. By e-mail dated 29th August, 2011, the plaintiff intimated to Ms. Jordan that she intended to return to work on 19th September, 2011.

7. While there was obviously some response from the defendant, in respect of which legal professional privilege has been claimed by the defendant, on the basis of the evidence before the Court, the next step was that, by letter dated 5th September, 2011, the plaintiff's solicitors wrote to the defendant's solicitors referring to a rumour of which the plaintiff had learned to the effect that the defendant intended to dismiss her from her position as general manager on the grounds of gross misconduct, which it was contended were allegations of which the plaintiff had never been made aware. The plaintiff's solicitors called on the defendant to confirm by close of business on 8th September, 2011 that the plaintiff remained the incumbent of the position of general manager and that she would return to work on 19th September, 2011 without any hindrance whatsoever. Proceedings in this Court for injunctive relief were threatened. That letter certainly evoked a response, which was contained in the defendant's solicitors' letter of 8th September, 2011. With that letter the defendant's solicitors enclosed a copy of a letter 7th September, 2011 from the defendant, which was signed by Ms. Jordan as Human Resources Manager to the plaintiff. The copy suggests that it was sent by registered post. However, it was wrongly addressed and the plaintiff's position is that she did not receive it. In any event, she received a copy with the letter of 8th September, 2011 and she became aware of its contents.

8. The letter of 7th September, 2011 marked what the defendant considered to be the commencement of its disciplinary process against the plaintiff and it is of crucial importance. As regards the manner in which the disciplinary process would be implemented, it stated that –

> "… in light of certain very serious matters that have recently come to the [defendant's] attention, the [defendant] intends to conduct an investigation into those matters in accordance with its Disciplinary Procedures. I have been nominated by the company to co-ordinate and conduct this investigation on its behalf."

The letter went on to state that the matters under investigation related to the defendant's "alleged role in the misrepresentation of the true position of the defendant's outstanding claims reserves and underwriting results for the 2009/2010 financial year end to the Board of the Maltese sister company", together with "other matters" related to alleged breaches by the plaintiff of both her fiduciary duties to the defendant and of the defendant's policies and procedures. The letter went on to state:

> "The purpose of the investigation is to establish the relevant facts related to the various matters under investigation and to prepare a report for consideration of the Board of the [defendant]. Upon receipt of the investigation report, the Board will then determine if there are sufficient grounds to warrant progressing to a formal disciplinary hearing in respect of any of the matters under investigation. You will be furnished with a copy of the investigation report, together with confirmation of the outcome of the investigation, in due course."

The plaintiff was then warned that the various matters under investigation, if proven to be true, are sufficiently serious so as to constitute "Serious Misconduct" under the defendant's Disciplinary Procedure, which could result in disciplinary action being taken against the plaintiff "up to and including summary dismissal".

9. The letter of 7th September, 2011 also dealt with the suspension of the plaintiff. It was stated that, in the light of the matters under investigation, the defendant considered it appropriate to place the plaintiff on suspension with immediate effect pending the outcome of the investigation in accordance with the Disciplinary Procedure. During the suspension period, the plaintiff would continue to be paid in full, but she would be required to make herself available to attend meetings that might prove necessary as part of the investigation process.

10. By way of general observation, while that letter does not follow "to the letter" the disciplinary process as set out in the defendant's Employee Handbook, it certainly follows its spirit. There are obviously difficulties in strictly applying the provisions of the Employee Handbook to the general manager, because its provisions are clearly designed for disciplining employees further down the employment hierarchy than the plaintiff. However, one particular complaint made by counsel for the plaintiff was that details of the "other matters" being investigated have not been given to the plaintiff at any time. That is a justifiable complaint.

11. The covering letter of 8th September, 2011 from the defendant's solicitors contained a denial of wrongdoing on the part of the defendant in relation to the various issues raised in the plaintiff's solicitors' letters of 30th May, 2011, 21st June, 2011 and 8th July, 2011. Having referred to the enclosed letter of 7th September, 2011, it was stated that an application to the High Court for *ex parte* injunctive relief was inappropriate and unnecessary. Any proceedings would be defended. In fact, the plaintiff's solicitors' response to that letter was to initiate these proceedings.

The course of the proceedings

12. The plenary summons was issued on 14th September, 2011. On the same day a notice of motion was issued returnable for 19th September, 2011 in which various interlocutory reliefs were sought. I will consider the detail of the reliefs sought later.

13. The grounding affidavit of the plaintiff was sworn on the same day. In it, after a plethora of detail, the plaintiff averred that she was absolutely convinced that the defendant's attempt to suspend her, which she contended was wholly unlawful and did not accord with any fair procedures whatsoever, given that no allegations had actually been made against her, was "a dressed up attempt" to remove her from her position on the grounds of gross misconduct, thereby ensuring that the defendant does not have to pay her notice entitlement pursuant to her contract of employment. She contended that, given the reputational damage being caused to her professionally, damages would not be an adequate remedy.

14. Ms. Jordan's replying affidavit was filed on 27th September, 2011. In that affidavit, Ms. Jordan, having averred that her investigation revolves around actions that were taken in late September 2010 which "gave rise to a significant overstatement of

underwriting results" for the year ended 30th September, 2010 and "substantial reductions in the prevailing claims reserves held in the books of the defendant at that time", outlined various reviews which had been carried out in relation to the defendant's claim management position from November 2010 onwards by an employee of the defendant and a consultant with expertise in insurance and, in particular, the personal injuries insurance area. She also referred to the fact that Mr. Derek Douglas became actively involved in the day to day management of the Setanta Group companies in June 2011 and that he became the chief executive officer of the Group following the resignation of Mr. Mike Matthews, the plaintiff's husband, from that position on 21st July, 2011. She averred that Mr. Douglas became aware of potential irregularities regarding the process adopted and the outcome for the 2010 year end claims reserve review shortly after assuming his role in June 2011 and she specifically pointed to an instruction which had been given by the plaintiff by e-mail in September 2010 and its consequences. Those matters, amongst others, she averred, gave rise to the decision to suspend the plaintiff and to initiate a disciplinary investigation.

15. Issues of the type relied on by Ms. Jordan as justifying the suspension of the plaintiff are unquestionably of very serious import to the management of an insurance business and where discovered require investigation. However, what follows in Ms. Jordan's affidavit has more of the hallmark of a reasoned determination against the plaintiff than merely an outline of why the invocation of the disciplinary process against the plaintiff was necessary. Ms. Jordan has dealt in detail with the outcome of the review exercises which had been undertaken earlier this year to the extent of exhibiting charts. One of the charts, she has averred, reveals "the full impact of what appear to be wholly inaccurate representation of the true claims position as at 2010 financial year end". The other chart, she has averred, demonstrates that "the level of active claims [in July, August and September 2010] with only nil or first notification reserves is highly unusual and suggests a substantial degree of incomplete and inadequate reserving for new cases which had not been taken into consideration by the plaintiff . . . and which further misrepresented the true claims position at the 2009/2010 financial year end".

16. A number of comments are apt in relation to those averments. They point to conclusions having been reached by Ms. Jordan as to misconduct on the part of the plaintiff. Further, one wonders if they are conclusions which a person with human resources expertise is entitled to reach. However, counsel for the plaintiff took particular objection, justifiably in my view, to an averment by Ms. Jordan in the following terms:

> "The Plaintiff is quite correct when she says that the Defendant is dissatisfied with her management of its business and in particular the manner in which she has conducted herself in her dealings with staff, service providers, third party representatives and customers of the Defendant. Her conduct in that regard would, on its own, warrant the termination of her employment for cause."

17. Finally, in her affidavit, in addressing the plaintiff's contention that there was a conspiracy to dismiss her, Ms. Jordan averred that the Board of the defendant had passed a resolution delegating the adjudicative function in any disciplinary hearing to an independent third party. That apparently happened on 23rd September, 2011. The relevant resolution was not exhibited but the agenda for the meeting to be held on that day in Malta and by teleconference was handed in to Court. Item 2 on the agenda provided that Ms. Jordan would be "responsible for assembling the relevant evidence and formulating allegations, if any, against" the plaintiff. It further provided that Ms. Jordan would present the details of such allegations, and any relevant information underpinning the same, to a panel of three nominated independent adjudicators. Mr. Douglas was to be authorised to determine who the three nominated independent adjudicators should be. It was to be resolved that the defendant would continue to observe "principles of fair procedure and natural justice at all times" in the matter.

18. The plaintiff swore a further affidavit on 5th October, 2011 in which she addressed the various matters referred to in Ms. Jordan's affidavit. The conflicts of evidence thrown up on the affidavits cannot be addressed on this application.

19. A further affidavit was sworn by Ms. Jordan on 10th October, 2011 which compounded the conflicts of evidence and the complexity of the legal issues raised, for instance, by introducing for the second time what is described as "a unique provision" – s. 28 of the Act of 1990. However, Ms. Jordan disclosed that a panel of three barristers had been nominated by the defendant to adjudicate at any disciplinary hearing and the barristers were named. One example of the degree of confusion which seems to pervade the defendant's handling of the disciplinary process against the plaintiff is that it is not clear whether one adjudicator is to be chosen from the panel of three or whether the entire panel will adjudicate as item 2 on the agenda for the meeting on 23rd September, 2011 suggests.

20. The plaintiff's third affidavit was sworn on 19th October, 2011. In that affidavit she averred that she has no difficulty with a "*bona fide* investigation or disciplinary process" into "her conduct". What she objects to is what is occurring, what she described as "a sham investigation with a preordained outcome". She characterised the independent disciplinary hearing as, in effect, "a sentencing hearing on foot of findings of misconduct to be made by Ms. Jordan".

21. The hearing of the interlocutory application, which commenced on 25th October, 2010, continued to the next day.

The reliefs claimed

22. I will now consider the reliefs sought by the plaintiff on the notice of motion and their current status.

23. The first relief sought on the notice of motion is an order directing the rescinding of the purported suspension of the plaintiff and an order restoring her to her contractual position. The plaintiff, even if she did not get the letter of 7th September, 2011 directly from the defendant by post, did receive it as an enclosure with the letter of 8th September, 2011 from the defendant's solicitors. It is true that the defendant did not follow the procedure for suspension set out in Clause 5.7.1 of the Employee Handbook, which involves engagement between the employee's manager and a human resources representative and the employee before the decision is made to implement the decision to put on suspension. Counsel for the defendant submitted that an argument based on non-compliance with the procedure had not been made by the plaintiff. I do not think it appropriate to attach any weight to that point. However, I do think it is appropriate to take a pragmatic view of the position in which the parties find themselves, in the light of the fact that the plaintiff's position is that of general manager and prior to her suspension she was out on sick leave for almost four months. She is on suspension on full pay. Having regard to all of the circumstances, I do not consider that the plaintiff has made out a case for an interlocutory injunction rescinding the decision to suspend her. In any event, I am satisfied that the decision I have made is in line with two authorities put before the Court by counsel for the defendant: the decision of Kearns J., as he then was, in *Morgan v. Trinity College* [2003] 3 I.R. 157; and the decision of Clarke J. in *O'Brien v. Aon Insurance Managers (Dublin) Ltd.* [2005] IEHC 3. I am satisfied on the evidence that this is a holding suspension, not a punitive suspension.

24. It follows from the fact that the plaintiff is on suspension on full pay that the reliefs sought by the plaintiff in relation to the payment of her salary and perquisites and her other remunerative entitlements does not arise.

25. The plaintiff originally sought an injunction restraining the defendant from continuing "any further investigation, inquiry or disciplinary investigation into the alleged conduct" of the plaintiff. The plaintiff also sought an injunction preventing the defendant from dismissing the plaintiff or from taking any steps adverse to the plaintiff on foot of "its purported investigation or disciplinary procedure" into the plaintiff. Further, the plaintiff sought an injunction restraining the defendant from taking "any step however directed at the termination of the plaintiff's employment". As I have already recorded, the plaintiff eventually indicated on affidavit that she has no difficulty with a *bona fide* investigation or a disciplinary process into her conduct. Counsel for the plaintiff made it clear that the plaintiff's case is not that there should be no investigation. Her case is that the continuation of the investigation which Ms. Jordan was appointed to embark on should be restrained pending the trial of the action, because it would infringe the plaintiff's entitlement to an investigation followed by a disciplinary process in accordance with fair procedures. In my view, the crucial question to be determined by the Court on this application is whether the plaintiff has established that there is a fair issue to be tried that her rights will be infringed if such investigation by Ms. Jordan, followed by a disciplinary process, is allowed to continue.

Fair issue to be tried that the plaintiff's rights will be infringed?
26. On the assumption that it is the process outlined in the letter of 7th September, 2011, rather than the process outlined in the defendant's Employee Handbook, which the defendant intends to adopt in this case, the process intended to be applied is as follows:

> (a) Ms. Jordan will conduct an investigation on behalf of the defendant into the matters identified in the letter of 7th September, 2011, which I have set out earlier. The purpose of the investigation is to establish the relevant facts and to prepare a report for the Board.
>
> (b) On receipt of the investigation report, the Board will then determine if there are sufficient grounds to warrant progressing to a formal disciplinary hearing in respect of any of the matters under investigation.
>
> (c) Apart from stating that the plaintiff will be furnished with a copy of the investigation report, together with confirmation of the outcome of the investigation, the letter does not contain any information as to by whom or how the formal disciplinary hearing will be conducted. However, presumably as a reaction to the plaintiff's proceedings, the defendant has determined that "the adjudicative function in any disciplinary hearing" will be delegated to an independent adjudicator identified in Ms. Jordan's last affidavit as all, or one, of the named barristers on the panel referred to.

While the manner in which the disciplinary hearing will be conducted has not been elaborated on, the submission made on behalf of the defendant that it is premature for the plaintiff to seek interlocutory relief in respect of that aspect of the process at this juncture has merit. Having said that, as I understand the position, having regard to the way in which matters have developed since the proceedings were initiated, the plaintiff's complaint relates to the first stage of the process, the investigation, and what is proposed in relation to it.

27. In relation to when a court should intervene in a disciplinary process at investigation stage, the following observations made by Clarke J. in *Minnock v. Irish Casing Co. Ltd. and Stewart* [2007] ELR 229 are instructive:

> "It seems to me, firstly, as a matter of law that the authorities are now beginning to settle upon a test as to the appropriate attitude to be taken or the test to be applied in cases such as this. It clearly is the case that in the ordinary way, the court will not intervene necessarily in the course of a disciplinary process unless a clear case has been made out that there is a serious risk that the process is sufficiently flawed and incapable of being cured, that it might cause irreparable harm to the plaintiff if the process is permitted to continue."

Clarke J. went on to give as an example of an investigation which was not so flawed, the "pure investigation" which it had been found was being conducted in *O'Brien v. Aon Insurance Managers (Dublin) Ltd.,* stating –

> ". . . it seems clear on all the authorities that that type of pure investigation which does not involve any findings is not a matter to which the rules of natural justice apply and is not a matter therefore which the courts should interfere with. The fact that an employee may be obliged as a matter of his contract of employment to assist in any such investigation does not confer on it the status of an inquiry which carries with it an obligation to act in accordance with the rules of natural justice."

As regards the investigation which was being carried on in the *Minnock* case, Clarke J. observed that it was clear that the second defendant, who was conducting the investigation on behalf of the first defendant employer, had purported to make what he described as findings, and had not, therefore, confined himself simply to collecting the evidence and determining that there was a case to answer to warrant formal disciplinary proceedings. He had gone further than that. On that basis, Clarke J. concluded that the inquiry could not be characterised as the "pure evidence-gathering type" to which the rules of natural justice do not apply.

28. On the question whether a clear case has been made out by the plaintiff that there is a serious risk that the investigative process which Ms. Jordan has been authorised to embark on is sufficiently flawed and incapable of being cured that it might cause irreparable damage to the plaintiff if it is permitted to continue, the following considerations are relevant. If the letter of 7th September, 2011 stood on its own, one could parse and analyse it and, perhaps, seek clarification as to what the defendant intended by the purpose of the investigation being "to establish the relevant facts" and what matters were under investigation other than the alleged misrepresentation in relation to outstanding claims reserves and underwriting results for 2009/2010 and form a view as to whether what was proposed was a "pure investigation". The formation of that view would, no doubt, be influenced by whether the matters under investigation, which have not been identified, would, if proven to be true, be sufficiently serious as to constitute serious misconduct, as was contended in the letter of 7th September, 2011. However, the defendant has not availed of the opportunity to specify what the "other matters" are. More importantly, the letter of 7th September, 2011 does not stand on its own. We know from the affidavit evidence of the investigator, Ms. Jordan, that, aside from the outstanding claims reserves and underwriting results for 2009/2010, Ms. Jordan has made the judgment that the conduct of the plaintiff warrants her dismissal, presumably, because she considers it constitutes serious misconduct. In relation to what happened in the days leading up to the end of the defendant's financial year 2009/2010 Ms. Jordan has made comments, which I have not quoted, which certainly point to a pre-judgment on her part in relation to the conduct of the plaintiff and has sought to support that view by reference to the charts she has exhibited. If the averments contained in Ms. Jordan's affidavits represent her understanding and that of the officers of the defendant as to what "establishing the facts" means, one must conclude that it goes beyond a "pure investigation".

29. For that reason, I am satisfied that this is a case in which it is appropriate for the Court to intervene at this juncture and restrain the defendant from carrying out the investigation in the manner proposed, because I have absolutely no doubt that the test adumbrated by Clarke J. has been met.

Adequacy of damages/balance of convenience
30. Moreover, I am satisfied that damages would not be an adequate remedy for the plaintiff if she were summarily dismissed on foot of a flawed process, because of the reputational damage she would suffer. I am also satisfied that the balance of convenience lies in favour of granting an injunction limited to restraining the defendant from continuing an investigation conducted by Ms. Jordan in accordance with the mandate given to her in the letter of 7th September, 2011. However, it is open to the defendant to initiate an alternative investigation in accordance with the plaintiff's contract incorporating the provisions of the Employee Handbook modified to suit the plaintiff's position and to proceed to a disciplinary process. It is also open to the defendant to continue the suspension of the plaintiff until the process is completed, but both sides should co-operate to complete it as soon as reasonably practicable.

Order
31. There will be an order, which will record the undertaking as to damages given by the plaintiff, restraining the defendant from continuing the investigation to be conducted by Ms. Jordan as notified to the plaintiff in the letter of 7th September, 2011 until the hearing of the action.