Neutral Citation Number [2005] IEHC 170

THE HIGH COURT

[2005 No. 1503 P]

BETWEEN

NOREEN O'SULLIVAN

PLAINTIFF

AND
MERCY HOSPITAL CORK LIMITED

DEFENDANT

Judgment of Mr. Justice Clarke delivered 3rd June, 2005.

1. In this application the plaintiff seeks a variety of interlocutory orders designed to restrain the defendants from progressing, in a manner which she contends is unlawful, with enquires and procedures relating to her employment.

2. Despite the lengthy affidavits filed by both sides the facts that are material to the issues as they became refined in the course of the hearing before me are not unduly complex and are, to a significant extent, not in dispute.

The Factual Context

3. The plaintiff is Assistant Director of Nursing at Mercy University Hospital in Cork City. She has been employed by the defendant for almost 30 years and has never been the subject of disciplinary proceedings of any sort. She was promoted to her current position in 2002 as a result of an open and nationally-advertised competition. The current grade of Assistant Director of Nursing compares to the previous grade of Assistant Matron.

4. The events which lead to the current difficulties between the parties may be said to commence in the latter part of 2003 when, it would appear, concerns emerged about the performance of certain members of staff, and one in particular, employed in a clerical capacity in a department of the defendant hospital with which the plaintiff was not involved. It would appear that a record may have been taken of alleged failures on the part of the member of staff concerned to carry out her duties in a proper manner. It would also appear that a report was compiled setting out those failures ("the performance report"). In unusual circumstances the performance report came into the hands of the staff member concerned while she was legitimately and with permission opening the post of a more senior individual who was on holidays. As a result of reading the contents of the performance report the individual concerned complained that the contents of that report reflected bullying and harassment on the part of certain individuals.

5. It is important to note that in her complaint the individual concerned named two other members of staff whom she state were the persons whom she believed had compiled the performance report and also in a general way and without naming any individual, indicated that her complaint extended to those who had caused the performance report to come into existence.

6. Arising from her complaint the defendant appointed Mr. Declan Brown a Consultant Occupational Psychologist to investigate the allegations made. The terms of reference given to Mr. Brown were not put in evidence at this interlocutory hearing. However he did produce two separate reports dated the 17th December, 2004 ("the Brown Reports"). The two reports are respectively headed by naming the individual who made complaint as the complainant and each of the named persons against whom complaint was made as respondent in the respective reports. Insofar as the reports are material to these proceedings Mr. Brown concluded that the two named individuals had, indeed, compiled the performance report. Mr. Brown also concluded that the plaintiff and another named senior member of the nursing staff were involved with the initiation of that report. He went on to conclude that:-

> "Furthermore where a report is compiled over a seven month period without the knowledge of the particular employee and where monitoring is formalised without communication about alleged performance problems is such action indirect bullying?"

7. He further concluded that bullying occurred by what he described as the initiators (who he named as the plaintiff and the other senior nurse to whom I referred above) as well as those whom he described as the narrators and compilers who he identified as the two named individuals against whom complaint was expressly made.

8. Thus the Brown Reports contain a clear and unequivocal finding that the plaintiff had been guilty of bullying.

The case against the Brown Reports

9. The principal complaint which the plaintiff makes as to the Brown Reports is to the effect that she was never informed that Mr. Brown was considering making an adverse finding against her at all. She was interviewed by Mr. Brown. She also gave a written account of her position on the matters which were put to her at interview which she compiled in the days immediately after the interview. That written account is annexed to the report. She has deposed on affidavit that when she was asked to become involved in what I might call the Brown enquiry she herself asked whether she should be represented by her trade union but was informed that she was simply a witness. At no stage in the course of the enquiry was she ever informed that the situation had changed and that Mr. Brown was now considering making adverse findings in relation to her. No evidence was presented at the hearing before me from Mr. Brown. At certain stages in the course of the filing of affidavits the defendant hospital seemed to reserve its position. For example at para. 12 of the initial replying affidavit Mr. John Murphy the Chief Executive Officer of the hospital indicated that he "cannot comment on whether Mr. Declan Brown will allege that at any time during the investigation process the plaintiff was made aware that any finding of any nature whatsoever would be made against her or whether she was ever afforded an opportunity to respond to such complaint as might exist against her or otherwise have professional advice or representation in relation to such complaint". However it would seem to be the case that by the time the hearing was concluded it was accepted on the part of the hospital that Mr. Brown had not taken any such action. For the purposes of this application there is no evidence before me that Mr. Brown did any of the things which the plaintiff claims he did not do by way of alerting her to the possibility of an adverse finding being made against her. In those circumstances, and for the purposes of this interlocutory hearing, it seems to me that I must operate on the basis that Mr. Brown was guilty of a significant failure in the manner in which he conducted his enquiry in failing to give any advance notice to the plaintiff that he was considering making a finding adverse to her interest. Indeed it appears that Mr. Brown made a finding of bullying against a number of individuals arising out of the fact that, in his view, they monitored or caused to be monitored an individual's conduct and reached conclusions about the adequacy thereof without informing the individual concerned. It is not, in my view, putting it too far to suggest that on the evidence before me Mr. Brown did virtually the same thing in respect of the plaintiff. There is evidence that other persons called as witnesses to his enquiry were questioned about the conduct of the plaintiff. This has not been denied. He thus conducted an enquiry which had at least as part of its focus and undoubtedly had as part of its findings matters adverse to the plaintiff and yet gave the plaintiff no notice of the fact that he was so doing. It seems to me, therefore, that I must approach this application on the basis that no reliance can be placed upon the report of Mr. Brown insofar as it relates to the plaintiff.

10. I can readily understand that the fact that the Brown Reports were compiled in such flawed circumstances placed the hospital in a difficult position. The issue which is now before the court concerns the manner in which the hospital has attempted to deal with that difficult situation.

The O'Brien Inquiry
11. The hospital decided to set up a second enquiry and appointed a distinguished member of the Cork Bar, Ms. Ann O'Brien, to conduct same. No suggestion is made that there is anything inappropriate about the identity of the person so appointed. However the plaintiff contends that the nature of the enquiry now being sought to be put in place by the hospital is legally flawed for a number of reasons:-

> 1. That the terms of reference incorporate, by reference, the findings of the Brown Reports and as such, it is contended, any enquiry will necessarily be tainted by the flawed nature of the Brown Inquiry.
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> 2. It is suggested that the factual basis for the findings set out in the Brown Reports as against the plaintiff could not, in any event, amount to bullying and that there is thus, no basis for the O'Brien Inquiry.
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> 3. It is suggested that certain of the procedures proposed for O'Brien Inquiry do not conform with the plaintiff's contract of employment.

12. On that basis it is sought to restrain the conduct of the O'Brien Inquiry.

13. Before analysing each of those claims it should be noted that in the course of his submissions to the court counsel for the defendant made clear the hospital's position in relation to the O'Brien Inquiry.

The Hospital's Position
14. It was made clear that it was accepted by the hospital that no reliance of any sort could be placed upon the Brown Reports insofar as they affected the plaintiff. It was suggested that Ms. O'Brien would be asked to look again at all of the matters which had been enquired into by Mr. Brown insofar as relevant to the plaintiff and should do so afresh. Finally it was suggested that the O'Brien Inquiry was not intended to form part of any of the formal disciplinary processes set out in the various documents which govern disciplinary matters within the hospital. It was suggested that the enquiry was, therefore, of a preliminary type which would inform a decision by the hospital as to whether to invoke the hospital's disciplinary procedure. That procedure in turn involves an initial informal process followed by a formal investigation and, possibly, a further full disciplinary hearing.

15. It should be emphasised at this stage that counsel for the plaintiff made it clear at an early stage in the course of her submissions to the court that she did not contend on behalf of the plaintiff that the hospital could not set up another enquiry into the matters which have given rise to these proceedings. She did state that it was the plaintiff's position that such an enquiry could only be established if the defendants withdrew the adverse findings against her as set out in the Brown Reports and also conducted any subsequent enquiry in accordance with the relevant codes of practice.

16. It therefore seems to me that there is not as much between the positions of the parties as identified as a result of the hearing before me as might have been anticipated from a reading of the papers in advance. In fairness to the plaintiff I should state that I, along with counsel for the plaintiff, had not anticipated from a reading of the affidavits and materials put before the court by the defendant that the position which was ultimately adopted by counsel for the defendant in the course of his submissions would, in fact, be the hospital's case. I have already referred to the portion of the hospital chief executive's affidavit which appears to reserve the hospital's position in relation the question of whether proper procedures were followed out by Mr. Brown. In that replying affidavit Mr. Murphy goes on to indicate that the hospital placed reliance on the fact that "in the opinion of an independent investigator the plaintiff, perhaps unwittingly, in her involvement in initiating the report may have been guilty of bullying and harassment in the workplace". Such an averment does not convey the impression that the hospital was placing no reliance whatsoever on Mr. Brown's findings. Later on in the affidavit Mr. Murphy draws attention to paragraph 5 of the terms of reference of the O'Brien Inquiry. That paragraph notes the conclusion of Mr. Brown (in each of his reports) to the effect that there was indirect bullying by the plaintiff and another named individual. The correspondence which predated these proceedings also needs to be considered. In their initial letter of complaint dated the 27th January, 2005, the Plaintiff's Solicitors sought "a full and unequivocal withdrawal of the" Brown Reports. The reply of the 2nd March, from the hospital's solicitors sought to defend the status of the report. Against that background it might reasonably have been expected that a change in that position would have been set out in clear and unambiguous terms. As late as the second replying affidavit sworn on behalf of the Defendants on the 23rd May, 2005, the plaintiffs demand for withdrawal was described as "utterly unreasonable". If it was the case that the defendants were concerned to ensure that the Brown Reports were only withdrawn in respect of the findings against the Plaintiff and not others then this could have, and should have, been made clear. If a distinction was to be drawn between "withdrawal" and agreeing that the reports were such as could not be "stood over" (as Counsel described it at p. 44 of the Transcript, day 2) then this too could have been made clear. In fairness to the hospital the terms of reference of Ms. O'Brien do state that the hospital was not satisfied to initiate its disciplinary procedure in respect of the plaintiff and the other named individual as the hospital was not satisfied that the individuals concerned were given sufficient opportunity to make submissions or statements regarding the nature and extent of their involvement as identified by Mr. Brown. There is, however, a difference between not initiating disciplinary procedures and treating as of no effect.

A Fair Issue to be Tried
17. Against that background it is necessary to consider whether the plaintiff has established a fair issue to be tried. The first question concerns the issue of whether the terms of reference of the O'Brien Inquiry are such as to lead, potentially, to that enquiry being tainted by what is alleged to be the flawed nature of the Brown Reports. I am satisfied that subject to one legal issue to which I will return there are arguable grounds that the terms of reference are so tainted. It may be that all that it was intended to do in the terms of reference for the O'Brien Inquiry was to draw attention to the fact that there had been a previous enquiry into the matter. It is, of course, the case that the fact that various accounts were given to Mr. Brown is a fact which could properly and if appropriate be taken into account by Ms. O'Brien in the course of her enquiry both to direct her attention to individuals whom she might wish to interview and also for the purposes of questioning those individuals most particularly if they seem to give a different account to her than they gave to Mr. Brown. To that limited extent it is permissible to have regard in a further enquiry to the Brown Reports. However subject to the question of whether the rules of natural justice applied in the compilation of the Brown Reports there does not seem to me to be any stateable defence on the evidence before me to the plaintiff's claim that the report was compiled in flagrant disregard to those principles and should be quashed. Subject to that legal issue it seems to me that it is at least arguable that no subsequent enquiry can legitimately be conducted which places any reliance on or has any regard to the Brown Reports save to the limited extent referred to above. I am satisfied that it is at least arguable that the terms of reference for the intended O'Brien Inquiry place such a reliance. Subject to the legal issue referred to above I am, therefore, satisfied that the plaintiff has made out an arguable case.

18. I now turn to that legal issue. Counsel for the defendant draws attention to my decision in *O'Brien v. Aon Insurances Manager (Dublin) Limited* (Unreported, High Court, Clarke J. 14th January, 2005) and to the judgment of Kearns J. in *Morgan v. Trinity College* [2003] 3 I.R. 157 which I followed in *O'Brien*. Both cases are concerned with the extent to which the rules of natural justice may be applicable to a preliminary investigation. Firstly it is important to emphasise that preliminary investigations may take one of a number of forms.

19. At one end of the scale is an entirely informal investigation carried out by an employer for the purposes of ascertaining whether there might be a basis for instituting disciplinary procedures. I use the term informal for the purposes of indicating that such an enquiry has no formal validity even though it may, in the course of its conduct, take on a certain degree of formality where individuals are interviewed and, most particularly, where its conduct may be entrusted to an outside individual. It was such an informal investigation that had been engaged in on behalf of the defendants in the *O'Brien* case. Such an investigation does not purport to reach any conclusions other than, perhaps, to determine that disciplinary proceedings should be instigated and to established the evidence which might form the basis of such proceedings or, if the investigation is carried out by a third party, to make recommendations in relation to the above to the employer. It is important to note that at p. 8 of the judgment in *O'Brien* I indicated that counsel for the defendant in that case "likened the document to a book of evidence prepared in advance of a trial". For a report on an investigation to come into this category it does not seem to me that it should contain anything that might smack of findings but it can, of course, record the evidence that has been uncovered and state the position of any parties affected by that evidence in relation to such evidence.

20. At the other end of the spectrum there are statutory schemes which require a decision of a particular body as to the existence of a *prima facie* case as a pre-requisite to formal disciplinary proceedings. Where it is provided by statute or rule that the respondent can be heard at that stage there is little doubt but that at least certain of the rules of natural justice apply to the initial enquiry which is designed to determine whether a prima facie case has been made out.

21. In between those two extremes may be a variety of forms of preliminary enquiry which may vary as to their formality in the sense of whether they are a formal and necessary step to a subsequent stage in a disciplinary process. They may also vary as to the extent that the inquirer may be authorised to make findings. It may well be that the extent (if any) to which any or all of the rules of natural justice may apply to such inquiries may vary depending on the nature and purpose of the enquiry involved. The judgment of Kearns J. in Morgan amounts to a finding that the plaintiff in that case was not entitled to challenge, on the grounds of lack of fair procedures, a report by the Senior Dean of Trinity College on the basis that in the absence of an agreement by the employee concerned same could not give rise directly to disciplinary sanction. It is important to note, as was pointed out by counsel for the plaintiff in these proceedings, that the principal focus of the plaintiff's claim in *Morgan* was to remove a suspension which had been placed on him as part of the disciplinary process pending completion thereof. Furthermore it is not clear that the argument now made by counsel for the plaintiff to the effect that a distinction must be made between an enquiry which is for the purposes of gathering evidence and making recommendations as to further action on the one hand and an enquiry which is required to reach conclusions which will remain on the record on the other hand was made before Kearns J. In the circumstances I am of the view that it is at least arguable that the plaintiff in the circumstances of this case was entitled to have the principles of natural justice applied in the conduct of the enquiry by Mr. Brown on the basis that it would appear that Mr. Brown was asked not just to compile evidence and make recommendations but also to make findings which would potentially be adverse to the interests of employees. In addition the fact that the Brown Inquiry was, as a matter of contract, apparently a part of the defendants disciplinary process (as evidenced by the fact that it has lead to disciplinary hearings against the named respondents), is, arguably, also a factor. It should also be noted that the only absence of fair procedures relied upon by the plaintiff in *Morgan* was the fact that he (Mr. Morgan) had not been afforded an opportunity to cross examine the witnesses against him. He had, unlike the plaintiff in this case, being given a clear account of the accusations against him and the evidence which, it was contended, supported same. It may well be that the right to cross examine witnesses does not necessarily arise at every stage in a process.

22. I am therefore satisfied that the plaintiff has made out a *prima facie* case that the terms of reference of the O'Brien Inquiry are such as to render that enquiry tainted by what, on the basis of the evidence before me at this stage, I must conclude was a legally flawed enquiry conducted by Mr. Brown.

Definition of Bullying

23. In relation to the next issue the plaintiff contends that on the basis of what is known from the accounts of persons who apparently gave evidence to Mr. Brown it could not be concluded that the plaintiff was guilty of bullying having regard to any appropriate definition of bullying. Bullying is defined in the Code of Practice detailing Procedures for Addressing Bullying in the Workplace in the following terms:

> "Workplace Bullying is repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual's right to dignity at work. An isolated incident of the behaviour described in this definition may be an affront to dignity at work but, as a once off incident, is not considered to be bullying."

24. While there are a number of slight variations in the way in which bullying is defined in various other documents which may be material to this case it appears clear that each definition includes a requirement that the activity concerned should be more than a "one off". It does, however, appear to me that it is premature to raise this issue at the current stage. It should not be assumed that any person charged with a consideration of the plaintiff's conduct will miss apply an appropriate definition of bullying. It is for those who may be properly entitled to consider either whether to invoke disciplinary procedures or to reach conclusions on foot of the conduct of such procedures to determine, initially, what conduct may be said to amount to bullying. If such persons come to a legally impermissible conclusion then the courts jurisdiction to quash such determination can be invoked. However I do not believe it appropriate to invoke the courts jurisdiction in advance in a case such as this.

Failure to comply with procedures

25. The third issue concerns the plaintiff's contention that it is clear that the defendant hospital does not intend to comply with the procedures set out in the various codes of practice which, it is common case, bind the conduct of disciplinary proceedings relating to harassment or bullying in the defendant hospital. However it seems to me that in the light of the position adopted by the hospital in the replying submissions of their counsel before me that issue no longer arises. It has been made clear that the enquiry which it is intended Ms. O'Brien should carry out is not an enquiry which forms part of either the informal or formal processes described in the various codes of practice. It is, it is now made clear, an enquiry which is intended to inform the minds of the hospital as to whether it should initiate the procedures set out in the codes by the making of a formal complaint against the plaintiff.

26. Again in fairness to the plaintiff it does not seem to me that that position was at all clear from the papers which had been filed in

advance of the hearing. What was clear was that the plaintiff believed that the investigation was one to which the "Dignity at Work Policy for the Health Service" applied and she complains at para. 47 of her grounding affidavit that in certain respects the procedures required by that policy for the investigation of bullying complaints were not being complied with. There does not seem to be anything in the replying affidavits which sets out in an unequivocal way a clear statement to the effect that the enquiry which it was intended Ms. O'Brien should carry out was not one contemplated as even forming part of the process set out in that policy. However that matter has now been made clear and I must deal with the case as it now is. While acknowledging that this aspect of the case must be dealt with on the basis of what is now said I should note that the submissions of Counsel for the defendant in respect of the terms of reference of the O'Brien Inquiry cannot be taken to alter those terms from the natural meaning of the words contained in the document. Therefore while the position taken by counsel as to the status of the O'Brien Inquiry is decisive as to that status it is at least arguable that his position on the interpretation of the terms of reference is not.

27. In those circumstances and solely on the basis of the clear statement made by counsel for the defendant at the hearing to the effect that this enquiry does not form part of any disciplinary process (even at a preliminary stage) which might result in a sanction I do not believe that a fair issue has been made out under this heading.

Conclusions on Fair Issue
28. I am, therefore, satisfied that a fair issue to be tried has been made out to the effect that under the existing terms of reference the proposed enquiry intended to be conducted by Ms. O'Brien is arguably tainted by what, on the basis of the current evidence I must conclude, was a legally flawed enquiry by Mr. Brown.

Damages an Adequate Remedy
29. I must now consider whether damages would be an adequate remedy. While it is true to state that the plaintiff has claimed damages in these proceedings the jurisprudence in this area is full of cases where the court has taken the view that it should intervene by way of injunctive relief where it can be shown that there are legal flaws in a significant disciplinary process. The mere fact that damages are claimed does not, it seems to me, alter the position that damages would not be an adequate remedy for someone in the position of the plaintiff if her record were to be wrongly sullied as a result of a flawed legal process. In the circumstances I am satisfied that damages would not be an adequate remedy.

Balance of Convenience
30. I now turn to the balance of convenience. As I indicated at an early stage in the course of this judgment I have sympathy for the difficult position in which the hospital finds itself as a result of what would appear to have been a seriously flawed initial report. I accept that that report was compiled by an independent person over whom the hospital had no direct control. I also accept that there is no evidence upon which one could base a view that the hospital was, itself, in anyway at fault in giving rise to the infirmities which apparently undermine that report. It is, however, nonetheless a report which was compiled on behalf of the hospital and it is, in that sense, the hospital's report. The fact that there may be difficulties for the hospital in dealing with the legitimate interests of all of the parties involved which difficulties are significantly compounded by the fact that this process would appear to have gotten off to a most inauspicious start does not alter the fact that the plaintiff is entitled to have her rights and her reputation dealt with in accordance with law. Where she has, as I have found, made out an arguable case that what is intended will be in breach of those entitlements I am satisfied that the balance of convenience would favour the granting of an interlocutory injunction unless some particular and exceptional countervailing injustice that would occur by reason of a delay could be pointed to. I am not satisfied that any such countervailing factor has been established and in particular I am not so satisfied provided that the full hearing of this action can, as I intend it will, be made ready for hearing in a relatively short period of time. In that regard I do note the comment made by counsel for the plaintiff to the effect that the Brown Report post dated the events into which it enquired by at least eight months.

31. In all the circumstances I am therefore satisfied that the plaintiff is entitled to an interlocutory injunction restraining the conduct of the O'Brien Inquiry as currently constituted. However for the avoidance of doubt I would wish to make it clear that in my view there could be no objection to the conduct of such an enquiry provided that its terms of reference were altered in such a way that either removed all reference to the Report of Mr. Brown (though not necessarily to the content of any evidence which may have been given to Mr. Brown) or alternatively made it absolutely clear that no reliance of any sort could be placed upon any conclusions reached by Mr. Brown.

32. It is not part of the function of the court to advise on the form of Terms of Reference that might be immune to attack. However it may be that the hospital will decide to provide Ms. O'Brien with fresh terms of reference.

33. In that context I should comment that in my view it would be prudent (in the event that the hospital wished to alter the terms of reference so as to bring them into a state where they would not be in conflict with the terms of the interlocutory injunction which I intend to grant), that the terms of reference should make clear (which the current terms of reference do not) precisely what matters it is that Ms. O'Brien is being requested to make findings on and should also, for the avoidance of doubt, make clear that the purpose of the enquiry is to inform a decision on the part of the hospital as to whether to invoke the procedures set out in the relevant bullying and harassment policies rather than as forming any part of such procedures.

34. When the parties have had an opportunity to consider this judgment I will hear the parties again as to the precise form of the order which I should make.