

## THE HIGH COURT

2005 No. 3997 P

BETWEEN

MARY McEVOY

PLAINTIFF

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

DEFENDANT

**Judgment of Miss Justice Laffoy delivered on 26th January, 2006.****The Application**

1. On this application the plaintiff seeks interlocutory injunctions in the following terms:

- (a) restraining the defendant from holding an appeal from the conclusions of a second disciplinary meeting held in relation to the plaintiff on 29th September, 2005;
- (b) restraining the defendant from giving effect to the purported dismissal of the plaintiff;
- (c) restraining the defendant from treating the plaintiff other than continuing to be employed by the defendant unless and until her contract of employment has been lawfully discharged in compliance with the principles of natural justice and fair procedure;
- (d) requiring the defendant to pay the plaintiff's salary and other entitlements as they fall due until trial of the action or until further order of the court;
- (e) requiring the defendant to preserve the plaintiff's pension and other entitlements, including an order requiring continuing funding of same by the defendant, until the trial of the action or until further order of the court; and
- (f) permitting the plaintiff to return to her position of permanent full-time bank clerk.

2. The application arises out of a decision of the defendant to impose the disciplinary sanction of dismissal on the plaintiff, an employee of the defendant, following two disciplinary meetings conducted in accordance with the defendant's Disciplinary Procedures. The disciplinary meetings followed a Group Internal Audit report dated 5th August, 2005 on a special investigation into the circumstances surrounding the disappearance of a cash remittance of €80,000 at the Portlaoise branch of the defendant on 27th and 28th June, 2005. The plaintiff was one of a number of officials who was involved in the preparation of the missing bag and other bags for collection on the evening of 27th June, in transferring them from the bulk cash depository to the drop safe on the morning of 28th June and their collection by Brinks Allied on the evening of 28th June. At the time she was twenty years of age and she had been in the employment of the defendant for approximately fifteen months, for ten months in a permanent position.

**The Disciplinary Procedures**

3. The Disciplinary Procedures provide that in a situation, which may be potentially deemed as gross misconduct, a full investigation will be carried out. An employee may be placed on special paid leave during such an investigation. Upon completion of the investigation an audit or other report, as appropriate, will be prepared and a copy furnished to the employee concerned. Where the imposition of a disciplinary sanction is being considered, the following procedures will be followed:

(1) The employee will be requested to attend disciplinary meetings held in two stages. At both stages the employee may have a representative with him or her and may make such oral or written representations as he or she thinks fit. At the stage 1 meeting, in cases which may be potentially gross misconduct, the audit or other report of the prior investigation will be considered, having been furnished to the employee not less than seven days before the meeting, and the investigator will be present. The outcome of the stage 1 meeting is set out as follows:

"After consideration of such representations, if any, as have been made, the Manager will then review the nature of the potential Disciplinary Sanction, and give notice in writing to the Employee of the potential Disciplinary Sanction being considered."

The outcome of the stage 2 meeting is that the manager will give his or her decision in writing, where possible within ten working days, and, if the decision is to impose a disciplinary sanction, the notice of the decision will inform the employee of his or her right to appeal.

(2) A two-stage appeal process is provided for. It is provided that the first appeal will be heard "by the Chief Executive or other senior executive nominated by him". It is further provided that the disciplinary sanction the subject of the decision under appeal will be suspended pending the outcome of the hearing of the appeal. The employee, the employee's representative and the manager whose decision is the subject of the appeal may attend the hearing of the appeal and may make such oral or written representations as they see fit. The person conducting the appeal, after such representations as have been made, will review the disciplinary sanction the subject of the appeal and will give notice of his decision on the appeal, where possible within ten working days of the hearing. If the decision is to impose a disciplinary sanction, the notice will inform the employee of his or her right to a further appeal. The further appeal will be heard by an independent person agreed by the defendant and the employee and, in default of agreement, the independent person shall be nominated by the Labour Relations Commission. The decision of the independent person will be final and binding on both parties. The disciplinary sanction will not be suspended pending the outcome of the hearing of the further appeal.

4. The Disciplinary Procedures expressly provide that they do not preclude the employee from exercising his or her statutory or other legal rights.

**The implementation of the Disciplinary Procedures to date**

5. The following is the course of the implementation of the Disciplinary Procedures against the plaintiff to date:

- The investigation into the missing €80,000 remittance by the Group Internal Audit commenced on 29th June, 2005. The principal investigator was David Corcoran.
- The plaintiff has averred that at the end of July, 2005 she was "advised" to take paid leave from her employment. Subsequently she assisted fully with the investigation.
- By letter dated 30th August, 2005, Pat O'Regan, Regional Manager – South East Midlands of the defendant, sent the plaintiff a redacted version of the Group Internal Audit report insofar as it related to her and a copy of the Disciplinary Procedures. She was informed that Mr. O'Regan had decided to instigate disciplinary procedures against her and she was requested to attend the first disciplinary meeting on 7th September following. She was informed that Mr. Corcoran would attend the meeting. She was also informed that she was entitled to be accompanied and represented by a nominated work colleague or a union representative. The plaintiff's attention was drawn to findings of the investigation which identified breaches of procedure by her, which were set out in section B2 of the report. The plaintiff has averred that she was not aware that the Group Internal Audit investigation would result in findings against her. She has further averred that she did not receive a copy of the Disciplinary Procedures until they were furnished with the letter of 30th August. It has been averred on behalf of the defendant that consideration of the Audit report led to the application of disciplinary proceedings to a number of staff based in the Portlaoise branch.
- The plaintiff attended the first disciplinary meeting, which was held on 7th September, 2005, with her union representative, Brian Deasy of IBOA and another IBOA official. At the meeting an issue arose as to a conflict of evidence between a statement given by a colleague of the plaintiff to the investigation and the plaintiff's evidence on same factual matter. The meeting was adjourned until 9th September, 2005 to allow for the attendance of the colleague to deal with the conflict. The meeting resumed on 9th September. The plaintiff was in attendance with her union representative, Mr. Deasy. Her colleague was also in attendance.
- On 20th September, 2005 Mr. O'Regan wrote to the plaintiff informing her that, having considered her representations at the first disciplinary meeting and having taken account of all of the circumstances of the case, he was then currently of the view that the matter was so serious as to warrant potential disciplinary sanction of dismissal. Mr. O'Regan then set out the basis on which he formed that view. He was satisfied that the plaintiff had breached the bank's security procedures as set out at B2 of the report of the Group Internal Audit. Secondly, he made a statement which indicated that he accepted her colleague's version on the conflict. Thirdly, he stated that he did not find the plaintiff's explanations to be credible. Finally, he said that, given the totality of the plaintiff's actions in the matter together with the inconsistencies in her recollection, he was of the view that the bond of trust that must exist between her and the bank, as her employer, had been broken. He invited her to a second disciplinary meeting on 29th September, 2005 and informed her that she was entitled to be represented and accompanied by a union representative.
- By letter dated 27th September, 2005, which was addressed to the defendant, the plaintiff set out comprehensive responses to the points made by Mr. O'Regan in his letter of 20th September. She concluded her letter by seeking the defendant's response to queries she raised in relation to the investigation into the missing €80,000.
- The second disciplinary meeting took place on 29th September, 2005. The plaintiff was accompanied by Mr. Deasy and another official of IBOA. Mr. Deasy made representations on behalf of the plaintiff.
- By letter dated 3rd October, 2005 Mr. O'Regan notified the plaintiff that he had not changed his view that dismissal was the appropriate disciplinary sanction against her. He informed her that that sanction would be imposed with effect from the date of the letter. He then stated the reasons for his decision were as set out in his letter of 20th September, 2005 and he reiterated those reasons. Mr. O'Regan advised the plaintiff of her entitlement to appeal and that, in the event of an appeal, the disciplinary sanction would be suspended pending the outcome of the appeal hearing.
- By letter dated 11th October, 2005, Mr. O'Regan sent the plaintiff the minutes of the meetings held on 7th, 9th and 29th September. In relation to the queries raised at the end of the plaintiff's submission of 27th September, Mr. O'Regan stated that he did not believe it appropriate to respond to some of the queries.
- The plaintiff exercised her right to appeal. By letter dated 7th November, 2005, she was informed that the nominee of the Chief Executive to conduct the appeal was Pat Byrne, Regional Manager, North East Region. The appeal would be heard on 25th November, 2005.
- On 22nd November, 2005 the plaintiff's solicitors wrote to the defendant contending that the initial two disciplinary hearings involving the plaintiff were conducted in contravention of fair procedures. An undertaking was sought that the plaintiff would be reinstated and that the scheduled appeal hearing would be cancelled. On 23rd November, 2005 the defendant responded to that letter stating that the meetings had been held in accordance with the Disciplinary Procedures, and denying that fair procedures were contravened. The plaintiff's solicitor was informed that the disciplinary sanction had been suspended pending the outcome of the appeal and that the plaintiff continued to be an employee of the bank and was then currently on special paid leave. The letter indicated that the defendant was prepared to reschedule the appeal hearing, but not to cancel it.
- By letter dated 23rd November, 2005, the plaintiff's solicitor asked that the appeal hearing should be postponed to a later date. The defendant immediately acceded to that request.

6. The plenary summons and the notice of motion seeking interlocutory relief were issued on 25th November, 2005.

#### **Fair issue to be tried?**

7. The first hurdle which the plaintiff must overcome to establish an entitlement to an interlocutory injunction is that there is a fair issue to be tried. As a matter of law, and indeed of constitutional justice, it is the plaintiff's entitlement that the disciplinary process which may lead to her dismissal from her employment should accord with fair procedures. (*Glover v. BLN Ltd.* [1973] I.R. 388)

8. The plaintiff contends that there is a fair issue to be tried that to date the disciplinary process has not accorded with fair procedures and that the court should, in effect, prohibit its continuation to the first appeal pending the trial of the action. The breaches of fair procedures which she alleges have occurred, as gleaned from the affidavits filed in support of her application and submissions of counsel, are as follows:

(1) In her grounding affidavit the plaintiff alleged that she was not informed at the investigation stage that she was being subject to a disciplinary proceeding which could result in her dismissal as an employee. This point was not reiterated by her counsel in his submissions. The investigation being conducted by the Group Internal Audit patently related to a serious matter. It is common case that the plaintiff was placed on special paid leave in the course of the investigation. In my view, a fair issue as to breach of fair procedures does not arise on this point.

(2) Counsel for the plaintiff submitted that at the first disciplinary hearing the plaintiff should have been afforded an opportunity to cross-examine the persons on whose evidence the report of the Group Internal Audit was based and those persons should have been produced as witnesses to enable that to occur. It was further submitted that Mr. O'Regan should not have relied on the conclusions reached by Mr. Corcoran. In response, counsel for the defendant submitted that there was no request from the plaintiff or from her union representative that witnesses be produced. Mr. Corcoran was available at the first disciplinary meeting and he could have been challenged. In relation to the conflict of evidence between the plaintiff and her colleague, that matter was properly dealt with by Mr. O'Regan by adjourning the first disciplinary hearing so that the colleague could attend. I am not satisfied that the plaintiff has established that there is a fair issue to be tried on this point.

(3) It was alleged by the plaintiff in her grounding affidavit, and it was submitted by her counsel, that Mr. O'Regan predetermined the issue before the second disciplinary meeting and that this is evident from his letter of 3rd October, 2005. For instance, it was alleged that the view he expressed on the conflict of evidence between the plaintiff and her colleague confirms that he came to the second disciplinary meeting with his mind made up. In accordance with the Disciplinary Procedures, Mr. O'Regan was required to give the plaintiff notice of the potential disciplinary sanction being considered. He did so and he also set out the reasons why he considered the matter so serious as to warrant dismissal. In my view, it would not be proper to interpret that as meaning that Mr. O'Regan came to the second disciplinary meeting with a closed mind. Therefore, I am not satisfied that there is a fair issue to be tried on this point.

(4) Counsel for the plaintiff submitted that at the second disciplinary hearing "lip service" was paid to the Disciplinary Procedures. There was no further enquiry and there was no further consideration. The points raised by the plaintiff in her letter of 27th September, 2005 were not addressed and never have been addressed. The list of questions raised by the plaintiff at the end of that letter go to the events surrounding the loss of the €80,000 remittance, it was submitted, and should have been responded to. In my view, the questions which Mr. O'Regan considered that it was not proper to answer were not germane to the issue with which he was concerned in the disciplinary proceedings. I am not satisfied that the plaintiff has established a fair issue to be tried on this point.

(5) Counsel for the plaintiff did not contend, as had been contended in the plaintiff's grounding affidavit, that her appeal should be chaired by the Chief Executive of the defendant. Counsel's submission was that the appeal should be heard by a senior executive who ranks in seniority to Mr. O'Regan. In my view, there is no substance in this point. What the Disciplinary Procedures stipulate is that the appeal should be heard by a senior executive nominated by the Chief Executive. Mr. Byrne falls into that category.

(6) In her grounding affidavit the plaintiff complained that Mr. Byrne has access to all information that exists in relation to the matter, including decisions and conclusions that have been reached in contravention of fair procedures. That point was not pursued by counsel.

9. As a general proposition, counsel for the plaintiff submitted that there is a fair issue to be tried that the first and second disciplinary meetings were so flawed as not to constitute a proper full enquiry and that what happened in reality is that there was an acceptance of Mr. Corcoran's report.

10. Counsel for the defendant submitted that the plaintiff has participated in the process and that she has appealed against the decision of 3rd October, 2005. The Disciplinary Procedures provide for an elaborate appeal process. There will be a full appeal. It is not correct to suggest, as the plaintiff has suggested, that the outcome of the appeal is a foregone conclusion. The Disciplinary Procedures also provide for a further full appeal. At the end of the appeal process the plaintiff has her statutory rights which are preserved. These proceedings are premature, it was submitted, in circumstances where the plaintiff has two appeals still open to her under the Disciplinary Procedures. In this connection counsel for the defendant referred to the decision of this Court (Kearns J.) in *Morgan v. Trinity College* [2004] E.L.R. 235, which was upheld by the Supreme Court, although there is no written judgment of the Supreme Court.

### **Conclusion**

11. I have already expressed a view on whether the plaintiff has established that there is a fair issue to be tried on each of the grounds on which the plaintiff has alleged that the disciplinary process to date has contravened fair procedures. Taking the process as a whole, from inception to date, in my view, the plaintiff has not established that there is a fair issue to be tried that the process was flawed to the extent that it would be appropriate for the court to intervene and prohibit the disciplinary process continuing. Apart from that, in my view, the plaintiff's application is premature, given that the plaintiff has two further appeals under the Disciplinary Procedures. Under the terms of the Disciplinary Procedures her dismissal is suspended pending the outcome of the first appeal.

12. It is important that I emphasise that this judgment is concerned only with whether the plaintiff has made out a case that there is a fair issue to be tried that the disciplinary proceedings to date have not been conducted in accordance with fair procedures. It is concerned only with the process. It is not concerned with whether the decision arrived at by Mr. O'Regan was the correct decision, on which I have neither formed nor express any view.

### **Decision**

13. The plaintiff's application is dismissed.