[2019] IEHC 201

THE HIGH COURT

[2019 No. 86 P.]

BETWEEN

MÁIRE O'REILLY

PLAINTIFF

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 4th day of April, 2019

Introduction

1. This is an application on behalf of the defendant for an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts striking out the plenary summons issued in this case on 7th January, 2019 on the grounds that it fails to disclose a reasonable cause of action; alternatively, for an order pursuant to the inherent jurisdiction of the court dismissing the action on the grounds that it is an abuse of process because the issues raised are *res judicata.*

2. The defendant moves also for an order restraining the plaintiff from bringing any other proceedings before the High Court or any other court in the State in respect of disciplinary proceedings commenced pursuant to the Garda Síochána (Discipline) Regulations, 2007 as amended, without the prior permission of the court: a so called *Isaac Wunder* order.

Background

3. Garda Máire O'Reilly the plaintiff, joined An Garda Síochána in 1994 and was attested on 14th December, 1995. She served in Dun Laoghaire and Cabinteely Garda Stations until 1999 when she was transferred to Garda Headquarters in the Phoenix Park. In January, 2006 the plaintiff was transferred, at her own request, to Ballymote Garda Station and from there, on 19th September, 2006 the plaintiff was transferred to Manorhamilton Garda Station.

4. From 22nd March, 2008 until 31st December, 2009 the plaintiff was on certified sick leave. Since 1st January, 2010 the plaintiff has not submitted medical certificates in respect of her absence from duty and, in accordance with the provisions of the Garda code, was removed from the payroll with effect from that date.

5. On 21st December, 2009 the plaintiff made a formal complaint of bullying at work, which ran to 90 pages. The complaint was investigated by a Chief Superintendent and was not upheld. The plaintiff was notified of the outcome of that investigation by letter dated 3rd August, 2001. The plaintiff did not appeal or otherwise seek to challenge the validity of that decision.

6. On 22nd May, 2013, Superintendent Noreen McBrien was appointed as an investigating officer under the Garda Síochána (Discipline) Regulations, 2007 to investigate the plaintiff's continued absence without leave from 7th March, 2012 to 23rd May, 2013. The plaintiff was notified of that investigation but did not engage with it.

7. On 13th November, 2013 Superintendent McBrien made her report and on 16th December, 2013 a board of inquiry was established to determine whether the plaintiff's conduct amounted to a breach of discipline. The inquiry was scheduled to take place on 26th June, 2014 but, on the plaintiff's application, was adjourned, peremptorily against the plaintiff, to 24th July, 2014. On 24th July the plaintiff applied *ex parte* to the High Court for an interim injunction restraining the inquiry. The High Court refused to grant an interim injunction but did give the plaintiff liberty to effect short service of a motion for an interlocutory injunction.

8. The board of inquiry proceeded, as planned, on 24th July, 2014. The plaintiff did not attend.

9. The board of inquiry recommended to the Commissioner of An Garda Síochána that the plaintiff be dismissed, and on 5th September, 2014 the plaintiff was given notice of her dismissal. She did not seek to challenge the decision of the board of inquiry by way of judicial review but instead, by a notice dated 12th September, 2014 exercised her right, under the Regulations, to appeal.

The plaintiff's 2014 action

10. The focus of the plenary summons issued by the plaintiff on 24th July, 2014 was on the board of inquiry due to take place that day. On 30th July, 2015, pursuant to leave of the court granted on 23rd July, 2015, the plaintiff amended her plenary summons to claim, *inter alia*:

> 1. An injunction restraining the defendant from proceeding with inquiries under the Garda Síochána (Discipline) Regulations, 2007 pending supply by the defendant to the plaintiff of all requested documentation, including her medical file and personnel file.
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> 2. An order that all inquiries under the Garda Síochána (Discipline) Regulations, 2007 be determined together and not in isolation of one another.
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> 3. An order prohibiting any further steps in any disciplinary inquiry, disciplinary proceedings, and internal appeal.
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> 4. An order restoring the plaintiff's pay from March, 2008, including loss of earnings in respect of overtime, weekend and night duty pay.
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> 5. An order transferring the plaintiff from Manorhamilton Garda Station to Garda Headquarters.

11. In her statement of claim delivered on 13th August, 2005 the plaintiff pleaded that following informal reports to her superiors, she lodged a detailed 90 page formal complaint to the Garda Commissioner on 21st December, 2009. She alleged that one week later she was taken off the payroll, without notice, and since had been paid no money. She alleged that her formal complaint had never been

investigated and that no transfers had been effected out of the region where the alleged breaches allegedly took place.

12. One of the plaintiff's complaints in her 2014 action was that in an apparent attempt to encourage her to drop her formal complaint, the defendant commenced two separate but mutually contradictory disciplinary inquiries against her, one stating that she was failing to turn up for work and the other that she was failing to undergo medical treatment. She pleaded that when she pointed out these contradictions to the defendant, the defendant responded by quietly shelving one of the two disciplinary inquiries, without explanation.

13. The plaintiff complained that the disciplinary hearing on 24th July, 2014 had been held in her absence and that thereafter her dismissal had been fast tracked. She claimed to have suffered irreparable and catastrophic financial loss and reputational damage and had been denied the opportunity to advance her career.

14. The plaintiff's action was heard before the High Court (O'Connor J.) between 30th March, 2017 and 6th April, 2017. For the reasons given in an *ex tempore* judgment delivered on 6th April, 2016, O'Connor J. dismissed the plaintiff's claim.

15. The plaintiff appealed.

16. On 16th February, 2018 the Court of Appeal (the President, Irvine and Hedigan JJ.) dismissed the plaintiff's appeal. In a judgment with which the other members of the court concurred, Irvine J. said:

> *"48. It is also perhaps appropriate at the conclusion of this judgment to make a number of observations which, I hope will assist Ms. O'Reilly in clarifying her present position. First, whilst she is clearly dissatisfied and grossly upset concerning the outcome of her ninety page complaint in respect of bullying and harassment, the inquiry into her complaints was concluded in August 2011 and for some reason, notwithstanding her dissatisfaction with that decision, she did not appeal it and neither did she challenge the fairness of the procedure adopted by way of judicial review. That being so she must come to realise that she has no further avenue by which she may pursue that particular complaint.*
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> *49. Insofar as the board of inquiry established on the 6th December 2013 made a recommendation, following the hearing that took place on the 24th July 2014, that she be dismissed, Ms. O'Reilly has lodged an appeal against that decision. Her appeal entitles her to a full rehearing of the complaint made against her. That [complainant] was that she had been in neglect of her duty and was in breach of discipline with the meaning of Regulation 5 of The Garda Síochána (Discipline) Regulations 2007 and in particular by reason of her continued absence from work without leave.*
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> *50. As a matter of fact Ms. O'Reilly has only attended work on two days since March 2008 namely the 10th and 31st May 2011. Nonetheless she maintains that she is more than willing and well able to return to work and that there is nothing medically that would preclude her from resuming her duties as a member of An Garda Síochána. Her principal complaint is that if she returned to work she would have to return to the same toxic situation that resulted in her making her complaint of bullying and harassment back in December 2009. Ms. O'Reilly is clearly intent upon trying to achieve a result whereby she can return to work in what she considers to be a non-toxic environment. However, this Court can have no role in relation to decisions made by the Commissioner as to where she is assigned. Her desire to be transferred out of the Sligo/Leitrim division is clearly a matter for internal management in An Garda Síochána.*
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> *51. Regardless of whatever other disciplinary enquiries may remain outstanding in respect of Ms. O'Reilly's conduct, her failure to fully engage with her upcoming appeal will undoubtedly bring to a close any prospect she has, whatever that may be, of successfully defending the breach of discipline alleged against her. It is clearly in her interests to engage with that process and to procure such medical or other evidence as she considers might assist her in making her defence and in particular to establish that she had good and sufficient cause to remain absent from duty during the period identified in the complaint against her."*

17. I should say that Irvine J. noted earlier in her judgment that the plaintiff was also the subject of two other separate disciplinary inquires under the 2007 Regulations about which that court knew little, save that the plaintiff was of the view that they were the result of a deliberate campaign or policy against her that would ultimately result in her dismissal from An Garda Síochána.

The reconvening of the Appeal Board

18. By letter dated 11th April, 2018 the plaintiff was notified that her appeal against the recommendation of the board of inquiry had been fixed for hearing on 26th June, 2018.

19. In the years which had elapsed since the plaintiff's appeal, some of the members of the Appeal Board had become unavailable and, for the reasons given in the judgment of the High Court in *Broughall v. Commissioner of An Garda Síochána* [2018] IEHC 243, it was necessary to establish a new Appeal Board. This was done on 19th July, 2018 and by notice dated 9th November, 2018, the plaintiff's appeal was re-listed for 7th December, 2018.

20. On 6th December, 2018 the plaintiff submitted a medical certificate to the Appeals Board. The Appeals Board decided to adjourn the appeal until 10th January, 2019.

These proceedings

21. On 9th January, 2019 the plaintiff issued a plenary summons and applied *ex parte* to the High Court (McDonald J.) for an interim order restraining "*the going ahead of proposed internal disciplinary appeal*". An order was made on 9th January, 2019 restraining the defendant until after 17th January, 2019 or until further order in the meantime from proceeding with the appeal hearing, and on the following day the plaintiff issued a notice of motion for an interlocutory injunction returnable for 17th January, 2019. The plaintiff's motion has been adjourned pending the determination of the defendant's motion, and the interim order continued in the meantime.

22. The general endorsement of claim on the plenary summons issued on 9th January, 2019 runs to twelve pages. The first 67 paragraphs set out the matters complained of and the reliefs which are sought are set out in a further ten. The plaintiff filed an *ex parte* docket which set out the ten reliefs sought in the general endorsement of claim and swore an affidavit in precisely the same terms as the 67 paragraphs of narrative.

23. In the affidavit submitted to McDonald J., the plaintiff chronicled the difficulties she encountered in Ballymote and later in Manorhamilton; her medically certified absence from work from March, 2008 to 31st December, 2009; her desire for, and attempts to secure, a transfer back to Dublin; the making and rejection of her 90 page formal bullying complaint; her removal from the payroll; her

unsuccessful applications to a Rights Commissioner, Labour Court and Employment Appeals Tribunal.

24. The narrative in the plaintiff's affidavit jumped from 31st May, 2013 to 2018 when, it is said, the Garda authorities recommenced "*fake*" Garda disciplinary proceedings against her, including the hearing which was scheduled to take place on 7th January, 2019. The reliefs claimed by the plaintiff include the upholding of her statutory right of protection under the Protected Disclosures Act, 2014; the vindication of her personal rights under the Constitution; and an injunction restraining the disciplinary appeal hearing or any further steps in the Garda disciplinary process.

25. As I have observed, the affidavit of the plaintiff on which the *ex parte* application was grounded is in identical terms to the general endorsement of claim, save for the reliefs sought. Strikingly absent from the documents was any reference to the plaintiff's 2014 action.

26. In the course of the hearing before McDonald J. the plaintiff referred twice to her 2014 action. She said "*I have previously went to court in 2014 to the High Court"* and later "*And after I instituted proceedings in the High Court in July, 2014 they went ahead on the day that I knew I was going to be in court. And they wrote to me afterwards saying that the outcome was that they decided to dismiss me*." The plaintiff told McDonald J. that she had "*… lodged a new protected disclosure in December just gone by…*" and gave the court to believe that her protected disclosure would be rendered nugatory if the Appeal Board hearing proceeded on the following day.

27. Apart from the application to the High Court in July, 2014 which McDonald J was told about, the plaintiff had previously been to the High Court twenty times, to the Court of Appeal four times, and to the Supreme Court once. Having finally disposed of the plaintiff's 2014 action, after nearly four years of litigation, Irvine J. had gone to the trouble of spelling out the importance of the plaintiff engaging with the appeal which she was asking McDonald J. to stop.

28. The plaintiff's motion for an interlocutory injunction which was initially returnable for 17th January, 2019 was adjourned until 31st January, 2019. When the matter came back before the court on 31st January, 2019, the defendant had issued a cross motion, returnable for 21st February, 2019. The court further adjourned the plaintiff's motion to 21st February, 2019 and directed that the plaintiff file and serve any replying affidavit within two weeks.

29. When the matter came before me on 21st March, 2019 the plaintiff had failed to comply with the direction of the court as to the filing of any replying affidavit but Mr. McGarry S.C., for the defendant, acquiesced in an application then made by the plaintiff to extend the time for delivery of a replying affidavit, and for leave to file her affidavit in court.

30. On 31st January, 2019 an affidavit of Superintendent Helen Deely was filed on behalf of the defendant in response to the plaintiff's application for an interlocutory injunction and in support of the defendant's motion which is the subject of this judgment. Superintendent Deely set out the history of the 2014 proceedings, explained the circumstances in which the Appeal Board had been reconstituted and the appeal hearing reconvened, and suggested that this action is substantially the same as that previously brought.

31. On 21st March, 2019 the plaintiff swore and filed an affidavit in response to the defendant's motion. Much of that affidavit was directed to the defendant's argument that she had no cause of action. The plaintiff rehearsed her complaints in relation to her 90 page bullying complaint (which she now called her Whistleblower Formal Complaint); the disciplinary process initiated in 2013; the acceptance by the then acting Garda Commissioner of the recommendation of the board of inquiry; the plaintiff's apprehension as to the outcome of the Appeal Board hearing; and the fact that the plaintiff has not been paid her salary since December, 2009.

32. In response to the defendant's argument that her claims are *res judicata*, the plaintiff refers *inter alia* to the evidence given to the High Court in April, 2017; her submissions to the Court of Appeal; the judgment of the Court of Appeal, and a letter of 16th March, 2018 from the Department of Justice to the Garda Commissioner, apparently in relation to her bullying complaint.

The issues

33. The first issue I need to decide is whether the plaintiff's summons disclosed a cause of action. I think that it does. More correctly, perhaps, I could not be satisfied that it does not. While I do not believe that it is useful to dwell on this issue, I cannot forbear to observe that the application to strike out the proceeding as disclosing no cause of action sits rather uneasily with the application to dismiss the action on the grounds that the plaintiff's claims have already been heard and determined.

34. The second issue is whether the plaintiffs' claims are *res judicata*.

35. The principle is succinctly stated in *Delaney & McGrath* (4th Edition) (2018) at para 16-70:-

> *"The doctrine of estoppel per rem judicatam, better known by the shorthand term res judicata, provides that the final judgment of a judicial tribunal of competent jurisdiction is conclusive and, therefore, a party is precluded from re-litigating the matters decided in the judgment or giving evidence to contradict it in subsequent proceedings."*

36. There is no doubt that all of the plaintiff's complaints identified in her replying affidavit as her cause of action are *res judicata*. These complaints were all advanced and adjudicated upon in her 2014 action. The plaintiff's reference to the evidence given to the High Court in 2017 and her submissions to the Court of Appeal are fundamentally misconceived. It simply underlines that the issues she would now agitate were previously argued and decided.

37. The plaintiff's challenge to the disciplinary process initiated in 2013, including the suggestion that the decision of the Commissioner to accept the recommendation of the board of inquiry is not a matter for the Appeal Board, has been heard and determined and rejected. There is no basis on which the plaintiff can properly seek to restrain the appeal hearing. I am quite satisfied that if Mc Donald J. had the information he ought to have been given on the *ex parte* application he would not have made the interim order.

38. The complicating factor on this application is that since the judgment of the Court of Appeal was delivered on 16th February, 2018, further disciplinary proceedings have been initiated or revived against the plaintiff. These appear to be the two other separate disciplinary inquiries under the 2007 Regulations of which the Court of Appeal was aware but of which that court knew little, and, I think, the disciplinary inquiries referred to in the plaintiff's statement of claim of 13th August, 2015 and there said to have been quietly shelved without explanation.

39. By notice dated 24th May, 2018 the plaintiff was advised that Superintendent R. McMahon had been appointed to replace Superintendent Mary Murray to investigate five allegations of breach of discipline. Those allegations go back to 2011. It is alleged that the plaintiff failed to report for duty on 10th May, 2011 and was absent without leave from then until 20th June, 2011; and thereafter until 7th March, 2012. It is further alleged that the plaintiff failed to attend an occupational health service appointment on 8th September, 2011; failed to attend a medical appointment on an unspecified date; and failed to follow unspecified advice of Dr. Devitt given on 16th July, 2011.

40. By a further notice dated 11th July, 2018 Superintendent McMahon notified the plaintiff that he had been appointed to investigate an alleged failure to comply with a direction (and, separately, a request) to submit medical certificates from 1st January, 2010 to 30th June, 2010; and an alleged failure to attend medical appointments on 22nd February, 2010 and 12th April, 2010.

41. Superintendent McMahon's two letters were introduced on the morning of the hearing of the defendant's motion. This court knows little more than the little known by the Court of Appeal about these disciplinary inquiries. The lists of allegations attached to Superintendent McMahon's letters carry 2010 and 2011 reference numbers. It appears that the defendant was attempting to revive disciplinary procedures initiated in 2010 and 2011 but which were not proceeded with at the time. The court has not been told whether the inquiries have been progressed since May and July, 2018.

42. It will be recalled that among the reliefs claimed by the amended plenary summons in the 2014 action were an order that all inquiries under the 2007 Regulations be determined together, and an order prohibiting any further step in any disciplinary inquiry against the plaintiff. That claim for an order that all inquiries be heard together was not in the prayer in the statement of claim which the plaintiff delivered on 13th August, 2015 but the amendment of the summons and the delivery of the statement of claim were both the subject of the same order of Keane J., made on 23rd July, 2015. The plaintiff's *ex parte* application on 24th July, 2014 to prevent the board of inquiry hearing failed. She later applied for an interlocutory order restraining the Appeal Board hearing, and that was refused by Binchy J. on 13th November, 2014. The plaintiff does not appear to have sought any interlocutory order in relation to the 2010 or 2011 allegations but they were part of the 2014 action, which was dismissed in its entirety.

43. In circumstances in which the allegation of breach of discipline in respect of the period from 7th March, 2012 to 23rd May, 2013 had been determined by a board of inquiry before the summons was amended, that inquiry could not have been determined with any others.

44. In circumstances in which the plaintiff's case in 2014 was that the disciplinary inquiries other than that in relation to her absence between 7th March, 2012 and 23rd May, 2013 had been quietly shelved, it is not clear that she was seeking to challenge the defendant's entitlement to proceed with them. But if she did, any issue in relation to the defendant's entitlement to proceed with those inquiries is *res judicata*. And if she did not, I think that any challenge or complaint now, by reference to matters as they stood in 2014, when the earlier action was commenced, up to 2017, when the earlier action was determined, is precluded by the rule in *Henderson v. Henderson*. That is a rule which prevents a person from seeking to litigate an issue which, although not previously decided, is one which could and should have been brought forward in previous proceedings.

45. As it was in the 2014 action unclear what, if any complaint, was made in relation to the 2010 and 2011 inquiries, it is similarly unclear in this action what, if any, complaint is made in relation to those inquiries. The focus of this action (such as there is) is on the Appeal Board hearing. On close reading, however, the plaintiff seeks to prevent not only the Appeal Board hearing but "*any further steps or initiatives under the Garda Disciplinary Process*". The narrative in the general endorsement of claim does not specifically refer to Superintendent McMahon's letters but it does allege that "… *in 2018, the Garda authorities re-commenced fake Garda disciplinary proceeding against me*".

46. It is quite clear that the plaintiff is not entitled to seek to challenge the entitlement of the Appeal Board to hear and determine her 2014 appeal. That is a battle which has been fought and lost. It is equally clear that the plaintiff is not entitled to complain about, or to challenge the validity of, the commencement of the 2010 or 2011 inquiries. Specifically, the plaintiff is not entitled to seek to make the case that those inquiries are "*fake*". If that has not already been expressly decided, the plaintiff ought to have raised any issue in her 2014 action.

47. What has exercised me is whether the plaintiff is precluded from complaining about the revival, as opposed to the initiation, of the 2010 and 2011 inquiries.

48. As I have said, I know very little about these inquiries. Since they appear to have 2010 and 2011 reference numbers and relate to events in 2010 and 2011, it seems reasonable to assume that they were initiated before the inquiry into the plaintiff's absence between 7th March, 2012 and 23rd May, 2013 but were somehow overtaken by Superintendent McBrien's investigation, the board of inquiry hearing on 24th July, 2014, and the Commissioner's acceptance of the board's recommendation. The plaintiff failed in her attempt to restrain the Appeal Board from hearing her appeal but the appeal was nevertheless deferred pending the outcome of her 2014 action, and her appeal to the Court of Appeal. The interim order restraining the appeal hearing will be discharged and the Appeal Board will hear and determine the plaintiff's appeal in early course. I respectfully echo the observations of Irvine J. that if the plaintiff is to have any chance of successfully defending the charge of breach of discipline against her, she will need to fully engage with the appeal.

49. With the caveat that I know very little about the 2010 and 2011 inquiries, it seems to me that if the plaintiff's appeal were to fail, they would be moot. If, on the other hand, the plaintiff were to succeed in her appeal, the issue would then arise as to whether she should face disciplinary inquiries, perhaps from scratch, into earlier periods of a more or less continuous absence from duty. In the meantime, the plaintiff's ability to focus on her appeal would not be helped if she was attempting to engage in other investigations or inquiries.

50. As the Court of Appeal was, so am I, careful to express no view in relation to the other disciplinary inquiries which might be outstanding against the plaintiff. It does seem to me, however, that any case the plaintiff might make in relation to the revival of those inquiries could not be *res judicata*.

Order

51. I have carefully considered what the appropriate order is on this application.

52. On the authority of *Aer Rianta cpt v. Ryanair Ltd*. [2004] 1 I.R. 506, O. 19, r. 28 only applies where it is sought to strike out an entire pleading. For the reasons given, I do not believe that this is such a case.

53. The defendant's alternative claim is for an order pursuant to the inherent jurisdiction of the court dismissing the action on the grounds of *res judicata*. For the reasons given, I do not believe that such an order would be appropriate.

54. There is power under O. 19, r. 27, as well as in the inherent jurisdiction of the court, to strike out part of a pleading on the ground that it is frivolous or vexatious, but the court has not been addressed as to whether or how those issues which I have found to be *res judicata* might be excised from the general endorsement of claim. As I have said, the letters of 24th May, 2018 and 11th July, 2018 were first referred to on the morning of the hearing of the defendant's motion. Much of the narrative in the first 67 paragraphs of the general endorsement of claim addresses issues which were the subject of the 2014 action. The fact, progress, and outcome of that action has been airbrushed out. A good deal of the narrative is irrelevant or argumentative.

55. In this case, that element of the plaintiff's case, or the case which the plaintiff might make, and which is not *res judicata*, accounts for very little of the twelve pages. Within the body of the summons that element is obscure, but it immediately becomes apparent when Superintendent McMahon's letters are considered.

56. I do not think that it is necessary or appropriate or that it would be useful to take a blue pencil to the general endorsement of claim. I contemplated the desirability of striking out the claim for an injunction restraining the Appeal Board hearing but that, I think, would be to create ambiguity because it would leave a claim for an injunction restraining "*any further steps in the Garda Disciplinary Process*." Apart from that, I could not be confident that any statement of claim that might be delivered in this action would be properly confined to the issues which the plaintiff is entitled to agitate, in which event the process would have to be repeated.

57. The defendant having failed to satisfy the court that the plaintiff's action is in its entirety frivolous or vexatious, I do not believe that it is appropriate to make an *Isaac Wunder* order. For the reasons given, the plaintiff is not precluded from challenging the 2010 or 2011 inquiries. If, as she should, the plaintiff engages with the Appeal Board and is dissatisfied with the outcome, she will be entitled to seek to challenge that. Such a challenge would be encompassed by the order sought by the defendant and, for that reason alone, I would not make such an order.

58. What I propose to do is to make an order on this motion declaring that the plaintiff is not entitled in these proceedings to attempt to re-litigate any claim or issue arising out of the disciplinary proceedings initiated on 22nd May, 2013, in respect of her absence from duty between 7th March, 2012 and 23rd May, 2013, up to and including the reconvening of the Appeal Board, and is not entitled to seek to restrain the defendant from proceeding with the hearing of the plaintiff's appeal to the Appeal Board.

59. On the plaintiff's motion for an interlocutory injunction, I will make an order refusing the plaintiff's motion and discharging the order made on 9th January, 2019.