

THE HIGH COURT

CHANCERY

[2017 No. 1221P]

BETWEEN:

MARLA O'CONNOR

PLAINTIFF

-AND-

ADIGUN LIMITED

DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 9th day of March, 2017.

1. The plaintiff is a pharmacist in a pharmacy known as 'Burke's Pharmacy' which is owned by the defendant. In these proceedings, she seeks, *inter alia*, an interlocutory injunction restraining the defendant from taking any further steps in a disciplinary procedure against her in connection with an alleged dispensing error by her, which it is alleged constitutes gross negligence on her part. The plaintiff alleges that this proposed disciplinary procedure breaches her right to fair procedures since, *inter alia*, the outcome of the procedure has been pre-determined by the defendant. An *ex parte* injunction restraining the holding of the disciplinary hearing was granted by Gilligan J. on the 9th February, 2017.

Ex parte proceedings before Gilligan J.

2. This Court will first refer to the *ex parte* proceedings before Gilligan J. The background to those proceedings is that the alleged dispensing error took place on the 1st February, 2017, when the plaintiff was working in the pharmacy, although the defendant did not become aware of it until the 3rd February, 2017, on which date the plaintiff was off work. This may have been why the two letters from the Company which were given to the plaintiff on the 6th February, 2017, incorrectly refer to the dispensing error having occurred on the 3rd February, 2017. However, the managing director of the defendant, Ms Joan Kilgallen, avers in her affidavit dated 23rd February, 2017 that there was a conversation between her and the plaintiff on the 2nd February, 2017, regarding the alleged dispensing error which would have made it clear to the plaintiff that the alleged error took place on the 1st February and not on the 3rd February. The plaintiff, in her affidavit for these proceedings which was sworn on the 2nd March, 2017, accepts that Ms. Kilgallen discussed the dispensing errors with her on the 2nd February, 2017, although in this affidavit the plaintiff puts the matter as follows:-

"I say that I went through the dispensing errors briefly with Ms. Kilgallen via telephone conversation on the 2nd February."

3. On this basis therefore, it is this Court's view that the plaintiff knew that there was an allegation of a dispensing error against her which had occurred on the 1st February, 2017. In this context, it is relevant to note that in seeking an *ex parte* injunction before Gilligan J. the plaintiff swore an affidavit dated 9th February, 2017. In this affidavit, she exhibited two letters from the defendant dated 6th February, 2017. The first letter suspended the plaintiff on full pay, while the second letter notified her of the disciplinary hearing scheduled for 9th February, 2017. In both letters reference is made to the dispensing error having been made on the 3rd February, 2017 rather than on the 1st February, 2017. In her affidavit before Gilligan J. the plaintiff makes no reference to her conversation with Ms. Kilgallen which had taken place just seven days previously on the 2nd February, 2017 and during which they discussed the dispensing error which occurred on the 1st February 2017. Instead she baldly avers that:-

"Your Deponent did not attend work with the Defendant on 3rd February 2017 so I am (*sic*) do not understand how it is alleged that I could have dispensed incorrect medication on that date."

4. Gilligan J. was therefore presented with facts that suggested that there was absolutely no way that the plaintiff could have been guilty of the alleged dispensing error, since she was not working on the relevant date, when the truth was that the plaintiff knew that the dispensing error had taken place on the 1st February, 2017 and she would have also known that the reference in the letter to the 3rd February, 2017, should have been to the 1st February, 2017. The impression was given therefore to Gilligan J., in the proceedings in which the defendant was not represented, that the defendant was knowingly embarking upon a disciplinary procedure in relation to which the defendant knew, or should have known, that the plaintiff was innocent.

5. In *ex parte* proceedings, it is well established, most recently in the judgment of Keane J. in *McDonagh v Ulster Bank* [2014] IEHC 476, that the applicant party is required to provide full and frank disclosure to the Court. In this regard, the plaintiff may have felt that she was being accurate in a very strict legal sense in stating that she could not have been guilty of the dispensing error on the 3rd February, 2017 of which she was accused in the letters of 6th February, 2017. However, when in *ex parte* proceedings, the other party is not present in court to enable the contrary argument be presented to the Court, it is essential that parties provide full and frank disclosure, even where it may damage the case they are making. In this instance, the plaintiff, and this may have been completely inadvertent on her part, failed to meet this standard when she made the foregoing bald averment.

6. While not as significant as the foregoing omission, there was a second failure by the plaintiff to give the full picture to Gilligan J at the *ex parte* hearing. This is because attached to the second letter of 6th February, 2017 is what is described in that letter by the defendant as '*relevant evidence*' regarding the proposed disciplinary hearing. This consists of a document which is entitled '*previous errors of concern*' and sets out a list of the plaintiff's previous dispensing errors. The covering letter was exhibited to Gilligan J. in the *ex parte* proceedings. However, in her application for the *ex parte* injunction, the plaintiff failed to exhibit the attachment, even though it was described in the covering letter as relevant evidence. In the interests of full and frank disclosure this should have also been disclosed to Gilligan J. since it is clearly relevant for any employer who wishes to investigate an allegation of dispensing errors, that he do so in the context of the previous errors. Hence this list of previous errors was relevant to Gilligan J's decision as to whether to grant an injunction restraining that hearing. Accordingly, the attachment should not have been removed by the plaintiff from the letter of 6th February, 2017 when it was exhibited to Gilligan J.

The application before this Court

7. The plaintiff's application for an interlocutory injunction in these proceedings is based primarily on the two letters from the defendant to the plaintiff of the 6th February, 2017 to which reference has already been made, which were handed to the plaintiff on

that date. In the first letter, it is stated that on 'the 3rd February, 2017, you dispensed the incorrect medication' and it provides that the plaintiff is suspended with pay pending a disciplinary hearing relating to what is described as 'an incident of gross negligence of your duties which could result in injury/harm to customers' and it is further stated that 'the decision had to be made to suspend you from your duties with pay, until this matter has been addressed'.

8. In the second letter the plaintiff is requested to attend a disciplinary hearing on Thursday 9th February, 2017. This letter states, insofar as relevant, that:-

"The hearing will be conducted by Joan Kilgallen who will chair the meeting, and Sarah Collier as a minute taker. You are entitled to be accompanied by a representative or colleague of your choice. This person can either act as your representative and address the disciplinary hearing, or merely attend as your witness. However, that person cannot answer questions on your behalf. Please let me know by 5pm on Wednesday 8th February if you wish to be accompanied to this disciplinary hearing.

Please find attached a copy of the Company's disciplinary rules and procedures of which you are aware/a copy which was furnished to you at the commencement of your employment and to which I will be making reference.

After the conclusion of the disciplinary hearing, a decision will be made and issued within a number of days as to whether or not a disciplinary sanction is to be imposed. The time for consideration and the decision will allow adequate time for all of the evidence to be considered.

This meeting must not be recorded without the prior consent of all parties involved; any recording made of this meeting without the permission of all parties will be inadmissible for consideration in any proceedings at a later date.

Finally, I must advise you that the outcome of this hearing may result in disciplinary action up to and including dismissal being taken against you. This is in no way to prejudice or sully the outcome of this procedure; however, we are obliged to make the position absolutely clear to you.

If you are dissatisfied with any action taken by Burke's Pharmacy as a result of the process, you will have a right of appeal which will be explained to you in the letter confirming the outcome of the process, where appropriate meanwhile, if there is any matter which you wish to raise, please contact me at (086) 2791372.

Yours sincerely, Joan Kilgallen

Manager/ Burke's Pharmacy".

9. It is relevant at this juncture to note that the plaintiff commenced working for the defendant on the 9th February, 2016, and so had not completed one year's service when the letter of 6th February, 2017, was issued suspending her with full pay. Since the plaintiff is seeking to have the defendant restrained from proceeding with the disciplinary hearing on the grounds, *inter alia*, that she will not be treated fairly and on the grounds of pre-judgment by the defendant, this Court is struck by the fact that if this was indeed the defendant's intention, it could have saved itself a considerable amount of time, and the risk of very significant High Court legal costs, if it had simply dismissed the plaintiff before she had reached the first anniversary of her commencement of employment.

10. In this regard, it is also relevant to note that in her affidavit of 9th February, 2017, the plaintiff avers that in or about December of 2016 she was involved in seven incidents of dispensing incorrect medication which she describes as 'minor'. For its part, the defendant has averred that that all dispensing errors must be taken extremely seriously and that there has been an unprecedented increase in prescribing errors in the year since the plaintiff commenced working in the pharmacy.

11. It seems to this Court therefore that if the defendant had reached a pre-conceived conclusion about the plaintiff, as alleged by her, and was intent on not affording the plaintiff fair procedures, the easiest and cheapest way for the defendant to have achieved this unlawful purpose would have been for the defendant to have dismissed the plaintiff before she acquired the full range of employment rights on the 9th February, 2017. The fact that the defendant did not do so, but instead allowed the plaintiff to acquire her employment rights supports, in this Court's view, the defendant's contention that it was determined to treat the plaintiff fairly and in accordance with fair procedures.

Fair procedures and the two letters of 6th February, 2017

12. As regards the two letters of the 6th February, 2017, and in particular the second letter of that date, the plaintiff apprehends that she will not receive fair procedures at the disciplinary hearing, since she believes that a decision has already been taken against her because of the wording of the second letter since it states in very definitive terms in one section that on "3rd February 2017 you dispensed incorrect medication". On the other hand, in other parts of the letter the wording is not definitive in nature but is conditional, since it states that "If, after investigation the case is proven...."

13. The plaintiff also apprehends that she will be deprived of her right to fair procedures because she believes that Ms. Kilgallen should not be dealing with the disciplinary hearing, since in the plaintiff's affidavit of 9th February, 2017 she averred that

"It appears to be the case that she is the person who has made the allegation of gross misconduct against me."

For the defendant's part, Ms. Kilgallen avers in her affidavit of 23rd February, 2017, that she was contacted by the plaintiff's supervising pharmacist in Burke's Pharmacy to advise her of the fact that the dispensing error had occurred. This is not controverted by the plaintiff in her replying affidavit of 2nd March, 2017 and on this basis this Court concludes that the person who is dealing with the allegation against the plaintiff at the disciplinary hearing is not the person who made that allegation.

14. Before considering the plaintiff's apprehensions regarding fair procedures, it is important to note that an apprehension that a person will not get fair procedures is not a basis for court intervention. This is clear from the statement of Clarke J. at p. 231 of *Minnock v Irish Casing Company Limited* [2007] 18 ELR 229 that:-

"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."

15. Having reviewed the two letters of 6th February, 2017, and in particular the second letter, this Court is of the view that it is not

perfectly drafted since it does not refer to an investigation, but rather refers to a disciplinary hearing and it also refers to there being an incident of gross negligence of the plaintiff's duties, rather than an allegation of such an incident.

16. However if, rather than concentrating on these specific matters, one looks at the actual effect of the second letter as a whole, it is clear that this letter nonetheless contains the key requirements of fair procedures required for any investigation and disciplinary procedure. This is because the purpose of the letter is clearly to set out for the plaintiff the nature of the complaint against her and to give her an opportunity to deal with the complaint. This letter also makes it clear that the plaintiff has the right to bring a representative with her to the hearing and so the plaintiff is perfectly entitled to attend the disciplinary hearing with her lawyer. Significantly, if she is unhappy with the decision she is given a right of appeal. While the letter is not perfectly drafted, it is manifestly clear from its terms, when read as a whole, that no adverse decision has been taken against the plaintiff and that one of the primary purposes of the hearing is to hear from the plaintiff before any decision is taken. It is also important to note that during all of this time, the plaintiff is on full pay and so she is not at a financial loss.

17. On this basis, this Court concludes that the plaintiff has not to date been deprived of fair procedures and therefore it is this Court's view that the relief sought should not be granted.