THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 346

[2017/394]

Irvine J.
Whelan J.
Baker J.

BETWEEN

IARNRÓD ÉIREANN / IRISH RAIL

APPELLANT

- AND -

BARRY McKELVEY

RESPONDENT

JUDGMENT of Ms. Justice Irvine delivered on the 31st day of October 2018

1. This is the appeal of Iarnród Éireann / Irish Rail ("the appellant") against the judgment and order of the High Court, Murphy J., dated the 28th day of July 2017. By her order she granted an injunction restraining the appellant from commencing a disciplinary hearing against Mr. McKelvey in respect of alleged misconduct notified to him on the 8th May 2017, unless his claimed entitlement to legal representation was agreed to.

2. While many legal arguments were advanced by the respective parties in the High Court it is fair to say that only two issues have been raised by the appellant for the court's consideration on this appeal. The first is whether the High Court judge erred in law and in fact when she concluded that it would be contrary to the principles of natural justice and fair procedures to require Mr. McKelvey to engage with the disciplinary hearing proposed by the appellant without the benefit of legal representation. The second is whether the High Court judge ought to have rejected Mr. McKelvey's application for an injunction on the basis that it was premature in that it could not be stated, at the time of his application, that any finding ultimately made at the conclusion of the disciplinary process would be bound to be unsustainable in law, by reason of the fact that he did not have legal representation from the outset.

Background Facts

3. It is first necessary to set out in skeletal form the facts material to the conclusions made by the High Court judge. These are of particular relevance to the submissions of the parties on this appeal as they are to my conclusions.

4. At the time he commenced the within proceedings, Mr. McKelvey was 39 years of age and had been an employee of the appellant since 1999. He was appointed to the role of inspector in May 2013. His responsibilities included managing those employees charged with maintaining the Cork to Dublin railway line. As part of his work, Mr. McKelvey was provided with fuel cards to facilitate the re-fuelling of company vehicles and machinery. Other Iarnród Éireann personnel also have the use of such cards.

5. In late 2016 the appellant became concerned regarding the amount of fuel purchased using the aforementioned cards in Mr. McKelvey's division i.e. Division 3. As a result, a preliminary investigation was carried out, during the course of which Mr. McKelvey was interviewed on a number of dates including the 21st December 2016. In the course of that meeting Mr. McKelvey was apparently shown copies of spreadsheets relating to purchases made with his fuel card for the years 2014, 2015 and 2016.

6. It is clear from the notes of the aforementioned interview, which are exhibited in one of his affidavits, that Mr. McKelvey had been asked about a number of purchases ostensibly made with his fuel card and that he had explained how some such purchases could have been made using his card without his knowledge. One such possibility was that his card might have been taken without his knowledge by another member of staff.

7. By letter dated the 13th March 2017, Mr. McKelvey was advised that as a result of the ongoing investigations into fuel usage in Division 3 and his meeting with the inquiry panel that he was being suspended on basic pay until further notice. That notification triggered a letter from Mr. McKelvey's trade union representative, Mr. Paul Cullen, and also a letter from Sinnott Solicitors, challenging the lawfulness of his suspension.

8. On the 8th May 2017, using what is described as Disciplinary Form A, Mr. McKelvey was notified that the appellant had decided to initiate its formal disciplinary process to inquire into the following matter:

> "Theft of fuel through the misuse of a company fuel card(s), which has resulted with the company suffering a significant financial loss."

In the said form Mr. McKelvey was invited to respond to the notification within seven days and to indicate whether he would be requesting "a personal hearing".

9. By letter dated the 10th May 2017. Mr. McKelvey requested an oral hearing and, having regard to the allegation of "theft", requested that he be allowed to be represented by solicitor and counsel at the disciplinary hearing. He also complained that the procedures pursuant to which the hearing was to be conducted were unsatisfactory insofar as they provided that he would only receive the documentary evidence to be relied upon in support of the allegation at the commencement of the hearing. It is not disputed that the Grievance and Disciplinary procedure pursuant to which the proposed disciplinary inquiry is to be conducted was notified to him as part of his contract of employment.

10. In circumstances where the issues to be decided on this appeal are relatively net it is not necessary to further detail the communications between the parties exchanged prior to the commencement of these proceedings on the 7th June 2017. It is, however, of note that certain interim orders were made by Humphreys J. on the 7th June 2017 which had the effect of restraining Iarnród Éireann taking any further steps in the disciplinary process until such time as Mr. McKelvey was in a position to apply for the interlocutory relief sought in his notice of motion dated the 7th June 2017.

Judgment of Ms. Justice Murphy

11. Having considered the submissions of the parties and the evidence before her, Murphy J. concluded that the charges levelled against Mr. McKelvey could hardly have been more serious insofar as they put at risk not only his reputation but also his future employment prospects. In those circumstances she was satisfied that his right to fair procedures and natural and constitutional justice were engaged.

12. As to the entitlement of Mr. McKelvey to legal representation, the High Court judge had regard to a number of legal authorities concerning the circumstances in which a party might claim to be entitled to legal representation when faced with the prospect of having to defend allegations of misconduct. In particular, she relied upon the decision of Geoghegan J. in *Burns v. Governor of Castlerea Prison* [2009] 3 I.R. 682 and that of Webster J. in *R v. Home Secretary ex parte, Tarrant* [1985] 1 Q.B. 251. The High Court judge specifically considered certain factors identified in *Tarrant*, and approved of in this jurisdiction in Burns, as relevant to the appellant's discretion and sought to apply them to the facts of the present case. Having done so she concluded that the inquiry proposed would not be fair unless Mr. McKelvey had legal representation. Accordingly, she made an order restraining the appellant from conducting the proposed inquiry unless it agreed that he might have such representation.

13. In coming to the aforementioned conclusions the High Court judge attached weight to the following factors:-

> (i) the seriousness of the charge and the fact that the potential penalty to be imposed might lead to dismissal and adversely affect his employment prospects;
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> (ii) the outcome had the potential to significantly impact upon Mr. McKelvey's reputation;
>
> (iii) that multiple points of law were likely to arise, including contentions that there had been flaws in the investigation process, the imprecision of the charges levelled against Mr. McKelvey and the necessity for Iarnród Éireann to establish loss;
>
> (iv) that Mr. McKelvey did not have the capacity to conduct his own defence;
>
> (v) the facts would be complex given that the investigation would relate to the use of multiple fuel cards and would engage with multiple transactions over a period of years. It was, the High Court judge concluded, "ridiculous" to consider that Mr. McKelvey might navigate that process unaided;
>
> (vi) that it was not yet clear how the employer intended to conduct the disciplinary hearing and thus it could not be determined how procedurally difficult it would be for Mr. McKelvey to engage with the process without legal representation; and
>
> (vii) whilst the engagement of lawyers would almost certainly slow the disciplinary process the downside for the appellant would be relatively minor because of the fact that the plaintiff had already been suspended.

14. The trial judge concluded her reasoning with the following statement:-

> "Given the complexity of this case the court is satisfied that in order to do so [defend the misconduct alleged] he should be entitled to retain lawyers should he desire to do so." (Transcript, p. 14, lines 26-27)

15. While at no stage in her judgment does the trial judge expressly state that it would be to deprive Mr. McKelvey of a fair hearing if he was not permitted to have solicitor and counsel present for the duration of the disciplinary process or so that counsel might cross examine such witnesses as might be called by the appellant, it is to be inferred from the fact that she acceded to counsel's request that she make an order in such terms, that she must have so concluded.

16. For completeness it should also be recorded that the trial judge expressed herself satisfied that the failure on the part of the appellant to provide Mr. McKelvey with all of the evidence upon which it intended to rely in the course of the disciplinary process in advance of the commencement of the process did not, of itself, give rise to any unfairness. This was because the disciplinary procedure to be deployed provided that such evidence would be furnished at the commencement of the hearing and that at that point he could seek an adjournment to consider that evidence, if the same proved necessary. She accordingly concluded that it was premature to propose that Mr. McKelvey's rights to fair procedures would likely be infringed on that ground. Nonetheless, because she was concerned that such evidence might not be furnished in accordance with the disciplinary procedure advised, the trial judge gave Mr. McKelvey liberty to apply to the court should he find himself in that position.

Submissions of the Parties

Submissions on behalf of Iarnród Éireann

17. Mr. Frank Callanan SC of behalf of the appellant submits that while the High Court judge correctly had regard to the principles to be applied by a court when considering whether or not the principles of natural justice and fair procedures required that a party the subject matter of a disciplinary complaint was entitled to be legally represented by solicitor and counsel, she had misapplied those principles having regard to the particular facts of the case. In this regard he submits that when she engaged with the capacity of Mr. McKelvey to defend the complaint made against him she treated him as an employee that would be "unaided" rather than an employee who would be represented by Mr. Cullen, an experienced trades union official from SIPTU. Further, contrary to the conclusions of the trial judge, there was nothing uncertain about the procedure to be deployed. Mr. McKelvey had been furnished with a copy of the procedure proposed. He had also been advised that it was for the appellant to establish the wrongdoing alleged and that he would enjoy the right to cross examine all witnesses called in support of the misconduct alleged and that he himself might call witnesses. Further, the proposed procedure was in conformity with the code of practice approved under the Industrial Relations Act 1990 and

S.I. 146/2000 Industrial Relations Act 1990 (Code of Practice of Grievance and Disciplinary Procedures) (Declaration Order) 2000.

18. Counsel further submits that there was no basis for the finding of the High Court judge that multiple points of law were likely to arise in the course of the disciplinary hearing or that Mr. McKelvey would not, with the assistance of Mr. Cullen, be capable of defending the allegations made against him. The same was to be said of her conclusion that the facts under consideration, might not fairly be dealt with by Mr. McKelvey without the assistance of solicitor and counsel.

19. Mr. Callanan also contends that the High Court judge failed to have regard to the general principle that emerges from the case law concerning the right to legal representation in the context of what are generally described as workplace investigations namely that legal representation should only be required in exceptional circumstances.

20. Counsel submits that it does not follow that just because the facts underlying the allegation of wrongdoing made against Mr. McKelvey might, in other circumstances, form the basis for the criminal charge of theft means that those facts could not fairly be investigated in the course of a workplace disciplinary processes unless the employee was permitted to be legally represented by solicitor and counsel. Further, the fact that the wrongdoing, if established, might lead to the employee's dismissal was not of itself dispositive of the employee's entitlement to legal representation. Counsel argues that there is nothing exceptional about an allegation of misconduct that might lead to dismissal in a workplace setting. It cannot be said that it necessarily follows from the fact that the sanction may be significant that the employee cannot have a fair hearing absent legal representation.

21. As to the prematurity issue, Mr. Callanan submits that there is a heavy burden on an applicant who seeks by injunction to arrest the commencement of a disciplinary process and he relies in this regard upon the decision in Rowland v. An Post [2017] 1 I.R. 355. Before intervening the court would have to have been satisfied, at the time the application was made, that it was clear that the result of the investigation was bound to be unsustainable by reason of the fact that Mr. McKelvey would not have legal representation. According to Mr. Callanan, on the facts before the High Court it simply could not be said that any conclusion reached as a result of the disciplinary inquiry was bound to be unsustainable in law. It was, according to counsel "to take a leap in the dark" to conclude that the hearing was bound to be unfair and the result unsustainable.

Submissions on behalf of the Respondent

22. Mr. Jim O'Callaghan SC, on behalf of Mr. McKelvey, submits that the decision of the High Court judge, having regard to the prevailing facts, was fully in accordance with the authorities as to the circumstances in which a party the subject matter of a disciplinary investigation was entitled to claim a right to legal representation by solicitor and counsel. The High Court judge had correctly identified and considered each of the factors identified by Geoghegan J. in *Burns* in concluding that a fair hearing could not be assured if Mr. McKelvey was to be denied representation by solicitor and counsel. The fact that she considered each of these factors in turn, a process which was criticised by Mr. Callanan SC as being unduly mechanistic, was entirely appropriate.

23. Counsel submits that the High Court judge correctly attached significant weight to the gravity of the wrongdoing alleged against Mr. McKelvey and the fact that it might lead to his dismissal and also adversely impact upon his future employment prospects. The gravity of the wrongdoing alleged against Mr. McKelvey and its likely consequences were, he submits, no different to those to which the medical practitioner was exposed in *Borges v. Fitness to Practice Committee* [2004] 1 I.R. 103 where the doctor concerned faced the possibility of being struck off the Registrar of Medical Practitioners for misconduct. He relied upon that part of the judgment of Keane C.J. wherein he had accepted that the medical practitioner had a right to cross examine his accusers "through counsel". He further replied upon the decisions of Blayney J. in *Gallagher v. The Revenue Commissioners* [1991] 2 I.R. 370, Gilligan J. in *Kinsella v. Ulster Bank* (Unreported, 25th October 2016) and Eager J. in *Lyons v. Longford Westmeath Education and Training Board* [2018] 29 ELR 35; [2017] IEHC 272, all of which he maintains are supportive of the approach of the trial judge.

24. Counsel argues strongly that the High Court judge was also correct to conclude, on the evidence before her, that the factual matters the subject matter of the proposed disciplinary hearing were indeed complex. This was evident from the documents already furnished to Mr. McKelvey in advance of the commencement of the disciplinary process and upon which the appellant clearly intended to rely. In particular, Mr. O'Callaghan referred to information contained in a number of spread sheets detailing the alleged use of fuel cards over several years and also to the content of a three-page memorandum/word document detailing exchanges had between Mr. McKelvey and his employers in the course of the preliminary investigation concerning the excessive purchases of fuel in Division 3. According to Mr. O'Callaghan, Mr. McKelvey needed a solicitor and counsel to examine such documents on his behalf so that he might be properly advised as to their significance and as to what, if any, additional information might be sought in light of their content.

25. Regarding Mr. Callanan's submission based on the likely consequences for large organisations should all employees facing similar charges of misconduct be entitled to legal representation through solicitor and counsel, Mr. O'Callaghan submits that his client's rights to natural justice and fair procedures simply cannot be subordinated to considerations such as the speed or efficiency with which a disciplinary process might be concluded or the costs pertaining thereto.

26. Finally, Mr. O'Callaghan submits that his application for interlocutory relief was not premature. It was perfectly clear at the time when the High Court application was made that he could not receive a fair hearing in the course of the disciplinary process without legal representation and that it was beyond doubt that any decision made, absent such representation would not withstand legal scrutiny.

Discussion

27. Given that it was not in dispute between the parties in the High Court that the appellant had the discretion to permit Mr. McKelvey to be legally represented at the disciplinary hearing, notwithstanding that its Grievance, Disciplinary Policies and Procedures refer only to his right to be represented by a fellow employee or trade union representative, the High Court judge was legally correct in the approach which she adopted to the injunction application. She first identified the factors material to an employer's discretion when faced with a request by an employee that they might be legally represented at a formal disciplinary inquiry. These, of course, are the same factors as would be material to the Court's discretion on an application, such as that made by Mr. McKelvey, to retrain the commencement of such an inquiry until consent to such a request was forthcoming. Then, the High Court judge considered those factors in the light of the particular circumstances of the case.

28. Before moving to consider the findings of the High Court judge, a brief review of a number of the relevant legal authorities is warranted.

29. There are admittedly two very recent judgments of the High Court which engage with the type of hearing that must be afforded to an employee faced with an investigation into their conduct. As these judgments are in conflict I propose to return to them later in this judgment. See: the judgments of McDermott J. in *NM v. Limerick and Clare ETB* [2007] IEHC 558 and Eager J. in *Lyons v. Longford Westmeath ETB* [2018] 29 ELR 35; [2017] IEHC 272. Nonetheless in my view the leading authority pertaining to the central issue on this appeal is, without doubt, the judgment of Geoghegan J. in *Burns*. That being so I will briefly refer to the relevant facts and the principles which emerge from that decision.

30. In *Burns* the net issue for the Court's consideration was whether two prison officers, against whom misconduct had been alleged, were entitled as a matter of natural justice and fair procedures to be legally represented at an oral hearing to be held before the Governor under the 1996 Prison Rules ("the Rules"). Under the Rules, the prisoners were required to be present at the hearing and were entitled to call witnesses. They were also entitled to have advocacy assistance, but only from a prison officer albeit that the judgment records that it was common practice that trade union representatives would regularly act as their advocates.

31. The facts underlying the hearing to be held before the Governor are as follows: the prison officers had been detailed to take a prisoner to a hospital in Galway for treatment. They had returned to the prison at approximately 6.30 p.m. on the day in question and it was later discovered that the prisoners' business at the hospital had concluded as early as 12.40 p.m. that day. When this was discovered, they were advised that there was to be an inquiry into three charges of breach of discipline. The first charge was that they had made a false report concerning the events of the day in question; the second, that they had failed to carry out their duties promptly or with diligence and the third, that they had made an improper overtime claim. The prison officers were then furnished with a report that had been prepared by the Assistant Governor setting out the evidence to be relied upon to support the aforementioned charges.

32. The prison officers both attended the disciplinary hearing, but did so solely for the purpose of protesting that they were entitled to be legally represented. They were denied that representation on the basis that the disciplinary code did not make any provision for legal representation. The hearing then proceeded and in circumstances where there was no rebuttal evidence it was concluded that the breaches of discipline had been proved. The sanctions imposed were first, that their duties for the following year would all be performed within the prison complex and second, that they were to lose an annual salary increment and third that they would make reparation for the three hours of overtime for which they should not have been paid.

33. The prison officers applied to the High Court to quash the Governor's decision on the ground that they ought to have been permitted to have legal representation. They were successful in their application in that Butler J. concluded that, in circumstances where the charges made against them concerned dishonesty and they faced a possible reduction in pay or even dismissal if the charges were proved, the rules of natural justice and fair procedures warranted that they be entitled to legal representation.

34. In reversing the High Court decision on appeal Geoghegan J. expressed himself satisfied that on the particular facts of the case, it could not be said that the applicants could not receive a fair hearing without legal representation, that being the central issue which the court had to decide.

35. Of particular relevance in the context of the present appeal is the following statement made by Geoghegan J. at p. 688 of his judgment:-

> "The cases for which the respondent would be obliged to exercise a discretion in favour of permitting legal representation would be exceptional. They would not necessarily be related even to the objective seriousness of the charges if the issues of proof were purely ones of simple fact and could safely be disposed of without a lawyer. In any organisation where there are disciplinary procedures, it is wholly undesirable to involve legal representation unless in all the circumstances it would be required by the principles of constitutional justice"

36. This statement by Geoghegan J., in my view, provides clear authority for the proposition that if the facts to be considered in the course of a disciplinary hearing are relatively straightforward then, to conduct a disciplinary hearing in respect of those facts cannot be stated to be unfair or in breach of the principles of natural and constitutional justice by reason only of the fact that the person against whom the misconduct is alleged does not have legal representation. Further, when he stated that it was wholly undesirable that lawyers should become involved in disciplinary hearings unless it was clear that any individual hearing would likely offend the principles of constitutional justice, he was not confining his observations to inquiries conducted under the Prison Rules, but rather was stating a principle which he considered relevant to a wide-range of potential investigations including workplace investigations such as the one under consideration here.

37. The decision in *Burns* is of particular importance insofar as Geoghegan J. specifically adopted in this jurisdiction, as proper matters for consideration by an employer faced with a request that an employee should be entitled to legal representation at a disciplinary hearing, the six factors identified by Webster J. in *Regina v. Home Secretary ex parte Tarrant* [1985] 1 Q.B. 251. Before considering these factors in detail in the context of the present appeal, it is important to note that in so doing Geoghegan J. added the following rider concerning the said factors:-

> "I am merely suggesting that they are the starting off points to be considered. Even if the case falls within one of these categories, in the context say of the Rules of 1996, the respondent would still be entitled to consider whether a fair hearing would require a lawyer."

38. The factors advised in *Tarrant* are set out by Geoghegan J. at para. 14 of his judgment in the following manner, namely:-

> "1. the seriousness of the charge and of the potential penalty;
>
> 2. whether any points of law are likely to arise;
>
> 3. the capacity of a particular prisoner to present his own case;
>
> 4. procedural difficulty;
>
> 5. the need for reasonable speed in making the adjudication, that being an important consideration; and
>
> 6. the need for fairness as between prisoners and as between prisoners and prison officers."

39. Of relevance also is the fact that Geoghegan J. further qualified his statement that the aforementioned factors should serve as a

starting point for the consideration of any application for legal representation at a disciplinary hearing, by adding the following caveat:-

> "[15] I would approve of that list but it is a list merely of the kind of factors which might be relevant in the consideration of whether legal representation is desirable in the interests of a fair hearing. Ultimately, the essential point which the relevant governor has to consider is whether from the accused's point of view legal representation is needed in the particular circumstances of the case. I would reiterate that legal representation should be the exception rather than the rule. In most cases the provisions of the Rules of 1996 will simply apply".

40. The particular facts of the litigation in which Webster J. came to identify the aforementioned factors are also, in my view, material to the outcome of this appeal and for that reason I will summarise them. In *Tarrant*, five prisoners were charged with serious offences against prison discipline. Two were charged with mutiny and others with serious breaches of discipline including assault. The charges against them were to be determined by the Board of Visitors of the relevant prisons. Webster J. concluded that in respect of all five prisoners the Board of Prisoners had a discretion to permit legal representation and had erred as a matter of law in failing to engage with that discretion. He also concluded that the two prisoners charged with mutiny, which was a particularly serious offence and one which was complex as a matter of law, should have been entitled to legal representation.

41. From the judgment in *Tarrant*, it is clear that there was no express bar in the (U.K.) Prisons Act of 1952 or the Prison Rules of 1964 to a prisoner having legal representation. Further, there was nothing in the Rules to permit the prisoners to have anyone attend with them to give them assistance. Indeed, the two applicants charged with mutiny had specifically asked that they might be permitted to have someone accompany them as a "MacKenzieman" but that too had been refused.

42. By the time the court came to consider the Board's decision to refuse the applicants legal representation the disciplinary hearings had concluded with the result that the two prisoners charged with mutiny had been found guilty of that offence. Each was to lose 400 days remission and 56 days earnings. Regarding the other prisoners not charged with mutiny, one was to lose 112 days privileges whilst another was to endure 77 days of cellular confinement with consequential exclusion from the labour force.

43. Of particular importance, in the context of the present case, is the discussion by Webster J. of the complexities of the charges of mutiny against two of the prisoners. In his judgment he refers to the fact that the offence was one of collective subordination, collective defiance or disregard of authority. Concerning these charges he stated as follows:-

> "It seems to me in most, if not all, charges of mutiny, and certainly in these two cases, questions are bound to arise as to whether collective action was intended to be collective, *i.e.*, whether it was concerted or not, and as to the distinction between mere obedience of a particular order on the one hand and disregard or defiance of authority on the other.
>
> In my judgment, where such questions arise or are likely to arise, no Board of Visitors, properly directing itself, could reasonably decide not to allow the prisoner legal representation."

44. Finally, of relevance in the context of the present appeal is Webster J.'s reliance upon a report by the Home Office Research Unit which was based on interviews with a number of prisoners after their cases had been adjudicated upon by the Board of Visitors. The report advised that some of the prisoners were poorly educated and were not very intelligent. It recorded that a few of those interviewed spoke poor English and others appeared to have psychiatric problems. It went on to recommend that unless given considerable assistance, it was unrealistic to expect prisoners with difficulties of that nature to prepare an adequate written statement or to present their case effectively. This report was, of course, of particular significance given that the prisoners in *Tarrant* were not entitled to representation of any type whatsoever. This was obviously of significant importance in the context of the legally complex charges of mutiny.

45. The decision in *Burns*, because it focuses upon a charge of misconduct which was immediately to become the subject matter of a formal disciplinary hearing, does not engage with the difference between the rights to which an employee may be entitled depending upon whether they are the subject matter of what is often referred to as a preliminary investigation and a formal disciplinary process. The investigative process is usually conducted to ascertain whether there are issues that an employee should be required to answer in a formal disciplinary process and there are no immediate legal consequences that flow from such investigations. On the other hand, a formal disciplinary inquiry, which often follows on from an investigative process, has the potential to have serious consequences for the employee as it is at the end of this process that sanctions may be employed if misconduct is found. Relevant to the rights of the employee in the course of the preliminary investigation is the fact that the findings of fact made in the course of such an investigation are of significance only insofar as they may lead to a formal disciplinary process. If a formal disciplinary inquiry is later commenced the misconduct alleged will have to be proved in the course of that inquiry and for that reason the employee will be entitled to challenge all of the evidence adduced and will be entitled to call their own evidence. The distinction between these two processes is helpfully considered by Laffoy J. in *Maher v. Irish Permanent* [1998] 4 I.R. 302.

46. It is important therefore to recognise that this court is not concerned with the rights which Mr. McKelvey enjoyed in the course of the initial investigation into the purchase of fuel in Division 3 but rather with what are undoubtedly his enhanced entitlements having regard to the fact the formal disciplinary inquiry which has been notified to him will expose him to the imposition of a significant potential sanction should the wrongdoing alleged against him be established.

47. This brings me to mention briefly the two contradictory decisions of the High Court earlier referred to. I do not intend to consider these in any great detail because both judgments focus upon the rights of the employee in the course of the investigative process rather than the rights to which they would be entitled in the course of a formal disciplinary inquiry.

48. In his judgment in *Lyons* Eager J., in my view, departs to a significant extent from the jurisprudence set out in *Burns* wherein it is stated that even when it comes to a formal disciplinary inquiry, that in order to comply with natural justice and fair procedures, legal representation should be required only in exceptional cases. Eager J. did not consider that the right to legal representation should be so confined. It was his view that before the employer could invoke what is referred to in his judgment as "the stage 4 procedure", that being the equivalent in most workplace disputes to a formal disciplinary inquiry, it had to be established that the earlier investigation had been conducted in line with fair procedures which included the right to legal representation and cross-examination. Further, in so deciding he did not confine the entitlement of the employee to legal representation in any specific type of case but would appear to have decided that it was the entitlement of the employee in all instances.

49. In stark contrast to the decision in Lyons, McDermott J. in *N.M. v. Limerick and Clare Education and Training Board* [2017] IEHC 588 concluded, in the context of a preliminary investigation into vastly more serious complaints than those which arose for

consideration in *Lyons*, that the investigative process was fair even though the employee was not legally represented.

50. In my view, however, it is the decision in Burns, because it engages with a consideration of the rights of the individual who may be subjected to a severe sanction if the charges pending against them are proved in the course of a formal disciplinary inquiry, that must guide this court in reaching its judgment.

51. All that said there is, I believe, only one substantial issue that needs to be addressed in this judgment namely whether, on the facts of the present case, it was clear that Mr. McKelvey could not have a fair hearing in the course of the formal disciplinary inquiry absent legal representation by solicitor and counsel. None of his other rights are in dispute. These include:

(i) his right to know the nature of the complaint/allegation made against him;

(ii) his right to know the procedure to be followed in the course of the investigation;

(iii) his right to know the potential implications of the complaint/allegation should it be established, *i.e.* the sanction/sanctions that might be imposed;

(iv) his right to be heard in relation to the complaint/allegation and to make representations in relation thereto;

(v) his right to challenge such evidence as might be called to establish the complaint/allegation and to cross-examine all witnesses;

(vi) his right to call witnesses in support of his stated position.

Decision

52. Having considered the submissions of the parties and the relevant authorities I am satisfied that the High Court judge erred in law and in fact in concluding, as she did, that the appellant incorrectly exercised its discretion in refusing Mr. McKelvey legal representation for the purposes of the disciplinary inquiry which was due to commence on the 9th June 2017. Having regard to the evidence before her I am not satisfied that there were any special or exceptional circumstances which would have warranted her conclusion that he could not receive a fair hearing in accordance with natural justice unless he was represented by solicitor and counsel.

53. I now propose to deal with the manner of the trial judge's consideration of the factors identified in *Tarrant* and *Burns* in light of the evidence. It is important, I believe, to conduct this exercise mindful of the guidance provided by Geoghegan J. in *Burns* to the effect that it is wholly undesirable to involve lawyers in workplace investigations unless it be established that there is something exceptional about the matters to be scrutinised such that it would be reasonable to conclude that the proposed hearing could not be a fair one absent legal representation.

54. The first factor relied upon the trial judge was what she described as the serious nature of the allegation made against Mr. McKelvey, which was one of theft which carried the potential sanction of dismissal. I would here observe that whilst the complaints under investigation in *Burns* where less serious than those faced by Mr. McKelvey, it is nonetheless clear from para. 12 of the judgment of Geoghegan J. that the prison officers concerned were at risk of dismissal or having their rank reduced.

55. It is nonetheless true that the wrongdoing alleged against Mr. McKelvey was properly classified as serious by the trial judge for the reasons which she identified, with the result that this was a factor to be considered by her when assessing the correctness of the appellant's decision to refuse him the right to be legally represented. However, given that she ultimately granted Mr. McKelvey the injunction which he sought, I consider it likely that she ascribed undue weight to this factor.

56. I do not consider the fact that the conduct under investigation had the potential to result in a criminal prosecution at a later date is a particularly significant factor. Whilst I am not privy to such statistics as might reveal what percentage of charges investigated in the context disciplinary hearings in the workplace might have the potential to support a criminal charge, I would venture to suggest that a reasonable percentage of them would have such potential. For example, any type of theft or assault, significant or otherwise, would carry that possibility. To put it another way, there is nothing particularly unusual or exceptional about an inquiry into an incident or incidents of theft in the work place.

57. Relevant also in this regard is the fact that any finding made against Mr. McKelvey in the course of the disciplinary inquiry would not be admissible as evidence against him in any future criminal proceedings and he would be entitled to be legally represented in that process. Thus, it is hard to see how Mr. McKelvey could be prejudiced in any future criminal proceedings by the fact that the appellant had carried out a disciplinary inquiry into similar facts.

58. I am, accordingly, satisfied that the fact that the circumstances to be investigated in the course of the disciplinary inquiry have the potential to be investigated in the course of criminal proceedings is not a factor which would bring the inquiry proposed within the type of exceptional category described in *Burns*, particularly given that the charge of misconduct against Mr. McKelvey is, in my view, relatively straightforward one.

59. The trial judge was of course correct to have regard to the fact that the charge made against Mr. McKelvey was one which, if established, could result in his dismissal. However, the sanction of dismissal is hardly an exceptional or unusual feature of disciplinary hearings in the workplace. As already noted, dismissal was a possible sanction in *Burns*. Thus it is hard to see that this particular factor can be relied on to support a claim that the proposed inquiry is exceptional to the point that Mr. McKelvey might not receive a fair hearing without legal representation.

60. Further, it does not follow that just because the sanction has the potential to be grave that Mr. McKelvey is at any greater risk of receiving an unfair hearing without legal representation than in a case where he might be at risk of a lesser sanction. After all, it is the risk that the employee may not receive a fair hearing absent legal representation that is central to the court's consideration. This was certainly the view of Geoghegan J. in *Burns* wherein he noted that Butler J. in the High Court had taken the view that because the charges against the applicants were of dishonesty and they faced possible dismissal, they were entitled to legal representation. He rejected that approach emphasising the need to focus upon whether or not the applicants would, on the facts of that case, have the benefit of a hearing which would be fairly conducted. Relevant to his conclusion that they would receive such a hearing without legal representation was the fact that, in his view, the charges were straightforward and could easily be defended without a lawyer

meant. Thus, there was no risk that there would be an unfair hearing absent legal representation.

61. The fact, therefore, that the charges were straightforward and could readily be defended without the need for legal assistance meant, accordingly, in the view of Geoghegan J. that there would be no risk that there would be an unfair hearing absent such representation.

62. Of some guidance as to the weight to be attached to the potential sanction for Mr. McKelvey if the charges against him were to be established, is the judgment of Webster J. in *Tarrant* wherein he stated that the fact that the prisoners were at risk of forfeiture of remission was not necessarily a reason for concluding that they should have legal representation. At p. 32 of his judgment he stated as follows:-

> "The charges against Tangney and Anderson each included one charge of an assault on a prison officer under rule 51. Each of them was, therefore, exposed to the risk of "an award" of forfeiture of remission for a period not exceeding 180 days – more, if, as Mr. Simon Brown contends but which is challenged on behalf of the applicants, a board has the power to make consecutive awards, a point upon which I need express no view. For my part, I do not think it can possibly be said that any reasonable board properly directing itself would be bound to grant legal representation or, in the case of Tangney and Anderson who applied for it, would be bound to have allowed the presence of an advisor. I would, therefore, leave the matter to be decided by any board before which it may come, if it does so."

63. Whilst obviously a matter of considerable concern to any employee under investigation for alleged wrongdoing in the workplace, there is nothing exceptional about the fact that any finding made against them might have adverse consequences for their future employment prospects or their good name. Whilst these are matters to which a body asked to exercise its discretion and permit legal representation is entitled have regard, they are not in any respect unusual factors and they are somewhat disconnected from the principal consideration, namely, whether or not the employee can be assured of a fair hearing absent legal representation.

64. In light of the aforegoing, whilst the High Court judge was entitled have regard to the serious nature of the charges made against Mr. McKelvey, the potential penalty to which he might be subjected and possible adverse effect of any adverse findings for his reputation and future job prospects, these were all matters which were far from exceptional in the context of work place investigations and as such could not be dispositive of his entitlement to legal representation. Further, they are matters which, in my view, are more peripheral than central to the core issue which is whether it was clear that Mr. McKelvey might not receive a fair hearing absent legal representation.

65. Insofar as Mr. McKelvey sought to support his entitlement to be represented by solicitor and counsel based on the decision of Keane C.J. in *Borges*, I regret to say that I am satisfied that that decision is of no application to issues under consideration on this appeal. *Borges* is not authority for the proposition that where an allegation of misconduct is to be the subject matter of a disciplinary hearing and the party against whom the charge is made faces the risk of serious damage to their reputation and their ability to earn a livelihood, that natural justice and fair procedures mandates that they be entitled to legal representation for the purposes of defending that charge.

66. It is true to say that in the course of his judgment in Borges, Keane C.J. made the following observation at para. 26 of his judgment namely:-

> "26. It is beyond argument that, where a tribunal such as the first respondent is inquiring into an allegation of conduct which reflects on a person's good name or reputation, basic fairness of procedure requires that he or she should be allowed to cross-examine, by counsel, his accuser or accusers. That has been the law since the decision of this court in *In re Haughey* [1971] I.R. 217 and the importance of observing that requirement is manifestly all the greater where, as here, the consequence of the tribunal's finding may not simply reflect on his reputation but may also prevent him from practising as a doctor, either for a specified period or indefinitely."

67. However, having considered the full judgment in *Borges*, it is clear that the decision had nothing to do with the circumstances in which a party might claim an entitlement to entitled legal representation in the context of a disciplinary hearing, but rather, the entitlement of a party against whom allegations of misconduct have been made, to confront their accuser by way of cross-examination, concerning those charges. That this is so is clear from the relevant facts which I will now summarise.

68. In *Borges*, the Medical Council had served a notice of intention to hold a disciplinary inquiry under part 5 of the Medical Practitioners Act 1978 in relation to allegations of serious sexual misconduct on the part of the doctor. The Council proposed to prove the misconduct alleged by introducing into evidence a transcript of proceedings which had taken place before the Professional Conduct Committee of the General Medical Council of the United Kingdom where the two complainants had given evidence in relation to the matters referred to in that inquiry. It was also proposed to introduce in evidence the report of that committee and the judgment on appeal of the Privy Council upholding the findings of the Professional Conduct Committee which had decided that the medical practitioner's name should be erased from the register.

69. Insofar as the complaint before the Medical Council in this jurisdiction was concerned, the complainants were not only unwilling to come to Ireland to give evidence but refused also to make themselves available to be cross examined by way of video link. Neither were they willing to take part in any hearing that might be conducted by the Fitness to Practice Committee in the United Kingdom.

70. Notwithstanding objections on the part of the medical practitioner to the procedure proposed, the Fitness to Practice Committee ruled that it would proceed with the inquiry and admit as evidence the transcript from the U.K. proceedings with the result that the medical practitioner applied to the High Court for an order of *certiorari* quashing that ruling as unlawful.

71. It is clear from the judgment of Keane C.J. that the issue with which he was concerned was whether or not the Fitness to Practice Committee's decision to go ahead with the inquiry without the complainants attending and being available for cross-examination constituted a denial of fair procedures and natural justice, and whether the transcripts which it was proposed to admit might, as a matter of law, be admissible as an exception to the hearsay rule. The entire decision centres upon the entitlement of the party against whom serious charges have been made to cross-examine their accusers rather than by whom such a cross examination might be conducted. It was the fact that the Medical Practitioner was to be afforded no opportunity to confront the complainants which led the court to conclude that the proposed inquiry was otherwise than in accordance with the basic fairness of procedures guaranteed by Article 40.3 of the Constitution. Accordingly, Mr. McKelvey's reliance upon this decision is misplaced.

72. For the sake of completeness, I would here also caution about any over-reliance on such jurisprudence as pertains to fair procedures in the context of hearings conducted by professional regulatory bodies such as the Medical Council. Statutory bodies such

as the Medical Council have functions and powers which are in many respects different from those of the employer investigating allegations of misconduct against an employee and that being so different considerations arise. Furthermore, statutory bodies such as the Medical Council have specifically been established to set standards, monitor and investigate the conduct and capacity of the members of that profession. That is their focus and their decisions can- and frequently do-result in the exclusion of the disciplined members from the profession. This is to be contrasted with the practicalities within the workplace setting of dealing with suspected misconduct on the part of an employee in a manner which is fair, just and efficient from the prospective of both parties.

73. Returning to the judgment of the High Court judge, I am satisfied that she was correct as a matter of law to consider whether, in the course of the disciplinary inquiry, any legal issues were likely to arise which might cause prejudice to Mr. McKelvey if he did not have a legal team acting on his behalf. Where I would take issue with the High Court judge is in her conclusion that multiple points of law were likely to arise. In identifying these, she referred first to alleged flaws in the investigation, second to the imprecision of the charges levelled against Mr. McKelvey and third to the need for the appellant to establish loss.

74. In my view these were not factors which, had they been considered by the appellant, would have warranted its agreement to Mr. McKelvey's request that he be legally represented by solicitor and counsel. There was, in my view, nothing imprecise about the charge of misconduct to be investigated. It was theft by the misuse of his fuel card/cards which had caused financial loss to his employer.

75. Neither, in my view, was there any evidence to suggest that any legal issue could arise in the course of the disciplinary inquiry as might engage with any possible flaws there may have been in the course of the early preliminary investigation. It was only following the conclusion of that investigation that a formal allegation of misconduct was made against Mr. McKelvey and that charge will have to be established based on evidence adduced within the four walls of the formal disciplinary inquiry.

76. Regarding the trial judge's reliance upon the need for the appellant to establish loss in order that the charge of theft be sustained, it is important to remember that Mr. McKelvey is not to be tried by his employer for the crime of larceny. The appellant will or will not prove as a matter of fact that he used his fuel card to make improper purchases of fuel. If the evidence establishes that certain purchases were made by Mr. McKelvey otherwise than for the purpose of fuelling vehicles or machinery owned by the appellant, it will follow as a matter of fact that the organisation suffered loss to the value of those purchases. I cannot see how it can be contended that Mr. McKelvey would need legal representation so that he could have a fair hearing in relation to the proof of loss arising out of his alleged wrongdoing.

77. Perhaps it is relevant in relation to this issue to reflect upon the origins for the consideration of this factor i.e. the possibility that a complex issue or issues of law might arise in the course of a hearing which might only be fairly dealt with the assistance of legal representation. It was the complexity of the charge of mutiny described by Webster J. in Tarrant which lead to the identification of this factor and its potential importance in the assessment of the exercise of the discretion to afford a party against whom a complaint is made, legal representation. The facts of that case were really quite unique given the complex nature of the charge of mutiny and the proof that would be required to prove it. That is to be contrasted with the appellant's allegation that as a matter of fact Mr. McKelvey used his fuel card for improper purchases of fuel which cost the company money.

78. It is of course possible that some complex issue might in the course of the disciplinary inquiry. However, if it did, that would be the time for Mr. McKelvey to ask that the inquiry be postponed to enable him obtain legal representation. In my view, at the time when he demanded the right to be legally represented there was no issue of any legal complexity on the horizon which would have warranted the appellant agreeing to Mr. McKelvey's request.

79. I am also satisfied that there was nothing in the evidence to suggest that the circumstances to be investigated in the course of the disciplinary process would be in any way complex. The alleged misuse by Mr. McKelvey of his fuel card/cards will involve a consideration of the day-to-day use by him of any such card. The fact that the appellant will seek to establish that the fuel card was used inappropriately on more than one occasion or over an extended period does not, in my view, elevate the complaint to one of complexity such that it can be said that the hearing to be conducted against Mr. McKelvey would be unfair unless he was legally represented. The facts to be investigated in the course of the proposed disciplinary inquiry in this case are, in my view, much more straightforward than those that arose for the consideration of Blayney J. in *Gallagher v. Revenue Commissioners* [1991] 2 IR 370 where the employee was the subject matter of 18 sets of charges (72 charges in all) concerning the seizure of 18 vehicles in the course of his duties as a Customs and Excise officer.

80. Whilst Mr. O'Callaghan claimed that Mr. McKelvey required the assistance of a lawyer to interpret the content and evidential significance of certain documents which had been furnished to him in advance of the hearing, in order that he might have a fair hearing, I am not satisfied that this is so. Counsel first referred to a number of spreadsheets exhibited in the supplemental affidavit of Mr. McKelvey sworn on the 14th June 2017. These set out in tabular form a list of dates and locations where fuel was apparently purchased and the price paid. For my part, I fail to see why a lawyer would be needed to interpret these documents or to advise as to their significance. Their content seems to be self-evident and it is difficult to see how such documents could cause Mr. Cullen and Mr. McKelvey to be confused. Further, it is to be noted that all that is said by Mr. McKelvey in his affidavit of the 6th July 2017 concerning these spreadsheets is that he is not clear as to which of these transactions his employer maintains constitutes theft. Indeed, it might be said that it is to be inferred from his affidavit that Mr. McKelvey well understands the information set out in the spreadsheet, but merely wants to know how many of these entries concerning the purchases of fuel it is alleged were not for the purposes unconnected with his employment. Those are matters which will, in the course of the inquiry, have to be proved.

81. As to a three page Microsoft Word document which records an interview conducted with Mr. McKelvey in the course of the initial investigation, once again it is difficult to see how this document could raise the need for any legal representation at the hearing. It does no more than perhaps give Mr. McKelvey a preview of the transactions likely to be queried in the course of the disciplinary inquiry.

82. Insofar as the trial judge would appear to have concluded that in some way Mr. McKelvey lacked the capacity to defend his interests at the disciplinary hearing and that this was a factor to be taken into account by the appellant when considering his request for legal representation, that finding is not, in my view, supported by the evidence. The capacity of Mr. McKelvey to, as the trial judge stated, "navigate such a process unaided" was not a factor to be considered in circumstances where he was to be represented by Mr. Cullen, an experienced trade union official. The relevance of the capacity of the individual facing a disciplinary inquiry, insofar as it emerges from the decision in *Tarrant*, is dependent upon the facts in each individual case. In *Tarrant*, the two prisoners charged with mutiny were not only not entitled to legal representation under the prison rules but neither were they entitled to be accompanied at the hearing by someone who might act as a "MacKenzieman" and it was for this reason that Webster J. engaged with the Home Office Report which referred to the lack of education and intellectual capacity of many prisoners and their inability to defend the charges against them.

83. Accordingly, insofar as the issue of capacity could be a factor relevant to an asserted right to legal representation, the question to be determined by the High Court judge in this case was whether it could be said that Mr. McKelvey, with the assistance of Mr. Cullen or some other trade union representative, would not obtain a fair hearing at the proposed inquiry because of their lack of legal training. In my view, there was no evidence to suggest that Mr. McKelvey would not receive a fair hearing if represented by Mr. Cullen. Indeed, there was some evidence to the contrary given that it was established that Mr. Cullen was defending two other employees facing precisely similar charges.

84. Insofar as the trial judge would appear to have concluded that there was something unclear about the disciplinary procedure to be deployed at the inquiry and that this was a factor to be taken into account by the appellant when considering his application for legal representation, I am not satisfied that there was any evidence to support that conclusion. Mr. McKelvey had been furnished with the company's Grievance Disciplinary Policies and Procedures which clearly identifies the procedure to be adopted. It is not in dispute that this disciplinary code had been in operation within Iarnród Éireann since it was adopted with the agreement of the relevant trade unions thirty years ago and was, in such circumstances, presumably well known to Mr. Cullen. The disciplinary procedures are clearly set out in that document allied to which, by letter of the 2nd June 2017, it was confirmed that Mr. McKelvey would receive all documents which were to be relied upon in the course of the hearing in advance thereof.

85. For completeness it is perhaps relevant to observe that the disciplinary policy and procedures operated by Iarnród Éireann are fully compliant with the code of practice issued under the Industrial Relations Act 1990 and S.I. 146/2000. That code of practice is stated to promote best practice and outlines the principles of fair procedures for employers and employees generally and is, of course, of particular relevance to disputes in an industrial relations context. It is well understood that the code, promulgated so many years ago, was developed so that disciplinary issues could be handled in accordance with the principles of natural justice and fair procedures and in order that good industrial relations might be maintained in the workplace. It was undoubtedly intended that the code would assist management maintain satisfactory standards whilst providing employees with a fair procedure whereby any alleged failing on their part to comply with those standards could be sensitively addressed. It might be said that the fact that the code is silent on legal representation is perhaps indicative of the view that it should be possible for organisations to carry out inquiries into alleged misconduct on the part of employees on an "in house" basis without the need to involve lawyers. As is observed in many of the authorities, once lawyers become involved, the process is ultimately slowed, becomes more expensive and oftentimes will fracture and irreparably damage relations between employer and employee.

86. Finally, I would observe that it remains open to Mr. McKelvey at any stage during the disciplinary inquiry to renew his request that he be entitled to representation by a solicitor and counsel should matters emerge which neither he nor Mr. Cullen could reasonably be expected to deal with without legal representation.

87. Relevant also, in my view, is the fact that Mr. McKelvey enjoys the right to a full appeal from any findings as may be made against him in the course of the proposed disciplinary inquiry. At that point in time he might, by reference to some particular matter of complexity as may have arisen in the course of the disciplinary inquiry, and which he can demonstrate was critical to the outcome, claim an entitlement to be legally represented at the hearing of his appeal in order to insure a hearing that is fair and in accordance with the principles of natural justice. However, on the facts as they stood at the time the appellant refused Mr. McKelvey's request that he be entitled to be legally represented, the circumstances were not such that it could reasonably have been contended that he would not obtain a fair hearing in accordance with natural and constitutional justice absent legal representation.

88. For all of the aforementioned reasons, I would allow the appeal.

Conclusion

89. Whilst an employee facing a disciplinary inquiry in respect of alleged misconduct may be at risk of *inter alia* dismissal from their employment and significant damage to their good name, it should nonetheless generally be possible, save in exceptional circumstances, for such an employee to obtain a fair hearing in accordance with the principles of natural justice without the need for legal representation.

90. It is of course mandatory that all disciplinary inquiries into misconduct alleged against an employee be carried out in a manner which is fair and in a process that meets the requirements of natural and constitutional justice. However, for the process to meet that standard it should not, save in exceptional circumstances, be necessary for the employee to be legally represented. Neither, in my view, should it be necessary that the procedure to be deployed should ape the type of hearings with which we are familiar in criminal or civil proceedings before the courts. Regrettably, once a party against whom an allegation of misconduct is made can make the case that they cannot receive a fair hearing absent legal representation, it is difficult to see how, for example, a fellow employee making such a complaint would not also be entitled to be legally represented. Not only would a disciplinary process which routinely involved the retention of lawyers have the effect of slowing down the process and making it more costly but it would also have significant potential adverse consequences for the relationship between management and the employee under investigation and also as between employees themselves.

91. In my view Geoghegan J. was correct in *Burns*, when he cautioned that legal representation should only be permitted in those cases where the party applying for that right can demonstrate the existence of exceptional circumstances which would caution that that the employee might not receive a fair hearing absent legal representation.

92. Accordingly, a convenient starting point for a consideration of whether an employee should be permitted legal representation at any proposed disciplinary inquiry is a consideration of the factors advised by Geoghegan J. in *Burns*.

93. While it is true to say that Mr. McKelvey faces a disciplinary inquiry which could lead to his dismissal and which has the further potential to impact on his future employment prospects and his reputation, in this regard he is no different to a very substantial percentage of employees facing allegations of misconduct in the workplace. In my view, the allegation of misconduct made against Mr. McKelvey is a straightforward one and I am not satisfied that he has identified any factual or legal complexities that may arise that he should not be in a position to deal with adequately with the assistance of Mr. Cullen, an experience trade union official.

94. Should it come to pass that at some future stage of the disciplinary process Mr. McKelvey can point to some matter of significant factual or legal complexity which he could not reasonably be expected to navigate safely without the assistance of legal representation, it would be open to him at that point in time to renew his application on the grounds that he required such representation to guarantee a hearing that was fair and in accordance with natural justice. However, on the evidence before the High Court I am satisfied that the trial judge should not have treated the circumstances of Mr. McKelvey's case as exceptional such as would have warranted the making of the order which she did.

95. For the aforementioned reasons, I would allow the appeal.