Neutral Citation: [2015] IEHC 589

THE HIGH COURT

Record No. 2015/6739P

BETWEEN/

GARY BOYLE

Plaintiff

and
AN POST

Defendant

JUDGMENT of Mr Justice Max Barrett of 23rd September, 2015.

PART I: OVERVIEW.
1. Postmen and postwomen are important pillars of community life, entrusted with the safe carriage and delivery of all manner of business and private correspondence. Mr Boyle was, until recently, a postman in the Dublin area. To his vexation, he has been dismissed by An Post for alleged 're-posting'of mail. In other words, An Post has formed the view that instead of delivering certain post that was entrusted to him for safe delivery, Mr Boyle re-posted it in a letter-box close by his home. Mr Boyle emphatically denies the allegation made by An Post. He asserts that there would be no sense in him re-posting mail because he would only end up having to deliver it anyway once it got back to the post office. Plus, he maintains, if he was going to re-post mail he would hardly do so at the post-box closest to his home. An Post does not believe Mr Boyle's protestations. It considers his misbehaviour to have been so bad as to merit termination of his employment for misconduct. It treats this form of misconduct with some seriousness, not just because it naturally has an impact on the ordinary running of An Post as a commercial entity but also because re-posting has the potential to constitute a criminal offence under s.84 of the Postal and Telecommunications Services Act, 1983 and s.53 of the Communications Regulation (Postal Services) Act 2011.

2. Notwithstanding An Post's view that Mr Boyle's alleged re-posting of mail constitutes misconduct of a sufficiently serious nature as to warrant dismissal, it has effected dismissal pursuant to the standard notice provisions contained in his contract of employment and paid him all the payments to which he would have been entitled on the ordinary termination of his contract. In addition, prior to the termination of his contract of employment, Mr Boyle went through an investigation and disciplinary process with An Post. He comes to court complaining that An Post did not adhere to fair procedures throughout that process and that, as a consequence, he was wrongfully dismissed. At this time he seeks of the court (1) an interlocutory injunction reinstating him to his position with An Post, (2) by way of alternative to (1), an interlocutory injunction compelling An Post to pay Mr Boyle a salary pending the determination of his wrongful dismissal proceedings, (3) an interlocutory injunction preventing An Post, its servants or agents, from dismissing him for misconduct save in accordance with fair procedures, and (4) an interlocutory injunction restraining An Post, its servants or agents, from appointing a replacement for Mr Boyle on anything other than a temporary basis. Items (1) and (2) are mandatory in their terms. Item (3) has been overtaken by events in that Mr Boyle has been dismissed in accordance with the standard notice provisions of his contract and he acknowledges himself in his affidavit evidence to have been dismissed. Item (4), though expressed in negative form is mandatory in effect as it would direct An Post as to what basis it could employ a replacement for Mr Boyle. Thus Items (1), (2) and (4) seek mandatory relief and so are subject to the 'strong case' requirement considered hereafter. Relief in the form of Item (3) is now without meaning.

PART II: KEY ISSUE ARISING.
3. The principal dispute arising between the parties, though not a matter for adjudication in the within application, is whether An Post adhered to fair procedures in dismissing Mr Boyle. (Fair procedures, not perfect procedures. The law does not demand the impossible: fairness is ever required; perfection is unattainable). In this application for interlocutory injunctive relief the court's focus is on the procedural issues that such an application typically presents. Even so, it is necessary to provide some detail as to the principal dispute arising.

PART III: MR BOYLE'S CASE IN SUMMARY.
4. It appears to the court that Mr Boyle's contentions as regards the principal dispute arising between him and An Post can perhaps be summarised as follows: (1) a letter sent to him on 16th December, 2014, which initiated the disciplinary process evidences on its face, he claims, pre-judgment and bias; (2) Mr Boyle allegedly suffered a deficit of information by not being given the notes of one or more meetings, as well as various internal memoranda; (3) An Post's investigation was allegedly inadequate in that there was a failure on its part to inquire adequately into other potential reasons for mail being where it ought not to be; (4) Mr Boyle understood from his trade union that there could be no dismissal for re-posting; and (5) other alleged deficiencies as regards fair procedure arose from Mr Boyle's allegedly not receiving the notes of certain meetings.

PART IV: AN POST'S CASE IN SUMMARY.
5. An Post's contentions as regards the principal dispute arising between the parties can perhaps be summarised as follows: (1) Mr Boyle has been dismissed and his dismissal was effected on notice, so there can be no claim of unfair dismissal; (2) the essential facts in issue were basic in that substantial quantities of mail were allegedly re-posted and An Post concluded that Mr Boyle was responsible for same; (3) damages are, An Post claims, an adequate remedy and Mr Boyle, on his own admission, does not have the financial wherewithal in any event to meet an undertaking as to damages; (4) this, An Post claims, is a case for the Employment Appeals Tribunal given the somewhat modest level of Mr Boyle's income, the fact that dismissal has been effected, and an apparent loss of trust between the parties.

PART V: STRONG CASE THAT LIKELY TO SUCCEED?

i. MahaLingham, etc.
6. It is settled law since at least the time of the *ex tempore* judgment delivered for the Supreme Court by Fennelly J.in *Maha Lingham v. HSE* [2006] 17 ELR 137, 140 that where a plaintiff employee is seeking a mandatory interlocutory injunction against her employer, it is necessary for the plaintiff *"to show at least that he has a strong case that he is likely to succeed at the hearing of the action".* Additionally, per Clarke J. in *Bergin v. Galway Clinic Doughiska Ltd* [2008] 2 I.R. 205, 216:

> *"[Where a plaintiff employee]seeks to prevent a dismissal or a process leading to dismissal, as a matter of common law and in whatever terms the claim is couched, the employee concerned is seeking what is, in substance, a mandatory injunction….In those circumstances it is necessary for the employee concerned to establish a strong case in order to obtain interlocutory relief."*

7. The court considers that the decision in *Maha Lingham* is applicable to, and thus binding upon it in, the within application. The court also respectfully agrees that the judgment in *Bergin* is correct in its statement of applicable law, though the court has in any event concluded that the various available reliefs being sought in the within proceedings are mandatory and thus that the burden of

establishing the required *"strong case"* presents.

ii. Fair procedures?

8. Has Mr Boyle shown that he has a strong case in which he is likely to succeed at the hearing of the action? When it comes to fair procedures, principles evolve and particulars change: the requirements of natural and constitutional justice derive from current principle and are applied to present facts. As Barrington J., giving judgment for the Supreme Court, observed in *Mooney v. An Post* [1998] 4 I.R. 288, 298 *"The terms natural and constitutional justice are broad terms and what the justice of a particular case will require will vary with the circumstances of the case."* In the seminal decision of *Glover v. BLN Ltd.* [1973] I.R. 388, Walsh J. stated as a matter of general principle, at 425, that:

> *"[P]ublic policy and the dictates of constitutional justice require that statutes, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures."*

9. However, on the particular facts of *Glover*, Walsh J. noted, at 425:

> *"The plaintiff was neither told of the charges against him nor was he given any opportunity of dealing with them before the board of directors arrived at its decision to dismiss him. In my view this procedure was a breach of the implied term of the contract that the procedure should be fair, as it cannot be disputed, in the light of so much authority on the point, that failure to allow a person meet the charges against him and to afford him an adequate opportunity of answering them is a violation of an obligation to proceed fairly."*

10. An Post contends that these facts stand in contradistinction to the within proceedings where not only did Mr Boyle have an opportunity to put his case forward but has in fact done so at an oral hearing and by follow-up written submission by his father. Moreover, Mr Boyle has engaged in an appeal process where he was accompanied by trade union representation and made oral submissions.

11. Continuing, however, with an analysis of relevant case-law, the decision of the court in *Rowland v. An Post* [2011] IEHC 272 seems to this Court to be instructive when it comes to the matter now before it. In that case, the plaintiff argued that (i) he had not been afforded a statement of the complaints against him which were to be determined, (ii) he had not been provided with any of the documentation which purportedly grounded those complaints, (iii) he would not be provided with the opportunity to cross-examine his accusers, (iv) the defendant had pre-determined the outcome of the hearing and/or significant aspects of the factual evidence; and (v) the persons appointed by the defendant to determine the outcome of the hearing were biased as both were involved from the outset in building a case against the plaintiff and had gathered the evidence and formulated the obligations. The issues enumerated at (i), (ii), (iv) and (v) in *Rowland* are similar to many of the complaints raised by Mr Boyle in the within proceedings. The case was different in that Mr Rowland was an independent contractor, but the *ratio* of the case would appear to apply with equal vigour to cases involving employees.

12. In *Rowland*, Murphy J. held, at section 4.3 of his judgment, in relation to the general complaint that the plaintiff had been denied fair procedures that *"[T]he plaintiff has been told in detail of the concerns of the defendant and was given ample opportunity to address these concerns before the disciplinary procedure was initiated."* An Post contends that the same conclusion is apposite in the within case.

13. In *Rowland*, in relation to the complaint that the plaintiff had not been provided with any of the documentation grounding the complaints, Murphy J. stated, at section 4.4 of his judgment, that *"The court is satisfied that the detail given under the twelve headings [in the initial letter sent to the plaintiff] was sufficient to enable the plaintiff to reply."* In the present case the plaintiff complains that he was not provided with adequate documentation to enable him to make his case. An Post contends that the information furnished to Mr Boyle was more than sufficient to enable Mr Boyle to put his case.

14. In relation to the complaint that An Post pre-determined the outcome of the proceedings, this appears to derive ultimately from the letter of 16th December, 2014. This was in effect the letter which offered Mr Boyle the opportunity formally to respond to such allegations as were now being put against him by An Post as regards the alleged re-posting. The paragraph which has engendered no little controversy between the parties states:

> *"Your explanations in this regard are unacceptable to the Company and while you have denied this, it is the Company's view that you are the only person who could have placed the mail items in the [named] postbox. To this end, it is the Company's view that you are responsible for the wilful delay and reposting of mail on the 3rd, 4th and 5th September 2014. Your actions clearly constitute serious gross misconduct and you have undermined the trust and confidence the Company can have in you as an employee."*

15. The letter goes on to offer Mr Boyle the opportunity to furnish any explanation that he might wish to make, or to secure representations from his trade union or others on his behalf, as well as the opportunity to attend an oral hearing in addition to, or in lieu of, furnishing a written explanation.

16. Counsel for Mr Boyle claims that the quoted text involves an element of pre-judgement and shows bias on the part of An Post. An Post disputes this and points to the 'right of reply' process to which the letter refers and that was thereafter invoked. The court, in reaching its determinations in and for the purposes of the within application, considers that it is entitled to be mindful of the fact that: (a) the invocation of a disciplinary process by any employer likely involves some element of pre-judgment as to a worker's behaviour (an employer is generally unlikely to invoke a disciplinary process against an employee if it believes everything is 'fine and dandy' between employer and employee); and (b) one letter does not a process make, i.e. this Court may look to the entirety of the process that precedes and accompanies dismissal in reaching its decision in the within application.

17. Mr Boyle complains that the person appointed by An Post to co-ordinate the disciplinary process against him and then to make an internal recommendation was biased. An Post points to the fact that in *Rowland* the court was quite clear that notwithstanding that persons appointed by the defendant to determine the outcome of a hearing had been involved throughout the relevant process, this did not mean that there was bias. An Post points to the observation of Murphy J, at section 4.4 of his judgment, that *"As long as a neutral third party is assigned to the decision-making contest, there is no issue with the disciplinary hearing."* This Court respectfully considers that the word *"neutral",* as typically defined, is not entirely apposite in this context. The word *"neutral"* is defined in the Oxford Online Dictionary as meaning *"not supporting or helping either side in a conflict, disagreement, etc; impartial"*. However, the very act of one employee dismissing another employee on behalf of their common employer is intrinsically *"supporting or helping either side in a conflict, disagreement"* and is certainly not *"impartial"* – why else would the dismissing employee execute the dismissal other

than as part of a continuing duty qua paid employee to 'support or help' her or his employer? The only party who could approach being *"neutral"* would be a third party 'outsider', and it has never been a part of our law, nor is it now, that an employer must, should, needs to, or would be well-advised to, invoke the assistance of such an 'outsider' to effect a lawful dismissal. Indeed, given that such third party would presumably be remunerated for her or his services by the relevant employer, even s/he could not properly be described as 'neutral'. What the court considers Murphy J. must have intended to connote by using the word "neutral" was that company employees and officers required to investigate other company workers and make decisions regarding dismissal, or to determine appeals therefrom, should bring an appropriate level of objective detachment to the task required of them and not simply accede to the perceived expectations of an employer-company. It is the relevant employee's future relationship with the company which the employee or officer is being asked to investigate or pronounce upon; it is not the competency or corporate loyalty of, say, the HR officer or the arbiter on appeal that is in issue. Such detachment can be achieved without complete prior non-involvement in the matter at hand. As Peart J. observed in *Kelleher v. An Post* [2013] IEHC 23, para.48, there is no requirement that an investigating staff member be *"hermetically sealed"* from the decision-maker throughout a disciplinary process. Likewise there is no requirement that the arbiter on appeal be or have been *"hermetically sealed"* in such manner. That said, a question might perhaps arise whether in a large corporate enterprise such as An Post, which is divided into HR and other departments, it may be preferable that an appeal from a decision to dismiss be placed before an executive who does not have direct involvement in the HR department and who cannot therefore be perceived as having a vested interest in the vindication of that department's prior actions. But there are, in Ireland, a limited number of entities of the scale of An Post, and in small and medium-sized enterprises (SMEs) it has to and does suffice, as a matter of fair procedure and commercial practicality (of which the law is ever mindful), that an objective and detached mind-set is brought to any decision-making and appeal process concerning a dismissal. In the within application, Mr Boyle has not pointed to any substantive evidence that the person who made the decision to dismiss him, or the executive who determined the appeal from that decision, evidenced any pre-judgment or bias; the assertion seems in truth to rest on the wording of the above-quoted paragraph in the letter of 16th December, 2014. But again a single letter does not a process make.

18. The court cannot see in any of the foregoing that Mr Boyle comes close to satisfying the *Maha Lingham* standard that he *"has a strong case that he is likely to succeed at the hearing of the action"*. He has an arguable case but that is not enough.

19. The court has considered the cases of *Carroll v. Dublin Bus* [2005] 4 I.R. 184 and *McLoughlin v. Setanta Insurance Services Ltd* [2012] ELR 57 to which it was kindly referred by counsel for Mr Boyle but does not see anything in those cases that would alter its conclusions, whether in the preceding paragraph or elsewhere in this judgment. If anything, the concept of confidence between employer and employee, which Clarke J. touches upon in *Carroll*, at 209–210,rather buttresses the court in its conclusion that to grant the injunctive relief sought in the within proceedings, when An Post claims a breakdown in trust between the parties, would be inappropriate.

20. On a general note, the court would observe that employers ought to be careful before they claim in court, or allow their advisors to so claim, that they have no confidence in a particular individual. No confidence? None? It is a very powerful assertion to make, and not one that ought lightly to be made. We all make mistakes; if and when we do it is well for those in a position of authority to remember Lincoln's adage that 'mercy bears richer fruits than strict justice'. Be that as it may, such an assertion has been made in good faith by An Post in the within proceedings and is accepted by the court as a truthful statement of An Post's position.

iii. Entitlement to terminate on reasonable notice.

21. In *Maha Lingham*, Fennelly J., in the Supreme Court, set out what he stated, at 140, was one of a number of *"quite obvious legal matters"*, namely:

> *"…that according to the ordinary law of employment a contract of employment may be terminated by an employer on giving of reasonable notice of termination and that according to the traditional law at any rate, though perhaps modified to some extent in light of modern developments, according to the traditional interpretation, the employer was entitled to give that notice so long as he complied with the contractual obligation of reasonable notice whether he has good reason or bad for doing it. That is the common law position and it is an entirely different matter as to whether a person has been unfairly dismissed and a different scheme of statutory remedy is available to any person dismissed whether with or without notice under the Unfair Dismissal Act, but this is not such an application. This is an action brought in common law for wrongful dismissal in the context of which an injunction was sought."*

22. In *Sheehy v. Ryan* [2008] 4I.R.258, the Supreme Court concluded in perhaps even more stringent terms than those of Fennelly J. in *Maha Lingham* ,that an employer is entitled to dismiss an employee for any reason or no reason on giving reasonable notice. Referring to the decision at first instance in that case, Geoghegan J. stated, at 265:

> *"The judge…went on to point out that the plaintiff had chosen a common law remedy. She could have initiated proceedings under the Unfair Dismissals Act 1967 or under the Redundancy Payments Act. The trial judge then said that the position at common law is that an employer is entitled to dismiss an employee for any reason or no reason on giving reasonable notice. I would slightly qualify that by saying that it does depend on the contract but in the absence of clear terms to the contrary which are unambiguous and unequivocal, that clearly is the position."*

23. Such is the present state of our common law as now repeatedly stated by the Supreme Court. To borrow from the judgment of Hogan J. in *McGrath v. Athlone Institute of Technology* [2011] IEHC 254, para.20, *"Some may think that this situation is unsatisfactory, but if so, change in this area is a matter for the Oireachtas",* that is if the Oireachtas wishes to make provision additional to that which it has previously made in the Unfair Dismissals Acts.

24. This Court must apply, and unhesitatingly applies, binding Supreme Court precedent. Applying the expositions of principle identified in the above-mentioned decisions of the Supreme Court to the within proceedings, the court finds as follows: (1)this is an action brought in common law, in effect for wrongful dismissal, and in the context of which an injunction is sought; (2)given the position as regards termination at common law which appears, on the evidence before the court at this time, to have been unvaried by Mr Boyle's contract of employment (the *"unambiguous and unequivocal"* variation that Geoghegan J. anticipates does not appear even to be contended to have arisen here), Mr Boyle has failed to establish that he, to use the words of *Maha Lingham* ,*"has a strong case that…[he] is likely to succeed at the hearing of the action"* concerning his claim.

PART VI: LITIGATION IN COURT.

25. An Post claims that Mr Boyle's claim centres on an alleged breach of the Unfair Dismissals Acts and that he should not be allowed to litigate such grievances before the High Court at common law. An Post points in this regard to the decisions of the court in Nolan v. Emo Oil [2009] 20 ELR 122, *McGrath*, and *Kirwan v. The Mental Health Commission* [2012] IEHC 217.The court does not accept this line of contention. Mr Boyle has in effect brought a claim for wrongful dismissal as he is entitled to do, and the just-mentioned High Court cases do not preclude him from so doing. To preserve his position under the Unfair Dismissals Acts he has not sought any

damages for wrongful dismissal at this time. The position as regards the relationship between (a) an action for wrongful dismissal and (b) the remedies available under the Unfair Dismissals Acts, remains as stated by Barrington J., for the Supreme Court, in *Parsons v. Iarnród Éireann* [1997] 2 I.R. 523, 529, viz:

> *"This is not a case of the ouster of the jurisdiction of the High Court. The jurisdiction of the High Court remains the same. What the Unfair Dismissals Act, 1977, does is to give the worker, who feels that he has been unfairly dismissed, an additional remedy which may carry with it the very far-reaching relief of reinstatement in his previous employment. It [the Act]does not limit the worker's rights; it extends them."*

26. An Post may contend, it might even be right, that Mr Boyle's best option was and remains to bring a complaint before the Employment Appeals Tribunal; and it is entitled to that belief. But Mr Boyle has entitlements too; among them is his entitlement to bring what is an arguable claim of wrongful dismissal before the court and to seek related reliefs such as those now sought in the within application. In general, one must tilt with one's opponents where they seek to joust, and not in an arena of one's choosing: here the court does not accept any contentions by An Post that the appropriate forum for the dispute between the parties necessarily lies elsewhere and/or that the within proceedings ought not to have been commenced. All that said, the court cannot but note again that, so far as the within application for injunctive relief is concerned, Mr Boyle has failed to establish that he, to use the words of *Maha Lingham*, *"has a strong case that…[he] is likely to succeed at the hearing of the action"* concerning his alleged wrongful dismissal. Thus his case falls at the very first hurdle; and from that stumble he cannot recover.

PART VII: GENERALLY LOW PROSPECTS OF SUCCESS IN COURT?

27. Our publicly funded courts are open to all, and rightly so; the courts were not created exclusively to serve any one constituency. That said, it seems to the court that when it comes to an application such as that now before it:

(i) the high burden that an applicant must satisfy pursuant to *Maha Lingham*;

(ii) the present almost, but not quite, inevitable requirement of an undertaking as to damages if injunctive relief is granted; and

(iii) the regrettable expense of litigation at this time (and an applicant's related potential exposure to a potentially ruinous order for costs),

together have the combined effect that an application such as that now presenting seems unlikely generally to yield a happy ending for an unhappy worker of moderate means. As regards (ii) and (iii),that taxpayer access to taxpayer-funded courts may in practice be foreclosed by reference to a taxpayer's income might, perhaps not unreasonably, be contended to involve an objectionable rationing of remedies on the basis of financial circumstance, and thus to favour the few who are rich over the many who are not. A denial of meaningful opportunity to seek an ostensibly available remedy of choice seems not fully met by the answer that some other remedy might elsewhere be found.

PART VIII: ADEQUACY OF DAMAGES/BALANCE OF CONVENIENCE.

28. The court does not consider that damages will be an adequate remedy in the event that Mr Boyle's action eventually succeeds in the within proceedings. Until his dismissal, his salary was his sole source of income; it does not take great imagination to conjure up a sense of the personal financial disaster that would quickly engulf most people in the event that their remuneration was suddenly stopped consequent upon dismissal. Moreover, it seems to the court that factors such as job satisfaction, the ability to find alternative employment, and the particular standing which a postman (or postwoman) enjoys in our society by virtue of holding a position of trust, all lend weight to the conclusion that this is not a case where damages will ultimately be adequate to recompense Mr Boyle in the event that he is eventually successful against An Post.

29. On the other hand, there has been no significant reputational damage to Mr Boyle over and above that which arises in any dismissal case. In his affidavit evidence, he mentions the fact that people have been saying possibly untrue things about him. This may be so, and it is doubtless unpleasant if so, but to the extent that it has occurred Mr Boyle will doubtless find that today's news quickly becomes yesterday's story. The court is satisfied too from the evidence before it that injunctive relief in the terms sought would cause great prejudice to the operation and functioning of An Post's business in that arrangements have already been made to deal with its workforce requirements following Mr Boyle's initial suspension and ultimate dismissal. And, again, the court is continuously mindful that Mr Boyle has failed to establish that he, to use the words of *Maha Lingham*, *"has a strong case that…[he] is likely to succeed at the hearing of the action"*. His case falls at that very first hurdle; there is in truth no recovery from that fall; and there is good reason why this should be so: if Mr Boyle does not have a strong case that he will succeed following the hearing of his action for wrongful dismissal, why, for example, should An Post between now and then pay Mr Boyle a salary or otherwise be constrained in the conduct of its business? The balance of convenience in this regard, and on the whole in these proceedings, must favour An Post.

PART IX: CONCLUSION.

30. It is never nice to believe that one has been wronged, and Mr Boyle clearly considers that he has been seriously wronged. His courage in running the financial risk to which he stands exposed by coming to court is testament to the strength of his conviction in this regard. However, for the reasons stated above, the court is coerced to the conclusion that Mr Boyle is not entitled to the injunctive reliefs that he has sought in the within application.