

THE HIGH COURT

[2013 No. 8544 P]

BETWEEN

ROSEMARIE GALLAGHER

PLAINTIFF

AND

CERTUS

DEFENDANT

JUDGMENT of Mr. Justice Michael White delivered the 17th day of September, 2013.

1. These proceedings were commenced by plenary summons issued on the 9th August, 2013. A memo of appearance was entered on the 12th August, 2013. The plaintiff claims injunctive and declaratory relief in respect of a proposed investigation and possibly disciplinary inquiry by the defendant, arising from her employment and the circumstances surrounding the certification of entitlements she has received. In addition, the plaintiff seeks declaratory relief as to the proper contractual relationship between her, the defendant and Aviva plc in respect of group permanent health insurance. The plaintiff issued a motion on the 9th August, 2013, returnable for the 13th August, 2013, seeking:-

- An order restraining the defendant from proceeding with and/or continuing the purported investigation and/or disciplinary action as commenced against the plaintiff;
- An order restraining the defendant from making any findings, conclusions of fact or determinations in respect of the plaintiff on foot of the purported investigation.

2. The President of the High Court listed the motion for hearing on the 4th September, 2013. The matter was at hearing on the 4th, 9th and 10th September and judgment was reserved to this date. The plaintiff commenced employment with the ICC on the 1st April, 1990, as a banking executive, having been offered the position by letter of the 23rd February, 1990. The plaintiff was diagnosed with multiple sclerosis in April, 1991. Her condition gradually deteriorated and she had to give up work in 1998. As part of the terms and conditions of her employment, in the event of a long-term illness in excess of six months she was entitled to claim up to two-thirds of her salary, subject to the terms of the staff benefit scheme. The exact nature of this condition of her contract of employment is in dispute between the parties. The defendant contends that it was a conditional clause of her employment, dependent at all times on insurance being in place to discharge the sum. The plaintiff contends that it was part of her contract of employment. The plaintiff's employment transferred from the ICC to Bank of Scotland (Ireland) on the 26th February, 2001, and to the defendant, Certus, on the 1st January, 2011, pursuant to the European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations 1980 (S.I. No. 306/1980). From 1998 until the 1st April, 2013, the plaintiff received a monthly payment on foot of this clause in the contract. On an annual basis the plaintiff certified her illness. There is no dispute between the parties that the plaintiff suffers from a serious debilitating illness and is not fit to return to work in her former occupation as a banking executive.

3. It is important to summarise the employment documents, on which there is some consensus with the exception of one contentious matter. In the terms and conditions document, under, "Job function" it is stated that:-

"Not without the consent of the company engage in employment with any other person, firm or company, except in accordance with ICC's guide to business conduct."

4. In respect of the terms and conditions as referred to in the letter of the 23rd February, 1990, under "Sick leave and pay", it is stated that:-

"In the event of a long-term illness in excess of six months, up to two-thirds of salary may be paid, subject to the terms of the staff benefit scheme."

5. In the "Guidelines to business conduct", under the heading, "Outside employment", it is stated that:-

"Unless required by ICC, staff members may not undertake outside employment in any customer enterprises. Employment in non-customer enterprises may only be undertaken where a conflict with ICC would not arise and where the employment undertaking would not interfere in any way with the full discharge of the staff member's duties and responsibilities to ICC."

6. In the document, "Staff benefit scheme" under the heading, "Disability income", it is stated that:-

"If you are disabled through sickness or accident before age 65 for a continuous period of 26 weeks or more you will receive an immediate income equal to two-thirds of your annual basic salary less the annual maximum flat rate State disability benefit as determined as at 1st November preceding the date of disablement. Subject to satisfactory evidence of disablement, the income will commence 26 weeks after the date of disablement and continue for as long as the disability lasts but not beyond age 65. It will be paid monthly and will be subject to deduction of tax under PAYE."

7. Note 1 is also relevant:-

"Your benefit will be subject to any maximum limit or other restriction imposed by the insurers. You will be notified if those apply."

8. I have considered the ICC staff benefits scheme of November, 1999, and under the heading, "Disability scheme", there does not seem to be any change from the previous document.

9. In the schedule to the insurance policy, 'disability' is defined as meaning:-

"that a member is totally unable because of injury or illness to follow his normal occupation and is not following any other occupation for remuneration or profit".

10. The insurance policy number is 702906 and seems to be the insurance policy that still governs the relationship between the defendant and Aviva, and the defendant and the plaintiff. In Schedule 6 under 'Entitlement to and payment of benefit', it is stated that:-

"On proof satisfactory to the company of the continuous disability of a member over the deferred period and subject to the conditions contained therein, the company will, by payment of the benefit, indemnify the employer against periodic payments made by him and in respect of the member."

11. At para. 8 there's also a mention that there may be a payment of proportionate benefit.

12. The Court must also consider some Certus documents. In the document entitled "Income protection benefit", the Court can see no reference to issues of other employment or how that it is dealt with.

13. There is also a document from Invesco, the defendant's insurance brokers. In the Certus defined continuous pension scheme, the Court can see no reference to disability definitions or other employment under the heading, "Income continuance plan".

14. There is a Certus sickness absence policy and procedure for colleagues who commenced before the 1st September, 2009, and para. 9 states:-

"Long-term absence: In the case of absence due to illness for a period in excess of 26 weeks, and subject to acceptance by the company's income continuance insurers, a portion of salary may be paid for the duration of absence. Further information is available in the income continuance policy. Where a colleague is absent for more than 26 weeks and is not accepted for payment by the insurers, salary will not be paid by the company. Colleagues in those circumstances may be eligible for payment of a disability allowance or an invalidity pension from the Department of Social Protection."

15. There is then a document headed as follows, "Certus, this guideline is for the use of HR colleagues only and is not for general distribution". At para. 6.6 it states:-

"Absence due to long-term illness. The Equality Act defines a disability as a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. Certus has a legal and best practice obligation to ensure that colleagues do not suffer any disadvantage as a result of a disability. The salaries of colleagues who are absent due to long-term illness will be reviewed in accordance with the policy on income protection. Managers must review the salary of colleagues with a disability without regard to the level of any sickness absence related to their particular disability."

16. The contentious issue referred to later in the summary and now referred to by the Court is that the defendant contends that all relevant documents apply to the plaintiff. This is disputed by the plaintiff.

17. The Court then moves on to how the particular dispute and issue which the Court has to deal with commenced. On the basis of the correspondence exhibited before this Court, the first letter received by the plaintiff was a letter of the 15th March, 2013, from the defendant, which stated:-

"Rosemary, thank you for taking my call earlier. As discussed, please see the information below that we've been requested to gather on behalf of Aviva, who currently provide your income continuance cover. Aviva have advised that they believe you have some involvement in a company which we believe to be called Citywide Consultants and Mediators. In light of this, they have asked for information about this other work that you are potentially engaging in outside of your employment with Certus. They've requested the following from you: Full details of any alternative work being undertaken, duties involved, hours worked per week/month, details of income received, and how long you've been involved with this company. Copies of income tax assessments for the last three years, full financial statements for Citywide Consultants and Mediators for the last three years. Please gather this information and furnish this to me within one week of receipt of this letter. It is important that you respond to this information request promptly, as failure to do so could result in the suspension of your claim payments from Aviva. Please be further advised that we will also closely review any of the documentation returned and will potentially look to meet with you to discuss same in the context of your ongoing employment with Certus. If you have any questions, please do not hesitate to contact me further."

18. Certus had received an email from Brid O'Donoghue on the 6th February, 2013. Ms O'Donoghue works for Invesco, the defendant's insurance brokers. This email has not been exhibited, to my knowledge. It has emerged in the course of these proceedings that the matter did not commence with Aviva, the defendant's insurers, initiating an inquiry without any contact. The defendant first received an email from the plaintiff on the 13th November, 2012, and notified Aviva via their insurance broker, Invesco, of a concern that the plaintiff may have been working for Citywide Consultants Limited. This correspondence has not been exhibited.

19. By email of the 20th March, 2013, the plaintiff sent the following documents to the defendant:-

- 2009 income tax return;
- 2010 income tax return;
- 2011 income tax return.
- Page 13 of the profit and loss accounts of Citywide Consultants showing rental income.

20. By further email of the 25th March, 2013, the plaintiff sent to the defendant:-

- Full financial statements of Citywide Consultants from 2010;
- Full financial statements of Citywide Consultants from 2011;

- Full financial statements of Citywide Consultants from 2012.

21. In both emails the plaintiff denied that she was engaged in any other occupation for remuneration and profit.

22. In her email of the 20th March, 2013, she stated:-

"Thanks for your letter dated the 15th of March. I will answer the matters item by item and hopefully this will clarify the situation. Aviva are correct to say that I am involved with a company called Citywide Consultants and Mediators. This company is a vehicle for the collection of rent from Dublin City Council. They had at one stage two properties belonging to me rented on a full-time basis. This is now being reduced to one house and the second property is rented on an ad-hoc basis. I do not work in any of those houses and for the last 15 years I have employed and paid various people to run the business, as I am unable to undertake any physical or clerical work myself. The requested information response. I have no alternative work, therefore I have no duties, and I do not work any hours. I have no income from this company. With regard to copies of tax assessments, see attached. See P&L returns for years 2011 and 2012. I have three sources of income as shown on account: rental income, pension Aviva, and disability payment. We are awaiting copy of accounts for 2010 and we can send full financial statements for all three years before the end of this week. Mediation is my hobby and I enjoy having a crack at the huge fees being paid to solicitors. You are aware of my deteriorating medical condition, and if you have any further questions, please do not hesitate to contact me."

23. In her email of the 25th March, she stated:-

"So sorry for all the work you had to do about my payments from Aviva. I attach detail of three year accounts from Citywide Consultants. As you can see, I am a director of the company, and because it is dealing with the homeless I have been paying for things for the running of the houses on an ad-hoc basis. They do return it whenever there are funds available. The wages account is made up of the wages the company pays to the people who work with the homeless on a day-to-day basis. I get no wage or income from this business. Hope you have all the information you need. Perhaps you could ask Aviva why I never got the benchmark payments that were received by all my colleagues, as I now find that my payments and future pension is so small in correspondence to my health work colleagues. Rosie Gallagher."

24. All these documents were sent by letter of the 25th March, 2013, to Aviva.

25. By letter of the 2nd April, 2013, Aviva wrote to Certus, referring to documentation received, and went on to state:-

"Thank you for providing us with information that we had requested from Ms Gallagher. We have now carefully considered her response and have reviewed the information that she has provided. I refer to her email of 20th of March addressed to you concerning her claim under the group income protection policy. In this email, Ms Gallagher stated that Citywide Consultants and Mediation, CWCM, is solely a vehicle for collection of rents from Dublin City Council. Ms Gallagher has further confirmed that she has no alternative work and that mediation is her hobby. A significant body of information exists in the public domain that suggests that the above statements are inaccurate, and that Ms Gallagher has been working as a mediator rather than practising it as a hobby. We would therefore request that Ms Gallagher disclose her complete and true involvement with CWCM and provide an explanation regarding her activities since her claim started in 1998. This explanation should include all activities undertaken through this company, or any other companies, which have been carried out by her since that claim began. Ms Gallagher will be aware that throughout the course of her claim under this policy she has completed declarations of continued disability. These contain a question asking if she has been following or has followed any occupation since the date she was first absent for work. On every occasion Ms Gallagher has always answered in the negative. Pending receipt of satisfactory responses to this enquiry, future payment of benefit under this claim has been suspended. We have recently processed a payment for benefit up to the 28th of March 2013, with claimed payments being now suspended from this date. Should no satisfactory response be forthcoming, the claim will be closed with immediate effect. I note that Certus were planning to investigate this matter, and I would appreciate if you could advise us of the outcome of your investigations, and also any action you may be deciding to take. I trust the above outlines our position, and I would be grateful if you could pass the details of this on to Ms Gallagher for her response. In the meantime, if there are any aspects of this you wish to discuss, please feel free to contact me."

26. Aviva did not state what significant body of information in the public domain they had in their possession, or what aspects of it the company was relying on. The insurance company made no reference to the detailed information provided by the plaintiff, other than to say they had carefully considered the response and had reviewed the information provided. The letter implies that Ms Gallagher's response was untruthful. The letter states:-

"We would therefore request that Ms Gallagher disclose her complete and true involvement with CWCM, and provide an explanation regarding her activities since her claim started in 1998."

27. The letter further stated that:-

"Pending receipt of satisfactory responses to this enquiry, future payment under this claim has been suspended."

28. The insurance company did not set out any detail whatsoever, except in the general terms I have already set out.

29. The defendant, as far as I can ascertain from the documentation exhibited, did not take any issue with the insurance company on the suspension of the payments to the defendant company, or query their reasons, or request more exact information for their decision.

30. The undisputed evidence is that the plaintiff has a serious illness, multiple sclerosis, and that her condition is deteriorating. She is and was on the 2nd April, 2013, unfit to work as a banking executive for the defendant. The Court is surprised at the contents of the letter of the 2nd April, 2013. It may well be that the insurance company was in possession of other information which led to the suspension of the payment, but this was not disclosed. The letter only refers to "a significant body of information in the public domain". It was not until a letter of the 15th May, 2013, from Aviva to Invesco, that the information was particularised, and even then it was of a general nature. It requested:-

"Full and precise details of her business dealings since 2000 onwards, full and precise details of all income received by Ms Gallagher as a result of her involvement in mediation services since that time, and whatever financial documentary evidence exists in this regard. On receipt of Ms Gallagher's response we will give further consideration to this claim, and

advise you of the outcome of this or any other requirements we may have, depending on the response received. Until such time, claim payments to Certus remain suspended."

31. The letter of the 15th May, 2013, was not brought to the plaintiff's attention until the 13th August, 2013. Since the commencement of this particular enquiry, Aviva have never communicated directly with the plaintiff. Since the 18th April, 2013, there has been ongoing correspondence between the solicitors for the plaintiff, the defendant directly, and solicitors for the defendant, without consensus on the way forward.

32. By letter of the 17th May, 2013, the defendants set out the terms of reference for an inquiry, which they termed "a fact-finding investigation". The letter was a detailed letter which was opened to the Court, and in the heading it states:-

"Private and confidential fact-find investigation, terms of reference. Introduction: Gavin Lyng, HR Director of Certus, has appointed Naomi McGloin, Senior Fraud Manager, and Oonagh Carlin, Employee Relations Specialist, the investigators to conduct a fact-find investigation to determine whether Rosemary Gallagher has been engaged in any other occupation while she remains an employee of Certus, in circumstances where she has been and remains certified unfit for employment with the company, and is in receipt of income protection benefit arising from her disability."

33. The terms of reference were set out in that letter of the 17th May, 2013. Subsequent correspondence did not produce any significant advance by way of agreement or consensus or conduct of the investigation.

34. By letter of the 5th July, 2013, the defendant sent a list of questions in furtherance of their fact-finding investigation, which I will refer to later. This was the first time that clarity was brought to the issues in dispute, and the detail and specifics of the document are in stark contrast to the letter from Aviva of the 2nd April and 15th May. The fact-finding investigation involved a list of questions which set out the following:-

- Paragraph one: the plaintiff's involvement in a number of specific companies;
- Paragraph two: the requirements in relation to Citywide Consultants;
- Paragraph three: the requirements in relation to the Citywide Consultants website;
- Paragraph four: the requirements in relation to other internet information in respect of Citywide Consultants Ltd;
- Paragraph five: information required in relation to the Irish Commercial Mediation Association website;
- Paragraph six: extracts from an interview with Castleknock Gazette newspaper. Clarification is also sought here in relation to a letter to the Irish Times dated the 1st March, 2013;
- Paragraph eight: clarification is sought in relation to social media information; Paragraph nine: clarification is sought on information in relation to Hasenworth Developments Ltd.

35. The plaintiff's complaints regarding the procedure followed by the defendants are summarised as follows:-

- the plaintiff had not been made aware of the nature of any allegations of misconduct;
- the defendant had failed to specify the acts/omissions it was alleged the plaintiff was engaged in;
- the defendant had failed to identify the contractual provisions which it sought to invoke and rely upon;
- the defendant had failed to explain the nature of the relationship between Aviva and itself, and the possible impact or consequences that would flow from the making of an adverse finding;
- the plaintiff was being asked to submit to an investigation in circumstances where she had previously, on a unilateral basis and in the absence of any investigation whatsoever, had her disability payments, VHI contributions and related payments suspended;
- the defendant was seeking to contend that the relationship with the defendant was governed by recent documentation with which the plaintiff had never previously been furnished, as opposed to the terms of the original contract and the relevant contemporaneous documentation;
- the plaintiff had a concern that the position remained unclear regarding the consequences of an adverse finding on determination in the context of the assertion by the defendant in their letter of the 7th May, 2013, that payment of long term sickness benefit is entirely dependent on and subject to the terms of the underlying insurance policy;
- the plaintiff had a right to consider the evidence to be put before the decision maker and to hear and question those who sought to provide evidence to the decision maker upon which the decision maker would reach its determination. The plaintiff stated that she readily accepted the defendant's entitlement to conduct a fair, transparent and independent investigation to ascertain specific alleged breaches of her contract of employment.

36. The defendant in these proceedings contends that the plaintiff has no right to continue receiving the disability benefit once suspended by Aviva. It describes itself as a conduit for correspondence between Aviva and the plaintiff. It contends:-

- that a fact finding investigation does not prejudice the plaintiff in any way as no allegation of misconduct at present arises;
- that the plaintiff is bound by subsequent refinements of the disability payment scheme and any updated disciplinary procedures;
- that the plaintiff cannot seek to control the investigation or dictate the method of its conduct;
- that the plaintiff has a duty to cooperate with the investigation, answer any queries and give information on request;

- that sufficient safeguards have been put in place, such as legal representation, notification of information received and an invitation to comment on information received;
- that the plaintiff's natural and constitutional rights are adequately protected and;
- that once the fact-finding investigation is completed, it is open to a disciplinary tribunal to vary the determination of facts so found.

37. The Court then considers the law. The Court will first deal with the general principles in relation to interlocutory injunctions.

38. In *McLoughlin v. Setanta Insurance Services Limited* [2011] 1EHC 410, Laffoy J states at para. 3:-

"It is obviously necessary to remind litigants and practitioners of what Lord Diplock stated in *American Cyanamid v. Ethicon Ltd* [1975] All ER 504 before outlining the criteria for the grant of an interlocutory injunction which had been adopted in this jurisdiction. He stated (at p. 510) as follows:

'It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial'.

39. The general questions which the Court has to consider:-

- are questions of fact and law to be tried?
- are damages an adequate remedy for either party?
- where does the balance of convenience lie?

40. In these particular proceedings, the Court has to consider the law on whether, if at all, or to what extent, a Court should interfere in potential disciplinary proceedings in employment contracts. There is no great disagreement between the parties on the legal principles, and in fact there is an extract from a case which deals with matters of principle on this particular issue which are close to the set of facts in this particular case. That is the case of *Minnock v. Irish Casing Company Limited* [2007] 18 E.L.R. 229. I will quote in full an extract of that judgment by Clarke J., which states at p. 2 of the internal pagination:-

"The more contentious aspect of the issues between the parties is as to whether it is appropriate to make an interlocutory order which would interfere with the existing disciplinary process. In substance, the allegations which are made on behalf of the plaintiff concern the investigation being conducted by the second-named defendant on behalf of the company and it is said that the manner in which the investigation has been conducted to date demonstrates a fatal series of flaws in respect of that investigation such as would warrant the Court taking the view at this stage that it is appropriate to intervene at an interlocutory stage. The defendant on the other hand, suggests that any interlocutory application is premature at this stage and places reliance on a contention that the only matter being conducted by the second-named defendant at this stage is an investigation which would be followed by a full disciplinary hearing should that be warranted as a result of the investigation.

It seems to me, firstly, as a matter of law that the authorities are now beginning to settle upon a test as to the appropriate attitude to be taken or the test to be applied in cases such as this. It clearly is the case that in the ordinary way, the Court will not intervene necessarily in the course of a disciplinary process unless a clear case has been made out that there is a serious risk that the process is sufficiently flawed and incapable of being cured, that it might cause irreparable harm to the plaintiff if the process is permitted to continue.

To illustrate the two sides of that possible argument, I need to no more than refer to my decision in *O'Brien v. Aon Insurance Managers (Dublin) Ltd* [2005] I.E.H.C. 3 on the one hand, and my decision in *Byrne v. Shannon Foynes Port Company*, unreported, High Court, Clarke J., February 2, 2007 on the other hand. In *O'Brien* the plaintiff failed to obtain an interlocutory injunction because it was clear that the investigation being carried out was a pure investigation. In *Shannon Foynes*, which it seems to me is not entirely dissimilar to the facts of this case as alleged by the plaintiff, the plaintiff succeeded because there was cogent evidence supporting the view that an enquiry being conducted on behalf of the board of the company was flawed. Against that legal background, it is necessary to address the specific issues that are put forward on behalf of the plaintiff in this case for saying that the enquiry be conducted by Mr Robert Stewart is flawed.

Firstly, while it is asserted on the part of the defendants that Mr Stewart is conducting an investigation, it seems to me that that is only partly true. As has been pointed out on some of the authorities, the range of preliminary enquiries that can be conducted may flow from one end of the scale where there is a pure investigation where no findings of any sort are made on behalf of the enquiry other than to determine whether there is sufficient evidence or materials to warrant a formal disciplinary process, and it seems clear on all the authorities that that type of pure investigation which does not involve any findings is not a matter to which the rules of natural justice apply, and is not a matter therefore which the Court should interfere with. The fact that an employee may be obliged as a matter of the contract of employment to assist in any such investigation does not confer on it the status of an enquiry which carries with it an obligation to act in accordance with the rules of natural justice."

41. This Court has to address the question; are there serious issues to be tried that would possibly warrant interference with the employer's investigative and disciplinary process? The Court poses the following questions:-

- Is it an investigation where evidence is assembled, or is it a fact-finding determination?
- Could a fact finding determination cause the plaintiff irreparable damage from which she would not or could not recover even before a disciplinary process is invoked, if any?
- Is the plaintiff faced with two enquiries, one by the defendant and one by the defendant's insurer, Aviva?
- Has the plaintiff any right of recourse directly against Aviva in the event of the allegation that Aviva has acted unfairly

and arbitrarily either by already suspending cover to the defendant, or deciding to terminate the cover paid to the defendant?

- What tribunal, either the fact-finding investigation or a potential disciplinary enquiry, decides issues of a legal or administrative nature? For example, what documents cover the contracts between the plaintiffs and the defendants and how is occupation or employment to be defined?
- If a disciplinary enquiry is invoked, can it reverse a fact-finding determination already made?
- Can this Court or the defendant guarantee that the processes of the fact-finding determination and/or the disciplinary enquiry will never be disclosed to Aviva?

42. The Court provides the following possible answers:-

- The defendant has asserted on numerous occasions that it is undertaking a fact-finding investigation to determine whether Roseanne Gallagher has been engaged in any other occupation while she was or while she remains an employee of Certus.
- A fact-finding investigation which determines facts in accordance with para. one could cause the plaintiff irreparable damage if, for example, it found that the plaintiff did, as a matter of fact, follow any other occupation for remuneration or profit. That is a clear breach of the insurance policy between the defendant and Aviva, possibly entitling Aviva to revoke it.
- The plaintiff, on the defendant's interpretation of her contract of employment, is faced potentially with two enquiries; one conducted by the defendant, which includes possibly two stages, fact-finding and disciplinary, and one conducted by Aviva, regarding whether it will restore cover or not having already suspended it. The defendant strongly asserts it has no obligation to pay any monies to the plaintiff if Aviva refuses to reinstate the policy in respect of the plaintiff's claim. The defendant accepts in its legal submissions that Aviva must reach its own conclusions on the facts submitted to it by the plaintiff. In addition, if the defendant finds as a matter of fact that the plaintiff followed any other occupation for remuneration or profit and is forced to disclose this to Aviva, it is open to Aviva to refuse to pay any monies to the defendant without further enquiry, as that activity is in clear breach of the policy.
- The defendant, in the course of the correspondence between it, its legal advisers and the plaintiff's solicitors, has not answered the question or given any opinion as to whether the plaintiff has recourse against Aviva directly. Based on their contention that it is a direct relationship between the plaintiff and Aviva there should be, as of right, some recourse by the plaintiff against Aviva. However that is not certain and it is not an issue for this Court to decide at this stage. Furthermore, the Court notes that at no stage did Aviva ever write directly to the plaintiff. The correspondence, in respect of all the documents exhibited, including the correspondence from 1998 from the insurance company, was always directed to the defendants or the brokers or directly to the defendant's predecessors.
- The Court would presume that the fact-finding investigation would have to deal with the documents that govern the contract of employment and also with the definition of employment and occupation, or otherwise no determination could be made.
- The defendant, through counsel, has now asserted strongly that a disciplinary enquiry can reverse the findings of the fact-finding investigation. That, in the Court's view, is totally contrary to the exchange of correspondence, the terms of reference and the disciplinary code, most of which has already been opened by the Court. Paragraph 4.1 of the disciplinary code must be noted. This states that:-

"When the investigation has been completed, the colleague will be invited to attend a meeting to discuss the outcome. They are entitled to appropriate representation at this meeting. No disciplinary penalty will be imposed without a meeting with the colleague to discuss the outcome of the investigation, with the exception of a situation of gross misconduct."

43. In respect of disclosure of information between the defendant and Aviva, this Court certainly could not give that guarantee, and I doubt that the defendant could give it either.

44. The Court wishes to make a few general comments. The term 'disability' in the insurance policy schedule exhibited to the Court is defined as meaning:-

"That a member is totally unable, because of injury or illness, to follow his normal occupation, and is not following any other occupation for remuneration or profit."

45. In most letters between the defendant, the defendant's solicitors, and between Aviva and the defendant's brokers, the words, "for remuneration or profit" are left out; that should be clarified.

46. The plaintiff contends that in the course of a disciplinary process it is obligatory on the employer to make available witnesses for cross-examination. That is not my understanding of the law, nor is it my understanding that the plaintiff can dictate the mode of the enquiry other than to ensure that it is conducted in accordance with natural and constitutional justice.

47. The Court also finds nothing objectionable about the set of questions framed and sent by letter of the 5th July, 2013, from the defendant to the plaintiff's solicitors. The plaintiff has not responded to any of those queries.

48. The Court is of the view that damages would not be an adequate remedy for either party. The balance of convenience clearly favours the plaintiff, as unless the Court intervenes, there is a serious risk that the present process is sufficiently flawed that irreparable harm to the plaintiff could result if the process in its present form were to continue. The appropriate remedy is an interlocutory injunction in an amended form of para. two, which provides for:-

"An order, pending the full hearing, restraining the defendant from making any findings, conclusions of fact, or determination in respect of the plaintiff following any other occupation or occupation for remuneration or profit, in advance of a full disciplinary hearing, which does not preclude the defendant from gathering evidence and information,

including evidence and information from the plaintiff."

49. The Court cannot at interlocutory stage make findings in respect of paras. six and seven of the plenary summons, nor is this sought in the motion. It would not be appropriate to restrain the defendant from proceeding with an investigation and/or disciplinary action on the grounds of the lack of clarity in the contractual relationship between the plaintiff, the defendant and Aviva. That does not preclude the plaintiff from raising the issue at any disciplinary hearing. The defendant, separate from any issue of indemnity by Aviva, is entitled to conduct an investigation and/or disciplinary hearing into the alleged breaches by the plaintiff of her terms of employment, provided it is carried out in accordance with the injunctive relief granted by the Court and with the safeguards already offered in place. The issue of any continuance of payment by the defendant has not been considered by this Court.