

THE HIGH COURT

2009 837 P

BETWEEN

THOMAS ROWLAND

PLAINTIFF

AND

AN POST

DEFENDANT

JUDGMENT of Mr. Justice Roderick Murphy dated the 6th day of July, 2011**1. Background**

The plaintiff operates a small retail shop and post office in the village of Bofeenaun, Ballina, Co. Mayo which is family run business with no employees. He was appointed sub-postmaster by the defendant company (the company) in 1974.

The plaintiff's relationship with the defendant is governed by the provisions of the Postmaster's Manual. Although postmasters are independent contractors they are represented by a union, the Irish Postmaster's Union ("IPU") who conducts negotiations and enters agreements on behalf of its members in the discharge of their functions.

The plaintiff had been audited annually by the Audit Department of the defendant without any significant issue until the present proceedings.

The remuneration of the postmaster is based on the volume of transactions and is determined, in part, through a process known as triennial review.

The plaintiff's most recent triennial review of 2007 was delayed. The defendant requested the plaintiff to comment on some anomalies which the plaintiff at first refused. An investigation stage was initiated which was to be followed by a disciplinary hearing.

The Postmaster's Manual does not provide for disciplinary procedure but presumes one to exist. In Clause 2.39 it provides for an appeal available in the event that a postmaster is subjected by the company to disciplinary action. That Clause speaks of:-

"Any appeal against a disciplinary decision"

and,

"the punishment be not of a 'serious' nature."

The plaintiff contends that this is not the language of commercial contracts but rather the language of employment to which the plaintiff is entitled to fair procedures as conceded by the defendant in para. 5 of its defence.

The plaintiff submits that the dispute relates to whether the procedure which the defendant had imposed meets the requirements of natural justice and fair procedures in relation to the dispute.

The issue which gave rise to the application arose in 2007 when the tri-annual review should have been completed in January of that year. When the plaintiff had heard nothing by March, 2007, he wrote and complained about the delay. In a reply dated the 3rd April, 2007, the defendant stated that they wanted the plaintiff to clarify the increase in post office bank transactions where 25% of those transactions were by persons with the name "Rowland". Issues were also raised about the plaintiff's own business account.

By letter of 16th April, 2007, the plaintiff explained the increase in transactions as a result of a closure of a number of local bank branches and the travelling bank.

In relation to his own business accounts the plaintiff said he would agree to divulge their purpose in an undertaking that the information would be kept confidential. On the issue of his relationship with all customers, the plaintiff stated he would supply that information provided the account holders had no objection. The plaintiff said that he was arranging to write to each account holder in that regard, however, he was instructed on the 18th April, 2007, not to write any such letters and he refrained from doing so.

The defendant wrote to the plaintiff on the 1st June, 2007, justifying the question raised in order to ensure that records "accurately reflect *bona fide* transactions and that the office is managed in a manner satisfactory to (the company) whenever (the company) has reason for concern, it initiates inquiries into the matter regrettably in other cases we find that, in the judgment of the company and/or the admission of the postmaster, there has been artificial inflation of transactions and/or business mismanagement".

On the 13th July, 2007, the Contractors Department of the defendant wrote to the plaintiff characterising his answers as evasive. Further, the delay and evasiveness in providing the required information had caused the defendant to further investigate the results of the plaintiff's triennial review.

At that stage, the issue became the subject matter of correspondence between the IPU and the defendant. The IPU confirmed to the plaintiff on the 24th July, 2007, that his objections were well founded.

On the 1st December, 2007, there was a meeting in the plaintiff's residence, between the plaintiff and Mr. John Dunleavy, of the Contractors Departments of the defendant. During the meeting, Mr. Dunleavy referred in general to postmasters engaging in certain types of behaviour. In particular allegations were made about postmasters doing their business during lunch hour and splitting

charitable donations to increase income. Further contact was to be made within two weeks. When no contact was made, the plaintiff wrote on the 2nd January, 2008, indicating his dissatisfaction with the meeting and the failure by Mr. Dunleavy to get back to him. On the 22nd January, 2008, he was informed that Mr. Dunleavy had been on sick leave for two weeks before Christmas.

By letter dated the 28th November, 2007, solicitors on behalf of the plaintiff wrote to the defendant who, after a holding letter of the 4th January, 2008, responded on the 28th March, 2008, in the following terms:-

"Arising from our increasing concerns regarding the office, the company (An Post) has also been examining other aspects of the business conducted there and our preliminary findings heighten our concerns. This information is currently being validated, following which the issues arising from same will be put to Mr. Rowland. Regrettably, it has not been possible to do this earlier primarily due to my personal absence and sick leave. We expect to be writing further to Mr. Rowland in the next two to three weeks on these issues."

A further letter from the defendant was written to the plaintiff on the 27th June, 2008.

The letter contained two appendixes, the first of which was entitled "Issues of Concern to the Company".

The letter referred to previous communication in relation to the plaintiff's triennial review. It critiques the plaintiff's failure to co-operate with reasonable company inquiries which heightened the concerns in relation to his operation and necessitated a comprehensive investigation of the transaction of business which took longer than anticipated.

The investigation had uncovered a range of extremely irregular payments of business and activities that required comprehensive and credible explanation. The initial concern in relation to Post Office Saving Bank transactions had then broadened into serious concerns over a range of activities designed to artificially maximise the transactions volumes/remuneration of the office and represented a serious abuse of the trust invested by the defendant in the plaintiff. The defendant had written to all postmasters, including the plaintiff, by registered post in April, 2006 warning them of the serious consequences of engaging in such activities. The defendant was extremely concerned over the potential impact that any abuse of transactions would have on its reputation, integrity and trustworthiness in all its dealings with corporate and individual customers who paid for the transactions in question. The company's letter instanced the handling of charitable donations. Significantly the letter stated that:-

"Before making any decision, the company wishes to afford you the opportunity to furnish an explanation and/or to put forward any representations you might wish to make."

The issues of concern were detailed in the first appendix to the letter. The second appendix set out the standard process followed by the defendant, including the appeals process.

2. Issues of Concern

The issues of concern claimed under twelve headings detailed issues regarding transactions and raised 35 points by way of questions to the plaintiff.

Three of these related to AIB Bank.

1. AIB SME lodgements

These small and medium enterprises were stated to have been erroneously processed as SME should have been processed as personal lodgements. Transactions seemed to consist almost entirely of €50 or €100 lodgements.

In August, 2003 the regional manager had written asking for an explanation. The explanation was deemed unsatisfactory. Nine questions were raised in relation to this matter.

2. AIB (personal PIN and paper) lodgements

These were stated largely to be low value transactions, some of which were after hours transactions suggesting that there might have been an account operated by the plaintiff or a member of his family. The personal account lodgements made in 2007 were included and he was asked to identify which were operated by him or immediate members of his family.

3. AIB Credit Card payments

These appeared to have unusual patterns; in particular, a certain account with 20 transactions to a total value of €575 or an average value of €29 required explanation.

4. Bill Pay transactions – Charity Donations

On a detailed analysis, these raised concerns regarding the volume and value of the transactions (between €2.37 and €4.44) as compared to the average value in peer offices (€17.49 to €37.15) with a sum of similar average value for Auto Contractor lodgements. The appendix referred to a "spike" in the tri-annual revision year to the 30th September, 2006, where the volume appeared to be six times that of the pre tri-annual review year and the average value was less than half. The plaintiff was asked to explain the reasons for the high volumes and low value, for the extraordinary growth in the volume of transactions from pre tri-annual review year, the following year and the drop in value and to explain how transactions could show such "a frankly incredible growth" in volume and drop on values which consistently coincided with the commencement of the plaintiff's tri-annual review.

5. ESB Bill Pay transactions

These also showed an extraordinary number of part payments of ESB bills. In one case there would appear to have been a transaction every second working day and three instances of double payments in the same day.

Other accounts showed between 23 and 57 payments over the year at amounts between €5 to €20. Further questions were raised regarding the identity of those accounts and whether the plaintiff's immediate family had any involvement.

6. Eircom Bill Pay transactions

These also showed an "extraordinary number of part payments". One showed approximately 1.5 transactions per week. The defendant was concerned that such practice was being followed in order to inflate the office transaction volumes and consequently the remuneration. The plaintiff was asked to explain the high level of low value part payments and whether any members of his family were involved.

7. O2 Bill Pay transactions

Payments for mobile phone use also exhibited an extraordinary number of part payments. Similar questions were asked.

8. Postage Stamp sales

Sales of stamps were the subject of a query in July, 2007. An analysis of sales figures from 2000 to 2007 showed a decrease in the post triennial review year of 2001 and 2004 in particular. The triennial year sales for 2003 and 2006 showed an increase of 55% and 47% respectively. This gave the defendant cause for concern and the plaintiff was asked whether there was a reasonable and credible alternative explanation. The plaintiff attributed the decline in sales to the loss of two customers to meter postal users. The plaintiff was asked to supply the name of those two customers and to explain the unusual pattern of postage sales around his tri-annual review years.

9. Postage sales to stamp retailer licensees (SRL)

Single sales showed an unusual pattern. According to the defendant's records the only SRL buying stamps was Legal Rock Ltd, which may have been the company which owned the retail shop that accommodated the post office. If this were so, then the plaintiff was selling from himself as postmaster to himself as stamp retailer. The sales to SRL has increased every year and was then (2007) running at a level of over 58% of all reported postage stamps sales in the plaintiff's office. Paragraph 5 queries were raised relating to Legal Rock Ltd, the hours of opening of the retail grocery shop and the increase of 58% of the total postage stamp sales being made through the SRL in 2007, and no reported sales of peel and stick stamps in September 2005.

10. Post Office Savings Bank transactions

The defendant had written on a number of occasions requesting information with regard to the plaintiff's personal or family accounts being operated in the office and his refusal to co-operate with inquiries. This had resulted in a more in depth examination of the transactions in the Savings Bank and other transactions at the office.

A random examination of 56 withdrawal transactions conducted in the name of Rowland were referred to. There was an instance of money being withdrawn from one of the Rowland accounts.

The plaintiff was asked to explain why official counter receipts were not being signed in accordance with procedures, why withdrawal slips were missing and manual paper receipts being generated and why one account holder was allowed to withdraw from another account holder's account where the account was not in joint names. He was asked whether all transactions took place on the day and time indicated on the counter automation receipts and, if so, what happened and why that happened and, finally, to confirm if automated receipts were being issued on all cases where appropriate and the customer attended to conduct the transaction. The defendant remarked that it, regrettably, had experience of admitted misuse of family accounts to artificially inflate the scale of payment. The plaintiff was again asked and required to identify all accounts at the office operated by him and his immediate family.

11. Hours of business

A significant number of transactions were processed through the system outside the normal scheduled opening hours. The plaintiff was asked to explain what appeared to be a common practice of conducted transactions outside normal hours and further asked to explain compliance with requirements in relation to securing of cash, time locking of safes, and whether the office accounts accurately reflecting the state of affairs of the office.

12. Non co-operation with inquiries

This was raised as a fundamental issue of confidence and trust. The key element was the defendant's concerns. It had a right to expect that reasonable and full co-operation would be readily forthcoming from the postmaster to assist its inquiries.

In the plaintiff's case the defendant had not received any such co-operation but rather, in their view, the plaintiff had sought to obfuscate and evade reasonable inquiries. The "threat" of writing to customers and questioning the Rowland account holders being discriminated against, his failure to provide the names of the meter post customers and the relationship to Post Office Saving Bank account holders seemed to illustrate a deliberate and persistent effort to frustrate inquiries.

Despite the defendant explaining in detail and writing (expressing) the very valid reasons why it was undertaking the inquiries, and despite visits to his office by two senior managers of the defendant in an effort to progress matters, his non co-operation continued. This contributed to the defendants' concerns in relation to the plaintiff's management of his office and raised a question whether the defendant could retain confidence in him as postmaster. The plaintiff was being given the opportunity to put forward any views or explanations he wished in relation to the issue of his non co-operation with company inquiries.

3. The Plaintiff's Submissions

The plaintiff regarded the wording of the issues of concern as constituting a *fait accompli* in that the defendant had stated that neither witnesses nor documents would be produced to allow the plaintiff the opportunity to test the assertions being made. The plaintiff submitted that the letter contained issues which were expressed in the context of various assertions of fact as found or established by the defendant. The plaintiff submitted that on a cursory examination of that appendix it was impossible for the plaintiff to answer where the defendant had refused to provide any documentation to back up their assertions. The instant assertions were based on comparing the transactions to other offices and to "auto contractors". It was submitted that as a result of that comparison

various allegations were made throughout the document. There was no disclosure of what other offices were referred to or what their transactions were.

The court notes that the letter of the 13th July, 2007, almost a year before that critical letter of the 27th June, 2008, had raised two of the issues and questions regarding the Savings Bank transactions and the postage stamp sales.

The court notes that of the twelve main issues of concern that only some of these referred to inter-office comparisons, the AIB SME lodgements in particular. The other areas of concern related to the plaintiff's own office would appear to the court to have constituted the normal queries that any business and, in particular, a financial business, would require to be answered.

The plaintiff, in his submissions, queried that if the information was being withheld from him, how could he ever hope to provide a meaningful and comprehensive response to meet the defendant's threshold of "the necessity to comprehensively and credibly respond to all points raised". The answers would of necessity be incomplete and not comprehensive in the absence of underlying documents and data. There was prejudice to the plaintiff, and in his submission, it was obvious that there was a breach of fair procedures.

He referred to Appendix 2 outlining the proposed disciplinary procedure and noted that nowhere did the procedure refer to a "fact finding investigation" or a separate process to disciplinary procedure. It referred to the only outcome being a penalty which "may range from a warning to a recommendation to terminate the contract due to loss of confidence in the postmaster".

The plaintiff took exception to what he believed to be repeated references to wrongdoing on his part ("the material concerned would strongly indicate that you have been engaged in a range of activities designed to artificially maximise the transactions (which) represent a serious abuse of the trust vested in you by the company").

The plaintiff submits that the title of the procedure indicated that it applied where the defendant had already determined that a postmaster had been found guilty of a "breach of contract". The initial procedure did not provide for an oral hearing where the plaintiff could confront and cross examine his accusers. The appeal provided for was in complete breach of the appeals procedure provided under Clause 2.39 of the Postmasters Manual which only provided an appeal in the event of a decision to dismiss and only provided for one appeal and no right to confront accusers or cross examine them. Moreover, there is no prohibition on a person involved in the evidence gathering exercise being involved in the decision-making process.

By letter dated the 13th August, 2008, the plaintiff's solicitors requested an undertaking that the defendant would not proceed upon the inquiry contemplated on the basis of the seriously flawed and grossly unfair procedures.

The defendant replied on the 28th August, 2008 and the 6th October, 2008. In the latter the defendant stated that if the plaintiff refused to deliver a response or if the responses were incomplete or unsatisfactory, the defendant would consider the matter and might decide to take serious actions up to and including termination of the plaintiff's contract.

When the plaintiff wrote on the 7th November, 2008, inquiring if it was intended to embark on a disciplinary procedure the defendants demanded further replies be provided to the Appendix 1 document and if there were no replies, that they would take it that there was nothing further that the plaintiff wished to have taken into account in their coming to a decision on the matter. This, the plaintiff submitted, was an indication that the defendants were intent on pursuing a disciplinary inquiry and, on the 19th December, 2008, asked for a full and precise list of allegations and the identity of witnesses purported to be called to give evidence, sight of witness statements, documents relied on, statements, records and meetings and interviews from other persons interviewed when preparing the case against the plaintiff and identity of the person who would represent the defendant in conducting the oral hearing.

By reply of the 22nd January, 2009, the defendant refused to provide a list of allegations and instead referred the plaintiff to Appendix 1.

John Dunleavy and Tony Smith would conduct the oral hearing. The plaintiff submitted, that both were involved from the outset in building a case against the plaintiff and had gathered the evidence and formulated the allegations. The plaintiff believed that, as the inquiry was inquisitorial, he would not be entitled to any of the rights which he requested. The plaintiff referred to *Scariff v. Taylor* [1961] 1 I.R. 424 and to *Becker v. Duggan* [2009] 4 I.R. 1 and said that he was willing to engage with the defendant provided that the defendant provided him with a minimum to which he was entitled by way of fair procedures.

4. Interim Relief

The plaintiff applied for and was granted relief by the Court on the 29th January, 2009, where it was ordered that the defendant were enjoined from proceedings with any hearing of a disciplinary nature in respect of the plaintiff and from making any determination in respect of any such hearing. This Court's order continued following the full interlocutory hearing by Charleton J. on the 30th March, 2009, and the order of Feeney J. on the 19th May, 2010, (with the proviso "save by consent of the parties", being added). That followed on the trial of the issue before Feeney J. on the 13th January, 2010, where it was agreed between the parties that the defendant would engage in a procedure which was purely fact finding in nature and did not involve any action or staff of a disciplinary nature and the plaintiff agreed to reply to the queries raised by the defendant strictly on that basis.

By letter dated the 13th February, 2010, solicitors for the plaintiff submitted a detailed response to the queries raised by the defendant in the letter of the 27th June, 2008 which it was stated, incorporated replies previously provided on 23rd October 2009.

While the Court notes the replies of the plaintiff it is not its function to adjudicate on them. It is noted that a number of 35 queries were answered as "correct". The relationship of the Rowland accounts is given in most cases, certain factors were mentioned as affecting the level of transactions, the charity donation were influenced by the plaintiff's organisation and promotion of certain charity in centres, the plaintiff's part payment facility offered by the defendant for ESB or/and Eircom bill pay.

His wife, Frances, holds an SRL and purchases her stamps from the Post Office 60% to 80% of stamps are to SRL and there has been no sale of stamps to commercial customers.

He acknowledges that there were occasional errors (point 20) and that post transactions were infrequently and exceptionally not signed in accordance with procedures. He appeared to dispute that withdrawal slips were missing. It was not common practice to conduct transactions outside normal hours.

The plaintiff denied not co-operating with the defendant queries while, he said, raised queries and quoted selective and inaccurate figures on previous occasions.

Two months later on the 13th April, 2010, the defendant responded with what the plaintiff categorises as accusations made against the plaintiff "mirroring almost completely those set out in the defendants' previous letter of the 27th June, 2008". The letter stated, in particular that the defendant having considered the responses were concerned with the plaintiff's management of the Post Office in the following respects:

1. Artificial inflations business;
2. Providing services out of hours, and
3. Persistent failure to co-operate. The letter concluded:-

"In the light of the above circumstances a serious question has arisen as to whether the company could have confidence in Mr. Rowland continuing to hold the post office contract at Bofeenau. The question will now be considered by the company and its deliberations may include a decision up to and including the termination of his contract.

However, before making any decision, the company wishes to afford to your client the opportunity to furnish any explanation and/or to put forward any representations/assurances he may wish to make."

The defendant required a response by the 27th April, 2010, (two weeks later) failing which the defendant would have no option but to proceed to consider the contractual position up to and including termination of his contract.

The plaintiff submitted that the letter of the 13th April, 2010, blatantly transgressed into the disciplinary sphere and expressed an intention to proceed with disciplinary action up to and including the termination of the plaintiff's contract. This, it was submitted, cannot in any manner be considered to be consistent with a preliminary "fact finding" exercise.

The matter came before Feeney J. once more on the 19th May, 2010, where the plaintiff submitted that his primary concerns with the defendant's proposed procedure was the reluctance of the defendant to produce documentation which it relied upon in formulating its allegations against him and his categorical objection to an oral hearing and the cross examination of witnesses, and finally, its insistence that Mr. Smith and Mr. Dunleavy perform central roles in the disciplinary process, notwithstanding what was termed "their pivotal and decisive role" in the formulation of the allegations against the plaintiff and throughout the matter to date.

The defendant responded by indicating that it no longer intended to involve Mr. Dunleavy and Mr. Smith in the disciplinary procedure, but that Mr. Ryan and Mr. Ennis will perform the roles previously allocated to them under the Appendix 2 procedure.

4.1 The Plaintiff's Complaints

The plaintiff seeks to restrain his employer An Post, (the defendant) from continuing with an alleged disciplinary process unless the following alleged defects, all centralised around the ideas of fair procedure, are rectified:

- (i) The plaintiff has not been afforded a statement of the complaints against him which are to be determined;
- (ii) The plaintiff has not been provided with any of the documentation which purportedly ground these complaints;
- (iii) The plaintiff will not be provided with the opportunity to cross examine his accusers;
- (iv) The defendant has predetermined the outcome of the hearing and/or significant aspects of the factual evidence which underpin the "issues of concern";
- (v) The persons appointed by the defendant to determine the outcome of the hearing are biased.

Each of the above alleged defects requires consideration based on the applicable case law provided by each party in their legal submissions. There is general agreement on what constitutes fair procedure. The court will then look at the complaints made by the plaintiff and whether court intervention in the internal procedures is appropriate.

4.2 Court Involvement

In *Becker v Board of Management of St. Dominic's Secondary School* (Unreported, High Court, Clarke J., 13th April, 2006). Clarke J. stated in an application for an interlocutory relief that ". . . the mere fact that there may be an argument as to whether a particular disciplinary process has taken an appropriate course does not of itself justify the Court in intervening . . . The Court should intervene only where it has been demonstrated that the process has already been so tainted with an absence of fair procedures that it cannot be allowed to continue". In the present case, the disciplinary process has not even begun. According to the defendant, a mere inquiry into apparently abnormal transactions within the plaintiff's control was all that was asked. The parties never got to the disciplinary stage. What the defendant was seeking were explanations to the transactions. The transactions could have been in innocent mistake. However, there was no way to be certain unless the plaintiff gave an account of them.

4.3 Fair Procedures

In *Mooney v An Post* [1998] 4 I.R. 288, Barrington J. discussed what steps should be taken in a termination procedure. He said that "if a contract outlines a procedure for termination, it is usually sufficient for the employer to show that he has followed said procedure". However, where no procedure is enumerated, as in this case, "the employee is entitled to the benefit of fair procedures but this is dependent upon the terms of his employment and the circumstances surrounding his proposed dismissal. The minimum he is entitled to, is to be informed of the charge against him and to be given an opportunity to answer it and to make submissions."

The defendant has supplied an appeals procedure for post-disciplinary actions in the Postmaster's Manual however no initial procedure for pre-disciplinary actions are supplied (excluding the controversial Appendix 2). Since no procedure is available, "fair procedures" should apply.

Walsh J. also held that fair procedures should be used in *Glover v. BLN Limited* [1973] I.R. 388. He noted that the "machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures. *Glover* was found to be a case of unfair procedure because the plaintiff was not told of the charges against him nor was he given the opportunity to

address them before he was terminated.

In the present case the 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. The court, for the avoidance of doubt, has considered the plaintiff's submissions in relation to his specific complaints.

4.4 Specific Complaints by the Plaintiff

(i) The plaintiff has not been afforded a statement of the complaints against him which are to be determined

The defendant notified the plaintiff of "issues of concern" which he wanted the plaintiff to explain. No formal complaints, or charges, were made against the plaintiff because the defendant was and still is in the fact finding phase. The defendant made it clear to the plaintiff through correspondence that they were seeking an explanation to the issues of family accounts, POSB transactions, charitable donation, AIB credit accounts as well as the decrease in revenue from stamp sales. No allegations of fault were directed to the plaintiff.

The plaintiff was initially contacted because it is the accounts under the name Rowland which show irregularities based on multiple years of comparison and the defendant wanted the plaintiff to provide an explanation for them.

(ii) The plaintiff has not been provided with any of the documentation which purportedly ground these complaints.

The plaintiff uses the case of *Scarriff v. Taylor* [1996] 1 I.R. 424, to support, although inapplicability, his reasoning for documentation. *Scarriff* was a military case where the main issue was lack of legal representation before formal disciplinary proceedings. Carroll J. held that "legal representation is a necessity where decisions are made which adversely affect an accused". Decision can only arise following the disciplinary procedure which has not yet commenced. The plaintiff purports that legal representation is only effective when he provided the relevant documents, information and facts. The court is satisfied that the detail given under the twelve headings was sufficient to enable the plaintiff to reply.

The plaintiff also cites *Tierney v. An Post* [2000] 1 I.R. 536, which states that when a "matter was sufficiently serious to warrant an oral hearing, it follows inevitably that the applicant was entitled to fair procedures in the conduct of that oral hearing and the determination arrived at by the respondent following the hearing". This does not require proof of the figures put to the plaintiff at the investigation stage.

(iii) The plaintiff will not be provided with the opportunity to cross examine his accusers.

The plaintiff refers to Kenny J. in *Kiely v. Minister of Social Welfare* [1977] I.R. 267, who held that "where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but which is allowed to be based on written and, effectively unquestionable evidence on the other side has neither the semblance nor substance of a fair hearing. It is contrary to natural justice". The plaintiff uses this to justify his desire for cross examination because he will be asked questions by the defendant but apparently will not be able to ask questions of those who "accused" him. The plaintiff repeatedly fails to recognise that the investigation stage is not a trial. There are no witnesses to cross examine because there is no necessity to have witnesses to prove figures. The defendant required satisfactory answers to the questions to the questions raised by the letter of the 27th June, 2008.

The plaintiff raises his right to be heard as found in *Cassidy v. Shannon Castle Banquets* [2000] E.L.R. 248, but this is inapplicable because the plaintiff had every opportunity to tell his side of the story.

(iv) The defendant has predetermined the outcome of the hearing and/or significant aspects of the factual evidence which underpin the "issues of concern".

The only basis the plaintiff has for this assertion is the mere fact that the title of Appendix 2 lacks the word alleged and that the possible disciplinary action the plaintiff may or may not face a range of sanctions from a warning to termination. The plaintiff submits that range does not include a sanction of being found not guilty before conducting an investigation. The court is satisfied that the defendant has not pre-judged. Indeed, if it is satisfied with the explanations given by the plaintiff it may not initiate any disciplinary procedure.

(v) The person appointed by the defendant to determine the outcome of the hearing is biased.

The plaintiff contends it is bias for anyone who participated in the gathering of the evidence or who is paid by the defendant to play a decision making role in the disciplinary process. The defendant agreed to substitute Mr. Dunleavy and Mr. Smyth and nominate Mr. Ryan and Mr. Ennis on its behalf to deal with the disciplinary hearing.

In *Heneghan v. Western Regional Fisheries Board* [1986] I.L.R.M. 225, Carroll J. found there was a lack of natural justice when the prosecution in the dismissal, in addition to participating in gathering evidence, also acted as a judge on the allegations. Similarly in *O'Donoghue v. Veterinary Council* [1975] I.R. 398, the decision to suspend a veterinary surgeon was overturned because one of the members of the council who voted on the status of the surgeon had his name used as a prosecutor in the inquiry preceding the vote. This was held to be a violation of *nemo iudex causa sua*, that "no one should be a judge in their own cause".

In *Charlton v. HH The Aga Khan's Studs Societe Civile* [1999] E.L.R. 136, Laffoy J. stated that there is a fair issue to be tried when a trier of fact also takes part in the inquiry process.

Both the plaintiff and the defendant rely on *Flanagan v. U.C.D.* [1998] I.R. 74. This case involved a student who was accused of plagiarising a paper. She was told she would be involved in a disciplinary hearing. She was asked to choose a representative from the Student Union or the dean of Residence but from no other source, she was not allowed to question the evidence in the hearing or to interview witnesses. The Registrar acted as both prosecutor and the decision making body. Barron J. took issue with the format of the proceedings and went on to hold that "the applicant should have received details in writing of the precise charge and the facts alleged to support that charge, that [the applicant] should have been allowed to be represented by someone of her own choosing and informed in sufficient time of that right and of any other rights given to her by the rules governing the procedure". Barron J. also held that "[the applicant] should have been allowed to hear evidence in the case against her at the hearing, to challenge the evidence on cross examination, and indeed to present her own evidence and finally that the Registrar ought not to have remained with the committee while it deliberated because he had been, in effect, the prosecutor". Finally, Barron J. said "the principles of natural justice involved relate to the requirement that the person involved should be made aware of the complaint against them and should have an

opportunity both to prepare and to present their defence". The plaintiff claims this case is on all fours with the instant case. The plaintiff claims he was never told the allegations against him. The court is satisfied that "issues of concern" involving the plaintiff were sent to him through correspondence. Cross examination does not arise because there are no witnesses to interview. The plaintiff is not precluded from having someone he wants to the disciplinary meeting. The rules governing the procedure can be found in Appendix 2 as well as in the correspondence. Those participating in the investigation will not have a decision making role. The dynamic between a student and school is also very different than between an employer and independent contractor.

The Court has already referred to the defendant agreeing to the nomination of Mr. Ryan and Mr. Ennis to conduct the disciplinary hearing.

The court is satisfied that this meets the plaintiff's concerns.

As long as a neutral third party is assigned to the decision-making contest, there is no issue with the disciplinary hearing. However, the parties have not arrived at this stage.

The court is satisfied that the plaintiff's reply of the 13th February, 2010, to the defendant's letter of 27th June, 2008, took a period of sixteen and a half months. The defendant is entitled to proceed to a disciplinary hearing in line with the provisions as outlined in the second appendix of the letter of the 27th June, 2008, with the involvement of Mr. Ryan and Mr. Ennis.

In the circumstances, the court will not intervene as there has been no satisfactory evidence of any unfair procedure at this stage of the process.