

BETWEEN**EAMON O'BRIEN****PLAINTIFF****AND****AON INSURANCE MANAGERS (DUBLIN) LIMITED****DEFENDANT****Judgment of Mr. Justice Clarke delivered 14th of January, 2004.**

1. The plaintiff is the Managing Director of the defendant company ("the Company"). The Company is a specialist insurance and re-insurance management company which is licensed to operate within the IFSC. The Company's main activity is concerned with managing insurance and re-insurance companies which are in turn wholly owned by multi-national companies and which, in effect, act as self insurers for those multi national companies. The plaintiff as Managing Director of the company is responsible for the day to day management of the business pursuant to the terms of a contract of employment entered into between the plaintiff and a predecessor of the Company which contract of employment is dated 11th April, 1996. The events which lead to the dispute between the parties commenced in mid to late July 2004 when the management of the Company (including the plaintiff) became aware of what is agreed was a serious problem which suggested that signatures on important documents, including accounts and statutory documentation, had been forged by a former senior employee of the company. After a short period of time the issue was reported to senior officials in AON Captive Services Group ("ACSG") which is the direct line parent company. Thereafter a number of investigations and enquiries were undertaken. As a result of same an investigation into the conduct of the plaintiff, as Managing Director, was initiated. The plaintiff has been on what he describes as enforced leave since 21st August, 2004 as a result of, it would appear, decisions taken by senior officers of the parent companies. The initial reason given to the plaintiff was that he should be absent while an internal audit/review was carried out. However his absence from active work was continued during the investigation into his conduct referred to above and continues to this day.

2. It is of importance to set out the terms of reference of that investigation. The initial terms of reference and the objective of the investigators are summarised in a letter dated 14th September, 2004 from Juris Grinbergs Human Resources Director of the AON group to the plaintiff which states as follows:-

"the internal review of the operation of AON (Dublin) that was initiated following the discovery of certain documents containing forged signatures has identified a number of issues in relation to the corporate governance financial report and financial control of AON (Dublin).

3. If substantiated these issues could have preferred implications for the professional of AON Dublin and ACSG and there standing with clients and regulators. Furthermore there may be a need to restate the financial results for prior years and review decisions made on the basis of those results.

Investigation

4. In the light of above you are advised that an investigation would be undertaken with the following aims:-

1. confirm or otherwise the findings relating to the alleged breaches of statutory and regulatory requirements and of company procedure policies and management instructions;
2. ascertain accountability for any breaches that may be confirmed;
3. to the extent that it is decided that there is evidence that the accountability for any breaches rests with yourself the investigation will also seek to determine whether there is evidence to suggest that you have been guilty of misconduct or gross misconduct in relation to which the company should commence disciplinary proceedings against you. This stage of the investigation would focus on the following allegations against you.
 - (a) whether there is evidence that you failed to prevent breaches of statutory and regulatory requirements, company procedures, policies and/or management instructions in circumstances where it was part of your role to prevent these types of breaches;
 - (b) whether there is evidence that you knowingly misrepresented information relating to the financial performance of the business such that senior management were given a false impression of how the business was doing. At our meeting on 8th September, 2004 we discussed the specific issues in respect of receivables and the accounting treatment of fiduciary income; and
 - (c) whether there is evidence that you failed to prevent such breaches and/or that you made such misrepresentations as you stood to gain from them personally. As discussed at our meeting on 8th September, 2004 there is evidence to suggest that there were discrepancies between the statutory accounts and the management accounts for AIM (Dublin) in respect of 2003 and prior years which meant that you received a larger bonus as a result of the enhanced figures in the management accounts."

5. The investigation into those matters was to be conducted by two investigating officers (Mr. Donald and Ms. Yeowell).

6. The letter goes on to deal with certain of the procedures that would be followed in the event that disciplinary proceedings are commenced against the plaintiff.

7. The investigators issued their report on 22nd October which report set out certain allegations of misconduct in respect of which the investigating officers found that there was evidence. The report went on to recommend that the company's disciplinary procedure should be invoked. On foot of the receipt of the report it was proposed to convene a disciplinary hearing on the 18th November, 2004.

8. The plaintiff, through his solicitors, made a number of objections to the convening of such a hearing. In the absence of a response

satisfactory to the plaintiff these proceedings were commenced. The matter comes before the court by way of an application for an interlocutory injunction the company having, through counsel, given certain undertakings to the court (without prejudice to its position) which have effectively frozen the disciplinary proceedings until this hearing.

9. In both his written and oral submissions the plaintiff makes two principal areas of complaint:-

(a) he contends that the court should intervene to remove his suspension pending the conduct of any disciplinary enquiry on the basis that the decision to, in effect, force him to take leave on pain of suspension was not made *bona fide* in the interests of advancing any internal investigation by the company but was made as a prelude to dismissal. He contends that a decision to dismiss him had in fact been taken.

(b) he makes a series of complaints concerning the procedures followed by the investigators as follows:-

(i) he suggests that the investigators failed to honour a commitment to meet with the plaintiff for a second time following an initial meeting on 28th September, 2004:-

(ii) he suggests that the investigators failed to give an adequate opportunity to the plaintiff to make submissions in relation to one of the original enquiries (which has come to be called the operational review);

(iii) he suggests that the investigators failed to give him an opportunity to comment on interviews conducted by the investigators with third parties and also failed to interview third parties suggested by him;

(iv) he suggests that the investigators wrongly recommended disciplinary action against the plaintiff contrary, it is said, to their terms of reference

(v) he suggests that the investigators wrongly failed to consider whether it was appropriate to make adverse findings in respect of other parties

(vi) he suggests that the investigators wrongly failed to consider the role of head office finance

(vii) he suggests that the investigation report failed to highlight what he describes as changes of fact as the investigation progressed and failed to disclose to the plaintiff material changes made by interviewees to the initial transcripts of their interviews

10. In relation to the second of these arguments the plaintiff seeks to restrain the company from taking any steps to discipline the plaintiff arising out of the investigation report. In relation to the first of the above complaints the plaintiff seeks an order from the court which would in effect permit him to return to active duties as managing director. It seems logical to consider the position in relation to possible disciplinary proceedings first.

11. The principal ground relied upon by the company in respect of this aspect of the case is to contend that the investigation report and the process which led to it is part of a two phase process frequently engaged in in disciplinary matters whereby an initial investigation is, if it discloses sufficient evidence, followed by more formal disciplinary proceedings. In those circumstances, it is contended, a party under investigation does not have the benefit of an entitlement to the rules of natural justice at the investigative stage. Such entitlement, it is contended, arises only and if and when the employer concerned moves to a formal disciplinary process.

12. In that regard particular reliance is placed on *Morgan v. Trinity College* [2003] 3 I.R. 157. In that case the plaintiff Mr. Morgan complained that a suspension imposed upon him under the procedures of Trinity College had been imposed in circumstances where he had been denied fair procedures. As set out in some detail in the judgment of Kearns J. the appropriate procedures in Trinity College involved an enquiry by the Senior Dean which, in the absence of an agreement by the employee or officer concerned, could not give rise directly to disciplinary sanctions. Unless the employee or officer agreed with the recommendations of the Senior Dean such a sanction could only be imposed after a hearing before a disciplinary panel.

13. In those circumstances Kearns J. reached the following legal conclusions:-

"Crucially he retained the right of veto over any possible sanction which the second defendant might regard as appropriate. Nothing in his conclusion or recommendation therefore amounts to a sanction and I am satisfied that the panoply of rights identified in *Re Haughey* [1971] I.R. 217 do not arise in those circumstances."

14. It should also be noted that the *Morgan* case came before the court as an application for an interlocutory injunction. Thus it is clear that Kearns J. was satisfied that no fair issue arose to be tried in respect of the question as to whether the rights to fair procedures as identified in *Haughey* applied at the stage of an investigation which was to be preliminary to a possible full disciplinary hearing.

15. In those circumstances I am not satisfied that the plaintiff has made out a fair case to be tried in relation to the contention that proceeding further with the contemplated disciplinary process would be contrary to his legal entitlements.

16. Even if there are infirmities in the methodology of the investigators (and I express no view on that issue) and even if those infirmities may have affected the contents of their report the fact remains that the recommendations of the report do not, in the words of Kearns J. in *Morgan* "amount to a sanction" and therefore *Haughey* rights do not arise.

17. Before leaving this aspect of the case I should add that I have given consideration to the submissions made on behalf of the plaintiff to the effect that there are aspects of the documentation emanating from the company from which it might be inferred that the company intended to give greater status to the investigation report than that of a mere investigation which would form the basis for a full disciplinary hearing. Without expressing any view on the extent to which it might be appropriate to draw such an inference it seems to me that I must view this case as it now stands. Counsel for the Company in the course of argument made it clear that the Company does not assert that the report of the investigators has any status beyond recounting the evidence and issues which are to be considered at the full disciplinary hearing. While noting that the analogy may not be complete Counsel likened the document to a book of evidence prepared in advance of a trial. On that basis the report of the investigators does not establish any facts which may be contested. In the event that there are facts contained within that report which the plaintiff does not accept then he is clearly entitled to have the full disciplinary hearing consider those facts entirely afresh and having applied fair procedures to the hearing

whereby they will be considered.

18. In those circumstances I do not think it appropriate to make any order restraining the further conduct of the disciplinary process. Obviously if it does not, ultimately, prove to be the case that that hearing is conducted in accordance with fair procedures then the plaintiff will have his remedy at that stage.

19. I now turn to the separate question as to whether it is appropriate to make an order which would have the effect of permitting the plaintiff to return to active employment. As is also pointed out by Kearns J. in *Morgan* suspensions can fall into one of two broad categories. Firstly a suspension may be disciplinary in that it may be imposed as a sanction as a result of wrongdoing on the part of an employee. Secondly it may be temporary as an interim measure while enquiries are being carried out. It seems to me on the evidence presented that there are at least substantial grounds upon which the company could have concluded that it was inappropriate for the plaintiff to continue in active employment until such time as the issues which had been raised were comprehensively dealt with. As was pointed out by counsel for the company it is involved in a form of business which requires it to retain the confidence both of its clients and of its regulators. Where serious questions as to whether the appropriate standard of corporate governance has been applied by the managing director have arisen it does not seem to me to be unreasonable for an employer to require that that managing director not be engaged actively in the management of the business for a reasonable period to permit an appropriate enquiry to be carried out and, if necessary, disciplinary proceedings to be completed, and a decision one way or the other taken. In making this last point I should emphasise that in such circumstances and even where the suspension is on full pay there is a clear obligation on the part of the employer to conclude any such enquiries with all necessary expedition. I am not, at present, satisfied that there is any evidence from which it could be properly concluded that the company has been guilty of any inappropriate delay in the conduct of its enquiries. Clearly if that situation were to change then it would be open to the plaintiff to renew his application.