Neutral Citation Number: [2010] IEHC 15

THE HIGH COURT

2009 11325 P

BETWEEN

JOHN KEENAN

PLAINTIFF

AND

IARNRÓD ÉIREANN

DEFENDANT

JUDGMENT of Mr. Justice John MacMenamin delivered the 22nd day of January, 2010.

1. The plaintiff has been employed by the defendant or its predecessors in title since 1973. Having been promoted on a number of occasions he was appointed manager, (now Director), Human Resources in Iarnród Éireann in 1995. He states that he is the most experienced manager in the Personnel/Human Resources area of the defendant, and that he has built a "strong reputation" as a human resources professional, gaining the respect both of management and trade unions in an organisation which in the past has had many industrial relations difficulties.

2. The relief which the plaintiff claims is for interlocutory injunctions directing Iarnród Éireann to allow the plaintiff to perform his duties as Director of Human Resources without interference; and restraining the defendant from taking any steps to remove him from his position. The plaintiff claims an ancillary relief restraining the defendant or its servants or agents from communicating with any third party that he has been removed, that he has "stood aside" or been relieved of his duties. He seeks the continuance of his salary pending a suspension which has arisen in the following way. The last two issues are not in dispute. But in view of the mandatory nature of the relief now sought by the plaintiff the allegations and counter allegations must be clearly identified.

Chronology

3. On 3rd December, 2009, Mr. Keenan was informed by Mr. Richard Fearn, the Chief Executive of the defendant that he was being relieved of his responsibilities as Director of Human Resources. He states that Mr. Fearn told him this because he had lost confidence in him, owing, "solely", to an alleged delay informing him about the outcome of a recent equality tribunal case taken by an employee against Iarnród Éireann. The plaintiff says he was directed to take his personal effects, leave his office and that he would be contacted further.

4. On 6th December, 2009, an article appeared in the Sunday Independent apparently quoting a senior executive of Iarnród Éireann saying that the plaintiff had stood aside from his post. On 11th December, the plaintiff's solicitors sent a letter challenging what had occurred. On 14th December, the proceedings herein were issued. Liberty was granted by the High Court (Murphy J.) for short service of this application to Thursday, 17th December. On 17th December, the application was adjourned to 13th January for the defendants to deliver affidavits by 21st December, 2009 and the plaintiff to deliver his responding affidavit by 8th January, 2010. On 17th December a further letter was sent by the chief executive of the defendant raising an additional matter that according to the defendant required a response. The nature of these matters will be explained below.

5. Despite the fact that the plaintiff has been suspended and, an investigation is said to be in contemplation in relation to issues now raised by the defendant, no specific investigator has been appointed for these and therefore no time scale is identifiable at this point for the course of any investigation, or (if the defendants so decide) any disciplinary proceedings against the plaintiff. The plaintiff has not responded to the correspondence from his employer save through his solicitor. The substance of the issues has been outlined but not particularised; potential witnesses have not all been identified; no statements have been furnished to the plaintiff; no disciplinary allegations have yet been made in the context of a hearing. No formal hearing of any type was conducted subsequently to the 3rd December, 2009.

6. There is conflicting evidence as to what was the trigger point giving rise to the dispute between the parties. The plaintiff says that there has been a controversial series of events within Iarnród Éireann involving fraudulent practices. He says these were originally identified by an investigation carried out under his direction from 2005 onwards. He says that evidence emerged of collusion between certain Iarnród Éireann personnel and third party contractors. Disciplinary actions ensued and dismissals followed; the gardaí were involved and criminal prosecutions were brought resulting in convictions. As matters progressed and became more complex he proposed that expert forensic accountants be retained to take the investigation further and this was agreed. Accordingly the firm of Baker Tilly Ryan Glennon ("Baker Tilly") were appointed following a procurement process. They began their work in the second quarter of 2007.

7. The plaintiff says that in October 2007, he was asked by the chief executive to prepare a report for the C.I.E. Audit Committee. This report set out the progress made in respect of disciplinary charges issued in the case of an Iarnród Éireann employee, one of the subjects of the Baker Tilly investigation. In the final sentence of a report made to the C.I.E. Audit Committee on 4th October, 2007, Mr. Keenan says that in his estimation losses over a period of three years under review, 2004-2007, amounted to a seven or eight digit sum. He says this report triggered a very adverse reaction against him and to the investigations.

8. He says the Audit Committee received the report at its October 2007 meeting. He avers that, within a couple of days, he received an irate phone call from Dr. John Lynch, chairman of C.I.E. (the defendant's parent company), berating him for reporting the loss at such a high level. He says that Dr. Lynch and Mr. Paul Kiely, the chairman of the Audit Committee believed that this aspect of the report jeopardised their positions and that he was told that he was stupid and should have known better than to suggest such high losses in writing to a Board sub-committee. I emphasise none of these

matters have been tested in evidence or cross-examination.

9. The plaintiff continued to direct the Cost Audit Unit. He says that in December, 2007, there was a direction given that no minutes be kept of meetings of a "steering group" on these matters and that nothing should be kept in writing. Mr. Keenan says that in May, 2008, a meeting was arranged to discuss the draft Baker/Tilly report which estimated losses in the order of €8.7 million for the period 2004-2007, and that based on their examination that losses from the ongoing fraud could be running at 5% of the annual spend of €500 million. He says that, at one point, Baker Tilly estimated losses could have been 12% of the defendant's annual spend. The plaintiff asserts that the chief executive argued that this estimate was outside Baker Tilly's terms of reference and wanted it removed. The plaintiff says he spoke to the chief executive and advised him against removal but he was "unmoved". Accordingly, by removing the estimate of historic loss, he says the figure was reduced to €2.5 million.

10. The plaintiff says that in August, 2009, the cost audit team under his direction advised him that an examination of transactions with one particular contractor also indicated gross overcharging. He says that the C.I.E. legal department and the chief financial officer were appraised of the situation and that further action was required, initially in determining the level of such overcharging and then requiring recompense. He says he discussed this with the chief financial officer.

11. On 18th September, 2009, the Sunday Independent printed a story revealing details contained in the Baker Tilly Report. The plaintiff says this was one of a series of four press reports. He says in the week following, the chairman of C.I.E. phoned and berated him, accusing him of leaking the Baker Tilly Report to the journalists concerned, and indicating he would consider taking the cost audit team away from him.

Consideration of the averments by the plaintiff

12. The picture painted, even in the plaintiff's grounding affidavit, is one of very considerable difficulty in the relations between himself, the chairman and the chief executive at least from October and November, 2009. He accuses the chairman of seeking to pressurise him to remain silent in relation to matters of concern to him such as those outlined earlier. He claims that on 11th November, 2009, the chief executive in the company of the chief financial officer relieved him of responsibility for the cost audit unit by re-directing its reporting line to the chief financial officer.

13. I refer to these matters specifically because the plaintiff specifically deposes that the defendant and in particular, the chief executive have both acted *mala fides* in now proffering a reason for his removal which manifestly lacks credibility, and is clearly a contrived reason.

14. The plaintiff says that the Baker Tilly issue was being investigated by the Oireachtas Committee on Transport. He asserts that the chairman wanted him "off the pitch" primarily to put him out of immediate reach of the committee in respect of the Baker Tilly report. He says the stated reason for removing him from his duties was contrived with this objective in mind.

15. The plaintiff claims that the chief executive, Mr. Fearn, "showed no interest whatsoever" in determining the basis for the higher figure on estimated loss contained in the Baker Tilly Report and that he therefore "improperly directed" that the estimate of loss be reduced from approximately €8.9 million to €2.5 million. He says that he has not inquired since as to what the basis was for the higher estimate nor has he actively pursued any loss estimated. The plaintiff deposes:

> "I say that even if he felt that the estimate was not in line with the terms of reference given to the Baker Tilly Ryan Glennon team he had a duty to pursue same."

16. I do not think that there is any gainsaying the inference that the plaintiff is effectively accusing the chief executive, and by implication, the chairman, of the defendant, of seeking to suppress information, acting *mala fides* and in dereliction of their duty to investigate alleged fraud. It goes without saying these are very serious allegations. I repeat nothing in this judgment should be taken as in any way seeking to decide or determine the issues between the parties which, as may be imagined, are disputed.

17. In a replying affidavit Mr. Fearn totally denies that he was guilty of acting in any way inappropriately, and that his reassignment of duties in relation to the Baker Tilly Report was in order to ensure that the matter was best dealt with by persons with financial expertise rather than in the area of human resources.

18. In a further affidavit, Dr. Lynch refutes that any statements which he made to the plaintiff were in any way to protect his own position or that of the chairman of the Audit Committee. Both Mr. Fearn and Dr. Lynch deny any allegation of *mala fides* and refute any suggestion that they sought to apply pressure to the plaintiff or that they were engaged in any form of financial cover-up in relation to the internal financial affairs of the defendant.

19. The plaintiff accepts that there have been significant "tensions" between himself and others in positions of authority in Iarnród Éireann. Even judging from the affidavits and from the tone of the exhibited correspondence this would appear to be something of an understatement. The plaintiff's claim is that what occurred on 3rd December, 2009, must be seen in the light of these previous events and that what occurred on that day was a pretext, a contrivance for his removal from the scene.

The defendant's case

20. Iarnród Éireann says that what happened on 3rd December derived from dereliction of duty on the part of the plaintiff. It is said that matters transpired in the following way.

21. Sometime previously an employee of Iarnród Éireann initiated proceedings against that company. The complainant, Ms. M.M. alleged that she had been discriminated against on the ground of gender in relation to her conditions of employment and access to promotion, and that she had been harassed by her employer on the same ground contrary to the Employment Equality Acts 1998 – 2008. The complainant also claimed victimisation for making a complaint of discrimination against Iarnród Éireann. The hearing was held on 3rd December, 2008. The final piece of correspondence was received from the respondent's representative on 30th June, 2009.

22. This claim is currently under appeal, and also the subject matter of judicial review. Suffice it to say that on 13th November, 2009, the Equality Officer delivered a decision. The decision was very much adverse to Iarnród Éireann. The

Equality Officer found that the respondent had discriminated against the complainant in relation to her conditions of employment, had discriminated in relation to access to promotion, had victimised the complainant within the meaning of s. 74(2) of the Act although she refrained from making any finding that Ms. M. had been harassed on the ground of gender. The Equality Officer directed that Iarnród Éireann should pay the complainant:

(i) €126,000 (the equivalent of two years salary) in compensation for the discrimination; and

(ii) €63,000 in compensation for distress caused by victimisation. A total of €189,000.

23. While Mr. Fearn and the plaintiff are not specifically referred to by name, there are clear references to both of them in the report, which it might be thought could potentially reflect on their reputations.

24. The decision of the Equality Officer was received by C.I.E.'s legal offices on 18th November, 2009 and, Mr. Keenan says was received by himself on 20th November, 2009. The affidavits do not disclose whether any oral communication took place as to the outcome or result at the time it was received by the law officers of the company. Mr. Keenan says that having received it on 20th November, 2009 (a Friday), he took the determination home with him and returned to work on the following Monday, 23rd November. He says that he then took a number of steps in relation to the determination, involving meeting with the Iarnród Éireann solicitor who had dealt with the matter (with regard to an appeal) and also instructed that counsel be briefed. The plaintiff says that he planned to brief Mr. Fearn on this issue at a meeting arranged for 2nd December, 2009. A full meeting however did not proceed as planned.

25. Mr. Fearn considered the contents of the determination as being extremely serious. He says that the decision was severely critical of the plaintiff, himself, and other senior personnel. He states that he only first became aware of the Equality Officer's decision on 2nd December, 2009, when the chairman of C.I.E. approached him after a C.I.E. Board meeting and asked him what he knew about an equality officer's decision where the defendant had been ordered to pay a large award of compensation, possibly the largest award every made under the Employment Equality Act. Mr. Fearn says he was embarrassed to admit that he knew nothing about the decision. He observes that the plaintiff's office is in the next room to his own office and that he could have informed him of the decision at any time. He says that the plaintiff had three meetings with him after he received the decision where he could have been informed. There were two meetings on 24th November, 2009 and a brief meeting on 2nd December, 2009 prior to the C.I.E. Board meeting.

26. Mr. Fearn says he was deeply concerned that the plaintiff had not informed him of the decision for almost two weeks. He was concerned too, that the defendant could suffer adverse publicity without his foreknowledge. He says that on the 3rd December, 2009, he asked the plaintiff for a written explanation for the delay. He says the defendant agreed. Mr. Fearn says that he wanted an external investigator to investigate the case, but that he had not decided who that would be but that he would advise him and would need him to cooperate with the investigation. It was not said explicitly that the investigation was as to the plaintiff's conduct in reference to the case. The plaintiff says that Mr. Fearn was overreacting and that he had already taken steps in order to deal with the appeal and to initiate judicial review proceedings which have subsequently been brought before this Court. He also stated that the decision was confidential to the parties until its publication by the Equality Tribunal in the calendar month subsequent to the determination.

Consideration of the defendant's case

27. It does not appear in dispute that the plaintiff agreed to provide a written explanation as to why he had not told Mr. Fearn about the decision. He was to do so by 4.30pm on 3rd December when they were to meet again. It is not in dispute that the plaintiff arrived later into Mr. Fearn's office, and said that he had not completed his written explanation, but held an unfinished handwritten document in his hand which he did not give to Mr. Fearn.

28. Mr. Fearn deposes that he informed the plaintiff that he had a crisis of confidence in him as a H.R. Director as he had failed to tell him about this decision and that he should have known what a big issue this would be for the company. He says that he directed the plaintiff to stand aside from his duties with immediate effect, to go home and not to return to work until further notice. He was to continue to be paid his full salary. He was to collect his personal belongings and to hand him the keys of his office.

29. It appears the plaintiff did not leave his office immediately and returned to make a number of phone calls. The plaintiff says that he asked Mr. Fearn to confirm his decision in writing. This is denied by Mr. Fearn. It appears then that the Chief Executive says that the plaintiff indicated that he might well appear at work the following day. He says he therefore took steps to seal his office and that the plaintiff's email facility and messaging service and internet access were removed to make sure he did not return to work. He says he did not give any instruction to security staff to refuse the plaintiff access to the premises and if this instruction was given it was not on his direction.

30. Mr. Fearn accepts that he did not contact the plaintiff subsequently as he awaited the outcome of the independent investigation which was to be carried out by a senior human resources manager in Bus Éireann (the associated company) on the defendant's behalf. He says this investigation commenced on 8th December and its purpose was to examine the files and make such recommendations as were considered appropriate and how the defendant would deal with the case from then on. It is not deposed that this investigation was of a disciplinary nature or involved an examination into the plaintiff's conduct.

31. In an affidavit sworn on 22nd December, 2009, Mr. Fearn deposes that the only reason for the plaintiff's suspension was because of his delay in notifying him of the Equality Officer's decision. It appears that subsequently at these meetings there was an absence of clarity as to precisely what had transpired. The plaintiff may have understood that he had actually been summarily dismissed. The defendant now says that what has actually happened is that the plaintiff is the subject matter of what is termed a "holding suspension". It is noteworthy however that this has been in existence since 3rd December. The defendant's disciplinary procedures provide for:

(1) Early notification that a report is being submitted;

(2) A formal statement in writing of the charge;

(3) The right to call witnesses;

(4) The right to representation by a fellow employee or trade union representative;

(5) The right of appeal.

It is also provided that disciplinary procedures "should be processed expeditiously". In cases of grave misconduct a staff member may be summarily suspended.

32. The steps taken in relation to the plaintiff were quite radical involving the sealing of his office, the removal of his communication facilities and, it is claimed, a bar on his entering any part of Iarnród Éireann's premises. The plaintiff says that this has had a significant effect on his reputation and word of what happened has spread, that the nature of the allegation concerns the plaintiff authorising access to the computer records of a significant number of employees, perhaps 30.

33. The defendant outlines a number of further issues concerning the plaintiff which have also come to light since the meeting of 3rd December. These include allegations that the plaintiff:

(a) authorised subordinates to access email correspondence to and from employees of the company and directed such subordinates to make copies of these.

The plaintiff rejects the suggestion that the monitoring of email between unnamed individuals was "secret" or "wrongful". He says the subordinate was a senior member of his team reporting directly to him and had been pivotal in finding evidence of procurement procedure circumvention, collusion and fraud. It is also said he has been instrumental in producing evidence for prosecutions sufficient to enable him to recover close to €2 million to date from contractors. The plaintiff says he is in fact the manager of the cost audit unit and was delegated authority for particular email access to enable him to conduct his investigations relating to use of company resources and dealings with third parties. The plaintiff says that in delegating this authority to the manager of the cost audit unit (an accountant) he submitted a formal written request to the head of the C.I.E. group I.T. Department and that in any case user policy permits such accessing.

(b) procured access to the email correspondence of the personal assistant of the Chief Medical Officer of Iarnród Éireann.

The Chief Medical Officer, Dr. Declan Whelan, has deposed in affidavit as to his dismay at this. He indicates that he is "astonished" that the plaintiff would have given direction that the "I.T. activity of one individual within the medical department" would be reviewed and that his understanding of the nature of the access was that the plaintiff or somebody under his direction would be enabled to view all the documentation that could have been viewed by his personal assistant using that assistant's email access facility. Dr. Whelan states that he considers that the activities of the plaintiff, as disclosed, constitute a breach of trust established between him and those who entrust confidential information. He says this breach is of the gravest kind affecting his role as Chief Medical Officer for the defendant and his associated companies.

(c) may also have authorised access to employees bank accounts;

and finally

(d) may have authorised the placement of a tracking device on a third party's car.

Mr. Fearn says that these matters now must also be investigated. He says that while his decision to suspend the plaintiff was taken solely because he wished to investigate his failure to inform him of the Equality Officer's decision, it is crucial that his suspension remain in place so that the defendant can investigate not only that failure but also the other matters as referred to.

34. In summary the defendant says that the plaintiff:

(a) does not deny that he failed to inform Mr. Fearn of the Equality Officer's decision in the *M.M.* case;

(b) has not explained his failure to do so but sought to minimise the significance of that failure;

(c) has failed to provide a written account for the delay in so informing the defendant;

(d) refused to comply with a direction to leave the office forthwith;

(e) tacitly accepts he authorised access to the plaintiff's emails but has not responded to the defendant with his observations in this matter despite a written requested to do so.

It is said that further matters require to be investigated including accessing indirectly medical records, bank accounts and the placing of a tracking device on an employee's car. All of these are of course, potentially important issues for the trial.

Legal principles

A strong case likely to succeed at the trial of the action

35. The test applicable for the relief sought is whether the plaintiff has a strong case likely to succeed at the trial of the action. (per Fennelly J., *Maha Lingham v. Health Service Executive* [2006] 17 E.L.R. 137.) There is no doubt but that when an investigation is conducted an employer may be authorised in law to decide to suspend an employee until such investigation is complete. (See *Morgan v. Trinity College* [2003] 3 I.R. 157). To be lawful such a suspension is to be seen as a holding one and this fact must be made clear to the employee. Here, I do not think a court can simply ignore the manner in which the plaintiff says events evolved. The Court must look to the reality of the situation and matters in dispute.

36. In simple terms Mr. Fearn who is charged with human resources in the defendant company was without any formal hearing summarily suspended, his office sealed, informed he was not to return to work and his communication facilities were removed. There appears significant evidence that this had the effect of ensuring that what had occurred received wide currency in Iarnród Éireann, and beyond.

37. The plaintiff contends Mr. Fearn acted precipitately and that his reaction was disproportionate. It is contended that this lack of proportionality is attributable to the background which has been outlined earlier in this judgment.

38. Without reaching any conclusion, it seems to me that the plaintiff may be in a position to establish that:

> (i) in the circumstances outlined the suspension here inevitably carried with it the implication that there had been a finding of misbehaviour and breach of rules by the suspended person. It accrued wide currency.
>
> (ii) that the situation here would not be characterised as being one where there has been merely "an allegation" of "impropriety or misconduct", to paraphrase Barr J. in *Quirke v. Bord Lúthchleas na hÉireann* [1988] I.R. 83. In fact the plaintiff appears to have concluded he had been simply dismissed.

I take into account also:

> (iii) the fact that, apparently, no concrete steps have been taken to institute disciplinary proceedings against the plaintiff. The thrust of the submissions made on behalf of the defendant was that the investigations were still continuing and that it was the plaintiff who had failed to respond to allegations thereby preventing any further steps taking place in the meantime.
>
> (iv) No concrete indication of any timescale for the investigation was given. It seems to me that the plaintiff might establish a strong case that it might reasonably be inferred that he had been found guilty of significant misconduct and that by reason of the publicity and currency given to what had necessarily occurred what is involved here is *in its effect not a holding suspension but punitive*.

39. There is no doubt that whether a suspension amounts to a sanction such as would invoke concepts of natural justice or give rise to an inference that the plaintiff had been guilty of significant misconduct is in every case a question of fact and degree. (See *Morgan* cited earlier).

40. In this case it is at least substantially arguable that the plaintiff was entitled to be afforded natural justice and fair procedures before the decision to suspend was taken. At this stage the Court must have particular regard to what Mr. Fearn deposed on behalf of the defendant, that is to say that a suspension was in the first instance *entirely* as a consequence of the plaintiff's alleged delay in informing Mr. Fearn. The question arises as to whether this response was proportionate and whether Mr. Fearn acted in a manner which was fair, reasonable or rationally cognisant of the consequences in coming to the decision to suspend. In this question it may be legitimate to enquire was it necessary to suspend in order to investigate the plaintiff's delay; whether the decision could, or should have been communicated in writing; and in a manner so as to avoid controversy. A letter could also have identified the nature of enquiry, the person charged with carrying out the inquiry (indicating an intention to contact the employee) and have identified fixed time limits.

41. What happened raises the question as to whether the steps taken by Mr. Fearn were, as is submitted on behalf of the plaintiff, the exercise of a disproportionate "draconian" power in circumstances where such were unwarranted and where what was before Mr. Fearn on 3rd December was not a circumstance of grave misconduct.

42. In this context I bear in mind that there appears even now to be no concrete evidence that any true investigation is taking place. There appears to be an investigation of the *M.M.* case but its remit is unclear. The suspension which took place here also had a high publicity impact. One cannot ignore the reputational effect of this. As Clarke J. commented in *Mulcahy v. Avoca Capital Holdings Ltd*. an absence from work for a prolonged period

> "particularly someone who is in a significant position is the kind of thing which can be noticed to an extent that it can affect that person's reputation in the relevant economic community in which the employment is situated".

That judge went on to comment that the effect of suspension and absence from work is also a factor that should be taken into account favouring additional expedition again having regard to the position held by an employee and the effect that absence from work could have upon him. I take into account that to-date no notice has been given to the plaintiff as to the precise disciplinary process being invoked, (if any)(or whether such disciplinary process is being invoked) that he has not been informed as to the existence of any disciplinary hearing, or, as yet been informed, as to the *precise* nature of the charge or charges against him.

43. The effect of the order which the plaintiff seeks in this case is a mandatory injunction. As Fennelly J. commented in *Maha Lingham*:

> "In substance what the plaintiff/applicant is seeking is a mandatory interlocutory injunction and it is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory. In such case it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action."

As was pointed out by Clarke J. in *Bergin v. Galway Clinic Doughiska* [2007] I.E.H.C. 386:

> "The strong case test is applicable 'even though damages might well be the appropriate remedy at trial'" (See

Shortt v. Data Packaging Ltd. [1994] E.L.R. 251 and *Phelan v. B.I.C. (Ireland) Ltd.* [1997] E.L.R. 208.)

44. The plaintiff is not a State office holder – nonetheless for the purposes of the application I will take the authorities relied on by the plaintiff in this complex and developing area of law at their high watermark. This cannot be seen as a situation where the plaintiff is to be seen as "a professional person on administrative leave". (see *O'Donoghue v. South Eastern Health Board* [2005] 4 I.R., a judicial review where Macken J. quashed the suspension of the applicant.)

45. In the circumstance I am prepared to apply a test said to have been applied in *Ali v. London Borough of Southwark* 1988 I.R.L.R. 100, that is whether even in circumstances where an employer may have lost trust and confidence a court may look at whether or not the decision being taken by the employer is rational.

46. For the purposes of the argument I am prepared on the facts to proceed even on the hypothesis that if this is a case where a person is suspended so that an inquiry can be undertaken rules of natural justice should have been applied. (See by way of distinction *Deegan v. Minister for Finance* [2000] E.L.R., at p. 191 and *Lewis v. Heffer* [1979] 3 All E.R. 351 where suspensions were regarded as purely administrative precautionary acts; and see *Morgan* cited earlier. All of these may go to the establishment of a "strong case". I believe the plaintiff has crossed that threshold. But this is not a case where the facts are comparable to *Maha Lingham*. What is in issue here are not questions of "absence of support from fellow orthopaedic surgeons in a health board" or a failure to be short listed for a consultant post, or an alleged failure by the employer to obtain sanction for continued employment. The allegations here are for more radical. They involve the interplay between "strong case" established by reference to matters not in dispute and balance of convenience.

Balance of convenience

47. A court must at all stages bear in mind the hesitations which are applicable in relation to the granting of a mandatory injunction in the case of a contract of services. It may arise only in exceptional cases and then for well established policy reasons. (See *Ahmed v. H.S.E.* [2007] I.E.H.C. 312, and the discussion therein of the issue by Laffoy J. at p. 6 and Yap v. *Children's University Hospital (Temple St. Ltd.)* [2006] 4 I.R. 298. Terms and conditions of an employment contract are not a one way street.

48. In *Yap* Clarke J. specifically identified as being one of the limited circumstances in which the courts would interfere to force a continuation of contract employment was when there was a serious controversy. In *Yap* Clarke J. commented:

> "There is a huge controversy between the parties as to the position that should apply in the event that the plaintiff goes back to work, and it seems to me therefore that the case is also very similar to *Carroll v. Bus Átha Cliath* [2005] I.E.H.C.1, [2005] 4 I.R. 184, in that until such time as that controversy had been resolved, it is not possible for the court, at an interlocutory stage, to make an order that would entitle the plaintiff to go back to work, as it were, on her terms. I use the phrase 'on her terms' not to in any way deprecate those terms but simply to indicate that they are the terms on which she says she is entitled to go back to work."

49. Even accepting that at an interlocutory stage a court might be entitled to "ring-fence" the issues which might appertain to a strong case to the date of the suspension itself, that is by no means the end of the issue. Insofar as it may be thus characterised, the balance of convenience seems to me to be by far the determinative factor in this application. The allegations and counter allegations in controversy simply cannot be ignored. This is not simply a matter of "tension" between the plaintiff and other officers of Iarnród Éireann. It is a question of trust, authority, loss of confidence, and I think plain common sense. The plaintiff has challenged the integrity of the chief executive and the chairman. He claims that they have acted *mala fides*. He alleges the defendant has acted in dereliction of his duty. He says that there has been a cover up in relation to substantive fraud and that the chairman and the chief executive have been collusive in pressurising him to be part of a cover up. It is said the alleged cause of the suspension is a pretext by the defendants.

50. Whatever may have been the position on the 3rd December, it cannot now be said that there *now* exists a relationship of trust and confidence between the parties. I think all the probabilities point against this proposition. What has been said cannot be unsaid. Whatever may have been an alleged want of proportionality or impropriety procedure adopted by the chief executive on the 3rd December, it is now suggested that the plaintiff was engaging in other conduct which, if proved, it might be thought could be corrosive of trust and confidence and constitute breach of contract. These include the allegations of accessing e-mails, medical records, tracking employees and accessing bank statements. I identify these not so as to suggest that these necessarily indicate that the plaintiff, if he engaged in such conduct, was guilty of misconduct. Even if these were proved it may be that the plaintiff will contend that each of these activities was engaged in the conduct of his work and in the investigation of wrongdoing.

51. One cannot blind oneself to the realities as to the nature of the allegations which have been made against those which have been placed in positions of authority in the defendant, that is, the chairman, the chief executive and also to the effect which it is said the accessing of medical records may have on the position and duties of confidentiality of the chief medical officer. I do not ignore also the fact that Mr. Fearn suggests that the plaintiff was, in fact, insubordinate in failing to answer questions and even on the day failing to leave the office when requested to do so.

52. I bear in mind that there are factors which may yet tell against the defendant. A significant time has already elapsed between the Baker Tilly Report events and the present day. Granted it is said that the equality award will be challenged by appeal on judicial review. It may be that the plaintiff will succeed in his contention that everything he did, he did in the interests of the company

53. However to any neutral observer the litmus test in this situation must be whether, pending full hearing, there can be said to exist the requisite level of trust and confidence at this point. Various allegations may ultimately tell against the plaintiff. He says whatever he did was in furtherance of his employers interests.

54. They may tell against the defendant, and the company will ultimately be found culpable for putting issues "into play" which have tilted the balance of convenience against the plaintiff. Be that as it may, I think the Court must, in assessing the balance of convenience now look objectively at the position as it exists now rather than as of the 3rd December. It would be entirely artificial to suggest that the clock can be simply turned back for the purpose of giving effect to a mandatory injunction. That balance now falls against the plaintiff. The breakdown in relationship tells against the plaintiff (see *Carroll v. Dublin Bus* [2006] E.L.R. Vol. 17 NO. 3, p. 149, Clarke J. and the discussion on this point at p. 167 of the

report. I treat it here as a "balance of convenience issue". It may also bear on the strength of the plaintiff's case.

55. The issue of damages did not emerge to the forefront of argument here. The plaintiff continues to be paid his salary and I will assume this situation will continue. There is agreement there will be no further problems.

56. For the reasons given the applications for interlocutory injunction must be dismissed. Pre-eminently this is a case which requires a degree of supervision of the Court. The defendant should be entitled for a reasonable period to carry out an investigation and with due expedition to bring on any disciplinary proceedings if such arise. Were there to be failure in that regard it may be that the balance of convenience might alter or circumstances could arise where a court would consider it appropriate to intervene in order to ensure that no injustice was done by a prolonged or "open ended" suspension.