Neutral Citation Number: [2008] IEHC 332

THE HIGH COURT

1998 No. 3571P

BETWEEN

FRANK SHORTT

PLAINTIFF

AND

ROYAL LIVER ASSURANCE LIMITED

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on the 21st day of October, 2008.

Background

1. When these proceedings were initiated by a plenary summons which issued on 23rd March, 1998, the plaintiff had been an employee of the defendant for over twenty years, since 1977. From April, 1991 onwards he had occupied the position of District Sales Manager, Dublin South West. The chain of events which led to the initiation of these proceedings commenced in July, 1997 and encompassed two pivotal events which are at the core of these proceedings. The first was the implementation and outcome of a disciplinary process under which the plaintiff was subjected to a sanction. The second was the decision of the defendant to transfer the plaintiff from the position of Sales Manager for the Dublin South West district to Sales Manager for the Dublin West district in the course of the restructuring of the defendant's operations in Ireland.

2. The disciplinary process arose out of a complaint made by another employee of the defendant, who had acted as the plaintiff's personal assistant for about six years (whom I will refer to as "the personal assistant"), against the plaintiff, which was transmitted to the defendant through the personal assistant's trade union, SIPTU. The complaint related to the manner in which the plaintiff had treated the personal assistant on 10th July, 1997. The issue between them arose because, while the plaintiff was on sick leave on the previous day, the personal assistant had taken a day's leave to look after her young son who was sick. On his return to the office, the plaintiff, having erroneously concluded that the personal assistant had taken a day's leave in his absence without cause or notice, remonstrated with the personal assistant. A comparison of the almost contemporary statements made by the personal assistant and the plaintiff in relation to what transpired discloses a large element of consistency as to the substance of the interaction between them. Where the accounts differ is that the personal assistant complained that the plaintiff created a tense and hostile atmosphere by slamming the door, speaking to her in an abrupt manner and raising his voice and butting in in an enraged tone. In a subsequent statement the personal assistant complained that during the following week the plaintiff had continued his hostile attitude towards her and that she found the atmosphere in the office tense and the working conditions intolerable. She stated that she felt very intimidated by the plaintiff's aggressive behaviour. The personal assistant's account of the plaintiff's demeanour towards her on 10th July, 1997 was corroborated in the statement of a female colleague who witnessed part of their interaction.

3. At that time the defendant had a disciplinary procedure in place in relation to Area/District Managers, which, in general, provided that at every stage of the procedure the employee would be informed in writing of the disciplinary charge being brought, would have an opportunity of stating his or her case in person before any penalty was imposed, would be given at least five days working notice in advance of a disciplinary interview, and would have the right to consult and be accompanied by a trade union representative throughout the process. The procedure involved an investigation of the facts by management, which involved taking statements from relevant witnesses. It also provided for suspension with pay pending the investigations. A progression of sanctions was envisaged: a formal verbal warning; a written warning; a final written warning; and dismissal. There was also provision for an internal appeal. The sanction of a final written warning could be applied in the case of a first offence which was considered to be serious but fell short of gross misconduct. A final written warning would be disregarded after twelve months satisfactory conduct.

4. The statements of the personal assistant in relation to her complaint against the plaintiff were sent by SIPTU to Mr. Derek Brennan, the Divisional Manager of the defendant in Ireland, on 1st August, 1997 on the basis that the content would form the basis of a formal written complaint and would be processed accordingly. Mr. Brennan was the plaintiff's line manager. He set an investigation in train. The plaintiff was suspended with pay pending the investigation. As a result of his investigation Mr. Brennan decided to hold a disciplinary hearing on 3rd September, 1997, at which the plaintiff would be given the opportunity to respond to "the allegations of hostile, intimidatory and aggressive behaviour towards a subordinate" as contained in the personal assistant's statements. The plaintiff was informed that he could be accompanied by a trade union representative or a colleague and that copies of all the complaints and statements had already been furnished to him, which was the case. The plaintiff had already involved his own trade union, then known as MSF. The letter advising him of the disciplinary hearing stated that the request of his trade union representative to have staff members available for questioning could not be agreed to due to the nature of the complaint. The request was not subsequently pursued by the plaintiff or his representative during the disciplinary process.

5. The disciplinary hearing took place on 3rd September, 1997. Mr. Brennan was the decision maker. The defendant's personnel advisor for Ireland was also present. The plaintiff attended with his trade union representative, Brian Gallagher. At the outset, in response to Mr. Brennan's query as to whether there were any procedural questions, Mr. Gallagher lodged a formal objection that disciplinary action was inappropriate as there had been no attempt to resolve the issue informally. Mr. Brennan then set out his interpretation of the background to the hearing. The plaintiff and Mr. Gallagher were given an opportunity to respond, during which Mr. Gallagher reiterated his complaint as to the lack of an attempt to resolve the matter informally. Mr. Brennan stated that he had spoken with the personal assistant and that she had requested that the matter be made formal and dealt with by her trade union, thus effectively rejecting the objection.

6. Having at the end of the hearing reserved his decision, Mr. Brennan conveyed it by letter dated 8th September, 1997. While he did not express this, it was implicit that he had made a finding of "hostile, aggressive" and "intimidatory behaviour" on the part of the plaintiff, because he stated that any repetition of such behaviour to employees at any level within the organisation would lead to the consideration of the next stage of the Disciplinary Procedure. He stated that he had decided to issue the plaintiff with a final written warning. The plaintiff could appeal that decision to the General Manager of Field Operations, Mr. Barry Caulfield. The plaintiff was informed that normally a final written warning would lapse after twelve month's satisfactory conduct, that he would not be eligible to participate in the Staff Bonus Scheme while he was on the disciplinary procedure and that it was in order for him to resume his duties on 10th September, 1997.

7. The plaintiff did resume his duties on 10th September, 1997. He also availed of the internal appeal against Mr. Brennan's decision.

8. Pending the investigation of her complaint and the disciplinary hearing, the personal assistant had been on special paid leave. After the decision of Mr. Brennan, in response to a letter of 12th September, 1997, informing her that her paid leave would end and she should report for work on 17th September, 1997, her solicitor, by letter dated 17th September, 1997, wrote to the defendant alleging

that she had been subjected to a campaign of harassment and intimidation and seeking confirmation that she would be allowed to return to her normal duties free from an atmosphere of harassment and intimidation, failing which she would have no option but to institute appropriate legal proceedings against the defendant. As I understand the personal assistant's position, it was that she wished to return to her position as a personal assistant in Dublin South West but not under the plaintiff.

9. The plaintiff's appeal was heard by Mr. Caulfield in Liverpool on 30th October, 1997. The plaintiff was represented by Mr. Gallagher, who raised a number of grounds of appeal. He reiterated his complaint that there had been no attempt to resolve the issue informally and that the use of the disciplinary procedures was premature. He also objected to the manner in which Mr. Brennan had conducted the disciplinary hearing, in that, in setting out his interpretation of the case, Mr. Brennan had referred to two previous matters, one dating from 1996 in which there had been complaints against the plaintiff from agents working under him, and another dating from 1997 which Mr. Brennan had characterised as "unprofessional behaviour" in relation to a colleague of the plaintiff, which Mr. Gallagher suggested manifested an element of prejudgment on the part of Mr. Brennan.

10. Mr. Caulfield's decision on the appeal was communicated in his letter of 17th November, 1997. He rejected the appeal and all of the grounds advanced. He confirmed Mr. Brennan's decision. He then went on to address a matter which had not been raised at the appeal hearing, commenting on the manner in which the plaintiff had conducted himself at the appeal hearing and stating that there had been "quite considerable degradation in [his] attitude and demeanour". He suggested that the plaintiff seek counselling. In fact, Mr. Brennan in his letter dated 8th September, 1997, had expressed the view that behavioural counselling would assist the plaintiff in his relations with people and stated that he anticipated that the defendant would fund counselling in full.

11. After the determination of the appeal hearing the plaintiff did not pursue any other industrial relations avenue, such as bringing the matter before a Rights Commissioner. The plaintiff's trade union and Mr. Gallagher dropped out of the picture at that stage.

12. Although the plaintiff's solicitor's opening letter preliminary to these proceedings was not sent until 24th February, 1998, and was not received by the defendant until 27th February, 1998, I am satisfied on the evidence that it was the intention of the plaintiff at all times to seek to have the outcome of the disciplinary process reversed, through litigation if necessary.

13. It is not clear on the evidence when precisely the personal assistant returned to work but it was before mid-December, 1997. She was assigned to work as a personal assistant in the Administrations Centre. By the end of January, 1998, her solicitor was complaining, as no doubt he believed was the case, that no disciplinary action had been taken against the plaintiff, that it was his client, not the plaintiff, who had been transferred, which gave rise to the impression that it was she, not the plaintiff, who had been guilty of wrongdoing, and that her new duties and working conditions were substantially different to those she had previously enjoyed. The solicitor threatened that, if the matters could not be resolved amicably within a reasonable time, she would have no alternative but "to ventilate her grievance before the Courts". As I understand it, that never happened. She left her employment with the defendant in June, 1998, having first made enquiries about voluntary redundancy early in February, 1998. She continued to work in the Administration Centre until she left.

14. The second pivotal event underlying these proceedings was the decision which the defendant made, in the implementation of the restructuring of its business in Ireland, to transfer the plaintiff from the position of District Sales Manager for the Dublin South West district to the position of District Sales Manager for the Dublin West district. The decision did not involve a change of work place or even office; it involved the assignment to the plaintiff of responsibility for a different area of operations with different agents and other personnel working to him. There is no issue but that a genuine restructuring was on the cards from 1996 onwards and that it was implemented in February, 1998. The issue raised by the plaintiff is that the decision to assign him to Dublin West, which was communicated to him by Mr. Brennan at a meeting on 20th February, 1998, was a direct consequence of the allegations made by the personal assistant and was an additional penalty imposed on him, in that Dublin West did not have the potential to yield as much sales commission, which was a component of his remuneration, as the district in which he had been operating, Dublin South West.

15. On the evidence, I have no doubt that in February, 1998, Mr. Brennan was apprehensive that the personal assistant would leave her employment with the defendant and launch an action for constructive dismissal if she was not reinstated in the position as personal assistant in the Dublin South West district working to somebody other than the plaintiff, as she was demanding. I have also no doubt that that apprehension was a factor in the decision to assign the plaintiff to the Dublin West area under the restructuring and I so find. However, I am satisfied that to the extent that it was a factor, the objective was not to impose an additional penalty on the plaintiff; the objective was to be in a position to address the personal assistant's issue, lest she pursue the apprehended strategy. Other factors also informed the decision to assign the plaintiff to the Dublin West district in the very complex restructuring operation being implemented, which involved, *inter alia*, reducing the number of districts within the geographical area of Dublin City and County, County Kildare and County Wicklow from nine to six, reconfiguration of the districts and the allocation of five incumbent managers and almost two hundred agents to the new districts. One of the factors was the problem which had arisen in 1996 between the plaintiff and agents working under him. Another was his experience of working for the defendant in the area which was to constitute the new Dublin West district before taking up his assignment as District Sales Manager for Dublin South West in 1991, which was seen as an advantage in dealing with the challenges which were going to arise in the new district of Dublin West.

16. The plaintiff objected to the proposed transfer both personally and through his solicitors, who threatened injunctive proceedings if the defendant did not capitulate. The plaintiff had a meeting with Mr. Caulfield on the 16th March, 1998. As a result of that meeting Mr. Caulfield wrote to him on 18th March, 1998. Mr. Caulfield's position was that the disciplinary process was completely separate from, and bore no relationship to, the restructuring plan. He set out the supports which the plaintiff would receive in Dublin West. He acknowledged that the move might have implications for the plaintiff's earnings and indicated that a formula would be in place to ensure protection of the plaintiff's earnings for a three year period. Mr. Caulfield concluded the letter with an assurance that it was not the intention of the management that the appointment to Dublin West would be a punitive measure but one seen as a progressive and beneficial move for both the defendant and the plaintiff.

17. Notwithstanding the supports and income protection offered to the plaintiff, he refused to take up the position in Dublin West and he was suspended on pay on 18th March, 1998. That action provoked these proceedings. Contemporaneously with the plenary summons, a notice of motion was issued on 23rd March, 1998 seeking, *inter alia*, an injunction restraining the defendant from transferring the plaintiff to Dublin West. The application for the interlocutory injunction came on for hearing on 27th and 28th May, 1998 before O'Sullivan J., who by order of 28th May, 1998, refused the application.

18. Immediately following the dismissal of the interlocutory application, the plaintiff returned to work. He worked as District Sales Manager for Dublin West until September, 2001, when he was appointed to the position of Sales Development Manager, as part of a further restructuring of the defendant's business in Ireland. He continued in that position until he took voluntary redundancy in January, 2004. The guarantee of income protection given in Mr. Caulfield's letter of 18th March, 1998, was continued for six years until the plaintiff left the defendant's employment. The plaintiff took voluntary redundancy and the settlement which came with it on

the basis that he was doing so without prejudice to his entitlement to pursue these proceedings.

19. There are a number of other factual matters which are relevant.

20. First, as the plaintiff had been advised in Mr. Brennan's letter of 8th September, 1997 would happen, the final written warning lapsed after twelve months, whereupon the bonus which had been withheld was paid to him.

21. Secondly, the plaintiff claimed that the events of August and September, 1997, caused him stress, for which he had to receive medical attention. His general practitioner testified to having seen the plaintiff at the beginning of September, 1997, and on the 10th September, 1997. At the time the plaintiff's symptoms seemed to be stress related. He had symptoms of anxiety, he was feeling tired and he had problems sleeping. His general practitioner prescribed sleeping tablets for him on the first occasion and gave him a medical certificate certifying him unfit for work due to stress. The general practitioner saw the plaintiff again on 2nd February, 1998, when he found that he had the same problems but probably worse. He referred the plaintiff to a Stress Clinic for professional help for his symptoms. On the evidence, I am satisfied that the plaintiff, who was suspended on pay from 5th August, 1997 to 10th September, 1997, did not at any time apprise the defendant that he was suffering from work place related stress. In particular, he did not submit the general practitioner's certificate to the defendant. The first the defendant knew of his claim that he was suffering from work related stress was in a reply to notice of particulars in these proceedings delivered in September, 1998.

The claim
22. There are two distinct elements in the plaintiff's claim and a third which relates to a consequence which is alleged to flow from the first and second elements.

23. The first element arises from the manner in which the disciplinary action against the plaintiff was conducted. The relief sought in relation to this element is a declaration that the disciplinary action as implemented by the defendant was both wrongful and unlawful and in breach of the plaintiff's rights to natural and constitutional justice.

24. The second element arises out of the transfer of the plaintiff to Dublin West. The plaintiff contends that the position adopted by the personal assistant, as manifested by her continuing representations to the defendant, significantly influenced the defendant in deciding to transfer the plaintiff. Therefore, the decision to transfer was an additional sanction arising from the disciplinary process initiated by the personal assistant's complaint, the imposition of which was unlawful as being in breach of the plaintiff's rights. The remedy that the plaintiff seeks in relation to this element is damages for breach of contract, the claim being predicated on the proposition that the plaintiff's earnings would have been greater had he remained in Dublin South West. As a consequence, it was contended, he suffered loss in the nature of special damage under three headings:-

> (1) loss of earnings from 20th February, 1998 until he took voluntary redundancy on 9th January, 2004;
>
> (2) diminution of the redundancy payment to which he would otherwise have been entitled; and
>
> (3) loss of pension entitlement.

25. The third element is a claim for damages for personal injuries due to stress suffered by him as a result of the disciplinary process and his transfer.

26. I will consider each element in turn.

The disciplinary process
27. It was submitted on behalf of the defendant that there is an insuperable difficulty to the plaintiff pursuing a claim for a declaration in the terms sought in that, having regard to the effect of the passage of time, the plaintiff's claim is not justiciable. The defendant pointed to the fact that the final written warning lapsed after a year and the plaintiff's withheld bonus payment was restored. As a result, it was submitted, the plaintiff was not prejudiced in any way and no benefit would accrue from the granting of the declaration sought.

28. In support of that argument, the defendant relied on the decision of this Court (Blayney J.) in *Ahern v. Minister for Industry and Commerce* (No. 2) [1991] 1 I.R. 462. The plaintiff in that case, a public servant, was seeking to quash, by way of judicial review, the decision of his employer to have him placed on compulsory sick leave. Before the proceedings were initiated he had been instructed to return to work and he had done so. Issues arose as to the conduct of the applicant. Having stated that the factors in relation to the applicant's conduct would incline him to exercise his discretion against granting the reliefs sought, Blayney J. stated that there was a third factor which was even more compelling and he continued (at p. 469):-

29. "In *The State (Abenglen Properties Ltd.) v. Corporation of Dublin* [1984] I.R. 381, Walsh J. said in his judgment at page 397:-

> 'If I am correct in this, then an order for certiorari quashing the decision made by the respondents would be of no benefit to Abenglen. While the Court could make such an order in the present case, the Court in its discretion could refuse to do so where that would not confer any benefit upon Abenglen'.

30. I am satisfied that in the present case the order sought would not confer any benefit on the applicant. He claims that it would in that, if Mr. Bennett's decision remains in his personal file, it will affect his career prospects. I am not at all convinced that this is so …. So the presence of this decision on his file will not prejudice him in any way and accordingly would not confer any benefit on him.

31. Also in [the Abenglen case], O'Higgins C.J. at p. 393 had this to say in his judgment in regard to applications for *certiorari*:-

32. 'In the vast majority of cases, however, a person whose legal rights have been infringed may be awarded certiorari *ex debito justitiae* if he can establish any of the recognised grounds for quashing; but the court retains a discretion to refuse his application if his conduct has been such to disentitle him to relief or, I may add, if the relief is not necessary for the protection of those rights. For the court to act otherwise, almost as of course, once an irregularity or defect is established in the impugned proceedings, would be to debase this great remedy'.

33. Even if the legal rights of the applicant were infringed in the present case, the order sought is not necessary for the protection of those rights. The applicant did not lose any salary, he continues in his position as a senior examiner in the Patents Office and his career prospects have not, in my opinion, been affected by the decision sought to be impugned. To grant an order of certiorari in the present case would to my mind, to borrow the words of O'Higgins C.J., debase this great remedy".

34. The decision of Blayney J., in the light of those considerations, was to refuse the relief sought in the exercise of his discretion. A reporter's note discloses that subsequently the applicant's appeal was dismissed by the Supreme Court without reserving judgment.

35. Counsel for the defendant also relied on a decision of the former High Court in *O'Doherty v. Attorney General & O'Donnell* [1941] 569, in which Gavan Duffy J., as a matter of discretion, refused to make a declaration that notice sent by a statutory decision maker was inaccurate and contrary to law, because there was a more convenient, beneficial and effectual remedy available for misconstruction of the relevant statutory duty by the statutory decision maker, an order of mandamus. It was submitted that in this case the plaintiff could have sought redress through industrial relations channels by bringing the matter to a Rights Commissioner.

36. It was not contended on behalf of the defendant that it is not open to the Court to grant a declaration to an employee concerning breaches by his employer of its contractual obligations to him. Indeed, counsel for the defendant acknowledged that in an appropriate case such a declaration may be made, referring to the decision of this Court (Clarke J.) in *Carroll v. Bus Atha Cliath* [2005] 4 I.R. 184 and submitting that circumstances which arose in that case were a perfect example of the type of situation when it is appropriate to grant a declaration.

37. In this case, even if it were the case that the implementation of the disciplinary process against the plaintiff was irregular and contravened the plaintiff's contractual or constitutional rights, I am of the view that, having regard to the circumstances which now prevail, the Court should refuse to grant the discretionary remedy sought by the plaintiff. When this matter came on for hearing, almost ten years had elapsed from the time the sanction, which had been imposed on the plaintiff in September, 1997, had ceased to exist, having lapsed. That sanction did not in any real sense militate against the plaintiff either financially or in career terms. Even though he harboured a grievance that he had been treated unfairly and that his reputation has been tarnished, the reality is that he continued in the employment of the defendant for over six years after the events complained of and ultimately availed of voluntary redundancy. Although the claim for a declaration in the terms which the plaintiff seeks, in my view, is justiciable, the remedy is a discretionary remedy. On the facts of this case, in my view, to borrow the words of O'Higgins C.J. and Blayney J., it would debase the remedy to grant it to the plaintiff even if he has established that the defendant acted unlawfully.

38. Apart from that, I am not satisfied that the plaintiff has established that the defendant acted unlawfully or in breach of his contractual or constitutional rights.

39. The principal plank in the plaintiff's case that the defendant breached his right to fair procedures is that he was neither afforded the opportunity to cross-examine the personal assistant nor provided with some alternative means of testing her evidence. While it was conceded on behalf of the plaintiff that not every disciplinary process will give rise to a right to cross-examine the complainant, it was asserted that the graver the allegation the more important it is that the employee who is under investigation should have the right to test the evidence. In this case, it was submitted, the allegations of "hostile, intimidatory and aggressive behaviour towards a subordinate" were serious and ought to have been tested in a more robust fashion than occurred. It was submitted that there was a lack of even-handedness on the part of the defendant.

40. I am satisfied that the defendant conducted the disciplinary process in accordance with the Disciplinary Procedure. The complaint against the plaintiff was investigated promptly and as thoroughly as was warranted. The plaintiff was given an opportunity to respond to all of the evidence which was before Mr. Brennan. As is recognised in Industrial Relations Act 1990, Code of Practice on Disciplinary Procedures (Declaration) Order 1996 (S.I. No. 117/1996), the principles of natural justice "may require … that the employee concerned be allowed to confront or question witnesses." (Article 11). That is in line with the authorities, which make it clear that, while an employee who is facing a disciplinary action is entitled to the benefit of fair procedures, what these will demand depends on the terms of the employee's employment and the circumstances surrounding the disciplinary action (*per* Barrington J. in *Mooney v. An Post* [1998] 4 I.R. 288 at p. 298). The important point is that the decision-maker must not act in such a way as to imperil a fair hearing or a fair result (*per* Hamilton C.J. in *Gallagher v. The Revenue Commissioners* (No. 2) [1995] 1 I.R. 55, at p. 76).

41. As I have stated, in this case there was a large measure of consistency between the basic facts as asserted by the personal assistant and the plaintiff's account of what happened on 10th July, 1997. There was a conflict as to the demeanour of the plaintiff towards the personal assistant. The essential question is whether, given the refusal of the personal assistant to submit to being questioned at a disciplinary hearing by or on behalf of the plaintiff, the plaintiff was likely to be exposed to the risk of an unfair hearing or an unfair result. Because of the nature of the conflict in their respective accounts of what transpired between them on 10th July, 1997, which related primarily to the delivery and tone of the exchanges rather than their content, I consider that Mr. Brennan was entitled to proceed on the basis that to do so was not likely to imperil a fair hearing or a fair result, particularly, when the point was not pursued by or on behalf of the plaintiff. Moreover, taking account of the nature of the complaint of the personal assistant and the respective positions of the personal assistant and the plaintiff within the defendant's organisation, in my view, Mr. Brennan was entitled to consider the likelihood of a detrimental effect on her by being confronted by the plaintiff or by someone on his behalf. On the evidence I am satisfied that he was entitled to conclude that such an outcome was likely.

42. Despite the lapse of time, the Court had the benefit of hearing all of the parties involved in the disciplinary hearing: Mr. Brennan and Mr. Colin Watt, the defendant's personnel advisor for Ireland, on the defendant's side; and the plaintiff and Mr. Gallagher, on the plaintiff's side. In addition, a considerable body of contemporaneous documentation generated by the defendant, which had been discovered, was canvassed in the cross-examination of the defendant's witnesses. The plaintiff contended that the documentation revealed that Mr. Brennan had pre-judged the issue and had formed certain conclusions as to the plaintiff's likely conduct on 10th July, 1997. It is true that Mr. Brennan came to the disciplinary hearing with the belief, based on the incidents dating from December, 1996, and February, 1997, that the plaintiff had the capacity to behave in an aggressive manner towards a co-employee. Indeed, Mr. Brennan laid that belief out clearly when he was setting out his understanding of the issues and the evidence at the commencement of the disciplinary hearing and the plaintiff and his representative had the opportunity of addressing the introduction of that material.

43. The type of disciplinary process which was being implemented by the defendant in relation to the complaint made by the personal assistant against the plaintiff, which involved the investigation of the complaint followed by the conduct of a disciplinary hearing by the plaintiff's line manager with a view to establishing whether his conduct warranted the imposition of a disciplinary sanction and, if so, which sanction, does not lend itself to the application of the principles of natural justice in the manner in which they would be applied if the plaintiff had been entitled to a hearing by an impartial tribunal, which was not the case. As was pointed out at first instance in *Mooney v. An Post* [1994] E.L.R. 103 by Keane J., what he described (at p. 116) as the "two great central principles of natural justice" – *audi alterem partem and nemo iudex in causa sua* – cannot be applied in a uniform fashion to every set of facts. As Keane J. pointed out by way of example, the *nemo iudex* requirement cannot be literally applied in this type of situation because, if it were, an employer could never dismiss an employee, since he would always be an interested party in the decision. On the appeal in *Mooney*, Barrington J. pointed out (at p. 298) that, likewise, it is difficult to apply the principle of *audi alterem partem* to a contract of employment, because that principle implies the existence of an independent judge who listens first to one side and then to the other side.

44. On the specific arguments advanced by the plaintiff in this case, in my view, the plaintiff has not established that he was not afforded fair procedures by reason of the fact that there was no opportunity for him or his representative to question the personal assistant. The factual dispute which the investigation identified, in my view, did not indicate that it was necessary in the interest of fairness to afford such opportunity. It would undoubtedly have been preferable if Mr. Brennan had confined his assessment to the evidence which had been elicited in the investigation and, as regards the matters extraneous to the complaint at issue, as Mr. Gallagher put it, had "left them outside the door when conducting the hearing". Having said that, as counsel for the defendant submitted, it could not be suggested that the extraneous matters were determinative. In any event, insofar as Mr. Brennan was influenced by them, he had fairly disclosed this in advance to the plaintiff and his representative.

45. Taking an overview of the matter, I do not think that the process involved in the Disciplinary Procedure was unfair, nor was it implemented in an unfair manner. It follows that the decision of Mr. Caulfield on the plaintiff's appeal was not perverse or wrong.

46. In my view, it was not inappropriate for Mr. Brennan to suggest that counselling would assist the plaintiff in his relationships with people. Given that the plaintiff was continuing in the employment of the defendant in a management position, Mr. Brennan, as his manager, was entitled to make recommendations which he considered would improve the interaction between the plaintiff and his colleagues and subordinates. Furthermore, in my view, it was open to Mr. Caulfield to comment, as he did, on the plaintiff's demeanour at the appeal hearing and, on the basis of what he observed, to suggest that the plaintiff would benefit from counselling.

47. Viewing the process as a whole, while not perfect, in my view it was not conducted in breach of the plaintiff's rights.

The Transfer.
48. It was made clear on behalf of the plaintiff that he was not asserting that there exists a general right on the part of an employee to seek damages against his employer in circumstances where the employer transfers the employee within the organisation or business against the employee's wishes. In other words, as I understand it, the plaintiff accepted that in the ordinary course of events the plaintiff would have had no cause of action if he was transferred from one district to another by the defendant in the course of the implementation of a restructuring of the defendant's business. The plaintiff's argument was that what happened in February, 1998, was out of the ordinary because, as he perceived it, it was linked to and was a consequence of the disciplinary process which followed the personal assistant's complaint. His claim that there was a breach of his implied contractual rights was founded on that link and was posited on two propositions which are inextricably intertwined. The first proposition was that the transfer constituted an additional sanction or penalty arising from the disciplinary process. The basis on which it was contended that the transfer was tantamount to an additional sanction was that the plaintiff's earnings potential was likely to be adversely affected by being transferred. The second proposition was that the sanction was imposed unlawfully and in breach of the plaintiff's right to fair procedures, in that it was alleged that it was a penalty which had been imposed surreptitiously and without having been threatened and without the plaintiff having been given an opportunity to be heard in relation to it.

49. Dealing with the first proposition, I am of the view that it is impossible to conclude on the evidence that, by being assigned to the Dublin West district in implementation of the restructuring plan, the plaintiff was likely to be, or was in fact, penalised financially or in any manner. As his remuneration during the remainder of his employment with the defendant was maintained at the same level as had applied when he ceased to be District Sales Manager for Dublin South West, the plaintiff was constrained to argue that, had he remained as Manager of the Dublin South West district, he would have had the potentiality to earn and would, in fact, have earned more than he actually did after he was transferred. However, on the evidence I can find no basis for concluding that the plaintiff was likely to be, and was in fact, deprived of the opportunity to earn higher remuneration by not being allocated to the new Dublin South West district.

50. It is true that over the last two tax years during which he was in the position of District Sales Manager of Dublin South West, that is to say, from 6th April, 1996 to 5th April, 1998, the plaintiff's gross income had increased considerably – by an average of twenty four per cent per annum. During that period the plaintiff was "caretaking" jointly with a colleague the management of the Dun Laoghaire district. The Court has been invited to conclude that the contribution of the Dun Laoghaire district was not significant, although there was no accountancy evidence to support such conclusion. More significantly, no evidence was led from which one could conclude what the potentiality of the new restructured Dublin South West district was to yield remuneration in the form of sales commission for its District Sales Manager, or what the remuneration of the District Sales Manager actually was, in the six years ensuing the restructuring.

51. While, as I have found, the demands of the personal assistant to be reinstated as personal assistant in the Dublin South West district and her threat of legal proceedings did influence the decision to assign the plaintiff to the Dublin West district, I am satisfied that it was only one of a number of factors, which I have already outlined, which had a bearing on the decision. It is difficult to assess the relative significance of the various factors. Even if the threat of litigation by the personal assistant was a significant factor, having regard to the evidence, that would not justify the conclusion that, as a matter of fact, the assignment of the plaintiff to the Dublin West district was a penalty or an additional sanction, as the plaintiff perceived it to be, because it is impossible to conclude that the decision was likely to, or did in fact, result in a financial detriment to the plaintiff.

52. Moreover, I am satisfied on the evidence that the decision to assign the plaintiff to the Dublin West district on the restructuring was not motivated by any desire or intention on the part of the defendant to penalise the plaintiff. The provision made to protect the plaintiff's income and the other supports put in place, which were outlined in Mr. Caulfield's letter of 18th March, 1998, support that conclusion.

53. Turning to the second proposition, the nub of the plaintiff's submission, as I understand it, was that, as there was no threat to transfer the plaintiff out of the Dublin South West district in the course of the disciplinary process, which concluded in November 1997, and as the plaintiff had not been heard in relation to a proposed transfer, it was not open to the defendant thereafter to transfer the plaintiff. That submission, of course, assumes that the transfer was tantamount to an additional sanction or penalty, which I have held was not the case. Apart from that, when the decision to transfer the plaintiff was made subsequently to November 1997, his internal staff representative, Mr. Michael Murphy, made representation to Mr. Brennan on his behalf. Later, accompanied by Mr. Murphy, the plaintiff had the meeting with Mr. Caulfield on 16th March, 1998. That meeting was followed by Mr. Caulfield's letter of 18th March, 1998, in which all of the issues were comprehensively dealt with and in which the plaintiff was guaranteed income protection and other supports.

54. It is difficult to see what more the defendant could have done in the complex evolving situation to which the implementation of the restructuring gave rise. Having regard to all of the circumstances, I am not satisfied that the plaintiff has established that the transfer was in breach of his implied contractual right to fair procedures.

55. Apart from that, there is no evidential basis on which the loss and damage which the plaintiff alleges flowed from the transfer are

quantifiable. Joseph Byrne, actuary, testified as to the "potential" loss of gross earnings over the following six years during which the plaintiff remained in the employment of the defendant after his transfer to the Dublin West district on the assumption that, had he not been transferred, his gross income would have increased by twenty four per cent per annum. He also gave computations on the purely hypothetical basis that the increase would have been in the range of fifteen per cent per annum, ten per cent per annum or five per cent per annum. As I have already indicated, there is no evidential basis to support any increase in the plaintiff's remuneration had he been allocated to the new Dublin South West district; that was left entirely in the realms of speculation. It follows that there is no evidence to support a claim based on a diminished redundancy package or loss of pension rights.

Personal Injuries Claim

56. The circumstances in which an employer will be liable for the adverse consequences of work related stress suffered by an employee have been succinctly summarised by Clarke J. in *Maher v. Jabil Global Services Limited* [2005] 16 E.L.R. 233 (at p. 246), in which he identified the starting point for any consideration of liability in such a case as the following questions, all of which must be answered in the affirmative to give rise to liability:-

> "(a) has the plaintiff suffered an injury to his or her health as opposed to what might be described as ordinary occupational stress;
>
> (b) if so is that injury attributable to the workplace; and
>
> (c) if so was the harm suffered to the particular employee concerned reasonably foreseeable in all the circumstances."

57. In this case, even if I was satisfied that the evidence establishes that the plaintiff suffered an injury to his health which was caused by his treatment by the defendant in the workplace so that the first two questions should be answered in the affirmative, and I am not, the third question must undoubtedly be answered in the negative. The harm which the plaintiff alleges he suffered, even if it constituted an injury in the sense of a recognised psychological injury, was not reasonably foreseeable. While it is reasonable to assume that being subjected to a disciplinary process in the workplace and being transferred to a different position in the workplace against one's will are events which are accompanied by a certain degree of stress, they are events which are encountered in the normal course of the management of a business or organisation. In the absence of any reason for a contrary conclusion, an employer is entitled to assume that an employee is able to withstand such stress. On the basis of the evidence in this case, the management of the defendant did not know, and there was no reason why the management personnel ought to have known, that the plaintiff was vulnerable or likely to succumb to psychiatric or psychological injury because of the implementation of the disciplinary process in 1997 or his transfer in 1998. Indeed, the plaintiff deliberately, if understandably, concealed from the defendant that he was suffering from, and being treated for, stress.

58. Accordingly, the plaintiff's claim for damages for personal injuries must fail.

Order

59. There will be an order dismissing the plaintiff's claim.