THE HIGH COURT

[2021] IEHC 477

[2021 No. 3515 P.]

BETWEEN

RORY MASON

PLAINTIFF

AND

ILTB LIMITED T/A GILLEN MARKETS AND DERMOT BROWNE

DEFENDANTS

JUDGMENT of Ms. Justice Butler delivered on the 8th day of July, 2021

Introduction

1. This is the plaintiff's application for interlocutory injunctions to restrain his employer, the first defendant (also "the employer" or "the company"), from taking steps directed towards the termination of the plaintiff's employment. The second defendant is a director of the first defendant, chairman of its board and the person who has been most closely connected with the events giving rise to these proceedings. There is considerable dispute between the parties as regards what has occurred to date both as a matter of fact and as to its legal significance. A range of reliefs are sought by the plaintiff, much of it referable to particular steps already taken by the defendants which the plaintiff alleges to have been unlawful and which it is alleged taint the process which the defendants now wish to pursue.

2. The defendants oppose the application, arguing that an employer must be entitled to conduct an investigation to examine serious concerns which it may have regarding the conduct of an employee and that the plaintiff cannot realistically object to what is currently proposed, namely an independent investigation by an experienced barrister specialising in employment law/industrial relations.

3. Thus, the court is caught Janus-like between two parties, one of whom contends the court should look only at the legality of what has already occurred and should disregard proposals by the other side which might be construed as an attempt to cure defects in the process to date and the other of whom contends that what has occurred to date is largely irrelevant and the court should make its decision whether the justice of the situation requires interlocutory relief to be granted solely by reference to what is now proposed by it. In order to identify the legal issues arising and the legal standards by reference to which they should be determined, it is necessary to look in more detail at the factual background to the dispute and the relationship between the parties.

Factual Background

4. The plaintiff has been employed as the managing director and company secretary of the first defendant since January, 2016, having previously worked in a range of roles in the financial services sector principally in wealth management. The plaintiff's academic background and his experience are entirely focused on this area of the financial services sector. The plaintiff's contract of employment, dated December, 2015, contains a grievance and disciplinary procedure at clause 12. In particular, 12.3 provides:-

"Where there is an allegation of misconduct, or the Company perceives that there has been misconduct on your part, the company will investigate the matter with a view to determining whether the disciplinary policy will be invoked. The Company may suspend you, on full pay, for the purposes of conducting a proper investigation. Suspension is not a sanction and should not be perceived as such. It is, rather, a holding measure to protect the integrity of the investigation process."

5. In addition to being employed as managing director, the plaintiff is also a director of the defendant company. This arises because on entering into his new employment, the plaintiff purchased a 15% shareholding in the first defendant and all shareholders with a shareholding of greater than 10% are entitled to nominate a director. This shareholding was not simply an indent of the plaintiff's employment. He paid some €235,000 to purchase it in the name of a nominee company, Rorel Ltd, and, consequently, it represents a significant investment by him in the first defendant. The plaintiff states that he accepted the position of managing director at a salary less than that which he would normally have expected because it was envisaged that his principal reward would lie in the value of his shareholding which would deliver substantial value to him if he were successful as managing director.

6. A shareholders' agreement was entered into between the parties on 19th December, 2017. That agreement made provision for circumstances in which the plaintiff might cease to be employed by the first defendant. The agreement defines a "*bad leaver*" as an employee who ceases to be employed by the company "*for any other reason than as a good leaver*". "Good leaver" is defined as someone who leaves with the consent of the company or due to death, disability/ill health or redundancy or in cases of dismissal other than dismissal for reasons relating to fraud or gross misconduct, where the dismissal is subsequently held by a court or tribunal to be unfair within the meaning of the Unfair Dismissals Acts. The significance of these definitions is to be found in clause 9.4 dealing with the transfer of shares by key employees. Effectively, if the plaintiff ceases to be an employee of the first defendant, then Rorel Ltd must offer its shares for sale to such persons as directed by the board. However, under clause 10 the sale price for the shares will vary depending on whether the plaintiff is classified as a good leaver or as a bad leaver. Needless to say, the basis for the valuation of shares if the plaintiff is classified as a bad leaver is significantly less advantageous to him than if he is a good leaver. Thus, if dismissed by the company, the plaintiff loses not only his employment, but also a significant proportion of the investment he has made in the first defendant or in the anticipated increase in the value of that investment.

7. The first defendant is a private company and a regulated entity under the Central Bank Act, 2010. It is involved in the provision of wealth management and investment advisory services to its clients as well as operating a subscription-based investment newsletter service. It was founded in 2005 by Mr. Rory Gillen, the majority shareholder, who was joined by Mr. Brian Delaney, also a shareholder. Both Mr. Gillen and Mr. Delaney are directors. The second defendant, Mr. Dermot Browne, who the plaintiff describes as a close friend of Mr. Gillen, joined the company as a director and chairman of the board in

the Summer of 2020. He is not a shareholder. The plaintiff makes certain allegations about the interpersonal relations between members of the board describing those relations as "*dysfunctional*". Mr. Browne, who has sworn the replying affidavits on behalf of the defendants, disputes this. Whilst accepting that there were disagreements between board members from time to time, he characterises the relationships, and particularly that between the plaintiff and Mr. Gillen, as being professional.

8. The plaintiff's perception that relations between members of the board were not good is relevant to the circumstances of his employment immediately before the events which give rise to these proceedings. The plaintiff perceives there to have been a difference in focus between Mr. Gillen and Mr. Delaney on the one hand, both of whose experience and skillset lies in stockbroking and himself on the other with a background in wealth management and investment advice. He feels that as stockbroking is more focused on individual performance, he has not been given sufficient credit for the performance of the team which he has built for the purposes of providing wealth management services. The plaintiff is of the view that his management of the first defendant's business has been very successful and cites figures in this regard to show how the business has grown during his tenure. Despite this, the plaintiff alleges that in the months preceding April, 2021, his employment was already under threat as Mr. Gillen and the second defendant wished to remove him as managing director.

9. Mr. Browne disputes this but gives an account of discussions he had with the plaintiff as a result of which it was proposed that the plaintiff would move to the role of chief operations officer and a new person would be employed as chief executive officer. It is not entirely clear what difference there would be between the role of chief executive officer and that of managing director, the position currently occupied by the plaintiff. Mr. Browne asserts that this was because the plaintiff would not accept the business development aspect of the CEO role. The plaintiff claims that the growth plans prepared by Mr. Gillen and Mr. Browne included unachievable targets thereby setting him up to fail. The key discussion between Mr. Bowne and the plaintiff on this topic took place by telephone on 12th March, 2021. Mr. Browne informed the plaintiff that the directors (presumably meaning himself, Mr. Gillen and Mr. Delaney) "*felt that he was not the right persons to lead the business going forward*". Mr. Browne describes himself as having been "*instructed*" by the first defendant to have this discussion but does not indicate how or by whom that instruction was given to him. There is no evidence to suggest a decision was taken by the board of directors (of which the plaintiff was a member) as regards the plaintiff not being the right person to lead the company and clearly it was not a decision taken by the plaintiff as managing director. The court can only assume that the instruction given to Mr. Browne represents either the agreed position of the other directors excluding the plaintiff or simply the views of Mr Gillen. Indeed, the plaintiff describes Mr. Browne as saying that the "*shareholder majority*" wanted to appoint a new managing director. As a result of ongoing exchanges both before and after the key discussion on 12th March, 2021, the plaintiff instructed a solicitor who commenced correspondence with the first defendant on his behalf on 1st April, 2021.

10. Contemporaneous with these events, the plaintiff claims that the shareholder majority proposed to dilute the plaintiff's shareholding in the defendant company without his consent. The proposal was to issue new shares which would total 10% of the company and to allocate these to nominated staff. The issuing of new shares would necessarily reduce the plaintiff's shareholding as a proportion of the overall shares in the company. The only member of staff to be excluded from the proposed scheme was the plaintiff, as managing director. The plaintiff perceived this as a proposal to build staff loyalty whilst deliberately reducing his shareholding. As of the date of the hearing, this proposal had not been the subject of a board resolution. Nonetheless, it seems that Mr. Gillen had informed some staff members who, naturally enough, were delighted at the prospect of receiving an allocation of shares. The plaintiff felt this put him into an invidious position and that it would generate ill feeling from other members of staff if the scheme did not proceed because of his objections.

11. Whilst findings cannot be made in an interlocutory application on the disputed account of events given by either side, I think it can safely be said that, by April, 2021, there was a degree of disagreement between the members of the board as regards the future direction of the company and, more specifically, the role the plaintiff was to play in the company's future. It is, perhaps, unsurprising that Mr. Browne describes the plaintiff as "*quite agitated*" as a result of the discussions on 12th March, 2021.

Events between 23rd and 28th April

12. The parties disagree both as to what occurred during this period and, even more pertinently, as regards the legal significance of the events. There is some measure of agreement as to the basic chronology and there is also documentary evidence, relied on in particular by the plaintiff as supporting his account of events. Again, it is not for the court to resolve the areas of dispute on this interlocutory application. However, the factual background is relevant to the question of whether the plaintiff has made out a sufficient case to warrant the grant of an interlocutory injunction and, more generally, feeds into the balance of justice analysis which the court must conduct if the plaintiff has met this initial threshold.

13. It is agreed that a meeting took place between the plaintiff and the second defendant on Friday, 23rd April, 2021 at the second defendant's request. The plaintiff understood this meeting was to discuss material prepared for a scheduled board meeting due to take place on 28th April which he had emailed to the second defendant the previous evening. A meeting of this kind between the managing director of a company and the chairman of its board of directors in advance of a board meeting would be entirely routine. The second defendant does not suggest that the plaintiff had any notice that this would not be the purpose of the meeting.

14. The second defendant had a concern arising from the circulated documents which showed payment of a €14,000 bonus to the plaintiff as part of an overall package of bonuses for staff worth €82,000. The plaintiff's position is that this payment was agreed by the board at a meeting of the 14th December, 2020 and approved by the second defendant. He states that, although he had not drawn down the bonus payment at the time, he

proceeded to organise payment of what he understood to be an agreed bonus payment in March, 2021. The plaintiff alleges that there was no discussion with the second defendant in respect of the payment, rather the second defendant immediately accused him of fraud and theft, demanded a letter of resignation and repayment of the €14,000 and indicated that the alleged criminal act should be notified to the Central Bank and the Gardaí. The second defendant also intimated that the plaintiff's shareholding might be adversely affected as he would be a "*bad leaver*". The plaintiff claims that in a state of shock, he gave the second defendant his key fob and credit card in response to a demand but refused to provide a letter of resignation. The plaintiff claims that the second defendant purported to summarily dismiss him during this meeting.

15. The second defendant's account of the same meeting is broadly similar but different in key respects. He describes a discussion between himself and the plaintiff as regards the bonus payment and the documents prepared for the meeting in which the payment is shown as having been made. He regards it as significant that the paperwork for this payment was put through the payroll system on the day after the discussion between himself and the plaintiff at which he had indicated that the majority shareholder did not feel the plaintiff was the right person to lead the business going forward. The second defendant is adamant that it was never agreed by the board that the plaintiff would be paid a bonus and that the payment was never approved by him. On the contrary, the board was of the view that no bonus should be paid to any director. The second defendant agrees that he stated the matter would have to be reported to the Central Bank and the Gardaí and that there might be implications for the plaintiff's shareholding as a bad leaver. He also agrees that he told the plaintiff "*that I wanted his letter of resignation*" but maintains that it was the plaintiff who suggested he would repay the bonus. He states, neutrally, that the plaintiff handed him his access fob and company credit card before leaving the office. Crucially, the second defendant maintains that, despite asking for the plaintiff's resignation and advising the plaintiff that he should resign, he did not fire the plaintiff during this meeting. He states the plaintiff did not refuse to provide a letter of resignation; rather he indicated that he was going to take advice. Subsequent to the meeting, the second defendant attempted to make contact with the plaintiff in order to remove his access to the defendants' computer system.

16. At the hearing of this application, there was disagreement between the parties as to whether the email and other exchanges on the issue of bonus payments to staff in December, 2020 and early 2021 concerned the plaintiff's dissatisfaction with the amount of the bonus payment he was due to receive or the fact that he was not getting a bonus at all. The plaintiff, who denies all allegations of fraud and theft, maintains that he would not have included details of this payment on documents circulated to all board members unless he genuinely believed that the payment had been approved. The defendants allege that the amount paid by the plaintiff to himself is actually greater than €14,000 as it included an additional 10% pension contribution.

17. On leaving the meeting, the plaintiff sought advice from his solicitor and, at 5:25pm on the same day, a solicitor's letter was sent by email to the second defendant as chairman

of the first defendant. That letter clearly stated that the second defendant's actions at the meeting *"amount to a purported summary dismissal of our client which our client does not accept".* The allegations of theft and fraud were denied and the solicitor suggested that the company's actions "*when viewed against our recent correspondence, is readily visible for what it is".* The letter stated that the company should not exacerbate the damage to the plaintiff by publishing the false allegations or the purported summary dismissal to any third party. Finally, the letter advised of an intention to apply to the High Court "*at the very earliest opportunity to seek orders protecting our client's interests*".

18. That letter was replied to by the defendants' solicitor on 26th April, 2021, being the following Monday. The plaintiff regards it as significant that the defendants' solicitor's letter does not dispute the purported summary dismissal of the plaintiff by the second defendant. Instead, it sets out an account of the meeting of the 23rd April, focusing on the underlying bonus payment issue. It then proceeds as follows:-

> *"Your client is fully aware that the payment of €14,000 made to himself in March 2021 was improper, irregular, unauthorised and unlawful. However, based on the contents of your letter, your client is in utter denial and the matter must now therefore proceed to be dealt with in a formal manner.*
>
> *To this extent and to ensure that your client can have no cause of complaint, the matter will be dealt with at the board meeting on Wednesday next by way of a resolution to have the circumstances of the said conduct of your client investigated. The appointment of an external independent investigator by the company will be proposed. Your client will be expected to fully cooperate in such investigation if approved by the board.*
>
> *In relation to the threats made in your letter regarding potential defamation, these are rejected. Our client is lawfully entitled to notify the relevant authorities of any such concerns they have about your client. This may include notification to the Central Bank Authorities, in accordance with best practice, that there is an investigation ongoing should the board resolve to proceed on Wednesday. Any such notification to the authorities will have to be done within a reasonable period after the commencement of the investigation. Our client will give your client 24 hours' advance noticed of such notification.*
>
> *In relation to your client's attendance at the board meeting on Wednesday as a director of the company, your client will be recused from any discussions or considerations dealing with this issue. The same applies to Mr. Browne given the dispute as to the facts."*

19. The plaintiff contends that it is clear from this letter that as of 26th April, the company had already decided that the bonus payment was "*improper, irregular, unauthorised and unlawful".* Consequently, the proposed investigation was not for the purposes of ascertaining what had occurred but rather for the company to be seen to be affording the plaintiff fair procedures notwithstanding that conclusions adverse to him had already been

reached and on which the company had already provided instructions to its solicitor. Further, the plaintiff contends that as he was to be excluded from the portion of the board meeting at which the proposal was to be discussed, he was to be denied natural justice as regards the question of whether there should be an investigation. Finally, the plaintiff contends that the notification to the Central Bank of an ongoing investigation would be extremely damaging to him and his prospects of future employment in the financial sector, regardless of the outcome of any investigation.

20. On 27th April, the second defendant as chairperson circulated the papers prepared by the plaintiff to all members of the board (including the plaintiff) in respect of the meeting scheduled for the following day. He proposed an agenda for the meeting of which item 2 read as follows:-

> *"2. Consideration of the need for an investigation into/actions in relation to*
>
> - *the payment of a bonus to Rory M in March 2021*
>
> - *a review of all payments made from 1 April 2019 up to today"*

The evidence before the court does not indicate what concern, if any, relates to payments between 1st April 2019 and the date of the board meeting and Mr. Browne in his affidavits did not elaborate on why he included this in the agenda for the proposed meeting.

21. The plaintiff did not attend the board meeting scheduled for 12:00pm on Wednesday, 28th April. Instead, his lawyers made an *ex parte* application to the High Court for interim relief. At 10:07am on the morning of 28th April, his solicitor sent a letter to the defendants' solicitors advising that the plaintiff "*had no option but to commence urgently High Court proceedings*" and asked the solicitors to confirm their authority to accept service on behalf of the defendants. That letter did not expressly advise the defendants' solicitors that an application to the High Court was being made that morning nor did it request that the scheduled board meeting be deferred. In those circumstances, unsurprisingly, the board meeting went ahead, albeit after a short delay to allow the plaintiff, who had not indicated that he would not attend, time to arrive. The draft minutes of that meeting which took place at 12:10pm record as follows:-

> *As agenda item 2 involved a matter where Dermot Browne had a potential conflict of interest he proposed that he recuse himself from the meeting and the other directors present agreed.*
>
> *Dermot Browne left the meeting at 12:12pm.*
>
> *Dermot Browne re-joined the meeting at 12:16pm and was advised by Rory Gillen on his return that "it has been decided that the matter concerning the payment of an amount of €14,000 to Rory Mason be investigated, that a person independent of the Board and Company be appointed to conduct the investigation and advise the Board on what action, if any, should be taken as a result of any findings made,*

such investigation to conducted as quickly as possible, preferably within fifteen working days, and that Rory Mason be suspended with pay while such investigation is ongoing."

As the plaintiff did not attend and the second defendant recused himself, the directors present at the meeting which made this decision were Mr. Gillen and Mr. Delaney. The draft minutes then record that the meeting concluded at 12:18pm. At that very moment, a text message was sent by the plaintiff's solicitor to the defendants' solicitor advising that an interim order had been made by Allen J. "*restraining your clients from passing any resolutions about Mr. Mason*". The text advised that the plaintiff's solicitor would call the defendants' solicitor immediately and asked that the defendant be notified urgently. This was followed up by a phone call and a formal letter from the plaintiff's solicitors' office emailed directly to the directors of the first defendant (excluding the plaintiff) and their solicitor at 12:33pm. That communication was made on the direction of the High Court to notify the defendants of the making of orders restraining them from passing any resolutions concerning the plaintiff. It would seem from the exhibited material that the plaintiff's application to court occurred simultaneously with the director's meeting proceeding. As the defendants were not on notice of the fact that the plaintiff was making an application to court on the morning of the 28th April; had not been requested to defer the board meeting to allow such application be made and were not on notice of the making of the orders until after the meeting had concluded, the defendants cannot be criticised for proceeding with the board meeting nor, for this reason, for having passed resolutions concerning the plaintiff. The defendants' solicitors subsequently confirmed in correspondence that in light of the court orders the defendants had not taken any steps arising from the resolution passed to appoint an external investigator or to suspend the plaintiff.

22. The interim order made by Allen J. restrained the defendants from giving effect to or implementing the purported dismissal of the plaintiff, from publishing or disseminating the allegations of misconduct and from passing any board resolutions concerning the plaintiff. As the making of the interlocutory application, the identity of the plaintiff and the nature of the allegations underlying the alleged purported dismissal were reported on widely in the national media, the benefit of restraining the defendants from publishing the allegations may be open to question.

23. Subsequent to the making of the interim order, the defendants' solicitor wrote to the plaintiff's solicitor on 4th May (the day before the scheduled interlocutory hearing) indicating that an application would be made to the court on the 5th May pursuant to the "*liberty to apply*" granted by Allen J. for the variation of the interim order to allow the appointment of an external investigator to proceed, to allow the suspension of the plaintiff to proceed, to allow the defendant to notify the Central Bank regarding the plaintiff and any investigation and to allow the defendants "*to provide a neutral narrative to any clients of the company in circumstances whereby they have entrusted the management of their personal funds [sic]".*

24. The plaintiff's solicitor responded and took the view that the matters identified as variations to an existing order were not in fact variations but rather substantive changes which would require to be sought by way of formal application grounded on affidavit and which the plaintiff would oppose. In the event no application was made on the 5th May and no formal application was brought by the defendants. Nonetheless, the general thrust of the request (that the first defendant be allowed appoint an independent investigator and the plaintiff be suspended pending investigation) were at the heart of the defendants' submissions on the plaintiff's application for an interlocutory injunction. In circumstances where no formal application has been made by the defendants for orders of this nature, I do not propose to consider whether the particular orders should be granted.

25. That said, it is not a matter for the court to micro-manage the conduct of a disciplinary process at either party's request. It is certainly undesirable that a court should be asked to do so at an interlocutory stage and in a manner which might be construed as confirming the legality of steps (e.g. the conduct of an investigation and the suspension of the plaintiff) which are very much in issue in the proceedings. Whilst the court has a jurisdiction to grant an injunction to restrain an employer from taking steps which would otherwise be *prima facie* open to it, any such order is made with a view to maintaining the balance of justice between the parties until a full trial can take place. It is materially different for an employer to seek the cover of a court order to take an action, the legality of which has been placed in issue in proceedings. It may seem semantic, but in my view, there is a significant legal difference between asking a court to lift a restriction which has been placed on an employer taking certain steps and asking a court to specifically authorise the taking of those steps. As the employer is entitled to take these steps unless restrained from doing so, the circumstances on which it will be appropriate to ask for a court order for permission to do something that is *prima facie* perfectly lawful must be limited. If an interim order restraining the employer is in place, then the appropriate course is for the employer to seek to have that order set aside either in whole or in part.

Interlocutory Application

26. The interlocutory application is made on foot of a motion issued by the plaintiff on 28th April and seeks ten specific orders, all bar one of which were actively pursued by the plaintiff at the hearing. Whilst there is some overlap as regards the relief sought, the essential thrust of the application is to restrain the defendant from proceeding to dismiss the plaintiff. The specific orders are directed as restraining the defendant from implementing the purported dismissal, from taking any steps to terminate the plaintiff's employment, proceeding with the proposed investigation, appointing anyone else to the plaintiff's position, restraining publication of the allegations and from passing any resolution regarding the plaintiff. Orders were sought facilitating the plaintiff's return to work and directing the first defendant to continue to pay the plaintiff's salary. The first defendant has indicated a willingness to continue payment of the plaintiff's salary but subject to the caveat that such payment will be pending the conclusion of an investigation to which the plaintiff objects.

27. The defendants' response to the application is threefold. Firstly, the defendants point to the extent to which the factual basis of the plaintiff's claim is disputed by them. This is certainly so and the court cannot determine these disputes on the basis of contested affidavit evidence on an interlocutory application.

28. Secondly, the defendants place heavy emphasis on the fact that, at this stage, the plaintiff has not been either dismissed or suspended and, consequently, contend that the intervention of the court in the disciplinary or investigative process is premature. However, there is a legal and factual dispute as to whether the actions of the second defendant at the meeting on the 23rd April amounted to a dismissal of the plaintiff. The plaintiff contends that demanding the return of his key fob and credit card and subsequently removing his access to the company's computer system are all indicative of dismissal. The second defendant contends that the plaintiff was simply asked for his resignation which he did not provide. Further, whilst it is legally correct to argue – as the defendants do - that repudiation of an employment contract is not effective unless that repudiation is accepted by the other party, if the non-accepting party is the employee then, although the contract of employment persists, the employee is undoubtedly in a vulnerable position vis-a-vis an employer who has sought to terminate the relationship.

29. Further, although the defendants' written submissions state that there has been no decision to suspend the plaintiff from his duties, in fact the defendant company took a decision to suspend the plaintiff at the board meeting of 28th April. That decision has not been implemented, no doubt because it was made simultaneously with the plaintiff obtaining an interim order from the High Court restraining the defendants from taking further action as regards his purported dismissal. The order of 28th April does not expressly mention suspension, most likely because the plaintiff had no notice that the defendant was proposing to suspend him. The order does restrain the defendant company from passing any resolution concerning the plaintiff and would, from that point forward, have precluded a resolution to suspend him. The existence of this order would almost certainly have prompted a response from the plaintiff had the defendants moved to implement the decision already taken to suspend him. Hence, the circumstances in which the plaintiff is currently neither dismissed nor suspended cannot be equated with those of the cases on which the defendants rely, most notably *Rowland v. An Post [2017] 1 IR 355* where the plaintiff moved to restrain an ongoing investigation in circumstances where he had not been suspended and where there was no suggestion that he had been dismissed, even on a constructive basis.

30. Thirdly and finally, the defendant argues that the circumstances which have led to this point are largely irrelevant when what is now proposed is a "*gold standard*" investigation (to use the defendants' description) to be carried out by an independent lawyer with employment law and industrial relations experience. The plaintiff points out that the investigation proposed by the defendants has taken a number of different iterations with some significant variations as to the extent of the decision-making power to be delegated to the proposed investigator. Whilst this may be so, the court accepts that subject to appropriate terms of reference being framed, an independent investigator would, in

principle, be capable of carrying out an investigation into the underlying dispute between the parties in a manner which meets the requirements of natural justice. Nonetheless, there remains a significant legal issue as to what, now, would be the legal basis for such an investigation and how the outcome of an investigation would interact with the instructions given by the defendant company to its solicitor and reflected it in the letter of 26th April, 2021 indicating that conclusions adverse to the plaintiff had already been reached by the defendant company on the matters to be the subject of the investigation.

Threshold for Interlocutory Injunction – "Strong Case"

31. The parties are agreed that because the plaintiff is seeking mandatory relief to enforce the contract of employment pending the determination of the proceedings, the threshold standard is not the ordinary interlocutory injunction standard of "*a fair question to be tried"* but, rather, the higher "*strong case*" standard. In an analogous employment context, Fennelly J. put it thus in *Maha Lingham v. HSE* [2006] 17 ELR 137:-

> *"…The implication of an application of the present sort is that in substance what the plaintiff/appellant is seeking is a mandatory interlocutory injunction and it is well established that the ordinary test of a fair question 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 a 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. So it is not sufficient for him simply to show a prima facie case, and in particular the courts have been slow to grant interlocutory injunctions to enforce a contract of employment."*

In *Earley v. HSE* [2015] IEHC 520, Kennedy J. accepted that the requirement of showing a strong case did not mean a plaintiff had to establish that he will necessarily secure a permanent injunction at trial. Rather, given that the remedy sought may vary between the interlocutory stage and the trial, what is required is that the plaintiff demonstrate that he is probably going to be successful at trial, not that he will probably obtain any particular relief.

32. The plaintiff points out that this higher standard does not apply to all aspects of his claim. In particular, the plaintiff contends he need only establish a fair question to be tried as regards his application for an injunction to restrain the holding of an investigation. I accept that this is correct. However, in purely practical terms, if elements of the plaintiff's case meet the higher threshold then it is unnecessary to decide whether those elements which do not do so nonetheless meet the lower threshold. The test applies to the plaintiff's case as a whole and not to every element of the plaintiff's case individually. Therefore, I will address the strong case test first and I will only consider whether there is a fair question to be tried if the strong case test is not met.

33. There are at least two aspects of the plaintiff's case which, in my view, amply meet the requirement to demonstrate a strong case in the sense of a case which would probably succeed at trial. It goes without saying that the court is not finding that these elements will necessarily succeed. For example, the evidence the plaintiff has adduced on affidavit

might not withstand cross-examination or the defendants may adduce evidence additional to that currently before the court which casts the plaintiff's evidence in a different light. Legal arguments which are dependant on facts which cannot be definitely established at an interlocutory stage may prove conclusive one way or the other once the relevant facts are clear. Therefore, the finding that a case is strong in the sense of being one which will probably succeed at trial does not carry with it an indication that the case actually will succeed at trial. Rather, on the basis of the evidence before the court at the interlocutory stage and allowing for the fact the disputed factual elements of the plaintiff's case may have to be taken at their height, it means that the plaintiff has exceeded by some margin the fair question to be tried threshold and has raised a case which is not only stateable but which has a real prospect of success.

34. Both aspects of the plaintiff's case which meet the test are connected to the overall complaint of a denial of fair procedures. The solicitor's letter of 26th April which was written on the company's instructions indicates that the defendant company had already reached a conclusion that the payment of the bonus to the plaintiff was "*improper, irregular, unauthorised and unlawful*". The investigation proposed in that letter was not being proposed by the company to ascertain the facts in order to make up its mind on a matter of concern to it. Rather, the investigation was proposed because the plaintiff refused to accept the defendants' view on the matter and so that the plaintiff "*can have no cause of complaint*". It is difficult to construe this letter other than as meaning the defendant company was proposing to go through the formality of an investigation in order to support a decision which it had already reached. Clearly this raises a substantial issue both as to the legality and the purpose of what is now proposed.

35. The second element of the plaintiff's case which satisfies the "*strong case*" test is the fact that the board of the defendant company took a decision to suspend the plaintiff at a meeting without any prior notice being given to the plaintiff either as the employee directly affected or as a director of the company that such a step was being considered. The fact that the decision was not implemented because of the contemporaneous granting of interim relief by the High Court does not alter the substance of the plaintiff's complaint. Both the "variations" proposed in the defendants' solicitor's letter of 4th May 2021 and subsequent correspondence indicating that the plaintiff would be required to take paid leave of absence pending the investigation are predicated on the company having already decided, without hearing the plaintiff, that he must *de facto* be suspended for an investigation to take place. The court has been referred by the plaintiff to a number of authorities (*O'Donoghue v. South Eastern Health Board* [2005] 4 IR 217; *Khan v. HSE* [2009] 20 ELR 178; *Bank of Ireland v. Reilly* [2015] IEHC 241) which emphasise the significant impact that a decision to suspend may have on an employee, not least in terms of reputational damage, and the consequent need for great care to be taken by an employer before taking any decision to suspend. The defendants do not take issue with the import of these authorities. Rather, the defendants' written submissions emphasise the fact that the plaintiff is not currently suspended, although those submissions also state, incorrectly, that no decision to suspend the plaintiff from his duties had been taken.

The defendants focus on the need for the defendant company to be able to conduct an independent investigation into the underlying dispute.

36. In circumstances where I am satisfied that central elements of the plaintiff's case meet the *Maha Lingham* test, I do not regard it as necessary to subject all elements of the case to the same level of scrutiny and, as regards any plea that might not meet that test, to decide if it nonetheless constitutes a fair question to be tried for the purposes of interlocutory relief restraining certain actions on the part of the defendants. This is because any plea that meets the strong case test must necessarily also meet the lower threshold. As long as the court is satisfied that some of the grounds advanced will probably succeed, the inclusion of additional grounds does not take away from that conclusion. As it happens, the two grounds analysed above are central to the plaintiff's claim of a breach of fair procedures in the manner in which the defendants have handled the issues arising in his employment. These grounds cannot be characterised as minor or peripheral to the main thrust of the claim. I also do not mean to suggest that other aspects of the plaintiff's claim would not meet the relevant thresholds, merely that at this level of analysis they are somewhat less clear cut.

Continuance of Investigation while Proceedings Pending

37. The argument made by the defendants suggests that a finding that the plaintiff has a strong case may not, in the particular circumstances, be sufficient to justify the court in treating the plaintiff as having passed the initial threshold. Because the first defendant has a real and serious concern as to the legitimacy of the bonus payment, as the plaintiff's employer, it must be allowed to investigate that concern and, depending on the outcome of the investigation, to take appropriate action. The plaintiff's contract of employment does not require the decisions regarding his employment be taken at board level and provision is expressly made for investigation of alleged misconduct and for a "*holding*" suspension in the event of an investigation. Consequently, the defendants contend that in order for the plaintiff's case to be regarded as sufficiently strong to warrant restraining his employer from taking any investigative or disciplinary action, he must show that the defendants' concerns in respect of the €14,000 payment in dispute between the parties are not *bona fide*. Significant emphasis is also placed on the level of fair procedures that can be guaranteed going forward by the defendants placing the investigation in the hands of an independent expert.

38. The main authority relied on by the defendants in this regard is the decision of the Supreme Court (Clarke J.) in *Rowland v. An Post* [2017] 1 IR 355. Although not strictly speaking an employment case, it concerned the holding of a disciplinary investigation in analogous circumstances where the plaintiff was a sub-postmaster providing services under contract to the defendant. The defendant had become concerned about certain matters and commenced a process whereby the plaintiff was asked to respond in writing to certain queries. As the defendant was not satisfied with the level of information provided by the plaintiff, it proposed to hold an oral hearing into the matters. Shortly prior to the date of the scheduled hearing, the plaintiff issued proceedings and sought injunctive relief on the grounds that the procedures being followed were unfair and in

breach of the terms of his contract, which was undoubtedly vague as to the detail of the process to be followed in any such investigation. Injunctive relief was refused, primarily on the basis that the investigative process was at an early stage, that the decision-maker had a significant margin of appreciation as to how the process should be conducted and the court should not interfere unless it was clear that the process had gone "*irremediably wrong*" so that any conclusion reached adverse to the plaintiff could not be sustained. Clarke J. reasoned as follows at paras. 11 and 12 of his judgment:-

> *"In many cases the proper approach of a court when called on to consider the validity of a disciplinary-like process is to look at the entirety of the procedure and determine whether, taken as a whole, the ultimate conclusion can be sustained having regard to the principles of constitutional justice. Many errors of procedure can be corrected by appropriate measures being taken before the process comes to an end. Decision makers in such a process have a significant margin of appreciation as to how the process is to be conducted (subject to any specific rules applying by reason of the contractual or legal terms governing the process concerned). Thus the exact point at which parties may become entitled to exercise rights such as the entitlement to know in sufficient detail the case against them, the entitlement in appropriate cases to challenge the credibility of evidence and the right to make submissions are, at least to a material extent, matters of detail to be decided by the decision maker in question provided that the procedures adopted do not, to an impermissible extent, impair the effectiveness of the exercise of the rights concerned.*
>
> *Precisely because procedural problems can be corrected and because there may well be a significant margin of appreciation as to the precise procedures to be followed it will, in a great many cases, be premature for a court to reach any conclusion on the process until it has concluded."*

39. I do not doubt the correctness of these principles which have been followed and applied in a number of cases cited to the court by the defendants (see Barr J. in *O'Sullivan v. HSE* [2021] IEHC 282 and *McKelvey v. Iarnróid Éireann* (Supreme Court, 11th November, 2019)). There are, however, some significant differences between this case and Rowland which have not really been fully engaged with by the defendants. In *Rowland*, the defendant had identified issues of concern on which it sought information, at times quite robustly, before deciding to hold an oral hearing, having taken the view that sufficient information had not been forthcoming from the plaintiff. Although the correspondence flagged the fact that "*the concerns raised call into question whether [the defendant] could continue to have confidence in* [the plaintiff]", no conclusions had been reached by the defendant on those concerns. Consequently, the oral hearing was part of an investigative process taking place prior to any conclusions being reached on the subject matter of the investigation.

40. The facts of *O'Sullivan* are different again. The case concerned a challenge to the recommendation of the CEO of the respondent that a hospital consultant be dismissed for

misconduct. Such a recommendation was a precondition to the establishment of a statutory committee which would conduct an inquiry into the matter and make a further recommendation as to the removal or non-removal of the officer concerned. Thus, in a formal two stage process, the recommendation of the CEO was merely the trigger for the statutory inquiry and was not in any way binding on the committee.

41. As I understand the plaintiff's case, what is in issue here is materially different. The case is not specifically that any of the persons nominated by the defendants by whom an investigation might be carried out would not afford the plaintiff adequate fair procedures. Rather, it is the fact that the defendant has already made up its mind and reached the conclusion that the bonus payment was "*improper, irregular, unauthorised and unlawful*". Thus, the proposed investigation, no matter how professionally it might be carried out, is merely window dressing. The plaintiff contends that the process has gone irremediably wrong. The proposed investigation is tainted by the fact that it was not established to ascertain the facts relating to the issue as a precursor to the making of a decision but because the plaintiff would not accept the conclusions already reached by the defendants as to those facts. Consequently, the plaintiff argues that the resolution establishing the investigation is fatally flawed. This is not a challenge to an ongoing process as in Rowland but to the very legality of the establishment of the process in the first place.

42. I do not accept the defendants' argument that the strength of the plaintiff's case at this interlocutory stage must be determined by reference to whether the underlying concerns of the defendant are held *bona fide*. The court cannot at this stage decide the merits of the underlying dispute on which extensive evidence has been led and robust arguments made by both sides. Whilst the existence of a *bona fide* concern is a necessary prerequisite for an employer to legitimately embark upon a disciplinary process, it does not follow that once a *bona fide* concern is shown to exist that the process must be allowed to continue unimpeded no matter what. It is, I think, legally possible both that the defendant have a *bona fide* concern regarding the plaintiff's employment and that the plaintiff have a strong case which will probably succeed at trial as to the manner in which the defendant has handled that concern.

43. I do not think that the circumstances of this case are governed by the *Rowland* line of authority. The dispute does not concern the procedures to be applied in the carrying out of an investigation or in a disciplinary process. Instead, what is at issue is whether the employer has already reached conclusions adverse to the plaintiff employee in advance of any investigation or disciplinary process taking place. As the process is predicated on a resolution adopted by the board of the defendant company on 28th April in circumstances where the defendants' solicitors' letter of 23rd April indicated that that resolution was being proposed because the plaintiff would not accept the defendants' conclusions as to the legality of the bonus payment, the plaintiff has a strong case that the process has gone "*irredeemably wrong*" within the meaning of the *Rowland* jurisprudence.

44. In deciding that the plaintiff has a strong case, both as to a breach of fair procedures and as to the process having gone irredeemably wrong, I am not of course making any definitive findings on these matters. I note that the plaintiff's case is broader than the issues which I have highlighted in the passages above and that there are other grounds upon which it is alleged the defendants have not complied with fair procedures. I accept also that the defendants have a *bona fide* concern in relation to the disputed payment and that, in principle, an employer must be allowed to investigate matters of concern relating to the conduct of its employees. However, I am not satisfied, just because an employer has an entitlement to investigate a matter of legitimate concern to it, that serious concerns about the legality of the steps taken by the employer can be disregarded by the court solely on the basis that a "*gold standard*" investigation will take place in the future. The case is not simply whether procedural irregularities can be cured downstream in the course of an extended process, but whether the steps taken at the very outset of the process in order to establish the investigation which the employer wishes to pursue, have irredeemably tainted that process.

45. A similar rationale applies to the question of whether the second defendant purported to dismiss the plaintiff at the meeting of 23rd April. There is a conflict of factual evidence as regard some aspects of what occurred at that meeting and a conflict as to the legal inferences to be drawn making it more difficult to conclude at an interlocutory hearing that the plaintiff has a strong case that will probably succeed at trial. Nonetheless, the plaintiff has certainly at least raised a fair question to be tried on this point. If the factual evidence were to establish that a purported dismissal had taken place, then there would be a strong case in the circumstances that such summary dismissal was unlawful. Further, if the plaintiff was dismissed by the second defendant at that meeting, then the procedural quality of any subsequent investigation would be legally irrelevant since the investigation would follow rather than precede the decision to dismiss. If the plaintiff were to succeed on this ground, then the process would have gone irredeemably wrong at the outset as a subsequent investigation could not retrospectively justify or provide the necessary procedural fairness for an unlawful summary dismissal which had already taken place. There is also a material difference between the position of an employee who has already been dismissed in the context of such an investigation and an employee against whom allegations have been made but whose employer accepts that the relevant facts must be inquired into before any final conclusions can be drawn.

46. It should be noted that I accept the defendants' argument that an employer must be able to inquire into matters of concern to it as regards an employee's conduct. Therefore, I accept that a court should be reluctant to intervene in any investigative or disciplinary process taking place in an employment context. Certainly, there are many circumstances in which a process can and should be allowed to continue notwithstanding a challenge brought to the manner in which it is being conducted. However, this is a case in which there are strong grounds for contending that the process has gone irredeemably wrong from the outset such that any conclusion which might ultimately be reached adverse to the plaintiff would be unsustainable. Even though an independent expert would most likely conduct an exemplary investigation, there are significant issues as to the legality of

the anterior actions on which the proposed investigation would be based. There are also significant issues as to whether the employer has already reached definitive conclusions and taken definitive decisions on the matters which it now proposes should be the subject of an investigation.

Balance of Justice

47. The parties agree that subject to the application of the *Maha Lingham* test as a threshold requirement, the principles governing the grant of interlocutory injunctions and, in particular, the assessment of the balance of justice as recently discussed by the Supreme Court in *Merck*, *Sharp and Dohme v. Clonmel Healthcare Ltd* [2019] IESC 65are relevant to this case. The principal focus of the court is to consider how best matters should be arranged as between the parties pending the trial. The adequacy of damages for either party in the event that an injunction is granted, or refused, contrary to their interests and they subsequently prevail at trial, is a significant factor in the assessment of the balance of justice, but not a factor to be considered as a stand-alone criterion before the balance of justice is considered more generally. The factors which are relevant and the weight to be attached to those factors will vary from case to case, bearing in mind always that the remedy is intended to be flexible.

48. Much of the plaintiff's argument under this heading concerned whether damages would be an adequate remedy for him. The focus was not only on the financial loss the plaintiff would sustain if wrongfully dismissed, but on the reputational damage that he will inevitably suffer just by virtue of being suspended or being the subject of an investigation (regardless of the outcome) or because the fact of an investigation concerning him is formally notified to the Central Bank. The plaintiff contends that he faces long-term reputational damage which will harm his future employment prospects in the financial sector on an ongoing basis. In this regard, the plaintiff relies on the comments of Kennedy J. in *Earley v. HSE* [2015] IEHC 520; Hogan J. in *Wallace v. Irish Aviation Authority* [2012] 2 ILRM 345; and Laffoy J. in *McLoughlin v. Setanta Insurance Services Ltd* [2011] IEHC 410.

49. In response, the defendants point out that damages are, in fact, the remedy most often awarded in cases of unfair and wrongful dismissal. On its own behalf, the first defendant relies on the damage it will suffer if it cannot progress the disciplinary process in light of its concerns regarding its most senior employee. There is a significant overlap between the arguments made by the defendants under the "*strong case*" heading and under the balance of justice heading. I acknowledge that notwithstanding the similarity in the arguments, the way they fall to be analysed under each heading may differ. In particular, the views expressed by the Supreme Court in *Rowland v. An Post* (above) can be relied on to afford particular weight in the balance of justice to the general entitlement of an employer to conduct a disciplinary process without undue intervention by the courts. For the reasons already discussed, I do not think that this case is analogous with *Rowland*. Nonetheless, the employer's underlying concern as to the conduct of its employee and the *prima facie* entitlement to take action on foot of that concern is a matter to which I ascribe considerable weight.

50. As against that, the reputational damage to the plaintiff arising from the proposed investigation is both significant and, in the small and specialised sector in which he is employed, quite possibly irreparable. The understandable desire on the part of the defendants to continue with the disciplinary process has to be viewed in a context where the defendants stand over all of the actions which have been taken to date, including those at its board meeting of 28th April, 2021. Those actions provide the legal basis for the investigation and the suspension with which the defendants wish to proceed. Their legality is in issue in these proceedings and I have already concluded that the plaintiff has a strong case in this regard. Given the potentially irreparable reputational damage to the plaintiff, it seems to me that least injustice will be caused by restraining the defendants from continuing with this disciplinary process pending the determination of the substantive proceedings.

51. I have given some thought as to whether the most appropriate orders would be ones which restrained the defendants from acting on foot of the actions and decisions already taken by them but which did not in principle restrain them from taking any other action, acknowledging as I do that an employer must be permitted to carry out investigations and to take disciplinary action against an employee in appropriate circumstances. However, I note the manner in which the plaintiff has framed relief No.3 in his Notice of Motion looking for an interlocutory order restraining the defendants from proceeding with any investigation "*pertaining to the any [sic] matters set forth in correspondence sent on behalf of the first named defendant by Flynn O'Driscoll solicitors of 26 April 2021*". This encapsulates the difficulty facing the court in this particular case in attempting to preserve the defendant employer's entitlement to act and the margin of appreciation an employer must have in carrying out any investigative or disciplinary process. In circumstances where the defendant company has already reached the conclusions expressed in that letter on the only allegation made against the plaintiff, the same difficulties would arise in relation to any alternate investigation no matter how it might be legally constituted. Whilst there might in theory be other matters of concern to the employer unaffected by the conclusions set out in that letter and in respect of which an investigation and disciplinary action, possibly leading to dismissal, could be taken it was not suggested to the court that any such matters exist. Therefore, given the circumstances of this case in which the alleged purported dismissal and the proposed investigation all relate to a single underlying issue I do not see how orders could be framed which simultaneously restrain the defendants from pursuing the proposed investigation pending the trial of the action and permit the defendants to pursue another investigation into the same issues.

52. As regards the plaintiff's return to work, I note that the defendants have placed significant emphasis during the course of the hearing on the fact that the plaintiff has not actually been suspended, notwithstanding the decision of the board of management to suspend him. In those circumstances, the plaintiff is, to paraphrase Irvine J. in *Halpin v. Natural Museum of Ireland* [2019] IECA 57, an "*unsuspended employee*". As an unsuspended employee the plaintiff is entitled to attend at his workplace and to carry out

his duties and I will make an order requiring the first defendant to facilitate the plaintiff's return to work.

53. I acknowledge that the proceedings are at a very early stage. Given that the orders I propose making include an order that the plaintiff be facilitated in his return to work and acknowledging, as I do, that the defendants have a *bona fide* concern as regards the plaintiff's continued employment, it is imperative that the proceedings are prosecuted expeditiously so that matters can be resolved one way or the other. I am prepared to give directions as to the early exchange of pleadings (if that has not already occurred during the interval between the hearing and this judgment) and indeed these are proceedings which might benefit from being case managed in order to achieve an early trial date. I will hear the parties further on the specific orders to be made and on any other directions which may be required. Any submissions on these issues can be included in the written submissions on costs that now follow the delivery of an electronic judgment. However, given that we are approaching the long vacation and that it may be necessary to schedule a further hearing on these matters, rather than the usual 14 days allowed under the direction issued on 24 March 2020, I will allow a period of 7 days for the making of written submissions on the form of the order or orders that should follow this judgment and on the question of costs.