THE HIGH COURT

[2021] IEHC 87

[2020 No. 6116 P]

BETWEEN

THOMAS FOY

PLAINTIFF

AND

UNIVERSITY OF LIMERICK

DEFENDANT

JUDGMENT of Mr. Justice Twomey delivered on the 10th day of February, 2021

SUMMARY

1. This case considers the extent to which the *public interest* (in investigating the alleged misuse of the money in a publicly funded institution such as a university) is a factor in determining whether to grant an injunction to an employee who wishes to prohibit that investigation because of his fear of the potential harm the investigation may cause to his reputation.

2. The injunction is sought by the plaintiff ("Dr. Foy"), who is the subject of that investigation, against the defendant (the "University"). The background to the investigation is a matter of considerable public interest as evidenced by the fact that there was a *Prime Time Investigates* programme broadcast on RTÉ in May 2017 about the alleged misuse of funds in the University. This was followed by a hearing before the Dáil Public Accounts Committee on the 22nd June, 2017 and by a Special Report by the Comptroller and Auditor General on the Handling of Remuneration for certain senior staff in the University of Limerick in August 2018 which dealt with, in particular, the "*discretionary awarding of 'professional added years' for pension purposes*".

3. Dr. Foy, who was the Director of Human Resources at the University at the relevant time, objects to the proposed investigation because he signed a settlement letter with the University dated 5th July, 2018 (the "Settlement Letter") at the end of a mediation process. That mediation arose from concerns over his role in the giving of pension entitlements to employees, and in particular the award of professional added years to the pensions of certain employees of the University, including the pension of one particular employee, referred to herein as Mr. X.

4. Dr. Foy claims that the terms of this Settlement Letter are such as to prevent the University from investigating its current concerns (outlined in the letter dated 30th July, 2020 from the University to Dr. Foy - the "Investigation Letter") over one particular aspect of Mr. X's pension entitlements.

5. This relates to the transfer of years of pensionable service from Mr. X's pension with his previous employer to Mr. X's pension with the University. It is claimed that, as Mr. X received a refund of that pensionable service from his previous employer, he was not entitled to have those years transferred to his University pension. The University claims that the alleged unlawful transfer of additional years to Mr. X's pension amounts to a loss to the University of almost €200,000.

6. Dr. Foy claims that the proposed investigation amounts to a breach of the Settlement Letter, which he says settled matters regarding the University's concerns over his role in pension entitlements of employees of the University, including those of Mr. X. It is Dr. Foy's contention that the Settlement Letter amounts to a full and final settlement of matters known to the University at the time of its signing, including its concerns over the transfer of years of pensionable service from Mr. X's previous employer to Mr. X's pension with the University.

7. The University claims that there is nothing in the Settlement Letter (which consists of three sentences) which prevents it from investigating matters of serious concern, such as its proposed investigation into the role of Dr. Foy in the transfer of Mr. X's years of pensionable service.

8. To determine this issue, this Court considered not only the terms of the Settlement Letter but, as both parties have waived privilege, the terms of certain '*without prejudice'* correspondence exchanged prior to the execution of the Settlement Letter. It also considered the false sworn evidence provided by Dr. Foy in support of this application (which Dr. Foy now accepts is incorrect) and the public interest in the investigation of the alleged misuse of funds at a publicly funded institution.

9. For the reasons set out below, this Court concludes that the interlocutory injunction preventing the investigation, pending the trial of the action, should not be granted.

BACKGROUND

10. Dr. Foy commenced employment with the University on 20th October, 2005. On 28th May, 2008, he was appointed Director of Human of Resources and continued in that role until 5th July, 2018, the date on which the Settlement Letter was signed. He remains employed by the University although, in line with the terms of the Settlement Letter, he is currently on secondment to UniJobs, a subsidiary company of the University, where he is employed as Managing Director. Under the terms of the Settlement Letter, Dr. Foy's employment with the University is due to end on 6th July, 2022.

11. The University claims that Dr. Foy, during his time as Director of Human Resources in the University procured the unlawful giving of pension credits to Mr. X, who was an employee of the University. In particular, the University claims that Dr. Foy procured the transfer of a number of years of pensionable service from Mr. X's previous employer to Mr. X's pension with the University, even though Mr. X had received a refund of contributions in respect of those years of service from his previous employer and therefore those years were not transferable.

12. The University claims that, in addition, Dr. Foy processed this transfer of additional years in an unusual manner by contacting the Pension Human Resources Officer in person to arrange the processing of the pension, that he instructed the Human Resources Officer what to process even though that was not within the rules of the scheme and that this resulted in no validation of data and no independent review of the process. Furthermore, the University avers that no instruction regarding the process was ever put in writing by

Dr. Foy, which the University avers is most unusual. On this basis, the University wishes to investigate these matters.

13. It is helpful for an understanding of the issues raised, to set out in some detail the exact timeline regarding the various investigations conducted into the University, and the conclusions, where relevant, reached in the subsequent reports.

Prime Time Investigates and Public Accounts Committee

14. In May 2017, an RTÉ *Prime Time Investigates* programme reported on the financial affairs of certain third level institutions in Ireland, including the University of Limerick. The programme raised serious concerns in relation to the mismanagement of taxpayers' money by the University, and, in particular, concerns were expressed regarding certain payments made by the University to former employees, including those payments made to Mr. X in relation to his pension.

15. On foot of the issues raised in the RTÉ *Prime Time Investigates* programme, in May/June 2017 the Public Accounts Committee ("PAC") held meetings to discuss the financial accounts of the institutions mentioned in the programme, including those of the University. At one of these meetings, on 22nd June, 2017, the then newly appointed President of the University, Dr. Des Fitzgerald, was called and examined before the PAC and made a statement wherein he sought to address the allegations raised in relation to the finances of the University, including those concerns highlighted by the *Prime Time Investigates* programme. This Statement addressed several issues, including *'severance and other payments*' made by the University. These '*other payments'* were set out as comprising '*pension lump sum payments'* and '*pensionable added years'* given to two employees of the University, including Mr. X.

16. In the weeks and months following the broadcast of the *Prime Time Investigates* programme, several investigations and reports were commissioned by various institutions, including an internal review commissioned by the University itself.

The Thorn Report

17. In May/June 2017 the Higher Education Authority ("HEA") was instructed by the Minister for Education to arrange for an independent review into the practices of the University regarding*, inter alia,* its financial governance, the review to be entitled *'Independent Review of Certain Matters and Allegations relating to the University of Limerick'*. The HEA engaged Dr. Richard Thorn to carry out this review and to prepare a report on foot of his findings (the "Thorn Report").

18. On 27th September, 2017, Dr. Foy was sent in advance a précis of the conclusions reached in the Thorn Report, specifically those conclusions reached pertaining to the actions of Dr. Foy himself as Director of HR. Those conclusions related*, inter alia,* to '*severance payments'* made by the University and noted that '*at least some of those severance payments breached public pay policy guidelines'.*

19. The finalised Thorn Report was published in October 2017. That Report reached several conclusions, including in relation to payments made to senior managers employed by the

University, including those payments made to Mr. X. The Report also made several recommendations, one recommendation being that the issue of payments made by the University to Mr. X, should be more fully investigated.

The Second Thorn Report

20. Arising from the recommendations made in the first Thorn Report, the HEA commissioned a second review, again to be conducted by Dr. Thorn. The terms of reference for this follow-up review set out that this '*specific review'* was to focus on matters relating to payments made to Mr. X. As part of this review, Dr. Thorn was asked to *'examine and report on'* the *'processes and procedures'* followed in relation to the aforementioned payments and to examine the '*supporting documentation, senior management oversight and approval processes'* adopted during the relevant period.

21. It is helpful to recite in full the relevant terms of reference for this review:

> "The HEA [Higher Education Authority] has accepted Dr Richard Thorn's Independent Review of Certain Matters and Allegations Relating to the University of Limerick. […] The HEA has carefully considered the findings, particularly as they relate to the original allegations of financial mismanagement by Person B and C (at Section 6.10.12) and the recommendation dealing with severance payments and compromise agreements (at Section 6.2.9). The HEA considers the matters raised in the finding and recommendation noted to be of significant public interest and public accountability. The HEA now wishes that the portion of the recommendation in 6.2.9 that references the arrangements put in place for Persons [Mr. X] and K be the subject of separate, independent investigation, and not, as recommended, be undertaken by the University. […]
>
> The Terms of Reference for this specific review to be as follows:
>
> - Examine and report on the allegations made be Person B and C in relation to Persons [Mr. X] and K.
> - Examine and report on the processes and procedures followed in the Accounts Payable Office in relation to the payments to Persons [Mr. X] and K.
> - Examine and report on the nature of the work undertaken by Persons [Mr. X] and K including supporting documentation, senior management oversight and approval processes adopted during the period of rehire." [Emphasis added]

22. By email dated 27th November, 2017, Dr. Foy was notified by the HEA and Dr. Thorn of this follow up review. That email asks Dr. Foy to provide a statement regarding his '*role'* in the rehire arrangements for Mr. X and asks him to explain the role he had in the '*approval and sign off'* in relation to the work undertaken during the period when Mr. X was rehired by the University.

The Deloitte Report

23. The University also commissioned its own internal review into its financial affairs and the issues raised by the PAC and in the RTÉ *Prime Time Investigates* programme. The University engaged the services of Deloitte to carry out this review into several specific

issues, including termination payments, pensions, and other expenditure by the University.

24. The report prepared by Deloitte on foot of its findings was issued to the University in August 2017 (the "Deloitte Report"). The report raised issues regarding*, inter alia,* payments made to certain individuals and the way in which those payments were made.

The Report of the Comptroller and Auditor General

25. As a result of the issues raised before the PAC in May/June 2017, a further review was commissioned by the Comptroller and Auditor General. The remit of that Special Report was to examine the '*handling of remuneration for certain senior staff in the University of Limerick'.* In particular, the Report was to examine the '*award of professional added years for pension purposes'* at the University, the way in which these pension payments were calculated and the outcomes for the University of the processes engaged by it.

26. A draft Report was issued on 18th June, 2018 and the final Report was published in late August 2018. This Report contains many detailed findings in relation to severance payments made to senior managers at the University, including those payments made to Mr. X. In particular, the Report contains detailed analysis of the pension payments made by the University and compares the cost to the University of the pension payments actually made to certain senior managers and the financial benefit that those staff members might have otherwise derived.

Mediation

27. As the various investigations and reviews were ongoing, it is clear that there was a significant breakdown in the relationship between Dr. Foy and the University. This is clear from the first affidavit of Dr. Foy wherein he avers that following a meeting with the President of the University on 9th May, 2017, he was '*extremely unhappy'* with how he was being treated at that time and avers that his relationship with the University '*continued to deteriorate'* thereafter. Dr. Foy further avers that he was notified on 14th October, 2017 that changes were being made to his role, including the reassignment of certain duties to a colleague which he avers caused him '*great concern'*. As a result of this breakdown in the employment relationship, and in an effort to resolve the ongoing issues between Dr. Foy and the University, both parties agreed to enter mediation.

28. On 24th October, 2017, Dr. Fitzgerald, the President of the University, suggested that the parties engage in mediation as a way of resolving ongoing matters. This suggestion was accepted by Dr. Foy and the mediation process began in January 2018. Following certain preliminary meetings, it seems, a letter of engagement was sent by the mediator to the parties on 16th January, 2018 which it now seems clear attached the proposed mediation terms, and not as incorrectly averred by Dr. Foy, a 'draft settlement agreement', which false averment is discussed in detail later in this judgment.

29. The mediator's terms were signed by all parties on 25th January, 2018 which was also the date on which the first formal mediation session took place. This agreement set out in the usual way the terms to be agreed to by the parties in relation to the mediation.

30. Dr. Foy instructed his solicitor to negotiate with the University after this date with a view to resolving the dispute. However, no agreement was reached and Dr. Foy avers that by May 2018 the mediation process was '*close to breaking down'*.

31. Then, in June 2018, certain '*without prejudice'* correspondence was exchanged between the parties. The parties have now elected to waive their privilege over these letters and so this correspondence was opened during the course of the within hearing. It is important to note that the most recent of these letters was sent only 8 days prior to the final mediation session, at which a settlement agreement was reached between the parties.

32. The first of the letters is dated 12th June, 2018 and was sent by the solicitor, who was at that time representing Dr. Foy, to the solicitors for the University. That letter seeks to finalise matters before the final mediation session and sets out certain '*vital'* terms as sought by Dr. Foy, including that there be a prohibition on any future investigation of Dr. Foy. This letter and the response are set out more fully later in this judgment. In the reply from the solicitors for the University dated 26th June, 2018, it is clear that the University did not agree to the aforementioned 'prohibition on future investigation' term which was sought by Dr. Foy.

The Settlement Letter

33. On 5th July, 2018, the final mediation session took place and a settlement was reached between the parties. The terms of this settlement are reflected in the Settlement Letter signed on that date by both Dr. Foy and Dr. Fitzgerald, on behalf of the University. The effect of that settlement was that Dr. Foy, while continuing to be employed by the University, would be seconded to a subsidiary of the University, UniJobs, where he would be employed as Managing Director for a period of 4 years. After that period, his employment with the University would cease. It is relevant to note that this involves Dr. Foy ceasing to be employed by the University at 60, rather than 65, as had been his contractual entitlement. The settlement also included an express acknowledgement by Dr. Foy that standards expected in the implementation of the HR policy had fallen below those expected in the University. The Settlement Letter reads as follows:

> "Dear Mr. Foy
>
> I confirm that we have resolved matters in accordance with Section II paragraph I of Statute 4, as follows:
>
> 1. With immediate effect, you have stepped down as HR Director of the University and will no longer be involved or seek to be involved, directly or indirectly, in the functions of the University, including its HR functions, except as set out in paragraph 2 below.
> 2. With effect from tomorrow, 6 July 2018, you have agreed to take up the position of Managing Director of UniJobs for a 4 year period, at the end of which your employment with the University will end.

3. You acknowledge, on your behalf, that the standards expected in HR policy and procedure implementation and in communications with statutory bodies have fallen short of the standards expected in the University."

34. It appears that matters rested at that stage, with Dr. Foy taking up his position as Managing Director of UniJobs as envisaged under the terms of the Settlement Letter. In this regard, a Secondment Agreement was signed by the relevant parties in order to facilitate Dr. Foy's transition to his role at UniJobs.

The Investigation Letter

35. Subsequently, over one year after the signing of the Settlement Letter, on 18th November, 2019, Mr. Andrew Flaherty ("Mr. Flaherty"), the newly appointed Director of Human Resources at the University, and subsequently, as will be seen, the Chief Corporate Officer of the University, sent a letter to Dr. Foy raising a concern regarding the calculation of the pension payment made to Mr. X. This letter noted that the incorrect calculation had been performed at the request of Dr. Foy. The letter requested that Dr. Foy set out his response to the matter within 21 days thereof.

36. On 3rd December, 2019, the solicitor acting for Dr. Foy responded to the Investigation Letter. This response refers to the Settlement Letter and states that the terms of that Letter have the effect of '*prohibiting [Dr. Foy] from going behind same'* and therefore Dr. Foy would not be providing a response as requested by Mr. Flaherty.

37. No further correspondence was exchanged, until 10th March, 2020. On this date, Mr. Flaherty again wrote to Dr. Foy, requesting that Dr. Foy provide him with a response to certain issues raised in that letter, including issues relating Dr. Foy's level of knowledge and involvement regarding the employment arrangements for Mr. X.

38. A response to this letter was sent by Dr. Foy's solicitors on 19th March, 2020. This response again referenced the Settlement Letter and noted that Dr. Foy would be *'simply unable to assist'* with the issues raised in Mr. Flaherty's letter.

39. It is not necessary to set out the further correspondence exchanged between the parties, except to note that it became clear that Dr. Foy would not be responding to the specific issues raised by Mr. Flaherty in his letters of November 2019 and March 2020, by virtue of his belief that the Settlement Letter had resolved all outstanding matters.

40. Matters ultimately came to a head on 30th July, 2020. On this date, Mr. Flaherty wrote to Dr. Foy advising him that there had been an allegation of '*serious misconduct'* on his part and that an investigation would be commenced in line with Statute No. 4 of the Universities Act, 1997 (the "Investigation Letter"). The specific allegation is stated in that letter as being that Dr. Foy '*may have procured the giving of pension service credits to [Mr. X] to which he was not entitled'*. This letter records that Ms. Niamh McGowan BL has been appointed by the University to conduct the investigation. Although there appears to be a drafting error in the Letter of Investigation (in that it refers at one point to Section II (1) (g) of that Statute – the disciplinary part of the Statute – rather than Section II (4) (a) – the investigation part of the Statute), it seems clear that it was intended to refer to

the investigation part of the Statute, since the letter is concerned only with an investigation and in any case, Ms. McGowan BL would not have been entitled to conduct any disciplinary proceedings, as she is not an employee or officer of the University (which is a pre-requisite for any person undertaking disciplinary proceedings). The Investigation Letter insofar as relevant states:

> "Dear Dr Foy,
>
> This letter is to inform you that there has been a suggestion of alleged serious misconduct on your behalf while in your role as the Director of Human Resources.
>
> Specifically that you may have procured the giving of pension service credits to [Mr. X] to which he was not entitled, resulting in an improper inflation of the lump sum and of the pension payments made to [Mr. X] by the University of Limerick since [Mr. X] reached pension age. An investigation will now take place.
>
> The investigation will be in line with Statute No. 4 of the Universities Act 1997 (the "Statute") (attached for ease of reference). Section II (4) (a) states:
>
> *"In respect of any alleged misconduct which may warrant formal disciplinary action under this Statute, the University will investigate any matter which, in the opinion of the University, requires investigation and employees will, if requested by the University, cooperate fully with any such investigation, which will be conducted as promptly as reasonably practicable and in accordance with the principles of natural and constitutional justice. The University may decide, at its sole discretion, whether or not it will conduct an investigation in circumstances where an employee admits any misconduct."*
>
> In accordance with Section II (1) (g) of the Statute Ms Niamh McGowan BL has been engaged to conduct this investigation in line with the Statute."

41. The terms of reference for the investigation were sent to Dr. Foy by the University on 31st July, 2020 and state*, inter alia,* that:

> "Ms Niamh McGowan BL (the "Investigator") will conduct an independent investigation ("the Investigation") under the Statute following a suggestion of possible serious misconduct on the part of Dr Tommy Foy (the "Respondent"), as the then Director of Human Resources. It is alleged that he may have procured the giving of pension service credits to [Mr. X] to which he was not entitled, resulting in an improper inflation of the lump sum and of the pension payments made to [Mr. X] by the University since [Mr. X] reached pension age (the "Complaint").
>
> […] Every effort will be made by all concerned to ensure that the Investigation is carried out and completed within a period of 12 weeks from the commencement of the Investigation on 22nd August 2020 […]

> At the conclusion of the Investigation, the Investigator will issue a written report containing her findings. The Investigator will make findings of fact with reference to the Complaint and the Statute on the balance of probabilities.
>
> The Investigator shall provide the Investigation Report to [Dr. Foy] and the University and the matter will proceed thereafter as determined by her in compliance with relevant University procedures. The Investigator's role concludes once the Investigation Report has been so provided." [Emphasis added]

42. In response to this letter, the solicitor for Dr. Foy wrote a letter on 7th August, 2020 in which he cited the terms of the Settlement Letter and called on the University to cease the investigation with immediate effect. That letter noted that the proposed investigation was in respect of matters relating to Dr. Foy's role as Director of Human Resources and that '*all such matters were subject to a previous mediation and a binding agreement reached'*. The view is expressed in that letter that the Settlement Letter '*absolves'* Dr. Foy of '*any and/or all actions that could be taken by the University'.*

43. On 18th August, 2020, Mr. Flaherty responded on behalf of the University and noted that the matters raised by Dr. Foy's solicitor were matters more suitable for submission to Ms. McGowan BL during the course of the investigation. This letter stated that the investigation would not be discontinued, as had been requested by Dr. Foy's solicitor.

44. In a response sent on 21st August, 2020, the solicitor for Dr. Foy noted that as there was significant disagreement between the parties regarding the interpretation of the Settlement Letter, it was his intention to issue proceedings, in line with his previous correspondence.

45. The investigation did not commence on 22nd August, 2020, as envisaged by the terms of reference, and it is important to emphasise therefore that the proposed investigation by the University has not actually commenced. In line with Dr. Foy's earlier threat to take legal action, the within proceedings were issued by him on 1st September, 2020.

THE LAW RELATING TO INTERLOCUTORY INJUNCTIONS

46. The law in relation to the grant of interlocutory injunctions is well-settled and was most recently restated in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Limited* [2019] IESC 65. It does not need to be restated and it is clear that the primary questions to be addressed are:

- ***Fair question to be tried?***
  The plaintiff must establish that there is a fair question to be tried regarding his entitlement to that injunction.

- ***But a strong case has to be made out if mandatory injunction?***
  However, where the interlocutory injunction is mandatory in nature, before such an order will be granted, the plaintiff must show, not merely that there is a fair question to be tried, but that a strong case has been made out.

- ***Does balance of justice favour grant of injunction?***

Once a fair question/strong case has been made out, then the plaintiff must establish that the balance of justice (balance of convenience) favours the grant of the injunction. In considering where the balance of justice lies, an important, but not necessarily determinative issue (per O'Donnell J. in *Merck Sharp & Dohme* at para. 35) is the adequacy of damages.

Where the injunction seeks to prevent an employment disciplinary process?

47. This case involves an application to prevent an investigation by the University, which investigation could lead to a disciplinary process against Dr. Foy. This is because Dr. Foy is an employee of the University, *albeit* that he is on secondment to a subsidiary company of the University, UniJobs. As he remains an employee of the University, it is common case that he remains subject to the disciplinary processes of the University. The Investigation Letter makes clear that the Dr. Foy is suspected of serious misconduct and that an investigation is proposed pursuant to Section II (4)(a) of Statute No. 4 of the Universities Act, 1997, i.e.:

> "In respect of any alleged misconduct which may warrant formal disciplinary action under this Statute, the University will investigate any matter which, in the opinion of the University, requires investigation [..]."

48. It is clear from Section II (4)(a)(viii) of that Statute, that depending on the findings of the investigation, disciplinary proceedings may ensue, which disciplinary action includes dismissal.

49. In summary therefore, the injunction being sought by Dr. Foy is to prevent an investigation which could lead to disciplinary procedures up to and including dismissal. It seems clear from the judgment of Clarke J., as he then was, in *Bergin v. Galway Clinic* [2008] 2 I.R. 205 at p. 216 that an injunction to prevent an investigation such as the one proposed against Dr. Foy is treated as a mandatory injunction. This is because the reality of such an injunction is that the employer, in being prevented from investigating an issue which might lead to dismissal, is effectively being forced to continue to employ the employee:

> "I have, therefore, come to the view that in any case in which an employee seeks to prevent a dismissal or a process leading to a dismissal, as a matter of common law, and in whatever terms the claim is couched, the employee concerned is seeking what is, in substance, a mandatory injunction which has the effect of necessarily continuing his contract of employment even though the employer might otherwise be entitled to terminate it. In those circumstances it is necessary for the employee concerned to establish a strong case in order to obtain interlocutory relief."

For this reason, this Court has little hesitation in concluding that Dr. Foy is seeking a mandatory injunction and so must establish a strong case that he will succeed at trial in arguing that the investigation amounts to a breach of the Settlement Letter, in order for this interlocutory injunction to be granted.

ANALYSIS

50. As previously noted, Dr. Foy wishes to prevent the proposed investigation by a barrister (Ms. Niamh McGowan BL) who is independent of both parties as she is not an employee or officer of the University. The proposed investigation concerns alleged serious misconduct by Dr. Foy while he was the Director of Human Resources at the University. It is Ms. McGowan's role under the terms of reference for the proposed investigation to make findings of fact to be contained in a report at the conclusion of the investigation and her role is to end once that report has been provided to both the University and Dr. Foy.

Dr. Foy's claim

51. In seeking the injunction, Dr. Foy relies in particular on the following averment which he swore in his second affidavit dated 23rd October, 2020 (at para. 8), regarding the Settlement Letter:

> "I say that I signed that agreement and that when I signed it I understood, and had been led to understand by the [University], that "*the matters*" which the agreement confirmed that we had resolved referred to all and any disciplinary questions which could arise from any of the matters that had been the subject of investigation, audit, review or query prior to 5th July 2018."

52. At the hearing of this matter, his counsel made clear that the essence of Dr. Foy's claim is that the University cannot enquire into matters which were known by it at the time of the Settlement Letter (and thus allegedly included in the settlement). He claims that the University was aware of the issue of the alleged transfer of Mr. X's years of service from a previous employer to the University and so this issue cannot be investigated.

The University's response

53. The University's response is first that the Settlement Letter does not prevent subsequent enquiry into known or unknown issues at the time of signing that Letter and secondly that in any case while the University knew about Dr. Foy's alleged involvement in the *grant of additional years of service* to Mr. X it was not aware of his alleged involvement in the *transfer of previous years of pensionable service with a previous employer* to the University, where Mr. X has already received a refund of those years.

Did the parties agree a prohibition on a future investigation?

54. In seeking to analyse the first issue, of whether the Settlement Letter prohibits a future investigation of known issues (or indeed unknown issues), the without prejudice correspondence (already briefly referenced) is relevant since it clarifies very clearly the position of the parties regarding this issue in the days immediately preceding the execution of the Settlement Letter.

55. In its letter dated 12th June, 2018, just three weeks prior to the execution of the Settlement Letter and almost six months after the mediation process had commenced, Dr. Foy's solicitors wrote to the University's solicitors requesting the University to accede to certain terms which he expressed to be '*vital'*. It states*, inter alia,* that:

"It is imperative that matters are finalised as a matter of urgency before we can have the final mediation session that Turlough O'Donnell is proposing.

As you are aware, we have our client's instructions to indicate that he will accept the position in UniJobs as offered before, subject to detail of the job being clarified. This was a substantial breakthrough.

But all of this is predicated on reaching a comprehensive agreement that covers all issues.

What concerns our client is to reach agreement on the following vital matters:

1. A clear and unequivocal commitment by UL that no disciplinary action or investigation regarding any complaints will take place against Mr Foy into all the historic issues ventilated in the Thorn report and the PAC, or any other investigation or complaint.
   […]
4. The agreement will contain confidentiality and non-disparagement clauses.
   […]
6. The usual terms in such an agreement, such as it being the entire agreement, full and final, applicable law etc will be inserted.[…]

I look forward to receipt of such a draft document so we may advance discussions as soon as possible." (Emphasis added)

56. In many ways this letter of 12th June, 2018 is prescient on Dr. Foy's part, since he is seeking in this letter to prevent the University investigating the historic 'pension' matters or any other matter, i.e. known or unknown issues, and so he was seeking a commitment from the University not to undertake the very type of investigation which the Investigation Letter proposes, namely an investigation into Mr. X's pension.

57. However, it is equally clear from the University's emphatic response dated 26th June, 2018, and therefore only 8 days prior to the execution of the Settlement Letter, that there was no way it was going to accept any restriction on its right to investigate those issues:

"We refer to your letter of 12 June 2018. A series of issues raised by you in that letter that, despite months of mediation, are unresolved. As you know, our client has confirmed that subject to all being agreed in mediation, agreement could be reached on the basis of your client accepting a position in UniJobs, with your client and our client agreeing the terms of the job description. […]

We note also that you set out what you refer to as vital matters that concern your client. Some of these matters are issues that we have discussed in the course of the protracted mediation and have made clear are not attainable. Our client believes that mediation has run its course and that it must be brought to a close.

In doing so, we respond to your numbered paragraphs as follows:

1. You requested that UL would provide an unequivocal commitment that no disciplinary action or investigation of your client by UL will take place against Mr Foy into the matters arising from the Thorn Report and the PAC. UL cannot give a commitment in respect of any other investigation or complaint that might arise from any future reports even if connected to those issued to date, nor can it give any commitment in respect of any investigation that may be directed by for example, the Higher Education Authority or the Department of Education, or any enquiries that may be carried out by other bodies. [….]
4. Any agreement could contain very limited clauses in respect of confidentiality and non-disparagement, in circumstances where our client must cooperate with processes directed by the Public Accounts Committee, by the Higher Education Authority, Department of Education, and cannot decline to answer questions or answer matters raised by those bodies. […]

Our client was hopeful that agreement could be reached between the parties in this matter on the above basis. As agreement cannot be reached, our client will commence appropriate processes in due course." [Emphasis added]

58. It is difficult to imagine the University being clearer about its position that Dr. Foy's request, for a prohibition on future investigations, was not attainable. It is also clear from this letter that it is unwilling to have even a restriction on 'known' matters, since it states, *'even if connected to those [reports] issued to date'*.

59. It is also relevant to note that no further correspondence passed between the solicitors after this letter of 26th June, 2018, which it is sent only days before the execution of the Settlement Letter on 5th July, 2018.

The reality of what Dr. Foy is claiming

60. Despite all of this, the very thing which Dr. Foy sought, i.e. a prohibition on any investigation into his role in Mr. X's pension and which was rejected outright by the University, is exactly now what Dr. Foy claims is covered by the terms of the Settlement Letter (presumably as an express or an implied term thereof). He does so even though:

- The Settlement Letter is completely silent on there being any prohibition on the University from investigating any matters concerning Dr. Foy.
- The Settlement Letter does not even contain, what Dr. Foy's solicitor regarded as a '*usual term'* in every settlement, namely that it is in full and final settlement.
- The Settlement Letter does not by its express terms refer to the settlement of *all matters*, but simply '*matters'*.

- The University just days prior to the execution of the Settlement Letter expressly rejected any prohibition on its right to investigate Dr. Foy regarding any complaint '*connected with those [reports] issued to date'.*

- The University made clear in its letter of 26th June, 2018 that it was not simply that it did not wish to agree to have a prohibition on future investigation as some kind of negotiating tactic, but rather that it felt it was not permitted, as a public body, to agree to certain terms sought by Dr. Foy. It gave by way of example the fact that a prohibition on investigation was not possible because it might be directed by the Higher Education Authority or Department of Education to investigate matters.

- The same point was made in the context of Dr. Foy's request for confidentiality and non-disparagement clauses. This is because the University made clear that it was not a case that it did not *wish* to agree certain clauses with Dr. Foy but rather a case that it felt it was *not permitted* to agree certain clauses. On this basis, the University stated that it was not legally in a position to give any commitment beyond very '*limited clauses'* as it '*cannot decline'* to answer questions from the Department of Education or other such bodies.

- Even though Dr. Foy had regarded as '*vital'* that he get a clear and unequivocal commitment of a prohibition on future investigations, Dr. Foy nonetheless signed the Settlement Letter, with the benefit of legal advice, without that prohibition. He signed that Settlement Letter, in circumstances where, he had received a letter only days previously wherein the University set out in very clear terms that it could not decline to address matters that might be raised in the future and that it would not and could not commit not to pursue any future investigation.

61. In summary, Dr. Foy sought a prohibition on any future investigation of him by the University as part of the settlement terms. His solicitors made clear that it was '*vital'* that such a '*clear and unequivocal'* prohibition be contained in the Settlement Letter. This was rejected outright by the University, as was the suggestion that the Settlement Letter be a full and final settlement. In this regard Mr. Flaherty, Chief Corporate Officer of the University avers (at para. 12 of his affidavit dated 3rd November, 2020) that it was not an accident that the three-sentence Settlement Letter was drafted in this manner, since he avers that it was '*most deliberately not'* a full and final settlement of the type contended for by Dr. Foy. The evidence before this Court, in particular the letter of 26th June, 2018, supports this averment that a conscious decision was taken by the University not to include the terms sought by Dr. Foy.

However, Dr. Foy is now claiming that having failed to get an express prohibition on future investigations inserted in the Settlement Letter that somehow, against all the evidence, that this three paragraph Settlement Letter, a letter which he signed with the benefit of legal advice, does in fact contain such a prohibition (presumably as an implied term). Dr. Foy claims that the University changed its position from the letter dated 26th June, 2018 and that by the time of the mediation on 5th July, 2018 the University led him to believe that the University and Dr. Foy had, when signing the Settlement Letter,

resolved '*all and any disciplinary questions which arise from any of the matters that had been subject of investigation, audit, review or query'* prior to that date.

62. It seems to this Court that Dr. Foy's averment that the University changed its position from the 26th June and that he '*understood'* and had been '*led to understand'* by the University, that the Settlement Letter prohibited any investigation of him regarding Mr. X's pension, amounts to a bare assertion, *albeit* one given under oath, as there is no evidence to support it and what evidence there is flatly contradicts it.

63. Yet, this is a crucial averment in support of the injunction application, since Dr. Foy's case depends to a large degree on it.

64. However, not only does this bare assertion fly in the face of the express and trenchant terms of the '*without prejudice'* correspondence between Dr. Foy and the University in the days prior to the execution of the Settlement Letter, but it is also the case that Dr. Foy made a similarly crucial assertion (in support of the injunction), also under oath, which has turned out not only to be false (and now accepted as such by Dr. Foy), but also to be so completely inconsistent with the facts that it is surprising that it ever could have been believed by Dr. Foy. This will be considered next.

Dr. Foy's false sworn evidence – the 'fake' draft settlement agreement

65. In support of his claim that the three paragraph Settlement Letter contains an implicit prohibition on any future investigation of Dr. Foy's role in Mr. X's pension, Dr. Foy gave sworn evidence (at para. 16 of his first affidavit sworn on 1st September, 2020) that he now accepts is false.

66. At para. 15 of his first affidavit in support of this injunction application, he swore that:

> "Mr Turlough O'Donnell SC was appointed as mediator and the mediation commenced in January 2018. I beg to refer to a copy of the signed mediation agreement dated 25th January 2018 […]"

67. Dr. Foy exhibits in relation to this averment a mediation agreement containing the terms of appointment for the mediator, i.e. mediator's fees, confidentiality, exclusion of mediator's liability *etc*. Dr. Foy uses the term '*mediation agreement'* in his affidavit to describe this document. However, to avoid confusion, this Court will refer to this document as the 'mediator's terms' because, as noted hereunder, Dr. Foy also uses the term '*mediation agreement'* to describe a document containing proposed settlement terms, which this Court will refer to as a 'draft settlement agreement'.

68. Before getting to Dr. Foy's averment at para. 16 of his affidavit, it is useful to set out what is clearly a mediator's engagement letter dated 16th January, 2018 (the "Engagement Letter"). As such, it appears to be the first letter from the mediator, Mr. O'Donnell SC, to the solicitors for both parties:

> "Dear Colleagues,

I enclose herewith a draft Mediation Agreement for your perusal.

I'm proposing a fee of €6,000 and vat to include all reading in, Preliminary and other Consultations, Conference calls, and the day of Mediation itself. In addition to this my practice (if for any reason the mediation continues) is not to charge any further fees.

I will pay the cost of the rooms.

I am arranging rooms in the Arbitration Centre in the Distillery Building for Thursday the 25th of January at 4:15 pm.

The fees are payable forthwith. I understand they are to be paid by the University.

Thank you for your courtesy and co-operation to date.

Please do not hesitate to contact me.

Yours sincerely

Turlough O'Donnell"

69. This letter is patently the very first step in a mediation where the mediator is seeking agreement on his costs and is setting up a meeting between the parties and it seems clear that the primary purpose of the Engagement Letter is to enclose the 'mediator's terms' to be agreed and signed by the parties. The 'mediator's terms' so received by the parties are subsequently signed by them on the 25th January, 2018 (per para. 15 of Dr. Foy's first affidavit) on the day when '*the first formal mediation session'* took place (per para. 6 of his second affidavit dated 23rd October, 2020).

70. However, after referring to the appointment of Mr. O'Donnell SC as mediator at para. 15 of his first affidavit, this is where Dr. Foy makes, at para. 16, what he now accepts is, a false averment, which if it were true would provide crucial support for his injunction application.

71. Not only is this averment false but it is an averment that is so inconsistent with the facts in this case, that it is surprising how Dr. Foy could ever have believed it was true in the first place and for this reason must cast doubt over Dr. Foy's recollection of events regarding this dispute.

72. This is because at para. 16 of his first affidavit, he avers that:

"The mediation commenced by way of a series of preliminary meetings and general heads of agreement were reached by late January 2018. By way of a letter dated 16th January 2018, Mr O'Donnell SC circulated a draft mediation agreement to the parties in advance of the formal mediation session on 25th January 2018. This draft agreement set out a number of terms but the general agreement was that I would step down from my role as Director, Human Resources and take up an alternative

role with the [University], as Director of Equality & Diversity, as a way to resolve and address the issues that had arisen. The draft terms included an undertaking from each party that they would not further pursue action against the other regarding any matter that had arisen prior to the date of agreement as follows:

> *"UL undertakes not to take action of any description against Mr Foy regarding any matters arising prior to the date of this agreement. All matters relating to Mr Foy and his discharge of his duties as Director, HR arising before the date of this agreement will be considered as addressed fully in this process. The University acknowledges that Mr. Foy, at all times, discharged his duties diligently as part of the UL Executive Management Team and with the full knowledge and approval of the EMT, the President at that time […]*

I beg to refer to a copy of the draft mediation agreement, upon which marked with the letters "TF 5" I have signed my name prior to the swearing hereof." [Emphasis added]

73. Exhibit TF5 is not the 'mediator's terms' but rather a 'draft settlement agreement', which Dr. Foy swears was attached as an enclosure to the mediator's Engagement Letter of 16th January, 2018. This alleged 'draft settlement agreement' is a page and a half of tightly typed text, and as well as containing the aforesaid prohibition on future investigations contains ten other detailed settlement terms, such as payment by the University of compensation to Dr. Foy.

74. It is important to step back and consider what Dr. Foy was swearing, when he signed this affidavit in September 2020, to be the truth of what happened on the 16th January, 2018, before even the first formal mediation session had occurred.

75. This is because this averment (which Dr. Foy now accepts is false) is not simply an oversight regarding which document was attached to a letter. Instead, this is a detailed averment regarding the taking place of a series of meetings which resulted in *'a general agreement'* regarding various detailed terms of settlement (including for example a term regarding the manner in which the Corporate Secretary of the University would advertise the job of Vice President for Organisation Development and People Strategy, which Dr. Foy was to have).

76. Dr. Foy's false averment makes clear that these terms were negotiated with the University and that there were '*general agreement'* by the University to these terms, which were then sent by the mediator to the University on the 16th January, 2018 even before the first formal mediation session took place.

77. In particular, Dr. Foy swore that Mr. O'Donnell SC, an experienced mediator, prior to his 'mediator's terms' being agreed and signed, and prior to the first formal mediation session with the parties, sent the parties under cover of his Engagement Letter of 16th January, 2018 a 'draft settlement agreement' that had been reached between the parties after a series of mediation meetings had apparently occurred (and so must have occurred even prior to the date of the Engagement Letter, on the 16th January, 2018). In essence,

Dr. Foy averred that a draft settlement agreement, which turned out to be 'fake' since he now accepts there was no such agreement with the University, was sent by the mediator to the parties before the first formal mediation session took place.

78. This is what Dr. Foy swore to be the truth in September 2020.

79. In assessing how much weight this Court should attach now to Dr. Foy's crucial averment in support of his injunction application (that he '*understood'* and he was '*led to understand'* by the University that it would not undertake future investigations), it is relevant to consider in detail this false averment by Dr. Foy, which was also crucial to this injunction application and in particular how he could have come to swear an averment, supportive of his application, that was not only false, but so inconsistent with the evidence.

80. First, it is to be noted that there are internal inconsistencies in this averment, even if it were true, which should have been obvious to Dr. Foy. This is because it seems clear from the very terms of the mediator's Engagement Letter of 16th January, 2018 that the first formal mediation session was to occur on 25th January, 2018. Consistent with this, Dr. Foy avers (in September 2020) that mediation meetings took place in '*late January 2018'* and this led to the 'draft settlement agreement'. However, this averment, even if it were true, is internally inconsistent, since the meetings to negotiate this alleged agreement could not have occurred in late January on his version of events, since that draft settlement agreement, which resulted from these meetings, was allegedly sent under cover of Mr. O'Donnell's letter of 16th January, 2018 (which is clearly *mid* and not *late* January). However, by placing these meetings (which would have had to occur in early or mid-January) in *late* January, Dr. Foy ensures consistency with the fact that the first formal mediation session occurred on 25th January, 2018.

81. It is of course the case that Dr. Foy has sought to remedy this inconsistency in his sworn evidence (by his swearing of a second affidavit on 23rd October, 2020), in which he accepts that no such draft settlement agreement was sent by the mediator to the parties, but that these preliminary meetings actually took place *before* the first formal mediation session on the 25th January, 2018.

82. Secondly, the very terms of the Engagement Letter are plainly consistent with that letter enclosing the 'mediator's terms' for the commencement of the mediation (which were duly signed a few days later on 25th January, 2018). They are not in any way consistent with a mediator enclosing a 'draft settlement agreement' arising from negotiation between all the parties over a *'series of preliminary meetings'*. This also should have been obvious to Dr. Foy from even the most cursory perusal of the wording of that covering letter (which plainly sets out the mediator's terms regarding fees etc and contains no reference to either enclosing or the terms of a draft settlement agreement) when he was swearing his averment that the 'draft settlement agreement', rather than the 'mediator's terms', was attached to that letter.

83. Thirdly, these averments are not only false (as now accepted by Dr. Foy), but it should have occurred to Dr. Foy that it would be surprising that an experienced mediator would send a 'draft settlement agreement' with detailed concessions by the parties before the first formal mediation session and before the mediator's terms of appointment have even been agreed by the parties.

84. Fourthly, these averments are completely inconsistent with the other evidence in this case. This should have given Dr. Foy pause for thought before he falsely swore that by 16th January, 2018 (and so before the first formal mediation session and before the mediator's terms were even agreed), the University was in effect agreeable in principle to a prohibition on future investigations. This is because this suggested prohibition is completely at odds with the state of the negotiations as evidenced from the correspondence. The correspondence between the parties (outlined above) shows that on the 26th June, 2018, several months after this Engagement Letter dated 16th January, 2018, the University was not only *not prepared* to agree, but it also felt it was *not entitled* to agree, such a prohibition.

85. Fifthly, there is the explanation provided by Dr. Foy in his second affidavit dated 23rd October, 2020 wherein he accepted that he was wrong to have claimed that the mediator had sent a draft settlement agreement to the parties. This explanation only arose once the University swore that it had never even received such a document from the mediator, let alone agreed its terms. In considering his explanation, it is important to remember that the 'fake' draft settlement agreement contained very significant terms which were favourable to Dr. Foy, e.g. the payment of compensation, although none is contained in the Settlement Letter, the right to continue to work for the University for a total of ten years (when one includes the possibility of a renewal), although the Settlement Letter provides that he is to work for only four years (with no renewal), as well of course as the 'vital' prohibition on future investigations.

86. His explanation is that the document which he falsely claimed was a draft settlement agreement was in fact '*proposals*' that were being '*discussed with the mediator'* in preliminary meetings which took place prior to the first formal mediation session. He also states that *'I am not aware of whether or not'* the University had sight of that document. Nonetheless he goes on to state that it *'is my understanding that the document was shared with'* the University, which is however denied on oath on behalf of the University.

87. This reference to written '*proposals'* that he appears to have discussed with the mediator in preliminary meetings with him does not in this Court's view adequately explain how in swearing his first affidavit in September 2020, when considering the events of over two years previously, Dr. Foy could have wrongly 'remembered' something of such significance, i.e. a series of negotiations at preliminary meetings leading to '*general agreement'* with the University on a swathe of hugely significant terms for him (which are so supportive of his case and so at odds with the terms actually contained in the Settlement Letter). Equally, this explanation does not adequately explain how he could have wrongly remembered that those 'agreed' terms were contained in a 'fake' draft

settlement agreement sent by the mediator to the parties. In particular this reference to '*proposals'* discussed with the mediator does not adequately explain how he could have wrongly 'remembered' a 'general agreement' on a term (the prohibition on future investigation) that is, and was, so vital to him.

Conclusion regarding the false sworn evidence by Dr. Foy

88. For the foregoing reasons, not only was it false sworn testimony for Dr. Foy to say that Mr. O'Donnell SC enclosed the fake draft settlement agreement with his letter of 16th January, 2018 (as is now accepted by Dr. Foy), but it is hard to understand how such a false averment could have been made, as it is irreconcilable with the evidence.

89. Yet, the fact remains that this clear and detailed false statement under oath was made by Dr. Foy. Furthermore, this false sworn evidence is not insignificant, but rather it is evidence, which if true, would be strongly supportive of Dr. Foy's application for an injunction (since the fake settlement agreement contains the very undertaking which Dr. Foy now says is implied in the three paragraph Settlement Letter).

90. It is curious, to say the least, that a false averment (with a detailed recollection of negotiations during a series of meetings which led to a '*general agreement'* as outlined in a fake draft settlement agreement with detailed terms, including the 'prohibition on investigation') could have been 'remembered' by Dr. Foy. This is particularly so as the false averment is in the teeth of the written documentation which illustrates that the University was not willing and was not, in its view, able to give the prohibition on investigation sought.

91. While it is not being suggested that Dr. Foy deliberately misled this Court, the fact that such a false averment was made casts doubt over the reliability of Dr. Foy's other recollection of how the terms of the Settlement Letter came to be negotiated.

92. It is possible that Dr. Foy's anxiety, as evidenced in the letter dated 12th June, 2018, to get the University to agree a 'prohibition on future investigation' in the Settlement Letter (which he failed to achieve), may have clouded his recollection of what actually happened in the negotiation of the Settlement Letter.

93. In any case it is clear that his recollection of important events regarding the negotiation of the Settlement Letter is not reliable.

A number of versions of Dr. Foy's 'understanding' of the agreement reached

94. It is also the case that Dr. Foy has had a number of iterations of his recollection of his understanding of what was agreed with the University, which further takes from the confidence a court can have in his recollection of the negotiations leading to the Settlement Letter.

95. First, on the 10th March, 2020, when the University wrote to Dr. Foy for his response to issues regarding Mr. X's pension, his response, through his solicitor, was by letter dated 19th March, 2020 to the effect that the Settlement Letter:

"was in full and final settlement of all matters relating to [Dr. Foy's] role as HR Director". [Emphasis added]

96. If this was Dr. Foy's understanding in March 2020 of what transpired in July 2018, this understanding changed because on the 23rd October, 2020 when he swore his second affidavit his 'understanding' was that:

> "'*the matters'* which the [Settlement Letter] confirmed that we had resolved referred to all and any disciplinary questions which could arise from any of the matters that had been the subject of investigation, audit, review or query prior to 5th July 2018." [Emphasis added]

97. The third and final iteration of Dr. Foy's recollection or understanding of the terms of the Settlement Letter is contained in his legal submissions which state:

> "it was agreed as a term of the [Settlement Letter] reached between the parties on 5 July, 2018 that all potential disciplinary matters as against the Plaintiff known to the [University] at that time were being waived'" [Emphasis added]

98. Thus, in the space of a few months, Dr. Foy has claimed that it is a term of the Settlement Letter that there is a prohibition on investigating:

- First, all matters relating to his time as HR Director, then,
- those matters which had been the subject of investigation, and finally,
- those matters which were known to the University.

99. Thus, his recollection can be said to be a 'moving target' and for this and the foregoing reasons regarding the false sworn evidence, this Court concludes that it cannot rely on Dr. Foy's other recollection (which is also supportive of his application for an injunction), namely his bare assertion that he understood, and had been led to understand by the University, that the Settlement Letter prohibited any investigation of him regarding Mr. X's pension amounts. It is to be noted that it is on this bare assertion that much of his case for an interlocutory injunction depends.

Conclusion regarding 'strong case' and/or 'fair issue'

100. In order to establish that he has a strong case, that the terms of the Settlement Letter prohibit the University from undertaking future investigations, Dr. Foy relies in particular on his averment that he understood and was led to understand that the University agreed to such a prohibition. For the foregoing reasons and in particular the doubts which this Court has about the reliability of Dr. Foy's recollection of matters, this Court concludes that he has failed to do so.

101. If this Court is wrong to apply the 'strong case' threshold and this case were to be decided on the basis of Dr. Foy having to establish merely a fair issue to be tried, it is this Court's view that he has failed to produce any credible evidence to conclude that there is

even a fair issue to be tried that the investigation amounts to a breach of the Settlement Letter.

102. The foregoing conclusions are determinative of this matter and therefore lead to the application for the injunction being dismissed.

103. For good order and completeness however, this Court will deal briefly with other matters raised during the hearing.

Whether the investigation is of a 'known issue' or an 'unknown issue'

104. As previously noted, the University claims that even if the Settlement Letter prohibits a future investigation of *known* matters, the investigation, of the transfer of pensionable years from the previous employer of Mr. X to his pension scheme in the University, is not a matter that was known to the University at the time of execution of the Settlement Letter and so even on Dr. Foy's interpretation of the Settlement Letter, there is no prohibition on such an investigation.

105. In this regard, Mr. Flaherty avers that the Settlement Letter came about as a result of issues which came to light as a result of a review by the Office of the Comptroller and Auditor General of Professional Added Years in the University and in particular that Office's report seeking to establish if the practices of the University were in line with other universities. This is clear from the Report which is dated August 2018. It is to be noted that a draft of this Report in identical terms was provided to the University prior to the Settlement Letter. At page 9 of the Report, there is a summary of what the report concerns:

> "Certain public sector pension schemes provide, in exceptional circumstances, for discretionary awarding of 'professional added years' for pension purposes. These provisions are designed to compensate for the inability of certain professional or technical staff to qualify for a full pension based on 40 years service by mandatory retirement age.
>
> Professional added years are a form of remuneration, which for universities is subject to the sanction of the Department of Education and Skills and the Department of Public Expenditure and Reform.
>
> For historical reasons, profession added years in the five 'older' universities are approved on a case-by-case basis by the Minister for Education and Skills and the Minister for Public Expenditure and Reform. Up to late April 2018, the newer universities – Dublin City University and the University of Limerick – operated separate, independent frameworks for the award of professional added years.
>
> Based on the analysis of awards in those two universities between 2012 and 2016, this examination has found that the University of Limerick awarded more employees more generously in that regard than was the case in Dublin City University."

106. The body of the Report at p. 33 states*, inter alia,* that:

"Pension payments

4.21 The University calculated the pension lump sum and pension rate on the basis of the 2008 salary level for person AZ and on the basis of the 2010 salary level for person BY [Mr. X]. In both cases, professional added years were awarded.

4.22 Figure 4.3 outlines the comparative actuarial cost to the University of the overall pension and severance packages put in place for the senior managers, and the arrangement they might otherwise have benefited from had they remained in employment and retired at age 60.

[…]

Figure 4.3 Comparison of estimated severance and pension costs to the University

Payment type	**Person AZ NPV[a]**	**Person BY NPV[a]**
	€m	**€m**
Actual severance/pension arrangements	1.93	1.74
Pension arrangements if normally retired at age 60	1.71	1.65
Difference (i.e. net additional cost to the University of arrangement)	**0.22**	**0.09**

Source: Analysis by the Office of the Comptroller and Auditor General

Note: a The net present values (NPVs) were calculated by a consultant actuary. The methodology and assumptions used are set out in Appendix A."

107. In addition, Mr. Flaherty avers that in 2019 he was requested by the Pension Unit of the Department of Education and Skills to discuss the cases under review. At that stage the University's pension manager reported to him concerns relating to the transfer of pensionable service from a previous employer of Mr. X to Mr. X's pension scheme with the University to which he was not entitled. Mr. Flaherty avers that this issue regarding '*transfer of pensionable service'* has nothing to do with '*professional added years'*. In particular, he avers that the matter, the subject of the Investigation Letter, was not a matter that was in existence at the time of the Settlement Letter.

108. He also avers that the manner in which the transfer of pensionable years was undertaken in respect of Mr. X was a matter that was not known to the University at the time of the Settlement Letter.

109. For his part, Dr. Foy responds by averring that the matters of concern to the University at the time of the Settlement Letter were in four parts (based on evidence given by Dr. Des Fitzgerald, then President of the University, to the Dáil Public Accounts Committee on

22nd June, 2017), namely *ex gratia* payments on termination of employment, consultancy agreements, pension lump sum payments and pensionable added years.

110. On this basis, Dr. Foy avers that the matters of concern at the time of the Settlement Letter (and so the known matters) were '*severance arrangements agreed with' Mr. X and 'that these payments and arrangements included four parts, one of which was [Mr. X's] pension'.*

111. However, this averment simply means that the University had concerns about Mr. X's severance payments including his pension. In particular, Dr. Foy avers that the University knew that Mr. X *'had been awarded pension benefits which were significantly greater than his entitlement*s'. However, this is not in dispute, but it does not mean that Mr. Flaherty's averment, that the University was not aware of the issue regarding *the transfer of pensionable years,* as distinct from professional added years, is incorrect. Mr. Flaherty accepts that there was a concern regarding Mr. X's pension and in particular his professional added years. However, the issue of the transfer of pensionable service is a separate matter and this Court has not been provided with evidence to suggest that the University was aware of this issue at the time of the execution of the Settlement Letter.

112. On this basis, it seems to this Court that even if there was a fair issue to be tried that the Settlement Letter included a prohibition on the future investigation of known matters, there is no evidence to suggest that there is a fair issue to be tried that the University knew about the transfer of pensionable service from a previous employer at that time.

Balance of justice

113. If this Court is wrong in relation to its conclusions to date, then this Court would have to consider the balance of justice, which it will briefly do so now.

114. In this case, one is dealing with the internal affairs in a company/institution regarding the possible misuse of funds and it is clear that the Courts are reluctant to interfere in the internal affairs of a company/institution which are of legitimate concern to it. In this regard, Ryan J., as he then was, in *Elmes & Ors. v. Vedanta Lisheen Mining Limited & Ors*. [2014] IEHC 73 stated at p. 36 that:

> "Courts are reluctant to interfere in the internal affairs of a company in an area of legitimate corporate concern. The disciplinary process is governed by rules of law and contractual terms, express and implied, but until steps are taken, there is no basis or warrant for interference. It is relevant to note that it is proper for a company to be extremely concerned to establish all the relevant facts about a fatal accident and to want to look at how similar tragedies might be avoided in future. In that context, the people in charge of the location of the accident cannot expect to be immunised from criticism or sanction in advance by way of a court order." (Emphasis added)

115. Although that case concerned a fatal accident, which is different from the alleged misuse of funds in a public institution, this comment is nonetheless applicable in this Court's

view, since a University has an interest in establishing the relevant facts to ensure that the alleged misuse of funds does not re-occur (if it occurred in the first place).

Reluctance to prevent investigations into alleged misuse of public funds?

116. Indeed, this interest in preventing the misuse of funds is arguably even more important in this case, where one is dealing, not with a private company, but with a University which is funded by the taxpayer. This is because the courts need to be particularly alive to any waste of *public* funds, for the simple reason that when it is 'everyone's money' it is also 'no-one's money' and the same degree of diligence might not apply to the waste of public funds as applies when an individual, with a vested interest in protecting his own money, is directly out of pocket. Accordingly, there should arguably be an even greater reluctance on the courts to interfere in an investigation into the possible misuse of public funds, since if the Courts are not looking out for the public interest, there is a danger that there might not be others with sufficient incentive to do so.

117. The public interest, in this case, in preventing the alleged misuse of funds regarding the University's pension scheme is illustrated by the fact that there has been an investigative programme by the national public broadcaster (RTÉ) on this issue, followed by the involvement of the Public Accounts Committee and followed by an investigation by the Office of the Comptroller and Auditor General.

118. Furthermore, when one is considering the public interest in such an investigation not being stopped, it is also a factor that Dr. Foy held a very senior position in the University, as the Director of Human Resources, which clearly increases the public interest and the interest of the University in establishing all relevant facts. It is understandable therefore why the University should be '*extremely concerned to establish all the relevant facts' and to look at how, if a misuse of funds is established, it 'might be avoided in future'.*

119. Another factor which would weigh in the balance of justice against the prevention of the investigation is that it is an investigation which is part of an incomplete disciplinary process. In this regard, it is clear that there is a reluctance for the courts to be involved in an incomplete disciplinary process. For example, Clarke J., as he then was, in *Carroll v. Dublin Bus* [2005] 4 I.R. 184 at p. 189 stated:

> "The final matter in respect of which the plaintiff seeks interlocutory relief concerns a disciplinary process that has been put in place by the defendant. It seems to me that a court should be reluctant to intervene and in particular to intervene at an interlocutory stage, in an as yet incomplete disciplinary process. To do so would be to invite a situation where recourse might well be had to the courts at many stages in the course of what would otherwise be a relatively straightforward and expeditious set of disciplinary procedures.
>
> There may, however, be exceptions to that general rule. Where an employer has, in clear and unequivocal terms, indicated that procedures will be followed which would be manifestly unfair there may be circumstances where it is appropriate for the court to intervene at that stage. This will be so, in particular, in cases where the

> degree of prejudice which the employee concerned would suffer in the event of an adverse finding at the particular stage in the process in respect of which complaint is made would be great and unlikely to be substantially reversed by a finding of a court made after the process had come to an end." (Emphasis added)

120. Similarly, Clarke J. (as he then was) in the Supreme Court case of *Rowland v. An Post* [2017] 1 I.R. 355 considered at p. 359 that:

> "the standard by reference to which a court should intervene, whether by injunction, declaration or any other means, in a process having a disciplinary or similar character, which is still ongoing."

and concluded at p. 361 that:

> "Under the test which I propose the court should only intervene in an ongoing process where it is *clear* that the process has gone irretrievably wrong."

121. Accordingly, if this matter were to be determined on the balance of justice, all of the foregoing matters are factors which, in this Court's view, weigh on the balance of justice in favour of the University not being prohibited from investigating an issue of considerable public interest regarding the alleged misuse of the money of a University which is funded by the taxpayer, particularly where it would involve this Court intervening in an ongoing disciplinary process.

Potential for irreparable reputational harm if the investigation proceeds?

122. Dr. Foy does however claim that in the balance of justice in favour of the grant of an interlocutory injunction is the fact that, if at the trial, the judge decides that the Settlement Letter does in fact prohibit the investigation, if he does not get an injunction now, Dr. Foy will have been unnecessarily exposed to potential *'irreparable reputational harm'* from the investigation.

123. As a general point, one assumes that what Dr. Foy is referring to here is reputational harm beyond the reputational harm, if any, Dr. Foy has suffered to date by agreeing to give up his job as Director of Human Resources, by leaving the employment of the University at 60, rather than 65 and by acknowledging that he had fallen short of the standards expected in the Human Resources Department of the University, all of which were contained in the Settlement Letter. In this regard, it is to be noted that these terms were not subject to a confidentiality clause (although one was sought by Dr. Foy) and so these terms had the potential to, and may have, damaged his reputation.

124. However, it is this Court's view that when deciding how '*matters are to be held most fairly pending a trial'* (per O'Donnell J. in *Merck Sharpe & Dohme* at para. 64), the balance of justice favours allowing the University to investigate this matter of serious concern and this takes precedence over Dr. Foy's concern that the investigation might cause him further reputational harm.

Promise to injunct any future disciplinary process - a factor in grant of injunction now?

125. Finally, Dr. Foy also claims that another factor which weighs in the balance of justice in favour of the grant of the injunction is the fact that if the investigation proceeds and it leads to a disciplinary hearing, Dr. Foy will '*almost certainly'* seek to injunct the progress of the disciplinary process. This legal submission was not in any way made as a threat, since it was expressed that granting the injunction now would save unnecessary '*expenditure of further time and financial resources'* involved in having Dr. Foy come back to Court to seek to injunct the disciplinary process which might arise from the investigation.

126. However, this Court does not believe that the promise, as distinct from threat, to injunct any disciplinary process in the future is a sufficient factor in the balance of justice to convince this Court to injunct the investigation now. This is because, as is clear from Clarke J.'s judgment in *Carroll v. Dublin Bus*, the courts are just as reluctant to grant an injunction during an incomplete *disciplinary* process, as they are to grant an injunction during an incomplete *investigation* process. Hence, any future injunction application, will have to surmount this reluctance of a court to intervene in an incomplete disciplinary process. Therefore, the promise by Dr. Foy that he will seek to injunct a disciplinary process in the future is not a sufficient reason to justify, on the balance of justice, the grant of an injunction now.

CONCLUSION

127. In conclusion, this Court refuses the injunction prohibiting the investigation of an alleged serious misuse of hundreds of thousands of euro belonging to a taxpayer-funded University, since Dr. Foy has failed to establish that he has a strong case that the investigation amounts to a breach of the Settlement Letter.

128. In addition, this Court concludes that, he has also failed to establish that there is a fair issue to be tried regarding this matter.

129. Finally, even if there was a fair issue to be tried, the balance of justice does not favour the granting of an injunction because*, inter alia,* the public interest in investigating the alleged misuse of taxpayers' funds take precedence over Dr. Foy's concerns about potential reputational damage which may arise from this investigation.

130. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. In case it is necessary for this Court to deal with final orders, this case will be put in for mention one week from the date of delivery of judgment, at 10.45 am.