IMPURE DEEDS: INVESTIGATIONS AND INJUNCTIONS

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Introduction

1. An investigation may sit on one end a spectrum which has dismissal at the other end. However, investigations contain their own sub-spectrum, well encapsulated in a passage from the decision of Clarke J. in the case of *Minnock v Irish Casing Company Ltd.*[2] in which he stated that:

> "....the range of preliminary enquiries that can be conducted may flow from one end of the scale where there is a pure investigation where no findings of any sort are made on behalf of the enquirer other than to determine whether there is sufficient evidence or materials to warrant a formal disciplinary process, and it seems clear on all the authorities that that type of pure investigation which does not involve any findings is not a matter to which the rules of natural justice apply and is not a matter therefore which the courts should interfere with …. At the other extreme there are inquiries which can make formal findings which may, for example, be part of a statutory process or the like in respect of which it does appear on the balance of authorities to be settled that the rules of natural justice do apply, and it may well be that in those circumstances the court would need to consider whether it is appropriate to intervene by making an interlocutory order where a case has been established that there has been a significant flaw in the process."[3]

2. As such, it is in fact somewhat misleading to consider investigations as some sort of entirely homogenous process. Rather, there may be pure investigations which are no more than information gathering exercises. The risk with these types of investigations is that what should be an information gathering exercise, which does not necessarily engage the rules of natural justice, develops into something more, and something more prejudicial,

[1] My thanks to Marguerite Bolger S.C., Michael Conlon S.C. and Tom Mallon B.L. for their practical insights into some of the cases under consideration in this paper. Any errors or inaccuracies are my own.

[2] [2007] 18 E.L.R. 229.

[3] In *Kelly v Minister for Agriculture* [2012] IEHC 558 Hedigan J. observed that "There is no fixed model for fair procedures that is applicable to all circumstances".

than that. At that point, the rules of natural justice may well come into play. Equally, there may be statutory or contractually mandated investigations which bring with them their own specific requirements and which may in and of themselves engage the rules of natural justice.

3. As such, applications to court for interlocutory relief tend to fall into one of two categories:

   i. where there is a real apprehension of bias, based on cogent evidence, in relation to preliminary enquiries or if what purports to be an investigation is in fact more than that, with serious consequences.
   ii. Where there is a contractual or statutory procedure provided for and where that procedure is ignored or not properly applied.

4. This paper looks at two recent cases, *Joyce v The Board of Management of Colaiste Iognaid*[4] and *Conway v Health Service Executive*[5] in which the courts granted interlocutory injunctions on the basis of a failure to follow what the courts found to be the appropriate procedures and, in the case of *Joyce*, where the court found that what should have been a preliminary enquiry essentially overreached itself.

Investigations: A Background Overview

5. The courts' willingness to intervene in relation to inquiries has evolved in tandem with their approach to other steps short of dismissal, such as suspension.[6] The 'older' mindset is captured by decisions such as that in the 1982 case of *Collins v Cork Co. V.E.C.*[7] (albeit in the specific context of addressing the extent to which office holders have some form of additional protection by virtue of their position). In that case, Murphy J. concluded that:[8]

[4] [2015] IEHC 809.
[5] [2016] IEHC 73
[6] See, for example, *Rajpal v Robinson* [2005] 3 I.R. 385 and *Wallace v Irish Aviation Authority* [2012] 2 I.L.R.M. 345.
[7] unreported, High Court, Murphy J., May 27, 1982.
[8] Having reviewed the decision of the Supreme Court in the *State (Duffy) v Minister for Defence* unreported, Supreme Court, May 9, 1979.

"the rules of natural justice have no application to enquiries, investigations or reports which are made at a stage when the suspension or removal of the office holder is not in contemplation. If the position was otherwise it seems to me that the supervision and administration of any organisation involving a number of office holders would be quite impossible."[9]

6. Even that *dictum* is somewhat caveated, however, when one looks at the idea that there is a carveout when a suspension or removal is in fact in contemplation.

7. That the courts would in fact intervene if appropriate is evident from the 1986 case of *Heneghan v The Western Regional Fisheries Board,*[10] in which Carroll J. granted a declaration to the Plaintiff on the basis that his contract required an investigation by the defendant's board, not by a delegate, and also on the basis of natural justice as a party to the dispute had acted as prosecutor and judge.

8. In his 1999 judgment in *Cassidy v Shannon Banquets,*[11] Budd J. made clear the importance of complying with the requirements of natural justice when conducting an investigation. Referencing, *inter alia,* the *Heneghan* case, he found that "The procedures and conduct of the investigation adopted by the Defendant were flawed and of basic unfairness for several reasons". These included:

   - There was a failure in respect of *audi alteram partem*
   - The plaintiff and his solicitor were led to believe that at the conclusion of the investigation the findings of the investigation and the report thereon would be made available to them and that an opportunity to respond and to make submissions thereon would be given before any decision would be made
   - There was a failure to comply with *nemo index in sua causa*.

[9] unreported, High Court, Murphy J., May 27, 1982.
[10] [1986] ILRM 225
[11] [2000] 11 E.L.R. 248.

9. That same year, in *Charlton v H.H. The Aga Khan's Studs Société Civile*,[12] Laffoy J. acknowledged that there was a fair issue to be tried in relation to whether the enquiry concerned was an investigation or a disciplinary process.

10. Thus by 1999, the courts had set out their stalls in relation to both compliance with contractual or statutory requirements and what might be termed overreaching in relation to investigations. Despite this, a series of applications have continued to come before the courts in relation to investigations.

11. Three cases from the mid-2000s provide very useful expositions of the courts to their approach to investigations. In *O'Brien v AON Insurance Managers (Dublin) Ltd.*[13] Clarke J. considered the extent to which a defective investigation could in effect be cured. In that case, an internal investigation had carried out into the plaintiff's conduct. The investigators made certain allegations of misconduct and recommended disciplinary proceedings. The plaintiff sought an interlocutory injunction to restrain those disciplinary proceedings, making a series of complaints concerning the procedures followed by the investigators. In refusing the relief sought, Clarke J. summarised the defendant company's argument as follows:

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

12. He held that even if there were infirmities in the methodology of the investigators, the recommendations did not amount to a sanction. As such, the rights to fair procedures did

[12] [1999] 10 E.L.R. 136.
[13] [2005] IEHC 3.

not arise.[14]

13. However, the nature and form of the investigation have to be considered on a case by case basis. This was a point made by Clarke J. in *O'Sullivan v Mercy Hospital Cork Ltd.*[15] The plaintiff sought interlocutory orders restraining the defendants from progressing with enquires and procedures relating to her employment. Clarke J. identified a scale or spectrum upon which investigations could be placed. At one end is "an entirely informal investigation carried out by an employer for the purposes of ascertaining whether there might be a basis for instituting disciplinary procedures." Borrowing an analogy used in his own decision in *O'Brien*, Clarke J. referred to a document produced in the course of such investigation as being like a book of evidence prepared in advance of a trial. At the other end of the spectrum are "statutory schemes which require a decision of a particular body as to the existence of a *prima facie* case as a pre-requisite to formal disciplinary proceedings." Such schemes, according to Clarke J., require the application of certain of the rules of natural justice. In *O'Sullivan*, Clarke J. held that:

> "The fact that there may be difficulties for the hospital in dealing with the legitimate interests of all of the parties involved which difficulties are significantly compounded by the fact that this process would appear to have gotten off to a most inauspicious start does not alter the fact that the plaintiff is entitled to have her rights and her reputation dealt with in accordance with law. Where she has, as I have found, made out an arguable case that what is intended will be in breach of those entitlements I am satisfied that the balance of convenience would favour the granting of an interlocutory injunction unless some particular and exceptional countervailing injustice that will occur by reason of a delay could be pointed to. I am not satisfied that any such countervailing factor has been established and in particular I am not so satisfied provided that the full hearing of this action can, as I intend it will, be made ready for hearing in a relatively short period of time."

[14] Applying *Morgan v Trinity College Dublin* [2003] 3 I.R. 157.
[15] [2005] IEHC 170.

14. Clarke J. adopted a similar approach in *Minnock v Irish Casing Co. Ltd.*[16] As explained by Clarke J. in *Minnock*, the authorities were settling upon a test to be applied in relation to investigations. He articulated that as being that:

> "…in the ordinary way, the court will not intervene necessarily in the course of a disciplinary process unless a clear case has been made out that there is a serious risk that the process is sufficiently flawed and incapable of being cured, that it might cause irreparable harm to the plaintiff if the process is permitted to continue."[17]

15. The problem identified by Clarke J. in the *Minnock* case was that the second defendant had purported to make findings and, as such, had not confined himself to collecting evidence and determining that there was a case to answer, thereby giving rise to formal disciplinary proceedings.

16. *O'Brien*, *O'Sullivan* and *Minnock* clearly define the broad contours of the law insofar as investigations are concerned. However, a number of other cases contain equally important *dicta*. *Giblin v Irish Life and Permanent Plc*.[18] involved a challenge to a purported dismissal. It was alleged that what had started as an investigation had mutated into a disciplinary proceedings and that in the circumstances, the investigation team could not continue its investigation, as to do so would contravene the applicable disciplinary procedures. The defendants in response charged that the plaintiff had failed to cooperate with the investigation process. In an important passage in relation to ability of businesses to conduct their own processes, Laffoy J. observed that:

> "...it seems to me that the Court must have regard to the fact that the defendant has regulatory and statutory responsibilities, as well as responsibilities to its customers, and that it is entitled to ensure that, where an investigation into the conduct of an employee is being conducted, the investigation is not stonewalled by the employee."

[16] [2007] 18 E.L.R. 229.
[17] [2007] 18 E.L.R. 229 at 231, referring to *O'Brien v AON Insurance Managers (Dublin) Ltd.* [2005] IEHC 3 and *Byrne v Shannon Foynes Port Company* unreported, High Court, Clarke J. February 2, 2007. As approved of by Laffoy J. in *McLoughlin v Setanta Insurance Services Ltd.* [2012] 23 E.L.R. 57.
[18] [2010] IEHC 36.

17. However, in saying that, Laffoy J. also observed that the evidence before the court did not suggest that the plaintiff and his legal advisers were dilatory in responding to the voluminous queries from the Investigation Team and that they had in fact co-operated with the investigation in as timely a fashion as was reasonably possible.

18. That case also contains an important practical remark by Laffoy J.:

> "It is not to be inferred from this decision that I consider that it is not appropriate for executives of the defendant who are involved in the human resources aspects of the defendant's management to conduct the type of investigation which was conducted in relation to the plaintiff. Nor is it to be inferred that I am of the view that the person or persons who conduct the "thorough investigation" to be conducted under para. (iv) of the Disciplinary Procedures in all cases should not be the decision maker as to whether the conduct of the employee being investigated warrants a serious sanction such as dismissal. A one stage inquisitorial process may be appropriate in many cases."[19]

19. However, on the facts before her, Laffoy J. concluded that "it seems to me that the management of the defendant and the members of the Investigation Team were manifestly confused as to the role and function of the Investigation Team at the various stages in the process."

20. She ultimately found, for that and other reasons, that "the plaintiff has a strong case that he was deprived of fair procedures and that a fair hearing was imperilled by the conduct of the Investigation Team"

21. A similar example of a flawed process is evident in the case of *McLoughlin v Setanta Insurance Services Ltd.*[20] Laffoy J., in granting an injunction, expressed concerns that averments made by a member of the defendant's H.R. team evidenced a situation whereby the defendant's efforts to establish the facts went beyond a "pure investigation."

[19] Not entirely unrelated is the approach of Peart J. in *Kelleher v An Post* [2013] IEHC 23, in which he noted that there was there is no requirement that an investigating staff member be "hermetically sealed" from the decision-maker throughout a disciplinary process.
[20] [2012] 23 E.L.R. 57.

Laffoy J. noted that comments in the affidavit of the investigator bore "more of the hallmark of a reasoned determination against the plaintiff than merely an outline of why the invocation of the disciplinary process against the plaintiff was necessary". She considered that this suggested prejudgment on the part of the person conducting the investigation.

22. Charleton J., writing extra-judicially, has expressed the same point in slightly different terms:

> "...there must not be a preliminary investigation which has the whole matter decided prior to the hearing itself. To have decisions made through an investigator, so that they are presented in effect at the hearing, is to turn the rules of natural justice upside down so that in the important phase, the plaintiff has no rights, while at the unimportant phase, when the decision is in effect already made, he or she has the right to make submissions."[21]

Aspects of Investigations[22]

23. For completeness, there is a sub-strand of cases which involve particular aspects of investigations. For example, in *Martin v The Nationwide Building Society*[23] the plaintiff had been suspended on pay, but for an unduly long period. In ordering reinstatement at the interlocutory stage (and thus, a case falling within the rubric of "exceptional circumstances"), Macken J. explained that the inconvenience to the defendant of initiating a proper and speedy investigation was far outweighed by the inconvenience to a plaintiff who does not know "what his future is or might be with the defendant."[24]

24. In *Cribbin v PLC Ingredients Ltd.*,[25] Laffoy J. refused the injunction sought on the basis that the application was "misconceived." This was in part due to the fact that the plaintiff

[21] Charleton, "Employment Injunctions: An Over-Loose Discretion" (2009) 9(2) J.S.I.J. 1.
[22] In the very specific context of judicial review, the recent case of *McKenna v Commissioner of An Garda Siochana* considers, *inter alia*, the question of the interrelationship between an investigation into conduct by GSOC, by a Board of Inquiry established pursuant to s. 25 of An Garda Síochána (Discipline) Regulations 2007 and a criminal trial which resulted, absent any evidence from the complainant, in an acquittal
[23] [2001] 1 I.R. 228.
[24] [2001] 1 I.R. 228 at 236.
[25] [2012] IEHC 390.

had sought, *inter alia*, an order in relation to an internal investigation "directing the reinstatement of the Investigator to complete the investigation."

25. An important point in relation to contractual entitlements was considered by Ryan J. in *Elmes v Vedanta Lisheen Mining Ltd*.[26] Ryan J. rejected the argument made on behalf of the plaintiffs that they were entitled to an independent investigation. He noted that not only was there no legal principle or authority to which the plaintiffs had been able to point to justify such an intervention by the court, it would be "very unusual" on an interlocutory motion to give such a mandatory injunction. As Ryan J. noted, it is for a company to determine how to manage its own affairs and it is not for a court to dictate that there should be an independent (or other sort) of inquiry. Equally, Ryan J. observed that a court should be "very slow" to interfere with the nomination of a person to investigate grievances.

Unfair Dismissal

26. It is also worth remembering that concerns about investigations inform not just wrongful dismissal cases, but also unfair dismissal claims. In *Smith v RSA Insurance*,[27] the EAT held that it was "satisfied that from a very early stage in the investigation or perhaps even before it, the claimant's fate was determined by the respondent. The respondent then went on a fact finding exercise to justify its predetermined decision."[28]

27. It is against that background that the cases of *Joyce v The Board of Management of Colaiste Iognaid*[29] and *Conway v Health Service Executive*[30] can be considered.

Case Studies: Joyce and Conway

Joyce v The Board of Management of Colaiste Iognaid[31]

[26][2014] IEHC 73.
[27] UD1673/2013
[28] This is consistent with the determination which is regularly a starting point for unfair dismissals claims, *Hennessy v Read & Write Shop Ltd* UD 192/1978, in which the EAT stated that a test of reasonableness should be applied, inter alia, to "the nature and extent of the enquiry carried out by the respondent prior to the decision to dismiss the claimant..."
[29] [2015] IEHC 809.
[30] [2016] IEHC 73

28. *Joyce* involved a successful application by the (non-teaching) principal of a secondary school in Galway to restrain the school from continuing a disciplinary procedure against her.

29. The salient facts were that a meeting of the school's board had been held on 3 March 2015 (the plaintiff had attended that meeting in her capacity as secretary to the board) and had tasked the chairperson, Mr. Cleary, to prepare a report into "major issues in the school". That report was presented to the board on 15 April 2015 (the "April report"). The April report contained a number of negative references to the principal, in relation to, *inter alia*, her dealings with staff, a loss of authority amongst students, poor relations with parents and disagreements with the chair. Given the content of the report, the plaintiff did not – albeit under protest - attend that meeting of 15 April. As Binchy J. noted, the minutes of the board meeting of 15 April

> "are very detailed and it is clear that the board had an in depth discussion of the issues raised by the April report many of which concerned the plaintiff."

30. In his judgment, Binchy J. then recorded the board's next steps:

> "at the end of the meeting, the board resolved to ask the chairperson to draft a report outlining the issues of concern in relation to the principal. The chairperson then distributed to the board the disciplinary procedure for principals and requested board members to read this document with great care. The minutes record that the chairperson said that*:* "he would be inviting the board in time to consider if a report might be presented to the principal in the context of the procedure." He wanted the board to be familiar with the procedures in advance of considering any such report and before making any judgment in the matter."

31. The chairperson duly prepared the report, which was given to the board for a special meeting on 14 May 2015. The plaintiff was not given a copy of the report. Indeed, she had not been interviewed as part of its compilation. It was appended to the minutes of that

[31] [2015] IEHC 809.

May meeting. On foot of the report, the board considered two potential avenues in relation to progressing matters: either to put the matters to the principal informally, outside of any formal procedure, or to proceed under the revised procedures for suspension and dismissal of principals section 24(3) of the Education Act 1998 (which it was agreed were the applicable procedures). No decision was reached at that point.

32. The board met again on 4 June, 2015 to consider the matter further. The minutes of this meeting record that the chairperson reminded the board that "the issue here was not to adjudicate on the allegations being made but to establish if there was a *prima facie* case to be answered by the principal and then to decide (if that was judged to be the case) how best to manage this."

33. As summarised by Binchy J.,

> "it is apparent that the board had considered, in some detail, allegations made against the principal at its meetings (from which the principal herself was excluded) on April 15th, May 14th and June 4th."

34. The report was finalised in mid July (the "July report") and sent to the principal, who received it in mid August. Her complaints were summarised by Binchy J. at para.24 of his judgment thus:

> "The plaintiff complains that the report furnished to her purports to make findings and draw conclusions in relation to the performance of her duties, and that many of the findings are deeply prejudicial and shocking to her; that they are very damaging to her personal and professional reputation; that they are unfair and unwarranted and that she will not be able to challenge the findings of the report as the findings have already been made. In short, she fears that there is no prospect that she will have a fair hearing from the board in view of what she describes as its findings to date (which have been made without the benefit of any input of the plaintiff). The plaintiff fears that her employment will be terminated without her having been afforded the opportunity to be heard in her own defence "within an objective forum free from any actual or perceived bias"."

35. The Plaintiff accordingly sought orders requiring the July report to be set aside and for the discontinuation of the disciplinary process.

36. Mr. Cleary, the chairperson, denied that any findings had been made. He made a distinction between his own views which had been formed by May 2015, and which informed the report produced at that stage, and distinguished these from the views of the board, which had been arrived at prior to April 2015. He pointed to those parts of the minutes that stressed that the board could not discuss the substance of the concerns in the report presented to the board and that the principal must be afforded an opportunity to respond.

37. It was also argued that the Plaintiff's application was premature in that the process which was underway would resolve all relevant matters and that that process would protect the Plaintiff's rights. Mr. Cleary also noted that he himself would have no future role in proceedings.

38. In response, the Plaintiff pointed out that the Defendant had reviewed various versions of the report and that this was outside the provisions of the applicable Circular. She noted that she had had no input into the investigation, which she should have had pursuant to those provisions. She also pointed to the absolute language of the report. Her complaints could be distilled down to three elements:

- the report of Mr. Cleary was manifestly more than a mere evidence gathering exercise and that, as a matter of fair procedures, the Plaintiff should have had input into it;
- specific findings of fact in respect of the performance of the Plaintiff in her position as principal had been made prior to a disciplinary hearing taking place, and these findings were collated entirely in the absence of fair procedures and natural justice
- the board had acted in contravention of the Department circular.

39. The Defendant argued that the chair, Mr. Cleary, had simply sought to establish whether the Plaintiff had a *prima facie* case to answer and that everything remained to be determined with the Plaintiff's full input. Reliance was also placed on board minutes

which recorded the board being reminded of the need to be familiar with the applicable disciplinary procedure and the need to afford the principal an opportunity to respond to the report. Again, a distinction was advanced as between the position of the chair and the board.

40. As observed by Binchy J. at para.80 of his judgment,

> "The July report itself contains a number of remarks or comments (set out in paragraphs 25-28) which by any standards could only be regarded as highly prejudicial to the plaintiff. A number of them are most definitely in the nature of conclusions and some are in the nature of rhetorical questions, begging only of an answer adverse to the plaintiff." He was satisfied that the enquiry went beyond a pure evidence-gathering type of enquiry.

41. Binchy J. ultimately found that the Plaintiff had made out a strong case that:

- The investigation had not proceeded in accordance with the applicable departmental circular;
- The July report contained not just statements of facts, but also findings and conclusions;
- If findings were in fact envisaged by the departmental circular, then the Plaintiff should have been afforded fair procedures and natural justice.

42. Binchy J. also held that damages would not be an adequate remedy due to reputational damage (which at this stage in the evolution of the jurisprudence in relation to employment injunctions is hardly controversial, although its direct application in relation to investigations is more recent) and that the balance of convenience lay in favour of granting the injunction sought, notwithstanding his acknowledgement that it was "clear that an investigation of this kind is very disruptive to the orderly running of the school and therefore requires urgent resolution from the point of view of the defendant."

Conway v Health Service Executive[32]

43. *Conway* involved a successful application to restrain the HSE from taking steps in an investigation process against five psychiatric nurses in Mayo, on foot of complaints made following a television documentary which purported to show scenes of abuse at Áras Attracta, a HSE-run facility for people with intellectual disabilities, where the five were employed.

44. The plaintiffs were the subject of disciplinary procedures which, in the words of Murphy J.:

> "are purportedly being carried out under two policies of the defendant, namely a Trust in Care Policy and a Disciplinary Procedure. In essence, the claim of the plaintiffs is that those disciplinary procedures form part of their conditions and terms of employment and that the defendant has breached those terms by appointing a disciplinary investigation team without the prior agreement of the plaintiffs and further by conducting parallel investigations under the Trust in Care Policy and the Disciplinary Procedure."

45. Murphy J. summarised the difference between the parties in the following terms:

> "The HSE accepts that it has not followed the procedures laid down in those documents [the Trust in Care Policy and the Disciplinary Procedure] and there lies the core of the dispute between the parties. The plaintiffs contend that the failure to follow the agreed procedures is a breach of their contractual rights and that the manner in which the HSE has in fact proceeded, is unlawful and denies them fair procedures. The HSE counter that its admitted breach is a mere technical procedural breach which is not a material interference with contractual rights nor a denial of fair procedures."

46. The first point considered, and rejected, by Murphy J. in her judgment was the argument made by the HSE that the plaintiffs had delayed in bringing their application.

[32] [2016] IEHC 73

47. Some time was spent by Murphy J. in her judgment as to whether the Trust in Care Policy and the Disciplinary Procedure of the defendant formed an integral part of the terms and conditions of the plaintiffs' employment or whether they were "in a sense, aspirational rather than mandatory." A related issue was the extent to which an investigation under the Trust in Care Policy had to precede a Disciplinary Procedure, or whether that procedure could be put in place prior to an investigation being concluded under the Trust in Care Policy. Both policies required that "an investigation will be conducted by person(s) who are acceptable to both parties". In relation to the latter point, Murphy J. rejected any contention that this was "aspirational", noting that:

> "The right of an individual, who is to be made subject to a disciplinary process, to have an input into the composition of the panel who are to conduct that investigation, is a right of real substance. In all such disciplinary investigations, there is a potential inequality of arms in that the power of the institution is ranged against the individual. The requirement that the investigation team be agreed between the parties redresses that potential imbalance and is a material safeguard for the right of the individual to have a fair, unbiased and impartial hearing. As such, the right to have an input into the composition of the investigation panel appears to the Court to be a core value of both the Trust in Care and the Disciplinary Procedures of the defendant."

48. Murphy J. noted her failure to understand

> "how the seriousness of the issues and the urgency of the matter required the defendant to depart from the established procedures. In fact, it appears to the Court that it is precisely where issues are serious and urgent that scrupulous adherence to agreed procedure should be observed"

and observed that:

> "the fact that the defendant's chosen panel may consist of eminent people to whom no reasonable person could object is irrelevant in circumstances where the plaintiffs agreement was not sought to their appointment."

49. On the facts, Murphy J. held that the two processes could not run in tandem, as it "gives rise to a serious risk of unfairness in circumstances where, in the midst of the investigation of one complaint, an individual may be required to respond to additional complaints."

50. She was also concerned about the risk of injustice and contravention of the principle of *nemo iudex in causa sua* on the basis that in her view, the investigation committee appeared to hold three roles simultaneously: "They are the gatherers and collators of the evidence, they are the complainants of abuse and they are the judges of whether or not the abuse occurred." As Murphy J. observed,

> "To have a Review Group collate and gather all relevant evidence strikes the Court as an extremely good idea and it would be entirely unobjectionable for such evidence as they gather to be furnished to the HSE to form the basis, if appropriate, of disciplinary proceedings against individual personnel. What, as already stated, does not appear to the Court to be wise, is to invest the evidence gatherers with the power to become complainants and thereafter to become the judges in respect of those complaints."

51. In considering the question of the balance of convenience, Murphy J. accepted that damage to reputation could not be compensated by damages.

Observations

52. The most basic observation is that *Joyce* and *Conway* do not necessarily break new ground in relation to the law concerning injunctions when investigations are involved. However, they reinforce much of what the courts had previously said and, taken with the corpus of law which preceded them, give rise to a number of important observations.

53. The first – and a key – feature of both *Joyce* and *Conway* is that they underline once again that if a specific procedure is provided for, be it in a contract or in an applicable circular or similar document, it must be adhered to. This fundamental point can often be overlooked, with the focus instead on the purity or impurity of the investigation and

whether the investigator has arrived at conclusions which prejudge or prejudice a disciplinary process.

54. A related point flows from this: employers need to be alert, not just to the contractual or statutory procedures which govern their own processes, but to whether there is – or might be - a parallel investigation involving, for example, a regulatory body or the Gardaí and whether there is any risk of crossover or contamination arising from that.

55. Another related point is a query about the relevance of S.I. No. 146/2000 - Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000, insofar as investigations are concerned; investigations merit a single reference at clause 12[33] and are otherwise approached within the rubric of the somewhat aspirational clause 6, which makes reference to complying with "the general principles of natural justice and fair procedures."

56. The second observation concerns the issue of a pure investigation. The orthodoxy is that in light of the established jurisprudence, investigators should in principle be confined to a pure investigation unless otherwise provided for in contract or statute. That is all well and good, but is not without its practical challenges. The dividing line between an investigation and something beyond that is not always entirely clear; in practical terms, it is very difficult to simply present facts without a natural tendency to give them weight or reach even a tentative view becoming apparent. The English case of *Chhabra v West London Mental Health NHS Trust*[34] offers a very useful discussion in that regard. In that case, the Supreme Court in London granted an injunction restraining an employer from proceeding to a disciplinary hearing. On the facts, however, the Court held, *inter alia*, that there had been a breach of both an express term of the applicable NHS disciplinary procedures and an implied contractual right to fairness. Three key practical points can be identified from the judgment:

[33] "An employee may be suspended on full pay pending the outcome of an investigation into an alleged breach of discipline".
[34] [2013] UKSC 80.

i. Lord Hodge JSC noted that "Where, as here, the practitioner admits that she has behaved in a certain way or where there is otherwise undisputed evidence, the case investigator can more readily make findings of fact."

ii. The charges proffered had been based upon a report by a case investigator, but the conclusions of her draft report had subsequently been altered and made more serious by a HR adviser. Lord Hodge JSC observed that:

> "I do not think that it is illegitimate for an employer, through its human resources department or a similar function, to assist a case investigator in the presentation of a report, for example to ensure that all necessary matters have been addressed and achieve clarity"

iii. The Supreme Court also accepted that there must be some element of flexibility. Lord Hodge JSC noted that:

> "It would introduce an unhelpful inflexibility into the procedures if (i) the case investigator were not able to report evidence of misconduct which was closely related to but not precisely within the terms of reference (as in the former secretary's allegations) or (ii) the case manager were to be limited to considering only the case investigator's findings of fact when deciding on further procedure. Similarly, it would be unduly restrictive to require the case manager to formulate the complaint for consideration by a conduct panel precisely in the terms of the case investigator's report. I do not interpret MHPS or the Trust's policies in D4 and D4A as being so inflexible or restrictive. The case manager has discretion in the formulation of the matters which are to go before a conduct panel, provided that they are based on the case investigator's report and the accompanying materials in appendices of the report, such as the records of witness interviews and statements. But the procedure does not envisage that the case manager can send to a conduct panel complaints which have not been considered by the case investigator or for which the case investigator has gathered no evidence."

57. If lawyers are credibly able to argue for days about, *inter alia*, whether an investigation has spilled beyond its boundaries, there must be a real concern about the extent to which a lay person can make the necessary assessments about the extent to which their role is circumscribed. Charleton J., writing in an extrajudicial capacity, has made the following observation in that regard:

> "Finally, some contracts may set up more elaborate provisions for natural justice, including precise details on notification, information gathering, and submissions. One thing that really has to borne in mind is that persons applying fairness of procedure principles are not necessarily very familiar with the intricacies of law. Some years ago, while in practice, I suggested a quite elaborate procedure, pretty similar to a civil trial, for dealing with a particular kind of unpleasant allegation. I was reminded by my solicitor that the person who had to make this decision was a person with no legal training. These procedures are second nature to us. They are certainly not second nature to others outside the legal world. Whereas it is right for the courts to say that a person to be dismissed on the grounds of misconduct should get a fair crack of the whip, it is certainly not right for us to be constantly pushing towards the notion that plenary hearings have to take place before an employer can take action..."

58. Related to this is the very real question in relation to resource and the way in which investigations might be approached in a small company compared to a large corporation. In *Cassidy v Shannon Banquets*[35] Budd J. noted that:

> "It was explained in evidence that the Defendant is a subsidiary of SFADCO which is a large state sponsored body. Ms Hughes as Human Resources Manager has a staff of about ten working with her. Different considerations apply as to what is a fair procedure in respect of investigation and adjudication in a small firm employing a few people and in a large organisation such as the Defendant with its integral relationship with SFADCO"

59. It is going too far to suggest that fair procedures and their application should be governed by the size of a company, but it is not unrealistic to state that the extent to which a

[35] [2000] 11 E.L.R. 248.

company may be able to comply with fair procedures might, at a minimum, be influenced by the size of the company. This is where the observations in *Chabbra* about the need for flexibility are of relevance.

60. The Defendant in *Joyce* made an interesting argument in relation to the fact that the chair, Mr. Cleary, had stated on affidavit that he had formed certain views and had prepared a report which reflected those views. It was argued that "this is permissible and that if the chairperson's words are to be construed as a determination on his part that there is a case to answer, this is entirely consistent with the case law relied upon by the defendant." On the facts, Binchy J. rejected this, saying that "there must be a strong case that they go far beyond the gathering of evidence or the formulation of allegations based upon the evidence." However, it does give rise to a broader question as to where the dividing line is drawn as between facts which go to there being a case to answer and a formulation of allegations. In practical terms, that can be a very difficult line to draw.

61. The third observation concerns what happens if an original investigation is found to be tainted; at that point, where does a company go. Does it restart and, if so, can it restart with the same people involved. That is a very practical question: if contract or regulation provides that certain functions or actions must be carried out by a prescribed person or body, and that person or body is implicated in the injunction application, what does that company then do if it does want to restart the process.

62. The fourth observation concerns the situation where, due to the potential gravity of an offence, a person is suspended with immediate effect and then an investigation commences. Can an investigation in such circumstances truly be divorced from the suspension in the background? In that regard, it is important to bear in mind the cautionary words of Noonan J. in *Bank of Ireland v Reilly*,[36] in which he cautioned that "...even a holding suspension ought not be undertaken lightly and only after full consideration of the necessity for it pending a full investigation of the conduct in question."

[36] [2015] IEHC 241

63. The fifth and final observation concerns a situation in which an investigation concludes that there is, in essence, no case to answer. Where does that leave, for example, the person who may have made a complaint?[37] If a complainant's complaint is rejected but that conclusion is reached without a more far reaching process than a simple fact gathering exercise, the complainant potentially suffers reputational damage. Too often, when considering the process of an investigation, the focus is entirely on the person under investigation without any particular regard to those around them.

64. Judges must be alert to ensuring that an employer is able to address concerns arising in relation to employees without recourse being had to the courts at every step. Equally, however, employers must be alive to how they conduct their investigations. Investigations must have regard to contractual and / or statutory procedures. The terms of reference of any investigation must be clear and investigators must understand where their authority begins and where it ends.

[37] This may well become an increasingly important issue in the context of whistleblowing and the Protected Disclosures Act 2014.