[2020] IEHC 368

THE HIGH COURT

DUBLIN CIRCUIT **COUNTY OF THE CITY OF DUBLIN**

[2019 No. 358 CA]

[Circuit Court 2019 No. 003561]

BETWEEN

JOHN CLARKE

PLAINTIFF/RESPONDENT

AND

CGI FOOD SERVICES LIMITED AND CGI HOLDING LIMITED

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 31st day of July, 2020

1. This appeal is apparently the first case in the High Court regarding interim relief under the Protected Disclosures Act 2014. The Circuit Court granted such relief, ordering the employer to maintain the employee's pay and benefits pending the determination of his complaint to the Workplace Relations Commission. The employer now appeals against that order.

Facts

2. The plaintiff commenced employment as group financial controller with the defendants in January 2017. According to his account, AIB sought details of payments to directors in September 2017 and the plaintiff raised concerns because the payments exceeded the limits agreed with the bank. He was instructed not to forward the necessary information.

3. He says that in January and February 2018 he raised further issues regarding personal spending on company credit cards, a false invoice, unvouched expenses, Revenue issues and other issues including in relation to food safety. He states that he fell out of favour, that a campaign of penalisation commenced, and that he was marginalised and ignored by directors and senior management. He says he was excluded from monthly management meetings and that his duties and responsibilities were whittled down. On 9th April, 2018 he says he was called to the boardroom and berated. Apparently, he offered his resignation, he says in a state of shock, but that was not accepted. While the employer claims that "*additional supports were put in place to assist*", he says that not only was this reassuring claim untrue, but on the contrary he was "*bombarded with a tsunami of emails*", on one day counting 1,746 emails in his inbox which he says was an attempt to further intimidate and pressure him.

4. It would appear that the first queries about the plaintiff's performance were only raised after the plaintiff started raising concerns about compliance with financial and health obligations. He submitted a formal grievance on 12th October, 2018 and says that his health declined as a result of his treatment. He claims that in November 2018 there was an inspection from the Department of Agriculture, Food and the Marine which resulted in certain restrictions being imposed on the company's operations. He was subjected to performance reviews in December 2018 and January, February and March 2019, which he describes as arbitrary and says that *"a purported investigation by a Mr. Barry Madden of 'Focus Capital Partners'"* then took place, leading to adverse findings.

5. He was suspended on 11th April, 2019 and was cut off from his work email from that date, although the employer seems to have continued to send material to, and surprisingly from, his email address after that. It is alleged that the employer then failed to provide access to relevant information, as clearly set out in an affidavit of the employee's solicitor of 10th July, 2019. The employee was subjected to a disciplinary hearing on 2nd May, 2019. He says that was to be chaired by a barrister, but the chair was later replaced by the same Mr. Madden who had made the adverse '*findings'* on 11th April, 2019.

6. The plaintiff was then dismissed on 15th May, 2019. On 29th May, 2019 he commenced Circuit Court proceedings by Equity Civil Bill headed in the matter of the Protected Disclosures Act 2014 seeking *inter alia* continuation of his contract of employment.

7. On 25th July, 2019 Her Honour Judge Kathryn Hutton granted a stay pending the hearing of the plaintiff's application to the Workplace Relations Commission; jurisdiction to do so was conferred by paras. 1 and 2 of Schedule 1 to the 2014 Act. That hearing was to have taken place on 2nd September, 2019 but was adjourned at the instance of the defendants. The application was then part-heard and further adjourned on 22nd October, 2019. It adjourned again from a listing on 3rd and 4th February, 2020 at the instance of the defendants and adjourned from a further listing on 17th and 18th February, 2020 because the plaintiff was unavailable. It was listed again on 23rd and 24th March, 2020 but adjourned due to the COVID-19 emergency.

8. As noted above, what is before the court is an appeal by the employer by way of rehearing of the Circuit Court interim order for a stay pending the determination of the application to the WRC. In that regard, I have received helpful submissions from Mr. Ercus Stewart S.C. (with Ms. Susan Jones B.L.) for the employee (the plaintiff/respondent) and from Mr. Peter Ward S.C. (with Ms. Rosemary Mallon B.L.) for the employer (the defendants/appellants).

Are the complaints protected disclosures?

9. The disclosures made by the plaintiff relate to various matters of concern, primarily under the headings of food safety and financial irregularities. While the employer claims that they amount to a "*rolling series of allegations*", the main thrust of the plaintiff's case is set out in his original affidavit. In fairness there is some further detail of the alleged wrong-doing by the company and its directors in later affidavits.

10. The complaints under the heading of food safety include issues relating to alleged serious shortcomings regarding storage and freezing of customer food products, such as failing to freeze products for the required period, or storage of food in areas where animal blood had leaked. The most vivid example is a complaint that a full container load of 22 pallets of pizza was allowed to thaw and was refrozen again and then sold, this being pizza specifically for consumption by children. When the matter was raised with Mr. Padraig O'Connell, Managing Director of the employer, the plaintiff alleges that Mr. O'Connell's response was "*you're not a kid so you have nothing to worry about*". As the plaintiff puts it at para. 10.5 of the submissions. "*despite the children's pizza thawing out for the entire*

day they were nevertheless dispatched for consumption by unsuspecting children and their parents, the dates or labels would not alert or warn their parents to the contrary."

11. While the employer relies on the affidavit of Ms. Mary Moynihan and while Mr. O'Connell flatly dismisses the complaints at paras. 23 and 27 of his affidavit, in an email which was sent by the company from the plaintiff's email address in his absence and without his knowledge on 15th May, 2019, the company appears to confirm the allegation that food was not properly frozen. Mr. O'Connell says at para. 31 of his original affidavit that food safety wasn't an issue, but the email of 15th May, 2019 talks about product *"classed as downgrade or pet food"* as a result of the problem - hardly appropriate terms if food safety was not an issue.

12. The employer's written submissions at para. 50 contend that "*the plaintiff's allegations in respect of pizza being incorrectly stored [do] not amount to a protected disclosure*". But leaving aside the minimising characterisation of a health and safety issue as a mere storage issue, the plaintiff's communications fall well within the scope of protected disclosures, a point that may become clearer when we examine the issue further below.

13. Under the heading of financial irregularities, the plaintiff raised issues in relation to failure to comply with VAT and Revenue obligations and other financial irregularities. In particular, he says that an invoice was presented to the company from an entity called Celuplast Conservatory Roofs Ltd, but which in reality related to accountancy work privately completed by an associate of Mr Patrick Burke, a director of the employer. The employer replies that the invoice was in fact paid on behalf of the employer by the plaintiff, but that in itself doesn't mean that it has to be accepted as regular. The plaintiff's contention in that regard is that he was instructed to pay it. In subsequent affidavits, more detail is provided, such as that Mr. Padraig O'Connell used company monies to pay for electrical work on his home, expenses for his private properties, driveway resurfacing works, cash withdrawals on the company credit card and personal holidays. The plaintiff says that VAT was incorrectly reclaimed on personal expenses and diesel was supplied to directors their family and employees with no benefit in kind being recorded. For example, he says that company money was used for one relative of Padraig O'Connell to do a 13-week course in Ballymaloe, as well as paying her phone bill, that Padraig O'Connell's wife was paid €4,000 a month, inferentially without doing any or any commensurate work, and that another associate's wife was on the payroll without doing any work at all.

14. The employer's argument in para. 35 of written submissions is that "*the financial matters which the plaintiff attempts to portray as constituting protected disclosures do not fall within the definition of protected disclosures [for] the purpose of the Act*". The submissions go on to say at para. 38 "*under s. 5(5) of the Act a matter is not a relevant wrongdoing if it is a matter which it is the function of the plaintiff to detect or investigate*". That unfortunately is a complete misquotation of s. 5(5) which states that "*A matter is not a relevant wrongdoing if it is a matter which it is the function of the worker or the worker's employer to detect, investigate or prosecute and does not consist*

of or involve an act or omission on the part of the employer." The employer's submission totally ignores the crucial word "*and*", thus fundamentally mischaracterising the meaning of the provision. Where a person such as a group financial controller discovers fraud or wrongdoing *by the employer*, that is a relevant wrongdoing; and drawing attention to that is making a protected disclosure.

15. The employer's legal submission attempts to place reliance on the decision of the Labour Court in *Donegal County Council v. Carr* [PDD161] (Labour Court, 7th June, 2016), but that attempt is misconceived. The wrongdoing there was by *other employees*, not by the employer, so the Labour Court naturally found that the complaints "*related to matters other than an alleged omission of the employer*". There is no analogy with the present case. The employer's written submissions here mischaracterise that decision as one based on the fact that the complaint was made pursuant to the discharge of the employee's duties, and go on to say: "*as such the court determined that no protected disclosures were made within the meaning of the Act*". However once again, that totally omits the fact that there are two requirements (an investigative function and misconduct other than by the employer), which must both be present to exclude something from the definition of relevant wrongdoing, and which are joined by the word "*and*". In *Carr* the Labour Court not only addressed the duty to investigate, but also dealt with the second requirement as to whose wrongdoing was at issue, as noted above. Merely finding that the complaint was made pursuant to the discharge of the employee's duties, as the employer's submission here wrongly implies, would not be sufficient in itself to exclude it from the definition of a protected disclosure. Nor did the Labour Court find that, as incorrectly suggested by the employer here. The wrongdoing would also have to be other than on the part of the employer.

Whether an order continuing the *status quo* is appropriate?

16. The employer's submissions major on the claim that the plaintiff didn't make any mention of protected disclosures until after the dismissal. That may be so, and will no doubt be explored further at the WRC hearing, but that's not automatically crucial. There is no necessity for an individual employee to consider the situation in statutory terms until such time as adverse consequences such as dismissal materialise. Indeed it could be counterproductive to do so. The breakdown of an employment relationship, like that of any relationship, is not necessarily a linear process with entirely logical and rational steps on all sides. There can be vacillation, mixed feelings, false dawns, reconciliations and setbacks; and sometimes it is only after the person picks themselves up off the ground, if even then, that they start to figure out what actually happened.

17. The employer submits that *"the plaintiff has attempted to retrospectively characterise matters which are not and cannot be protected disclosures as such in an attempt to avail of the protection provided by s.11 of the 2014 Act"*, but that isn't how such situations automatically evolve in practice. One can make a protected disclosure without invoking the 2014 Act or without using the language of "*protected disclosure*". It is often only after the victimisation, dismissal or other adverse consequence arrives that one has to "*retrospectively*" figure out what really happened and analyse it in the statutory language.

There is nothing wrong with that process and it is certainly different from "*retrospectively*" creating a case from nothing.

18. Overall it is likely that there are substantial grounds for contending that communications that constituted protected disclosures were engaged in by the plaintiff insofar as he drew the attention of the employer to various potential illegalities and wrongdoings. That in principle is making a protected disclosure: see the definition in s. 6(1)(a).

19. The employer claims that the dismissal of the plaintiff was due to performance issues, but it is also clear that the complaint about performance only began after the plaintiff started raising awkward questions. Unfortunately, it is not difficult to "*performance manage"* someone out of a job. Such a process is manipulative, of course, and insofar as it impacts on an employee's wellbeing it is bullying and abusive; but decision-makers have to be alive as to how relatively easy it is to remove somebody from a position for ostensibly plausible reasons. On the other side of the equation, it is possible for someone who is dismissed for legitimate reasons to claim that removal was due to some improper purpose, or to characterise the imposition of legitimately high standards as the infliction of stress and bullying. The upshot really is that the court must look beyond mere face value on either side.

20. The evidence here establishes substantial grounds for contending that the performance issues were an attempt, as put in submissions by the employee, "*to dress up the dismissal as a performance related dismissal*". As put by Lord Wilson in *Royal Mail Group Ltd. v. Jhuti* [2019] UKSC 55 at para. 60, "*If a person in the hierarchy of responsibility above the employee … determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination."*

21. At the stage of the interim stay, I amn't making a final finding on any of these matters, but simply holding that it is likely that there are substantial grounds for contending that the dismissal results wholly or mainly from the employee having made a protected disclosure. In particular, factors supporting the argument that the performance issue was a device include the following:

    (i). it seems to have only emerged after the start of awkward questions by the plaintiff;

    (ii). it became quite relentless with monthly meetings;

    (iii). the plaintiff was summarily dismissed as if guilty of gross misconduct, as opposed to the procedure for dismissal for suboptimal performance; thus there was no oral or written warning or final written warning;

    (iv). the proposal to have an independent barrister as chair of the disciplinary hearing was not followed through;

(v). the employer failed to have an independent chair, appointing the same person as had already made findings against the plaintiff – a process that the plaintiff in submissions describes by saying *"they did not even see their own 'window dressing' through",* and engaged in unhelpful correspondence in advance of the disciplinary meeting in which relevant material was apparently not provided*;*

(vi). a lack of affidavits from those involved in the disciplinary meetings;

(vii). a lack of proper teasing out of the issues at the disciplinary meeting as might have been expected if it was a genuine process – the evidence from the employee's side is that no questions were asked; and

(viii). the lack of an answer to the question as to who made the decision to dismiss the plaintiff.

22. While the employer's submissions make much of the distinction between grounds and substantial grounds, it's clear that substantial grounds have been made out here as a matter of likelihood. While the submissions also major on the distinction between information and allegations (see *Baranya v. Rosderra Irish Meats Group Ltd* [2020] IEHC 56 (Unreported, High Court, O'Regan J., 13th February, 2020)), the plaintiff's complaints were sufficiently informational in nature and not merely allegations unharnessed from any factual point.

23. Thus, on the evidence before the court, it has been established that it is likely that there are substantial grounds for contending that the dismissal results wholly or mainly from the employee having made a protected disclosure. The balance of justice favours a stay in any event. Where the court so finds, there is an unnecessarily laborious and cumbersome procedure in sch. 1, para. 2 of the 2014 Act to ask what the employer is going to do about the matter, but that has already been gone through in the Circuit Court and it is accepted by both sides that the same position arises and that the court can simply proceed to the appropriate order.

Order

24. Accordingly:

(i). I will dismiss the appeal and affirm the order of Her Honour Judge Hutton;

(ii). for clarity, it will be expressly ordered that the defendants must continue the employee's contract of employment for the purposes of pay and benefits from the date of termination of the employment until the final determination of the claim before the Workplace Relations Commission and any appeal therefrom (including either under ss. 44 or 46 of the 2015 Act); and

(iii). while further light may be shed on the merits of the plaintiff's disclosures at the WRC hearing and those merits do not fall to be determined in the present application, I can say that that those complaints have at least some evidential support which could warrant further investigation, so without in any way pre-

empting the company's defence, it would be in the public interest if I direct the plaintiff's solicitors to transmit a copy of the judgment and all papers to the Department of Agriculture, Food and the Marine for whatever food safety investigations they consider appropriate and to the Revenue Commissioners for whatever investigations they consider appropriate.