

ALLIED Irish Bank v Lupton

16



THE HIGH COURT  
1980 No. 9634P

BETWEEN

ALLIED IRISH BANKS LIMITED

PLAINTIFFS

AND

JOHN DAMIEN LUPTON

DEFENDANT

Judgment of Mr. Justice Murphy delivered the 21st day of October, 1981.

In these proceedings the Plaintiffs - Allied Irish Banks Limited - claim a declaration that the Defendant Mr. Lupton, was effectively and validly dismissed from the employment of the Plaintiffs with effect from the 21st October, 1980. The Defendant denies that the Plaintiffs are entitled to that relief and in turn counterclaims a declaration that his purported dismissal was ultra vires and invalid. In addition he claims what I would describe as certain introductory declarations.

The Defendant was employed in December 1966 by the Munster & Leinster Bank Limited the terms -- or some of the terms - of his employment are set out in a letter to him dated the 8th December 1966. It was not disputed that these terms applied to the Defendant's employment subsequent to the bank amalgamation which resulted in the formation of the Plaintiff company. The terms of employment expressly referred to in that letter include the

following:-

"You will be liable to transfer to any branch of the bank at the discretion of the board ----".

In 1979 the Defendant was employed at the Plaintiffs' branch in Rush, Co. Dublin. He, and apparently other officials, became involved in a significant disagreement with the then Manager of that branch. In my view it is not necessary for the purpose of these proceedings to explore the details of that dispute or the manner in which it was resolved. It is sufficient to note that the Plaintiffs for their part appear to have complied with the appropriate procedures and certainly there was no suggestion that the members of the Irish Bank Officials Association (I.B.O.A.) who represented Mr. Lupton in the application of those procedures challenged the conduct of the Plaintiffs with regard to the manner in which they invoked or applied the procedures. On the other hand it is important to record that at the conclusion of what has been described as "the Rush incident" and the investigations arising from it that Mr. Lupton believed that he had been unfairly treated by at least one official of the bank and I think it is clear that he suspected that there might be an animus against him by that and perhaps other officials of the Plaintiffs.

On the 6th of February 1980 Mr. Ward (then General Manager Personnel) of the Plaintiffs notified the Defendant that he was being appointed to the

- 3 -

Plaintiffs Drogheda branch "as a temporary location pending your permanent placement". That letter and a confirmation of the 14th of February 1980 included a very specific and formal warning to the Defendant that any repetition by him of insubordinate or unofficial action of the kind previously taken by him would warrant his dismissal from the service of the bank.

The Defendant duly took up his position in the Drogheda branch. He had previously served in Drogheda and he was apparently happy to serve there again. As he was at the time engaged to be married it appears that he obtained a bank loan to purchase and did in fact purchase a dwellinghouse in Julianstown not far from his place of employment. His manager in Drogheda was Mr. Dolan. Mr. Lupton for his part felt that he had a good relationship with his manager and the official evaluation by Mr. Dolan and indeed by Mr. Guinane then Personnel Officer and now General Manager Personnel in succession to Mr. Ward, was that his conduct and work was satisfactory. Sometime after he had taken up his duties in Drogheda Mr. Lupton was interviewed by Mr. Guinane. This interview took place in the ordinary course of Mr. Guinane's duties of calling upon the branches in his area and familiarising himself with the needs, interests and qualifications of the various officials. Of this meeting Mr. Lupton gave evidence to the effect that Mr. Guinane led him to believe that he would remain at the Drogheda branch. This Mr. Guinane disputed. It was

not within his authority to say what officials would remain in or be posted to any particular branch and effectively the only assurance that he gave to Mr. Lupton was that his conduct was satisfactory. I am satisfied that Mr. Guinane did not give any assurance to Mr. Lupton as to his continued engagement at Drogheda. On the 6th of June, 1980 Mr. Guinane wrote to Mr. Lupton care of the Drogheda branch informing him that he had been transferred to the Plaintiffs' Athy branch where he was to report for duty on Tuesday the 1st of July, 1980. On the same day, or at any rate before that letter was posted, Mr. Hovenden who was the General Manager of the eastern region of the Plaintiff bank and who was known to the Defendant phoned him as a matter of courtesy to tell him of the transfer. Of this telephone conversation Mr. Lupton in his evidence said that Mr. Hovenden had told him in relation to the transfer that he was being very well treated by the bank as there were other people who would like to have him transferred further away. This piece of evidence was of considerable importance as an essential part of the Defendant's counterclaim is that the decision to transfer him to Athy was an effort to victimise him. In his own words he was being "gutted". It was submitted that this was the appropriate inference to draw from the conclusion of the Rush incident; the assurances said to have been given by Mr. Guinane and the evidence of the telephone conversation with Mr. Hovenden. As that

particular evidence had not been put to Mr. Hovenden in the course of his cross-examination he was recalled and swore that he had no recollection of any such statement being made in the course of his telephone conversation with Mr. Lupton but more particularly that that was not the basis on which the transfer to Athy had been determined. In relation to this crucial aspect of the matter Mr. Hovenden swore that he himself in conjunction with the Regional Manager for Kilkenny put a great deal of work into finding a suitable place for Mr. Lupton: that he satisfied himself that the Athy branch was suitable and would give Mr. Lupton every opportunity of promoting his career and that was the basis on which the decision was made. He denied that there was any effort made to have Mr. Lupton transferred to a more remote or unsuitable branch. I have no hesitation in accepting in full the evidence of Mr. Hovenden on this and indeed on every other aspect of the case.

In the same context it is proper to make reference to the fact that the transfer to Athy might - indeed would - involve Mr. Lupton in selling the house which he had purchased in the Drogheda area. Furthermore I accept that the bank - through Mr. Hovenden - indicated that he would not be facilitated in purchasing a house in the Athy area. On the other hand Mr. Hovenden explained - and as I have already said I accept his evidence - to Mr. Lupton that as an unmarried

man - his engagement to marry having been called off - he would not be entitled to a house loan with only 15 years of service but that some other provision might be made for him.

I am satisfied that the Defendant has not discharged the onus on him to establish that the decision to transfer him from his temporary location in Drogheda to Athy was made as a result of the wish on the part of the bank or any official in it to victimise the Defendant. Indeed it is appropriate to observe that the Plaintiffs called to give evidence those witnesses involved in the decision making process partly perhaps to negative the allegation of victimisation but also, it would appear, to afford the Defendant the unusual opportunity of cross-examining the bank's witnesses as to the motives which they possessed or the factors which influenced the decision. Even with that advantage and of course the opportunity, if the Defendant thought fit, of discovering documents in the possession of the bank the allegation of victimisation in my view wholly fails. Indeed to the contrary the evidence of Mr. Hovenden in particular and also that of Mr. Guinane indicates a commendable degree of sympathy and compassion on the part of the officials of the bank concerned in the permanent placement of the Defendant in the bank system at that time.

In fact an unintended moratorium occurred in the implementation of the

Defendant's transfer to Athy. As he informed Mr. Hovenden in the course of their telephone conversation on the 6th of June Mr. Lupton was having some problems with his back and had arranged to enter hospital which he did shortly after the date of the phonecall. He was apparently detained in hospital for 3 weeks but remained away from the bank on what was described "as certified sick-leave" until the 20th of October. Mr. Lupton explained that in relation to the decision to transfer him to Athy Mr. Hovenden had said, in effect, that the decision to transfer him was final and not open to review but that he Mr. Hovenden would see Mr. Lupton at any time when he returned after his sick leave. It was as a result of that statement, Mr. Lupton, explained, that he did not seek to contact Mr. Hovenden before the middle of October 1980. At that stage Mr. Lupton says he phoned Mr. Hovenden on two occasions. Apparently he was told by Mr. Hovenden's secretary that he was away. That statement coincides with Mr. Hovenden's own evidence that he was on annual leave at the time but apparently Mr. Hovenden's secretary contacted him and stated again that the decision to transfer him to Athy stood. Even on his own account of what took place it is hard to describe this as a refusal by Mr. Hovenden to see Mr. Lupton but certainly it is true that Mr. Hovenden saw the decision to transfer Mr. Lupton to Athy as being final and not open to further discussion or debate.

The matter then passes to certain events which occurred in the three days commencing on the 20th of October, 1980.

On the 20th of October, 1980 Mr. Lupton returned to the Drogheda branch. He informed the manager, Mr. Dolan, who had been aware of the decision in the previous June to transfer Mr. Lupton, that he was not going to Athy. It is not disputed that Mr. Dolan was taken aback by this statement: that he phoned the Personnel Department of the bank: that in pursuance of the advice which he received he told Mr. Lupton to proceed forthwith to Athy and that Mr. Lupton for his part said he was not prepared to go. As a result of that interchange of views Mr. Dolan received and transmitted to Mr. Lupton instructions to the effect that Mr. Lupton was to be suspended if he did not go to Athy. The only answer that Mr. Lupton made to this was "I'll see". However, Mr. Lupton did not leave the bank but took up his place at a desk there. On the following day, the 21st of October, 1980, Mr. Lupton returned to the bank. He asked Mr. Dolan to put the matter of his suspension in writing and this Mr. Dolan did with the assistance of other officials of the bank. The resulting letter is dated the 21st of October, 1980. That letter after referring to the warnings given to Mr. Lupton earlier in the year went on to state as follows:-

"I am further directed to refer to your refusal of yesterday to obey the bank's orders and instructions relative to your transfer to Athy which



resulted in your being suspended from duty until further notice".

The letter further provided that in the event of Mr. Lupton taking up his position in Athy that the suspension would be lifted and then went on to indicate the consequences of refusal in the following terms:-

"Should you continue to refuse to proceed on transfer to Athy as instructed, such refusal will constitute a fundamental breach of contract on your part which will result in your instant dismissal from the service of the bank".

On the 22nd of October, 1980 Mr. Lupton returned once more to the bank when - at 9.30 a.m. - he delivered to the manager his reply to the manager's letter in which he explained that his refusal to comply with the decision to transfer him to Athy was because he was being victimised by the bank. Mr. Lupton in his letter went on to seek clarification of the final paragraph of Mr. Dolan's letter. Having regard to the distraction and disruption which arose from Mr. Lupton's insistence on attending at the Drogheda branch from which he had been transferred Mr. Hovenden was recalled from his annual leave and was present in the branch on the 22nd of October to deal with the situation. As Mr. Lupton was for the third successive day categorically refusing to transfer to the Athy branch and insisting on his right to attend at the Drogheda branch in his capacity as an official engaged there notwithstanding the warnings which

had been communicated to him by Mr. Dolan verbally and in writing, Mr. Hovenden by his letter of the 22nd of October, 1980 notified Mr. Lupton of his dismissal from the services of the bank with effect from the 21st of October, 1980. That letter was not drafted by Mr. Hovenden. In fact it was drafted by or with the assistance of the Law Department of the bank but I cannot see that any importance is to be attached to that fact. Indeed I would be surprised if the position were otherwise.

As appears in the affidavit of Mr. Hovenden - which by consent was treated as part of his direct evidence - Mr. Lupton returned to the bank in the days and weeks following the incidents aforesaid and not only entered the bank itself but gained access to the private area of the banking hall by vaulting over the bank counter. Towards the end of the month of October it appears that he arranged to have his actions in relation to the occupation of the bank recorded by the newspaper journalists and a camera crew from Radio Telefis Eireann. The only relevance of the actions of the Defendant in that context is that they apparently induced the bank to institute these proceedings on the 30th of October, 1980 to claim, among other things, an injunction restraining the Defendant from occupying the bank's premises. Following upon the institution of the proceedings various interlocutory applications were brought following on which the Defendant desisted from attending at the premises.

In the foregoing circumstances it was submitted on behalf of the

Defendant as follows:-

- (1) that it was an implied term of the Defendant's contract of employment with the Plaintiff that any decision of the Plaintiff to transfer the Defendant from one branch to another would be made reasonably and properly. This argument had two branches first, that the decision would be arrived at honestly and fairly in pursuit of the proper interests of the Plaintiff and not for any improper motive and secondly that in reaching such a decision the Plaintiff was bound to give the official concerned an opportunity of being heard.

I have already found as a fact that the decision of the bank to transfer Mr. Lupton to their Athy branch was not inspired by any animus towards Mr. Lupton but was reached with a view to promoting his career prospects. Accordingly that argument cannot in my view succeed but in expressing that view I should make it clear that I do not wish to be taken as accepting that a decision to transfer for an improper motive would necessarily constitute a breach of contract. If such an abuse were to occur it would no doubt give an official grounds for complaint and result in a grievance which no doubt his Trade Union should and would pursue but it does not necessarily

follow that it would likewise entail a breach of contract.

I am not convinced either that there is any justification to infer an intention on behalf of either party that the decision to transfer should be subject to the employees right to be heard in respect of the decision generally or the particular location chosen on his behalf. In the present case the terms of Mr. Lupton's appointment clearly provided that his employment rendered him liable to such a transfer. No doubt this factor was taken into account by Mr. Lupton when seeking the employment and by the bank when determining or negotiating rates of remuneration. Furthermore the almost invariable practice has been to exclude any form of representation by the employee with regard to an intended transfer; less still any right to be heard in regard thereto. The system as applied involves the bank and its Personnel Officers in building up a fund of knowledge with regard to the needs and circumstances of each official on the one hand and the possible vacancies which would afford the best opportunity of meeting those needs and at the same time promoting the best interests of the bank. As I have said this is what was done in the present case and the evidence is that it is the system adopted in virtually every other case. I have not

been referred to any authority which would suggest that a right to be heard arises in these circumstances.

- (2) That in relation to the decision of the bank to dismiss Mr. Lupton he was entitled to be heard. Whilst it was not disputed that Mr. Lupton was an employee rather than an officer it was contended that the rules of natural and constitutional justice applied in relation to the decision to dismiss him. The decision of the Supreme Court in Glover and B.L.N. Limited 1973 I.R. 388 (and more particularly the passage at page 425) was invoked in support of this contention. I am unable to accept that that decision is authority for such a proposition. It seems to me that the Judgment of Walsh J. did not equate the position of an employee with that of an officer. What the Learned Judge pointed out was that the contract of employment of the Plaintiff in that case having provided in its terms that certain matters would be determined by the Board of Directors of the Plaintiff company and for that purpose an enquiry would be necessary it was then an implied term of that agreement that such an enquiry would be fairly conducted and the determination made thereat fairly made. Clearly the terms of employment between the Plaintiffs and the Defendant in the present

case in so far as they are enshrined in the letter of appointment dated the 6th of December, 1966 do not provide for any such enquiry. However for reasons hereinafter appearing it is unnecessary for me to express any opinions in this issue.

- (3) That the Plaintiff failed to comply with the requirements of the grievance and disciplinary procedure contained in the agreement between the bank's staff relations committee and the I.B.O.A. dated the 28th of June, 1979 (the 1979 Agreement) and that accordingly the decision to dismiss the Defendant was invalid. It might have been open to question whether the grievance and disciplinary procedure aforesaid formed part of the contract of employment between the Plaintiff and the Defendant. Indeed perhaps it could be argued that the agreement setting up this procedure was not intended to create legal obligations. The document is in its terms an agreement between the particular association and a number of different employers. Prima facie, therefore, it gives rights to each of the parties thereto as against the other of them and does not confer contractual rights on other parties. Moreover it might be assumed that the sanction intended for a breach of or a departure from the agreed procedures was the instigation of appropriate industrial action rather than the assertion of legal rights. However it is unnecessary for me to

reach any conclusion on this aspect of the matter because the Plaintiffs through their Counsel agreed by way of concession to the Defendant herein that the grievance and disciplinary procedures and the agreement in relation thereto formed part of the Defendant's contract of employment with the Plaintiff bank.

The 1979 Agreement defines the expression "disciplinary action" so as to include "dismissal" and then goes on to provide that where it is decided to take disciplinary action against an official that the official should be told of his offence and the disciplinary action proposed. The agreement then goes on to lay down an impressive hearing and appellate procedure. First the official may make oral or written representations to the bank after which the bank must review the nature of the intended disciplinary action. Next the official is entitled to appeal to the Chief Executive or other senior executive nominated by him and finally there is an appeal to "an independent person" agreed between the bank and the I.B.O.A.

Whilst the bank warned the Defendant very clearly as to the consequences of his conduct in refusing to report to Athy and disobeying the proper directions of his superiors it is clear that neither party purported to invoke the provisions of the grievance

and disciplinary procedure. The Plaintiffs assert that this was a matter for the Defendant and not for the bank.

It seems to me, however, that there is a more fundamental problem to be explored in relation to the adoption or otherwise of the disciplinary procedures.

The range of actions which the employer may take by way of disciplinary measure is expressly restricted by paragraph 1 of the disciplinary procedure clauses which provides as follows;

"The bank officials shall not be subject to summary dismissal. Summary action, such as immediate suspension from duty, may be taken where the circumstances warrant it, but such action does not preclude an official from bringing an appeal as provided for in paragraph 4 below"

The opening sentence of that paragraph expressly excludes summary dismissal as a remedy available to the bank against any bank official. It was argued on behalf of the Plaintiffs that the positive entitlement to take summary action "where circumstances warrant it" extended to summary dismissal. In support of this argument the Plaintiffs sought to rely on a document described as Industrial Relations Handbook (Allied Irish Banks Limited) which does unquestionably refer to "circumstances justifying summary dismissal". However, the Defendant had sought to introduce that document in evidence and



this had been rightly objected to on the grounds that there was no evidence that it had been executed and indeed in its terms it appeared that it applied only to officials who took up employment with the Plaintiffs after the enactment of the Unfair Dismissals Act 1977. Furthermore it would seem that the statement in the Industrial Relations Handbook emanated from a release made by the Plaintiffs themselves and not any agreement with the I.B.O.A. As it was not in pari materia with the 1979 agreement it would have been of little assistance in construing its terms.

It seems to me that the exclusion of the right of the bank to dismiss its officials in a summary manner is expressed in unequivocal terms. It is hardly conceivable that the parties to this agreement having thus expressed their conclusion on the subject of summary dismissal restored that option in the next following sentence. Furthermore it seems to me to be significant that in defining "Disciplinary Actions" the draftsman included the word "dismissal" and not the words "summary dismissal". It would seem, therefore, that the contract between the Plaintiffs and the Defendant incorporated a term which expressly precluded summary dismissal in any and every circumstance. Certainly officials may be suspended in an appropriate case and there is no doubt that they are liable to dismissal in the ordinary way but this, like any other disciplinary action, is subject to the rights of hearing and appeal provided for in the disciplinary procedures.

It was contended on behalf of the Plaintiffs that the Defendant had by his own conduct terminated the contract of employment. Whilst I accept without any hesitation that the Defendant's conduct in refusing to accept the transfer to Athy and insisting upon remaining on the Plaintiffs premises in Drogheda when he had been requested to leave was a gross breach of contract I could not accept as a matter of law that any party could by his own wrongdoing or breach bring to an end a contract to which he is a party. The effect of the breach by one party is to confer on the other party, the innocent party, the right in an appropriate case and by appropriate means to terminate the contractual relationship.

In the circumstances the Plaintiffs are not in my view entitled to a declaration that the Defendant's contract of employment with the Plaintiffs has been terminated.

On the other hand I am satisfied that the Plaintiffs are entitled to prevent the Defendant from entering upon the Drogheda premises - or indeed any other premises of the Plaintiffs - in his capacity as an employee of the Plaintiffs during the course of his suspension. In fact no argument was addressed to the Court in relation to this aspect of the matter but I do not understand the Defendant to challenge the fact that he was indeed suspended and that the Plaintiffs were within their rights in so doing. Obviously it would be impossible to rely upon the 1979 agreement and the clause therein

excluding the right of summary dismissal without accepting that the agreement positively acknowledges the right of the Plaintiffs summarily to suspend in appropriate circumstances. There is, therefore, no doubt but that this right exists: no doubt but that the Plaintiffs invoked it: no question that it was necessary to hear the Defendant before invoking the remedy as the agreement provides expressly that the right of the employee to query the summary action is by way of appeal - obviously subsequent to the action itself - in accordance with the provisions of paragraph 4 of the Disciplinary Procedure clauses.

If no argument was raised in relation to the validity of the decision to suspend the Defendant less still was the effect of that decision on any emoluments of the Defendant canvassed. Rather the issue between the parties was confined to whether Mr. Lupton had been effectively dismissed from the employment of the bank. My only reason for adverting to this aspect of the matter is the necessity for dealing with the issue as to whether or not an Injunction should issue to restrain the Defendant from entering upon the bank's premises. Unless a suitable assurance can be obtained from the Defendant I am satisfied that an Injunction should issue but by reason and during the continuance of his suspension and not deriving from his purported dismissal.

*David Hill*  
4/11/82