APPROVED **[2023] IEHC 706**

THE HIGH COURT

Record No.: 2023/2841 P

Between:

EDDIE CAMPBELL

Plaintiff

-AND-

THE IRISH PRISON SERVICE, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

Defendants

JUDGMENT of Mr Justice Rory Mulcahy delivered on 15 December 2023

Introduction

1. On 13 June 2023, the Secretary General of the second Defendant notified the Plaintiff of the decision to terminate the Plaintiff's contract as a recruit prison officer with the first Defendant. The decision was scheduled to take effect on 20 June 2023. On 16 June 2023, the Plaintiff obtained an order from the High Court (Stack J) restraining the Defendants from proceeding with the decision to terminate until after 20 June 2023 or further order.

2. That order was continued by consent pending the hearing of this interlocutory application. The parties exchanged numerous affidavits and written legal submissions, and the injunction was heard before me on 16 November 2023. In this application, the Plaintiff seeks an injunction restraining his dismissal from his position as a recruit prison officer with the first Defendant and his reinstatement to full duties pending the determination of these proceedings.

3. The Plaintiff's dismissal followed a finding of serious misconduct against him in a disciplinary procedure carried out in purported compliance with the Department of Public Expenditure and Reform's Circular No. 04/2019, Disciplinary Procedures for new entrant civil servants serving in a probationary capacity ("**Circular 04/2019**"). The Plaintiff denies any alleged wrongdoing and contends that the disciplinary process failed to respect his contractual and constitutional rights to fair procedures.

Factual Background

4. Mr Campbell started work with the first Defendant ("**the IPS**") as a recruit prison officer on a twelve-month probationary contract on 25 April 2022. His contract of employment was stated to be subject to the Civil Service Regulation Acts 1956 to 2005. During the first six weeks of his employment, he trained in Portlaoise Prison ("**the Prison**") and was provided with residential accommodation in a single room in the Prison. The room was inspected when he left on 3 June 2022, and nothing untoward was discovered. The Defendants describe this inspection as, in effect, a cursory inspection to determine whether there was any damage to the room.

5. The room was not occupied again after Mr Campbell moved out, due to the system of rotation of available accommodation in operation at the Prison. It was subjected to what was described as a "deep clean" on 9 June 2022. Whether anyone else entered the room after Mr Campbell left but before that deep clean was a significant issue addressed during the disciplinary proceedings.

6. During the cleaning of the room on 9 June 2022, three plastic bags containing a white powdery residue were found in the drawer of a bedside locker. Mr Campbell has never contended that the bedside locker had been inspected as part of the inspection on 3 June 2022. Mr Campbell was notified of the discovery of the plastic bags the following day and was advised that An Garda Siochána had been notified.

7. It appears that Mr Campbell was advised by another prison officer that there were insufficient quantities of the substance in the bags to allow for forensic testing or that testing had been inconclusive. This is corroborated by an email from the IPS to a

Superintendent of An Garda Siochána, dated 7 July 2023, noting that one of the Assistant Governors in the Prison had been told that there was insufficient content in the bags to make an analysis. The email stated that the IPS was keen to have a determination made by a laboratory as to the bags' contents and offered to take the matter up with the laboratory directly. By further email dated 3 August 2022, the Superintendent confirmed to the IPS that the substance had been sent to Forensic Science Ireland for testing. By further email dated 15 November 2022, a Detective Inspector of An Garda Siochána confirmed to the IPS that the substance in the bags had been identified as cocaine by Forensic Science Ireland.

8. On 15 December 2022, Mr Campbell was notified that an investigation would be conducted under the civil service disciplinary code. He was sent terms of reference on 31 January 2023 and was invited to attend an interview at Cloverhill prison on 8 February 2023. The terms of reference set out in detail the allegations against Mr Campbell and the procedure to be followed, and was accompanied by a summary of the evidence, including details of the review of the CCTV undertaken by the IPS, photos of the bags and clothes found in Mr Campbell's room and a statement from the facilities manager who found the plastic bags. At this time, the Plaintiff was told the disciplinary procedure would take place in accordance with the provisions of Circular No. 19/2016, Civil Service Disciplinary Code ("**Circular 19/2016**").

9. On 8 February 2023, the Plaintiff requested an adjournment of the interview and was shown CCTV footage. The interview was adjourned, and he was invited to attend again on 22 February 2023 with an officer of the rank of Assistant Governor acting as the Investigating Officer. He attended an investigation meeting on that date.

10. On 28 February 2023, the Plaintiff was informed that he had been inadvertently provided with Circular 19/2016, containing the disciplinary code of general application to the Civil Service, rather than the correct circular, Circular 04/2019, which contains the procedure for new entrants to the service. He was advised that the disciplinary procedure would be conducted under Circular 04/2019. Revised terms of reference to reflect this were provided on 13 March 2023.

11. Mr Campbell was requested to attend a second investigation meeting on 20 March 2023. The second meeting was for the purpose of addressing matters which Mr Campbell had not referenced during the first meeting, in particular, the fact that he had left his room in the early hours of 9 June 2022 and also that another officer had been with him in his room for a short period that night. Following the meeting, the Investigating Officer produced an investigation report ("**the Investigation Report**") dated 28 March 2023. The Investigation Report concluded that Mr Campbell had three small plastic bags in his possession, which he left behind when he vacated the room on 3 June 2022, and that possession of those items amounted to serious misconduct, in particular, the possession, sale or use of illegal drugs. The Investigation Report also concluded that the illegal substance had been consumed while Mr Campbell was in training at the Prison, also amounting to serious misconduct. In respect of both matters, the investigating officer found that the balance of probabilities had been significantly exceeded. In addition, the Investigation Report concluded that Mr Campbell had breached rules by allowing a visitor to enter his room at 2.32 am on Friday, 3 June 2022, but concluded that the balance of probabilities was not met with regard to Mr Campbell witnessing the consumption of an illegal substance by another officer. The Investigation Report was accompanied by documentation gathered during the investigation.

12. On foot of the Investigation Report, by letter dated 31 March 2023, the Plaintiff was requested to attend a disciplinary meeting on 11 April 2023 (subsequently changed to 14 April 2023). The letter set out the matters which were the subject of the disciplinary meeting. It was stated in the letter that at the meeting, the Plaintiff would be afforded an opportunity to respond to the concerns raised and to present any mitigating circumstances or evidence he wished to advance. The Plaintiff was advised that in accordance with Circular 04/2019, he had a right to be represented by a serving civil servant or by an official employed by the Prison Officers' Association. The Investigation Report and accompanying documentation appear to have been enclosed with this letter.

13. The Plaintiff's solicitor raised concerns about the change in procedure – from that set out in Circular 19/2016 to that contained in Circular 04/2019 – by letter dated 12 April 2023. The letter also noted that his client *"otherwise takes serious issue with the manner in which the inquiry has otherwise been conducted to date in terms of its failure*

otherwise to apply the fundamental principals [sic] of fairness and fair procedures in respect of the matter under inquiry which will be notified to you in due course."

14. The Governor appointed as the Relevant Manager to conduct the disciplinary hearing replied on 13 April 2013, clarifying the basis of the change in procedure and noting that he intended to proceed with the disciplinary hearing the following day.

15. The meeting took place on 14 April 2023, and the Plaintiff was accompanied by a representative from the Prison Officers' Association.. By letter dated 18 April 2023, which was handed to the Plaintiff on 19 April 2023, the Relevant Manager advised the Plaintiff that he had concluded, on balance, that there had been serious misconduct on the Plaintiff's part and that the misconduct was at the "highest level of transgression". The letter advised that the Relevant Manager was recommending that Mr Campbell's contract be terminated forthwith and advised him that he was entitled to appeal that recommendation.

16. Mr Campbell submitted a comprehensive written appeal on 26 April 2023, and an appeal hearing took place on 10 May 2023. The Plaintiff attended the hearing with his mother. After the hearing, he submitted revised written submissions. By letter dated 2 June 2023, the Appeals Officer notified the Plaintiff that he had decided that the appeal was unsuccessful and that he was upholding the recommendation of the Relevant Manager. The Plaintiff subsequently received the letter of 13 June 2023 notifying him of the decision to dismiss him. He issued these proceedings on 16 June 2023.

Relevant Principles – Interlocutory Injunction

17. The principles concerning the grant of an interlocutory injunction are well understood and have recently been clarified in **Merck, Sharp & Dohme Corporation v Clonmel Healthcare Limited [2019] IESC 65, [2020] 2 IR 1**. In that case, the Supreme Court noted that it would usually be inappropriate to grant an interlocutory injunction where a permanent injunction wouldn't be granted at the full hearing.

18. In order to obtain an injunction to prevent termination of the employment relationship, it is necessary to establish not just a fair issue to be tried but a strong case

likely to succeed at hearing (see, for instance, **Maha Lingam v HSE [2005] IESC 89**). In **Taite v Beades [2019] IESC 92**, Irvine J sought to explain the somewhat elusive concept of a "strong case":

> *"26. In this context the reference to a "higher standard" is to the degree of assuredness the court should have that the applicant will succeed in his or her claim at the trial of the action. Adjusting that standard shows how courts adapt the test for awarding interlocutory relief where there would be a risk of injustice were such acute relief available too readily."*

19. In **Mason v ILTB Limited [2021] IEHC 477**, Butler J clarified that the requirement to establish a strong case likely to succeed did not require that the entirety of a Plaintiff's case meet that threshold.

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

20. In **Hennigan v An Coimisiún Le Rincí Gaelacha [2023] IEHC 87**, Roberts J concluded that damages would not be an adequate remedy (at para. 105) for the following reasons:

> *"I am satisfied that the plaintiff would not be adequately compensated by an award of damages were she to succeed at trial in relation to the lawfulness of her suspension but remained suspended during that time. While much of the damage complained of by the plaintiff arising from her suspension may perhaps have already been incurred, I believe there continues to be ongoing prejudice and damage to the plaintiff's health, reputation and well-being that does not lend itself easily to being compensated by an award of damages."*

21. The Plaintiff accepts that he must establish a strong case likely to succeed at trial and that the question of whether the balance of convenience or balance of justice lies in favour of granting an injunction only arises if an applicant has met that threshold. It is convenient, therefore, to address that threshold question first, before considering, if necessary, where the least risk of injustice lies.

Arguments

22. The Plaintiff made a number of complaints about the disciplinary procedure while it was ongoing, including in relation to the 'change' in the disciplinary procedure notified in the letter of 28 February 2023, when he was advised that the procedure in Circular 04/2019 would apply, rather than that contained in 19/2016. For the purpose of this application, however, he identifies in his written legal submissions a "*non-exhaustive list of the primary deficiencies in the investigation and disciplinary process*", which he contends constitute breaches of fair procedures entitling him to the relief sought, and his counsel focussed on a number of these in his oral submissions. They are addressed below when considering the question of whether the Plaintiff has made out a strong case likely to succeed.

23. The Plaintiff accepts that the procedures required in disciplinary proceedings are not those appropriate to a criminal trial but argues that having regard to the seriousness of the allegation, which his counsel describes as an allegation of "exceptionally serious wrongdoing", the disciplinary procedures adopted should "approach" those of a court hearing. He argues that the procedures at the investigative, disciplinary and appellate stages all fell short of what was required.

24. Similarly, he accepts that the standard of proof is not the criminal standard, beyond a reasonable doubt, but contends that a higher degree of probability is required to be established than the balance of probabilities given the serious criminal nature of the allegation. He contends that the Defendants erred in the standard applied.

25. The Defendants contend that the disciplinary proceedings were fully in accordance with the procedure set out in Circular 04/2019 and argue that that, of itself, is an answer to the Plaintiff's claim. They highlight that there is no plea that there has been a failure

to follow those procedures. They argue that, in any event, the procedures adopted fully respected the requirements of natural and constitutional justice.

26. Insofar as the Plaintiff is arguing that the procedures were inadequate, they contend that, notwithstanding his protestations to the contrary, he is impermissibly seeking to impose procedures appropriate to criminal proceedings in the employment context. They contend that the standard of proof applied, the balance of probabilities, was the appropriate standard to apply.

Relevant Law – Fair Procedures in Disciplinary Matters

27. Both parties rely on the decision of the Supreme Court in **McKelvey v Iarnród Eireann [2019] IESC 79, [2020] 1 IR 573**. That case examined the circumstances in which it was appropriate for a Court to intervene to restrain disciplinary proceedings. In that case, the plaintiff claimed that he should be entitled to legal representation in disciplinary proceedings which his employer proposed commencing into allegations of theft. The Supreme Court concluded that a court should not restrain disciplinary proceedings prior to their conclusion unless it was clear that there was no realistic prospect of those proceedings reaching a legally sustainable conclusion. The Court, having considered the entitlement to legal representation in disciplinary proceedings, concluded that that had not been established in that case. Clarke CJ's judgment (in which three other members of the court concurred) concluded that legal representation would rarely be required to ensure fair procedures in disciplinary proceedings (at p. 592):

> *"**[55]** It should be recalled that an internal disciplinary process such as this is not a criminal trial. While the process must be fair, the formal rules of evidence or the procedures which govern either criminal or civil proceedings do not necessarily apply. The position of persons who may also have been the subject of investigation and the question of any evidence which they might give is not necessarily governed by the procedures or rules of evidence which would apply in a similar situation in the courts. Of course, the credibility of such persons may, in an appropriate case, be questioned on the basis of their own possible involvement. But they do not necessarily have to be treated in exactly the same way as a potential accomplice, co-accused or co-defendant in court proceedings. What is required is that Mr.*

McKelvey and his trade union representative be given a reasonable opportunity to challenge the evidence of any such persons on any reasonable basis. In those circumstances, it does not seem to me that there is, at least at present, any real basis for suggesting that legal issues of any substance will emerge."

28. He observed (at p. 593) that "*I am also satisfied that the observation to be found in the judgment in* Burns v. Governor of Castlerea Prison *to the effect that legal representation will only be required as a matter of fairness in exceptional cases provides overall guidance to the proper approach*."

29. Charleton J delivered a concurring judgment, but, as he put it, *"a different analysis of the legal route is possible*." Charleton J emphasised the extent to which disciplinary proceedings are governed by contract. He referred with approval to the judgment of Barrington J in **Mooney v An Post [1998] 4 IR 288** (at p. 599):

"***[74]*** *Thus, the place to start, and often to end, is the contract of employment. That much is clear from the judgment of Barrington J. in* Mooney v. An Post *[1998] 4 I.R. 288 where at p. 298 he said:*

> "If the contract or the statute governing a person's employment contains a procedure whereby the employment may be terminated, it usually will be sufficient for the employer to show that he has complied with this procedure. If the contract or the statute contains a provision whereby an employee is entitled to a hearing before an independent board or arbitrator before he can be dismissed then clearly that independent board arbitrator must conduct the relevant proceedings with due respect to the principles of natural and constitutional justice. If, however, the contract (or the statute) provides that the employee may be dismissed for misconduct without specifying any procedure to be followed, the position may be more difficult.
>
> Certainly the employee is entitled to the benefit of fair procedures but what these demand will depend upon the terms of his employment and the circumstances surrounding his proposed dismissal. Certainly the minimum he is entitled to is to be informed of the charge against him and to be given an opportunity to answer it and to make submissions."

30. The Plaintiff places some reliance on the decision of the High Court (Barron J) in **Flanagan v UCD [1988] IR 724**. That case involved a student accused of plagiarism. The court found the procedures adopted wholly wanting (at p. 731):

> *"The present case is one in which the effect of an adverse decision would have far-reaching consequences for the applicant. Clearly, the charge of plagiarism is a charge of cheating and as such the most serious academic breach of discipline possible. It is also criminal in its nature. In my view, the procedures must approach those of a court hearing. The applicant should have received in writing details of the precise charge being made and the basic facts alleged to constitute the alleged offence. She should equally have been allowed to be represented by someone of her choice, and should have been informed, in sufficient time to enable her to prepare her defence, of such right and of any other rights given to her by the rules governing the procedure of the disciplinary tribunal. At the hearing itself, she should have been able to hear the evidence against her, to challenge that evidence on cross-examination, and to present her own evidence."*

31. I note that Clarke CJ in **McKelvey** concluded as follows in similar circumstances to those that applied in **Flanagan**, *i.e.* an alleged breach of discipline that was also criminal (at p. 592):

> *"**[56]** It is true that the allegation is one of theft and that an adverse result to the process could result in dismissal. That is undoubtedly a factor to be taken into account, but it does not seem to me that it can, of itself, bring the case into a category where it can be shown that legal representation is necessitated. The fact that theft may also be a criminal offence is of some marginal relevance but is, in my view, of limited weight having regard to the fact that any result of this disciplinary process could have no bearing on a criminal trial where the guilt of an accused would need to be established beyond reasonable doubt. If, coupled with the seriousness of the allegation and of the potential consequences, there are particularly difficult issues of law or extremely complex facts, then the cumulative effect of each of those matters might lead, in an exceptional case, to the view that*

legal representation was required. However, it does not seem to me that this is such a case."

32. Of course, Clarke CJ was considering whether a disciplinary process should be restrained, whereas Barron J was reviewing a process which had been completed, but it seems clear that the seriousness of an allegation and the potential consequences are only factors to be taken into account in determining whether legal representation is required for a fair hearing. The entitlement for such representation will only arise in exceptional circumstances.

33. The Plaintiff also relies on the decisions in **Georgopoulus v Beaumont Hospital Board [1998] 3 IR 132** and **O'Laoire v Medical Council, unreported, Supreme Court, 25 July 1997** as authorities for the proposition that having regard to the nature of the allegations made here, which are criminal in nature, a standard higher than the balance of probabilities should have been applied by the Defendants. That is not a correct interpretation of those judgments. As made clear in both cases, the correct standard of proof in disciplinary proceedings is the balance of probabilities, albeit that that standard has sufficient flexibility to enable the degree of probability to be proportionate to the nature and gravity of the issue being investigated.

Circular 04/2019

34. Section 17 of the Civil Service Regulation Act 1956, as amended ("**the 1956 Act**") provides as follows:

> (1) The Minister shall be responsible for the following matters—
>
> *(a)* the regulation and control of the Civil Service,
>
> (*b*) the classification, re-classification, numbers and remuneration of civil servants,
>
> (*c*) the fixing of—
>
> (i) the terms and conditions of service of civil servants, and
>
> (ii) the conditions governing the promotion of civil servants.

(2) The Minister may, for the purpose of subsection (1) of this section, make such arrangements as he thinks fit and may cancel or vary those arrangements.

35. Circular 04/2019 was issued in purported exercise of that power and sets out the disciplinary procedures applicable to new entrant civil servants serving in a probationary capacity. In section 3, the Circular sets out the relevant principles applicable to such disciplinary procedures:

All new entrant civil servants serving in a probationary capacity who are in a disciplinary process will be treated in a fair and equitable manner in accordance with the principles of natural justice which will normally include:

- *The right of a civil servant to be informed of any concern about his or her conduct;*
- *The right of reply to any such concern;*
- *The right to be represented by a serving civil servant or by an official employed by a trade union holding recognition from the relevant Department or Office in respect of civil servants at that grade or rank; and*
- *The right to a fair and impartial determination of the matter after all relevant facts have been considered.*

36. The procedure set out is made up of five stages plus a right of appeal. The steps are, in relevant part, may be summarised as follows:

1. Notification of the issue of concern and a request to attend a disciplinary meeting;
2. Advice as to entitlements, including the right to be represented by a serving civil servant or trade union member and the right to be furnished with copies of relevant documents being considered, save where it is inappropriate to so provide;
3. The disciplinary meeting will be held by the relevant manager, who will establish the relevant facts. The Circular expressly provides that the relevant manager may have regard to facts established in any prior

investigation process. The civil servant will be given the opportunity to respond to the concerns raised and answer any appropriate questions.

4. The civil servant will be advised of the outcome.
5. If a finding is made of serious misconduct, the civil servant will be advised of the recommendation that the contract of employment be terminated.

37. The appeals procedure provides for a right of appeal to an internal appeals officer. A civil servant can appeal on any of the following grounds:

- The provisions of the Circular were not adhered to;
- All the relevant facts were not ascertained;
- All the relevant facts were not considered or not considered in a reasonable manner;
- The civil servant was not afforded a reasonable opportunity to answer any allegation, suspicion or other concern arising about him or her.

38. The appeals officer may hold a meeting with the civil servant and will consider information that is relevant to the appeal.

39. Appendix A of the Circular defines 'serious misconduct' as conduct "*which is sufficiently serious to warrant dismissal or other serious sanction*" and gives a list of examples of conduct amounting to serious misconduct, including 'possession and/or sale or use of illegal drugs'.

Discussion

40. The Plaintiff complains about each step in the process, the investigative phase, the disciplinary phase and the appellate phase and argues that he has established a strong case likely to succeed at hearing in respect of each deficiency identified. He also argues that, taken in the round, the process was so unfair as to entitle him to an interlocutory injunction. He makes clear that he is not seeking to restrain permanently *any* disciplinary proceedings, only any disciplinary action grounded on what he argues was a flawed

disciplinary process. I am satisfied that it is, in principle, possible that the Plaintiff could secure a permanent injunction to this effect at the hearing of the action and that, accordingly, interlocutory injunctive relief should be available.

41. Moreover, as made clear in **Mason v ILTB**, it is not necessary for the Plaintiff to establish that the entirety of his case meets the threshold of a strong case likely to succeed. The question, therefore, is whether *any* of the complaints made by the Plaintiff disclose a claim for breach of fair procedures likely to succeed at trial. In order to answer this question, I propose to examine each of the main complaints in turn before, if necessary, considering whether, taken together, the various complaints disclose a strong case likely to succeed that the Plaintiff was subjected to an unfair procedure.

42. Before doing so, it is important to emphasise that this application is merely an interlocutory application, based on affidavit evidence. Notwithstanding the necessity for the court to engage perforce with the strength of the Plaintiff's case, any conclusion for the purpose of this application as to whether or not the threshold for an injunction has been met should in no way be regarded as determining, even on a provisional basis, the merits of the Plaintiff's case. Any assessment of the merits is a matter for the full hearing based on all the evidence to be tendered at that hearing.

i. Change of Procedure/Investigative Phase

43. During the course of the disciplinary process, the Plaintiff's solicitor complained about the change of procedure from that prescribed in Circular 19/2016 to that contained in Circular 4/2019. However, no specific complaint is made about this change in the Plenary Summons. It does, perhaps, form part of a more general complaint that, overall, the process was unfair. In any event, it is difficult to see how any complaint about this change could be said, at this stage, to establish a strong case likely to succeed at hearing. The Plaintiff did not advance any argument that Circular 04/2019 did not apply to his position as a probationary recruit officer. The material difference between the provisions of the two circulars is that Circular 19/2016 provides for distinct investigative and disciplinary phases, Circular 04/2019 does not. By the time the Plaintiff was notified of the change in procedure, an investigation procedure had already occurred. In fact, the Plaintiff was afforded a second interview during this phase in order to address matters

that had not been addressed during his first interview. In other words, the Plaintiff got the benefit of a more comprehensive procedure than that to which, strictly speaking, he was entitled. In any event, it seems to me that the actions of the Defendants in commencing a disciplinary process under the incorrect procedure but 'mending their hand' during the course thereof illustrate the reason why courts should be reluctant to intervene during disciplinary proceedings. Despite the apparent misstep in the manner the disciplinary procedure had commenced, the process hadn't gone so irredeemably wrong that the procedure couldn't be completed without affording the Plaintiff the benefit of the procedure to which he was entitled.

44. The Plaintiff's affidavits contain averments, which are disputed in the Defendant's affidavits, that he wasn't aware of the disciplinary procedure which would be applied in the event of disciplinary action, but he did not advance any argument at the interlocutory application that the incorrect procedure had been applied or that the Defendants were in error in relying on Circular 04/2019. In light of the provisions of section 17 of the 1956 Act and the terms of the Plaintiff's employment contract, I do not think that any strong case has been made that the incorrect procedure was applied.

45. The only complaint made by the Plaintiff regarding compliance with the procedure in Circular 04/2019 is that he wasn't provided with all relevant evidence prior to the conclusion of the investigative phase. In this regard, Mr Campbell's first affidavit refers to Clause 4.3(b) of Circular 04/2019, which provides that civil servants will be advised of their right to be *"provided with copies of all relevant documentary evidence that is being considered*". However, the Plaintiff's complaint is that he wasn't provided with relevant material in the *investigative* phase. He points, in particular, to the written statement, or rather an email, from a Chief Officer, dated 25 March 2023, with which he wasn't provided before the Investigation Report was completed on 28 March 2023. However, the Plaintiff accepts that he was provided with this email prior to his disciplinary hearing. In circumstances where Circular 04/2019 does not provide for a distinct investigative phase, there is no basis for concluding that the Plaintiff has made out a strong case that the relevant procedure was not complied with by the Defendants.

46. The Plaintiff has not, therefore, made out a strong case likely to succeed that the Defendants have failed to comply with the disciplinary procedure to which the Plaintiff

was contractually entitled. He may, of course, succeed in making such a case at hearing, but, on one view, that is the end of the enquiry for the purpose of this application. As Barrington J noted in **Mooney**, compliance with the contractual procedure is "*usually*" enough and Charleton J in **McKelvey** stated that the contract was the place to start and "*often to end*".

47. Compliance with contractual provisions is, at the very least, a strong indicator that fair procedures have been afforded. In order to establish that despite such compliance, there has, nonetheless, been a breach of fair procedures, or a strong case that there has been a breach of fair procedures, it would be necessary to establish some exceptional feature, or at least something sufficiently out of the ordinary, which resulted in the contractual entitlements being inadequate to ensure fair procedures. It is necessary, therefore, to consider the Plaintiff's complaints about the disciplinary and appellate phases in order to determine whether there is a strong case to be made that there was any such exceptional feature which might entitle him to interlocutory relief.

ii. Disciplinary/Appellate Phase

48. The Plaintiff's complaints about the manner in which his appeal was conducted are, in effect, complaints that the appeal failed to address his concerns with the disciplinary hearing. Accordingly, his arguments in relation to the disciplinary and appellate stages can be dealt with together. For the most part, his arguments are variations on a theme: that he wasn't afforded a fair opportunity to test the evidence against him. He argues that given the seriousness of the complaint, he should have been entitled to legal representation, he should have been afforded an opportunity to cross-examine witnesses (and that witnesses should have been called in order to give him an opportunity to cross-examine them), that he should have been given an opportunity to have the substance in the plastic bags tested, and that he should have been given an opportunity to review all the CCTV footage that was available.

49. As Clarke CJ noted in **McKelvey**, it can "*hardly be doubted that the particular skills brought to bear by the most experienced and able counsel may add something to a case, whether in the courts or anywhere else, over and above that which might be brought to bear by a fully competent but not, perhaps, quite so experienced advocate*".

It certainly can't be doubted in this case, given the skill with which his case was argued by counsel in this court. But that is not the relevant issue. As Clarke CJ put it, the question is whether the failure to provide legal representation leaves the person without adequate representation. In my view, the Plaintiff has not made out a strong case that he was left without adequate representation in this instance.

50. Although the allegation against the Plaintiff was clearly serious and, if made out, was likely to lead to his dismissal, that of itself, did not mean that legal representation was necessary in order to ensure a fair hearing. The allegation did not give rise to complex legal issues. Nor was it an allegation which, at least at this stage, appears to have rested on the credibility of particular witnesses or disputed evidence as to what occurred at particular times. There was no evidence from any individual suggesting that they had witnessed Mr Campbell in possession of the plastic bags. Rather, the key evidence seems to have been that the bags were found in a room occupied by Mr Campbell, that no one entered the room after Mr Campbell had left until the cleaner who found the bags entered, and, of course, that the bags contained cocaine.

51. It doesn't seem to me that a strong case has been made out that a fair procedure required that the Plaintiff have legal representation for the purpose of addressing or challenging that evidence. The Plaintiff doesn't appear to have ever contended that plastic bags were not found in the room that he had occupied. There is a discrepancy between the statement of the cleaner and the email of the Chief Officer, who accompanied her, regarding precisely what was found when the room was searched, which discrepancy I address below, and counsel argues that the cleaner and the Chief Officer should have been made available to be cross-examined on Mr Campbell's behalf by legal representatives. As set out below, I am not persuaded at this stage that the failure to call those persons as witnesses amounted to a breach of fair procedures, but even if that were not the case, it doesn't appear to me that the Plaintiff has made out a strong case that it was unfair to him that he was represented by a union representative. The issues identified between the two statements do not seem to be of such significance or complexity as to render this the type of exceptional case in which legal representation was necessary to ensure a fair hearing.

52. The Defendants point out that the Plaintiff never sought legal representation, and the Plaintiff, in response, relies on this court's judgment in **RM v SHC [2023] IEHC 424** to the effect that it is an employer's obligation to conduct a fair hearing, not the employee's obligation to ask for one. However, that has no application where I have concluded at this interlocutory stage that the Plaintiff has not made out a strong case that the absence of legal representation rendered the disciplinary process unfair.

53. The decision in **RM** arguably has more relevance in relation to the Plaintiff's complaint that witnesses were not made available to be cross-examined. He points, in particular, to the discrepancies in statements referred to above. However, I have also concluded that the Plaintiff has not established a strong case in this respect. Firstly, I am not satisfied that there is a strong case that a fair disciplinary hearing required that the witnesses mentioned above, or other witnesses, be called by the Defendants, having regard to the nature of the evidence they provided*, i.e.* none of the witnesses purported to have witnessed any action by the Plaintiff which the Plaintiff wished to dispute. Insofar as there was a discrepancy between the statement of the cleaner and the Chief Officer, it was as to the number of plastic bags found, not whether any were found.

54. More importantly, it is not clear that the Plaintiff was prevented from calling witnesses. No doubt, at the hearing of the action, greater detail will be available regarding the manner in which the disciplinary and appellate hearings were conducted, but on the basis of the evidence available at this stage, the Plaintiff was advised in the invitation to the disciplinary hearing that he would be provided at that hearing with an opportunity to "*present any mitigating circumstances or evidence you wish to advance in this regard.*" The conclusion of the appeal hearing was that there was *"no evidence to suggest that [the Plaintiff was] refused the opportunity to call or question witnesses or admit evidence or submissions."* Mr Campbell avers that none of the relevant witnesses were made available, but does not aver that he ever requested that they be made available but that that request was refused.

55. Unlike in **RM v SHC**, where I concluded that the employee's failure to complain during disciplinary proceedings that she was being subjected to an unfair procedure did not debar her from interlocutory relief, in this case, the Plaintiff appears to have been provided with a procedure, at least in this respect, which was capable of being conducted

fairly, but did not seek to exercise all his entitlements in that procedure. In those circumstances, he has not made out a strong case that the failure by the Defendants to call the witnesses he has identified in the affidavits amounts to a breach of fair procedures.

56. The Plaintiff makes two particular complaints about the evidence relied on by the Defendants. One is the evidence of the Chief Officer who reviewed the CCTV footage. The other is the evidence from Detective Inspector of An Garda Siochána regarding the content of the plastic bags.

57. To explain briefly regarding the CCTV, in emails from the Chief Officer Fox to the Investigating Officer, the Chief Officer explained that he was asked to review CCTV between 14 May 2022 and 10 June 2022. The Chief Officer states that between the Plaintiff's departure from his room on 3 June 2022 and the cleaner entering the room on 9 June 2022, no one else entered the room.

58. He explains in affidavits sworn in these proceedings the method used for reviewing the CCTV. In total, there were 28 days of CCTV footage to review, amounting to 672 hours or 84 working days of footage. Therefore, rather than review the footage minute by minute, he reviewed it by way of what he describes as a "motion detection search", which creates video clips of selected areas for periods when motion is present.

59. Mr Campbell's complaint is that he should have been given all of the CCTV footage to review himself, particularly, the footage from 3 to 9 June 2022. In his submissions, he describes the Defendants' analysis of the CCTV footage as "grossly inadequate". I do not agree. In my view, there is no strong case that there was a want of fair procedures in the Defendants' reliance on the Chief Officer Fox's review of the CCTV footage in the context of disciplinary proceedings. It seems to me, at this stage, that the approach taken was a reasonable one. The Plaintiff has not identified any basis for doubting the credibility or impartiality of the Chief Officer evidence, despite a suggestion of pre-judgment, or anything other than wholly speculative bases for calling the accuracy of his conclusions that no one had entered the room after Mr Campbell left into question, *e.g*. that the motion sensor was not sufficiently calibrated.

60. Similarly, the suggestion that fair procedures required that the Plaintiff should have been provided with the plastic bags, in order to independently test them as to their contents or for fingerprints seems to me to be somewhat fanciful. Leaving aside that the evidence had been given to An Garda Siochána, the Defendants had been told by An Garda Siochána that Forensic Science Ireland had confirmed that the plastic bags contained cocaine. In the context of disciplinary proceedings, it does not seem to me at this stage that there was any want of fair procedures in the Defendants' reliance on this confirmation. To require more would be to import criminal standards into disciplinary proceedings, and the Plaintiff has not made out a strong case that that was appropriate here. There was a suggestion for the first time at the hearing of the action that there was some doubt whether the confirmation from An Garda Siochána related to the contents of the plastic bags found in the Plaintiff's room, but that is an argument which had never previously been raised and is not pleaded and cannot, therefore, ground an application for interlocutory relief.

61. There is not, in my view, any substance in the Plaintiff's contention that there has been a breach of fair procedures by not giving him the opportunity to undergo drug testing. I cannot, at this stage, see any basis for concluding that it was unfair for the Defendants to have terminated the Plaintiff's employment without taking this step.

62. The Plaintiff raises an issue about reliance on statements from the officer who was present in his room in the early hours of 9 June 2022 and the lack of access to information regarding a parallel investigation into that officer. I have not seen any evidence of reliance on statements from that officer. The suggestion of unfairness by reason of any parallel investigation is too vague to amount to a strong case likely to succeed at this stage.

63. As indicated above, it seems to me at this stage that the Plaintiff's complaint about the application of the wrong standard of proof is based on a mischaracterisation of the case law relied on by the Plaintiff, **Georgopoulus** and **O'Laoire**.

64. Finally, it does not seem to me that the Plaintiff has made out a strong case likely to succeed that either the disciplinary hearing or the appeal hearing were conducted

other than in accordance with fair procedures or that the reasons given for the decision at this disciplinary stage or on appeal were inadequate or irrational.

65. Having considered the individual complaints made by the Plaintiff, it remains necessary to consider whether, notwithstanding that those individual complaints made by the Plaintiff do not amount to a strong case likely to succeed; there is a strong case that, considered in the round, the procedure adopted by the Defendants fell short of the requirements of fair procedures. In my view, the Plaintiff has not established that to be the case at this interlocutory stage. The overall procedure included a lengthy investigation, during which the Plaintiff was interviewed twice, followed by a disciplinary hearing at which he was represented by a colleague. He was advised of the outcome and given a right of appeal, which he exercised. Critically, the entire procedure appears to have been carried out in accordance with the requirements to which the Plaintiff was contractually entitled.

Conclusion

66. In the circumstances, I have concluded that the Plaintiff has not met the threshold required to obtain an injunction to restrain his dismissal, a strong case likely to succeed. Accordingly, it is not necessary for me to consider the arguments advanced by the parties regarding the balance of convenience and the adequacy of damages as a remedy.

67. I, therefore, refuse the reliefs sought. I will list the matter for mention on 19 January 2024 for the purpose of making final orders.