HARTON NDOVE v NATIONAL EDUCATIONAL COMPANY OF ZAMBIA LIMITED
(1980) Z.R. 184 (H.C.)

HIGH COURT
CHIRWA, J.
26TH MARCH, 1980
1979/HP/1692

Flynote
Civil procedure - Injunction - Interlocutory injunction - Principles to be considered before granting.

Headnote
The plaintiff, an employee of the second defendant was dismissed from employment. He applied for an interlocutory injunction to restrain the defendant from withdrawing the sponsorship for his BA studies at the University of Zambia, eviction from his flat and withholding his salary and other benefits.

Held:
Before granting an interlocutory injunction it must be shown that there is a serious dispute between the parties and the plaintiff must show on the material before court, that he has any real prospect of succeeding at the trial.

1980 ZR p185
CHIRWA, J.

Cases referred to :
(1) Preston v Luck [1884] 27 Ch. D. 497.
(2) American Cyanamid v Ethicon Ltd, [1975] 2 W.L.R. 316.
(3) Fellows v Fisher, [1975] 2 All E.R. 829.
(4) Stratford and Sons Ltd v Lindley, [1964] 3 All E.R. 102.

For the plaintiff: Mr G. Hamaundu of Chuundu Chambers.
For the defendant: Mr M. S. Banda of Chigaga and Co.

Judgment
CHIRWA, J.:

The endorsement on the writ of summons issued by the plaintiff against the two defendants asks for three things. The first is for damages for wrongful dismissal and arrears of salary. The second is a declaration that the purported termination of employment by the first defendant and on behalf of second defendant on 10th October, 1978, was and is unlawful and contrary to natural justice and of no effect.

The third is a prayer for injunction directed to the defendants restraining by themselves, their

servants or agent from (a) withdrawing the sponsorship of the plaintiff to complete his BA studies at the Adversity of Zambia, (b) evicting the plaintiff from flat number 27-D2-8 Kabwata Estate and immediate possession of keys and furniture, (c) withholding the plaintiff's salary and other financial fringe benefits.

This judgment is in respect of the last prayer, i.e. a prayer for an injunction as outlined above and whose application I heard on the 26th March, 1980. Evidence both in support and opposition is by affidavits and I also heard submissions from both counsels.

It is not disputed that the plaintiff was employed by the second defendant as an English editor from about 1st February, 1979, which appointment was duly confirmed in May, 1979. The first defendant is a general manager to the second defendant and it appears that he has been joined in this action on that basis only. Further, it is also clear that by virtue of employment with the second defendant, the plaintiff was given flat number 27-D2-8 Kabwata Estate and also was given furniture loan. Further, by virtue of employment with the second defendant the plaintiff was sponsored to complete his BA studies at the University of Zambia. The only thing which is in dispute is the termination of the plaintiff's employment with the second defendant; and this termination is also subject of the present suit although I am not dealing with that at the moment.

The object of an interlocutory injunction is to maintain *status quo.* This has been the principle upon which an interlocutory injunction is granted for a long time, certainly as recognised by Cotton, L.J., In the case of *Preston v Luck* (1) at p. 505 where he says:

> "This is an application only for an interlocutory injunction, the object of which is to keep things in status quo, so that, if at the hearing the plaintiffs obtain a judgment in their favour, the defendants will have been prevented from dealing in the mean time with the property in such a way as to make that judgment ineffectual."

As late as in the ease of *American Cyanamid v Ethicon Ltd* (2) the principle is still accepted as the basis on which interlocutory injunctions are granted. In this case, in the House of Lords, Lord Diplock had this to say at pp. 321-322:

> "My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It wale to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against

> injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial;but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies."

What then has a plaintiff to do in order to move the court to grant him an interlocutory injunction? In the case of *Preston v Luck* (1) already referred to, Cotton L.J., had this to say at pp. 505-506:

> "Of course to entitle the plaintiffs to an interlocutory injunction, though the court is not called upon to decide finally on the right of the parties, it is necessary that the court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiffs are entitled to relief."

Since then various terminologies have been used by the courts such as plaintiff "must establish to the satisfaction of the court a strong prima facie case," "must show that he has a prima facie case or if you will, a strong prima facie case." The use of these phrases came under attack in the *American Cyanamid* case (2) referred to above. Lord Diplock at p. 322 said:

> "Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions

> as 'a probability' 'a prima facie case' or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried."

I am aware that Lord Denning, M.R., discusses the above "clarification" by the House of Lords in the case of *Fellows v Fisher* (3). In his discussion, Lord Denning does refer to an earlier decision of the House of Lords in which the very term of "prima facie case" been established by the plaintiff before an interlocutory injunction can be granted was used. This other case of the House of Lords is the case of *J.T. Stratford & Son Ltd v Lindley* (4) where Lord Upjohn brought up the establishment principle on which courts can grant an interlocutory injunction:

> ". . . the principle which ought to guide your Lordship's seems to me clear. An appellant seeking an interlocutory injunction must *establish a prima facie case* of some breach of duty by the respondent to him." (italics my own.)

In the case of *Fellows v Fisher* (3) all their Lordships shared to Certain extent what Lord Denning

said and Browne, L. J., and Sir Penny-cuick even went further that there was need for further guidance from the House of Lords on their decision in the *American Cyanamid* case (2) (*see* pp. 841 letter E and 844 letter F respectively).

Although English decisions do not bind me, this court has always had persuasive guidance from the English decisions and therefore, I for one, I am caught in the same confusion created by the House of Lords decision in *American Cyanamid* case (2) as the other English courts. I think, as Lord Denning says in the *Fellows v Fisher* case (3), in his attempt to clear from the confusion at p.836:

> "Where there is the reconciliation to be found? Only in this: the House did say that 'there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

the old approach in these cases is still a valid approach because even Lord Diplock at p.323 in the *American Cyanamid* case (2) says:

> "So unless the material available to the court at the hearing of the application for an interlocutory injunction *fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial,* the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought." (italics my own)

My understanding of the italicized words mean the same as prima facie case been established by the plaintiff. I will therefore consider the present application on the understanding that there is a serious dispute between the parties, but the plaintiff must show, on the material before me, that he has real prospect of succeeding at the trial.

The main claim against the defendants is unlawful dismissal. The plaintiff alleges that the dismissal was against natural justice. The natural justice breached is as contained in para. the plaintiff's affidavit which reads:

> "That the ground given for my dismissal is so petty and frivolous that it lacks merit as the ones who insulted me have been pardoned by the defendants while as a victim of the insult I have been dismissed from my employment."

Natural justice lacks precise meaning but I would say it has two elements the right to be heard on any accusation and that those presiding over the issue should not be interested parties or biased. To the plaintiff's affidavit are a number of exhibits and amongst these exhibits is the letter of dismissal dated 10th October, 1979. On going through this letter, I have no doubt that the plaintiff was given a chance to be heard on allegations against him before a decision to dismiss him was made. Also on reading particularly para. 2 of this letter, it is clear that the incident involved the plaintiff and two other members of staff from whom exculpatory statements were obtained. It is also clear that the management blamed all the people Involved as this paragraph in part reads: *"It is our considered*

view that the incidents were a clear demonstration of gross indiscipline and lack of self-restraint on the part of all those involved." From the evidence before me it appears only the plaintiff was dismissed as a result of these incidents which are described as "clear demonstration of gross indiscipline and lack of self-restraint on the part of all those involved" and if all involved were indisciplined why only dismiss the plaintiff? This action throws some credence to the plaintiff's allegation that there was some bias although he does not boldly say so. As it appears that the defendants treated the plaintiff unfairly in that the defendants seem to have been biased, they were in breach of the second element of the principle of natural justice. The plaintiff has real prospect of succeeding at his trial. I will now consider whether the balance of convenience lies in favour of granting or refusing the interlocutory injunction.

Lord Diplock in the *American Cyanamid* case (2) lays down the principle under which this "balance of convenience" is decided and at p. 323 he says:

> "As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff

> in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiffs undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time oil the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case."

In the present case, as already pointed out, the claim is for unlawful dismissal. If the plaintiff were to succeed at the trial, would he be adequately compensated by an award of damages for the loss that he would sustain between now and the time of the trial of his case? I have no doubt that he would be adequately compensated for the loss and I have no doubt that the defendant would pay the damages. On the other hand, the plaintiff is a student and not employed, if an interlocutory

injunction were granted and the plaintiff lost his action, he would not be in a position to pay the defendant the damages in the form of salary and money spent in sponsoring him to the university. I am satisfied that on the balance of convenience, it is proper that the application for an interlocutory injunction be refused.

Application is dismissed with costs to the defendant.
Application dismissed

1980 ZR p189