THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 37
Court of Appeal Record Number 2020/148

Costello J.
Haughton J.
Power J.

BETWEEN

DONAL O'DONOVAN

PLAINTIFF/
RESPONDENT

- AND -

OVER-C TECHNOLOGY LIMITED AND OVER-C LIMITED

EFENDANTS/
APPELLANTS

JUDGMENT of Ms. Justice Costello delivered on the 16th day of February 2021

1. This is an appeal against the decision of the High Court (Keane J.) where he granted the plaintiff/respondent ("Mr. O'Donovan") an injunction against the defendants/appellants pursuant to a written judgment delivered on 12 June 2020 ([2020] IEHC 291), and he gave a ruling in relation to the scope of the order and on the costs of the application on 3 July 2020 ([2020] IEHC 327).

2. The appellants appealed in respect of both judgments and Mr. O'Donovan cross-appealed in relation to the terms of the order made by the High Court when granting him an injunction and in respect of the order for costs. This is my judgment in respect of the appeal and the cross-appeal.

Background

3. Mr. O'Donovan was offered a contract of employment with the first named appellant ("the employer") under cover of a letter dated 30 May 2019 which he accepted on 31 May 2019. On 6 August 2019, he commenced work for the employer as its Chief Financial Officer (CFO). The contract provided for a probationary period in the following terms:-

> *"PROBATIONARY PERIOD*
>
> *An initial probationary period of six months applies to this position. During this period your work performance will be assessed and, if it is satisfactory, your employment will continue. However, if your performance is not up to the required standard, we may either take remedial action or terminate your employment. Any*

continuous period of absence of four weeks or more will suspend your probationary period until your return to work."

4. The employer reserved the right to take either remedial action or to terminate Mr. O'Donovan's employment during the probationary period. His work performance "*will be assessed*" during that period. The meaning of this provision will be discussed below.

5. The contract has a specific clause in relation to termination:-

> *"TERMINATION TO BE GIVEN BY EMPLOYER: One Month in the first year, Three months thereafter.*
>
> *…*
>
> *We reserve the contractual right to give pay in lieu of all or any part of the above notice by either party."*

6. It was not disputed that the employer was entitled to give payment in lieu of notice in the event that the contract was terminated.

7. Finally, there were express clauses governing disciplinary rules and procedures and disciplinary appeal procedure:-

> *"DISCIPLINARY RULES AND PROCEDURES*
>
> *The disciplinary rules and procedures that apply to your employment are shown in the Employee Handbook to which you should refer.*
>
> *DISCIPLINARY APPEAL PROCEDURE*
>
> *The disciplinary rules and procedures which form part of the Contract of Employment incorporate the right to lodge an appeal in respect of any disciplinary action taken against you. If you wish to exercise this right, you should apply either verbally or in writing to the General Manager or the CEO within five working days of the decision you are complaining against."*

8. It is common case that there were no such disciplinary rules and procedures in the Employee Handbook furnished to Mr. O'Donovan.

9. Mr. O'Donovan worked for his employer from 6 August to 13 December 2019 when he took annual leave. He returned from annual leave on 7 January 2020. On that day, he had a meeting with the Chief Executive Officer of his employer, Mr. Michael Elliot. At that meeting, Mr. Elliot informed Mr. O'Donovan that his performance was substandard and that the confidence of the board in his capabilities was "*at an all-time low*", and that he had lost confidence in Mr. O'Donovan. He told Mr. O'Donovan that his employment was terminated with immediate effect, that payment in lieu of notice would be forthcoming, and that he would write to him confirming his decision.

10. He wrote a letter the following day, dated 8 January 2020, in the following terms:-

> *"Thank you for attending our meeting at Over-C's Cork offices on yesterday 7th January.*
>
> *During this meeting I pointed out to you, that your performance continues to be sub-standard and this has been highlighted to you by various Board members at previous meetings.*
>
> *I no longer have confidence in your ability to carry out a crucial Chief Finance (sic) Officer role. This is despite the fact that I provided assistance for you with vastly experienced personnel in preparing budgets and board packs on two separate occasions.*
>
> - *At the Board Meeting on 2nd December you gave an inflated budget sales figure for 2020 of £6.5 million which was not agreed by either the Sales Director or myself. Subsequently this misleading figure lead (sic) the board to question the credibility of the senior management team and at best made the team look incompetent.*
> - *Your preparatory work for the Board Meeting of 19th Dec was negligible and this was evidenced by your lack of input in putting the figures and budget deck together with Neil Cross who had flown in to help you.*
> - *At our meeting yesterday you acknowledged that you were unable to answer the Board's basic cash position question as you do not check Bank Account Balances or accounting platform Xero. This questions the validity of the advice you are providing to the Board.*
>
> *You have been unable to give me any reasonable explanation for any of the above and your performance is unacceptable. Having given the situation due consideration, I informed you that your employment with Over-C Technology was terminated with immediate effect in line with the terms of your Contract of Employment and within your stated Probationary Period.*
>
> *You will be paid one months pay in lieu of notice."*

11. Mr. O'Donovan says that he received this letter by registered post on 13 January 2020. On 8 January 2020, the day after the meeting, Mr. O'Donovan emailed Mr. Elliot in the following terms:-

> *"I am in shock following on from our conversation yesterday and I am placed in financial difficulty with a young family and mortgage to pay. As per the contract there is an appeal process. I would like to appeal the decision or to discuss what the details are around my departure**. You said yesterday that you would look after me and I would appreciate if you could let me know what that***

entails. It could take me 6 mths to find a similar role elsewhere." (emphasis added)

The letter suggests that he may have accepted the fact that his employment was terminated, while keeping open his appeal.

12. Mr. Elliot replied on 9 January 2020:-

"Hi Donal,

Thank you for your email of 8 Jan. I acknowledge the contents therein and in particular your request to Appeal my decision to terminate your employment.

You are correct that there is an Appeal process. A member of our Board of Directors will hear your Appeal and this will be arranged shortly. You will be contacted next week to agree a date and location for this meeting.

You will understand, so as to ensure fair process, I now have been instructed to stand back to allow the Appeal and to await the Appeal determination."

13. On 14 January 2020, following receipt of the letter of 8 January from Mr. Elliott, Mr. O'Donovan wrote to the chairman of the board and a director whom he described as an "*investor director*" setting out why he believed that the letter of 8 January 2020 was "*self-serving and completely at variance with the truth.*" He said he did not have a proper opportunity to deal with some of the points made by Mr. Elliot on 7 January as he was shocked and surprised by the arbitrary nature of "*this proceeding*."

14. On 14 January 2020, Ms. Eileen Moloney, a director of the employer, wrote to Mr. O'Donovan to confirm that she would hear his appeal on Friday 17 January at 14.30 hours in the boardroom of the company. The appeal was to be by way of a review of the original decision. She said the appeal would be chaired by her in the presence of a company witness who would take notes and she informed him that he may be accompanied if he so wished. She concluded by saying "*The decision of this appeal hearing is final and there is no further right of review. If you have any queries concerning the content of this letter, please contact me.*" Her mobile phone number was given at the end of the letter.

15. Mr. O'Donovan did not telephone her but wrote on 16 January 2020 stating:-

"Regarding your proposed time on Friday 17th for the appeal, this time is neither convenient for me nor my legal counsel."

In passing, I observe that this is somewhat surprising as the appeal was fixed during what would have been his normal working day in the offices of his employer and in respect of which he was being paid. He did not suggest any alternative arrangements.

16. Mr. O'Donovan took issue with Ms. Moloney's statement that the decision of the appeal hearing "*is final*" and "*that there is no further right of review*" and reserved the right to defend his good name and professional reputation wheresoever he may choose. He concluded by saying he required a reference letter from the board stating that he provided his professional services to the company "*with tenacity and dedication, delivering added value of substantial and significant amounts.*" The application for a reference does not sit easily with the contention that he had not been dismissed.

17. Mr. O'Donovan did not attend on 17 January at 14.30 hours and so Ms. Moloney wrote to him that date stating:-

> *"I note you do not now wish to proceed with the appeal today. I now confirm that your dismissal stands."*

She concluded the letter by stating that the matter is now closed.

18. On 28 January 2020, the General Manager of the employer wrote to Mr. O'Donovan setting out the calculation of his final gross payment, showing the payment of his salary up to 7 January 2020 and salary in lieu of notice. He was asked to return his company iPhone X. The final gross payment was paid to his account on 30 January 2020.

19. Mr. O'Donovan did not accept that his employment had been validly terminated and he instructed solicitors to write to the company which they did by letter dated 24 January 2020:-

> *"Dear Sirs,*
>
> *We act on behalf of Donal O'Donovan the Chief Financial Officer of Over-C Limited and its subsidiary Over-C Technology Limited. We refer to the purported dismissal of our client on 7 January 2020. We also refer to your letter of dismissal dated 8 January 2020 which was received by our client on 13 January 2020.*
>
> *Please note that the dismissal of our client for misconduct is unlawful and has been carried out in a manner directly contrary to the terms of our client's contract of employment. We therefore call on you to take the following actions forthwith:*
>
> *(i) Withdrawal of all allegations of misconduct as contained in your letter of dismissal dated 8 January 2020;*
>
> *(ii) Make a full written apology to our client;*
>
> *(iii) Reinstate our client to his position of Chief Financial Officer.*
>
> *Should we not hear from you by close of business of 28 January 2020, we will be forced to issue proceedings for wrongful dismissal. We will also seek injunctive relief in the High Court so as to secure our client's contractual rights. This letter will be used to fix you with the costs associated with such."*

20. Letters in identical terms were written to each of the appellants. It is worth noting that this was the first reference to misconduct. Mr. Elliot did not accuse Mr. O'Donovan of misconduct on 7 January 2020, nor was he so accused in terms in the letter of 8 January 2020. It is to be observed that the letter from Mr. O'Donovan's solicitors seeks his reinstatement as CFO. This serves to imply an acceptance that the contract of employment had been terminated. It is also a relief which arises in respect of claims brought under the Unfair Dismissals Act 1977. Mr. O'Donovan could never have brought a claim under that legislation as he was employed less than a year and so did not satisfy the threshold established under the Act.

21. On 29 January 2020, the solicitors for the employer emailed Mr. O'Donovan's solicitors in reply:-

> *"1. First of all we point out that your Client has been paid his Notice Pay and his Employment will finish on the 7th of February 2020.*
>
> *2. He will be paid any other of his entitlements including any accrued Holiday Pay up to the 7th of February 2020.*[1]
>
> *3. Your Client was on Probation under the Terms of his Contract when he was informed that his Employment was being ended with one month notice. In a meeting with Mr. Michael Elliot on the 7th of January 2020 Mr. Elliot the Managing Director clearly set out the reasons to your Client for not extending your Clients (sic) contract beyond Probation.*
>
> *4. As a result of the above please note that your threat of Legal Proceedings is without basis or foundation and any Proceedings you institute in the High Court will be vehemently defended. We will use this correspondence to ground an application that your Client will be responsible for our Clients legal costs in defending such spurious Proceedings."*

The proceedings

22. Mr. O'Donovan issued a plenary summons and a concurrent plenary summons, as required under the Rules of the Superior Courts, as the second named appellant is a company incorporated in England, on 29 January 2020 seeking a declaration that he continues to be employed by the appellants as the CFO and that the purported dismissal from that position on 7 January 2020 is null and void and/or invalid and of no effect. He sought an injunction restraining the appellants from terminating or purporting to terminate his contract of employment, and/or from taking any steps to implement or give effect to the purported dismissal, from repudiating or seeking to repudiate his contract of employment, from interfering with his discharge of the role and functions of CFO and restraining the appellants from publishing, in any manner howsoever, any statement or other communication to the effect that he had been dismissed from his employment, and from appointing any other person to the position of CFO. He also sought damages for

[1] It was subsequently explained that this was a typographical error and his employment was confirmed to have finished on 7 January 2020.

breach of contract, misrepresentation, defamation and breach of duty and breach of constitutional rights.

23. In his statement of claim, delivered on 18 February 2020, he set out the express terms of his contract regarding disciplinary rules and procedures and the disciplinary appeal procedure which I have quoted above. He pleaded that there were three implied terms of the contract of employment:-

    (a) any disciplinary rules and/or procedures would be fair and carried out in accordance with the principles of natural and constitutional justice;

    (b) any appeal procedure would be fair and carried out in accordance with the principles of natural and constitutional justice;

    (c) Mr. O'Donovan and the appellants, as employee and employer, owed each other mutual obligations of trust, good faith and confidence.

24. He pleaded that the purported dismissal was carried out in violation of the express and/or implied terms of his employment contract and that the disciplinary process as established was not fair on the grounds set out in paras. 26(a)-(g). He also pleaded that the appellants were guilty of misrepresentation and that they defamed him. However, as this aspect of his case was not relied upon in his application for injunctive relief it is not necessary to consider these claims any further.

25. Prior to the delivery of the statement of claim, Mr. O'Donovan issued a notice of motion on 31 January 2020 seeking interlocutory relief in the terms set out in his endorsement of claim, including, incidentally, seeking declarations. The application was grounded upon the affidavit of Mr. O'Donovan, sworn on 30 January 2020. He said that on 7 January 2020, Mr. Elliot made a series of allegations of "*misconduct*" against him. He said that the letter of 8 January 2020 made "*serious accusations of misconduct against [him], including dishonesty and gross negligence*". He referenced, in particular, the accusation of misleading the board of directors. It was his view that the dismissal letter gravely impugned his integrity as a CFO and chartered management accountant. He totally rejected the claims and suggestions made by Mr. Elliot.

26. He complained that his dismissal for misconduct was carried out contrary to the principles of natural and constitutional justice as he was not notified of any allegations of misconduct prior to his purported dismissal, and that no inquiry and/or adequate inquiry had been carried out into his behaviour prior to his purported dismissal. He said that no allegations were put to him prior to his dismissal. He was not given the right to speak in his own defence, he was not afforded an oral hearing, he was not given an opportunity to confront his accusers and he was given no representation, legal or otherwise, prior to his dismissal.

27. He said that his purported dismissal contravened the express one-month notice period set out in the employment contract. He acknowledged that he was to receive one month's pay in lieu of notice and that he received it on 30 January 2020.

28. He said that the clause in his employment contract which provided for a disciplinary appeal procedure applied in the circumstances of his dismissal. He said he was dismissed for misconduct and, in effect, no right of appeal was afforded to him and this constituted a breach of his contract of employment. He said that the offer and withdrawal of the appeal was contrary to the principles of natural and constitutional justice.

29. He said that from 7 January 2020 to date, the appellants acted in a manner directly contrary to the implied term of mutual trust and confidence contained in the contract of employment.

30. He said that:-

> *"34. I have a young family and reside in the south of Ireland near Tralee, County Kerry. Without remuneration, I will be unable to discharge my debts as they fall due. These include mortgage repayments, insurance and usual family expenses.*

35. In light of the foregoing, I say and believe that my interests can only be protected if this Honourable Court grants the reliefs set out in the Notice of Motion hereto."

31. For these reasons, he said that damages would not be an adequate remedy.

32. The position of the appellants was presented by Mr. Elliot, as the CEO of both of the appellants, in an affidavit sworn on 14 February 2020. He makes the following points. Firstly, he says that the contract of employment was with the first named appellant only and that Mr. O'Donovan has no legal relationship with the second named appellant. Mr. Elliot says that Mr. O'Donovan is no longer the CFO of the first named appellant as his employment was terminated on 7 January 2020. He relied on the express term of the contract headed "Probationary Period". He says that Mr. O'Donovan's work performance would be assessed and that if it was not up to the required standard, his employment would not continue beyond the probationary period. He argued that, in effect, it was a fixed term contract for six months, subject to continuation only if the performance was satisfactory.

33. Over six pages he sets out difficulties the employer said it had with Mr. O'Donovan's performance during the probationary period. It is necessary to identify the complaints/allegations as Mr. O'Donovan says they amount to charges of misconduct, while the appellants say that he was never charged with misconduct and that he was dismissed for poor performance during his probationary period. The complaints relate to his performance as a CFO and included complaints regarding the preparation of financial papers for the board and for meetings with investors. There were complaints regarding his engagement of an outside consultant without the authorisation of Mr. Elliot, the CEO. Mr. Elliot said that in December Mr. O'Donovan presented an inflated revenue figure of

£6.18m. to the board which had not been agreed with either Mr. Elliot or the sales director, Mr. Kevin Stanton, when the true figure was approximately half this. There were complaints about him furnishing documentation prepared for the board to an outside consultant without authorisation, and communicating with Enterprise Ireland in breach of express instructions from Mr. Elliot, and of his failure to engage with an investor, Mr. Neil Cross, who travelled from the UK to Cork for two days to assist Mr. O'Donovan in preparing the financial papers for a meeting of the board later in December. Mr. O'Donovan went on holidays from 13 December 2019 to 6 January 2020 without Mr. Elliot's knowledge. He said he was astonished that a new employee would be on continuous holiday for that period without his knowledge and at a critical time for the company. In the absence of Mr. O'Donovan, others had to complete the budget scenarios and the board pack in time for the board meeting on 19 December 2019. Mr. O'Donovan joined the board meeting by telephone and he was asked a specific question by an investor regarding how much cash would be in the account as of 1 January 2020. Mr. O'Donovan was unable to answer. Mr. Elliot said that he was shocked "*as was everybody else on the call*". He said he called Mr. O'Donovan immediately after the meeting expressing his disbelief that he was unable to answer this question, and this contradicts Mr. O'Donovan's averment that no issues had been raised with his performance prior to 7 January 2020. Mr. Elliot says that he subsequently discovered that Mr. O'Donovan had not logged into Xero, the company's accounting system, since 14 November 2019. Persons other than Mr. O'Donovan continued to carry out roles more appropriate to Mr. O'Donovan's, such as debtor and creditor reconciliations, invoicing and creditor payments. He concluded by saying that Mr. O'Donovan's timekeeping was poor, and he regularly came into the office after 10 a.m. and left before 4 p.m.

34. While Mr. Elliot's allegations are hotly disputed by Mr. O'Donovan, it is noteworthy that the nearest he comes to allegations of misconduct relate to Mr. O'Donovan's engagement with an outside consultant and the furnishing of confidential and commercially sensitive information to that individual. He complains about the factual inaccuracy of the figures produced by Mr. O'Donovan for the meeting of the board of directors. It is in this sense that he says that Mr. O'Donovan misled the board. There is no suggestion of moral turpitude in Mr. Elliot's affidavit. He makes this clear in para. 44 of his affidavit where he states:-

> *"I wish to state categorically that there are no allegations of misconduct against the plaintiff. His performance was substandard, and he did not pass his probation. His employment was not continued. As per the express term of his employment contract, the plaintiff's performance was at all times under review during the initial six-month probationary period, and the plaintiff must have been aware of the terms of his contract."*

35. Mr. Elliot concluded his affidavit by stating that the mutual trust and confidence between Mr. O'Donovan and the appellants had been destroyed. He referred to the fact that he recently became aware that Mr. O'Donovan furnished confidential commercial information of a highly sensitive nature to a third party who was completely unrelated and

unconnected to the appellants. He had previously reprimanded Mr. O'Donovan and had advised him, in no uncertain terms, that the appellants did not wish to engage with that third party. Notwithstanding this, it is Mr. Elliot's understanding that Mr. O'Donovan sent information, including financial information, to that third party on or about 8 November 2019 and 4 December 2019. He asked the court to refuse the relief sought.

36. In his replying affidavit of 18 February 2020, Mr. O'Donovan took issue with the complaints raised by Mr. Elliot in his affidavit. Mr. O'Donovan described these as allegations of misconduct. He said that the allegations "*impugned my integrity as a CFO and chartered management accountant.*" He was surprised that the appellants do not consider the allegations to be misconduct. He said that his application for interlocutory relief was "*grounded on the defendants' decision to terminate [his] employment without offering an appeal.*" He said the manner in which his contract was terminated was "*manifestly unfair*".

37. Mr. Elliot swore a second affidavit and he again averred that Mr. O'Donovan was not dismissed for misconduct. He said:-

> *"15. I reiterate that there were no allegations of misconduct against [Mr. O'Donovan], and I deny absolutely any suggestion of this kind. The [employer] was not satisfied with the performance of [Mr. O'Donovan] and did not extend his employment beyond his probation as a result. As set out in my Replying Affidavit, I believe and am advised that the issues raised with [Mr. O'Donovan] were issues concerning his performance and that it is incorrect on the part of [Mr. O'Donovan] to refer to these as "allegations of misconduct". As per the express term of his Employment Contract, [Mr. O'Donovan's] "work performance" was to be assessed and if it was not up to the required standard his employment would be terminated. No allegation of misconduct was ever made against [Mr. O'Donovan] during the course of his employment."*

Decision of the High Court

38. The trial judge noted that the relief sought by Mr. O'Donovan was effectively a mandatory injunction and, accordingly, he was required to establish a strong case rather than the lower threshold of an arguable case, in order to obtain injunctive relief (*Maha Lingham v. Health Service Executive* [2005] IESC 89). He referred to the most recent authority of the Supreme Court in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Limited* [2019] IESC 65, where O'Donnell J., speaking for the court, emphasised the essential flexibility of the relief. The trial judge held that Mr. O'Donovan had not established a strong case that he was dismissed for misconduct, but he had established a strong case that his dismissal was in breach of his contract of employment on the grounds that the employer had failed to afford him fair procedures. He held at para. 66:-

> *"In my judgment, Mr O'Donovan has established a strong case that he had an implied contractual right to fair procedures in the assessment of his performance during his probationary period, which right was breached in the manner and*

circumstances of both the decision on 7 January to summarily dismiss him for sub-standard performance and the decision on 17 January to deem his appeal against that decision to have been withdrawn."

39. He held that the obligation to afford an employee fair procedures in relation to his or her dismissal was not confined to cases where the dismissal was by reason of an allegation of misconduct, but also held "*the same obligation may apply to a 'poor performance' dismissal*" (para. 48). He referred to *Naujoks v. Institute of Bioprocessing Research & Training Limited* [2006] IEHC 358 as authority for this proposition.

40. He held that "*[t]here is not the slightest doubt*" that the relationship of mutual trust and confidence no longer existed between Mr. O'Donovan and his employer. He noted that Mr. O'Donovan acknowledged that the relationship of trust and confidence had "*irretrievably broken down*" (para. 68). He held it was highly improbable that Mr. O'Donovan would ever resume the role of CFO, even if he was entirely successful at the trial of the action (para. 61) and that his claim in reality was "*one for a fair termination process rather than for reinstatement in the role of CFO*" (para. 68).

41. He was satisfied that the least risk of injustice in the case favoured the granting of an order in the following terms:-

"(1) That the defendants are restrained from repudiating Mr O'Donovan's contract of employment pending the trial of the action on the following specific terms:

(i) That Mr O'Donovan is to be paid his salary for a period of six months from the end of January 2020 (and any applicable bonus and other benefit arising during that period), on the provision by him of an undertaking to carry out any of the duties of CFO that the defendants may require of him.

(ii) That the defendants are not required to assign any of the duties of CFO to Mr O'Donovan at any time pending the trial of the action but, insofar as they do beyond the period of six months from the end of January 2020 and pending the trial of the action, must pay his salary (and any applicable bonus and other benefit) accordingly.

(iii) That the defendants may choose to put Mr O'Donovan on leave of absence rather than assign any duties to him, but that is without any prejudice to their obligation at (i) above.

(iv) That the defendants are released from their undertaking not to replace Mr O'Donovan by the appointment of a new CFO and may do so as they see fit."

The appeal

42. The appellants argued that the grant of the interlocutory injunction to reinstate Mr. O'Donovan in his employment and to pay his six months' salary on the basis of an implied contractual obligation to fair procedures and natural justice was an error in the circumstances where:

(i) Mr. O'Donovan's employment had already terminated at the time of the commencement of the proceedings;

(ii) the trial judge accepted that there were no allegations of misconduct, and that the termination was not for misconduct but rather simply poor performance;

(iii) the termination was within Mr. O'Donovan's six-month probation period;

(iv) the trial judge noted that Mr. O'Donovan accepted that mutual trust and confidence between the parties had completely broken down; and

(v) the trial judge found that Mr. O'Donovan's case was, in reality, one for a fair termination process.

43. The appellants argued that the trial judge failed to apply common law principles applicable to termination of employment for any or no reason, and that he wrongfully implied a contractual term requiring fair procedures for termination of a contract of employment when performance was not adequate.

44. In his respondent's notice, Mr. O'Donovan argued in his grounds of opposition (additional grounds on which the decision should be affirmed) that he had a strong case, likely to succeed at trial, that he was dismissed wrongfully, and in breach of his express and/or implied contractual entitlement to fair procedures, for *misconduct*. It should be noted that this had been expressly rejected by the trial judge and the injunction was granted on the basis that he had a strong case based on a dismissal for poor performance. While Mr. O'Donovan cross-appealed in relation to the terms of the order and the order as to costs made by the trial judge, he did not appeal the trial judge's finding that he did not have a strong case that he had been dismissed wrongfully for misconduct.

Discussion

45. In *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Limited*, O'Donnell J. said that when considering an application for an interlocutory injunction the first matter the court should consider is whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon the ending of the trial could be granted (para. 64). So, this is the starting point for the court.

46. In my view, Mr. O'Donovan is highly unlikely to obtain a permanent injunction even if he succeeds at trial.

47. In *Maha Lingham v. The Health Service Executive*, Fennelly J. held that an application to restrain the termination of a contract of employment amounted, in effect, to a mandatory injunction and therefore the onus is on a plaintiff to establish that he or she has a strong case that is likely to succeed at the hearing of the action. It was accepted by the parties and trial judge that the onus was on Mr. O'Donovan to establish that he had a strong case in respect of one or other of his claims against the appellants and that if he could not do so, then he should be refused the relief he sought.

48. The view of the trial judge was that Mr. O'Donovan had not established a strong case that he was dismissed for misconduct. I would agree. Mr. Elliot, on behalf of the appellants, twice, expressly stated this and affirmed that Mr. O'Donovan was dismissed from his position on the basis of poor performance. The nature of the complaints set out by Mr. Elliot bears this out and falls very far short of allegations of misconduct, in my judgment. Furthermore, there was no cross-appeal by Mr. O'Donovan in relation to this decision of the High Court. Therefore, this appeal must proceed on the basis that he has not established a strong case that he was dismissed for misconduct and the issue is whether he has a strong case for an injunction restraining the termination of his contract of employment – and the other associated relief – in circumstances where his dismissal, for the purposes of this exercise, was for poor performance.

49. It is common case that Mr. O'Donovan was still serving his six-month probationary period when his employment was terminated on 7 January 2020. In my judgment, the trial judge failed to give adequate weight to the fact that the termination occurred during the probationary period. That is a critical fact in this case. During a period of probation, both parties are – and must be – free to terminate the contract of employment for no reason, or simply because one party forms the view that the intended employment is, for whatever reason, not something with which they wish to continue. Neither party can hold the other to the continuation of the employment against the wishes of the other. I do not accept that a court can imply a right to fair procedures – still less uphold a cause of action for the breach of such an alleged right – in relation to the assessment of an employee's performance by an employer (other than for misconduct, which does not arise here) during the probationary period, as this would negate the whole purpose of a probationary period. This does not prevent an employer from including a term in the contract which confers rights to fair procedures on the employee, even during the period of probation. Whether there may be other exceptions which do not arise here, I leave to another case. In my judgment, Mr. O'Donovan could not – and did not – establish that he had a strong case for an injunction restraining the termination of his employment, where this occurred during his probationary period.

50. In addition, the contract expressly provides that:-

> *"During this period your work performance will be assessed and, if it is satisfactory, your employment will continue. However, if your performance is not up to the required standard, we may either take remedial action or terminate your employment."*

51. Mr. O'Donovan signed up to a contract with an express entitlement of the employer to terminate the contract during the probationary period if the performance of Mr. O'Donovan was "*not up to the required standard*".

52. The employer was also entitled to give pay in lieu of notice in the event of a termination of the contract. It was not contested that the applicable notice period was one month, and that Mr. O'Donovan was paid one month's salary in lieu of notice. Therefore, he was

dismissed pursuant to an express contractual term which entitled the employer to dismiss him if his performance was substandard and he was paid in lieu of one month's notice.

53. In *Curr v. London & Country Mortgages* [2020] EWHC 1661 (QB), the High Court in London considered an application to dismiss the claim of the plaintiff on the basis that it was bound to fail and held at paras. 9-10 as follows:-

> *"9. However, even if Mr Curr was able to prove all these matters at trial, and even if he were able to overcome the fact that his sales performance was not the sole reason given for the termination**, he faces an insuperable legal difficulty, namely, that during the probationary period L&C had the express contractual right to terminate his contract on payment of one week's salary, whether or not they had any good reason for doing so**. As Lord Hoffmann pointed out in Johnson v Unisys Ltd [2003] 1 AC 503, if the employer has a contractual right to dismiss an employee on notice without giving any reason, the court cannot imply a term that the dismissal should not take place save for good cause and after giving him a reasonable opportunity to demonstrate that no such cause existed.*
>
> *10. Moreover, **even if Mr Curr had been able to prove that there was a repudiatory breach of the contract of employment, and that he was wrongfully dismissed, as a matter of law his damages would be limited to the payment in lieu of notice that he has already received.** That is why any claim for breach of contract brought at common law seeking damages based on the amount of future salary he would have or might have earned is bound to fail, however that claim is formulated."* (emphasis added)

54. At para. 49, the trial judge held that Mr. Curr's claim for wrongful dismissal "*could not even get off the ground unless he was able to show that, as a matter of construction, the contract did **no**t entitle L&C to terminate his contract at any time without reason, and that he was entitled to finish his probation period.*" The court continued:-

> *"55. If the employer has the right to dismiss on notice, as L&C did, then at common law the damages are confined to the payment in lieu of notice that the employee would receive if the employer terminated the contract in accordance with the relevant contractual provisions. Because Mr Curr had already received that payment, there was no loss recoverable at law, and the Court would not allow the claim to proceed to trial just to enable recovery of nominal damages."*

55. I would adopt these statements of principle as representing the law in this jurisdiction.

56. If an employer has a contractual right – in this case a clear express right – to dismiss an employee on notice without giving any reason, the court cannot imply a term that the dismissal may only take place if fair procedures have been afforded to the employee, save where the employee is dismissed for misconduct. The decision in *Johnson v. Unisys* [2001] UKHL 13; [2003] 1 A.C. 518, referred to in *Curr*, was considered in detail by the High Court (Carroll J.) in *Orr v. Zomax Limited* [2004] IEHC 47, [2004] 1 I.R. 486. In

Orr, the plaintiff argued that there was an implied term in his contract of employment that the employer must act reasonably and fairly. Carroll J. rejected this. She said that the defendant gave notice in accordance with the plaintiff's contract, plus an additional month. There was no allegation that the notice was inadequate. In reliance on *Johnson v. Unisys Ltd.*, it was not open to the plaintiff to argue that the principles applicable under the Unfair Dismissals Act 1977 should be imported into the common law. She approved of the judgment of Lord Nichols as follows:-

> *"I am persuaded that a common law right embracing the manner in which an employee is dismissed cannot satisfactorily co-exist with the statutory right not to be unfairly dismissed. A newly developed common law right of this nature, covering the same ground as the statutory right, would fly in the face of the limits Parliament has prescribed on matters such as the classes of employees who have the benefit of the statutory right, the amount of compensation payable and the short time limits for making claims. It would also defeat the intention of Parliament that claims of this nature should be decided by specialist tribunals, not the ordinary courts of law."*

57. She also quoted with approval from the judgment of Lord Millett:-

> *"But the creation of the statutory right has made any such development of the common law both unnecessary and undesirable. In the great majority of cases the new common law right would merely replicate the statutory right; and it is obviously unnecessary to imply a term into a contract to give one of the contracting parties a remedy which he already has without it. In other cases, where the common law would be giving a remedy in excess of the statutory limits or to excluded categories of employees, it would be inconsistent with the declared policy of Parliament. In all cases it would allow claims to be entertained by the ordinary courts when it was the policy of Parliament that they should be heard by specialist tribunals with members drawn from both sides of industry. And, even more importantly, the co-existence of two systems, overlapping but varying in matters of detail and heard by different tribunals, would be a recipe for chaos. All coherence in our employment laws would be lost."*

58. On this basis she concluded that the common law claim for damages for wrongful dismissal and the statutory claim for unfair dismissal were mutually exclusive and that the principles applicable under the statutory scheme of unfair dismissal should not be implied into the common law action of wrongful dismissal. At para. 28 of the judgment, she held:-

> *"… As the law stands, at common law an employer can terminate employment for any reason or no reason provided adequate notice is given. In cases involving dismissal for misconduct, the principles of natural justice also apply, but that does not arise here."*

59. This statement of the law is clear. This authority has not been questioned and has been frequently cited and followed. Two principles are relevant to the decision in this case. Firstly, confirmation that an employer can terminate employment for any reason or no reason, provided adequate notice is given. This applies whether or not the dismissal occurs during the probationary period. Secondly, it is authority for the proposition that the principles of natural justice apply to cases involving dismissal for misconduct, but not to termination on other grounds.

60. In *Carroll v. Bus Átha Cliath* [2005] IEHC 1, [2005] 4 I.R. 184, the High Court (Clarke J. as he then was) reiterated that if a contract of employment entitles an employer to dismiss an employee for no reason then the employee is only entitled to payment for the appropriate notice period. He held at para. 53:-

> *"The traditional position at common law was that a contract of employment could be terminated on reasonable notice without giving any reason. In those circumstances it was obvious that* ***the only remedy for a breach of contract by way of dismissal was for the payment of the amount that would have been earned had appropriate notice been given.*** *However, it is now frequently the case that employees cannot be dismissed,* ***as a matter of contract****, save for good reason such as incapacity, stated misbehaviour, redundancy or the like. It would appear that the development of the law in relation to affording employees a certain compliance with the rules of natural justice in respect of possible dismissal derives, at least in material part, from this development. If the stated reason for seeking to dismiss an employee is an allegation of misconduct then the courts have, consistently, held that there is an obligation to afford that employee fair procedures in respect of any determination leading to such a dismissal.* ***That does not alter the fact that an employer may still, if he is contractually free so to do, dismiss an employee for no reason.*** *It simply means that where an employer is obliged to rely upon stated misconduct for a dismissal or, where not so obliged chooses to rely upon stated misconduct, the employer concerned is obliged to conduct the process leading to a determination as to whether there was such misconduct in accordance with many of the principles of natural justice."* (emphasis added).

61. There is no suggestion that the principles of natural justice must be applied where an employer terminates the employment contract of an employee on the grounds of poor performance.

62. Fennelly J. in *Maha Lingham* referred to this principle in the following terms:-

> *"… according to the ordinary law of employment a contract of employment may be terminated by an employer on the giving of reasonable notice of termination and that according to the traditional law at any rate, though perhaps modified to some extent in the light of modern developments, according to the traditional interpretation, the employer was entitled to give that notice so long as he complied*

with the contractual obligation of reasonable notice whether he had good reason or bad for doing it.

…

… where a dismissal is by reason of an allegation of misconduct by the employee, the courts have in a number of cases at any rate imported an obligation to comply with the rules of natural justice and give fair notice and a fair opportunity to reply. This does not apply in the present case either. The defendant is not making any allegation of improper conduct so it is not the case and it is not contended that the [rules] (sic) of natural justice apply."

63. *Maha Lingham* is an authority which is frequently cited and followed and, as a decision of the Supreme Court, is binding on this court.

64. Mr. O'Donovan was dismissed pursuant to an express contractual term within the period of probation and he was paid one month's salary in lieu of notice. Mr. O'Donovan accepts that his employer was entitled to dismiss him with notice. He was dismissed with notice because he was dismissed and paid his salary in lieu of notice. Under the common law, this would appear to satisfy his claim in full against his employer. It is for Mr. O'Donovan to establish that he has a strong case that this is not so and that he has, on the contrary, a strong case for an injunction. In my judgment, he has failed in this regard.

65. If he is to be entitled to the injunction sought, Mr. O'Donovan must satisfy the court that he has a strong case that he is entitled to fair procedures in relation to the termination of his contract of employment on the grounds of poor performance. As is apparent from the cases discussed, there is considerable authority to the contrary, including the binding authority of *Maha Lingham*.

Do fair procedures apply in a case of dismissal for poor performance?

66. The trial judge relied upon the decision of the High Court (Laffoy J.) in *Naujoks v. National Institute of Bioprocessing Research & Training Limited* [2006] IEHC 358, [2007] 18 E.L.R. 25. In that case, the plaintiff sought an interlocutory injunction restraining his removal from his position as CEO of the defendant and directing restoration to that post, restraining the defendant from dismissing him, ordering the defendant to pay him all salary to include arrears, and restraining the defendant from appointing any other person to the post. Laffoy J. noted the finding in *Maha Lingham* that, in substance, the plaintiff was seeking a mandatory interlocutory injunction and, accordingly, he was required to show that he had a strong case that he was likely to succeed at the hearing of the action. She held that this standard applied to the application before her. She quoted the passage from *Carroll v. Bus Átha Cliath* cited above. At pp. 12-13 of the judgment (pp. 33-34 of the report) she stated:-

"The second strand [of the plaintiff's case] is that the plaintiff has not been afforded fair procedures, in that he has not been given an opportunity to put forward his point of view in relation to the management issues which precipitated the action

taken by the defendant on 12 October, 2006. The defendant's answer to that is that the question of fair procedures does not arise, because the defendant has not made any allegation of misconduct against the plaintiff. I have difficulty with the stance adopted by the defendant on this point. It is true that Mr. Gantly has asserted that the plaintiff's employment was not terminated by reason of misconduct. The fact remains, however, that the reason given for the determination of the plaintiff's employment is that the Board had lost confidence in his ability to manage the Institute. Insofar as the defendant has explained how the Board reached that conclusion, it has done so by disputing the plaintiff's averments as to the issues which arose in relation to the research team and its head. Mr. Gantly has averred that ***the plaintiff's management style and his manner of communication with members of the research team l****ed to "serious human resource issues" arising. The inference to be drawn is that Mr. Gantly and the non-executive directors made a judgment as to who was responsible for the "serious human resource issues" which had arisen. It seems to me that* ***that is not far removed from making a judgment that there was a failure on the part of the plaintiff to properly discharge his duties as CEO, which would entitle the defendant to summarily dismiss the plaintiff, but subject to affording him fair procedures.*** *On this point, I can put the matter no further than that, having regard to the facts as disclosed in the affidavits before the court, it is not an answer to the plaintiff's contention that he should have been, but was not, afforded fair procedures that it is the defendant's stated position that his contract was not terminated on grounds of misconduct."* (emphasis added).

67. Laffoy J. held that it was insufficient for a defendant seeking to resist a mandatory injunction to state that the plaintiff's contract of employment was not terminated on the grounds of misconduct. The court was entitled to assess the evidence and reach its own conclusion. In this instance, Laffoy J. held that there was an "*inference to be drawn*" from the evidence as to the conduct of the defendant; that the defendant, in fact, made a judgment that there was a failure on the part of the plaintiff "*to properly discharge his duties as CEO*". She took the view that this would entitle the employer to dismiss the employee summarily, but that the employee was entitled to the benefit of fair procedures. Insofar as it is asserted that this is authority for the proposition that an allegation that an employer is of the view that an employee has not "*discharged his duties*" is sufficient to warrant the implication of the right to fair procedures in relation to such dismissal, I would respectfully decline to follow such a precedent.

68. The authority relied upon by Laffoy J. does not, in fact, state that an employee who was dismissed on grounds other than misconduct is entitled to the benefit of the principles of natural justice. The decisions in *Orr v. Zomax Ltd. or Johnson v. Unisys Ltd.* do not appear to have been cited to her. The corollary of a finding that it was not sufficient for a defendant to state that the issue of fair procedures does not arise because the plaintiff's contract was not terminated for misconduct, is not that fair procedures apply even if the plaintiff's contract was terminated for reasons other than misconduct.

69. In my view, *Orr* and *Carroll* remain good law. The principle established was specifically endorsed in Maha Lingham where Fennelly J. confirmed that a dismissal by reason of an allegation of misconduct attracts the right to fair procedures, whereas a dismissal in the absence of an allegation of improper conduct does not attract such a right.

70. To my mind, the trial judge did not adequately address the implications of his finding that Mr. O'Donovan had failed to establish a strong case that he had been dismissed on grounds of misconduct when the trial judge proceeded nonetheless to hold that he had established a strong case that he was entitled to fair procedures in respect of his dismissal. In my judgment, the trial judge erred when he held that Mr. O'Donovan had a strong case that he was entitled to fair procedures in relation to the assessment of his performance during the period of probation, or in relation to the termination of his employment, or in relation to any appeal against the termination of his contract of employment. In my opinion, Mr. O'Donovan's argument that the right to fair procedures might extend to a dismissal on grounds other than misconduct fell very far short from establishing that he had made out a strong case in this regard. That being so, whether there were breaches of fair procedures in relation to the assessment of his performance or the conduct of the appeal is *nihil ad rem*.

71. Accordingly, in my view, the trial judge erred in holding that Mr. O'Donovan had satisfied the requirement established in *Maha Lingham* of showing that he had a strong case that he was likely to succeed in trial and, in accordance with *Merck Sharp & Dohme*, that he was likely to obtain a permanent injunction at the trial of the action. For these reasons, I would allow the appeal.

Damages as an adequate remedy

72. Separately, in my opinion, the learned trial judge failed to give effect to his finding that Mr. O'Donovan would not be reinstated as CFO at the hearing of the action.

73. If, as the appellants argued, and Mr. O'Donovan apparently accepted, his contract of employment had, in fact, terminated when he instituted the proceedings, then he could not be reinstated on foot of an order granted in these proceedings. His claim was for wrongful, not unfair, dismissal. Had he remained in place when he commenced the proceedings he might have obtained an order restraining the termination of his employment, if, for instance, he could show that his employment was about to be terminated for alleged misconduct without affording him fair procedures; but, once his contract was terminated he could not be reinstated to his former position in wrongful dismissal proceedings.

74. More importantly, Mr. O'Donovan accepted that the mutual trust and confidence which is necessary between an employer and an employee had been irretrievably lost. The trial judge acknowledged this. In these circumstances, the courts do not normally grant permanent injunctions restraining the termination of the contract of employment as this would amount to a permanent mandatory injunction to continue a contract of employment in circumstances where such an order would be simply untenable. The trial judge acknowledged that, in effect, Mr. O'Donovan's claim was one for damages for

wrongful termination of his contract of employment. By definition, damages are an adequate remedy within the meaning of the *jurisprudence* in those circumstances and, accordingly, no injunction ought to have been granted. On this separate basis alone, I would allow the appeal.

75. As I would allow the appeal and vacate the order of the High Court, it is not necessary to address the arguments in relation to the terms of the injunction or the cross-appeal by Mr. O'Donovan in relation to the costs in the High Court.

76. I would allow the appeal and vacate the order of the High Court. Provisionally, I am of the view that the appellants have succeeded on the appeal and are entitled to an order for costs against Mr. O'Donovan in respect of the appeal and in respect of the hearing in the High Court. If Mr. O'Donovan wishes to argue for an alternative order for costs, he may apply within fourteen days of delivery of this judgment to the Office of the Court of Appeal to have the matter listed for a short hearing in relation to the costs of the appeal and of the High Court.

77. This judgment is being delivered electronically; Haughton and Power JJ. have indicated their agreement with this judgment.