[2020] IEHC 291

THE HIGH COURT
CHANCERY

[2020 No. 708P]

BETWEEN

DONAL O'DONOVAN

PLAINTIFF

AND

OVER-C TECHNOLOGY LIMITED AND OVER-C LIMITED

DEFENDANTS

JUDGMENT of Mr Justice David Keane delivered on the 12th June 2020

Introduction

1. This is an employment injunction application, brought against the background of an action for wrongful dismissal challenging both the decision made on 7 January 2020 by the first defendant/respondent, Over-C Technology Limited ('Over-C Technology'), to terminate the employment of the plaintiff/applicant, Donal O'Donovan, and its subsequent confirmation of that decision on 17 January, when it deemed Mr O'Donovan's appeal against dismissal to have been withdrawn. The second defendant/respondent, Over-C Limited ('Over-C'), an English-registered company, is the parent of Over-C Technology. Thus, collectively, Over-C Technology and Over-C are the defendants.

Procedural history

2. On 29 January, Mr O'Donovan issued proceedings. A memorandum of appearance was entered on behalf of each of the defendants on 5 and 6 February, respectively. On 18 February, Mr O'Donovan delivered a statement of claim in which he seeks, among other reliefs: declarations that his dismissal was unlawful and, hence, invalid and that he remains employed by the defendants; permanent injunctions requiring the defendants to acknowledge and maintain the position as such; and damages against the defendants for breach of contract, breach of duty, and breach of his constitutional right to fair procedures.

3. On 31 January, Mr O'Donovan sought, and was granted, leave *ex parte* to effect short service of the present motion. He filed and issued a notice of motion on 31 January, initially returnable to 6 February on the direction of Reynolds J. The principal interlocutory reliefs that Mr O'Donovan seeks are injunctions pending trial in terms of the permanent injunctions that he claims as substantive relief. The application is grounded on an affidavit sworn by Mr O'Donovan on 30 January. Michael Elliot, the chief executive officer ('CEO') of each of the defendants, swore an affidavit in reply on 14 February, supplemented by a short affidavit of John Boylan, a partner in the firm of solicitors representing the defendants, sworn on the same date. Mr O'Donovan swore a second affidavit on 18 February, as did Mr Elliot one week later. Still further affidavits sworn by Mr O'Donovan on 26 February and Mr Elliot on 10 March were later exchanged. Finally, Liam Wade, the general manager and company secretary of Over-C Technology, swore a short affidavit on its behalf on 25 May that I gave the defendants leave to file in court. I have considered the contents of each of those affidavits.

4. The defendants gave an undertaking to the court (O'Connor J) on 6 February that they would not appoint another person to the role of CFO pending the determination of the present application.

5. The application was argued before me on 25 May. The defendants had not yet delivered a formal defence.

Background

6. Mr O'Donovan is a chartered management accountant. By letter dated 30 May 2019 ('the employment offer letter'), Mr Elliot offered him the position of chief financial officer ('CFO') of 'our Irish company Over-C Technology and Over-C Ltd in the UK'.

7. On 31 May 2019, Mr O'Donovan signed a contract with Over-C Technology, headed 'Statement of Main Terms of Employment' ('the contract'), which recites that it forms part, and sets out the main terms, of his 'Contract of Employment'. The contract states that Mr O'Donovan's employment with Over-C Technology as CFO was to begin on 22 July 2019, and that the CEO was to be his line manager.

8. Among the other express terms of the contract, are the following:

> *'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.
>
> ...
>
> *TERMINATION TO BE GIVEN BY EMPLOYER*: One month in the first year, [t]hree months thereafter.
>
> ...
>
> *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.'

9. Mr O'Donovan has exhibited the Employee Handbook that was furnished to him in conjunction with the contract. It contains little in the way of disciplinary rules and nothing on disciplinary procedures.

10. Mr O'Donovan began work as CFO of Over-C Technology in Cork on 6 August 2019. Between 13 December 2019 and 6 January 2020, he was on annual leave.

11. Upon his return from leave on 7 January, Mr O'Donovan was called to a meeting with the CEO, Mr Elliot. At that meeting, Mr Elliot informed Mr O'Donovan, that his employment with Over-C Technology was terminated with immediate effect and that he was to receive one month's pay in lieu of notice.

12. As CEO of Over-C Technology, Mr Elliot later wrote to Mr O'Donovan, confirming that decision. The letter (for ease of reference, 'the letter of termination') is dated 8 January, though Mr O'Donovan contends that post office records show it was sent by registered post on Friday, 10 January, and delivered on Monday, 13 January. The letter states that Mr O'Donovan's performance in the role of CFO was sub-standard and had been identified to him as such by Over-C Technology board members at earlier meetings. In particular, it alleges that Mr O'Donovan had: (a) provided an inflated and, hence, misleading projected sales figure at a board meeting on 2 December 2019; (b) failed to prepare adequately for a board meeting on 19 December 2019; and (c) failed to answer a question from the board about the company's 'basic cash position.' The letter concludes by confirming that Mr O'Donovan's employment with Over-C Technology had been terminated the day before with immediate effect in line with the terms of his contract of employment and within his probationary period and that he would receive one month's pay in lieu of notice.

13. Meanwhile, on the afternoon of 8 January, Mr O'Donovan emailed Mr Elliot, asserting that, under his contract of employment, he had an entitlement to appeal the decision to terminate his employment. Just over two hours later, Mr Elliot emailed in reply:

> 'You are correct that there is an [a]ppeal process. A member of our [b]oard of [d]irectors will hear your [a]ppeal and this will be arranged shortly. You will be contacted next week to agree a date and location for this meeting.'

14. On 14 January, Eileen Moloney, a director of Over-C Technology, wrote to Mr O'Donovan in the following terms:

> 'I'm in receipt of your mail of 8th Jan in which you wish to appeal against the decision to dismiss you on 7th January. This was confirmed in writing to you in the letter dated 8th January (attached).
>
> I write to confirm that I will hear your appeal, the hearing details are as follows:
>
> Date: Fri 17th January
>
> Time: 14.30 hours

Venue: Over-C Boardroom, 12 South Mall [Cork]

The hearing will be conducted by way of a review of the original decision. The appeal hearing will be chaired by me in the presence of a Company witness, who will take notes.

You may wish to be accompanied at the appeal. If you wish to be accompanied, please contact me on the number below, by Thursday 16th at 17.00 hrs to advise me of the name of the person, so that any necessary arrangements can be made.

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.'

15. Mr O'Donovan received that letter via an email sent to him by Ms Moloney at 6.23 p.m. on 14 January. He replied by email on 16 January, opening by stating that the time fixed for the proposed appeal hearing was not convenient for him or his legal representative, then raising a number of procedural issues, before concluding with the assertion that Over-C Technology must address those issues 'as quickly as possible as delay will allow matters to fester and worsen.'

16. Ms Moloney responded by letter, dated 17 January, stating in material part:

'I note you do not now wish to proceed with the appeal today.

I now confirm your dismissal stands.'

17. On 24 January, Mr O'Donovan's solicitors wrote a letter before action to each of the defendants, claiming that his dismissal 'for misconduct' was unlawful and had been effected in breach of his contract of employment. On behalf of Mr O'Donovan, they called upon the defendant to: (a) withdraw the allegations of 'misconduct' contained in Mr Elliot's letter of 8 January; (b) make a full written apology to Mr O'Donovan; and (c) reinstate him as CFO, by close of business on 28 January 2020, failing which proceedings for wrongful dismissal would issue and injunctive relief would be sought.

18. The defendants' solicitors responded by email on 30 January 2020, stating that: (a) Mr O'Donovan had received one month's pay in lieu of notice and his employment would finish on 7 February 2020; (b) Mr O'Donovan's employment had been terminated during his initial six-month probationary period for reasons clearly set out by Mr Elliot; and (c) Mr O'Donovan's claims were without foundation and would be vigorously defended.

19. Here, it is convenient to consider briefly two issues that the defendants have raised on affidavit.

20. First, their solicitor Mr Boylan has averred that the statement in that email that Mr O'Donovan's employment would end on '7 February 2020' was a typographical error and should have read '7 January 2020' because that is the date upon which Mr Elliot informed Mr O'Donovan that his employment was terminated with immediate effect. It seems to

me that whether Mr O'Donovan was summarily dismissed with immediate effect on 7 January 2020 or was given one month's notice of dismissal on that date in accordance with the relevant term of his contract of employment (so that his employment finished on or about 7 February 2020), depends in significant part on the true interpretation of the letter of termination ('your employment with Over-C Technology was terminated with immediate effect in line with the terms of your Contract of Employment within your stated [p]robationary [p]eriod'); see, for example, the decisions of the England and Wales ('EW') Court of Appeal in *I. Brindle v H W Smith (Cabinets)*[1972] IRLR 125 and *R J Dedman v British Building and Engineering Appliances Ltd* [1973] IRLR 379. While that may or may not be an issue at trial, I cannot see that it is material to the determination of the present application.

21. Second, Mr Elliot has averred that the effect of the term of Mr O'Donovan's contract of employment stipulating a six-month probationary period was to create, in effect, a six-month fixed term contract, subject to extension or continuation only upon satisfactory performance. In so far as it is necessary to address that assertion for the purpose of the present application, there is a strong case to be made that Mr O'Donovan's contract of employment was one of indefinite duration, subject to the entitlement of his employer to terminate his employment if his performance was 'unsatisfactory' or 'not up to the required standard' during his initial six-month probationary period; that is to say, a contract that would continue unless terminated on the ground of unsatisfactory performance, rather than one that would expire after six-months unless extended on the ground of satisfactory performance, as Mr Elliot claims.

22. To conclude the chronology of events that are not in dispute, Mr O'Donovan did receive the payment of one month's salary on 30 January, which was the day after the these proceedings issued and the day before the present motion did.

The case for an employment injunction

23. In these proceedings, Mr O'Donovan advances several different causes of action beyond breach of contract. There is a claim in misrepresentation, alleging that he was induced to enter the defendants' employment in reliance upon statements that were untrue concerning both the size of the defendants' revenue stream and client base and his eligibility as CFO to acquire equity in the business. And there is a claim in defamation, alleging that the dismissal letter of 8 January 2020 is defamatory in content and was published to third persons. Those claims, which are denied by Mr Elliot on behalf of the defendants, are of no relevance to the present application.

24. Also of no relevance, are Mr Elliot's averments, on behalf of the defendants, that Mr O'Donovan has acted in breach of their confidence – a claim that Mr O'Donovan denies. Mr Elliot deposes to having recently become aware of the unauthorised disclosure by Mr O'Donovan on 8 November and 4 December of certain of the defendants' confidential commercial information to a third party, an identified business consultant. In response, Mr O'Donovan avers that, at all material times, his interactions on behalf of the defendants with that business consultant were known to, and authorised by, Mr Elliot, a claim that, in turn, Mr Elliot denies. Mr Elliot has since expanded on the defendants'

claims by suggesting that Mr O'Donovan had wrongly sent the defendants' confidential information to his personal email account. Mr O'Donovan's position is that he accessed his work email account on his home computer with the defendants' express consent and that he has offered to make his computer available for inspection. According to Mr Elliot, Over-C Technology may issue separate proceedings against Mr O'Donovan for breach of contract or breach of confidence, or both.

25. The part of Mr O'Donovan's case, as pleaded, that underpins the present application for injunctive relief is his claim that his dismissal was effected in breach of contract and in breach of his constitutional right to fair procedures, such that (in addition – or as an alternative – to damages) he is entitled to a declaration that he continues to be employed by the defendants as CFO or that his purported dismissal from that position is invalid, or both.

26. From his pleadings, it is clear that Mr O'Donovan rejects the assertion that his performance in the role of CFO was unsatisfactory or, differently put, that it was below the required standard. Further, he pleads that the defendants never informed him of any issue with, or concern about, the standard of his performance, prior to his meeting with Mr Elliot on 7 January 2020. Mr O'Donovan and, on behalf of the defendants, Mr Elliot have joined issue on those two propositions at length over three exchanges of affidavit. Indeed, Mr Elliot now avers to a number of alleged instances of unsatisfactory or sub-standard performance by Mr O'Donovan in the role of CFO in addition to those identified in the letter of termination, each of which Mr O'Donovan denies or rejects on oath.

27. Quite apart from any issue concerning his conduct or performance as CFO, Mr O'Donovan goes on to plead that the procedures used to effect his dismissal breached both the express and implied terms of his contract of employment. According to Mr O'Donovan, the express terms breached are those dealing with 'disciplinary rules and procedures' and 'disciplinary appeal procedure', set out earlier in this judgment. In addition, Mr O'Donovan contends that the defendants breached an implied term of that contract that those rules and procedures would be fair and in accordance with the requirements of natural and constitutional justice.

28. Mr O'Donovan's central contentions are that the defendants breached those terms by: (a) effecting his dismissal before affording him an opportunity to appeal; (b) failing to provide him with adequate notice of the arrangements for the conduct of the appeal, once that entitlement was conceded after his dismissal; and (c) wrongly and unreasonably deeming his appeal to have been withdrawn when informed by him that the arrangements they had unilaterally made for it were not convenient. Through Mr Elliot's averments, the defendants join issue with those claims, adopting the position (simply stated) that Mr O'Donovan: (a) was offered an appeal (albeit only upon requesting one after he was informed of his summary dismissal); (b) was given adequate notice of the arrangements they had made for the conduct of his appeal; and (c) did, in effect, withdraw that appeal by writing to inform them that those arrangements were not convenient for him but without proposing alternative ones.

29. Finally, in describing the issues between the parties, I do not overlook Mr Elliot's averment on behalf of the defendants that, despite Mr O'Donovan's express plea that he was employed by both defendants (as reflected in the terms of the employment offer letter signed by Mr Elliot), his contract of employment was with Over-C Technology alone (as reflected in the contract that Mr O'Donovan signed).

The test for an employment injunction

30. The proper approach to an application for an interlocutory injunction was recently restated in *Merck Sharp & Dohme Corp v Clonmel Healthcare Ltd* [2019] IESC 65 (Unreported, Supreme Court (O'Donnell J; Clarke CJ, McKechnie, Dunne and O'Malley JJ concurring), 31 July 2019) ('*Merck*').

31. The general principles remain those identified by Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL) (at 407-9) and approved by the Supreme Court in *Campus Oil v Minister for Industry (No. 2)* [1983] 1 IR 88 (O'Higgins CJ and Griffin J, Hederman J concurring) ('the *Campus Oil* principles').

32. At the risk of crude over-simplification, I consider those principles to be that the applicant must establish that: (1) there is a serious question to be tried on the applicant's entitlement to a permanent injunction; (2) the balance of convenience favours the grant of interlocutory relief, which requires, but is not limited to, a consideration of whether damages would be an adequate and effective remedy for an applicant who fails to obtain interlocutory relief but later succeeds in the action at trial and, if not, whether the applicant's undertaking to pay damages would be an adequate and effective remedy for a respondent against whom interlocutory injunctive relief is granted but whose defence to the action succeeds at trial. While Lord Diplock's speech in *American Cyanamid* was ambiguous on whether the adequacy of damages was a consideration antecedent to, or part of, that of the balance of convenience, the judgment of O'Donnell J in *Merck* (at para. 35) has now clarified that it is preferable to consider adequacy of damages as part of the balance of convenience, thus emphasising the flexibility of the remedy.

33. Where a mandatory injunction is sought, such as where an applicant seeks an injunction restraining dismissal (which is, in substance, an injunction mandating the continuation of an employment relationship), the *Campus Oil* principles are subject to the significant refinement that an applicant must establish at least a strong case, likely to succeed at the hearing of the action, and not merely surmount the lower threshold of establishing a serious question to be tried; *Maha Lingam v Health Service Executive* [2005] IESC 89, [2006] 17 ELR 137 (*per* Fennelly J at 140). Mr O'Donovan accepts – correctly, in my view – that the strong case test is the one that he must meet in order to obtain the relief that he seeks in the present application.

34. In *Merck*, O'Donnell J pointed out that it would be an error to treat the *Campus Oil* principles as akin to statutory rules (at para. 34), before later outlining the steps that might usefully be followed in considering an interlocutory injunction application (at para. 64):

'(1) First, the court should consider 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 ending the trial could be granted;

(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the American Cyanamid and Campus Oil approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;

(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice;

(4) The most important element in that balance is, in most cases, the question of adequacy of damages;

(5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy;

(6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it *may* be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial;

(7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;

(8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined.'

35. Finally, in approaching the test I must apply to the evidence that I have attempted to summarise, I am conscious of Lord Diplock's admonition in *American Cyanamid* (at 407):

> 'It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial.'

A serious question to be tried?

36. In his statement of claim, Mr O'Donovan pleads that he was dismissed for misconduct. In particular, he pleads that, in asserting in the letter of termination that he had provided an inflated and, hence, misleading sales figure to the board, the defendants meant – and were dismissing him for the reason that – he had deliberately misled the board and, hence, was dishonest and untrustworthy. Further, Mr O'Donovan goes on to plead that this in turn by innuendo meant that he was in breach of the Code of Conduct of the Institute of Management Accountants. Thus, Mr O'Donovan makes the case that he was dismissed on grounds of alleged misconduct, without the benefit of the appropriate disciplinary procedures, including an appeal.

37. Through the averments of Mr Elliot, the defendants adamantly deny that Mr O'Donovan's dismissal was based on any allegation of misconduct. They point to the express terms of the letter of termination, which makes no reference to misconduct and specifically states instead that Mr O'Donovan's performance in his role was, variously, sub-standard and unacceptable and that his employment had been terminated in line with the terms of his contract, 'within his stated probationary period'.

38. Remember, the 'probationary period' term in the contract signed by Mr O'Donovan required Over-C Technology to assess his performance within the initial six months of his employment and, if it was not up to the required standard, permitted Over-C Technology to either take remedial action or terminate his employment. In that context, Mr O'Donovan pleads that at no time during his employment was he ever informed of any issue with his performance nor was he afforded any, or any adequate, opportunity to address the alleged shortcomings identified by Mr Elliot at their meeting on 7 January and in the letter of termination.

39. Remember, also, that Mr O'Donovan emailed Mr Elliot on 8 January, stating 'as per the contract there is an appeal process', and Mr Elliot emailed in reply on 9 January, stating '[y]ou are correct that there is an [a]ppeal process.' Mr Elliot has since averred, in the affidavit that he swore on behalf of the defendants on 25 February, that Mr O'Donovan had no contractual entitlement to an appeal but was offered one 'as a matter of courtesy'. The circumstances in which the defendants came to deem Mr O'Donovan's appeal to have been withdrawn have already been described.

40. Mr O'Donovan pleads that, what he describes as, the 'disciplinary' process established by the defendants was unfair and conducted in breach of both his entitlement to natural and constitutional justice and the implied contractual obligation of mutual trust, good faith and confidence between employer and employee.

41. On the basis of the evidence and arguments just described, I am not satisfied that Mr O'Donovan has established a strong case, likely to succeed at the trial of the action, that he was dismissed, wrongly and in breach of his entitlement to fair procedures, for 'misconduct'. Having regard to the present state of the evidence and, in particular, the express terms of the letter of termination, it seems significantly more probable that the ground for his dismissal was that of poor performance during his probationary period.

42. The question that then arises is whether Mr O'Donovan's dismissal on that ground was properly effected in accordance with the terms of his contract. On that issue, I conclude, on the current state of the evidence, that Mr O'Donovan has established a strong case, likely to succeed at trial, that it was not. As matters stand, there is nothing to suggest that either the instances of alleged sub-standard or unsatisfactory performance identified in the letter of termination or any of the various other instances of alleged poor performance since averred to by Mr Elliot were ever drawn to Mr O'Donovan's attention as *performance issues*, either orally or in writing, prior to the meeting of 7 January at which he was summarily dismissed on that basis.

43. Of course, Mr O'Donovan's case at trial will be stronger if he can persuade the court that the express terms of the contract dealing with 'disciplinary rules and procedures' and 'disciplinary appeal procedure' directly apply to allegations of sub-standard or unsatisfactory performance raised in the context of the 'probationary period' term of the contract. But, even if Mr O'Donovan cannot do so, there remains a strong case that, in the specific circumstances of his contractually required performance assessment, he was entitled to a level of procedural fairness that he did not receive, most obviously in the context of both a right to be heard and a right of appeal.

44. In referring to the specific circumstances of that assessment, I have in mind principally the following: first, that it was contractually mandated and capable of resulting in either remedial action by Over-C Technology or the termination of Mr O'Donovan's employment if his performance was found not to have reached a required standard; second, the specific nature of Mr O'Donovan's probation, whereby, as a qualified management accountant, he was directly appointed to a senior role, rather than – as is more frequently the case with probationary employment – required to successfully complete an initial course of training or instruction in the skills required for an entry-level position; third, the potential seriousness of an adverse performance assessment, reputationally and economically, for a qualified person engaged in a professional role; and fourth, the exchange of email correspondence on 8 and 9 January, whereby, in response to Mr O'Donovan's assertion of a contractual entitlement to an appeal, Mr Elliot acknowledged there was an appeal process, without any qualification to the effect that it was being offered only as a courtesy and not as a contractual entitlement. In those circumstances, I judge that there is a strong case to be made that Mr O'Donovan was dismissed for sub-standard performance during his probationary period without being afforded his implied contractual right to be heard as part of that assessment or to appeal against an adverse assessment, or both.

45. The strength of Mr O'Donovan's case in this regard derives from the defendants' express reliance in the letter of termination on the allegation that his performance in the role of CFO was sub-standard and unacceptable and the express statement in that letter that his employment had been terminated in line with the terms of his contract, 'within his stated probationary period'. Thus, while – on the present state of the evidence – it seems to me that the termination of Mr O'Donovan's employment was not a 'misconduct' dismissal, nor was it merely a dismissal on notice.

46. As Ms Kimber SC for the defendants sought to emphasise and Ms Bolger SC for Mr O'Donovan candidly acknowledged, the traditional common law position is that a contract of employment can be terminated by an employer on reasonable notice whether for good or bad reason (or, indeed, no reason at all); see, for example, the judgment of Fennelly J in *Maha Lingam* (at 140). The contract in this case contains an express term that the notice of termination to be given by the employer shall be '[o]ne month in the first year.' However, as Fennelly J went on to observe (at 141):

> '... [W]here 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.'

47. In *Carroll v Bus Atha Cliath/Dublin Bus* [2005] 4 I.R. 184 (at 208), Clarke J explained that, while in general an employer may, if contractually free to do so, dismiss an employee for any reason or no reason at all, it is no less the case that, where an employer chooses to rely upon stated misconduct as the reason for dismissal, an obligation arises to conduct the process leading to that determination in accordance with the principles of natural justice.

48. Although, on the evidence before me, I am not persuaded that this is a misconduct dismissal case, nonetheless, depending upon the terms of the relevant contract, the same obligation may apply to a 'poor performance' dismissal, as Laffoy J made clear *in Naujoks v Institute of Bioprocessing Research & Training Ltd* [2006] IEHC 358, [2007] ELR 25.

49. The facts of the present case are different to those in *Hughes v MongoDB Ltd* [2014] IEHC 335, (Unreported, High Court (Keane J), 6 June 2014). The employer in that case gave did not give an adverse performance assessment as the reason for the employee's dismissal but relied solely on its asserted contractual entitlement to dismiss on notice. The letter of termination went on to state that the employee would be provided with a standard reference. That is not the position here, where the reason given for dismissal was sub-standard or unsatisfactory performance during the probationary period; a claim that has since been amplified and expanded upon in the three affidavits that Mr Elliot has sworn on behalf of the defendants.

50. I have found that Mr O'Donovan has established a strong case that: (1) the stated reason for his dismissal was his sub-standard or unsatisfactory performance during his probationary period; (2) a fair procedures obligation in the conduct of the relevant

performance assessment arises under the terms of his contract of employment; and (3) there was a breach of that obligation in this case.

51. In view of the interlocutory nature of the present application, it will suffice to say only that I am not persuaded that the analogy the defendants seek to draw between the 'probationary period' term of the contract now at issue and the statutory power to terminate the services of a civil servant working in a probationary capacity under s. 7 of the Civil Service Regulation Act 1956, as amended, is a valid one, sufficient to deprive Mr O'Donovan's case of the strength necessary to obtain relief. That is to say, I am not persuaded of the force of the argument that an employer's entitlement to dismiss a probationary employee, regardless of the specific terms of the contract between them, is the same as, or co-extensive with, that of the appropriate State authority to terminate the services of probationary civil servant under that Act as a matter of public law. Thus, I glean no assistance from a consideration of the line of authority relied upon by the defendants in that regard, culminating in the decision of the High Court (*per* Barron J) in *The State (Daly) v Minister for Agriculture* [1987] 1 IR 165.

52. For the same reason, I cannot see that the decision of the Supreme Court in *Hickey v Eastern Health Board* [1991] 1 IR 210 – holding that the rules of natural justice had no application to a decision to dismiss, by reason of redundancy rather than misconduct, a person who, by operation of the provisions of the Health Act 1970, was a temporary officer of the health board – is of any relevance to the present case, which must be determined by reference to the proper construction of the contract between the parties as a matter of private law and which does not involve a decision that is, or can be, susceptible to judicial review.

53. I can find no meaningful analogy between the position here and that which arose before O'Connor J in *Earley v Health Service Executive* [2015] IEHC 841, (Unreported, High Court, 27 November 2015), another authority upon which the defendants seek to rely. That decision was subsequently reversed on appeal in *Earley v Health Service Executive* [2017] IECA 158, (Unreported, Court of Appeal (Hogan J; Finlay Geoghegan and Peart JJ concurring), 5 May 2017) and an injunction was ultimately granted reinstating the appellant to the contractual position with the HSE from which she had been transferred; *Earley v Health Service Executive (No. 2)* [2017] IECA 207. As the decision of each court in that case made clear, the issue in cases of this kind is always the proper construction of the relevant contract.

The balance of convenience or least risk of injustice

54. Following the steps suggested in *Merck*, it seems to me that: (1) if Mr O'Donovan succeeded at trial, a permanent injunction might well be granted directing his reinstatement, or restraining his dismissal on the ground invoked, in the absence of a performance assessment conducted in accordance with his entitlement to fair procedures; and (2) this is not a case in which the grant of an interlocutory injunction will *per se* determine the issues between the parties, thus rendering any trial superfluous, although I do not overlook the tactical significance attributed to the grant or refusal of interlocutory relief in employment cases, as evidenced by the limited proportion of them that ultimately

proceed to trial. Clarke J observed in *Bergin v Galway Clinic Doughiska Ltd* [2008] 2 IR 205 (at 212) that, when dealing with employment injunctions, it would be 'somewhat naïve not to surmise that a significant feature of the interlocutory hearing is concerned with both parties attempting to establish the most advantageous position from which to approach the frequently expected negotiations designed to lead to an agreed termination of the contract of employment concerned.'

55. It is thus necessary to consider (3) how the matter should be arranged pending trial, with due regard to the balance of convenience and the balance of justice. This requires a consideration (4) of the adequacy of damages, bearing in mind that this is an employment, rather than a commercial, claim, and that the former may not require (5) the same robust scepticism about the claimed inadequacy of an award of damages as the latter. In considering the adequacy of damages, it is also necessary to take into account (6) as a factor any difficulty there may be in assessing damages. It is also necessary to consider (7) any other factors that come into play and must be weighed in the balance in considering what arrangement is fairest pending trial, bearing in mind there may be no trial. Finally, as an overarching principle, the application must be approached recognising (8) the essential flexibility of the remedy and the fundamental objective of seeking to minimise injustice prior to the determination of the legal rights of the parties at trial.

56. There is not the slightest doubt in this case that a relationship of mutual trust and confidence no longer exists between Mr O'Donovan and the defendants. Mr O'Donovan claims, among other things, that he was induced to enter the defendants' employment by misrepresentation and that, in the manner and circumstances of his dismissal, they have traduced his reputation. The defendants claim, among other things, that Mr O'Donovan's performance as CFO was sub-standard and that, while in that position, he wrongly disclosed sensitive commercial information to a third party in breach of confidence. That is, to put it no higher, a very weighty factor against the grant of an interlocutory order that would require, rather than permit, the defendants to allow Mr O'Donovan to resume his duties as CFO; see, for example, *Harte v Kelly* [1997] 8 ELR 125; and Bergin, already cited.

57. Mr O'Donovan apprehends that he will suffer reputational, as well as direct financial, damage in consequence of a performance assessment that he claims was conducted in breach of his entitlement to fair procedures and was wrong in its result. While it is possible to assess damages for reputational injury, that might not be a precise and perfect remedy in the circumstances.

58. More fundamentally, Mr O'Donovan has averred, albeit tersely, that without remuneration pending trial, he will be unable to discharge his debts as they fall due; including his monthly mortgage payments, insurance premiums and the expenses associated with rearing a young family. In *Brennan v Irish Pride Bakeries (In receivership)* [2017] IECA 107, (Unreported, Court of Appeal (Finlay Geoghegan J; Irvine and Hedigan JJ concurring), the Court of Appeal approved the following passage from the judgment of Laffoy J in *Giblin v Irish Life & Permanent plc* [2010] ELR 173 (at 184):

> 'As a general proposition, in the context of employment injunctions, the jurisprudence of the courts has developed over the last quarter century so that it is generally considered that the prospect of an award of damages following the trial of the action is not an adequate remedy for a successful plaintiff who has been deprived of his salary pending the trial of the action.'

59. The defendants argue that, should an injunction be granted and should they later succeed in their defence to Mr O'Donovan's claims, his undertaking to pay damages in that event may not adequately compensate them for two reasons; first, because he has not provided sufficient detail of his means to enable the court to assess the extent to which it is realistic for him to fully compensate them; and second, because, they claim, not unreasonably, that their inability to appoint a new CFO is causing them ongoing damage – as averred to in the affidavit sworn on their behalf by Mr Wade, the general manager of Over-C Technology – that may not be easy to quantify.

60. In support of the first reason, the defendants pray in aid the decision of O'Sullivan J in *Martin v An Bord Pleanála* [2002] 2 IR 655. However, that was not an employment injunction case, nor was it one in which it could have been argued, as it may be here, that any impecuniosity there may be on the part of the applicant has been caused or contributed to by the alleged wrongful conduct of the respondent(s).

61. There is obvious force in the argument that the defendants suffer significant ongoing prejudice through being without a CFO. In view of what is, in all probability, the irretrievable breakdown of the relationship of mutual trust and confidence between the parties, it is highly improbable that Mr O'Donovan will ever resume that role, even if he is entirely successful at the trial of the action. The substantive remedy he seeks is the annulment of the decision to terminate his employment during his probationary period for sub-standard performance. Mr O'Donovan acknowledges that the defendants are nonetheless entitled to terminate his employment on one month's notice in accordance with the terms of his contract of employment. As is their right, the defendants have chosen to join issue on Mr O'Donovan's claim that they were not entitled to dismiss him in the manner and circumstances that they did for sub-standard performance. But it is on that issue that I have found that Mr O'Donovan has made out a strong case.

A Fennelly Order

62. With those considerations in mind, I judge that the balance of convenience (that is to say, the least risk of injustice) lies in making a modified form of what has become known as a Fennelly order, after the decision of Costello J in the case of *Fennelly v Assicurazioni Generali S.P.A.* (1985) 3 ILT 73, (Unreported, High Court (Costello J, *ex tempore*), 12 March 1985). In its most basic form, that is an interlocutory order directing an employer to pay an employee all salary and other benefits to which the employee is entitled under the relevant contract of employment, on the undertaking of the employee to carry out such duties under that contract as the employer may require.

63. The defendants submitted in the course of argument that a *Fennelly* order is an exceptional relief that the court should be slow to grant. For my part, I share the view

expressed in Kirwan, *Injunctions: Law and Practice* (2nd edn, 2015) (at 9-206) that 'given the *Fennelly* orders evolutionary path, and the way in which subsequent cases followed *Fennelly*, it can now be said with some confidence that whatever about its status at the time Costello J delivered his judgment [in 1985], it can no longer be considered an exceptional – in either sense of the word – case at all'.

64. On behalf of Mr O'Donovan, Ms Bolger SC invited the court to consider instead an interlocutory injunction directing the defendants to conduct a fresh assessment of Mr O'Donovan's performance during the probationary period in a manner consistent with his entitlement to fair procedures or, alternatively, directing that Mr O'Donovan's appeal against the existing adverse assessment must proceed. In my judgment that would be inappropriate. It would alter, rather than preserve, the *status quo* pending trial. More significantly, it would involve prejudging what is likely to be a central – if not the central – issue at trial, namely, whether Mr O'Donovan's dismissal was indeed effected in breach of his contractual entitlement to fair procedures. In addition, in the absence of the necessary determination at trial concerning the nature and extent of that entitlement, if it is found to exist, any such order would be difficult, if not impossible, to police.

65. It should not be necessary to reiterate that, in dealing with the present interlocutory application, I am not purporting to finally decide any of the legal or factual issues in controversy between the parties in the action. As Hardiman J observed in *Dunne v Dun Laoghaire-Rathdown County Council* [2003] 1 IR 567 (at 581), on a full hearing the evidence may be different and more ample and the law will be debated at greater length.

Summary

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.

67. I am satisfied that the balance of convenience or, differently put, the least risk of injustice favours the making of a *Fennelly* 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.

68. I have fixed the period during which the defendants must pay Mr O'Donovan's salary as one of six months, rather than the entire period pending trial, because, in light of Mr O'Donovan's acknowledgment that the relationship of mutual trust and confidence between the parties has irretrievably broken down, his claim is, in reality, one for a fair termination process rather than for reinstatement in the role of CFO. It is also significant that, as Carroll J noted in *Orr v Zomax Ltd* [2004] IEHC 47, (Unreported, High Court, 25 March 2004) (at para. 58), on appeal to the Supreme Court in *Fennelly*, payment of salary was limited to six months.

Final matters

69. On 24 March 2020, the Chief Justice and Presidents of each court jurisdiction issued a joint statement recording their agreement that, in light of the COVID-19 pandemic and the need to minimise the exposure of persons using the courts to unnecessary risk, the default position until further notice is that written judgments are to be delivered electronically and posted as soon as possible on the Courts Service website. The statement continues:

> 'The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of deliver subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made where appropriate.'

70. Thus, I direct the parties to correspond with each other to strive for agreement on any issue arising from this judgment, including the issue of costs. In the event of any disagreement, short written submissions should be filed in the Central Office of the High Court within 14 days, to enable the court to adjudicate upon it.

Appearances

Marguerite Bolger SC for the plaintiff/applicant, with William Prasifka BL, instructed by Kelly Kennedy & Co, Solicitors.

Clíona Kimber SC for the defendants/respondents, with Aoife Beirne BL, instructed by BDM Boylan Solicitors.