

## On probation and not performing? *Employers breathe a sigh of relief as fair procedures not required says the Court of Appeal*

Employers will welcome the recent decision of Ms. Justice Costello, Court of Appeal, in *O'Donovan v Over-C Technology Limited and Over-C Limited*. The decision overturns the decision of Mr. Justice Keane of the High Court.

In a clear and direct judgment, Costello J held that an employer may, if it is contractually free to do so and upon giving adequate notice, terminate the employment of an employee on probation for any or no reason (provided that it is not for misconduct) without affording the employee fair procedures.

### How was Mr O'Donovan dismissed?

Mr O'Donovan had been employed by Over-C Technology Limited as its CFO. His contract provided for a six month probationary period with a one month notice period and the right to pay in lieu of notice. It also provided an express entitlement on the employer to terminate the contract during the probationary period if the performance of Mr O'Donovan was "not up to the required standard".

Mr O'Donovan commenced employment in August 2019. In January 2020, following a number of sub-standard performance related issues, Mr O'Donovan was called to a meeting with the CEO. The CEO informed him that his performance was below standard and that the Board had lost confidence in him. He was told he was being dismissed immediately with payment in lieu of notice.

The CEO subsequently confirmed his decision in writing and set out in this letter the particular performance related issues that were unacceptable to the company. Mr O'Donovan asked to appeal the decision. An appeal hearing was set up but did not go ahead due to Mr O'Donovan's availability. The company took this as Mr O'Donovan wishing not to proceed with the appeal and confirmed that the decision to dismiss him stood.

### What happened in the High Court?

Mr O'Donovan sought an interim mandatory injunction in the High Court restraining his dismissal. To succeed, the threshold of a "strong case" for his claims had to be met. Mr O'Donovan claimed that (i) the allegations of poor performance were in fact allegations of misconduct and (ii) that he had an implied contractual right to fair procedures and a contractual right to an appeal hearing which he said was not offered to him. As regards (i), the company confirmed on more than one occasion that he was dismissed on the grounds of poor performance and not misconduct, and at no point was there ever any mention of misconduct.

The trial judge held that Mr O'Donovan had not established a strong case that he was dismissed for misconduct. However, 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.

Relying on the decision in *Naujoks v. Institute of Bioprocessing Research & Training Limited [2006] IEHC 358*, the trial judge held that the obligation to afford an employee fair procedures prior to his dismissal was not confined to allegations of misconduct but also applied to poor performance dismissals.

The injunctive relief was granted in June 2020 and precluded the company from terminating Mr O'Donovan's contract pending the trial of the action and paying Mr O'Donovan six months' remuneration. The defendant company appealed the decision of the trial judge to grant the injunction and the appeal was heard by Costello J in the Court of Appeal.

### What did the Court of Appeal decide?

Costello J overturned the decision of the High Court and allowed the appeal. Costello J was of the view that it was highly unlikely that Mr O'Donovan would obtain a permanent injunction even if he succeeded at the trial of the action for a number of reasons.

Costello J agreed with the trial judge that Mr O'Donovan had not established a strong case that he was dismissed for misconduct as the nature of the complaints fell very far short of allegations of misconduct. Indeed, it was asserted by the company (and so found by the High Court) that there were no allegations of misconduct. Mr O'Donovan had not appealed that finding. The issue left to be decided by Costello J was whether Mr O'Donovan established a strong case for an injunction in circumstances where he was dismissed for poor performance.

In this context, Costello J declined to follow the decision of Laffoy J in *Naujoks* as she:

1. Disagreed with the approach Laffoy J took in reaching her decision. Laffoy J had based her decision on her own assessment of the evidence and reached her own conclusion that the allegations against the employee entitled the employee to fair procedures. Laffoy J formed the view that an inference could be drawn from the evidence as to the conduct of the employer and decided that dismissing the employee by reason of "failing to properly discharge his duties" entitled the employee to the benefit of fair procedures.
2. Pointed out that the jurisprudence relied upon by Laffoy J did not in fact support the view that employees dismissed for reasons other than misconduct are entitled to the benefit of fair procedures, and that certain relevant cases were not cited to her.
3. Relied on the Supreme Court case of *Maha Lingham v Health Service Executive*

[2005] IESC 89 to support her departure from following *Naujoks*. In *Maha Lingham*, Fennelly J confirmed that where allegations of misconduct ground a dismissal then fair procedures are warranted but in the absence of such allegations, they are not.

Separately and in addition, Costello J said that damages would be an adequate remedy in this case. Given the break-down of mutual trust and confidence, which had been accepted by both sides, it would be untenable for a court to grant a permanent injunction to restrain the dismissal of an employee in such circumstances. On this basis alone, she would have allowed the appeal.

### The importance of a probationary period

It was a "critical fact" in this case that the employee was on probation. This appears to be a distinguishing factor for Costello J's decision. Reassuringly, she opined that "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."

Costello J said that the trial judge had failed to give adequate weight to the fact that Mr O'Donovan's dismissal occurred during the probationary period. She did not accept that a court can imply a right to fair procedures in relation to the assessment of an employee's performance by an employer during the probationary period as this in her view would negate the whole purpose of a probationary period.

Unhelpfully, the Court of Appeal does not specifically address the issue of whether the same outcome would apply to an employee having passed probation but not yet accrued one year of service. This appears to remain an open issue. What also appears unresolved is the applicability of fair procedures generally to performance related dismissals outside of the statutory unfair dismissal remedy.

What is clear is that employers can feel more comfortable not affording employees on probation the benefit of fair procedures when dismissing them for any or no reason, provided the reason for the dismissal is not based on allegations of misconduct and they are not precluded from doing so by contract.

### What should employers do now?

Prior to dismissing any employee on probation, employers should review the employee's contract of employment to ensure they are contractually free to terminate for any or no reason (except for misconduct) without following any fair process in doing so.

Employers should be aware of and comply with any:

1. contractual notice period or payment in lieu of notice so as to avoid any claim for wrongful dismissal. In the absence of contractual notice, the statutory minimum notice of one week must be given for those with over 13 weeks' and less than two years' service. That said, depending on the level and nature of the role, a court may take the view that one week is inadequate in the circumstance and so consideration should be given to what is adequate and reasonable notice.
2. contractual process to be followed for employees on probation in circumstances where disciplinary issues arise.

It would be prudent for employers to ensure any new contracts of employment specify:

- a. an initial probationary period, usually three to six months in duration
- b. the possibility, at the employer's discretion, of extending the probationary period
- c. that performance and suitability will be monitored and assessed during probation;
- d. the employer is free to terminate the employment for any or no reason during or at the end of probation (provided that for misconduct fair procedures are afforded)
- e. that the employer's disciplinary policy does not apply to employees on probation (save where allegations of misconduct have been made)
- f. a (shorter) notice period, usually one to four weeks, applies to those on probation with the right to pay salary in lieu of all or part of such notice.

Management and HR should also be made aware of the consequences of dismissing an employee, including those on probation, on the grounds of misconduct. Namely, that the principles of fair procedures and natural justice must be afforded the employee in advance of the employer reaching the decision to dismiss. This includes giving fair notice of any disciplinary hearings and a fair opportunity to reply.

It is important that employers bear in mind that, notwithstanding this Court of Appeal decision, employees dismissed on probation may still refer a dispute to the Workplace Relations Commission under the Industrial Relations Acts (read our briefing [here](#)) or bring a claim under the Employment Equality Acts if they feel the dismissal is discriminatory.

### In summary

The Court of Appeal decision has altered the way in which employers will approach dismissal during probationary periods for poor performance. Since 2006 employers have been forced to comply with the principles enunciated by Laffoy J in *Najouks* which essentially require the application of fair procedures for performance related dismissals. What is yet to be determined is if the Court of Appeal's decision will now extend to non-probationary dismissals that are performance related. The decision clearly raises some very interesting issues and may well find its way to the Supreme Court for final determination.

For more information in relation to this topic, please contact [Duncan Inverarity](#), Partner, [Maria Pittock](#), Associate, or any member of the [A&L Goodbody Employment Team](#).