



# Court of Appeal clamps down on employment injunctions

By **Niall Pelly** and Dónall Breen - 22 February 2021

In a landmark judgment that will be welcomed by employers, the Court of Appeal has overturned a High Court decision that potentially undermined the freedom of employers to dismiss an employee during probation.

However, the decision has far reaching consequences beyond probationary dismissals. In making it clear that employment injunctions should be limited only to cases where an employee is being dismissed for misconduct, the case appears to have made it significantly more difficult for employees to secure an employment injunction outside of this narrow scope.

## Background

In June 2020, in *Donal O'Donovan v Over-C Technology Limited and Over-C Limited*, the High Court granted an injunction preventing a Cork-based technology company from dismissing its then CFO on grounds of poor performance. The injunction was primarily awarded on the basis of the employee presenting a strong case that he was entitled to fair procedures in the assessment of his performance before being dismissed.

The case attracted widespread attention as the employee was in his probationary period at the time, with many commentators pointing to the case as evidence of a willingness on the part of the Irish courts to extend the remit of employment injunctions.

If that was the direction of travel of the Irish courts, the Court of Appeal has brought that journey to a shuddering halt.

## Employment injunctions

Employment injunctions (i.e. injunctions to restrain the dismissal of an employee) are an unusual feature of Irish law in that they essentially prevent an employer from relying on the express terms of a valid contract – namely, the power to terminate it on notice. This is because the courts, in certain circumstances, are willing to impose an obligation on an employer to apply fair procedures before dismissing an employee.

This obligation is ultimately derived from an employee's constitutional rights, and so takes precedence over the contractual terms agreed between the parties. The question that has vexed employers is when this constitutional right is triggered, and under what circumstances.

The consequences for an employer in getting this question wrong can be severe. For example, where an employee secures an employment injunction, their employer is typically required to retain them on their payroll until a full hearing, which usually takes at least 9-12 months to be heard. Under the terms of an injunction, employers may be prevented from appointing a successor or even advertising the role, which can create significant disruption if the employee is in a senior position.

The costs of defending an injunction are substantial, as is the ongoing cost of retaining an employee on payroll where an injunction is awarded. But it is often the uncertainty, instability, and managerial deadlock that can arise when senior management are involved that presents the biggest risk to an employer.

This is reflected in the fact that, rather than face the prospect of a potential injunction, employers often choose to adopt a "no-fault termination" approach. This approach minimizes the risk of an injunction, but at the expense of paying out (or buying out) a statutory unfair dismissal claim (which in Ireland, is a separate claim an employee with more than 12 months' service can bring and is likely to succeed if there is no formal process followed).

Given the risks involved, it's fair to say that employment injunctions are one of the greatest concerns for employers in Ireland, particularly multinational employers who are more familiar with "employment-at-will" concepts.

It is relatively unusual for employment injunction cases to reach the Court of Appeal, but as decisions of the Court of Appeal are binding on all lower courts (e.g., the High Court) until such time as they are overturned or distinguished, the impact of these judgments can be profound. It's against this background that the Court of Appeal judgment in this case provides some much-needed certainty for employers.

## Court of Appeal reverses High Court judgment

At a minimum, in order to secure an injunction that requires an employer to retain them in employment, an employee must establish that they have a strong case of succeeding in a full trial. This means that they must establish that they have an entitlement that requires protection (e.g., a contractual or constitutional entitlement) and that there is strong likelihood that their employer has (or intends to) breach that entitlement.

In this case, the Court of Appeal decided that the trial judge "had 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 employment".

In essence, because Mr O'Donovan was not entitled to fair procedures arising from a performance-related dismissal during probation in the first place, he could not then seek an injunction to prevent a breach of any such procedures.

While this case related to a dismissal during probation, the court's assessment of the law as it stands - in particular, the circumstances in which an employment injunction may be awarded - was not restricted to those narrow confines. It's this assessment that looks likely to have a major impact on the law in this area into the future and provides the main takeaways for employment lawyers and HR professionals.

## Key takeaways of the Court of Appeal judgment

### ■ Fair procedures do not apply during a probationary period (except in cases of misconduct)

The Court of Appeal could not have been clearer in stating its position on the applicability, or otherwise, of fair procedures during probation:

"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.” (emphasis added)

In short, unless there is an express contractual provision to the contrary, the Court of Appeal has held that an injunction cannot arise for a performance-related dismissal (other than one for misconduct) during probation.

Employees on probation will generally have less than one year’s service and so are not eligible to bring an ordinary unfair dismissal claim. In recent times, it has become more common for employees with less than the requisite service to bring a claim under the Industrial Relations Acts instead. A claim of this nature is non-binding on an employer, but can attract negative press coverage – for example, the 2018 case involving the Park Hotel Kenmare.

However, as these types of claims are also based on an alleged breach of fair procedures during probation, the reference to not upholding “any cause of action for the breach of such an alleged right” in the court’s judgment appears to also knock out the possibility of an employee seeking relief under the Industrial Relations Acts.

**2. Except in cases of misconduct, there is nothing to prevent an employer relying on contractual termination provisions, whether during or after probation**

In paragraph 59 of her judgment, Costello J. identified and upheld two relevant principles arising from existing case law, as follows:

“Firstly...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...the principles of natural justice apply to cases involving dismissal for misconduct, but not to termination on other grounds.” (Emphasis added)

It is clear from this passage that these principles are of general application and are not confined to probation only. This is consistent with the fact that, of all the Irish cases cited by the court as forming the legal basis for these principles, none relate to a dismissal during probation. If a contract permits termination on notice, then the court is clear that an employer is entitled to rely on that entitlement whether during or after probation, except in cases of misconduct.

Although it reflects existing law, a confirmation of this nature from the Court of Appeal is important in terms of providing certainty, particularly in the context of “no-fault” terminations. By clearly limiting the scope to misconduct dismissals, the circumstances under which an employee can successfully obtain (or even threaten) an injunction will also narrow.

**3. Dismissal on grounds of poor performance in isolation does not trigger an entitlement to fair procedures - there must be an allegation of improper conduct**

This case turned on whether fair procedures apply in a case of dismissal for poor performance only. On this point, the court noted that *“there is no suggestion that the principles of natural justice must be applied where an employer terminates the employment contract of employee on the grounds of poor performance”*.

While there could be circumstances where an entitlement to fair procedures might arise, the court also notes and applied the principle identified in the Supreme Court *Maha Lingum* decision that *“a dismissal by reason of an allegation attracts the right to fair procedures, whereas a dismissal in the absence of an allegation of improper conduct does not attract such a right”*.

On the basis of this judgment, it appears that an allegation of improper conduct on the part of an employee, and not just poor performance, is a necessary requirement before any right to fair procedures is triggered. This will also likely serve to limit the extent to which employees can obtain or threaten an injunction.

**Future impact**

The judgment in this case provides a clear, unequivocal assessment of the circumstances in which (in the absence of express contractual provisions to the contrary) an employment injunction may be awarded - and, perhaps more importantly, when it generally will not. That it comes from the Court of Appeal means that it is binding on lower courts.

While the facts of this case are confined to a dismissal during probation, the assessment of the underlying law relating to employment injunctions undertaken by the Court of Appeal is not. In making it clear that imputed misconduct is an essential element for the triggering of constitutional protections, and especially so where an employee is still in their probation period, the Court of Appeal looks to have drawn a line in the sand when it comes to the future award of employment injunctions by Irish courts.

An employment injunction is often the most effective weapon an employee can utilise to challenge their dismissal. While it will not have any impact on an employee's entitlement to seek relief under unfair dismissal or other employment legislation, this judgment is likely to considerably rebalance the power dynamic between employees and employers during contentious dismissals. In particular, by providing greater certainty on the limited scope on which employment injunctions should be awarded, this judgment is likely to make it more difficult for an employee to secure (or at least threaten) an employment injunction.

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