THE HIGH COURT

[2023] IEHC 126

[RECORD NO 2022/ 2038 P]

BETWEEN

ANNA BUTTIMER

PLAINTIFF

AND

OAK FUEL SUPERMARKET LIMITED TRADING

AS COSTCUTTER RATHCORMAC.

DEFENDANTS

Judgment of Mr Justice Dignam delivered on the 23rd day of February 2023.

Introduction and Background

1. This matter comes before the Court by way of an application by the plaintiff for interlocutory Orders:

(i) restraining the defendant from treating the plaintiff as otherwise than employed by the defendant;

(ii) requiring the defendant to pay the plaintiff's salary and associated emoluments and benefits as they fall due in addition to bonuses and commissions owed;

(iii) restraining the defendant from taking any steps to appoint any other person to the Plaintiff's position or from assigning the plaintiff's duties to any other person;

(iv) restraining the defendant from terminating the plaintiff's contract of employment other than in accordance with the plaintiff's contractual and legal entitlement;

(v) restraining the defendant from treating the plaintiff as other than continuing to be employed by the defendant;

(vi) restraining the defendant from publishing or communicating to any party that the plaintiff is no longer connected with the defendant company.

2. At its core, the dispute between the parties lies in a conflict as to what occurred between the parties on the 17th and 18th May 2022. It is first necessary to set out the background to the events of those days.

3. The defendant operates a fuel station and shop in Rathcormac, Cork. The plaintiff commenced employment with the defendant on the 7th March 2022 as a supervisor with a promise that, subject to performance, she would be promoted to the position of store manager in a month's time. From the beginning of her employment, she performed the role of manager. Mr Mullane, the defendant's operations manager, who recruited the plaintiff, told the other staff that the plaintiff was store manager from the date of her commencement. The plaintiff did not have any previous experience as a manager.

4. Towards the end of March, an employee made a number of allegations against the plaintiff. Mr. Mullane, who swore the affidavits on behalf of the defendant, deposes that this employee made him aware on the 24th March 2022 of issues that she had with the plaintiff and then put these allegations in writing on the 31st March. He describes them as centering on "*the Plaintiff's management duties and interpersonal relationship with her at work.*" The full detail of these allegations is not relevant to the current dispute but the nature of some of the allegations is of relevance. I therefore propose to summarise the relevant allegations. They were (as described in the plaintiff's grounding affidavit) that the plaintiff had said of the complainant that she was "*all smiles, laughing and talking to everyone we don't see the real [Mary]*" (this is not her real name – her name is not relevant to the issues); that the plaintiff had concealed certain conversations; that she had told the complainant that she, the complainant, could leave her job because there were multiple people looking for employment; and that the plaintiff used foul language and inappropriate commentary. The plaintiff's view is that

these allegations were made against her as part of an effort by a number of staff members to have her removed. The Court does not have to deal with this.

5. On the 1st April 2022 the defendant engaged the services of an external human resources consultancy firm to carry out a formal investigation into these allegations. The plaintiff was told by the firm conducting the investigation in a letter of the 6th April that it would be conducted in accordance with the defendant's Bullying and Harassment policies and relevant codes of practice. The letter also referred to the company's disciplinary procedure and set out the terms of reference for the investigation.

6. The letter stated, inter alia:

> *"Oakfuel Ltd t/a Costcutter Rathcormac has engaged our services to formally investigate a complaint which has been received from your colleague…*
> *This investigation will be conducted as a formal investigation in accordance with Company's Bullying and Harassment policy and the relevant Codes of Practice. I have enclosed a copy of this policy for your attention, along with the Terms of Reference, as the investigation will be conducted in line with the procedure laid out in these policies. Please review the attached Terms of Reference document. I would appreciate if you would sign this document and return a signed copy to me by 4pm on Friday 8th April 2022.*
> *…*
> *Please note that there is no presumption at this point of any wrongdoing by any person – the purpose of this investigation is to give every person involved an opportunity to explain the situation from their perspective, so that we come to fair and reasoned conclusion as to what might have happened and what actions may be necessary to resolve the matter. The investigation will be conducted with objectivity and sensitivity, discretion and with due respect for the rights of all parties concerned.*
> *However, please note that if this investigation should conclude that any of the parties to be investigated have been involved in some form of misconduct, then the company may decide to proceed this matter through its Disciplinary procedure, which may lead to sanctions up to an including dismissal.*
> *…"*

7. The terms of reference which were attached to the letter provided, inter alia:

"*The investigation will be completed in accordance with these Terms of Reference, the relevant Bullying and Harassment policy and the relevant Codes of Practice. The Company Disciplinary Procedure may also apply if the matters alleged are substantiated by the Investigator."*

8. They also set out a detailed process for the investigation and provided that:

"*The principles of Natural Justice will be applied at all times. The burden of proof in substantiating complaints made, is on the balance of probabilities.*"

9. The details of the investigation are not relevant to the issue before the Court other than to note (because the parties rely on these points) (i) that the plaintiff told the investigator that this was her first managerial position and that she had undoubtedly made mistakes and would do certain things differently, but that she had not bullied or harassed anyone (these comments are reflected in the plaintiff's affidavits), and (ii) that the investigation progressed during April and May and was still ongoing on the 17th May when the plaintiff was told her employment was being brought to an end.

10. The plaintiff was promoted to the position of store manager on the 25th April 2022 while this investigation was continuing. As noted above, she had been performing this role since the beginning of her employment and indeed, Mr. Mullane had told the other staff that the plaintiff was store manager from the date of her commencement.

11. The plaintiff signed her contract of employment as store manager on the 25th April 2022. It may be worth pausing to refer to some of the features of the contract as they form a central part of the defendant's case.

12. The contract was of indefinite duration, terminable on one week's notice after completion of thirteen week's service, subject to a probationary period of six months extendable for a further five months. The contract provided that during that probationary period management would regularly assess the plaintiff's performance and monitor her progress and that if feedback was given it had to be listened to because if she was reasonably deemed unsuitable, she would not pass the probationary period and would be let go. The Introduction Section of the contract stated that the Company Handbook and Safety Statement outline a variety of policies and procedures in place within the company. It goes on to say "*while these policies and procedures do not form part of your Contract of Employment the company requires you to comply with the content of these documents. Failure to do so may, after a full investigation, result in disciplinary action*

being considered." It also stated that where there was conflict between the contract and the Handbook, the terms of the contract prevailed. The Handbook stated that it, along with the contract of employment, formed part of the terms and conditions of employment.

13. The Handbook provides, under the heading "*Disciplinary Procedure":*

> "*This procedure applies to all employees. Standards of conduct and performance etc. are required in any organisation to ensure order, effective operation of the business and a safe and healthy working environment. This policy has been written to ensure that if standards are believed to be lacking – or a breach is believed to have occurred – there should be a fair and systematic approach to investigating these matters and to taking appropriate corrective action.*
>
> *Standards of conduct are – though not exclusively – those defined by company rules and procedures by legal requirements and by what is generally recognised as acceptable workplace performance and behaviour."*

14. It then defines misconduct as referring to:

> "• *Breaches of standards of behaviour – The failure to adhere to acceptable and appropriate levels of conduct.*
>
> • *Breaches of company rules and regulations or the failure to adhere to them.*
> • *Failure to carry out instruction of Supervisors, Managers or Directors."*

15. While the section of the Handbook quoted above states that "*the disciplinary procedure applies to all employees*", the contract of employment states that "*The standard disciplinary procedure will not be used during the probationary period".*

16. Section 15 of the contract provides that "*The company requires all employees mutually respect each other and has a Dignity at Work policy in place which details our stance on Bullying and Harassment…*"

17. The Handbook defines bullying and harassment as:

> "*…repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at*

the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual's right to dignity at work. An isolated incident of the behaviour described in this definition may be an affront to dignity at work but as a once off incident is not considered to be bullying."

18. Returning to the chronology, while the investigation was still going on, Mr. Mullane received a text message from another employee making certain complaints about the plaintiff. Mr. Mullane does not say when he received the text other than that he had "*very recently received it*" before the 17th May. Nor does he exhibit the text. He does describe its contents. Some of the complaints were very similar in nature to the earlier complaints which were the subject of the investigation, including that the plaintiff was speaking to one employee about another behind her back and asked the former not to tell the latter about the conversation.

19. Mr. Mullane requested the plaintiff to attend a meeting in his office on the 17th May 2022 (while the original investigation was still going on). There is a fundamental conflict about what occurred at this meeting, in conversations later that day and on the following day. I consider this in detail below. What is not in dispute is that the plaintiff's employment as store manager in Rathcormac was brought to an end either at the meeting (on the plaintiff's account) or in a telephone conversation later that day (on Mr. Mullane's account). The plaintiff describes this as her employment being terminated or her being dismissed. The defendant describes it as the plaintiff failing her probation. I propose to use the word "*termination*" because, whether the plaintiff failed her probation or was dismissed, her employment was terminated.

20. During these interactions, the plaintiff raised the possibility of being given a position in another of the defendant's premises, the Grenagh store, and there was some discussion of this. A meeting was arranged in the Grenagh store for the following day, the 18th May. Unfortunately, the plaintiff was unable to attend and Mr. Mullane, in an email later that day, explained that the purpose of the meeting was to offer the plaintiff a position in the Grenagh store. This is a central factor in the case and I return to it below. Mr. Mullane, in his email, asked the plaintiff to revert to him in respect of this offer (as it is described by the defendant) by Friday, the 20th May. Mr Mullane stated:

"I understand yesterday was a difficult conversation to hear but as discussed, things were just not working out in Rathcormac with you as the Manager, and

while I do think you have the potential to become a very good manager, you just weren't the right fit and I had to make the difficult decision to fail your probation of Manager in Rathcormac. You then asked me if I could move you to another store and to Grenagh in particular in an alternative position, which we have considered as I do see the potential in you, but I believe you need to gain more experience to successfully manage a store like Rathcormac, which is why we asked you to meet us in the Grenagh store this evening.

The purpose of the meeting today was to offer you a position of trainee manager in Grenagh under new terms and conditions, with a new 6-month probation period which you will work closely with the Manager of Grenagh and learn the requirements of the role from him. We will set out clear goals of what is required in your role, and by working closely alongside the manager of Grenagh you will be provided with the skills to become a good manager.

Please take some time to consider this offer, and let me know by Friday if you are willing to accept this offer.

Let me know if you have any questions.

…"

21. The plaintiff did not reply to Mr. Mullane. He texted her on the 19th May asking if she would be coming to work the following day (she had been required to work out her notice but had been out sick on the 17th and 18th May) and she did not reply to this text.

22. That was the end of the direct interactions between the parties. The next contact between them was by way of solicitors' letter of the 20th May. The solicitor for the plaintiff wrote to the defendant referring to the interactions between the parties, outlining Ms Buttimer's position and requesting her immediate reinstatement. It claimed that she had been dismissed at the meeting of the 17th May when she refused to resign and that she had been dismissed due to allegations of misconduct and before they had been investigated, or before the investigation was completed, in breach of fair procedures and the company's own policies. It referred to the defendant having offered the plaintiff a more junior role as a trainee manager in a different store and stated that the plaintiff had refused the offer, the "*proposed demotion*".

23. Mr. Owens, a director of the defendant company, sent a holding reply on the 24th May 2022 and, it seems, sought information from Mr. Mullane.

24. The plaintiff issued these proceedings on the 26th May 2022 and made her application and was granted short service of the motion for interlocutory relief on the 31st May 2022 seeking the reliefs set out above. There followed an exchange of affidavits before the application for interlocutory relief came on for hearing.

Plaintiff disentitled to relief on equitable grounds

25. The defendant submits that the applicant is estopped from obtaining relief or should be refused relief on a number of grounds. The first is that the plaintiff does not come with clean hands. The defendant has raised this as a preliminary point. The second ground relates to the specific relief sought.

Coming to Court with Unclean hands

26. The defendant submits that the plaintiff has come to court with unclean hands such as to disentitle her to relief because she did not inform the defendant of her decision in respect of the defendant's offer of an alternative position prior to the institution of these proceedings, and because of the manner in which she dealt with the question of the defendants' offer in her solicitor's correspondence and her affidavits. The defendant also raised the fact that there was a delay in the service of the plenary summons and raised a point about communication from the plaintiff's solicitor when notifying the defendant of the making of the Order for short service.

27. The first point made by the defendant is that the plaintiff did not inform the defendant of her decision in respect of the defendant's offer before instituting the proceedings. There is a dispute about whether the defendant in fact made an offer but I do not need to resolve that issue at this stage. It was clear from Mr. Mullane's email of the 17th May that the defendant was either offering the plaintiff an alternative placement or was indicating that they would be doing so.

28. The second point made by the defendant is that the plaintiff has taken completely different positions in relation to whether or not an offer was even made, moving from what the defendant says was an initial acknowledgment that an offer had been made to

the position that the most that the defendant did was make a suggestion of another position. The defendant points to the fact that in her solicitor's letter of the 20th May 2022 and in her grounding affidavit the plaintiff accepted that the defendant had offered an alternative position but that in her second affidavit she seemed to resile from that position. The defendant pointed to the statement in the solicitor's letter that "*The Company did offer our client a more junior role as a trainee manager in another store on different terms and under a new contract of employment, the particulars of which were not furnished to our client*" as an acknowledgment that an offer had been made. The defendant in paragraph 15 of its written submissions noted that the plaintiff said in her grounding affidavit that **"***I requested that I retain my position or be kept on as Store Manager in another store if necessary… I say that the Defendant did raise the potential of me being offered an alternative role in a different store at a lower-level position, however, the particulars of same were not finalised… The said letter* [referring to the Defendant's 18th May email] *referenced the potential offer of alternative work as an Assistant Trainee Manager in an alternative store, subject to a new contract and a new probationary period"* and relied on this as an acknowledgment that an offer had been made. The defendant contrasted these with the plaintiff's second replying affidavit where she said "*…there was a suggestion of an alternative role, which would have been a demotion…I say that there was no concrete offer of an alternative role. It was suggested but not formally offered. No details were provided.*"

29. In contending that the plaintiff had come with unclean hands, the defendant also points to the fact that the plaintiff's solicitor stated that in the letter of 20th May the plaintiff had refused the alternative offer ("*our client refused to accept the proposed demotion*") but that she had in fact not done so.

30. A complaint was also made that the plaintiff had not served her plenary summons before the defendant had to deliver its replying affidavit and it was submitted that it is inequitable to expect or permit the defendant to reply substantively to the plaintiff's claims without first seeing the underlying writ.

31. No authorities were opened to the Court as to the type of conduct which might amount to a party coming to court with unclean hands but it is long-established that there must be an element of turpitude involved and therefore not all conduct which is open to criticism or disapproval constitutes behaviour which would amount to the party coming with unclean hands such as to disentitle them to relief.

32. Even taking the defendant's points at their height the conduct does not amount to the type of conduct or level of turpitude which would constitute the plaintiff coming with unclean hands. Taking the points in turn:

(i) I do not accept that the plaintiff did not inform the defendant of her position in relation to the offer prior to the institution of the proceedings. It is correct that the plaintiff did not inform the defendant directly of her decision or of her position in relation to this offer. However, in my view, the plaintiff's solicitor's letter of the 20th May (quoted above) can only be read as amounting to a refusal of the offer. I deal with this in more detail below under the balance of convenience heading (because the fact that the plaintiff did not inform the defendant directly is relevant to the consideration of the balance of convenience) but it can not be said that the defendant was not informed of the plaintiff's refusal before the proceedings were instituted in light of the terms of this letter.

(ii) In relation to the contention that the plaintiff has taken completely different positions in relation to whether an offer was made, I am not satisfied that the plaintiff's position changed in the fundamental way suggested by the defendant. The plaintiff's position in her solicitor's letter and her first affidavit, in relation to whether or not an offer was made, was not the absolute acknowledgment suggested by the defendant. Even in the solicitor's letter of the 20th May it was pointed out that the proposed "*different terms*" and the "*new contract of employment"* were not furnished to the plaintiff. In her grounding affidavit (in which, the defendant claims, the plaintiff accepted that an offer had been made) she said "*I requested that I retain my position or be kept on as a Store Manager in another store if necessary…I say that the Defendant did raise the* ***potential of me being offered an alternative role*** *in a different store at a lower-level position, however,* ***the particulars of same were not finalised****…The said letter* [of the 17th May] *referenced* ***the potential*** *offer of alternative work as an Assistant Trainee Manager in an alternative store, subject to a new Contract and a new probationary period.*" [emphasis added]. In the absence of a clear and fundamental change I do not think it is established that the plaintiff is guilty of such a level of inconsistency that it amounts to misconduct or turpitude. It also seems to me that if there had been a significant change in the plaintiff's position it would be more a matter to be dealt with in the substantive proceeding. For example, the defendant is free to point to inconsistency in the plaintiff's position as evidenced by what it says is the changing position on her part as to whether an offer was made.

(iii) The defendant is correct that the plaintiff's solicitor's letter states that she had refused the alternative offer and that this is incorrect. However, I do not believe that this reaches the level of misconduct or turpitude required for the Court to conclude that the plaintiff had come with unclean hands.

(iv) In relation to the point that the plaintiff had not served the Plenary Summons by the date upon which the defendant served its replying affidavit, I accept, of course, that the defendant should have been served with the plenary summons long before that date. However, the defendant, while making a legitimate complaint about the summons not having been served, did not appear to be asking that the application would be refused on that basis. If I am incorrect in this and this was in fact the defendant's position, I would not be satisfied to do so. There is no correspondence exhibited to any of the affidavits in which the defendant demands service of the plenary summons or even complains about non-service. The obligation to serve the writ is, of course, that of the plaintiff but, nonetheless, it would not be appropriate to take the grave step of refusing the application without any consideration of the merits solely on the basis of the non-service of the writ where the defendant had not requested a copy and where there was ample time for them to do so. In addition, it was open to the defendant to bring the matter before the Court in advance of having to deliver the replying affidavit but they did not choose to do so. I emphasise that the obligation to serve the summons falls squarely on the plaintiff and the failure to do so may, in an appropriate case, be grounds for the dismissal of the application but this is not one of those cases.

33. The final basis upon which it is contended that the plaintiff acted inequitably and should be refused relief is the claim contained in Mr. Mullane's affidavits is that the plaintiff's solicitor, when serving the order for short service of this motion on the defendant company, informed the defendant that the Court had made an *"order restraining the defendant from treating the Plaintiff as otherwise than employed by the defendant until further Order*." This was not relied upon at the hearing as a basis for suggesting that the plaintiff's application should be dismissed. There was no basis for the suggestion in the first place. The solicitor's letter (31st May 2022) did not state that the Court had made an order restraining the defendant from treating the Plaintiff as otherwise than employed by the defendant until further Order. It simply informed the defendant that an order for short service of a notice of motion seeking interlocutory relief including an order in those terms had been made by the Court and was returnable for the 2nd June. It stated that the Court *"made an order for short service of a Notice of*

Motion (herewith) returnable to Thursday the 2nd June for hearing of an application for interlocutory relief, including an Order restraining your company, the Plaintiff's employer, from treating the Plaintiff as otherwise than employed by the Defendant until further Order. We are also enclosing the grounding Affidavit of Anna Buttimer." The letter was clear in its terms. To the extent that it allowed of any confusion, it went on to invite the defendant to phone the plaintiff's solicitor if they required an explanation as to the terms of the Order and then the Order itself was served the following day, the 1st June. There was no basis for suggesting that the plaintiff had acted inequitably in relation to the communication of the terms of the Order.

34. Thus, I am not satisfied that the plaintiff should be refused relief on the basis of coming to Court with unclean hands.

Specific Relief

35. The second basis upon which it is claimed that the application should be refused *ab initio* relates to the specific relief sought.

36. It was submitted that the application for reliefs 1 and 5 of the Notice of Motion should be refused ab initio because the plaintiff's solicitor's letter before action did not seek undertakings in those terms. Relief 1 is "*an Interlocutory Injunction restraining the Defendant from treating the Plaintiff as otherwise than employed by the Defendant until further Order…*" and relief 5 is an "*Interlocutory Injunction restraining the Defendant from treating the Plaintiff as other than continuing to be employed by the Defendant until further Order.*" I am not satisfied that a failure to seek an undertaking in the precise terms as are subsequently contained in the Notice of Motion must necessarily lead to the refusal of the application ab initio, i.e. simply on the basis of that failure. It will, of course, be directly relevant to what relief may be granted by the Court, if it is satisfied that any relief should be granted, and may certainly be relevant to the question of costs even if a plaintiff is successful. In any event, the substance of those reliefs is in fact captured in the undertakings that were sought, all of which are directed towards the plaintiff being treated as though she is still employed by the defendant.

37. The defendant also submits that the plaintiff has no factual basis for the reliefs at paragraphs 2 and 4 of the Notice of Motion. The reliefs at paragraphs 2 and 4 are *an "Interlocutory Order requiring the Defendant to pay the Plaintiff's salary and associated emolument and benefits as they fall due in addition to bonuses and commissions owed*

until further Order…" and an *"Interlocutory Injunction restraining the Defendant from terminating the Plaintiff's Contract of Employment other than in accordance with the Plaintiff's contractual and legal entitlement until further Order…"*. The basis for the defendant's submission is that the plaintiff claims to have already been dismissed (and therefore there is no factual basis for an Order restraining the termination of her employment – and she has no entitlement to be paid) and she refused or neglected to take up an offer of "*continued employment with the Defendant by the date she instituted both her underlying writ and the within application.*" Save in the clearest of cases, the question of whether there is a factual basis for any specific relief is to be considered as part of the overall consideration of the application but, in any event, I am not satisfied that I could conclude that there is no factual basis for these reliefs. Firstly, the gravamen of the plaintiff's case is that the purported termination was not in accordance with her contractual and legal entitlements (and is therefore null and void) and there is therefore a basis for relief that the defendant be restrained from terminating her employment other than in accordance with her contract. One of the effects of that purported termination is that she will no longer be paid. That provides a factual basis for an interlocutory order that she continue to be paid pending determination of that substantive issue. Secondly, in relation to the defendant's reliance, in making this point on the plaintiff's refusal to take up an offer of "*continued employment*", there is a live dispute as to whether an offer of an alternative position was made. Thirdly, and more importantly, even at the height of the defendant's case in respect of this offer, it was an offer of a lower position on different terms and conditions including, presumably, a lower salary. It is difficult to see how the promise/offer of employment on such different terms can be said to mean that there is no factual basis for relief 2 and 4. The point seems to be based on the defendant's description of the offer as one of "*continued employment*". The reference in the defendant's submissions (para 20) to an offer of *"**continued** employment*" [emphasis added] is interesting in circumstances where, even on the defendant's case, the plaintiff's employment had been terminated due to a failure of her probation, and where the alternative position was to be on the basis of a new contract of employment, on new terms and conditions and subject to a new probation period. It is therefore difficult to see how, even if the defendant's account that an offer of an alternative position was made is fully accepted, it can be described as an offer of *"continued employment".* Furthermore, if the defendant's position is that it was to be a continuation of her employment then this, in itself, provides a factual basis for relief 4 because it must mean that the defendant's position is that the plaintiff's employment had not been terminated. I do not understand that to be the defendant's position.

38. It is also submitted that the plaintiff has failed to lay any factual basis for reliefs no. 3 or 6 and that there is no evidence that the defendant has or has threatened to appoint another person to the plaintiff's position. The relief sought at paragraphs 3 and 6 are an "*Interlocutory Injunction restraining the Defendant from taking any steps to appoint any other person to the Plaintiff's position or from assigning the Plaintiff's duties to any other person until further Order…*" and an "*Interlocutory Injunction restraining the Defendant from publishing or communicating to any party that the Plaintiff is no longer connected with the Defendant Company until further Order…"*. I accept that the plaintiff has not advanced or pointed to any evidence that the defendant is planning to appoint someone in her place or to assign her duties to someone else or to communicate to any other party that the plaintiff is no longer connected with the defendant. However, I do not believe that it is necessary for the plaintiff to do so. In circumstances where the defendant's case is that the plaintiff's employment has been terminated there is, in the absence of a specific averment to the contrary by the defendant, a reasonable likelihood that the plaintiff will be replaced or, at the very least, that her duties will be assigned to someone else and that the defendant will have to communicate with a third party such as, for example, the Revenue Commissioners, that the plaintiff is no longer employed by the defendant.

39. I therefore am not satisfied to refuse the plaintiff's relief solely on these grounds.

Application of the Test for an Interlocutory Injunction

40. The traditional approach to the consideration of applications for interlocutory injunctions (set down in such cases as *Campus Oil v Minister for Industry and Energy (No. 2) [1983] IR 88)* and *Okunade v Minister for Justice & Ors [2012] 3 IR 152*) was recalibrated by the Supreme Court in *Merck Sharp & Dohme v Clonmel Healthcare [2019] IESC 65* where O'Donnell J stated inter alia:

> *"…it may be useful to outline the steps which might be followed in a case such as this: -*
>
> *(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 pending 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."*

<u>*Whether a permanent injunction would be granted*</u>

41. The defendant's first point is that the plaintiff fails at the first step, i.e. a permanent injunction would not be granted even if she succeeded at trial and, therefore, an interlocutory injunction should not be granted.

42. The defendant submits that even if the plaintiff succeeded at trial the Court would not grant a permanent injunction compelling the continued employment of the plaintiff

because there now exists no trust and confidence between the parties and because the remedy for wrongful dismissal is damages limited to the notice monies due to her. It is clear from some of the authorities (see *Bergin v Galway Clinic Doughiska Ltd [2008] 2 IR 205* and *Curr v London and Country Mortgages [2020] EWHC 1661*) that the plaintiff will have significant difficulty in obtaining relief which amounts to reinstatement, particularly, though not exclusively (see *Curr*) if the Court finds the relationship of trust and confidence has broken down. However, given the different terms and nature of the injunctions sought, I am not satisfied that I can conclude with sufficient certainty that the Court would not grant a permanent injunction to decline to consider the other steps in *Merck Sharpe & Dohme.*

43. It must also be recalled that the question will not be whether the Court should (or could) grant an injunction compelling the defendant to reinstate the plaintiff and/or preventing the defendant from ever terminating the plaintiff's employment. That is an Order that a court simply could not make. The only Orders that could be granted (if the plaintiff is entitled to any relief) are Orders preventing the defendant from acting on foot of the impugned decision. The parties would remain bound by the terms of the contract of employment and the defendant's entitlement to exercise its rights under the contract in a correct and lawful manner would remain intact. It seems to me that where there is a possibility that such relief might be secured this is sufficient to satisfy the first step in *Merck Sharp & Dohme*. It seems to me that in the circumstances of this case I should consider the issue of a breakdown in the relationship and the difficulty of securing a permanent injunction where the plaintiff was still in her probationary period or for wrongful dismissal under the balance of convenience.

Strong case established?

44. The parties agree that the higher threshold set down in *Maha Lingham v Health Service Executive [2006] 17 ELR 137* applies in this case (see also *Bergin v Galway Clinic Doughiska Ltd [2008] 2 IR 205* and *Earley v HSE [2015] IEHC 520*). Fennelly J stated in *Maha Lingam*:

> *"In such a case* [where the injunction sought was mandatory in nature] *it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action. So, it is not sufficient for him simply to show a prima facie case and in particular the Courts have been slow to grant interlocutory injunctions to enforce contracts of employment".*

45. The plaintiff referred to the judgments in *Shelbourne Holdings, Torriam Hotel Operating Co. Ltd [2015] 2 IR52 and Wallace v Irish Aviation Authority [2012] IEHC 178* in which Kelly J and Hogan J respectively referred to the need for the Court to adopt whatever course would carry the least risk of injustice and to avoid the *Campus Oil* principles being applied in a "*purely formalistic fashion*" but the plaintiff also accepted that the *Maha Lingham* test was the applicable one. In light of the fact that I am satisfied that the plaintiff has met this test, it is not necessary for me to consider whether the facts are such as to require the application of some other test or more flexible approach.

46. The plaintiff submits that she has established a strong case that her dismissal was in breach of contract on a number of different grounds which can be summarised as follows: (1) allegations of wrongdoing and/or misconduct were made against her and no investigatory or disciplinary process was put in place, which was in breach of her rights to fair procedures and/or natural justice and instead the defendant elected to unilaterally dismiss the plaintiff from her role; (2) the decision to dismiss (as described by the plaintiff) was in breach of her contractual entitlement and the terms of reference for the independent investigation because the defendant had established an investigation, it was ongoing and the allegations (the first set) had not been determined.

47. In relation to the first of these, the plaintiff's case essentially is that her employment was brought to an end on the basis of the allegations without her being given any opportunity to challenge the allegations or to defend her position; the allegations were unsubstantiated so the defendant could not have reasonably deemed her employment to be unsuitable without properly investigating the allegations; the company's policy on bullying and harassment applies to all employees and does not exclude employees who are subject to a probationary period and therefore the defendant failed to comply with its own policies; these allegations were of the same nature as the first set of allegations and the defendant's election to carry out a proper and independent investigation of the first set of allegations establishes that this was the appropriate mechanism to investigate allegations of that nature.

48. At the core of the plaintiff's case is that her employment was terminated because of the allegations made in or around the 17th May (possibly combined with the earlier allegations) and that this amounts to a termination for misconduct.

49. The defendant's case is that the plaintiff's employment was not terminated because of allegations of misconduct but because she failed her probationary period due

to poor performance and that she was not the right fit for the Rathcormac Store; that there was no obligation to give the plaintiff an opportunity to address any such performance issues; and even if the plaintiff were to establish a strong case that she was dismissed for misconduct, her contract expressly contracted out the application of the defendant's standard disciplinary procedure during her probationary period. The defendant relies on *O'Donovan v Over-C Technology Ltd & Anor 2012 IECA 37* to which I return.

50. The authorities are clear that an employee may be let go during her probationary period for any reason (including poor performance) or no reason without any obligation to afford fair procedures. However, it is equally clear as a matter of general principle that while at common law an employer is free to dismiss an employee for any reason or no reason, where the dismissal or termination is for misconduct, the employer is obliged to comply with fair procedures.

51. For example, Costello J said in *O'Donovan v Over-C Technology Limited & anor* (para 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."*

52. At paragraph 49 she stated:

> *"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…"*

53. In paragraph 56 of her judgment, Costello J said:

> *"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."*

54. At paragraph 58 of her judgment Costello J quoted from the judgment of Carroll J in *Orr v Zomax Limited [2004] IEHC 47* where Carroll J 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.*"

55. It is important to recall what the issue was in *O'Donovan*. The High Court had granted an interlocutory injunction to the plaintiff but this was overturned on appeal. However, in that case, the High Court had granted the interlocutory injunction even though the plaintiff had failed to establish a strong case that he was dismissed for misconduct because he had established *"a strong case that he has an implied contractual right to fair procedures in the assessment of his performance during his probationary period.*" The plaintiff did not appeal against the decision that he had failed to establish a strong case that he was dismissed for misconduct and in the Court of Appeal Costello J described the issue as "*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 poor performance."* She held that such a term could not be implied into the contract but she distinguished between performance and misconduct. Indeed, the distinction is implicit in the ratio of the judgment. She also expressly did so in the quotes set out above.

56. In *Carroll v Bus Átha Cliath [2005] IEHC 1* Clarke J held:

> *"9.4 The traditional position at common law was that a contract of employment could be terminated on reasonable notice without giving any reason.*

…

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.

…

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."

57. Fennelly J in *Maha Lingham* stated:

"*…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."

58. Thus, in order to succeed, the plaintiff has to establish a strong case that her employment was terminated for misconduct.

59. The first matter which requires to be determined is why the plaintiff's employment was terminated.

Reasons for Termination

60. There is a fundamental conflict of fact between the parties as to why the plaintiff's employment was terminated and what reasons were given by Mr. Mullane at the meeting of the 17th May and in the phone conversations of the 17th May and the 18th May. The plaintiff says that she was told that her employment was being terminated due to the allegations and Mr. Mullane says that she was told that she had failed her probationary period due to performance issues, including those that had been raised with her previously.

61. The conflicts include (but are certainly not limited to) a dispute about what topics were discussed at the meeting as well as disputes about precisely what was said. I do not propose to address the disputes about precisely what was said (though I have to return to some of them later) but it is necessary to refer to the dispute about what topics were discussed. Mr. Mullane says that three topics were discussed at the meeting: the allegation which he had recently received, the plaintiff crying in the shop, and performance issues which he says he previously raised and which he set out in his affidavit. In summary, those performance issues included issues about the plaintiff's non-presentation of weekly operational reports on cash sheets, stock takes, sales reports, and unfollowed up 'drive offs' despite being advised by him on numerous occasions as to what was required; her non-completion of weekly cash sheets which requires a weekly reconciliation of daily cash sheets despite being trained by Mr. Owens, one of the directors of the defendant, and Mr. Mullane; and the plaintiff having failed to comply with the defendant's policy in respect of 'drive offs'. Mr. Mullane deposes to having provided the plaintiff with feedback on her performance *"on multiple occasions and set future goals, aims and dates for further monitoring of same but ultimately her performance on these and other issues did not improve."*.

62. The plaintiff says that "*performance-related issues*" were not raised by Mr. Mullane and that the only issue raised was the recently-made allegations with some reference to the earlier allegations and the investigation. She accepts that there was also discussion about her allegedly crying in front of staff in the workplace and about her

allegedly previously asking Mr. Mullane to telephone staff members on her behalf. The plaintiff claims that Mr. Mullane told her that as a result of the recent complaint it would be necessary to terminate her contract of employment and that he said that the defendant could not take any more allegations, whereas Mr. Mullane says that the plaintiff's employment was not terminated at this meeting (but in a telephone conversation later) and not as a result of the allegation and that he told her that "*no decision had been made by him or anyone else in the defendant company"* and that he would take time to consider her time spent on probation given the "*multiplicity of issues then at play".* He deposes to having reflected on the *"issues discussed at the meeting and the performance matters relating to the plaintiff",* to having discussed them with Mr. Owens and to having come to a decision to fail her probationary period working as a store manager in the store and that he explained his reasons, which reflected what he set out in his affidavit.

63. I can not resolve these, or the other, conflicts of evidence at this stage. Nor is it necessary for me to do so in order to determine whether or not the plaintiff has established a strong case. The question is not whether the plaintiff's or the defendant's account is correct but whether the plaintiff has established a strong case that she is likely to prove her account, i.e. that her employment was terminated due to the allegations. If so, it will then have to be determined whether the requirements of fair procedures applied.

64. I am satisfied that the plaintiff has established a strong case that her employment was terminated due to the allegations. Indeed, I am not convinced that there is any real dispute between the parties that they were part of the decision.

65. I am of this view for the following reasons.

66. Firstly, it must be noted that there are reasons to believe that the plaintiff's recollection or account is not entirely accurate. For example, the plaintiff makes key allegations about the discussion at the meeting of the 17th May in her second affidavit which one would have expected to be in her first, grounding, affidavit. She alleges in her second affidavit that Mr. Mullane said that "*there is a bad smell in Rathcormac and I have to get rid of it*", that he referred to the cost of the original investigation and that he had previously said that it was going to cost a fortune. These are highly significant and no explanation is given for their omission from the grounding affidavit. One would expect such highly significant allegations to be in the grounding affidavit if the plaintiff had a clear recollection of the discussions. Furthermore, the plaintiff says that other performance issues were not raised at the meeting and that the only matter raised was

the allegations that had recently been made but also accepts that there was discussion of her having allegedly cried in front of staff and of having allegedly asked Mr. Mullane to phone staff on her behalf previously. At this stage it would seem strange if these two specific issues (which are performance-related matters) were raised in isolation from other performance issues and it is suggestive that such issues were in fact raised, at least to some extent.

67. However, it is not necessary to rely solely on the plaintiff's account. Mr. Mullane accepts he raised the allegations that had recently been made and specifically says that he asked the plaintiff about them at the meeting. He says in his affidavit that he asked the plaintiff "*why these allegations of speaking to* [the other employee] *were being made and expressed to* [the plaintiff] *how aghast I was that they were being made at a time when a separate investigation into her conduct involving another employee was ongoing…" (*paragraph 53 of his replying affidavit). He also says that he told the plaintiff that he would have to consider the plaintiff's continuing employment "*…given the multiplicity of issues then at play*." The "*multiplicity of issues*" clearly include the allegation. He also says that he "*…reflected carefully on the issues discussed at the meeting and the performance matters relating to the plaintiff which had been ongoing at the time.*" On the defendant's own account, the performance matters relating to the plaintiff were discussed at the meeting so by referring to having reflected on the "*issues discussed at the meeting"* and the "*performance matters*" he accepts that issues other than those performance matters were discussed and reflected on by him.

68. On Mr Mullane's own account the allegations were discussed at the meeting and the termination was on the basis of the "*multiplicity of issues then at play"*. The multiplicity of issues then at play and the "issues discussed at the meeting" both included the allegations. Thus, on the basis of the defendant's own account there is a strong case that the termination of the plaintiff's employment was on the basis of the allegation, at least in part.

69. Even if the defendant did not accept that the allegations had been discussed, it seems to me that the evidence (subject to discovery and cross-examination etc) strongly supports a conclusion that that they formed part of the decision.

70. Mr. Mullane deposes that the plaintiff failed her probation, i.e. that he terminated her employment, due to poor performance issues that he had been concerned about for some time, that he had raised these with her and given her feedback and set future goals, aims and dates but that her performance in certain areas had not improved. There are a number of striking features about this. Firstly, Mr. Mullane has not exhibited a

single contemporaneous document recording any feedback, training or instruction given to the plaintiff or recording that he had raised any performance issue with her. He explains this on the basis that the feedback was given orally and that the defendant does not operate a separate human resources department. Nonetheless, one would expect that if the concerns were at the level deposed to by Mr. Mullane and if goals and dates were set there would be some contemporaneous note or memo of some interaction with the plaintiff in relation to the performance. Mr. Mullane relies on an email which he sent to Mr. Owens on 25th May in response to the plaintiff's solicitor's letter as evidencing his concerns but this was written after the termination had been challenged and is clearly not a contemporaneous note of any conversation or session with the plaintiff. The absence of any feedback or training records is particularly noteworthy in circumstances where, on the defendant's own case, the plaintiff had no experience in a lead management role but they felt she had the potential to become a good manager. This involved a considerable risk and investment by the defendant and one would expect that if there were performance problems of the nature and extent described by Mr. Mullane that there would have been some formal steps taken. The absence of any documents tends to support the plaintiff's case though this will, of course, be a matter for the trial. Secondly, the plaintiff started with the defendant on the 7th March 2022. She was performing the role of manager from that date and was formally promoted/appointed to that position on the 25th April 2022. Her employment was then brought to a sudden end on the 17th May 2022. There is nothing in the defendant's affidavits to suggest that there was a difference between her performance between the 7th March and the 25th April and then between the 25th April and the 17th May. There is therefore nothing to explain how the concerns were not sufficient to require or warrant the postponement of her formal appointment/promotion to the position of manager but were then, within four weeks of that appointment/promotion, so serious that they warranted failure of the probationary period. In fact, what intervened was that Mr. Mullane received a text from an employee containing the second set of allegations. Within a matter of a short few days of that text Mr. Mullane sought the meeting with the plaintiff and informed her, either at the meeting or in the conversations after it, that she had failed her probation. Put simply, even taking the defendant's case at its height, i.e. that they had concerns about the plaintiff's performance and had spoken to her about them, they did not consider those concerns sufficient to fail her probation and only reached that view within a very short few days of having received another set of allegations. This coincidence of events can not be ignored and in fact is not even explained by the defendant. It may, of course be fully explained at trial but for present purposes it supports the plaintiff's account.

71. Thus, I am satisfied that the plaintiff has established a strong case that the allegations were discussed at the meeting and formed the basis, at least in part, for the decision to terminate her employment.

Fair procedures - Poor performance vs. misconduct

72. However, that is not sufficient. The plaintiff must also establish that those allegations are of a nature to attract an entitlement to fair procedures - in essence that they were misconduct. That is clear from the authorities cited above. If the matters alleged against her and forming the basis for the decision to terminate her employment were solely "*performance*" issues then the requirement for fair procedures would not be attracted. This seems to me to in fact be the real dispute between the parties - not that the allegations were not discussed in the meeting and formed a basis for the termination – but that they were performance issues rather than conduct issues.

73. I have no hesitation in concluding that the type of behaviour which is alleged against the plaintiff amounts to misconduct and would be understood as such by reasonable persons. The mere fact that it might also be considered as a performance issue does not preclude it from being misconduct. The defendant appears to take the position that if it is "*performance*" then it cannot be "*misconduc*t". I do not accept that. Some things can, of course, amount to poor performance but not misconduct; for example, a failure to reach sales targets may amount to poor performance while not amounting to misconduct. I am satisfied that talking about a person behind their back in a way which was critical of them and which has the potential to denigrate them is and would be seen and understood by a reasonable person as being in the nature of misconduct (it may also be poor managerial performance).

74. That regard should be had to what the reasonable person might think is clear from the Handbook which states that *"standards of conduct are though not exclusively those defined by company rules and procedures by legal requirements <u>and by what is generally recognised as acceptable workplace performance and behaviour</u>"* [emphasis added].

75. Clause 15 of the contract of employment is also of significance. It provides that the "*Company requires all employees to mutually respect each other and has a Dignity at Work policy in place which details our stance on Bullying and Harassment and outlines both the informal and formal procedures to be used in resolving any such issues…"* The Employee Handbook's definition of bullying is set out above.

76. The investigation into the first set of allegations was established under the defendant's Bullying and Harassment policy. Mr Mullane states in his affidavit that he did not instruct the investigator as to what policies of the defendant were relevant. Even if that is correct (and I presume it is), an expert engaged by the defendant was clearly of the view that the alleged behaviour could constitute bullying. Thus, the first set of allegations was seen as possible bullying and harassment by a person working in the field of human resources. The second set was very similar in nature and it is therefore impossible to see how they could be seen as not falling within the category of bullying and harassment. It must also be recalled that the consultant's letter warned that the investigation might lead to the investigation of the disciplinary procedures. Even if this firm had not taken this view, I would be satisfied that such conduct – bullying or harassment of another employee – could only be viewed as misconduct and therefore there must be a strong case that the failure of the probationary period or termination of the plaintiff's employment on the basis of allegations of alleged bullying and harassment - amounted to a failure of probation or termination on the grounds of misconduct.

77. Finally, while the contract of employment excludes the application of the standard disciplinary procedures, the defendant chose to establish an investigation in respect of the first set of allegations which the plaintiff was told by the human resources firm engaged by the defendant might lead to the application of that very disciplinary procedure. It seems to me that there is a strong case that, having adopted this course in respect of the first set of allegations, the defendant (i) must be taken to have accepted that the allegation against the plaintiff was in the nature of misconduct (indeed, Mr. Mullane described it as an investigation into the plaintiff's "*conduct involving another employee*") or (ii) could not act on foot of the second set (which were very similar in nature) without adopting the same course.

78. One question which does arise from the decision in *Carroll v Bus Átha Cliath* is whether the termination has to be expressly on the basis of stated misconduct in order to attract the requirement for fair procedures or should the Court examine the substance of the reasons. Clarke J said*" 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"* [emphasis added]. This is, of course, relevant in this case because the termination was not stated to be for misconduct. The reference to "*stated misconduct"* and the argument that the termination has to be for "*stated misconduct*" in order to attract the requirements of fair procedures arises because of the reputational

damage that would be caused by a termination which is expressly on the basis of a misconduct. However, I do not believe that it can be correct that the right to fair procedures can only arise where the termination is for stated misconduct. The right to fair procedures comes from the individual's constitutional rights. To ignore the real reason or the substance of the reason for a termination in favour of what an employer chooses to state as the reason would not effectively protect the individual's rights and would allow an employer to avoid the obligation to observe fair procedures by simply stating a reason other than misconduct for the termination (see also the reference to Laffoy J's judgment in *Naujoks v National Institution of Bioprocessing Research & Training Ltd v National Institution of Bioprocessing Research & Training [2010] IEHC 35* in paragraph 67 of *O'Donovan* where Costello J said: "*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*.)

79. Finally, the defendant submits also that the plaintiff had no such entitlement to fair procedures (even if the basis of the failure of the probationary period was misconduct) because her contract "*expressly contracted out the application of the company's standard disciplinary procedure in such circumstances given the nature of her probationary status*." The contract provided that "[*T]he standard disciplinary procedure will not be used during the probationary period"*. It was submitted that there was a contractual right to terminate during the probationary period and that the Court "*cannot imply a term that a termination should not take place save for good cause and after giving the plaintiff a reasonable opportunity to demonstrate that no such cause existed*." The defendant relies on *Curr v London & County Mortgages [2020] EWHC 1661 (QB)* as referred to in *O'Donovan v Over-C Technology Ltd & Anor*. It seems to me that the argument that the *"standard disciplinary procedure"* does not apply or that the Court cannot imply a term that termination should not take place save for good cause and only on the basis of fair procedures because of that contractual provision is somewhat to miss the point. Put simply, there is a strong case that the common law and the Constitution requires fair procedures where a termination is for reasons of misconduct. All that is contracted out of is the application of the company's standard disciplinary procedure, not these common law or constitutional principles. I do not have to consider whether it is open to parties to contract out of those principles.

80. Thus, I am satisfied that the plaintiff has established a strong case that the termination of her employment was on the basis of alleged misconduct and therefore fair procedures should have been afforded. As discussed above, the authorities make it clear

that an employer is free to terminate an employee's employment for no reason during probation and, even where it relates to poor performance, the employer is not obliged to observe fair procedure but where the termination is for misconduct fair procedures must be observed (*Carroll v Bus Átha Cliath, Maha Lingham, Orr v Zomax and O'Donovan v Over -C Technology*).

Were fair procedures applied?

81. There is no serious dispute that the normal requirements of fair procedures were not applied. What is required by fair procedures will, of course, depend on the circumstances of the particular case but, in this case, there is no claim that the defendant even informed the plaintiff in advance of the allegations which had been made and the only opportunity she had to address them was when she was told of them at the meeting of the 17th May. Indeed, it is the defendant's case that the termination was not due to those allegations. The defendant's real response is that the plaintiff was fully aware of the allegations and in fact admitted them at the meeting. However, this is disputed by the plaintiff. I am therefore satisfied that there is a strong case that the plaintiff's employment was brought to an end due to alleged misconduct and that she was not given an opportunity to address those allegations. The defendant could have simply terminated the plaintiff's employment for no reason or on the basis that she was not performing well or was not the right fit but I am satisfied that the plaintiff has established a strong case – though one to be tested fully at trial - that her employment was terminated due to alleged misconduct.

82. The plaintiff also makes the case that her employment should not have been terminated where the investigation into the first set of allegations was ongoing. In light of my decision that she has established a strong case on the above point, it is unnecessary for me to determine this point.

Balance of Convenience

83. That being the case I must consider the balance of convenience/justice including the adequacy of damages. Traditionally the adequacy of damages was treated in advance of a consideration of the balance of convenience/justice and was determinative. However, since *Merck Sharp & Dohme*, the adequacy of damages is to be considered as

part of the overall consideration of the balance of convenience/justice and is not be treated as determinative in itself, though it is still generally the most important element in that balance. O'Donnell J made clear in *Merck Sharpe & Dohme* that the primary focus in deciding whether or not to grant an injunction has to be to minimise the risk of injustice. Clarke J in paragraphs 5.1-5.9 of *AIB v Diamond [2011] IEHC 505* considered the necessity to minimise the risk of injustice and in paragraph 5.7 said "*Finally, the balance of convenience is, perhaps, the factor that is most closely and directly associated with the risk of injustice."* O 'Donnell J also emphasised that the consideration of whether or not to grant an injunction should not be approached as a checklist but as the flexible remedy which an injunction is intended to be.

Adequacy of damages

84. There is a strong argument that damages would be an adequate remedy if the plaintiff were successful at trial. The direct financial loss would be readily calculable. It would be the amount of salary that the plaintiff would have been paid if she had not been wrongfully let go. Arguably, this is limited to one week's notice. The precise amount of damages will be a matter for argument at trial and does not have to be resolved at this stage. The point is that the amount is readily calculable. This must also be seen in the context of the court's traditional reluctance to grant mandatory injunctions compelling the continuation of a personal relationship such as an employment relationship (see *Giblin v Irish Life & Permanent Plc [2010] ELR 173*). The possibility of such an Order can not be excluded (see the discussion above) but as a general principle it is more likely that a court will grant relief in the form of damages where a termination is found to have been in breach of contract. Costello J dealt with this, in paragraphs 72-74 of her judgment in *O'Donovan* (see also *Philpott v Oglivy and Maher Ltd [2000] 3 IR 206)*.

85. Costello J adopted statements of principle which had been set out in *Curr v London & Country Mortgages [2020] EWHC 1661 (QB):*

> "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."

86. As against the contention that the plaintiff could be readily compensated by damages, the plaintiff places considerable emphasis on the loss of reputation that she would suffer were an injunction directing her employment pending trial not ordered and she later succeeded at trial. The plaintiff claims in her grounding affidavit that the "*termination of my Contract of Employment pending the outcome of Plenary hearing would have an unmitigated and disastrous impact on my professional reputation and standing within the retail industry. I say that any such implication would effectively prohibit an eventual return to the said industry and any such consequences would be difficult to quantify by way of damages and/or restitution.*" The defendant does not dispute the plaintiff's averments in relation to the nature of the retail industry and that she would in fact suffer reputational harm with such grave consequences, and in fact, accepts that reputation is important. At the very earliest point in the relationship, Mr Mullane acknowledged that reputation was important. Notwithstanding that she was not appointed as the store manager at the outset, Mr Mullane told staff she was store manager because if she was subsequently formally appointed to the position he did not want them to know that she had been on trial and if she was not appointed he did not want staff to know she had failed the trial period because he was "*cognisant of the plaintiff's reputation at all material times".* At the time of her termination, Mr Mullane claims that he offered her an opportunity to resign rather than be let go and he expressly told Mr. Owens in an internal email of the 25th May 2022 (in response to the letter from the plaintiff's solicitor) that *"I accept we discussed the option of her resigning but I am clear this was done after I had informed her of the unsuccessful probation. I said if it was her preference,* ***in order to protect her reputation****, she could take the opportunity to resign first…"* [emphasis added]. Indeed, in paragraph 95 of his replying

affidavit (dealing specifically with the plaintiff's averments as to damage to her reputation) Mr. Mullane refers to the plaintiff's failure to address the impact which his offer of alternative employment in the Grenagh Store would have on the plaintiff's alleged reputation and standing in the retail industry.

87. Barrington J, on behalf of the Supreme Court, in *Mooney v An Post [1998] 4 IR 288* said:

> "*…Dismissal from one's employment for alleged misconduct with possible loss of pension rights and damage to one's good name, may, in modern society, be disastrous for any citizen. These are circumstances in which any citizen, however humble, may be entitled to the protection of natural and constitutional justice.*"

88. Thus, on the evidence, the damage to the plaintiff's reputation is a significant factor in the assessment of the balance of convenience. It would be even more significant if the plaintiff's employment had not already been terminated – in that case she would have been seeking an injunction to restrain the termination on the basis that a termination would cause grave harm to her reputation. But the plaintiff has already suffered the harm of a termination. It is true that mandatory injunctions in the terms sought would go some way to mitigating the damage to her reputation but ultimately the only way that her reputation can be vindicated is at the full trial. The mitigation that would be achieved by the relief sought must be weighed against the other factors, in particular that some of the mandatory relief would involve compelling the parties to work together.

89. In assessing the adequacy of damages, the Court must also consider the adequacy of the plaintiff's undertaking as to damages. The defendant expressed its concerns as to the plaintiff's "*…capability to provide the undertaking as to damages she has provided at paragraph 60 of her Grounding Affidavit given inter alia the salary to which she was contractually entitled to whilst she worked for the Defendant*" and went on to say "*I say and believe and have been advised that it is incumbent upon the Plaintiff to further satisfy this Honourable Court as to her continuing capability to provide the said undertaking at all material times."* The plaintiff did not respond by placing information as to her financial situation before the Court. The ability of the plaintiff to satisfy an award of damages made on foot of her undertaking and her decision not to place any financial information before the Court are undoubtedly factors which the Court

can and must take into account but it is essential not to place too much weight on them. The purpose of an undertaking as to damages is to provide an avenue for the successful defendant to recover any damages from the unsuccessful plaintiff who had secured interlocutory relief and it is therefore relevant whether the undertaking is a meaningful one. However, a precondition that an applicant for an injunction must prove at that stage that they have the means to satisfy an award of damages (the quantum of which is not known at the time the undertaking is given) against them would have the potential to deprive individuals of more limited means of the right or ability to obtain interlocutory relief against an alleged wrong. It would have the effect of limiting the availability of equitable relief to those with means and assets. If the plaintiff obtains an injunction on foot of an undertaking as to damages, the defendant, if successful at trial, can obtain an award of damages on foot of that undertaking and will have all of the usual enforcement mechanisms available to it. Thus, the ability to satisfy any award and the absence of financial information are important relevant factors but do not in themselves automatically disqualify the plaintiff from obtaining relief, if otherwise entitled to it. In fairness to the defendant, they did not submit that it should act as a disqualifying factor and simply say that the plaintiff has failed to "*counter and/or address this concern in her affidavits to date" and "It remains live in the circumstances and is a factor this Honourable Court is entitled to take account of in this application as a whole."*

Loss of Salary

90. The plaintiff also relies on the loss of her salary pending the full trial in submitting that the balance of convenience favours the grant of an interlocutory injunction even if only in terms of paragraph 2 of the Notice of Motion. Loss of salary is, of course, compensable by way of an award of damages but what is relevant is the difficulty that might be presented by the loss of income in the meantime. There is authority for an interlocutory order compelling the payment of salary pending determination of the substantive issues. Carroll J in *Orr v Zomax* said:

> *35. The first case in which a mandatory order for the payment of salary pending trial was made was by Costello J. in Fennelly v. Assicurazioni Generali SpA (1985) 3 I.L.T. 73. Here the evidence established that the plaintiff left a permanent and pensionable post and obtained a letter that the contract was for the fixed term of 12 years. The High Court held it was entitled to conclude that there was a fair question to be tried that the contract was determined invalidly. It approached the case on general principles that the courts would not give*

specific performance of an employment contract (subject to the exception as in Hill v. C. A. Parsons & Co. Ltd. [1972] Ch. 305). Costello J. said the court might conclude at trial that damages were an adequate remedy but at that stage he still had to consider the balance of convenience until the trial. He said in the meantime the plaintiff would be left without a salary and nothing to live on. The situation in which he found himself would be little short of disastrous. He said that he should not be left in the situation in which he would be virtually destitute with the prospect of damages at the action. That seemed an unjust situation. He said at p. 74:-

> *"In view of the very special circumstances in this case I will require the plaintiff to be paid his salary and I order that until the trial of the action the defendant should continue to pay the plaintiff's salary and bonus under his present contract.*
>
> *I accept that the court should not require an employer to take on an employee where serious difficulties have arisen between them or where there is no work for the employee but in this case the parties have obviously the highest regard for one another. I will take an undertaking that the plaintiff will be prepared to carry out such duties that the defendants will ask of him until the trial. If they would make use of him until the trial of the action the plaintiff should attend and carry out such duties as they give him. They might prefer not to give him any duties and put him on leave of absence. That is for the defendant but they must continue to pay his salary until the trial."*

36. I am told that on appeal to the Supreme Court payment of salary was limited to six months.

37. In Hill v. C. A. Parsons & Co. Ltd. [1972] Ch. 305 (which predated Fennelly v. Assicurazioni Generali SpA (1985) 3 I.L.T. 73) the plaintiff was given one month's notice to join a trade union and did not do so. He was then given one months notice of termination. He claimed an injunction restraining the defendant from implementing its notice of termination. It was held by the Court of Appeal that he was entitled to at least six months notice and in the exceptional circumstances of the parties' relationship and the plaintiff's likely protection by the coming into operation of Part II of the Industrial Relations Act 1971 before a fresh notice could take effect, his contract of employment was

still subsisting and, damages not being at all an adequate remedy, he was entitled to the interim injunction sought.

38. In both these cases it was emphasised that there were either "special" or "exceptional" circumstances and also there was no loss of trust in the employee.

39. In Harte v. Kelly [1997] E.L.R. 125, Laffoy J. went further and held that the entitlement to the type of order granted in Fennelly v. Assicurazioni Generali SpA (1985) 3 I.L.T. 73 was not limited to situations where the plaintiff could establish that he would face penury if such an order was made. She said:-

> *"The rationale of the decision is that it is unjust to leave a person who alleges his dismissal has been wrongful without his salary pending the trial of the action and merely with his prospect of an award of damages at the trial of the action."*

40. In GEE v. Irish Times (Unreported, High Court, McCracken J., 27th June, 2000) McCracken J. referred to the "well established practice" to continued payment of salary pending trial.

41. So, the position apparently has moved from being appropriate in either special or exceptional circumstances to being a "well established practice".

42. The cases where there is no suggestion of any breakdown of trust or confidence have no relevance to this case; likewise where there is alleged breach of a fixed term contract. Here the defendant claims it would suffer irreparable harm if forced to re-employ the plaintiff. The plaintiff in his grounding affidavit seeks re-instatement only. It is only in his second replying affidavit that he mentions money and then only in oblique terms. He refers to the claim by Mr. Shanahan that the loss of his career and the resultant suffering and financial hardship which he and his family would suffer, would adequately be compensated by damages. He does not allege irreparable loss and damage if deprived of his salary. The plaintiff has not made out a case on the balance of convenience that he should be paid his salary after the period of notice has expired. It would constitute a serious injustice for the defendant if it was obliged to pay the plaintiff's salary until trial of the action. The same applies to the application to maintain his pension and life assurance benefits or preserving his perquisites and entitlements. It follows that there is no justification for

permitting the performance of functions and duties by the plaintiff or restraining the performance of those functions and duties by any person other than the plaintiff."

91. In *Grenet v Electronic Arts Ireland Ltd [2018] IEHC 786* O'Connor J referred to Finlay Geoghegan J's judgment in *Brennan v Irish Pride Bakeries (In Receivership) [2017] IECA 107* where she, on behalf of the Court of Appeal, quoted Laffoy J in *Giblin v Irish Life & Permanent plc [2010] ELR 173* in which Laffoy J said 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.*" O'Connor J went on to refer to the judgment of Laffoy J in *Burke v Independent Colleges Limited [2010] IEHC 412* where she said:

"*Given the impact that the loss of his employment will have on the personal family and professional life of the plaintiff, as deposed to in his affidavit, I am of the view that the defendant has not established that the damages are an adequate remedy for the plaintiff.*"

92. The extent of the plaintiff's evidence about the reliance on her salary is at paragraph 50 of her grounding affidavit, where she says :

"*…in the absence of [interlocutory relief] your Deponent will not be in receipt of any salary or any associated emolument in that period up and until the Trial of the Plenary action which would result in undue hardship to your Deponent.*"

Offer of alternative position and the plaintiff's responses

93. As noted above, the defendant's indication that it was prepared to offer the plaintiff an alternative position and the plaintiff's response to that are relevant to the assessment of the balance of convenience/justice. There is, of course, a dispute about whether or not the defendant made an "*offer"* as such. For present purposes I will refer to it as an "*offer*" simply for ease of reference. The plaintiff's response to this offer is relevant to the consideration of the balance of convenience in its own right and as a part of the consideration of whether the relationship of trust and confidence has broken down.

94. I have some difficulty with the manner in which this is dealt with by the defendant. The defendant at times relies on this offer to suggest that the plaintiff's employment was not terminated and that the offer was one of "*continued employment.*" For example, Mr. Mullane in paragraph 98 of his replying affidavit describes it as an "*offer of continued employment*". It was put in even stronger terms in paragraph 93 where Mr. Mullane stated "*The Plaintiff was not dismissed. The Plaintiff was not dismissed for misconduct. The Plaintiff has unilaterally chosen to leave her employment in the face of my offer to continue her employment*". It is entirely inaccurate to describe the offer as one to continue the plaintiff's employment or that the plaintiff unilaterally chose to leave her employment. Her employment had been brought to an end by the decision of the defendant. That is clearly stated by Mr. Mullane. Indeed, the fact that the termination had already occurred is a central part of the defendant's case that the plaintiff is not entitled to some of the relief. The second difficulty is that these and other averments disregard that the offer was for a different position, presumably at lower pay, on different terms and conditions and subject to a different contract but those terms and conditions were not advised to the plaintiff. The offer was one of new employment. The logic of the defendant's position is that if an offer of employment at a lower position on different terms and conditions is made to an employee that employee can not maintain that he or she was dismissed/terminated from her original position or at least can not seek to enforce their rights. In my view that position is not sustainable.

95. Notwithstanding these difficulties, it seems to me that the fact that the offer was made and the fact that the plaintiff did not respond directly to the defendant are significant factors in the assessment of the balance of convenience. They would be even more significant if the offer was still open but the defendant in paragraph 7 of its submissions takes the position that while the offer remained open until 30th May 2022, the plaintiff by swearing her grounding affidavit "*chose not to accept the offer".* This is a curious submission – and reflects some of the averments by Mr. Mullane – in that it suggests that the offer had not been refused until the swearing of the affidavit. In fact the solicitor's letter of the 20th May makes it absolutely clear that the offer was being refused.

96. The fact of the offer having been made is relevant to the balance of convenience/justice. It would have been open to the plaintiff to have accepted the alternative position without prejudice to her right to claim that the termination of her original employment was in breach of contract and without prejudice to her right to sue in respect thereof. She does not address the impact of her accepting the alternative position on her reputation despite swearing a further affidavit after the defendant raised

the point but, logically, it must follow that, while there would be some loss of reputation because it was a lower position, that loss would be far less than her termination simpliciter, particularly in the wider retail industry and particularly where there was still the possibility of her progressing to the position of manager.

97. The plaintiff's failure to respond directly to her employer in respect of the offer is of greater significance. As discussed above, her failure to respond directly does not amount to her coming to Court with unclean hands but it is relevant to whether the balance of convenience favours the grant of an interlocutory injunction, partly because the court must have regard to the conduct of the parties and partly because it goes to the ongoing relationship between the parties.

Relationship of trust and confidence

98. One significant factor in deciding where the balance of convenience lies in an application for an injunction which would compel the continuation of an employment relationship is whether the necessary relationship of trust and confidence is so broken that it would be untenable and unjust to compel the parties to continue to work together. I have previously considered this in the context of O'Donnell J's first step and determined that I should not conclude that the breach in the relationship is such as to render it impossible that a court might grant an injunction but it still falls to be considered as part of the consideration of the balance of convenience. In *Bergin v Galway Clinic Doughiska Ltd [2008] 2 IR 205* Clarke J refused to make orders requiring a defendant employer to provide work to the plaintiff saying "*having regard to the serious breakdown in relations between the parties, evidenced, not least, by the serious accusations made in the course of these proceedings, I am not satisfied that, even if there were a limited jurisdiction, in special cases, to make an order…it would be appropriate, in the exercise of my discretion, to make such an order in this case*". He also said "*…having regard to the breakdown in relations between the parties as evidenced by the affidavits, it seems to me highly improbable that, irrespective of the outcome of the proceedings, a court would be persuaded to make an order which would have the effect of requiring that the Plaintiff be allowed to continue with his duties*."

99. The plaintiff states at paragraph 29 of her supplemental affidavit "*I did not and have not lost faith in the Defendant. I say that I maintain respect for the Defendant Company, and I continue to have confidence in it. I say that my relationship with Mr.*

Mullane in his capacity as my immediate line manager is strained given his purported dismissal of me and the reasons for same. *However, this would not cause me concern in terms of continuing to work with the Defendant which is a large enterprise. In that regard and contrary to what Mr. Mullane now avers, he did in fact praise my performance in my role. The only issue which arose was that of the allegation of wrongdoing."* The defendant, on the other hand, expresses the clear opinion that the necessary trust and confidence is now gone and that the relationship is at an end. In my view, a court can not base its decision as to whether the necessary trust and confidence no longer exists solely on the stated views of the parties. To do so would make it too easy for a respondent to defeat an application for a mandatory injunction by expressing the view that the relationship has broken down. Conversely, if the parties' stated views were to be determinative then all an applicant would have to do would be to convey the view that the relationship has not broken down. There has to be an objective basis for the view and upon which the court can determine whether or not the relationship has broken down.

100. There are a number of objective features in this case which point to a breakdown in the relationship of trust and confidence. The plaintiff's failure to respond to Mr Mullane's email of the 18th May (and the "*offer*" contained therein) and his text of the 19th is one such feature.

101. There is no dispute that the plaintiff asked Mr. Mullane about the possibility of an alternative position in Grenagh during one of their conversations on the 17th May. A meeting was arranged in the Grenagh store the following day. It seems clear that the plaintiff must have been aware that some offer or suggestion might be made at the meeting. Unfortunately, the plaintiff could not attend the meeting on the 18th May due to illness. Mr. Mullane then emailed her and informed her that "*The purpose of the meeting today was to offer you a position of trainee manager in Grenagh under new terms and conditions, and with a new 6-month probation period in which you will work closely with the Manager at Grenagh and learn the requirements of this role from him..."* The plaintiff did not respond at all. Mr. Mullane then texted on the 19th May to ask whether the plaintiff would be in work the following day and the plaintiff did not reply to this. The first response that the defendant received to the offer of the alternative position was the plaintiff's solicitor's letter of the 20th May. Thus, despite having requested an alternative position in the Grenagh Store and having received an offer or, on the plaintiff's own case, an indication that an offer would be made, of an alternative position in the Grenagh Store, the plaintiff did not respond to that offer other than through her solicitor. No explanation was given for this. Even accepting the plaintiff's account that she requested the position of store manager in Grenagh rather than a lower

position, that the offer was therefore different to the one she sought, and that she was perfectly justified in refusing this offer, and that it did not even amount to an offer, her conduct in not even responding directly to her employer is relevant and significant.

102. It is also relevant that the plaintiff did not reply to Mr. Mullane's email of the 19th May inquiring whether she would be back at work on the following day. A business such as the defendant has to prepare staff rosters and has to ensure that they have cover when the business is open. The plaintiff, as manager, must have appreciated that and yet did not inform the defendant whether she would be at work.

103. There may be a good explanation for these omissions and it is for that reason that I am not prepared to conclude that the relationship has broken down solely on the basis of these omissions. However, one could only conclude that the defendant must have significant and legitimate doubts about whether they could have trust and confidence in the plaintiff and, more importantly, about whether they should be compelled to continue having the plaintiff work for them.

104. The defendant also relies on the alleged performance issues in stating that it has lost trust and confidence in the plaintiff. However, in circumstances where there is a clear dispute about (i) the plaintiff's performance, (ii) whether proper training and instruction was given to her, (iii) whether these performance issues were ever raised with the plaintiff, and (iv) whether the performance issues were raised at the meeting of the 17th May, I do not believe that I could conclude that the plaintiff's performance was so deficient as to lead to a loss of trust and confidence because that would require me to make a finding of fact on a disputed issue.

105. However, what is significant about the performance issues is that the parties have given very different accounts in respect of the performance issues referred to in Mr. Mullane's first affidavit and the plaintiff has made very serious allegations against the defendant and Mr. Mullane specifically. It seems to me that as a general principle, while cognisant of what was said by Clarke J in *Bergin v Galway Clinic*, the Court has to be careful not to place too much weight on what is said in the exchange of affidavits or in evidence in assessing whether a relationship has broken down. Otherwise, the litigation process itself would or could automatically become the basis for the refusal of an injunction on the grounds that the relationship has broken down. Obviously, serious regard can and must be had to how the litigation is conducted and what might be said in evidence (or perhaps, more importantly how it is said) and in some instances that might be determinative (see *Bergin v Galway Clinic*) but to place too much weight on those factors or even to rely solely on them would have the potential to render an application

for relief self-defeating; a plaintiff who seeks an injunction against their employer must then be refused the injunction because the relationship has broken down because they sought an injunction. This is particularly so where there is any significant conflict of fact. In such a case, it will almost always be open to a defendant employer to say that because the employee is saying that the employer's account is wrong they must be saying that they do not believe the employer's account and therefore the relationship of trust and confidence has broken down. Within certain bounds the parties to litigation must be entitled to place their accounts before the Court without that becoming the basis for suggesting that the relationship has broken down. There will, of course, be cases where the allegations are so serious (see *Bergin v Galway Clinic*) or are made in such intemperate terms that they may in themselves lead to the conclusion that the relationship has broken down but short of that the Court must be careful not to place too much weight on the litigation process itself.

106. As I say above, I do not believe that the conflicts in relation to the performance issues themselves are evidence of the breakdown of the relationship. They are issues which will have to resolved at the full trial. However, it is relevant that the plaintiff goes further than merely disputing the defendant's account and alleges that the defendant's description of the second set of complaints as an issue of poor performance is a "*device*" and "*entirely disingenuous."* That goes much further than there simply being conflicting accounts and comes close to suggesting dishonesty on the part of the defendant. It is also relevant that the plaintiff avers in her second affidavit (but not in her first) that Mr. Mullane stated at the meeting that "*There is a bad smell in Rathcormac, and I have to get rid of it.*" This is denied by Mr. Mullane. In the context of a meeting where the plaintiff was effectively being let go such a statement would be highly personalised and highly inappropriate. If the plaintiff's allegation is true, it is impossible to see how the relationship could be repaired and if it is not true then the mere fact of the allegation having been made must go directly to the question of whether there could be any subsisting relationship of trust and confidence.

107. The plaintiff accepts that her relationship with Mr. Mullane in his capacity as her immediate line manager is strained but it is difficult to see that as anything other than an understatement in light of those allegations. Similarly, the plaintiff alleged in her second affidavit (but not her first) that Mr. Mullane said that he could not afford to deal with further allegations and that the original investigation was "*going to cost a fortune.*" If these things were said, they were highly inappropriate. The plaintiff was the subject of the investigation and for her manager to complain to her that the investigation of serious allegations against her was "*going to cost a fortune*" would be highly unprofessional. It is

difficult to see how the plaintiff could have any faith in such a manager. Conversely, if the plaintiff's allegation is found to be incorrect or untrue then it is impossible to see how the defendant could have any faith in the plaintiff.

108. I am satisfied that there is a very serious rift in the relationship. The plaintiff relies on the defendant being a *"large enterprise"* in saying that the strained relationship with Mr. Mullane would not cause her concern in terms of continuing to work with the defendant. This is not an answer. The Court has no evidence as to the size of the enterprise other than that it has two stores. Furthermore, were the plaintiff to return to work, Mr. Mullane would be her line manager.

Probationary Period

109. The final thing that is relevant to the balance of convenience is the fact that the plaintiff was still in her probationary period and that the defendant could have simply let her go for no reason (or for performance-related issues) subject only to one week's notice (see O' *Donovan* and *Curr*). This has to be taken into account in the assessment of the overall balance of convenience as well as in considering whether damages would be an adequate remedy. Even if the court were to grant relief, including in terms of paragraph 1 of the Notice of Motion, the reality is that the defendant would retain its entitlement to let the plaintiff go on a week's notice for no reason.

110. O'Donnell J made it clear that consideration of the balance of convenience is not to be approached as a checklist and that the Court is required to consider how best to arrange things pending full trial so as to minimise the risk of injustice.

Conclusion on the balance of convenience

111. Taking all of these into account I am satisfied that it would not be appropriate to make an Order in terms of paragraphs 1 and 5 of the Notice of Motion which would have the effect of compelling the defendant to bring the plaintiff back to work. This would not be in accordance with the long line of authorities to the effect that the Court should not make Orders compelling parties to work together, particularly where there is a breakdown in the relationship of trust and convenience required for an employment relationship. Whether or not there is such a breakdown is a matter for fact to be

determined at trial but I am satisfied that there is sufficient objective basis for finding that there are very significant difficulties in the relationship that it would not meet the balance of convenience or justice and would not be an appropriate way to arrange things pending trial to compel the parties to work together pending trial which, even if the trial was expedited, would not be for a period of months. I will therefore refuse the relief at paragraphs 1 and 5 of Notice of Motion.

112. I carefully considered whether or not to make an Order in terms of paragraph 2 that the defendant should continue to pay the plaintiff's salary and emoluments and have, with some reluctance, decided that such an Order would not be appropriate. Firstly, in the event that the plaintiff is successful then she will be able to seek to recover same as back-pay or damages on the basis that she was never properly let go, subject, of course, to argument that she could have been let go on a week's notice and therefore one week's pay is all that she is entitled to (this must be qualified to a certain extent by *Giblin v Irish Life & Permanent plc* and *Orr v Zomax*). Secondly, I have had regard to the fact that there is a serious rift in the relationship and were I to order that the defendant must continue to pay the plaintiff's salary it would have to do so without having the plaintiff working in the business or would have to ask her to work notwithstanding these difficulties. Thirdly, it is clear from *Orr v Zomax, Giblin v Irish Life & Permanent,* and *Grenet v Electronic Arts Ireland*, that it is within the Court's discretion to make this type of Order. However, it seems to me that something more than a mere assertion that the non-payment of salary would cause undue hardship is required, particularly where there is a significant rift in the relationship. Fourthly, I have had regard to the fact that if the plaintiff is ultimately unsuccessful the salary that will have been paid will be caught by the undertaking as to damages; in other words that she will have to repay the salary. The plaintiff avers that the non-payment of salary will cause undue hardship and this can only be understood as meaning that she will have to spend some or all of her salary pending trial. In the absence of any evidence as to the plaintiff's means and ability to satisfy her undertaking as to damages I have to have regard to the risk that she will not be able to do so.

113. However, I am of the view that the balance of justice does require some relief in order to avoid irredeemable harm to the plaintiff in the event that she is ultimately successful at trial. As is made clear in the authorities, the court has a broad discretion to arrange things appropriately to minimise the risk of injustice pending the full trial. The damage to the plaintiff's reputation and the defendant's acceptance of the importance of reputation is of particular relevance here. I will therefore grant interlocutory orders in terms of paragraphs 3 and 6 of the Notice of Motion. This does, of course, adversely impact on the defendant because they can not fill the vacancy but this prejudice must be

weighed against the prejudice to the plaintiff if the defendant can replace her permanently or can make it public that her employment was terminated. It holds open the plaintiff's position and seeks to reduce the reputational damage that might be done if it is made known that the plaintiff was let go even if her position is vindicated at trial. It also minimises the plaintiff's exposure on her undertaking as to damages.

114. I am conscious that there is a degree of prejudice to both parties: the defendant can not replace the plaintiff and will have to manage without one manager; the plaintiff will be waiting to vindicate her name and will be without her salary pending trial. It seems to me that as part of the Court's function of arranging matters pending trial it can make directions to get the case on for trial as quickly as possible with a view to minimising that prejudice to both parties. I therefore propose making such directions. I will in the first instance leave it to the parties' legal representatives to agree directions but, in the hope of assisting that process, the type of timeline that I have in mind is 2 weeks for delivery of a Statement of Claim, 2 weeks for delivery of Notice for Particulars, 1 week for replies, 2 weeks thereafter for delivery of Defence, 2 weeks for the delivery of any requests for voluntary discovery and 2 weeks for replies to those requests. The matter will then be listed for mention in order to see whether any motions are required and the Court will fix a return date for any such motions.