

# THE HIGH COURT

[2023] IEHC 96

BETWEEN

CMA

PLAINTIFF

-and-

K

DEFENDANT

## JUDGMENT of Ms. Justice Eileen Roberts delivered on 2 March 2023

### Introduction

1. This is an application by the plaintiff for an interlocutory injunction against the defendant seeking to restrain the termination of the plaintiff's employment or her removal from her position pending further order of this court. The plaintiff also seeks an order restraining the defendant from commenting on her work performance pending further order of the court and an order that the defendant continue to pay her salary and benefits including her pension contributions pending further order.
2. The plaintiff also seeks an order anonymising her details and directing that there be no publication of her identity or anything that could result in her identification pending further order.
3. All of the reliefs are resisted by the defendant.

4. As will be apparent from the title to this judgment and certain redactions and changes to quotations within the body of this judgment substituting the name of the defendant by “the employer”, I decided to grant the plaintiff the anonymity order she sought. I made that order pursuant to the provisions of section 27 of the Civil Law (Miscellaneous Provisions) Act 2008. Section 27 (1) provides that where in any civil proceedings a relevant person has a medical condition, an application may be made to the court in which the proceedings have been brought for an order under that section prohibiting the publication or broadcast of any matter relating to the proceedings which would, or would be likely to, identify the relevant person as a person having that condition. I am satisfied from the evidence provided by the plaintiff regarding her health conditions that all of the necessary requirements for an order were satisfied under section 27(3) namely that the plaintiff has a medical condition, that her identification as a person with that condition would be likely to cause undue stress to her and that this order giving her anonymity would not be prejudicial to the interests of justice. Accordingly, I made that order prior to the publication of this judgment and it now governs the reporting of this judgment.

#### **The background to this dispute and the arguments raised**

5. The plenary summons in this case issued on 7 February 2023. The plaintiff claims damages for breach of contract and wrongful dismissal. She also seeks immediate injunctive relief restraining the termination of her employment. The application was heard by this court on 17 February 2023. By that date the defendant’s position was that the plaintiff’s employment had already been terminated.
6. One of the key issues in this case is whether the plaintiff was on probation when the defendant dismissed her. The evidence in that regard will be considered in some detail.

7. In addition to the plaintiff's claim that she was unlawfully dismissed outside her probationary period, the plaintiff also argues that her employer, as a public body within the meaning of section 42 of the Irish Human Rights and Equality Commission Act 2014, has a statutory duty to have regard to the need to eliminate discrimination, promote equality of opportunity and treatment of staff and protect the human rights of its staff. The plaintiff argues that the defendant failed to have regard to its statutory duty during the course of the plaintiff's employment and in the circumstances of her dismissal and she seeks a declaration to that effect. The plaintiff avers in her grounding affidavit that she is a disabled person within the meaning of the Employment Equality Act 1998-2011 by reason of her stated medical conditions. She says she disclosed these issues to the defendant who failed to make reasonable accommodation or take appropriate measures to adapt the workplace for her.
8. The plaintiff's contract of employment is dated 21 February 2022. It was signed on behalf of the defendant on 21 February 2022 and by the plaintiff on 22 February 2022.
9. The contract provides at clause 1.1 "*The term of your employment shall commence on 16 March 2022, subject to the provisions for termination hereafter appearing*".
10. Clause 2 deals with probation and is in the following terms insofar as relevant to this claim:
  - "2.1 For the first eleven months of this contract you will be on probation.*
  - 2.2 During the period of your probation, your performance will be subject to review by your supervisor(s) to determine whether you:*
    - (i) have performed in a satisfactory manner*
    - (ii) have been satisfactory in general conduct, and*

*(iii) are suitable from the point of view of health with particular regard to sick leave.*

*2.3 Prior to completion of the probation period a decision will be made as to whether or not you will be retained. This decision will be based on your performance assessed against the criteria set out in (i) to (iii) above.*

*2.4 Notwithstanding paragraphs 2.2 and 2.3 above, termination of this agreement within the probationary period shall be at the discretion of [the employer] and in the event of such termination, you will receive two weeks' notice. Likewise, where you intend to resign from your employment during your probationary period you will be required to give [the employer] two weeks' notice in writing.*

*2.5 In certain circumstances where the capacity of your supervisor to assess performance and your capacity to demonstrate your suitability is interrupted, your probation may be extended... ”*

- 11.** Clause 14 of the plaintiff's contract of employment deals with termination. It is in the following terms insofar as it is relevant to this claim:

*“14.1 The Minimum Notice and Terms of Employment Acts 1973 to 2005 apply. In the event of the termination of your employment you will be entitled to receive one month's notice in writing or some such longer notice as may be prescribed.*

*Likewise, where you intend to resign from your employment, you will be required to give [the employer] one month's notice in writing. [The employer] may, at its discretion, pay you in lieu of notice.*

*14.2 Your employment may be terminated forthwith by [the employer] without notice for serious misconduct or persistent and wilful failure to carry out the duties of the position.*

*14.3 [The employer] reserves the right to take disciplinary action against you, under the terms of its Grievance and Disciplinary Procedures, for incompetence, poor work performance, misconduct or failure to comply with any of the provisions of the contract of employment.*

*14.4 In the event that [the employer] proposes to terminate your employment for any of the reasons outlined in 14.3 or for redundancy, [the employer] will furnish you with the reasons for such proposed termination and will afford you an opportunity to respond thereto.*

*14.5 On serving notice for any reason to terminate this contract or at any time thereafter during currency of such notice, [the employer] shall be entitled to pay to you your basic salary at the appropriate rate for the unexpired portion of the duration of the appointment or entitlement to notice as may be the case. After any such notice is given, [the employer] shall be entitled, at its discretion, to require you to remain away from the place of business during all or any part of the unexpired duration of the period of notice”.*

- 12.** The plaintiff argues that the first eleven months of her contract ran from the date of the contract (21 February 2022) and so her probation period expired on 20 January 2023. The defendant says that the contract of employment can only be interpreted as meaning that the probation period started when the plaintiff’s employment commenced on 16 March 2022. In those circumstances the plaintiff’s probation period ran from 16 March 2022 to 15 February 2023. The defendant says it is entirely usual for contracts of employment to themselves be dated prior to the commencement of the relevant employment. The defendant says that it would make no sense for a probation period to commence prior to the commencement of the employment itself and indeed such an interpretation could conceivably give rise to a situation where a probation period might

expire before a period of employment had even commenced. The plaintiff says the contract has to be read as it is drafted, which is that she is on probation “*for the first eleven months of this contract*”.

- 13.** It is common case that the plaintiff was dismissed with immediate effect on 26 January 2023 and was paid two weeks’ pay in lieu of notice. It is also common case that the plaintiff was dismissed for alleged performance issues. There is no suggestion that the plaintiff was dismissed for misconduct. The letter dated 26 January 2023 refers to the plaintiff’s recent probation assessment and advised the plaintiff that “*you have failed to successfully complete your probation period*”.
- 14.** The plaintiff says her probationary period ended on 20 January 2023. As she did not receive her notice of dismissal until 26 January 2023, she was therefore dismissed outside the probation period and she is entitled to all the protections of natural justice and fair procedures applicable to an employee in those circumstances and to the specific protections set out in clause 14 of her contract of employment.
- 15.** The plaintiff also argues that she was, under her contract, entitled to 2 weeks’ notice of termination during her probation period. She did not receive any notice but was, instead dismissed with immediate effect on 26 January 2023. She says there is no provision in clause 2 of the contract for payment in lieu of notice. The only reference to this entitlement on behalf of the defendant is in clause 14 which she says deals with termination outside the probationary period. The plaintiff says she has never waived her right to notice.
- 16.** The defendant says the plaintiff was dismissed while on probation. As such, the defendant says it was entitled to terminate the plaintiff’s employment on the grounds of unacceptable job performance at its discretion and without recourse to any formal

disciplinary procedure. It is the defendant's case that the probation period could only commence when the employment commenced and that the relevant 11-month probation period expired on 15 February 2022. The defendant says that it was entitled to give payment in lieu of notice and that clause 14 ought not to be interpreted as restrictively as the plaintiff suggests. Even if two weeks' notice had to be given by the defendant in order for the termination of probation to take effect, the defendant argues that this would bring the timing up to 9 February 2023 which was still within the plaintiff's probationary period under her contract of employment.

- 17.** The plaintiff also argues that the defendant failed to manage the period of probation for the entire duration of the contract. She says the defendant and its agents did not properly implement the defendant's obligations relating to the probationary reviews that were envisaged and required by her contract of employment and employee handbook. She says she was not provided with certain interim review documentation. When she did get probationary review documents following assessment meetings she says they included discriminatory comments which were also inaccurate. She says these documents had no evidence to support them and that they painted "*an entirely untrue picture of me as an employee*" (para 9 d of the plaintiff's grounding affidavit sworn 7 February 2023).
- 18.** The plaintiff believes that the decision to dismiss her was also unlawful as a consequence of the defendant's failure to have regard to its public sector equality duty as required by section 42 of the Irish Human Rights and Equality Commission Act 2014.
- 19.** The defendant denies the criticisms and allegations levied against it concerning the assessments carried out during the probationary process. The defendant also says that it is not the role of this court to make determinations as to whether the plaintiff's

performance was acceptable during her probation. The defendant argues that this court does not have jurisdiction at first instance to deal with any claim of discrimination under the Employment Equality Acts. Rather this court may hear appeals on a point of law from the Labour Court. Furthermore, the defendant says it does not understand the declaratory relief the plaintiff is seeking under the Irish Human Rights and Equality Act 2014. Section 42 of that Act makes it clear that it is the Human Rights Commission which has an oversight role and the defendant argues therefore that what the plaintiff is seeking is outside the jurisdiction of this court. Even if this assertion is incorrect, the defendant argues that such an allegation is not grounds for injunctive relief.

20. The defendant also takes issue with the plaintiff's delay in seeking injunctive relief at this point and regarding the plaintiff's failure to give an undertaking as to damages.

#### **Analysis of relevant caselaw and the applicable legal principles**

21. It is accepted by both parties that the interlocutory relief sought by the plaintiff amounts to a mandatory injunction. Therefore, the plaintiff must establish a strong case to obtain the interlocutory relief she seeks. In *Bergin v Galway Clinic Doughiska Ltd* [2007] IEHC 386, [2008] 2 IR 205, Clarke J (as he then was) held at para 26 that

*“in any case in which an employee seeks to prevent a dismissal or a process leading to the dismissal... and in whatever terms the claim is couched, the employee concerned is seeking what is, in substance, a mandatory injunction which has the effect of necessarily continuing his contract of employment... In those circumstances it is necessary for the employee concerned to establish a strong case in order to obtain interlocutory relief”.*

22. The Supreme Court authority of *Maha Lingham v Health Service Executive* [2005] IESC 89 has been cited with approval in many subsequent cases. Like the present



application, that case involved an action for wrongful dismissal in the context of which an employee injunction was sought. Fennelly J held at page 5

*“it is necessary for the applicant to show 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”.*

23. One of the later cases in this line of authority is the decision of the High Court in *Coffey v William Connolly and Sons Ltd* [2007] IEHC 319. There are some parallels between the facts of that case and the present case. Ms Coffey claimed she had been dismissed outside her probation period while her employer argued that she was dismissed while on probation. The evidence before the court in that case was conflicting as to how the plaintiff performed in her job during her probationary period and whether a further extension of the initial probation period arose on the facts. The court held that for the purposes of the interlocutory application before it, it did not have to resolve those conflicts of evidence, including whether Ms Coffey’s probationary period had expired by the time she was dismissed. Edwards J noted at pages 13 and 14 of his judgment:

*“Even if it were possible for this court to resolve the issue as to whether or not the plaintiff was still on probation at the time that she was purportedly dismissed on the basis of the affidavits alone, and I do not believe that it is, that issue would not be dispositive of the matter. There is a serious issue concerning the correct interpretation of the contract that requires resolution. ... As to whether the plaintiff’s interpretation of the contract is correct, the matter is arguable both ways. It is clear to me that both sides are in a position to proffer cogent legal arguments in support of their respective positions on that issue. It is not for me to resolve that issue at this time. There is definitely a fair issue to be tried but it could not be said that the*

*plaintiff's case is so strong with respect to it as to induce the belief that she is more likely than not to succeed at the trial of the action. She might or might not succeed".*

The court refused the mandatory injunction on that basis but granted other prohibitory injunctive relief sought.

24. The defendant also relies on a recent Court of Appeal judgment in *Donal O'Donovan v Over-C Technology Limited and Over-C Limited* [2021] IECA 37. In that case Mr O'Donovan was dismissed on the grounds of poor performance within his probationary period. The question at issue was whether in those circumstances Mr O'Donovan had an implied contractual right to fair procedures in the assessment of his performance during his probationary period. Costello J at para 49 of her judgment stated as follows:

*"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 the 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 the cause of action for the breach of such an alleged right – in relation to the assessment of an employee's performance by an employer (other than for misconduct, which does not arise here) during the probationary period, as this would negate the whole purpose of a probationary period. This does not prevent an employer from including a term in the contract which confers rights to fair procedures on the employee, even during the period of probation.... In my judgment, Mr O'Donovan could not – and did not –*

*establish that he had a strong case for an injunction restraining the termination of his employment, where this occurred during his probationary period.”*

25. Costello J also stated at paragraph 56 of her judgment that

*“[i]f 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”.*

It seems to me that that statement of the law is relevant to clause 2.3 of the plaintiff’s employment contract quoted above.

26. A further point expressed by Costello J in paragraph 64 of her judgment is of some relevance to the present case where she said:

*“Mr. O’Donovan was dismissed pursuant to an express contractual term within the period of probation and he was paid one month’s salary in lieu of notice... He was dismissed with notice because he was dismissed and paid his salary in lieu of notice. Under the common law, this would appear to satisfy his claim in full against his employer”.*

27. In relation to the question of payment in lieu of notice, I was referred by the plaintiff to a determination of the Labour Court in a matter between *Action Health Enterprises Ltd v Michael D’Arcy* (Determination no. UDD2019). That case related to a claim of unfair dismissal by Mr D’Arcy and, in particular, whether he had been employed for the necessary period of 12 months prior to his dismissal. This question turned on the date of his dismissal in circumstances where he had an entitlement to notice under his contract but had been paid by his employer in lieu of notice. The Labour Court found that the “date of dismissal” was the date on which the termination letter was issued with

a payment in lieu of notice rather than the date of the expiry of a three-month contractual notice period running from that date. I do not believe that this decision particularly assists the plaintiff other than to confirm that an employee can waive their right to notice and the plaintiff says she did not do so in the present case.

- 28.** In relation to the aspects of the plaintiff's claim which allege discrimination against her, the defendant relies on the case of *Doherty v South Dublin Co Council (No. 2)* [2007] IEHC 4, [2007] 2 IR 696 as authority for the proposition that these claims should not be litigated at first instance in the High Court. In that case an issue arose at the judicial review hearing as to whether the plaintiffs could initiate a claim of infringement of their rights under the Equal Status Acts in the High Court rather than engaging in the process specifically provided for in those Acts (where claims are heard at first instance by the Workplace Relations Commission with appeals to the Labour Court). The High Court held that the Equal Status Acts 2000 to 2004 created an entirely new legal norm and provided for a new mechanism for enforcement under its provisions for the disposal of controversies connected with those legal norms. While the High Court retained its supervisory jurisdiction, the proper course was for the relevant tribunal to deal with matters as prescribed in the legislation. The defendant says that whatever relief is sought by the plaintiff under the Irish Human Rights and Equality Act 2014, the same principle applies.
- 29.** The plaintiff says that the public sector equality functions she refers to do not give rise to an individual right of action (such as, for example, in relation to discrimination) but rather is a duty which falls to the individual decision-maker on behalf of a public body. She says there is no evidence that the defendant had any regard to its public duties when it dismissed her, so her dismissal was unlawful.

30. I was referred by the plaintiff in relation to this aspect of her claim to a decision of the High Court of Justice, Queen's Bench division in the matter of *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWHC 897. That case was taken by several severely disabled people who were users of the Independent Living Fund and who sought judicial review of two decisions of the Secretary of State to close the fund. The focus of the challenge was the equality impact assessment and the extent to which any or due regard was had to the public sector equality duty in making the closure decision. The Equality and Human Rights Commission was granted permission to intervene to assist the court with respect to the public sector equality duty engaged. I do not find that this case supports the proposition that the plaintiff has established a strong case for injunctive relief. In his decision Mr Justice Blake noted that even if he had reached the conclusion that due regard had not been made to the public sector equality duty as it applied to people with disabilities, he would have confined any relief to a declaration rather than quashing the decisions taken.

**Whether the plaintiff has established an entitlement to the injunctive relief she seeks**

31. This court is not, in this interlocutory application, in a position to resolve conflicts of evidence on affidavit or to determine who will ultimately succeed at trial. However, having considered all the evidence in this case I find that the plaintiff has not established a strong case likely to succeed at trial on either the probation/performance aspects or in relation to any public sector equality duty owed to her by the defendant.
32. While the plaintiff has raised fair arguments regarding the date from which her probation period should run and regarding the validity of her being paid in lieu of notice, I do not believe the plaintiff's case is so strong with respect to these aspects as to raise a reasonable expectation that she is more likely than not to succeed at the trial

of the action on these points. Neither, in my view, has the plaintiff established a strong case on which she is likely to succeed at trial that she is entitled to and was denied fair procedures in relation to the termination of her contract of employment on the grounds of poor performance.

33. I also do not believe that the declaratory relief sought by the plaintiff regarding the public sector equality duties owed to her raises a strong case justifying this court intervening in this dispute now by way of mandatory injunctive relief.
34. While I do not need to consider any further matters in circumstances where I find that the plaintiff does not meet the requirement of a strong case to justify the granting of mandatory injunctive relief in her favour, I have, nevertheless also considered the balance of convenience and the adequacy of damages. Having done so, I am reinforced in my view that this court should not grant the interlocutory relief sought.
35. The defendant says the plaintiff's performance was not acceptable during her probationary period and that it has lost its trust and confidence in the plaintiff. Reinstatement would be simply unworkable in the circumstances. Furthermore, once there is a breakdown of trust and confidence the courts do not normally grant permanent injunctions restraining the termination of the contract of employment as this would amount to a permanent mandatory injunction to continue a contract of employment in circumstances where such an order would be untenable.
36. Damages should be an adequate remedy for a claim for damages for wrongful termination of a contract of employment. I believe damages are an adequate remedy in this case if the plaintiff were to succeed at trial. On the other hand, the absence of any undertaking as to damages from the plaintiff may well mean that damages would not be an adequate remedy for the defendant if an injunction was granted compelling them to

continue to pay the plaintiff pending trial and the defendant ultimately succeeded at trial.

- 37.** In light of my findings on the absence of a strong case likely to succeed at trial and on the balance of convenience and the adequacy of damages, I do not need to consider the defendant's arguments on delay by the plaintiff in this case.

### **Conclusion**

- 38.** I refuse the plaintiff's motion seeking orders restraining the defendant from terminating her employment; restraining the defendant from commenting on her work performance pending further order of the court or requiring the defendant to continue to pay the plaintiff's salary and other benefits including her pension contributions pending further order of this court.
- 39.** I have already granted the plaintiff an order pursuant to the provisions of section 27 of the Civil Law (Miscellaneous Provisions) Act 2008 prohibiting the publication or broadcast of any matter relating to these proceedings which would, or would be likely to, identify her.
- 40.** I will list this matter for mention on 16 March 2023 for the purpose of dealing with costs and any other issues arising, including the agreement of a timetable or directions to ensure that these proceedings come to trial as quickly as possible.

