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Injustice in Dismissal:
The Anti-Dismissal Injunction

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Brendan Kirwan

SUMMARY

The purpose of this research is to analyse, primarily by reference to the written judgments delivered in the Superior Courts, the development of the anti-dismissal injunction and associated complexities which can lead to a lack of coherent principles in the courts' approach to such injunctions. This analysis can be divided into four sub-strands: (i) to consider the anti-dismissal injunction in the round and set out the basis for the courts' approach to the remedy; (ii) to identify established principles which inform the granting or refusal of such injunctions; (iii) to identify where and why there is a lack of coherence and uncertainty in the courts' approach to such injunctions; and (iv) to identify what might tentatively be called "starting points" for a reconsideration of how best the extraordinarily powerful remedy of the anti-dismissal injunction might be approached by the courts.

The approach to the research centres on an academic review of the judgments of the courts in applications for anti-dismissal injunctions, as it is judges who ultimately shape and develop the law. It is not intended to be an analysis of what might be called "behaviour and attitudes," e.g. why employees seek legal redress in the first place, the forum where they choose to pursue such redress and an exploration of their engagement with the legal process, whatever its form (which would of necessity involve a very different, empirical-evidence based approach). That is not to say that the research ignores the reality of what is happening outside the walls of a courtroom.

Chapter One reviews the employment relationship in its historical context, tracing it to the point whereby judges now have a much greater appreciation of the immediacy and impact of the loss of employment on an individual and are prepared to act accordingly. The importance of this, quite simply, cannot be overstated, as it provides a context for understanding why there are uncertainties in the law. **Chapter Two** looks at the structure of the employment relationship, understood in contractual terms. That in turn defines the contours within which the courts work and the orders which they may make. However, one variation on this is the discreet, though somewhat anachronistic, approach to the position of office holders, which will also be analysed. **Chapter Three** identifies further "established principles." The influence of natural and constitutional justice on anti-dismissal applications has been critical

and has had a profound impact. Ironically, its application has led to a sometimes uneven approach to the question of how best to protect a person's reputation at the interim and interlocutory stages of injunction applications. Equally important, though significantly under-analysed in this jurisdiction, the theories of repudiation are key to understanding the practical application of remedies upon termination. **Chapter Four** considers those reliefs and remedies. Although the range of reliefs available is relatively well settled, the chapter considers the practical application of those reliefs. It focuses on the courts' apparent reluctance to make positive orders in respect of maintaining a working relationship, the role of trust and confidence in this approach, and the related readiness of judges to fashion remedies to fit the facts before them, which can in itself lead to an uneven approach. It also looks at remedies available in statutory *fora*. **Chapter Five** has a narrow focus and considers those principles and trends as applied to steps short of dismissal, and in particular how they relate to suspensions, disciplinary hearings, investigations and the advertisement of existing positions. **Chapter Six** examines the courts' approach to purported dismissal. In doing so, it considers the application of the *Campus Oil* guidelines in detail. The Chapter concludes with an overview of the areas, based on the preceding analysis, where there is uncertainty. **Chapter Seven** acts as a comparator to Chapter Six and looks at both what might broadly be termed "commercial cases" and cases in which any damage is in the normal course held to be uncompensatable such that an injunction will usually issue, thereby creating a measure of certainty in terms of interim and interlocutory applications. **Chapter Eight** takes as a starting point the practical difficulties identified in Chapter Six and, drawing on the analysis in Chapter Seven, looks in detail at the possibilities which might arise from a much more fundamental change to how anti-dismissal injunctions are approached. It does so primarily by reference to considering employment as a property right, and how that is relevant both to constitutional protection and to the application of the *Campus Oil* guidelines, thereby engendering a greater degree of certainty in that regard. **Chapter Nine** considers what might be termed future trends, and how these might impact upon the anti-dismissal injunction. **Chapter Ten** summarises the established principles, considers those which are evolving or uncertain, and identifies how best to bring some measure of certainty to a vitally important area of the law, which has a huge impact on both the workplace and on society more generally.

ACKNOWLEDGEMENTS

This thesis would not have been written without the initial encouragement of Professor Hilary Biehler and, as importantly, her ongoing supervision and support. It has been both a privilege and a pleasure to have benefitted from her knowledge, guidance and input, for which I am deeply grateful.

I would also like to thank her colleagues in the Law School of Trinity College, Professor Oran Doyle for his help and assistance in answering queries about Constitutional law and Professor Des Ryan for his observations as to structure and content and for ensuring that I was kept abreast of latest developments in the law.

The practical aspects of anti-dismissal injunctions have informed the evolution of the remedy to a significant degree. I am most grateful to the following members of the Law Library for their time and generosity in giving me detailed practical insights into the evolution of the law and providing extremely helpful papers and materials: Mark Connaughton S.C., Roddy Horan S.C., Oisín Quinn S.C., Peter Ward S.C., Marcus Dowling B.L. and Tom Mallon B.L. I am also grateful to Mairead McKenna B.L., and to Alan Haugh of A&L Goodbody solicitors, for their input and insights. A number of the foregoing also provided insights into individual cases and orders, as did Marguerite Bolger S.C., Martin Hayden S.C., David Holland S.C. and Michael Howard S.C.; John Curran B.L., Mark Dunne B.L., MP Guinness B.L., and Rosemary Mallon B.L.; and Kieran Kelly of Fanning & Kelly solicitors, to whom I would also like to express my thanks.

David Chin of 5 Wentworth, Sydney kept me right in relation to the state of the law in Australia. Anneli Howard of Monckton Chambers, London and Professor John Mee of University College Cork were both generous with their time in assisting me track down information pertaining to the law in England and Wales and in Canada, respectively.

The Library Staff in both Trinity College and in the Law Library were both ever-courteous and helpful. I am also most grateful to Jason Kiernan of the Department of Jobs, Enterprise

and Innovation for his assistance in tracking down information relating to applications before the Redundancy / Employment Appeals Tribunal.

The demands of researching and writing a thesis can put family life under pressure. Mere words cannot do justice to the support, patience and understanding of Mary Freda, Liam and my mother, to whom I owe a huge debt of gratitude.

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Appendix A

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CHAPTER ONE

1. Introduction

In March 1985 Mikhail Gorbachev was elected General Secretary of the Communist Party of the Soviet Union by the Politburo. One day later, Costello J. delivered his judgment in *Fennelly v Assicurazioni Generali S.P.A.*[1] At the time, there was little appreciation of the impact each development would have.

The long-standing and clear position of the common law in relation to dismissal can be distilled down to the proposition that an employee can be dismissed for any or no reason on reasonable notice, and that damages should offer an adequate remedy in relation to such a dismissal. As summarised by Budd J. in the 1964 case of *Walsh v Dublin Health Authority,*[2] if an employee was "merely employed for an indefinite period" then "it follows that he would be dismissible on reasonable notice."[3] More broadly, in *King v Aer Lingus plc.*[4] McCracken J. explained that the appellants were "subject to any of the ordinary incidents of an employment contract, in particular, termination on notice, in accordance with the terms of the contract, dismissal on reasonable grounds and redundancy."[5] This approach was reaffirmed by Hogan J.'s summary in 2011 in the case of *McGrath v Athlone Institute of Technology*[6] to the effect that at common law, and "subject to appropriate contractual terms to the contrary, an employer can dismiss for any

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[1] (1985) 3 I.L.T. 73. A decision of March 12, 1985 (the citation for *Fennelly* is sometimes incorrectly rendered as I.L.T.R.: see, for example, *Garrahy v Bord na gCon* [2002] 3 I.R. 566 at 567).

[2] (1964) 98 I.L.T.R 82.

[3] *ibid.* at 94.

[4] [2006] E.L.R. 257.

[5] *ibid.* at 266. The practical application of this approach is evident from the earlier decision of the Supreme Court in *Mooney v An Post* [1998] 4 I.R. 288 at 298. As Barrington J. explained, "If the contract or the statute governing a person's employment contains a procedure whereby the employment may be terminated, it usually will be sufficient for the employer to show that he has complied with this procedure."

[6] [2011] IEHC 254.

reason or no reason on giving reasonable notice, even in the case of a permanent employee."[7]

Although key principles underlying claims for wrongful dismissal, such as the requirements of natural and constitutional justice, are both long established and continually reconfirmed,[8] the real (r)evolution in the law centred on interim and interlocutory applications for anti-dismissal injunctions.[9] Costello J.'s judgment in *Fennelly* was a hugely significant step in that regard.

Fennelly itself presented initially as a case which was very fact specific and unlikely to form the basis for the development of law in this area. It was not until the 1994 decision of Keane J. in *Shortt v Data Packaging*[10] that the importance and influence of *Fennelly* became more apparent. Within another fourteen years, a High Court judge remarked that he accepted that "the old regime, where the courts were very slow to entertain injunction applications relating to Contracts of Employment, has certainly broadened and moved on."[11] Two years later, another High Court judge referred to the law in this area as "complex and developing."[12]

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[7] *ibid.*, para. 20, referring to the Supreme Court's decisions in both *Maha Lingham v Health Service Executive* [2006] 17 E.L.R. 137 and *Sheehy v Ryan* [2008] 4 I.R. 258. Although Connaughton "Some Observations on Developments in Employment Law" Employment Law Association of Ireland March 5, 2013 submits, by reference to the *Sheehy* case, that that was "too much of a generalisation and it is noteworthy that in the particular case, the learned Judge was dealing with a redundancy type situation so that issues about the application of a disciplinary procedure or other express term of a contract did not arise."

[8] See cases such as *Glover v B.L.N. Ltd.* [1973] I.R. 388 and *Garvey v Ireland* [1981] I.R. 75.

[9] Although the terms "anti-dismissal injunction" and "employment injunction" are often used interchangeably the latter term admits of a wider set of applications, encapsulating both anti-dismissal injunctions sought against employers and negative injunctions sought by employers against employees (In *Bergin v Galway Clinic Doughiska Ltd.* [2008] 2 I.R. 205 at 212 Clarke J. referred to "what might loosely be called employment injunctions.")

[10] [1994] 5 E.L.R. 251. Under considerable pressure, Gorbachev had resigned three years previously, on December 25, 1991.

[11] *Per* McGovern J. in *Doyle v Asilo Commercial Ltd (t/a Ely HQ)* [2008] IEHC 445. Prior to the *Fennelly* decision, cases which gave rise to written judgments tended to be determined on their very specific facts at plenary hearing: see, for example, *O'Reilly v The Irish Press Ltd.* [1937] 71 I.L.T.R 194; *Carvill v Irish*

However, it has been observed by Cox, Corbett & Ryan in *Employment Law in Ireland* that the manner in which the law developed has created practical difficulties in terms of being able to anticipate the circumstances when an injunction will be granted to an employee on the verge of, or having been, dismissed.[13]

This Chapter considers underlying developments which have informed the evolution of employment law. Collins Ewing & McColgan make a very important point in noting that

> "To examine labour law thoroughly...it is important to study the legal rules in their economic, social and political context. The details of the legal rules have a profound influence on the efficiency of the economic system, the life-chances of individuals, and the type of social justice achieved in society."[14]

Such developments provide a crucial backdrop to the development of the law of anti-dismissal injunctions generally and the approach of the courts to interim and interlocutory applications in particular. Accordingly, this Chapter traces the evolution of the law from a focus on what was termed the relationship of "master and servant" to the more modern approach, which centres to a much greater degree on a relationship between equals, thereby facilitating the development of doctrines such as the implied term of trust and confidence, explored in Chapter Two.[15] Allied to this is the fact that judges now have a much greater appreciation of effect of a wrongful termination on an individual, and are prepared to intervene to protect that individual when they are at their most vulnerable. It is submitted that it is this awareness of social and economic realities in particular which

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Industrial Bank Ltd. [1968] I.R. 325, and *Hartery v Welltrade (Middle East) Ltd.* unreported, High Court, Finlay P., March 15, 1978.

[12] *Per* McMenamin J. in *Keenan v Iarnrod Eireann* [2010] IEHC 15.

[13] Cox, Corbett & Ryan *Employment Law in Ireland* (Clarus Press, Dublin, 2009), p.836.

[14] Collins Ewing & McColgan *Labour Law* (Cambridge University Press, Cambridge, 2012), p.5.

[15] See Chapter Two, section 4. As pointed out by Collins Ewing & McColgan *Labour Law* (C.U.P., Cambridge, 2012), p.142, "...the implied term of trust and confidence also corresponds to broader social and political values, which reject hierarchical class structures and require equally concern and respect for all persons. Instead of the image of master and faithful servant that informed the earlier legal construction of the contract of employment, the law tries to present the employment relationship as one between equals..."

has facilitated the courts' willingness to grant interim and interlocutory injunctions. However, this has also led to a situation whereby judges can display a tendency to "live in the moment" and make orders, particularly at the interlocutory stage,[16] which are inconsistent with the overall approach of the courts, or without a clear basis for such orders being articulated. Identifying ways in which a balance can be struck between a judge's empathy with an employee and the need to bring a measure of clarity and certainty to the law is one of the key overall functions of this thesis.

2. Social Evolution

Many comprehensive tracts such as Deakin's "The Contract of Employment: A Study in Legal Evolution"[17] have traced the evolution of the employment relationship in considerable depth and detail. This section has more modest aims, namely to sketch out some of the salient features of that evolution insofar as it is relevant to the anti-dismissal injunction.

In 1931, in relation to what is now generally termed employment law, Manley Smith observed that "No branch of law perhaps so readily provides illustrations of the recent developments in social manners and customs or in legal or political history."[18] This is particularly evident in the use of terminology such as "master and servant" (more extremely, as observed in Kelly's *Guide to Early Irish Law,* there appears to have been little differentiation in early Irish law – or at a minimum, commentary on the law - between slaves and servants[19]). As succinctly, if rather bluntly, stated by Bramwell L.J. in his judgment in the 1880 case of *Yewens v Noakes*,[20] "A servant is a person subject to the

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[16] See Chapter Six.

[17] Deakin "The Contract of Employment: A Study in Legal Evolution" (ESRC Centre for Business Research, University of Cambridge Working Paper No. 203, June 2001).

[18] Manley Smith *A Treatise on the Law of Master and Servant* (London, Sweet & Maxwell, 1931), preface.

[19] *Per* Kelly's *Guide to Early Irish Law* (Dublin Institute of Advanced Studies, Dublin, 1988), p.65, "The law-texts provide us with little information on the rights of servants and other menial occupations. For this reason it is not always possible to distinguish between the slave – who is the property of his or her master – and the servant – who has some degree of control over his or her destiny."

[20] (1880) 6 Q.B.D. 530 at 532.

command of his master as to the manner in which he shall do his work."[21] However, the nature of the relationship was not without some subtlety: in his 2005 paper on "The Comparative Evolution of the Employment Relationship" Deakin observed that up until 1946, and the publication of the Beveridge Report in England, the law there distinguished between "higher status non-manual workers," whose employment relationship was primarily defined in contractual terms, and the master and servant relationship, which was viewed through the prism of service, but not contracts of service.[22]

In fact it is worth digressing briefly to show just how rigid class structures and their relationship to the labour market were in Britain in the early twentieth century yet, almost perversely, to show just how flexible they could be when someone did not fit within what amounted to predetermined norms. By considering this, the extent to which the employment relationship has evolved should be immediately apparent.

In an attempt in 1911 to undertake a social classification of the nation, the General Register Office in England drew up an official model of the country's class structure, divided into five grades of social position or status, as follows: I. Professional II. Intermediate III. Skilled Manual IV. Intermediate V. Unskilled Manual. As explained by Szreter,[23]

> "As well as producing five grades of social position, the model also provided for a bipartite distinction between a non-manual 'upper and middle class' supposedly represented most equivocally by the professions of class I, as against the various grades of the manual working class, in classes III – V."[24]

However, Sretzer also observes that

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[21] *ibid.* at 532.

[22] Deakin "The Comparative Evolution of the Employment Relationship" *ESRC Centre for Business Research Working Papers*, No.317 (University of Cambridge, Cambridge, 2005).

[23] Albeit within the wider rubric of a study of fertility, class and gender.

[24] Szreter *Fertility, Class and Gender in Britain 1860 – 1940* (C.U.P., Cambridge 1996), p.74.

> "by the end of the 1920s routine clerical work had suffered such an obvious relative decline in both remuneration and social status that white-collar clerical workers were 'demoted' to Class III, where they were classed alongside skilled manual occupations in the publications derived from the 1931 census."[25]

The attitude which informed such an approach also permeated the Truck Acts, legislation designed to ensure that workers were fully and honestly paid in circumstances where some of them were paid, not in money, but in food, commodities and goods. However, in affording such protection, the Truck Acts made "absurd" distinctions: a bus conductor was not a worker within the meaning of the Truck Acts, whereas a bus driver was.[26]

Returning to the general characterisation of a relationship of master and servant, a function of this was that an employee could not obtain an injunction "requiring his employer to work with him."[27] As Charleton J. (writing extra judicially about the discretion afforded by what he terms "employment injunctions") explains, this "grew out of the principle that an employee had no right to be employed, simply an entitlement pursuant to contract to a period of notice before termination, or wages in lieu thereof." Accordingly, because "employment law derived from the old law of master and servant, it was felt that the close nature of the relationship was such as to make obnoxious injunctive relief."[28]

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[25] *ibid*, p.75. The fascination with class continues: a 2013 survey by the BBC identified a model of seven social classes ranging from the elite at the top to a "precariat" (the "poor, precarious proletariat") at the bottom: Savage *et al.* "A New Model of Social Class? Findings from the BBC's Great British Class Survey Experiment" (2013) 47(2) Sociology 219.

[26] See the 1960 House of Commons debate on the Payment of Wages Bill in Hansard, HC Deb 28 January 1960 vol 616 cc382-481, c.474. Such unexpected distinctions are not peculiar to Britain: in Belgium, and although the subject of an unfavourable judgment by the Belgian Constitutional Court on July 7, 2011 (Judgment 125/2011), which found the practice discriminatory, there is a distinction between "white collar employees" and "blue collar workers" in that, *inter alia*, the former are entitled to lengthier periods of notice and more generous indemnities in lieu of notice than the latter: see Van Geys "Deadline for harmonising employment statutes" EIROnline February 2, 2012. Under the Constitutional Court ruling, the legislature has two years to remedy the situation.

[27] Charleton "Employment Injunctions: An Over-Loose Discretion" (2009) 9(2) J.S.I.J. 1 at 3.

[28] *ibid.*

By the early 1970s, Edmund Davies L.J. in the English Court of Appeal was referring to the fact that cases cited before the courts were out of keeping with prevailing social conditions. He stated that "a contract of service imposes upon the parties a duty of mutual respect."[29] Despite this, some Irish judges were adjusting neither their mindset, nor even their judicial rhetoric, to take account of changing social conditions. Barr J. was still referring to a relationship of master and servant in the 1991 case of *O'Neill v Iarnród Eireann*.[30] As late as 2004, Peart J. was using the term "master and servant," albeit by way of contrast with the relationship of doctor and patient[31] (although both these uses are relatively isolated incidences of the deployment of such terminology).[32] The more current judicial attitude is reflected in the comment of Laffoy J. in her foreword to Cox, Corbett & Ryan *Employment Law in Ireland*:[33]

> "The attitude which the expression 'master and servant' reflected and which was epitomised in the judgment of Asquith J. in *Collier v Sunday Referee Publishing Company* [1940] 2 K.B. 647 is also, I hope, a thing of the past."[34]

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[29] *Wilson v Racher* [1974] 1 I.C.R. 428 at 430. Some six years previously in this jurisdiction, Walsh J. had been using the term "master and servant," in the case of *Roche v Patrick Kelly & Co. Ltd.* [1969] I.R. 100 at 108.

[30] As noted in the Supreme Court by Finlay C.J., Barr J. had, in his *ex tempore* decision in the High Court held that "the relationship between the Applicant and the Respondent was one of a contractual relationship of master and servant and that in those circumstances the Applicant was not entitled to apply, pursuant to Order 84, for judicial review." [1991] I.L.R.M. 129 at 130. Of course, it is not impossible that such terminology was adopted due to its use by counsel during the hearing. However, one would assume that if a judge objected to such terminology, that would be made clear.

[31] *Philp v Ryan* unreported, High Court, Peart J., March 11, 2004.

[32] Although in *Zuphen v Kelly Technical Services Ltd.* [2000] E.L.R. 277 at 291 Murphy J. referred to the relationship between the parties as being one of "master and servant," he had enough awareness to qualify this by noting that he was using "the old fashioned term."

[33] (Clarus Press, Dublin, 2009).

[34] In that case, Asquith J. had blithely dealt with the question of an obligation to provide work with the observation (at p.650) that "Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out." However, it had previously been observed in relation to the use of the term 'master and servant' that it has "the considerable merit of being the only pair of words in this context with a precise meaning and referring to one under a contract of service and the other with whom that contract is made.": Rideout, *Principles of Labour Law*, 2nd ed. (Sweet & Maxwell, London, 1976), p.1 (a work which

This gives rise to a question of whether there is any lingering sense that the relationship of master and servant in some way exists in parallel to a contractual relationship of employer and employee. That view can be safely rejected, based on the analysis carried out by Gray J. in the Federal Court of Australia in the case of *Gregory v Philip Morris Ltd.*[35] Having considered both Australian[36] and English[37] authority, Gray J. stated that there was nothing in the passages which had been cited from those cases which "compels the conclusion that there is known to the law a relationship of master and servant created by, but distinct from a contract of employment..."[38] Related to this, Gray J. made two other important observations, relevant to themes which will be explored in more detail in later Chapters. The observations relate to unaccepted repudiation and to the types of remedies which the courts will grant:

> "In my view, the assertion of the existence of a relationship of master and servant, which may be destroyed without the destruction of the contract of employment, is an attempt to revive in another guise the now defunct rule that a contract of employment may be determined by unilateral act of one party, otherwise than in accordance with the terms of the contract itself, and the equally defunct rule that a court will never grant specific performance, or a remedy akin to specific performance, of a contract of employment."[39]

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went to a 5th edition, which edition does not appear to contain a lauding of the merits of the phrase 'master and servant.').

[35] [1987] F.C.A. 243.

[36] *Automatic Fire Sprinklers Pty. Ltd. v Watson* (1946) 72 C.L.R. 435.

[37] *Gunton v Richmond-Upon-Thames London Borough Council* [1981] Ch. 448; [1980] 3 W.L.R. 714; [1980] 3 All E.R. 577.

[38] [1987] F.C.A. 243, para.64.

[39] *ibid.*

3. Changes in the Relationship

The move away from terminology involving the words "master" and "servant" to "employer" and "employee" was not simply a cosmetic one;[40] it was indicative of a revised approach by the courts to how they approached the employment relationship generally, the termination of that relationship specifically.[41] In the Australian case of *Sweeney v Boylan Nominees Pty. Ltd.*[42] Kirby J., dissenting, referred to the fact that the "language of 'employment' is obviously in need of more than verbal repair and re-expression."[43] The modern approach is reflected in the judgment of Lord Slynn in *Spring v Guardian Assurance,*[44] in which he took cognisance of the changes in the nature of the relationship between employer and employee. Those changes, according to Lord Slynn, imposed much greater duties on employers "to care for the physical, financial and even psychological welfare of the employee".[45] As simply stated by Lord Steyn in *Johnson v*

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[40] And notwithstanding some unease by commentators such as Deakin and Wilkinson as to whether the change of terminology was in fact a move as such; as they point out in *The Law of the Labour Market Industrialization, Employment and Legal Evolution* (O.U.P., Oxford, 2005), p.36, the term "servant" did not evolve into "employee" in that in the nineteenth century the term servant "was an alternative to the employee, in the sense that both expressions denoted a particular sense of wage-dependent labour, differentiated by status." Some commentators have suggested that even the word "employee" is not entirely satisfactory. Reviewing the applicable terminology, Lord Wedderburn noted that in 1966 Kahn-Freud was contrasting the concept of "employee" with that of "worker" and "workman" in earlier legislation: Kahn-Freund, "The Personal Scope of English Labour Law" in *Studi in memoria di Ludovico Barassi (a cura di V. Carullo, 1966)* Riv. di Diritto del Lavoro 510, at 514, 518 and that "Deakin has similarly pointed out that we have for decades had these concepts available in our legal language, some narrower, some wider than "employee": Deakin "Does the Personal Employment Contract Provide a Basis for the Reunification of Employment Law" (2007) 36 I.L.J. 68-85 - but we go on frequently legislating just for the "employee."": Wedderburn "Labour Law 2008: 40 Years On" (2007) I.L.J. 36(4) 397. Irish courts have settled into using the terms "employer" and "employee." For present purposes, it is proposed to use those terms, even though those terms admit of a wide range of employment "packages", encompassing independent contractors, fixed term contracts, short term contracts and so on.

[41] See generally Maine, *Ancient Law Its Connection to the History of Early Society* (1861), p.170 and Kahn-Freund "A Note on Status and Contract in British Labour Law" [1967] 30 M.L.R. 635.

[42] (2006) 226 C.L.R. 161.

[43] *ibid.* at 174.

[44] [1994] 3 All E.R. 129.

[45] *ibid.* at 161.

Unisys Ltd.,[46] "During the course of the last century a fundamental alteration in the relationship between employer and employee has come about."[47] The same Law Lord captured those changes well in his speech in *Johnson.* He noted that the 1909 case of *Addis v Gramophone Co Ltd.,*[48] in which an employee was denied compensation for the manner of his dismissal, was decided in

> "the heyday of a judicial philosophy of market individualism in respect of what was then called the law of master and servant. The idea that in the eyes of the law the position of a servant was a subordinate one seemed natural and inevitable."[49]

As he pointed out, there has been a "fundamental change in legal culture" since 1909. He illustrated his point by referring to the case of *Scally v Southern Health and Social Services Board.*[50] In that case, the House of Lords had held that there was an obligation implied by law as an incident of a contract of employment to bring a contractual term to the notice of the employee. As Lord Slynn had pithily summarised, "Such a decision would have been unthinkable at the time of *Addis's* case."[51] In another succinct summary, he explained that "The need for protection of employees through their contractual rights, express and implied by law, is markedly greater than in the past."[52] Such protection also arises from the fact that the employment relationship can be characterised as "at once inter-dependent and oppositional."[53]

A not dissimilar evolution also occurred in this jurisdiction. In the 1978 decision of *Brewster v Burke,*[54] Hamilton J. referred to the English decision of *Pepper v Webb.*[55] In

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[46] [2003] 1 A.C. 518.

[47] *ibid.* at 527.

[48] [1909] A.C. 488.

[49] [2003] 1 A.C. 518 at 531.

[50] [1991] 4 All E.R. 563.

[51] *ibid.* at 571.

[52] [2003] 1 A.C. 518 at 532.

[53] *Per* Lord Sumption J.S.C. in *Geys v Société Générale* [2013] 2 W.L.R. 50 at 91, citing T*he Oxford History of the Laws of England* , vol xiii (2010), p 623.

[54] [1985] 4 J.I.S.L.L. 98 at 100.

[55] [1969] 2 All E.R. 216.

that case, Karminski L.J. had stated that a person repudiates a contract of service if he willfully disobeys the lawful and reasonable orders of his master. He found that such a refusal fully justified summary termination. Hamilton J. simply stated that he had "no doubt whatsoever" but that this was a correct statement of the law. However, over twenty years later, in his decision in *Dooley v Great Southern Hotels*,[56] McCracken J. noted the age of the cases and observed that "it could certainly be argued that they do not represent the law as of today. Employment law has developed very considerably over those years."

This evolution in the understanding of the employment relationship has led to a greater appreciation of the significance of employment in a person's life.

4. Significance of Employment

Marsden[57] suggests that the rise of the modern business enterprise is based on two great innovations: limited liability for companies and the employment relationship. Limited liability is relatively clear as a legal concept.[58] The clarity of the employment relationship as a legal construct is diluted, however, by the very human considerations underpinning the relationship.

4.1 The Human Aspect

The significance of employment to a person's life is well captured by the Royal Commission on Trade Unions and Employers Associations' observation that:

> "In reality people build much of their lives round their jobs. Their income and prospects for the future are inevitably founded in the expectation that their jobs will continue. For workers in many situations dismissal is a disaster. For some workers it may make inevitable the breaking up of a community and the uprooting

[56] [2001] 12 E.L.R. 340.

[57] Marsden *A Theory of Employment Systems: Microfoundations of Societal Diversity* (O.U.P., Oxford, 1999), p.3. As considered in Anderson "Employment Rights in an Era of Individualised Employment" (2007) 38(3) V.U.W.L.R. 417.

[58] See generally Courtney *The Law of Companies* 3rd ed. (Tottel, Dublin, 2012).

> of homes and families. Others, and particularly older workers, may be faced with the greatest difficulty in getting work at all."[59]

Judges are aware of the importance of employment to individuals. As summarised by Lord Hoffmann in *Johnson v Unisys Ltd.*,[60] employment "gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise the social reality."[61]

The loss of that employment can have a profound effect. Hippensteele has suggested that, after death (presumably not that of the individual themselves) and divorce, the loss of a job is considered the third most stressful life event an individual will experience.[62] As the Canadian judge Iacobucci J. put it,

> "The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence most in need of protection. In recognition of this need the law ought to encourage conduct that minimises the damage and dislocation (both economic and personal) that result from dismissal....[t]he loss of one's job is always a traumatic event."[63]

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[59] Royal Commission on Trade Unions and Employers Associations (Cmnd. 3623), para. 526, as cited in Brodie "Specific Performance and Employment Contracts" (1998) 27(1) I.L.J. 37. In the course of his judgment in *Sharkey v Dunnes Stores (Ireland) Ltd.* [2004] IEHC 163, Smyth J. referred to the plaintiff's answer to a question about the termination of his employment. In an answer which captures much in terms of the human aspect of employment and associated attitudes to, the plaintiff stated that "You could leave a little bit of dignity, that you would have space in order to go and not be dumped out the door."

[60] [2003] 1 A.C. 518.

[61] *ibid.* at 539. Similarly, in Australia Dixon C.J. has referred to a person's employment being an "essential component of his or her sense of identity, self-worth and emotional well-being:" *Reference Re Public Service Employee Relations Act* [1987] 1 S.C.R. 313, para.91.

[62] Hippensteele "Revisiting the Promise of Mediation for Employment Discrimination Claims" (2009) 9 Pepp.Dis.Resol.L.J. 211 at 220, as referred to in the Law Reform Commission's 2010 report on *Alternative Dispute Resolution: Mediation and Conciliation* L.R.C. 98-2010, p.97.

[63] *Wallace v United Grain Growers* [1997] 3 S.C.R. 710 at para.95. See also the summary by Kaufman J. in the Supreme Court of California case of *Foley v Interactive Data Corp.* 254 Cal. Rptr. 211 at 253 in which he referred to the fact that "the relative imbalance of economic power between employer and employee

The impact of the loss of employment is a factor equally acknowledged by the courts in this jurisdiction. As Murphy J. commented in *Davis v Walshe*,[64] "a purported termination in a summary manner is a traumatic event in any employee's working life."[65]

The importance placed by the courts on the employment relationship is evident when contrasting it to the approach of the courts when a person's life, and not just their livelihood, is at risk. In *Foley v Sunday Newspapers Ltd.*,[66] Kelly J. noted the plaintiff's contention that his life was at risk due to the publication by the defendant of material concerning him. However, he balanced that against the right to publish and the overarching consideration of free speech, noting that he could "find no evidence of any express exhortation or positive encouragement to persons to do violence to the plaintiff."[67] Only if there was a "real and substantial risk of such an exhortation being made different considerations might apply." This is far from a perfect counterpoint (and indeed the courts will, for example, grant an injunction protecting a person's identify if cogent evidence is before them that that person's life is at risk)[68] but it serves to underline, by way of contrast, just how much emphasis the courts place on the importance of a person's employment to them.

It is also important to point out that just as a rupture in an employment relationship is of huge significance, so too is the idea of forcing an unwanted relationship. Lord Sumption J.S.C. addressed this in the case of *Geys v Société Générale.*[69] Referring to the policy considerations calling for a different approach when the relationship of employer and

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tends to increase rather than diminish the longer that relationship continues. Whatever bargaining strength and marketability the employee may have at the moment of hiring, diminishes rapidly thereafter."

[64] [2003] 14 E.L.R. 1.

[65] *ibid.* at 5.

[66] [2005] 1 I.R. 88.

[67] *ibid.* at 101.

[68] Such a case was that in which the mother of a boy injured in a gangland killing secured an injunction from Laffoy J. prohibiting the publication of any photos of the boy, or information about him, due to a "real and clear danger" to his life: "'Star' undertakes not to name again boy shot in attack" The Irish Times July 2, 2010.

[69] [2013] 2 W.L.R. 50.

employee is concerned, he stated that the social and economic implications of the relationship

> "affect a high proportion of the adult population and have a profound impact both on their personal lives and on their relationships with others. When it comes to enforcing an unwanted relationship of employer and employee, there are altogether more sensitive considerations involved than those governing most other more contractual bargains."[70]

5. Conclusion

The foregoing offers a brief overview of, in particular, the social background to the evolution of the employment relationship. The Chapter provides a crucial backdrop to understanding why courts are willing to intervene when an employment relationship ruptures. It feeds into the equally important consideration, explored in Chapter Two, of how the law's legal and structural characterisation of the employment relationship both facilitates, and militates against, judicial intervention. However it should be noted, as will be explored in Chapter Nine,[71] that various voices, particularly in England (and to an extent in Australia) are arguing for what has been termed a "partial retreat of dismissal laws."[72] Although that debate is framed around the necessity for unfair dismissal laws in their current form, as distinct from the laws relating to wrongful dismissal, there is an inter-relationship between the two, explored in Chapter Four.[73] The existence of such a debate indicates that the dynamic between employer and employee is not static; as social (and indeed economic and political) ideals change, the law must be prepared to respond to those changes, albeit in a principled way.

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[70] *ibid.* at 90.

[71] See Chapter Nine, section 7.3.

[72] See Deakin "The Law and Economics of Employment Protection Legislation" in Estlund & Wachter (eds). *Research Handbook on the Economics of Labour and Employment Law* (Edward Elgar Publishing Ltd., Cheltenham, 2012), p.330.

[73] See Chapter Four, section 15.

CHAPTER TWO

1. Introduction

The contract of employment (the "wage-work bargain"[1]) has been, and remains, as summarised by Marsden, a "remarkable social and economic institution."[2] Regan asserts that it is at "the core of employment law."[3] Courts routinely refer to contracts of employment. Yet despite this central role in the employment relationship, nowhere is the term "contract of employment" comprehensively defined. The courts have had to develop various tests to establish whether a person is working pursuant to a "contract of service", as distinct from a "contract for services."[4] Freedland, one of the most perceptive commentators in England on the employment relationship,[5] has remarked that defining the personal employment contract is "one of its most difficult parts."[6] Indeed, the same author has challenged, in his own words, "the boundaries of [the] doctrinal analysis" which holds that the contract of employment is the central organising category or conceptual framework of English labour, or employment, law.[7] Despite this, the

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[1] To use Carty's term in "Dismissed Employees: The Search for a More Effective Range of Remedies" (1989) 52(4) M.L.R. 449 at 449.

[2] Marsden "Breaking the Link: Has the Employment Contract Had Its Day" Centrepiece (1999) winter, p.20.

[3] Regan "The Contract and Relationship of Employment" in Regan (ed.) *Employment Law* (Dublin, Tottel, 2009), p.29.

[4] See, *inter alia, Re Sunday Tribune Ltd.* [1984] I.R. 505; *O'Coindealbhain v Mooney* [1990] I.R. 422; *Phelan v Coillte Teo* [1993] I.R. 18; *Henry Denny & Sons v Minister for Social Welfare* [1998] 1 I.R. 34; *Tierney v An Post* [2000] 1 I.R. 536 and *Castleisland Cattle Breeding Society Ltd. v Minister for Social and Family Affairs* [2004] 4 I.R. 150. However, as is evident from the decision of Edwards J. in *Minister for Agriculture v Barry* [2009] 1 I.R. 215, all the tests are potential aids to establishing the existence of a contract of employment and no one test is determinative. The position is broadly similar in England, as is evident from a review of *Chitty on Contracts Volume II Specific Contracts* (Sweet & Maxwell, London, 2008), p.1008.

[5] And described by Lord Steyn in *Eastwood v Magnox Electric plc.* [2005] 1 A.C. 503 at 534 as one of the "distinguished and experienced specialists in the field."

[6] Freedland *The Personal Employment Contract* (O.U.P., Oxford, 2003), p.13.

[7] See Freedland and Kountouris "Towards a Comparative Theory of the Contractual Construction of Personal Work Relations in Europe" (2008) 37(1) I.L.J. 49. In the same article, the authors concentrate on the significance of thinking about the contract of employment "as a legal institution."

underlying premise for any remedies considered, or orders made, when an employee has been, or about to be dismissed, is that the contract of employment is the first point of reference. Accordingly, the first part of this Chapter considers how employment is viewed as sitting within a contractual construct. It is the contract of employment which points to both the employer's power to dismiss, but also the protections and constraints on that power which can be invoked by employees. In that regard, the development and acceptance of the elective theory of repudiation, explored in Chapter Three,[8] is crucial. It has facilitated the growth of the implied term of trust and confidence, also explored in this Chapter. However, the implying of terms more broadly can lead to a very uneven application of the law, as the courts have never put any strictures on what types of terms they might in fact imply. This is useful inasmuch as the courts can both shape and react to the changing view of the employment relationship. The obvious downside is, of course, that it is never possible to anticipate exactly how a court might approach a given contract of employment. There is the added complexity (such as it is) in this jurisdiction that well established constitutional protections, explored in Chapter Three, also influence the employment relationship to a hugely significant degree.

However, the employment relationship admits not just of contractual employees. Apart from the considerations applicable to atypical employees (and that such a grouping has been acknowledged since the late 1970s / early 1980s[9] reinforces the point made in conclusion of the previous Chapter that the dynamic between employer and employee is not static), there is a subset within the employment structure of what are known as "office holders." These are the focus of the second part of this Chapter. Although historically they were afforded very different treatment by the courts than "ordinary" contractual employees, the distinction between the two – certainly inasmuch as rights are concerned - has been gradually dissolved. That there was a distinction highlights how the law is not entirely dependent on a contractual construction in order to characterise the employment relationship. It also highlights how it is not simply the intervention of judges which can create a lack of clarity and uncertainty; that office holders may still benefit from additional protections in certain cases is a function of wider legislative considerations.

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[8] See Chapter Three, section 6.

[9] See Vettoni *The Employment Contract and the Changed World of Work* (Ashgate, Hampshire, 2007), Chapter 6. See also Chapter Nine, section 2.

How that additional protection manifests itself will be part of the material explored both in this Chapter, but also in later Chapters when considering remedies[10] and the practical effect of the distinction on interim and interlocutory applications.[11]

2. Classical Contract Law Principles

Riley has observed that "classical contract law principles"[12] may well have been suited to the mercantile transactions of commercial parties in the 18th and 19th centuries, but are "inept in many respects when it comes to describing the typical 21st century employment relationship."[13] This is a view echoed in the *dictum* of Richardson J. in the New Zealand case of *Telecom South Limited v Post Office Unions*,[14] in which he suggested that the contract of employment "cannot be equated with an ordinary commercial contract. It is a special relationship under which workers and employers have mutual obligations of confidence, trust and fair dealing."[15] Riley also notes that many of the "technical rules" of classical contract law are also unrealistic in the employment context. In that regard, she observes that a typical employment relationship is "ambulatory in many of its terms," notwithstanding that according to classical contract law principles "the terms of a contract must be sufficiently certain at the time it is made or the contract fails for uncertainty."[16] The difference between commercial contracts and those relating to employment was well articulated by Aikens L.J. in the case of *Autoclenz Ltd. v Belcher*:[17]

> "the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties

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[10] As to which, see Chapter Four.

[11] As to which, see Chapter Six.

[12] For an overview of such principles, see generally McDermott *Contract Law* (Dublin, Tottel, 2001), Chapter 1.

[13] Riley "The Evolution of the Contract of Employment Post WorkChoices" (2006) 29(1) University of New South Wales Law Journal 166.

[14] [1992] 1 E.R.N.Z. 711.

[15] *ibid.* at 722.

[16] Riley "The Evolution of the Contract of Employment Post WorkChoices" (2006) 29(1) University of New South Wales Law Journal 166.

[17] [2010] I.R.L.R. 70.

> of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so."[18]

Despite the attraction of being able to distil the working relationship down to the phrase "the contract of employment," the reality is that employment cannot be viewed solely within a traditional matrix of contractual principles. A contract is certainly a key aspect of the employment relationship. However, and as observed by Deakin and Wilkinson, it has never been possible "to give an exhaustive account of the employment relationship using the logic of contract alone; indeed no single account can purport to be exhaustive."[19] In similar vein, Redmond makes a helpful contribution with her observation that when the doctrine of contract was applied to the employment relationship, "it was never applied in pure form. That would have given both parties full discretion to define the scope of authority."[20] This is well summarised by Fudge, with her argument (which ties in with a number of the issues already considered in Chapter One) that the

> "distinctive features of the employment relationship made it difficult to rationalise within a concept of contract modelled on a commercial transaction. This difficulty was particularly acute when courts had to deal with claims by middle-class and salaried workers to have their expectations met. Courts began to develop a

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[18] *ibid.* at 80. See also the judgment of the Supreme Court at [2011] I.C.R. 1157 and in particular the consideration of "The Legal Principles" by Lord Clarke J.S.C. at p.1163.

[19] Deakin and Wilkinson *The Law of the Labour Market Industrialization, Employment and Legal Evolution* (OUP, 2005), p.37.

[20] Redmond *Dismissal Law* 2nd ed. (Tottel, Dublin, 2007), p.20. Similarly, Freedland *The Personal Employment Contract* (O.U.P., Oxford, 2003), p.8 makes reference to the premise that "the contractual analysis of the individual employment relationship has serious shortcomings in terms of its clarity, coherence, and ability to serve the regulatory functions of this area of contract law." See also Brodie "Reflecting the Dynamics of Employment Relations: Terms Implied from Custom or Practice and the *Albion* Case" (2004) I.L.J. 33(2) 159.

'contractual model based upon reciprocity and mutuality' for higher status workers, and by the early 1900s this model was gradually extended to industrial workers, agricultural labourers, and domestic servants.[21] However, in 1909 in *Addis v Gramophone*, the House of Lords 'impose[d] a firmly free-market transactional approach to the termination of contracts of employment, and resist[ed] the encroachment of, at that time tort-based, relational obligations upon the employing entity which would vindicate the dignity and autonomy of the individual employee'."[22]

Fudge also notes that the nature of the employment relationship is such that it creates pressures "that are hard to contain within the conceptual boundaries of contract."[23]

Adding to this complexity is the fact that every contract of employment is in broad terms different, a point made by Geoghegan J. in the Supreme Court in *Sheehy v Ryan*.[24] In his words, "caselaw is of marginal assistance only in construing the terms of any given contract."[25]

Yet for all that, there are many familiar features of contract law which are applied to employment law, in relatively undiluted form. In considering the various strands governing the employment relationship, Hepple and O'Higgins point out that the "common law concept of bargain is essential to the formation of the legal employment

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[21] As noted in Countouris *The Changing Law of Employment* (Ashgate Publishing Ltd., London, 2007), p.20 "The important operation that British courts and statutory legislation achieved in the 19th century was precisely the transformation of these service relations into a fundamentally new and specific legal concept of service embodied in the contract of service. But again this was a slow process and one that initially only affected higher status non-manual workers, whereas for a very long period the employer-workman relationship was identified along the lines of the master-servant relationship."

[22] Fudge "The Spectre of *Addis* in Contracts of Employment in Canada and the UK" (2007) 36(1) I.L.J. 51, citing Freedland *The Personal Employment Contract* (O.U.P., Oxford, 2003), p. 360. See the consideration in Chapter Three, section 4.2.3 as to whether the courts may be slowly adopting a form of strict liability (intentionally or otherwise) when misconduct is alleged.

[23] *ibid.*

[24] [2008] 4 I.R. 258.

[25] *ibid.* at 260.

relationship." This concept imports with it all the "techniques of the common law for filling in the unspoken terms of the contract."[26] As such, not only does the contract of employment contain express terms, it also contains implied terms.

3. Express Terms

To return to Hogan J.'s summary in the case of *McGrath v Athlone Institute of Technology*[27] that at common law, and "subject to appropriate contractual terms to the contrary, an employer can dismiss for any reason or no reason on giving reasonable notice, even in the case of a permanent employee,"[28] it is clear that the express terms of an employee's contract are key to any action he or she may bring in respect of a purported dismissal. In *Carroll v Bus Atha Cliath*,[29] Clarke J. referred to the many "significant developments" in relation to the terms contained in a contract of employment. These changes, in Clarke J.'s view, have had a "material effect upon the circumstances in which, as a matter of contract, many employees can be dismissed."[30] The importance of this statement cannot be underestimated. It is highlighted by the case of *McSherry v Scoil Chriost Rí*,[31] in which Laffoy J. referred to a "very unsatisfactory" aspect of the case being that having heard evidence and submissions over two days, she was "by no means clear" as to the material terms of the plaintiff's contract of employment in relation to unpaid sick leave and termination. More specifically, if a contract contains a detailed procedure in relation to a proposed termination, an employee is on much stronger legal ground if s/he can point to a specific breach of that procedure (the converse is equally true if an employer can demonstrate adherence to a procedure). This was a point emphasised by Barrington J. in the Supreme Court in the case of *Mooney v An Post.*[32] More

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[26] Hepple and O'Higgins *Employment Law* 2nd ed. (Sweet & Maxwell, London, 1976), p.50.

[27] [2011] IEHC 254.

[28] *ibid.*, para. 20.

[29] [2005] 4 I.R. 184.

[30] *ibid* at 208.

[31] [2009] 20 E.L.R. 197.

[32] In the context of a consideration of natural and constitutional justice: "If the contract or the statute governing a person's employment contains a procedure whereby the employment may be terminated, it usually will be sufficient for the employer to show that he has complied with this procedure." [1998] 4 I.R. 288 at 298.

extremely, the case of *McClelland v Northern Ireland General Health Services Board*[33] suggests that it is lawful for parties to agree to contracts in which only certain grounds are, or indeed are not, permitted to form the basis for a dismissal.[34] As such, the starting point for any analysis has to be what is specifically provided for in a contract of employment. However, this is not to the exclusion of implied terms. The use of implied terms continues to gain increasing importance in circumstances where, as noted in Harvey on *Industrial Relations and Employment Law*, many employers "avoid referring to or incorporating disciplinary and grievance procedures into employment documentation in such a way as to create a contractual obligation to apply those procedures."[35]

4. Implied Terms

Terms can be implied into contracts of employment by operation of law. They can also be implied based on the intention of the parties. Lord Bridge has defined the implied term as "a term which the law will imply as a necessary incident of a definable category of contractual relationship."[36] The implied term is based on what a judge believes is necessary in order to give effect to a contract. A practical example of this in the employment context is provided by the case of *Sweeney v Duggan*,[37] in which the plaintiffs claimed that the defendant had a duty to ensure that the company which employed the plaintiffs, and of which the defendant was managing director, procured employer's liability insurance. Murphy J. in the Supreme Court found that the contract

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[33] [1957] 1 W.L.R. 594. See in particular p.612 and Lord Evershed's reference to the plaintiff not rendering herself "liable to dismissal on one or other of the grounds expressly stated in her contract."

[34] Although it was held in *Horwood v Millar's Timber and Trading Co. Ltd.* [1917] 1 K.B. 305 that parties cannot expressly contract for a right to specific performance (albeit that that case concerned, at its heart, a contract for money lending, and was a case which was fairly extraordinary on its facts).

[35] Harvey on *Industrial Relations and Employment Law* (LexisNexis Butterworths) Division AII Contract of Employment, para.309. Although in *Edwards v Chesterfield Royal Hospital NHS Fdn. Trust* [2012] 2 A.C. 22 at 40, Dyson J.S.C. noted that, based on the applicable statutory scheme in England, "if provisions about disciplinary procedure are incorporated as express terms into an employment contract, they are not ordinary contractual terms agreed by parties to a contract in the usual way."

[36] *Scally v Southern Health and Social Services Board* [1991] 4 All E.R. 563 at 571.

[37] [1997] 2 I.L.R.M. 211.

operated perfectly well without such a term, on the basis that the "officious bystander" would have most likely have rejected such a term.[38]

The use of implied terms has made a fundamental contribution to the development of the law relating to employment. This is particularly so given, notwithstanding the aspiration noted in the introduction to Chapter One that the law seeks to perceive the employment relationship as one between equals, that the employment relationship is frequently inherently unbalanced from its inception. Some contracts are arrived at by collective bargaining, but many employees are employed on the basis of a "contract of adhesion," where the terms of that contract are not negotiable. As commented by du Parcq L.J. in *Re Walker,*[39] "It is nowadays often impossible to regard the employment of each individual worker as the result of a separate bargain struck between master and servant."[40]

The importance of implying terms into the contract of employment is highlighted by Carty, who posits the idea that the contract of employment was advantageous to the employer, in that it required only a minimal commitment from him; however, the implying of terms was an acknowledgement that there was a relationship between employer and employee.[41] In similar vein, and as highlighted in Harvey, in a commercial contract, if major terms have not been agreed, the contact is void for uncertainty. This is "not a serious option" in respect of the employment relationship:

> "[I]f the individual has actually worked for the employer for a significant period, no tribunal is going to hold that there was no 'employment' at all merely because of a lack of written terms. Thus, there may be far greater pressure on a tribunal or court to *find* the (implied) terms of the contract."[42]

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[38] *ibid.* at 217.

[39] [1944] K.B. 644; [1944] 1 All E.R. 614.

[40] *ibid.* at 651; *ibid.* at 616. Although this comment is less relevant in many cases to senior executives, who often have contracts specifically tailored to them, or contracts which include the same basic terms as other employees, but which also include terms specific to that executive.

[41] Carty "Dismissed Employees: The Search for a More Effective Range of Remedies" (1989) 52(4) M.L.R. 449 at 449. Carty suggests that the implied terms "tended to favour managerial expectations."

[42] Harvey on *Industrial Relations and Employment Law* (LexisNexis Butterworths) Division AII Contract of Employment, para.29.

On the part of the employee, implied terms include, though are in no way limited to, a duty of fidelity; the duty to exercise skill; to exercise reasonable care; to obey lawful and reasonable requests and orders; to refrain from disruption; and not to disclose confidential information. An employer will be under an implied duty to remunerate his employee; to provide work; to provide for the health, safety and welfare of the employee; not to discriminate and so on.[43] A key development over the past decades, which merits more detailed consideration given the impact it has had in respect of anti-dismissal injunctions, is the implying of a term of trust and confidence. Equally important, though considered in Chapter Three within the rubric of established themes,[44] is the implied term that an employee is entitled to the benefit of fair procedures.

4.1 The Implied Term of Trust and Confidence

Anderson notes that the implied term of trust and confidence originated in England in the 1970s and was developed in "the context of statutory unfair dismissal law to provide the courts with a contractual basis for constructive dismissals."[45] The direct link between the evolving nature of the employment relationship, away from a "master and servant" relationship, and the implying of a term of mutual trust and confidence was explicitly acknowledged by the House of Lords in the case of *Malik & Mahmud v Bank of Credit and Commerce International S.A.*[46] In his speech, Lord Steyn acknowledged the "change in legal culture which made possible the evolution of the implied term of trust and confidence."[47] Sims, considering whether employment is a fiduciary relationship, points out that obligations were previously imposed on employees only, but that "new

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[43] See Freedland in *Chitty on Contracts Volume II Specific Contracts* (Sweet & Maxwell, London, 2008), p.1046.

[44] See Chapter Three, section 3.3.

[45] Anderson "Employment Rights in an Era of Individualised Employment" (2007) 38(3) V.U.W.L.R. 417.

[46] [1998] A.C. 20; [1997] 3 W.L.R. 95; [1997] 3 All E.R. 1.

[47] *ibid.* at 46; *ibid.* at 109; *ibid.* at 15. A similar view was expressed by Newman J. in *Hordulak v Cantor Fitzgerald International* [2004] I.C.R. 697, citing Lord Hoffmann in *Johnson v Unisys Ltd* [2003] 1 A.C. 518. Newman J. referred to the impetus provided by the move away from a strict master-servant style relationship, driven by the need to focus on "the element of co-operation which underpins the character of the contract of employment."

obligations" were imposed on employers, starting with cases where "there was a particular relationship between the parties (as in *Isle of Wight Tourist Board v Coombes* [1976] I.R.L.R. 413), or where the conduct of the employer was particularly serious (as in *Fyfe & McGrouther v Byrne* [1977] I.R.L.R. 29)."[48]

The importance of the recognition of trust and confidence as a central tenet of the employment relationship has been widely acknowledged both academically and by the courts. Cabrelli, writing on whether the term represented an emerging overarching principle for employment law, notes that "the implied term has generated a great deal of academic attention, having been described as (i) assuming a 'central position in the law of the contract of employment', (ii) being 'undoubtedly the most powerful engine of movement in the modern law of employment contracts' and (iii) forming the 'cornerstone of the legal construction of the contract of employment'."[49] It was described by Lord Hoffman in *Johnson v Unisys Ltd.*[50] as the most "far reaching" contribution of the common law to the "employment revolution."[51] In *Geys v Société Générale* [52] Lord Supmtion J.S.C. observed that employment is "...a relationship based on mutual trust and confidence, a factor which has assumed growing importance in the way that the law has developed over the past 30 years."[53] Yet, as noted by Collins Ewing & McColgan, there is something of tension between the idea that an employer can dismiss an employee for any or no reason and the doctrine of trust and confidence.[54] Related to this, there is evidence

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[48] Sims "Is Employment a Fiduciary Relationship?" (2001) 30(1) I.L.J. 101 The implied term has also been accepted in Australia and New Zealand. See, in relation to Australia, *McDonald v State of South Australia* [2008] S.A.S.C. 134 and an analysis in Riley "The Evolution of the Contract of Employment Post WorkChoices" (2006) 29(1) U.N.S.W Law Journal 166; in respect of New Zealand, see *Unkovich v Air New Zealand Ltd.* [1993] 1 E.R.N.Z. 526 and the analysis in Nelson "The Implied Term of Trust and Confidence: The Change in Approach of the Court of Appeal to the Requirement to Pay Redundancy Compensation" [2000] V.U.W.Law Rev. 33.

[49] Cabrelli "The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle?" (2005) 34(4) I.L.J. 284

[50] [2003] 1 A.C. 518.

[51] *ibid.* at 539.

[52] [2013] 2 W.L.R. 50.

[53] *ibid.* at 90.

[54] Collins Ewing & McColgan *Labour Law* (Cambridge University Press, Cambridge, 2012), p.779.

in cases such as *Johnson* and *Eastwood v Magnox Electric plc.*[55] of an effort to rein in the doctrine to a degree.[56] Furthermore, any over-emphasis on the importance of the doctrine should be tempered by the very pertinent observation made in one of the leading Australian texts, *Macken's Law of Employment*, that "the requisite degree of confidence is an important consideration, but its weight is diminishing with the advent of large corporate employers."[57] As will be seen,[58] the extent to which interlocutory orders may require employees to return to work, or at a minimum to make themselves available to return to work, can be guided to a degree by the size of the company in respect of which such an order is being contemplated.

4.2 Defining the Term "Trust and Confidence"

The difficulties involved in defining the contours of trust and confidence are well identified by Rideout, starting with his observation that it is "difficult to decide why this obligation should have emerged, apparently so suddenly, in 1977" (he also notes that "decisions in that year around this theme do not clearly define the obligation.")[59] Expression was first given to the idea of "trust and confidence" in the context of an employment relationship in cases such as *Western Excavating (ECC) Ltd v Sharp,*[60] in which the court adopted a contractual test for a claim of constructive dismissal.[61] However, the usual reference point is the later decision of *Woods v W M Car Services*

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[55] [2004] 1 I.C.R. 1064.

[56] Cabrelli "The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle?" (2005) 34(4) I.L.J. 284.

[57] Sappideen, O'Grady & Warburton *Macken's Law of Employment* 6th ed. (Thomson Reuters, N.S.W., 2009), p.371 citing, *inter alia*, *A.M.I.E.U. v G&K O'Connor Pty Ltd.* (2000) 100 I.R. 383 and *C.P.S.U. v Stellar Call Centres Pty. Ltd.* [2000] F.C.A. 1739.

[58] See Chapter Four, sections 6.4 and 11.9.

[59] Rideout *Principles of Labour Law*, 5th ed. (London, Sweet & Maxwell, 1989), p.91.

[60] *Western Excavating (ECC) Ltd v Sharp* [1978] 1 Q.B. 761. See also *Wood v Freeloader* [1977] I.R.L.R. 455 and the useful summary set out by Browne-Wilkinson J. in *Lewis v Motorworld Garages Ltd.* [1986] I.C.R. 57.

[61] As has been pointed out, however, by focusing on the contractual test, the courts had to reject the idea of a general obligation on an employer to act reasonably: Davies "Judicial Self-Restraint in Labour Law" (2009) 38(3) I.L.J. 278.

(Peterborough) Ltd.[62] In *Woods*, Browne-Wilkinson J. explained, in a fashion that describes rather than defines the term, that it meant that:

> "...the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."[63]

As to how to assess trust and confidence (though again, not strictly to define it), Ralph Gibson L.J. ventured in *Powell v London Borough of Brent*[64] that sufficiency of confidence was to be judged by reference to the circumstances of the case. These circumstances included "the nature of the work, the people with whom the work must be done and the likely effect upon the employer and the employer's operations if the employer is required by injunction to suffer the plaintiff to continue in the work."[65]

The courts in England have not been prepared to advance any tighter definition. In *Deadman v Bristol City Council*[66] Moore-Bick L.J. recognised that "a contract of employment carries with it certain rights and obligations which reflect the fact that the parties' relationship has personal and social as well as economic dimensions."[67] Referring to Lord Nicholls' characterisation in *Malik & Mahmud v Bank of Credit and Commerce International S.A.*[68] of the obligation not to destroy the obligation of trust and confidence without cause as being in the nature of a "portmanteau" obligation, Moore-Bick L.J. limited himself to stating that the practical consequences of that obligation were "many and various."[69]

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[62] [1982] I.C.R. 693. For a comprehensive review of the development of the implied term, see Hodder "Employment Contracts, Implied Terms and Judicial Review" [2002] V.U.W.L.R. 39.

[63] [1982] I.C.R. 693 at 697. See *Auckland Shop Employees Union v Woolworths NZ Ltd.* [1985] 2 N.Z.L.R. 372 at 375.

[64] [1988] I.C.R. 176.

[65] *ibid.* at 194.

[66] [2007] E.W.C.A. Civ 822, para.12.

[67] *ibid.*, para.12.

[68] [1998] A.C. 20 at 35.

[69] [2007] E.W.C.A. Civ 822, para.12.

Sims has noted that "the implied term of trust and confidence is not some watered-down version of a fiduciary obligation; it is a separate concept which (unfortunately) shares the same terminology as a fiduciary relationship."[70] However, in practical terms the division between the two concepts is blurred. This was highlighted by Clarke J. in *A.I.B. v Diamond*,[71] in which he referenced the *dictum* of Elias J. in *Nottingham University v Fishel*[72] that the employee's duty of good faith, or loyalty, or the mutual duty of trust and confidence are "concepts which tend to shade into one another."[73]

Efforts to define what is meant by trust and confidence are in reality unlikely to be successful. It has been suggested in the context of the law in New Zealand, which is in a similar state of development, that it "by necessity remains more of an art than a science,"[74] and hence the term remains largely undefined and possibly indefinable.[75] In light of this inability - or unwillingness - to specify with precision what is meant by trust and confidence, Freedland's comment in relation to the situation in England appears apposite: "As to the content of the implied obligation, there seems to be general, if tacit, agreement among both judges and commentators that this is not self-evident; it is seen to require further expounding before it can be applied directly to the facts of particular cases."[76] Brodie, who has written extensively on trust and confidence, summarises the implications of this with the observation that "The open-textured nature of the term

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[70] Sims "Notes—Is Employment a Fiduciary Relationship?" (2001) 30(1) I.L.J. 101.

[71] [2011] IEHC 505.

[72] [2000] I.C.R. 1462 at 1492.

[73] [2011] IEHC 505, para.7.7. As pointed out by Fudge "The Spectre of Addis in Contracts of Employment in Canada and the UK" (2007) 36(1) I.L.J. 51, in Canada "Good faith requirements were regarded as a way of imposing limitations on employers' right to terminate and as a means of compensating employees for the full extent of the psychological and financial losses that they suffered when their employment was terminated without cause or in a procedurally unfair manner." The duty of mutual trust and confidence in Britain "was articulated in the context of determining the scope of constructive dismissal under the statutory unfair dismissal regime."

[74] *Walden v Barrance* [1996] 2 E.R.N.Z. 598 at 615 *per* Goddard C.J.

[75] Mackay (ed.) *Butterworths Employment Law Guide* 4th ed. (Butterworths, Wellington, 1998), p.985.

[76] Freedland *The Personal Employment Contract* (O.U.P., Oxford, 2003), p.158.

makes it an ideal conduit through which the Courts can channel their views as to how the employment relationship should operate."[77]

4.3 A "Two-Way Street"

It is important to note that, notwithstanding the fact that the exposition of trust and confidence set out above in *Woods v W M Car Services (Peterborough) Ltd.*[78] focused on the behaviour of the employer, the courts here have accepted that trust and confidence operates as a two way process: in *Berber v Dunnes Stores*[79] Laffoy J. had focused on aspects of the defendant employer's conduct which she found wanting, although did note that she had "no doubt that counsel for the plaintiff accepted that the implied term, to use a modern idiom, is a "two-way street."" [80] In the same case, Finnegan J. in the Supreme Court, having noted that "The term imposes reciprocal duties on the employer and the employee,"[81] was prepared to consider the plaintiff employee's reaction in order to establish whether there had been a breach of duty.

4.4 Acceptance in Ireland

As is implicit from the foregoing reference to *Berber*, the implied term of trust and confidence has been adopted in this jurisdiction, as exemplified by the decision of Laffoy J. in the case of *Cronin v Eircom Ltd.*[82] Laffoy J. made reference to the fact that as a matter of principle a term of mutual trust and confidence "should be implied into each contract of employment in this jurisdiction by operation of law."[83]

In fact, it was the same judge who had first made reference to the phrase "trust and confidence" in the context of an anti-dismissal injunction. That was in the 1997 case of

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[77] Brodie "The Heart of the Matter: Mutual Trust and Confidence" (1996) 25 I.L.J. 121 at 126 quoted in Brodie "Mutual Trust and the Values of the Employment Contract" (2001) 30 I.L.J. 84 at 85.

[78] [1982] I.C.R. 693.

[79] [2007] 18 E.L.R. 1 (H.C.).

[80] [2007] 18 E.L.R. 1 at 14.

[81] [2009] 20 E.L.R. 61 at 70 (S.C.).

[82] [2007] 3 I.R. 104.

[83] *ibid.* at 125.

Courtenay v Radio 2000 Ltd.,[84] although it is unclear whether Laffoy J. was using the term in a general sense or with specific legal intent; she certainly did not attempt to analyse the genesis of the phrase or assess its legal weight. The same phrase, and the same lack of analysis, is also evident in Laffoy J.'s decision in *Harte v Kelly*.[85] That one judge should refer to the idea of trust and confidence in such a manner would suggest that its use was more than a simple generalised remark.

Despite this, a note of caution was sounded by Murphy J. in the Supreme Court in the case of *O'Neill v Canada Life*.[86] In his *ex tempore* decision (and without explicitly using the term "trust and confidence"), Murphy J. noted that the plaintiff's application to amend his pleadings to the effect that his employers "had an implied obligation to conduct their business in a proper fashion and in particular to conduct it in such a way as it would not unfairly or improperly damage the reputation of their employees" was brought against the background of the "evolution of the law in England," culminating in the *Malik* case. However, Murphy J. cautioned that he was "not suggesting or accepting that this is necessarily the law in this country." However, any sense that trust and confidence was not "necessarily the law" appears to have been overtaken: in *Berber*,[87] a case which concerned a claim for, *inter alia*, breach of contract, Laffoy J. referred to Lord Steyn's *dictum* in *Malik & Mahmud v Bank of Credit and Commerce International S.A.*[88] that "The implied obligation extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee."[89] She held this to be the correct approach. Bolger and Ryan have described this as "as extremely important development in the entrenchment in Irish law of the

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[84] [1997] 8 E.L.R. 198 .

[85] [1997] 8 E.L.R. 125 at 130.

[86] [1999] IESC 23.

[87] [2007] 18 E.L.R. 1. Analysed in Callanan, "Mutual Trust and Confidence in the Workplace—A Concept or an Obligation?" (2007) 4 E.L.R. 9.

[88] [1998] A.C. 20; [1997] 3 W.L.R. 95; [1997] 3 All E.R. 1.

[89] *ibid.* at 47; at 111; at 17. As referred to in *Berber* at [2007] 18 E.L.R. 1 at 15. In making reference to an "implied obligation" it is clear that this is an implied obligation of trust and confidence, as the *dictum* set out appears after consideration by Lord Steyn of "The implied term of mutual trust and confidence."

mutual duty of fidelity, trust and confidence between employer and employee."[90] There now appears to be a general acceptance by the courts that trust and confidence is a term to be implied into contracts of employment. In the appeal from the decision of Laffoy J. in *Berber*, Finnegan J. made clear that "the term is implied by law and is incident to all contracts of employment unless expressly excluded."[91]

4.5 Assertion of Loss of Trust and Confidence

It is generally not sufficient for one party to simply claim that trust and confidence has been lost in an attempt to compel a court not to order the resumption of duties by an employee; there must be some rational ground for making such an assertion. In that regard, and as explained by Ralph Gibson J. in *Powell v London Borough of Brent,*[92] confidence must be judged by reference to the circumstances of any given case before the court. Those circumstances include the nature of the work concerned, the people involved and the impact on the workplace.[93] This latter point is obviously a key one in terms of any remedies which a court may direct.

The Irish cases in which trust and confidence has been considered have also dealt with how to assess whether there has been a breach. In *Berber*, Laffoy J. accepted Lord Steyn's view in *Malik*[94] that what was significant was "the impact of the employer's behaviour on the employee rather than what the employer intended."[95] This approach was

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[90] Bolger and Ryan "The Mutual Duty of Fidelity in the Contract of Employment: Significant Recent Developments" (2007) 4(4) I.E.L.J. 112.

[91] [2009] 20 E.L.R. 61 at 70. See also the judgment of Laffoy J. in *Delaney v Central Bank* [2012] E.L.R. 117 in relation to a consideration of trust and confidence, albeit in very specific circumstances.

[92] [1988] I.C.R. 176.

[93] *ibid.* at 193.

[94] [1998] A.C. 20; [1997] 3 W.L.R. 95; [1997] 3 All E.R. 1.

[95] *ibid.* at 47; at 110; at 16, adopting Brodie, "Recent cases, Commentary, The Heart of the Matter: Mutual Trust and Confidence" (1996) 25 I.L.J. 121 at 121.

affirmed by Finnegan J. in the *Berber* appeal. As such, the courts in this jurisdiction[96] adopt an objective test in assessing any breach, as exemplified by the approach of MacMenamin J. in *Keenan v Iarnrod Eireann.*[97] He approached the facts before him on the basis of the test "said to have been applied in *Ali v London Borough of Southwark* ..." That test was "whether even in circumstances where an employer may have lost trust and confidence a court may look at whether or not the decision being taken by the employer is rational."[98] This was in keeping with the earlier decision of *Bergin v Galway Clinic Doughiska Ltd.*[99] in which Clarke J. accepted the argument that it was far too sweeping to say that an injunction could never be given where the employer advanced the view that trust had broken down.[100]

4.6 Criticism and Limitations

The reach of the doctrine of trust and confidence is evident from May L.J.'s observation in *Barros D'Sa v University Hospital Coventry*[101] that an allegation by an employer that the relationship of trust and confidence has broken down does not entitle an employer to dispense with the terms of a contractual inquiry process. Despite – or perhaps because of – this, the implying of a term of trust and confidence was has not been without criticism and limitations. One of these relates to its statutory origins (in testing alleged constructive dismissal). In *Maha Lingam v Health Service Executive*,[102] Fennelly J. summarised the views of Lord Nicholls in *Eastwood v Magnox Electric plc.*[103] as being that as a result of

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[96] There are conflicting English authorities as to whether the test is objective or subjective: see, *inter alia*, *Waltham Forest L.B.C. v Omilaju (No.2)* [2005] I.R.L.R. 35; *Nottinghamshire C.C. v Meikle* [2004] 4 All E.R. 97 and *Baldwin v Brighton and Hove City Council* [2007] I.C.R. 680, all noted in Freedland in *Chitty on Contracts Volume II Specific Contracts* (Sweet & Maxwell, London, 2008), p.1103.

[97] [2010] 21 E.L.R. 115.

[98] *ibid.* at 129. In *Keenan* the employee had also made serious allegations against those in positions of authority in the defendant and this clearly informed MacMenamin J.'s view as to the breakdown in the relationship between the parties.

[99] [2008] 2 I.R. 205.

[100] *ibid.* at 220. A similar view was expressed by Morland J. in *Robb v London Borough of Hammersmith and Fulham* [1991] I.C.R. 514.

[101] [2001] I.R.L.R. 691.

[102] [2006] 17 E.L.R. 137.

[103] [2004] 1 I.C.R. 1064.

the statutory code relating to unfair dismissal, in effect "it was not for the courts to extend further into the common law, the implied term regarding mutual trust in such a way as to upset the balance set by the legislature."[104] It was argued in *Ryan v ESB International Ltd.*[105] that "in a suitable case an employer may rely upon the breakdown in trust and confidence as a substantial reason for justifying dismissal." In that regard, the case of *Perkins v St. George's Healthcare NHS Trust*[106] was cited to the court. However, and as observed by Laffoy J.,

> "...in that case, the Court of Appeal was considering the application of a statutory provision in force in the United Kingdom as to determination of whether the dismissal of an employee is fair or unfair. It was not concerned with wrongful dismissal at common law. Aside from that observation, it would not be appropriate at this juncture to attempt to express any definitive view on that core legal issue..."

Furthermore, the courts have refused to apply the trust and confidence term "to constrain an employers' most devastating common law power – the power to dismiss without reason."[107] In the case of *Addis v Gramophone Co Ltd.*[108] the House of Lords held that damages can only be awarded where contractual notice is not given; such damages may not exceed the remuneration payable during the notice period.[109] As explained by Lord Hoffmann in *Johnson v Unisys Ltd.*[110] the implied term of trust and confidence was concerned with "preserving the continuing relationship which should subsist between employer and employee"[111] rather than its determination. As pithily summarised by

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[104] [2006] 17 E.L.R. 137 at 141.

[105] [2013] IEHC 126, para. 48.

[106] [2005] I.R.L.R. 934.

[107] See Anderson "Employment Rights in an Era of Individualised Employment" (2007) 38(3) V.U.W.L.R. 417, citing *Air New Zealand v Raddock* [1999] 1 E.R.N.Z. 30 at 36 *per* Henry J.

[108] *Addis v Gramophone Co Ltd.* [1909] A.C. 488.

[109] See generally Mallon and Millen "Wrongful Dismissal – A Right to General Damages?" (2002) 7(6) B.R. 307.

[110] [2003] 1 A.C. 518.

[111] *ibid.* at 541. Although Redmond *Dismissal Law* 2nd ed. (Tottel, Dublin, 2007), p.199 suggests that the term may well have a function if an employer dismisses an employee in "a harsh and humiliating manner,"

Brodie, "*Addis* serves to deny recovery for injury to feelings should the employment contract be breached."[112] The same writer notes that although the decision has been "the subject of cogent and persistent criticism," it remains good law. That criticism will be considered in greater detail in Chapter Nine.[113]

However, Charleton has observed in relation to trust and confidence that "in many circumstances, [judges] seem to be granting injunctions without even considering its relevance."[114] This leads to a consideration of the application of the doctrine of trust and confidence to injunction applications.

4.7 Implications for Injunction Applications

The direct link between trust and confidence and the reluctance of the courts to intervene in disputes relating to employment was well summarised by Megarry J. in *Chappell v Times Newspapers Ltd.*:[115]

> "The basic reason for refusing an injunction is that the relationship between employer and employee is one of confidence, and the courts ought not to seek to prolong the relationship by an injunction or a decree of specific performance when that confidence no longer exists. If the employer does not want to employ the employee, or the employee does not want to work for the employer, you cannot by

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Mallon and Millen "Wrongful Dismissal – A Right to General Damages?" (2002) 7(6) B.R. 307 suggest that the benefits of being able to invoke a breach of trust and confidence will be limited in the sense that the courts will confine recovery to financial loss, as in *Malik*, rather than for injured feelings. The same authors also point out that *Malik* involved a claim based on "anterior" conduct.

[111] [2003] 1 A.C. 518.

[112] Brodie "The Beginning of the End for *Addis v The Gramophone Company*?" (2009) 38(2) I.L.J. 228. Although it should not be forgotten that the manner in which a person's employment comes to an end may admit in some circumstances of a personal injuries claim.

[113] See Chapter Nine, section 5.

[114] Charleton "Employment Injunctions: An Over-Loose Discretion" (2009) 9(2) J.S.I.J. 6.

[115] [1975] 1 W.L.R. 482

order of the court satisfactorily make them do what one of them does not want to do."[116]

Although compelling, this *dictum* is framed against an assumption that what is sought is reinstatement. Indeed, it has been suggested that the application of mutual trust and confidence has been stretched to apply generally to any employment related injunction, rather than being confined to the area in which it does have genuine application, namely the question of reinstatement.[117] Yet the "open-textured" nature of the doctrine[118] is such that it may in fact be deployed in situations other than reinstatement; for example, if an employee is the subject of a disciplinary hearing, it would not be too difficult to argue that that employee would need a measure of trust and confidence in the parties conducting that hearing. Indeed, insofar as O'Donovan J. suggested in *Doyle v Grangeford Precast Concrete Ltd.*[119] that it was not necessary for trust and confidence to be present to justify the granting of interlocutory relief, this is a sensible approach, certainly insofar as reinstatement is not involved; there are orders which could be made which do not strictly speaking require any element of trust and confidence. Trust and confidence really has no significant role to play if, for example, the extent of a court's intervention is, in essence, to preserve the employment relationship until such time as an employer properly adheres to and executes a disciplinary procedure, as was the case in *Robb v London Borough of Hammersmith and Fulham.*[120] As pointed out by Delany, if the court's involvement is confined to an intervention to ensure compliance with the rules of natural justice and the proper application of disciplinary procedures, then in theory the relationship between the parties is not a relevant consideration as "it is not envisaged that they would continue to work together pending trial."[121] For example, in *Coffey v Connolly & Sons Ltd.*,[122]

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[116] *ibid.* at 492. See also the *dictum* of Kekewich J. in *Whitwood Chemical Company v Hardman* [1891] 2 Ch. 416 at 420.

[117] See Cox, Corbett & Ryan *Employment Law in Ireland* (Clarus Press, Dublin, 2009), p.851 and Delany "Employment Injunctions: The Role of Mutual Trust and Confidence" (2006) 28 D.U.L.J. 36.

[118] To use Brodie's phrase as set out above in section 4.2.

[119] [1998] 9 E.L.R. 260.

[120] [1991] I.C.R. 514. A point considered in greater detail by Harvey on *Industrial Relations and Employment Law* (LexisNexis Butterworths) Division AII Contract of Employment, para.435.

[121] Delany *Equity and the Law of Trusts in Ireland* 5th ed. (Round Hall, Dublin, 2011), p.601.

[122] [2007] IEHC 319.

Edwards J. granted the plaintiff injunctions restraining the defendants from publishing the fact of her purported dismissal and from filling her post until the hearing of the action. As the defendant was not coerced into permitting the plaintiff to work pending the trial of the action, or paying her, Edwards J. remarked that "issues of trust and confidence simply don't arise."

More generally, corporate structures are vastly different from those which predominated decades ago. It has been observed in the Australian text *Macken's Law of Employment* that the degree of confidence is linked to the size of the employing entity.[123] In the case of *Turner v Australasian Coal and Shale Employees Federation,*[124] the court pointed out that it was difficult to say that a relationship of mutual confidence was required in a large corporate enterprise. Similarly, in *Gregory v Philip Morris Ltd.*[125] the court found that an order amounting to specific performance could be made "under modern conditions and in connection with large employers."[126] Unfortunately, the court did not elaborate on what it meant by "modern conditions." However, in terms of large employers, it is not difficult to imagine what types of considerations might apply; it would be in theory easier to bring an employee back to a workforce but deploy them in a different area, or make them answerable to a new supervisor or manager as appropriate. This could address the concerns expressed by Charleton, who raised a rhetorical question as to personal service, asking "has the notion of personal service been so completely removed from the law, that we expect people who have had a serious falling out, resulting in sacking, to continue to

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[123] Sappideen, O'Grady & Warburton *Macken's Law of Employment* 6th ed. (Thomson Reuters, N.S.W., 2009), p.371.

[124] (1984) 6 F.C.R. 177. For analysis, see McDonagh, "Dismissals and the Federal Conciliation and Arbitration System" (1989) 18(3) Federal Law Review 153 at 163.

[125] [1988] F.C.A. 100.

[126] The Supreme Court touched on the point in *Geys v Societe Generale* [2013] 2 W.L.R. 50 at 76, although it was not an issue which fell for determination based on the facts of the case: as articulated by Lord Wilson J.S.C., "The big question whether nowadays the more impersonal, less hierarchical, relationship of many employers with their employees requires review of the usual unavailability of specific performance has been raised, for example by Stephenson L.J. in the *Chappell* case, at p 503, but is beyond the scope of this appeal."

work together under court order, and under threat of contempt, as if they were emotionless computers?"[127]

Of course, any remedy needs to be flexible enough given the very different factual scenarios which may confront a court: there is a world of difference between an employee who works in a discrete department or section of a large organisation, a chief executive of such an organisation and an employee who works for a small family business and whose job involves daily and intense interaction with the other employees. To put that view into the words of Ralph Gibson L.J. in the Court of Appeal in the case of *Powell v London Borough of Brent,*[128] the "...council is a large organisation employing many people in different departments. It is vastly different from a man or woman with a small business, partnership or small firm with a small staff."[129]

As the significance of the development of the doctrine of trust and confidence has increased, both in the context of the employment relationship overall and also in terms of its practical effect when injunctions are sought, an aspect of employment law which has diminished in significance is the position of office holders. Nevertheless, it still has some significance and, as will be seen, was of crucial significance in the case of *Cahill v Dublin City University.*[130]

5. Office Holders

A somewhat anachronistic feature of some employment relationships is the "historic idea of offices."[131] In the Australian case of *Marks v The Commonwealth*[132] Windeyer J. explained that "The legal concept embodied in the expression resignation of an office is founded upon the historic idea of offices, ecclesiastical, civil or military, held of the

[127] Charleton "Employment Injunctions: An Over-Loose Discretion" (2009) 9(2) J.S.I.J. 1 at 2.

[128] [1988] I.C.R. 176.

[129] [1995] 3 All E.R. 929 at 194.

[130] [2007] 19 E.L.R. 113.

[131] *Per* Windeyer J. in *Marks v The Commonwealth* (1964) 111 C.L.R. 549, para.8. See *Garvey v Ireland* [1981] I.R. 75 at 92, *per* O'Higgins C.J., for a brief historical overview of the position of offices held "at the will and pleasure of the Crown."

[132] (1964) 111 C.L.R. 549.

Crown or of a corporation, as a form of property."[133] The practical effect of having such a proprietorial interest was summarised by the same judge as being comparable to an estate in land, which estate could be yielded up or surrendered.[134] For example, military commissions could be bought and sold and, as such, were considered to be property.[135] One reason for the creation of offices was to enable properly qualified holders to be better able to perform public functions.[136]

For all the historical background to the idea of offices, it is much easier to describe, rather than define, office holders.[137] Kenny J. attempted to define what was meant by an "office holder", or at least to identify the features of such a position, in *Glover v BLN Ltd.*[138] He explained that:

> "The characteristic features of an office are that it is created by Act of the National Parliament, charter, statutory regulation, articles of association of a company or of a body corporate formed under the authority of a statute, deed of trust, grant or by prescription; and that the holder of it may be removed if the instrument creating the office authorises this."[139]

As a result of their proprietary interest in their offices, office holders were, in general terms, effectively better protected by the legislation governing their employment in terms

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[133] *ibid.*, para.9.

[134] *ibid.*

[135] See *Jarratt v Commissioner of Police* (2005) 224 C.L.R. 44; (2005) 221 A.L.R. 95; (2005) 79 A.L.J.R. 1581 *per* Gleeson J.

[136] See generally Hogan & Morgan *Administrative Law in Ireland* 4th ed. (Round Hall, Dublin, 2010), p.696.

[137] In *Great Western Railway v Bater* [1920] 3 K.B. 266 at 274 Rowlett J. suggested that what was meant by an "office" was "a substantive thing that existed apart from the holder of the office." However, he came to this conclusion after analysis of the "sound" contention, to which he did not give effect, that "what those who used the language of the Act of 1842 meant when they spoke of an office or an employment of profit was an office or employment which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders."

[138] [1973] I.R. 388.

[139] *ibid.* at 414.

of dismissal. As has been remarked by Rideout, courts would confer the status of office holder "specifically to make available some right which the purely contractual notion of employment would not confer, without giving any significant thought to the reality of the distinction between the two."[140]

6. Office Holders and Contractual Employees

Wade and Forsyth suggest that "A line has to be drawn between an office which gives its holder a status which the law will protect specifically, on the one hand, and, on the other hand, a mere employment under a contract of service."[141] Although the position of office holder might be considered by contrasting it with that of a "normal," or "contractual," employee, it can be difficult to identify with specificity which is which. Furthermore, a person can simultaneously be both an office holder and an employee although, as neatly summarised by Regan, "the employment relationship arises quite apart from the holding of the office."[142] This is made clear by Major J. in the Canadian case of *Wells v Newfoundland*:[143]

> "A common sense view of what it means to work for the government suggests that these relationships have all the hallmarks of contract. There are negotiations leading to agreement and employment. This gives rise to enforceable obligations on both sides. The Crown is acting much as an ordinary citizen would, engaging in mutually beneficial commercial relations with individual and corporate actors. Although the Crown may have statutory guidelines, the result is still a contract of employment." [144]

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[140] Rideout *Principles of Labour Law*, 5th ed. (Sweet & Maxwell, London, 1989), p.17.

[141] Wade and Forsyth *Administrative Law* 7th ed. (Clarendon Press, Oxford, 1994), p.557, as quoted by Vancise J.A. in *Saskatoon District Health Board v Rosen* [2001] S.K.C.A. 83, a decision of the Court of Appeal for Saskatchewan, Canada.

[142] Regan "The Contract and Relationship of Employment" in Regan (ed.) *Employment Law* (Dublin, Tottel, 2009), p.51. See generally the review by Vancise J.A. in *Saskatoon District Health Board v Rosen* [2001] S.K.C.A. 83.

[143] [1999] 3 S.C.R. 199. See also *Gratton v Canadian Judicial Council* [1994] 2 F.C. 769 and *Knight v Indian Head School Division No. 19* [1990] 1 S.C.R. 653.

[144] (1999) 3 S.C.R. 199, para.22.

It is also important to bear in mind that a person's position as an office holder does not preclude terms being implied into their employment relationship in addition to any clear statutory provisions. This is evident from the case of *Carr v Limerick V.E.C.*[145] Murphy J. accepted the argument that the statutory provisions governing the appointment of officers left room for the introduction of additional terms acceptable to the parties concerned, provided that they were not in conflict with the statutory provisions. Similarly, in *McGrath v Minister for Defence*[146] Geoghegan J. explained that on his understanding of the law, "the mere fact that an employee is an "officer" in legal terms rather than a "servant" does not mean that there cannot also be side contracts."[147]

7. Office Holders Dismissible at Pleasure and For Cause

It is evident from Lord Reid's speech in *Ridge v Baldwin*[148] that apart from a distinction between dismissal of "mere employees" and office holders, a further distinction can be made between office holders who are dismissible at pleasure[149] and those who can only be dismissed for cause.[150] Natural justice[151] did not apply to any office holder dismissed at pleasure as "the King could do no wrong and could not be made to answer in his Courts."[152] Dismissal for cause hardly needs any elaboration.

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[145] unreported, High Court, Murphy J., July 31, 1987.

[146] [2010] 1 I.R. 560.

[147] *ibid* at 565.

[148] [1964] A.C. 40 at 65.

[149] It being argued by the defendant in *Garvey v Ireland* [1981] I.R. 75 that the Commissioner of the Garda Síochána was dismissible at pleasure, without notice, reason or without affording the Commissioner the opportunity to make any representations.

[150] See Hogan & Morgan *Administrative Law in Ireland* 4th ed. (Round Hall, Dublin, 2010) p.696. One point on which there appears to be unanimous agreement is that the fact that a contract coming under the aegis of a statutory body expressly provides that a position is "whole-time, permanent and pensionable" does not imply employment for life. See *Walsh v Dublin Health Authority* (1964) I.L.T.R. 82, in which Budd J. referred to the speeches of the House of Lords in *McClelland v Northern Ireland General Health Services Board* [1957] 1 W.L.R. 594.

[151] As to which, see Chapter Three, section 4.2.

[152] As explained by O'Higgins C.J. in *Garvey v Ireland* [1981] I.R. 75 at 92. As pointed out by Henchy J. (p.99), this theory "has been steadily crumbling in modern times..." Griffin J. (p.107) made reference to

8. Maintaining a Distinction

Although the distinction between office holders and contractual employees is one which is still (albeit somewhat hesitantly) observed by the courts, it is becoming increasingly difficult to maintain, both in practice and in principle. This was a point made in the Canadian case of *Dunsmuir v New Brunswick.*[153] Further complicating matters has been the identification in Canada of a pseudo-category of jobs "with a strong statutory flavour."[154]

The *Dunsmuir* case is very helpful in that Bastarache and LeBel JJ. identified three main reasons for distinguishing between office holders and contractual employees, adding a modern gloss to those reasons. First, they noted the historic view that offices were a form of property which could thus "be recovered by the office holder who was removed contrary to the principles of natural justice." They explained that "This conception of public office has long since faded from our law: public offices are no longer treated as a form of private property."[155]

Secondly, they referred to the "more persuasive" reason that "dismissal from public office involves the exercise of delegated statutory power and should therefore be subject to public law controls like any other administrative decision."[156]

Thirdly, the judges noted that "unlike contractual employees, office holders did not typically benefit from contractual rights protecting them from summary discharge."[157] As

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Lord Esher M.R.'s colourful phrase from 1886 characterising the authority of the Crown to "get rid of the servants who are employed for public purpose" as "despotic."

[153] (2008) 1 S.C.R. 190, para.98. A case analysed by Delany in "Recent Developments in Administrative Law in Canada: The Implications of *Dunsmuir v New Brunswick*" (2008) 30(1) D.U.L.J. 100, albeit in the context of its implications for administrative law.

[154] See, for example, the comments of Vancise J.A. in *Saskatoon District Health Board v Rosen* [2001] S.K.C.A. 83 at para.45.

[155] (2008) 1 S.C.R. 190, para.99.

[156] *ibid.*, para.100.

[157] *ibid.*. para.101.

has already been seen,[158] the strength of this argument has been diminished by the fact that many office holders have a working relationship which has "all the hallmarks of contract,"[159] or are in fact both office holders and employees.

Policy considerations have also significantly dented a distinction described in forthright terms by Hogan & Morgan as being "abstruse and verging on the asinine or bizarre."[160] In *Malloch v Aberdeen Corporation*[161] Lord Wilberforce expressed his concerns about attempting to separate office holders from contractual employees, and found such separation to be "illogical and even bizarre."[162] Notwithstanding this, it is a distinction which exists and endures in this jurisdiction.

9. Office Holders in Ireland

The distinction between office holders and contractual employees has historically been recognised by the courts in Ireland. In *Connolly v McConnell*,[163] the fact that the defendant was an officer and not "a servant" was crucial. The status of office holders in this jurisdiction therefore *prima facie* brings with it particular considerations in terms of any attempt to dismiss such a person. Indeed, insofar as the status of office holder brings with it an additional layer of protection,[164] such protection extends to suspension. This is evident from the comments of Hardiman J. in *Rajpal v Robinson*:[165] he referred to

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[158] See section 6.

[159] *Per* Major J. in *Wells v Newfoundland* [1999] 3 S.C.R. 199. See generally Rideout *Principles of Labour Law*, 5th ed. (Sweet & Maxwell, London, 1989), p.18.

[160] See Hogan & Morgan *Administrative Law in Ireland* 4th ed. (Round Hall, Dublin, 2010) p.698, referring to a quotation from De Smith *Judicial Review of Administrative Action* (Stevens & Sons, London, 1980), p.228.

[161] [1971] 1 W.L.R. 1578.

[162] *ibid.* at 1294.

[163] [1983] 1 I.R. 172.

[164] An officer dismissible at pleasure clearly does not benefit from additional protection: see *Maunsell v Minister for Education*, in which Gavan Duffy J. noted that "The status of a teacher entering the service under the agreement must be noted. He has not the precarious tenure of an officer who can be dismissed at pleasure." [1940] I.R. 213 at 221.

[165] [2005] 3 I.R. 385.

ignoring "the clear statutory protection afforded to an officer of a health board, under which that officer took up his position and to which he appears to be to be entitled."[166]

That said, the courts have not always been comfortable with the distinction. In *Garvey v Ireland*,[167] O'Higgins C.J. acknowledged the breaking down in practical terms of the boundaries between office holders and contractual employees, referring to the once clear distinction becoming "blurred and increasingly unreal."[168] This, he observed, had come about due to the creation of offices in which grounds for removal and the determination of such a removal had to be specified.

There are many cases in which the courts have had to consider the position of office holders other than in the specific context of an injunction.[169] Cases which did involve injunction applications all bear witness to the confusion caused by separating office holders from contractual employees. This is particularly so when it comes to the question of the application of the principles of natural and constitutional justice, examined in Chapter Three. In *Allied Irish Banks Ltd. v Lupton*,[170] Murphy J. expressed doubt as to whether the obligation as to employing fair procedures laid down in *Glover v B.L.N. Ltd.*[171] applied to all employees as well as to office holders. This was clarified by both Keane J. in the High Court and Barrington J. in the Supreme Court in *Mooney v An Post.*[172] Barrington J. pointed out that it appeared to him that society was not divided into two classes, "one of whom - office holders - is entitled to the protection of the principles of natural and constitutional justice and the other of whom - employees - is not."[173] He explained that the terms natural and constitutional justice were broad terms and that

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[166] *ibid.* at 393.

[167] [1981] I.R. 75.

[168] *ibid.* at 92.

[169] Principal amongst these is the case of *Garvey v Ireland* [1981] I.R. 75, a case in which the plaintiff was the Commissioner of An Garda Síochána. See also *Hickey v Eastern Health Board* [1991] 1 I.R. 208.

[170] (1984) J.I.S.L.L. 107.

[171] [1973] I.R. 388.

[172] [1998] 4 I.R. 288. The need to do so arose from Walsh J.'s *dictum* in *Gunn v Bord An Cholaiste Naisinta Ealaine is Deartha / National College of Art and Design* [1990] 2 I.R. 168. See Delany "Natural Justice & The Office Holder / Employee Distinction" (1988) 10 D.U.L.J. 164.

[173] [1998] 4 I.R. 288 at 298.

"what the justice of a particular case will require will vary with the circumstances of the case."[174] Similarly, he stated that the employee "is entitled to the benefit of fair procedures but what these demand will depend upon the terms of his employment and the circumstances surrounding his proposed dismissal."[175] Those observations were summarised by Smyth J. in *Sharkey v Dunnes Stores (Ireland) Ltd.*[176] as amounting to the fact that "the difference between employee and office holder is not the determining issue as to whether the principles of natural and constitutional justice applies."[177] This is hugely significant in terms of the liberating effect it had on the courts' ability to make orders in favour of an employee.

10. Practical Effect in Injunction Applications

Despite this, Cox, Corbett & Ryan suggest that it is easier for an office holder to get injunctive relief than it is for a contractual employee.[178] This relevance of the distinction is evident in practice in the case of *Cahill v Dublin City University.*[179] The plaintiff was an associate professor in the defendant university. Further to discussions with the President of the university, in which the plaintiff indicated that there was a high probability that he would move to another university,[180] he received a letter which purported to give him three months' notice of termination of his contract of employment. At plenary hearing Clarke J. found that the plaintiff's purported dismissal was contrary to s.25(6) of the Universities Act 1997.[181] That section provided for certain procedures to be followed prior to dismissal. It also provided for tenure, from which the plaintiff benefited. Clarke J. explained that a court "should lean in favour of making an order which would

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[174] *ibid.*

[175] *ibid.*

[176] [2004] IEHC 163.

[177] See also *Cooney v An Post* [1991] 1 I.R. 323, in which Lavan J. granted the mandatory injunction sought due to a defective procedure in relation to the plaintiff's dismissal.

[178] Cox, Corbett & Ryan *Employment Law in Ireland* (Clarus Press, Dublin, 2009), p.839.

[179] [2007] 19 E.L.R. 113.

[180] Although as noted at paragraph 1.2 of Clarke J.'s judgment, "there are some disputes as to the precise content of a discussion which took place between Professor Cahill and the President of DCU…"

[181] Considering, *inter alia*, the decision in *Garvey v Ireland* [1981] I.R. 75.

restore the academic concerned to their duties"[182] [his emphasis] where a suspension or dismissal was in breach of the provisions of the 1997 Act. In other words, the courts have to have regard to the framework of an office holder's employment in order to establish whether they in essence benefit from extra rights by virtue of their position as office holder.[183] This comes down to a simple function in practice: the courts will give extra weight to any statutory considerations governing a person's employment. As pointed out by Clarke J., this "may well differ from the situation which might ordinarily obtain in relation to an ordinary contract of employment."[184] However, it is also important to note that Clarke J. emphasised that all he was saying was that a court was required to lean in favour of such a position. He observed that there may well be practical issues in individual cases which would prevent the making of such an order. In *Cahill*, the plaintiff was also entitled to the benefit of fair procedures before he could be dismissed due to the provisions of the university's own statutes, which statutes required that the plaintiff be given a final warning that it was proposed to serve notice of termination and that he be allowed make submissions in that regard (although perhaps not too much should be made of this point as any employer should be bound by the terms of contracts of employment).[185]

In *Moore v XNET Information Systems Ltd.*,[186] it was argued that Irish cases where salary or reinstatement were granted to a plaintiff at the interlocutory stage either involved plaintiffs who were office holders denied fair procedures, or plaintiffs against whom allegations of wrongdoing were made. This was not a point with which O'Sullivan J. engaged, nor has it been addressed in any meaningful way since, although it certainly points to a perception that office holders are in some way in a stronger position when seeking relief from the courts. However, and as will be seen in Chapter Four,[187] that a

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[182] [2007] IEHC 20, para.10.4.

[183] See the comments of Lord Wilberforce in *Ridge v Baldwin* [1971] 1 W.L.R. 1578 at 1597; [1971] 2 All E.R. 1278 at 1295, referred to by O'Higgins C.J. in the Supreme Court in the case of *Garvey v Ireland* [1981] I.R. 75.

[184] [2007] IEHC 20, para.10.

[185] Clarke J. referred in *Carroll v Bus Atha Cliath* [2005] 4 I.R. 184 at 208 to the many "significant developments" in relation to the terms contained in a contract of employment.

[186] [2002] 4 IR 362 at 371.

[187] See Chapter Four, section 15.3.

person is an office holder may attract specific requirements in terms of any purported termination, thus affording them an extra level of protection.

11. Conclusion

The focus in this Chapter on the idea of the employment relationship being based on a contractual construct arises from the fact that that contractual construct not just informed the development of key doctrines such as that of trust and confidence, it also permeates fundamental areas of importance such as unaccepted repudiation, which in turn feeds into the consideration of reliefs and remedies. Although a contractual underpinning, and all that that implies, is well established in employment law, and should to a degree create a measure of certainty and stability. it can lead to unexpected results. Aside from the fact that implied terms may well create case-specific outcomes, the creation of the *Fennelly* order, explored in detail in Chapter Four[188] and critical to the development of the anti-dismissal injunction, is effectively dependent on an underlying contract: it provides that an employee is to be paid his or her salary in exchange for making themselves available for work. This is the essence of any contract of employment.

Insofar as office holders acquire additional rights beyond those of contractual employees, the distinction between the two appears, *prima facie*, to retain some, albeit very diminished, relevance. However, the distinction between office holders and contractual employees may even less relevant if one considers the impact of the principles of natural and constitutional justice. These principles are at the heart of the exploration in Chapter Three. Yet there is some irony arising from the fact that it is such established principles which have given rise to a significant number of successful anti-dismissal injunctions, granted in particular in misconduct cases when a lack of fair procedures is evident such that a person's name and reputation may be blackened; this is despite that fact that in the normal course, damage to a person's reputation is quantified by an appropriate monetary award. As such, the established principles can in fact create a measure of uncertainty arising out of their application.

[188] See Chapter Four, section 11.

CHAPTER THREE

1. Introduction

It is arguable that principles evolved in the public law sphere such as natural and constitutional justice have had the greatest impact on the development of the substantive law relating to anti-dismissal injunctions. Equally important are the theories of repudiation. These are what might broadly be termed the "established underlying principles" which underpin anti-dismissal injunctions. They are the focus of this Chapter. Yet in the case of natural and constitutional justice, it has given rise to some uncertainty inasmuch as the courts are so cognisant of its importance that they have made injunction orders in situations involving damage to reputation where it might otherwise have been thought that such damage could be compensated by an award of damages (although as will be seen in Chapter Four, this is in itself taking on the characteristics of a broadly established principle).

Although the competing theories of repudiation have led to much analysis, debate and uncertainty in England, the opposite has been the experience here, albeit that the acceptance / elective theory, which predominates in this jurisdiction, has apparently been settled upon almost as a result of a lack of curial inquisitiveness. However, it comes squarely within the rubric of an "established principle" and, to return to the themes explored in Chapter Two, is a key function of treating the employment relationship as one which is contractual in nature.

2. Public Law Principles

A significant number of employment-related cases brought in the late 1980s and early 1990s were public in nature. One reason for this, albeit by reference to the position in England, has been advanced Hendy and Bowers, who observe that the majority of cases in England arising out of defective procedures do so in the public sector "where procedures are more formal and more extensive."[1] However, Clarke J. commented in the

[1] Hendy and Bowers "Discipline and Injunctions" E.L.B.A., June 15, 2010. However, the same authors observe that a significant amount of litigation in that jurisdiction has arisen out of the removal of a specific

case of *Bergin v Galway Clinic Doughiska Ltd.*[2] that "In the case of most contracts of employment, the issues which arise involve no questions of public law."[3] In one sense, therefore, a consideration of the applicability – or otherwise – of public law principles to the private law relationship may appear on the face of it to be somewhat superfluous. However, such a consideration is necessary for two main reasons. First, Clarke J. acknowledged that the principles of natural justice – a classic public law concept - may be imported into a contract of employment.[4] Secondly, Hogan & Morgan[5] suggest that the significance of a distinction between public and private law lies in the remedies available, their view being that public law admits of more "potent" remedies.

2.1 The Application of Public Law Themes to Private Employment

The extent to which a plaintiff in a private employment relationship may rely on public law to protect his position is not without controversy. The plaintiff in *Stoskus v Goode Concrete*[6] had relied on the decision of *Maguire v Ardagh*[7] in seeking an anti-dismissal injunction. *Maguire* concerned a challenge to an Oireachtas sub-committee which was inquiring into the Abbeylara shooting. Rejecting Mr. Stoskus' reliance on *Maguire*, Irvine J. explained why she was not prepared to rely on a case which had considered the application of public law principles to a public inquiry:

> "The decision of Hardiman J. as is relied upon by the plaintiff [in] *Maguire v Ardagh* related to public law issues which cannot be applied to issues of private law which in this case intimately concern a code of conduct incorporated into the plaintiff's contract of employment which has express conditions relating to the disciplinary procedure."[8]

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procedure for National Health Service staff; see in particular *Skidmore v Dartford and Gravesham N.H.S. Trust* [2003] I.C.R. 721.

[2] [2008] 2 I.R. 205.

[3] *ibid.* at 214.

[4] *ibid* at 215.

[5] Hogan & Morgan *Administrative Law in Ireland* 4th ed. (Round Hall, Dublin, 2010), p.921.

[6] [2007] IEHC 432.

[7] [2002] 1 I.R. 385.

[8] [2007] IEHC 432.

However, and notably, Irvine J.'s analysis relates to public law principles applicable to a public inquiry. A public inquiry is a very specific public action or function. What Irvine J. did not do was to reject the applicability of public law principles as applied to public *employment* situations to a private employment relationship. The distinction made between the spheres within which public law principles are deployed is evident from *O'Neill v Beaumont Hospital Board.*[9] In *O'Neill*, Finlay C.J. commented that the requirements applicable to the respondent hospital board did not apply "coextensively and identically with the requirements of natural justice which may apply to certain forms of independent tribunals or courts."[10]

O'Neill also highlights how the courts are prepared to, in essence, conflate the way they approach a case (together with the application of various principles) regardless of whether it is public or private in nature. The defendant in *O'Neill* had conceded that the matter could be dealt with by way of judicial review even though the decision in question centred on the contract of employment. Finlay C.J. took the view that the basis for a judicial review in the context was "doubtful." The Chief Justice did not want to determine that issue, but did record – crucially – that he was exercising his jurisdiction in the same way as if the matter had been instituted by way of plenary summons.[11] In *O'Neill v Iarnrod Eireann,*[12] Finlay C.J. reiterated that he retained the "grave doubt" previously expressed by him,[13] but noted that there had been an inconsistency among High Court judges as to the correct approach to be adopted and the matter had not previously been fully argued before the Supreme Court.[14]

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[9] [1990] I.L.R.M. 419.

[10] *ibid.*

[11] *ibid.* at 437.

[12] [1991] 2 E.L.R. 1.

[13] *ibid.* at 3.

[14] See, *inter alia*, *Flanagan v University College Dublin* [1988] I.R. 724; *McGabhan v Incorporated Law Society* [1989] I.L.R.M. 854; *Murphy v The Turf Club* [1989] I.R. 171 and *Murtagh v Board of St. Emer's National School* [1991] 1 I.R. 482. The question which has exercised the courts of late is whether an applicant is entitled to bring judicial review proceedings on the basis that their circumstances involve a matter of public law. For the contrasting approaches of the courts in that regard, see generally *O'Donnell v Tipperary (South Riding) County Council* [2005] 2 I.R. 483; *Becker v Board of Management of St*

As such, and although it might have been expressed in more robust fashion, it would appear that there is no substantive distinction between the principles applied to a public body and a private body in the context of an anti-dismissal injunction (that term also encapsulating steps short of dismissal). This approach was evident in practice in *Keenan v Iarnrod Eireann.*[15] MacMenamin J., dealing specifically with a suspension, contrasted his approach with, *inter alia*, those taken in *Deegan v Minister for Finance*[16] and *Morgan v Trinity College Dublin*,[17] cases arising in the public and private sphere respectively. He did not in any way suggest that his approach should be aligned with one or the other based on their genesis and associated legal principles.

This is consistent with the courts' approach to the diminished distinction, if any, between office holders and contractual employees: there is certainly no reason why the termination of employment of an employee who is an office holder should in some way admit significantly different (i.e. higher) standards or protections afforded by the Constitution on an application for an injunction. This was made absolutely clear in the judgment of Barrington J. in the case of *Mooney v An Post.*[18] As seen in Chapter Two,[19] he rejected a division of society into different classes which attracted different standards of protection. As he noted,

> "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."[20]

Dominic's Secondary School [2005] 1 I.R. 561; *Brown v Rathfarnham Parish National School* [2008] 1 I.R. 70; *Becker v Duggan* [2009] 4 I.R. 1 and *Hand v Ludlow* [2009] IEHC 583.

[15] [2010] 21 E.L.R. 115.

[16] [2000] 11 E.L.R. 190.

[17] [2003] 3 I.R. 157.

[18] [1998] 4 I.R. 288.

[19] See Chapter Two, section 9.

[20] [1998] 4 I.R. 288 at 297. *cf. Heneghan v Western Regional Fisheries Board* [1986] I.L.R.M. 225 in which Carroll J. had granted the declaration sought, *inter alia*, because the plaintiff was entitled to natural justice given his status as office holder.

Extrapolating from this, Laffoy J. observed in *Maher v Irish Permanent plc.*[21] that if there was any doubt at all about the applicability of fair procedures to an employer / employee relationship, "such doubt must have been dispelled by the decision of the Supreme Court in *Gunn...*"[22]

For completeness, insofar as Freedland makes reference to the "public law paradigm" in England being introduced into the area of private law in an "unfamiliar and indirect form,"[23] it is submitted that this comment has significantly less weight in this jurisdiction due to the protections afforded by a written Constitution. For example, in the case of *Traynor v Ryan*[24] McCracken J. acknowledged that most of the caselaw referred to him was concerned with public law situations. However, he was satisfied, based on the decision of the Chief Justice in *O'Neill*, that natural or constitutional justice had a role to play in his decision.

2.2 Remedies in Public Law

As Hogan & Morgan[25] explain, if an employee can bring his case into the public law domain,

> "then it will usually be open to him to secure a remedy establishing that the dismissal was invalid so that, as a matter of law, he retains his post; (whether this is done by way of an application for judicial review, or by obtaining a declaration or an injunction in plenary proceedings is of lesser importance). By contrast, an employee who is confined to a private law remedy is generally restricted to damages (usually of a limited amount, under the Unfair Dismissals Acts 1977-

[21] [1998] 4 I.R. 302.

[22] *ibid.* at 316.

[23] Freedland *The Personal Employment Contract* (O.U.P., Oxford, 2003), p.374.

[24] [2003] 2 I.R. 568.

[25] Hogan & Morgan *Administrative Law in Ireland* 4th ed. (Round Hall, Dublin, 2010), p.921.

1993). In practice, this may make a hugely significant – even spectacular – difference."[26]

Although this appears at first blush to be a compelling analysis, it is quite narrow in its terms. The contrast presents as a binary choice between public law remedies and remedies available under the Unfair Dismissals legislation. As such, it overlooks the potential potency of remedies available to contractual employees who bring wrongful dismissal actions before the courts; the courts have been quite prepared, in the context of the private employment relationship, to fashion remedies in keeping with what they perceive to be the "justice" of the case before them. It also overlooks the fact that office holders exist in the private employment sphere as well, and are entitled to the protection afforded, for example, by a company's statutes. Furthermore, the fact that a defendant is a public or statutory body may in fact hinder – certainly in principle – the obtaining of remedies. This is illustrated by the case of *Howard v University College Cork.*[27] It was argued in that case that the plaintiff would not be entitled to a permanent injunction as the defendant was a statutory body with statutory obligations, making it impermissible for the court to interfere with it. However, O'Donovan J., while acknowledging that he did not think it possible that at the trial of the action the plaintiff could be awarded the permanent injunction (and the declaration sought), had little doubt but that the trial judge would accede to an application to amend the statement of claim by qualifying the claim for the permanent injunction by the addition of the words "except in accordance with law."[28] As such, that a defendant may be a public body should not in real terms prevent the court from making appropriate orders if required, subject to any limitations in terms of the formal nature of the order sought. Although the argument in *Howard* focused on a permanent (perpetual) injunction,[29] there is nothing to suggest that the reasoning and

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[26] The authors cite, in that regard, the cases of *Histon v Shannon Foynes Port Co.* [2004] IESC 107 and *Cahill*, in which cases "the Supreme Court held that purported terminations of contract were invalid by reason of procedural irregularity and granted declarations that dismissals were invalid."

[27] [2001] 12 E.L.R. 8.

[28] *ibid.* at 13.

[29] A perpetual injunction may sometimes be referred to as a final injunction or a permanent injunction. "Perpetual" describes an injunction granted at the final determination of a case, and not because it operates in perpetuity.

rationale in *Howard* needs to be modified or displaced in the context of an interlocutory application.

It also appears clear that a defendant's status as a public body does not require a plaintiff to meet a higher threshold on an interlocutory application relative to that required in respect of private bodies.[30] As explained by O'Higgins J. in *Garrahy v Bord na gCon,*[31] he felt it "doubtful" that the English case of *Smith v Inner London Education Authority*[32] had set a different standard. O'Higgins J. also felt that even if a higher standard was applicable against public bodies "it is by no means certain that this would apply to all the functions ancillary to their main function."[33]

3. Role in Statute

Considering the Unfair Dismissals Act 1977, the authors of *Administrative Law in Ireland*[34] observe that the rules of natural justice "may have a different content from that of common law / constitutional natural justice, in that for instance, under the Act, it is necessary to balance up procedural and substantive justice."[35] There are other themes in public law which have a role in statutory, rather than common law, considerations. For example, reasonableness does not have a direct application to common law claims for wrongful dismissal. Rather, it has an important role to play in unfair dismissal, deriving as it does from s.6(7) of the Unfair Dismissals Act 1977, which provides in material part that the Tribunal may have regard:

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[30] Order 84 r.25 of the Rules of the Superior Courts provides that any interlocutory application may be made to the court in proceedings for judicial review. It has been accepted by the courts that the use of the phrase "interlocutory application" in Ord.84 r.25(l) is sufficiently wide to encompass an application for an injunction on foot of an application for judicial review: see *Harding v Cork Co Council* [2006] 1 I.R. 294; [2006] 2 I.L.R.M. 392.

[31] [2002] 3 I.R. 566.

[32] [1978] 1 All E.R. 411.

[33] [2002] 3 I.R. 566 at 579.

[34] Hogan & Morgan *Administrative Law in Ireland* 4th ed. (Round Hall, Dublin, 2010), p.699.

[35] See generally Redmond *Dismissal Law* 2nd ed. (Tottel, Dublin, 2007), p.250.

"(a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal"[36]

Proportionality is also an element of a Tribunal's consideration. It is well summarised in the determination in *Walker v Bausch & Lomb Ltd.*[37] in which it was stated that a respondent must show that "...the penalty was proportionate and was within the band of sanctions which might be imposed by a reasonable employer..." Proportionality has significantly less impact in the context of a claim for wrongful dismissal.

4. Key Public Law Themes

Against that background as to the general applicability of public law principles, what might be termed the classical "public law themes" which have (a well established) application in the specific context of employment are:

- the doctrine of *ultra vires*;
- natural and constitutional justice; and
- fair procedures.[38]

These will be considered in turn. However, this comes with the caveat that the lines between the three are blurred. For example, the courts take the view that, at a minimum,

[36] *ibid.*, p.248. In *Hennessy v Read & Write Shop* UD 184/1990 the Tribunal explained that: "In deciding whether or not the dismissal of the claimant was unfair we apply a test of reasonableness to 1. the nature and extent of the enquiry carried out by the respondent prior to the decision to dismiss the claimant, and 2. the conclusion arrived at by the respondent that, on the basis of the information resulting from such enquiry, the claimant should be dismissed."

[37] UD 179/2008.

[38] The doctrine of *audi alteram partem*, although treated as a discrete area for consideration in Hogan & Morgan *Administrative Law in Ireland* 4th ed. (Round Hall, Dublin, 2010) can be addressed for present purposes as an element of both natural and constitutional justice and fair procedures.

fair procedures are a subset of natural and constitutional justice,[39] in itself a unitary concept despite the suggestion of two forms of justice.[40]

4.1 The Doctrine of Ultra Vires

The doctrine of *ultra vires* is intended to limit the powers exercised by a public body, confining them to those prescribed by that body's empowering statute. In the context of understanding what is encompassed by the doctrine of *ultra vires*, the authors of *Administrative Law in Ireland* identify what they term a "most salient feature," namely that "the public body or corporation sole will usually only be empowered to perform a legal action – for example, making a contract – so far as this is necessary to its statutory objectives or reasonably incidental thereto."[41]

The case of *O'Donnell v Chief State Solicitor*[42] offers a good example of the doctrine of *ultra vires* in practice, albeit in relation to public employment. In the context of an application for an interlocutory injunction, Kelly J. determined that there was an issue as to whether the Chief State Solicitor was empowered to terminate the plaintiff's employment, as it appeared that such a power was reserved to the Attorney General and the Minister for Justice.

In a sense, there is no need to transpose the considerations relating to *ultra vires* in a public context to the private employment relationship. This is because within that private relationship, the question of *ultra vires* can arise on its own terms, specifically when there is an alleged breach of an employing company's articles of association. This is exemplified by the case of *Phelan v BIC (Ireland) Ltd.*,[43] in which it was argued that the dismissal of the plaintiff was *ultra vires* the first defendant as there was no power in the articles of association of the first defendant to terminate the position of managing director

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[39] See *Dellway Investment Ltd. v National Asset Management Agency* [2011] 4 I.R. 1.

[40] See Hogan & Morgan *Administrative Law in Ireland* 4th ed. (Round Hall, Dublin, 2010), p.583 and the *dictum* of Walsh J. in *McDonald v Bord na gCon* [1965] I.R. 217.

[41] Hogan & Morgan *Administrative Law in Ireland* 4th ed. (Round Hall Dublin 2010), p.441.

[42] [2003] 14 E.L.R. 268.

[43] [1997] 8 E.L.R. 208.

summarily. It was argued that such powers to terminate as did exist were dependent on any agreement between the parties. A similar issue fell for consideration in *Shortt v Data Packaging Ltd.* [44] The plaintiff in the case of *Burke v Independent Colleges Ltd. t/a Independent Colleges*[45] alleged that the purported termination of his employment was ineffective as the decision to terminate had not been made by the defendant in the manner stipulated in its articles of association. On the facts alone, Laffoy J. determined that the defendant had to be governed and managed in accordance with its own constitutional documents, and that the purported termination of the plaintiff was not in accordance with those documents. As such, the *vires* of a determination by a private company can be considered on its own terms, and none of the judges dealing with the aforementioned cases gave any indication that public law concepts and principles in some way informed those considerations.

4.2 Natural and Constitutional Justice

An elegant view was advanced by Lord Morris in *Furnell v Whangarie High School Board*[46] as to what was meant by natural justice. As he explained, "Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action.'"[47]

The application of natural justice (coincidentally in an employment-related dispute) was considered in some detail by O'Higgins C.J. in *Garvey v Ireland.*[48] The Chief Justice noted that the application of the principles of natural justice has never been capable of precise definition. Insofar as it is possible to define natural justice in any meaningful way, O'Higgins C.J. stated that it "came to be regarded as each man's protection against the arbitrary use of power."[49] In practical terms, the Chief Justice explained that the principles of natural justice were, shortly stated, "that an adjudication be disinterested and unbiased (*nemo iudex in causa sua*) and that a person judged be given adequate notice

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[44] [1994] 5 E.L.R. 251.

[45] [2011] 22 E.L.R. 169.

[46] [1973] A.C. 660.

[47] *ibid.* at 679.

[48] [1981] I.R. 75.

[49] *ibid.* at 91.

and an opportunity to be heard (*audi alteram partem*)."[50] However, there was a caveat mentioned by Henchy J. in *Flynn v An Post*,[51] namely that in a bilateral situation, "justice cannot be treated as a one-way street."[52]

4.2.1 Natural, or Constitutional, Justice

Hogan & Morgan suggest that natural justice in this jurisdiction was "reincarnated as constitutional justice."[53] Offered in support of this assertion is the *dictum* of Walsh J. in the 1965 case of *McDonald v Bord na gCon*[54] to the effect that in the context of the Constitution, "natural justice might be more appropriately termed constitutional justice." As Walsh J. explained, that term "must be understood to import more than the two well established principles that no man shall be judge in his own cause and *audi alteram partem.*"[55] In similar vein, McWilliam J. in the High Court in *Garvey v Ireland*[56] observed that "the Government must apply the concept of justice – be it called constitutional justice or natural justice."[57] The commonality between natural and constitutional justice was also referred to by Denham J. in *Dellway Investment Ltd. v National Asset Management Agency.*[58] She summarised the interrelationship as deriving from the fact that the principles of natural justice "have evolved into fundamental principles of constitutional law." She emphasised that those principles are "strong strands in the fabric of constitutional justice."[59] However, the Divisional High Court in the *Dellway* case had made reference to a distinction between a constitutional right to fair

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[50] *ibid.* In *Collins v County Cork V.E.C.* unreported, High Court, Murphy, J., May 27, 1982 Murphy J. suggested that "Whilst this may be a useful guide, the numerous cases both here and in other jurisdictions demonstrate clearly that the matter is considerably more complex than that statement would suggest."

[51] [1987] 1 I.R. 68.

[52] *ibid.* at 76.

[53] Hogan & Morgan *Administrative Law in Ireland* 4th ed. (Round Hall Dublin 2010), p.583.

[54] [1965] I.R. 217.

[55] *ibid.* at 242. *See also Mooney v An Post* [1998] 4 I.R. 288. In *Quirke v Bord Luthchleas na hÉireann* [1988] I.R. 83 at 88 Barr J. noted that "it is fundamental to the concept of natural justice that no man shall be condemned unheard."

[56] [1981] I.R. 75.

[57] *ibid.* at 84.

[58] [2011] 4 I.R. 1.

[59] *ibid.* at 224.

procedures and rights "which may be understood as the natural justice or common law rules."[60] In so doing, however, it acknowledged that the distinction was not clear cut and that the two "labels" had been used interchangeably.

Even though the *dictum* of Walsh J. in *McDonald* would imply that the term natural justice has in some way evolved into the term constitutional justice, the reality is that the two terms continue to be used interchangeably, together and indeed, separately. In the later case of *Ni Bheolain v City of Dublin V.E.C.*,[61] Carroll J. noted that "constitutional justice is not synonymous with natural justice though it may at times embrace it." One of the reasons for an ongoing separation of the terms was pointed out by the High Court in *Dellway,*[62] noting the suggestion made in *McCormack v Garda Síochána Complaints Board*[63] that "constitutional justice is a more policy led and flexible concept than natural justice."[64] This ongoing consideration should not detract, however, from the fact that the deployment of natural and / or constitutional justice, however termed and considered, has had a key impact on the anti-dismissal injunction. Accordingly, for present purposes, it is proposed to treat natural and constitutional justice as a unitary concept.

4.2.2 Differing Application From Case to Case

The problem with applying natural and constitutional justice is that it does not admit of a "one size fits all" approach, as acknowledged by Henchy J. in *Kiely v Minister for Social Welfare.*[65] For example, an employer may mend its hand sufficiently early in a process such that it might not be the subject of a successful application, as is evident from the case of *Turner v O'Reilly.*[66] Furthermore, there are limits to the extent to which the courts afford themselves free reign to apply natural and constitutional justice. This was well articulated by Keane J. in *Mooney v An Post*:[67]

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[60] *ibid.* at 59.

[61] unreported, High Court, Carroll J., January 28, 1983.

[62] [2011] 4 I.R. 1 at 59.

[63] [1997] 2 I.R. 489.

[64] [2010] IEHC 364, para.7.3.

[65] [1977] I.R. 267.

[66] [2008] IEHC 92.

[67] unreported, High Court, Keane J., February 11, 1994.

> "it might be going too far in another direction to incorporate into every contract of employment the principles of natural justice evolved in the sphere of administrative law. The pressure to do so in individual cases in order to avoid what might otherwise seem a harsh result must be significantly less today when there is an ample statutory machinery provided by the Oireachtas for affording redress to employees who are unfairly dismissed."[68]

This idea of imprecision and differing applications is a consistent theme,[69] although in *Maher v Irish Permanent plc.,*[70] Laffoy J. referred to caselaw confirming the principle that an employee is entitled to natural justice in respect of how their employer takes any decision which may affect rights or impose liabilities.[71] However, in considering the application of natural justice to employment, it is important to note that it has traditionally been confined to situations in which misconduct is alleged. This is, in simple terms, due to the stigma which can attach to an employee dismissed for misconduct.

4.2.3 Misconduct Cases

The confining of the principles of natural justice to cases involving misconduct is exemplified by *Hickey v Eastern Health Board.*[72] In that case, the Supreme Court held that the rules of natural justice regulating dismissal for misconduct had no application where the dismissal was for reasons other than misconduct. In *Phelan v BIC (Ireland) Ltd.*[73] Costello P., applying the *dicta* in *Hickey*, held that the rules of natural justice must be complied with where an employee is dismissed for misconduct. Similarly, in *Aziz v Midland Health Board,*[74] the Supreme Court accepted that for misconduct allegations, the parties hearing those allegations were under an obligation to ensure that the procedures

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[68] *ibid.*

[69] It was reaffirmed by Clarke J. in *Bergin v Galway Clinic Doughiska Ltd.* [2008] 2 I.R. 205 at 217.

[70] [1998] 4 I.R. 302.

[71] See generally Mallon and Bolger (1997) 3 (3) B.R. 113.

[72] [1991] 1 I.R. 208.

[73] [1997] E.L.R. 208.

[74] [1999] IESC 71.

adopted were fair and in accordance with principles of natural justice. The orthodox position was once more articulated by Carroll J. in her decision in *Orr v Zomax Ltd.*,[75] and by Clarke J. in *Carroll v Bus Átha Cliath.*[76] Clarke J. explained that although an employer was, if contractually free to do so, entitled to dismiss an employee for no reason, if 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."[77]

Although it did not strictly arise on the facts before it, the application of natural justice to the employment relationship where misconduct is alleged was again approved by the Supreme Court in *Maha Lingham v Health Service Executive.*[78]

As is evident from the foregoing, the law in relation to applying natural justice where misconduct is alleged appeared well settled. However, Laffoy J. tentatively moved the law on to a degree in the case of *Naujoks v National Institute of Bioprocessing Research and Training Ltd.*[79] The defendant in *Naujoks* deposed on affidavit to the fact that the plaintiff's contract was not terminated by reason of misconduct. It was accordingly argued that fair procedures did not arise. However, on the facts, Laffoy J. took the view that the inference to be drawn from the defendant's averments was such that a judgement had been made in relation to "serious human resource issues" and the plaintiff's alleged responsibility for those issues. In her view, such judgement was "not far removed from

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[75] [2004] 1 I.R. 486. In *Gee v Irish Times Ltd.* [2001] 12 E.L.R. 249 McCracken J. expressed "serious doubts" as to how far it was arguable that the defendant did not comply with natural justice in taking a decision to make the plaintiff redundant, absent personal allegations of wrongdoing.

[76] [2005] 4 I.R. 184.

[77] *ibid.* at 209.

[78] [2006] 17 E.L.R. 137 at 140. In saying this, it is of course not for the courts to investigate the misconduct and draw any conclusions themselves. This was made clear by Mummery L.J. in *Foley v The Post Office* [2000] I.C.R. 1283 at 1295, in a passage cited with approval in this jurisdiction by McGovern J. in *Doyle v Asilo Commercial Ltd.* [2008] IEHC 445.

[79] [2007] 18 E.L.R. 25.

making a judgment that there was a failure on the part of the plaintiff to properly discharge his duties as CEO, which would entitle the defendant to summarily dismiss the plaintiff, but subject to affording him fair procedures."[80] As such, Laffoy J. was prepared to approach the granting of an injunction on the basis of a want of fair procedures, even though misconduct was not specifically alleged.[81]

It may be reading too much into Laffoy J.'s judgment to suggest that she was proactively trying to evolve the law, as the case very much turned on its own specific facts. However, it highlights a potentially fascinating development. Not only does it point to the fact that judges will be alert to what might be termed hints of misconduct, such that defendants cannot simply avoid or circumnavigate the requirements of natural justice, it arguably is the initial stage of a move towards a form of strict liability for employers, whereby they are on risk that they may be held responsible for their actions whether or not misconduct is actually alleged or might in fact genuinely not be in issue (and as such, to pick up on the remarks made by Fudge in Chapter Two, this relates to the difficulty of containing the employment relationship within a contractual construct).[82]

However, any development in this area of the law must be tempered by Keane J.'s remarks in *Mooney v An Post*[83] as to its "going too far" to incorporate the principles of natural justice into every contract of employment, particularly given the safety valve afforded by the statutory remedies available. Furthermore, the practical reality is that the courts have to strive to strike a balance between ensuring that a plaintiff is not in any way unduly disadvantaged in terms of the implementation of a process which may lead to his

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[80] *ibid.* at 33.

[81] Charleton J. had to deal with a similar type of issue in *McGrane v Ulster Bank ex tempore*, High Court, Charleton J., June 29, 2012. The Defendant argued that there was no suggestion of misconduct on the part of the Plaintiff, and that it had effectively not made such a suggestion. However, and as summarised by Charleton J., "The case hinges on the Plaintiff's contract of employment. Fair procedures are required in cases of misconduct. Here, there is a definite hint, even a central allegation of misconduct..."

[82] See Chapter Two, section 2. This gives rise to something of a peculiarity: the reason for adopting such a strict approach where misconduct is alleged is the potential damage to an employee's reputation. Yet an employee against whom misconduct is not explicitly alleged is effectively forced to swear an affidavit, which can be read out in open court, in which they state that they are being charged with misconduct.

[83] unreported, High Court, Keane J. February 11, 2004.

termination and ensuring that a company is not put into a position whereby it is virtually impossible to discipline or dismiss an employee without that employee alleging that there has been some breach of natural justice. In that regard, it is important to note that in *Bergin v Galway Clinic Doughiska Ltd.*[84], Clarke J. accepted the submission that a significant degree of flexibility is required when it comes to the precise operation of the rules of natural justice in an employment context. In that regard, he gave the example of *Mooney v An Post*[85] in which Barrington J. "noted that the employer who makes a decision will, in a sense, be a judge in his own cause. That fact alone did not prevent the employer in that case from being entitled to make the decision concerned."[86]

There are also limits to the application of natural justice, related to the stage at which the assistance of the court is sought: as was also pointed out by Barrington J., the two central maxims associated with natural justice - *nemo iudex in causa sua* and *audi alteram partem* - are not necessarily capable of application where an employee has been dismissed.[87] In a sense, this was an extrapolation of Keane J.'s observation in the High Court in the same case that the maxims / principles "cannot be applied in a uniform fashion to every set of facts."[88] The position was well summarised by Laffoy J. in *Giblin v Irish Life & Permanent plc.*,[89] albeit by specific reference to fair procedures rather than natural justice more broadly:

> "...in conducting a process to determine whether the plaintiff should have a serious sanction, including the most serious sanction available, namely, dismissal, imposed on him, the defendant must act in accordance within the terms of the plaintiff's contract of employment, including the implied term that the plaintiff, as employee, is entitled to the benefit of fair procedures (*Glover v B.L.N.* [1973] I.R. 388). However, it is well recognised that what fair procedures demand depends on

[84] [2008] 2 I.R. 205.

[85] [1998] 4 I.R. 288.

[86] *Per* Clarke J. in *Bergin* [2008] 2 I.R. 205 at 217.

[87] Although in *Ingle v O'Brien* 109 I.L.T.R. 7, the doctrine of *audi alteram partem* was successfully invoked in relation to the revocation of the applicant's taxi licence, an act which, in the words of Pringle J., was clearly one "which affected his rights to earn his living by operating his taxi."

[88] [1994] 5 E.L.R. 103 at 116.

[89] [2010] 21 E.L.R. 173.

the terms of the plaintiff's employment and the circumstances surrounding his proposed dismissal (*Mooney v An Post* [1998] 4 I.R. 288)."[90]

In practical terms, any application to the courts is more likely to be taken, when these principles are to be invoked, at a point short of dismissal. Coupled with the courts' inherent unwillingness to intervene too early in investigations or disciplinary procedures (explored in more detail in Chapter Five[91]), there is in fact an argument that although the impact of natural justice is hugely powerful in principle, the instances in which it will be deployed in practice are more limited than might at first be anticipated.

4.3 Fair Procedures

Charleton notes, considering what is meant by fair procedures, that "this problem is virtually intractable."[92] As he explains, prior to 1970, fair procedures were "apparently not expected at all," whereas today "we regard the full panoply of a civil plenary action as the ideal."

The crucial importance of fair procedures is highlighted by the *dictum* of Ó Dálaigh C.J. in *Re Haughey*.[93] The Chief Justice observed that:

> "The Constitution guarantees to the citizen basic fairness of procedures. It is the duty of the Court to underline that the words of Article 40.3, are not political shibboleths, but provide a positive protection for the citizen and his fair name".[94]

The case of *Glover v B.L.N.*[95] is a judicial touchstone in relation to the necessity for fair procedures.[96] Building on the decision in *Re Haughey*, Walsh J. rehearsed the fact that it

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[90] *ibid.* at 184.

[91] See Chapter Five, section 5.2.

[92] Charleton "Employment Injunctions: An Over-Loose Discretion" (2009) 9(2) J.S.I.J. 1 at 17.

[93] [1971] I.R. 217.

[94] *ibid.* at 264.

[95] [1973] I.R. 388.

[96] See generally JMK "Wrongful Dismissal" (1968) 3(2) Jur 322.

had been held in that case that Article 40.3 of the Constitution was a guarantee of fair procedures. Walsh J. was quite clear in asserting that:

> "public policy and the dictates of constitutional justice require that statutes, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures."[97]

Laffoy J. observed in the later case of *Maher v Irish Permanent plc.*[98] that since *Glover*, and in particular the judgment of Walsh J., it has been recognised that both public policy and the requirements of natural justice required that "statutes, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures..."[99] (and this *dictum* also tends to show that fair procedures can effectively be treated as a subset of natural (and constitutional) justice). This is not vitiated or diminished by the motivation underlying the assertion of such rights, as was made clear by Morris J. in *Gallagher v Revenue Commissioners (No.2).*[100] This significance of importing the requirement of fair procedures into the employment relationship is well captured by the observation that, strictly speaking from a pure contract law perspective, it is "unnecessary."[101]

The reach of fair procedures in an employment context is evidenced by the case of *Tierney v An Post*,[102] in which Keane J. had to consider whether a contract for services (as distinct to a contract of services) contained an implied term that the respondent was obliged to conduct the disciplinary machinery provided for in the contract in accordance

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[97] [1973] I.R. 388 at 425.

[98] [1998] 4 I.R. 302.

[99] *ibid.* at 316. See *Glover v B.L.N. Ltd.* [1973] I.R. 388 at 425

[100] [1995] 1 I.R. 55. As put by Morris J. (at p.63) "a court cannot shut its eyes to the possibility that the applicant is raising the defence of lack of fair procedures in order to obstruct the holding of an inquiry."

[101] O'Connell "The Evolution of the Employment Injunction in Ireland and the United Kingdom: Analysing a Divergent Approach" (2009) 3/4 E.L.R.I 147 at 152.

[102] [2000] 1 I.R. 536.

with fair procedures. In confirming that it did, he also drew on the *dictum* of Walsh J. in *Glover v B.L.N. Ltd.,*[103] thereby echoing the approach of Laffoy J. in *Maher.*[104]

However, as with the application of natural and constitutional justice more generally, it is equally impossible to specify precisely what is meant by "fair procedures," a term that similarly does not admit of a "one size fits all" approach. This was well summarised by Hedigan J. in the case of *Kelly v Minister for Agriculture*[105] with his observation that "There is no fixed model for fair procedures that is applicable to all circumstances."[106] Similarly, in *McGlinchey v Ryan,*[107] Laffoy J. noted that

> "It is well settled, as a matter of constitutional law and of contract law, that an employee who is involved in a disciplinary process in the course of his employment is entitled to be afforded fair procedures, although what constitutes fair procedures may vary from case to case."[108]

Furthermore, Laffoy J.'s reference in Maher to the requirements of natural justice necessitating fair procedures indicates that the latter can effectively be treated as a subsect of the former.

An equally well established underlying principle involves the theory of repudiation, although it has become established in this jurisdiction with relatively little judicial scrutiny. However, its application is fundamental to what reliefs[109] can actually be sought and the point at which they can be sought.

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[103] [1973] I.R. 388.

[104] See *Tierney v An Post* [2000] 1 I.R. 536 at 547.

[105] [2012] IEHC 558.

[106] *ibid.* para.6.6.

[107] [2010] IEHC 536.

[108] *ibid.* para.6.5.

[109] As to which, see Chapter Four.

5. Repudiation of the Employment Relationship

The circumstances in which an employment relationship comes to an end can be a crucial factor in determining what steps the courts can take in the event of an application being made to injunct that termination. If a contract comes to an end, there is in theory little a court can do; there is no contract to which the court can give effect. This is well captured by a newspaper report of the case of *Goldrick v Dublin Corporation*,[110] in which it is reported that Murphy J. refused the injunction sought on the basis that "there was no point in trying to restrain the defendants from doing something they had already done." It is at this point that the doctrine of unaccepted repudiation assumes a key role.

6. Theories of Repudiation

Anderman suggests that in England there were two categories of cases which developed in relation to unaccepted repudiation.[111] The first concerned, broadly, repudiation following a breach of employees' rights in disciplinary procedures.[112] The second category encompassed cases in which the courts were prepared to restrain unilateral purported variation of the substantive terms of a contract.[113] As such, although the obvious role for unaccepted repudiation is in relation to termination, it also has a role to play in relation to steps short of termination. That it has such a role at all in those steps derives from the fact that steps short of termination may amount to a *de facto* termination.[114]

The doctrine of unaccepted repudiation grew out of the law relating to constructive dismissal.[115] In simple terms, if an employee is dismissed, a key element of that dismissal

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[110] "Court refuses injunction" The Irish Times, December 17, 1985.

[111] See Anderman *Labour Law* 4th ed. (Butterworths, London, 2000), p.103.

[112] This category included cases such as *Jones v Lee* [1980] I.C.R. 310, *Gunton v Richmond Upon Thames London Borough Council* [1981] Ch. 448, *R v BBC ex parte Lavelle* [1983] 1 All E.R. 241 and *Irani v Southampton and South West Hampshire Health Authority* [1985] I.C.R. 590.

[113] Such cases included *Hughes v London Borough of Southwark* [1988] I.R.L.R. 55, *Powell v London Borough of Brent* [1988] I.C.R. 176 and *Anderson v Pringle of Scotland Ltd.* [1998] I.R.L.R. 64.

[114] See the comments of Shaw L.J. in *Gunton v Richmond Upon Thames L.B.C.* [1981] Ch. 448.

[115] As did trust and confidence, considered in Chapter Two, section 4.2.

is whether it takes effect without more, or whether the employee must in some way acknowledge and accept the dismissal.[116] The former view is generally known as the unilateral, or automatic theory, the latter the acceptance, or elective, view. However, describing the doctrine "in simple terms" must also come with a warning: *per* Freedland,

> "The confrontation between elective and automatic theories of termination by wrongful dismissal...constitutes one of the most analytically difficult aspects of the whole of the law concerning the termination of personal work contracts."[117]

Matters are further complicated by the identification by Freedland of a third approach, known as the partial survival theory. The partial survival theory has been compared to an arbitration clause or a liquidated damages clause which survives the termination of a commercial contract.[118]

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[116] Repudiation can work of course both ways. As Smyth J. pointed out in *Harrington v Irish Life and Permanent Plc.* unreported, High Court, Smyth J., June 18, 2003 "it has long been part of our law that a person expudiates the contract of service if he wilfully disobeys the lawful and reasonable orders of his Master. Such a refusal fully justifies an employer in dismissing him summarily." In that regard, Smyth J. cited Karminski L.J. in *Pepper v Webb* [1969] 2 All E.R. 216 at 218, as adopted by Hamilton J. in *Brewster v Burke* [1985] 4 J.I.S.L.L. 98 at 100. See also the approach of Smyth J. (overturned on appeal) in *Histon v Shannon Foynes Port Co.* [2004] 15 E.L.R. 277.

[117] Freedland *The Personal Employment Contract* (O.U.P., Oxford, 2003), p.377. In *Thomas Marshall (Exports) Ltd. v Guinle* [1979] Ch. 227 Sir Robert Megarry V.C. described the authorities on the point as being "in a far from satisfactory state." Two years later, Browne-Wilkinson J. acknowledged in the case of *Robert Cort & Son Ltd. v Charman* [1981] I.C.R. 816 that it was still not established which of the views - the unilateral view or the acceptance view - was the correct one.

[118] Freedland *The Personal Employment Contract* (O.U.P., Oxford, 2003), p.377. It is exemplified by the approaches in *Marriott v Oxford & District Co-operative Society Ltd. (No.2)* [1970] 1 Q.B. 186 and *Hogg v Dover College* [1990] I.C.R 39. Freedland observes that on what he terms the "*Marriott* approach", the employee "has to be viewed as asserting that the previously existing contract has been wrongfully but effectively terminated by the employing entity." This is, as the same author notes, an "artificial construct." Similarly, and citing *Delaney v Staples* [1992] I.C.R. 482 at 489, *per* Lord Browne-Wilkinson, Smith & Randall had suggested that a possible synthesis is to "draw a distinction between the employment relationship (which automatically terminates because the employee cannot force the way in the next day through security) and the employment contract which might technically subsist for some unspecified time into the future for certain collateral purposes." However, the authors also point out that such a distinction has been rejected by the Court of Appeal in two different contexts, citing *Askew v Governing Body of*

The complexities involved in the theories of termination are borne out by the detailed review and analysis of the theories by Lord Wilson J.S.C. in the case of *Geys v Société Générale,*[119] in which the Supreme Court in England ultimately held in favour of the acceptance / elective theory. With a certain resigned weariness, Smith & Randall had previously observed that the elective versus automatic controversy "has been going on for four decades, and indeed the authors of this book seem to have been talking about it forever..."[120] The difficulties engendered by the controversy crystallised in the Court of Appeal's approach in *Boyo v London Borough of Lambeth*,[121] in which, in the words of Collins, Ewing and McColgan, the Court of Appeal felt "bound by authority to follow the elective theory, whilst strongly disapproving of it in favour of either the unilateral view or the partial survival theory."[122]

The decision in *Geys* appears to have settled the debate in England. Although not considered with any rigour, the acceptance / elective theory had long since been endorsed in Ireland. Somewhat uncharitably, one might adopt and adapt to this jurisdiction the view which Smith & Randall had advanced prior to *Geys* to the effect that an "uneasy truce" had been reached for reasons of inertia as much as anything else.[123] More importantly, they also suggested that "the real interest lies at the remedies end, in

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Clifton Middle School [2000] I.C.R. 286 (which concerned an alleged TUPE transfer) and *Symbian Ltd. v Christensen* [2001] I.R.L.R. 77 (which concerned a garden leave clause): Smith & Randall *Contract Actions in Employment Law –Practice and Precedents* 2nd ed. (Bloomsbury Professional, West Sussex, 2011), p.127.

[119] [2013] 2 W.L.R. 50.

[120] Smith & Randall *Contract Actions in Employment Law – Practice and Precedents* 2nd ed. (Bloomsbury Professional, West Sussex, 2011), p.127.

[121] [1994] I.C.R. 727.

[122] Collins, Ewing and McColgan *Labour Law Text and Materials* (Hart Publishing, Oxford, 2005), p.464. As noted by Lord Hope DPSC in *Geys v Société Générale* [2013] 2 W.L.R. 50 at 60, referring to Cabrelli and Zahn "The Elective and Automatic Theories of Termination at Common Law: Resolving the Conundrum?" (2012) 41 I.L.J. 346 "The fact has to be faced that there is still a degree of oscillation between the two theories."

[123] *ibid.*, p.128.

deciding when a court might be prepared to grant an injunction, rather than in exploring even further the conceptual basis of automatic or elective effect."[124]

To understand what is offered by the acceptance view, and the practical effect it might have, it is necessary to briefly digress to contrast to it the unilateral / automatic view.

6.1 Unilateral / Automatic View[125]

There is a lot of truth in Smith & Randall's suggestion that the emphasis should really be on remedies; what would otherwise be something of an intellectual curiosity cannot be divorced from the fact that the principles underlying the courts' unwillingness to order specific performance have, in the words of Lord Sumption J.S.C. in *Geys*, "always been influenced by a strong pragmatic aversion to the specific enforcement of contractual obligations in circumstances where they sterilise productive resources or lead to their wasteful allocation."[126]

In similar vein, it has been observed by Sappideen, O'Grady & Warburton that the rationale behind the unilateral termination approach was that the contractual relationship is "coterminous with the ability of the law to compel performance."[127] As such, the courts would not specifically enforce a contract of employment by "forcing a relationship which

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[124] *ibid.*

[125] First indentified in *Vine v N.D.L.B.* [1956] 1 QB 658 (C.A.) [1957] A.C. 488 (H.L.), cases in which this view prevailed include *Denmark Productions Ltd. v Boscobel Productions Ltd.* [1969] 1 Q.B. 699 and *Sanders v Ernest A. Neale Ltd.* [1974] I.C.R. 565.

[126] *Geys v Société Générale* [2013] 2 W.L.R. 50 at 89.

[127] Sappideen, O'Grady & Warburton *Macken's Law of Employment* 6th ed. (Thomson Reuters, N.S.W, 2009), p.323. "Specific Performance and Employment Contracts" (1998) 27(1) I.L.J. 37. Although it was noted in *Purcell v Tullett Prebon (Australia) Pty Ltd.* [2010] NSWCA 150 that for a certain time in England, "the opinion was maintained that contracts of employment are *sui generis*, in that certain forms of repudiation are effective automatically to terminate them without the need for their acceptance." However, Lord Sumption J.S.C. observed in *Geys v Société Générale* [2013] 2 W.L.R. 50 at 101 that "Much of the discussion of this question in the cases and textbooks is bedevilled by the persistent fallacy that under the general law of contract the employee would have had an unfettered election to treat the contract as subsisting and that the same must apply to contracts of employment unless a special exception can be carved out for such contracts."

required personal trust and confidence and the performance of personal services upon an unwilling party."

However, the same authors argue that "even if this were the true basis of the rule there is no longer an absolute rule preventing the grant of equitable remedies in favour of an employee."[128] Indeed, if the unilateral view were to prevail, then an employer could simply summarily dismiss an employee without fear of an injunction being granted (although could of course leave themselves exposed to an unfair dismissals claim). Without any contract left to perform, and to adopt a point well made by Brodie,[129] the courts would be stymied in their ability to make any orders for specific enforcement and performance, even on a limited basis, such as an order to pay an employee's salary pending the hearing of the action. In fact, the limitations of the unilateral view had been identified by Asquith L.J. in the case of *Howard v Pickford Tool Co. Ltd.*[130] He observed that:

> "An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind. Therefore a declaration that the defendants had repudiated their contract with the plaintiff would be entirely valueless to the plaintiff if it appeared at the same time, as it must appear in this case, that it was not accepted."[131]

The alternative approach is the acceptance / elective view.

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[128] See Chapter Four, section 6.

[129] Brodie "Specific Performance and Employment Contracts" (1998) 27(1) I.L.J. 37.

[130] [1951] 1 K.B. 417.

[131] *ibid.* at 421.

6.2 Acceptance / Elective View[132]

The acceptance view requires acceptance of repudiation in order to put an end to a contract. Anderman points out that the recognition and adoption of the acceptance theory "had the advantage of bringing the law of repudiation of employment contracts into line with the general law of contract..."[133] That said, there may actually be marginal difference between the theories in practice. As Smith & Randall point out, "the key case is *Gunton v Richmond Upon Thames London Borough Council*, both for demonstrating the difference of opinion, and for showing how little that difference may achieve in practice."[134] Despite their differences, all three judges were agreed that there could be no open-ended claim for future wages; such a claim would be restricted to the notice period plus an amount representing wages during the time taken to conclude the resolution of the issues between the parties, such as during the notional period of the operation of a disciplinary procedure (sometimes referred to as the "*Gunton* extension."[135]) Related to this, the importance of the acceptance view is not confined to the obvious attempt to maintain an employment relationship position and to be remunerated accordingly. As the Federal Court explained in *Turner v Australasian Coal and Shale Employees Federation*,[136] there may sometimes be reasons other than seeking remuneration for wanting to keep the contract alive:

> "From the employer's point of view, there may be a desire to restrain the employee from accepting employment which would be in breach of a restraint of trade clause, or from acting contrary to some term of the contract which restricts

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[132] Prior to *Geys*, the acceptance view had prevailed in the lower courts in the case of *Dietman v Brent London Borough Council* [1987] I.C.R. 737 and *Rigby v Ferodo*. [1988] 1 I.C.R. 29. In *Automatic Fire Sprinklers v Watson*, (1946) 72 C.L.R. 435 the Australian High Court determined that the elective and not the automatic theory should apply. This was confirmed in *Byrne v Australian Airlines Ltd.* (1995) 185 C.L.R. 410 See generally Sappideen, O'Grady & Warburton *Macken's Law of Employment* 6th ed. (Thomson Reuters, N.S.W., 2009), p.323.

[133] Anderman *Labour Law* 4th ed. (Butterworths, London, 2000), p.103.

[134] Smith & Randall *Contract Actions in Employment Law –Practice and Precedents* 2nd ed. (Bloomsbury Professional, West Sussex, 2011), p.127.

[135] See, for example, Smith "(In)decision time" (2012) 162 N.L.J. 121.

[136] (1984) 6 F.C.R. 177.

> the employee in his or her activities after the end of the employment. From the employee's point of view, there may be entitlements to annual leave or long service leave or superannuation which depend upon the continuance of employment. As Dixon J. said in *Watson's* case, the employer may be persuaded to take back the employee, in which case the period of employment will be unbroken."[137]

A key example of a case in which the contract of employment was deemed worth preserving was that of *Hill v C.A. Parsons & Co. Ltd.*[138] In that case, the plaintiff employee refused to accept that his contract of employment had terminated. The Court of Appeal agreed that the contract still subsisted. A key factor in that determination was the impending coming into force of a statute which would assist the plaintiff if his contract subsisted. As such, Lord Denning M.R. emphasised that in the ordinary course, if a 'master' terminated a contract of employment, "the relationship of master and servant thereupon comes to an end: for it is inconsistent with the confidential nature of the relationship."[139] However, in *Hill*, by invoking the idea of non-acceptance, the Master of the Rolls was able to achieve, in Smith & Randall's words, "the desired result of an extension of the contract by the (deemed) notice period, quite simply in order to bring the claimant under the new provisions of the Industrial Relations Act 1971 which would protect him from the trade union pressure that was being put on the employer to be rid of him."[140]

Crucially, the acceptance theory advanced the ability of a party to seek an injunction. Having noted that the theory provided the legal basis for a greater amount of damages (*viz.* not just the notice period pay, but also pay for the period during which a proper disciplinary procedure – where appropriate – would have taken place[141]), Anderman then

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[137] *ibid.* at 192.

[138] [1972] Ch. 305.

[139] *ibid.* at 314.

[140] Smith & Randall *Contract Actions in Employment Law –Practice and Precedents* 2nd ed. (Bloomsbury Professional, West Sussex, 2011), p.129.

[141] In relation to that extended period, see *Gunton v Richmond Upon Thames London Borough Council* [1981] Ch. 448; [1980] 3 W.L.R. 714; [1980] 3 All E.R. 577.

correctly observes that the courts could "also contemplate the possibility of an interlocutory injunction specifically enforcing a term or even the whole of the employment contract, pending a trial on the action for damages."[142]

The reasons advanced by the Supreme Court in *Geys* for endorsing the elective theory bear rehearsing.[143] As explained by Lord Hope D.P.S.C. in *Geys*, emphasising that it did make a difference which theory was adopted,[144]

> "The essential difference between the two theories may be said to be that under the automatic theory the decision as to whether the contract is at an end is made beyond the control of the innocent party in all circumstances, whereas under the elective theory it is for the innocent party to judge whether it is in his interests to keep the contract alive. Manifest justice favours preferring the interests of the innocent party to those of the wrongdoer. If there exists a good reason and an opportunity for the innocent party to affirm the contract, he should be allowed to do so: *London Transport Executive v Clarke* [1981] ICR 355, 367, per Templeman LJ."[145]

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[142] See Anderman *Labour* Law 4th ed. (Butterworths, London, 2000), p.103.

[143] See also the Australian case of *Purcell v Tullett Prebon (Australia) Pty Ltd.* [2010] NSWCA 150 in which it is noted that both *Byrne v Australian Airlines Ltd.* (1995) 185 C.L.R. 410 and *Visscher v Guidice* (2009) 239 C.L.R. 361 established that "contracts of service are not in a special position and like other contracts they are not terminated by a repudiatory breach even if further performance is suspended."

[144] The authors of Smith & Wood's *Employment Law* had queried whether, intellectual fascination apart, there was really any practical relevance to such considerations: Smith & Baker *Smith & Wood's Employment Law* 10th ed. (O.U.P., Oxford, 2010), p.398. They suggested that it is the application of such theories to unfair dismissals law where their real practical impact can be observed, specifically constructive dismissals. However, Carty "Dismissed Employees: The Search for a More Effective Range of Remedies" (1989) 52(4) M.L.R. 449 at 455 had observed that "the reopening of the debate in England as to whether the elective or automatic theory of repudiation prevailed "increased the chances of a wider range of remedies for dismissed employees" as "the reopened debate may have done something to stimulate the search for a wider range of remedies."

[145] [2013] 2 W.L.R. 50 at 61. Although see the judgment of Lord Sumption J.S.C. in which he forcefully advances the view that *Gunton* was wrongly decided as being, inter alia, contrary to a rule of law which had been settled for at least a quarter of a century: *Geys v Société Générale* [2013] 2 W.L.R. 50 at 100.

The importance of the theories of repudiation is underlined by the *dicta* of Lord Wilson J.S.C. in the same case: as he noted, and in similar vein to the *dictum* in *Turner*, as set out above, depending on the terms of a contract, an increase in salary may depend on the survival of the contract until a particular date; similarly, a pension entitlement may be calculated by reference to final salary, and holiday pay may also be dependent on the contract's survival to a particular date.[146] Lord Wilson J.S.C. also made the very striking point that the proponents of the automatic theory fail to explain how "the competition and the disciplinary cases" are consistent with it (which ties in with Anderman's categorisation as set out above). As Lord Wilson stated, "To describe them as examples of the enforcement only of collateral obligations would, I believe, be to fail to engage sufficiently with their significance."[147]

That said, the acceptance view is not without criticism. Some of these criticisms were articulated by Lord Sumption J.S.C. (dissenting) in *Geys*,[148] and can be summarised as follows:

- The acceptance view is contrary to a rule which had long been settled;[149]
- It is a fallacy to approach the matter as if "under the general law of contract the employee would have had an unfettered election to treat the contract as subsisting and that the same must apply to contracts of employment unless a special exception can be carved out for such contracts;"
- If a contract cannot be performed without co-operation, absent that co-operation, the contract "is in balk" unless it comes to an end;
- It is very difficult to accept that there is a valid distinction which can be made between a contract coming to an end but a relationship enduring;

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[146] *ibid.* at 72.

[147] *ibid.* at 61.

[148] [2013] 2 W.L.R. 50 at 101.

[149] Although Lord Hope D.P.S.C. notes at p.59 that he was persuaded by Lord Wilson J.S.C.'s "careful analysis of the authorities that provide support for the view that repudiation of a contract of employment terminates the contract without the necessity of acceptance by the other party was not as authoritative or as consistent as Lord Sumption JSC indicates..."

- If a contract has not been validly terminated, then an employee is in principle unable to mitigate his loss, even though he is not formally working. As such, an employee could in theory sit back and watch arrears accrue.

To this might be added the idea that any losses incurred could in theory dwarf the bargain entered into between the parties, particularly if a notice period is relatively circumscribed.[150] It could also be argued that it is wrong to preserve an employment relationship if there is to be no specific performance ordered at the hearing of the action.[151]

In practical terms, there must also be some obligation on an employee to highlight non-acceptance as soon as practicable. It does not seem right in principle that an employee could simply sit back and after some time, indicate such non-acceptance. Furthermore, the acceptance view requires scrutiny to ensure that in effecting any termination, any necessary steps provided by the contract in question, or statute as appropriate, have been followed. It cannot be a carte blanche for employees to simply refuse to accept termination of their employment relationship.

The decision in *Geys* would seem to answer Ewing's 1983 comment that "the waters are not yet still."[152] In Ireland the waters, both intellectual and practical, have in practical terms long been still, having never really been disturbed in any meaningful way.

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[150] Although this must be qualified by Buckley L.J.'s view in *Gunton v Richmond-upon-Thames London Borough Council*, [1981] Ch. 448; [1980] 3 W.L.R. 714; [1980] 3 All E.R. 577 that an employee's cause of action arises when he is wrongfully excluded from employment and a subsequent acceptance of repudiation does not create a new cause of action, thereby stretching out the theoretical losses incurred.

[151] Although it does not directly address this concern, one of the advantages of the *Fennelly* order, considered in Chapter Six, is that it preserves the essence of the employment relationship in the form of the wage-work bargain, but it is at the election of the employer whether they want the employee to actually work.

[152] Ewing "Remedies for Breach of the Contract of Employment" (1993) 52 C.L.J. 405 at 411.

7. Unaccepted Repudiation in Ireland

The main decision in relation to repudiation in this jurisdiction is that of Costello J. in *Industrial Yarns v Greene*,[153] in which he referenced the approach of the English courts in *Gunton*. Without much further analysis, Costello J. held that at common law,

> "...repudiation would not automatically bring the contract of employment to an end; the employee is free to accept that the repudiation has terminated the contract or not to do so...If he accepts the repudiation of the contract then there has been a constructive dismissal of the employee at common law and the contract has been terminated by the employer."[154]

Thus was the acceptance view of repudiation established in Irish common law.[155]

This view has never really been formally challenged or scrutinised in any real detail since and in *Pickering v Microsoft Ireland Operations Ltd.*[156] Smyth J. noted the view in academic comment that Costello J.'s decision "puts the matter beyond doubt."[157]

Previous cases had referred to the doctrine, but little more. At the interlocutory hearing in *Sheehy v Ryan*,[158] Peart J. made reference to the fact that a question which arose on the

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[153] [1984] I.L.R.M. 15. See generally Connaughton "Discipline and Dismissal – Practice and Procedure" (1995) 2(11) C.L.P. 278 and Von Prondzynski and McCarthy *Employment Law* (Sweet & Maxwell, London, 1984).

[154] [1984] I.L.R.M. 15 at 21. Considered by Edwards J. in *Coffey v William Connolly & Sons Ltd.* [2007] IEHC 319.

[155] Albeit that, as seen above, in an application dealt with subsequent to *Industrial Yarns*, Murphy J. refused an injunction in *Goldrick v Dublin Corporation* on the basis that "there was no point in trying to restrain the defendants from doing something they had already done": "Court refuses injunction" The Irish Times, December 17, 1985.

[156] [2006] 17 E.L.R. 65.

[157] *ibid.* at 128. Citing Clark *Contract Law in Ireland* 4th ed. (Round Hall Sweet & Maxwell, Dublin, 1998), p. 435. *Industrial Yarns* was in itself a relatively unusual case in that it came before the High Court by way of an appeal from the Employment Appeals Tribunal in relation to a claim under the Minimum Notice and Terms of Employment Act 1973, thus affording Costello J. the opportunity to address the doctrine of unaccepted repudiation.

plaintiff's evidence was whether "the termination constitutes an unlawful repudiation of the plaintiff's appointment, which has not been accepted by the plaintiff." This was linked to the question of whether a valid redundancy situation arose, or whether a situation had been effectively contrived to terminate the plaintiff's employment. However, the point was not developed.

It was a point which was expanded on in the case of *Davis v Walshe*,[159] with the potential impact of the doctrine of unaccepted repudiation manifest. The plaintiff in *Davis* did not accept that he had been properly dismissed. As pointed out by Murphy J., "If the applicant denies he has been dismissed — insofar as no proper notice was given — he is, paradoxically, undermining his right to equitable relief."[160] This was because, in Murphy J.'s words, "equitable relief has no independent existence apart from a claim for wrongful dismissal"

This should in principle create a real difficulty for plaintiffs, yet did not appear to do so in *Coffey v Connolly & Sons Ltd.*[161] The plaintiff in *Coffey* argued that the defendant's action in purportedly dismissing her was wrongful, and amounted to a repudiatory breach of contract, but that it did not of itself automatically terminate the employment relationship. As summarised by Edwards J., "She does not contend that she has been wrongfully dismissed. Her position is that she has not in fact been dismissed." The plaintiff claimed that she had elected not to regard the employer's breach of contract as terminating the contract. Edwards J., relying on *Industrial Yarns*, was satisfied that the plaintiff was entitled to adopt that position. Surprisingly, he did not develop this and consider the practical effect of refusing to accept a dismissal. One broader comment made by Edwards J. is *Coffey* is also of some importance. He indicated that he was not required at the interlocutory hearing to determine whether the plaintiff's employment had been either lawfully or effectively determined (although by definition, in making any interlocutory orders, a court would therefore have to assume that it had not).

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[158] unreported, High Court, Peart J., August 29, 2002.

[159] [2003] 14 E.L.R. 1.

[160] *ibid.* at 5.

[161] [2007] IEHC 319.

The practical effect of a plaintiff's position was considered by Irvine J. in *Stoskus v Goode Concrete,*[162] although she did not engage with the underlying jurisprudence. The case involved a dismissal pursuant to a disciplinary hearing. At the interlocutory application, the plaintiff sought a *Fennelly* order (whereby he would continue to be paid his salary in exchange for being available for work),[163] although also *de facto* accepted that he would not seek reinstatement, and would confine his substantive claim to declaratory relief. As Irvine J. pointed out, if the plaintiff was contending that there was a want of natural justice and fair procedures that "automatically means that the contract of employment from a legal perspective remains in being." As such, she took the view that it was normal in such circumstances for a plaintiff to contend for a right of reinstatement, however unlikely it was that reinstatement would be ordered.

One plausible way of addressing this is to adopt the "partial survival" approach, as identified by Freedland. In other words, the courts could view an employee "as asserting that the previously existing contract has been wrongfully but effectively terminated by the employing entity." This somewhat "artificial construct" does circumnavigate – albeit in a highly unsatisfactory way – what appears to be a difficult problem for plaintiffs. A variation of this has been advanced by Costello, who suggests that the theory of automatic termination was replaced by a "modified theory of relative existence," where by the contract of employment was deemed to continue in existence "for the purpose of the recognition of some rights, but not others."[164]

The importance of the elective theory of repudiation cannot be underestimated. Under the automatic theory, an employee was left to a remedy in damages in a wrongful dismissal action, or alternatively to an unfair dismissals action under the Unfair Dismissals Act 1977. As such, it could be said that the automatic theory in principle helped shape the dismissal action; it was only with the introduction of the elective theory that an employee could more readily seek the intervention of the courts: indeed, it is notable that it was Costello J., who handed down the hugely significant judgment in *Fennelly v*

[162] [2007] IEHC 432.

[163] See Chapter Four, section 11.

[164] Costello "Regulating the Anti-Dismissal Injunction" in Breen, Casey & Kerr *Liber Memorialis Professor James C. Brady* (Roundhall Sweet and Maxwell, Dublin, 2001), p.188 at 191.

Assicurazioni Generali S.P.A.[165] who had previously embraced the acceptance / elective theory in *Industrial Yarns v Greene*.[166]

What is frustrating about the lack of analysis of the doctrine in this jurisdiction is that it can lead a court into byways that it need not otherwise visit. For example, in *Bergin v Galway Clinic Doughiska Ltd,*[167] Clarke J. had to address whether there was a distinction between legal standards applicable based on whether an employee sought an injunction before or after dismissal. As he pointed out, it was not appropriate to make such a distinction such that an early, pre-dismissal application based on degrees of "luck, diligence, prescience or a combination of any of those"[168] would somehow admit of a different standard. A coherent approach to unaccepted repudiation in this jurisdiction would have made such a statement superfluous.

8. Applicability Other Than to Dismissal

Termination can encompass a lot more than a straight dismissal; the courts are prepared to acknowledge that an employer may commit a fundamental breach of contract, going to the root of the contract,[169] such that it amounts to termination (although it should also be stressed that the courts will consider the cumulative effect of the acts complained of).[170] More broadly, having referred to cases of "total repudiation" such as an "out and out dismissal by the employer" in *Gunton v Richmond Upon Thames L.B.C.,*[171] Shaw L.J. then referred to a situation where repudiation is more "oblique," such as "where the employer seeks to change the nature of the work required to be done or the times of

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[165] (1985) 3 I.L.T. 73.

[166] [1984] I.L.R.M. 15. See generally Connaughton "Discipline and Dismissal – Practice and Procedure" (1995) 2(11) C.L.P. 278 and Von Prondzynski and McCarthy *Employment Law* (Sweet & Maxwell, London, 1984).

[167] [2008] 2 I.R. 205.

[168] *ibid.* at 215, when considering whether the courts should draw a distinction in relation to an injunction being mandatory or prohibitory in nature by reference to the point at which it was sought.

[169] See the acceptance of this by Laffoy J. in *Berber v Dunnes Stores* [2006] IEHC 327.

[170] As explained by Finnegan J. in the Supreme Court in *Berber v Dunnes Stores* [2009] IESC 10.

[171] [1981] Ch. 448.

employment."[172] As such, steps taken prior to dismissal can, in appropriate circumstances, be viewed as an attempt to repudiate a contract of employment.

9. Conclusion

This Chapter has considered two well established and embedded principles: natural and constitutional justice is both well established and explicitly acknowledged by the courts. Unaccepted repudiation is also well established, but in a much more implicit form. However, each has had a profound role to play in relation to the anti-dismissal injunction. The right to natural and constitutional justice, in particular where misconduct is alleged, is a central feature of the anti-dismissal injunction. Unaccepted repudiation, in particular an approval of the acceptance / elective theory of repudiation, has a direct impact on the types of reliefs which are available: if an employee does not accept that their employment is at an end, that clearly influences what form of orders a court can make. Such orders and remedies will be considered in the next Chapter. In many ways, a consideration of the reliefs available and generally granted by the courts also comes within the umbrella heading of "established principles," although the application of those reliefs in particular situations can in itself lead to a measure of uncertainty.

[172] *ibid.* at 459.

CHAPTER FOUR

1. Introduction

The focus of this Chapter is on Reliefs and Remedies. This is in some ways a continuation of the "established underlying principles" considered in Chapter Three, although as will be seen, certain approaches to aspects of reliefs and remedies are still somewhat unsettled and are perhaps better classified as more in the style of emerging principles.[1]

A spectrum of the reliefs which are frequently sought at the interlocutory stage in the context of the breakdown of the employment relationship has been identified by Charleton.[2] This spectrum runs from "extreme relief, such as requiring that the plaintiff be reinstated immediately" to "remedies which are more attractive from the point of view of a judge hearing an interlocutory application, such as maintaining the plaintiff on salary, or on a proportion of salary, pending the hearing of the matter."[3] However, in considering the range of options available to a court, Charleton comments that he has an issue "as to the wide nature of the discretion given. I confess personal unhappiness with it."[4] It is not often that one gets such an unvarnished insight into judicial thinking. It points to one of the factors which can create uncertainty in terms of any interlocutory application: there is significant judicial discretion in terms of what might actually be ordered; as a result, orders can be made on a very fact specific basis, which makes any attempt to analyse the types of orders granted difficult. Conversely, there are other reliefs, such as specific performance, which are not as a rule granted at the interim or interlocutory stage, even though the intellectual impediments to same have in many ways been discounted.

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[1] See, for example, section 7 and the consideration of the willingness of the courts to make orders at the interlocutory stage of proceedings which orders are not (and in many ways cannot) be made at a plenary hearing. Inasmuch as labels are helpful, the way in which the "*Fennelly* order", considered in section 11, has evolved over the past twenty plus years also puts it more within the rubric of an "emerging principle" rather than an established principle, although it has arguably been established in current form since the turn of the century.

[2] Charleton "Employment Injunctions: An Over-Loose Discretion" (2009) 9(2) J.S.I.J. 1 at 12.

[3] For a more detailed overview of the types of orders made, see section 10.

[4] *ibid.* at 14.

The first part of this Chapter examines the reliefs and remedies which are available from the courts. There is a particular focus on what is termed the "*Fennelly* order," as this is the form of order upon which the growth of interlocutory applications was essentially built.

The second part of the Chapter considers those reliefs provided under statute: the importance of the latter is that there is a clear distinction between wrongful and unfair dismissals, and the courts – albeit not without a certain degree of hesitation in areas such as redundancy – generally approach unfair dismissal on the basis that it is more appropriately addressed in the relevant statutory forum, the Employment Appeals Tribunal. How this impacts on the ability to seek interlocutory relief from the courts will be considered in Chapter Six.[5]

2. Reliefs and Remedies

Clarke J. emphasised in *Bergin v Galway Clinic Doughiska Ltd.*[6] that at a full trial, an employee is entitled to whatever relief a court deems appropriate.[7] He felt it most likely that this would be a claim in damages, and noted that other forms of order are exceptions which "stem from special circumstances."[8] This is because in general terms, once a valid contract is in force,[9]

- The courts will not enforce a broken contract by specific performance;
- The courts will, however, enforce a negative covenant in an employment contract, such as a covenant not to compete;[10]

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[5] See Chapter Six, section 2.1.5.

[6] [2008] 2 I.R. 205.

[7] Of course, in respect of judicial review proceedings, the relevant reliefs are those of *certiorari*, *mandamus* and prohibition.

[8] *ibid.* at 216.

[9] See *Central Meat Products Co Ltd v Carney* [1944] Ir. Jur. Rep. 34, in which an injunction was refused as no enforceable contract existed between the plaintiffs and the defendant.

[10] As noted by Halsbury's *Laws of England* Vol.24 (reissue), para.899, a court may imply a negative covenant and grant an injunction to restrain the breach of this implied covenant. See *Wolverhampton and*

- There are limited exceptions to the general rule.

This views were expressed in the context of what a court is likely to do at a full trial. However, and as will be seen, powerful reliefs can be sought and granted at the interlocutory stage, starting with injunctions.

3. Injunctions

It was pointed out in *CSR Ltd. v Cigna Insurance Australia Ltd.*[11] that "it should be borne in mind that the term 'injunction' in the parlance of equity has no fixed definition and that it is legal usage which decides which court orders are to be identified as injunctions." As such, it is important to set out the basis upon which injunctions can be granted.

3.1 Legislative Basis

The primary basis for granting injunctions is the Supreme Court of Judicature Act (Ireland) 1877.[12] Section 28(8) of the Act empowers the High Court to grant both interlocutory and final injunctions. It is clear from the wording of the section that an injunction can be granted if the court feels that it would be "just" and "convenient" and on such terms and conditions as the court thinks just.[13]

The use of the words "just" and "convenient" means that, in practical terms, the courts have a significant degree of latitude in terms of how they wish to deal with an application

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Walsall Railway Co v London and North-Western Railway Co. (1873) L.R. 16 Eq. 433 at 440, *per* Lord Selborne. See also *Metropolitan Electric Supply Co v Ginder* [1901] 2 Ch. 799 and *Irish Shell Ltd v Elm Motors Ltd* [1984] I.R. 200; [1982] I.L.R.M. 519.

[11] (1997) 189 C.L.R. 345 at 390, referring to the unreported decision of Millett J. in *ISC Technologies Ltd. v WK Radcliffe* unreported, English High Court of Justice, Chancery Division, December 7, 1990 at 10-12.

[12] As Lindley L.J. stated in the case of *Holmes v Millage* [1893] 1 Q.B. 551 at 557, "the principles on which the jurisdiction of the Court of Chancery rested have not been changed."

[13] The use of the two words was considered by Jessel M.R. in *Beddow v Beddow* (1878) 9 Ch. D. 89 at 93, the Master of the Rolls holding that he had "unlimited power to grant an injunction in any case where it would be right or just to do so."

for an injunction.[14] Some commentators such as Meagher, Gummow and Lehane have decried this latitude and discretion by referring to the increasing - and unhappy - tendency for courts to empower themselves to grant injunctions whether related or not to any legal or equitable cause of action, and to cases in which such a tendency is evident as 'astonishing.'[15] In terms of equitable remedies, the whole point of such remedies is that they can be tailored to facts as appropriate.[16] In *Mercedes Benz v Leiduck*[17] Lord Nicholls referred to the fact that as circumstances change, so must the situations in which the courts will exercise their discretion to grant injunctions. However, in *Patterson v Murphy*[18] Costello J. pointed out that there were "well established principles in which the Court exercises this discretion." Similarly in *Mercedes Benz*, Lord Nicholls referred to the exercise of discretion being "principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester-year."[19] Although those words were spoken in the context of the development of "new" forms of injunctions, there is no reason why they should not equally apply to the development of existing, recognised injunctions and remedies. As Denning M.R. observed in *Hill v C.A. Parsons Ltd.,*[20] Brightman J. had, in the court below, "overlooked the fundamental principle that, whenever a man has a right, the law should give a remedy. The latin maxim is *ubi jus ibi remedium*. This principle enables us to step over the trip-wires of previous cases and to bring the law into accord with the needs of today."[21]

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[14] See the observations of Lord Cottenham L.C. in *Bacon v Jones* (1839) 4 M. & C. 433 at 436.

[15] See Meagher, Gummow & Lehane, *Equity*, Doctrines and Remedies 4th ed. (Butterworths Lexis Nexis, Australia, 2002), p.718, citing *Re Oriental Credit Ltd.* [1988] Ch. 204; [1988] 1 All E.R. 892.

[16] When the relief sought is equitable in nature, what are termed the "maxims of equity" will apply. Five of those equitable maxims tend to play a more prominent role in the granting or otherwise of injunctions, namely that (a) Equity acts *in personam*; (b) He who seeks equity must do equity; (c) He who comes to equity must come with clean hands; (d) Delay defeats equity; and (e) Equity, like nature, does nothing in vain.

[17] [1996] A.C. 284; [1995] 3 W.L.R. 718; [1995] 3 All E.R. 929.

[18] [1978] I.L.R.M. 85 at 99.

[19] [1996] A.C. 284 at 308; [1995] 3 W.L.R. 718 at 736; [1995] 3 All E.R. 929 at 946.

[20] [1972] Ch. 305.

[21] *ibid.* at 316.

3.2 Full Original Jurisdiction

The courts may also invoke their own jurisdiction as the basis for granting an injunction. The plaintiff in *McGrath v Athlone Institute of Technology*[22] was awaiting a determination from the Labour Court as to whether he was entitled to a contract of indefinite duration pursuant to the Protection of Employees (Fixed Term Work) Act 2003. He brought an application before the High Court to prevent the termination of his employment on the basis that he was seeking an order in aid of what he hoped would be a favourable Labour Court decision, but against the background of the Labour Court having no jurisdiction to grant injunctions. As summarised by Hogan J., the real question was whether the High Court "would enjoy a jurisdiction to grant an injunction in aid of the Labour Court in circumstances where the plaintiff's right to secure the benefit of that decision would otherwise have been wholly undermined."[23] Hogan J. felt that such jurisdiction must exist, at a minimum to ensure that legal rights could be appropriately vindicated. He ventured that:

> "in that situation this Court would enjoy such a jurisdiction, not least by reason of the inherent full original jurisdiction which this Court enjoys to determine all questions of law and fact by virtue of Article 34.3.1 of the Constitution."[24]

However, on the basis that the Supreme Court decisions in *Maha Lingham v Health Service Executive*[25] and *Sheehy v Ryan*[26] confirmed that employment could be terminated for any reason or no reason, Hogan J. felt constrained to refuse the injunction sought.[27] Nevertheless, Hogan J.'s comments highlight just how potent the injunction can be as a remedy.

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[22] [2011] IEHC 254.

[23] *ibid*, para.15.

[24] A point Hogan J. reaffirmed in the related case of *Holland v Athlone Institute of Technology* [2012] 23 E.L.R. 1.

[25] [2006] 17 E.L.R. 137.

[26] [2008] 4 I.R. 258. See also *Pickering v Microsoft Ireland Operations Ltd.* (2006) 17 E.L.R. 65, which followed the approach of Carroll J. in the High Court in *Sheehy*.

[27] See also the judgment of Laffoy J. in *Kirwan v The Mental Health Commission* [2012] IEHC 217.

3.3 Damages as an Adequate Remedy

It is, however, important to remember that pursuant to s.2 of the Chancery Amendment Act 1858 (more popularly known as Lord Cairns' Act), damages may be awarded in addition to, or in substitution for, the granting of an injunction.[28] The circumstances in which a court will do so were considered in the case of *Shelfer v City of London Electric Lighting Co.*[29] These principles were adopted and adapted in this jurisdiction in the case of *Patterson v Murphy*[30] by Costello J., agreeing with the submission on behalf of the defendants that even if an infringement of the plaintiffs' rights has been established, the court has a discretion to award damages in *lieu* of an injunction. Costello J. also observed that there were "well established principles on which the court exercises this discretion."[31] However, there is still a discretion residing with the court as to whether to grant an injunction even if the principles in *Shelfer* are met. This is clear from the case of *Jaggard v Sawyer.*[32] In that case, Millett L.J. observed that whilst A.L. Smith L.J.'s

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[28] See, inter alia, the *dictum* of Lord Chelmsford L.C. in *Betts v Neilson* (1868) 3 Ch. App. 429 at 440. See also *Leeds Industrial Co-Operative Society Ltd. v Slack* [1924] A.C. 851.

[29] [1895] 1 Ch. 287 at 322. See also the summary of the general principles made in *Coll v Home and Colonial Stores Ltd.* [1904] A.C 179 at 193, as adopted by Dixon J. in *McGrath v Munster and Leinster Bank Ltd.* [1959] I.R. 313 at 328.

[30] [1978] I.L.R.M. 85. Costello J. summarised them as follows: "1. When an infringement of the plaintiffs' right and a threatened further infringement to a material extent has been established the plaintiff is *prima facie* entitled to an injunction. There may be circumstances however, depriving the plaintiff of this *prima facie* right but generally speaking the plaintiff will only be deprived of an injunction in very exceptional circumstances. 2. If the injury to the plaintiff's rights is small, and is one capable of being estimated in money, and is one which can be adequately compensated by a small money payment, and the case is one in which it would be oppressive to the defendant to grant an injunction, then these are the circumstances in which damages in lieu of an injunction may be granted. 3. The conduct of the plaintiff may be such as to disentitle him to an injunction. The conduct of the defendant may be such as to disentitle him from seeking the substitution of damages for an injunction. 4. The mere fact that a wrong-doer is able and willing to pay for the injury he has inflicted is not a ground for substituting damages." Approved by Feeney J. in *Mc Keever v Hay* [2008] IEHC 145. See also *Doherty v Allman* (1878) 3 App. Cas. 709 at 728. *per* Lord Blackburn.

[31] The irony of this remark is that it was Costello J. who subsequently, in one of the key cases involving an application for an anti-dismissal injunction, *Fennelly* v *Assicurazioni Generali S.P.A.* (1985) 3 I.L.T.R. 73, strayed far beyond understood principles in the exercise of his discretion in that case.

[32] [1995] 1 W.L.R. 269.

check-list in *Shelfer* had stood the test of time, it was only a "working rule" rather than an exhaustive statement."[33]

However, one area in which the courts have been relatively consistent in terms of granting injunctions is in relation to enforcing negative promises in a contract.

3.4 Enforcing Negative Promises

In *Irish Shell Ltd. v Elm Motors Ltd.*[34] Costello J. felt that "it is the Court's duty to see that that contract, which in my judgment is an enforceable one, is carried out."[35] In so saying, Costello J. had regard to the statement of Lord Cairns L.C. in *Doherty v Allman.*[36] In that case, the Lord Chancellor had stated that an injunction "does nothing more than give the sanction of the process of the court to that which is the contract between the parties." The function of the courts was to specifically perform "that negative bargain which the parties have made, with their eyes open, between themselves."[37] However, with this comes a caution: it is quite properly suggested by Meagher, Gummow and Lehane that the treatment of *Doherty v Allman* is the "starting point, not a summation, of equity's attitude to negative stipulations."[38]

The principles set out in *Doherty v Allman*[39] were also applied at the interlocutory stage in the case of *Dublin Port and Docks Board v Brittania Dredging Co Ltd.,*[40] an approach which subsequently found favour with Clarke J. in the case of *Irish Shell Ltd. v J.H.*

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[33] *ibid.* at 287.

[34] [1984] I.R. 200; [1982] I.L.R.M. 519.

[35] *ibid.* at 217; *ibid.* at 532.

[36] (1878) 3 App. Cas. 709.

[37] *ibid.* at 720. It was made clear in *Shaw v Applegate* [1977] 1 W.L.R. 970 at 975, *per* Buckley L.J. that the statement in *Doherty* must be applied having regard to the considerations in each individual case and that wider discretionary considerations must be applied when an injunction of a mandatory nature is sought.

[38] Meagher Gummow & Lehane's *Equity Doctrines and Remedies* 4th ed. (Butterworths, Australia 2002), p.750.

[39] (1878) 3 App. Cas. 709.

[40] [1968] I.R. 136.

McLoughlin (Balbriggan) Ltd..[41]

3.4.1 Application to Contracts of Employment

This approach to enforcing negative promises is well entrenched in employment law. Spry provides an excellent summary in that regard, referencing the case of *Lumley v Wagner*.[42] The plaintiff in that case was enjoined from singing for someone other than the party with whom she had an exclusive contract. As Spry explains:

> "The doctrine in *Lumley v Wagner* applies so as to enable a negative obligation under a contract, that is, an obligation not to perform a particular act, to be enforced independently in appropriate circumstances, even although the contract is one that in other respects is enforceable only by damages or, indeed, is not otherwise enforceable at all. What must at all times be borne carefully in mind is that injunctions on a *Lumley v Wagner* basis are merely instances of specific performance of part of a contract."[43]

The same author also observes, however, that the difficulty in seeking an order similar to that in *Lumley v Wagner* is that such cases involve discretionary considerations of such significance that they may militate against granting injunctive relief. The example proffered is that of its being contrary to public policy "to enjoin a defendant from accepting any employment other than that which he has agreed to accept under the contract in question."[44] An alternative analysis suggests that cases such as *Lumley v Wagner* involve contracts of "special services."[45]

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[41] [2005] IEHC 304.

[42] (1852) De G.M. &G. 604, 42 E.R. 687. See also *Warner Brothers Pictures Incorporated v Nelson* [1937] 1 K.B. 209. For a critique, indeed criticism, of Lord St. Leonards' approach in *Lumley*, see Ashley "Specific Performance by Injunction" (1906) 6(2) Columbia Law Rev. 82.

[43] Spry *The Principles of Equitable Remedies* 8th ed. (Sweet & Maxwell, London, 2010), p.575. See also *Warner Bros. Pictures Inc. v Nelson* [1937] 1 K.B. 209.

[44] *ibid.*, p.599.

[45] Meagher, Gummow and Lehane *Equity - Doctrines and Remedies* 2nd ed., (Butterworths Lexis Nexis, Australia, 2002), p.755. See also the consideration of the position of high profile and skilled employees in Chapter Six, sections 2.3.4 and 2.3.5.

An important point in relation to the decision in *Lumley v Wagner* is made by Keane, namely that "in cases of personal service, the courts have granted injunctions that have come remarkably close to decrees of specific performance, while not crossing that perilous dividing line."[46] They have managed to do so by creating what are in effect divisible contracts, whereby they assert, as was done in *Lumley*, that "the contract was to sing for the plaintiff, and also not to sing for others." As explained by Kay L.J. in *Ryan v Mutual Tontine*[47] in doing so, the courts hold that "though we cannot enforce performance of the contract to sing for a particular person, and so cannot enforce the whole contract; nevertheless, there being the independent negative stipulation against singing for others, we can enforce that by injunction."[48]

In that regard, a cautionary note was also sounded by Nourse L.J. in the case of *Warren v Mendy*.[49] He noted that "the court ought not to enforce the performance of the negative obligations if their enforcement will effectively compel the servant to perform his positive obligations under the contract."[50] As will be seen in Chapter Six, this becomes very important in that the courts now approach anti-dismissal injunctions as being mandatory, rather than prohibitory, in nature.[51]

Keane's comment in relation to the at-times thin distinction between injunctions and specific performance is underscored by a consideration of whether the courts can and will grant an order of specific performance in the context of the employment relationship, and

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[46] Keane *Equity and the Law of Trusts in the Republic of Ireland* 2nd ed. (Bloomsbury, Dublin, 2011), p289.

[47] (1893) 1 Ch. 116.

[48] *ibid.* at 128.

[49] [1989] 1 W.L.R. 853. Also a case involving a "special service" in that it involved a boxer.

[50] *ibid.* at 867. See also *Page One Records Ltd v Britton* [1968] 1 W.L.R. 157 at 168, in which Stamp J. refused to grant an injunction which would have forced the employment of a plaintiff in whom the defendants "for reasons good, bad or indifferent have lost confidence." Meagher, Gummow and Lehane *Equity - Doctrines and Remedies* 2nd ed., (Butterworths Lexis Nexis, Australia, 2002), p.756 suggest that this case is, on the face of it, difficult to reconcile with *Lumley v Wagner,* though point to the difference in personal interdependence and duration of any potential injunction.

[51] See Chapter Six, section 2.1.5 and the case of *Bergin v Galway Clinic Doughiska Ltd.* [2008] 2 I.R. 205.

the related question of the interaction between injunctions and specific performance. It is easier to address the former by looking first at the latter.

4. Injunctions and Specific Performance

There are a number of similarities between injunctions and specific performance. Both are discretionary equitable remedies, based on established principles. Orders will not be granted if damages would provide an adequate remedy.[52] Despite the courts making distinctions between enforcing performance and enforcing negative stipulations, the reality is that an enforcing mandatory injunction, which requires positive action on the part of the person to whom it is directed, is often equated with a decree for specific performance.[53] Confusing the matter further, injunctions may be granted in aid of or ancillary to a claim for specific performance or in tandem with a claim for specific performance, particularly at the interim or interlocutory stage.[54]

As observed by Keane in his work on *Equity and the Law of Trusts in the Republic of Ireland*, the relevance of the distinction really arises when dealing with contracts, in particular when a mandatory injunction is sought and a court is asked to enforce a single term of a contract. In such circumstances, he notes that that court will "have to consider whether the term would be capable of being specifically performed if it stood alone and whether in all the circumstances it should be enforced on its own."[55] Spry also refers to the enforcement of "some only of the terms of an agreement, although other terms are not enforceable *in specie*."[56]

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[52] See *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch. 116 at 125, *per* Lopes L.J.

[53] In *Dowty Boulton Paul Ltd. v Wolverhampton Corporation* [1971] 1 W.L.R. 204 Pennycuick V.C. considered that there was no difference between an order for specific performance and a mandatory injunction, as stated by Millett L.J. in *Co-Operative Insurance v Argyll Stores* [1998] A.C. 1; [1996] 1 Ch. 286 at 302; [1997] 2 W.L.R. 898.

[54] See, for example, *Preston v Luck* (1884) 27 Ch.D. 497, in which an injunction was granted to preserve a patent pending the resolution of a claim for specific performance.

[55] Keane, *Equity and the Law of Trusts in the Republic of Ireland* 2nd ed. (Bloomsbury Professional, Dublin, 2011), p.310.

[56] Spry *The Principles of Equitable Remedies* 8th ed. (Sweet & Maxwell, London, 2010), p.574.

For all the legal niceties, in practical terms in an employment context the question of negative stipulations is less important than positive enforcement. Once that leap has been made, the courts are relatively agnostic as to whether they class orders as mandatory injunctions or specific performance. In *McNamara v Health Service Executive*[57] Laffoy J. commented that she did not think "that a mandatory injunction is an appropriate form of relief in this case, in that it is tantamount to specific performance of an employment contract." More generally, in *Whitwood Chemical Co. v Hardman*[58] Lindley L.J., advancing the idea that to decree specific performance could "generally do much more harm" than by leaving matters alone, felt that it was "immaterial" whether "it is attempted to enforce these contracts directly by a decree of specific performance, or indirectly by an injunction."[59]

Spry advances the helpful suggestion that injunctions may be ancillary to an order for specific performance, and that injunctions may be more attractive than specific performance in a temporal context. As the author explains, "on an interlocutory application special considerations may require the grant of a mandatory or restorative injunction or even an order that a term of the material contract be performed."[60] Temporality is in fact key. A practice has evolved whereby as a rule of thumb, courts and commentators tend to approach matters on the basis that injunctions are generally sought at the interlocutory stage, orders for specific performance entertained in principle at plenary hearing. The distinction is not always so clear. However, the reality is nicely summarised by Upex:

> "In practice, an order for specific performance and an injunction restraining a breach of contract may have the same effect – that of maintaining the relationship of employer and employee. But, in cases where one of the parties wishes to stop the other from taking or threatening to take an action which would be to his or her detriment, the most common relief sought is an injunction restraining the action or

[57] [2009] IEHC 418.

[58] (1891) 2 Ch. 416.

[59] *ibid.* at 428.

[60] Spry *The Principles of Equitable Remedies* 8th ed. (Sweet & Maxwell, London, 2010), p.571. One rarely, if ever, hears of an interlocutory order for specific performance.

> threatened action. In cases of this kind, discussion of the principles governing orders of specific performance tend to feature, since it is a principle common to both types of remedy that "the courts are bound to be jealous lest they turn contracts of service into contracts of slavery.""[61]

This situation is far from satisfactory and would benefit from some intellectual housekeeping. That said, there is an inevitable degree of overlap if remedies are approached from the perspective that what is really being considered, regardless of labels applied, is the courts' willingness (or otherwise) to compel parties to work together.

To better understand the distinction (and indeed the overlap), it is necessary to consider the remedy of specific performance on a standalone basis.

5. Specific Performance

In *A Practical Approach to Employment Law*, Bowers[62] sets out a useful summary of the impediments which the courts view as preventing making orders of specific performance in the context of an employment relationship. These include:

- It would amount to forced labour;
- It would be inconsistent with trust and confidence;
- It offends against the doctrine of mutuality, in that an employer reinstating an employee cannot force that employee to work;
- The courts cannot supervise performance of the contract;
- Damages are an adequate remedy.

None of these are peculiarly modern; in *Hill v C.A. Parsons & Co. Ltd.*,[63] counsel for the defendants cited the reasons for the rule against ordering specific performance as being

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[61] Upex *The Law of Termination of Employment* 8th ed. (Jordans, Bristol, 2012), p.390, and referring to *De Francesco v Barnum* [1890] 45 Ch. 430 at 483 *per* Fry L.J.

[62] In Bowers *A Practical Approach to Employment Law* 8th ed. (O.U.P., Oxford, 2009), p.294.

[63] [1972] Ch. 305.

set out in the 1921 edition of *Fry on Specific Performance*[64] (being broadly similar to those set out above). Of the foregoing reasons, as Carty comments, "the notion of not forcing a relationship is paramount."[65]

These reasons (apart from the idea of damages as an adequate remedy, already considered above) will be considered in turn.

5.1 Forced Labour

The apparent unwillingness to direct specific performance of a contract of employment is often illustrated by the *dictum* of Fry L.J. in *De Francesco v Barnum*:[66]

> "For my own part, I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of mankind that the rule of specific performance should be extended to such cases. I think the Courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery; and therefore, speaking for myself, I should lean against the extension of the doctrine of specific performance and injunction in such a manner."[67]

This approach in *De Francesco*, peculiar to its time and to the social circumstances within which it was formulated, has nevertheless been accepted and promoted by the courts,

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[64] Northcote *Fry on Specific Performance* 6th ed. (Stevens and Sons Ltd., London, 1921), p.50.

[65] Carty "Dismissed Employees: The Search for a More Effective Range of Remedies" (1989) 52(4) M.L.R. 449 at 450.

[66] (1890) 45 Ch.D. 430.

[67] *ibid.* at 438. See also the earlier decision of *Gillis v M'Ghee* (1863) 13 Ir.Ch.Rep.48 at 57, in which the court refused to reinstate the plaintiff as the relationship established by a "contract of hiring and service" was of "so personal and confidential a character that the court refuses to entertain jurisdiction in regard to such contracts." Such hesitation is not confined to employment *per se*: in *Rigby v Conol* (1881) 14 Ch.D. 482 Jessel M.R. shied away from specifically enforcing an agreement between members of a trade union, although that decision was informed in part by the provisions of the relevant trade union legislation.

including in this jurisdiction, without question as to whether the underlying social concerns were or are still valid. Those concerns manifest themselves with a degree of comical absurdity in the judgment of Knight Bruce L.J. in the case of *Johnson v Shrewsbury and Birmingham Railway Company*.[68] Knight Bruce L.J. was quite content to illustrate his point about destroying "the comfort of a man's existence for a period of years by compelling him to have constantly about him, in a confidential situation, one to whom he objects" by reference to valets who could faultlessly arrange clothes, coachmen possessed of excellent driving skills, and cooks whose performances were perfect.

Criticisms of the approach in *de Francesco* are well articulated with the observation that the idea of slavery as used historically related to "a farmer or the master of a small workshop and their servants. In modern conditions, it is hardly turning contracts of service into contracts of slavery to order the reinstatement of an engineer in a factory employing 5000 people."[69] A compelling historical analysis is advanced by Freedland as to the reasons why the courts adopted such an approach. Considering the *Johnson* case, he notes that the idioms used were designed "to express a very major public policy concern, with profound modern resonances, to ensure the terminability of arrangements for the contracting out of functions upon which the safety of the public depends."[70] The gradual hardening of such a position "occurred in the context of claims for injunctions by employing entities seeking to restrain their workers from establishing or working for rival concerns."[71]

Whatever the historical context, in the 1978 case of *Yeates v Minister for Posts and Telegraphs*,[72] Kenny J., albeit without referring to any authority, was able to say in relation to the arguments made by the defendant's counsel that "it is settled law that the courts never specifically enforce a contract for personal services: they give damages for wrongful dismissal but do not order the employer to take back a wrongfully dismissed

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[68] (1853) 3 De G.M. & G. 914.

[69] de Clark "Remedies for Unjust Dismissal, Proposals for Legislation" P.E.P. Broadsheet 518, June 1970. See also Chapter Four, sections 6.4 and 11.9.

[70] Freedland *The Personal Employment Contract* (O.U.P., Oxford, 2003), p.370.

[71] *ibid.*, p. 371, citing *Whitwood Chemical Co. v Hardman* [1891] 2 Ch.416.

[72] [1978] I.L.R.M. 22.

employee."[73] This was not a novel proposition for an Irish judge: an application in 1950 by the manager-secretary of the Meath Hospital in Dublin to prevent the termination of his appointment was dismissed by Davitt J.[74] He noted that if he put the plaintiff back into his position, it could have a very serious effect on the running of the hospital. He felt that refusing the application would not cause the plaintiff irreparable loss and damage; although it "might keep him out of his money for some time...he was not dependant on it."[75]

The unwillingness of a court to return an employee to their day to day work is bound up with the need for trust and confidence in an employment relationship.

5.2 Trust and Confidence

An order for specific performance (or indeed any other equitable remedy which would amount to causing an employer and employee to work together) leads to a consideration of trust and confidence, a doctrine already considered in detail in Chapter Two.[76] The importance of trust and confidence is encapsulated by a comment in *Macken's Law of Employment* in relation to the approach of the courts in Australia that not only must damages not provide an adequate remedy, but that "the necessary confidence between the employer and employee must not have eroded to the extent that the future relationship

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[73] *ibid.* at 24.

[74] *Fitzpatrick v Joint Committee of the Meath Hospital* "Secretary's action against hospital" The Irish Times, July 29, 1950.

[75] However, the courts have in general been particularly alive to the effect of their orders on the medical profession and the potential disruption which could be caused to a self-evidently critical working environment: see, for example, *Joyce v Health Service Executive* [2005] IEHC 174. See also *Muldoon v North Eastern Health Board* "Medical specialist fails to be reinstated by court to hospital" The Irish Times, January 11, 2000 in which it is reported that in rejecting an application by the plaintiff to overturn a decision to put him on administrative leave on full pay pending resolution of a dispute, O'Caoimh J. "said that in conflicts between doctors and hospital managers, the health and welfare of patients was paramount." As such, the courts' willingness or otherwise to order a form of specific performance is perhaps not best assessed in general terms by reference to cases with a medical context.

[76] See Chapter Two, section 4.

would require the constant supervision of the courts."[77] Similarly, Bowers & Honeyball comment in relation to cases in England that it will be "very rare for the courts to award injunctions where the parties do not agree that mutual trust and confidence remains."[78]

The same issue arises in this jurisdiction. This is evident from the comments of Laffoy J. in *Harte v Kelly*,[79] wherein she acknowledged that there was a breakdown in the parties' relationship. Accordingly, she did not believe that it was in the "broader interest" of the company to re-involve the plaintiff in its management "having regard to the total breakdown of trust and confidence between the Plaintiff and the other Directors, which the Plaintiff himself acknowledges." Such re-involvement would only be "to the extent that the first and second Defendants see fit to do so in return for [the plaintiff's] salary."

The necessity for trust and confidence in broad terms regularly informs the courts' approach. In *Maher v Irish Permanent plc.*[80] Laffoy J. noted that there remained serious allegations of misconduct against the plaintiff which had not been resolved. She felt, given the nature of the allegations, that it would be "inappropriate to order the reinstatement of the plaintiff as manager of the Killarney branch..."[81] In *Bergin v Galway Clinic Doughiska Ltd.,*[82] Clarke J. observed that "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." Reference was made in *Glynn v HSS*[83] to the reappointment of the plaintiff being a "disastrous outcome" for the defendant's business. Ryan J. acknowledged the difficulties outlined, and suggested that if the defendant saw fit to suspend the plaintiff on pay it could do so, but that if the defendant elected to have the plaintiff perform his duties, the plaintiff would have to make himself available to do so.

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[77] Sappideen, O'Grady & Warburton *Macken's Law of Employment* 6th ed. (Thomson Reuters, N.S.W., 2009), p.358.

[78] Bowers & Honeyball *Textbook on Labour Law* 2nd ed. (Blackstone Press Ltd., London, 1990), p.64.

[79] [1997] 8 E.L.R. 125.

[80] [1998] 4 I.R. 302.

[81] *ibid* at 319.

[82] [2008] 2 I.R. 205.

[83] unreported, High Court, Ryan J., February 26, 2010.

An interesting analogy is advanced by Delany, who suggests that where a relationship is "between business concerns which 'can be expected to make [it] work in their own interests,' the courts may be prepared to grant an injunction."[84] She gives by way of example the case of *Lauritzencool A.B. v Lady Navigation Inc.,*[85] in which the Court of Appeal upheld the granting of injunctive relief preventing the defendants from using their vessels outside a shipping pool pending the outcome of arbitration. Transposed to an employment context, the same sentiment essentially underpins the question of enduring trust and confidence where that trust and confidence is appropriate to maintaining the working relationship. Of course, the practical reality is that whatever about making commercial agreements work, the personal nature of the employment relationship is such that if an employee feels compelled to bring his employer to court, this would certainly point to the fact that it will in many cases be challenging to get the respective parties to mutually agree a workable relationship.

However, just because trust and confidence has been negatively impacted, this does not mean that in such circumstances, a court can never grant an order compelling parties to work together. This was made clear by Clarke J. in *Bergin v Galway Clinic Doughiska Ltd.*[86] However, he also acknowledged that that did not mean "that the state of relations between an employer and, in particular, key senior personnel must not be a very weighty factor in assessing the balance of convenience."[87] In *Coffey v William Connolly & Sons Ltd.*,[88] Edwards J. was mindful of the fact that the defendant's management structure was hierarchical, and that the plaintiff's functions "could be apportioned in the short term between her superiors and her subordinates." As such, he felt that the issue of a lack of trust and confidence did not impact any orders he proposed making.

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[84] Delany *Equity and the Law of Trusts in Ireland*, 5th ed. (Round Hall, Dublin, 2011), p.594.

[85] [2005] 1 W.L.R. 3686.

[86] [2008] 2 I.R. 205. See also *Doyle v Grangeford Precast Concrete Ltd.* [1998] 9 E.L.R. 260.

[87] *ibid.* at 219.

[88] [2007] IEHC 319.

More broadly, and as already touched on in the earlier consideration of unaccepted repudiation,[89] it might be the case that the order sought is not necessarily one designed to coerce parties into working together, but to force, for example, an employer to adopt proper procedures. In *Robb v London Borough of Hammersmith and Fulham,*[90] Morland J. granted an injunction to the plaintiff, not returning him to work as such, but rather restoring him to the position from which he had been suspended. This was designed to engineer a situation whereby the defendant council could only dismiss the plaintiff by properly following a prescribed discipline and capability procedure. As pointed out by Hendy and Ford, the lack of confidence in the plaintiff's ability to do his job "had nothing to do with the workability of an order that the employer must follow the capability procedure while the employee was suspended."[91]

5.2.1 Other Factors

There may, however, be extraneous factors which impact on the working relationship even where it is evident that trust and confidence subsists. This is highlighted by the judgment of Laffoy J. in *McSherry v Scoil Chriost Ri.*[92] She noted that "no issue of a breakdown in relations between the plaintiff and the defendant arises" and that "the Principal would be happy to have the plaintiff resume her duties." However, an impediment arose in that case in that the Chief Medical Officer had not approved the resumption by the plaintiff of her teaching duties. Similarly, in *Ahmed v Health Service Executive,*[93] Laffoy J. acknowledged that there was no breakdown of trust and confidence, but pointed to other impediments which militated against making an order for specific performance. These included "the complex infrastructural, organisational and practical considerations which are involved in the provision of surgical services to the public by the public body which has statutory responsibility for that function." Laffoy J.

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[89] See Chapter Three, section 6.

[90] [1991] I.C.R. 514.

[91] Hendy and Ford "Injunctions Brought by Employees", Old Square Chambers, November 2005. Also citing *Peace v City of Edinburgh* [1999] I.R.L.R. 418 and *Gryf-Lowczowski v Hinchingbrook Healthcare NHS Trust* [2005] EWHC 2407 in which "The same result was reached in relation to a suspended employee."

[92] [2009] 20 E.L.R. 197.

[93] [2007] IEHC 312.

was concerned that "the consequences of an order which, in effect, would direct the defendant to offer [an] appointment to the plaintiff are not foreseeable."

Courts are also very conscious of the disruption which could be caused to an employer in reinstating an employee. In *Tobin v Cashell*,[94] Kearns J. made it "absolutely clear" that he would not direct mandamus. He was influenced not only by the "unhappy history" between the applicant and respondent, but also by a lengthy delay of almost 8 years since dismissal, which created "all sorts of further problems which strongly suggest that such relief would be inappropriate." More explicitly, in *Gee v Irish Times Ltd.*,[95] had the plaintiff obtained all the orders sought, McCracken J. acknowledged that the defendants would have suffered "serious loss" if their proposed management reorganisation had been held up.

For completeness, there may also be external considerations and pressures: in *O'Brien v AON Insurance Managers (Dublin) Ltd.*,[96] Clarke J. made reference (in the context of a suspension) to counsel's submission that the defendant's business was one which "requires it to retain the confidence both of its clients and of its regulators." As such, given that "serious questions as to whether the appropriate standard of corporate governance has been applied by the managing director have arisen," Clarke J. did not find it unreasonable that the plaintiff not be "engaged actively in the management of the business for a reasonable period," thereby permitting an appropriate enquiry to be carried out.

5.3 Lack of Mutuality

The ability of parties to be forced to work together must also be considered by reference to mutuality or, more specifically, the lack thereof. Mutuality of obligation is a general contractual concept. As summarised by Freedland, it can best be thought of as

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[94] [2000] IEHC 31.

[95] [2001] 12 E.L.R. 249.

[96] [2005] IEHC 3.

> "a way of expressing the requirement of consideration in the language of promissory obligations. In order for an exchange of promises to constitute a valid contract supported by consideration, each party must make promises which amount to the taking on of contractual obligations; there must be mutuality of obligation."[97]

Lack of mutuality in the context of an anti-dismissal injunction focuses on the idea that to force an employer to reinstate an employee to his position cannot be balanced by forcing an employee to work. The question of lack of mutuality is a very difficult one to analyse in practice however; while an employee may well be at work, that is not the same as whether they are actually working, or working to the levels one would expect relative to their position and functions. This highlights the other area of concern for the courts in granting positive orders, namely that they are almost impossible to supervise and susceptible to frequent and ongoing breaches.

5.4 Supervision

An unwillingness to force parties to work together is matched by a concern on the part of the courts that they do not get drawn into situations where they effectively have to oversee the day to day operation of contracts of employment. As noted in *Macken's Law of Employment*, this also overlaps with a consideration of trust and confidence.[98]

It has been said that "Equity should not interfere at all, unless it can by a proper method bring about the performance that is sought."[99] That this observation was made in a 1906 article in the Columbia Law Review highlights the longevity and importance of such a principle. To do otherwise could lead to significant injustice. This was encapsulated by the comment of Geoghegan J. in the Supreme Court in *Cahill v Dublin City University*[100] that "In accordance with well established principles neither the High Court nor this court

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[97] Freedland *The Personal Employment Contract* (O.U.P., Oxford, 2003), p.100.

[98] Sappideen, O'Grady & Warburton *Macken's Law of Employment* 6th ed. (Thomson Reuters, N.S.W., 2009), p.358.

[99] Ashley "Specific Performance by Injunction" (1906) 6(2) Columbia Law Review 82 at 82.

[100] [2010] 21 E.L.R. 109.

can permit an injunction to be made against the appellant which is wholly impracticable or cannot be properly supervised by the court."[101]

This is a long standing and important factor which is relevant in the context of employment contracts.[102] It is illustrated by MacMenamin J.'s refusal to grant an injunction in the case of *Keenan v Iarnrod Eireann.*[103] This was on the basis, *inter alia*, that "Pre-eminently this is a case which requires a degree of supervision of the Court." A similar approach was adopted in *Yap v Children's University Hospital Temple Street Ltd.*[104] Clarke J. refused to require the defendant hospital to pay the plaintiff's salary on her return to work. He noted that the courts have been reluctant to make orders which amount to (indirect) specific performance of a contract of employment. For the courts to deal with the day-to-day operation of contracts of employment would essentially engage them in a quasi-industrial relations role.[105] A more qualified view was expressed by Mervyn Davies J. in the English case of *Posner v Scott Lewis.*[106] He referred to "superintendence by the court to an unacceptable degree." On his analysis, it would therefore appear that supervision is not a problem *per se*, rather it is the necessary degree of supervision which should inform a court's approach. However, the practical difficulties

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[101] *ibid.* at 114. This can be qualified by the observation of McWilliam J. in *Lift Manufacturers Ltd v Irish Life Assurance Co. Ltd.* [1979] I.L.R.M. 277 at 280 that where there does not appear to be any reason for the court to oversee such performance, the rule was not applicable, and referred to by Laffoy J. in *Ahmed v Health Service Executive* [2007] IEHC 312.

[102] See, for example, *Ryan v Mutual Tontine* [1895] 1 Ch 116 and *Johnson v Shrewsbury Railway* [1859] 3 D.M. & G. 914. *Powell Duffryn v Steam Coal Co v Taff Vale Ry. Co.* (1874) L.R. 9 Ch. 331 points to the difficulties arising concerning enforcement and supervision. See also Mathews "The right to fire" The Irish Times, September 10, 1976, an article considering the provisions of the then Unfair Dismissals Bill, and her comment that "In general, a court will not make an award where enforcement would have to be personally supervised by the court." However, it is not exclusive to employment contracts, as is evident from cases such as *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1; [1997] 2 W.L.R. 898; [1997] 3 All E.R. 297, a case which concerned the attempted enforcement of a covenant to carry on a business.

[103] [2010] 21 E.L.R. 115.

[104] [2006] 4 I.R. 298.

[105] *ibid.* at 301.

[106] [1986] 3 All E.R. 513.

which can arise are encapsulated in the following analysis (in an American context) by Wonnell:

> "An employer can alter an employee's duties subtly, making that worker's job more onerous, but that employee would have a hard time proving to a judge that the employer had not fulfilled her side of the bargain...Again, because enforcement obligations are largely undefined, a disaffected employee can subtly sabotage her employer's business or shirk her responsibilities. She can also make day-to-day life difficult for her supervisors, who must cope with the effects of recalcitrance on both interpersonal and business levels."[107]

This view is not revolutionary. To rehearse the colourful example suggested by Megarry J. in *C.H. Giles & Co. Ltd. v Morris,*[108] it would be difficult to commit a singer for contempt if they sang "flat, or sharp, or too fast, or too slowly, or too loudly, or too quietly, or resorted to a dozen of the manifestations of temperament traditionally associated with some singers..."[109]

Related to this is Laffoy J.'s caution in *Ahmed v Health Service Executive*[110] that the consequences of any order made by the court need to be foreseeable. The particular issue facing her in that case was that she could not foresee when an opening would be available for the employment of the plaintiff as a surgeon. As she noted, if she made the order, "the matter would not be finally resolved without further recourse to the court."[111] Foreseeability can in fact be the crucial aspect of any order. In his dissenting judgment in *Hill v C.A. Parsons & Co. Ltd.*[112] Stamp L.J. noted that there could be exceptions to the general rule, but that the consequences of an order for specific performance "can hardly

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[107] Wonnell "The Contractual Disempowerment of Employees" (1993) Vol 46:87 Stanford Law Rev. 87 at 99.

[108] [1972] 1 W.L.R. 307.

[109] *ibid.* at 318. See also Farrell on the *Irish Law of Specific Performance* (Butterworths, Dublin, 1994), p.968.

[110] [2007] IEHC 312.

[111] However, and importantly, she did not disavow the ability of the courts to order full specific performance of a contract of employment where the situation might warrant it.

[112] [1971] 3 All E.R. 1345.

ever be foreseen and the injustice which may stem from such an order may only become apparent after the order has been made."[113]

The corollary of there being a need for supervision is that if an injunction order is breached, the party breaching the order may be subject to a contempt application.

5.5 Breaches of Court Orders

When granting an injunction order, "the court does not contemplate that it will be disobeyed."[114] On the face of it, this implies strict compliance with any order. However, the courts can be more subtle in their approach to compliance. For example, in the Scottish case of *Retail Park Investments Ltd. v The Royal Bank of Scotland plc. (No.2),*[115] an Extra Division approached specific performance[116] in the context of a commercial lease by taking the view, as summarised by Macgregor and MacQueen, that

> "precise specification of what compliance required was not necessary in an order for specific implement; imprisonment or penalty only followed wilful breach of the order. With a non-wilful breach the court could give the defendants a further opportunity to comply. The court could therefore specify the end to be achieved but leave open the precise means of doing so."[117]

Although the Scottish courts will refuse specific implement / performance if a contract involves personal relationships such as employment contracts,[118] the *Retail Park* decision

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[113] *ibid.* at 1357.

[114] *South Bucks District Council v Porter* [2003] 2 A.C. 558 at 580; [2003] 2 W.L.R. 1547 at 1564; [2003] 3 All E.R. 1 at 19, *per* Lord Bingham, citing *Re Liddell's Settlement Trusts* [1936] Ch. 365 at 373 and *Castanho v Brown & Root (UK) Ltd* [1981] A.C. 557 at 574.

[115] (1996) S.C. 227; (1996) S.L.T. 669.

[116] "Specific implement" in Scotland.

[117] As summarised by Macgregor and MacQueen "Specific Performance, Interdict and Contractual Performance" Edin. L.R. (1999) 3(2) 239.

[118] Macgregor and MacQueen "Specific Performance, Interdict and Contractual Performance" Edin. L.R. (1999) 3(2) 239.

demonstrates that issues as to compliance and / or breaches should not in theory be the primary impediment to ordering specific performance.

Brodie also makes the salient observation that the courts do grant injunctions to enforce restrictive covenants. Such injunctions also raise the potential for "repeated applications over questions concerning the scope of clauses dealing with customer base, competitors and so on." Yet, as noted by Brodie, this is not an issue which appears to unduly concern the courts.[119]

6. Ordering Specific Performance

Notwithstanding the various reasons put forward as preventing a court from intervening to enforce obligations under a contract of employment, there has never been an absolute bar to such intervention. This is not unexpected, as the unwillingness to intervene is more in the way of a policy than a formal rule of law.[120] Rideout suggests that the reason for the rule "may be nothing better than an attitude of mind."[121] In the Australian case of *Turner v Australasian Coal and Shale Employees Federation*[122] the court noted "the continuation of a slow process of the courts recognising that equitable remedies should not automatically be excluded in cases involving personal services."[123]

The willingness to intervene where necessary is illustrated by fairly ancient cases such as *Ball v Coggs*.[124] A manager who had been discharged was deemed entitled to an allowance "during his life." More dramatic than *Balls*, in that the court went well beyond ordering a payment, was the decision in *East India Co. v Vincent,*[125] in which Lord Hardwicke L.C. made a direction in favour of the defendant "that the company do employ

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[119] Brodie "Specific Performance and Employment Contracts" (1998) 27(1) I.L.J. 37.

[120] See the judgment of the court delivered by Lord Morris in *Francis v Kuala Lumpur Councillors* [1962] 1 W.L.R. 1411 at 1417.

[121] Rideout *Principles of Labour Law* 5th ed., (London, Sweet and Maxwell, 1989), p.127.

[122] (1984) 6 F.C.R. 177.

[123] Sappideen, O'Grady & Warburton *Macken's Law of Employment* 6th ed. (Thomson Reuters, N.S.W., 2009), p.357.

[124] (1710) 1 Bro. P.C. 140.

[125] (1740) 2 Atk. 82.

him."[126] Similarly, in *Fortescue v Lostwithiel and Fowey Railway Co.,*[127] an order for specific performance of covenants, including one for personal service, was made.

This willingness to order specific performance in certain circumstances continued into the twentieth century: the decision in the 1906 case of *Young v Cuthbert*[128] (in which the plaintiff was a headmaster of a school) was followed in *Crisp v Holden,*[129](in which the plaintiff was a teacher) an injunction being granted in the latter case on the basis that the defendant had not complied with a proper dismissal procedure. Two years after *Crisp*, in the case of *Smith v MacNally*,[130] a teacher obtained an injunction to restore her to her job. However, a factor common to all three cases was there was a statutory element to the teaching position held.[131] In *Smith*, Warrington J. felt that the plaintiff was not "merely in the position of a servant who has contracted with a master." Rather, she had a "statutory right to the position she has acquired under the Act." If she was to be dismissed, the requirements of the Act with regard to dismissal had to be complied with.[132] In the 1980 case of *Jones v Lee,*[133] the latter two decisions were approved of and followed.

Various judges have been prepared to consider specific performance absent a statutory element, however. As Megarry J. stated in *C.H. Giles & Co. v Morris,*[134]

> "I do not think that it should be assumed that as soon as any element of personal service or continuous service can be discerned in a contract the court will, without more, refuse specific performance."[135]

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[126] *ibid.* at 83.

[127] [1894] 3 Ch. 621

[128] [1906] 1 Ch. 451.

[129] [1910] 54 Solicitors Journal 84.

[130] [1912] 1 Ch. 816.

[131] See generally Chapter Two, section 5.

[132] *ibid.* at 824. See generally the consideration of the position of office holders in Chapter Two, section 5 *et seq.*

[133] [1980] I.C.R. 310 at 316.

[134] [1972] 1 W.L.R. 307.

[135] *ibid.* at 970

The gradual crumbling of the resistance to ordering specific performance has been tracked by various commentators. Barry notes that in the 5th edition of Rideout's *Principles of Labour Law,*[136] the author suggests that this "may be a belated acknowledgement that modern employment is not normally the distinctly personal relationship which nineteenth century judges, with their domestic staff in mind thought it to be."[137] In *Peace v City and Edinburgh Council*[138] Lord Penrose acknowledged that

> "modern employment contracts may include a range of provisions which may be enforced as between employer and employee during the subsistence of the employment without prejudice to any general rule that the courts will not enforce implement or continuing implement of a working relationship as such between the employer and the employee."[139]

As such, it is arguably more a matter of circumstances than law[140] which can lead to the making or refusal of orders for specific performance.

One of the more honest approaches in this jurisdiction is that of Hogan J. in his judgment in *Wallace v Irish Aviation Authority.*[141] As he explained,

> "...if the courts were *de facto* debarred from giving interlocutory relief in employment cases merely because it involved the specific enforcement by means of mandatory interlocutory injunction of clauses contained in a contract of employment designed for the protection of employees, this would amount to a denial of effective access to this Court (as guaranteed by Article 34.3.1 and Article 40.3.1) and a breach of the Court's duty (as imposed by Article 40.3.2) to

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[136] Rideout *Principles of Labour Law* 5th ed., (London, Sweet and Maxwell, 1989), p.127.

[137] Barry "Specific Performance of Contracts of Employment" (1990) 8 .I.L.T 6.

[138] [1999] I.R.L.R. 417. See p. 418 for a list of cases in both England and Scotland in which there has been, in the words of Lord Penrose, a "qualification of the apparent absolute character of Lord Reid's comment" to the effect that there cannot be specific performance of a contract of services (although counsel in that case was attempting to argue that they were wrong inasmuch as they diverged from Lord Reid's *dictum*).

[139] *ibid.* at 419.

[140] The term used by counsel in *Peace v City and Edinburgh Council* [1999] I.R.L.R. 417 at 419.

[141] [2012] 2 I.L.R.M. 345.

> fashion a real (and not simply theoretical) remedy which would vindicate the infringement of a property right (namely, the breach of a contract of employment) which would otherwise have taken place..."[142]

As summarised by Clarke J. in *Bergin v Galway Clinic Doughiska Ltd.*[143] in the context of interlocutory relief,

> "a plaintiff may be entitled to injunctive relief which would have, to some extent, the effect of continuing his or her employment but only, it would seem, where the plaintiff concerned can establish a strong case."[144]

Based on a review of Clarke J.'s earlier judgment in *Carroll v Bus Atha Cliath,*[145] McDermott has summarised the position as being that "broadly speaking a court will be likely to grant injunctive relief to an employee where it would be unjust not to do so and where the order sought is workable."[146]

The remarks of MacMenamin J. in *Keenan v Iarnrod Eireann*[147] are also apposite, although somewhat more circumspect in tone. He made reference to a court bearing in mind the "hesitations" applicable in relation to the granting of a mandatory injunction in the case of a contract of services, and to the fact that such an injunction "may arise only in exceptional cases and then for well established policy reasons."

The reality is that the default position for judges in this jurisdiction tends to be that they will shy away from making orders at a plenary hearing returning an employee to work. In

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[142] *ibid.* at 354. Referred to by Hogan J. (p.355) as "the unyielding application of specialist sub-rules relating to the grant of interlocutory injunctions in employment cases."

[143] [2008] 2 I.R. 205.

[144] *ibid.* at 212, citing *Fennelly v Assicurazioni Generali* (1985) 3 I.L.T. 73 and *Maha Lingham v Health Service Executive* [2005] 17 E.L.R. 137.

[145] [2005] 4 I.R. 184.

[146] McDermott "*Carroll v Bus Atha Cliath*: Strengthening the Right to an Employment Injunction" (2006) 5 E.L.Rev. 104 at 108

[147] [2010] 21 E.L.R. 115.

Carroll v Bus Atha Cliath,[148] Clarke J. came to the conclusion that although there were a limited number of authorities in which injunctive relief had been granted permitting an employee to work, primarily at the interlocutory stage (and as considered below), it was "open to significant doubt" whether "there may be, notwithstanding the general policy of the courts to the contrary, a jurisdiction to make a mandatory order which would have the effect of entitling an employee to return actively to work after appropriate findings at a plenary hearing."[149] He also observed that even if such jurisdiction existed, it should "only arise in circumstances where it was clear that no other difficulties could reasonably be expected to arise by virtue of the making of an order." In his decision in *Coffey v William Connolly & Sons Ltd.*[150] Edwards J. noted Clarke J.'s views and determined that it seemed "unlikely" that a court would coerce the plaintiff's reinstatement. Around the same time, in *Ahmed v Health Service Executive*[151] Laffoy J. acknowledged the submission by counsel for the defendant that there was "no case in which a mandatory order was made in a substantive action requiring an employer to reinstate an employee." A similar type of approach clearly underpinned the approach of McCracken J. in *Gee v Irish Times Ltd.*[152] He acknowledged that if the plaintiff succeeded at plenary hearing, "the strong probability is that he will only obtain an order continuing his employment in some capacity but not necessarily in that of financial controller." Again, in *Ryan v ESB International Ltd.*[153] Laffoy J. referred to the decision in *Carroll* and noted in relation to Clarke J.'s use of the phrase "no other difficulties" that "the type of difficulty Clarke J. had in mind was a situation where there is a serious breakdown in the relations between the parties."

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[148] [2005] 4 I.R. 184.

[149] *ibid.* at 209.

[150] [2007] IEHC 319.

[151] [2007] IEHC 312.

[152] [2001] 12 E.L.R. 249.

[153] [2013] IEHC 126, para. 46.

6.1 Interlocutory Hearing

However, the courts have proven themselves willing to make orders which amount to reinstatement at the interlocutory stage in certain exceptional cases.[154] In explaining the courts' position as to making mandatory orders in *Carroll*, Clarke had regard to cases where injunctive relief had been granted which had the effect of requiring that the employee concerned actually be permitted to work. The three cases referred to by Clarke J. were *O'Donnell v Chief State Solicitor*,[155] *Martin v The Nationwide Building Society*[156] and *Bryan v Finglas Child and Adolescent Centre.*[157] Accordingly, it is necessary to consider the factors in those cases which led to the court being able to return an employee to work.

The circumstances in which the plaintiff in *O'Donnell* was returned to work are clear from a selection of remarks made by Kelly J.: "there is not the slightest suggestion of any wrongdoing on the part of the plaintiff;"[158] "...and indeed the Chief State Solicitor in his own affidavit indicated that he is happy to have him;"[159] "There is not the slightest question that the plaintiff is untrustworthy or lacking in work performance."[160] The practical effect of restoring the plaintiff to his position was touched upon by Kelly J. in that he referred to the fact that there was nothing in either the plaintiff's conduct or his performance "which would be a bar to the grant of such relief. There is no suggestion of any breakdown of trust or confidence between him and his employer."[161] As such, Kelly

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[154] In *Georgopoulos v Beaumont Hospital Board* it was submitted that "the traditional view was that – with a few exceptions – the court did not grant interlocutory relief in a contract of service. Where the court was confronted with affidavits that could only be described as extremely strong and with huge conflicts, the less should the courts intervene by means of injunction." See "Reinstatement of surgeon 'recipe for disaster'" The Irish Times, May 11, 1991.

[155] [2003] 14 E.L.R. 268.

[156] [2001] 1 I.R. 228.

[157] [2004] WJSC-HC 154. See also *Graham v Coras Iompair Eireann* unreported, High Court, D'Arcy J., April 7, 1981.

[158] [2003] 14 E.L.R. 268 at 272.

[159] *ibid.*

[160] *ibid.*

[161] *ibid.* at 274.

J. was clearly influenced by the fact that there were no performance issues or trust and confidence issues between the parties. However, most judges are more circumspect than Kelly J. was in *O'Donnell*, in that they will usually invite the parties to discuss the form of any order made.[162]

Martin involved a plaintiff who, whilst on pay, had been suspended for an unduly long period. Macken J. acknowledged that "previously there was a marked reluctance to order reinstatement."[163] As she explained, referring to the cases of *Fennelly v Assicurazioni Generali Spa*, *Phelan v BIC (Ireland) Ltd.* and *Shortt v Data Packaging Ltd.*,

> "even in the cases where reinstatement has been sought at interlocutory stage, the above cases and others make clear that if the employee does not enjoy the wholehearted support or confidence of his employer, the court will be very slow indeed to reinstate the employee pending the full action."[164]

In the case before her, she felt that the plaintiff could resume work, even though the defendant did not appear to have "wholehearted trust" in him. However, the defendant was entitled to initiate a proper and speedy investigation. As Macken J. explained, the inconvenience to the defendant of initiating a proper and speedy investigation was far outweighed by the inconvenience to a plaintiff who does not know "what his future is or might be with the defendant."[165] In downplaying the necessity for trust and confidence, it would appear that Macken J. was also, in essence, putting pressure on the defendant to commence and progress a proper procedure, and that the onus was on it to do so. As already considered, however, enforcing an employment contract in order to facilitate the proper effecting of, for example, a disciplinary procedure is somewhat different from simply returning them to work.[166]

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[162] See, for example, *Deegan v Minister for Finance* [1998] 9 E.L.R. 280; *Rajpal v Robinson* [2004] IEHC 149, *O'Donoghue v South Eastern Health Board* [2005] 4 I.R. 217; and *O'Sullivan v Mercy Hospital Cork Ltd.* [2005] IEHC 170.

[163] [2001] 1 I.R. 228 at 230.

[164] *ibid.*

[165] *ibid.* at 236.

[166] See Chapter Three, section 6.2 and the idea of the "*Gunton* extension."

Bryan was something of an extreme case in that Kelly J. was clearly extremely troubled by the fact that the plaintiff had been suspended even though a complaint had not even been made against him. He did not give any direct consideration to the actual, practical effect of the suspension being lifted.

As such, there were factors peculiar to each case which enabled the courts to overcome their reluctance to order reinstatement. However, there have been other cases in which orders for reinstatement have been made at the interlocutory stage, suggesting that this is less of an exceptional approach than might be assumed. For example, it was reported that in *Goss v Ryanair Ltd.*,[167] White J. granted an injunction to the plaintiff pilot reinstating him to his flying duties. Under the terms of the order, Ryanair was restrained from suspending the plaintiff from his duties as captain or preventing him from flying or interfering in any way with his ability to comply with his aviation licence requirements. White J. accepted that the suspension could affect the plaintiff's ability to earn a livelihood, that he would also suffer a loss of job satisfaction if unable to work and that his standing amongst other pilots could be damaged. However, White J. acknowledged that Ryanair could suspend the plaintiff on *bona fide* grounds.

More broadly, in *Boland v Phoenix Shannon*,[168] Barron J. was quite blunt in his observation that "If the law requires [the plaintiff] to be reinstated or to receive appropriate relief, then he will either be reinstated or receive such relief."

Other judges take a more nuanced view. In the case of *Yap v Children's University Hospital Temple Street Ltd.*[169] Clarke J. identified the circumstances in which courts had intervened, albeit without referencing specific cases by name. These circumstances were cases where the issue between the parties was, as described by Clarke J., "technical" issues, rather than issues going to the relationship between employer and employee. He gave the example of redundancy, "where the employer had no complaint against the

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[167] "Move to jail O'Leary adjourned." The Irish Times April 28, 2005, and see Stewart & Dunleavy *Compensation on Dismissal: Employment Law and Practice* (First Law, Dublin, 2008), p.215.

[168] [1997] 8 E.L.R. 113.

[169] [2006] 4 I.R. 298.

employee and the employee had no complaint against the employer but there was a technical question as to how the employee should be treated so far as redundancy or allied matters was concerned."[170] This summary is true in part, but is not wholly reflective of the approach taken in, for example, *Martin*.

This area of the law is well summed up by Freedland. He has made the suggestion that the various doctrines militating against granting full specific performance "should rather be viewed as default rules, or as presumptions about the meaning and strength of contracts, the strength of which is open to debate and reconsideration according to the context and circumstances of the case."[171] After further analysis, he elaborates and proposes that supposedly "firm normative propositions" such as the doctrine denying specific remedies for the enforcement of personal employment contracts turn out to be no more than "a series of contingent and context-specific rules or preferences, scarcely deserving the status of a doctrine well established or consistently maintained in the modern law."[172] It would be difficult to better that summary by reference to caselaw in this jurisdiction. Indeed, Horan has suggested that there is no reason why the courts should not develop this area of the law (albeit as much by reference to interlocutory orders as final orders). As he puts it,

> "... there is no doctrinal barrier to judicial activism in this area while the Courts have consistently upheld restrictive covenants in employment contracts even where there has been an effective termination of the employment relationship. Moreover, on any rendition, the injunction enjoining a dismissal is simply an attempt to keep the employer to his bargain pending a final adjudication on the controversy. This approach can be reconciled with those cases where individuals have been restrained from breaching their contracts and entering into commitments with other parties."[173]

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[170] *ibid.* at 301.

[171] Freedland *The Personal Employment Contract* (O.U.P., Oxford, 2003), p.355.

[172] *ibid.*

[173] Horan "Employment Injunction: Current Status and Future Developments" (2005) 1 E.L.Rev. 8 at 9. It has been observed that "The European approach is...characterised by a greater willingness to insist upon a more effective remedy of reinstatement for unfair dismissals. A good example is offered by the Italian

Even if there is a hesitation on the part of the judiciary to be too expansive in terms of ordering full specific performance, they could certainly consider certain categories where specific performance could be readily ordered, starting with areas where public interest is concerned.

6.2 Public Interest

One area which has not been considered in any detail by the courts could involve positions where the public interest is at stake. For example, if a separation of powers is called for in a job, such as where a head of safety should be able to make decisions

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Statuto di Lavoratori, Article 18, which provides that if an employee claims that he or she has been unfairly dismissed, there is a right to interim relief until the tribunal pronounces upon the fairness or unfairness of the dismissal..." Anderman "Termination of Employment: Whose Property Rights?" in Barnard, Deakin & Morris eds. *The Future of Labour Law* (Hart Publishing, Oxford, 2004), p.122 at 662 (although it should also be noted that However, "executives are never entitled to reinstatement unless they are dismissed for discriminatory reasons": Field and Moorehouse eds. *Employment Law in Europe* 3rd ed. (Bloomsbury Professional, West Sussex, 2013), p.661). More dramatically, in Germany "If an employment court holds that dismissal was invalid, judgment automatically results in reinstatement." *Employment Law in Europe*, p. 486. In similar vein, in Spain, "If the objective dismissal is held to be unfair by the labour court, the employer will be required either to reinstate the employee to his or her previous job....or to pay a severance payment for unfair dismissal." However, "If the objective dismissal is declared null and void, the employee must be reinstated to his or her old job and receive the salary accrued from the date of dismissal up to the date of reinstatement." (p.1138). However, it should be noted that other European jurisdictions are more not as willing to insist on reinstatement. It appears that in Denmark "Reinstatement / re-engagement is very rarely ordered and thus compensation is the usual remedy (p.232) (and as in Ireland, "A large number of unfair dismissal claims are settled out of court..." (p.225)). Similarly, in France, "The court may propose...that the employee be reinstated to his or her former contractual terms and conditions. If either party rejects this proposal or the court chooses not to order reinstatement, the employee will be awarded an indemnity payment of at least six months' wages..." (p.432). In the Netherlands, "If the court is of the opinion that the dismissal is manifestly unreasonable, the court will award a compensation (sic.) or decide to reinstate the employment contract. If reinstatement proves impossible, financial compensation may be awarded." (p.885). Something of a compromise approach is evident in Sweden, where damages are the usual remedy. However," if the employee challenges the termination, the general rule is that the employee will remain employeed until the case is fully settled. If the employer does not accept a court ruling that the dismissal was unlawful, it has to pay economic damages instead." (p.1170).

without fear of interference or being overruled by a chief executive, then arguably the courts could argue that there should specific performance in such a situation.[174]

6.3 Short Term Contracts

It is not difficult to conceive of a situation where a court could grant an order for specific performance in relation to short term contracts, or contracts agreed for a specific purpose.[175] Underlying this (and also allowing for its development) is the idea expressed by Lord Penrose in *Peace v City and Edinburgh Council*[176] that the rule against specific performance "may have been superseded by complex forms of employment contract which anticipate the situation which has arisen and provide for it."[177]

6.4 Company / Corporate Structure

The courts have acknowledged in cases such as *Gregory v Philip Morris Ltd.*[178] that many of the practical issues which might be associated with an order for specific performance do not arise when a large corporate entity is involved. Attractive on its face, such an approach presumably would require some kind of detailed consideration by the court of what practical effect such a corporate structure would have. It also would involve a judge attempting to see into the future; for example, if an employee was effectively sealed off day to day from those with whom difficulties had arisen, that might obviate any problems in terms of ensuring an order worked in practice. However, it would not necessarily address the fact that that employee might get promoted or transferred within the company such that the underlying problems would arise again. It also ignores the fact that in this jurisdiction (the *Gregory* case was an Australian case), a significant number of those seeking High Court injunctions are at such a level in the company that it would be very

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[174] See *Farrell v BATU* "Suspension lifted on union leader" The Irish Times, March 21, 2009. Senior Counsel for Mr. Farrell has explained that a key consideration in moving the application was that the defendant union's rulebook provided for a separation of powers.

[175] See Honeyball & Bowers' *Textbook on Employment Law* 11th ed. (O.U.P, Oxford, 2010), p.80.

[176] [1999] I.R.L.R. 417.

[177] *ibid.* at 419.

[178] [1988] F.C.A. 100.

difficult to isolate them from other decision makers in the company. Nevertheless, it is a point that the courts will contemplate: in *Wallace v Irish Aviation Authority.*[179] Hogan J., granting an injunction, clearly took into account the fact that the plaintiff's duties were "routine in nature." As he observed, however, "Very different considerations might well obtain if…she occupied a senior management position where trust had irrevocably broken down between the parties."[180]

7. Specific Remedies: Interlocutory and Plenary Hearings

In light of this, it is necessary to return to the distinction, whether real or imagined, between injunctions and specific performance. In that regard, Charleton has raised a query as to why the granting of an interlocutory injunction is "possible in circumstances of an employment contract, when the court at full hearing never grants a permanent or perpetual injunction?"[181] It is a legitimate question. It is perhaps best answered by suggesting that it is not entirely correct to say that at full hearing the court "never" grants a permanent or perpetual injunction. They may well tend not to in most cases, but that is a different proposition from saying that they never do. They can also – theoretically – enforce elements of a contract, as they do at the interlocutory hearing, such as payment of a salary.

Rather than focusing on two distinct labels, Freedland advances an elegant approach with his use of the phrase "specific remedies,"[182] as this captures both specific performance and (certainly mandatory) injunctions. In considering the willingness or otherwise of the courts to force an employment relationship, or elements thereof, at either the interlocutory or plenary stage, the key issue for consideration is whether the court is willing to grant a "specific remedy."

However, such difficult considerations are perhaps being overtaken by more recent developments, which suggest that the courts are quite prepared, after careful

[179] [2012] 2 I.L.R.M. 345.

[180] *ibid.*, para.29.

[181] Charleton "Employment Injunctions: An Over-Loose Discretion" (2009) 9(2) J.S.I.J. 1 at 2.

[182] Freedland *The Personal Employment Contract* (O.U.P., Oxford, 2003), p.369.

consideration, to make orders at the interlocutory stage which will not even be sought at the plenary stage, such an approach being openly acknowledged. This is exemplified by the decision of Clarke J. in *A.I.B. v Diamond*.[183] That case involved an application for a springboard injunction, designed to prevent a new employer from taking unfair advantage of AIB employees' breaches of their previous employment contract.[184] The nature of such an injunction is that it will only be sought at the interlocutory stage, with damages being the appropriate remedy at the plenary hearing. In acknowledging that there is "ordinarily a close connection between the temporary interlocutory order sought and the permanent order which the plaintiff might be entitled to in the event that the plaintiff succeeds at trial," Clarke J. also argued that the underlying rationale for granting a springboard injunction was the need to deal in "a fair and just manner with the consequences which may flow from employees acting in breach of contract or in breach of a fiduciary duty."[185]

This is an area of the law in which some judicial clarity would be helpful. In fact, it is not confined to this specific issue: as will be seen in Chapter Six,[186] there is also a disconnect between the courts' view that potential damage to reputation and loss of job satisfaction caused by a dismissal cannot be compensated in damages, yet this is not an issue which is canvassed or factored into judgments following a plenary hearing in any meaningful way.

The difficulty is that a re-evaluation of the distinction between injunctions and specific performance, together with a consideration of whether courts might formally grant specific performance at the interlocutory stage would require something other than a (relatively short) interlocutory hearing, narrow in its focus, as the basis for such re-evaluation. What would represent a fundamental shift (at least in theory, although perhaps less so in practice) in existing jurisprudence is not something best achieved on foot of a bitterly disputed interlocutory hearing on affidavit. Rather, it is the type of matter which

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[183] [2011] IEHC 505.

[184] See generally Rayner "Firm wins injunction against departing lawyer" (2009) 38 L.S. Gaz. 3(2) and Branigan "The Springboard Injunction—What is it?" (2013) 1 I.E.L.J. 17

[185] [2011] IEHC 505, para. 3.3.

[186] See Chapter Six, section 2.2.

would, realistically, admit of detailed consideration on foot of a plenary hearing and possibly after full engagement by the Supreme Court.[187]

8. Declaration

Given the various impediments (whether real or imagined) identified by the courts to granting specific performance or a perpetual mandatory injunction, a declaration can offer an acceptable solution to the difficulties faced by the courts. As explained by Bland (albeit in the specific context of easements and profits),

> "Declaratory relief is a convenient means for a court to bring a dispute to a conclusion…The flexible and discretionary nature of the relief enables the court to exercise precise control."[188]

A declaration merely states the rights and legal position of parties to an action. That a declaration is different from an injunction is clear from the decision of Lynch J. in the case of *Stelzer v Wexford North Slob Commissioners*.[189] He made a series of declarations as well as awarding damages, but felt it "inappropriate to make any order by way of mandatory or other injunctions" on the facts.[190]

In an employment context, granting a declaration means that the courts acknowledge that a contract of employment subsists, with attendant benefits and entitlements,[191] but do not make any order coercing a return to day to day work.

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[187] Although certain judges have, admittedly, been prepared to engage with the jurisprudence of employment law at a much deeper level at interlocutory hearings, as evidenced by Clarke J.'s decision in *Bergin v Galway Clinic Doughiska Ltd.* [2008] 2 I.R. 205.

[188] Bland *Easements and Profits a Prendre* 2nd ed. (Thomson Round Hall Dublin, 2009), p.423. In the case of *O'Doherty v A.G.* [1941] 1 I.R. 569 Gavan Duffy J. pointed out that the declaratory power was securely established in England, even without a constitutional reinforcement, and had been "described by high authority as almost unlimited," citing *Hanson v Radcliffe U.D.C.* [1922] 2 Ch. 490 at 507, *per* Lord Sterndale.

[189] [1988] I.L.R.M. 279.

[190] *ibid.* at 289.

[191] Benefits and entitlements are not confined to payment of salary and perquisites.

The use of a declaration is not at all an original idea in the context of the employment relationship. The declaration was originally used primarily in the context of cases involving statutory positions and office holders. As explained by Hepple & O'Higgins, it was not available to employees because "dismissal terminates the contact of employment."[192] For example, in *Cox v E.S.B.*,[193] Gavan Duffy J. was prepared to grant a declaration that an order made by the defendant purporting to dismiss the plaintiff was *ultra vires*, void, and of no legal effect, an order upheld by the Supreme Court. Notably, in the context of a consideration of specific performance, Gavan Duffy J. advised the plaintiff to consider whether he should ask for such a declaration rather than what amounted to "virtually a claim to restitution"[194] (albeit acknowledging that such a claim for restitution was known to the law).[195] Keane suggests that the remedy of a declaration is still appropriate for office holders as it is "frequently impractical" for them to "continue in an office where the persons exercising the power of removal have lost confidence in him."[196]

Ironically, Gavan Duffy J. had previously, in the case of *O'Doherty v A.G.*,[197] referred to the practice of the courts not to make a declaration "where there is an appropriate remedy to which the plaintiff ought to have resorted." [198] He felt that it was time to restrict the action for a declaration to its "proper purpose." Whatever that purpose may have been historically, the use of the declaration has become more widespread, and there is no sense that it should function as some kind of remedy of last resort.

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[192] *Hepple & O'Higgins Employment Law* 3rd ed. (Sweet& Maxwell, London, 1979), p.245. See generally Bowers & Honeyball *Textbook on Labour Law* 2nd ed. (Blackstone Press Ltd., London, 1990), p.63.

[193] [1943] I.R. 94.

[194] *ibid.* at 108.

[195] Citing the decision of Kindersley V.C. in *In re London and County Assurance Co.* 30 L.J. Ch. 373 at 376.

[196] Keane *Equity and the Law of Trusts in the Republic of Ireland* 2nd ed. (Bloomsbury, Dublin, 2011), p291, giving the example of *Garvey v Ireland* [1981] I.R. 76.

[197] [1941] 1 I.R. 569.

[198] *Ibid.* at 583, citing *Everett v Griffith* [1924] 1 K.B. 941 at 956.

At the end of the plenary hearing in *Cassidy v Shannon Castle Banquets,*[199] the plaintiff was granted a declaration that his purported dismissal was invalid. However, as Budd J. remarked, "No order in respect of reinstatement is required."[200] Budd J. noted that since the passing of the Judicature Acts, the common law courts had followed the chancery practice of "making declaratory judgments as an equitable remedy."[201] He referenced the decisions of *Garvey v Ireland*[202] and *O'Donnell v Dun Laoghaire Corporation*[203] as instances in which declarations had been granted, albeit that the first of these cases concerned office holders, the second was not related to employment at all. Nevertheless, Budd J. did not see the need to make any distinction between those cases and the case before him, and simply stated that it seemed to him that "if the procedure to terminate the Plaintiff's employment was invalid, then a declaration is the appropriate relief."[204] As he explained, echoing the position in *Cox v E.S.B.,*[205] a declaration does not coerce a reinstatement, but is simply declaratory of the plaintiff's rights and position. As Clarke J. subsequently pointed out in *Carroll v Bus Átha Cliath/Dublin Bus*,[206] "a factor taken into account in that case was the entitlement of the plaintiff to clear his name."[207]

The declaration has some limits, however. In *Coffey v Connolly & Sons Ltd.,*[208] Edwards J. referred to the fact that in *Vine v N.D.L.B.*[209] Viscount Kilmuir "made it clear that a declaration that a dismissal was null and void will not be granted in the case of an

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[199] [2000] 11 E.L.R. 248.

[200] *ibid.* at 274.

[201] *ibid.* at 273. Although Redmond observes that a declaration is not an equitable remedy. It can be sought without a claim for damages. As such, any argument based on *Parsons* that a declaration cannot be sought as a free-standing remedy is undermined by the nature of the declaration. Redmond *Dismissal Law* 2nd ed. (Tottel, Dublin, 2007), p.196.

[202] [1981] I.R. 76.

[203] [1991] I.L.R.M. 301.

[204] [2000] 11 E.L.R. 248 at 273.

[205] [1943] I.R. 94.

[206] [2005] 4 I.R. 184.

[207] *ibid.* at 208.

[208] [2007] IEHC 319.

[209] [1957] A.C. 488 at 500 *per* Viscount Kilmuir L.C.

ordinary contract of employment"[210] Similarly, in the English case of *Barbour v Manchester Regional Hospitals Board*[211] Barry J. made it clear that a declaration would not be granted to the effect that the plaintiff's employment had never been validly determined. Given that *Vine* was decided at a time well before the gradual dissolving of the distinction between office holders and those on "ordinary" contracts of employment, there is certainly an argument that Edwards J. could have rejected its guidance. However, this not does address the question of there possibly being an inherent reluctance to grant declarations.

In the New South Wales case of *Howes v Gosford Shire Council,*[212] Jacobs J. suggested that the reasons for such reluctance were threefold *viz.* the unwillingness to force a relationship between employer and employee; that the courts do not want to make orders which require constant supervision and that in the ordinary case of "master and servant the dismissal of the servant by the master is never a nullity."[213] These reasons are very similar to the reasons advanced for not granting injunctions or specific performance. Indeed, it has been observed in *Macken's Law of Employment* that approaching declarations in this way "...is to circumscribe the remedy in exactly the same way as the injunctive remedy. It has the effect that the declaratory relief will rarely achieve any significance as a remedy available to the employer and employee in the case of a disputed dismissal."[214]

Freedland advances the argument that judicial reluctance is in part due to a concern that:

> "the effect of such a declaration would have the result that wages would be payable as from the date of the purported dismissal onwards. The effect would then be that the rules of mitigation of loss would be circumvented, the employee

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[210] In fact, a reading of Viscount Kilmuir L.C's speech in *Vine* would suggest that he did not make such an assertive statement, but rather referred to the sparing use of a declaration and contrasted the case of a master and servant with the facts before him, which concerned the removal of the plaintiff's name from a register.

[211] [1958] 1 W.L.R. 181 at 194.

[212] [1962] 62 N.S.W.L.R. 58.

[213] *ibid.* at 63.

[214] Sappideen, O'Grady & Warburton *Macken's Law of Employment* 6th ed. (Thomson Reuters, N.S.W., 2009), p.378.

would have been allowed to 'sit in the sun' at the employer's expense and this the judges have regarded as undesirable. It has, on the whole, been taken for granted that this is the effect of a declaration of nullity of dismissal."[215]

In similar vein, Costello queries why an employee should be "allowed to sit in the sun, and accumulate wages until such time as the contract is properly discharged? It is wrong in principle that an employee should be indulged in doing nothing until the contract is discharged, and discouraged from mitigating his loss."[216]

However, a practical solution to this was identified in the New South Wales case of *Csomore v Public Service Board of New South Wales*.[217] The solution is well summarised by the authors of *Macken's Law of Employment*.[218] They note that "the declaratory order of itself does not require that wages be paid for the whole period between the purported dismissal and the declaratory order." Rather, declaratory orders can be coupled with orders for consequential relief.[219]

In *Turner v Australasian Coal and Shale Employees Federation,*[220] the Federal Court did not disavow the ability of the courts to grant declarations, but stated that "special circumstances" would be required before they would do so.[221] The authors of *Macken's Law of Employment* suggest that "special circumstances" would encompass the availability of some special statutory protection; a plaintiff's eligibility to work in an

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[215] Freedland *The Contract of Employment* (O.U.P., Oxford, 1976), p.20, citing *Francis v Kuala Lumpur* [1962] 1 W.L.R. 1411 at 1418; *Ridge v Baldwin* [1964] A.C. 40 at 140 and *Taylor v Furness Withy Ltd.* (1969) 6 K.I.R. 488. The phrase "sitting in the sun" derives from Salmon L.J.'s judgment in *Denmark Productions v Boscobel Productions* [1969] 1 Q.B. 699 at 726. Costello "Regulating the Anti-Dismissal Injunction" in Breen, Casey & Kerr *Liber Memorialis Professor James C. Brady* (Roundhall Sweet and Maxwell, Dublin, 2001), p.188 at 191.

[216] Costello "Regulating the Anti-Dismissal Injunction" in Breen, Casey & Kerr *Liber Memorialis Professor James C. Brady* (Roundhall Sweet and Maxwell, Dublin, 2001), p.188 at 191.

[217] (1986) 10 NSWLR 587.

[218] Sappideen, O'Grady & Warburton *Macken's Law of Employment* 6th ed. (Thomson Reuters, N.S.W., 2009), p.379.

[219] See, for example, *Gregory v Philip Morris* (1988) 80 A.L.R. 455.

[220] (1984) 6 F.C.R. 177.

[221] Having regard to *Francis v Municipal Councillors of Kuala Lumpur* [1962] 1 W.L.R. 1411.

industry; the right to remain on an employment register or retain union membership. Specifically in relation to the "UK" (*sic.*) the authors venture that "declarations may be made where there has been a failure to follow disciplinary procedures requisite for dismissal."[222]

Inasmuch as perceived impediments remain, however, Redmond explains that:

> "...a declaration will lie to declare a breach of contract. It might be useful to seek a declaration as to breach where other rights might be affected, or where an employer is guilty of repudiatory conduct which the employee is not willing to accept as terminating his contract. To sue for damages in the latter circumstances would be tantamount to 'acceptance'; to seek an appropriate declaration would not. The essential point to stress is that to declare a purported dismissal wrongful would not lead to anything like 'a contract of slavery.' And since an employer can pay wages in lieu of notice a declaration would not require the employee to continue working with the employer in question"[223]

As such, the effect of granting a declaration is bound up with a consideration of unaccepted repudiation. Redmond's view is that the flexibility afforded by a declaration to obtain 'whatever redress is appropriate in the circumstances' is "all the more significant in light of the common law's uncertainties."[224]

A similar approach is evident in England, with Bowers & Honeyball commenting that a declaration "may be particularly appropriate for declaring that a contract still exists and a repudiation has not been accepted by the other party."[225] Indeed, as Edwards J. noted in *Coffey v Connolly & Sons Ltd.*[226] in relation to the *Barbour* case, if the plaintiff "had

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[222] Sappideen, O'Grady & Warburton *Macken's Law of Employment* 6th ed. (Thomson Reuters, N.S.W., 2009), p.377.

[223] Redmond *Dismissal Law* 2nd ed. (Tottel, Dublin, 2007), p.200, citing *Stevenson v United Road Transport Union* [1977] ICR 893 at 907.

[224] *ibid.* p.202.

[225] Bowers & Honeyball *Textbook on Labour Law* 2nd ed. (Blackstone Press Ltd., London, 1990), p.63.

[226] [2007] IEHC 319.

sought a declaration that his employment had never been lawfully or rightly determined, such a declaration, if necessary, might have been made." He also observed that "there is little doubt that a declaration will lie to declare a breach of contract. Moreover, a declaration will lie to declare that a dismissal was wrongful."

8.1 Practical Issues

As such, declarations are available as a remedy, but need to be framed very carefully. As stated in the Australian case of *Gregory v Philip Morris Ltd.,*[227] "There are circumstances in which the making of a declaration upon such a matter may serve a useful purpose; for example, where some ancillary benefit can thereby be obtained." [228] However, declarations must be approached with caution, in that they are not routinely granted. In *Shortt v Royal Liver Assurance Ltd.*,[229] Laffoy J. noted in her judgment that counsel for the defendant had not argued that the court could never grant a declaration to an employee concerning breaches by his employer of its contractual obligation. In fact, counsel had acknowledged that a declaration may be made "in an appropriate case." However, Laffoy J. felt that although the claim for a declaration sought in *Shortt* was "justiciable," the remedy was a discretionary one, and on the facts of the case before her "it would debase the remedy to grant it to the plaintiff even if he has established that the defendant acted unlawfully."[230] Contrariwise, and highlighting the importance of the declaration as a remedy, the same judge had recourse to a declaration in terms not sought by the plaintiff in *McSherry v Scoil Chriost Ri.*[231] As Laffoy J. explained, she was granting the declaration "because I consider it the appropriate and only remedy which it is open to the court to grant on the basis of the finding made."

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[227] [1988] F.C.A. 100.

[228] *ibid.*, para.71.

[229] [2009] 20 E.L.R. 240.

[230] Borrowing the words of O'Higgins C.J. and Blayney J. in *State (Abenglen Properties Ltd.) v Corporation of Dublin* [1984] I.R. 381 and *Ahern v Minister for Industry and Commerce (No.2)* [1991] 1 I.R. 462 respectively.

[231] [2009] 20 E.L.R. 197.

An example of both the use of a declaration, but the practical difficulties associated with such a remedy, are encapsulated in two judgments delivered by Laffoy J., *McNamara v Health Service Executive*[232] and in *McSherry.*[233]

In *McNamara*, Laffoy J. felt it inappropriate to grant injunctive relief, but was prepared to grant declaratory relief, such relief recognising "the contractual entitlement of the plaintiff to resume her position" with the defendant. Laffoy J. did so confident that the defendant, as a statutory body, would act in accordance with the declaration. This highlights one of the weaknesses of a declaration; the obvious implication is that the parties would have to work out how in practice the plaintiff would resume her position.

In *McSherry*[234] Laffoy J. acknowledged that in granting a declaration that the plaintiff's employment did not terminate on a specified date, "the practical effect is that the real dispute as to the plaintiff's employment by the defendant remains unresolved." A declaration "would not coerce the resumption by the plaintiff of her teaching duties and the payment to her of an incremental salary without compliance with the requirements which the Department is entitled to impose..." Indeed, the way the declaration was framed in that case, with the attendant impetus on the parties to work out matters between themselves, led to enormous practical difficulties.

In fact, a certain amount of timidity is evident in relation to how the courts frame a declaration. Perhaps this is understandable given the possible consequences of making orders which are too robust and, as such, effectively unworkable. This is evident from the decision of Clarke J. in *Cahill v Dublin City University*,[235] albeit that the facts in that case were very specific. On the facts before him, Clarke J. indicated that he did not believe it appropriate to make any order beyond declaring that the plaintiff remained in office and was entitled to the payment of salary. This view was expressed against a specific piece of legislation governing the plaintiff's employment with the defendant. In suggesting that a court should lean in favour of an order entitling an academic office holder to continue to

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[232] [2009] IEHC 418.

[233] [2009] 20 E.L.R. 197.

[234] *ibid.*

[235] [2007] 19 E.L.R. 113. See Chapter Two, section 10.

operate in the academic world, Clarke J. emphasised that there may well be individual cases where it would not be appropriate to make such an order. Clarke J. also acknowledged that the parties might have to come back before the court in relation to the provision of appropriate academic duties. The parties did come back before the courts, but in the context of an appeal to the Supreme Court. However, in the Supreme Court Geoghegan J. approached the matter strictly on the facts before him, observing that "As in so many employment cases, previous court decisions are not of much assistance."[236]

There are other limitations to the effectiveness of the use of a declaration in practical terms. If, for example, a dismissal is declared null and void on the basis of flawed procedures, then in theory, there is nothing – certainly from a common law perspective - to stop the employer essentially restarting the dismissal process and adopting correct procedures.[237] This, however, could lead to a consideration of the *bona fides* of the employer, and an employer could end up facing a further claim, either at common law or, more realistically, under the Unfair Dismissals legislation.[238] The matter is not quite so straightforward, however. For example, in *Burke v Independent Colleges Ltd. t/a Independent Colleges*[239] the corporate structure of the defendant was such that Laffoy J. took the view that it was "impossible to conclude that the defendant can easily correct the situation which has resulted in the plaintiff being able to establish a strong case that he is likely to succeed at the trial of the action on the substantive issue."[240] However, she did

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[236] [2009] IESC 80. Albeit that that was by specific reference to two authorities which had been opened to the court.

[237] See, for example, *Maher v Irish Permanent plc.* [1998] 4 I.R. 302. In fact, in *Bergin v Galway Clinic Doughiska Ltd.* [2008] 2 I.R. 205 at 219, dealing with the appropriate form of order, Clarke J. noted that "In addition it does not seem to me to be appropriate to restrain the board, if it should be minded so to do, from purporting to exercise an entitlement to terminate the plaintiff's contract of employment by giving notice in accordance with the terms of that contract.."

[238] As Purdy points out, "In the event of a settlement occurring it is important to ensure that it is in full and final settlement of all claims both under common law and statute, thus preventing the employee taking an additional claim to the EAT." Purdy *Termination of Employment: A Practical Guide for Employers* 2nd ed., (Bloomsbury Professional, Dublin, 2011), p.266.

[239] [2011] 22 E.L.R. 169.

[240] *ibid.* at 185.

acknowledge that the defendant might be in a position to do so, and that there was no basis for precluding it from doing so.[241]

As such, the question the courts would have to consider is whether they would be prepared to take the next step and make a positive declaration to the effect that the employer is entitled to restart a dismissal process and thus, in some way, "protecting" the employer in effecting the dismissal. This could, to a degree at least, alleviate the position of an employer which finds itself to a significant degree effectively "forced" to compromise a claim due to the attendant time and expense associated with being on risk of a second claim being brought based on attempts to dismiss the same employee. Whether the courts would be prepared to countenance such an approach is debatable. As Charleton has commented (albeit by reference to injunctions, rather than declarations):

> "Some of our decisions seem to be grounded on the notion that as unfair procedures led to the conclusion that an employee had been guilty of, for instance, dishonesty or bullying, that a fair procedure would reverse that conclusion, and so an injunction should be granted. I wonder whether this is in fact correct."[242]

Unfortunately, he does not expand on why he so wonders.

To return to the reasons advanced by Jacobs J. in *Howes v Gosford Shire Council*[243] for not granting declarations, it is clear that they do not bear much scrutiny: a declaration need not force unwilling parties to work together; it does not necessarily lead to constant supervision; and the question of a dismissal being a nullity or otherwise may well be moot depending on the terms of the declaration. It very much depends on how the

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[241] It was reported that in *Fitzgibbon v Irish Nationwide Building Society* "Nationwide manager faces fresh inquiry" The Irish Times, December 15, 2007 the High Court, in granting an injunction, had originally found a lack of clarity in the original disciplinary procedures invoked against the plaintiff, but that it was subsequently proposed to replace the previous disciplinary procedure with one "which, the society contends, is fair and impartial." As against that, see *Branley v Commissioner of An Garda Siochana* "Court prohibits further inquiry against garda" The Irish Times, March 17, 1981, in which a further inquiry was prevented in circumstances where the High Court had previously quashed a decision to dismiss the plaintiff.

[242] Charleton "Employment Injunctions: An Over-Loose Discretion" (2009) 9(2) J.S.I.J. 1 at 6.

[243] [1962] 62 N.S.W.L.R. 58.

declaration is worded. Furthermore, the declaration may be deployed in relation to steps short of dismissal. For example, a declaration can be granted to the effect that a disciplinary procedure is flawed and must be restarted.

For all the legal niceties, there is also an unacknowledged practical aspect to a declaration. If a declaration is ordered, this gives the respective parties time to explore whether a compromise might be reached; as such, a declaration can soften the immediacy of a blow of termination and provide an employee with, effectively, a softer landing than would have been afforded by – for them at least – an unexpected termination. Judicial awareness of this is clear from the judgment of Hanna J. in *McCarthy v Breeo Foods Ltd.,*[244] in which he noted that "the plaintiff found the experience traumatic in the extreme and wished, quite properly and understandably, to maximise his departure package having realised that his employment was at an end."[245]

9. Other Reliefs and Remedies

Judges have proven themselves relatively flexible and creative when crafting remedies. A device used by the courts is to restrain the advertising of a position or the appointment of a party to a position, as Clarke J. did in *Evans v I.R.F.B. Services (Ireland) Ltd.*[246] Noting the reluctance of the courts to supervise orders for specific performance, Clarke J. pointed out that no such difficulty arose in relation to restraining the appointment of a person to a post "where such appointment might have the effect of breaching an existing employee's contract of employment by giving rise to a sufficiently radical alteration in work practices and conditions." The advantages of such an order were subsequently well articulated by Clarke J. in *Bergin v Galway Clinic Doughiska Ltd.*.[247] Starting from the premise that such an order could minimise any potential inconvenience to both sides, Clarke J. expanded on this, explaining that:

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[244] [2010] 21 E.L.R. 53.

[245] *ibid.* at 60.

[246] [2005] 2 I.L.R.M. 358. See also "Group HR manager's action against bookseller resolved" The Irish Examiner, March 17, 2011.

[247] [2008] 2 I.R. 205.

> "The courts' entitlement to make an effective order in favour of a plaintiff at trial is preserved. Any interference with the employer's entitlements is also minimised in that he can get on, in a practical way, with making provision for the carrying out of the duties of senior management pending trial, subject only to a limitation that whoever carries out those duties needs to do so on terms which would allow a reversal of the situation in the event that the plaintiff should succeed to sufficient extent at trial to require that he be restored to duties."[248]

In so saying, Clarke J. also indicated that he would not grant an order which was more extensive than that, due to the potentially serious disruption which could be entailed in so doing.

The risk for a plaintiff is that, as acknowledged by Clarke J. in *Bergin v Galway Clinic Doughiska Ltd.*,[249] after an initial legal skirmish, a defendant may then seek to re-start a process to legally terminate a contract of employment. An *Evans*-style order would afford little protection to the employee in that regard (although, as considered above, may leave the employer open to allegations of pre-judgment and bad faith, coupled with a trip to the Employment Appeals Tribunal). In *Bergin*, (albeit at the interlocutory stage) Clarke J. fashioned a remedy which bypassed any order requiring the employer to continue with the plaintiff in his post pending trial. The injunction which he did grant restrained the defendant from implementing a notice of dismissal and from appointing anyone to take over the plaintiff's role save where such duties would permit the plaintiff to resume his duties if the court was to make an order to that effect at the plenary hearing. As Keane comments, that would seem a more "satisfactory approach" than a binary one whereby relief is either refused or granted in unqualified fashion.[250] There is no reason why judges could not be equally creative at a plenary hearing. Furthermore, Clarke J.'s approach

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[248] *ibid.* at 220. See also *Lonergan v Salter Townshend* [2000] 11 E.L.R. 15; *Garrahy v Bord na gCon* [2002] 3 I.R. 566; *Naujoks v National Institute of Bioprocessing Research and Training Ltd.* [2007] 18 E.L.R. 25 and *Harkins v Shannon Foynes Port Company* [2001] 12 E.L.R. 75.

[249] [2008] 2 I.R. 205.

[250] Keane *Equity and the Law of Trusts in the Republic of Ireland* 2nd ed. (Bloomsbury, Dublin, 2011), p.290.

points to a willingness to be persuaded at plenary hearing that the plaintiff could be restored to his duties.

10. Orders Made

Against that background, it is worth identifying the types of orders sought and / or made at the interlocutory stage. Any list of reliefs will never be finite, and can always be added to by creative lawyers. In fact, multiple reliefs are frequently sought on a single set of pleadings. These reliefs are not always internally consistent (or more benignly, are claimed in the alternative). The obvious advantage of claiming so many reliefs is that the court will often find that it can grant at least one of them; even on the basis of limited success at, specifically, the interlocutory stage, this can give a plaintiff a significant tactical advantage if some form of order can be secured against an employer.

10.1 Dismissal

The types of reliefs generally sought and / or granted at the interlocutory stage when termination is a live issue encompass the following reliefs set out below (together with examples of cases in which such orders were made).[251]

- An injunction restraining the termination of the plaintiff's employment[252] / the plaintiff's dismissal[253] / from implementing the purported termination of the plaintiff's appointment (or employment)[254] / from embarking on the termination of the plaintiff's employment[255] / from giving effect to (or implementing) the

[251] It should be noted that these are based both on actual orders sought and / or granted and in some instances are derived from written judgments but adapted to make them more generally applicable.

[252] See, for example, *O'Donnell v Chief State Solicitor* [2003] 14 E.L.R. 268 and *Phelan v BIC (Ireland) Ltd.* [1997] 8 E.L.R. 208.

[253] See *Phelan v BIC (Ireland) Ltd.* [1997] 8 E.L.R. 208, *Bergin v Galway Clinic Doughiska Ltd.* [2008] 2 I.R. 205 and *Holland v Athlone Institute of Technology* [2012] 23 E.L.R. 1.

[254] Derived from *Phelan v BIC (Ireland) Ltd.* [1997] 8 E.L.R. 208 and *Glynn v HSS trading as Citywest Hotel* unreported, High Court, Ryan J., February 26, 2010.

[255] See *Keane v Irish Amateur Swimming Association Ltd. t/a Swim Ireland* [2004] 15 E.L.R. 6.

purported termination of the plaintiff's employment[256] / from removing the plaintiff from his post;[257]

- An injunction restraining the defendant from treating the plaintiff as other than continuing to be employed by the defendants;[258]
- An injunction restraining the defendant from interfering with or prohibiting the plaintiff from performing her role and functions;[259]
- An order restraining the defendant from taking any further steps to terminate the plaintiff's employment with the defendant save in accordance with the defendant's disciplinary procedure and the principles of natural justice;[260]
- An injunction restraining the defendant from appointing any other person other than the plaintiff to the plaintiff's position[261] / from assigning the plaintiff's functions and duties to any person other than the plaintiff[262] / from making any appointment to the plaintiff's position save on terms that preserve, in the event of the plaintiff being successful, his contractual entitlements[263] / an injunction that permits the plaintiff to return to his duties[264] should the court be persuaded to make an order to that effect;

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[256] See *Courtenay v Radio 2000 Ltd.* [1997] 8 E.L.R. 198 and *Burke v Independent Colleges Ltd. t/a Independent Colleges* [2011] 22 E.L.R. 169 *Ryan v ESB International Ltd.* [2013] IEHC 126.

[257] See *Naujoks v National Institute of Bioprocessing Research and Training Ltd.* [2007] 18 E.L.R. 25 (in that case, reliefs were granted both restraining the defendant from removing the plaintiff from his post and also restraining the defendant from dismissing the plaintiff from his employment and / or from giving effect to any purported termination) and *Howard v University College Cork* [2001] 12 E.L.R. 8.

[258] See *Keane v Irish Amateur Swimming Association Ltd. t/a Swim Ireland* [2004] 15 E.L.R. 6.

[259] See *Howard v University College Cork* [2001] 12 E.L.R. 8.

[260] See *Maher v Irish Permanent plc* [1998] 4 I.R. 302 and *McGrane v Ulster Bank ex tempore*, High Court, Charleton J., June 29, 2012.

[261] See *Naujoks v National Institute of Bioprocessing Research and Training Ltd.* [2007] 18 E.L.R. 25 and *Howard v University College Cork* [2001] 12 E.L.R. 8.

[262] See *Keane v Irish Amateur Swimming Association Ltd. t/a Swim Ireland* [2004] 15 E.L.R. 6 and *Coffey v Connolly & Sons Ltd.* [2007] IEHC 319.

[263] See *Evans v I.R.F.B. Services (Ireland) Ltd.* [2005] 2 I.L.R.M. 358.

[264] See *Bergin v Galway Clinic Doughiska Ltd.* [2008] 2 I.R. 205 and *Ryan v ESB International Ltd.* [2013] IEHC 126.

- An order prohibiting the defendant from advertising [a specific position] unless and until such advertisement makes it clear that the position advertised involves no overlap with or incorporation of the function now held by the plaintiff;[265]
- An order directing the defendant to pay to the plaintiff all salary as accruing from *[time period specified]* and benefits as they fall due until the trial of the action or until further Order of this Honourable Court may deem meet[266] / restraining the defendant from withholding any benefits of employment from the plaintiff including all pay and other emoluments[267]
- An injunction restraining the defendant from holding any meetings at which the plaintiff's employment would be discussed[268] / an injunction preventing [named individuals] from participating in a meeting of the board of directors of the defendant at which the plaintiff's employment would be discussed;[269]
- An injunction restraining the defendant from announcing, disclosing, publicising or otherwise revealing any purported dismissal of the plaintiff[270] / publishing any statement or communication to the effect that the plaintiff is no longer an employee or has stepped aside or otherwise ceases to act in any way as employee[271] or that his contract has been terminated[272] / making any disparaging comment[273] about the plaintiff.

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[265] See *Harkins v Shannon Foynes Port Co.* [2001] 12 E.L.R. 75 and *Garrahy v Bord na gCon* [2002] 3 I.R. 566

[266] See *Keane v Irish Amateur Swimming Association Ltd. t/a Swim Ireland* [2004] 15 E.L.R. 6 and *Naujoks v National Institute of Bioprocessing Research and Training Ltd.* [2007] 18 E.L.R. 25.

[267] See *Courtenay v Radio 2000 Ltd.* [1997] 8 E.L.R. 198

[268] See *Costelloe v Pat Keogh Ltd.* "Court prevents financial officer's dismissal" The Irish Times, May 16, 2008

[269] Derived from *O'Neill v Beaumont Hospital Board* [1990] I.L.R.M. 419.

[270] See *Coffey v Connolly & Sons Ltd.* [2007] IEHC 319.

[271] This formulation is more generally used in relation to someone holding a defined position such as chief executive officer of an organisation: See *Phelan v BIC (Ireland) Ltd.* [1997] 8 E.L.R. 208 and *Chapman v The Irish Times Ltd.* "Orders sought against newspaper" The Irish Times, November 1, 2001.

[272] See *Phelan v BIC (Ireland) Ltd.* [1997] 8 E.L.R. 208.

[273] See *Craig v FÁS* "Fás blocked from moves to dismiss ex-corporate affairs chief" The Irish Times, September 14, 2011.

10.2 Suspension

The types of orders which may be made in relation to a suspension include:

- An order directing the defendant to lift the plaintiff's suspension / purported suspension;[274]
- An order restraining the defendant from considering or discussing or acting upon a resolution purporting to suspend the plaintiff from office;[275]
- An order that the defendant be restrained from implementation of the disciplinary penalty of suspension without pay from employment for a period of [defined period] pending the trial of the action;[276]
- An order restraining the defendant from treating the plaintiff as having been placed on 'garden leave;'[277]
- An order restraining an employer from placing the plaintiff on administrative leave.[278]

10.3 Disciplinary Inquiries and Investigations

Orders may also be sought and granted in relation to disciplinary inquiries and investigations, and the following are examples of such orders:

- An order restraining the defendant from prosecuting the inquiry into disciplinary matters notice of which was given to the plaintiff;[279]
- An injunction restraining the conduct of the inquiry as currently constituted;[280]

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[274] See *Bryan v Finglas Child and Adolescent Centre* ex *tempore*, High Court, Kelly J, May 10, 2004.

[275] See *McConnell v N.E.E.T.U.* unreported, High Court, Hamilton P., July 22, 1986.

[276] See *Doherty v Health Service Executive* [2009] E.L.R. 131.

[277] See *Burke v Independent Colleges Ltd. t/a Independent Colleges* [2011] 22 E.L.R. 169.

[278] See *Wallace v Irish Aviation Authority* [2012] 2 I.L.R.M. 345.

[279] See *Charlton v H.H. The Aga Khan's Studs Société Civile* [1999] 10 E.L.R. 136, *Minnock v Irish Casing Co. Ltd.* [2007] 18 E.L.R. 229 (although no order was made restraining the disciplinary process being conducted by the first named defendant) and *McLoughlin v Setanta Insurance Services Ltd.* [2012] 23 E.L.R. 57

[280] See *O'Sullivan v Mercy Hospital Cork Ltd.* [2005] IEHC 170.

- An order restraining the defendant from holding an appeal from a disciplinary hearing until such time as the plaintiff has been furnished with specified documents and witnesses are permitted to attend the said appeal.[281]

As is evident from the foregoing, many of these orders are in essence iterations of each other. Furthermore, the actual order made by the court is often not recorded in the written judgment, with the court instead adopting a formulation along the lines of indicating in broad terms what it proposes to do, but inviting the parties to discuss the precise form of the order to be made.[282]

Of the orders identified, one merits significantly more detailed consideration due to the effect it has had on the growth in the seeking of interlocutory injunctions. It is the order which is commonly known as the "*Fennelly* order", derived from the case of *Fennelly v Assicurazioni Generali S.P.A.*[283] It is most basic form, it is an order directing the defendant to pay to the plaintiff all salary and other benefits to which he is entitled under his contract of employment, on the undertaking of the plaintiff to carry out such duties under that contract as may be required of him.[284]

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[281] See *Carroll v Bus Atha Cliath / Dublin Bus* [2005] 4 I.R. 184.

[282] See, for example, *Garrahy v Bord na gCon* [2002] 3 I.R. 566, *Evans v I.R.F.B. Services (Ireland) Ltd.* [2005] 2 I.L.R.M. 358, *O'Sullivan v Mercy Hospital Cork Ltd.* [2005] IEHC 170 and *Giblin v Irish Life & Permanent plc.* [2010] 21 E.L.R. 173.

[283] (1985) 3 I.L.T.R. 73.

[284] See *Shortt v Data Packaging* [1994] 5 E.L.R. 251, *Boland v Phoenix Shannon* [1997] 8 E.L.R. 113, *Phelan v BIC (Ireland) Ltd.* [1997] 8 E.L.R. 208, *Harte v Kelly* [1997] 8 E.L.R. 125, *Courtenay v Radio 2000 Ltd.* [1997] 8 E.L.R. 198, *Gee v Irish Times Ltd.* [2001] 12 E.L.R. 249, *Moore v Xnet Information Systems Ltd.* [2002] 4 I.R. 362 and *Sheehy v Ryan* unreported, High Court, Peart J., August 29, 2002. However, it is evident from cases such as *Phelan v BIC (Ireland) Ltd.* [1997] 8 E.L.R. 208 that a *Fennelly* order may be part of wider series of orders: in that case, a *Fennelly* order was granted, but orders were also granted restrained termination of the contract of employment, restraining the implementation of the purported dismissal of the plaintiff and from publishing in any manner whatsoever any statement to the effect that the plaintiff was no longer managing director of the defendant or that his employment had been terminated. A *Fennelly* order was made in *Lonergan v Salter-Townshend* [2000] 11 E.L.R. 15 together with an order restraining the appointment of any other person to the plaintiff's position.

11. The *Fennelly* Order

The plaintiff in *Fennelly* sought to injunct the termination of his contract in circumstances where the defendant company had suffered a serious downturn in business. Costello J. noted that it would be some considerable time before the matter came on for plenary hearing. In the meantime "the plaintiff will be left without a salary and nothing to live on." He took the view that the situation in which the plaintiff found himself "would be little short of disastrous." He did not want to see the plaintiff left "virtually destitute." In light of the "very special circumstances" in the case before him, Costello J. required the plaintiff to be paid his salary and bonus under his contract until the trial of the action.[285] Thus was created the "*Fennelly* order." The *quid pro quo* for such relief was that the plaintiff had to make himself available for work should his employers want him to "attend and carry out such duties as they give him. They might prefer not to give him any duties and put him on a leave of absence. That is for the defendant…"

There is no doubt that "a purported termination in a summary manner is a traumatic event in any employee's working life."[286] As such, there is an argument that a *Fennelly* order can in some way cushion the immediacy of the dismissal blow to an employee. Although never specifically alluded to, a changing - not to say changed - contextual approach, with the move away from terminology such as "master and servant" and the views it betrayed, must presumably have been in Costello J.'s mind when the *Fennelly* case came before him in 1985. Unfortunately, neither Costello J., nor indeed any judge since, has really elaborated on the extent to which such a changing social context has influenced their decisions. He did not explain why was prepared to so obviously address hardship in such a way seven years after Kenny J. had refused to do so in *Yeates v Minister for Posts and Telegraphs*,[287] despite Kenny J. being "fully aware" of such hardship,[288] but refusing to make an order.[289] It is a development which cannot be satisfactorily explained on a

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[285] (1985) 3 I.L.T.R. 73 at 74.

[286] *Per* Murphy J. in *Davis v Walshe* [2003] 14 E.L.R. 1.

[287] [1978] I.L.R.M. 22.

[288] *ibid.* at 25.

[289] Albeit in the context of a suspension, although the suspension in that case could effectively be equated with dismissal in its impact.

reading of either decision, although the outcome in *Fennelly* appeared to be a just one on its facts (though there is no gainsaying the remark that it was an "exceptional" one).[290]

Fennelly also catches the eye for the fact that it was a hugely significant breach of the courts' stated position that they would not specifically enforce contracts of employment, albeit while paying lip service to considering exceptions (although this does lead to further consideration as to whether a *Fennelly* order is in fact an anti-dismissal injunction in a pure sense, or rather the limited enforcement of certain terms of the contract of employment). Such a missed opportunity is increasingly pronounced given the effect which *Fennelly* would subsequently have on the development of the anti-dismissal injunction.

11.1 Basis for the Order

Looking at it objectively, there was in fact no formal legal impediment to Costello J.'s order in *Fennelly,* inasmuch as it appears to have been based on the (admittedly "awkward," to use Meagher, Gummow and Lehane's word[291]) case of *Hill v C.A. Parsons Ltd.*,[292] already considered in Chapter Three in the context of unaccepted repudiation.[293] In *Hill*, the Court of Appeal granted an injunction to Mr. Hill, restraining effect being given to a notice period that was "too short by far." It is arguable, however, that *Hill* was a somewhat infirm basis for Costello J.'s approach: it is easy to forget at a remove of nearly forty years that *Hill* was itself a case which created, as summarised by Hepple & O'Higgins, a "special, and very limited exception, to the general rule."[294] Specifically,

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[290] See, for example, the comments of Macken J. in *Lonergan v Salter-Townshend* [2000] 11 E.L.R. 15 at 27, although she acknowledged that in subsequent cases "the same relief has been granted." An interim order had in fact been granted in *Lonergan* by Geoghegan J.

[291] *Per* Meagher, Gummow & Lehane *Equity* (Butterworths Lexis Nexis, Australia, 2002), p.754.

[292] [1972] Ch. 305.

[293] See Chapter Three, section 6.2.

[294] Hepple and O'Higgins *Employment Law* 2nd ed. (Sweet & Maxwell, London, 1976), p.46.

- Damages were not an adequate remedy (which was effectively admitted), as the loss of Mr. Hill's pension rights were purely within the employer's discretion, and were not a term of the Mr. Hill's contract;
- Personal confidence had not been lost between the parties;
- Mr. Hill was anxious to remain in employment until the relevant provisions of the (English) Industrial Relations Act came into force, as these would provide various remedies of which he could avail himself.[295]

As such, it is possible to view *Hill* as a case which could be dealt with on the facts before the court without causing any seismic shift in the underlying jurisprudence. Although Smith & Randall have observed that it is possible "to see *Hill's* case in its historical perspective, not just as a case really aiming the common law at perceived (pre-Thatcher legislation) abuse of trade union power, but as marking a possible move towards some common law restraint on unbridled dismissal,"[296] any such restraint "was very quickly trumped by the arrival of the statutory action of unfair dismissal which turned out to be the real area for future development."[297]

In fact, the immediate reaction to *Hill* on the part of the courts in England was not particularly enthusiastic: in *Sanders v Ernest A. Neale Ltd.*[298] Sir John Donaldson referred

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[295] It is also important to bear in mind that Lord Denning had a very particular view on both work and trade unions, summed up in an obituary from The Guardian newspaper of March 6, 1999: "He took with him his distaste for interference with individual enterprise, whether by the state or by trade unions and his paternalistic, and sometimes simplistic, views on social questions. These had a long lineage." More broadly, Davies suggests that "The starting point for many labour lawyers is that traditional judicial values—individualism, freedom of contract, and property rights - tend to align with the interests of employers, rather than with those of employees and trade unions." Davies "Judicial Self-Restraint in Labour Law" (2009) 38 I.L.J. 278

[296] Smith & Randall *Contract Actions in Employment Law – Practice and Precedents* 2nd ed. (Bloomsbury Professional, West Sussex, 2011), p.129.

[297] *ibid.*

[298] [1974] I.C.R. 565.

to it as being "unusual if not unique."[299] Lord Denning himself acknowledged in *Chappell v Times Newspapers*[300] that it was exceptional.

The underlying philosophy informing *Hill* was not entirely unique, however. *Hill* was decided around the same time as *C.H. Giles & Co. v Morris.*[301] Megarry J. was cautioning in the latter case that the fact that a contract was one of personal service did not mean that specific performance would be automatically refused.[302] As such, the *C.H. Giles* case may in fact be a more helpful starting point (or, perhaps, a "restarting" point) for a consideration of the development of the law in England in this area.[303] Nevertheless, the popular academic approach in England is to start with a consideration of *Hill* when examining the courts' willingness to order specific performance.

An alternative understanding of *Hill* has been advanced in Australia, with it being suggested in the case of *Gregory v Philip Morris Ltd.*[304] that the relief granted in *Hill* "was not really of specific performance. The order of the court was merely to restrain the employer from treating as valid a particular notice of dismissal." In effect, the court in *Gregory* treated *Hill* as a case involving considerations of unaccepted repudiation. The view in *Gregory* is not one which appears to have been either actively canvassed or entertained in reported judgments in this jurisdiction, and common wisdom has it that *Hill* was both an exception and an exceptional case.[305]

Hill was not only accepted, it was also expanded (albeit to a limited degree) to apply to cases in which dismissal was not effected. A helpful summary of the situation in England as it pertained in 1989 is provided by Carty:

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[299] *ibid.* at 571.

[300] [1975] I.C.R. 145.

[301] [1972] 1 W.L.R. 307.

[302] *ibid.* at 970

[303] See also *Price v Strange* [1978] Ch. 337 at 359 *per* Goff L.J., as identified by Carty "Dismissed Employees: The Search for a More Effective Range of Remedies" (1989) 52(4) M.L.R. 449 at 450.

[304] [1988] F.C.A. 100.

[305] Although the term "a *Fennelly* order" is in common usage in this jurisdiction, the English do not appear to have adopted the term "a *Hill* order."

> "As a principle [the *Hill* principle] is not limited to dismissals. So in *Powell v London Borough of Brent*,[306] the Court of Appeal upheld the *Hill* principle and granted an interlocutory injunction when, in effect, the employer sought to change its mind over promoting the plaintiff. The court based its decision on *Hill v Parsons*: they found as a fact that confidence remained and that damages would be an inadequate remedy. Damages would be inadequate because they could not compensate for the loss of pleasure and satisfaction in doing a more demanding job. Again in *Hughes v London Borough of Southwark*[307] the judge restrained the local authority, which was arguably in breach of contract, from forcing hospital social workers to transfer to a community district. However in both cases the balance of convenience was strongly in favour of the *status quo*."[308]

At a longer remove, however, Smith & Randall suggest that *Hill* is "the *Rylands v Fletcher* of employment law," namely that it was "a fascinating early decision which could have led in a totally new direction if it had been followed, but which for good historical reasons was not further developed, and which remains in force in its own restricted terms, to be relied on in a few cases but not the majority."[309]

Much like the *Hill* case in England, *Fennelly* was an unlikely case upon which to base the development of the jurisprudence in relation to anti-dismissal injunctions here. In a supreme irony, *Fennelly* involved a challenge to a redundancy without (on the face of it, based on the judgment as recorded) more; accordingly, as a case which, for the reasons considered in the next section, should more properly have been dealt with before the Employment Appeals Tribunal (E.A.T.). It also involved "very special circumstances." Costello J.'s judgment was *ex tempore* and was never going to trouble those looking for detailed legal analysis. It relied on *Hill*, a case which was treated as a limited exception and which was already subject to critical comment by other judges in England. There was

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[306] [1988] I.C.R. 176.

[307] [1988] I.R.L.R. 55.

[308] Carty "Dismissed Employees: The Search for a More Effective Range of Remedies" (1989) 52(4) M.L.R. 449 at 464.

[309] Smith & Randall *Contract Actions in Employment Law –Practice and Precedents* 2nd ed. (Bloomsbury Professional, West Sussex, 2011), p.131.

no consideration of these criticisms of *Hill* or of more recent English authorities generally.[310] Conversely, nor did Costello J. mention the much more ancient case of *Ball v Coggs*,[311] of which he would presumably have been aware, given that it was specifically referred to in *Hill*, or *East India Co. v Vincent,*[312] both cases considered earlier in this Chapter.

That Costello J. had to rely exclusively on an English authority at all is also a little surprising; he made no mention of the Irish case of *Graham v Coras Iompair Eireann*,[313] in which it was reported that an injunction was granted to the plaintiff coachbuilder to prevent a threatened dismissal unless he rejoined a union he had left in order to join another union.

However, although not articulated by Costello J., it is possible to identify broader legal bases underpinning his order:

1. It is entirely consistent with a court's jurisdiction to make such an order; as has been seen,[314] as is clear from the wording of s.28(8) of the Supreme Court of Judicature Act (Ireland) 1877, an injunction is granted if the court feels that it

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[310] Such as *Irani v Southampton and South West Hampshire Health Authority* [1985] I.C.R. 590. However, the authors of Smith & Wood's Employment Law suggest that cases such as *Irani*, (and *Wadcock v Brent London Borough Council* [1990] I.R.L.R. 223, *Robb v London Borough of Hammersmith and Fulham* [1991] I.C.R. 514, *Powell v London Borough of Brent*, [1988] I.C.R. 176, *Hughes v London Borough of Southwark,* [1988] I.R.L.R. 55 and *Peace v City and Edinburgh Council* [1999] I.R.L.R. 417 are not "ordinary, everyday dismissal cases" (*Powell*, *Hughes* and *Peace* did not involve dismissals at all). Smith & Baker *Smith & Wood's Employment Law* 10th ed. (O.U.P., Oxford, 2010), p.402. See Barry "Employee Injunctions - Specific Performance of Contracts of Employment" (1991) 9 I.L.T. 102 and see generally Madden "Specific Performance of Contracts of Employment" (1985) 3 I.L.T. 134. In fact, Harvey suggests that *Irani* may "in fact, be evidence of further innovation in this area of the law." Harvey on *Industrial Relations and Employment Law* (LexisNexis Butterworths) Division AII Contract of Employment, para.429.

[311] (1710) 1 Bro. P.C. 140.

[312] (1740) 2 Atk. 82.

[313] "Employee gets injunction against CIE." The Irish Times, April 8, 1981.

[314] See section 3.1.

would be "just" and "convenient", and on such terms and conditions as the court thinks just;

2. Costello J. placed great emphasis on the fact that "the parties have obviously the highest regard for one another."[315] As such, and although not articulated in these terms, there was no loss of confidence (the "litmus test", to use MacMenamin J.'s phrase in the later case of *Keenan v Iarnrod Eireann*[316]);
3. Given this regard which the parties had for each other, there was unlikely to be any issue in relation to a possible breach of the doctrine of mutuality;
4. For the same reason, there was unlikely to be any issue in relation to a possible contempt by the plaintiff if called upon to present for work and to carry out duties at the workplace. Related to this, although the order represented a breach in the accepted wisdom that specific performance of a contract would not be ordered, the order worked because it was, in effect, policeable, thus overcoming one of the main objections to granting specific performance.[317]
5. Although again not explicitly articulated, the doctrine of unaccepted repudiation had to take effect, otherwise Costello J. could not have, in essence, continued the relationship between the parties.[318]

11.2 The Influence of Fennelly

A benign view would be that the type of order made in *Fennelly* was (obviously) beneficial to the employee, but also in a sense to the employer, in that it was possibly the least intrusive option from the range of orders which might have been made. More prosaically, Charleton suggests that, simply put, an order such as maintaining a plaintiff on his or her salary pending the trial of an action, can be "more attractive from the point of view of a judge hearing an interlocutory application."[319]

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[315] It is unclear how to square this with the fact that the defendant challenged the existence of what the plaintiff claimed was a twelve year contract.

[316] [2010] 21 E.L.R. 115.

[317] See section 5.

[318] As noted in Chapter Three, section 7, it is not without significance that the same judge delivered, shortly before *Fennelly*, one of the few judgments in this jurisdiction which explicitly recognises and defines the doctrine of unaccepted repudiation, in the case of *Industrial Yarns v Greene*. [1984] I.L.R.M. 15.

[319] Charleton "Employment Injunctions: An Over-Loose Discretion" (2009) 9(2) J.S.I.J. 12.

There was very little with which to compare *Fennelly* when it was delivered; it was unclear whether it was to be a one-off, exceptional case. However, given the *Fennelly* order's evolutionary path, and the way in which subsequent cases have followed *Fennelly* in such an unquestioning way, it can now be said with some confidence that whatever about its status at the time Costello J. delivered his judgment, it can no longer be considered an exceptional – in either sense of the word - case at all. It has been observed that the *Fennelly* case has "generated a mini-industry, and, in comparative terms, a doctrinal innovation: the anti-dismissal injunction."[320]

Despite this, it in fact took some time for the impact of *Fennelly* to make itself apparent. The first written decision in the aftermath of *Fennelly* was that of Hamilton P. in *McConnell v N.E.E.T.U.*[321] In *McConnell* Hamilton P. made specific reference to the question of compensation for loss of salary (acknowledging that in principle the plaintiff could be so compensated by an award of damages). However, he then referred to damages not being adequate compensation "for the damage to his prestige and standing which would undoubtedly occur if he were to continue to be suspended without pay with its implication that he had been found guilty of gross insubordination." Despite this, he professed himself satisfied that he could not make an order rescinding the defendant's Resident Executive Council's order, pursuant to which the plaintiff was suspended without pay. The decision in *Fennelly* was not referred to. It was not until the decision of *Shortt v Data Packaging,*[322] almost a decade later, that the *Fennelly* order was revisited and applied.

It is worth pausing to consider why such a period elapsed before a *Fennelly* order was made again and why the jurisprudence in this area grew as it did. A number of factors can be suggested in that regard.[323] First, on its own terms the order in *Fennelly* was made due

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[320] Costello "Regulating the Anti-Dismissal Injunction" in Breen, Casey & Kerr *Liber Memorialis Professor James C. Brady* (Roundhall Sweet and Maxwell, Dublin, 2001), p.188 at 188.

[321] unreported, High Court, Hamilton P., July 22, 1986.

[322] [1994] 5 E.L.R. 251. As in *Fennelly*, the decision in *Shortt* was delivered *ex tempore*.

[323] *Per* counsel who acted for the defendant in *Shortt v Data Packaging* and for the plaintiff in *Phelan v BIC (Ireland) Ltd.* He has also suggested that it was Roddy Horan B.L., who had acted for the defendant in

to the "very special circumstances" of the case. As such, it would seem that another case which on the facts admitted of such circumstances would have to be identified in order to develop the approach adopted in *Fennelly*; that case was *Shortt*. Secondly, it has been suggested that it was only by the late 1990s that there was something approximating to a broader recognised employment bar, with an increased number of specialists in employment law who were prepared to mine existing jurisprudence and leverage it in future cases. This then had to be coupled to the third factor, namely a judiciary which was prepared to accept that *Fennelly* orders could be more readily granted and in cases which did not exhibit "very special circumstances."

For these reasons, *Shortt* was a critical case in terms of reviving the *Fennelly* order after something of a hiatus, and its importance should not be underestimated. The plaintiff in *Shortt* was informed that he was to be made redundant. He contended, *inter alia*, that his purported dismissal on the grounds of redundancy was unlawful as the requirements of the defendant company for his position had not ceased or diminished. In a very brief judgment, Keane J. made an order restraining the defendant from implementing the purported termination of the plaintiff's appointment as managing director. He also explained that his order would be "largely in the form of the order made by Costello J in the *Fennelly* case."

What is notable about *Shortt* is Keane J.'s reference to a trial "inevitably" being "some time away." Coupled with the fact that the plaintiff would, in the interim, be "totally without remuneration," this was a factor which clearly influenced his decision. It is not unreasonable to suspect that the state of court lists may have informed Keane J.'s views.[324] If so, it would not be the first time that the court's approach to injunctions has

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Fennelly, and who acted for the plaintiff in *Shortt*, who identified that the facts of the latter case afforded an opportunity to seek a *Fennelly* style-order.

[324] It is very difficult to make a more definitive statement than this in relation to the waiting time for cases to get a hearing; as noted in its consideration of "The Problem of Delay," the Working Group on a Courts Commission observed that "The Group has encountered difficulties in obtaining comparable statistics in this and other areas…Figures available vary and may be based on different criteria. For example, in considering delay one may approach from the first document in a case, the first appearance in Court, or from when the case is listed as ready to be heard. The Group is of the opinion, from its own experience, and from information available, that the delays in certain areas may be considerably more than is apparent on

been informed by what might be termed purely administrative factors: the "old" (pre-*American Cyanamid / Campus Oil*) test of a *prima facie* case was adopted in 1887 in the case of *Challender v Royal.*[325] Kerr has observed that the change from a consideration of whether there was a "fair question" to be tried was effected in order to facilitate a cheap method of arbitrating on disputes at a time when courts lists were lengthy and courts overburdened.[326]

Apart from a consideration as to whether the plaintiff's removal was in breach of a properly convened board of directors and in accordance with the defendant company's memorandum and articles of association, the circumstances of *Shortt* were less "special" (never mind "very special") than in *Fennelly*, but Keane J.'s order was at least consistent with that in *Fennelly* in terms of its rationale. Unfortunately, it was also consistent with *Fennelly* in the sense that it was lacking a narrative which would explain the basis for the making of such an order and facilitate an understanding of the extent to which such an order was truly exceptional or was the basis for the expansion of the law in this area. Interestingly, in his own text on *Equity and the Law of Trusts in the Republic of Ireland*, the second edition of which was published after his retirement from the bench, Keane comments that the *Fennelly* order is a pragmatic compromise between a potentially long wait for a trial and requiring the parties to remain working together in circumstances where trust and confidence have broken down.[327] Somewhat unfortunately, this view is undermined by the fact by Costello J.'s observations, as set out above, about the parties in the *Fennelly* case having the "highest regard" for one another.

It has been suggested by Mallon that the decisions in *Fennelly* and *Shortt*, together with

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the face of the existing statistics." Working Group on a Courts Commission First Report "Management and Financing of the Courts" April 1996, p.36. The provisions of Article 6§1 of the European Convention of Human Rights are of relevance now in that they provide that "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

[325] (1887) 36 Ch. D. 425.

[326] See Kerr "The Problem of the Labour Injunction Revisited" (1983) 18 *Ir. Jur.* (ns) 34, at 38, citing Hammond "Interlocutory Injunctions: Time for a New Model" (1980) 30 Univ. of Toronto L.J. 240.

[327] Keane *Equity and the Law of Trusts in the Republic of Ireland* 2nd ed. (Bloomsbury, Dublin, 2011), p.304.

the case of *Phelan v BIC (Ireland) Ltd.*,[328] "are the foundation stones of the modern law of employment injunctions in this jurisdiction."[329] *Phelan* was perhaps a less secure foundation stone. It represented the start of a process whereby judges took *Fennelly* and developed it in a wholly unexpected way. In *Phelan*[330] Costello P. granted interlocutory relief notwithstanding that the plaintiff would not be destitute. That conclusion may be explained in part by the fact that the President was giving practical effect to his evident disapproval of the defendant's conduct. It was nevertheless a dramatic step to take in the context of making a *Fennelly* order, which had previously been linked to destitution and penury.[331]

The next significant expansion of the *Fennelly* order came against a backdrop of no overt disapproval as to the defendant's conduct being expressed by the court. Laffoy J. found in *Harte v Kelly*[332] that "the entitlement to the type of order granted in the *Fennelly* case is not limited to a situation in which the Plaintiff can establish that he will face penury if such an order is not made."[333] Laffoy J.'s view, although novel, was not an isolated one for long. In *Doyle v Grangeford Precast Concrete Ltd.*[334] O'Donovan J. granted the injunction sought and referred to *Fennelly*, *Shortt* and *Harte* as affording him the authority to do so. These represented missed opportunities, points at which the courts could have set out some clear guidance as to when exactly they would contemplate making a *Fennelly* order and, more broadly, the jurisprudential basis upon which they could do so.[335]

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[328] [1997] 8 E.L.R. 208.

[329] Mallon "Remedies for Termination of Employment: Injunctions" Paper delivered to the Employment Bar Association of Ireland, February 2, 2012.

[330] [1997] 8 E.L.R. 208.

[331] Conduct was also key to the decision in *Boland v Phoenix Shannon plc.* [1997] 8 E.L.R. 113, in which Barron J. expressed his unhappiness with aspects of the way the defendant ran its defence.

[332] [1997] 8 E.L.R. 125.

[333] [1997] 8 E.L.R. 125 at 130.

[334] [1998] 9 E.L.R. 260.

[335] See also *O'Donnell v Chief State Solicitor* [2003] 14 E.L.R. 268 at 272 and *Lonergan v Salter-Townshend* [2000] E.L.R. 15.

In the later case of *Moore v Xnet Information Systems Ltd.,*[336] counsel for the defendant attempted to analyse the development of the *Fennelly* order by suggesting that the common thread to the cases in which such an order was made was not, as apparently accepted by Laffoy J. in *Harte v Kelly,*[337] that the plaintiff was totally dependent on his income. Rather, it was that these were all exceptions to the general rule. In *Harte*, the plaintiff was a director and minority shareholder and had been accused of wrongdoing. Similarly, in *Boland v Phoenix Shannon plc.,*[338] and *Phelan v BIC (Ireland) Ltd.,*[339] allegations of wrongdoing subsisted, with a concomitant need for fair procedures. O'Sullivan J. did not really engage with this argument, beyond rehearsing what had been said in previous cases, before granting a *Fennelly* order.

Although subsequent decisions would indicate that the courts are prepared to grant *Fennelly* orders in all cases, not just when office holders are involved or wrongdoing alleged, attempts to put a gloss on *Fennelly* and its progeny surface from time to time. In *Glynn v HSS trading as Citywest Hotel,*[340] Ryan J. made reference to misconduct as underpinning the development of the *Fennelly* line of cases, although that view is somewhat undermined by the fact that a purported redundancy was in issue in *Fennelly.*

However, not all judges were prepared to embrace the granting of *Fennelly* orders as a matter of routine. The language used by Carroll J. in *Orr v Zomax Ltd.*[341] suggested a degree of skepticism on her part in relation to developments in this regard, in particular her observation that "the position apparently has moved from being appropriate in either special or exceptional circumstances to being a "well established practice."[342]

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[336] [2002] 4 I.R. 362.

[337] [1997] 8 E.L.R. 125.

[338] [1997] 8 E.L.R. 113.

[339] [1997] 8 E.L.R. 208.

[340] unreported, High Court, Ryan J., February 26, 2010.

[341] [2004] 1 I.R. 486.

[342] Albeit that as O'Connell points out, Carroll J. was apparently misquoting McCracken J.'s judgment in *Gee v The Irish Times Ltd.* [2001] 12 E.L.R. 249, as the well established practice "in question is, in fact, the refusal to order specific performance of the employment contract..." O'Connell "The Evolution of the Employment Injunction in Ireland and the United Kingdom: Analysing a Divergent Approach." (2009) 3/4 E.L.R.I. 147 at 177.

Notwithstanding these apparent doubts, the state of the law by 2003 was such that it has been commented that interlocutory relief was being granted for the asking.[343] The "exceptional" outcome of the *Fennelly* decision had effectively become the norm. By 2007, Irvine J. felt able to comment in *Stoskus v Goode Concrete*[344] that it was "easy to see" why in certain circumstances a court would grant a *Fennelly* order, albeit referring specifically to the financial difficulties arising for the plaintiff in various cases. Three years later, Laffoy J. was able to summarise the state of the law in *Giblin v Irish Life & Permanent plc.*:[345]

> "As a general proposition, in the context of employment injunctions, the jurisprudence of the courts has developed over the last quarter century so that it is generally considered that the prospect of an award of damages following the trial of the action is not an adequate remedy for a successful plaintiff who has been deprived of his salary pending the trial of the action."[346]

The Supreme Court had an opportunity in *Maha Lingham v Health Service Executive*[347] to review cases in which *Fennelly* orders had been granted. It did not do so in any rigorous way. Rather, and somewhat surprisingly, Fennelly J. felt able to group those cases together and observe that:

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[343] Moffatt *Employment Law (Law Society of Ireland Manual)* (O.U.P., Oxford, 2006), p.250.

[344] [2007] IEHC 432.

[345] [2010] 21 E.L.R. 173.

[346] *ibid.* at 184. *In Hernandez v Vodafone Ireland Limited* [2013] IEHC 70, a case which centred on the efficacy of a non-compete clause, Laffoy J. noted that the plaintiff was not "as happens in many employment injunction cases, seeking an order for the payment of his salary by the defendant pending the trial of the action." It should be noted that in granting the injunction sought, although not involving an anti-dismissal application, Laffoy J. focused on the implications for the plaintiff of being deprived of his salary for a period of over three months, referring to the fact that he was a "married man with two young children aged eight and three years, who has to meet the usual household expenses, mortgage repayments, utility costs, health insurance and so forth on a continuous basis." She also made reference to the plaintiff's averment that he had to support his two parents in Mexico and his concerns that he might not qualify for Jobseeker's Allowance.

[347] [2006] 17 E.L.R. 137.

> "there is a very strong trend in those cases to the effect that where a person has a clear right to either a particular period of notice or a reasonable notice or has a fixed period of employment, a summary dismissal or a dismissal without notice or without any adequate notice is a first step in establishing the ground for an injunction in those sort of cases."[348]

This is surprising because, as has already been seen, *Fennelly* itself involved a challenge to a purported redundancy. So too did *Gee v Irish Times Ltd.*,[349] *Moore v XNET Information Systems Ltd.*[350] and *Davis v Walsh*.[351] A key feature of *Shortt v Data Packaging*[352] and *Phelan v BIC (Ireland) Ltd.*[353] was alleged non-compliance with the respective companies' articles of associations (albeit that this did go to the question of proper notice). Nevertheless, it is unsatisfactory to group all these cases together and suggest that they all fall under the rubric of, broadly speaking "no, or no adequate, notice." A much more engaged and compelling analysis by the courts of the *Fennelly* case and its progeny is still awaited.

There are also two important considerations in respect of which the courts do not appear to have engaged to any significant degree in their written decisions, both relating to financial circumstances.

11.3 Fennelly Orders and Evidence of Financial Circumstances: The Plaintiff

There appears to be very limited detailed analysis in reported decisions of whether a party who could be denied their salary pending the substantive hearing of their injunction may have other means. The point was considered in *Harte v Kelly*,[354] as it was argued that the plaintiff benefitted from a share of royalty payments. Laffoy J. was not prepared to limit

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[348] *ibid.* at 140.

[349] [2001] 12 E.L.R. 249.

[350] [2002] 4 I.R. 362.

[351] [2003] 14 E.L.R. 1.

[352] [1994] 5 E.L.R. 251.

[353] [1997] 8 E.L.R. 208.

[354] [1997] 8 E.L.R. 125.

the situations in which a *Fennelly* order might be imposed; in the case before her, the plaintiff would have had the benefit of half his nett income absent a *Fennelly* order, but this did not persuade the court that such an order should not be made. In fact, Laffoy J. observed that in neither *Shortt v Data Packaging Ltd.*[355] nor *Boland v Phoenix Shannon plc.,*[356] which had been cited to her, had there been any consideration "of matching the totality of the income of the plaintiff to his outgoings or commitments, nor was there any consideration of the value of his assets or his spending patterns."[357]

That is not to say that the point is not rehearsed before the courts. In *Lonergan v Salter-Townshend,*[358] there was affidavit evidence before the court on behalf of the plaintiff stating that he was dependent on his salary to meet his day to day expenses. However, this was challenged by the second defendant in the case. A challenge was also made to the issue of the plaintiff's financial requirements and outgoings in *Coffey v Connolly & Sons Ltd..*[359] It was submitted that the plaintiff had significant property assets and was by no means indigent and that, as such, the principles set out in *Fennelly* did not apply. However, this was not a point directly addressed by Edwards J.

A somewhat different approach was adopted in *Hegarty v P.J. Hegarty and Sons*, in which an order for the payment of half the plaintiff's salary was made[360] However, as noted by Stewart & Dunleavy, as the plaintiff was only to receive half his salary, he was not required to work full time.[361]

11.4 Fennelly Orders and Evidence of Financial Circumstances: The Defendant

The second consideration relates to the effect on a company of ordering it to pay an employee's salary pending a trial, an effect which is often not considered. It was argued

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[355] [1994] 5 E.L.R. 251.

[356] [1997] 8 E.L.R. 113.

[357] *ibid.* at 130.

[358] [2000] 11 E.L.R. 15.

[359] [2007] IEHC 319.

[360] unreported, High Court, Shanley J., January 20, 1998.

[361] Stewart & Dunleavy *Compensation on Dismissal: Employment Law and Practice* (First Law, Dublin, 2008), p.234.

in *Moore v XNET Information Systems Ltd.*[362] that an order requiring the defendant company to pay the plaintiff's salary would be onerous, as the company's financial position was "extremely tight". As Charleton has written, "A requirement that a small firm, for instance, continue to pay salary and benefits up to the date of trial, perhaps eighteen months away, can be crippling."[363] This was recognised on the facts of the case by Carroll J. in *Orr v Zomax.*[364] She held that it would constitute "a serious injustice for the defendant if it was obliged to pay the plaintiff's salary until trial of the action." [365] Her very sensible, practical solution was to have an early trial (although the extent to which an early trial is workable depends, of course, on the facts of a case, the willingness of the parties to progress matters and the state of the court lists at any given time).

There is an indication by Macken J. in both *Lonergan v Salter-Townshend*[366] and *Martin v Irish Nationwide Building Society*[367] that a defendant has the opportunity to set out its position in relation to the effect of making a *Fennelly* order. She referred in *Lonergan* to the fact that the defendant gave no evidence that they would suffer irreparable loss and damage if the plaintiff's salary was restored pending trial and was ultimately unsuccessful. O'Sullivan J. appears to have responded to such an argument in *Moore v Xnet Information Systems Ltd.,*[368] duly considering the financial position of the defendant and whether it was in a position to continue paying the plaintiff's salary pending the hearing of the action.

There is no doubt that from an employer's perspective, a *Fennelly* order may not appear particularly just, especially to an employer which does not wish to avail itself of its employee's services pending the hearing of the action, yet is obliged to pay them. This is turn feeds into the hugely significant tactical advantage of obtaining a *Fennelly* order; when adding together notice periods and the likely wait until a date for the plenary

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[362] [2002] IEHC 6.

[363] Charleton "Employment Injunctions: An Over-Loose Discretion" (2009) 9(2) J.S.I.J. 14.

[364] [2004] 1 I.R. 486.

[365] *ibid.* at 496.

[366] [2000] 11 E.L.R. 15.

[367] [2001] 1 I.R. 228.

[368] [2002] 4 I.R. 362.

hearing, an employee could legitimately claim anywhere between twelve and eighteen months' salary from an employer by way of compromising their claim. The attraction (such as it is) from an employer's perspective is that such a compromise "frees up" the position in question such that they are now free to deal with it as they wish. As Costello points out, if a plaintiff secures a *Fennelly* order, there is little incentive on that plaintiff to pursue the matter further (although as will be seen in Chapter Six, courts will often give directions for accelerated pleadings and / or case manage litigation in order to ensure an early trial). Although the defendant may have an interest in pursuing the matter,

> "there is something unreal about the undertaking in damages in the case of the post-dismissal salary injunction. The rationale for the order [destitution and lack of remuneration]...is not easily reconcilable with the existence of an effective right of recovery. Even where there might be a prospect of recovery, the sum involved may not justify the risk of the costs of a full action, and the temptation may be to write the matter off."[369]

As such, it is not just the cost of paying a salary pending a trial which needs to be factored into a defendant's thinking, it is also the cost of running a full trial.[370]

11.5 Limits on the Fennelly Order

There are limits on the making of a *Fennelly* order, and certain judges, in particular Clarke J., have clearly been uneasy about the way in which the order has developed. In *Yap v Children's University Hospital Temple Street Ltd.*,[371] Clarke J. refused to make such an order, finding that the case was not "one of the very limited types of cases where it is appropriate or possible for the Court to direct that there be payment pending trial."[372]

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[369] Costello "Regulating the Anti-Dismissal Injunction" in Breen, Casey & Kerr *Liber Memorialis Professor James C. Brady* (Roundhall Sweet and Maxwell, Dublin, 2001), p.188 at 197.

[370] As to which, see Chapter Six, section 4.2.

[371] [2006] 4 I.R. 298

[372] *ibid.* at 304.

Furthermore, there are a number of instances of limitations on the *Fennelly* order, in particular temporal limitations and limitations on the range of employment benefits captured by such an order.

11.6 Temporal Restriction on the Payment of Salary

One point which appears to have been lost in the courts' enthusiastic embracing of the *Fennelly* order is the fact that the *Fennelly* decision was appealed, and on the appeal, the Supreme Court limited the payment of salary to a period of six months.[373] However, and as pointed out by Costello, "the length of the wages order should be determined solely by reference to the employer's outstanding notice commitments."[374]

In reality, the key in most cases for an employee is to secure some form of order such that they then hold the tactical whip hand in terms of any negotiations with their employer. Although the comment cannot be explicitly linked to the making or otherwise of, specifically, a *Fennelly* order, Carroll J. observed in *Orr v Zomax*,[375] having reviewed the cases in which *Fennelly* orders were granted, that "as far as I could ascertain, the vast majority of these settled."[376]

11.7 Perquisites and Benefits

As crafted by Costello J., the *Fennelly* order related to salary only. The case of *Doyle v Grangeford Precast Concrete Ltd.*[377] involved an appeal from an order of the Circuit Court, in which a *Fennelly* order was granted which allowed the plaintiff the use of a car which was a benefit of his employment with the defendant. In the High Court, O'Donovan J. held that there was no requirement to supply benefits other than salary unless services were performed which admitted of such benefits. In refusing the

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[373] As made clear by Carroll J. in *Orr v Zomax* [2004] 1 I.R. 486 at 495.

[374] Costello "Regulating the Anti-Dismissal Injunction" in Breen, Casey & Kerr *Liber Memorialis Professor James C. Brady* (Roundhall Sweet and Maxwell, Dublin, 2001), p.188 at 194.

[375] [2004] 1 I.R. 486.

[376] *ibid.*at 494.

[377] [1998] 9 E.L.R. 260.

injunction sought in *Orr v Zomax Ltd.*,[378] Carroll J. observed that it would not only be a serious injustice for the defendant if it was obliged to pay the plaintiff's salary until trial of the action, it would also be a serious injustice if the defendant had to maintain the plaintiff's pension and life assurance benefits, or preserving his perquisites and entitlements.

11.8 Availability for Work

The *quid pro quo* of making a *Fennelly* order is that an employee should make themself available for work if the employer requests it. It may well be acknowledged by the court that it will not be in the company's interest to re-involve the plaintiff day to day. That is encapsulated by the remark by Laffoy J. in *Harte v Kelly*[379] that she was "satisfied that it is not in the broader interest of the Company to re-involve the Plaintiff in the management of the Company, save to the extent that the first and second Defendants see fit to do so in return for his salary."[380]

The idea of a *quid pro quo* in return for payment is not simply an empty formula: in both *Carroll v Bus Átha Cliath / Dublin Bus*[381] and *McCrave v Littlefuse Ireland Ltd.*[382] a *Fennelly* order was refused in circumstances where the respective plaintiffs were unable to work due to health issues which had arisen in the course of their employment. However, these cases sit slightly uneasily with the decision of Kelly J. in *Mullarkey v Irish National Stud Company Ltd.*[383] That case involved the seeking of injunctions requiring the plaintiff's salary to be paid to him pending trial, notwithstanding the fact that he was not working due to illness. It was alleged that that illness was directly related to the situation which obtained at his place of work. As summarised by Kelly J., the plaintiff's argument was that although he had been out sick longer than the period within

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[378] [2004] 1 I.R. 486.

[379] [1997] 8 E.L.R. 125.

[380] *ibid.* at 131.

[381] [2005] 4 I.R. 184.

[382] *ex tempore*, High Court, Laffoy J., June 28, 2004.

[383] [2004] 15 E.L.R. 172. Referred to with approval by Clarke J. in *Yap v Children's University Hospital Temple Street Ltd.* [2006] 4 I.R. 298 at 302.

which he could be paid whilst on sick leave, his salary should be paid until trial regardless of contractual entitlements. Kelly J. held that on balance a fair case had been made out by the plaintiff that as he was entitled to full pay for a "reasonable time" (six weeks in that case), with half pay for 26 weeks thereafter. As such, the plaintiff did not benefit from an untrammelled *Fennelly* order.

Although an employee may be available for work, issues may arise as to their willingness to perform their job if called upon to do so. The obvious difficulty with this is that in a working relationship, it is very difficult to establish exactly when an employee may be in contempt. Human nature is fundamental to this. The image lingers of Megarry J.'s singer manifesting the temperament "traditionally associated with some singers..."[384] However, it was also quite sensibly pointed out by Megarry J. that not all contracts of personal service "are as dependent as this on matters of opinion and judgment, nor do all such contracts involve the same degree of daily impact of person on person."

The question of trust and confidence being extant between the parties may also be a key consideration in terms of any order made. Irvine J. was particularly alert to the practical effects of any order she might make in *Stoskus v Goode Concrete*.[385] The plaintiff had indicated that he would not be seeking reinstatement at the trial of the action, but was seemingly going to confine his relief to a declaration that the procedures adopted by the defendants at the time of his dismissal were wanting in natural justice and fair procedures. There was an ancillary claim for damages limited to the infliction of emotional suffering. As Irvine J. pointed out, the plaintiff had effectively accepted that as of the date of the trial of the action, his relationship with his employers was over. As such, she did not believe that the balance of either justice or convenience warranted the continuance of the relationship between the parties, even to the extent of making a *Fennelly* order. On one view, this is a very pragmatic approach; the reality is that there cannot be too many cases where, in light of a breakdown between the parties, an employee would really want to return to employment under the same conditions as had previously pertained, whatever about wanting to keep their job in the abstract. The authors of Meagher, Gummow and Lehane's *Equity* express this in typically forthright, but compelling, terms: "the adequacy

[384] See *C.H. Giles & Co. Ltd. v Morris* [1972] 1 W.L.R. 307 at 318; [1972] 1 All E.R. 960 at 969.

[385] [2007] IEHC 432.

or otherwise of damages is an entirely irrelevant factor if the result of an injunction is necessarily to keep alive a master-servant relationship which is intolerable to either party."[386]

However, the approach adopted by Irvine J. is not consistent with that generally adopted. In *Doyle v Grangeford Precast Concrete Ltd.,*[387] O'Donovan J. felt that he could grant a *Fennelly* order to a person who challenged the legality of their dismissal on the basis that the termination of their employment was unlawful "where that person is facing short term impecuniosity, even though, at the end of the day, that person is likely to end up with an award of damages, rather than re-instatement."[388] Perhaps this can be explained by the observation that what a *Fennelly* order does is ensure that an employee's right to be paid a salary is protected in circumstances where they are wrongly dismissed.[389] Where the analysis breaks down is in the practical reality that if a *Fennelly* order is in place until trial, a plaintiff may end up in principle getting "overpaid." As such, a better approach might be to put in place a *Fennelly* order limited in time, as considered above. Considerations of an unwillingness to leave plaintiffs in penury would admit of a slightly longer timescale, but on a strict black and white view of things, such a time limit should perhaps be gauged – to pick up on Costello's point - by reference to any contractual notice period, together with an extension to encompass the time which it would have taken to effect a procedurally correct termination.[390]

11.9 Company / Corporate Structure

The size of a company and how that relates to trust and confidence has already been touched on in Chapter Two[391] and addressed to in the context of specific performance

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[386] Meagher, Gummow and Lehane *Equity - Doctrines and Remedies* 2nd ed., (Butterworths Lexis Nexis, Australia, 2002), p.755.

[387] [1998] 9 E.L.R. 260.

[388] *ibid.* at 264. At plenary hearing, the plaintiff was awarded six months' remuneration in lieu of notice. A discount was also applied for monies paid pursuant to the *Fennelly* order.

[389] Costello "Regulating the Anti-Dismissal Injunction" in Breen, Casey & Kerr *Liber Memorialis Professor James C. Brady* (Roundhall Sweet and Maxwell, Dublin, 2001), p.188 at 188.

[390] The "*Gunton* extension," as referred to in Chapter Three, section 6.2.

[391] See Chapter Two, section 4.7.

earlier in this Chapter.[392] However, this is mainly in the context of the relationship between the employer and employee. The question of trust and confidence as an element of the relationship between employees *inter se* is not unheard of, but is relatively rare; in *Harte v Kelly*,[393] Laffoy J. explicitly took the wider interests of, *inter alia*, a company's employees (and indeed its creditors) into account when considering whether to re-involve the plaintiff in the company. The difficulty, as pointed out by Collins Ewing & McColgan, is that "the contractual framework has difficulty in expressing the relations between workers in the organisation...the relations between each other, especially those between managers and subordinates, are constituted and regulated by the bureaucratic rules of the organisation rather than any direct contracts between members of the organisation."[394] On one view, the relationship between employees is a superfluous consideration; if an employer does not have trust and confidence in its employee, that should be determinative. Yet at a practical level, if an employee, particularly in a large organisation, retains the trust and confidence of those around them and for example, their manager or supervisor, one would have thought that this should be an aspect of the employment relationship which the court should actively consider. In short, rather than simply considering the "vertical" employment relationship, it could also consider the "horizontal" aspect of that relationship. Such an approach would also be in harmony with the view of Ralph Gibson J. in *Powell v London Borough of Brent*[395] that confidence should be judged by reference to circumstances including the people involved in the work concerned and any impact on the workplace if an employee was to be maintained in employment by the court.[396] However, that analysis comes under a degree of pressure in an Irish context inasmuch as it is frequently the supervisors or managers themselves who are the plaintiffs in actions.

However, it is important to ensure that if an order is made directing that a party be allowed return to work, the terms upon which that happens are clear; for example, Clarke

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[392] See section 6.4.

[393] [1997] 8 E.L.R. 125 at 130.

[394] Collins Ewing & McColgan *Labour Law* (Cambridge University Press, Cambridge, 2012), p.101.

[395] [1988] I.C.R. 176.

[396] *ibid.* at 193.

J. was very wary of the fact in *Yap v Children's University Hospital Temple Street Ltd.*[397] that the plaintiff wanted to return to work on "her terms."

The *Fennelly* order provides a workaround to questions of whether a court can or should order specific performance, specifically at the interlocutory stage. Related to this, the question arises as to whether the matter is approached differently in the Employment Appeals Tribunal, as it has the statutory power under section 7 of the Unfair Dismissals Act 1977 to order reinstatement or re-engagement (albeit at the equivalent of the end of the plenary hearing). This leads to a consideration of the difference between wrongful dismissal and unfair dismissal, with different remedies available depending on how an action is categorised.

12. The Impact of Legislation

The social evolution of the approach to the employment relationship, together with developments in the common law, has been heavily influenced by legislative intervention. As such, the employment relationship admits of various statutory rights and duties (not all of which sit easily with a straightforward contractual analysis).[398] As such, any employer terminating an employee's contract has to be cognisant of both a potential action for wrongful dismissal before the courts, where an employee can assert their common law rights, but also a claim for unfair dismissal brought before the E.A.T., based on an assertion of statutory rights.[399] That being so, it is important to identify the relationship, but also the lines of demarcation, between the two forms of dismissal.

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[397] [2006] 4 I.R. 298.

[398] Hepple and O'Higgins *Employment Law* 2nd ed. (Sweet & Maxwell, London, 1976), p.50.

[399] The Employment Appeals Tribunal was initially established pursuant to s.39 of the Redundancy Payments Act 1967 as the Redundancy Appeals Tribunal. Its current incarnation came about by virtue of s.18 of the Unfair Dismissals Act 1977.

13. Wrongful Dismissal

The *dictum* of McLachlin J. in the Supreme Court of Canada in *Wallace v United Grain Growers Ltd.*[400] bears setting out in full, as it provides one of the more complete summaries of what is meant by wrongful dismissal and the effect of same. As McLachlin J. explained,

> "The action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal... If an employer fails to provide reasonable notice of termination, the employee can bring an action for breach of the implied term. A "wrongful dismissal" action is not concerned with the wrongness or rightness of the dismissal itself. Far from making dismissal a wrong, the law entitles both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given."[401]

This summary is one which has commended itself to the courts in this jurisdiction. In *McCarthy v Breeo Foods Ltd.*[402] Hanna J. made reference to what he termed the scope of the remedy available to a plaintiff in an action for wrongful dismissal, and in setting out

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[400] (1997) 152 D.L.R. (4th) 1.

[401] *ibid.* at 39. *See also Gunton v Richmond Upon Thames London Borough Council* [1981] Ch. 448; [1980] 3 W.L.R. 714; [1980] 3 All E.R. 577 *per* Buckley L.J. In *Cockburn v Alexander* (1848) 6 C.B. 791 Maule J. set out the key principles of the law of minimum obligation., which informs the approach in *Gunton*: "Generally speaking, where there are several ways in which the contract might be performed, that mode is adopted [for the purposes of calculating damages] which is the least profitable to the plaintiff, and the least burdensome to the defendant."

[402] [2010] 21 E.L.R. 53.

the *dictum* of McLachlin J., confirmed that it had been approved in this jurisdiction.[403] It is, however, important to focus on the idea of a breach of contract; a wrongful dismissal may arise not just due to lack of reasonable notice, but also from the breach of a term of the contract of employment in purporting to effect a dismissal.

However, a plaintiff may have a remedy, not for wrongful dismissal, but for unfair dismissal under the applicable statutory scheme, principally the Unfair Dismissals Act 1977, as amended.

14. Unfair Dismissal

Although legislative intervention in the employment relationship can be traced back to attempts to impose wage ceilings in the 1349 Ordinance of Labourers, the observation has been made that "Statute law was historically accorded a marginal role in its attempts to regulate and co-ordinate [the employment] relationship."[404] That may well have been so, but in no way reflects the modern dispensation. The comment has been made that the ability to hire and fire "has been considerably reduced by a range of legislation."[405] It has also been argued by Fennell & Lynch that the intervention of the legislature has introduced "a floor of rights into every contract of employment."[406] A concise summary of the impact of statute on the employment relationship has been offered by Freedland. He has observed that while the contract of employment essentially forms the core of the employment relationship, legal regulation of that relationship nowadays "consists largely of provisions contained in statutes, statutory regulations and European Community measures."[407] Although written in the context of the employment relationship in England, these observations carry just as much force in this jurisdiction. Listing twenty pieces of

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[403] *ibid.* at 61. Citing *Sheehy v Ryan* [2008] IEHC 14. As such, Hanna J. ruled that the action was one for wrongful dismissal as it was in essence a claim for a breach of contract, and the plaintiff had not sought relief via the statutory route.

[404] Wallace, Gunnigle & McMahon *Industrial Relations in Ireland*, 3rd ed. (Gill & MacMillan, Dublin, 2004), p.33.

[405] *ibid.*

[406] Fennell and Lynch *Labour Law in Ireland* (Gill & MacMillan, Dublin, 1993), p.114.

[407] Freedland in *Chitty on Contracts Volume II Specific Contracts* (Sweet & Maxwell, London, 2008), p.1008.

legislation as being "among the most important employment statutes," Regan explains that "Since the 1970s, statute has become an increasingly lively source of employment law."[408]

The impact of statute is not just an important consideration in its own right; it also ties in to the evolving nature of the way in which society views the employment relationship. This was well captured by Sachs L.J. in *Hill v C.A. Parsons & Co. Ltd.*[409] He observed that it was essential for the courts, in formulating practice and exercising discretion, to "take account of any important change in that climate of general opinion which is so hard to define but yet so plainly manifests itself from generation to generation." He also acknowledged that account must be taken "of the trend of the views of the legislature expressed on behalf of the community in its enactments and also of the trend of judicial decisions."[410]

The key impact of legislation in the context of redress for termination of employment relates to unfair dismissals.

14.1 The Unfair Dismissals Act

As Lord Millett observed in *Johnson v Unisys Ltd.*,[411] if a statutory right in respect of unfair dismissal had not existed, it is possible that the courts would have "fashioned a similar remedy at common law, though they would have proceeded by implying appropriate terms into the contact of employment."[412] He also noted that this would have been a major step for the courts to take. However, it was not a step which the courts were required to take either in England, or in this jurisdiction, due to the intervention of the legislature.

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[408] Regan "Sources and Institutions" in Regan (ed.) *Employment Law* (Tottel, Dublin, 2009), p3.

[409] [1972] Ch. 305.

[410] *ibid.* at 321.

[411] [2003] 1 A.C. 518.

[412] *ibid.* at 549.

The Unfair Dismissals Act 1977 "restricted the hitherto largely unlimited authority of an employer to dismiss his employees for whatever reason he thought fit."[413] Although influenced by the 1963 I.L.O. Recommendation No.119 on the Termination of Employment,[414] there was a more fundamental reason for the need to introduce such legislation, namely the increasing number of injunctions being sought to prevent picketing.[415] This was the predominant form of injunction insofar as the employment relationship was concerned. As summarised in an article in The Irish Times newspaper in 1975, it was estimated that 40 labour injunctions were being granted every year by the High Court in the years immediately prior to that year, "whereas in the whole 10 years up to 1967 only 37 injunctions were issued in labour disputes."[416] As was noted in the same article, against an increase in industrial unrest and associated applications for injunctions, the then Unfair Dismissals Bill was a welcome step in protecting workers against dismissal, diminishing the reason for strikes, and thereby stopping picketing in a constructive way.

This view of industrial unrest and picketing as a key informant of the need for legislative intervention is reflected in the Oireachtas debates on the then Unfair Dismissals Bill.[417] The Minister overseeing the passage of the Bill through the Oireachtas referred to the fact

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[413] Redmond "Dismissal" in Regan (ed.) *Employment Law* (Dublin, Tottel, 2009), p.542.

[414] Geneva, 1963. Anderman "Termination of Employment: Whose Property Rights?" in Barnard, Deakin & Morris eds. *The Future of Labour Law* (Hart Publishing, Oxford, 2004), p.111 explains that ""The ILO Recommendation was introduced quite clearly as a counterweight to the power of the employer at work. It explicitly incorporated the rationale of limiting abuses of a dominant power position by the employer and embraced a concept of introducing minimum standards of fairness reflecting the fact that labour had social value and was not reducible to a commodity."

[415] See, for example, "Erosion of the right to picket," The Irish Times, April 17, 1975.

[416] *ibid.* As the relevant Minister observed during the Oireachtas debates on the then Unfair Dismissals Bill, "The economy has suffered through these strikes. In 1975, 116,000 man-days were lost as a result of disputes relating to engagement, dismissal or redundancies and much the same figure is shown in the provisional figures of man-days lost through strikes in 1976." Unfair Dismissals Bill, 1976: Second Stage, Seanad Eireann Debate Vol. 86 No. 7, March 29, 1977.

[417] Although some commentators evidently took a broader view of the effects of the Bill: see Mathews "The right to fire" The Irish Times, September 10, 1976 and her comment that "The old common law notions of hiring and firing on a contractual basis have produced injustice for long enough. This Bill effectively attempts to write a death certificate for these old ideas."

that the Bill sought to "foster better relations between management and employees in relation to discipline and dismissals."[418] It was argued that the omission of a statutory protection resulted in disputes about the merits of a dismissal which led to costly strikes.[419]

At a remove of thirty five years, the emphasis on the industrial relations aspect of the Bill is notable (although the underlying concern was certainly not unique: Carty observes that "the major concern of the time [1971] appears to have been labour unrest and it was felt that a more accessible forum for complaining of dismissal – industrial tribunals rather than the courts – should be available"[420]) A useful summary was provided during the Oireachtas debates of both the rationale underpinning the need for legislation and some of the perceived inadequacies with the common law regime:

> "The situation as it prevailed prior to this Bill was the imbalanced and inadequate situation where a worker, wrongfully dismissed, if he was a trade union member might rely on trade union pressure and, ultimately, on industrial action to provide the adequate bargaining power and ultimate protection, or else had the alternative of pursuing a common law claim for wrongful dismissal. As a lawyer I know how unreal and inadequate that particular course of action could be. This is reflected in the few cases of common law proceedings for wrongful dismissal that there have been. In the cases that occurred it was generally a manager who claimed he was wrongfully dismissed or somebody at that level who regarded the courts as being protective and could afford advice and have lawyers representing him. It was not,

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[418] Minister O'Leary, Unfair Dismissals Bill, 1976: Second Stage, Seanad Eireann Debate Vol. 86 No. 7, March 29, 1977.

[419] *ibid.* A similar concern (albeit that there were others) influenced the legislature in London. As noted by Howe "Poles Apart? The Contestation between the Ideas of No Fault Dismissal and Unfair Dismissal for Protecting Job Security" (2013) 42(2) I.L.J. 122, the majority in the Royal Commission on Employers and Trade Unions "noted that there were 276 unofficial strikes between 1964 and 1966 resulting from dismissal disputes and believed that a statutory unfair dismissal scheme would aid industrial peace," referencing Report of the Royal Commission on Trade Unions and Employers' Associations (Cmnd 3888, 1969), para. 528.

[420] "Dismissed Employees: The Search for a More Effective Range of Remedies" (1989) 52(4) M.L.R. 449 at 451.

in fact, a very adequate type of proceeding, though it is appropriate that it should continue as part of our law because there is a place for an action for wrongful dismissal."[421]

It is worth pausing to parse this summary. First, the emphasis is clearly on addressing recourse to strike action as a response to dismissal. Absent such legislation, it is unclear whether strike action would have continued to play a central role in the context dismissals. However, it seems not unreasonable to suggest that, coupled with industrial relations legislation (such as the Industrial Relations Act 1990), the effect of the unfair dismissals legislation was that the number of days being lost to strike action resulting from dismissals diminished significantly.[422]

Secondly, it suggests that only the more well-heeled employee was likely to bring an action before the courts for wrongful dismissal. There is still an element of truth to that. The costs of bringing a case before the courts can act as a natural barrier to injunction applications in that forum.[423] Although that overlooks the fact that injunctions related to a

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[421] Senator Kerrigan, Unfair Dismissals Bill, 1976: Second Stage, Seanad Eireann Debate Vol. 86 No. 7, March 29, 1977.

[422] See generally Redmond and Mallon *An Essential Guide to Industrial Action and the Law* (Bloomsbury Professional, Dublin, 2010). That is not to say that such strike action did not occur: see "Union gives pledge in sacking row" The Irish Times, June 18, 1987, in which it is reported that following the dismissal of an employee of Westinghouse Electric Ireland Ltd, "Instructions were issued by the union's section committee to its 360 members in the company not to report for work. On February 17th, 1986, pickets were placed on the Galway company's premises."

[423] Although written before the threshold test for mandatory interlocutory applications was acknowledged as being the need to show a "strong case," Costello argues that E.A.T. proceedings are fully contested and involve retrospective compensation, whereas injunctions to prevent dismissal involve immediate relief, with full salary payments permissible. As such, what "does appear invidious is that in the case of the privileged group, the remedy should not merely be superior, but that it should be granted virtually without scrutiny, while in the case of the non-privileged group, the remedy should be closely contested, and often fail." Costello "Regulating the Anti-Dismissal Injunction" in Breen, Casey & Kerr *Liber Memorialis Professor James C. Brady* (Roundhall Sweet and Maxwell, Dublin, 2001), p.188 at 197. For a different view, see the argument made by Charleton as summarised later in this section.

contract of employment have been successfully sought from the Circuit Court,[424] there is certainly an argument which can be made that the Circuit Court does not in fact have the jurisdiction to grant anti-dismissal injunctions, and so any putative claimant is looking at the costs of bringing an application before the High Court.[425]

Thirdly, it envisages the statutory and common law regimes existing side by side (in Australia, Gleeson C.J. went further in *Brodie v Singleton Shire Council*[426] and argued that the two regimes are symbiotic). Linked to the second point, it does not seem too much of a stretch to suggest that at the time, it may well have been envisaged that a situation could develop whereby the legislation would be engaged by a manual labourer, with the E.A.T. being viewed as in some sense a low cost alternative to the courts, the latter entertaining the "professional" employee who could engage in what might casually be called a "rich man's sport." However, although there may be a lingering vestige of this division, the courts have been alert to ensuring that the distinction between the two regimes is one based on law rather than vague notions of a distinction between the working man and the well heeled employee.

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[424] As occurred, for example, in *Doyle v Grangeford Precast Concrete Ltd* [1998] 9 E.L.R. 260. See also *Visagie v Sir Alfred McAlpine Group plc. trading as Sir Alfred McAlpine Utility Services* "South African granted injunction in ESB case" The Irish Times, May 21, 2003 and *Maloney v Simon Community* "Pregnant woman dismissed by Simon, court told" The Irish Times, September 23, 1999, with applications for injunctions brought before Galway Circuit Court in both cases.

[425] The Circuit Court derives its jurisdiction from s.22(1)(a) of the Courts (Supplemental Provisions) Act 1961. The extent to which that jurisdiction encompasses anti-dismissal injunctions is referable to Column (2) of the Third Schedule of the Act, which includes "An action (in relation to property) claiming an injunction, otherwise than as ancillary to other relief." It is arguable that what is contemplated by an injunction in relation to property is an injunction in relation to real property: in *Rodgers v Mangan*, unreported, High Court, Geoghegan J., July 15, 1996. the injunction sought was to restrain wrongful interference with his business. Geoghegan J. felt that this was not an action in relation to property, albeit acknowledging that "one could argue that the goodwill of the business has a value and that in that sense it might be said to be an action relating to property." However, he determined that the injunction concerned the "wrongful causing of financial loss by a wrongful activity." It is easy to conceive of an argument that an alleged wrongful dismissal concerns the "wrongful causing of financial loss." Although an injunction was granted in *Doyle v Grangeford Precast Concrete Ltd* [1998] 9 E.L.R. 260, it may well have been the case that no argument as to jurisdiction was advanced, or if it was, was not engaged with by the Circuit Court. The relevant Oireachtas debates do not advance the matter any further.

[426] (2001) 206 C.L.R. 512 at 532.

Collins, Ewing and McColgan have remarked in an English context that "many of the assumptions which led to the introduction of a statutory right to claim unfair dismissal proved to be only partially true."[427] In that regard, it is pointed out that compensation for wrongful dismissal is not necessarily derisory, that damages may be substantial and that the common law has the capacity to protect an employee's job security. The same considerations could equally apply in this jurisdiction. The same authors rightly remarked that this was achieved without the introduction of new principles of law, but "merely the application of the ordinary law of contract."[428] However, and to pick up on an idea considered in Chapter Two,[429] they identify the crucial change as being "in the content of the contract of employment, which became in the second half of the twentieth century a more elaborate transaction better suited to the development of internal labour markets."[430] Specifically, by reducing an employer's undertakings to writing in the form of contracts and associated handbooks, "the law of contract could be used to prevent the employer from reneging on those undertakings."[431]

Yet Carty observes that, somewhat ironically, by the late 1980s in England, employees were more prepared to litigate before the courts precisely because of the introduction of statutory remedies.[432] This has been ascribed to a number of factors, not necessarily consistent, including disappointment in the working of the unfair dismissals laws; the fact that reinstatement may be available under unfair dismissals legislation, thereby encouraging claimants to see if it could be available under the common law; the increased emphasis on procedural rights deriving from employment legislation and an emboldening of employees who were more willing to seek legal protection of their employment rights.

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[427] Collins, Ewing and McColgan *Labour Law Text and Materials* (Hart Publishing, Oxford, 2005), p.475.

[428] *ibid.*, p.476.

[429] See Chapter Two, section 2.

[430] *ibid.*

[431] *ibid.*

[432] Carty "Dismissed Employees: The Search for a More Effective Range of Remedies" (1989) 52(4) M.L.R. 449 at 451. Indeed, both the doctrine of trust and confidence and unaccepted repudiation derive from constructive dismissal, itself a statutory construct.

From the 1985 decision of Costello J. in *Fennelly v Assicurazione Generali*[433] on (albeit not in a steady, linear fashion), the courts in this jurisdiction were much more receptive to applications for injunctions by employees. For completeness, that was not necessarily matched by a falloff in applications to the Employment Appeals Tribunal: in 1978, the first full year of the operation of the Unfair Dismissals legislation, a total of 163 cases were heard relating to unfair dismissals.[434] One year later, 399 cases were heard under the Unfair Dismissals Acts.[435] In 1980, the figure was 381 cases.[436] Derived from the three most recent sets of Annual Reports produced by the E.A.T., the figures for 2009 indicate that a total of 1,182 cases were disposed of under the Unfair Dismissals Acts,[437] 1,210 cases were disposed of a year later,[438] with the equivalent figure for 2011 being 1,599 cases.[439]

In fact, Charleton highlights a very practical, as well as legal, aspect to the interaction between the common law and statute.[440] He advocates a clear preference for using the statutory mechanisms available.[441] Considering matters "in the round," he argues that:

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[433] (1985) 3 I.L.T.R. 73.

[434] Employment Appeals Tribunal Eleventh Annual Report, Annexe 2 (the figure is made up of 151 cases decided, 12 withdrawn during hearing).

[435] Employment Appeals Tribunal Twelfth Annual Report, Annexe 2 (the figure is made up of 331 cases decided, 68 withdrawn during hearing).

[436] Employment Appeals Tribunal Thirteenth Annual Report, Annexe 3 (the figure is made up of 300 cases decided, 81 withdrawn during hearing).

[437] Employment Appeals Tribunal Forty Second Annual Report 2009, p.16.

[438] Employment Appeals Tribunal 2010, p.9.

[439] Employment Appeals Tribunal 2011, p.10. The number of cases has increased over the years despite a fall off in unionisation within the workforce, as noted by commentators such as O'Brien "Why organised labour is at a strategic crossroads" The Irish Times, January 18, 2013 and Humphreys "Power of unions has crumbled with rise of HR" The Irish Times, January 17, 2013. In fact, there appears to have been a view on the part of some trade union officials that the E.A.T. was overly-legalistic and not a "friend" of the unions, *per* Connaughton in "Some Observations on Developments in Employment Law" Paper given to the Employment Law Association of Ireland March 5, 2013, "The Employment Appeals Tribunal has, in my opinion, been far more successful than it is credited with in some circles. I have often debated with Trade Union Officials their contention that it was overly legalistic and not a friend of Trade Unions or their members."

[440] Charleton "Employment Injunctions: An Over-Loose Discretion" (2009) 9(2) J.S.I.J. 1.

> "...redress by way of reinstatement, re-engagement, or up to two years wages by way of damages, under the Unfair Dismissals Acts, 1977 to 2007 seems more attractive than a temporary order in the High Court. In granting injunctions in respect of a breach of fair procedures, the High Court should take a real view as to what procedures are available to personnel managers: to continue the move towards the direction of a plenary hearing as a means of resolving internal employment issues is perhaps to do a disservice to the proper administration of business. Those who have suffered such unfairness have a clear statutory remedy. The limited nature of a hearing, over two hours on affidavits, should be contrasted in terms of its ability to find the truth of the complex situation, to the alternative full oral witness procedure available in the Employment Appeals Tribunal."[442]

Superficially this may seem very attractive. But it is somewhat undermined by the practical realities of the time it takes to get a case on for hearing before the Employment Appeals Tribunal. As of early 2011, it was reported that applicants were waiting up to a year and a half before their cases were being heard.[443] Against that background, tactical

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[441] One might well argue that it is somewhat self-serving of a sitting judge of the High Cout to make this point, inasmuch as it advocates moves litigation away from the courts, thereby lightening their burden; one could equally argue, when considering Charleton's views in the round, that the advocating of the use of statutory mechanisms is borne of a frustration with the way in which anti-dismissal applications come before the courts when there is a perfectly valid mechanism available in another forum which, for better or worse, tends to produce definite outcomes, albeit at a slightly slower pace than afforded by interim or interlocutory applications. The Employment Appeals Tribunal Annual Report 2010 identifies, at p.12, that "Approximately 183 cases were appealed to the Circuit Court" under the Unfair Dismissals legislation. This is a relatively small percentage (15%) of the total of 1,210 cases disposed of. Similarly, the Employment Appeals Tribunal Annual Report 2011 identifies, at p.20, that "Approximately 128 cases were appealed to the Circuit Court" under the Unfair Dismissals legislation. This represents 8% of the total of 1,599 cases disposed of.

[442] *ibid.* at 17.

[443] "Applicants to employment tribunal facing long delays" The Irish Times, January 11, 2011; "1,700 backlog at Equality Tribunal after rise in employment cases" The Irish Times, April 8, 2011. A consideration of E.A.T. reports over a two year period shows an increase in waiting times in Dublin from 30 weeks (2009 E.A.T. report) to 78 weeks. Connaughton "Some Observations on Developments in Employment Law" Employment Law Association of Ireland March 5, 2013 observes that "a lot of cases

considerations and a balancing of time and cost come into play, often trumping a purer legal analysis.

It is also not unrealistic to suspect that there may also be a considerable lack of awareness among the judiciary of the practical realities of how the E.A.T. operates. The shifting makeup of the panels hearing cases means that a consistent approach is often difficult to discern. Determinations are for the most part lacking in any meaningful analysis or reasoning; considerable space is devoted to a recitation of the facts, with a cursory, one or two paragraph conclusion which does little more than identify the determination reached and set out the appropriate remedy as necessary. The precedential value of determinations is accordingly very limited. Freedman and Lee[444] have also suggested that one of the deficiencies of the unfair dismissals legislation in England results from an insufficient emphasis on substance, rather than procedure. Such a criticism could equally be made of the Irish legislation, and its application by the E.A.T.

In those circumstances, it is not at all surprising that there is some agitation to have employment disputes referred to mediation or some similar service, or indeed to restructure the entire statutory mechanism. This will be considered in Chapter Nine.[445]

It is also important to consider the awards actually made by the E.A.T. Although it might be argued that re-engagement and reinstatement are specific performance in all but name, the reality is that they are remedies which are not frequently deployed. The authors of *Gloag & Henderson The Law of Scotland*[446] refer to modern employment legislation empowering industrial tribunals to order reinstatement or re-engagement of employees. However, they then point out that "even in that context positive orders are understood to be infrequent and the court, not having access to the expertise available to a specialist tribunal, would necessarily be more hesitant about departing from its traditional

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that are moved by way of injunction application are cases that would be much more suited to a claim of unfair dismissal but for the delays in obtaining a first hearing before the Employment Appeals Tribunal."

[444] Freedman and Lee "Natural Justice for Employees: The Unacceptable Faith of Proceduralism" (1986) 15 I.L.J. 15.

[445] See Chapter Nine, sections 7 and 8.

[446] *Gloag & Henderson The Law of Scotland* 10th ed. (Edinburgh, W. Green & Son Ltd. 1995), p.162.

stance."[447] Indeed, it has been remarked by Smith & Randall - albeit in the context of the applicable regime in England - that:

> "One irony is that that [a reliable remedy of contractual enforcement] was supposed to be provided by the law on unfair dismissal with its remedies of reinstatement and re-engagement, but it is a measure of the failure of that aspect of the statutory scheme that lawyers are forced into mining the common law instead."[448]

The same observation can be made in relation to the deployment of the remedies of reinstatement and re-engagement available under the he Unfair Dismissals Act. It provides three main remedies for unfair dismissal. Pursuant to section 7 of the Act, the E.A.T. may order reinstatement, re-engagement or compensation for loss in respect of employment. As noted by Kerr in *Termination of Employment Statutes*,[449] in its determination in *Sheehan v Continental Administration Co. Ltd.*[450] the E.A.T. set out in some detail the inappropriateness of redress in the form of reinstatement or re-engagement (and as is evident when considering this passage, it bears many similarities to the concerns raised when considering making orders of specific performance[451]):

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[447] As explained by Lord Penrose in *Peace v City and Edinburgh Council* [1999] I.R.L.R. 417at 418, referring to the 10th edition of the book now in its 12th edition. Considering the equivalent English position in *Johnson v Unisys* [2003] 1 A.C. 518 at 534, Lord Steyn noted that "At the time of the Donovan Report reinstatement was envisaged as a major remedy: paras. 551-552. In practice, however, only about 3% of applicants are reinstated: see Davies & Freedland, *Labour Legislation and Public Policy: A Contemporary History* (1993), p 210, citing statistics dating from 1987/8. My understanding is that about 3% still represents the reinstatement figure. Not surprisingly, the award of compensation by a tribunal has to be the primary remedy." *McBride v Strathclyde Police Joint Board* [2013] I.R.L.R. 297 highlights how the requirements for reinstatement are very strict, leading to its continuing rarity as a remedy. In *McBride*, the Inner House of the Court of Session held that there is no power to attach conditions to the work to which the person is to be returned and that, on the facts, reinstatement would not be ordered (the claimant had specifically not sought re-engagement but rather wanted to return to her full duties).

[448] Smith & Randall *Contract Actions in Employment Law –Practice and Precedents* 2nd ed. (Bloomsbury Professional, West Sussex, 2011), p.162.

[449] Kerr *Termination of Employment Statutes* (Round Hall, Dublin, 2009), p.J22.

[450] U.D. 858 /1999.

[451] See section 5.

"Both these remedies cannot be considered, if, firstly there exists a very definite possibility that it would result in compelling a reluctant employer to continue a relationship of employer / employee, a relationship which is founded on mutual trust and understanding and secondly, the performance of the returning employee may require consistent supervision to ensure adequate performance of duties. If the Tribunal attached sufficient importance to the workplace on one hand and the actual position of the employee on the other hand and is conscious of the sensitivities that exists, it will be deterred to award relief which has a potential of creating future friction, disharmony and possibly and acrimonious relationship which could spill over into other areas and cause a disruptive work environment resulting in a decrease in productivity or performance. The more senior the position in the company the greater the care necessitated by the Tribunal in assessing the appropriate remedy."

The concerns expressed in *Sheehan* are reflected in the actual awards made by the E.A.T.

Looking at the figures for the years 1978, 1979 and 1980, the first three full years of the operation of the Unfair Dismissals Act, compensation was the predominant form of redress, albeit that the number of cases in which reinstatement or re-engagement were ordered was somewhat higher than in later years:

- In 1978, compensation was awarded in 44 cases, reinstatement in 10 and re-engagement in 4.[452] Thus in the 58 cases in which orders were made, reinstatement and re-engagement accounted for 24.14% of those orders.[453]
- In 1979, compensation was awarded in 117 cases, reinstatement in 12 and re-engagement in 1.[454] Thus in the 130 cases in which orders were made, reinstatement and re-engagement accounted for 11.11% of awards made.[455]

[452] Eleventh Employment Appeals Tribunal Annual Report 1978, p.6.

[453] Percentage figures again rounded up or down as appropriate.

[454] Twelfth Employment Appeals Tribunal Annual Report 1979, p.6.

[455] Percentage figures again rounded up or down as appropriate.

- In 1980, compensation was awarded in 87 cases, reinstatement in 21 and re-engagement in 1.[456] Thus in the 109 cases in which orders were made, reinstatement and re-engagement accounted for 20.18% of awards made.[457]

However, in a 1984 survey, it was recorded that "less than 5% of claimants are awarded re-employment by the EAT."[458] That low level of re-employment orders being made continues, as is evident from the three most recent years for which figures are available:

- In 2009, the E.A.T. awarded compensation in 217 unfair dismissal cases, reinstatement in 5 and re-engagement in 6.[459] Taking the latter two remedies together, in the 228 cases in which orders were made, that accounts for 4.82% of the total number of orders made.[460]
- In 2010, E.A.T. again awarded compensation in 217 cases, reinstatement in 6 and re-engagement in 3.[461] Taking the latter two remedies together, in the 226 cases in which orders were made, that accounts for 3.98% of the total number of orders made.[462]
- In 2011, the most recent year in respect of which such figures are available, recourse to reinstatement and re-engagement as remedies again occurred in a tiny fraction of cases overall: compensation was awarded in 338 unfair dismissal cases; reinstatement in 6, re-engagement in 7.[463] Taking the latter two remedies

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[456] Thirteenth Employment Appeals Tribunal Annual Report 1980, p.2.

[457] Percentage figures again rounded up or down as appropriate.

[458] Kerr and Whyte *Irish Trade Union Law* (Professional Books, Oxford, 1985), p.37, citing Joyce and Murphy "Restoring Management Prerogative: The Unfair Dismissals Act 1977 in Practice" (1984) 6 I.B.A.R. 21.

[459] The Employment Appeals Tribunal Forty Second Annual Report 2009, p.17. It should be noted that there is generally a disconnect between the number of determinations made and the number of cases heard in a given calendar year, as a case heard in one calendar year may admit of a reserved determination and lead to an order being formulated and perfected the following year..

[460] Percentage figures again rounded up or down as appropriate.

[461] Employment Appeals Tribunal Annual Report 2010, p.10.

[462] Percentage figures again rounded up or down as appropriate.

[463] Employment Appeals Tribunal Annual Report 2011, p.13.

together, in the 351 cases in which orders were made, that accounts for 3.70% of the total number of orders made.

Based on these figures, it seems fair to say that whatever chance relatively limited existed of reinstatement or re-engagement in the initial years of the operation of the Unfair Dismissals legislation, this was negligible by the mid 1980s and has remained so. This tends to highlight some of the inadequacies or failures of that aspect of the statutory scheme.

15. Unfair or Wrongful Dismissal

As to when the Unfair Dismissals legislation is engaged or when a claim more properly arises for wrongful dismissal under common law, Redmond sets out a useful reckoner. She explains that wrongful dismissal occurs where no or inadequate notice is given, or where there is a breach of an express or implied term in the contract of employment. However, unfair dismissal is assessed by reference to statute:

> "A dismissal is deemed unfair "unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal." The statute sets out various grounds. There are important differences between damages at common law and compensation under the statute."[464]

A relatively straightforward explanation masks an area of the law that is both complex and confusing. This can be analysed by reference to the distinction between the remedies sought in the two *fora.* More specifically, challenges to redundancies have given rise to very particular considerations.

15.1 Mutual Exclusivity: The Lines of Distinction

Notably, from the perspective of dismissal, the E.A.T. does not have the jurisdiction to grant injunctions. With no injunctive relief available from the E.A.T. there is an obvious

[464] Redmond "The Implied Obligation of Mutual Trust and Confidence—A Common Law Action for "Unfair" Dismissal?" (2009) 6(2) I.E.L.J. 36

temptation for a plaintiff who feels that they have been unfairly (as distinct from wrongfully) dismissed to attempt to bring a claim before the courts to seek such relief. However, the courts are generally speaking alive to this, a challenge initially tackled by the courts in England.

In *Eastwood v Magnox Electric plc.*,[465] Lord Nicholls, reinforcing what he had already stated in *Johnson v Unisys Ltd.*,[466] pointed out that although parliament did not seek to circumscribe an employee's rights in respect of wrongful dismissal, it had "occupied the field relating to unfair dismissal."[467] He explained that a common law obligation having the effect that an employer will not dismiss an employee in an unfair way would be "much more than a major development of the common law of this country."[468] He believed that it would cover the same ground as addressed in legislation and "it would do so in a manner inconsistent with the statutory provisions."[469]

There are sound policy reasons for this approach. As explained by Lord Nicholls, parliament had legislated for the balance, not just of the interests of employers and employees in cases of unfair dismissal, but also the social and economic interests of the country as a whole.[470] From a very practical bent, Lord Nicholls was also concerned that if the courts expanded a common law principle (in that case, the duty of trust and confidence) into the statutory field, it could "produce an inconsistent outcome."[471]

It is an approach which has found favour in this jurisdiction. In rejecting the plaintiff's application for an injunction in *Orr v Zomax Ltd.*,[472] Carroll J. pointed out that the plaintiff was attempting to introduce an obligation to act reasonably and fairly in the case of dismissal into the common law. As she observed, this was a concept, absent

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[465] [2004] 3 W.L.R. 322.

[466] [2003] 1 A.C. 518.

[467] [2004] 3 W.L.R. 322 at 327.

[468] *ibid.*

[469] *ibid.*

[470] *ibid.*

[471] *ibid.*

[472] [2004] 1 I.R. 486.

misconduct, which only applied to the statutory regime.[473] In arriving at her conclusion, Carroll J. referred to the House of Lords decision in *Johnson.*[474] She rehearsed what the Law Lords had determined, and their unwillingness to introduce a general common law remedy for unfair circumstances attending dismissal, as to do so would be contrary to the "evident intention of parliament."

The same judge made a similar point in *Maha Lingham v Health Service Executive.*[475] Considering whether there was an implied term of mutual trust and confidence in Irish law, and assuming that there was, she observed that "this does not extend to ousting the statutory scheme under the Unfair Dismissals Acts." Although the concept of an "exclusion area" would imply that two regimes can exist in parallel, Redmond has addressed the question of whether the provision of a statutory remedy froze the development of the common law in this jurisdiction. In short, the answer to that is in the negative. As she points out, the legislation simply prevents a claim "on the double," one in respect of unfair dismissal, one in respect of wrongful dismissal[476]

For completeness, the existence of a statutory remedy is also pertinent when it comes to judicial review applications: in refusing the applicant an order of *certiorari* in *Purdy v Commissioner of An Garda Siochána,*[477] Kearns P. noted that in considering the exercise of its discretion, "a court must consider whether there is an alternative remedy available to the applicant and the appropriateness and effectiveness of such a remedy to the matter in question." In that regard, he observed that the applicant was not precluded from bringing a case before the Employment Appeals Tribunal.

Lord Nicholl's approach has given rise to what is often referred to as the "*Johnson* exclusion area" or "zone." As subsequently explained by Lord Nicholls himself in the *Eastwood* case, identifying the boundaries of this exclusion area is rather straightforward:

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[473] *ibid.* at 493.

[474] [2004] 1 I.R. 486 at 492.

[475] [2005] IEHC 186.

[476] Redmond "The Implied Obligation of Mutual Trust and Confidence - A Common Law Action for "Unfair" Dismissal?" (2009) 6(2) I.E.L.J. 36.

[477] [2013] IEHC 141.

> "The statutory code provides remedies for infringement of the statutory right not to be dismissed unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal."[478]

In this jurisdiction, the statutory regime applicable to unfair dismissals should be clear on its own terms. The demarcation lines between the law applicable to wrongful and unfair dismissals should also in theory be clear. Section 15 of the Unfair Dismissals Act 1977 reinforces that distinction, providing that an employee must choose between suing for damages at common law and claiming relief under the Act. Subsection 2 provides that if relief is claimed under the Act, damages are not recoverable at common law. Contrariwise, subsection 3 provides that where proceedings for damages at common law for wrongful dismissal are initiated by an employee, that employee shall not be entitled to redress under the Act in respect of the same dismissal.[479]

Insofar as there might have been some ambiguity as to the relationship between the two regimes, the decision of the Supreme Court in the case of *Parsons v Iarnród Eireann*[480] should have brought certainty to the matter. The case concerned an application to strike out the plaintiff's proceedings in circumstances where he had already had his grievance heard by a Rights Commissioner. That being so, in the High Court, Carroll J. agreed that the plaintiff could not have recourse to the common law. On appeal, two main strands to Barrington J.'s judgment can be discerned. The first involved a consideration of the fact that pursuant to the terms of the Unfair Dismissals legislation, workers had to choose

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[478] [2004] 3 W.L.R. 322 at 331. As such, the factors informing any consideration of an alleged unfair dismissal are such that although such a dismissal may not be considered under the rubric of wrongful dismissal, a dismissal which on its face may well be considered wrongful may also be analysed with a view to determining whether it is in fact unfair.

[479] See generally O'Brien "Parallel Proceedings in Employment Law" (2013) 2 I.E.L.J. 40.

[480] [1997] 2 I.R. 523.

between suing for damages at common law and claiming statutory relief.[481] As Barrington J. explained:

> "This is not a case of the ouster of the jurisdiction of the High Court. The jurisdiction of the High Court remains the same. What the Unfair Dismissals Act, 1977, does is to give to the worker, who feels that he has been unfairly dismissed, an additional remedy which may carry with it the very far-reaching relief of reinstatement in his previous employment. It does not limit the worker's rights; it extends them."[482]

However, Barrington J. then considered the question of the relationship between a common law right to damages and the question of related remedies. Barrington J. explained that:

> "The traditional relief at common law for unfair dismissal was a claim for damages. The plaintiff may also have been entitled to declarations in certain circumstances, for instance, that there was an implied term in his contract entitling him to fair procedures before he was dismissed. But such declarations were in aid of his common law remedy and had no independent existence apart from it. If the plaintiff loses his right to sue for damages at common law the heart has gone out of his claim and there is no other free standing relief which he can claim at law or in equity."[483]

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[481] In *Sheehy v Ryan* unreported, High Court, Peart J., August 29, 2002 Peart J. took the view that the *Parsons* decision had no bearing on the case before him as the plaintiff had "made her choice not to pursue statutory relief."

[482] [1997] 2 I.R. 523 at 529. This can, however, be manipulated. Although a scenario that would be both rare and high risk, a well resourced plaintiff who had not got the 12 months' service required to bring a claim before the E.A.T. could in theory seek an interlocutory in order to accumulate 12 months service, then effectively abandon the injunction application and pursue a remedy from the E.A.T.

[483] [1997] 2 I.R. 523 at 529.

As summarised by O'Sullivan,[484] the Supreme Court in *Parsons* "not only appeared to take a strict approach to prohibiting the bringing of proceedings before both *fora*,[485] but also seemed to rule out the bringing of a free-standing application for an injunction."

The first of these two strands was reiterated in the case of *Stephens v Archaeological Development Services Ltd.*[486] in which MacMenamin J., considering whether there was an overlap in remedies sought as between both the Employment Appeals Tribunal and the High Court stated unequivocally that "there can be no question of double recovery."[487] It is the second strand which has led to some difficulties.

In *Cassidy v Shannon Castle Banquets and Heritage Ltd.*[488] Budd J. explained that *Parsons* was authority for the proposition that "declaratory relief is available unless precluded by the option having been taken of making a claim under the Unfair Dismissals Act."[489] Against that background, he then noted the statement made in the Supreme Court that a declaration may be available in certain circumstances such as where "there was an

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[484] O'Sullivan "Wrongful dismissal: Recent Developments" (2004) 1(4) I.E.L.J. 116.

[485] See "Former school head is refused order" The Irish Times, November 16, 1999, in which it was reported that McCracken J. refused an injunction on the grounds that "he had chosen to pursue a remedy through the tribunal and was still pursuing it, and was seeking to have the tribunal's decision set aside by the Circuit Court. Having taken that course, the judge did not think that Mr. Boyle could seek an interlocutory injunction so that he could be taken back by the school, pending the hearing of his action."

[486] [2010] IEHC 540.

[487] He also noted (para.57) that "it may be necessary for a court to intervene by way of case management in order to identify precisely the case to be made before the Tribunal and that which may ultimately come before this Court." See also *Boyle v Boyce* "Former school head is refused order" The Irish Times, November 16, 1999, in which it is reported that McCracken J. refused the injunction sought on the grounds that the plaintiff had chosen to pursue a remedy through the E.A.T. and was seeking to have the E.A.T.'s decision set aside by the Circuit Court. It is reported that in *Murphy v Ryanair Ltd.* "Dismissed pilot sues Ryanair" The Irish Times, March 29, 1995, the plaintiff sought remedies under both the Unfair Dismissals Acts but also sought an injunction restraining his dismissal. See also "Action by pilot is settled" The Irish Times, 31 March, 1995. That said, it is presumably open to a court, in the appropriate circumstances, to address a claim for unfair dismissal by reference to its full original jurisdiction, as to which, see *McGrath v Athlone Institute of Technology* [2011] IEHC 254 (although to do so would in effect be an usurpation of a statutory remedy and procedure provided by the legislature, the facts may warrant a practical approach).

[488] [2000] 11 E.L.R. 248.

[489] *ibid.* at 273.

implied term in [an employee's] contract entitling him to fair procedures before he was dismissed."[490] By linking the plaintiff's argument that there was a want of natural and constitutional justice to the Supreme Courts's reference in *Parsons* to fair procedures, Budd J. neatly circumnavigated the potentially difficult issue of whether a declaration could be granted as a free standing application, and proceeded to grant one.

Clarke J. considered Budd J.'s approach in his own decision in *Carroll v Bus Átha Cliath.*[491] He noted that the key factor in *Cassidy* was that the declaration "did not coerce a reinstatement" and that in that respect, "*Parsons* was distinguished."[492] Clarke J. was prepared to follow the approach of Budd J. in *Cassidy*, and suggested that the limiting factor in *Parsons* was simply that a declaration would not be granted where it did not benefit a plaintiff in any practical way. He was not concerned with the question of underlying free standing proceedings. This was an approach which was endorsed by Edwards J. in *Coffey v Connolly & Sons Ltd.*[493] as being "particularly helpful."

However, a very different approach to that in *Cassidy* was evident less than one year later, in Murphy J.'s decision in *Philpot v Ogilvy and Mather Ltd.*[494] A failure to claim damages for wrongful dismissal was held to be fatal to the claim for the injunction sought. This was notwithstanding that the plaintiff argued that he was summarily dismissed, that no disciplinary procedures were followed and that he was denied natural justice in the manner in which the decision was taken. Despite relying on the same passages from the judgment of Barrington J. in *Parsons* as Budd J. had done, Murphy J. made no reference to *Cassidy*.

Murphy J. was consistent in his approach to *Parsons* in the case of *Davis v Walshe*,[495] three years later. He confirmed that where a claim for damages was not made, there could be no separate declaratory and injunctive relief of an interlocutory nature as sought by the

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[490] *ibid.* at 272. As to fair procedures, see Chapter Three, section 4.3.

[491] [2005] 4 I.R. 184.

[492] *ibid.* at 208.

[493] [2007] IEHC 319.

[494] [2000] 3 I.R. 206.

[495] [2003] 14 E.L.R. 1.

plaintiff. He also confirmed, by reference to his decision in *Philpot*, that such equitable relief had no independent existence apart from a claim for damages for wrongful dismissal. It is, at a minimum, unhelpful that such differing approaches can derive from a single judgment in *Parsons*, particularly given that a lack of fair procedures was alleged in all three cases.

In practical terms, it would appear that *Parsons* can be relatively easily circumnavigated. By way of relief, a plaintiff can seek a declaration in relation to protecting their position, together with ancillary orders and damages in the alternative. Such damages would cover future earnings which, as a matter of probability the employee could have expected to make if they had been kept in continuous employment.[496]

Confusion and conflicting decisions on the part of the courts is also evident in the related issue of whether an application based on a redundancy should more properly be before the courts or the E.A.T.

15.2 Mutual Exclusivity: Redundancies

A number of cases have come before the courts challenging redundancies and purported redundancies.[497] Some of these were entertained, notwithstanding that s.6 of the Unfair[498]

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[496] In respect of which actuarial and tax evidence can be led.

[497] Although Horan "Employment Injunction: Current Status and Future Developments" (2005) 1 E.L.Rev. 8 at 10 argues that redundancy affords both a full defence to an unfair dismissal claim and is "blame free" thereby obviating the necessity for fair procedures with attendant "obvious attractions for an employer," the reality is that, as is evident from cases such as *Sheehan v Vintners Federation of Ireland* [2009] 20 E.L.R. 155 fair procedures are required even when it is found that a genuine redundancy situation exists. In the former case, although the Employment Appeals Tribunal agreed that a redundancy existed, it found that the deficiencies in the respondent's response to the situation made the process undertaken unfair. See also *Crosby v Fuss Door Systems Ltd.* [2009] 20 E.L.R. 38, *Mulligan v J2 Global (Ireland) Ltd* [2010] 21 E.L.R. 312. An extreme example arose in *Bennett v Bunzl Ireland* UD 2409/2009 the Tribunal was satisfied that a genuine redundancy situation existed in the respondent company due to the particular business and financial circumstances. However, it went on to say that the Unfair Dismissals Acts required it to consider: "the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal" In so doing, it found that the respondent had failed to explore the option of bumping with the respondent (whereby he would be moved into a position occupied by another employee, with the latter

Dismissal Act 1977, read together with s.7(2) of the Redundancy Payments Act 1967 provide a statutory scheme for redundancy situations, to be addressed by the E.A.T. Chief among these cases, though not unique,[499] is *Fennelly v Assicurazioni Generali S.P.A.,*[500] as considered earlier in this Chapter.[501] As seen, the plaintiff sought to injunct a purported termination arising from a serious downturn in business. Although it is not entirely clear from the report of Costello J.'s *ex tempore* judgment whether it was the fact of the redundancy which was being challenged or the manner of its implementation,[502] the phraseology of the decision would tend towards the former. Either way, this was a case which, it is submitted, should more properly have been brought before the E.A.T. given the statutory framework for addressing such a situation.[503] Although there were other factors in *Fennelly* which led Costello J. to grant an injunction (the potential destitution of the plaintiff absent an injunction being a key consideration), the case offers an example of the courts trespassing on a statutory regime set out by the Oireachtas.

The dangers of setting down such a precedent in *Fennelly* are evident when one considers that in *Gee v Irish Times Ltd.,*[504] McCracken J., explicitly citing *Fennelly* (albeit more in the context of the form of order which the court might make), was prepared to grant an injunction in circumstances where a redundancy was challenged.

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employee being dismissed by reason of redundancy). Bumping as a concept had rarely been referred to by the Tribunal prior to that decision (and in fact had been rejected in a determination from around the same time, *Flanaghan v Castlethorn Construction* UD 1451/2010)

[498] As amended by s.4 of the Redundancy Payments Act 1971.

[499] See, for example, *Gee v Irish Times Ltd.* [2001] 12 E.L.R. 249, *Moore v XNET Information Systems Ltd.* [2002] 4 I.R. 362; and *Davis v Walsh* [2003] 14 E.L.R. 1. Such instances are not confined to the private sphere: the case of *Hickey v Eastern Health Board* [1991] 1 I.R. 208, a judicial review, involved a challenge to a redundancy.

[500] (1985) 3 I.L.T.R. 73.

[501] See section 11.

[502] An important distinction in light of the decisions of Laffoy J. in *Nolan v EMO Oil Services Ltd.* [2010] 1 I.L.R.M. 228; *Burke v Independent Colleges Ltd. t/a Independent Colleges* [2010] IEHC 412 and *O'Mahony v Examiner Publications (Cork) Ltd.* [2011] 22 E.L.R. 1.

[503] As Horan points out, "redundancy is an exclusively statutory concept and does not operate to discharge a contract of employment at common law." Horan "Employment Injunction: Current Status and Future Developments" (2005) 1 E.L.Rev. 8 at 10.

[504] [2001] 12 E.L.R. 249.

The decision in which a demarcation was made, and made for explicitly the correct reasons, was that of Carroll J. in *Orr v Zomax Ltd.*[505] The plaintiff in *Orr* claimed that he had been unfairly dismissed because there was no valid redundancy, and that criticisms made about him were the real reason for his dismissal. He also claimed that there had to be an implied term in his contract of employment that his employer was obliged to act reasonably and fairly. Carroll J. made it clear, by reference both to the judgment of Barrington J. in *Parsons* and to the speech of Lord Nichols in *Johnson v Unisys Ltd.*,[506] that the common law and statutory regimes were separate and distinct. As she explained:

> "What the plaintiff is seeking to do is to introduce a new obligation under the common law on the employer to act reasonably and fairly in the case of dismissal. 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."[507]

It is easy to be critical of judges who entertain redundancy related applications which appear on the face of it to be more appropriately dealt with by the E.A.T. In a series of cases in 2010 and 2011[508] Laffoy J. put some kind of structure on, and gave guidance as to, the applicable principles and key considerations in such circumstances. It is only when the arguments being advanced in those cases are considered that it becomes apparent how relatively complex this area of the law can be. A consideration of two of the earlier cases highlights the difficulties inherent in trying to establish a clear demarcation between the statutory and common law regimes.

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[505] [2004] 1 I.R. 486.

[506] [2003] 1 A.C. 518.

[507] [2004] 1 I.R. 486 at 493.

[508] *Nolan v EMO Oil Services Ltd.* [2010] 1 I.L.R.M. 228; *Burke v Independent Colleges Ltd. t/a Independent Colleges* [2010] IEHC 412; *O'Mahony v Examiner Publications (Cork) Ltd.* [2011] 22 E.L.R. 1.

In his *ex tempore* judgment in *Shortt v Data Packaging*,[509] Keane J. found that there was a fair issue to be tried as to the legality of the plaintiff's purported termination, an alleged restructuring-related redundancy. Although not explicitly dealt with in Keane J.'s very brief judgment, it is clear from the report of the case that it was argued that the plaintiff's removal was not ruled upon by a properly convened meeting of the board of directors and was in breach of the defendant company's articles of association. Indeed, in *Nolan v EMO Oil Services Ltd.*,[510] distinguishing *Shortt* from the case before her, Laffoy J. observed in that regard that "the plaintiff in the *Shortt* case was an office holder, as a director, as well as a contract employee. Secondly, the defendant purported to terminate his employment forthwith without giving him the notice to which he was entitled as a matter of contract." As such, she took the view that

> "the *Shortt* case is not authority for the proposition that, in a case in which the plaintiff's employment has been terminated in accordance with his contract of employment, but on the grounds of redundancy, the High Court in a plenary action, has jurisdiction to consider whether the redundancy was a genuine redundancy and, if it finds that it was not, or that there is a strong case that it was not, to afford relief to the plaintiff either in the substantive action or by way of interlocutory injunction."

As more recently considered by Laffoy J. in *Burke v Independent Colleges Ltd. t/a Independent Colleges,*[511] this is a critical factor. Insofar as Keane J. had entertained the arguments made based upon redundancy in *Shortt*, it is submitted that that should not, and could not, have informed his judgment.[512] If the plaintiff's argument was limited to that, his claim should more properly have been brought before the E.A.T. (indeed, the defendant had argued that the plaintiff had a number of legal remedies open to him if he

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[509] [1994] 5 E.L.R. 251. Not to be confused with a case reported under the same name at [1996] 7 E.L.R. 7, which was an unfair dismissals claim brought by Terence Shortt's brother Gerald.

[510] [2010] 1 I.L.R.M. 228.

[511] [2011] 22 E.L.R. 169.

[512] The judgment is so brief that it is almost impossible to analyse precisely what factors did influence Keane J.

believed that his dismissal was unfair, including a claim under the Unfair Dismissals legislation).

In *Phelan v BIC (Ireland) Ltd.*,[513] Costello P. had to address the question of the application of the Redundancy Payments Act 1967 and an associated alleged breach of the terms of the Act. The President's view was that a serious issue had been raised in relation to the illegality of the termination, by reference to the requirements of the Redundancy Payments Act, meaning that that the decision was illegal and invalid and had no effect in law. Although the President was prepared to entertain that as a "serious question" for the purposes of granting an interlocutory injunction,[514] he should not on the face of it have done so. However, and as with *Shortt*, a key factor was the fact that the decision to terminate was *ultra vires* the powers of the defendant company, as set out in its Articles of Association (a lack of appropriate notice was also a ground on which Costello P. found in favour of the plaintiff). As such, even if the illegality element of the decision in *Phelan* is somewhat infirm, it is submitted that the President reached the correct conclusion having regard to the question of the company acting *ultra vires*, a matter which can properly be addressed by the courts.

The judgment by Laffoy J. in the case of *Nolan v EMO Oil Services Ltd.*[515] represented a renewed effort on the part of the courts to set out a clear division between the statutory and common law regimes by reference to a redundancy situation. The plaintiff in *Nolan* had argued that he should be granted a mandatory injunction on the basis of his contention that his redundancy was not valid. Laffoy J. explained her understanding of the plaintiff's argument as being that it was an implied term of his contract of employment that he could "litigate the fairness or otherwise of the termination of his contract on the grounds of redundancy by reference to the statutory code in plenary proceedings in this Court."[516] Rejecting the plaintiff's arguments, Laffoy J. held that the his contention that his redundancy was not a valid redundancy or, alternatively, that he should not have been selected for redundancy, could only be pursued on a claim under the

[513] [1997] 8 E.L.R. 208.

[514] *Ibid.* at 211.

[515] [2010] 1 I.L.R.M. 228.

[516] *ibid.* at 235.

Unfair Dismissals legislation. She characterised the plaintiff's application as an invitation to the court to "develop its common law jurisdiction by reference to the statutory concepts of redundancy and unfair dismissal."[517] As such, she accepted both "in principle and in accordance with precedent"[518] that the plaintiff had not made out a strong case to be tried for the mandatory injunction he was seeking.

This would have appeared to be determinative and to have established a clear demarcation between the statutory and common law regimes. However, the courts have also had to address the question of whether there are different standards for office holders, directors and shareholders.

15.3 Office Holders, Directors and Shareholders

The idea of different standards for office holders or, by extension, directors and shareholders, was ventilated in *Moore v Xnet Information Systems Ltd.*[519] It was argued in *Moore* that in those cases where salary or reinstatement were granted to a plaintiff at the interlocutory stage, the plaintiff was either an office-holder denied fair procedures or was someone against whom allegations of wrongdoing were made. That was a fairly ingenious argument, in the sense that there was nothing on the face of the judgments in *Fennelly v Assicurazioni Generali Spa*,[520] *Shortt v Data Packaging Ltd.*[521] and *Boland v Phoenix Shannon plc.*[522] or *Harte v Kelly*[523] to suggest that their common thread was anything other than dependency on income.[524] However, this ambitious effort to confine

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[517] *ibid.* at 236.

[518] See, for example, *Philpot v Ogilvy and Mather Ltd.* [2000] 3 I.R. 206; and *Davis v Walshe* [2003] 14 E.L.R. 1 and O*rr v Zomax Ltd.* [2004] 1 I.R. 486.

[519] [2002] 4 I.R. 362.

[520] (1985) 3 I.L.T.R. 73.

[521] [1994] 5 E.L.R. 251.

[522] [1997] 8 E.L.R. 113.

[523] [1997] 8 E.L.R. 125.

[524] That is not to say that there was no consideration of factors other than income in those cases. For example, in *Shortt*, it is clear from the decision of Keane J. that the plaintiff had evidently argued that some form of different treatment was required by reference to the fact the power of termination was only exercisable by directors and that his "removal from office" was ineffective. In *Burke v Independent*

both orders to specific types of case did not succeed as, on the facts, O'Sullivan J. felt that there was a fair question raised as to whether the plaintiff was in fact an office holder. Although O'Sullivan J. did not engage with the argument, it merits broader consideration.

The idea that shareholders were in some way entitled to differing treatment did not find favour with Murphy J. in the case of *Davis v Walshe*.[525] Murphy J. agreed with the submission that even if the applicant was a shareholder he would have no right to injunctive relief submission, noting that "The issue of shareholding does not, in itself or in conjunction with other relationships with the company, give a right to injunctive relief in the terms sought."[526]

The plaintiff in *Burke v Independent Colleges Ltd. t/a Independent Colleges*[527] was an employee, a shareholder and a director of the defendant company. The defendant college sought to terminate the plaintiff's employment by reason of redundancy. The case therefore afforded the court an opportunity to bring some clarity to both the issue of the appropriate remedy where redundancy is challenged and to whether there was some kind of special protection for office holders (and indeed shareholders).

Laffoy J. observed that if the company's relevant statutory provisions had been properly invoked, then the defendant's contention that the plaintiff could not challenge the redundancy was correct, in particular having regard to her own decision in *Nolan*. In Laffoy J.'s view, however, the case before her could be distinguished from *Nolan*. As she explained, the plaintiff would be confined to a statutory remedy if he was "constrained to argue that there was no basis, or that he was improperly selected, for redundancy, for the reasons set out in the *Nolan* case."[528] However, on the facts, she found that the plaintiff was entitled to argue that the letter purporting to terminate his employment was

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Colleges Ltd. t/a Independent Colleges [2011] 22 E.L.R. 169, Laffoy J. held that the case was not about redundancy *per se*, but rather "in whose hands lay the authority to terminate the employment, whether for reason of redundancy or otherwise."

[525] [2003] 14 E.L.R. 1.

[526] *ibid.* at 6.

[527] [2011] 22 E.L.R. 169.

[528] *ibid.* at 183.

ineffective from either a contractual or statutory perspective. This was the critical distinction. In short, the case was not about redundancy *per se*, but rather "in whose hands lay the authority to terminate the employment, whether for reason of redundancy or otherwise."[529] Cox ventures that "this suggests that one cannot challenge one's redundancy by way of an application for an interlocutory injunction, but one *can* challenge the process by which one was made redundant even if, in practice the two will amount to the same thing for employer and employee should the relief be granted."[530]

The point was raised in *Burke* that *Nolan* might in some way be inconsistent with the decisions in *Shortt v Data Packaging*[531] and *Phelan v BIC (Ireland) Ltd.*[532] As already referred to above, Laffoy J. firstly clarified that in *Shortt*, the plaintiff's employment had not been terminated in accordance with his contract, thereby distinguishing it from the *Nolan* case. However, the plaintiff in *Shortt* was also both an office holder and a shareholder, as well as a contracted employee. Laffoy J. acknowledged that there had been academic comment as to the relevance of this factor. She observed that a plaintiff's status as director or shareholder or a corporate employer was "not of significance." Status in and of itself may not be of significance (and is entirely consistent with the courts' gradual acceptance that office holders should not be afforded rights above and beyond those granted to contractual employees, an approach which will be considered in detail). However, it becomes more important when one considers Laffoy J.'s reference to the fact that there could be some significance in principle to a "duality of roles:" an employee could argue that the evidential onus on him changed or varied if the employer had not acted in accordance with its constitutional documents.

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[529] Mallon "Remedies for Termination of Employment: Injunctions" Paper delivered to the Employment Bar Association of Ireland, February 2, 2012.

[530] Cox "Burke v Independent Colleges – Employment Injunctions Revisited" (2010) 4 E.L. Rev. 3 at 27. This approach may explain how cases based on alleged sham redundancies continue to be brought: see, for example, "Director of One51 firm challenges redundancy notice" The Irish Times, March 3, 2012 (*Hegarty v Hegarty Metals Processors (International) Ltd.);* "Munster rugby coach gets order blocking filling of post" The Irish Times, May 4, 2012 (*Comyns v Dawson*); and "PR executive initiates action to prevent termination of post" The Irish Times, January 19, 2013 (*Lavery v Paramount Pictures Services UK).*

[531] [1994] 5 E.L.R. 251.

[532] [1997] 8 E.L.R. 208.

Laffoy J.'s judgment should have been determinative. However, the issue arose again in *O'Mahony v Examiner Publications (Cork) Ltd.*[533] In *O'Mahony*, Laffoy J. held that if the action of the defendant employer was not a genuine redundancy, then the dismissal was an unfair dismissal under the statutory code. The plaintiff had relied, *inter alia*, on *Phelan v BIC (Ireland) Ltd.*,[534] on the basis that Costello P. had found that there was a serious issue to be tried in relation to the illegality of the decision to dismiss the plaintiff. This was due to the absence of any formal redundancy notice or offer of a lump sum to the plaintiff, thereby violating the provisions of the Redundancy Payments Act 1967. However, and without engaging in an analysis of the effect of *Phelan*, Laffoy J. re-emphasised that if the plaintiff had to rely on the argument that his was not a genuine redundancy, then any redress sought would have to be pursued within the confines of the statutory scheme. In doing so, she reconfirmed what she had already explained in *Nolan*. In so doing, there is now - eventually - some measure of clarity brought to bear on this area. This can be summarised as follows:

- A challenge to a redundancy on the basis that it is not a genuine redundancy is not one which the courts will entertain; such a challenge is more appropriately dealt with under the statutory regime;
- The same principle applies to a challenge to a redundancy based on alleged improper selection;
- The fact that an employee is also a director or shareholder of a defendant corporate entity is not *per se* a relevant consideration;
- However, the courts will entertain a challenge if the claim is based on an assertion that termination does not conform with an employee's contract or, if appropriate, with a company's articles of association or with a statute.

This is not a finite summary; in *Holland v Athlone Institute of Technology*[535] Hogan J. granted an injunction on the basis of an argument that under the terms of a Department of Education circular, the defendant had a strong case that he had a legitimate expectation

[533] [2011] 22 E.L.R. 1.

[534] [1997] 8 E.L.R. 208.

[535] [2012] 23 E.L.R. 1.

that he would not be made redundant (although Hogan J. did acknowledge that the case was not "a conventional employment injunction case."[536])

Although the jurisprudence in this area has historically lacked clarity, through her decisions in *Nolan*, *Burke* and *O'Mahony*, Laffoy J. has clearly enunciated the principles which should apply where a redundancy is challenged. She summarised the approach of the courts in the case of *Treacy v Irish Packaging Recycling Ltd.*:[537]

> "The plaintiff's cause of action in these proceedings is at common law for wrongful dismissal. This Court has no function at first instance in relation to any claim for redundancy payment to which the plaintiff is entitled or any issue under the Act of 1967, as amended, in relation to his dismissal by reason of redundancy. Similarly, this Court has no function at first instance in relation to any claim a person may have under the Unfair Dismissals Act 1977 (the Act of 1977), as amended, for compensation for unfair dismissal and, in particular, the Court has no function in determining whether the dismissal of the plaintiff as an employee should be deemed, for the purposes of the Act of 1977, not to be an unfair dismissal, if it results wholly or mainly from the redundancy of the employee (s. 6(4)(c))."[538]

As will be seen in the context of the development of the interlocutory anti-dismissal injunction, a party applying for an injunction will have to demonstrate in the first instance that they have a strong case.[539] They will certainly not surmount this hurdle if they are shown to have brought what amounts to an unfair, as distinct from a wrongful, dismissal claim before the courts.

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[536] The acknowledgement of the uniqueness of that approach is borne out by Laffoy J's reference in *Kirwan v The Mental Health Commission* [2012] IEHC 217 to the fact that the plaintiffs in *Kirwan* did not pursue their reliance on legitimate expectation and that there was no factual basis on which a "strong case" of legitimate expectation could be argued.

[537] [2013] IEHC 41.

[538] *ibid.* at para.23.

[539] See Chapter Six, section 2.1.5.

16. Other Statutory Schemes

There are other statutory schemes which provide their own mechanisms in terms of relief such that a court may not have jurisdiction to grant an injunction. This is clear from the decision in *Maha Lingham v Health Service Executive.*[540] As Fennelly J. pointed out, the Protection of Employees (Fixed Term Work) Act 2003 contained its own statutory scheme of enforcement. He did not believe that it was intended that the Act would confer independent common law rights in addition to any statutory rights, nor was it intended to in some way modify contracts of employment.[541] This is entirely consistent with the idea of the "*Johnson* exclusion area."

In a succinct summary which encapsulates the broad distinction between the statutory and common law regimes Murphy J., "guided by the remarks of Carroll J." in *Orr v Zomax Ltd.,*[542] observed in *Buckley v N.U.I. Maynooth*[543] that the plaintiff "may be protected by the statutory law of unfair dismissals or redundancy, but that is a matter for the specialist tribunals which have statutory jurisdiction over those matters."[544]

17. Conclusion

The way in which reliefs and remedies have evolved is of particular importance if one considers the impact of *Hill* and, in this jurisdiction, *Fennelly* upon the interlocutory anti-dismissal injunction. Collins Ewing & McColgan highlight the flexibility of the courts in that regard with their observation that:

> "At the time of the enactment of the statutory right to claim unfair dismissal, it was doubted that any claim against dismissal might be successful, except perhaps in the special case of public officials holding an office under statute. Yet this view

[540] [2006] 17 E.L.R. 137.

[541] See also the judgment of Laffoy J. in *Kirwan v The Mental Health Commission* [2012] IEHC 217.

[542] [2004] I.R. 486.

[543] [2009] IEHC 58.

[544] Murphy J. held on the facts that he had to determine the case "by reference to the common law of wrongful dismissal."

immediately turned out to be a misconception of the capacity of private law to respond to claims of job security based on express terms of the contract."[545]

The *Fennelly* order is by now, together with the various other reliefs and remedies which are available to a plaintiff, both from the courts and from the statutory *fora*, well established. What is less certain is the willingness of those bodies to deploy those reliefs in practical terms, particularly insofar as specific performance is concerned. Before looking at how this shapes and influences the courts' approach to interlocutory applications, considered in Chapter Six, it is appropriate to look at the both established and emerging principles and trends in relation to steps short of a dismissal.

[545] Collins Ewing & McColgan *Labour Law* (Cambridge University Press, Cambridge, 2012), p.766.

CHAPTER FIVE

1. Introduction

In referring to anti-dismissal injunctions, it is important to highlight that a significant number of cases coming before the courts on an interim or interlocutory basis do so against a background of investigations, disciplinary procedures and suspensions rather than actual dismissal. Although some of the fundamental considerations underlying anti-dismissal injunctions are equally applicable at the pre-dismissal stage, steps short of dismissal have their own jurisprudential "micro-climate," with important *dicta* specific to such steps. As such, this Chapter focuses on steps short of dismissal, with considerations peculiar to those steps, such as the timing of any application to court, being to the fore. In particular, it looks at the law as applied to suspensions, disciplinary hearings and procedures, investigations and situations where an employer advertises what is an already occupied position within the firm. However, there is a close link between this Chapter and Chapter Six: although the latter focuses predominantly on dismissal (and as with steps short of dismissal, by reference to the guidelines set out in the case of *Campus Oil Ltd v Minister for Industry and Energy (No. 2)*),[1] there is often a *continuum* from investigation to suspension, through to a disciplinary hearing and ultimately dismissal.

2. Steps Short of Dismissal

The steps short of outright dismissal will be looked at in turn, and are listed in order of seriousness, suspension (particularly without pay) being regarded by the courts as being of the utmost seriousness. Although separate steps, there is a significant degree of interconnection between them. For example, an investigation may precede disciplinary procedures, which may take place while an employee is suspended from work. There is some force to the argument that the need for urgent intervention by a court is also at a premium in relation to these matters in the sense that an early intervention could "avoid the relationship irreparably breaking down."[2]

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[1] [1983] I.R. 88; [1984] I.L.R.M. 45.

[2] Quinn "The Employment Injunction – Dead or Alive?" (2011) 8(3) I.E.L.J. 71.

The courts' approach to these steps is significant. Employees are naturally concerned that a step being taken can inexorably lead to dismissal, particularly when a suspension without pay is involved.[3] For example, in *McNamara v South Western Area Health Board,*[4] Kearns J. noted that the suspension in question was a second suspension, and in reality an inexorable move towards dismissal. A purported dismissal may also take place against a backdrop of a suspension, investigation and hearing. As such, there is a significant overlap in relation to the matters which the courts have to consider, whether faced with a dismissal or whether something short of dismissal is in issue.[5]

3. *Quia Timet* Applications

Injunctions sought in respect of steps pre-dismissal may be *quia timet* in nature, insofar as they purport to halt a process leading to dismissal.[6] At the interlocutory stage, this fact makes no material difference to the considerations being dealt with by the courts, as is clear from the case of *Szabo v Esat Digifone Ltd.,*[7] an approach which was approved in an employment context in the case of *Garrahy v Bord na gCon.*[8]

4. Suspension[9]

In one sense, it is very difficult to analyse a suspension *simpliciter*. This is because suspensions can be placed along a spectrum, and are of varying degrees of severity.[10]

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[3] In *Ahern v Minister for Industry and Commerce* [1991] 1 I.R. 462 at 468, Blayney J. held that a decision to put the applicant on compulsory sick leave was on balance justiciable, on the basis that "If the applicant had been suspended without pay there is no doubt that that decision would have been justiciable."

[4] [2001] 12 E.L.R. 317.

[5] See, for example, the English case of *Irani v Southampton and South West Hampshire Health Authority* [1985] I.C.R. 590.

[6] Although of course an application may be made in relation to a suspension in its own right, not simply because it might inexorably lead to a dismissal.

[7] [1998] 2 I.L.R.M. 102.

[8] [2002] 3 I.R. 566 at 580.

[9] An alternative is to adopt the somewhat Jesuitical approach of asking someone to "stay away" from work; they are not suspended as such, but they do not report to work. See, for example, *Foley v Aer Lingus* "Aer Lingus chief executive told not to report for work" The Irish Times, May 19, 2001 and"Merrill Lynch tells 20 staff to 'stay away' for e-mailing porn", The Irish Times, June 23, 2006.

4.1 The "Suspension Spectrum"

At one end of the spectrum sit suspensions which are viewed as being as serious as dismissals due to their punitive nature. At the other end are those which are in the nature of a holding operation pending enquiries. As Barr J. pointed out in *Quirke v Bord Luthchleas na hEireann,*[11] (albeit not in the context of employment), a "holding" suspension does not imply any finding of misbehaviour or breach of rules. However, a suspension which is punitive in nature effectively means that "the body in question has found its member guilty of significant misconduct or breach of rules."[12] In *Higgins v Bank of Ireland,*[13] which did involve a wrongful dismissal claim, O'Keeffe J. made reference to the case of *Rochford v Storey*[14] as "An early example of the distinction between a suspension as a disciplinary sanction and a suspension for the purpose of an investigation."

One thing is clear from the *dictum* of Sedley L.J. in *Mezey v South West London and St Georges Mental Health Trust*:[15] a suspension should not be treated as a neutral act. Sedley L.J. noted that not only did a suspension change the *status quo* from work to no work, it also "inevitably casts a shadow over the employee's competence. Of course this does not mean that it cannot be done, but it is not a neutral act."[16]

There is certainly evidence of a historic view that suspension was in some way a significantly "lesser" action than dismissal. In the 1978 High Court case of *Yeates v*

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[10] See the comments of Hogan J. in *Wallace v Irish Aviation Authority* [2012] 2 I.L.R.M. 345 in relation to the distinction between disciplinary suspensions and holding measures.

[11] [1980] I.R. 83.

[12] *ibid.* at 87.

[13] [2013] IEHC 6, para. 519. This is the report of the plenary hearing. In 2002, the plaintiff had lost an interlocutory application to restrain his suspension pending the outcome of proceedings: see "Former BoI manager sues for wrongful dismissal" The Irish Times, June 24, 2010.

[14] unreported, High Court, O'Hanlon J., November 4, 1982.

[15] [2007] I.R.L.R. 244.

[16] *ibid.* at 245.

Minister for Posts and Telegraphs,[17] the plaintiffs sought, *inter alia*, an injunction restraining the defendants from continuing the purported suspension of their employment by the defendant. Kenny J., refusing the injunction sought, observed that the plaintiffs had only been suspended, not dismissed. He found this to be of "critical importance."[18] This was despite the fact that the plaintiffs were liable to be suspended only in cases of grave misconduct or grave irregularity warranting disciplinary action. A second point fatal to the application was the fact that Kenny J. felt that damages would be an adequate remedy, and that assessment of such damages would be easy, "for they will be the amount which the plaintiffs would have been paid if they had not been suspended."[19]

The more modern approach of the courts to suspension is evident from the case of *Rajpal v Robinson*.[20] Hardiman J. referred to "the drastic nature of the decision to suspend without pay."[21] In the course of his judgment, he captured the seriousness of the punitive effect of the impugned suspension. The effect of the suspension was, according to Hardiman J., calculated to place the plaintiff:

> "...in a position of humiliation and disadvantage.[22] On the one hand it compromises his ability to pay his ordinary liabilities and to support himself and those for whom he is responsible in the standard to which they are accustomed. It undermines his credit worthiness. It radically and dramatically transforms his position as a self supporting member of the community. It can be of long and indefinite duration. It stigmatises him in the eyes of medical colleagues, patients and such members of the wider community as become aware of it. In a rural area

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[17] [1978] I.L.R.M. 22.

[18] *ibid.* at 24.

[19] *ibid.* at 25. Kenny J. also took the view that to restore the plaintiffs to their positions would in effect be to order specific performance of a contract for personal services.

[20] [2005] 3 I.R. 385.

[21] *ibid.* at 396. In some cases a contract of employment may provide that suspension without pay can only arise where very severe accusations are being made which would justify that course of the action.

[22] Chairing a seminar organised by the Employment Bar Association on "Employment Law in the Superior Courts" on March 21, 2013, Gilligan J. commented that a suspension can be humiliating and leave an employee in a no-man's land. He also queried whether the law in this area is clear and suggested that it might in fact still be evolving.

this is probably a substantial group. It puts a major obstacle in the way of his obtaining alternative employment or developing a private practice. It constitutes a financial disaster, a grave blow, possibly irrecoverable, to reputation and a gross professional humiliation."[23]

Hardiman J.'s remarks in *Rajpal* suggest that being without pay while suspended is the key consideration in terms of determining the seriousness of the suspension. This appears to be corroborated by the approach of Laffoy J. in *Mc Loughlin v Setanta Insurance Services Ltd.*[24] Laffoy J. was clearly influenced by the fact that the plaintiff was suspended on full pay. Given all the facts, she took the view that the suspension in question was in the nature of a holding suspension, not a punitive suspension. However, a different view is evident in *O'Donoghue v South Eastern Health Board.*[25] In that case, Macken J. remarked upon the fact, albeit *obiter*, that suspension with pay in the case before her was no "less serious, onerous or damaging than suspension without pay."[26] Similarly, in *Wallace v Irish Aviation Authority*[27] wherein it was proposed to place the plaintiff on administrative leave, but on full pay, Hogan J. remarked that:

"Even in those cases of "holding" suspensions where the employee is ultimately vindicated following a full inquiry, the very fact of suspension is enough, in this valley of squinting windows, to expose the employee to the decidedly unpleasant prospect of calumny and detraction at the hands of the unforgiving and the uncharitable, not least during the period of suspension itself." [28]

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[23] *ibid.* at 396. See also the *dictum* in very similar terms of Elias J. in the case of *Crawford v Suffolk Mental Health Partnership* [2012] I.R.L.R. 402 at 409 (under the heading "Footnote").

[24] [2012] 23 E.L.R. 57. Laffoy J. observed that her decision was in line with those in *Morgan v Trinity College Dublin* [2003] 3 I.R. 157 and *O'Brien v AON Insurance Managers (Dublin) Ltd.* [2005] IEHC 3.

[25] [2005] 4 I.R. 217.

[26] *ibid.* at 241.

[27] [2012] 2 I.L.R.M. 345.

[28] *ibid.*, at.350. It seems fair to assume that the same considerations apply even if someone is suspended on "half pay": see *Holmes v Minister for Justice* "Warder obtains court order" The Irish Times, December 20, 1980.

These *dicta* suggest that a court is entitled to, and should, look at all the circumstances surrounding a suspension in order to determine just how serious it is. Indeed, they suggest that the importance of a person's reputation is such that the courts may well be moving to a position whereby the starting premise is that a suspension will damage a person's reputation.[29] In *O'Donoghue*, the fact that the plaintiff was a consultant chief psychiatrist was clearly of relevance. As Macken J. noted, there "can be decisions with adverse implications for the person affected thereby which nonetheless fall short of infringing their legal rights."[30]

Since *Yeates*, the courts have shown themselves much more willing to intervene where appropriate. They have done so by taking a much more nuanced view of suspension than Kenny J. did in *Yeates*. In that regard, the holding / punitive suspension distinction is one which has been repeatedly emphasised by the courts.[31] The distinction, and associated degree of seriousness of a suspension, is important in determining how a court will approach the granting of an interlocutory injunction. Particularly relevant in that regard is the application of natural justice and fair procedures, one of the established underlying principles considered in Chapter Three.[32]

4.2 Natural Justice and Fair Procedures

Importantly, as was made clear by Hamilton P. in *McConnell v N.E.E.T.U.*,[33] the courts are slow to interfere with the internal workings of an organisation, provided rules are adhered to and the principles of natural justice observed. If a manifest lack of natural justice or fair procedures is evident, the courts will intervene. This is exemplified by the

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[29] It was submitted on behalf of the plaintiff in *Fitzgibbon v Irish Nationwide Building Society* "Judge to rule on INBS manager's injunction" The Irish Times, November 28, that he "had no option but to take injunction proceedings to stop his suspension because no amount of damages would be able to compensate him for the damage done to his reputation."

[30] *ibid.* at 235.

[31] See in particular *Morgan v Trinity College Dublin* [2003] 3 I.R. 157 and *O'Brien v AON Insurance Managers (Dublin) Ltd.* unreported, High Court, Clarke J., January 14, 2004.

[32] See Chapter Three, section 4.

[33] unreported, High Court, Hamilton P., July 22, 1986.

judgment of Keane C.J. in *Deegan v Minister for Finance*.[34] In considering the degree of seriousness of a suspension, the Chief Justice referred to a number of English cases, in particular to the *dictum* of Megarry J. in *John v Rees*:[35]

> "... in essence suspension is merely expulsion *pro tanto*. Each is penal, and each deprives the member concerned of the enjoyment of his rights of membership or office. Accordingly, in my judgment the rules of natural justice *prima facie* apply to any process of suspension in the same way that they apply to expulsion."[36]

However, Keane C.J. also noted, as Lord Denning M.R. had pointed out in *Lewis v Heffer*,[37] that Megarry J.'s *dictum* may well apply when a suspension is inflicted by way of punishment, but did not apply when a suspension was made "as a holding operation, pending enquiries."

The need for natural justice and fair procedures also informed the approach of the Supreme Court in the cases of *Flynn v An Post*[38] and *Maher v Irish Permanent plc*.[39] The plaintiff in the latter case had been suspended, and wanted to restrain any purported dismissal which might arise out of a meeting concerning his alleged behaviour. Both the suspension and the purported dismissal fell to be considered by the court. Laffoy J. acknowledged, by reference to the decision of the Supreme Court in *Gallagher v The Revenue Commissioners (No. 2)*,[40] that although there may be an element of informality when adjudicating on charges of misconduct against an employee, an employer cannot

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[34] [2000] 11 E.L.R. 190. The case is also referred to *sub nom Gavin v Minister for Finance*, as the courts held that although there were two judicial review applications, there was sufficient commonality of issues between them such that it was not necessary to give two separate judgments.

[35] [1970] Ch. 345; [1969] 2 All E.R. 274.

[36] *ibid.* at 397; *ibid.* at 305.

[37] [1978] 1 W.L.R. 1061; [1978] 3 All E.R. 354.

[38] [1987] I.R. 68.

[39] [1998] 4 I.R. 302.

[40] [1995] 1 I.R. 55.

"act in such a way as to imperil a fair hearing or a fair result."[41] She pointed out that since the decision of the Supreme Court in *Glover v B.L.N. Ltd.*,[42] it had been recognised that both public policy and constitutional justice required that "statutes, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures."[43] She acknowledged, on the basis of the decision of the Supreme Court in *Gunn v Bord an Choláiste Náisiúnta Ealaíne is Deartha*,[44] that there should be no difference in the application of such procedures as between office holders and contractual employees.

In *Maher*, Laffoy J. essentially treated the question of the plaintiff's suspension and his purported dismissal (and the investigation into his conduct) by reference to the same principles. Accordingly, *Maher* highlights that there is not one set of discrete fundamental principles to be applied in relation to suspension, one in relation to dismissal. That is why it is important to consider the development of the law relating to anti-dismissal injunctions by reference to suspension cases as well. Although in *Martin v Irish Nationwide Building Society*[45] Macken J. took the view that the cases involving dismissal which had been opened to her were not on point, the issue in that case was that a suspension had been in effect for too long, even though the plaintiff had been suspended on full pay. As summarised by Delany, "The most reasonable explanation for the decision in *Martin* is that what was at issue was the suspension of an employee rather than a purported dismissal and the court simply wished to ensure that this overly lengthy suspension should not be allowed to continue."[46] As such, there is no inconsistency created by *Martin*; rather, it is submitted that its facts merely place it further away from

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[41] The phrase used in the judgment of Henchy J. in *Kiely v Minister for Social Welfare* [1977] I.R. 267 at 281, as referred to in *Gallagher*. The court in *Gallagher* gave some measure of guidance as to what, in practical terms, would be necessary for a fair hearing.

[42] [1973] I.R. 388.

[43] [1998] 4 I.R. 302 at 316. Costello J. subsequently rejected an interlocutory application to prevent the defendant carrying out any disciplinary inquiry or investigation other than in accordance with the principles of natural justice and the defendant's own disciplinary procedures. He felt that there was no justifiable complaint about the defendant's proposed procedures: [1997] IEHC 225.

[44] [1990] 2 I.R. 168.

[45] [2001] 1 I.R. 228.

[46] Delany *Equity and the Law of Trusts in Ireland* 5th ed. (Round Hall, Dublin, 2011), p.603.

dismissal on the "suspension spectrum" than do the facts in *Maher*. As is evident from a consideration of *Maher*, the courts need to exercise caution as to the timing of applications; a plaintiff cannot simply come to court by virtue of the fact that they have just been suspended, without more.

That is not to say that there is no qualitative difference between dismissal and steps short of dismissal. This is evident from the case of *Doherty v Health Service Executive*,[47] in which Laffoy J. observed that that the application, brought by plaintiffs who were suspended, before her was "qualitatively different" to what she termed "the usual type of application for an interlocutory injunction arising out of a contract of employment or an employer/employee relationship." As she observed, the employer had not terminated, nor did it propose to terminate, the plaintiffs' employment. Rather, it proposed to impose a sanction or penalty on the plaintiffs.

The one case which does not chime with other decisions in relation to suspension is that of *Foley v Aer Lingus Group*.[48] The plaintiff had been suspended, and sought to appeal the findings of a committee in relation to an allegation of sexual harassment. He also sought to halt the work of a second committee which was set up to decide what, if any, disciplinary action was warranted. Carroll J. refused the reliefs sought.[49] She found that the application was premature. However, she also noted that any alleged damage to the plaintiff's reputation would be compensatable by damages. This latter view sits very uneasily with those subsequently expressed by Hardiman J. in *Rajpal*, and indeed is out of kilter with the approach of the courts prior to that point in relation to the effect of punitive suspensions. That the plaintiff was entitled to a twelve month notice period also appeared to inform a view by Carroll J. that this was in some way relevant to a potential loss of career.

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[47] [2008] IEHC 331.

[48] [2001] 12 E.L.R. 193.

[49] Although an interim injunction had previously been granted: see "Foley secures Aer Lingus restraint order" The Irish Times, May 25, 2001.

4.3 Individual Circumstances of a Case

Carroll J. had adopted a similar approach to that in *Foley* in the earlier case of *Ni Bheolain v City of Dublin V.E.C.*[50] in the context of a suspension implemented pursuant to statute. However, Carroll J. did add an important caveat; it had been argued by the plaintiff that she was entitled by virtue of the fair procedures guaranteed by the Constitution to notice of the resolution suspending her and a right to make representations to the meeting that suspended her. Carroll J. held that "In relation to suspension it seems to me that no such general rule can be laid down. It seems to me to be dependent on all the circumstances of an individual case." This is a consistent theme; in *Morgan v Trinity College Dublin*,[51] Kearns J. made reference to the fact that a suspension "may have different consequences and implications by reference to the particular occupation of the person affected," contrasting the position of a professional footballer with that of a senior medical consultant. He also emphasised that the court will have to consider "the manner and nature of the suspension."[52] The same judge had in fact already considered the position of a senior consultant in his earlier judgment in *McNamara v South Western Area Health Board*.[53] The plaintiff was suspended due to her refusal to work a system she believed was unsafe. As Kearns J. observed, the suspension of a senior consultant which was open ended and without pay amounted to a "sanction, and a severe one at that." He noted that:

> "Whether a suspension invokes fair procedures or not seems to me to hinge entirely on the gravity of the reasons for the suspension, the implications for the person concerned and the likely consequences following suspension."[54]

The extent to which a suspension attracts natural justice or gives rise to an inference of significant misconduct is, as concisely summarised by MacMenamin J. in *Keenan v Iarnrod Eireann*,[55] and citing *Morgan* with approval, "a question of fact and degree."[56]

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[50] unreported, High Court, Carroll J., January 28, 1983.

[51] [2003] 3 I.R. 157.

[52] *ibid.* at 169.

[53] [2001] 12 E.L.R. 317.

[54] *ibid.*

5. Disciplinary Hearings and Procedures

A considerable number of injunction applications have come before the courts in relation to disciplinary hearings. This is not surprising; much like suspensions, there can be a legitimate concern that a disciplinary hearing may inexorably lead to dismissal. Fair procedures and natural justice in individual cases are key considerations. The timing of an application is again important.

5.1 Natural Justice and Fair Procedures

The importance of natural justice and fair procedures in relation to disciplinary procedures was emphasised by Clarke J. in the case of *Carroll v Bus Átha Cliath/Dublin Bus*.[57] The plaintiff bus driver sought to injunct a disciplinary process initiated in relation to two complaints made against him. Clarke J. referred to the fact that employees cannot be dismissed as a matter of contract save for good reason such as incapacity, stated misbehaviour, redundancy and so on.[58] He considered that it was this development which had given rise to an emphasis on fair procedures and compliance with the requirements of natural justice. As with suspensions, a key consideration for the courts is the stain which may be placed on someone's character arising from a charge of misconduct. An emphasis on natural justice is also evident in the judgment of Feeney J. in *Conway v An Taoiseach*,[59] although he did offer the caveat that the "procedures which are permitted must allow flexibility…"

The onus is on the party seeking the injunction to demonstrate that there has been a lack of fair procedures. In *McEvoy v Bank of Ireland*[60] Laffoy J. refused the injunctions sought. This was because the plaintiff had not established that there was a fair issue to be

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[55] [2010] 21 E.L.R. 115.

[56] *ibid.* at 128.

[57] [2005] 4 I.R. 184. See also *O'Donoghue v South Eastern Health Board* [2005] 4 I.R. 217.

[58] [2005] 4 I.R. 184 at 208.

[59] unreported, High Court, Feeney J., April 12, 2006.

[60] [2006] IEHC 3.

tried, namely that the disciplinary process concerned was so flawed that it would be appropriate for the court to prohibit the process continuing.

5.2 Prematurity

In *McEvoy*, Laffoy J. also noted that the plaintiff's application was premature in that she had two further appeals available to her under the disciplinary process in operation.[61] This leads to the broader consideration that the point at which an interlocutory injunction is sought may also be a relevant consideration for the courts when considering a challenge to a disciplinary hearing. Key to this is the courts' evident reluctance to get themselves involved in a company's internal procedures. A good example of this is the case of *Morgan v Trinity College Dublin*.[62] In that case the plaintiff sought an interlocutory injunction restraining the third named defendant, the chair of a disciplinary panel, from holding a disciplinary hearing. Kearns J. refused the injunction sought, and held, *inter alia*, that the plaintiff's complaints were premature as all matters could have been dealt with fairly before the disciplinary panel.

In similar vein, Clarke J. stated in *Carroll v Bus Átha Cliath / Dublin Bus*[63] that a court should be reluctant to intervene in an incomplete disciplinary process. He wanted to avoid a situation developing where recourse "might well be had to the courts at many stages in the course of what would otherwise be a relatively straightforward and expeditious set of disciplinary proceedings."[64] However, he also held that where an employer had, in clear and unequivocal terms, indicated that procedures would be followed which would be manifestly unfair, the court might intervene as appropriate. Clarke J. felt that this was particularly apposite where the degree of prejudice which the employee concerned would suffer in the event of an adverse finding at the particular stage in the process in respect of

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[61] Prematurity also informed Feeney's rejection of the interlocutory application in *Conway*, in which he found support from Laffoy J.'s decision in *McEvoy*. In *Roche v Microchem Laboratories (Ireland) Ltd. ex tempore*, High Court, Hedigan J., August 19, 2009 Hedigan J. stated that "it seems that if this was an application for a judicial review, which is the list I normally deal with, I would refuse it on the basis of remedies not being exhausted. The applicant should have availed herself of an appeal."

[62] [2003] 3 I.R. 157.

[63] [2005] 4 I.R. 184.

[64] *ibid.* at 189.

which the complaint was made would be great and unlikely to be substantially reversed by a finding of a court made after the process had come to an end. He ultimately granted the interlocutory injunction sought, restraining the defendant company from holding a hearing until such time as they provided particulars of the allegations made (having a reasonable account of the complaint to answer being a "basic tenet of the rules of fair procedures")[65] and allowed the plaintiff's witnesses to attend the hearing. A similar approach was adopted by the same judge in *Becker v Board of Management of St Dominic's Secondary School.*[66] He held that a court should only intervene in the course of an uncompleted disciplinary process in a "clear case", and that it should not be invited to intervene at a "variety of stages". Such intervention should only occur, according to Clarke J., in cases where a step or act had been taken in the process which could not be cured and which was "manifestly at variance with the entitlement to fair procedures". He also observed that it should not be assumed that unfairness will occur in the future.

The emphasis is thus on a party contemplating bringing an injunction application - and his legal advisers - to ensure that all internal mechanisms available to them have been exhausted prior to initiating legal proceedings. The one qualification to this is that identified by Clarke J. in *Carroll*, namely that if it is manifest that the procedures to be followed will be unfair, that may be an appropriate reason to seek the intervention of the courts.

5.3 Individual Circumstances of a Case

As with suspensions, the extent to which fair procedures have been followed, and natural justice evident, falls to be considered on the facts of each individual case, a point made by Shanley J. in *Vogel v Cheeverstown House Ltd.*[67] The defendant had established a committee to investigate a claim against the plaintiff. However, the committee decided that the complainant would not be available for examination and cross-examination at the inquiry on account of her condition. The plaintiff sought an interlocutory injunction to restrain the defendant from commencing a disciplinary hearing without affording him an

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[65] *ibid.* at 191.

[66] [2007] 19 E.L.R. 293. Judgment in related, but separate, proceedings is reported at [2005] 1 I.R. 561.

[67] [1998] 2 I.R. 496.

opportunity to cross-examine the complainant. In the circumstances Shanley J. refused the relief sought, but granted an injunction restraining the defendant from commencing the disciplinary hearing pending the holding of a validation exercise (in essence, a review by an appropriately qualified person such as a psychologist or a psychiatrist) by a nominee of the plaintiff. What the judgment in *Vogel* highlights is that the approach of the courts to employment issues is peculiarly fact-sensitive.

5.4 Conducting a Hearing

There are a number of features peculiar to disciplinary procedures and hearings which the courts have been asked to consider. These include:

- The constitution of a board;
- Particulars of allegations; and
- Representations and witnesses.

For completeness, these will be considered in turn.

5.4.1 Constitution of a Board

Inevitably, a situation may arise where a party reasonably fears bias and injustice in terms of the constitution of a hearing committee. In *O'Neill v Beaumont Hospital Board*[68] the Supreme Court granted an injunction preventing certain members of the board from participating in a meeting concerning the plaintiff's retention as a consultant. However, it did not restrain a meeting of the board.

When putting together a board for a disciplinary hearing, an organisation must adhere to its disciplinary rules.[69] This was a point emphasised in *Carroll v Bus Átha Cliath/Dublin Bus*.[70] Clarke J. observed that unless a court was satisfied that all reasonable possibilities

[68] [1990] I.L.R.M. 419.

[69] This presupposes that the organisation has such rules in place. That they might not gives rise to separate considerations.

[70] [2005] 4 I.R. 184.

for empanelling such a board had been exhausted, it was likely that the court would make an order precluding the conduct of the disciplinary hearing until the board was properly constituted.[71]

5.4.2 Particulars of Allegations

In *Mooney v An Post*[72] Barrington J., referring to the fact that what fair procedures demand will depend upon the terms of employment and the circumstances surrounding a proposed dismissal, observed that the minimum an employee is entitled to is to be informed of the charge against him and to be given an opportunity to answer it and to make submissions.[73] In *Georgopoulus v Beaumont Hospital*,[74] Hamilton C.J. (although dismissing the appeal on the facts) accepted the submission that it is a breach of fair procedures if a decision is taken based on information obtained outside the hearing and this is not disclosed to the party adversely affected.

The importance of this is also evident from the case of *Murphy v ACC Bank plc.*,[75] in which the plaintiff was dismissed by the defendant bank, but claimed that in breach of the disciplinary procedure he was not informed of the complaint against him. On the plaintiff's application for an interlocutory injunction, O'Sullivan J. held that the plaintiff had made out a case that a substantial question fell to be tried at the hearing of the action, namely whether the defendant complied with its procedures.

5.4.3 Representation and Witnesses

A question which often confronts the courts is the extent to which a party at a disciplinary hearing may have legal or other representation, and whether witnesses may be called to give evidence at the hearing on his behalf.

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[71] *ibid.* at 193.

[72] [1998] 9 E.L.R. 238.

[73] *ibid.* at 248, referred to with approval by Laffoy J. in *Maher v Irish Permanent plc* [1998] 4 I.R. 302 at 317.

[74] [1998] 3 I.R. 132 at 154. As referred to by Herbert J. in *Somers v Minister for Defence* [2012] IEHC 447.

[75] [2000] IEHC 162.

In *Maher v Irish Permanent plc.*[76] (considered in the context of suspension), Laffoy J. found that the plaintiff was entitled to be furnished with statements made by staff members in advance of the relevant oral hearing dealing with the matter. She also found that he was entitled to be legally represented at the hearing.[77] She consequently made an order restraining the defendant from taking any further steps to terminate the plaintiff's employment save in accordance with the defendant's disciplinary procedures and in accordance with natural justice.

However, it is important to emphasise that each case will have to be dealt with on its own facts in terms of whether representation is allowed. This is evident from the decision of the Supreme Court in *Burns v Governor of Castlerea Prison.*[78] The court held that that in any organisation where there were disciplinary procedures, it was undesirable to involve legal representation unless in all the circumstances such was required by the principles of constitutional or natural justice.[79] In *Gallagher v Revenue Commissioners*[80] Blayney J. adopted the *dictum* of Barron J. in *Flanagan v University College Dublin*[81] that "depending upon the gravity of the matter, the person concerned may be entitled to be represented."[82]

That legal representation, or more specifically lack thereof, will not automatically lead to the entitlement to an injunction is clear from the case of *O'Neill v Iarnród Eireann.*[83] Finlay C.J. stated that he was not satisfied, having regard to all the circumstances of the case, that there were any *prima facie* grounds for suggesting that the respondent had acted

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[76] [1998] 4 I.R. 302.

[77] As to the sources of the right to legal representation at a disciplinary hearing, see generally Farrell, "Opening the Door to Injunctions?—Refusing Legal Representation at Disciplinary Hearings" (2006) 3(1) I.E.L.J. 7.

[78] [2009] 3 I.R. 682.

[79] In that regard, Geoghegan J. adopted a list set out by Webster J. in *R v Secretary of State for the Home Department ex parte Tarrant* [1985] 1 Q.B. 251 as "a broad guideline."

[80] [1991] 2 I.R. 370.

[81] [1988] I.R. 724 at 730.

[82] [1991] 2 I.R. 370 at 377.

[83] [1991] 2 E.L.R. 1.

in breach of natural justice in failing to allow the applicant to be legally represented at the hearings. Barr J. made an even more general statement in relation to representation in *Aziz v Midland Health Board*[84] when he held that "there is no general right to legal representation at quasi-judicial disciplinary hearings such as those in the present case."[85]

Even where there is an entitlement to legal representation, the employer may, through his conduct, render such representation ineffective. This can in turn lead to a party seeking an injunction. In *Cassidy v Shannon Castle Banquets and Heritage Ltd.,*[86] Budd J. found that although the plaintiff was entitled to have his solicitors present at meetings at which a claim of unwanted sexual advances made against him was investigated, the efficacy of the solicitor "was nullified because the defendant prevented her having an effective role by denying her the statements and the opportunities to make representations and submissions".[87]

Related to this is the ability of a party to call witnesses at a hearing. In *Carroll v Bus Átha Cliath/Dublin Bus*[88] Clarke J. accepted that the right to have a witness give evidence on a party's behalf at a disciplinary hearing constituted a fundamental right to fair procedures.[89] An issue had arisen in that case in that the proposed witness had been certified sick for work. Accordingly, the defendant took issue with his appearing as a witness. Clarke J. dismissed this objection, holding quite sensibly that there are situations in which a person may not be fit to attend work but still be fit to give evidence.[90]

In the same case, Clarke J. noted that the extent to which a defective hearing could be cured would have to be reviewed having regard to all the circumstances of a case. [91] In essence, he considered the extent to which an appeal board could offer a fair appeal after

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[84] [1995] 6 E.L.R. 48.

[85] *ibid.* at 58.

[86] [2000] 11 E.L.R. 248

[87] *ibid.* at 271.

[88] [2005] 4 I.R. 184.

[89] The EAT has held that a party should be allowed call witnesses at a disciplinary hearing: See, for example, U.D. 367/88 *Gearon v Dunnes Stores*; U.D. 69/197 *Moran v Bailey Gibson Ltd.*

[90] [2005] 4 I.R. 184 at 192.

[91] [2005] 4 I.R. 184 at 212.

a flawed initial hearing. He took a similar approach in the context of investigations, in the case of *O'Brien v AON Insurance Managers (Dublin) Ltd.*[92]

An evolving element of this particular area of the law centres on Article 6 of the European Convention on Human Rights, which provides in material part that:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

The potential importance of Article 6 is evidenced by the English Supreme Court decision in *R (G) v Governors of X School*,[93] which concerned representation. As Lord Dyson J.S.C. explained having reviewed the relevant jurisprudence, Article 6 is engaged if a first hearing is "determinative" of an issue[94] (although is not engaged if the first hearing only has a "tenuous" or "remote consequence."[95]) On the facts before him, though in a *dictum* which resonates more widely, he found that

> "if article 6 did apply in the disciplinary proceedings, then the claimant was entitled to the enhanced procedural protection (normally associated with criminal proceedings) of the right to have legal representation at the disciplinary hearing. The more serious the allegation and the graver the consequences if the allegation is proved, the greater the need for enhanced protection."[96]

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[92] [2005] IEHC 3.

[93] [2012] 1 A.C. 167.

[94] *ibid.* at 193.

[95] *ibid.* at 192.

[96] *ibid.* at 194. See also *Ali v Belfast Health & Social Care Trust* [2008] NIQB 143, although it is best confined to its own facts, for as McCloskey J. noted (para.6) "in the particular circumstances of this case, the concession with regard to Article 6 was well made, for the prosaic reason that in the Statement of Claim, the asserted breaches of Article 6 (quoted above) do not differ in any material respect from the alleged breaches of contract and the alleged infringements of the Plaintiff's common law right to a fair hearing. It might have been otherwise, of course, if the Plaintiff were making the case that, in his particular circumstances, Article 6 confers on him some right or rights greater than or different from those which he asserts in contract and at common law. However, the Plaintiff does not do so."

Whether that potential importance will translate into a practical element underlying injunction applications in this jurisdiction is open to doubt, however. In his article "A Comparison of Article 6 of European Convention on Human Rights and the Due Process Requirements of the Constitution of Ireland,"[97] O'Donnell, prior to his elevation to the Supreme Court bench, made some very germane observations as to how the constitutional guarantees and protections in the Irish Constitution were such that

> "In view of the degree of correspondence between the provisions of Article 6 of the Convention and Articles 34, 38 and 40.3 of the Constitution of Ireland, it would be surprising in my view, if the incorporation of the Convention gave rise to a dramatic impact on the procedures in criminal or civil matters."[98]

Although the article does not deal with representation specifically, O'Donnell advances the argument that "the Irish Constitution as interpreted, requires more exacting standards than Article 6." That the courts have recognised such standards – where appropriate – when it comes to representation is evident from the review of the relevant caselaw set out above.

6. Investigations

In the normal course, an investigation will precede a disciplinary hearing. As investigations do not of themselves amount to a punishment, it would be unusual for an investigation to be injuncted by the courts. As Purdy points out, "any investigation which is designed to gather evidence will not be required to adhere to the rules of natural justice and it will be extremely difficult for an applicant to successfully obtain an injunction at that stage."[99]

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[97] (2004) 4(2) J.S.I.J. 37.

[98] *ibid.* at 44.

[99] Purdy *Termination of Employment: A Practical Guide for Employers* 2nd ed. (Bloomsbury Professional, Dublin, 2011), p.261. See *Harrington v Irish Nationwide Building Society*, in which Sheehan J. is reported as having commented that "he was satisfied this was not one of those rare cases whereby someone could be restored to their position while an investigation was under way.": "Nationwide official fails to halt inquiry"

However, it is often difficult to draw a clear distinction between an investigation and a disciplinary hearing. In *Charlton v H.H. The Aga Khan's Studs Société Civile*,[100] Laffoy J. acknowledged that there was a fair issue to be tried in relation to whether the enquiry concerned was an investigation or a disciplinary process. In *McLoughlin v Setanta Insurance Services Ltd.*[101] the same judge, in granting an injunction, expressed concerns that averments made by a member of the defendant's H.R. team evidenced a situation whereby the defendant's efforts to establish the facts went beyond a "pure investigation." Indeed, in practical terms, the courts rarely have to deal with an application in relation to a standalone investigation. Rather, the process involved in an investigation is more likely to be reviewed when such an investigation underlies further steps being taken. As explained by Clarke J. in *Minnock v Irish Casing Co. Ltd.*,[102] the authorities were settling upon a test to be applied in relation to investigations. He articulated that as being that:

> "...in the ordinary way, the court will not intervene necessarily in the course of a disciplinary process unless a clear case has been made out that there is a serious risk that the process is sufficiently flawed and incapable of being cured, that it might cause irreparable harm to the plaintiff if the process is permitted to continue."[103]

The problem identified by Clarke J. in the *Minnock* case was that the second defendant had purported to make findings and, as such, had not confined himself to collecting evidence and determining that there was a case to answer, thereby giving rise to formal disciplinary proceedings.

Even if there are infirmities in an investigation, these could in the normal course be cured

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The Irish Times, March 17, 2009. See also *Cribbin v PLC Ingredients Ltd.* [2012] IEHC 390, albeit that the case turned on somewhat unusual facts.

[100] [1999] 10 E.L.R. 136.

[101] [2012] 23 E.L.R. 57.

[102] [2007] 18 E.L.R. 229.

[103] *ibid.* at 231, referring to *O'Brien v AON Insurance Managers (Dublin) Ltd.* [2005] IEHC 3 and *Byrne v Shannon Foynes Port Company* unreported, High Court, Clarke J. February 2, 2007. As approved of by Laffoy J. in *McLoughlin v Setanta Insurance Services Ltd.* [2012] 23 E.L.R. 57.

at any disciplinary hearing. This is evident from the decision of Clarke J. in *O'Brien v AON Insurance Managers (Dublin) Ltd.*[104] An internal investigation was carried out into the plaintiff's conduct. The investigators made certain allegations of misconduct and recommended disciplinary proceedings. The plaintiff sought an interlocutory injunction to restrain those disciplinary proceedings, making a series of complaints concerning the procedures followed by the investigators. In refusing the relief sought, Clarke J. held that even if there were infirmities in the methodology of the investigators, the recommendations did not amount to a sanction. As such, the rights to fair procedures did not arise.[105]

6.1 Natural Justice

The approach of the courts to the application of natural and constitutional justice in the context of an investigation has been well summarised by Murphy J.. In *Collins v Cork Co. V.E.C.,*[106] albeit in the specific context of addressing the extent to which office holders have some form of additional protection by virtue of their position, Murphy J. concluded that:[107]

> "the rules of natural justice have no application to enquiries, investigations or reports which are made at a stage when the suspension or removal of the office holder is not in contemplation. If the position was otherwise it seems to me that the supervision and administration of any organisation involving a number of office holders would be quite impossible."[108]

However, a lot depends on the nature and form of the investigation. This was a point made by Clarke J. in *O'Sullivan v Mercy Hospital Cork Ltd.*[109] The plaintiff sought

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[104] [2005] IEHC 3.

[105] Applying *Morgan v Trinity College Dublin* [2003] 3 I.R. 157.

[106] unreported, High Court, Murphy J., May 27, 1982.

[107] Having reviewed the decision of the Supreme Court in the *State (Duffy) v Minister for Defence* unreported, Supreme Court, May 9, 1979.

[108] unreported, High Court, Murphy J., May 27, 1982.

[109] [2005] IEHC 170.

interlocutory orders restraining the defendants from progressing with enquires and procedures relating to her employment. Similar to the idea of a spectrum in suspensions, Clarke J. identified a scale or spectrum upon which investigations could be placed. At one end is "an entirely informal investigation carried out by an employer for the purposes of ascertaining whether there might be a basis for instituting disciplinary procedures." Borrowing an analogy used in his own decision in *O'Brien*, Clarke J. referred to a document produced in the course of such investigation as being like a book of evidence prepared in advance of a trial. At the other end of the spectrum are "statutory schemes which require a decision of a particular body as to the existence of a *prima facie* case as a pre-requisite to formal disciplinary proceedings." Such schemes, according to Clarke J., require the application of certain of the rules of natural justice. He adopted a similar approach in *Minnock v Irish Casing Co. Ltd.*[110]

7. Advertisement of Existing Positions

A less obvious challenge to an employee's position is the advertising of a job or appointment of a person to a job which has all the hallmarks of being similar to that employee's job. In the case of *Garrahy v Bord na gCon*,[111] the plaintiff, believing that the purported appointment of a full-time regulation manager was effectively an attempt to force him out of his employment, successfully sought an injunction to prevent the appointment. The case of *Harkins v Shannon Foynes Port Company*[112] dealt with a similar situation. The plaintiff formed the opinion that a new position being advertised by the defendant company, for whom he worked, would in effect absorb or subsume his own existing position. He thus sought an order restraining the defendant from advertising the position of Harbour Engineer, however styled. In granting the injunction sought, O'Sullivan J. expressed the view that it was clear that if the defendant was permitted to continue making the appointment advertised, the plaintiff's position at the trial would be devalued, possibly irretrievably, in a way that might not be compensated.[113] Similarly, in

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[110] [2007] 18 E.L.R. 229.

[111] *Garrahy v Bord na gCon* [2002] 3 I.R. 566.

[112] [2001] 12 E.L.R. 75.

[113] *ibid.* at 78. In *Garrahy v Bord na gCon* [2002] 3 I.R. 566 at 572, in which O'Higgins J. remarked in relation to *Harkins* that "[t]here are striking similarities between that case and the present one."

Evans v IRFB Services (Ireland) Ltd.[114] the plaintiff sought to restrain the appointment of a new head of its rugby department on foot of an internal reorganisation, on the basis that to do so might breach his existing contract of employment. Clarke J. observed that the height of the plaintiff's entitlement was an order similar to that in *Garraghy* which would "preclude or limit the making of an appointment to the job of head of the rugby department pending the trial of the action."[115] Clarke J. then found, after considerable analysis, that the balance of convenience favoured the making of such an order.[116]

There is a very practical reason underpinning the court's unwillingness to allow for an appointment to a position which is already occupied: as identified by O'Donovan J. in *Howard v University College Cork*,[117] not injuncting a second appointment could leave a trial judge having to essentially decide as between two people in respect of one post.[118] However, and importantly, Delany points out that such orders will have an indirect effect in that they may amount to requiring parties to work together.[119] This is a point also made by Charleton J. (writing extra-judicially) in fairly blunt terms:

> "What is being done here is to twist the defendant's arm, by way of an application dressed up as a prohibitory injunction: you will not employ anyone else. In some circumstances, the net effect of this is to make it considerably more attractive for the defendant firm to re-engage the plaintiff; in other words, to settle the case! In other circumstances it may mean that a necessary function within a firm may remain unfulfilled or that already stretched employees will have to cover the plaintiff's duties in his or her absence. I cannot analyse this form of application,

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[114] [2005] 2 I.L.R.M. 358.

[115] *ibid.* at 364. See also *Keane v Irish Amateur Swimming Association Ltd. t/a Swim Ireland* [2004] 15 E.L.R. 6 at 11 in which Gilligan J. refused to grant an order for specific performance, but was satisfied that by granting other reliefs sought, "including an injunction restraining the defendants from appointing any other person to the position" as well as paying her salary that the Plaintiff would be "adequately and fairly protected" pending the determination of the proceedings.

[116] The balance of convenience, one of the guidelines set out in the *Campus Oil* case, will be considered in much greater detail in the next Chapter.

[117] [2001] 12 E.L.R. 8.

[118] *ibid.* at 14.

[119] Delany *Equity and the Law of Trusts in Ireland* 5th ed. (Round Hall, Dublin, 2011), p.609.

however, as being anything other than part of an application to redefine the reality of what has already happened: the plaintiff has been sacked."[120]

He also makes the important point that a prohibition against re-engaging an alternative employee may make it impossible to continue if the employer concerned is a small firm.

The decision of Carroll J. in *Foley v Aer Lingus Group*[121] is somewhat out of keeping with this approach. Carroll J. formed the view that the balance of convenience lay in favour of Aer Lingus in that it would damage a company to be left indefinitely without a CEO. However, this implies that Aer Lingus would have to appoint an acting CEO. It is absolutely unsatisfactory that the length of time for which a company would have to engage an acting CEO would be entirely dependent on court schedules and the coming on for hearing of the substantive trial. This particular example highlights the practical complexities that can face the courts in such situations. It also differs from the approach taken by O'Donovan J. in *Howard v University College Cork.*[122] In that case, he observed that it seemed to him that the appointment of a new head of the German Department in the defendant college in advance of the hearing, with the question of whether the plaintiff was entitled to retain that post "is likely to create greater difficulties within the Department."[123] Although a significant underlying difference between the cases was the views of the respective judges as to whether damages would compensate the plaintiffs' reputations, Carroll J. rather breezily dismissed *Howard* in *Foley*, saying that it was not a case in point, though without explaining why this was so.

However, these cases are both relatively rare and unique. In reality, as identified in *Howard*, they admit of very practical, rather than detailed legal, considerations. As such, they have not contributed much to the overall jurisprudence in this area.

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[120] Charleton "Employment Injunctions: An Over-Loose Discretion" (2009) 9(2) J.S.I.J. 1 at 14.

[121] [2001] 12 E.L.R. 193.

[122] [2001] 12 E.L.R. 8.

[123] *ibid.* at 14.

8. Other Situations

Other situations in which an injunction may be sought can be identified by reference to caselaw in England include injunctions to prevent a demotion[124] and to restrain a change of duties.[125] Were cases with the same or similar factual matrices to come before the Irish courts, it is safe to suggest that the questions of natural justice and fair procedures and the timing of any application would be key considerations, viewed against the backdrop of the individual circumstances of the case at hand.

9. Conclusion

One overarching comment made, albeit *obiter*, by Fennelly J. in the 2003 case of *Traynor v Ryan*[126] is notable: he referred to the "regrettable tendency" in some employment cases to "treat procedural safeguards as the real battlefield in preference to facing the substance of complaints in accordance with an agreed procedure."[127] Although those safeguards (and their limitations) are, as seen in this Chapter, well established, the overarching message from *Traynor* was clear: semantics and procedural issues should not be viewed as the springboard from which to launch injunction applications. This was an approach picked up in *Stoskus v Goode Concrete*.[128] Irvine J. was dismissive of the plaintiff's assertion that he was entitled, as a matter of natural justice and fair procedures, to legal representation at his disciplinary hearing. As she observed, if the plaintiff succeeded with that argument, "every employee threatened with potential dismissal has a right to legal representation at his disciplinary hearing, irrespective of any contractual provision which provides for lesser representation such as representation through a colleague or trades union representative."

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[124] *Powell v London Borough of Brent* [1988] I.C.R. 176.

[125] *Hughes v London Borough of Southwark* [1988] I.R.L.R. 55. See generally the cases identified by Hendy and Bowers "Discipline and Injunctions" E.L.B.A., June 15, 2010.

[126] [2003] 2 I.R. 568. Referred to in *Rajpal v Robinson* [2004] IEHC 149.

[127] [2003] 2 I.R. 568 at 578. See also *Wright v Board of Management of Gorey Community School* [2000] IEHC 37, which concerned the suspension of schoolboys, who based their claim on unfair procedures.

[128] [2007] IEHC 432.

As will be seen in the next Chapter, the fact that a dismissal is contemplated, with an associated loss of salary (which does not usually arise in steps short of dismissal, other than suspensions without pay), brings with it an added dimension. It is a dimension which has already been considered by reference to the *Fennelly* order in Chapter Four.[129] Another significant consideration arising out of dismissal is the courts' view that damage to reputation by reason of dismissal is more appropriately addressed by means of an injunction at the interlocutory stage, rather than by theoretical damages. This has led to considerable unevenness and uncertainty.

[129] See Chapter Four, section 11.

CHAPTER SIX

1. Introduction

This Chapter considers the overall growth and apparent contraction of injunction orders at the interim and – primarily - interlocutory stages. In doing so, it gets to the heart of understanding how it is that there are a lack of coherent principles when it comes to the granting or otherwise of interim or interlocutory injunctions, encompassing the principles which have emerged – and indeed continue to emerge – since the judgment of Costello J. in *Fennelly v Assicurazioni Generali S.P.A.*[1] It does so for the most part by reference to how the courts have used, and indeed arguably manipulated or indeed effectively ignored, the guidelines set out in *Campus Oil Ltd v Minister for Industry and Energy (No. 2)*[2] to facilitate the granting or refusal of interim or interlocutory orders.

2. Guidelines for Interlocutory Injunctions

Interlocutory (and interim) injunction applications are in the main determined by reference to the guidelines (frequently referred to as the tests) set out in *Campus Oil Ltd v Minister for Industry and Energy (No. 2).*[3]

In broad terms, the *Campus Oil* guidelines start with the threshold test of a "serious question to be tried" when a prohibitory injunction is sought, a "strong case" where the injunction is mandatory in nature. Once this threshold test has been addressed, the courts then consider the adequacy of the respective remedies in damages available to each party. These are sometimes considered as a discrete issue, sometimes as an element of the "balance of convenience." Where other matters are evenly balanced, the courts attempt to maintain the *status quo*. In England, but not (explicitly, at least) in Ireland, the strength of a case may be taken into account. Special factors can also be taken into consideration as appropriate.

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[1] (1985) 3 I.L.T. 73. A decision of March 12, 1985 (the citation for *Fennelly* is sometimes incorrectly rendered as I.L.T.R.: see, for example, *Garrahy v Bord na gCon* [2002] 3 I.R. 566 at 567.

[2] [1983] I.R. 88; [1984] I.L.R.M. 45.

[3] *ibid.*

It is proposed to consider these guidelines in sequence. In each instance, the general application of the guideline will be considered as necessary. This will be followed by a review of the specific considerations applicable to the employment relationship (or more pertinently, the breakdown thereof) in the context of that particular guideline. At the outset, however, it is important to emphasise the difficulty with attempting to treat guidelines on a "one size fits all" basis.

2.1 The Threshold Test

2.1.1 Prohibitory Interlocutory Injunctions

In *American Cyanamid Company v Ethicon Ltd.*,[4] Lord Diplock set out the threshold test for a prohibitory interlocutory injunction as being that the court "must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried." Thus was introduced in England the now standard threshold test for a prohibitory injunction of a "serious question to be tried" or, as frequently used, the test of a "fair case."[5]

2.1.2 Mandatory Interlocutory Injunctions

However, a more rigorous, or higher, standard is applied when seeking a mandatory interlocutory injunction. Courts are reluctant to grant mandatory injunctions at the interlocutory stage, and will frequently refer to a formula along the lines of the need for an "unusually sharp and clear" case.[6] This is due primarily to the practical difficulties

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[4] [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504.

[5] As explained by Butler J. in *Moloney v Bolger* [2000] IEHC 63, a plaintiff had to show that a "serious", "fair" and "*bona fide*" issue existed, "in contradistinction" to one which was "frivolous or vexatious".

[6] *Per* Megarry J. in *Shepherd Homes Ltd v Sandham* [1971] Ch. 340 at 352. In *Locabail International Finance Limited v Agroexport* [1986] 1 All E.R. 901, Mustill L.J. in the Court of Appeal noted that although *Shepherd Homes* predated *American Cyanamid*, the statement of principle in relation to the case of a mandatory injunction was not affected by the later decision of the House of Lords.

involved in undoing a mandatory order compared to the effects of granting a prohibitory order. The modern shorthand is for the need to show a "strong" case.

Despite criticisms of *American Cyanamid* (notably by Lord Denning M.R. in *Fellowes & Son v Fisher*[7]), and notwithstanding the rather specific factual matrix of the case,[8] it was imported into this jurisdiction with little rigorous analysis by the Supreme Court in the *Campus Oil* case.

However, the courts have not always been consistent in their application of these guidelines, specifically as to whether to apply the threshold test of a serious case or a strong case. This inconsistency is evident when comparing and contrasting the decision of Carroll J. in *A&N Pharmacy Ltd. v United Drug Wholesale Ltd.*[9] with that of Denham J. in *Boyhan v Tribunal of Inquiry into the Beef Industry.*[10] These are not isolated examples, and Kelly J. was compelled to remark on the "inconsistency of approach" in *Shelbourne Hotel Holdings Limited v Torriam Hotel Operating Co. Ltd.*[11]

2.1.3 An Evolving Standard

The American writer Leubsdorf has pointed out that the "English judicial masters of equity" in the 19th century would have "eschewed" the "rigid formulation" of a higher standard as a threshold test.[12] As noted by Gummow, this principle of a "high degree of assurance in granting temporary restraining orders which were mandatory rather than

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[7] [1976] Q.B. 122 at 129; [1975] 3 W.L.R. 184 at 189; [1975] 2 All E.R. 829 at 834.

[8] The plaintiff owned a patent for surgical sutures, and sought to enforce a proprietary right to a monopoly. As observed by Gee, "Notoriously damages are not an adequate remedy for the patentee because they would be difficult to assess and because the monopoly can generate a goodwill which persists for some considerable time after the expiry of the patent." Gee *Commercial Injunctions* 5th ed. (Sweet & Maxwell, London, 2004), p.45.

[9] [1996] 2 I.L.R.M. 46.

[10] [1993] 1 I.R. 210 at 223; [1992] I.L.R.M. 545 at 556.

[11] [2010] 2 I.R. 52 at 67.

[12] Lebusdorf "The Standards for Preliminary Injunctions" (1978) 91 Harv. L. Rev. 525 at 542, as cited in Gummow "The Injunction in Aid of Legal Rights. An Australian Perspective." (1993) 56(3) Law and Cotemporary Problems 83 at 91.

prohibitory" has also been "discounted in the Australian decisions."[13] There appears to be an evolving principle emerging in this jurisdiction that in fact the appropriate test might better be a single test for both prohibitory and mandatory injunctions based on the idea of avoiding causing irremediable prejudice.[14]

The foundations of this evolution can be identified in the decision of Lord Hoffmann in *Films Rover International Ltd. v Cannon Film Sales Ltd.*[15] He identified as a key principle an approach whereby the court should adopt "whatever course would carry the lower risk of injustice if it turns out to have been the 'wrong' decision."[16] The Court of Appeal had taken a similar approach around the same time in *Leisure Data v Bell.*[17] Dillon L.J., referencing *N.W.L. Ltd. v Woods*,[18] had referred to the need to "give full weight to the practical realities of the situation" and to weigh the risks of injustice.

Lord Hoffmann returned to this principle in *National Commercial Bank Jamaica Ltd. v Olint Corporation Ltd.*[19] He referred to the fact that in respect of both prohibitory and mandatory interlocutory injunctions, "the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other."[20] Emphasising that the key consideration is what "the practical consequences of the actual injunction are likely to be", Lord Hoffmann felt that "arguments over whether the injunction should be classified as prohibitive or mandatory are barren."[21]

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[13] Gummow "The Injunction in Aid of Legal Rights. An Australian Perspective." (1993) 56(3) Law and Cotemporary Problems 83 at 91 citing, *inter alia*, *Aerospatiale Societe Nationale Industrielle v Aerospatiale Helicopters Pty. Ltd.* (1986) 11 F.C.R. 37.

[14] See generally Delany "The Test for the Grant of Mandatory Interlocutory Injunctions" (2010) 28 I.L.T. 217.

[15] [1987] 1 W.L.R. 670.

[16] As explained by Kelly J. in *Shelbourne Hotel Holdings Ltd. v Torriam Hotel Operating Co. Ltd.* [2010] 2 I.R. 52.

[17] [1988] F.S.R. 367.

[18] [1979] 1 W.L.R. 1294.

[19] [2009]1 W.L.R. 1405.

[20] *ibid.* at 1409.

[21] Citing *Films Rover International Limited v Cannon Film Sales Ltd.* [1987] 1 W.L.R. 670 at 680.

This approach was the one which commended itself to Kelly J. in the *Shelbourne Hotel* case (although of course the decision of the Supreme Court in *Campus Oil* still binds the High Court, as was acknowledged by Kelly J.).[22] However, Kelly J. cautioned that regardless of the standard applied,[23] it is clear that the grant of mandatory interlocutory relief is exceptional. As he also pointed out, in many cases, the fact that the relief sought is mandatory is a relevant consideration in relation to the balance of convenience.

2.1.4 Application to Employment

The *American Cyanamid* decision has been described by Ewing as "a tremendous bonus to employees seeking interlocutory relief to restrain a breach of an employment contract."[24] In practical terms, an employee had simply to show that there was arguably a breach of contract (bolstered, as necessary, by reliance on the doctrine of unaccepted repudiation and referencing trust and confidence). For that, there are cases which highlight the fact that the courts have not been afraid to refuse injunctions as appropriate,[25] a fact attested to in particular by newspaper reports of such decisions.[26]

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[22] [2010] 2 IR 52. In *Bryan v Finglas Child and Adolescent Centre* [2004] WJSC-HC 154, Kelly J. had previously referred to the "balance of justice."

[23] In fact, in *A.I.B. v Diamond* [2011] IEHC 505 Clarke J. suggested that such a test was in fact not a different test, but rather "the underlying principle which informs the more detailed rules which have been worked out" in accordance with the *Campus Oil* jurisprudence (albeit a principle with "some additional benefits.").

[24] Ewing "Remedies for Breach of the Contract of Employment" (1993) 52 C.L.J. 405 at 431.

[25] Where a dismissal is alleged, a plaintiff must, of course, be able to demonstrate to the court that they have in fact been dismissed: see *Thompson v Munster and Leinster Bank Ltd.* "Judge refuses preliminary application on dismissal issue" The Irish Times, June 18, 1966 and *Sheils v Clery & Co. (1941) Ltd.* "Clery actions settled on an 'amicable' basis" The Irish Times, October 20, 1979 in which, although the plaintiff had secured an interim injunction, interlocutory relief was refused for, as Barrington J. is reported to have noted, there was no evidence that the plaintiff had been removed from his position as general manager or secretary.

[26] See, for example, *Goldrick v Dublin Corporation; Mooney v Dublin Corporation* "Firemen seek injunction to prevent dismissal" The Irish Times, December 6, 1985; "Court refuses injunction" The Irish Times, December 17, 1985; *Boyle v Boyce* "Former school head is refused order", The Irish Times, November 16, 1999; *Muldoon v North Eastern Health Board* "Suspended consultant challenges hospital

Since the decision of Clarke J. in *Bergin v Galway Clinic Doughiska Ltd.*,[27] the courts have perceived most anti-dismissal injunctions to be mandatory in nature, with an attendant higher threshold standard of a strong case. The decision in *Bergin* was one of two cases which fundamentally changed the approach to anti-dismissal injunctions. Its effect derived from confirmation by the Supreme Court in *Maha Lingham v Health Service Executive*[28] as to the appropriate threshold test to be applied.

2.1.5 Threshold Test: A Strong Case

The *Maha Lingham* case arose out of the plaintiff's wish to be appointed as a consultant orthopaedic surgeon. He had been appointed on a series of fixed term contracts, but was unable to secure a permanent appointment. His employment was due to terminate, as there was no sanction for a post of orthopaedic surgeon. Accordingly, he sought, *inter alia*, an order that he was entitled to a contract of indefinite duration. He also claimed that other consultants had interfered with his employment; that there was a breach of the implied term of mutual trust and confidence; that he was the victim of racial and ethnic discrimination, and that his constitutional rights had been breached.

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decision in court" The Irish Times, December 30, 1999; "Medical specialist fails to be reinstated by court to hospital" The Irish Times, January 11, 2000; *Good v Gurranebraher Credit Union Ltd.; O'Neill v Gurranebraher Credit Union Ltd.* "Credit union executives start High Court case" The Irish Times, July 9, 2003; "Credit union executives fail to get injunction" The *Irish Times*, July 17, 2003; *Gorey v Northern Area Health Board* "Hospital chief fails to block job move" The Irish Times, December 7, 2004; *Hennessy v Maxwell Motors Ltd.* "BMW dealer's managing director fails to stop firm from dismissing him" The Irish Times, September 20, 2007; *Connor v Bohemian Football Club Ltd.* "Ex-club manager fails in salary bid" The Irish Times, April 28, 2008; *Cotter v Cork County Council* "Suspended council employee fails to halt disciplinary action" The Irish Times, June 14, 2008; *Dillon v Board of Management of the Catholic University School* "Teacher must serve week-long suspension" The Irish Times, September 19, 2008; *McCarthy v Roscrea Credit Union Ltd.* "Credit union chief refused injunction against dismissal" The Irish Times, December 23, 2010; *Scanlon v Irish Canoe Union Ltd.* "Canoe chief fails to stop disciplinary hearing" The Irish Times, May 15, 2011.

[27] [2008] 2 I.R. 205.

[28] [2006] 17 E.L.R. 137.

In the High Court, Carroll J. refused the relief sought. She held that the plaintiff had a remedy in damages at common law, or could apply to the Employment Appeals Tribunal for relief. She did not engage in any structured consideration of the *Campus Oil* guidelines other than to consider whether damages would be an appropriate remedy. Rather, she focused on what she termed the "general principle of not granting an interlocutory injunction" in the case of termination of employment.

However, Fennelly J. dealt with the threshold test in some detail in the course of his judgment on appeal. He held that it was well established that the test of a fair case to be tried is not appropriate where a mandatory injunction is being sought (notwithstanding the contrast between the approaches of Carroll J. and Denham J. highlighted above). Rather, it was necessary to demonstrate a strong case. There is nothing controversial about that comment in itself, and it does bring some welcome confirmation of the appropriate standard to be applied when a mandatory injunction is being sought.

Affirming that a "strong case" was necessary when seeking a mandatory injunction was not in itself sufficient for a fundamental change in approach to the anti-dismissal injunction. It was also necessary to channel anti-dismissal cases through the courts by reference to the strong case test. In *Maha Lingham,* Fennelly J. referred to the fact that "in substance what the plaintiff / appellant is seeking is a mandatory interlocutory injunction."[29] That was consistent with Carroll J.'s summary in the High Court to the effect that what was at issue was "whether the defendant must provide a post for [the plaintiff]."

As such, there was a very specific mandatory order sought in *Maha Lingham*, which was approached on the basis of the appropriate test for mandatory injunctions. This should give the lie to any suggestion that the Supreme Court effected what amounted to a judicial ambush to clamp down on the use of anti-dismissal injunctions. Indeed, had it wanted to, the Court could have done so in much more clear, robust terms, and certainly not in a relatively brief *ex tempore* judgment. However, it would certainly be difficult to argue from a policy perspective that the court's judgment was in some way neutral. A case

[29] *ibid.* at 140.

which was ostensibly about fixed term work was used to revisit the test on interlocutory injunctions, which had not formed part of the High Court decision. That said, the *Maha Lingham* judgment did not in itself bring about an immediate sea change in approach, although a hint of what might come is evident from the decision of Laffoy J. in *Naujoks v National Institute of Bioprocessing Research and Training Ltd.*[30] Laffoy J. acknowledged that the plaintiff had to demonstrate to the court that he had a strong case, but was satisfied that he had done so in relation to a number of strands of his case. However, in respect of an argument based on the termination provisions contained in the plaintiff's contract of employment, Laffoy J. held that although there was a fair issue to be tried, the plaintiff had not discharged the onus of demonstrating a strong case in relation to that specific argument.[31]

The practical effect of *Maha Lingham* really only crystallised with the judgment of Clarke J. in *Bergin v Galway Clinic Doughiska Ltd.*[32] In his judgment in *Bergin*, Clarke J. acknowledged that injunctions preventing "a dismissal or a process leading to a dismissal, as a matter of common law, and in whatever terms the claim is couched" are such that "the employee concerned is seeking what is, in substance, a mandatory injunction which has the effect of necessarily continuing his contract of employment even though the employer might otherwise be entitled to terminate it."[33] In so holding, the "strong case" threshold test confirmed in *Maha Lingham* was thereby extended to most anti-dismissal injunctions. Given Clarke J.'s explicit use of the phrase "a process leading to dismissal," a strong case must also be demonstrated in relation to steps short of dismissal. In that regard, the potency of the *Maha Lingham* / *Bergin* approach is captured by the observation by *Cox, Corbett & Ryan* that the application of a strong case test is equally applicable to cases:

> "where an order is sought to require an employer to pay an employee his or her salary prior to the hearing, where an employee is seeking to restrain an employer from making a decision to dismiss him on foot of a disciplinary investigation, and

[30] [2007] 18 E.L.R. 25.

[31] *ibid.* at 33.

[32] [2008] 2 I.R. 205.

[33] *ibid.* at 216.

> even where an order is sought requiring an employer to hold a disciplinary hearing in accordance with rules of fair procedures and natural and constitutional justice…These changes may mean that the employment injunction becomes a less significant weapon for employees than had previously been the case."[34]

It is submitted that Clarke J. could equally have held that a negative order was being sought: it is arguably as much a matter of linguistics as of practical reality which determines what form of order is being sought. The way in which this can be approached was well summarised by Lindley L.J. in *Whitwood Chemical Co. v Hardman*.[35] He observed that:

> "Now every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will not be anywhere else at the same time, and so on *ad infinitum*; but it does not at all follow that, because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else which is inconsistent with it."[36]

Applied to employment, the equivalent argument would be that in seeking to remain in employment, an employee is attempting to prevent being dismissed. Notwithstanding this, the courts now accept that the anti-dismissal injunction is in fact mandatory in nature, and attracts the higher standard of a strong case.

The real bite effected by the acknowledgement of the higher standard and its application to employment became very clear in *Stoskus v Goode Concrete*.[37] The plaintiff sought various injunctive reliefs in relation to a proposed disciplinary hearing. By the time the matter had come to court, the hearing had taken place, and a dismissal effected. Reviewing the facts, Irvine J. held that the plaintiff had an "arguable" and "stateable"

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[34] Cox, Corbett & Ryan *Employment Law in Ireland* (Clarus Press, Dublin, 2009), p.847.

[35] [1891] 2 Ch. 416.

[36] *ibid.* at 426.

[37] [2007] IEHC 432.

case. That should have been sufficient to get him over the threshold test of a fair / *bona fide* case. However, on the facts before her, Irvine J. held that plaintiff had not demonstrated a strong case. She refused the injunction sought. In so doing, she reinforced Clarke J.'s point as to the applicable standard regardless of the wording of the relief sought. The plaintiff sought an order, framed as one "restraining the defendants from ceasing to pay the plaintiff's salary pending the hearing of the action." Despite this wording, Irvine J. was satisfied that the plaintiff was in effect seeking mandatory relief.[38] In *Nolan v EMO Oil Services Ltd.,*[39] the injunction sought was refused on the basis the matter should more properly have been addressed through the appropriate statutory mechanism, being a claim for redundancy. As such, it failed the "strong case" test.

However, these developments mask the fact that it is not entirely clear what is actually meant by a strong case. This is evident from the judgment in *O'Mahony v Examiner Publications (Cork) Ltd.*[40] in which it appears that counsel for the plaintiff had rhetorically raised a question as to what was meant by "a strong case" and "how the test is complied with: does it mean that one has to show a high degree of probability of probable success?"[41] The question may well have been rhetorical in the context in which it was posed, but it is in fact a question which deserves an answer. That answer has not been forthcoming from the courts. Instead, in the *O'Mahony* case, Laffoy J. referred to the rationale of the application of the strong case test set out in *Bergin v Galway Clinic Doughiska Ltd.*[42] She also remarked on the inherent difficulty for a party seeking mandatory relief in making out a strong case "where there is a conflict of evidence or...a challenge that the evidence led by the plaintiff to support the legal basis of his primary argument is inadequate..." Laffoy J. was firm in her refusal to attempt to resolve conflicts of evidence on affidavit at the interlocutory stage.

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[38] See also *Coffey v William Connelly & Sons Ltd* [2007] IEHC 319.

[39] [2010] 1 I.L.R.M. 228.

[40] [2011] E.L.R. 1.

[41] *ibid.* at 10. This was a point in fact considered by Edwards J. (in the context of an injunction sought to prevent picketing) in *Chieftain Construction Ltd. v Ryan* [2008] IEHC 147, in which he remarked that "The very looseness of the language used and the interchangeability of the adjectives employed suggests strongly to me that what is required is a consideration of the "substance" of the point raised in the broad sense that I have spoken about rather than in the narrow sense."

[42] [2008] 2 I.R. 205.

A not unrelated point had manifested itself in *Glynn v HSS trading as Citywest Hotel.*[43] It was argued in that case that there was so much dispute and disagreement that it was impossible to grant an injunction. This dispute and disagreement arose in circumstances where a "torrent of affidavits," to use Ryan J.'s phrase, had been filed. He remarked that he got the distinct impression that this enthusiastic filing was "at least in part due to this understanding of the legal issues and the advantages that may be gained by putting in issue as much as possible of what is asserted in other affidavits." Ryan J. quite sensibly observed that if that argument was correct, Fennelly J. would have "set up a test that, in effect, cannot be met if there is a major factual dispute."[44]

By targeting the threshold test, the courts managed - intentionally or otherwise - to rein in the anti-dismissal injunction to a degree. It is somewhat unsatisfactory that what might broadly be termed a procedural test has been used to effect a substantive change to the courts' approach to anti-dismissal injunctions even if, as suggested by Clarke J. in his decision in *A.I.B. v Diamond*,[45] the same underlying principle, regardless of labels applied, informs arriving at decisions involving the least risk of injustice and minimising adverse consequences.

It is not only the threshold test which has absorbed judicial thinking. Once the "strong case" threshold is surmounted, the courts invariably turn to a consideration of the adequacy of damages.

2.2 Adequacy of Damages

The shorthand term the "adequacy of damages" refers to the extent to which damages would compensate the parties to an action for any losses suffered in between dealing with

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[43] unreported, High Court, Ryan J., February 26, 2010.

[44] Although such issues predated the decision in *Maha Lingham*: it is reported that in *Georgopoulos v Beaumont Hospital Board*, it was submitted that "Where the court was confronted with affidavits that could only be described as extremely strong and with huge conflicts, the less should the courts intervene by means of injunction." See "Reinstatement of surgeon 'recipe for disaster'" The Irish Times, May 11, 1991.

[45] [2011] IEHC 505.

a matter at the interlocutory stage and the trial of the action. There are two elements which a court must consider in that regard:

> (a) whether a plaintiff who succeeds at the trial of the substantive action will be adequately compensated by an award of damages for any loss suffered between the hearing of the interlocutory injunction and the trial of the action if an injunction is not granted at the interlocutory stage;
> (b) whether a plaintiff's undertaking as to damages will adequately compensate the defendant, should it be successful at the trial, in respect of any loss suffered by it due to the injunction being in force pending the trial (and referred to by Zuckerman as "restorative compensation."[46]).

In practical terms, the consideration of the adequacy of damages is generally the single most important factor in the analysis of whether or not to grant an interlocutory injunction. That said, Zuckerman has observed that "The question is not really about the adequacy or inadequacy of compensation but about the justness of allowing a right to be converted into damages."[47]

More generally, what precisely is meant by the "adequacy of damages" has given rise to indecision on the part of the courts in relation to whether a consideration of the adequacy of damages is a standalone guideline or should be considered as part of the balance of convenience. A measure of common sense has been applied in recent years, with Clarke J. suggesting in *Metro International S.A. v Independent News & Media plc.*[48] that it was a question of "semantics" rather than "substance" whether the question of adequacy of damages and the weighing up of balance of convenience are viewed as two separate tests, or as one in which the former is a significant part of the latter.

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[46] Zuckerman, *Civil Procedure* (London, Lexis Nexis, 2003), p.268. See generally the explanation by Laffoy J. in the case of *Pasture Properties v Evans* [1999] IEHC 214.

[47] Zuckerman, *Civil Procedure* (London, Lexis Nexis, 2003), p.286.

[48] [2006] 1 I.L.R.M. 414 at 423.

In the context of the adequacy of damages from the plaintiff's perspective, each case has to be looked at on its own facts. This can lead to seemingly contradictory outcomes.[49] From a defendant's perspective, an inability on the part of the plaintiff to compensate the defendant on foot of the undertaking as to damages does not of itself necessarily deprive a party from going to court.[50] In *Riordan v Minister for the Environment*,[51] the plaintiff admitted that he did not have the means to satisfy his undertaking if called upon to do so. Although Finnegan P. found this fact "not determinative of the application," it was a factor which he said he had to take into account. This flexible approach is perhaps best encapsulated in a statement by Lord Walker, who had to consider the position of those who are legally assisted, in the case of *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment*[52] Lord Walker stated that "The court is never exempted from the duty to do its best, on interlocutory applications with far-reaching financial implications, to minimise the risk of injustice."[53]

2.2.1 Application to Employment

The starting point for any consideration of the adequacy of damages in an employment context is that the courts accept the principle that an employer or employee can terminate an employment relationship without cause.

2.2.2 Adequacy of Damages: The Plaintiff

As summarised by Fennelly J. in *Maha Lingham* in the context of an exposition of "a couple of quite obvious legal matters,"

> "...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

[49] Contrast *Miller v Jackson* [1977] Q.B. 966; [1977] 3 W.L.R. 20; [1977] 3 All E.R. 338 with *Kennaway v Thompson* [1981] Q.B. 88; [1980] 3 W.L.R. 361; [1980] 3 All E.R. 329.

[50] *Allen v Jambo Holdings Ltd.* [1980] 1 W.L.R. 1252.

[51] [2004] IEHC 89

[52] [2003] 1 W.L.R. 2839.

[53] *ibid.* at 2850.

that according to the traditional law at any rate...the employer was entitled to give that notice so long as he complied with the contractual obligations of reasonable notice whether he had good reason or bad for doing it."[54]

If an employee is dismissed without reasonable notice, then the appropriate remedy is *prima facie* an award of damages commensurate with a defined, or if necessary reasonable, notice period. As McLachlin J. explained in *Wallace v United Grain Growers Ltd.,*[55] such damages "place the employee in the position that he or she would have been in had the contract been performed." Accordingly, and on the face of it, the question of damages as an adequate remedy should be an easy one for a court to address in the context of an anti-dismissal injunction: a party's salary (and associated financial benefits) is generally readily quantifiable and, in the normal course, the most that a plaintiff can expect to recover from a court is the equivalent of the amount to which they would have been entitled by way of notice.[56]

This was in essence the approach adopted by Kenny J. in *Yeates v Minister for Posts and Telegraphs.*[57] He accepted that damages would be an adequate remedy insofar as the plaintiffs, if successful, would be entitled to all lost payments of wages. In so holding, Kenny J. emphasised that he was "fully aware" of the hardship which would be endured by the plaintiffs in being deprived of their earnings in circumstances where he was not prepared to grant an injunction. A similar approach is evident in the English case of *Jakeman v South West Thames Regional Health Authority.*[58] The court held that although the plaintiffs having to do without their wages until the issue was finally determined

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[54] [2006] 17 E.L.R. 137 at 140.

[55] [1997] 3 S.C.R. 701.

[56] See *Gunton v Richmond Upon Thames London Borough Council* [1981] Ch. 448; [1980] 3 W.L.R. 714; [1980] 3 All E.R. 577, *per* Brightman L.J.: "The damages recoverable...are the moneys needed to compensate the plaintiff for his net loss of salary or wages during the period for which the defendant was bound by his contract to employ the plaintiff." This is effectively a reiteration of the principle of minimum obligation as explained in *Cockburn v Alexander* (1848) 6 C.B. 791. If no notice is provided for, the courts will imply a notice period: see *Tierney v Irish Meat Packers* (1989) I.L.T. 5; *Lyons v M.F. Kent & Co.* [1996] 7 E.L.R. 103.

[57] [1978] I.L.R.M. 22.

[58] [1990] I.R.L.R. 62

might well be difficult for them, such was the case in every claim by an employee for wages paid.[59]

However, such an approach is in many ways too simplistic given the modern approach to the employment relationship, as considered in Chapter One. In fact, the modern dispensation is captured by Collins Ewing & McColgan's observation that it is now relatively easy to satisfy the adequacy of damages test as "courts can be persuaded that the prevention of the dismissal with the consequence that the employer retains the job will be rather more valuable to the employee than a successful claim for the meagre damages awarded for wrongful dismissal."[60]

In that regard, seven years on from the decision in *Yeates*, there was a hugely significant change of approach effected by Costello J. in *Fennelly v Assicurazioni Generali S.P.A.*[61] That change was a willingness to devise a form of relief which facilitated a practical acknowledgment of the potential hardship to the plaintiff in that case, who would otherwise have been left "virtually destitute." As seen in Chapter Four,[62] this unique approach opened up the courts to the seeking of injunctions by employees. For completeness, and although in a sense of less relevance in light of Clarke J.'s suggestion in *Metro International* that it was a question of "semantics" rather than "substance" as to whether the question of adequacy of damages and the balance of convenience are viewed as a single or separate tests, it should be noted that the courts have adopted a varying approach to whether the plaintiff's financial circumstances, and the associated need for *Fennelly* type relief, comes within a consideration of the adequacy of damages[63] or the balance of convenience.[64] Indeed, in one instance, it was apparently considered as going

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[59] As referred to in *Rooney v Kilkenny* [2001] 12 E.L.R. 129

[60] Collins Ewing & McColgan *Labour Law* (Cambridge University Press, Cambridge, 2012), p.797.

[61] (1985) 3 I.L.T.R. 73.

[62] See Chapter Four, section 11.

[63] As was the case in *Shortt v Data Packaging* [1994] 5 E.L.R. 251, *Harte v Kelly* [1997] 8 E.L.R. 125, *Charlton v H.H. The Aga Khan's Studs Société Civile* [1999] 10 E.L.R. 136 and *Lonergan v Salter-Townshend* [2000] 11 E.L.R. 15.

[64] It was treated as part of the balance of convenience in the *Fennelly* case itself, in *Boland v Phoenix Shannon plc.* [1997] 8 E.L.R. 113 and *Sheehy v Ryan* unreported, High Court, Peart J. August 29, 2002.

towards the *status quo*.[65] Insofar as it does relate to the adequacy of damages, financial hardship is one of a number of aspects of the adequacy of damages which the courts will consider.

2.2.3 Adequacy of Damages: Intangible Implications

A person's "identity, self-worth and emotional well-being"[66] is bound up with the idea of job satisfaction, and is one factor which has informed how the courts approach the adequacy of damages. The other – equally intangible – implication is the reputational impact of a dismissal. There is also some limited evidence that courts are willing to look at individual circumstances and, in doing so, will go beyond these two elements and consider elements such as the effect on domestic arrangements, whether a plaintiff has had to relocate to take up a job and so on. Furthermore, the creativity of lawyers and courts should never be underestimated. Anderman has suggested that in the case of a disciplinary hearing, it could be argued that damages are inadequate to meet the loss of opportunity on the part of the employee to put his side of matters to that hearing.[67]

2.2.4 Intangible Implications: Damage to Reputation

The question of potential damage to reputation in the context of dismissal has long been acknowledged, if not always accepted as a reason for granting an injunction, by the courts. In *McConnell v N.E.E.T.U.,*[68] Hamilton P. made specific reference to the damage to the plaintiff's "prestige and standing." This was in the specific circumstance of an allegation of misconduct, with the President referring to the implication that the plaintiff had been found guilty of gross insubordination.

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[65] *Naujoks v National Institute of Bioprocessing Research and Training Ltd.* [2007] 18 E.L.R. 25.

[66] *per* Dickson C.J. in *Reference Re Public Service Employee Relations Act* [1987] 1 S.C.R. 313, para.91. See also Chapter One, section 4.1.

[67] Anderman *Labour Law* 4th ed. (Butterworths, London, 2000), p.108.

[68] unreported, High Court, Hamilton P., July 22, 1986. See also *Cummins v Commissioner of An Garda Síochána* "Sacking of Bunratty Garda stopped" The Irish Times, July 24, 1986 and the observation in relation to the plaintiff that "If he were dismissed he would suffer immense and irreparable damage to his career, reputation and family life."

As seen in Chapter Three,[69] the courts are particularly alive to importing the requirements of fair procedures when misconduct is alleged, due primarily to concerns in relation to potential damage to reputation.[70] This is evident from the case of *Howard v University College Cork*,[71] in which a charge of misconduct hung over the plaintiff. In granting an interlocutory injunction preventing the removal of the plaintiff as head of the German department at the defendant university, O'Donovan J. observed that there was no doubt in his mind that, were the plaintiff to be removed, "the public's perception would be that her role as head of the department had been terminated because of misconduct of the kind that has been alleged against her." He also expressed the view that it would be "extremely difficult, if not impossible" for a trial judge to assess a sum for damages which would adequately compensate the plaintiff for injury to her reputation. This is notwithstanding that this is what juries are routinely asked to do in defamation cases.

The scope of what is contemplated by "the public," and the public's perception, is evident from the decision of O'Sullivan J. in *Murphy v ACC Bank plc.*[72] He referred to the fact that the plaintiff was from a "small close-knit community."[73] Similarly, in *Martin v Irish Nationwide Building Society,*[74] Macken J. made reference to the fact that the plaintiff worked in "a relatively small locality where such matters became general public knowledge."[75] It was argued in *Morgan v Trinity College Dublin*[76] that damages would not compensate the plaintiff due to the fact that his reputation and standing would be incredibly damaged within the college community (although the application was refused

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[69] See Chapter Three, section 4.

[70] In a 2002 analysis, O'Sullivan suggested that although there was no clear rationale underlying the granting of injunctions, the idea of damages not being an adequate remedy was crucial. As he noted, "The decisions in the years up to 1997 showed that a court would hold damages to be an inadequate remedy...where the plaintiff would either lose a significant portion of his/her income or...damage to his/her reputation." O'Sullivan "Developments in the Employment Injunction" (2002) 7 (6) B.R. 303.

[71] [2001] 12 E.L.R. 8.

[72] [2000] IEHC 162.

[73] O'Sullivan J. was also cognisant of the fact that the plaintiff's only source of income was his salary and that he had ongoing financial obligations to the members of his family.

[74] [2001] 1 I.R. 228.

[75] *ibid.* at 235.

[76] [2003] 3 I.R. 157.

primarily on the grounds of prematurity). As such, it is clear that the question of a person's reputation is not necessarily to be measured by reference to the wider public, but can be considered in the context of a limited number of people. It does not seem too much of a stretch to argue that an employee who is employed in a relatively niche market would also potentially face reputational issues in that defined, and limited, market; indeed, the "public" in *Keating v Weir & Sons Ltd.*[77] was distilled down to the world of goldsmiths and gemologists. Similarly, it was argued in *Sheerin v AIB plc.*[78] that the plaintiff would suffer irreparable harm without the court's protection as the banking community "was an extremely small one" and the plaintiff "operated at a management level where very few roles were available."

At around the same time as Macken J. was addressing reputation in *Martin*, however, Carroll J. was holding in the case of *Foley v Aer Lingus Group*[79] that damage to reputation is compensatable by an award of damages. A gloss was put on this by O'Higgins J. in *Garrahy v Bord na gCon.*[80] He observed that while loss of reputation could be compensated by an award of damages, this did not mean that damages were an adequate remedy in all such cases.[81] In that regard, O'Higgins J. appears to have been impressed by the argument that the defendant's proposed actions would "strike at the core of the plaintiff's job."[82] However, some three years later, Finnegan P. took the view in *Joyce v Health Service Executive*[83] that damages at an appropriate level would remedy any injury to the plaintiff's reputation among his colleagues, patients and potential patients (as well as to any issue concerning his becoming de-skilled, as considered below).

Even allowing for the fact that each case involves slight different background

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[77] "Goldsmith gets court order restraining jewellers from dismissing her" The Irish Times, February 13, 1999.

[78] "AIB executive tells court he is 'scapegoat'" The Irish Times, March 12, 2005.

[79] [2001] 12 E.L.R. 193.

[80] [2002] 3 I.R. 566.

[81] *ibid.* at 573.

[82] *ibid.* at 574.

[83] [2005] IEHC 174. A case which, by reason of its factual background, is intertwined with that of *Rajpal v Robinson* [2005] 3 I.R. 385.

considerations, insofar as they address the question of damages in the context of reputation, it is very difficult to reconcile the decisions in *Foley* and *Joyce* with the other decisions identified. *Foley* and *Joyce* stand out as being rare holdings by the courts in the context of anti-dismissal injunctions that reputation is compensatable by an award of damages.

In *Bergin v Galway Clinic Doughiska Ltd.*[84] Clarke J. observed that:

> "...a plaintiff may be entitled to injunctive relief which would have, to some extent, the effect of continuing his or her employment but only, it would seem, where the plaintiff concerned can establish a strong case. That such can be the case even though damages might well be the appropriate remedy at trial, is clear from, for example, *Shortt v Data Packaging Ltd.* [1994] E.L.R. 251 and *Phelan v BIC (Ireland) Ltd.* [1997] E.L.R. 208."[85] [emphasis added]

Clarke J. reviewed the question of the impact of a finding of misconduct on the reputation of the employee concerned, and felt that this could be a "possible factor for taking the view that different considerations might apply in the grant of interlocutory injunctions in such cases."[86] Based on this one phrase alone, it certainly appears arguable that applications for anti-dismissal injunctions cannot be determined by a straightforward application of the *Campus Oil* guidelines.

At a minimum, damage to reputation is now evidently an acceptable and accepted factor for courts to consider. It appears to have been argued in *O'Sullivan v Mercy Hospital Cork Ltd.*[87] that because damages had been claimed, the plaintiff should not be entitled to argue that damages would not be an adequate remedy. This was rejected by Clarke J., who observed that the fact that damages were claimed did not "alter the position that damages would not be an adequate remedy for someone in the position of the plaintiff if her record were to be wrongly sullied as a result of a flawed legal process." *Giblin v Irish*

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[84] [2008] 2 I.R. 205.

[85] *ibid.* at 213.

[86] *ibid.*at 215.

[87] [2005] IEHC 170.

Life & Permanent plc.[88] involved an allegation of misconduct. Laffoy J. accepted that if the plaintiff succeeded at the trial of the action with his argument that the decision to dismiss him was null and void, he would not necessarily be adequately compensated by damages for "the actual and potential damage to his reputation and to his future career prospects which he is likely to suffer in consequence of being perceived to have been summarily dismissed from the senior position of Branch Manager of a financial institution for misconduct."[89] The entrenchment of reputational damage as a critical factor in considering the adequacy of damages is evident from the decision of Laffoy J. in *Mc Loughlin v Setanta Insurance Services Ltd.*[90] She took the view, without any further consideration, that if summarily dismissed on foot of a flawed process, damages would not be an adequate remedy for the plaintiff "because of the reputational damage she would suffer."

The courts will also consider factors beyond simple reputational damage. In *Glynn v HSS trading as Citywest Hotel,*[91] which also involved an allegation of misconduct, Ryan J. was prepared to take into account reputational stigma. However, he also took judicial notice of the prevailing economic circumstances. In so doing, he linked the stain of a reputational stigma with the difficulty of finding alternative employment in a harsh economic climate.

Horan summarises the overall position elegantly with his observation that "the summary dismissal of a professional may have serious long-term consequences including public obloquy which have few paradigms in the commercial world."[92] He spells out the practical elements of a summary dismissal as being that a senior executive may "encounter marked resistance in his attempts at rehabilitation and may be destined to

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[88] [2010] 21 E.L.R. 173.

[89] *ibid.* at 188.This is not only a concern held by judges in Ireland. In the Australian case of *Gregory v Philip Morris Ltd.* [1988] F.C.A. 100, the court observed of the plaintiff that the consequences to him of dismissal would be severe, noting that "He would lose substantial superannuation entitlements. But, for a man aged 47 years with restricted employment mobility, especially one carrying the stigma of dismissal, there could be no assurance that he would quickly gain an alternative position."

[90] [2012] 23 E.L.R. 57.

[91] unreported, High Court, Ryan J., February 26, 2010.

[92] Horan "Employment Injunction: Current Status and Future Developments" (2005) 1 E.L.Rev. 8 at 8.

suffer repeated rejection in his efforts to secure an alternative post."[93] In his view, there is virtually no "legal redemption" in such circumstances.

This leads to one peculiarity: a "somewhat imprecise"[94] situation has developed whereby anti-dismissal injunctions can be granted on the basis of damage to reputation, yet there is no substantive law as to how the courts deal with this thereafter, specifically in terms of any plenary action. Any claim for damage to reputation at a plenary hearing is likely to be met by a defence of qualified privilege or by the approach adopted in *Addis v Gramophone Co Ltd.*,[95] as considered in Chapter Two.[96] Yet this is not an isolated instance of such a disconnect: as seen in the case of *A.I.B. v Diamond*[97] Clake J. was prepared to grant a "springboard injunction" even though damages were the more likely remedy at the trial of the action. Similarly, and as also seen in Chapter Four,[98] the courts have made interlocutory orders which amount in practical terms to specific performance yet at plenary hearing consistently state that they are not prepared to grant specific performance.

2.2.5 Intangible Implications: Damage to Reputation When Suspended

There is also a judicial view that a suspension can damage a person's reputation. In *Mulcahy v Avoca Capital Holdings Ltd.*[99] Clarke J. referred to the impact of a suspension, specifically its effect in "the relevant economic community in which the employment is." This was a view endorsed by MacMenamin J. in *Keenan v Iarnrod Eireann.*[100] Once again, this was against a backdrop of "allegations or possible allegations of misconduct."

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[93] *ibid.*

[94] In the words of Mark Connaughton S.C. in the course of delivering a paper entitled "The Current Approach of the Superior Courts to substantive employment law issues" to the Employment Bar Association on March 21, 2013.

[95] [1909] A.C. 488.

[96] See Chapter Two, section 4.6.

[97] [2011] IEHC 505.

[98] See Chapter Four, section 7.

[99] [2005] IEHC 70.

[100] [2010] 21 E.L.R. 115.

However, in *Conway v An Taoiseach*[101] Feeney J. rejected the suggestion that any employee who is suspended is automatically prejudiced and cannot get a fair hearing. He noted that it is an "inescapable fact" that anyone coming before a disciplinary panel will carry with them a taint or degree of prejudice.[102] However, and as he pointed out, that would in practical terms mean that the idea of a "holding suspension" could simply not exist, and that if work colleagues were complainants, they "would have to suffer the prejudice instead." An employer would be forced to do nothing or go straight to a determination stage, a clearly untenable proposition. However, he was prepared to hold that a possible adverse finding of conduct and an inter-governmental departmental transfer could "impact or damage the Plaintiff's reputation and impact upon her career." As such, she was protected by the dictates of natural and constitutional justice. This was notwithstanding that Feeney J. explicitly acknowledged that the plaintiff was not at risk of dismissal from her employment.[103]

2.2.6 Intangible Implications: Job Satisfaction

The question of job satisfaction formed part of a wider ranging set of considerations identified by Henchy J. in the case of *Garvey v Ireland*.[104] The Government of the day purported to remove the Garda Commissioner from that position without notice and without cause. As Henchy J. stated,

> "If by maintaining an obscuring silence, the Government could render their act of dismissal impenetrable as to its reasons and irreconcilable as to its methods, an office holder such as the plaintiff could have his livelihood snatched from him, his chosen career snuffed out, his pension prospects dashed and his reputation irretrievably tarnished, without any hope of redress, no matter how unjustified or unfair his dismissal might be ...".[105]

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[101] unreported, High Court, Feeney J., April 12, 2006 (transcript).

[102] As had already been pointed out by Kearns J. in *Morgan v Trinity College Dublin* [2003] 3 I.R. 157.

[103] The application ultimately did not succeed on other grounds, specifically prematurity. For completeness, see also "Officer at Aras takes new case" The Irish Times, January 23, 2007.

[104] [1981] I.R 75.

[105] *ibid.* at 101. See also *Powell v London Borough of Brent* [1988] I.C.R. 176 at 296, *per* Ralph Gibson L.J.

Concerns as to a plaintiff's job satisfaction also informed the approach of O'Sullivan J. in *O'Shaughnessy v Boston Scientific Ireland Ltd.*[106] He granted an injunction restraining the defendant from dismissing its H.R. manager other than in accordance with its own disciplinary procedures. In so doing, felt that damages would not be an adequate remedy because the plaintiff was "entitled to the dignity of employment and the satisfaction and fulfilment that it will give her."

Consideration of these factors underscores the importance, identified in Chapter One,[107] of the modern understanding by judges of the importance of employment to a person's life. It highlights just how broad a court's discretion in approaching injunction applications may be, particularly insofar as an employee is concerned. It is matched by a notable reticence to engage in a meaningful consideration of a defendant company's position. This is exemplified by the case of *Boland v Phoenix Shannon plc.*[108] The defendant company argued that if the plaintiff was reinstated, then company lenders would withdraw their support and the company would fail. Barron J. was "not impressed" by what he termed a "threat" of this nature (although it is also clear from the terms of his judgment that Barron J. was not impressed with the company or its conduct overall). Of course, it would be a relatively rare situation whereby a plaintiff's injunction application could in reality lead to a company going out of business.[109] It would be even rarer that a plaintiff's undertaking as to damages – considered below - would compensate a company in such a situation.

2.2.7 Position of the Defendant Company

The courts have, in general terms, offered a much less legally hostile arena to individual employees than they have to corporate defendants. This is perhaps unsurprising and

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and *Hughes v Southwark London Borough Council* [1988] I.R.L.R. 55 at 58 *per* Taylor J.

[106] "Court order restrains manager's dismissal" The Irish Times, January 19, as recorded by Stewart & Dunleavy *Compensation on Dismissal: Employment Law and Practice* (First Law, Dublin, 2008), p.237

[107] See Chapter One, section 4.

[108] [1997] 8 E.L.R. 113.

[109] Although the courts are not afraid to let this happen: see Chapter Seven, section 2.

consistent with a refocusing of the employment relationship away from that of "master and servant," coupled with a heightened awareness of the significance of an individual's employment. What is important is that there is no imbalance such that a company's position is utterly subordinate to that of an employee. There is certainly evidence that judges are aware of potential detriment to a company in terms of orders they may make in favour of an employee. In the case of *Gee v Irish Times Ltd.*[110] McCracken J. identified that the loss of job satisfaction on the part of the plaintiff could not be compensated in damages, but that neither could the holding up of the plaintiff's management reorganisation. In the circumstances, he granted the plaintiff a *Fennelly* order, requiring the plaintiff to be paid in return for being available for work, but no other order. However, this is a relatively rare example of the courts being informed by a defendant's considerations (although as will be seen below, what might be termed "hospital cases" admit of special considerations). In fact, the courts are essentially at large in terms of considering individual circumstances of cases.

2.2.8 Individual Circumstances

In the case of *Coffey v William Connelly & Sons Ltd.*[111] Edwards J. found that if the fact that the plaintiff was purportedly dismissed was published widely, that "would undoubtedly damage the plaintiff's standing and reputation both within the company and without." However, he went beyond this and found that the plaintiff had "altered her position to her detriment in ways that cannot be fully compensated in damages." Although the fact that the plaintiff had moved house was compensatable in damages, Edwards J. found that the circumstances of the case also impinged "upon her family and domestic life and the arrangements that she has made with regard to her daughter's education."

Similarly, the scope of intangible implications which the courts will factor into their

[110] [2001] 12 E.L.R. 249.

[111] [2007] IEHC 319.

consideration is evident in *Naujoks v National Institute of Bioprocessing Research and Training Ltd.*[112] Laffoy J. referred to the nature of the plaintiff's position, "his age, his prospects of finding alternative employment, his family circumstances, the fact that he relocated from Munich to Dublin to take up his position with the defendant and the manner in which the defendant has acted."[113] "Personal and family circumstances" also informed the approach of Laffoy J. in *Doherty v Health Service Executive.*[114]

In *Joyce v Health Service Executive,*[115] the argument was made, *inter alia*, that the plaintiff surgeon was at risk of becoming de-skilled as a result of his exclusion from practice at Cavan General Hospital. This was effectively trumped by Finnegan P.'s overriding concern for the safety and welfare of the hospital's patients.[116] However, it is an interesting argument when stitched in to a wider consideration, as explored below, of the idea that special or high profile occupations might admit of an injunction being granted by virtue of that profile.

2.2.9 Adequacy of Damages: The Defendant

The adequacy of damages from a defendant's perspective is also subject to considerations which are peculiar to the employment relationship. The ability of a plaintiff to pay damages, on foot of an undertaking as to damages, to his employer in the event of an unsuccessful action can be a real concern. This is particularly so where an order has been made requiring the payment of the plaintiff's salary pending trial. Even if paid for a circumscribed period, there must be considerable doubt as to a (now former) employee's ability to repay such money. As such, an employer could in theory argue that an undertaking as to damages given by an employee is effectively worthless. In *Ryan v ESB*

[112] [2007] 18 E.L.R. 25.

[113] *ibid.* at 35.

[114] [2008] IEHC 331.

[115] [2005] IEHC 174.

[116] The welfare of patients was also clearly a paramount consideration in *Muldoon v North Eastern Health Board*, as set out in a newspaper report that "Medical specialist fails to be reinstated by court to hospital" The Irish Times, January 11, 2000, in which O'Caoimh J. held that "in conflicts between doctors and hospital managers, the health and welfare of patients was paramount."

International Ltd.[117] Laffoy J. endorsed the proposition advanced by Cox, Corbett and Ryan in *Employment Law in Ireland* that in anti-dismissal injunction cases "the undertaking as to damages is often "something of a fallacy."[118] However, it has been observed that such an argument is not favoured by the courts "as in most cases it is by reason of the employer's act (dismissal) that the employee is in such a precarious position."[119] Indeed, in *Ryan*, Laffoy J. observed that:

> "In practice, however, that has not deterred the courts from granting interlocutory relief, including an order directing continuance of the payment of salary, to a plaintiff employee who is challenging the lawfulness of his dismissal." [120]

Accordingly, she did not feel it necessary to address those issues further.

That said, the courts have looked in at least two instances at a plaintiff's assets generally in order to assess the viability of an undertaking as to damages: in *Charlton v H.H. The Aga Khan's Studs Société Civile*[121] Laffoy J. noted that the plaintiff's liquidity was in issue, but that she had "sufficient assets" to support the undertaking as to damages. In *McCarthy v Roscrea Credit Union Ltd.*[122] the plaintiff sought specific performance of his contract of employment even though he could not perform his contract due to health issues. Although the application was refused on the grounds of delay, Clarke J. is reported as having noted that due to the plaintiff's inability to work, he would not be able to give the defendant credit union any undertaking as to damages. However, an engagement to even that extent is very rare. It is not wildly speculative to suggest that a regard for the importance of the Constitutional right of access to justice must underpin the courts' apparent unwillingness to engage with this point more often.

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[117] [2013] IEHC 126, para. 38.

[118] Cox, Corbett & Ryan *Employment Law in Ireland* (Clarus Press, Dublin, 2009), p.849.

[119] Stewart & Dunleavy *Compensation on Dismissal: Employment Law and Practice* (First Law, Dublin, 2008), p.224.

[120] [2013] IEHC 126, para. 38.

[121] [1999] 10 E.L.R. 136.

[122] "Credit union chief refused injunction against dismissal" The Irish Times, December 23, 2010.

If an employer seeks a measure of reassurance that their position might be aided by a consideration of the balance of convenience, they will often be disappointed. The difficulty is that the term "balance of convenience" is itself so nebulous and malleable that its usefulness in the context of anti-dismissal injunctions is questionable. And in the specific context of employment, the adequacy of damages is inexorably tied up in the balance of convenience.

2.3 Balance of Convenience

Lord Diplock explained in *American Cyanamid* that what he intended to be weighed in the balance of convenience was the protection of the plaintiff against injury by violation of his right, for which he could not be adequately compensated in damages, against the need to protect the defendant from injury resulting from being prevented from exercising his own legal rights for which he could not be adequately compensated by an undertaking as to damages.[123]

In *Cayne v Global Natural Resources*,[124] May L.J. referred to the term "balance of convenience" as being a "useful shorthand."[125] He suggested that the balance which the court looks to make is more fundamental than mere convenience. May L.J. preferred the description "the balance of the risk of doing an injustice" by granting the injunction.[126] Sir John Donaldson M.R. went further in *Francome v Mirror Group Newspapers Ltd.*[127] describing the term "balance of convenience" as "an unfortunate expression. Our business is justice, not convenience." Whether one refers to the "balance of convenience" or the more accessible phrase "the balance of the risk of doing an injustice," the courts are at large in terms of what can and should be weighed in the balance. This is not an issue peculiar to anti-dismissal injunctions: Lord Diplock observed in *American Cyanamid v*

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[123] [1975] A.C. 396 at 406; [1975] 2 W.L.R. 316 at 321; [1975] 1 All E.R. 504 at 509. Approved of by McWilliam J in *Lift Manufacturers Ltd. v Irish Life Assurance Co Ltd.* [1979] I.L.R.M. 277 at 280.

[124] [1984] 1 All E.R. 225. See also *Harkins v Shannon Foynes Port Co.* [2001] 12 E.L.R. 75.

[125] [1984] 1 All E.R. 225 at 237.

[126] Referred to with approval by O'Higgins J. in *Garrahy v Bord na gCon* [2002] 3 I.R. 566.

[127] [1984] 1 W.L.R. 893 at 898; [1984] 2 All E.R. 408 at 413.

Ethicon Ltd.[128] that it would be unwise "...to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case."[129] Furthermore, determining an interlocutory injunction by reference to the balance of convenience has its limitations: in *Szabo v Esat Digifone Ltd*,[130] Geoghegan J. felt that there would be "something most distasteful about balancing the convenience of the first named defendant in being able to carry on its business against alleged dangers to the life and health of the plaintiff children."[131] He thus considered the matter primarily other than on the basis of the *Campus Oil* guidelines.

Also contributing to the difficulty in anticipating what might be considered by the courts in the context of the balance of convenience is what have been labeled "special factors;" as Lord Diplock stated in *American Cyanamid,* there may be "other special factors to be taken into consideration in the particular circumstances of individual cases."[132] In the case of *Clane Hospital Ltd v Voluntary Health Insurance Board*,[133] Quirke J. also took the view that the court should consider any special factors which might influence the exercise of discretion and the grounds of the relief sought.[134] He referred to such factors as usually being technical in nature, although did not specify with any particularity what was meant by this.[135]

It has never been satisfactorily explained by the courts whether such "special factors" provide an escape route from *Campus Oil* generally, or whether they form part of an analysis of the balance of convenience. Both those decisions which have addressed the

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[128] [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504.

[129] *ibid.* at 408; *ibid.* at 323; *ibid.* at 511.

[130] [1998] 2 I.L.R.M. 102.

[131] *ibid.* at 105. The fact that the application was *quia timet* in nature was also a relevant consideration.

[132] *Per* Lord Diplock [1975] AC 396, at 409; [1975] 2 W.L.R. 316, at 324; [1975] 1 All E.R. 504, at 511.

[133] [1998] IEHC 78.

[134] In fact, in *Fellowes & Son v Fisher* [1976] QB 122; [1975] 3 W.L.R. 184; [1975] 2 All E.R. 829 Lord Denning M.R. appeared to try to circumnavigate the *American Cyanamid* principles by identifying special factors.

[135] Special factors were also referred to by Lord Diplock in *American Cyanamid*, but again, no explanation was given as to what was contemplated by the phrase in general terms.

matter, and academic reviews, would suggest that they do form part of the analysis. In the case of *Smith v Inner London Education Authority*[136] Browne L.J. approached matters on the basis that special factors affected the balance of convenience. Similarly, in a relatively contemporaneous review of the decision in *American Cyanamid*, Gore suggested that the special factors "clearly refer to the balance of convenience, not to situations where *Cyanamid* can be ignored and the old test of *prima facie* case applied." [137] In fact, and as will be seen,[138] there is a class of exceptional case where the courts can approach injunctions without having regard to any of the *Cyanamid / Campus Oil* guidelines.

2.3.1 Application to Employment[139]

The wide discretion afforded by a consideration of the balance of convenience (other than by reference to *Fennelly* order-type considerations) is in theory problematic insofar as doing so on a case by case basis, without reference to defined norms, can make it very difficult to advise both employees and employers as to the prospects of a successful application. However, in reality there are a few key factors around which the courts' considerations have coalesced. It is also worth noting Costello's comment that "The balance of convenience nearly always favours the employee.[140] The inconvenience to the employer is always subordinated to the interest of the employee in maintaining his or her standard of living."[141]

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[136] [1978] 1 All E.R. 411, at 422.

[137] Gore "Interlocutory Injunctions - A Final Judgment" (1975) 38 M.L.R. 672 at 676.

[138] See section 2.6.

[139] In *Boland v Phoenix Shannon plc.* [1997] 8 E.L.R. 113 Barron J. referred (at p.214) to the "balance of hardship" lying in favour of the plaintiff, though made no effort to explain what he meant by that (and whether it was something different to the balance of convenience), and what type of hardship he envisaged the plaintiff or defendant suffering. Given that the plaintiff had been suspended on full pay, deprivation of salary cannot have been a factor.

[140] Well exemplified in the case of *Gee v Irish Times Ltd.* [2001] 12 E.L.R. 249. Notwithstanding that McCracken J. found that the potential damage to the Irish Times of being prevented from reorganising was "much greater" than any damage to the plaintiff caused by loss of job satisfaction, he decided that the case was "clearly a proper case for a *Fennelly* order" and duly made such an order.

[141] Costello "Regulating the Anti-Dismissal Injunction" in Breen, Casey & Kerr *Liber Memorialis Professor James C. Brady* (Roundhall Sweet and Maxwell, Dublin, 2001), p.188 at 196. Costello also argues that it is very easy to satisfy the "merely arguable case" test, though this has of course been

2.3.2 The Relief Sought

In *Giblin v Irish Life & Permanent plc.*,[142] Laffoy J. made reference to the fact that given the nature of the employer/employee relationship, the question of the balance of convenience had to be determined "having regard to the precise form of relief sought by the plaintiff and will bear on the type of relief the Court is prepared to grant."[143] The decision in *Giblin* also provides a very good example of this approach in practice: the plaintiff had been placed on what was termed "special leave" on full pay. In granting an order that the defendant be restrained from dismissing the plaintiff until further order, Laffoy J. added the proviso that the defendant could continue the placement of the plaintiff on special leave with full pay, as provided for in the defendant's disciplinary procedures. As she explained, she did not want to deprive the defendant of its entitlement to do so. The idea of reliefs being considered as part of the balance of convenience was also evident in the same judge's approach in *Ryan v ESB International Ltd.*:[144] on the facts of the case, she felt that it was "crucial" to address the balance of convenience in relation to the reliefs sought.[145]

There is considerable merit in this approach in general. There is quite clearly a significant difference between a relief in which a plaintiff seeks to be reinstated in their position, and the effect that might have on an employer and, to use the one of the examples advanced by Charleton, an injunction to restrain the use of a document purporting to be a statement of facts relevant to a disciplinary procedure.[146]

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superseded by the *Maha Lingham / Bergin* approach to the threshold test and, more specifically, by Laffoy J.'s clarification of how to approach redundancy situations.

[142] [2010] 21 E.L.R. 173.

[143] *ibid.* at 185.

[144] [2013] IEHC 126.

[145] As to reliefs generally, see Chapter Four, and in particular section 10, in which examples of the different types of relief which a court may grant are set out.

[146] Charleton "Employment Injunctions: An Over-Loose Discretion" (2009) 9(2) J.S.I.J. 1 at 12..

2.3.3 Relations Between the Parties

Although there is a degree of overlap with the consideration of a company's structure in the context of a consideration of a *Fennelly* order,[147] the relations between the parties involved is an important element of the balance of convenience in its own right. This is evident from the decision of Laffoy J. in *Ryan v ESB International Ltd.*,[148] in which, guided by Clarke J.'s decision in *Carroll v Bus Átha Cliath / Dublin Bus,*[149] she pointed out that Clarke J. had recognised

> "that the state of relations between an employer and, in particular, key senior personnel, is a weighty factor in assessing the balance of convenience. He found that any order which, either directly or indirectly, required that the plaintiff continue with his duties, would not meet the balance of convenience test."[150]

2.3.4 High Profile Occupations

In *Courtenay v Radio 2000 Ltd.*[151] an injunction was granted to the plaintiff on the basis that his position of broadcaster, being a "high profile occupation", was in a special category. It is unclear why this on its own should have influenced Laffoy J. The idea of a person's heightened profile influencing a court was being decried over a century ago in an analysis of cases involving negative covenants, such as that of *Lumley v Wagner.*[152] The observation was made by Ashley as far back as 1906 that:

> "In many of these cases, involving contracts for the services of actors or other professionals, the judges in their opinion seem to believe that it makes a difference

[147] See Chapter Four, sections 6.4 and 11.9.

[148] [2013] IEHC 126.

[149] [2005] 4 I.R. 184 at 220.

[150] [2013] IEHC 126, para.52.

[151] [1997] 8 E.L.R. 198. And see "Radio presenter's action settled" The Irish Times, November 8, 1997. As reported, Laffoy J. had not directed the defendant radio station to reinstate the plaintiff, but rather had directed that they must continue to employ him pending the trial of the action. See also the Court of Appeal decision in *Warren v Mendy* [1989] 1 W.L.R. 853.

[152] (1852) 1 De G M & G 604.

whether the actor is great and famous or entirely unknown. This idea seems to be erroneous and not based upon principle."[153]

It is unfortunate that Laffoy J. did not articulate any further why she felt that a high profile carried with it the requirement to be placed in a "special category." On the face of it, and over ninety years from the observation about "great and famous" actors, there still appears to be no principled reason for treating a high profile employee in a special way. Indeed, it would seem challenging to build any really convincing argument in favour of such an approach. Perhaps the best that could be said is that employees such as broadcasters, journalists and so on would benefit from the fact that, as summarised by Gaymer, "enhancement of reputation might be deemed to have been contemplated by the contract itself."[154] In that regard, the courts have held that damages might be recoverable in respect of an opportunity to acquire a reputation.[155]

It has been argued in the context of negative covenants that in the case of a high profile "actor, singer, artist and the like," "no amount of money recovered by the plaintiff (employer) might enable him to obtain the same or the same kind of services or acts elsewhere, or by employing any other person."[156] Ashley, quoting this and noting that it was approved in *Carter v Ferguson,*[157] draws an analogy with the sale of land, and makes the pertinent observation that

> "There would be as much sense in refusing to perform a contract specifically because the lot of land in question is not of much value as there is to deny an injunction because an actor is unknown. If it is sound to require that the actor be a

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[153] Ashley "Specific Performance by Injunction" (1906) 6(2) Columbia Law Rev. 82 at 90.

[154] Gaymer *The Employment Relationship* (London, Sweet & Maxwell, 2001), p.365, citing Goddard J. in *Tolnay v Criterion Film Productions Ltd,* [1936] 2 All E.R. 1625 at 1626, in which he made reference to the fact that those who make a living by attracting the public to their works "must live by getting known to the public."

[155] See *Withers v General Theatre Corporation Ltd.* [1933] K.B. 536.

[156] Pomeroy's Eq. Juris. Sec. 1343.

[157] (1890) 58 Hun 569.

star, then specific performance in the cases of land should turn upon the question whether the land is unique in value or historic interest or the like."[158]

It might be argued that this analogy was advanced at a time when an employee was a mere servant type character, a form of chattel, and that a more contemporary approach to the employment relationship means that the employer-employee relationship should be treated more sensitively. Yet even this does not address the basic proposition: it is wrong within the employment relationship to make a distinction between two employees simply because one has a higher profile than the other.

Considerably easier to justify than a high profile in terms of a special categorisation is a heightened skill (which of course may in itself bring a heightened profile).

2.3.5 Skilled Occupations

Courts in America in the 1930s were considering whether boxers or their trainers were blessed with some form of unique skill and proficiency.[159] This was a key consideration in the case of *Warren v Mendy*,[160] albeit in that case the plaintiff was the employer, seeking to injunct a boxer from being managed by the defendant (many of the "skills" cases in fact arise out of employees undertaking not to offer their skills to a "rival" employer). Considering the question of a situation where a contract for personal services was "inseparable from the exercise of some special skill or talent"[161] Nourse L.J. indicated that specific regard should be paid to the "psychological and material, and sometimes the physical, need for the servant to maintain the skill and talent."

This could be linked to the argument advanced in *Joyce v Health Service Executive*[162] to the effect that a person – in that case a surgeon – could become de-skilled if not permitted

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[158] Ashley "Specific Performance by Injunction" (1906) 6(2) Columbia Law Rev. 82 at 91.

[159] See *Safro v Lakofsky* (Minn.1931) 238 N.W. 641, albeit in the context of an attempt to enforce a negative covenant. See a note on the case in (1932) 30(5) Michigan Law Review 798.

[160] [1989] 1 W.L.R. 853.

[161] *ibid.* at 857.

[162] [2005] IEHC 174

to work. This would clearly require a court to consider whether there was an inter-relationship between a profile and a skill; not all high profile occupations require particular skills, and not all skilled employment leads inexorably to a high profile. However, the courts would certainly appear receptive in principle to an argument for an injunction based on skill, profile or a combination of both.

That said, there are limits to the extent to which the courts will treat skills as requiring a special approach. This is evident from the older decision of Cozens-Hardy M.R. in *Walker v Crystal Palace Football Club*,[163] in which the Master of the Rolls refused to differentiate between an "ordinary" workman and a footballer.[164] In the specific context of sports contracts, McCutcheon has identified a stricter approach by American courts which places an emphasis on sportsmen honouring contracts and not reneging on commitments in the face of a lucrative alternative contract being offered.[165]

The obvious practical difficulty with this area overall is that it will, to a significant degree, be a matter for an individual judge, based on the facts before the court, to determine whether the court is dealing with a particular skill. Delany[166] suggest that parallels can be drawn between the decision in *Cahill v Dublin City University*,[167] with its references to leaning "in favour of a construction which favours academic freedom" and continuing "to operate as an academic in the university world" [168] and that in *Warren v Mendy*.[169] She does acknowledge that given the special circumstances identified by

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[163] [1910] 1 K.B. 87.

[164] Although the rather rarified modern world of the sportsperson is encapsulated by the observation of the President of FIFA (subsequently denied by him) that Manchester United Football Club were effectively indulging in 'modern slavery' by refusing Cristiano Ronaldo, a prominent Portuguese footballer, a transfer to the Spanish Club, Real Madrid; see "Cristiano Ronaldo agrees with Sepp Blatter that he is 'slave' to Manchester United", The Telegraph, July 11, 2008. He subsequently transferred for a fee of approximately GBP£80ml.

[165] McCutcheon "Negative Enforcement of Employment Contracts in the Sports Industries" (1997) 17 L.S. 65 at 74.

[166] Delany *Equity and the Law of Trusts in Ireland* 5th ed. (Round Hall, Dublin, 2011), p.604.

[167] [2007] 19 E.L.R. 113.

[168] *ibid.*, para.10.3.

[169] [1989] 1 W.L.R. 853.

Clarke J. "it would probably be too unwise to read too much into the conclusions which he reached." Nevertheless, it is an interesting analysis in that it suggests that a court could take a view that an academic position (in the *Cahill* case, the plaintiff was an associate professor in the School of Biotechnology and Director of the Vascular Health Research Centre of the Faculty of Science and Health) is a skilled position. Of course, a skill must also be judged by reference to how widely practised it is; Professor Cahill was clearly operating at the upper echelons of academia; it is open to question what approach a court might take in relation to a more junior role and whether such a junior role required a special skill or skills.

Indeed, the problem with adopting too expansive an approach to what constitutes a skilled worker is that it is surely not beyond the bounds of possibility that the courts might, in an appropriate case, expand the range of what comes within the phrase a "special skill or talent"[170] and apply it to a role or function in an office or factory; for example, in a small company, an IT manager may have a special skill or talent relative to the other employees.

2.3.6 Public Functions

There is no doubt that a person performing an important public function may also benefit from a consideration of the balance of convenience; in *O'Neill v Beaumont Hospital Board*[171] the plaintiff neurosurgeon appears to have secured an *ex parte* injunction in circumstances where the court was informed that he had patients in the hospital awaiting surgery. As against that, the courts have also been very careful in terms of intermeddling in what might broadly be called "hospital cases;" this is clear from the case of *Joyce v Health Service Executive*,[172] in which Finnegan P. expressed an overriding concern for the safety and welfare of the defendant hospital's patients.

[170] The phrase used by Nourse L.J. in *Warren v Mendy* [1989] 1 W.L.R. 853 at 857.

[171] [1990] I.L.R.M. 419. As explained by the (then) Junior Counsel acting for the respondent in that case.

[172] [2005] IEHC 174.

2.3.7 The Nature of the Dismissal

Notwithstanding the approach of *Johnson v Unisys Ltd.*,[173] accepted in this jurisdiction, to the effect that the courts are unwillingness to introduce a general common law remedy for unfair circumstances attending dismissal, the nature of a dismissal may nevertheless impact on the court's consideration of the balance of convenience. This is evident from the judgment of Ryan J. in *Glynn v HSS trading as Citywest Hotel,*[174] in which he referred to the "brutal and insensitive" nature of the purported dismissal, noting that the circumstances of the dismissal were a "humiliation" and that "that has some materiality to the balance of convenience." The extent to which the courts will go beyond this general consideration of the nature of a dismissal will be considered in Chapter Nine.[175]

2.4 Status Quo

As observed by McCracken J in *B & S Ltd. v Irish Auto Trader Ltd.*,[176] "It is normally a counsel of prudence, although not a fixed rule, that if all other matters are equally balanced, the court should preserve the *status quo*."[177] This view echoed that expressed by O'Higgins C.J. in the *Campus Oil* case. The Chief Justice had stated that "interlocutory relief is intended to keep matters in *status quo* until the trial and to do no more."[178] However, in practical terms, the preservation of the *status quo* appears to play a less significant role in the courts' decisions than might be expected, and rarely features as a central consideration. This represents a shift from the approach of the courts pre-

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[173] [2003] 1 A.C. 518.

[174] unreported, High Court, Ryan J., February 26, 2010.

[175] See Chapter Nine, section 5.

[176] [1995] 2 I.R. 142; [1995] 2 I.L.R.M. 152. Albeit that in that case, McCracken J found that it was an "unusual case" where the balance of convenience lay in favour of refusing an interlocutory injunction, notwithstanding the fact that this involved altering the *status quo*.

[177] [1995] 2 I.R. 142 at 145; [1995] 2 I.L.R.M. 152 at 156. Albeit that in that case, McCracken J found that it was an "unusual case" where the balance of convenience lay in favour of refusing an interlocutory injunction, notwithstanding the fact that this involved altering the *status quo*.

[178] [1983] I.R. 88 at 106; [1984] I.L.R.M. 45 at 60. See also the *dictum* of Finlay C.J. in *S.P.U.C. v Grogan* [1989] IR 753 at 762.

American Cyanamid, whereby the governing principle – certainly in theory – was the maintenance of the *status quo*.[179]

The difficulty with attempting to maintain the *status quo* is that the concept, to adopt the slightly jaundiced wording deployed by Zuckerman, "has survived due to its ambiguity and to the limited practical significance given to it."[180] As Zuckerman has also pointed out, a principle which says that "a state of affairs should be preserved simply because it happens to exist is arbitrary, and its operation is a matter of pure chance." [181] As such, he observes that the courts have sought to protect "the most appropriate state of affairs," whether or not that qualifies as an "existing state."

It has also been held in at least one English case that the *status quo* test is in fact inappropriate in the case of mandatory injunctions; in ordering the performance of an act, there is a clear "interference" with the *status quo*.[182] Yet a prohibitory injunction is not without its issues either. Leubsdorf has suggested that to freeze an existing situation can also inflict irreparable injury. As he points out, "The *status quo* shibboleth cannot be justified as a way to limit interlocutory judicial meddling, because a court interferes just as much when it orders the *status quo* preserved as when it changes it."[183]

It is obviously not sufficient to simply ignore the matter and presume that this will in some way maintain the *status quo*. The need to reach a decision on an interlocutory application for an injunction was referred to by Finlay C.J. in the case of *S.P.U.C. v Grogan*.[184] The Chief Justice observed that deferring or postponing reaching such a decision "for a period which certainly equals and probably exceeds the time necessary to bring the action to hearing is, in my view, to decline or refuse to make an interlocutory injunction".[185]

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[179] See, for example, *Jones v Pacaya Rubber & Produce Co.* [1911] 1 K.B. 455 at 458; *Texaco v Mulberry Filling Station Ltd.* [1972] All E.R. 513 at 528.

[180] Zuckerman "Interlocutory Remedies in Quest of Procedural Fairness" (1993) 56 M.L.R. 325 at 327.

[181] Zuckerman *Civil Procedure* (Lexis Nexis, London, 2003), p.269.

[182] See *N.W.L. v Woods* [1979] 1 W.L.R. 1294; [1979] 3 All E.R. 614.

[183] Leubsdorf "The Standard for Preliminary Injunctions" (1978) 91 Harv. L. Rev. 525 at 546.

[184] [1989] I.R. 753.

[185] *ibid.* at 762.

A realistic approach is evident in the words of Fennelly J. in *McKenna v A.F.*[186] As he explained, the purpose of an interlocutory injunction is to "maintain a just equilibrium between the parties until their respective rights can be substantively determined."[187] In *Dublin City Council v McGrath*[188] Carroll J. also took a more realistic view of affairs. Whilst acknowledging that the court will generally preserve the *status quo*, she also stated that the court should not be constrained *ab initio* from considering whether an injunction should be granted.

The general view as is that the *status quo* is, in the normal course, that which prevailed during the period immediately preceding the issuing of the writ claiming the permanent injunction.[189] However, it has been accepted that if there is a lengthy delay in seeking an interlocutory injunction (and insofar as that in itself does not prevent the granting of the injunction sought[190]) it may be the *status quo* at the time immediately preceding the motion seeking the interlocutory injunction application which is of relevance.[191]

2.4.1 Application to Employment

In the context of the specific reliefs sought in an anti-dismissal injunction, the question of what exactly is meant by the *status quo* has the potential to cause considerable difficulty, although the courts have approached matters on the basis of common sense.

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[186] [2002] 2 I.L.R.M. 303 at 314.

[187] *ibid.* at 314.

[188] [2004] 1 I.R. 216.

[189] See, for example, *Contech v Walsh* [2006] IEHC 45.

[190] See, for example, "Credit union chief refused injunction against dismissal" The Irish Times, December 23, 2010 (*McCarthy v Roscrea Credit Union Ltd.*) in which the delay concerned proved fatal to the interlocutory application, Clarke J. making reference to "much correspondence and little activity" since the previous June.

[191] *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] A.C. 130 at 140; [1983] 2 All E.R. 770 at 775.

2.4.2 Post Termination

On one view, if a person's employment has been terminated, then the *status quo* is that they are no longer employed. If a court took a very strict view in relation to the maintenance of the *status quo*, then no employee would ever be entitled to a *Fennelly* order, let alone reinstated pending a full hearing of their action. This is a point which was touched on by Smyth J. in the case of *Hennessy v St Gerard's School Trust.*[192] As he explained, the plaintiff was seeking to have her salary paid from the end of her probationary period pending the hearing of the action. This was in effect to adjust the *status quo*. He adopted the view of Murphy J. in *Bula Ltd. v Tara Mines (No. 2)*:[193]

> "So far from maintaining the *status quo* it would compel the parties not merely to take certain actions but also to decide, at least on some temporary or conditional basis, the legal framework within which those actions are to be taken. In my view it would be wrong for the Court to adopt that course at interlocutory stage."[194]

In the circumstances, he did not feel it appropriate that a *Fennelly* order should be made (in fact, he ultimately rejected the application in its totality).

The question of the *status quo* is bound up with the doctrine of unaccepted repudiation: if the doctrine of unaccepted repudiation is engaged, then a person's employment is in principle not affected if they do not accept termination. Accordingly, the *status quo* is for them to continue to receive a salary in exchange for work. In *Naujoks v National Institute of Bioprocessing Research and Training Ltd.*[195] Laffoy J. characterised a *Fennelly* order as enabling the maintenance of the *status quo*. Strictly speaking, it is difficult to gainsay this. However, viewed from the perspective of an interlocutory order being a tactical device, a *Fennelly* order can tilt the balance of any tactical advantage heavily in favour of the plaintiff. As such, although from a purist perspective it does simply represent the maintenance of the *status quo*, the practical reality is different.

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[192] [2004] 15 E.L.R. 230.

[193] [1987] I.R. 95.

[194] *ibid.* at 105.

[195] [2007] 18 E.L.R. 25.

However, matters are complicated by the fact that by keeping an employer and employee together and theoretically forcing them to work together, the courts could become involved in the need to supervise such a relationship or enforce the injunction granted. The type of deterioration of relations which can result from court-directed work practices is evident from a comment in the case of *Connolly v McConnell*.[196] Hamilton J. had held that the procedure by which the defendant had been dismissed was unfair and contrary to the principles of natural justice. Accordingly, he could not be dismissed unless afforded natural justice. As dryly observed by Griffin J., "The relations between the parties did not improve to any great extent thereafter…"[197]

2.4.3 Pre Termination

Matters are a little simpler pre-termination: if an employee believes that their employment is about to be terminated, and seeks an injunction prior to termination, then the *status quo* is that they should maintain their position. Otherwise, and logically, they could end up dismissed.

In practical terms, if the emphasis is put on "just" in Fennelly J's phrase "a just equilibrium," it seems highly unlikely that the courts will approach matters differently based purely on degrees of "luck, diligence, prescience or a combination of any of those."[198] Rather, they will come to what is the most sensible and practical conclusion given all the facts before them. As MacMenamin J. put it somewhat more delicately, the maintenance of the *status quo* is "by no means an immutable principle."[199]

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[196] [1983] 1 I.R. 172.

[197] *ibid.* at 176.

[198] *Per* Clarke J. in *Bergin v Galway Clinic Doughiska Ltd.* [2008] 2 I.R. 205 at 215 when considering whether the courts should draw a distinction in relation to an anti-dismissal injunction being mandatory or prohibitory in nature by reference to the point at which it was sought.

[199] *Whelan Frozen Foods Ltd v Dunnes Stores* [2006] IEHC 171.

2.5 Consideration of the Strength of a Case

In *American Cyanamid*,[200] Lord Diplock suggested that if the various arguments were finely balanced, the court could, based on the affidavit evidence adduced, consider the relative strength of each party's case. Despite this, Bean, one of the foremost authorities on injunctions in England, has suggested that in the aftermath of the *American Cyanamid* decision, once there was a view that the plaintiff had shown that there was a serious question to be tried, "any further reference to the relative strength of the parties' cases was prohibited."[201] This latter view prevails in Ireland, though not necessarily in uniform fashion.

The Supreme Court's position on the relevance of a consideration of the strength of a case is set out in the case of *Westman Holdings Ltd. v McCormack*.[202] Finlay C.J. stated that once a conclusion had been reached that the party seeking an interlocutory injunction had raised a fair question to be tried, "the Court should not express any view on the strength of the contending submissions leading to the raising of such a fair and *bona fide* question."[203] This was reaffirmed in *Symonds Cider & English Wine Company Ltd. v Showerings (Ireland) Ltd.*[204] and *Local Ireland Ltd. v Local Ireland-Online Ltd.*[205] There are two important observations which flow from this: first, on a mandatory application, a plaintiff has to demonstrate that he has a strong case. Insofar as this may appear at odds with a court refraining from addressing the strength of a case, this is dealt with by the second observation: Finlay C.J. was clear in referring to the "strength of the contending submissions." As such, it might more properly be said that the courts refrain from expressing any view on the relative strengths of the case.

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[200] [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504.

[201] Bean *Injunctions* 10th ed., (Thomson Sweet & Maxwell, London, 2010), p.33.

[202] [1992] 1 I.R. 151.

[203] *ibid.* at 157. See also *Symonds Cider & English Wine Company Ltd v Showerings (Ireland) Ltd.* [1997] 1 I.L.R.M. 481.

[204] [1997] 1 I.L.R.M. 481.

[205] [2000] 4 I.R. 567.

However, in his judgment in the High Court in *B & S Ltd v Irish Auto Trader Ltd.*,[206] McCracken J. took the view, albeit *obiter* (and contrary to what had been said in *Westman Holdings*) that the strength of a case may be a factor if all the other factors do not lead to a conclusive determination.

2.5.1 Expressing a Non-Binding View

An attempt to introduce a more general engagement with the strength of the case is evident in England. Laddie J. explained in *Series 5 Software v Clarke*[207] that it had not been intended in *American Cyanamid* to exclude consideration of the strength of the case in applications for interlocutory relief. In fact, he believed that there was great merit in courts expressing a non-binding view as to the strength of cases. The flexibility of the *American Cyanamid* principles was one of the justifications put forward by Laddie J. in explaining why he felt he could consider the strength of the case.[208] Bean has commented that "in truth [this] represented what many judges were doing already, and since 1996 has stood the test of time."[209] The justification for this is best encapsulated in the statement by Zuckerman that "A court which does not enquire into the prospect of winning on the merits would be as likely to come to the assistance of a party with no rightful claim as to assist a rightful party."[210]

In *Chieftain Construction Ltd. v Ryan*,[211] Edwards J. referred to Laddie J's reasoning in *Series 5 Software* as being "both provocative and seductive." He suggested that "at some future point the Supreme Court may be called upon to consider and rule upon a *Series 5 Software* type argument," although also acknowledged that he was bound to apply the *Campus Oil* principles, and could not consider the strength of the case.

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[206] [1995] 2 I.R. 142; [1995] 2 I.L.R.M. 152.

[207] [1996] 1 All E.R. 853 at 865.

[208] See also *Guardian Media Groups plc. v Associated Newspapers Ltd.* All England Official Transcripts, January 20, 2000.

[209] Bean *Injunctions* 8th ed. (Sweet & Maxwell, London, 2004), p.29, as cited in *Chieftain Construction*. Now in its 11th ed. (2012).

[210] Zuckerman "Interlocutory Remedies in Quest of Procedural Fairness" (1993) 56 M.L.R. 325 at 328.

[211] [2008] IEHC 147.

Byrne and Binchy have argued that a consideration of the strength of a case is "...realistic and practical. If the issue is a purely legal one, nothing will be gained by deferring such consideration of the legal issue until a full hearing."[212] There is also an argument that it is really only by considering the strength of a case that a judge can come to a proper, informed view as to where the risk of an injustice lies in real terms. However, the dangers of trying to factor in a consideration of the strength of a case at the interlocutory stage are identified by Delany; she advocates maintaining the *status quo* rather than prejudging the issues unless it is "abundantly clear" that otherwise no trial of the action will take place.[213]

2.5.2 Disposal of an Action

A consideration of the strength of a case may yet be subject to further review in this jurisdiction. In *N.W.L. Ltd. v Woods,*[214] (a case related to employment inasmuch as it concerned picketing) Lord Diplock considered the role of the balance of convenience in the *American Cyanamid* guidelines. He contrasted this with what he termed "exceptional" cases. These were cases in which the granting or refusal of an injunction at the interlocutory stage would dispose of the action in favour of whichever party was successful in the application. He suggested that if the outcome of the application for an interlocutory injunction in effect determined the case, with the trial of the action unlikely, there may be a role for a consideration of the strength of a case, based on the "practicalities" of a case (although this should be tempered by Redmond's suggestion that "Typically this exception would operate in an industrial conflict situation rather than an individual employment one."[215])

In *Cayne v Global Natural Resources plc.*[216] May L.J. observed that if a plaintiff's "evidence is so strong that to refuse an injunction and to allow the case to go through to

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[212] Byrne & Binchy, *Annual Review of Irish Law* (Thomson Round Hall, Dublin, 1988), p.200.

[213] Delany (1993) 15 D.U.L.J. 228 at 241, in the course of her analysis of *Curust Financial Services Ltd. v Loewe-Lack-Werk* [1994] 1 I.R. 450.

[214] [1979] 1 W.L.R. 1294.

[215] Redmond *Dismissal Law* 2nd ed. (Tottel, Dublin, 2007), p.176.

[216] [1984] 1 All E.R. 225.

trial would be an unnecessary waste of time and expense and indeed do an overwhelming injustice to the plaintiff." However, he felt that such cases would be "exceptional."[217] Similarly, in *Cambridge Nutrition Ltd v British Broadcasting Corporation*[218] Kerr L.J. did not apply the *American Cyanamid* principles as the matter before him was one in which the determination of the crucial issue as between the parties would essentially depend on whether interlocutory relief was granted or refused.[219]

There are a number of Irish cases in which the courts have acknowledged, whether expressly or otherwise, that the fact that the interlocutory application could determine the overall case is, at a minimum, something of which they are aware. For example, in *Benckiser GmbH v Fibrisol Services Ltd.*,[220] Costello J. considered the lack of a serious conflict between the parties on affidavit evidence and the strength of the plaintiff's case in refusing to grant an injunction. This represents a clear acknowledgement by the courts that cases may well come before them in which the granting or otherwise of an injunction will determine the matter. This is a pragmatic approach; it attempts to address any obvious unfairness in the context of an application being brought within limited timeframes, and evidence not being tested by way of cross-examination. The attraction of this approach is that it also effectively displaces the undertaking as to damages. Rather than the defendant being indemnified in monetary terms, they are effectively being indemnified by a much more rigorous scrutiny of the strength of the plaintiff's case than would otherwise be applied. Similarly, the courts can consider whether there is any merit in the purported defence advanced. Furthermore, this approach channels the emphasis on diminishing the risk of doing an injustice, favoured by Kelly J. in the *Shelbourne Hotel* case.

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[217] *ibid.* at 238.

[218] [1990] 3 All E.R. 523.

[219] See also *Douglas v Hello! Ltd.* [2001] Q.B. 967 at 1007; [2001] 2 W.L.R. 992; [2001] 2 All E.R. 289, *per* Keene L.J. See also *Lansing Linde Ltd. v Kerr* [1991] 1 W.L.R. 251 and *Credit Suisse Asset Management Ltd. v Armstrong* [1996] I.C.R. 882.

[220] [1988] IEHC 15. See also *Governors of Barrington's Hospital v Minister for Health* [1989] I.L.R.M. 77; [1988] I.R. 56 in which Costello J refused to grant an interlocutory injunction to the plaintiffs, finding that there was no dispute as to the facts and thus determining the legal issue.

2.5.3 Application to Employment

Based on the Supreme Court's decision in *Westman Holdings*, even if not always faithfully followed, the courts cannot in principle assess the strength of the parties' case in an anti-dismissal application. In *Cronin v Minister for Education*,[221] Laffoy J. was quite explicit in refusing to consider whether the plaintiff was likely to succeed at the trial. In *Becker v Board of Management of St Dominic's Secondary School,*[222] Clarke J. was satisfied that it was more appropriate to "assess the state of the case at this stage against the traditional criteria applied in the grant or refusal of an interlocutory injunction adapted, as *per* the established authorities, to cases involving contracts of employment."[223] This is uncontroversial, though not without qualification. It was acknowledged by the same judge in the case of *Yap v Children's University Hospital Temple Street Ltd.*[224] that "it is only in cases where either the Plaintiff has made out no case, or indeed on some occasions where the Defendant has made out no defence, that the Court is entitled to make assumptions about how the ultimate proceedings will be resolved." This may appear at first blush to be somewhat different from saying that a court will consider the strength of a case, but it is to all intents the same thing. Making an assumption about the resolution of the case must, by necessity, involve a consideration of the relative strengths of each party's positions (although it must of course be acknowledged that such assumptions need not necessarily be openly expressed to the parties).

Yap is not the only case in which Clarke J. has explored the boundaries of a consideration of the strength of a case. He also did so in *Bergin v Galway Clinic Doughiska Ltd.*,[225] having indicated that he was "mindful" of the emphasis expressed by Laffoy J. in *Naujoks v National Institute of Bioprocessing Research and Training Ltd.*[226] on the courts refraining from attempting to assess the likely outcome of contested factual issues.

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[221] [2004] 3 I.R. 205.

[222] [2005] 1 I.R. 561.

[223] *ibid.* at 565.

[224] [2006] 4 I.R. 298 at 300.

[225] [2008] 2 I.R. 205.

[226] [2007] 18 E.L.R. 25.

However, it is unclear how far this will extend. Edwards J.'s distinction in *Chieftain Construction*[227] between cases involving serious conflicts and those which did not would suggest that it might be a fertile ground for exploration. However, Edwards J.'s suggestion that a judge could analyse the relative strengths of the parties' positions in cases not involving serious conflict feeds back to Ryan J.'s remarks in *Glynn v HSS trading as Citywest Hotel*[228] about the "torrent of affidavits" which had been filed, and Ryan J.'s view that this was in part motivated by an effort to put as much in issue as possible. Ryan J. did not believe that this was what intended as a result of Fennelly J.'s decision in *Maha Lingham*.

2.5.4 Expressing a Non-Binding View

Whatever about not considering the strength of a case, and evidencing a somewhat Jesuitical approach, the courts have never been shy about expressing a non-binding view on the merits of cases. In *McConnell v N.E.E.T.U.,*[229] Hamilton P. referred to the "strong probability of the plaintiff being successful" in his challenge to the decision to suspend him without pay. Although this decision preceded that of the Supreme Court in *Westman Holdings*, it is still rather surprising to see the President refer to the fact that before the plaintiff could obtain relief, the first thing in respect of which he had to satisfy the court was "The likelihood of his success in the proceedings which he has issued."

In *Phelan v BIC (Ireland) Ltd.*,[230] Costello P. could not have been clearer when he observed at the interlocutory stage that if that hearing was the trial of the action, he would have decided in the plaintiff's favour.[231] This can work both ways, however: in *O'Malley*

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[227] [2008] IEHC 147.

[228] unreported, High Court, Ryan J., February 26, 2010.

[229] unreported, High Court, Hamilton P., July 22, 1986.

[230] [1997] 8 E.L.R. 208.

[231] See "Court grants Payzone executives injunctions on dismissals" The Irish Times, February 2, 2008 and Clark J.'s comments in an application brought against Payzone by two executives that their case was among those "rare cases" where the breach of contract was so clear and the defence to the case so "devoid of merit" that the court should grant the injunctions.

v Aravon School Ltd.[232] Costello P. refused to grant an injunction, and was seemingly influenced by the fact that it was unlikely that a perpetual injunction or specific performance would be granted (although in *Doyle v Grangeford Precast Concrete Ltd.,*[233] O'Donovan J. indicated that he found it "difficult to reconcile" *O'Malley* with the other cases to which he had been referred and stated that he intended to "ignore" it.)[234] However, *O'Malley* is not a completely isolated case; in *Connor v Bohemian Football Club Ltd.,*[235] in circumstances where the defendant football club had already appointed a new manager, Clarke J. is reported as having stated that "It seemed Mr. Connor would face a very uphill struggle in persuading the trial court he was entitled to be put back in as manager of Bohemians. If the case went to trial, it seemed the reality was it would be about damages."

In fact, the frequency with which non-binding views are expressed is betrayed by a comment by Smyth J. in *Gaffney v IMRO.*[236] In granting a *Fennelly* order, but holding that the plaintiff should not resume his duties given the fundamental differences between the parties and the breakdown in trust and confidence, it is reported that Smyth J. indicated that it was a "very very rare" case where he would decline to make any remarks "even of a most preliminary nature."

2.5.5 Disposal of an Action

In *Wallace v Irish Aviation Authority,*[237] the defendant proposed to place the plaintiff on administrative leave with full pay pending the outcome of an appeal against dismissal. An injunction was sought to prevent this. The key question was whether such a proposal

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[232] *See* "Bray principal fights sacking in High Court" The Irish Times, August 13, 1997 and *O'Malley v Aravon School Ltd.* "Singer criticised at court for role in sacking of school principal" The Irish Times, August 14, 1997 As stated in the latter article, "But [Costello P.] did not think that the eventual trial judge would order the board of governors to take her back as principal and he felt it would be wrong for him to do so now."

[233] [1998] 9 E.L.R. 260.

[234] *ibid.* at 265.

[235] "Ex-club manager fails in salary bid" The Irish Times, April 28, 2008.

[236] See"Imro must continue to pay CEO pending court action, judge rules." The Irish Times July 22, 2007.

[237] [2012] IEHC 178.

amounted to disciplinary action pursuant to the plaintiff's contract of employment. Hogan J. noted that the determination of the interlocutory injunction "will effectively resolve the outcome of the main proceedings."[238] As he explained, if the plaintiff was refused the injunction sought, then she would be "denied the benefit of a key contractual protection just at the time when such protection was vitally necessary to protect her interests." In such circumstances, Hogan J. questioned whether a court should "shut its eyes to the underlying merits of the claim."[239] He felt that it could not, and approached the granting of the injunction by reference to the underlying strength of the parties' respective positions "by way of modest derogation from the *Campus Oil* principles."[240]

It is arguable that anti-dismissal injunctions come within the category wherein the hearing of the interlocutory motion can decide a case.[241] This is based on the idea that the determination of the case is not confined to the literal meaning of those words, but can also cover situations where the granting of an injunction "will in practice have this effect," to adopt Zuckerman's wording.[242] The practical reality is that when a court gives a determination at the interlocutory stage, it is not resolving a legal dispute as such, but will in real terms be determining a tactical strategy in many cases: Redmond observed in 2007 that plaintiffs seeking anti-dismissal injunctions from the High Court "have in the main been senior executives for whom High Court proceedings are strategically important against their employer (not least because of bad publicity and high legal costs for the employing entity)."[243]

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[238] *ibid*, para.16.

[239] *ibid*, para.18.

[240] *ibid*, para.32.

[241] In *McArdle v Laragan Developments Ltd.* "Bricklayers fail in bid to halt dismissals" The Irish Times, February 23, 2007 it is reported that T.C. Smyth J. "said he was not prepared to grant the injunctions at this stage as that would effectively decide the full case."

[242] See Zuckerman *Civil Procedure* (Lexis Nexis, London, 2003), p.279, referring to *Stacy v 2020 Communications plc.* [1991] F.S.R. 49.

[243] Redmond *Dismissal Law* 2nd ed. (Tottel, Dublin, 2007), p.173. See also Costello "Regulating the Anti-Dismissal Injunction" in Breen, Casey & Kerr *Liber Memorialis Professor James C. Brady* (Roundhall Sweet and Maxwell, Dublin, 2001), p.188 at 198. See also sections 3 and 4.2.

2.6 Dis/application of the Campus Oil Guidelines

Related to the question of the realities of an interlocutory hearing disposing of an action, there are certain situations which admit of a disapplication of the *Campus Oil* guidelines. After all, they are just that; guidelines. As May L.J. cautioned in *Cayne v Global Natural Resources plc.,*[244] a court "must be very careful to apply the relevant passages from Lord Diplock's familiar speech in the *Cyanamid* case not as rules but only as guidelines."[245]

As has already been seen,[246] in *Szabo v Esat Digifone Ltd.*[247] Geoghegan J. felt that the case before him should be determined other than by reference to the *Campus Oil* guidelines. He shied away from adopting the "traditional language" of the guidelines, expressing the view that the categories were neither appropriate nor helpful. In fact, this is a comment which might be more generally applied. The courts have been prepared to accept that there are other areas to which the *Campus Oil* guidelines do not apply, are partially displaced or are effectively supplemented. In the case of *Reynolds v Malocco,*[248] which concerned an alleged libel, Kelly J. held that the *Campus Oil* principles had "a wide, but not universal, application."[249] The importance which the courts ascribe to freedom of expression was again evident in the case of *Foley v Sunday Newspapers.*[250] Kelly J. pointed out that a number of "special categories of cases have been identified where the *American Cyanamid* guidelines, even if satisfied, do not result in an interlocutory injunction being granted." In that respect, he noted that in the normal course, a court will not impose a prior restraint on publication.[251] An application to restrain the presentation of a winding-up petition involves the exercise by a creditor of his right of access to the courts. As such, Keane J. held in *Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd.*[252] that the normal *Campus Oil* principles did not apply.

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[244] [1984] 1 All E.R. 225.

[245] *ibid.* at 237.

[246] See section 2.3.

[247] [1998] 2 I.L.R.M. 102.

[248] [1999] 2 I.R. 203.

[249] *ibid.* at 209.

[250] [2005] 1 I.R. 88.

[251] *ibid.* at 98.

[252] [1996] 1 I.R. 12.

2.6.1 Application to Employment

In the case of *Garrahy v Bord na gCon*,[253] O'Higgins J. was referred to the comments of Kelly J. in *Reynolds v Malocco.*[254] Kelly J. had observed in *Reynolds*, by way of example of the *Campus Oil* principles not having a universal application, that:

> "Normally courts will not grant an injunction to restrain breaches of covenant in a contract of employment if that would amount to indirect specific performance of such contract or would perpetuate a relationship based on mutual trust which no longer exists."[255]

Garraghy concerned an application for an injunction to prevent the appointment of a full-time regulation manager by the defendant. However, O'Higgins J. rejected the contention that he should not apply the *Campus Oil* guidelines. He took the view that the concept of no injunction being granted in defamation cases, dependent as it is on the right of free speech, could not be equated to the case before him. He also observed that the *dictum* of Kelly J. related to cases concerning wrongful dismissal for the most part - which cases, he pointed out, could potentially involve ongoing supervision - and might not apply when dealing with an appointment.

However, it seems clear that in an appropriate case, it can be prudent for the court to disapply the *Campus Oil* guidelines. In *Vogel v Cheeverstown House Ltd.*,[256] Shanley J held that the ordinary principles for interlocutory injunctions did not apply in "exceptional cases" such as the one before him. It concerned a complaint of sexual abuse against the plaintiff by the resident of a centre for people with mental handicaps.

More generally, echoing Geoghegan J.'s remarks in the *Szabo* case, there is something distasteful about balancing the convenience of a defendant carrying on its business

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[253] [2002] 3 I.R. 566.

[254] [1999] 2 I.R. 203.

[255] *ibid.* at 209.

[256] [1998] 2 I.R. 496 at 501.

against a person's career, livelihood and reputation. In fact, and as should be evident from the foregoing analysis, although paying lip service to the guidelines, the reality is that judges have (whether rightly or wrongly) fashioned remedies and solutions to the facts before them in the face of, rather than assisted by, the guidelines. The ways in which the courts might approach the guidelines more faithfully without diminishing the protection afforded by the anti-dismissal injunction will be explored in Chapter Eight.

Underlying any application, no matter how it is approached by the courts by reference to the *Campus Oil* guidelines, is the question of costs.

3. Costs

A potentially significant deterrent to seeking interlocutory anti-dismissal injunctions came in the form of S.I. No. 012 of 2008. This amended Ord.99, r.1 of the Rules of the Superior Courts.[257] Of particular relevance is the insertion of Rule 4A, which provides that:

> "The High Court or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."

A consideration of judgments prior to the introduction of this amendment indicates that costs were generally, though not always, reserved at the interlocutory stage. As explained by Keane J. in *Dubcap Ltd v Microchip Ltd.*,[258] "the normal procedure on the hearing of an interlocutory application is to reserve the costs to the trial judge." The rationale for this was spelt out by Keane J.:

> "there may and very frequently will be matters which can only be resolved by the court of trial on oral evidence at a plenary hearing of the action and indeed matters may come to light by way of discovery or by way of new evidence not available to

[257] The provision came into law on February 1, 2008. See generally Slattery "Litigation Costs: A New Dawn?" (2008) 15(5) C.L.P. 113.

[258] unreported, Supreme Court, December 9, 1997.

the parties at the time of the hearing of an interlocutory application which may bring about a result which seemed unlikely or improbable at the time of the hearing of the interlocutory application, so for that reason it is quite normal on the hearing of the interlocutory applications to reserve the costs."

An exception to this "normal procedure" in fact arose in a case which had involved an application for an anti-dismissal injunction. The plaintiff in *Davis v Walshe*[259] appealed the fact that an order for costs had been made at the interlocutory stage in favour of the defendant, and argued that the costs should have been reserved. McGuinness J. acknowledged that costs were usually reserved to the substantive trial. However, she stated that in her view the interlocutory application concerned a discrete issue which would have no further relevance to trial of action and, as such, she concluded that it was correct to award costs in the High Court at the interlocutory stage.[260] Similarly, in *Bryan v Finglas Child and Adolescent Centre* [261] Kelly J. acknowledged that the "normal rule" was that costs are reserved at an interlocutory stage, but pointed out that it "is not an inflexible one, if it even is a rule." As he explained, "The practice is subject to exceptions. I think that this is one of those exceptional cases where I ought to deal with the interlocutory costs at this stage."[262]

Given the mandatory tones in which it is cast, Rule 4A would suggest that it should be much more common in practice for the courts to now award costs on an interlocutory application, subject to their discretion. This would in principle clearly inform any tactical considerations when weighing up whether or not to bring an application for an injunction, and it must no doubt be a hugely frightening prospect for a putative plaintiff to be told that if they do not succeed on their injunction application, they could be liable not only for their own costs, but also the costs of their employer / former employer after a couple

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[259] [2003] 2 I.R. 152.

[260] *ibid.* at 154.

[261] *ex tempore*, High Court, Kelly J, May 10, 2004.

[262] As a variant on this, in *Joyce v Health Service Executive* [2005] IEHC 174, Finnegan P. made an order that costs be in the cause as he acknowledged that his decision had turned on the public interest in the safety and welfare of patients rather than on the interest of either of the parties; *Joyce* is a case which, by reason of its factual background, is intertwined with that of *Rajpal v Robinson* [2005] 3 I.R. 385.

of days' hearing in the High Court.[263] The actual quantum of costs can, on any rendition, be prohibitive. By way of example, costs in respect of a case in which an interim and interlocutory anti-dismissal injunction were secured were agreed on foot of a calculation in 2011 by the successful plaintiff's cost accountant as totalling €52,102.95.[264] Turning that around, had the plaintiff failed in his application and costs between awarded against him, without any stay being put on them, he would be looking at costs in a similar amount being awarded against him together with having to bear his own legal costs. Such sums are broadly in line with those identified in newspaper reports of the mediated settlement achieved in the case of *Craig v FÁS,* in which it was reported that the plaintiff was to receive the sum of €50,000 towards his legal costs.[265] That case is also of interest insofar as the parties waived confidentiality and consented to information being released to satisfy any queries made by the Dáil Public Accounts committee. As such, it is a relatively rare publicly accessible example of the structure of a compromise.[266] As well as

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[263] That an interlocutory hearing can last this long is clear from written judgments in cases such as *Mullarkey v Irish National Stud Company Ltd.* [2004] 15 E.L.R. 172, in which Kelly J. referred to the fact that he had heard the matter "over the last two days." Similarly, Irvine J. referred in *Stoskus v Goode Concrete Ltd.* [2007] IEHC 432 to having heard the plaintiff's interlocutory injunction application "over two days." See also "Credit union executives fail to get injunction" The *Irish Times*, July 17, 2003 (*Good v Gurranebraher Credit Union Ltd.; O'Neill v Gurranebraher Credit Union Ltd.*) which involved a four day hearing. For completeness, a full plenary hearing in the High Court takes up considerable time as well: *Brophy v Independent News & Media plc.* was listed for six days' hearing (settling on day three): see "Brophy injunction proceedings over INM dismissal adjourned until June" The Irish Times, May 16, 2012 and *Brophy v Independent News & Media plc* "Former INM executive settles case over dismissal" The Irish Times, October 24, 2012. The case of *Higgins v Governor and Company of the Bank of Ireland* [2013] IEHC 6 was at hearing for an astounding 51 days.

[264] Made up of a solicitor's instruction fee, Junior and Senior Counsels' fees on both interim and interlocutory applications, together with outlay and sundries: information provided by Fanning & Kelly solicitors on a confidential basis. A helpful summary of the principles to be considered by the Taxing Master was set out by Ryan J. in *Cafolla v Kilkenny* [2010] 2 I.L.R.M. 207 at 212.

[265] "Fás case ends with apology and payment of €175,000" The Irish Times October 12, 2011.

[266] The report of the resolution of a case frequently includes a variation on the phrase "The terms of settlement were not disclosed in full but involve the plaintiff leaving the company on agreed terms." Accordingly, it was somewhat unusual that in the related cases of *Clancy v Peamount Hospital Incorporated and Kelly v Peamount Hospital Incorporated* "Peamount case settled, both doctors reinstated" The Irish Times, May 6, 2004, it was reported that both cases were settled on terms that involved the reinstatement of the plaintiff doctors to their positions.

the contribution to his legal costs, the plaintiff received the sum of €125,000, an *ex gratia* payment of €75,000, €35,000 in respect of annual leave and €15,000 as general damages.[267] As part of the settlement, the plaintiff agreed that he had no right to take up employment with Solas, the body replacing F*ÁS*. Similarly, in terms of publicly available information, a settlement package of €200,000 was reporting as having negotiated in the earlier case of *Lennon v Association of Secondary Teachers Ireland.*[268]

Recent jurisprudence has coalesced around the question of whether there is an event pursuant to which courts can be awarded.[269] In *O'Dea v Dublin City Council*,[270] Laffoy J. emphasised that costs follow the event and that on the facts before her, there was no "event" pursuant to which costs could be awarded;[271] rather, there had been a "supervening event which renders it unnecessary for the Court to determine the issues on the application." In her judgment, Laffoy J. referred back to the *dictum* of Keane J. in *Dubcap* and noted that:

> "The factors outlined in that passage, which informed the "normal procedure" prior to the coming into operation of rule 1(4A), are the very factors which a Court is likely to have regard to in considering whether, having decided whether to grant or refuse an application for an interlocutory injunction, it is possible to justly adjudicate at that stage on whom liability for the costs of the application

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[267] Based on a salary of €90,000, *per* "Greg Craig: public servant allowed spend up to €76,000 on credit card" The Irish Independent, November 30, 2008.

[268] *Lennon v Association of Secondary Teachers Ireland* "ASTI central executive will vote on Lennon's settlement package" The Irish Times, November 28, 2003. It is reported that "On the €200,000 settlement, one ASTI source said "it was better to settle than risk a long and expensive court case."

[269] Foreshadowed by the decision of Clarke J. in *Veolia Water UK plc. v Fingal County Council* [2007] 2 I.R. 81 at 85 in which he held that in interlocutory applications which were listed in a manner similar to full hearing it would be appropriate to "consider the costs of such applications as standalone items to be assessed by virtue of the "event" being the issue which is determined by the interlocutory application."

[270] [2011] IEHC 100.

[271] In *Callagy v Minister for Education ex tempore*, Supreme Court, May 23, 2003 the court awarded costs in circumstances where the plaintiff discontinued his action. In *Garibov v Minister for Justice, Equality and Law Reform* [2006] IEHC 371 Herbert J. awarded costs on the basis of the "special circumstances" of the application, on the basis that the respondents could have rendered the application redundant some two years before they did so.

should lie.."

As neatly summarised by Laffoy J., "in every case the Court has discretion on the issue of costs, but it is a discretion which must be exercised properly."

Although the question of an "event" occurring (or not) was crucial in *O'Dea*, it is not the only factor which a court will consider. Costs were reserved in an employment related application in *A.I.B. v Diamond.*[272] The case involved a springboard injunction application against employees of the plaintiff bank. The discretion afforded by Rule 4A proved crucial. Referring to the decision of Laffoy J. in *O'Dea v Dublin City Council*,[273] Clarke J. pointed out that the real issue for the court is "whether even after an interlocutory application for an injunction has been decided one way or the other, it is possible to justly adjudicate on the liability for costs." As Clarke J. observed, there are a range of issues which may arise at the interlocutory stage and depending on those issues, a court may well take a view on "whether it is safe to deal with the question of costs."[274] In the case before him, he felt that the better course was to reserve the question of costs.

In turn, Laffoy J. referenced the decision in *A.I.B. v Diamond* in a case which also concerned a springboard injunction. The interlocutory motion in *Tekenable Ltd. v Morrissey*[275] had been settled, save as to costs, on the terms of an undertaking to be given by the defendants. As explained by Laffoy J., the amendment of R.S.C. Ord.99

> "appears to remove the discretion of the Court to postpone making a determination in relation to costs of interlocutory applications except in cases where it is not possible to justly adjudicate upon liability for costs, in which case, presumably, the

[272] *ex tempore*, High Court, Clarke J., November 7, 2011.

[273] [2011] IEHC 100.

[274] For example, in reserving costs in *Bates v Minister for Agriculture* [2009] IEHC 85, McMahon J. made reference to the unusual nature of the application, being an attempt to halt criminal proceedings until the question of an alleged failure to issue a fisheries licence, coupled with a challenge to sections of the Maritime Jurisdiction Act 2006, was determined.

[275] [2012] IEHC 391.

costs should be reserved to the trial Judge on the basis that the determination of the substantive action will produce an "event"."

Noting that there was a "wide range" of interlocutory applications governed by rule 1(4A), such as a motion for judgment in default of defence, Laffoy J. also cautioned that other situations could give rise to genuine concerns that determining the question of costs at the interlocutory stage "may perpetrate an injustice." The example advanced was that of the conclusion of an application for an interlocutory injunction. In reserving costs, Laffoy J. explained that:

> "In the case of interlocutory injunction applications the diversity of outcomes following which the Court may be asked to determine where the burden of costs should lie is a factor which is inevitably going to bear on the Court's determination."

Acknowledging that there were "undoubtedly cases in which the Court will consider it appropriate to exercise its discretion to award costs of an application for an interlocutory injunction which has come to an end", Laffoy J. did not believe on the facts before her that she should award costs in order "to avoid expressly or by implication adjudicating on any issue on which the Court is not required, and is not in the best position, to adjudicate."

The same judge adopted a similar approach in *Haughey v Synnott*,[276] observing that:

> "As experience has shown, the prospect of a court being in a position to make an award of costs in relation to an application for interlocutory injunctive relief after the determination of the application is less likely than in the case of other forms of interlocutory applications, for example, interlocutory applications dealing with procedural matters. That is because, in the case of an application for interlocutory injunctive relief, it is frequently "not possible justly to adjudicate upon liability for

[276] [2012] IEHC 403.

costs" at that juncture, so that the case comes within the saver in rule 1(4A)."[277]

As such, it is arguable that matters in relation to interlocutory injunctions generally have come full circle, and that notwithstanding the apparently mandatory nature of the amendment to R.S.C. Ord.99, costs will not be granted if there is no event or where it is not "safe" (to use Clarke J.'s word in *A.I.B. v Diamond*) to deal with costs. In other words, the introduction of the amendment to R.S.C. Ord.99 has not, in real terms, changed very much. However, this leads to a consideration of whether such an approach is adopted in relation to anti-dismissal injunctions.

3.1 The Costs of an Anti-Dismissal Injunction

As already alluded to, the normal practice prior to the amendment to R.S.C. Ord.99 in anti-dismissal applications was also to reserve costs. This was captured by Feeney J.'s remark in *Conway v An Taoiseach,*[278] on the submission by counsel for the unsuccessful plaintiff that the normal order in relation to costs was to reserve them, that "I would need considerable persuasion that what you have said is not the correct approach to be taken."

In terms of anti-dismissal applications post the amendment to R.S.C. Ord.99, it can be said that the courts tend to lean towards reserving costs. Some cases are relatively clearcut in that the court finds conclusively against a plaintiff and, to borrow the language rehearsed above, identifies an "event" pursuant to which costs can be awarded where the interlocutory application has come to an end. In some cases the disputed facts are such that matters are far from being at "an end," to adopt the wording of Laffoy J. in the *Tekenable* case.

Of the interlocutory applications determined since February 1, 2008 (the date of the amendment of Order 99), the position in respect of those cases in which a written

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[277] *ibid.*, para.5. In *Haughey,* Laffoy J. was prepared to grant the costs of interlocutory applications, with the relevant event(s) identified, although on the facts, she also granted a stay as "it is probable that, at the conclusion of the proceedings there will be financial adjustments to be made between the parties arising from the issues, possibly including the issue of costs, in the proceedings."

[278] unreported, High Court, Feeney J., April 12, 2006.

judgment is readily available (see Appendix A)[279] is set out below. It should be noted that decisions in relation to costs are, for the most part, not addressed in the substantive written decision; as such, the information set out has come from the most part from counsel and / or solicitors acting in the cases referred to. However, that a written judgment is available facilitates the identification of the legal representatives acting in a given case.

There is a group of cases in which the injunction sought was refused on the basis that statutory mechanisms provided for the claim to be brought in a forum other than the High Court. In *Nolan v EMO Oil Services Ltd.,*[280] the injunction sought was refused on the basis that, being a claim for redundancy, the matter should more properly have been litigated pursuant to the statutory mechanism. Given that element of finality, it is not surprising that costs were awarded to the defendant.[281] The matter was ultimately resolved between the parties.[282] Similarly, in *Buckley v N.U.I. Maynooth*[283] the plaintiff failed to establish a strong case as to her entitlement to an injunction, due to the existence of a statutory scheme under the Protection of Employees (Fixed Term Work) Act, 2003. Costs were awarded to the defendant.[284] A notice of discontinuance was subsequently served.[285] Somewhat surprisingly in light of the foregoing, although the availability of protection under the Protection of Employees (Fixed Term Work) Act 2003 was also fatal

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[279] It should be noted that the cases are not confined to dismissal, but cover investigations and disciplinary hearings as well. Judgments are available either through www.courts.ie, www.justis.com, on transcript or through the Law Library. The Courts Service website must come with a health warning: the way in which details of a case are recorded differs from case to case. In some cases, a fairly precise summary of the order made is recorded, together with a note as to what has happened in relation to costs. In other cases, it is simply recorded that a judgment has been delivered, with no reference to either the specific outcome or to any costs order. Records are often incomplete, in particular in relation to costs. Finally, cases which have been settled are still recorded as live (although this may well be due to the solicitors representing the parties not making the necessary filings).

[280] [2010] 1 I.L.R.M. 228.

[281] *Per* Junior Counsel for the defendant.

[282] *Per* Junior Counsel for the defendant.

[283] [2009] IEHC 58.

[284] *Per* Junior Counsel for the defendant.

[285] *Per* www.courts.ie.

to the plaintiff's interlocutory application in *Kirwan v The Mental Health Commission*,[286] the costs of the application were reserved. The case remains live.[287]

As to the approach of the courts to costs in cases other than when a statutory mechanism is available, and where an injunction was granted, the courts have tended to reserve costs.[288] Costs were reserved in the case of the plaintiff who brought a successful interlocutory application in *Glynn v HSS trading as Citywest Hotel*[289] and secured a *Fennelly*-type order. The case later settled.[290] Costs were also reserved in *Giblin v Irish Life & Permanent plc.*,[291] even though the plaintiff succeeded in obtaining an interlocutory order. The order granted was somewhat unusual insofar as it restrained the dismissal of the plaintiff, but allowed the defendant keep him on special leave with full pay in accordance with the defendant's disciplinary procedures. Laffoy J. also made reference to hearing submissions "in relation to case management of the action with a view to expediting the trial." The case was subsequently settled.[292] The plaintiff in *Burke v Independent Colleges Ltd. t/a Independent Colleges*[293] also succeeded with his application, securing an order preventing his termination other than in accordance with both the law and his contract of employment. Costs were reserved, but Laffoy J. again made reference to case managing the case "so that an expedited trial of the action may be achieved." The case also settled later.[294] Costs were also reserved by Laffoy J. in the case of *Mc Loughlin v Setanta Insurance Services Ltd.*,[295] which later settled.[296] The same

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[286] [2012] IEHC 217.

[287] *Per* Junior Counsel for the defendant.

[288] Again, it should be emphasised that this relates to cases in which a written decision was handed down in the context of a substantive interlocutory application. An injunction was granted in *Doherty v Health Service Executive* [2009] E.L.R. 131, although it was a somewhat unusual case in the instant context, as it dealt with a sanction / penalty rather than a dismissal. There is no reference to any costs order in although it is recorded by the Courts Service (www.courts.ie) that a notice of discontinuance was ultimately served in the case.

[289] unreported, High Court, Ryan J., February 26, 2010, *per* Senior Counsel for the defendant.

[290] *Per* Senior Counsel for the defendant.

[291] [2010] 21 E.L.R. 173. *Per* Junior Counsel for the defendant.

[292] *Per* Junior Counsel for the defendant.

[293] [2011] 22 E.L.R. 169.

[294] *Per* the solicitor for the defendant.

[295] [2012] 23 E.L.R. 57.

judge took the same approach in *Ryan v ESB International Ltd.*[297] in which an injunction was granted. The case was then put under case management by the court in order to progress matters and remains live. However, highlighting the slightly unpredictable approach of the courts, Hogan J. granted an injunction in *Wallace v Irish Aviation Authority*[298] "having regard to the very special circumstances of this case." Rather than reserving costs, however, he awarded them to the plaintiff.[299]

In terms of cases in which an interlocutory application was refused (other than by reason of the existence of a statutory mechanism), McGovern J. reserved costs in the case of *Doyle v Aliso.*[300] The case later settled.[301] Similarly, although the application in *Keenan v Iarnrod Eireann*[302] was refused, the costs of the application were reserved by MacMenamin J. However, MacMenamin J. also indicated that it was "...a case which requires a degree of supervision of the Court." That supervision was overtaken by the fact that the case later settled.[303] In *O'Mahony v Examiner Publications (Cork) Ltd.,*[304] (in which the question of alternative statutory relief played more of a secondary role) having refused the interlocutory relief sought by the plaintiff, Laffoy J. reserved the question of costs, but indicated that she would facilitate the plaintiff in bringing the substantive action to hearing as soon as possible. Laffoy J. acknowledged both that the amended Order 99 required that costs be ordered on interlocutory applications save in the case of possible injustice and that it was easier to make an order for costs where an injunction application had been refused. However, in reserving costs, she repeated the concerns expressed in her judgment about the application of the "strong case" test in the case before her.[305] More clearcut was *Cribbin v PLC Ingredients Ltd.,*[306] in which Laffoy J. refused the injunction

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[296] *Per* Junior Counsel for the plaintiff.

[297] [2013] IEHC 126. *Per* Junior Counsel for the plaintiff.

[298] [2012] IEHC 178.

[299] *Per* Senior Counsel for the plaintiff.

[300] [2008] IEHC 445.

[301] *per* Junior Counsel for the defendant.

[302] [2010] 21 E.L.R. 115.

[303] *per* Senior Counsel for the plaintiff.

[304] [2011] E.L.R. 1.

[305] *Per* Senior Counsel for the plaintiff.

[306] [2012] IEHC 390.

sought on the basis that the application was "misconceived." This was in part due to the fact that the plaintiff had sought, *inter alia*, an order in relation to an internal investigation "directing the reinstatement of the Investigator to complete the investigation." She accordingly awarded costs against the plaintiff (although the case later settled).[307] Contrariwise, in *Turner v O'Reilly*[308] Hedigan J. refused to intervene in a disciplinary investigation (on the basis that it would be premature to do so), but reserved costs on the basis of views he had expressed regarding an earlier attempt to dismiss the plaintiff (again, the case later settled[309]).[310]

As can be seen from the foregoing, and notwithstanding the amendment to Order 99, the courts tend to reserve costs on interlocutory anti-dismissal injunction applications other than in clearcut cases (and even then, there may be exceptions). Two related cases with contrasting outcomes demonstrate how the courts lean towards reserving costs: *McGrath v Athlone Institute of Technology*[311] and *Holland v Athlone Institute of Technology*[312] resulted in different outcomes, with an injunction refused in the former, but granted in the

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[307] *Per* Senior Counsel for the plaintiff. Although not the subject of a written judgment, Murphy J. adopted a similar approach in *Smith v Adaptive Mobile Security Ltd. ex tempore*, High Court, Murphy J., October 9, 2012, as discussed by Martin Hayden S.C. (Senior Counsel for the defendant) in a presentation to the Employment Bar Association, "Costs in interlocutory applications," November 15, 2012. Having found that the application for an injunction was premature (an investigation had not been completed) and that no actual flaw in the investigation had been identified, he awarded costs to the defendant (the case was ultimately settled). Even prior to the amendment to RSC Ord.99, the courts would award costs as necessary against a plaintiff in an unsuccessful interlocutory application: see *Hennessy v Maxwell Motors Ltd.* "BMW dealer's managing director fails to stop firm from dismissing him" The Irish Times, September 20, 2007, in which it is reported in respect of Peart J.'s decision that "Considering Mr. Hennessy's application for an interlocutory injunction solely on its merits, he felt the evidence before him did not afford a sufficient legal basis for granting the restraint sought. He granted the company the legal costs of yesterday's proceedings."

[308] [2008] IEHC 92.

[309] Per courts.ie, the case is recorded as having been settled by February 3, 2009.

[310] As a helpful counterpoint, though not the subject of a written judgment, in *Rowland v An Post, ex tempore*, High Court, Charleton J., March 30, 2009 and [2011] IEHC 272. Charleton J. granted an interlocutory injunction preventing any hearing of a disciplinary nature (although it is important to note that the plaintiff in that case was an independent contractor), but reserved costs, p*er* Senior Counsel for the defendant.

[311] [2011] IEHC 254.

[312] [2012] 23 E.L.R. 1.

latter (albeit on the basis of a 'special fact,' namely the doctrine of legitimate expectation). However, costs were reserved in both cases.[313] Once again the judge hearing the interlocutory application, Hogan J., indicated in *Holland* that he would, as necessary, "give directions to ensure that this case comes to trial in very early course." Each case was subsequently settled.[314]

Three other cases, not the subject of written decisions, bear mentioning in terms of the approaches to costs adopted in them.[315] In *Roche v Microchem Laboratories (Ireland) Ltd.*,[316] although refusing the injunction sought, Hedigan J. determined that costs would be "in the action," due to what he termed the "standoff" between the parties. The case remains live. Similarly in *McGrane v Ulster Bank*,[317] Charleton J. restrained the continuation of a disciplinary process already in train (though noted that he could not restrain the defendant bank from exercising contractual provisions) but made costs costs in the cause. The case also remains live. In *Nerney v Thomas Crosbie Holdings Ltd.*,[318] Peart J. refused to reinstate the plaintiff to his post on full pay, and awarded costs to the defendant. However, he put a stay on the payment of costs until the hearing of action.[319]

4. Factors Influencing the Course of Litigation

What is interesting about the judgments considered, however, is the fact that so many of the cases to which they relate subsequently settle. Given the tendency of the courts to reserve costs, it is worth identifying whether there are other factors may influence the course of litigation / settlement. The first of these is one already referred to, namely case management / an expedited trial of the action.

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[313] *Per* Junior Counsel for the defendant.

[314] *Per* Junior Counsel for the defendant.

[315] Although no written judgment is available in respect of these cases.

[316] *ex tempore*, High Court, Hedigan J., August 19, 2009.

[317] *ex tempore*, High Court, Charleton J., June 29, 2012.

[318] See "No injunction for ex-newspaper chief" The Irish Times, August 14, 2012.

[319] The case was subsequently heard by Laffoy J.: *Nerney v Thomas Crosbie Holdings Ltd.* [2013] IEHC 127, the court finding that "the basis on which damages for loss of remuneration should be quantified is that the plaintiff should be compensated for being deprived of the remuneration he would have received from the defendant under the Executive Contract for two years from 17th July, 2012." (para.55).

4.1 Case Management / Expedited Trial

This is not a phenomenon which has evolved since the amendment to Order 99: costs were reserved in *Bergin v Galway Clinic Doughiska Ltd.,*[320] (the interlocutory aspect of which preceded the amendment to Order 99). However, the case was ultimately resolved on the morning it was listed for hearing.[321] The relevance of this arises from the fact that Clarke J. held that the defendant was entitled to terminate the plaintiff's contract on notice and accordingly noted that "This latter point emphasises the need for an early trial in this matter and I propose putting in place measures to ensure that such occurs."[322]

4.2 Practical Realities of Litigation

Directly related to this is the fact that although going through a full plenary hearing can be extremely pressurised and stressful for a plaintiff, it may prove equally so for the individuals giving evidence on behalf of a company. These pressures are in practical terms only accentuated closer to hearing dates, and thus matters might only resolve as such a date comes into focus. Furthermore, each side will inevitably have been advised by their legal teams that there is no such thing as a 100% certain outcome in wrongful dismissal cases; weaknesses will be probed and some form of reality usually brought to bear. This is related to the next consideration, namely the costs of a plenary hearing.

4.3 Costs of Plenary Hearing

The potential costs arising on a full hearing can be extremely significant. Although there are very few cases which do go to full plenary hearing, and it is therefore hard to identify with any degree of accuracy the type of sums involved, an indication is provided by a

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[320] [2008] 2 I.R. 205.

[321] *Per* Junior Counsel for the defendant.

[322] [2008] 2 I.R. 205 at 221.

newspaper report concerning the case of *Georgopoulos v Beaumont Hospital Board,*[323] which referenced the earlier case of *O'Neill v Beaumont Hospital Board,* and in respect of which it was commented that "Mr. O'Neill lost his battle after High Court and Supreme Court hearings[324] and a four-day oral hearing at the hospital. The vast bulk of the costs, estimated at the time at around £590,000,[325] was awarded against the hospital, however and was borne by the Department of Health."[326]

4.4 A Functioning Defendant

Cases may be compromised simply because a defendant cannot function with an interlocutory order granted against them. Three examples highlight this. The first is the case of *Williamson v Payzone*,[327] an injunction was granted against Payzone restraining it from terminating the employment of its chief executive and chief financial officer, or from interfering with their carrying out their duties. The company was faced with a situation where it had to keep the executives in their roles but, more fundamentally, had to do so with its shares suspended from trading during the currency of the dispute.[328] This was clearly an untenable position for the company and the matter was ultimately settled.[329]

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[323] Hospital registrar to fight sacking" The Irish Times, April 3, 1991. See *Georgopoulus v Beaumont Hospital Board* [1998] 3 I.R. 132.

[324] Albeit that on appeal Finlay C.J. granted a limited injunction preventing certain named individuals from taking part in a specified meeting: see *O'Neill v Beaumont Hospital Board* [1990] I.L.R.M. 419. A similar type of order was made in *Cotter v Cork County Council* "Suspended council employee fails to halt disciplinary action" The Irish Times, June 14, 2008, in which the plaintiff failed in his attempt to obtain an interlocutory injunction to prevent the defendant authority from taking disciplinary proceedings against him, but did secure a limited injunction against a named county council employee from heading up the proposed disciplinary hearing.

[325] The equivalent of €749,145.

[326] See generally "The consultant who fell from favour" The Irish Times, September 8, 1989 and "Sacked surgeon appointed to Mater Private Hospital" The Irish Times, September 21, 1989.

[327] See "Court grants Payzone executives injunctions on dismissals" The Irish Times, February 2, 2008 and "Attempt to end contracts invalid – Payzone" The Irish Times, February 7, 2008.

[328] See McCrann "Heavy legal risks in firing a top executive" The Irish Times, August 22, 2008.

[329] "Payzone settles with two sacked executives" The Irish Times, October 17, 2008.

The second example is the case of *Ellis v Sir Alfred McAlpine Group plc. trading as Sir Alfred McAlpine Utility Services*[330] and arises from an injunction to prevent two British companies from removing fourteen South African and one Zimbabwean worker from jobs as electricity linesmen in Mayo. The High Court granted the injunction sought but, as subsequently reported in the newspapers, "faced with the possibility of injunctive orders and having to pay the plaintiffs until the trial, McAlpines had decided it was preferable to re-engage the workers. The company would invest time and additional cost in working with them to attain the required standard."

The third example involves Independent News and Media. The group's board took the view that its former chief executive "would seek interlocutory injunctive relief from the High Court to prevent his employment being terminated, and had engaged a firm of solicitors and senior and junior counsel to act on his behalf..." As such, it is reported that the company secretary deposed in an afffidavit in subsequent, related proceedings[331] to the fact that the board "agreed that compensation should be paid to forestall legal proceedings, which appeared to be imminent and would have been expensive and acrimonious."

4.5 Publicity

To return to Redmond's observation from earlier in this Chapter,[332] the potential bad publicity generated by applications made in open court is theoretically also an important consideration.

4.6 Influences on Settlement

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[330] "African workers granted injunction over jobs" The Irish Times, June 4, 2003.

[331] "INM board feared O'Reilly legal action on removal" The Irish Times May 1, 2012. This emerged in the context of a challenge to the payment on the ground that it was alleged to breach s.186 of the Companies Acts, in that although it had been approved by the board, it was paid before it had been approved by the company's shareholders in a general meeting.

[332] See section 2.5.5.

Against that overall background, a number of counsel acting in the cases listed at Schedule A accordingly provided answers to four questions:[333]

1. What order was made in relation to costs in the case in which you acted?
2. Was the case ultimately settled?
3. Do you believe that the costs order led to the settlement of the case?
4. If not, what do you believe led to the settlement of the case?

The answers to the first two questions have informed the exposition in relation to costs as set out above.[334] In relation to the third and fourth questions, and allowing for the fact that any views expressed are inevitably subjective and can really only provide a flavour of the drivers of what can lead to a settlement, three views emerged. These are in a sense interrelated:

1. A costs order in favour of either a plaintiff or a defendant can certainly lead to settlement;
2. More often, it is the fast-tracking of a case to an early trial which prompts an effort to resolve matters;
3. However, even if costs are reserved, the initiating and hearing of applications in themselves create what one counsel termed an "event horizon" which can ultimately lead to a resolution.

This third view is consistent with the cases identified above which were settled notwithstanding that costs were in fact reserved. It is a view which also ties in with Cox's suggestion that in many cases the application for injunctive relief itself is more important

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[333] Commonality of counsel as between different cases meant that this involved speaking to three Senior Counsel and two Junior Counsel, who between them were able to offer in-depth insights into eight of the seventeen cases listed in Schedule A, both from the plaintiff and defendant side. It was not possible to get an overview of all seventeen cases due to an unwillingness of counsel, for reasons of confidentiality or otherwise, to discuss them, or to discuss them only on the basis that their views would not be published, even anonymously.

[334] In fact, a greater number of counsel than the five referred to above (although including those five) were prepared to identify what costs orders had been made in specific cases.

in practical terms than the manner in which the courts deal with the application[335] (and as seen from the foregoing analysis, cases resolve even when the plaintiff does not succeed with the interlocutory injunction application). It that regard, it is worth considering, based on newspaper reports, the time periods concerned in terms of settling cases; the cases identified are merely an indicative sample, and are selected on the basis that a report exists both as to the application for injunctive relief and that the case has settled.[336]

5. Settlement

Starting with the shortest periods within which cases were settled from the bringing of an application for interim or interlocutory relief, the pressures which can be created by bringing an application and the opportunities which present for rapid resolution are underlined by the case of *Skelly v ACC Bank plc.*,[337] which was settled a day after an injunction was sought.[338] Equally rapidly, it was reported on December 18, 2007 that an application had been brought to court in the case of *Richardson v Cork City Football Club Investments Ltd.*[339] Some three days later, the case was reported as having been settled.[340] A few additional days were needed to resolve *McGowan v Leinster Express Newspapers Ltd.*,[341] in which the action was settled seven days after the court granted an injunction.[342] Similarly, just over a week passed from when the plaintiff in *Hunt v Wexford Festival Trust* secured an injunction[343] and when the matter was resolved.[344] *Keating v Weir & Sons Ltd.*[345] resolved ten days after an injunction was secured.[346]

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[335] Cox "*Burke v Independent Colleges* – Employment Injunctions Revisited" (2010) 4 E.L. Rev.12.

[336] It does not in any way purport to be a fully comprehensive list in that regard.

[337] "Injunction sought by ACCBank executive" The Irish Times, February 29, 2000.

[338] "Official Settles in ACC Case" The Irish Times, March 1, 2000.

[339] "Cork City manager in move to stop dismissal" The Irish Times, December 18, 2007.

[340] "Cork City manager to leave as case is settled" The Irish Times, December 21, 2007.

[341] "Newspaper manager secures injunction to stop dismissal" The Irish Times, September 26, 2008.

[342] "Ad manager settles High Court action" The Irish Times, October 7, 2008.

[343] "Wexford opera chief granted injunction to stop dismissal" The Irish Times, June 23, 2007.

[344] "Dispute between opera festival and executive settled" The Irish Times, July 3, 2007.

[345] "Goldsmith gets court order restraining jewellers from dismissing her" The Irish Times, February 13, 1999.

[346] "Goldsmith's action settled" The Irish Times, February 23, 1999.

Other cases have taken a little longer to resolve: *Comyns v Dawson*[347] was resolved in fewer than twenty days from when an order was first secured.[348] The case of *Williams v O'Shea*[349] was resolved within a month,[350] and that of *Lavery v Paramount Pictures Services UK*[351] settled after just over a month.[352]

Resolution was achieved in *Costello v Cadbury Ireland Ltd.*[353] after over two months, but the resolution was clearly being formulated prior to the terms of settlement being concluded.[354] However, that the "event horizon" created by an application may admit of a lengthier period before settlement is achieved is evident from the fact that an application had been brought to court in *Gaffney v Irish Music Rights Organisation*[355] on July 11, 2007, an interlocutory hearing leading to the granting of an injunction later that same month.[356] It was reported on October 10, 2007 that the matter had been settled.[357] The cases of *Nagle v Payzone plc.* and *Williamson v Payzone plc.*[358] took longer to settle, some eight and a half months after the court had granted injunctions to the plaintiffs.[359]

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[347] "Munster rugby coach gets order blocking filling of post" The Irish Times, May 4, 2012.

[348] "Rugby coach settles action" The Irish Times, May 23, 2012.

[349] "Young Munster's coach takes club to the High Court" The Irish Times, June 28, 2003.

[350] "Dispute over rugby job settled" The Irish Times, July 26, 2003.

[351] "PR executive initiates action to prevent termination of post" The Irish Times, January 19, 2013.

[352] "Paramount dismissal case is settled" The Irish Times February 27, 2013.

[353] "Sacked after remarks to boss at gala dinner" The Irish Times, July 21, 2006; "Court order restrains dismissal of Cadbury's executive" The Irish Times, July 22, 2006.

[354] "Court told manager may retire early" The Irish Times, August 24, 2006; "Dismissal action over remark settled" The Irish Times, October 4, 2006.

[355] "Head of music body challenges dismissal" The Irish Times July 11, 2007.

[356] "Imro must continue to pay CEO pending court action, judge rules." The Irish Times July 22, 2007.

[357] "Imro and chief executive settle legal dispute over his dismissal" The Irish Times, October 10, 2007 (although the Law Library long vacation during August and September may have been a consideration in that regard).

[358] "Court grants Payzone executives injunctions on dismissals" The Irish Times, February 2, 2008.

[359] "Payzone settles with two sacked executives" The Irish Times, October 17, 2008.

Demonstrating that matters may take considerably longer to resolve, it took almost a year before the case of *O'Dea v St. Louis High School* was settled.[360]

6. Conclusion

It is evident from the foregoing analysis that the courts are clearly influenced by a desire to "do the right thing" by a plaintiff who is at risk of losing, or who has just lost, their job in breach of contract. That has, in part, led to an uneven approach to interim and interlocutory applications:

- Although the courts have clarified how the fair case / strong case guideline works in practice, the decision in *Bergin* highlights just how one judgment or change of approach (or perhaps clarification of approach) can reset the approach to anti-dismissal injunctions. That said, since *Bergin* the courts have been consistent in treating an order seeking to prevent a dismissal as one which is mandatory in nature;
- Whether considered as either an element of the adequacy of damages or in terms of the balance of convenience, the development of the *Fennelly* order and its evolution from being an exceptional order to an order routinely granted regardless of financial circumstances highlights the unpredictability of the guidelines in their application;
- More generally the question of the adequacy of damages really highlights in many ways the unsuitability of the *Campus Oil* guidelines, particularly having regard to the inconsistent decisions in relation to the interaction between the question of the adequacy of damages and damage to reputation. It should also be borne in mind that there is a distinction between damage to reputation arising out of an allegation of misconduct and the fact that where misconduct is not (and cannot be) alleged, such considerations do not in principle arise. More broadly, how the idea of holding at an interlocutory hearing that damage to reputation is not compensatable interacts with plenary hearings is, at best, opaque.

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[360] "Teaching nun asks court to prevent her dismissal" The Irish Times, August 20, 1991; "Nun's action settled" The Irish Times, July 1, 1992.

The fine line between being refused and being granted an interlocutory injunction is well captured by Delany's observation that the plaintiff in *Orr v Zomax*[361] was "in some respects unfortunate not to obtain an order that his salary should continue to be paid pending trial."[362] This was because Carroll J. pointed to the fact that if the plaintiff was ultimately to be successful, his remedy would be in damages. Delany suggests that an alternative approach would have been similar to that adopted by Keane J. in *Shortt v Data Packaging*.[363] He held that damages would not be an adequate remedy if the plaintiff was totally without remuneration pending the trial of his action. Delany also points out that Carroll J. had taken the view that cases where there was no suggestion of a breakdown in trust and confidence had no relevance to the case before her. However, as the same author comments, "in fact as decisions in cases such as *Shortt* illustrate, a lack of trust appeared to have virtually ceased to be a factor for a court in making orders of this nature."[364]

This uncertainty is reflected in the fact that it was argued in the case of *Glynn v HSS trading as Citywest Hotel* [365] that the anti-dismissal injunction was "practically a thing of the past." Although that submission is a little too forceful, there is certainly an argument to be made that the anti-dismissal injunction, particularly at the interim and interlocutory stages, has been emasculated: as commented by Mallon, albeit in the context of straitened economic circumstances in 2012,

> "the availability of employment injunctions has been somewhat diminished. That is however not to say that they have been eliminated and it seems to me that in an appropriate case...an injunction would still be granted."[366]

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[361] [2004] 1 I.R. 486.

[362] Delany "Employment Injunctions: the Role of Mutual Trust and Confidence" (2006) 28 D.U.L.J. 363 at 373.

[363] [1994] 5 E.L.R. 251.

[364] Delany "Employment Injunctions: the Role of Mutual Trust and Confidence" (2006) 28 D.U.L.J. 363 at 373.

[365] unreported, High Court, Ryan J., February 26, 2010. As a result of the decision of the Supreme Court in *Maha Lingham v Health Service Executive* [2006] 17 E.L.R. 137.

[366] Mallon "Remedies for Termination of Employment: Injunctions" Paper delivered to the Employment Bar Association of Ireland, February 2, 2012.

What might somewhat unimaginatively be called the "rise and fall of the anti-dismissal injunction" can be referenced to contemporary papers and articles, primarily by practising barristers. In a 1997 paper, Mallon and Bolger referred to "an increase in cases where interlocutory injunctive relief is sought to restrain a purported dismissal of an employee."[367]

O'Sullivan[368] identifies the 2002 case of *Orr v Zomax Ltd.*[369] as imposing a more restrictive approach. With the benefit of hindsight, this appears to have been a little premature, with *Orr* a relatively isolated example of an injunction being refused. In fact, the amount of cases coming before the courts appeared to increase significantly from 1997, through to, and indeed beyond, the 2005 decision in *Maha Lingham v Health Service Executive.*[370] As noted by Quinn in 2011, "In the late 1990s and early 2000s the employment injunction was in its heyday." This jurisdiction "exploded into life particularly from the mid to late 1990s onwards."[371] Yet it was observed in 2009 that "Three years ago fully one third of all cases listed in the chancery motion list on a Monday were applications to restrain the termination of a contract of employment. The vacation lists during the summer were replete with urgent applications to prevent the dismissal of employees. Now the situation has changed completely."[372] Similarly, Quinn observed two years later that "There has been a sense that in the last number of years the jurisdiction to grant employment injunctions has considerably tightened up."[373] Despite this, however, it is important to note the view that "Notwithstanding what is often perceived as the blockage on the jurisprudential road caused by *Maha Lingham*, there are later cases which overcame that blockage and developed the law further."[374]

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[367] Mallon and Bolger "Injuncting the Contract of Employment" (1997) 3(3) B.R. 113.

[368] O'Sullivan "Wrongful dismissal: Recent Developments" (2004) 1(4) I.E.L.J. 116.

[369] [2004] 1 I.R. 486.

[370] [2006] 17 E.L.R. 137.

[371] Quinn "The Employment Injunction – Dead or Alive?" (2011) 8(3) I.E.L.J. 71.

[372] Dowling "The demise of the Employment Injunction" CPD Presentation, September 28, 2009.

[373] Quinn "The Employment Injunction – Dead or Alive?" (2011) 8(3) I.E.L.J. 71.

[374] Mallon "Remedies for Termination of Employment: Injunctions" Paper delivered to the Employment Bar Association of Ireland, February 2, 2012 citing, *inter alia*, *Naujoks v National Institute of Bioprocessing Research and Training Ltd.* [2007] 18 E.L.R. 25. O'Sullivan "The Employment Injunction

In light of this, it is legitimate to ask whether there are any guiding principles which could inform a more coherent, predictable approach by the courts, in particular when considering the adequacy of damages, an area which has engendered an element of unpredictability. This is the focus of the next two Chapters.

Revisited and the Ryanair Case on Industrial Relations"(2007) 2 (1) I.B.L.Q. 1 at 3 remarks that *Naujoks* "provides hope for those seeking an interlocutory injunction of the *Fennelly* type."

CHAPTER SEVEN

1. Introduction

The approach of the courts in relation to the question of damages as an adequate remedy at the interim or interlocutory stages was considered in Chapter Six.[1] An assessment of the adequacy of damages (more often than not interlinked with the balance of convenience) offers an opportunity to the courts to arrive at what they perceive to be a just result based on the facts of a given case. This leads, depending on one's view, to either much needed flexibility or unacceptable unpredictability. The purpose of this Chapter is to contrast the anti-dismissal injunction with two areas in which the courts have adopted differing, but relatively consistent, approaches to damages. The first is what might broadly be termed "commercial cases," where damages are, in the main, usually held to be an adequate remedy. The second involves cases of uncompensatable damage, in other words, situations in which damages are not considered by the courts to afford an adequate remedy for a given breach. The theme common to the latter area is, in general terms, that a property right is under attack and that the effect of such an attack cannot, indeed should not, be compensated in damages. Chapter Eight will then focus on the extent to which the approach to, in particular, uncompensatable damage (given what has already been seen in Chapter Six about the courts' approach to damage to reputation not being compensatable) might in some way be transferred to the anti-dismissal injunction. An approach based on a consideration of uncompensatable damage could be an important factor lead to much greater predictability and consistency, removing much of the uncertainty which arises when the courts are asked to consider applications for anti-dismissal injunctions, specifically at the interim and interlocutory stages.

2. Commercial Cases

In commercial cases, the courts tend to take the very raw view that damages are generally adequate as relief. In *Curust Financial Services Ltd v Loewe-Lack-Werk*,[2] a submission was made on behalf of the plaintiff that although the loss likely to be sustained by it in the

[1] See Chapter Six, section 2.2.

[2] [1994] 1 I.R. 450. See generally the analysis of this case by Delany (1993) 15 D.U.L.J. 228.

event of an injunction not being granted was simply commercial loss arising from a diminution in trade, damages were not an adequate remedy because of the difficulty in quantifying those damages. Rejecting that argument, Finlay C.J. held that "Difficulty, as distinct from complete impossibility, in the assessment of such damages should not, in my view, be a ground for characterising the awarding of damages as an inadequate remedy."[3] The caveat to this approach was the Chief Justice's observation that it had not been established as a matter of probability that there was a real risk of the financial collapse of the Curust companies if an injunction was not granted. As such, it would seem that the courts might, on the basis of cogent evidence put before them, be prepared to consider a company's collapse as a factor in assessing the adequacy of damages. This was neatly summarised by Laffoy J. in *Meade v Minister for Agriculture*:[4]

> "Where there is a risk that a commercial enterprise, whether conducted by an individual or a company, will be tipped over the edge into insolvency if an interlocutory injunction is not granted, provided there is appropriate evidence to support the existence of that risk, which would normally require up to date and precise financial data averred to by an accountant, in my view, it is open to the Court to conclude that damages would not be an adequate remedy, if the interlocutory injunction were not granted." [emphasis added]

The Chief Justice's *dictum* in *Curust* has been adopted in a number of cases.[5] Accordingly, if damages are impossible to assess, they will be inadequate as a remedy. This is highlighted by *European Paint Importers Ltd. v O'Callaghan.*[6] Peart J., dealing with a case involving a non-solicitation clause, approached the facts before him on the basis that "damages would be incapable of assessment...and not simply difficult." As such, the defendant was not able to avail itself of the *Curust* principles.[7]

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[3] *ibid.* at 468, disagreeing with the determination of Barron J. in the High Court that "damages which are not readily susceptible to accurate measurements are not usually an appropriate remedy."

[4] [2010] IEHC 105.

[5] See, for example, *Cavankee Fishing Company Limited v Minister for Communication, Marine and Natural Resources* [2004] IEHC 43.

[6] [2005] IEHC 280.

[7] See also *Murgitroyd & Co. Ltd. v Purdy* [2005] IEHC 110 and *Osmond Ireland on Farm Business Ltd. v McFarland* [2010] IEHC 295.

More often, the defendant is able to avail itself of the *Curust* principles and argue that damages are capable of assessment. In *O'Murchu t/a Talknology v Eircell Ltd.*[8] an injunction was sought in relation to a breach of an agency or distribution agreement. Speaking for the Supreme Court, Geoghegan J. stated that although "the task of assessing damages will be difficult, this does not mean that it cannot be done."[9] In fact, the Supreme Court took a rather extreme view in that case, holding that even if the plaintiff went out of business, its losses could be assessed in money terms. As such, damages would be an adequate remedy. Such an approach does not appear to take into account the many intangibles of a company going out of business: the directors' professional reputations, their potential exposure in an investigation by a liquidator which might ultimately lead to a restriction or disqualification application and so on. However, a similar view was taken by Peart J. in *Wesumat (Ireland) Ltd. v Topaz Energy Ltd.*,[10] namely that losses would be clearly quantifiable and purely commercial in nature if the plaintiff company was wound up. It is difficult to reconcile these cases with the approach in *Curust* and *Meade* to the effect that if cogent evidence is put to the court of a company going into liquidation, an injunction may well be granted.

Something of an explanation as to the distinction was advanced by Irvine J. in relation to an application by a group of dentists to block the Health Service Executive from applying cutbacks in free dental treatments for medical card holders. The dentists in *Lynch v HSE*[11] had argued that some of them could be forced to close their practices, with associated redundancies, as a result of reduced income under the scheme. However, Irvine J. noted there was no principle of law which established that insolvency or going out of business could not be adequately remedied by an award of damages. In that regard, she was at odds

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[8] [2001] IESC 15. See also *BUPA Ireland Ltd v Health Insurance Authority* [2005] IEHC 453.

[9] In *Sheridan v The Louis Fitzgerald Group Ltd.* [2006] IEHC 125, Clarke J. refused the injunction sought on the basis that "the grant of an injunction which would require the parties to 'live together' in the sense of making day to day business decisions as to how the premises as a whole should operate, would be fraught with the type of difficulties identified by Geoghegan J. in *Ó Murchú.*"

[10] [2008] IEHC 185.

[11] [2010] IEHC 346.

with the approach of Laffoy J. in *Reid v Health Service Executive*,[12] as referred to in her judgment. However, Irvine J. justified her approach by explaining that:

> "insolvency or going out of business *per se* will not result in irreparable harm that cannot be adequately compensated by damages. However, there may be special features of a particular case which could convince the court that the closure of a business would constitute irreparable harm and damages would not be an adequate remedy."[13]

She also refused to take into account, in considering the adequacy of damages, the fact that staff could be made redundant if the injunctions sought were refused. She acknowledged that this might appear harsh, but as she explained, "the effect of the alleged breach of contract on third parties is not a matter which can be taken into account when considering whether damages are an adequate remedy."[14]

Moreover, the courts have not adopted a uniformly uncompromising approach in relation to the adequacy of damages to what might broadly be termed commercial agreements. In *Mantruck Services v Ballinlough Electrical Refrigeration Co Ltd.*[15] the Supreme Court contrasted the position of a well-established company with that of a growing business. McCarthy J. observed that if the injunction in question was to be continued, the defendant, a growing business, would suffer damage which "would be very difficult to assess in money terms."[16] Factors such as a broad trading base which could be jeopardised if an injunction was not granted were relevant to the granting of an injunction by Laffoy J. in *O'Sullivans Pharmacies and Beauticians (Sarsfield Street) Ltd. v Health*

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[12] [2010] IEHC 292.

[13] [2010] IEHC 346 at para.27.

[14] In *Relax Food Corporation Ltd. v Brown Thomas & Co Ltd.* [2009] IEHC 181, Laffoy J. noted that "if the employees were to be made redundant and if liability for 40% of the statutory redundancy payments, which would not be recoverable from the State, fell on the plaintiff, as the employer, the plaintiff would be entitled to recover that sum from the defendant by way of damages, if the plaintiff were successful in this substantive action."

[15] [1992] 1 I.R. 351.

[16] *ibid.* at 359.

Service Executive.[17] An ongoing trading relationship of indefinite duration was a key element of the decision of MacMenamin J. to grant an injunction in *Whelan Frozen Foods Ltd. v Dunnes Stores*.[18] However, as explained by Laffoy J. in *Relax Food Corporation Ltd. v Brown Thomas & Co Ltd.*,[19] "Those cases are also distinguishable on the basis that what was in issue was the alleged unilateral variation of a term in an ongoing contractual relationship, not the termination of such relationship."

Nevertheless, it appears that the harm potentially experienced by a corporate or commercial entity is treated very differently to the potential harm to an individual employee as a result of the termination of their contract of employment. What these cases do highlight is that it is possible to adopt a relatively consistent approach to the adequacy of damages in the context of an interim or interlocutory injunction, thereby engendering a measure of predictability, even if the price of that predictability is what seem to be fairly harsh outcomes (and as is also evident from the foregoing, that predictability, and the reasons underlying the courts' approach in that regard, is something which has taken some time to evolve).

At the other end of the spectrum are cases in which injunctions are granted almost as a matter of course, as a result of a consideration of the question of the adequacy of damages. These involve rights which the courts "normally protect."

3. Rights "Normally Protected"

There are various areas in which injunctions are more often granted than not. This is captured by the remarks of Clarke J. in *Metro International SA v Independent News & Media plc*.[20] Clarke J. accepted that a court's primary consideration in assessing the adequacy or otherwise of damages at the interlocutory stage is the loss that might be sustained in the period between the refusal of an interlocutory injunction (or indeed its grant and the reliance by a defendant upon the undertaking as to damages given to secure

[17] [2008] IEHC 106.

[18] [2006] IEHC 171.

[19] [2009] IEHC 181.

[20] [2006] 1 I.L.R.M. 414.

it) and the trial. However, he also took the view that in assessing the adequacy or otherwise of such damages, a court should have regard to whether the right in respect of which an interlocutory injunction was sought "is of a type which the court will normally protect by injunction even though it might, in one sense, be possible to value the extinguishment or diminution of that right in monetary terms."[21] One of these "types" is the area of intellectual property.

4. Intellectual Property

4.1 Passing Off

An application of the *Campus Oil* principles in passing off cases will generally lead to a holding that damage is uncompensatable. In *Mitchelstown Co-Operative Agricultural Society Ltd v Golden Vale Products Ltd.*,[22] Costello J. referred to the fact that it was "axiomatic that in most passing-off actions damages are not an adequate remedy for a successful plaintiff." A similar point was made by Laffoy J. in *DSG Retail Ltd. v PC World Ltd.*,[23] in which she made reference to "the normal axiom in passing off actions, that damages would not be an adequate remedy for the plaintiff."[24]

However, these *dicta* must be treated with a degree of caution: in *Contech v Walsh*,[25] Finlay Geoghegan J. took the view that the court should look at the facts of each case to see whether or not damages would be an adequate remedy. More broadly, in *Jacob Fruitfield Food Group Ltd. v United Biscuits (UK) Ltd.*[26] Clarke J. rejected the suggestion that these cases established that there was a rule of law to the effect that an interlocutory injunction will always be granted in such cases on the basis that the plaintiff will

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[21] *ibid.* at 424.

[22] unreported, High Court, Costello J. December 12, 1985.

[23] [1998] IEHC 3.

[24] Although in that case, no injunction was granted in circumstances where undertakings were furnished by the defendant.

[25] [2006] IEHC 45.

[26] [2007] IEHC 368.

inevitably suffer uncompensatable damage. Rather, he summarised the position as being that:

> "...a proper application of the principles applicable to a consideration of the balance of convenience and the adequacy of damages will normally, in a passing off case, lead to the conclusion that the plaintiff will suffer uncompensatable damages and that the balance of convenience will favour the grant of an injunction. The factors which lead to such a conclusion may vary from case to case."[27] [emphasis added]

There are two such interlinked factors which are of crucial importance in passing off cases. The first is damage to goodwill. Goodwill is a property right, and it is such a right which is the second factor. As remarked by Clarke J. in the *Jacob Fruitfield* case,[28] "a claimant's goodwill is a property right which should not lightly be taken to be capable of being diminished or interfered with in return for damages."

As Carty has pointed out, goodwill is based on a plaintiff's reputation, which thus needs protection. As such, this head of damage "is useful when an interlocutory injunction is sought, as in such a case the quantification of damages is difficult"[29] (although it should be remembered that, as was held in *Curust Financial Services Ltd v Loewe-Lack-Werk*[30] difficulty—as opposed to complete impossibility—in the assessment of such damages is not a ground for characterising the awarding of damages as an inadequate remedy). As seen in Chapter Six,[31] the issue of reputation is also central in employment cases, particularly where misconduct is alleged. With the exception of the decisions of Carroll J. in *Foley v Aer Lingus Group*[32] and Finnegan P. in *Joyce v Health Service Executive*,[33] judges have been prepared to hold that damage to reputation can lead inexorably to an

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[27] *ibid.*, para.4.2.

[28] *ibid.*

[29] Carty "Heads of Damage in Passing Off" (1996) E.I.P.R. 18(9) 487

[30] [1994] 1 I.R. 450 at 468, *per* Finlay C.J. See generally the analysis of this case by Delany (1993) 15 D.U.L.J. 228.

[31] See Chapter Six, section 2.2.4.

[32] [2001] 12 E.L.R. 193.

[33] [2005] IEHC 174.

injunction being granted on the basis that such damage is not compensatable (although ironically in defamation actions it is very rare for judges to grant injunctions given the emphasis placed by the courts on freedom of expression. As explained by Kelly J. in *Reynolds v Malocco*,[34] "damages are the normal remedy for defamation and injunctions are not.")

More broadly, drawing from the *dictum* of Clarke J. in the *Jacob Fruitfield* case, the idea that interference with a property right "should not lightly be taken to be capable of being diminished or interfered with in return for damages" is an important one. This was an idea to which Clarke J. returned in *A.I.B. v Diamond,*[35] noting that the courts "have always been anxious to guard property rights in the context of interlocutory injunctions."[36]

The extent to which employment can be considered a property right will be considered in Chapter Eight.

4.2 Trade Marks

In *General Electric Company (of USA) v General Electric Company Ltd.*[37] Diplock L.J. reviewed the history of the development of relief for infringement of trade marks. He described the interest of a user of a trade mark at common law as a proprietary interest. Considering Diplock L.J.'s judgment in *Tommy Hilfiger Europe Inc. v McGarry (T/A Lifejacket),*[38] Finnegan J. observed that the user of a trade mark had a proprietary interest in the goodwill of his business, of which the trade mark formed part. As such, the infringement of any such right "is not a tort but an action based on interference with a

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[34] [1999] 2 I.R. 203 at 218.

[35] [2011] IEHC 505.

[36] Clarke J. gave the very specific example of the notion that "declining to enforce property rights on the basis that the party who has lost its property can be compensated in damages would amount to a form of implicit compulsory acquisition," even if in theory it could be possible to measure the value of property lost.

[37] [1972] 2 All E.R. 507 at 518-520.

[38] [2009] 1 I.L.R.M. 161.

proprietary interest."[39] This is reflected in section 18(2) of the Trade Marks Act 1996, which provides that:

> "In an action for infringement of a registered trade mark all such relief by way of damages, injunctions, accounts or otherwise shall be available to the proprietor as is available in respect of the infringement of any other property right."

It is evident from this that a property right underpins the approach of the courts to trademarks. This again points to a consideration of the extent to which the acknowledgment of property rights in the employment relationship could assist the courts in developing a more cohesive set of principles which could be followed.

4.3 Industrial Designs and Copyright

In similar vein, s.57(3) of the Industrial Designs Act 2001 and s.127(2) of the Copyright and Related Rights Act 2000, bearing almost identical wording to that in the trade marks legislation, provide that relief "by way of damages, injunction, account of profits or otherwise is available to the plaintiff as it is available in respect of the infringement of any other property right."

It is not only in respect of intellectual property that damages tend not to be viewed as an adequate remedy. A similar view is evident in the courts' approach to real property and, in particular, to issues involving, broadly, land.

5. Trespass

The idea of special protection being afforded to property rights is also evident from a consideration of cases in which interlocutory injunctions are sought in respect of trespass. As explained by Bland, regardless of how strong a plaintiff's claim may seem, if damages afford an adequate remedy, an interlocutory injunction will not in the normal course be

[39] *ibid.* at 166.

granted.[40] As he notes, however, "it is axiomatic that damages are not an adequate remedy in trespass actions, and damages are no remedy for infringement of an asserted public right." The attitude of the courts to applications for interlocutory injunctions where trespass is alleged is succinctly summed up by Laffoy J.'s dictum in *Pasture Properties v Evans*:[41] "I think it is axiomatic in trespass cases that damages are not an adequate remedy."

This robust approach, where a plaintiff clearly has good title and the defendant's trespass is indisputable, is also evident in England. As stated by Balcombe L.J. in the case of *Patel v WH Smith (Eziot) Ltd.,*[42] "It seems to me that, first, *prima facie* a landowner whose title is not in issue is entitled to an injunction to restrain trespass on his land whether or not the trespass harms him."[43] In *Keating & Co. Ltd. v Jervis Shopping Centre Ltd.*[44] Keane J. repeated almost verbatim Balcombe L.J.'s *dictum.*[45] Having set out the principles articulated in *Patterson v Murphy*[46] by Costello J., and reinforcing Keane J.'s stance, Feeney J. accepted in *McKeever v Hay*[47] that in circumstances where the plaintiff's rights had been infringed, and a (continuing) trespass admitted, "the starting point for consideration by this Court is that the plaintiff is *prima facie* entitled to an injunction." As Feeney J. explained, the plaintiff would only be deprived of this entitlement if very exceptional circumstances could be identified. In saying so, he also acknowledged the principle that damages should not be deployed to, in effect, legalise the commission of a wrong by a defendant who is willing to pay such damages.

Again, the underlying rationale for such an approach is evident: the courts are dealing with an assertion of property rights. This is clear from the earlier decision of Kenny J. in

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[40] Bland *Easements and Profits a Prendre* 2nd ed. (Thomson Round Hall Dublin, 2009), p.396 citing, in respect of public rights, *Dunne v Dun Laoghaire-Rathdown County Council per* Hardiman J. [2003] 1 I.R. 567 at 579.

[41] [1999] IEHC 214.

[42] [1987] 1 W.L.R. 853; [1987] 2 All E.R. 569.

[43] *ibid.* at 858; *ibid.* at 573.

[44] [1997] 1 I.R. 512.

[45] *ibid.* at 518.

[46] [1978] I.L.R.M. 85 at 99.

[47] [2008] IEHC 145.

Cullen v Cullen[48] in which, although refusing an injunction on the facts, he acknowledged that he was "denying the plaintiff one of the incidents of his fundamental right of property."[49]

6. Nuisance

In *Halpin v Tara Mines Ltd.*[50] Gannon J. took it, as a general proposition, to be the law that anyone who repeatedly interfered with "the ordinary comfort of the occupier of such property or in such a way as to cause physical damage to the property of his neighbour" would be subject to a court order restraining such activities "whether accompanied or not by an award of damages by way of recompense." Again, the language used by Gannon J. very much centres on property.

7. Sale of Land

The adequacy (or more specifically, lack thereof) of damages as a remedy in relation the sale of land is well established. This is well exemplified by the English case of *Attorney General v Blake*,[51] from which Lord Nicholls' *dictum* bears setting out:

> "It is equally well established that an award of damages, assessed by reference to financial loss, is not always 'adequate' as a remedy for a breach of contract. The law recognises that a party to a contract may have an interest in performance which is not readily measurable in terms of money. On breach the innocent party suffers a loss. He fails to obtain the benefit promised by the other party to the contract. To him the loss may be as important as financially measurable loss, or more so. An award of damages, assessed by reference to financial loss, will not recompense him properly. For him a financially assessed measure of damages is inadequate."[52]

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[48] [1962] I.R. 268.

[49] *ibid.* at 289.

[50] [1996-7] I.L.R.M. 28.

[51] [2001] 1 A.C. 268.

[52] *ibid.*at 282.

Lord Nicholls advanced the specific example of a contract for the sale of land. As he explained, "The buyer of a house may be attracted by features which have little or no impact on the value of the house. An award of damages, based on strictly financial criteria, would fail to recompense a disappointed buyer for this head of loss."[53] As such, the primary response of the law is to ensure compliance with the contract in question. He cited the example of the case of *Beswick v Beswick,*[54] in which an order was made directing specific performance of a contract to make payments of money to a third party. As Lord Nicholls explained, the law recognised that "the innocent party to the breach of contract had a legitimate interest in having the contract performed even though he himself would suffer no financial loss from its breach."[55]

Lord Nicholls also acknowledged the primacy of property rights, stating that "Property rights are superior to contractual rights in that, unlike contractual rights, property rights may survive against an indefinite class of persons." In so saying, he queried why "a violation of a party's contractual rights should attract a lesser degree of remedy than a violation of his property rights."[56] Whether or not this is accepted, it appears clear that considerable importance is attributable to property rights such that remedies other than damages are available.

8. Conclusion

The foregoing evinces a relative coherence of approach by the courts when it comes to approaching a violation of property rights. In terms of borrowing from these areas to inform an approach to employment, a difficulty with all of the areas set out above is that, although they do not concern negative obligations as such; rather, they involve prohibitory injunctions. As is evident from the *Maha Lingham / Bergin* strand of caselaw,

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[53] *ibid.*

[54] [1968] A.C. 58.

[55] [2001] 1 A.C. 268 at 282.

[56] Referring to Smith "Disgorgement of the profits of Breach of Contract: Property, Contract and 'Efficient Breach'" (1995) 24 Can.B.L.J. 121, wherein the author queried why it should be any more permissible to expropriate personal rights than it is permissible to expropriate property rights.

the anti-dismissal injunction is treated as being mandatory in substance. Nevertheless, with that caveat in mind, the next Chapter considers the extent to which the anti-dismissal injunction can be cast as one based on a property / proprietary right such that the courts could make a statement equivalent to the one that "a claimant's goodwill is a property right which should not lightly be taken to be capable of being diminished or interfered with in return for damages."[57] In doing so, it will be argued that much greater consistency and certainty could be brought to interlocutory applications in terms of probable outcomes.

[57] *Per* Clarke J. in *Jacob Fruitfield Food Group Ltd v United Biscuits (UK) Ltd.* [2007] IEHC 368.

CHAPTER EIGHT

1. Introduction

Building on Chapter Seven, this Chapter considers in the first instance how, by conceptualising employment as a property right, it might be possible to argue that it is almost "axiomatic" that damages are not an adequate remedy for the breach of such a right and that accordingly an interlocutory injunction will in the normal course issue to prevent a wrongful dismissal. Such an approach could generate a degree of consistency in terms of how the courts approach anti-dismissal injunctions.

There are a number of stages to this approach: the first is to review the idea of employment as a property right. The question is then posed as to who actually possesses the property in employment: the employee or the employer. The Chapter then considers the extent to which enhanced constitutional protection may be available to an employee bringing an anti-dismissal injunction on the basis that a property right is at stake, and how this might interact with any property rights residing with an employer. It also considers by way of comparative analysis whether anything might usefully be learnt from other common law jurisdictions in that regard, specifically England and Wales, Australia and Canada. The practical aspects of how reliance on a proprietary right might actually play out in terms of any anti-dismissal injunction are then considered, particularly by reference to its interaction with the *Campus Oil* guidelines. The final consideration in this Chapter is how an approach more analogous to the "commercial cases" approach as considered in Chapter Seven might bring greater consistency and certainty to interlocutory anti-dismissal applications.

2. Employment as a Property Right

The need to consider different perspectives on the employment relationship is well captured by Njoya's observation in the context of a consideration of the employment relationship in the Anglo-American firm that "as the conceptual foundations of the employment relationship have come under detailed scrutiny during the evolution of labour law, one recurring theme has been the inability of 'contract' to fully describe that

relationship."[1] This section considers the conceptualisation of employment as a property right (although such consideration does not preclude employment having a multifaceted character).

In 1967, Kelly suggested that "the right to dispose of or withdraw one's labour is probably better classified as a property right."[2] He also remarked that the matter had not at that stage received "close consideration" from an Irish court. This still holds true today.

The modern emphasis in terms of the employment relationship has been on that relationship as a contractual construct.[3] This is not altogether unsurprising: it is much easier to conceptualise employment as a contract between two parties rather than as a more nebulous property right. It is difficult to conceive of a job as a piece of property; it is not like land.[4] It is not something which is bought or sold.[5] However, as explained by Fennelly J. in *Dellway Investment Ltd. v National Asset Management Agency*,[6] the property rights of the citizen are not limited to land, "real property" or monies. He acknowledged that it has long been recognised that property rights extend to established contractual rights, to "the right to earn a living, to the rights to one's entitlements under an appointment to an office or under a contract of employment, and to rights to pensions, gratuities or other emoluments for which one has contracted, or has earned."[7] This was a view echoed by Hardiman J. in the same case, referring to the observation by O'Keeffe P.

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[1] Njoya *Property in work: the employment relationship in the Anglo-American firm* (Ashgate, London, 2007), p.48, citing Freedland *The Personal Employment Contract* (O.U.P., Oxford, 2003).

[2] Kelly *Fundamental Rights in the Irish Law and Constitution* 2nd ed. (Allen Figgis & Co., Dublin, 1967), p.186.

[3] See Chapter Two.

[4] When it came to reviewing the constitutional provisions on property, the All Party Oireachtas Committee on the Constitution was only asked to examine "the need for updating provisions which pertain to planning controls and infrastructural development." See *Ninth Progress Report Private Property* (2004).

[5] Although footballers and other sportspeople are "bought" and "sold," it is the individual, rather than a job, which is at the centre of that transaction.

[6] [2011] IESC 14.

[7] Citing *East Donegal Co-operative Marts v Attorney General* [1970] I.R. 317 and *Cox v Ireland* [1992] 2 I.R. 503.

in *East Donegal Co-Operative Ltd. v A.G.*[8] that "Property rights may include rights other than ownership of immovables, such as contractual rights..."[9]

Hepple and O'Higgins observe that by classifying the employment relationship in contractual terms, "the judiciary has rendered itself incapable of protecting the worker's 'property' in his job, that is such valuable assets as his seniority and pension rights."[10] In passing, it should be noted that this is a very narrow view of the property which may be held in a job; inasmuch as the courts acknowledge that employment is a property right, they are not as restrictive in their definition by confining it to "seniority and pension rights."

In fact, the view is even more restrictive if one considers that an employer may also have property in the job it offers to an employee. Instinctively, however, there is an assumption that any proprietary rights reside with the employee. This is crystallised in the fact that most employees refer to "my job" rather than "my employer's job," or even "our job." As such, the employee is the starting point for a consideration of property rights in employment.

2.1 An Employee's Right

The extent to which the right to employment is a property right has long been the subject of academic analysis, though relatively less judicial interest or curiosity. A 1930 note of a decision in the United States involving the Brotherhood of Railway & Steamship Clerks refers to the fact that "the court held that an employee has a property right in his employment. Almost of necessity the case leads to the yet broader view that one's right of free access to the employment market is property."[11] Dealing with the quite reasonable

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[8] [1970] I.R. 317.

[9] *ibid.* at 332.

[10] Hepple and O'Higgins *Employment Law* 2nd ed. (Sweet & Maxwell, London, 1976), p.46.

[11] The case noted being *Texas & NOR Co. v Brotherhood of Railway & Steamship Clerks*, 33 F (2d) 13, in "Recent Important Decisions Equity-Injunction-Property in Employment" (1930) 28(5) Michigan Law Review 261.

concern that it is difficult to conceptualise employment as property, the same writer notes that:

> "the courts would have less trouble getting over the property bump if they would call every right having commercial value 'property,' or instead of using property, would use 'interest of substance,' or better yet, say that equity protects the pocketbook."[12]

The conceptualisation of employment rights as property rights held by an employee was also a view which found favour with Kahn-Freund. He identified an analogy "between ownership of tangible assets and tenure of employment."[13] As he explained, for the large majority of people their job is their principal asset, into which they have invested their skill and their strength.[14] The question is whether employment can be classified as an actual property right rather than simply analogous to one.

As already touched on, the courts have acknowledged that property rights extend to contractual rights, including contracts of employment.[15] The practical effect of this is illustrated by the case of *Wynes v Southrepps Hall Broiler Farm*,[16] in which Sir Diarmuid Conroy observed that just as a property owner was entitled to compensation upon being deprived of his property, so too "a long term employee is considered to have a right analogous to a right of property in his job…" More forcefully, and again moving beyond the idea of an analogous right, as Hamilton C.J. pointed out in *Re Article 26 and the*

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[12] *ibid.*

[13] For present purposes, 'tenure' is treated in the generic sense, rather than the formal sense when applied in particular to university positions, with associated complexities: see *Cahill v Dublin City University* [2007] 19 E.L.R. 113 and [2010] 21 E.L.R. 109.

[14] Khan Freund *Labour Law: Old Traditions and New Developments* (Clarke, Irwin & Co., Toronto, 1968) as quoted in Njoya *Property in work: the employment relationship in the Anglo-American firm* (Ashgate, London, 2007), p.2.

[15] Although as seen in Chapter Four, section 14.1, whether such a right is contemplated by the provisions of Courts (Supplemental Provisions) Act 1961 is relevant to the consideration of whether the Circuit Court in fact has jurisdiction to grant anti-dismissal injunctions.

[16] (1968) 3 I.T.R. 407.

Employment Equality Bill 1996,[17] the protection afforded by the Constitution goes beyond the actual right to work. As he explained,

> "It is also clear that certain rights associated with these rights, such as the right to a pension, gratuity or other emolument or the right to the advantages of a subsisting contract of employment are property rights which the State is obliged to protect, so far as practicable, from unjust attack."[18]

This comment focuses primarily on subsisting rights, rather than rights in relation to or upon a purported termination (although the doctrine of unaccepted repudiation means that for present purposes, there is something of an equivalence between the two), but is nevertheless useful in advancing the argument that employment is a property right.[19] The advantage of focusing on a property right in employment – and a crucial advantage in the context of this analysis - was identified by Collins in 1991. He wrote that the assertion by employees of property rights in a job was essentially a rhetorical device to express "the idea that employees should enjoy greater job security than that accorded to them by the common law's doctrine of termination at will."[20]

The difficulty with this otherwise attractive argument is that it overlooks the property rights which reside with an employer.

2.2 An Employer's Right

The foregoing is all essentially predicated on an understanding of the property right in employment residing with the employee. However, in his consideration of the employment relationship in English and American law and culture, Steinfeld notes that

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[17] [1997] 2 I.R. 321.

[18] *ibid.* at 342, citing *Cox v Ireland* [1992] 2 I.R. 503 at 522.

[19] See also *Scally v Minister for Environment* [1996] 1 I.R. 367 at 378 in which Lardner J. noted that the plaintiff architects alleged that their right to practise their profession was a property right.

[20] *Per* Anderman "Termination of Employment: Whose Property Rights?" in Barnard, Deakin & Morris eds. *The Future of Labour Law* (Hart Publishing, Oxford, 2004), p.101, citing Collins *Justice in Dismissal: The Law of Termination of Employment* (Clarendon Press, Oxford, 1992), p.88.

the master and servant laws were understood to be based on a "kind of property that employers enjoyed in the services of their workers, a legal right to the exclusive use and enjoyment of their workers' energies for the period or purposes specified in the agreement."[21] [emphasis added]

In fact, the idea of a property right residing with an employer is not particularly novel; as seen in Chapter Two,[22] the idea underlying offices were that they were property held of the Crown or a corporation. Property residing with an employer also manifests itself in the action *per quod servitium amisit*. As explained by O'Keeffe P. in *Chapman v McDonald*,[23] "The action for loss of services is based on a quasi-proprietary interest which a master has in the services of one who is *de facto*, even if not *de jure*, his servant."[24] The action was also considered in *A.G. v Ryan's Car Hire Ltd.*[25] Reviewing authorities from, in particular, Australia and England, Kingsmill Moore J. referred to the case of *Commonwealth v Quince*,[26] in which two judges in the High Court in Australia observed that the *per quod* rule was an exception to the general rule that a person has no claim against, and cannot recover from, another merely because that other person has committed a tort against a third person which indirectly injured the first person. The *per quod* action was "maintainable where as a result of a tortious action a master has lost the services of one who was *de facto*, even if not *de jure*, his servant."[27] In *Attorney General for New South Wales v Perpetual Trustee Co. Ltd.*,[28] Viscount Simonds held that the *per quod* action

> "was based on the proprietary interest which a master had in the services of his servant and originated in the rules of law applicable to villein status. It did not depend on a contract of service but on the fact of service, though, when the

[21] Steinfeld *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870* (University of North Carolina Press, Chapel Hill, 1991), p.4.

[22] See Chapter Two, section 5.

[23] [1969] I.R. 188.

[24] *ibid.* at 191.

[25] [1965] I.R. 642.

[26] (1944) 68 C. L. R. 227.

[27] *per* Kingsmill Moore J. in *A.G. v Ryan's Car Hire* [1965] I.R. 642 at 659.

[28] [1955] A.C. 457.

relationship of master and servant became less a matter of status and more a matter of contract, the action was extended to cover cases of enticement of a servant and malicious procurement of a breach of contract for personal service."[29]

Despite this, as Anderman observes, a lot less effort has been made to look at the property rights of employers compared to employees.[30] There is a reason for this, related to the considerations in Chapter Two as to the construct of the employment relationship: as Anderman explains, from the late nineteenth century and the abandonment of the rules of status, contract law was looked at "in order to provide a functional substitute for the extension of the 'property' rights of the employer into a managerial prerogative."[31] He argues that the contract of employment in fact limited an employer's property rights, and suggests that the introduction of statutory remedies in the form of unfair dismissals legislation "was meant substantially to restrict the exclusive property right of the employer to dispose of jobs via dismissals..." (with a similar function being fulfilled in continental EU member states by company law).[32] On his analysis, there is an element of giving and taking: giving, in the sense of an acknowledgment of a property right in an employer, but taking in the sense of effectively emasculating that right through the deployment of contract law and through statute law.

That a right may be emasculated does not of course mean that it ceases to exist. In fact, the idea of a property right employment residing with the employer is not a novel concept

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[29] *per* Kingsmill Moore J. in *A.G. v Ryan's Car Hire* [1965] I.R. 642 at 661. Similarly, as noted by Kingsmill Moore J., (p.662) in *Inland Revenue Commissioners v Hambrook* [1956] 2 Q. B. 641 the Court of Appeal, placed reliance on Blackstone, who, "discussing a master's action for enticing away his servant (1 Comm. 429), had said:—"The reason and foundation, upon which all this doctrine is built, seems to be the property that every man has in the service of his domestics, acquired by the contract of hiring and purchased by giving them wages,"" In the 2012 case of *Barclay v Penberthy* [2012] HCA 40, the High Court of Australia confirmed that an action for *per quod servitium amisit* continues in Australia.

[30] Anderman "Termination of Employment: Whose Property Rights?" in Barnard, Deakin & Morris eds. *The Future of Labour Law* (Hart Publishing, Oxford, 2004), p.102.

[31] *ibid.*, p.105.

[32] *ibid.*, p.106.

in Irish law, albeit that it has not been subject to very detailed analysis.[33] In *Re Article 26 and the Employment Equality Bill 1996,*[34] the Supreme Court accepted that the right to carry on a business and earn a livelihood was an employer's right (although the authors of Kelly's *The Irish Constitution* suggest that the decision "may be regarded as perhaps unduly protective of the right of employers to earn a livelihood[35]). In so saying, the Supreme Court was not asserting that such a right was exclusive to employers. Rather, it was acknowledging that employers have such a right. This has echoes of an earlier *dictum* of Budd J. in the 1957 case of *Brendan Dunne Ltd. v Fitzpatrick.*[36] In that case, Budd J. referred to Art.40.3 as being one of the provisions of the Constitution which preserved the rights "of the employer and worker respectively to deal with and dispose of their property and labour as they will without interference unless such interference be made legitimate by law."[37] [emphasis added]

The idea of a bilateral character to a property right in employment is articulated, if somewhat awkwardly, in the Australian text *Australian Property Law*:

> "To the extent that he propertises this resource [his 'labour-power'] through the contract of employment, the employee has a 'property' in his labour power and arguably, therefore, in his job. The contract certainly underlines the employee's control over the access which strangers may have to the benefits of his labour-power. For precisely the same reason the contract of employment, being bilateral in character, confers also on the employer a 'property' in the employee's labour-power."[38]

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[33] In a newspaper report of the case of *Graham v CIE*, it is clear that the submission was made on behalf of the defendant that "CIE had constitutional rights also": *Graham v CIE* "Employee gets injunction against CIE." The Irish Times, April 8, 1981.

[34] [1997] 2 I.R. 321 at 365.

[35] Hogan & Whyte *J.M. Kelly: The Irish Constitution* 4th ed. (Lexis Nexis: Butterworths, Dublin, 2003), p.1432.

[36] [1958] I.R. 29.

[37] *ibid.* at 34. Budd J. made a distinction in that passage between property and labour, whereas this Chapter argues that labour can be considered a property right.

[38] Bradbrook, MacCallum & Moore *Australian Property Law* (LBC Information Services, N.S.W., 1996), para. 1.34.

The same authors manage to neatly summarise the idea of property as a right residing in both employer and employee with the observation that "The employment context demonstrates that two persons can both claim 'property' in the same resource: here the resource of labour-power generates two sets of choses in action."[39] Similarly, Njoya refers to property rights as a bundle of rights, "which may be shared, or held concurrently, by different stakeholders in the firm." Such rights are "more often relative than absolute."[40]

This focus on property rights from an employer's perspective can be interwoven with some of the analysis in Chapter Three in relation to the theories of repudiation.[41] Anderman argues that the elective theory of termination rolls back the implicit property rights assumptions in the unilateral theory of termination. He also suggests that the question of the retention of trust and confidence (as considered in Chapter Two[42]) by an employer in an employee is arguably a "residue of employer 'property' rights thinking" as much as a feature of contract law.[43] In his view, an implied term such as trust and confidence continues "to perpetuate the image of the employer as the sole owner of the business as well as to reinforce the power inherent in that property right."[44] (although this is predicated on the idea of trust and confidence being unidirectional; as argued in Chapter Two, trust and confidence must be understood to reside in both employer and employee).

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[39] *ibid.*

[40] Njoya *Property in work: the employment relationship in the Anglo-American firm* (Ashgate, London, 2007), Preface.

[41] See Chapter Three, section 6.

[42] See Chapter Two, section 4.

[43] Anderman "Termination of Employment: Whose Property Rights?" in Barnard, Deakin & Morris eds. *The Future of Labour Law* (Hart Publishing, Oxford, 2004), p.109.

[44] *ibid.*, p.108. Although it can hardly be classed as a unifying theme, it is nevertheless highly interesting that three apparently disparate strands of employment law, *viz.* trust and confidence, unaccepted repudiation and property can come together in this way to, apparently, influence each other, even if not openly acknowledged by the courts.

There is little substantive literature in this jurisdiction which approaches property rights in employment from the perspective of the employer. However, Anderman's analysis is compelling. It also creates a tension in terms of any putative 'enhanced' rights in relation to an anti-dismissal injunction, for such rights have to be balanced against an employer's property rights. The effect of such a balancing act is considered in more detail below.

Having established that employment can be characterised as a property right, the focus turns to what, if any, protections might be afforded by the Constitution in respect of such rights, either to employee or employer.

3. Constitutional Aspects of a Property Right in Employment

Njoya observes that "judicial reference to rights of 'property' was much more explicit in the US than in England partly because in the US the constitutional protection of property rights formed the background for the early debates about job security."[45] In short, a connection was drawn between an employer's property rights and the freedom to dismiss workers at will. By way of contrast, the same author notes that "master and servant cases in England were usually tried in summary hearings before propertied laymen or magistrates."

Despite there being a written Constitution, judicial reference to rights of property in an employment context is similarly relatively muted in this jurisdiction. That is not to say, however, that the Constitution is never invoked in anti-dismissal proceedings. For example, it is evident from the judgment of Feeney J. in *Conway v An Taoiseach*[46] that one of the reliefs sought was "damages for the infringement of the Plaintiff's constitutional right to earn a living." However, in common with the majority of judgments in which this relief, or a variant thereof, has been sought, Feeney J. did not engage with the implications of affording constitutional protection to the right to earn a

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[45] Njoya *Property in work: the employment relationship in the Anglo-American firm* (Ashgate, London, 2007), pp.31-32, citing Hay "Master and Servant in England: Using the Law in the Eighteenth and Nineteenth Centuries" in Steinmetz (ed.) *Private Law and Social Inequality in the Industrial Age: Comparing Legal Cultures in Britain, France, Germany and the United States* (O.U.P., Oxford, 2000).

[46] unreported, High Court, Feeney J., April 12, 2006 (transcript).

living. Despite this, Connaughton has suggested that constitutional law might be invoked to demonstrate an infringement of constitutional justice and, furthermore, that "[i]n more exceptional circumstances express rights such as the right to earn one's livelihood and the right to one's good name might be relied upon."[47] In his work on *Equity and the Law of Trusts in the Republic of Ireland*, Keane has also suggested that cases based on fact patterns such as *Lumley v Wagner*[48] could arguably be in breach of the constitutional guarantee to earn a livelihood. As he points out, "an agreement which compels a person to choose between working exclusively for a particular employer and not working at all...does not honour that guarantee and should not be enforced by the courts."[49] However, he also acknowledges that in today's world, perhaps the law "should lean in favour of the upholding of freely negotiated contracts."

There are two aspects to the Constitution's impact on the employment relationship and, more specifically, the termination thereof. The first, and the primary focus of this section, concerns what might be, namely leveraging the idea of employment as a property right to invoke constitutional protection. The second concerns what already is (and what has already been considered in Chapter Three), namely the impact of natural and constitutional justice on the ending, or purported ending, of the employment relationship.[50] Insofar as Conaughton's comments point to a third aspect, namely the constitutional protection of a person's good name, that is in a sense already addressed, in that the courts have, for the most part, been acutely aware of the potential impact of a dismissal, particularly where misconduct is alleged, on a person's reputation and standing.[51]

4. Constitutional Protection of a Property Right

Starting from the premise that employment is indeed a property right, the authors of Kelly's *The Irish Constitution* observe that Art. 43.1.2 of the Constitution applies to land

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[47] Connaughton "Discipline and Dismissal – Practice and Procedure" (1995) 2(11) C.L.P. 278.

[48] (1852) De G.M. &G. 604, 42 E.R. 687.

[49] Keane *Equity and the Law of Trusts in the Republic of Ireland* 2nd ed. (Bloomsbury, Dublin, 2011), p.290.

[50] As to which, see Chapter Three, section 4.2.

[51] See Chapter Six, section 2.2.4.

and associated rights, to moveable property and money, and also to intangible rights.[52] As they note, Art. 43.1.2 itself refers to a "'general right to transfer, bequeath and inherit property' – while the guarantee has been invoked in relation to intangible rights created by legislation and by contract."[53]

However, Art. 43.1.2 is of less assistance in an employment context than Art. 40.3, albeit that "the status of the right to work as an unspecified personal right deriving from Article 40.3 is somewhat clouded."[54] This is because insofar as Art.43 refers to property,[55] and as explained by O'Higgins C.J. *Blake v Attorney General*,[56] the purpose of the Article is to protect property rights in very particular circumstances. Specifically, the Article protects against legislation designed to confiscate private property, or to abolish the right to transfer, bequeath or inherit property.[57] As the Chief Justice explained, "It does not deal with a citizen's right to a particular item of property…Such rights are dealt with in Article 40 under the heading 'personal rights' and are specifically designated among the personal rights of citizens."[58]

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[52] Hogan & Whyte *J.M. Kelly: The Irish Constitution* 4th ed. (Lexis Nexis: Butterworths, Dublin, 2003) p.1971.

[53] *ibid.*, in which the authors indicate by way of footnote that the reader should "See also *Cox v Ireland* [1992] 2 I.R. 503, where the Supreme Court referred to the right to a pension, gratuity or emolument already earned and to the advantages of a subsisting contract of employment as property rights protected by the Constitution."

[54] *ibid.*, p.1425.

[55] As Kingston points out, Art.43.1.1 resorts to "the absolutist terminology frequently used in the Constitution in relation to quite debatable propositions." Kingston "Rich People Have Rights Too? The Status of Property as a Fundamental Human Right" in Heffernan ed. *Human Rights A European Perspective* (Round Hall Press and Irish Centre for European Law, 1994), p.284.

[56] [1982] I.R. 117.

[57] Keane C.J. acknowledged in *Re. Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 I.R. 321 at 347 that "...the interpretation of these Articles and, in particular, the analysis of the relationship between Article 40.3.2 and Article 43 have not been free from difficulty."

[58] [1982] I.R. 117 at 135. See also *John Grace Fried Chicken Ltd. v Catering Joint Labour Committee* [2011] 3 I.R. 211. In his piece on "The Irish Constitution in its Historical Context" in Murphy & Twomey (eds.) *Ireland's Evolving Constitution 1937-1997* (Hart Publishing, Oxford, 1998), p.34 former Taoiseach Garrett Fitzgerald locates what he terms "the property issue" in its historic context, noting that the entrenchment of private property rights was, in his view, "pushed very much further by deValera" in the 1937 Constitution, as he wanted to protection "his" Constitution from being denounced by the Holy See

As such, Article 40.3 is the key provisions in terms of a consideration of employment as a property right which is safeguarded by the Constitution.[59] It provides, in material part, that:

> "1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

In *Yeates v Minister for Posts & Telegraphs*[60] Kenny J. accepted that a constitutional right to earn a livelihood existed (although was not infringed in that particular case). As an extrapolation from this, the authors of Kelly's *The Irish Constitution* suggest that "the right to earn a livelihood arguably includes the right to go to court in defence of that livelihood."[61] Notwithstanding that the issue of whether a right to work was an unspecified personal right deriving from Art.40.3 was "clouded" in *Murtagh Properties v Cleary,*[62] the same authors point out that the constitutional basis to the right to work or earn a livelihood was developed in *Murphy v Stewart.*[63] In that case, Walsh J. accepted the proposition that among the unspecified personal rights guaranteed by the Constitution is the right to work.[64] In *Cafolla v O'Malley*,[65] Costello J. held that the right to earn a

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which, at the time, was preoccupied with, inter alia, "a global threat of socialism and communism" hence the double protection afforded by Articles 40.3.2 and 43.

[59] It has of course a much wider, fundamental importance, captured by Hogan's observation "Article 40.3 is, perhaps, the single most important provision in the entire Constitution." Hogan *The Origins of the Irish Constitution 1928 – 1941* (Royal Irish Academy, Dublin, 2012), p.277.

[60] [1978] I.L.R.M. 22.

[61] Hogan & Whyte *JM Kelly: The Irish Constitution* 4th ed. (Lexis Nexis Butterworths, Dublin, 2003), p.1428.

[62] [1972] I.R. 330.

[63] [1973] I.R. 97.

[64] *ibid.* at 117.

[65] [1985] I.R. 486; [1986] I.L.R.M. 177.

livelihood was derived from two different sources, namely that it was an unspecified personal right protected by Art.40.3.1 and that it could "also exist as one of the bundle of rights arising from the ownership of private property capable of being commercially used and so receive the protection of Article 40, s.3, sub-section 2."[66] Such an approach is entirely consistent with Doyle's reference in his work on *Constitutional Equality Law* to a time "when the courts enthusiastically adopted an expansionist reading of many constitutional provisions, most notably in their enumeration of rights under Art.40.3.2..."[67] and his comment in his text on *Constitutional Law* that "...the courts have been expansive in their determination of what property falls within the constitutional guarantees."[68]

However, this overview masks the fact that the constitutional right to earn a living is not without its complexities. As McCracken J. observed in *Shanley v Galway Corporation*,[69] a case which concerned prohibitions on casual trading, "...this may be a good example of how potentially confusing it is to state that there is a constitutional right to earn a living."[70] It is also important to bear in mind that, as pointed out by Hamilton C.J. in *Re Article 26 and the Employment Equality Bill 1996,*[71] the rights are not absolute and may be restricted, where such restriction is "required by the exigencies of the common

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[66] *ibid.* at 493; *ibid.* at 183. And thereby, as the authors of Kelly's *The Irish Constitution* point out, modifying a view he had expressed in *Attorney General v Paperlink Ltd.* [1984] I.L.R.M. 373 that the right was an unspecified personal right derived from Article 40.3.1: Hogan & Whyte *JM Kelly: The Irish Constitution* 4th ed. (Lexis Nexis Butterworths, Dublin, 2003), p.1427. As pointed out by Van Der Walt "The Protection of Private Property Under the Irish Constitution: A Comparative and Theoretical Perspective" in Carolan & Doyle eds. *The Irish Constitution Governance and Values* (Thomson Round Hall, Dublin, 2008), p.398, "Read together, the two articles resemble the double property guarantees in other postcolonial Commonwealth constitutions...but the resemblance is superficial and never had any effect in case law;" In the same text, O'Donnell observes that it is "remarkable...that there is still a debate as to how Article 43 interacts with the protection contained in Article 40.3"O'Donnell "Property Rights in the Irish Constitution: Rights for Rich People, or a Pillar of Free Society?" in Carolan & Doyle eds. *The Irish Constitution Governance and Values* (Thomson Round Hall, Dublin, 2008) p.412.

[67] Doyle *Constitutional Equality Law* (Thomson Round Hall, Dublin, 2004), p.viii.

[68] Doyle *Constitutional Law: Text, Cases and Materials* (Clarus, Dublin, 2008), p.140.

[69] [1995] 1 I.R. 369.

[70] *ibid.* at 405.

[71] [1997] 2 IR 321.

good."[72] This was a view also advanced by Hardiman J. in *Dellway Investment Ltd. v National Asset Management Agency.*[73]

5. Protection of Private Relationships

Importantly, in the context of a private employment relationship, the right to earn a living is protected against action by private parties. O'Hanlon J. held in *Parsons v Kavanagh*[74] that:

> "the constitutional right to earn one's livelihood by any lawful means carries with it the entitlement to be protected against any unlawful activity on the part of another person or persons which materially impairs or infringes that right."[75]

In *Lovett v Gogan*[76] Finlay C.J. found the decision of O'Hanlon J. in the *Parsons* case to be correct in law on the findings of fact made by him in that case.[77] The Chief Justice held in the case before him that the plaintiff was entitled to an injunction if he could establish that this was the only way of protecting himself from the threatened invasion of his constitutional rights.

6. The Constitution Applied to Contracts

On one view, these points are different to the one primarily under consideration, namely the protection which might be afforded in relation to a dismissal. However, an acknowledgement of a constitutional right in employment is, it is submitted, a necessary precursor to a consideration of what kind of rights might exist in relation to the forced

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[72] *ibid.* at 343, citing *Cox v Ireland* [1992] 2 I.R. 503 at 522.

[73] [2011] 4 I.R. 1. However, as pointed out by Forde, the extent to which the Oireachtas can nullify contracts between the State or public body and a private individual "has never been considered by the Irish courts."Forde *Constitutional Law* 2nd ed. (First Law, Dublin, 2004), p.758.

[74] [1990] I.L.R.M. 560.

[75] *ibid.* at 566.

[76] [1995] 3 I.R. 132; [1995] 1 I.L.R.M. 12.

[77] *ibid.* at 142; *ibid.* at 19.

ending of that employment. This underpins Finlay C.J.'s observation in *Cox v Ireland*[78] that

> "... the unilateral variation or suspension of contractual rights, including rights which may involve the entitlement to a pension to which contribution over a period has been made, constitutes a major invasion of those particular property rights."[79]

It is the entering into a contract of employment which is the crucial trigger for such rights; they do not exist in a vacuum. This is clear from the decision of Murphy J. in *Chestvale Properties Limited v Glackin*.[80] He accepted the contention advanced by the applicants that the legislation at issue in that case impinged on their property rights "insofar as the same consist of mutual contractual obligations between themselves and their bankers and solicitors respectively."[81] The same point was made in the clearest terms by the divisional High Court in *Dellway Investment Ltd. v National Asset Management Agency,*[82] with the observation that "There is no doubt but that contractual rights can amount to property rights which have constitutional protection."[83]

The circumstances in which constitutional rights might have a significant role to play in what is treated as a contractual relationship were considered by McMahon J. in *J & J Haire & Co. Ltd. v Minister for Health and Children*.[84] That case was brought against the background of the introduction of legislation encompassing, in broad terms, new rates and allowances payable to pharmacists. It was argued by the plaintiffs that the reduction in the rates of remuneration for the pharmacists amounted to an interference with the plaintiffs' property rights, specifically the contractual right the plaintiffs had with the H.S.E. As

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[78] [1992] 2 I.R. 503.

[79] *ibid.* at 522.

[80] [1993] 2 I.R. 35.

[81] *ibid.* at 45. Although in that case, Murphy J. ultimately held that there was a justifiable limited intrusion on constitutional rights. See also *Southern Industrial Trust Ltd. v A.G.* 94 I.L.T.R. 161.

[82] [2011] 4 I.R. 1.

[83] *ibid*, at 61.

[84] [2010] 2 I.R. 615. See generally Gwynn Morgan "Government has scope for bigger cut in pensions of ex-taoisigh" The Irish Times, March 20, 2013.

McMahon J. explained, contractual rights have the well-developed common law rules to protect them, supplemented as appropriate by relevant legislation. He pointed out that it should be assumed that the principles of contract law provided adequate protection to parties. It was only where such protection was "demonstrably inadequate" that an independent argument could be made based on Article 40.3.2 and Article 43 of the Constitution.[85] As such, and despite the reservations considered in Chapter Two,[86] the contractual relationship underpinning the employment relationship and the protections afforded by the contract of employment itself should not be lightly dismissed; they are, as is evident from McMahon J.'s *dictum,* the first line of any claim brought by an employee.

Although recourse to constitutional protection in the context of employment is less attractive to an employee than may at first have seemed apparent as the first line of protection is in fact provided by the contract of employment itself, that is not to say that an argument based on the Constitution could not be deployed, which gives rise to how and in which circumstances constitutional protection could be asserted.

7. Asserting Constitutional Protection

In asserting constitutional protection in respect of their employment, it is important at the outset to identify what an employee is not doing. Fundamentally an employee cannot in general assert that they have a job for life. Although the judgment turned on the facts of the case, and the specific employment relationship before the court, in *Sheehy v Ryan*[87] Carroll J. rejected the contention that a "permanent and pensionable" job equated to a "job for life." In that regard, Carroll J. referred to the case of *Walsh v Dublin Health Authority*[88] in which Budd J. interpreted a "permanent job" as meaning a job indefinite in duration but subject to dismissal on reasonable notice. This was also the approach taken by McCracken J. in *Dooley v Great Southern Hotels Ltd.*[89] In *McClelland v Northern*

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[85] *ibid.* at 646.

[86] See Chapter Two, section 2.

[87] [2004] 15 E.L.R. 87.

[88] (1964) 98 I.L.T.R. 82.

[89] [2001] 12 E.L.R. 340. Carroll J. rejected the contention that she should apply the decision of Costello J. in *Grehan v North Eastern Health Board* [1989] I.R. 422. As pointed out by Geoghegan J. in the Supreme

Ireland General Health Services Board,[90] where a similar contention had to be considered by, ultimately, the House of Lords, Lord Oaksey held that the word 'permanent' must be construed in the light of its context.[91]

Furthermore, simply because constitutional protections exist in relation to employment, that does not lead to people being able to claim that they must be employed. This is evident from the *Shanley v Galway Corporation*[92] case already referred to. Kerr also makes the important point that "One does not have a right to work for a particular employer. What one has is a right to earn a livelihood, and other people's constitutional rights to earn a livelihood must also be taken into account."[93]

In terms of how constitutional protection might be asserted, there is nothing in principle to prevent reliance on Art.40.3.2 in the context of a purported termination: in *Ryan v A.G.*[94] Ó'Dálaigh C.J. accepted that the provisions of Art.40.3.2 extended to unenumerated rights, but acknowledged that "To attempt to make a list of all the rights which may properly fall within the category of personal rights would be difficult..." In *Chestvale Properties Ltd. v Glackin*[95] Murphy J. accepted that mutual contractual obligations could amount to constitutionally protected property: as such, the contract of employment would seem to fit within its scope.

Court appeal from Carroll J's decision, "[*Grehan*] was a very exceptional case which specifically provided that the employment of a medical practitioner would terminate on reaching the age of 70 and on the basis of the particular contract of employment pertaining in that case it was held that premature termination was not permissible." See [2008] 4 I.R. 258 at 265.

[90] [1957] 1 W.L.R. 594.

[91] A not unrelated issue concerns applications made in relation to mandatory retirement ages: see "Indebted bank manager claims right not to retire" The Irish Times May 20, 2010 (*Martin v Lombard Ireland Ltd.*) and "Credit union worker in court to stop dismissal" The Irish Examiner, December 15, 2010 (*Murtagh v Lanesboro-Ballyleague Credit Union Ltd.*).

[92] [1995] 1 I.R. 369.

[93] Kerr "Employment – The Constitution – Rights to Work and Fair Play" (1978) D.U.L.J. 61 at 64.

[94] [1965] I.R. 294.

[95] [1992] I.L.R.M. 221 at 229.

Returning to Hamilton C.J.'s *dictum* in *Re Article 26 and the Employment Equality Bill 1996,*[96] that the State is obliged to protect, so far as practicable, from unjust attack, "the right to the advantages of a subsisting contract of employment,"[97] the wording of Art.40.3.2 would on the face of it suggest that being able to point to some form of "unjust attack" would, on the face of it, be the most fertile area for exploration: in short, could a wrongful dismissal constitute an "unjust attack" upon a person's property right? Before undertaking that exploration, it is worth pausing to note by way of warning Hogan's observation in his work on *The Origins of the Irish Constitution 1928 – 1941* concerning Art.40.3.2: the reaction of the various departments to the wording of the provision was "generally adverse." As he explains, "While the precise future significance of these provisions may not have been identified by many of the departmental commentators, their unease about the potential implications was palpable."[98]

7.1 "Unjust Attack"

In fact, the courts' consideration of "unjust attack" in the context of Art.40.3.2 has been less expansionist than might have been feared: the focus of the courts has tended to be on an "attack" by the State through the legislature rather than an "attack" visited by one private party upon another (or indeed by the State as employer upon an employee). This is perhaps unsurprising: the emphasis in any consideration of Art.40.3.2 is on the State, for the very good reason that the wording of the subsection is very much directed at the State. In *Re Article 26 and the Health Amendment (No.2) Bill 2004*[99] Murray C.J.'s observations focused on interference by the legislature:

> "…where an Act of the Oireachtas interferes with a property right, the presence or absence of compensation is generally a material consideration when deciding whether that interference is justified pursuant to Article 43 or whether it

[96] [1997] 2 I.R. 321.

[97] *ibid.* at 342, citing *Cox v Ireland* [1992] 2 I.R. 503 at 522.

[98] Hogan *The Origins of the Irish Constitution 1928 – 1941* (Royal Irish Academy, Dublin, 2012), p.355. See also the commentary by Keogh and McCarthy *The Making of the Irish Constitution 1937* (Mercier Press, Cork, 2007), p.111.

[99] [2005] 1 I.R. 105.

constitutes an 'unjust attack' on those rights. In practice, substantial encroachment on rights, without compensation, will rarely be justified."[100]

Furthermore, as noted by the authors of Kelly's *The Irish Constitution*, cases in which it has been held that there is no unjust attack are "in the preponderance."[101] This is reflected in decisions such as that by Peart J. in *Shirley v A. O'Gorman & Co. Ltd.*,[102] in which he stated that:

> "Until some point of absolute extremity is reached where legislation is patently and manifestly not in pursuit of any possible common good exigency, the Court should abstain from interfering with the role of the legislature in deciding what measures are needed."

The authors of Kelly's *The Irish Constitution* identify the factors which the courts consider when assessing an unjust attack as being:

- the role of other constitutional provisions;[103]
- absurd, irrational or excessive restrictions;[104]
- proportionality;[105] and
- the cost of implementing social policy.[106]

Again, however, the focus of the courts' considerations is on interference by the legislature with property rights; such considerations have evolved in a very different

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[100] *ibid.* at 201.

[101] Hogan & Whyte *J.M. Kelly: The Irish Constitution* 4th ed. (Lexis Nexis: Butterworths, Dublin, 2003), p.2004

[102] [2006] IEHC 27.

[103] *ibid.*, p.1994.

[104] *ibid.*, p.1996.

[105] *ibid.*, p.1998. See generally Walsh "The Constitution, Property Rights and Proportionality: A Reappraisal" (2009) 31 D.U.L.J. 1.

[106] *ibid.*, p.2001. See generally Van der Walt "The Protection of Private Property Under the Irish Constitution: A Comparative and Theoretical Perspective" in Carolan & Doyle (eds.) *The Irish Constitution Governance and Values* (Thomson Round Hall, Dublin, 2008), p.398.

context to how the courts might approach the question of "unjust attack" when considering the actions of an employer in relation to an employee. In light of the foregoing, it is not at all surprising that there is no substantive guidance in relation to the latter.

In any event, there is a further aspect to any protection which might be in theory be afforded by the Constitution in that regard, in that any such protection is qualified by the words "as best it may." As explained by O'Higgins C.J. in *Moynihan v Greensmyth*,[107] in proceeding on the "assumption that the right to sue claimed by the Plaintiff is a property right which is guaranteed by Article 40, S.3, sub-S.2, of the Constitution," it was to be noted that the constitutional guarantee "is qualified by the words 'as best it may.' This implies circumstances in which the State may have to balance its protection of the right against other obligations arising from regard to the common good."[108] This emphasis on the phrase "as best it may" was also rehearsed by McMahon J. in *J & J Haire & Co. Ltd. v Minister for Health and Children*.[109]

This is highly relevant if one considers the fact that the State has intervened in the employment relationship in the form of, *inter alia*, unfair dismissals legislation. It could readily be argued that it has already discharged any obligations upon it, protecting employee's rights to the extent that it is in a position to do so. As such, it could be argued that the State is under no further obligations in relation to the protection of the employment relationship.

7.2 "Wild Cards"

More generally, Barrington J.'s cautionary words in *McDonnell v Ireland*[110] also bear rehearsing:

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[107] [1977] I.R. 55.

[108] *ibid.* at 71.

[109] [2010] 2 I.R. 615 at 652.

[110] [1998] 1 I.R. 134.

> "...constitutional rights should not be regarded as wild cards which can be played at any time to defeat all existing rules. If the general law provides an adequate cause of action to vindicate a constitutional right it appears to me that the injured party cannot ask the court to devise a new and different cause of action."[111]

One senses from this that the courts would be very reluctant to revisit its jurisprudence in relation to Article 40.3.2 to find that it in some way applies directly to private employment relationships.[112] Also flowing from the *McDonnell dictum* is a consideration of whether adequate protections already exists to protect an employee in terms of vindicating any property rights they may have in their employment.

7.3 Existing Protections

The starting point in relation to a consideration of existing protections is that, based on the approach in *J & J Haire & Co. Ltd.*, in the first instance the contract between the parties is the source of any necessary protection. Most infringements can be addressed within a contractual rubric: as seen at the very outset of this research,[113] at the heart of a dismissal is the common law approach that employment is terminable on notice, for any or no reason. In fact, it is arguable that the Constitution has already bequeathed to the employment relationship – and specifically to employees - a key protection, namely the requirement for natural and constitutional justice, particularly where misconduct is alleged.

However, the ability of an employee to rely on the Constitution must also be considered in light of the view that an employer also has a property right in the employment relationship. If an employee can invoke constitutional protection in relation to that right,

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[111] *ibid.* at 148.

[112] Or, at a stretch, to recommend that the State should intervene in some way to provide some additional protection to those in private employment relationships in the context of the breakdown of such relationships.

[113] See Introduction.

there appears to be no reason in principle why an employer cannot equally do so.[114] As such, one is then faced with a situation where there are in fact competing constitutional rights in play.

7.4 Competing Constitutional Rights: Employer and Employee

The courts often have to consider the interplay between rights derived from different constitutional provisions. Griffin J. addressed the question of different competing constitutional rights in *Shaw v D.P.P.*[115] He stated that where a conflict between rights arises (in that case, the competing rights were the right to personal liberty and the right to life), there is an obligation on the State to protect the "more important right," even at the expense of another important (though evidently less important) right. As such, the State has to weigh those rights to evaluate their respective merits. However, and as Von Prondzynski[116] has commented, "Claims based on the Constitution are generally couched in the language of absolute entitlement, so that a reconciliation between irreconcilable claimants would become a task calculated to defeat a present-day Solomon."[117] That comment has even more force where the two parties in essence rely on the same constitutional protection, or a right derived from the same source: in the case of employment, such rights derive from mutual contractual obligations. There is no supervening event or actor impinging on those rights, which is often the focus of a court's consideration.[118] In essence, the court then has to look at the terms of the contract; as McMahon J. stated in *J&J Haire & Company Ltd. v Minister for Health and Children*,[119] "The plaintiffs' property rights in this instance are no more and no less than those rights which are accorded to him in the Contract."[120]

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[114] As the employer could presumably, for example, point to a breach of trust and confidence by the employee.

[115] unreported, Supreme Court, December 17, 1980. See Von Prondzynski "constitutional Law – Rights in the Balance" (1981) D.U.L.J. 42.

[116] Von Prondzynski "constitutional Law – Rights in the Balance" (1981) D.U.L.J. 82.

[117] *ibid.*at 83.

[118] See generally the judgment of Hardiman J. in *Dellway Investment Ltd. v National Asset Management Agency* [2011] 4 I.R. 1.

[119] [2010] 2 I.R. 615.

[120] *ibid.* at 647.

Analysing the case of *Gannon v Duffy*,[121] Kerr and Whyte point out that McWilliam J. raised the issue in the case of the nature of the "right to work" which was allegedly violated. He expressed "very considerable doubts as to whether such a right can be held to be infringed so as to give a cause of action against a person who is lawfully trying to enforce his own rights."[122] In short, it would appear that if an employer legitimately seeks to terminate a contract of employment, as they are entitled to, there would appear to be no countervailing cause of action which would benefit an employee who could argue that his own rights to employment, protected by the Constitution, absent any other factors, were in some way being infringed by that action. It could of course be argued, with some conviction, that in the case of an alleged wrongful dismissal, the employer is not in fact lawfully seeking to terminate the contract of employment, in that by its very nature, a wrongful termination cannot be legitimate. As such, the argument which could be advanced is that the right to work is being violated, but it is being violated in circumstances where the employer is not acting lawfully, and so that employer cannot seek the aid of the constitutional protection of property in terms of its own actions. That of course could require a consideration of whether the termination is in fact wrongful (or at a minimum, the ability to demonstrate on an interim / interlocutory application that there is a "strong case" that it is wrongful). However, this brings matters back to a consideration of the contract of employment and whether that contract in fact contains the relevant necessary protections before considering the question of some enhanced constitutional protection being available.

8. Approach of Other Common Law Jurisdictions

Given the complexities involved in this issue, it seems appropriate to consider whether any guidance might be gleaned from approaches in other common law jurisdictions. This must be qualified by the observation that any analysis of the extent to which a written Constitution has created a unique climate of additional protection in this jurisdiction relative to others is hindered by either the lack of a written constitution in other jurisdictions, or the specific provisions of their constitutions, and the application of those

[121] unreported, High Court, McWilliam J. March 4, 1983.

[122] Kerr and Whyte "Labour Law – Trade Disputes and The Constitution" (1984) 6 D.U.L.J. 187.

provisions. Three common law comparators are useful in that regard, the case law of each of which has been cited and considered in this jurisdiction: England and Wales is selected on the basis of there being no written constitution underpinning their law. Australia and Canada are the other two comparators, with each of those jurisdictions having written constitutions. However, and as will become apparent, the comparisons between constitutional jurisprudence in Ireland and those other jurisdictions are in fact quite unenlightening.

8.1 Comparative Analysis: England and Wales

Without the benefit of a written constitution, the evolution in England and Wales of constitutional-style enhanced protection in the context of the employment relationship has focused on natural justice. Around the same time that natural justice was being acknowledged in the context of private contractual relationships in this jurisdiction,[123] Carty was writing about the development of the relevant jurisprudence in England and identifying (in a public law context) *R v BBC ex parte Lavelle*[124] as a case the principles of which "could develop into a process for implying natural justice into a contract of employment. The width or otherwise of this principle is far from clear."[125]

In fact, narrowness rather than width is probably the operative word in that regard. As Honeyball & Bowers explain (in an English context), it is office-holders and occupants of statutory positions who have greater security at common law than other employees "because the law implies a right to natural justice so that each party has a right to be heard in proceedings, and no party acting in a judicial capacity should do so in his own cause."[126] In similar vein, Hendy and Ford note in an earlier paper that "Strictly speaking, the rules of natural justice are primarily an administrative law remedy and primarily

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[123] *Gunn v Bord an Choláiste Náisiúnta Ealaíne is Deartha* [1990] 2 I.R. 168.

[124] [1983] 1 All E.R. 241.

[125] Carty "Dismissed Employees: The Search for a More Effective Range of Remedies" (1989) 52(4) M.L.R. 449 at 465.

[126] Honeyball & Bowers' *Textbook on Employment Law* 11th ed. (O.U.P., Oxford, 2010), p.83, citing *Malloch v Aberdeen Corporation* [1971] 1 W.L.R. 1578 and *R v Chief Constable of Merseyside Police ex parte Bennion* (2000) I.R.L.R. 821.

available only in relation to judicial and quasi-judicial proceedings by public bodies."[127] The significant aspect of the deployment of natural and constitutional justice in this jurisdiction is that it is not limited to office holders.[128]

In *R v East Berkshire Area Health Authority ex parte Walsh*,[129] Purchas L.J. held that natural justice may be imported into the private contractual relationship. However, the key point differentiating such an approach from this jurisdiction is that he held that it would go solely to the question of rights and duties involved in the performance of the contract of employment itself, as distinct from termination.

English caselaw must in any event be treated with a measure of caution. In particular, the existence of the statutory regime in England, and the way specialist tribunals operate under that regime, has given rise to the comment by Freedland that "... the justifiability of dismissal is now in practice normally raised as an issue of unfair dismissal, and the question of whether a summary dismissal was wrongful at common law has to that extent lost its former significance."[130] Related to this, the fact that there is a specified cap on damages in the English Employment Tribunals drives considerations there as to the interaction between the common law and statutory regimes. It will presumably inform any future developments in relation to whether relief can be claimed as a result of the manner of termination. It should also be borne in mind that public law cases and public law themes are more pronounced in England and have given rise to greater academic scrutiny as to their influence.

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[127] Hendy and Ford "Injunctions Brought by Employees", Old Square Chambers, November 2005, citing *Russell v Duke of Norfolk* [1949] 1 All E.R. 109; *University of Ceylon v Fernando* [1960] 1 All E.R. 631; *Ridge v Baldwin* [1946] A.C. 40; *Padfield v Minister of Agriculture and Fisheries* [1968] 1 All E.R. 694.

[128] See Chapter Three, section 9.

[129] [1984] I.C.R. 743 at 768.

[130] Freedland in *Chitty on Contracts Volume II Specific Contracts* (Sweet & Maxwell, London, 2008), p.1128. See Kerr's review of Hepple and O'Higgins Employment Law 4th ed. (Sweet and Maxwell, 1981), in which he cautions that "reliance on English textbooks, even those as clear as *Hepple and O'Higgins*, is unsatisfactory, as countless Irish labour law students will testify, because of significant differences in the legislation." Irish Jurist (1981) 16 *Ir. Jur.* (ns) 385 at 388.

8.2 Comparative Analysis: Australia

It has been commented by Brooks in *Labour Law in Australia* that "The common law, in particular the law of contract, lies at the heart of Australian industrial law."[131] The same commentator notes that "Australian courts have usually followed the principles established in British (*sic.*) Courts unless Australian statutes expressly govern the matter."[132]

The situation pertaining in Australia is that dismissal is approached by reference to the common law, subject to legislative intervention by individual states. As such, in various states it is possible for a tribunal to order reinstatement, with tribunals weighing, *inter alia*, "the right of the employer to manage his business, the nature and quality of the work in question, the circumstances surrounding the dismissal and the likely practical outcome if an order for reinstatement is made."[133]

There is little beyond this which would suggest that the fact that Australia has a written constitution has in some way influenced their courts in a way which might offer a different perspective to the approach of the Irish courts (or indeed confirm in general terms their existing approach). In fact, the Australian constitution deals, in broad terms, with more structural issues such as the separation of powers. It does not include a bill of rights *per se*, although Section 51(xxxi) does create a right to compensation "on just terms" for "acquisition of property." However, this is limited to acquisition by the Commonwealth from any state or person. As such, it offers little guidance to the question of whether there might be enhanced constitutional protection in the context of a private employment relationship. It has nothing explicit to say about employment rights beyond empowering the federal government to legislate to resolve industrial disputes.

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[131] Brooks *Labour Law in Australia* (Kluwer Law, The Hague, 2003), p.111.

[132] *ibid.*

[133] Per Sheldon J. in *Re Loty and Holloway and Australian Workers Union* (1971) 71 (N.S.W.) 95 at 99. See Brooks *Labour Law in Australia* (Kluwer Law, The Hague, 2003), p.114.

8.3 Comparative Analysis: Canada

The courts in Canada have primarily developed the law of employment by reference to developments in the common law, rather than by specific reference to any constitutional provision.

Part I of the Constitution Act 1982 is the Canadian Charter of Rights and Freedoms. It is part of the Constitution of Canada. Section 7 of the Charter imposes the requirement that any deprivation of "life, liberty and security of the person" be "in accordance with the principles of fundamental justice." Engaging with the tortuous attempts to define what is meant by "fundamental justice," and whether it covers substantive as well as procedural justice,[134] is in a sense moot, as the concept of liberty is quite restricted. Section 7 requires that liberty be interpreted as "not including property, as not including freedom of contract and, in short, as not including economic liberty.[135] That being so, and as analysed by Hogg in *Constitutional Law of Canada*,[136] it has been held that liberty does not include the right of an individual to work. Accordingly, not a huge amount of guidance is offered by the Canadian model as to how constitutional provisions can assist an employee, or indeed employer.[137]

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[134] See *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486 and see generally Hogg *Constitutional Law of Canada*, Volume 2 5th ed. (Thomson Carswell, Ontario, 2007), p.387.

[135] *ibid.* See also Rotman & Wydrzynski "Life, Liberty and Security of the Person" in Rotman, Elman & Gall *constitutional Law* (Thomson Carswell, Ontario, 2008), p.1103.

[136] Hogg *Constitutional Law of Canada*, Volume 2 5th ed. (Thomson Carswell, Ontario, 2007), p.375, citing, *inter alia*, *ILWV v Canada* [1994] 1 S.C.R. 150.

[137] This is quite deliberate, in that the Canadians wanted to avoid the type of situation which arose in the United States on foot of the decision in *Lochner v New York* (1905) 198 U.S. 45, whereby the liberties of factory owners and mines were protected against efforts to limit working hours, to require the payment of minimum wages, to impose health and safety standards and to protect union activity. See generally Hogg *constitutional Law of Canada*, Volume 2 5th ed. (Thomson Carswell, Ontario, 2007), p.374.

9. Uncompensatable Damage

In fact, it must be open to question whether the courts need to get involved in such a detailed debate when there may be another approach open to them. Such an approach involves focusing on the implications of invoking a proprietary interest in employment and assessing the extent to which that in and of itself may offer practical protection. By way of analogy, in *Tommy Hilfiger Europe Inc. v McGarry (T/A Lifejacket),*[138] Finnegan J. in the Supreme Court observed that the user of a trade mark had a proprietary interest in the goodwill of his business, of which the trade mark formed part. As such,

> "the court would exercise its jurisdiction to prevent by injunction infringement of that proprietary interest. It follows from this that an action for infringement of a Trade Mark after the Judicature (Ireland) Act 1877 is not a tort but an action based on interference with a proprietary interest."[139]

An equivalent argument in the context of the anti-dismissal injunction would be that an action arising out of a dismissal would in fact be based on interference with a proprietary interest (as seen earlier in this Chapter, the divisional High Court in *Dellway Investment Ltd. v National Asset Management Agency*[140] observed that "There is no doubt but that contractual rights can amount to property rights…"[141]). In addressing such interference, it could be argued in the context of an interlocutory application that when considering the adequacy of damages, the view should be taken such damages are uncompensatable from the employee's point of view. Indeed, it is arguable that the principle of uncompensatable damage might not even be dependent on a constitutional underpinning. After all, there is no written constitution in England, yet as already seen, in the English case of *Attorney General v Blake*,[142] Lord Nicholls noted that "an award of damages, assessed by reference to financial loss, is not always 'adequate' as a remedy for a breach of contract."[143]

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[138] [2009] 1 I.L.R.M. 161.

[139] *ibid.* at 166.

[140] [2011] 4 I.R. 1.

[141] *ibid*, at 61.

[142] [2001] 1 A.C. 268; [2000] 3 W.L.R. 625. See Chapter Seven, section 7.

[143] *ibid.*at 282; *ibid.* at 635.

In essence, such an approach extrapolates from what the courts have already been doing in relation to anti-dismissal injunctions by reference to damage to reputation, loss of job satisfaction and so on.[144] Such considerations do not (or should not) affect the employer in the same way, thereby circumnavigating any issues as to some form of conflicting "equal and opposite" rights. If that proposition is accepted, then the courts could, based on their approach in the "axiomatic" cases identified in Chapter Seven, approach the anti-dismissal injunction on the basis that a consideration of the adequacy of damages and the balance of convenience will, in the normal course, lead to the granting of an interim or interlocutory injunction. Such an approach would, in a sense, be a logical extension of the way in which the courts' approach to employment has evolved in, primarily, the twentieth century, with an increased awareness of the practical realities of a person (wrongfully) losing their job.

To understand how this would work in practice, and how such an approach would interact with the *Campus Oil* guidelines, it is necessary to return to the property-related cases considered in Chapter Seven.

9.1 Uncompensatable Damage: Point of Consideration

It is clear from Clarke J.'s consideration in *Metro International SA v Independent News & Media plc.*[145] that the characterisation of employment as a property right would, in terms of its informing the *Campus Oil* guidelines, be considered as an element of the adequacy or otherwise of damages. As he explained, "the plaintiff here seeks to support a property right which should not, in the ordinary way, be capable of being "bought off" by damages..."[146] If there was any potential for concern arising out of a focus on a single element of the *Campus Oil* guidelines (albeit a hugely significant element), Clarke J. also considered the other *Campus Oil* guidelines as well. This approach is entirely consistent with that adopted in *Mitchelstown Co-Operative Agricultural Society Ltd v Golden Vale*

[144] See Chapter Six, section 2.2.

[145] [2006] 1 I.L.R.M. 414.

[146] *ibid.* at 427.

Products Ltd.[147] and *Symonds Cider & English Wine Company Ltd. v Showerings (Ireland) Ltd.*[148] Equally, in *Jacob Fruitfield Food Group Ltd. v United Biscuits (UK) Ltd.,*[149] Clarke J. once again considered all of the *Campus Oil* guidelines by reference to the facts before him. As such, there is no need to circumnavigate the guidelines, or approach the matter on the basis that some form of derogation is required. Nor would such an approach give rise to the concern referred to by Hogan J. in *Wallace v Irish Aviation Authority*[150] in relation to the "unyielding application of specialist sub-rules relating to the grant of interlocutory injunctions in employment cases."

Furthermore, any concern that the characterisation of employment as a property right would automatically lead to injunctions being granted without any further consideration should be assuaged by the concern that an employee would still have to satisfy the court that they had a fair / strong case and that they should be granted an injunction on the balance of convenience (to the extent that the latter should be considered separately). Even if this has the potential to create or maintain an element of unpredictability, as seen in Chapter Six[151] there are a number of identifiable elements around which considerations relevant to the balance of convenience have coalesced (albeit that these are frequently to the plaintiff employee's advantage[152]) . Furthermore, it is important to bear in mind that in *Contech v Walsh*[153] Finlay Geoghegan J. acknowledged that the courts need to look at the facts of each case, and to recall Clarke J.'s nuanced approach in *Metro International SA v Independent News & Media plc.*[154] wherein he referred to cases in which the interlocutory injunction sought "is of a type which the court <u>will normally protect</u> by injunction.[155] [emphasis added] Of course, such considerations may lead to an injunction

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[147] unreported, High Court, Costello J. December 12, 1985.

[148] [1997] 1 I.L.R.M. 481.

[149] [2007] IEHC 368.

[150] [2012] IEHC 178 at para.30.

[151] See Chapter Six, section 2.3.

[152] To again rehearse Costello's comment as set out in Chapter Six, "The balance of convenience nearly always favours the employee:" Costello "Regulating the Anti-Dismissal Injunction" in Breen, Casey & Kerr *Liber Memorialis Professor James C. Brady* (Roundhall Sweet and Maxwell, Dublin, 2001), p.188 at 196

[153] [2006] IEHC 45.

[154] [2006] 1 I.L.R.M. 414.

[155] *ibid.* at 424.

not being granted, but insofar as the adequacy of damages has been a key area which has engendered unpredictability, this could go a considerable way towards creating greater certainty.

However, the form of any such injunction would also have to be considered. Given the courts' reluctance, as considered in Chapter Four,[156] to order specific performance, a tension could arise between the approach to specific performance (and all that encompasses such as a consideration of trust and confidence, mutuality, supervision and breaches) and a situation whereby courts would grant an injunction *simpliciter*, forcing a working relationship, on the basis of an approach centered on uncompensatable damage.

Such tension could, in fact, be eased by a pre-existing solution, namely the *Fennelly* order. By granting such an order, a court would acknowledge the fact that an employee would in the normal course suffer uncompensatable damage, but create a situation in which the essence of the employment relationship would be preserved, with the employee receiving his or her salary and the employer entitled, as necessary, to call on the employee to fulfill his or her duties, but not have the employee forced on them in terms of day to day involvement. Of course, this is not a perfect solution,[157] and as considered in Chapter Four,[158] some judges have been uneasy about the expansive way in which the *Fennelly* order has developed. However, as an approach which is already embedded in Irish jurisprudence, it does offer an attractive solution. In simple terms, one could adopt and adapt the *dictum* of Clarke J. from the *Jacob Fruitfield* case[159] such that it would read:

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[156] See Chapter Four, section 5.

[157] And indeed does not address the issue identified in Chapter Four, section 7 as to the disconnect between reliefs granted at the interlocutory and plenary stages; in intellectual property cases, there is a much more obvious effort by the courts to assess levels of damages at plenary hearing, as encapsulated by the judgment of Laffoy J. in *Universal City Studios Inc. v Mulligan (No.3)* [1999] 3 I.R. 407 (albeit in that case an undertaking provided by the defendant meant that the court did not have to engage at the interlocutory stage with the question of the adequacy of damages: see *Universal City Studios Inc. v Mulligan (No.2)* [1999] 3 I.R. 392)

[158] See Chapter Four, section 11.5.

[159] [2007] IEHC 368 at para.4.2.

> "a consideration of the balance of convenience and the adequacy of damages will normally, in a dismissal case, lead to the conclusion that the plaintiff will suffer uncompensatable damages and that the balance of convenience will favour the grant of a *Fennelly*-style order."

More broadly, the attractions of such an approach include the fact that it avoids the courts having to reframe the consideration of "unjust attack" as set out in Article 40.3.2 of the Constitution by reference to employment. It does not require the creation of an exception to the *Campus Oil* guidelines on the basis that constitutional principles trump those guidelines. It preserves the approach adopted evident from the caselaw considered earlier in this Chapter to the effect that the starting point for any consideration is the underlying contract and that, to repeat Barrington J.'s words in *McDonnell v Ireland*[160] constitutional rights are not "wild cards which can be played at any time to defeat all existing rules." The practical importance of this also cannot be overstated: given the time pressures involved in interim and interlocutory applications, it is submitted that this solution could be much more attractive to a court than a detailed engagement with constitutional principles, and is one which they could quite legitimately adopt.

10. Analogy with "Commercial Cases"

It may well be that the courts take a different view at some point in the future, and prefer the approach evident in *Foley v Aer Lingus Group*[161] and *Joyce v Health Service Executive*,[162] to the effect that damages at an appropriate level would remedy any injury to the plaintiff's reputation. Should a shift in judicial thinking leading to the view that damage to reputation is in fact compensatable would in and of itself bring greater certainty to the application of the *Campus Oil* guidelines by reference to the way in which "commercial cases" are approached, as considered in Chapter Seven; in short, the courts would for the most part refuse anti-dismissal injunctions as they would take the view that damages, rather than an injunction, would afford an adequate remedy. Such an approach would seem unlikely in the short to medium term, however, in that appears to run

[160] [1998] 1 I.R. 134.

[161] [2001] 12 E.L.R. 193.

[162] [2005] IEHC 174.

contrary to the courts' evolved view as to the nature of the modern employment relationship and the unlawful termination of that relationship, as considered in Chapter One.

11. Conclusion

There is no doubt that there is in principle room for manoeuvre and expansion in terms of the Constitution and how it might impact on employment law: in *Glover v BLN Ltd.*,[163] Walsh J. noted that the arguments and submissions made "ranged over a very wide field particularly in the field of constitutional justice." However, having acknowledged that *Re Haughey*[164] provided that Art.40.3 of the Constitution was a guarantee of fair procedures, he took the view that it was not, in his opinion, "necessary to discuss the full effect of this Article in the realm of private law or indeed of public law."[165] The importance and impact of that guarantee of fair procedures, subsisting within a wider consideration of natural and constitutional justice, cannot be overstated. Emphasising its importance, Redmond refers to the fact that the implied term of fairness is founded in natural and constitutional justice, and that "the significance of its constitutional roots cannot be overestimated."[166] This significance is enhanced if one subscribes to Horan's analysis that "...the Irish cases are primarily concerned with complaints of breach of natural justice..."[167]

What the analysis in this Chapter demonstrates is that by explicitly acknowledging employment as a property right, with the underlying protections that that attracts, it is possible to envisage a more certain, predictable application of the *Campus Oil* guidelines, particularly by reference to the questions of the adequacy of damages and the balance of convenience, and without having explicit recourse to some form of enhanced constitutional protection.

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[163] [1973] I.R. 388.

[164] [1971] I.R. 217.

[165] [1973] I.R. 388.

[166] Redmond *Dismissal Law* 2nd ed. (Tottel, Dublin, 2007), p.186.

[167] Horan "Employment Injunction: Current Status and Future Developments" (2005) 1 E.L.Rev. 8 at 8.

As will be considered in the next Chapter, there are other factors which may also help inform and shape the anti-dismissal injunction into the future.

CHAPTER NINE

1. Introduction

The previous Chapters have considered, in general terms, established principles such as the requirements of natural and constitutional justice, together with emerging trends, which encompasses aspects of the application of the *Campus Oil* guidelines. The focus of this Chapter is on possible future developments in relation to the anti-dismissal injunction. In a sense this is a standalone Chapter, in that it (self-evidently) does not purport to identify areas of law which are settled, but nor does it suggest that any developments in the law will inherently lead to greater uncertainty or lack of clarity. As has been seen in previous Chapters, particularly in relation to the *Fennelly* order,[1] the issue with the approach of the courts is not so much with, to be colloquial, what they do, as the failure to clearly articulate why they are doing it. What is important is that any future developments, insofar as they feed in to existing principles and approaches, do so in a structured way and in a way which is both clear and consistent.

There are four main aspects to potential future developments: the first covers the ongoing evolution of the employment relationship generally. The second addresses issues arising in relation to termination specifically. The third relates to changes in the way the courts approach the *Campus Oil* guidelines. The fourth concerns external developments such as structural change.

2. The Employment Relationship

The history of the employment relationship is one of slow but significant change. There is nothing to suggest that such change is not ongoing. The development of relations between employer and employees invites, in Brodie's words, "continuous reconsideration by the courts of rules worked out in different conditions."[2] As already seen in Chapter One, the relationship between employer and employee is one which is not static. There is considerable room for further development. In that regard, it is also important not to lose

[1] See Chapter Four, section 11.

[2] *Chappell v Times Newspapers* [1975] 1 W.L.R. 482 at 503, *per* Stephenson L.J.

sight of the fact that although there has been an evolution of the concept of a master-servant relationship to that of, broadly speaking, employer-employee, that is not the only type of employment relationship; as Wedderburn observes, labour is now sold in more "precarious packages than the traditional standard employment contract"[3] such as the use of independent contractors, fixed term contracts, short term contracts and so on.

More generally, although the evolution of the law of employment over the past half century has been premised on the construct of the employment contract, there is certainly a growing sense amongst academics that it may need to be viewed as some class of *sui generis* contract, informed, but not bound by, the traditional contractual matrix.[4] For example, Freedland[5] has suggested that:

> "The contract of service should be replaced by a broad definition of an 'employment relationship' between the worker and the undertaking by which he is employed. That relationship would of course, be based upon voluntary agreement between the worker and the undertaking to work in return for pay. The insistence on agreement makes it appropriate to describe this as a 'contract' rather than a 'status,' but it would be 'contract' of a new kind, one that encompassed both the intermittent exchange of work for remuneration, and the single continuous contract."[6]

Clearly, any changes in how the employment relationship is structured and governed go to the heart of wrongful dismissal: if there is no contract in place, then by definition there can be no breach of contract in the context of dismissal, such that it would be very hard to argue for a wrongful dismissal which merited an injunction. Even an intermittent contract of the type described by Freedland could well, by its structure, prove very difficult to enforce by way of injunction.

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[3] Wedderburn "Labour Law 2008: 40 Years On" (2007) I.L.J. 36(4) 397.

[4] See, for example, Brodie "Commentary – Reflecting the Dynamics of Employment Relations: Terms Implied from Custom or Practice and the Albion Case" (2004) I.L.J. 33(2) 159.

[5] Citing Hepple "Restructuring Employment Rights" (1986) 15 I.L.J. 69.

[6] Freedland *The Personal Employment Contract* (O.U.P., Oxford, 2003), p.5.

Other less dramatic changes could also impact on the ability to seek an anti-dismissal injunction. Human rights law could certainly be of relevance in that regard, though perhaps not to the extent that might be anticipated.

3. Human Rights Law

It has been argued by Kimber that "[t]he issue of remedies is not just one of procedure, but rather one of human rights."[7] In that regard, Article 13 of the European Convention on Human Rights (the "Convention") provides that:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The potential significance of Article 13 becomes apparent when the legislature seeks to circumscribe the right to an "effective remedy." In that regard, the Credit Institutions (Stabilisation) Act 2010 is noteworthy.[8] Section 23 of that Act provides powers to special managers to remove anyone from, *inter alia*, a "position of employment" and an "executive position" (where a financial institution is under special management, on foot of an order made by the courts). That can be done without notice. Although that person can claim compensation or damages for loss of office, s.23(3)(a) provides that:

> "a court, tribunal or rights commissioner may not grant any remedy that would have the effect of preventing or restraining the special manager from exercising the special manager's powers under this section,"

In other words, that person is statutorily precluded from seeking an injunction from the courts in respect of their removal from their position or office. There is a very real issue as to the legality of such powers, or rather the stripping of such powers from courts, tribunals and rights commissioners. This is not just in light of Article 13 of the Convention but also of Article 6, which deals with the right to a fair trial (not to mention

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[7] Kimber "Employment Law and Remedies" Bar Council C.P.D., November 7, 2011.

[8] See generally Matthews "Employment in the Financial Sector – New Challenges" (2011) 8(3) I.E.L.J. 76.

the potential constitutional issues which could arise from Articles 34.3.1 and 40.3.1 in terms of access to the courts). The potential importance of articles such as Article 6 is evidenced by the English Supreme Court decision in *R (G) v Governors of X School*,[9] as already considered in Chapter Five[10] (though as seen in that Chapter, its impact may be less significance in this jurisdiction). Of course, the 2010 Act is a very specific instance of depriving an employee or office holder of a remedy. It is arguable that human rights law more generally is unlikely to have a major impact on the anti-dismissal injunction.

Insofar as the Convention might have an impact on the employment relationship,[11] Bowers and Lewis note that "Accrued benefits pursuant to the contract of employment are included in the concept of possessions for the purposes of Article 1 Protocol 1."[12] They argue in relation to a summary dismissal that "the cause of action for damages would itself constitute a property right within the meaning of Article 1 Protocol 1."[13] Any suggestion that this might open a new front for employees is immediately qualified by the authors' observation that "the impact of Article 1 Protocol 1 on disputes between employer and employee is likely to be limited by the scope of the contract of employment." As such, an employee cannot assert interference with a property right if such interference is permissible under the applicable contract of employment.

However, Collins suggests that "From a core right, such as the right to work, it should be possible to derive support for other fundamental rights, such as general protection against

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[9] [2012] 1 A.C. 167.

[10] See Chapter Five, section 5.4.3.

[11] The effect of the European Convention on Human Rights Act 2003 is to establish a procedure (under s.5) whereby the Courts are empowered to grant what are described as declarations of incompatibility where it is found that provisions of a domestic statute are in breach of the Convention Beyond that, and as explained by Murphy J. in *Byrne v Dublin City Council* [2009] I.E.H.C. 122, "The Court is required to take judicial notice of judgments of the European Court of Human Rights, and to "take due account", in interpreting and applying Convention provisions, of the principles they lay down (s. 4 of the 2003 Act)..."

[12] Bowers and Lewis *Employment Law and Human Rights* (Sweet & Maxwell, London, 2001), p.119, citing the decision in *Fenzel and Köllner v Austria* App.22351/93 (May 15, 1996).

[13] Bowers and Lewis *Employment Law and Human Rights* (Sweet & Maxwell, London, 2001), p.120.

unfair dismissal."[14] That is the theory (and it is of course a theory relating to unfair dismissal). How far the courts will go to actually prevent termination of employment based on an alleged breach of human rights is debatable. Specifically, it would seem that the impact of the Convention has been relatively muted in that regard. Its impact has been considered in England, albeit in the specific context of whether its application should lead to a different construction and application of the relevant statutory provisions governing jurisdiction.

The background to the case of *X v Y*[15] involved a caution for gross indecency which the claimant did not disclose to his employer, a charity which worked with young offenders. He was dismissed for gross misconduct. Mummery L.J. in the Court of Appeal set out a helpful "framework of questions" to be addressed by Tribunals when dealing with points raised under the English Human Rights Act 1988:

> "(1) Do the circumstances of the dismissal fall within the ambit of one or more of the articles of the Convention? If they do not, the Convention right is not engaged and need not be considered.
>
> (2) If they do, does the state have a positive obligation to secure enjoyment of the relevant Convention right between private persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer.
>
> (3) If it does, is the interference with the employee's Convention right by dismissal justified? If it is, proceed to (5) below.
>
> (4) If it is not, was there a permissible reason for the dismissal under the ERA, which does not involve unjustified interference with a Convention right? If

[14] Collins "Theories of Rights as Justification for Labour Law" in Davidov & Langille *The Idea of Labour Law* (O.U.P., Oxford, 2011) p.137 at 154. See generally Hepple *Rights at Work: Global, European and British Perspectives* (Sweet & Maxwell, London, 2005).

[15] [2004] I.R.L.R. 625.

there was not, the dismissal will be unfair for the absence of a permissible reason to justify it.

(5) If there was, is the dismissal fair, tested by the provisions of s.98 of the ERA, reading and giving effect to them under s.3 of the HRA so as to be compatible with the Convention right?"[16]

Having considered that decision, together with other cases in which Convention rights were in issue, including *Pay v Lancashire Probation Service*[17] and *Copsey v W.W.B. Devon Clays Ltd.*,[18] Upex concludes that "even if an employee's rights under one or more of articles of the European Convention are engaged, the outcome of an unfair dismissal claim is unlikely to be affected."[19] Even allowing for the fact that that conclusion is advanced in the context of unfair, rather than wrongful, dismissal, having regard to the English experience (where the Human Rights Act 1988 goes beyond the text of the Irish Act) it would seem that, as a basic proposition, invoking some form of protection in respect of human rights will not advance an employee's position when they are dismissed. As summarised by Upex, "In view of the many ways in which the ECHR could interact in employment law, it has been quite limited in relation to termination."[20]

It was noted by the divisional High Court in *Dellway Investment Ltd. v National Asset Management Agency*[21] that the definition of possessions for the purposes of the Convention was, "if anything, narrower than the scope of property rights which may be afforded constitutional protection under the Irish Constitution."[22] A downbeat note is also sounded by O'Donnell, who advances the view that property rights "are different from other human rights (and arguably not human rights at all) in that they emerged from circumstances of an accident of birth and /or career, unlike other rights which could be

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[16] *ibid.*at 633(the ERA is the Employment Rights Act of 1996).

[17] [2004] I.C.R. 187; [2004] I.R.L.R. 129.

[18] [2005] I.C.R. 1789; [2005] I.R.L.R. 811.

[19] Upex *The Law of Termination of Employment* 8th ed. (Jordans, Bristol, 2012), p.187.

[20] *ibid.*, p.186.

[21] [2011] 4 I.R. 1.

[22] *ibid.* at 126.

said to be a product of immutable human characteristics."[23] A similar view is propounded by Schermers.[24]

As such, the potential influence of human rights law in this area does not appear to be overly promising. What can well have a significant influence, however, is the introduction by the legislature of codes and guidelines governing particular professions.

4. Professional Codes

By way of example, in the banking sphere, certification for both pre-approved controlled and controlled functions is assessed relative to the Fitness and Probity Standards Code issued under the Central Bank Reform Act 2010, specifically section 50 thereof. It is not difficult to conceive a situation whereby a refusal to certify an employee may lead to an injunction application.[25] Equally, it is not unrealistic to expect that issues may arise out of the operation of the Criminal Justice Act 2011, which affords protection to employees who disclose information in relation to specified offences and the Protected Disclosures in the Public Interest Bill 2012, pursuant to which it is proposed to protect employees who disclose wrongdoing. These are just a few examples of codes which could impact on the employment relationship in such a way that injunction applications can be contemplated.

The foregoing represent some potential changes to the ongoing working relationship which could lead to either an increase, or change of emphasis in the reasons for, anti-dismissal applications. A potential area of possibly even greater development arises in respect of the termination of the employment relationship.

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[23] O'Donnell "Property Rights in the Irish Constitution: Rights for Rich People, or a Pillar of Free Society?" in Carolan & Doyle eds. *The Irish Constitution Governance and Values* (Thomson Round Hall, Dublin, 2008), p.421.

[24] Schermers "The International Protection of the Right to Property" in Matscher and Petzpld eds. *Protecting Human Rights – The European Dimension: Essays in Honour of GJ Wiarda* 2nd ed. (Cologne 1990), p.565.

[25] The issue of certification was one of the issues considered by Charleton J. in *McGrane v Ulster Bank ex tempore*, High Court, Charleton J., June 29, 2012, although the question of fair procedures in the context of what the court believed to be an allegation of misconduct was central to the orders made by Charleton J.

5. Termination of the Employment Relationship

One area of development which has an air of greater imminence than others is a revisiting of the idea that a court may go beyond a dismissal and look at "whether or not the decision being taken by the employer is rational"[26] This leads to an even broader consideration of whether the courts will be prepared to trespass (or arguably trespass even further), or indeed simply overturn, the doctrine propounded in *Addis v Gramophone Co Ltd.*,[27] and which has stood (relatively) firm in this jurisdiction for over a century, and the "*Johnson* exclusion zone" which uses *Addis* as its foundation and develops it into a contemporary understanding of employment law. The House of Lords held in *Addis* that, *inter alia*, damages can only be awarded where contractual notice is not given; such damages may not exceed the remuneration payable during the notice period.[28]

5.1 The Addis Doctrine

Other jurisdictions have been able to address, without any intellectual or jurisprudential concerns, the question of the manner of termination. It has been noted by Collins, Ewing and McColgan that "in the USA, for instance, many states have recognised an implied term not to terminate a contract in bad faith, a principle of commercial contracts, which has been applied to dismissals."[29] In *Wallace v United Grain Growers Ltd.*[30] McLachlin J. (dissenting in part) acknowledged that the Canadian courts would recognise an implied contractual obligation of good faith when dismissing an employee. She further observed that this was part of an "incremental step-by-step revision,"[31] and that the action for breach of this duty "supplements the independent causes of action in contract and tort

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[26] See the comments of McMenamin J. in *Keenan v Iarnrod Eireann* [2010] IEHC 15.

[27] *Addis v Gramophone Co Ltd.* [1909] A.C. 488

[28] See generally Mallon & Millen "Wrongful Dismissal – A Right to General Damages?" (2002) 7(6) B.R. 307.

[29] Collins, Ewing and McColgan *Labour Law Text and Materials* (Hart Publishing, Oxford, 2005), p.476.

[30] *Wallace v United Grain Growers Ltd.* [1997] 3 S.C.R. 701.

[31] *ibid.*, para.146. Approved, according to McLachlin J., in *Watkins v Olafson* [1989] 2 S.C.R. 750 at 760 and *R v Salituro*, [1991] 3 S.C.R. 654 at 668.

previously recognized to provide ample redress for wrongs such as those raised by the appellant without altering the traditional notice-based action for wrongful dismissal."[32]

Mallon has argued that it cannot be right that an employer can dismiss an employee in "utter disregard" of his rights. As he observes, "An unscrupulous employer could do so secure in the knowledge that in all probability he will merely be ordered to pay compensation for the employee's actual loss and he will be fortified that the employee must seek to mitigate that loss."[33] There are three cases which point to this area, both academically and judicially, as being one in which there will be significant (in every sense of the word) judicial activity in the short to medium term. The first is the decision of the U.K. Supreme Court in *Edwards v Chesterfield Royal Hospital N.H.S. Foundation Trust.*[34] The Irish cases are those of *Maha Lingham v Health Service Executive*[35] and the decision of MacMenamin J. in *Keenan v Iarnrod Eireann.*[36] At the outset, however, it should be cautioned that the motivation in England for returning to review this area of the law is a feature specific to the law in the neighbouring jurisdiction, namely a quantified cap on damages for any unfair dismissal claim.[37] As such, the idea of "common law damages…stretching way into the future on a par with personal injury damages has long been the Holy Grail for claimants' lawyers."[38]

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[32] *Wallace v United Grain Growers Ltd.* [1997] 3 S.C.R. 701, para.146. Brodie "The Beginning of the End for Addis v The Gramaphone Company?" (2009) 228 I.L.J. 38 suggests that whilst on the face of it *Wallace* might appear to represent an improvement on *Addis,* "the approach was somewhat problematic." In that regard, he notes that there was no standalone claim allowed for injury to feelings. However, he suggests that cases such as *Fidler v Sun Life Assurance* [2006] 2 S.C.R. 3 demonstrate that the courts in Canada are freeing themselves from the "shackles of *Addis*," a position which further evolved with the decision in *Honda Canada v Keays* (2008) 294 D.L.R. (4th) 577.

[33] Mallon, Paper at Roundhall Conference, May 24, 2006, as set out in Redmond *Dismissal Law* 2nd ed. (Tottel, Dublin, 2007), p.199.

[34] [2011] UKSC 58. Strictly speaking, this was in fact two cases, as the Supreme Court also dealt with the appeal in *Botham v Ministry of Defence*. See the analysis of the case(s) by Costello "Edwards v Chesterfield Royal Hospital Parliamentary intention and damages caused by maladministration of a contractual dismissal procedure"' (2013) 76(1) M.L.R. 134.

[35] [2006] 17 E.L.R. 137.

[36] [2010] 21 E.L.R. 115.

[37] For dismissals on or after 1 February 2011 the cap is £68,400.

[38] Smith "Employment: New Rules for Old" (2010) 160 N.L.J. 893.

The importance of this arises from the approach of the courts in this jurisdiction to misconduct. Given the heightened emphasis on an employee's reputation where misconduct is alleged, and the courts' willingness to consider this as part of the adequacy of damages, if the courts were prepared to revisit *Addis* in a significant way, the argument which could be advanced at the interlocutory stage is that the manner of a dismissal is such that the stain on the employee's character caused by such a process is such that it is not adequately compensatable in damages, and that, all other things being equal, an injunction should issue.

5.2 The Evolution of the Addis Doctrine

Enonchong has suggested that *Addis* was a case confined to its own facts, and a proposition for no more than the fact that the "loss of reputation in that particular case could not be compensated because it was not caused by a breach of contract."[39] Whatever the truth of this, as Fudge notes,

> "although the issue in *Addis* was the limitation of damages in wrongful dismissal actions to the loss of remuneration and benefits in respect of the notice period, the House of Lords' decision reinforced a 'nexus of mutually self-sustaining ideas' that restricted the expectations that employees could vindicate through law."[40]

The case of *Malik & Mahmud v Bank of Credit and Commerce International S.A.*[41] did not involve wrongful dismissal. Rather, the employees concerned brought an action seeking "stigma damages" due to their association with the collapse of the controversial defendant bank. The decision in *Addis* was analysed by the House of Lords, with Lord Steyn acknowledging that the principle that an employee cannot recover exemplary or

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[39] Enonchong, "Contract Damages for Injury to Reputation" (1996) 59 M.L.R. 592 at 593.

[40] Fudge "The Spectre of Addis in Contracts of Employment in Canada and the UK" (2007) 36(1) I.L.J. 51.

[41] [1998] A.C. 20; [1997] 3 W.L.R. 95; [1997] 3 All E.R. 1.

aggravated damages for wrongful dismissal was "still sound law."[42] However, the House of Lords managed to distinguish *Addis* from the case before it, making it clear that they were not overruling *Addis*. *Malik* has been described as "unusual and rare," as the stigma damages were claimed on the basis that the defendant bank had carried out its business corruptly and dishonestly.[43] However, it does point to the fact that the *Addis* doctrine is not insurmountable.

5.3 The Johnson Exclusion Area

Addis fell for consideration again in *Johnson v Unisys Ltd.*[44] The plaintiff in *Johnson* sought to establish that there was an implied term in every contract of employment that an employer would not act unfairly, nor would they, without reasonable and proper cause, damage the employee's prospects of obtaining subsequent employment by the manner of dismissal. He sought to do so using an argument constructed on the idea of a breach of the implied duty trust and confidence surrounding the dismissal. Specifically, he asserted that the breach arose by reason of, first, his employer's failure to afford him an opportunity to defend himself in disciplinary proceedings, and secondly from the failure of the company to follow its own disciplinary code. In essence, the plaintiff sought to rely on the doctrine of breach and confidence as a way of circumnavigating *Addis*.

Lord Steyn addressed the concerns raised in relation to *Addis,* tracing them back to 1909:[45] as then editor of the Law Quarterly Review, Sir Frederick Pollock had noted that "In the case of wrongful dismissal, a harsh and humiliating way of doing it, by the imputation which such a dismissal conveys, may make it very difficult for the servant to obtain a new situation."[46] Lord Steyn noted that *Addis* was very much a product of its time.[47] However, the Law Lords ultimately held that in light of the statutory scheme in

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[42] *ibid.*at 51; *ibid.* at 114; *ibid.* at 20.

[43] Anderman *Labour Law* 4th ed. (Butterworths, London, 2000), p.103. As such, what was in issue was financial loss rather than what might be termed "injury to feelings."

[44] [2003] 1 A.C. 518.

[45] *ibid.* at 526.

[46] (1910) 26 L.Q.R. 1 at 2.

[47] [2003] 1 A.C. 518 at 531.

place, it would not be appropriate to develop the common law in a way that would accommodate the plaintiff's claim. In so doing, Lord Hoffman doubted whether the implied term of trust and confidence could be deployed to essentially create a breach of contract additional to the dismissal itself. Rather, trust and confidence is concerned with preserving the continuing relationship between employer and employee rather than its termination

Somewhat bluntly, Horan has argued that *Addis* has "blighted the development of the wrongful dismissal action"[48] He suggests that *Addis* has "arguably been reinforced" by the decision of the House of Lords in *Johnson v Unisys,*[49] as a result of which an employee may not recover damages "for the impairment of future employment prospects or the difficulties encountered in seeking an alternative position."

That reinforcement continued in the case of *Eastwood v Magnox Electric Plc.*,[50] in which Lord Nicholls decisively rejected the extension of the implied term of trust and confidence to termination. As explained by Fennelly J. in *Maha Lingham*,[51] Lord Nicholls did not want to extend "the implied term regarding mutual trust in such a way as to upset the balance set by the legislature."[52] As he explained, this referred to the fact "that the principle that there is an implied term of mutual trust and good faith in contracts of employment does not extend so as to prevent the employer terminating a contract of employment by giving proper notice."

However, within these cases, there is evidence of growing unease at the contrast between the application of trust and confidence to the ongoing employment relationship and the fact that it cannot be applied to termination. This was well articulated by Lord Steyn in *Eastwood*. As he explained, such a dichotomy

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[48] Horan "Employment Injunction: Current Status and Future Developments" (2005) 1 E.L.Rev. 8 at 9.

[49] [2001] I.R.L.R. 279. Described as a "notoriously difficult case" by Smith "Employment: New Rules for Old" (2010) 160 N.L.J. 893.

[50] [2004] 3 W.L.R. 322.

[51] [2006] 17 E.L.R. 137.

[52] *ibid.* at 141.

> "... will often give rise to questions whether earlier events do or do not form part of the dismissal process. After all, such problems in relationships between an employer and an employee will often arise because of a continuing course of conduct. In practice this will inevitably lead to curious distinctions and artificial results. It will involve case by case decision making rather than principled adjudications. The outcome of litigation will be very unpredictable."[53]

This tension came to something of a head in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust.*[54] In broad terms, the plaintiff surgeon in *Edwards* was dismissed in circumstances where he argued that his employer had not followed a prescribed contractual disciplinary procedure (thereby setting the case up very differently from an argument centred on a breach of an implied term of trust and confidence). He argued that had it been followed, he would not have been dismissed. He accordingly claimed compensation for losses and loss of earnings (which would have exceeded the English cap on compensation for unfair dismissal).

In the Court of Appeal, Moore Bick L.J. held that *Johnson* was not relevant to the plaintiff's claim as he was relying upon a breach of an express term of the contract. The Court proceeded to hold that, assuming that Mr. Edwards had a good cause of action for breach of an express term as to disciplinary procedure, thereby establishing that had the correct procedure been implemented it would have resulted in a finding of no misconduct, he was entitled to recover damages for the loss of the opportunity to hold another full-time appointment as a consultant surgeon.

Ultimately, the Supreme Court ruled against the plaintiff, but only by a margin of 4 to 3.[55] As Lord Dyson J.S.C., giving the leading judgment, explained, parliament had "specified the consequences" of a failure to comply with disciplinary provisions in unfair dismissal proceedings. "It could not have intended that the inclusion of these provisions in a contract would also give rise to a common law claim for damages ..."[56] The only

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[53] [2004] 3 W.L.R. 322 at 334.

[54] [2011] Q.B. 339; [2012] 2 A.C. 22.

[55] [2012] 2 A.C. 22.

[56] *ibid.* at 41.

qualification - such as it is - to this is that Lord Dyson J.S.C. reaffirmed that "an injunction to prevent a threatened unfair dismissal does not cut across the statutory scheme for compensation for unfair dismissal."[57] However, the ongoing conceptual difficulties in this area are well captured in Baroness Hale J.S.C.'s observation that she was puzzled "as to how it can be possible for an employee with a contractual right to a particular disciplinary process to enforce that right in advance by injunction but not possible for him to claim damages for its breach after the event."[58]

The discussion across the judgments in all the courts up to the Supreme Court is, in its own way, absorbing. Coupled with the various judgments in *Johnson*, *Malik* and *Eastwood,* it certainly points to the fact that a process of loosening entrenched doctrines may well be underway, albeit that it is a process which is far from complete. The final word – for the time being – goes to Lord Phillips P.S.C., who in his judgment in *Edwards* acknowledged that "It may be that this area of the law merits fundamental review."[59]

5.4 The Irish Approach

On one view, the Irish courts, whilst paying lip service to an *Addis* / *Johnson* style approach, have effectively been approaching matters in a somewhat unique - and, frankly, somewhat unprincipled – way for some time.

In *Johnson*, the House of Lords addressed its mind to whether, by virtue of *Addis*, an employee was precluded from recovering special damages for financial loss in respect of damage to his employment prospects resulting from the manner of a wrongful dismissal. As has been seen, they refused to do so, primarily due to concerns arising from a risk of trespassing on the statutory scheme. The courts in this jurisdiction are faithful to the *Johnson* style approach. This conventional approach (albeit in the context of a dispute arising from a failure to pay a cheque) was articulated by Kennedy C.J. in *Kinlan v Ulster Bank Ltd.,*[60] in which the Chief Justice stated that

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[57] *ibid.* at 42.

[58] *ibid.* at 62.

[59] *ibid.* at 53.

[60] [1928] I.R. 171.

> "It is very clearly settled in this country and in England, and affirmed in many cases, that in actions for breach of contract damages may not be given for such matters as disappointment of mind, humiliation, vexation or the like."[61]

Johnson was referred to approvingly by Smyth J. in *Sharkey v Dunnes Stores (Ireland) Ltd.*.[62] The Irish courts have also embraced Lord Nicholls' approach in *Eastwood*, best exemplified by the approach of Carroll J. in *Orr v Zomax Ltd.*[63] (although arguably the focus in *Orr* was on the encroachment of the common law onto a statutory scheme rather than on the question of damages arising from the manner of dismissal). That said, the Irish courts have been prepared on occasion to award general (as distinct from special) damages arising out of dismissal. These developments were summarised by Laffoy J. in *Nerney v Thomas Crosbie Holdings Ltd.*[64] by reference to the submissions made by counsel. Although on the facts she was not prepared to award general damages, she noted the defendant's submission that, having regard to the decision in *Addis* "the plaintiff is not entitled to compensation for loss of reputation and injury to his feelings as regards the manner in which his employment was terminated." However, she also noted the plaintiff's contention that "The basis of his claim is that there was damage to his reputation in the community. Counsel for the plaintiff submitted that there has been a practice to award a small amount of compensation in cases such as this and that that practice prevails at Employment Appeals Tribunal level."[65]

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[61] *ibid.* at 184.

[62] [2004] IEHC 163.

[63] [2004] 1 I.R. 486.

[64] [2013] IEHC 127, para.59.

[65] See, in that regard, *Smith v Custom House Docks Development Authority* unreported, High Court, McGuinness J., March 20, 1997 and *Dooley v Great Southern Hotels Ltd.* unreported, High Court, McCracken J., July 27, 2001 (The decision in *Dooley* was handed down in July 2001, that in *Johnson* in March 2001. As such, it is not unreasonable to assume that the judgment in *Johnson* was available to the court in *Dooley).* In *Phelan v BIC (Ireland) Ltd.* [1997] 8 E.L.R. 208 Costello J. indicated that if the Plaintiff succeeded with his claim, he would be entitled to exemplary damages "because of the nature of his dismissal." However, that judgment was delivered some six years before that in *Johnson* albeit, and quite obviously, long after that in *Addis.* In *Sullivan v Southern Area Health Board* [1997] 3 I.R. 123, (and so pre-*Johnson*) the Supreme Court found that the plaintiff was entitled to compensation for emotional upset caused by a failure to provide him with the resources for the discharge of his duties. However, and crucially

Of more import in the context of the instant discussion is that the Irish courts have, in a sense, circumnavigated *Addis* and its progeny inasmuch as, as seen in Chapter Six,[66] they are quite prepared to grant an injunction based on the manner of an employee's dismissal by reference to the fact that their reputation is called into question. That does not go as far as awarding damages for the nature of a dismissal, though it is certainly at variance with the philosophy of *Addis*. On the basis of the courts' approach to damage to reputation, what on the face of it is a potential liability in damages is also of considerable importance in the context of a possible injunction application. Furthermore, the potential available in leveraging the implied obligation of trust and confidence has been well identified by Redmond:

> "...were the employer to act in breach of the independent implied obligation by dismissing an employee in a harsh and humiliating manner, the employer might become liable in damages. There would be no conflict between the express and implied terms. The full potential of this over-arching legal principle has yet to be explored in Ireland."[67]

This is an area which might well be explored before too long. In *Maha Lingham v Health Service Executive*[68] Fennelly J. appeared receptive to the idea that the law might develop such that it could be argued that an employer is "bound not to act so as to undermine the contract of employment but to also act in good faith on the basis that there is a relationship of mutual trust between the parties."[69] Although this is very much couched in the language of a continuing relationship, Fennelly J. then linked his observations to the decision in *Eastwood* and the refusal to extend implied terms to termination. There was more than a hint in *Maha Lingham* that specific matters could influence a court's approach in that regard. In particular, Fennelly J. referred to the fact that if there was a

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in the context of a (re)consideration of *Addis*, that was based on an express agreement to provide a second medical consultant.

[66] See Chapter Six, section 2.2.4.

[67] Redmond *Dismissal Law* 2nd ed. (Tottel, Dublin, 2007), p.199.

[68] [2006] 17 E.L.R. 137.

[69] *ibid.* at 141.

"strong and clear body of evidence" that the defendant had "been motivated by a policy of racial discrimination," the matter would be "entirely different."[70] Insofar as Fennelly J.'s judgment suggests that the courts will have to engage with a *Johnson* style debate in considering whether to award damages in relation to the manner of termination, it may not even be necessary to have recourse to trust and confidence to overcome *Addis*: in Australia, the courts have in cases sidestepped the trust and confidence argument by relying on the tort of negligence.[71] In *Keenan v Iarnrod Eireann,*[72] McMenamin J. stated that he was prepared to apply a test applied in *Ali v London Borough of Southwark,*[73] (decided pre-*Johnson*) namely whether "even in circumstances where an employer may have lost trust and confidence a court may look at whether the decision being taken by the employer is rational." This is an eye-catching idea and appears to mesh with the approach adopted by Fennelly J. in *Maha Lingham*: the courts in this jurisdiction are not averse to considering exactly how termination came about.

Apart altogether from the fact that it might be argued that *Addis* is a pre-independence decision, there are in fact a number of persuasive authorities from other jurisdictions which suggest that the *Addis / Johnson* line of cases need not be followed. The New Zealand Law Commission considered the relevant principles and caselaw in a 1991 paper entitled "Aspects of Damages: Employment Contracts and the Rule in *Addis v Gramophone Co.*"[74] They identify cases which at a minimum breach the *Addis* doctrine, such as the decision of the Court of Appeal in *Marlborough Harbour Board v Goulden,*[75] in which the court observed that:

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[70] *ibid.* at 142.

[71] See *State of N.S.W. v Seedsman* [2000] N.S.W.C.A. 119; *State of N.S.W. v Jeffery* [2000] N.S.W.C.A. 171 and *Mannall v State of N.S.W.* [2001] N.S.W.C.A. 327. Fudge notes that in *Addis*, the House of Lords eschewed the encroachment of "tort-based, relational obligations" upon an employing entity: Fudge "The Spectre of *Addis* in Contracts of Employment in Canada and the UK" (2007) 36(1) I.L.J. 51, citing Freedland *The Personal Employment Contract* (O.U.P., Oxford, 2003), p. 360.

[72] [2010] 21 E.L.R. 115.

[73] [1988] I.R.L.R. 100.

[74] N.Z.L.C. R18 (Wellington, New Zealand, 1991)..

[75] [1985] 2 N.Z.L.R. 378.

> "... the position has probably been reached in New Zealand where there are few, if any, relationships of employment, public or private, to which the requirements of fairness have no application whatever. Very clear statutory or contractual language would be necessary to exclude this elementary duty..."

Such observations led somewhat inexorably to the decision of Gallen J. in *Whelan v Waitaki Meats Ltd.*[76] The Plaintiff's employment was abruptly terminated, to adopt the phraseology of the Law Commission, "as part of a somewhat arbitrary cost-cutting exercise." Included in his claims was one of general damages for mental distress. Drawing comfort from, *inter alia*, *Goulden*,[77] Gallen J. felt that the proposition that the law did not permit general damages to be awarded for breach of contract was untenable. As summarised by the Law Commission, he took the view that "if *Addis* was more narrowly construed as a rule prohibiting damages for mental distress for breaches of employment contracts, the legal or logical justification for it was doubtful."[78]

This should be qualified by the fact that if followed in New Zealand, *Addis* would result in an "illogical distinction" between those who could seek relief under the provisions of New Zealand's Labour Relations Act 1987 and those who could not. However, at a more general level, Gallen J. also took the view that *Addis* "merely illustrated a principle that general damages are inappropriate as not being foreseeable in commercial contracts, but that a contract such as that in *Addis* would no longer be regarded as commercial in nature."[79] This could also be used by way of answer to the observations of Kennedy C.J. in *Kinlan v Ulster Bank Ltd.* set out at the start of this section.

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[76] [1991] 2 N.Z.L.R. 74. Although prior to this, the courts in New Zealand had followed *Addis*: see, for example, cases such as *Cowles v Prudential Assurance* [1957] N.Z.L.R. 124 and *Vivian v Coca-Cola Export Corporation* [1984] 2 N.Z.L.R. 289.

[77] Although as noted by the Law Commission, it appears that Gallen J. "was not referred to the May 1989 decision of the Supreme Court of Canada in *Vorvis v Insurance Corporation of British Columbia* (1989) 58 D.L.R. (4th) 193where, by a 3:2 majority, the continuing - if not absolute - force of *Addis* in Canada was confirmed."

[78] As summarised by the Law Commission, N.Z.L.C. R18, Wellington, New Zealand, 1991, p.25.

[79] *ibid.* That the House of Lords became aware of *Whelan* is evident from the fact that it is referred to in *Malik & Mahmud v Bank of Credit and Commerce International S.A.* [1998] A.C. 20; [1997] 3 W.L.R. 95; [1997] 3 All E.R. 1. A distinction between general commercial contracts and contracts "an object of which

The Law Commission Report is also an extremely useful repository of information inasmuch as in a series of Appendices, it considers views of non-pecuniary loss (and by extension, the effect of *Addis*) in various jurisdictions including England,[80] Australia,[81] Canada,[82] the United States[83] and how non-pecuniary loss is treated in both France and Germany.[84] This consideration evidences cases in which *Addis* was followed, but also cases in which there was a departure from it or it was distinguished. As such, there is no reason why the courts in this jurisdiction should approach *Addis* or the *Addis* line of cases on the basis that they are absolutely bound by its logic or reasoning. Indeed, in *Carey v Independent Newspapers Ltd.*,[85] Gilligan J. remarked that it was "of interest to note that other common law jurisdictions have rejected *Addis*."[86] Referring to the New Zealand decision of *Stuart v Armourguard Security Ltd.*,[87] he noted that in that case, the High Court of New Zealand had held that it was an implied term of the contact of employment "that an employee should not be dismissed in a manner likely to cause distress or loss of reputation, without proper cause." Although on the facts in *Carey* no damages were awarded for loss of reputation, and accordingly Gilligan J. took the view that it is was not necessary for him to consider the legal issue "as to whether or not there is a remedy in Irish law in respect of a valid claim for damages for loss of reputation arising from a termination of a contract of employment," he certainly did little to suggest that the Irish courts would not be willing to (re)consider *Addis* as appropriate.

The obvious question is whether a change from the approach in *Addis* might benefit an employee in terms of seeking an anti-dismissal injunction, notwithstanding the clear benefit of their being able to advance an enhanced claim in damages. As considered, the

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is to secure a particular psychological benefit" is referred to in the Canadian case of *Fidler v Sun Life Assurance Co of Canada* (2006) 271 D.L.R. (4th) 1.

[80] N.Z.L.C. R18, Wellington, New Zealand, 1991, Appendix C, p.74.

[81] *ibid.*, Appendix D, p.80.

[82] *ibid.*, Appendix E, p.83.

[83] *ibid.*, Appendix F, p.86.

[84] *ibid.*, Appendix G, p.88.

[85] [2004] 3 I.R. 52.

[86] *ibid.* at 82.

[87] [1996] 1 N.Z.L.R. 484.

relevance of such a change would arise when married to the courts' views on reputational damage necessitating interlocutory injunctions. That being so, and returning to Mallon's comments, the manner of dismissal is a matter which could be of great significance over the next few years.

Also relevant in the context of interlocutory injunctions is the way in which the courts approach the *Campus Oil* guidelines.

6. The *Campus Oil* Guidelines

The way in which the *Campus Oil* guidelines are deployed can be hugely influential: the *Maha Lingham* / *Bergin* changes to the threshold test are a clear example of that. Likewise the development of the *Fennelly* order. Similarly, the difference in approach between judges as to whether damage to reputation is compensatable by damages shows how courts can move the law in one direction or another.

The most obvious potential change to processes in the short term is a focus on the idea of the "least risk of injustice." That has the potential to give the courts considerably more latitude as to how they approach the anti-dismissal injunction. The clear concern is that it might lead to even greater inconsistency, with judges influenced to a significant degree by the facts before them; for all the difficulties posed by the application of the *Campus Oil* guidelines to anti-dismissal injunctions, they are at least an agreed starting point, with both employer and employee aware of the type of material which will have to be put before a court to satisfy those guidelines. However, in the case of anti-dismissal injunctions at least, by coupling such an approach with the maintenance of a threshold test of a "strong case," the courts would have some mechanism by which they could filter cases.

As considered in Chapter Eight,[88] a reconsideration of employment as a property right, such that it should primarily be protected by injunction rather than being "bought off" by damages could also be of considerable importance in terms of the application of the

[88] See Chapter Eight, section 2.

guidelines. Whether it can be argued that the guidelines should in fact be set aside, or more realistically, varied, in the case of anti-dismissal injunctions will be considered in the next Chapter.

7. Structural and Systemic Reform

Consideration of systemic change does not directly address any consideration of how the anti-dismissal injunction might evolve *per se*. It does, however, offer some pointers as to whether such applications will remain pre-eminent before the courts and acknowledges the extraneous pressures which can impact the development of the law in general terms.

Reference to the inconsistencies which manifest themselves in the application of the *Campus Oil* guidelines leads neatly to the first aspect of what might be termed structural and systemic reform, and concerns the extent to which a group of specialist judges dealing with employment matters generally, anti-dismissal injunctions specifically, might bring greater clarity and consistency.

7.1 Specialist Courts and Judges

An array of judges is called upon to deal with employment disputes. Not all may have a background in employment law, either as judges or practitioners. Not all may have the same grasp of the underlying concepts and jurisprudence. As such, the question arises as to whether there is some merit in setting up dedicated employment courts or designating specialist employment judges to deal with all employment matters.

The idea of using specialist judges dealing with discrete areas of the law was considered in some detail in England in the 2011 Report of the Committee on Super-Injunctions,[89] chaired by the Master of the Rolls, Lord Neuberger (the "Neuberger Report"). Although nothing to do with employment *per se*, its views merit consideration in that they are readily applicable to a discrete area of the law such as employment.

[89] Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice, May 2011.

A fundamental concern raised in the context of the Neuberger Report was that *ex parte* injunctions in particular were often sought by vacation or duty judges who did not have sufficient expertise or familiarity with the law in relation to privacy. As such, it was suggested that a practice had developed of such injunctions being granted "almost automatically," such that the *status quo* could be preserved until such time as proper scrutiny could be brought to bear. That anti-dismissal injunctions are regularly sought on an *ex parte* basis, with employees genuinely apprehending that they are about to lose their jobs, makes this a very real consideration in the employment context (although it should be tempered by the fact that the law in relation to privacy has recently been undergoing a surge in development in England, driven by the application of human rights law, whereas the law in relation to employment is of considerably lengthier heritage and thus more familiar and accessible).

The reasons for using specialist judges are well set out in the Neuberger Report:

> "Specialisation is called for because of the particular nature of those proceedings. [family, commercial, construction disputes and intellectual property matters] It improves the quality of justice and public confidence in the courts through the application of expert knowledge and judicial efficiency."[90]

However, the point is also made that applications for interim and interlocutory injunctions are rarely specialist proceedings. Rather, "They are proceedings with which all High Court judges are familiar." Whilst is it difficult to gainsay this, it does gloss over the need for a judge to have some grasp of the underlying substantive law, for the seeking of an injunction is a procedure grafted on to some underlying law, and cannot exist independently.

The Report rejects the idea that all applications on notice would be made to specialist judges only, as "this would be likely to introduce unacceptable delay, with its attendant costs." As was pointed out in the report, in a remark that applies equally to employment (albeit for different reasons), "Delay in matters such as these is often of greater adverse

[90] *ibid.*, para 3.55.

effect than is ordinarily the case, given the time-sensitivity of the information that is often at the heart of such proceedings."

Rather, the Neuberger Report recommended various remedial measures, including:

i. Ensuring compliance with the obligation of full and frank disclosure on *ex parte* applications; such an obligation includes drawing the court's attention the applicable law, formalities and procedures;
ii. Training for vacation / duty judges from experienced members of the judiciary;
iii. The use of what is known as the Practice Guidance and Model Order.

On balance, it therefore seems more appropriate to maintain the extant system. If anything, the underlying issue is not with the assignment of cases to different judges, but the lack of a clear approach to how anti-dismissal injunctions are approached. The prime example of this is the approach of the courts to injunctions sought in the context of redundancy, only recently tackled by Laffoy J.

7.2 The Impact of the Civil Procedure Rules

The relevance and impact of other systemic changes is highlighted by the introduction of the Civil Procedure Rules ("C.P.R.") in England. Other than in cases of extreme urgency, the need for a mechanism such as an interlocutory injunction is effectively directly related to the length of time which it takes to get a case from inception to substantive hearing. This dictates the need for interlocutory injunctions: the more likely it is to get a quick hearing of a substantive issue, the less likely it is to require an interlocutory injunction. The introduction of the C.P.R. has led to a recalibration of the numbers of interlocutory injunction applications relative to the number of substantive hearings. As observed by Wadlow, albeit in the specific context of passing off, the decrease in the number of interlocutory applications and attendant increase in the number of full hearings can be explained in the following terms:

> "...a claimant seeking an [interlocutory] injunction has to convince the court of two propositions which will not easily be satisfied: first, that the damage he will

> suffer over a period measured in weeks or months, rather than years, will truly be irreparable in the sense of *American Cyanamid*; and secondly that the effort expended on both sides on the application for the [interlocutory] injunction, including evidence on the balance of convenience, would not have been better spent in going to full trial on an expedited basis."[91]

As such, systemic change may not bring simply substantive changes and benefits, it can also bring in its wake significant procedural improvements, both direct (in terms of more streamlined *fora*) and indirect, in terms of waiting times and the associated need for urgent relief.

One other feature of the C.P.R. merits mentioning: Part 24 provides that a court may determine any question of law or construction of a document if it appears that (1) such question can be determined without a full trial and (2) it will finally determine the entire cause. This may appear superficially attractive in that it can lead to accelerated determinations. However, the authors of Smith & Wood's *Employment Law* raise the concern that injunctions may be granted on the basis of interpretations of contracts at an early stage.[92] Although this does not involve enforcement of a contract *per se*, "if its use became more widespread the question would have to be faced as to whether it constituted unacceptable back-door enforcement."[93] That said, it is notable that the case of *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*[94] came before the courts in England pursuant to Part 24. There is no suggestion that it led to back-door enforcement, although it took a lengthy journey up to and including the Supreme Court in London to arrive at that conclusion.[95]

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[91] Wadlow *The Law of Passing Off* (London, Sweet and Maxwell, 2004), at 795-796.

[92] Citing the approach of Chadwick J. in *Jones v Gwent County Council* [1992] I.R.L.R. 521.

[93] Smith & Baker *Smith & Wood's Employment Law* 10th ed. (O.U.P., Oxford, 2010), p.402.

[94] [2011] Q.B. 339.

[95] As observed by Moore-Bick L.J. in the Court of Appeal, "we have had the benefit of extensive argument and citation of authority at least as ample as that which the trial judge could expect to have." [2011] Q.B. 339 at 343.

7.3 Proposed Changes in England

Further changes are proposed in England. It has been reported that one such change is that workers will not be allowed to take unfair dismissal cases for two years after taking up a job. According to the Chancellor of the Exchequer, the aim of the measure was to increase business confidence[96] (indeed, this is part of a wider debate as to the "reform of unfair dismissal law hinging upon the idea of compensated no fault dismissal," which "would allow an employer to dispense with an employee's services by paying her out at the rate prescribed by the legislation." [97])

If such a restriction was applied in this jurisdiction, it would obviously have the potential, all other things being equal, to increase the number of applications coming before the courts, inasmuch as a greater number of people would have potential claims excluded from the E.A.T. Interestingly, the argument made in an English context is that a wider move towards no fault dismissal is based on a "real agenda" to "deregulate unfair dismissal law and return to the common law of wrongful dismissal."[98]

However, proposals in England to abolish unfair dismissal laws completely have met with vocal criticism.[99] Under those proposals all rights to claim unfair dismissal would be removed and replaced with a right to seek a redundancy payment. Again, were such an approach to be taken in this jurisdiction, it could in theory lead to an increase in cases where wrongful dismissal is alleged.

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[96] "Osborne changes rules on unfair dismissal cases" The Irish Times, October 4, 2011.

[97] *Per* Howe "Poles Apart? The Contestation between the Ideas of No Fault Dismissal and Unfair Dismissal for Protecting Job Security" (2013) 42(2) I.L.J. 122.

[98] *ibid.*

[99] See, for example, "Vince Cable rejects proposal to abolish unfair dismissal laws," The Guardian, October 26, 2011.

7.4 Proposed Changes in Ireland

In this jurisdiction, the Director of the National Employment Rights Authority (N.E.R.A.) has been charged with coordinating the streamlining of the employment rights bodies, namely the Labour Relations Commission (L.R.C), N.E.R.A., the E.A.T, the Labour Court and the Equality Tribunal.[100] In that regard, the Workplace Relations (Law Reform) Bill underpins various proposed changes.[101]

Against that background, it is hoped, *inter alia*, to resolve grievances and disputes as close to the workplace as possible and as early as possible after they arise and to minimise the number of cases that present for resolution at formal hearings through active case progression and an increased range of interventions.[102] For such changes to be meaningful, it is submitted that a system needs to put in place which can draw on appropriate levels of expertise. If it is, the new non-court forum could prove an attractive option for those seeking a measure of protection in relation to a dismissal, albeit on the basis of a more limited suite of remedies, not including injunctions. This would give more weight to Charleton's views as to the desirability of using the statutory mechanisms available, as outlined in Chapter Four.[103]

7.5 Statutory Injunctions

As also seen in Chapter Four,[104] the general ability of the courts to grant equitable injunctions is based in broad terms on s.28(8) of the Supreme Court of Judicature Act

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[100] In a press release of January 6, 2012 ("Bruton Delivers on Employment Rights and Industrial Relations Reform") the Minister stated that he was "more determined than ever to proceed to a two tier structure i.e. a single Workplace Relations Commission of first instance and a separate appeals body. This will mean effecting changes to bring about the ultimate merger of the existing five institutions into two."

[101] See Mallon "Employment Law Reform" (2012) 3 I.E.L.J. 76 and in response, Duffy "Blueprint for Reform of Employment Rights Institutions" (2012) 3 I.E.L.J. 81. See also Kelly "April Blueprint for New Employment Redress Regime" Lexology, April 24, 2012.

[102] See Gahan "Significant Reform of Ireland's Employment Law Structures and Procedures" Lexology, October 14, 2011.

[103] See Chapter Four, section 14.1.

[104] See Chapter Four, section 3.1.

(Ireland) 1877. However, statute has a further role to play in the context of injunctions. Various pieces of legislation make provision for the granting of injunctions in defined areas and circumstances. This is both explicit—in the sense of using the term "injunction" in the legislation—and also implicit, in that provision can be made for orders which amount to injunctions.[105] Where such injunctions are provided for in statute, the legislation adopts, in general terms, one of two approaches: it either makes provision for an application for an injunction based on the breach of a particular statutory provision or set of circumstances, or it provides for a self-contained code,[106] which will govern the application for, and granting of, an injunction order. The caveat is, of course, that it is contemplated that it is the courts which would grant such orders.

This leads to a consideration of whether there would be any legal impediment to making provision for the E.A.T. / some newly constituted body to grant injunctions (and assuming that there would have, in practical terms, to be a reworking of the Tribunal's processes and ensuring that appropriate expertise was available). In theory there should not be, as the E.A.T. already has the power under statute to order reinstatement.

There is already such a model in place in England. Interim relief can be granted by Employment Tribunals in that jurisdiction under section 128 of the Employment Rights Act 1996 when three conditions are satisfied:[107]

- If the employee has been dismissed because of his activities as a union member, a health and safety representative, an employee representative for the purposes of TUPE consultations a trustee of an occupational pension fund or because he has made "protected disclosure" (e.g. whistle blowing).
- If at a 'pre-hearing review' the Tribunal considers that one of these reasons is likely[108] to be the primary reason for dismissal at the main hearing;[109]

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[105] See, for example, s.160 of the Planning and Development Act 2000.

[106] See *Mahon v Butler* [1997] 3 I.R. 369 at 377; [1998] 1 I.L.R.M. 284 at 290.

[107] See Musgrave "Applications for interim relief in whistleblowing claims" (2010) 17(4) E.L.A. Briefing 4.

[108] See *Taplin v Shippam Ltd.* [1978] I.C.R. 1068 and *Raja v Secretary of State for Justice* [2010] All E.R. (D) 134.

[109] Section 129(1).

- The claim is brought within seven days of the last day of employment (or before dismissal if dismissed on notice).

In practical terms, the interim relief provides for reinstatement or re-engagement in a comparable job, or else for ongoing payment of salary.[110]

However, it is important not to overlook the role of both Article 34.1 and Article 37.1 of the Constitution in this jurisdiction. Article 34.1 clearly confines the administration of justice to the courts, and provides that:

> "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

It is qualified by the provisions of Article 37.1:

> "Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution."

Judicial focus has been on the phrase "limited functions and powers." As explained by Kingsmill Moore J. in *Re Solicitors Act 1954*,[111]

> "If the exercise of the assigned powers and functions is calculated ordinarily to affect in the most profound and far-reaching way the lives, liberties, fortunes or

[110] Relief is also available under s.161 of the Trade Union and Labour Relations (Consolidation) Act 1992: see *Chacko v London City Airport Ltd.* [2013] All E.R. (D) 182, in which it was made clear that the relevant test under both this Act and the Employment Rights Act 1996 is the same.

[111] [1960] I.R. 239.

reputations of those against whom they are exercised they cannot properly be described as 'limited.'"[112]

However, writing in 1997, Morgan commented that although that formulation offers "a definite and sensible start," "Unfortunately...the exegesis of the formulation 'limited function' still remains imprecise."[113]

Dealing specifically with the powers currently afforded to the E.A.T., Morgan cautions that the powers afforded to the E.A.T. appear to be "judicial in nature in that, for instance, it involves administering a fairly detailed code of rules analogous to an ordinary common law jurisdiction between two private parties." He also raises the concern that the power is not limited by virtue of the ability to direct reinstatement or award compensation.[114] The matter was addressed, albeit *obiter*, by McKenzie J. in *Government of Canada v The Employment Appeals Tribunal,*[115] in a judgment which suggested that "the activities of tribunals border on the unconstitutional..." However, something of a safety valve exists in that regard. As Morgan points out, pursuant to s.10 of the Unfair Dismissals Acts, an appeal to the Circuit Court from any determination of the E.A.T. is available. That appeal involves a full re-hearing. As such, "it is for the Circuit Court to determine whether an employee is entitled to redress and to specify the appropriate remedy, if any."[116] Morgan also notes that only the minister and not an employee can enforce a Tribunal's determination. That being so, and notwithstanding the observations of McKenzie J., Morgan suggest that "the shape of the procedure devised by the 1977 Act appears to

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[112] *ibid.* at 263. See also *McDonald v Bord na gCon* [1965] I.R. 217.

[113] Morgan *The Separation of Powers in the Irish Constitution* (Round Hall Sweet & Maxwell Dublin, 1997), p.118. See also Curtin *Irish Employment Equality Law* (The Round Hall Press, Dublin, 1989), p.303.

[114] *ibid.* at 81. See Mathews "The right to fire" The Irish Times, September 10, 1976 in which she comments, in relation to the then Unfair Dismissals Bill, in relation to reinstatement and re-engagement that "I am aware of the fact that constitutional arguments and objections enter at this stage."

[115] [1992] 2 I.R. 484 at 488. A successful appeal from the judgment of McKenzie J. on the substantive point re state immunity did not address the obiter observations made in the High Court. See also Hogan & Morgan *Administrative Law in Ireland* 4th ed. (Round Hall, Dublin, 2010), p.294 and Hogan & Whyte *J.M. Kelly: The Irish Constitution* 4th ed. (Lexis Nexis: Butterworths, Dublin, 2003), p.1029.

[116] See also Curtin *Irish Employment Equality Law* (The Round Hall Press, Dublin, 1989), p.305.

make it analogous to that which has already been upheld in the professional discipline cases and so probably to make it constitutional."[117]

More recently, in their work on *Administrative Law*, Hogan & Morgan comment that "In summary, the high tide of judicial adherence to Art.34.1 has ebbed and it would now be extravagant to contend, if it were ever true, that Art.34.1 constitutes a timebomb, ticking away under the Irish system of tribunals."[118]

Notwithstanding this conclusion, there is still in principle a risk that bestowing on the E.A.T. or an incarnation thereof the power to grant injunctions may in some sense be unconstitutional, or at a minimum skirt the margins of constitutionality. As such, it would clearly be preferable if a form of mechanism was also incorporated which provided, in broad terms, for some form of judicial oversight of the exercise of such powers, and not simply by way of judicial review. Coupled with any such powers would have to be a power of enforcement. The notion of the E.A.T. having the power to commit someone to prison for a breach of any injunction order would, on the face of it, and based on the foregoing analysis, be unconstitutional. Again, the observation that only the minister and not an employee can enforce a Tribunal's determination offers a suggestion as to how to circumnavigate such a potential problem; powers of enforcement would have to be vested other than in the Tribunal. This in itself highlights how much detailed consideration would have to be given to any changes to the system, though does not of itself eliminate the potential inherent in effecting such changes.

8. Other *Fora* / Other Methods of Resolution

Related to the idea of systemic change is a consideration of the use of other methods of resolution of employment disputes, perhaps in non-traditional *fora*, where anti-dismissal injunctions would not in principle feature.

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[117] Morgan *The Separation of Powers in the Irish Constitution* (Round Hall Sweet & Maxwell Dublin, 1997), p.82. See, for example, *M v The Medical Council* [1984] I.R. 485 and *Kerrigan v An Bord Altranais* [1990] 2 I.R. 396, as referred to by Morgan at p.79.

[118] Hogan & Morgan *Administrative Law in Ireland* 4th ed. (Round Hall, Dublin, 2010), p.296.

8.1 Arbitration

The Arbitration Act 2010 did not remove a pre-existing exclusion on employment-related disputes.[119] As such, court supervision and enforcement of any arbitration process is not available, although there is nothing to prevent the parties themselves agreeing to go to arbitration. Arbitration has been suggested as an attractive alternative to litigation in the courts "in the interests of confidentiality, speed and cost for both parties."[120] Whilst such an approach is laudable, it ignores the reality of employees being fully aware of the publicity and time factors which may lead an employer to compromise a claim on terms favourable to the employee. As such, arbitration may in fact be of more benefit to an employer than an employee.

Furthermore, an attempt to be overly prescriptive in relation to arbitration resulted in a lot of disquiet in England. The introduction of a statutory dispute resolution mechanism effected by the Employment Act 2002 and the Employment Act 2002 (Dispute Resolution) Regulations 2004 led within three years to a recommendation that those Acts be completely abolished.

There could also be a concern in relation to the risks arising from what has been characterised as a "privatization of wrongful dismissal protection"[121] and, more crudely, "justice for hire."[122] In using these terms, Finkin summarises the relevant concern well with his observation that "The US Supreme Court has allowed employers to sweep employee claims of violation of most labour protective law into arbitration systems that employers unilaterally establish." His concern is not that arbitration is *per se* a bad thing. Rather, he takes issue with whether a system is being put in place whereby "procedures were agreed to by management and employees jointly and employees receive expert advice and assistance in the process."

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[119] Arbitration Act 1954, s.5.

[120] Battye "Alternative dispute resolution in employment disputes" Lexology May 26, 2011.

[121] Finkin "Privatization of Wrongful Dismissal Protection in Comparative Perspective" Ind. Law J (2008) 37(2) 149.

[122] *ibid.*

He also points to the fact that a survey by Freeman and Rogers[123] established that three quarters of employees "thought the mandatory relinquishment of the right 'to go to court and agreeing to use a management-appointed arbitrator for disputes over legal rights as a pre-condition for getting a job' ought to be unlawful."[124]

8.2 Mediation

The Law Reform Commission's 2010 report on *Alternative Dispute Resolution: Mediation and Conciliation* suggested that it may be "beneficial for employers to include a contract clause which provides for a mandatory attendance at an information session on A.D.R. [Alternative Dispute Resolution] prior to the commencement of a legal claim."[125] The purpose of such a session would be to make the parties aware of their options to engage in A.D.R. to try to resolve their dispute. Were such a provision to be given effect, it would in principle have the effect of keeping employees from having to go to court. However, the report does not appear to contemplate such a provision including disputes arising out of a purported termination; rather, its tenor and focus is on disputes arising in the workplace in the course of the working relationship (although it is not unprecedented for judges to suggest to recommend mediation when faced with an employment dispute involving termination[126]). Insofar as such an approach could be extended to termination, the advantage of mediation or conciliation is that a session can be convened at relatively short notice. This could obviate the need to seek injunctive relief pending the holding of such a session. To fully benefit from this, of course, it would be necessary for the information session envisaged by the Law Reform Commission to be held extremely quickly.

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[123] Freeman and Rogers *What Workers Want*, revised ed., (ILR Press, Cornell, 2006), p 163.

[124] Finkin "Privatization of Wrongful Dismissal Protection in Comparative Perspective" Ind. Law J (2008) 37(2) 149.

[125] L.R.C. 98-2010, p.102.

[126] See *McCarthy v Roscrea Credit Union Ltd.* "Credit union chief refused injunction against dismissal" The Irish Times, December 23, 2010, in which it is reported that Clarke J. recommended that the parties seek to settle their differences by way of mediation. The case of *Craig v FÁS* was settled following mediation: see "Fás case ends with apology and payment of €175,000" The Irish Times October 12, 2011.

9. Conclusion

External changes may well impact on the anti-dismissal injunction. However, of more interest in terms of this research is the question of internal change. That what appears to be a relatively benign change (some would say no change at all) to the way in which the threshold test for anti-dismissal injunctions is approached at the interlocutory stage can cause a shift in approach to such injunctions shows just how difficult it is to say with considerable certainty what the outcome of a given application is likely to be. Accordingly, the next Chapter, which fulfils a dual function as an overall Conclusion, seeks to identify those areas in which there is now a measure of certainty, albeit testing those assumptions as necessary, and to summarise the way/s in which the courts might bring greater certainty to the anti-dismissal injunction.

CHAPTER TEN

1. Introduction

In *Bergin v Galway Clinic Doughiska Ltd.*[1] Clarke J. identified an important feature of anti-dismissal injunctions: the preponderance of authorities which derive from interlocutory applications means that although such authorities "may be of very considerable assistance in defining the jurisprudence in relation to the grant or refusal of interlocutory injunctions, same may do little to advance the cause of clarity in respect of employment law generally."[2] In fact, it can be argued that this inverts matters somewhat, and that a considerable number of the underlying principles of employment law are relatively well settled, but that there is some (admittedly diminishing) uncertainty as to the jurisprudence in relation to interlocutory injunctions. More broadly, however, and as summarised by Horan, "it is clear that the questions surrounding the anti-dismissal injunction are complex and not amenable to simple formula."[3] Even more broadly again, Redmond expresses the view that there is "no 'Holy Grail' to be found in Irish case-law, no single unifying principle in employment injunction cases."[4]

There does not have to be a single unifying principle. The difficulty, as is evident from the foregoing Chapters, is that the courts do not always speak with one voice. Furthermore, the potential impact of some nascent themes and approaches is not always immediately apparent, whereas others are critical, yet undervalued. Equally, it can be tempting to place too much store in an approach which is in the ascendancy and may seem fashionable at a particular

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[1] [2008] 2 I.R. 205.

[2] *ibid.* at 212.

[3] Horan "Employment Injunction: Current Status and Future Developments" (2005) 1 E.L.Rev. 8 at 13. His is an important voice in that he represented the defendant company in *Fennelly v Assicurazioni Generali S.P.A.* (1985) 3 I.L.T. 73 and has acted in a number of the significant cases dealing with anti-dismissal injunctions, including some of the early cases which helped shape the contours of the anti-dismissal injunction, such as *Shortt v Data Packaging* [1994] 5 E.L.R. 251 and *Boland v Phoenix Shannon plc.* [1997] 8 E.L.R. 113.

[4] Redmond *Dismissal Law* 2nd ed. (Tottel, Dublin, 2007), p.180.

point. Clarke J. put matters somewhat diplomatically when he acknowledged that the law was in a "state of evolution."[5] More bluntly, Charleton J., writing in an extra-judicial capacity, remarked that the case law cited to him in anti-dismissal injunctions seemed "to be lacking in clarity overall."[6] Indeed, Charleton J. felt that any exercise of his judicial discretion was "insufficiently certainly grounded in law." This is not a unique view; at least one senior practitioner has suggested that there is no authentic base in the evolved jurisprudence for some of the orders made by the courts.[7] However, it is important to bear in mind that the latitude afforded by s.28(8) the Supreme Court of Judicature Act (Ireland) 1877 provides an underpinning to the approach of the courts, as does the full original jurisdiction of the courts as appropriate, and as invoked to powerful effect by Hogan J. in *McGrath v Athlone Institute of Technology*.[8] Of course, evolution is often to be welcomed; after all, the anti-dismissal injunction is an equitable, discretionary remedy. There has been an obvious evolution in terms of the judiciary's understanding of the dynamics of the employment relationship, and in particular their awareness of the vulnerability of employees where a contract of employment has been, or is just about to be, terminated.[9] Indeed, and as seen in Chapter One,[10] Lord Nicholls observed in *Mercedes Benz v Leiduck*[11] that as circumstances change, so must the situations in which the courts will exercise their discretion to grant injunctions, albeit in a principled fashion. This is reflected in the increasing tendency of the courts to refer, in the context of interlocutory injunctions generally, to the "balance of

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[5] *Bergin v Galway Clinic Doughiska Ltd.* [2008] 2 I.R. 205 at 212.

[6] Charleton "Employment Injunctions: An Over-Loose Discretion" (2009) 9(2) J.S.I.J. 1.

[7] Connaughton "Some Observations on Developments in Employment Law" Employment Law Association of Ireland March 5, 2013 suggests that the Supreme Court "would welcome the opportunity of offering considerable clarification on the law and although the decision of *Maha Lingham v HSE* is often cited as authority for the jurisdiction of the Court to intervene by way of injunction in disciplinary or dismissal cases, it was a decision given *ex tempore* and clearly touches very lightly on the subject."

[8] [2011] IEHC 254.

[9] Directly related to this is the understanding of the relationship between the employer and employee as being contractual in nature, even if in the form of a *sui generis* contract, or a contract informed by very specific principles.

[10] See Chapter Four, section 3.1.

[11] [1996] A.C. 284; [1995] 3 W.L.R. 718; [1995] 3 All E.R. 929.

injustice."[12] Whether one thinks that the development of the anti-dismissal injunction is a tribute to, or an indictment of, the flexibility of equitable remedies is really a matter of personal taste.

The difficulty arises more, it is submitted, from the fact that the courts do not always articulate why they are approaching matters in a certain way: for example, how the courts moved the *Fennelly* order from being an exceptional one to one which is deployed regardless of an employee's financial circumstances has never been satisfactorily explained. However, and as considered in Chapter Four,[13] although the *Fennelly* order was first granted on an exceptional basis, there are in fact a number of legal bases for such orders. More generally, in fact, and as the foregoing Chapters have shown, it is possible to identify a number of established principles which underpin anti-dismissal injunctions. The purpose of this Chapter is, based on the analysis in previous Chapters, to firstly identify those settled key principles. Although they may well be settled, consideration will be given where appropriate to whether such principles might or should in fact be reviewed. The next section of the Chapter looks at the areas of the law in which there is ambiguity or uncertainty and, to the extent possible, suggest ways in which such ambiguity or uncertainty could be addressed.

2. Established Principles

Although more a theme or approach than a principle, one key point needs to be re-emphasised: underlying everything is a much greater awareness by judges of, and focus on, the importance of employment in a person's life, and the effects of the wrongful rupturing of the employment relationship. This is a crucial underlying theme, which merits the full treatment given to it in Chapter One as it can assist in understanding why judges react as they do. Judges can be particularly exercised when they feel that an employee is being, in the broadest of terms, wrongly treated, and will attempt to assist that employee in addressing the fact that one of the most important relationships in their lives, which gives them a "sense of

[12] See, for example, *Shelbourne Hotel Holdings Limited v Torriam Hotel Operating Co. Ltd.* [2010] 2 I.R. 52.

[13] See Chapter Four, section 11.

identity, self-worth and emotional well-being"[14] is about to, or has just been, ruptured. In that regard, judges quite often make clear their displeasure at the way employees are being treated: this was very much evident in *Boland v Phoenix Shannon plc.,*[15] highlighted by Barron J.'s reference to "unwarranted and unfounded" assertions made against the plaintiff. Similarly, in *Phelan v BIC (Ireland) Ltd.*,[16] Costello P. evidently disapproved of the defendant's conduct, remarking that "I have never come across a case where a managing director was dismissed in such a way other than in cases of serious misconduct."[17] Even more forcefully, he remarked that "If I was trying this case today, all the facts which emerged in the case, if accepted by me, I would have decided in favour of the plaintiff."[18] More broadly, a real sense of humanity underpins many of Laffoy J.'s judgments. For example, the personal and family circumstances of the plaintiffs clearly informed the orders she granted in, *inter alia*, *Naujoks v National Institute of Bioprocessing Research and Training Limited*[19]and *Doherty v Health Service Executive.*[20] In *Fennelly v Assicurazioni Generali S.P.A.*,[21] Costello J. was clearly specifically influenced by the fact that the plaintiff could be left "virtually destitute," very emotive language in itself. Unspoken, but one can surmise as undoubtedly influential, was the fact that the plaintiff was a former member of An Garda Síochána who had given up his job to work for the defendants, and who claimed to have a long term contract.

Fundamental to the development of the anti-dismissal injunction was the recognition by the courts of, and emphasis on, natural and constitutional justice, coupled with their acknowledgement that these precepts applied equally to the private employment relationship

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[14] As seen in the Introduction, the comment as made by Dixon C.J. in *Reference Re Public Service Employee Relations Act* [1987] 1 S.C.R. 313.

[15] [1997] 8 E.L.R. 113.

[16] [1997] 8 E.L.R. 208.

[17] *ibid.* at 212.

[18] *ibid.*.

[19] [2007] 18 E.L.R. 25.

[20] [2008] IEHC 331.

[21] (1985) 3 I.L.T.R. 73.

as to the public relationship.[22] The reach of natural and constitutional justice has always been immense, both in terms of steps short of dismissal and dismissal itself. Its impact was both confirmed and enhanced with the acknowledgement of the effective dissolution of any distinction between office holders and contractual employees, specifically in terms of the application of natural and constitutional justice. This is the Constitution's huge, and enduring, contribution to anti-dismissal injunction applications. It has long been a settled part of the jurisprudence relating to such injunctions. As such, where there is an allegation of misconduct, and given the reputational issues which can thereby arise, an employee is afforded extra protection by the dictates of natural and constitutional justice.[23] Rights cannot be abridged in such circumstances. Whilst the courts are absolutely right, as occurred in *Naujoks v National Institute of Bioprocessing Research and Training Ltd.*,[24] to scrutinise what is actually being alleged in reality (even if not in word) and, as necessary, determine that misconduct is indeed in issue, the idea of the courts determining that there is an allegation of misconduct, even when not so specifically articulated, is potentially dangerous. Given the acceptance, for better or worse, that the employment relationship is contractual in nature, holding that misconduct is in issue, even though never alleged, is problematic insofar as it potentially creates a form of strict liability, which creates something of an imbalance as between employer and employee.

There are even greater dangers should the courts try to apply a single standard of natural justice whether an employee is charged with misconduct or not; the practical reality is that such a single standard could leave every employer exposed in almost every case and could potentially completely override the statutory mechanisms put in place by the legislature. Part of the problem arises from the (absolutely understandable) lack of a fixed standard for defining natural and constitutional justice. It is not too difficult to envisage a situation, by way of example, where an employee whose performance was in issue and who was in some way dissatisfied with the manner in which his employer was managing any process arising

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[22] See Chapter Three.

[23] See *Glover v. B.L.N.* [1973] I.R. 388 and *Mooney v. An Post* [1998] 4 I.R. 288.

[24] [2007] 18 E.L.R. 25.

from that could readily go to the High Court in the expectation that he could at least secure an interlocutory injunction on the basis that he had not been afforded natural and constitutional justice. The courts must ensure that a plaintiff is not in any way unduly disadvantaged in terms of the implementation of a process which may lead to his termination. Equally, however, they must be alive to a company's need to operate a normal working environment, and to investigate, discipline or dismiss an employee without that employee as a matter of course simply alleging that there has been some breach of natural justice. In that regard, it is important to recall that in *Bergin v Galway Clinic Doughiska Ltd.*,[25] Clarke J. accepted the submission that a significant degree of flexibility is required when it comes to the precise operation of the rules of natural justice in an employment context.

Related to this is the question of the extent to which an office holder might in some way benefit from a form of enhanced protection. At the outset, the obvious point should be made that the modern understanding of an office holder, certainly in this jurisdiction, is very different to that which perceived offices to be held at the pleasure of the monarch of the day.[26] Following on from this, the distinction between office holders and contractual employees has quite rightly been, for the most part, eliminated.[27] However, rather than diminishing the rights of office holders, the law has evolved such that many of the enhanced protections available to office holders are available to employees as well. In fact, and although not articulated in such terms by the courts if, as seen in Chapter Eight, a starting proposition is that employment is considered to be a property right, this effectively puts it on the same footing as offices, which were traditionally viewed as a form of property.[28] In more practical terms, that natural and constitutional justice was not in any way confined to office holders was a key principle articulated by the courts.[29] In any event, and as seen in Chapter Two,[30] office holders are more often than not employees as well. Insofar as a person holding

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[25] [2008] 2 I.R. 205 at 217.

[26] As explained by O'Higgins C.J. in *Garvey v Ireland* [1981] I.R. 75 at 92.

[27] See Chapter Two, section 8.

[28] See *Marks v The Commonwealth* (1964) 111 C.L.R. 549, *per* Windeyer J.

[29] See *Mooney v An Post* [1998] 4 I.R. 288 at 297.

[30] See Chapter Two, section 6.

an office may benefit from additional protections, the reality is that any injunction application brought to protect their position is no more than the seeking of a remedy by reference to, for example, legislation as distinct from a contract of employment. If they benefit as a result of the legislation, this is clearly as a result of a decision of the Oireachtas.

Another significant development, now embedded in any consideration of the law relating to employment, is the idea of "trust and confidence" in an employment relationship.[31] Unknown before 1971, it was not until the 1997 case of *Courtenay v Radio 2000 Ltd.*[32] that the courts explicitly referenced the idea of trust and confidence in the context of an anti-dismissal injunction. Although two years later, Murphy J. in the Supreme Court acknowledged the idea of trust and confidence in the case of *O'Neill v Canada Life*,[33] it was an acknowledgement tinged with more than a degree of circumspection. It is now a key consideration in the context of remedies sought and in the making any orders which compel a working relationship. Although a key consideration, its importance should not be overstated; it is not quite the overarching principle in employment law some envisioned it as being or having the potential to be:[34] as seen in Chapter Two,[35] not all orders require the existence of trust and confidence, exemplified by the approach of Edwards J. in *Coffey v Connolly & Sons Ltd.*[36] Furthermore, as also seen in that Chapter,[37] the advent of large corporate employers means that courts have to reconsider its role; just as the courts were prepared to acknowledge the evolution of the employment relationship from that of a personal one based on the idea of a "master and servant," so they should be acknowledging that trust and confidence is potentially of less relevance when dealing with modern corporations. Clearly every employer wishes to have trust and confidence in their employees (and vice versa) in the abstract.

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[31] See Chapter Two.

[32] [1997] 8 E.L.R. 198.

[33] [1999] IESC 23.

[34] See the summary provided by Redmond in "The Implied Obligation of Mutual Trust and Confidence - A Common Law Action for "Unfair" Dismissal?" (2009) 6(2) I.E.L.J. 36.

[35] See Chapter Two, section 4.7.

[36] [2007] IEHC 319.

[37] See Chapter Two, section 4.7.

However, the function of the courts should be to go beyond this and look at the actual mechanics of any order which they might make and ascertain whether trust and confidence really is of relevance in that regard.

Conversely, however, there is an important argument to be made that trust and confidence should assume a greater role beyond simple reinstatement. If it truly is an "open textured" doctrine,[38] it should not only have a role to play in specific instances, for example, in relation to disciplinary hearings (inasmuch as the employee will want to be confident in the way the hearing is being run) but should also be more generally adaptable to newer or different forms of work practices; for example, if natural and constitutional justice applies to contracts for employment,[39] it is arguable that trust and confidence should equally apply in such situations.

Equally important in terms of remedies, and equally well established in this jurisdiction, though dreadfully under-analysed by the courts, is the doctrine of unaccepted repudiation.[40] A *Fennelly* order, capturing the essence of the "wage-work bargain,"[41] would not be possible without a court accepting that the employee concerned had not accepted a purported termination. That the Supreme Court in London has ultimately accepted the elective, rather than automatic, theory of repudiation,[42] coupled with the very robust and compelling reasons for doing so, means that this important doctrine is likely to remain embedded in Irish jurisprudence.

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[38] To adopt the phrase used by Brodie in "The Heart of the Matter: Mutual Trust and Confidence" (1996) 25 I.L.J. 121 at 126 quoted in Brodie "Mutual Trust and the Values of the Employment Contract" (2001) 30 I.L.J. 84 at 85

[39] See *Tierney v An Post* [2000] 1 I.R. 536.

[40] See Chapter Three.

[41] As set out in Chapter Two, section 1, Carty's term as used in "Dismissed Employees: The Search for a More Effective Range of Remedies" (1989) 52(4) M.L.R. 449 at 449.

[42] See *Geys v Société Générale* [2013] 2 W.L.R. 50.

Although in Chapter Nine[43] the extent to which the approach of the courts to the *Addis* doctrine might evolve was considered, it would be unfair to suggest that the question of the *Johnson* exclusion area and its reach, which built on *Addis*, needs to be clarified. The courts, particularly Carroll J. in *Orr v Zomax Ltd.*,[44] have been fairly clear in recent years as to the division between statutory and other remedies (notwithstanding the ambiguity created by the case of *Parsons v Iarnród Eireann*).[45] More recently, judges, with Laffoy J. to the fore, have really tackled this aspect of anti-dismissal injunctions in a structured and coherent way, particularly by reference to whether a claim meets the "strong case" guideline in *Campus Oil*.[46] The circumstances in which a claim should more properly be before a statutory forum as distinct from the courts are now relatively clear: in short, if a dismissal claim centres on either unfairness or a genuine redundancy, the courts will refrain from dealing with it, as it can be dealt with under the relevant statutory regime. However, a challenge will be entertained in that regard if a claim is based on an assertion that termination does not conform to an employee's contract or, if appropriate, with a company's articles of association. This approach has a lot to commend inasmuch as it strikes a balance between common law and statutory remedies.

Although not so much a principle as a practice, it is also worth noting that insofar as there is a substantive difference between termination and the steps leading to termination, the courts are, as a general proposition, generally unwilling to get involved when matters are only at an investigation stage, with a disciplinary stage yet to take place. This is in many ways an iteration of the issues outlined earlier in relation to any expansion of the doctrine of natural and constitutional justice beyond misconduct: the courts must be alert to ensuring that an employer is able to invoke disciplinary procedures and otherwise address concerns arising in relation to employees without (successful) recourse being had to the courts at every step. Of course, matter becomes more serious when there is a real apprehension of bias, based on

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[43] See Chapter Nine, section 5.

[44] [2004] 1 I.R. 486.

[45] [1997] 2 I.R. 523. although, as considered in Chapter Four, section 15.1, various workarounds are available in that regard.

[46] See Chapter Four, section 2.1.5.

cogent evidence, or if what purports to be an investigation is in fact more than that, with serious consequences. Related to this, and quite properly, the courts will approach suspensions on the basis that they can have as much a deleterious effect on a person's career as termination; Hogan J.'s reference in *Wallace v Irish Aviation Authority*[47] to "the decidedly unpleasant prospect of calumny and detraction at the hands of the unforgiving and the uncharitable" summarises perfectly the reality of the effect of a suspension.

As is evident from the foregoing, considerable elements of the underlying law are in fact clear. To the extent that it is possible to summarise the courts' approach to anti-dismissal injunctions (including in relation to steps short of dismissal) in this jurisdiction, the following are the key elements:

- At the heart of the anti-dismissal injunction lies an understanding of the relationship between the employer and employee as being contractual in nature, even if in the form of a *sui generis* contract. If an employee is dismissed (or disciplined) in accordance with the terms of the contract, then *prima facie* they will not be granted an injunction. If there is a breach of that contract (or if the dismissal is *ultra vires*), then they are in legitimate territory for praying the aid of the courts.
- If, however, a dismissal claim centres on either unfairness or a genuine redundancy, the courts will refrain from dealing with it, as it can be dealt with under the relevant statutory regime. However, a challenge will be entertained in that regard if a claim is based on an assertion that termination does not conform to an employee's contract or, if appropriate, with a company's articles of association.
- In simple terms, it is the manner, rather than the fact, of the dismissal which will generally concern a court. This is exemplified by the fact that if misconduct is being alleged, then any steps being taken which could or do lead to termination attract the requirements of natural and constitutional justice and, insofar as it may admit of a separate consideration, fair procedures.

[47] [2012] 2 I.L.R.M. 345. See Chapter Five, section 4.

- Such requirements apply whether the party concerned is an office holder or an employee. To all intents and purposes, the idea of office holders being afforded some additional protection beyond that afforded to other employees has to a significant degree been dispensed with.
- However, the courts will, regardless of the plaintiff's status, be unwilling to intervene prematurely, as the employer must have some scope to run its business and operate normal work practices without constant interference.
- That said, steps short of dismissal can have as much a deleterious effect on a person's career as termination, and so the courts will not shy away from granting any necessary injunctive relief in relation to steps short of dismissal.

As is clear from the foregoing, there has been gradual progress towards greater certainty. However, uncertainties remain. Although the courts have, broadly speaking, settled on the types of remedies available, uncertainties are created in relation to the actual application of those remedies. Although the doctrine of unaccepted repudiation, long established as a settled principle, underpins the way a court views a purported termination and remedies it may grant, the general question of what remedies are appropriate at what stage of proceedings remains uncertain. A lack of cohesion is apparent at different levels: the willingness of the courts to accept that damages are not an adequate remedy for a plaintiff where their reputation is in issue (although this has effectively taken on the character of an accepted tenet); the extent to which the courts make orders at the interlocutory stage which they do not make at plenary hearing; and the actual terms of what the courts are prepared to order relative to what they say they can and cannot do. These considerations often manifest during interlocutory considerations and as part of the application of the *Campus Oil* guidelines. It is these uncertainties, and possible ways to address them, which are the focus of the next section of this Chapter.

3. Areas of Uncertainty and Possible Solutions

Before looking at specific issues which arise, some broader comment can be made in relation to the *Campus Oil* guidelines. Although they remain binding, there is clearly some agitation amongst High Court judges at the way in which they feel constrained by the guidelines, as manifested by references to trying to evolve a test which focuses on the "least risk of injustice" (albeit acknowledging Clarke J.'s reference in *A.I.B. v Diamond*,[48] to the fact that the same underlying principles inform such an approach).

The way in which an application was tested by reference to having a strong case, achieved by marrying the 2005 Supreme Court decision in *Maha Lingham v Health Service Executive*[49] with the 2007 decision of Clarke J. in *Bergin v Galway Clinic Doughiska Ltd.*[50] was a sea change from what had gone before. In the aftermath of those two judgments, it appeared that it would be harder to secure an interlocutory injunction, given the raised threshold for mandatory interlocutory injunctions. Although successful applications continue to be made,[51] it is somewhat unsatisfactory that a change in approach – or at a minimum a change in emphasis – to an existing guideline led to a shift in how anti-dismissal injunctions are considered by the courts. Although there is a lot of merit in the argument that anti-dismissal injunctions are mandatory in nature, this brings with it the standard of demonstrating a "strong case." As seen in *O'Mahony v Examiner Publications (Cork) Ltd.*[52] counsel for the plaintiff rhetorically raised a question as to what was meant by "a strong case" and "how the test is complied with: does it mean that one has to show a high degree of probability of probable success?"[53] This is a question which goes far beyond the parameters of anti-dismissal injunctions, though highlights the attractions of a "least risk of injustice" approach.

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[48] [2011] IEHC 505.

[49] [2006] 17 E.L.R. 137.

[50] [2008] 2 I.R. 205.

[51] See, for example, *Giblin v Irish Life & Permanent plc.* [2010] 21 E.L.R. 173 and *Glynn v HSS* unreported, High Court, Ryan J., February 26, 2010.

[52] [2011] E.L.R. 1.

[53] *ibid.* at 10.

What is important is that whatever standard is applied, it is selected by reference to the other aspects of the guidelines: for example, if the courts were to adopt the view that the loss of employment, as a property right, could never be "bought off" by an award of damages, this would have the potential to lead to a surge in anti-dismissal applications. As such, and as considered below, it would be important to have in place some form of threshold test which would act as a control and did more than simply filter out cases which were frivolous and vexatious.

The question of the adequacy of damages raises two issues: the evolution of the *Fennelly* order and the way in which the courts approach damage to reputation. Although it could be said that the way in which the courts approach *Fennelly* orders is now well established and embedded in Irish jurisprudence, it is unsatisfactory that what was supposedly an exceptional remedy evolved into the tactical cornerstone of anti-dismissal applications without any real analysis of the basis for such an order. Related to this, it is unsatisfactory that the key factors informing the granting of a *Fennelly* order were at turns considered by reference to of the adequacy of damages, in other cases to the balance of convenience. Although any distinction in that regard has effectively been superseded in recent years by Clarke J.'s very sensible approach in *Metro International S.A. v Independent News & Media plc.*,[54] it serves to highlight the uncertain evolution of the order. The nature of the employment relationship, and the consequences flowing from the wrongful termination of that relationship, are such that the *Fennelly* order remains a very attractive relief from a court's perspective. However, there is a strong argument in doing exactly what was done by the Supreme Court in the *Fennelly* case, and limiting the order temporally, but coupling such a limit with directions for accelerated pleadings and an early hearing date, such that an employer does not have an employee remaining on the payroll for an indefinite period of time, and in all reality not actively engaged in any day to day work (notwithstanding the theoretical ability of the employer to call upon them to work under the 'standard' terms of a *Fennelly* order).

[54] [2006] 1 I.L.R.M. 414 at 423.

More generally, uncertainties arising from the application of the *Campus Oil* guidelines are most pointed in relation to the question of the adequacy of damages when reputation is in issue. The plaintiffs in *Foley v Aer Lingus Group*[55] and *Joyce v Health Service Executive*[56] would presumably to this day struggle to understand why they were told that any damage to their reputation could be compensated by an award of damages, in contrast to the approach in most other cases in which misconduct was alleged.

As considered in Chapter Eight, this could be addressed by approaching the question of the adequacy of damages by treating employment as a property right and invoking the proposition that such a right cannot simply be "bought off" by damages. In a sense, this is a natural evolution of the way in which employment has always been characterised, even though such characterisation, if engaged with at all, has tended to be by reference to the employee rather than the employer. However, it is an important evolution. It could bring much greater certainty to the application of the adequacy of damages guideline, and indeed encompass both misconduct and non-misconduct cases. It would bring a level of sophistication to the courts' analysis beyond a simple desire to "do the right thing" by an employee. Whilst acknowledging the unique aspects of the employment relationship, it would also bring any consideration of the breakdown of that relationship more in line with the approach in cases in which other property rights are at stake. Any sense that this would create a huge growth in anti-dismissal injunctions would be tempered by the fact that a plaintiff would still have to satisfy the "strong case" threshold test, and the fact that a judge could bring other considerations to bear in assessing the balance of convenience.

However, directly related to this, and problematic, is the relationship between reliefs granted at the interlocutory and plenary stages. In *Cribbin v PLC Ingredients Ltd.*[57] Laffoy J. observed that "The first difficulty I have encountered is in relating the relief sought on this application to what the hearing of the substantive action will be about if the action ever

[55] [2001] 12 E.L.R. 193.

[56] [2005] IEHC 174.

[57] [2012] IEHC 390.

comes to hearing." (although this does not appear to have been the determinative factor in the refusal of the relief sought). Whilst judges are prepared to protect a party's reputation by injunction at the interlocutory stage, insofar as damage to reputation is considered at the plenary hearing, that is really only addressed, if at all, by an award of damages (and almost as an add-on[58]), with judges accepting that reinstatement is unlikely. This approach is typified by O'Donovan J. in *Doyle v Grangeford Precast Concrete Ltd.,*[59] in which he "ignored" the approach of the court in *O'Malley v Aravon School Ltd.;*[60] in *O'Malley*, Costello P. had refused to grant an injunction, seemingly influenced by the fact that it was unlikely that a perpetual injunction or specific performance would be granted. However, in keeping with the approach in *O'Malley*, Irvine J. took the view in *Stoskus v Goode Concrete*[61] that she should not continue the working relationship between the parties at the interlocutory stage (encompassing a simple *Fennelly* order) as the plaintiff had indicated that he would not be seeking reinstatement at the trial of the action.

It is clearly unsatisfactory that there is such a divergence of approach, although in a sense, such an issue is more problematic in theory than in practice. To return to Clarke J.'s observations in *A.I.B. v Diamond,*[62] "there is ordinarily a close connection between the temporary interlocutory order sought and the permanent order which the plaintiff might be entitled to in the event that the plaintiff succeeds at trial." However, considering "springboard injunctions" in the case before him, he noted that such injunctions "are different." The practical realities of the employment relationship are such that it could readily be argued that anti-dismissal injunctions are also "different," a factor borne out by the use of

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[58] See Chapter Nine, section 5.4.

[59] [1998] 9 E.L.R. 260.

[60] *See* "Bray principal fights sacking in High Court" The Irish Times, August 13, 1997 and *O'Malley v Aravon School Ltd.* "Singer criticised at court for role in sacking of school principal" The Irish Times, August 14, 1997 As stated in the latter article, "But [Costello P.] did not think that the eventual trial judge would order the board of governors to take her back as principal and he felt it would be wrong for him to do so now."

[61] [2007] IEHC 432.

[62] [2011] IEHC 505; see Chapter Four, section 7.

the *Fennelly* order. Equally, and as seen in Chapter Six,[63] Clarke J. suggested in *Bergin v Galway Clinic Doughiska Ltd.*[64] that the impact of a finding of misconduct on the reputation of the employee concerned could be a "possible factor for taking the view that different considerations might apply in the grant of interlocutory injunctions in such cases."[65]

Related to this is the fact that although the courts continue to state that they will not order specific performance at plenary hearing, the reality is that there is no longer – insofar as there ever was one – an absolute jurisprudential reason not to do so. There may be various factors and practical difficulties arising on a particular case mitigating against such orders, but that is some remove from saying the courts will not make such orders in principle. As such, there is theoretically no disconnect between the orders made at the two stages. However, this highlights again the relatively special position of the employment relationship. Hogan J.'s explanation in *Wallace v Irish Aviation Authority*[66] bears repeating: it would amount to a denial of effective access to the courts were the courts "debarred from giving interlocutory relief in employment cases merely because it involved the specific enforcement by means of mandatory interlocutory injunction of clauses contained in a contract of employment designed for the protection of employees."[67] Also worth bearing in mind are his cautionary words as to the as "the unyielding application of specialist sub-rules relating to the grant of interlocutory injunctions in employment cases."[68]

The courts have no difficulties in setting aside either elements or the whole of the *Campus Oil* guidelines in relation to certain classes of case: in the normal course, the courts do not impose prior restraints on publication due to the importance of free speech;[69] they do not apply in applications to restrain the presentation of a winding-up petition, as these involve

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[63] See Chapter Six, section 2.2.4.

[64] [2008] 2 I.R. 205.

[65] *ibid.*at 215.

[66] [2012] 2 I.L.R.M. 345.

[67] *ibid.* at 354.

[68] *ibid.* at 355.

[69] See *Sinclair v. Gogarty* [1937] I.R. 377, as referred to in *Garrahy v Bord na gCon* [2002] 3 I.R. 566.

the exercise by a creditor of his right of access to the courts.[70] In *Polly Peck International plc v Nadir (No. 2)*,[71] Lord Donaldson M.R. took the view that the *American Cyanamid* guidelines had no relevance to *Mareva* injunctions. The Irish courts, as exemplified by the approach in *O'Mahony v Horgan*[72] approach the threshold test as being one of a "good arguable case."[73]

In that regard, in the context of the anti-dismissal injunction the courts could maintain the threshold test as being that a "strong case" (in the sense of a clear case that there has *prima facie* been a breach of the terms of the contract of employment) must be demonstrated; however, rather than considering the adequacy of damages in the conventional way, they could approach employment as a property right, the wrongful termination of which could not be bought off by an award of damages. As the adequacy of any undertaking from the plaintiff is generally bound up in the fact of the alleged wrongful dismissal, this would not form a key consideration. Finally, insofar as the balance of convenience admitted of other factors, they could consider the balance from the perspective of identifying the least risk of injustice in terms of any order made. As such, guidelines would still be in place, but would be more specific to what ultimately is a very specific relationship, that of employment.

As such, although there certainly are areas in which there is a lack of clarity, there are approaches which could address these areas. Such approaches may not lead to the "Holy Grail" of a single unifying principle, but as with the real grail, such a pursuit may be more in the nature of an aspiration than a practical reality.

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[70] *Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd*. [1996] 1 I.R. 12.

[71] [1992] 4 All E.R. 769.

[72] [1995] 2 I.R. 411 at 416 and 418.

[73] Although O'Flaherty J. stated that he would have preferred it if the test was a "clear case", where the claim was "more or less certain", he felt that "It may now be too late to put that particular clock back." [1995] 2 I.R. 411 at 422.

4. Conclusion

Smith and Randall,[74] referring to this area of the law generally as "complex law,"[75] make an important point: they observe that anti-dismissal remedies should not be perceived as aimed at protecting long-term job security. They point out that a plaintiff has a better chance of success when challenging the mechanism of dismissal rather than the dismissal itself. They also emphasise the fact (albeit not in as many words) that tactical considerations may, in effect, trump pure legal considerations.[76]

That summary and those observations are equally relevant in this jurisdiction, particularly in relation to tactical considerations. Clarke J. could not have put it more clearly in *Bergin* with his observation that it would be

> "somewhat naïve not to surmise that a significant feature of the interlocutory hearing is concerned with both parties attempting to establish the most advantageous position from which to approach the frequently expected negotiations designed to lead to an agreed termination of the contract of employment concerned."[77]

Judges are more than aware of this.[78]

As considered in Chapter Six,[79] the practical effect on a company of the granting of an injunction to a plaintiff (or even the very real threat of one being granted) cannot be over-

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[74] Smith & Randall *Contract Actions in Employment Law –Practice and Precedents* 2nd ed. (Bloomsbury Professional, West Sussex, 2011), p.167.

[75] *ibid.*, p.173.

[76] *ibid.*

[77] [2008] 2 I.R. 205 at 212.

[78] In one instance, Geoghegan J. is reported to have said that it seemed to him that "the issue between the parties was one which would ultimately have to be settled through discussion," albeit against a complex set of background facts involving the failed merger of AIB and TSB banks: see "Injunction sought by ACCBank executive" The Irish Times, February 29, 2000 and the associated report "Official Settles in ACC Case" The Irish Times, March 1, 2000.

emphasised. The appeal of bringing interim or interlocutory High Court applications is well summarised in the observation that such injunctions "were attractive. They were quick. They brought immediate pressure on the parties. The work was intensive but solutions were usually found to the disputes."[80] The speed with which such applications could be processed relative to the Employment Appeals Tribunal is also not insignificant. Horan's well observed point bears setting out:

> "a given dismissal is likely, in most instances, to expose an employee to immediate financial detriment bordering on the disastrous, this requires a prompt response and it is unsurprising that the employment injunction has been developed to counter such a contingency."[81]

Tactical considerations underscore Cox's suggestion that in many cases the application for injunctive relief itself is more important in practical terms than the manner in which the courts deal with the application.[82] The related practical consequence of this is that the courts are often thereby deprived of the opportunity of engaging in a meaningful way with the general jurisprudence relating to anti-dismissal injunctions. Given the reasons identified in Chapter Six for why cases resolve,[83] it may well be that creating a greater measure of certainty in terms of how a court approaches an interim or interlocutory application will not have a direct practical effect on such tactical considerations. Nevertheless, it is important to highlight that courts have the tools and ability to consider anti-dismissal injunctions in a clear and consistent way.

Within those strictures, there has also been considerable effort, particularly on the parts of Clarke and Laffoy JJ., to bring greater clarity and consistency to the law relating to anti-dismissal injunctions, predominantly at the interlocutory stage. In particular, Clarke J.'s

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[79] See Chapter Six, section 4.

[80] Quinn "The Employment Injunction – Dead or Alive?" (2011) 8(3) I.E.L.J. 71.

[81] Horan "Employment Injunction: Current Status and Future Developments" (2005) 1 E.L.Rev. 8 at 8.

[82] See Chapter Six, section 4.4.

[83] See Chapter Six, section 4.

judgment in *Bergin v Galway Clinic Doughiska Ltd.*[84] is a signal achievement.[85] Under the heading "The Legal Issues,"[86] and in just over 2300 words, he deals with the nature of an employment contract, the tactical considerations underpinning anti-dismissal injunctions, the applicable test for injunctions, the mandatory nature of relief, exceptions to the rule in relation to mandatory injunctions, the impact of an allegation of misconduct, putatively private law disputes referencing public law standards and doctrines and the relationship between wrongful and unfair dismissal. It offers succor to those who were seeking some clear judicial thinking in this area.

However, it can be very easy to get lost in the technicalities of injunction applications at the expense of recalling what they are designed to achieve. Horan has cautioned that "the anti-dismissal injunction is no more than an affirmation of the guiding principle that a wrongdoer should not profit from his or her wrong rather than an attempt to shore up or create a dubious jurisprudence."[87] The reality is that it is only over the last twenty plus years that the courts have really engaged with anti-dismissal applications in any meaningful way and developed the law. That, in legal terms, is a relatively short period of time. In many respects, the progress made in the development of the law in that regard is astonishing. There is no doubt that progress is welcome, subject to the caveat that it must be principled progress, those principles understood by judges, practitioners, academics and the parties to an injunction application alike. Clarifying and conforming to those principles is the biggest challenge confronting this area of the law.

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[84] [2008] 2 I.R. 205.

[85] In the preface to the second edition of his work on equity and trusts, former Chief Justice Ronan Keane refers to the fact that it "is in the area of injunctions, and particularly their use at the interlocutory stage in employment cases, that there have been the most important Irish decisions." In that regard, he specifically instances the judgment of Clarke J. in *Bergin*: Keane *Equity and the Law of Trusts in the Republic of Ireland* 2nd ed. (Bloomsbury, Dublin, 2011), preface.

[86] [2008] 2 I.R. 205 at 212.

[87] Horan "Employment Injunction: Current Status and Future Developments" (2005) 1 E.L.Rev. 8 at 9.

APPENDIX A

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