EMPLOYMENT INJUNCTIONS: AN OVER-LOOSE DISCRETION

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INTRODUCTION

My interest in this topic developed as a result of my experience of doing the Chancery No. 2 list in the High Court. On almost every Monday there were a few employment injunction applications.[1] Typically, over the previous week or two, someone will have been dismissed from their employment, or purportedly made redundant, a process of sorts would have been gone through, and the party dismissed would seek to be reinstated immediately, on full pay. This was often against the background of where it was either a small company where the parties were at loggerheads with each other, or where allegations of dishonesty were focused on the ex-employee seeking the injunction. The case law that was continually cited seemed to me to be lacking in clarity overall. I felt I was thus being called upon to exercise judgment where the legal principles were so uncertain as to leave that discretion insufficiently certainly grounded in law. That continues to be my view. I think that the lack of clear legal principles in dealing with what are essentially business relationships puts too wide a variation on the nature of the potential orders that may be made, or may be refused, in these cases.

A sense of urgency informed my suggestion that this topic should be further debated upon. This was because of a case that happened just before last Christmas. During the week before that particular Monday morning Chancery motion list, a dismissed employee had sought, and had obtained, an interim ex parte injunction requiring his employers to accept him back at work,

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[1] I would like to thank Orla Veale-Martin for research assistance into the relevant authorities.

with liberty given for short service of a notice of motion seeking that, and other, injunctive relief for the Monday on which I was sitting. The employer did not like the order made. In fact, over the weekend, the employer had gone to the office and changed all of the locks. In addition, computer access to the dismissed employee was blocked. On arriving at the office expecting, apparently, to work cheerfully with those who had just dismissed him for misconduct in the context of what was alleged to be a disgraceful lack of fair procedures, his way was barred. He then sought, not only an interlocutory injunction, but to lock up his ex-employers for contempt of court. I do not know what happened to the case. It was adjourned on the basis that the employer had to put in replying affidavits. The blithe notion that an employment relationship could continue in circumstances where the parties manifestly distrusted each other, and where one was now seeking to lock up the source of his employment in Mountjoy jail, struck me as ironic.

Because of that case, and because of a number of other encounters with this form of injunction, the following questions occurred to me: 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 work together under court order, and under threat of contempt, as if they were emotionless computers? By what standard is an employment injunction to be judged, it being, of its essence, an order to reverse a sacking? What are the range of options that are open to the court in making such an order? Is there any certainty as to what fair procedures means within the context of ending an employment relationship; this being the ground on which most injunction applications are launched? Is the equitable jurisdiction a usurpation of the statutory jurisdiction given by law under the Unfair Dismissals Acts, 1977 to 2007; and is the availability of that alternative remedy a bar to the grant of injunctive relief? Why is an interlocutory injunction possible in circumstances of an employment contract, when the court at full hearing never grants a permanent or perpetual injunction?

I. PERSONAL SERVICE

Up to 1971 in England, and up to 1985 in Ireland, it was unchallenged that a dismissed employee could never obtain an injunction requiring his employer to work with him. The foundation for this attitude 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. Secondly, 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 to grant injunctive relief. (It had been remarked, privately it must be said, by one of our former colleagues when the words "labour law" was mentioned to him; "ah yes, that invention of the devil that comes between a master and his servant".) Finally, there was the notion that no injunction should be granted if constant supervision was needed: the court would cease to be one of equity and, in those circumstances, become one of constant supervision. Megarry J. in *C.H. Giles and Co. Ltd v. Morris*[2] encapsulated some of these objections when he said:

> One day, perhaps, the courts will look again at the so-called rule that contracts for personal services or involving the continuance performance of services will not be specifically enforced. Such a rule is plainly not absolute and without exception, nor do I think that it can be based on any narrow consideration such as difficulties of constant superintendence by the court … I do not think that it should be assumed that as soon as any element of personal service or continuous services can be discerned in a contract the court will, without more, refuse specific performance.

Shortly afterwards, the mould was broken. In the case of *Hill v. C.A. Parsons and Co. Ltd*[3] Lord Denning M.R. blithely

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[2] [1972] 1 All E.R. 960, [1972] 1 W.L.R. 30.

[3] [1972] Ch. 305, [1971] 3 All E.R. 1345. See further Farrell, *Irish Law of Specific Performance* (Butterworths, 1999), and the analysis of the relevant passage in *Ahmed v. Health Service Executive* by Laffoy J. at [2007] I.E.H.C. 312.

dismissed the notion that to grant an injunction was to enforce the contract for personal services. He agreed, but went ahead anyway, saying "so be it". Confidence between the employer and the employee, however, continued to exist in that case. The employer had had his arm twisted to dismiss the employee at the behest of a trade dispute, and within a couple of weeks of the dismissal, the Industrial Relations Act, 1971 was due to come into force which would have given Mr. Hill access to the equivalent of our Unfair Dismissals Acts, 1977 to 2007. So, most importantly, damages were regarded as not being an adequate remedy.

In *Fennelly v. Assicurazioni Generali*,[4] resistance to employment injunctions first began to be dissolved in this jurisdiction. Costello J. made an order that the plaintiff should continue to be paid a salary until his action for wrongful dismissal was decided. They say "hard cases make bad law", but I don't know. Whereas the hardness in *Hill's* case was the effective denial of a statutory remedy, the hardness here was that the plaintiff without salary would be left "virtually destitute". Costello J., however, mentioned that both parties continued to have high regard for each other and therefore could, in the circumstances of an injunction, reasonably be expected to work together. He said:

> The plaintiff has established a fair question for trial to the effect that he has established that his dismissal is a wrongful one … I have to consider the well established principles on which interlocutory relief is granted. I agree that in approaching the question of interlocutory relief I should approach the case on the basis that the courts have laid down a general principle that they will not give specific performance of an employment contract, but this general principle is subject to exceptions and it had recently been subject to exception in the well known case, *Hill v. C.A. Parsons,* [1971] Ch. 305.

Thus the view of Lord Denning M.R. in *Hill*, that there was a fundamental principle in equity in that whenever a man has a right, the law should give him a remedy, *ubi jus ibi remedium*,

[4] [1985] 3 I.L.T. 73.

was extended to Ireland. Lord Denning felt that this enabled him to step over "the trip wires of previous cases and to bring the law into accord with the need of today".[5] Rapid steps away from settled law followed. In *Phelan v. Bic Biro,*[6] an injunction was granted notwithstanding that the plaintiff would not be destitute without a salary. In *Shortt v. Data Packaging Ltd.*[7] an injunction was granted on the basis that a fair issue had been made out as to the legality of the procedures for termination. Finally, it is argued that we now seem to be at the point where the test set out in *Campus Oil v. The Minister for Industry (No. 2)*[8] is the sole test applicable. These principles are:

- That there is a serious or fair issue to be tried at the full hearing;
- That the balance of convenience favours the granting of the injunction; and
- That damages would not be an adequate remedy when awarded at the time of the hearing.

However, one thing is left out. This is the notion that parties have to work together. This continues to be an important principle in Scotland and in England; and for good reason. The idea that an employer and an employee should be able to work together is something more than an arcane notion derived from the law of master and servant. People have to be able to work together. If they cannot, changing of locks, applications for contempt of court, and potentially, the very destruction of the business that gave rise to the employment will result. It is something that has not been emphasised in the paper presented. In both Scotland and in England it continues to inform the grant of an injunction and is, in effect, a fourth principle, beyond the three mentioned in the *Campus Oil* test, which is necessary for

[5] [1972] Ch. 305, at 316.
[6] [1997] E.L.R. 208.
[7] [1994] E.L.R. 251.
[8] [1982] I.R. 88.

the grant of these injunctions.[9] The courts in those jurisdictions focus on whether the injunctive relief is workable.

Trust and confidence are an implied part of the employment relationship between an employer and an employee. The principle is so obvious that it does not need to be stated within the written terms of an employment contract. Yet, in many circumstances, we seem to be granting injunctions without even considering its relevance. Where in a very large enterprise the parties work within a factory context, or where the employee can be moved from one department to another, there is clearly less of the personal relationship upon which, in part, the implied term is based.

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. One thing that seems to me to be certain is that we must start to take into account the relationship between the parties and not simply ground every injunction on a breach of procedure. As to the up-to-date position in England and Scotland, *Butterworths Employment Law Guide*[10] offers this:

> In conclusion, specific performance is not generally available. But the rule that an injunction cannot be granted to an employee in relation to the contract of employment is no longer immutable. In all the circumstances particularly if there is confidence subsisting between the employer and employee, an injunction might be granted in an appropriate case. The criteria for determining whether the circumstances are sufficiently acceptable for the general rule to be disapplied are however unclear. It is to be noted that in many (if not most) cases, particularly of wrongful dismissal, the element of confidence will be absent. … It may be that the

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[9] In Scotland see *Peace v. Edinburgh City Council* [1999] I.R.L.R. 417, and in England see *Wishart v. National Associations of Citizens Advice Bureaux Ltd.* [1990] I.L.R.L. 393 and *Robb v. Hammersmith and Fulham London Borough Council* [1991] I.R.L.R. 72.

[10] Brennan and Osman (eds.) *Butterworths Employment Law Guide* (LexisNexis Butterworths, 2005).

> increasing use of the implied duty of mutual trust and confidence as the foundation of the contract of employment since the House of Lords' decision in *Malik* will mean that in future these cases are confined to their own facts.

As a concept, confidence between employer and employee has not disappeared from the case law in this jurisdiction. It is, however, something that is widely ignored. In *Ahmed v. Health Service Executive*,[11] Laffoy J. stressed that the grant of any form of injunction was discretionary. She referred to a breakdown of trust and confidence as being an impediment to the granting of injunctive relief. She also stressed that the consequences of an equitable order, whether mandatory or prohibitory, should be foreseeable to the court. In refusing to enforce what is known as the Consultants' Common Contract, she found that she could not foresee when an opening would be available for the employment of the plaintiff as a surgeon, and said that if she made the order "the matter would not be finally resolved without further recourse to the court". Similarly, in *Carroll v. Bus Átha Cliath*,[12] Clarke J. acknowledged the existence of the principle of confidence:

> However, a more difficult question arises as to whether I should, beyond making such a declaration, make orders which would require the defendant physically to provide the plaintiff with work. I have been referred to some limited number of authorities which suggest that, in certain limited circumstances, the courts have, notwithstanding the general policy to the contrary, granted injunctive relief which has the effect of requiring that an employee be actually permitted to work. Many of those judgments appear to have arisen at an interlocutory stage. *O'Donnell v. Chief State Solicitor* [2003] E.L.R. 268, *Martin v. Nationwide Building Society* [2001] 1 I.R. 228 and *Bryan v. Finglas Child and Adolescent Centre* (Unreported, High Court, Kelly J., 10th May, 2004). The extent to which 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

[11] [2007] I.E.H.C. 312.
[12] [2005] 4 I.R. 184.

> appropriate findings at a plenary hearing is, therefore, open to significant doubt.
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> Even if such a jurisdiction exists, it seems to me that it could, in principle, 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. I am afraid that I am not satisfied that this is such a case. Having regard to the serious breakdown in relations between the parties, evidenced, not least, by the serious accusations made in the course of these proceedings, I am not satisfied that, even if there were a limited jurisdiction, in special cases, to make an order which would have as its effect the placing of a requirement upon the defendant to take the plaintiff back into active employment, it would be appropriate, in the exercise of my discretion, to make such an order in this case.

II. BY WHAT STANDARD?

Let us consider the position we are in when hearing an application for an interlocutory injunction in an employment matter. The plaintiff is already dismissed, that is invariably the case, and the defendant, the company which employs him, no longer wants his or her services. The salary may have been cut off, or a period of notice may have been offered in lieu thereof. Save in very rare circumstances, the parties will be close to at daggers drawn to each other. Characteristic of these injunctions is the exchange of lengthy affidavits. These perhaps go as far back as the formation of the company, and involve averments as to a foundation of understanding upon which the parties were meant to proceed. What was said by the parties to each other at various meetings will be rehearsed and traversed at length.

My complaint is not that judges cannot make sense of this. They can, if given time. Rather, by what standard are they meant to approach it? The traditional *Campus Oil* test involves a fair or serious question to be tried. It cannot mean an arguable case, since all of us will have experience that virtually anything on earth is arguable, just as in a criminal trial the defence can seek to make anything relevant to almost anything else. Rather, there has to be some kind of a standard whereby an argument is fairly

raised, or reasonably raised, or can be seriously raised with some kind of a reasonable prospect of success at full hearing. To grant an injunction on any lesser basis is, in my view, to lose sight of the seriousness of contempt proceedings which can follow from it. This test of a reasonably arguable case can be contrasted with statutory modalities under the Planning Acts and under the Refugee Acts, whereby people are required, on obtaining judicial review, not merely to show some reasonably arguable ground, but to show substantial grounds, ones which are not tenuous or trivial but which are weighty.

When it comes to the resolution of facts in employment injunctions, as between contending parties, the multiplicity of contradictions within the affidavits may make it impossible to know, at an interlocutory stage, where the trial Judge finds herself or himself. Is the answer to this: one does one's best! I do not know. In attempting to formulate judgments in these cases, I believe that many of us have been driven back on attempting to draw out from the affidavits what appears to be clear, from among the fog of contending allegations among the parties. Often this is no more than describing the battleground upon which the parties have contended. It may be on that basis that one can say that because of certain facts which are in common, a fairly arguable case has been raised by the plaintiff. I find that particularly difficult to say in any context where everything that the plaintiff says is undermined, and sometimes by documentary exhibits.

But, going back to where the court finds the plaintiff at the moment of an application for an interlocutory injunction, the following needs to be said: it is easy to draw a distinction between prohibitory injunctions and mandatory injunctions in many circumstances. After all, the distinction developed in equity outside of the employment relationship. One can prohibit someone from building a wall, but one is much more careful about ordering that a wall should be torn down. At interlocutory stage, one might do the latter where there is proof that the defendant acted to steal a march on the plaintiff. Perhaps the usual test is that elucidated by McGarry J. in *Shepherd Homes*

Ltd. v. Sandham.[13] An interlocutory injunction is prohibitory if its effect is to seek to regulate the conduct of the defendant by requiring that party to continue to act as had been the case in the past, whereas the mandatory injunction looks to the future. A similar view was taken as to the test by Costello J. in *Irish Shell Ltd. v. Elm Motors Ltd*.[14] Although, this may seem like an elegant solution, it is very difficult to see it working in practice. If a consultant is dismissed from a hospital then, as I have already argued, the confidence of the parties in each other should loom large as to whether an injunction should be granted at all. To say that what happened two weeks ago never happened, and that the defendant hospital is to continue to act as it had done in the past so making the injunction merely prohibitory, might be seen as flying in the face of the facts. The parties have lost confidence in each other; the plaintiff no longer works for the defendant; the defendant feels that the plaintiff is a danger. That is an obvious example.

What about the situation where two weeks ago, the plaintiff was dismissed because the defendant company thought that he or she had "cooked the books" and was acting dishonestly? Again, the parties have no confidence in each other; the defendant does not want the plaintiff working in any capacity any more. In both instances, the court is being asked to overturn reality in favour of pretending, as it may be argued, that both parties are to be required, on pain of contempt of court, to continue to act as if nothing had happened; as if they still trusted each other and had not been in a situation which ended up with the affidavits flying about.

One case which is often cited in these applications is that of *Maha Lingam v. Health Service Executive*.[15] The plaintiff was a temporary surgeon in Cork University Hospital. He thought that his fellow surgeons were prejudiced against him, and had generated a situation whereby he was given three months notice towards the end of successive temporary appointments. The defendant was not making an allegation of misconduct against him. In the course of his judgment, Fennelly J. referred to

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[13] [1971] Ch. 340.
[14] [1984] I.R. 200.
[15] [2006] 17 E.L.R. 137.

the obligation on the employer and on the employee to work faithfully, and respect the mutual obligations of employment, and not to undermine the basis of good faith and mutual trust between the parties. Fennelly J. emphasised that, until modified by the Unfair Dismissals, Acts 1977 to 2007, the ordinary law of the employment contract was that it might be terminated by either side on giving a specified period of notice, in accordance with the contract, or reasonable notice, and that this entitlement to either party continued whether or not there was good reason for so acting. On the subject of mandatory injunctions, he continued as follows:

> … The implication of an application of the present sort is that in substance what the plaintiff – appellant is seeking is a mandatory interlocutory injunction and it is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory. In such a case it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action. So it is not sufficient for him simply to show a *prima facie* case, and in particular the courts have been slow to grant interlocutory injunctions to enforce contracts of employment. None of this is to deny that there had been developments in the law in recent years and it is necessary to refer very briefly to the nature of these developments. The first is that, in this jurisdiction the development can be traced to the judgment of Costello J. in the case of *Fennelly v. Assisurazioni Generali* (1985) 3 I.L.T.R. 73 in which an injunction was granted directing an employer to continue payment to the plaintiff, in that case pending the hearing of the action, and that type of jurisdiction was exercised in a number of subsequent cases. It is fair to say however, that there is a very strong trend in these 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 these sort of cases … A second element in cases of that sort is that, where a dismissal is by reason of an allegation of misconduct by the employee, the courts have

> in a number of cases at any rate imported an obligation to comply with the rules of natural justice and give fair notice and a fair opportunity to reply.

It seems to me that in employment injunction matters the plaintiff can seek to ignore the implications of the *Maha Lingam* judgment, whereas the defendant is all for emphasising it. I can have no clear or settled view as to this matter. It is arguable, however, to imply, that a prohibitory injunction ignoring the reality of what has occurred between the parties is to remove sense from the application of law in this context. Very often, as Laffoy J. acknowledged in *McNamara v. Health Service Executive*,[16] what is in effect, a mandatory injunction may be formulated in prohibitory terms: the court is therefore obliged to analyse the substance of what is sought. I would find it hard to believe that in anything but a small percentage of these cases that the reality of what is being applied for is to require the defendant to take the plaintiff back, to treat him as a normal employee in respect of whom suspicions do not arise until, for example a fair disciplinary process, and to pay him accordingly. In consequence, it seems to me that the *Maha Lingam* standard for mandatory injunctions, of requiring that the plaintiff show "a strong case that he is likely to succeed at the hearing of the action", should be substituted for the usual first test in *Campus Oil*.

But this may depend, at least to a degree, on what specific injunction is being sought.

III. RANGE OF OPTIONS

The notice of motion seeking injunctive relief in employment matters is invariably an ingenious document. It seeks both extreme relief, such as requiring that the plaintiff be reinstated immediately, and 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. These are the ones that I, in any event, have come across:

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[16] [2009] I.E.H.C. 418.

- The plaintiff seeks an injunction requiring the defendant to reinstate him with immediate effect to his post.
- The plaintiff seeks an injunction requiring the defendant not to appoint any other employee in the same or equivalent position to the plaintiff, or otherwise to assume his duties.
- The plaintiff seeks an injunction restraining the defendant from appointing A.B. to his employment in the defendant company.
- The plaintiff seeks an injunction requiring that the defendant should continue to pay the plaintiff's salary and pension benefits, pending the trial of this action.
- The plaintiff seeks an injunction prohibiting the defendant from initiating, or from continuing in any way, a purported procedure of discipline that may lead to the dismissal of the plaintiff from the defendant's employment.
- The plaintiff seeks an injunction restraining the use of a document purporting to be a statement of facts relevant to a disciplinary procedure and which, if used, may lead to the dismissal of the plaintiff from the defendant's employment.

Our first task, in terms of the reliefs sought, is to sort out what is mandatory from what is prohibitory. Clearly, requiring that the plaintiff be reinstated is the grant of the mandatory injunction at interlocutory stage. The *Maha Lingam* case test then applies. If the salary of the plaintiff has been cut off, or if he or she has been given (let us say) three or six months' salary in lieu of notice, then an application to restrain the defendant from cutting off the plaintiff's salary and benefits is, in effect, a mandatory interlocutory injunction. Again, the *Maha Lingam* test applies.

More difficult to analyse is the usual third tier of an injunction application. The plaintiff seeks to restrain a company from having anyone else fulfil his or her duties within it. In its most extreme form, this is an application to restrain the appointment of a named individual (I have called her or him

A.B.) to the plaintiff's employment. 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, however, as being anything other than part of an application to redefine the reality of what has already happened: the plaintiff has been sacked. Within a small firm, a prohibition against re-engaging an alternative employee may make it impossible to continue. Within a large firm, the high probability is, it might be thought, that such an order will make no difference. If the plaintiff was engaged in a key position like I.T. or financial control (which is very often the case in these applications), injunctive relief by the court will result in severe disruption to the defendant because, in those circumstances, the firm may be unable to continue with its work. What firm, after all, can do without a financial controller, an executive over a particular division, or a key sales organiser?

Perhaps the answer here is to look seriously at the balance-of-convenience issues. 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. In one or two cases, the court has ordered that a proportion of salary should be paid. A court should not grant an injunction, using the words of the Supreme Court of Judicature (Ireland) Act, 1877, unless it is "just and convenient" so to do. The strongest argument, often advanced in these cases, is that a positive finding of misconduct has been made against the plaintiff and that, in consequence, his or her reputation has been ruined. The reversal of that decision, on an interlocutory basis founded upon the existence of a real argument that the decision was wrong, at least, in part, may reverse that finding. Then the plaintiff may get on with reordering life within employment.

My issue with all of this is as to the wide nature of the discretion given. I confess personal unhappiness with it. Turning

to traditional texts on the exercise of injunctive relief at interlocutory stage, one notes a number of principles. Firstly, the court should consider whether there is any real necessity to grant an injunction at all. The plaintiff has a burden of showing that in the event that an injunction is not granted, irreparable loss will be suffered.[17] Secondly, a plaintiff is required to give an undertaking that in the event that the injunction was wrongfully granted, that he or she will compensate the defendant. If the effect of an injunction is to seriously interfere with the business carried on by the defendant, this must be closely scrutinised. The factor becomes stronger if there is serious doubt as to the ability of the plaintiff to compensate the defendant. This is not, however to say, that the court should, in effect, sanction manifest injustice simply because a plaintiff is, or worse, has been rendered, impecunious. These principles are regarded as a "counsel of prudence" whereby the court, as a general matter, seeks to preserve the existing status of the parties pending the trial.[18]

In Keane's text, *Equity and the Law of Trusts in the Republic of Ireland*[19], the following passage occurs which, while it seems to me to be correct, casts the discretionary nature of prohibitory interlocutory injunctions back to the assessments of individual facts, thus widening the discretion:

> … where the damage likely to be suffered by either side as a result of the granting or withholding of the relief is not determinative, the court may take into account the comparative strength of the parties' respective cases. In other words, while it sufficient for the plaintiff at the outset to show that there is a serious question to be tried to enable the court to proceed to consider the whole question of the balance of convenience, the court may return to the comparative strength of the parties' positions where the damages aspect does not point clearly in favour of either party.[20]

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[17] *Moore v. Attorney-General* [1927] I.R. 569, at 575.
[18] *American Cynamid v. Ethicon Ltd* [1975] A.C. 396, at 408.
[19] Keane, *Equity and the Law of Trusts in the Republic of Ireland* (Butterworths, 1988).
[20] Citation from *American Cyanamid Ltd. v. Ethicon Ltd* [1975] A.C. 396 at 408, per Lord Diplock.

Are there any guide points out of this mire? It seems to me that there possibly are. Firstly, we have to take into account that some reliefs sought will (as to their reality) require that the defendant act in a positive way. These are mandatory reliefs. Secondly, the issue as to whether damages are an adequate remedy was based in the *Fennelly* case on a foundation whereby the plaintiff would be rendered destitute. That may be a factor in some cases, but it is not necessarily one in every case. Where, thirdly, a positive finding of misconduct has been made against a plaintiff, then, fourthly, the issue of whether the parties continue to have confidence in each other will arise in a serious way. If the court is not minded to grant a mandatory interlocutory injunction, then, it seems to me, that the judge should bear in mind, the paying position of the defendant, and whether it is fair to order salary and other benefits, without the benefit of work in return, for an extended period. Sometimes that can be fair, and in other circumstances it may be unreal. Finally, the decision as to whether to grant an injunction in terms of any of the range of options, usually put before the court is probably, in reality, as Keane says, dependent to a large degree on whatever preliminary view the judge takes on reading the affidavits, as to the relative strength of each side of the case. Remember this is a hasty hearing, on paper only. How fair is it? This is a point I will revert to later in the article.

Then, separately, we have the issue of the court being asked to decide to restrain a disciplinary procedure. Of its nature, a prohibitory injunction ought to decide, in effect, that a disciplinary procedure should be regarded as being void, and of no effect, thereby requiring that the plaintiff should be re-engaged pending a proper disciplinary procedure – in truth a mandatory order.

IV. FAIR PROCEDURES?

A common feature of employment injunctions is to restrain a dismissal on the basis that the procedure leading to termination has been unfair. It remains the law that, at any stage, either the employer or the employee may terminate a contract of

employment by giving the period of notice specified in the contract, or which is implied by law in the absence of expressed words. This can be done, by either side, for a good or a bad reason. A bad reason may give rise to redress under the Unfair Dismissals, Acts 1977 to 2007 but not at common law. Where, however, the reason for the dismissal by the employer is that the employee had been guilty of misconduct, fair procedures must be followed.

What, however, are fair procedures? This problem is virtually intractable. If it is possible to point out a general trend in the application of fair procedures, it is that we have gone from a stage where prior to 1970, they were apparently not expected at all, to a position today were we regard the full panoply of a civil plenary action as the ideal. The decision of *In Re Haughey*[21] opened the flood gates. It could have been held to apply solely to an Oireachtas committee of inquiry, but subsequent decisions have applied matters such as the right to cross-examine, the right to confront an accuser, the right to make submissions, the right to be appraised of the nature of the allegation against one and the right to be represented much more widely.

Confusion arises here as to when these rights should arise. There seem to be different procedures for different forms of inquiry. For instance, in an inquiry under Part III of the Companies Act, 1990, inspectors hear witnesses individually. If, in consequence of an inquiry, a witness, in another context you might say "a party", is to be criticised, the material on which that criticism is to be made, for instance transcripts of evidence, documents and exhibits of real evidence (if any) are to be sent to the party to be criticised together with a draft of the relevant section of the report; he or she is be allowed to comment and, in consequence, that tribunal must look at its findings again to see whether they should be altered in the light of the submission made. When it comes to a tribunal of inquiry under the Tribunal of Inquiry Acts, 1922 to 2004, parties must be given a full set of documents, if they are in any danger as to their reputation; they must be allowed to attend at relevant portions of the hearing; and they must be allowed to cross-examine and to make submissions.

[21] [1971] I.R. 217.

As Ó Neill J., has recently held, it is not necessary for draft findings to be sent to people whose reputation is in jeopardy since they have, by that stage, been already afforded the full panoply of *Haughey* – rights. For administrative tribunals, the nature of what fair procedures are depends upon the function being fulfilled. Geoghegan J. for the Supreme Court has recently held that it is not necessary to have a full plenary hearing before sacking a prisoner officer. Charleton J. has held that before the financial services ombudsman makes a decision, which can involve reversing a financial investment worth many millions of euros, that all material should be gathered; that a decision should be made as to whether any oral hearing should be held; that witnesses should be called upon, who are crucial to a decision if an oral hearing is deemed necessary; that the adverse parties should be allowed to cross-examine, subject to the risk that cross-examination is often used to cause confusion, and not to find the truth and that at the end oral or written submissions should be made.[22] This is but an example of the extension of *Haughey* rights.

The touchstone as to what is, or is not, a fair procedure has always been for me, the judgment of Henchy J. in *Kiely v. Minister for Social Welfare*.[23] In that case an oral hearing had been held, but after it was finished the medical evidence on behalf of the applicant was undermined by a submission from a contrary expert, without giving the applicant notice of this or an opportunity to test it. Henchy J. held that the hearing might be oral or might be in writing. For him, the guide point was whether or not the same level of consideration was applied to each side. Henchy J held that:

> Tribunals exercising quasi-judicial functions are frequently allowed to act informally – to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like – but they may not act in such a way as to imperil a fair hearing or a fair result. I do not attempt an exposition of what they may not do for, to quote the frequently cited dictum of Tucker L.J. in *Russell*

[22] *Davy v. Financial Services Ombudsman* [2008] I.E.H.C. 256.
[23] [1977] I.R. 267.

> *v. Duke of Norfolk* [1949] 1 All E.R. 109, 118, "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth".
>
> Of one thing I feel certain, that natural justice is not observed if the scales of justice are tilted against one side all through the proceedings. *Audi alteram partem* means that both sides must be fairly heard. That is not done if one party is allowed to send in his evidence in writing, free from the truth-eliciting processes of a confrontation which are inherent in an oral hearing, while his opponent is compelled to run the goblet of oral examination and cross-examination. The dispensation of justice, in order to achieve its ends, must be even-handed in form as well as in content. Any lawyer of experience could readily recall cases where injustice would certainly have been done if a party or a witness who had committed his evidence to writing had been allowed to stay away from the hearing, and the opposing party had been confined to controverting him simply by adducing his own evidence. In such cases it would be cold comfort to the party who had been thus unjustly vanquished to be told that the tribunal's conduct was beyond review because it had acted on logically probative evidence and had not stooped to the level of spinning a coin or consulting an astrologer. Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but which is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side has neither the semblance nor the substance of a fair hearing. It is contrary to natural justice[24].

So does this mean that in employment matters there must be an oral hearing, with cross-examinations? I remind myself of a fact all too frequently observed, especially in the criminal courts, that cross-examination can be either used to elicit the truth, or can be used to cast a pall of confusion over the proceedings. It is the

[24] [1977] I.R. 267, at 281-282.

control by the trial judge, or the chairman of the tribunal which allows for some moderation of confusion. Without it, the weed of untruth will grow unchecked.

It is all very well to emphasise, as did O'Flaherty J. in *Keady v. An Garda Síochána,*[25] the flexibility and varied nature of the requirements of fairness in decision-making. What is a personnel manager supposed to do when faced by the proposition that he may have to dismiss an employee for his conduct? In so far as I can tell, the case law seems to say the following.

First, before a decision is made to dismiss, the person who is accused of whatever it is, must be informed clearly of that with which he is "charged". He must then get a fair hearing. This does not necessarily involve procedures that would be followed in a court of law.[26]

Secondly, fair play must be observed in the hearing of a "charge". In essence, in ordinary employment situations, this can involve taking statements from those who claim that they were bullied by the plaintiff, that the plaintiff acted dishonestly, or was guilty of other disreputable conduct. He or she should be told by way of a letter that it is proposed to consider this material on a particular date. The full material that the sub-committee of the board, or whatever other appropriate organ of the defendant is to consider the matter, should be furnished to the plaintiff. He or she should be then given an opportunity to respond and to call in aid in his defence, whatever other material, perhaps including calling in other people who are witnesses, to rebut the "change". He should be allowed to make, in addition, a submission. The want of mutuality in this is the exact opposite to that which occurred in *Kiely's* case: the employer's side is not entitled to speak through witnesses or submission, but the employee is.

Thirdly, there must not be a preliminary investigation which has the whole matter decided prior to the hearing itself. To have decisions made through an investigator, so that they are presented in effect at the hearing, is to turn the rules of natural justice upside down so that in the important phase, the plaintiff has no rights, while at the unimportant phase, when the decision

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[25] [1992] 2 I.R. 197 at 212.

[26] *Cassidy v. Shannon Castle Banquets* [2000] E.L.R. 248.

is in effect already made, he or she has the right to make submissions.[27]

Fourthly, it is impossible to say definitely, on the basis of case law, as to whether there is a right to cross-examine witnesses who, for example, alleged that the plaintiff bullied them, or who say that he or she stole money.[28]

Fifthly, no more than in a court hearing, it is not established on the case law that there is a right to appeal.

Finally, some contracts may set up more elaborate provisions for natural justice, including precise details on notification, information gathering, and submissions.

One thing that really has to borne in mind is that persons applying fairness of procedure principles are not necessarily very familiar with the intricacies of law. Some years ago, while in practice, I suggested a quite elaborate procedure, pretty similar to a civil trial, for dealing with a particular kind of unpleasant allegation. I was reminded by my solicitor that the person who had to make this decision was a person with no legal training. These procedures are second nature to us. They are certainly not second nature to others outside the legal world. Whereas it is right for the courts to say that a person to be dismissed on the grounds of misconduct should get a fair crack of the whip, it is certainly not right for us to be constantly pushing towards the notion that plenary hearings have to take place before an employer can take action. Nor is it right, in my view, to import cross-examination and all that that implies in terms of its modern tendency merely to confuse and not to help to adjudicate the truth, into domestic employment decision-making. But, for me, one matter looms large: what kind of hearing are we giving these matters in Monday lists?

V. UNFAIR DISMISSAL

A perfectly good alternative jurisdiction exists with the Unfair Dismissals Acts, 1977 to 2007. The Employment Appeals Tribunal has an entitlement to award up to two years of salary.

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[27] *O'Sullivan v. Mercy Hospital Cork Ltd* [2005] I.E.H.C. 170.
[28] *O'Sullivan v. Mercy Hospital Cork Ltd* [2005] I.E.H.C. 170.

This is in stark contrast to the usual three to six months notice that may be implied in a contract of employment; the longer period at the higher reaches of executive engagement. It has the right to order re-engagement (in other words one loses the wages that one has lost up to the order) or reinstatement (which means that the employee, is treated in terms of wages and benefits as if the dismissal had never happened). That tribunal looks carefully and clearly at all aspects of the dismissal. Its two most important inquiries seem to be whether a reasonable employer could reasonably have concluded on the basis from the information provided that misconduct was involved and, secondly, whether fair procedures were used. In contrast to the interlocutory hearing coming before the High Court, all of this is heard on oral evidence. Submissions are made and cross-examination takes place. We do none of that. As is often quoted in text books, the grant or refusal of an interlocutory injunction can often be the end of a case. So, decisions with far-reaching consequences are being made before us at a much lower level of natural justice than would be the case before the Employment Appeals Tribunal; or at a lower level than used to dismiss an employee? Can we regard this as satisfactory?

There are major differences between the two jurisdictions, apart from the fact that the level of damages is higher, the orders made by the Employment Appeals Tribunal are permanent, and only subject to appeal to the Circuit Court on a rehearing, and then to the High Court on a point of law. The Employment Appeals Tribunal has no power to award costs. The High Court does, and O. 99 of the Rules of the Superior Courts obliges a High Court judge, having disposed of an interlocutory matter, to make an order for costs unless there is a reason, which should be stated in the order, as to why that decision is deferred to trial. Proceedings at interlocutory stage before the High Court are likely to be more expensive than a full hearing, with the most rigorous application as natural justice, before the Employment Appeals Tribunal.

It seems to me that the modern trend is for more cases to be diverted away from the Employment Appeals Tribunal and towards the High Court. The problem from the point of view of the plaintiff, and from the point of the view of the defendant, is

that if there is determination against either side, that this may be regarded as almost final. Very few of these cases actually come to trial. Instead, settlements are effected, sometimes bad ones for employees. The 1977 Act bars specifically from taking an unfair dismissals claim, anyone who is initiated to proceedings for wrongful dismissal. It is surprising that any should choose injunctive relief in the context of the very much greater damages, and the very much superior remedies, that are available before the Employment Appeals Tribunal. I also consider that there is no basis upon which the clear wording of the 1977 Act can be violated so that an applicant or plaintiff seeks to have a bite out of both.

VI. PERMANENT OR PERPETUAL?

A permanent order can be made at final hearing. Since, however, the nature of employment at common law, not under the 1977 Act, is that it can be terminated by such reasonable notice as the contract specifies or implies by either side, such an injunction is never given. The employment injunction is therefore an example of a jurisdiction that is exercised at interlocutory stage only. This is extraordinary. What is also notable is the lack of mutuality in equity. Specific performance can be ordered by a court to enforce an employment contract. Very few cases come to full trial, and in the case of *Ahmed v. Health Service Executive,*[29] Laffoy J. refused the order for the reasons already stated.

Once you seek redress in the High Court you have to, as a matter of law, also be seeking wrongful dismissal and barring yourself from appearing before the Employment Appeals Tribunal in an unfair dismissal claim under the Unfair Dismissals Acts, 1977 to 2007. The Supreme Court has held that any declaratory relief cannot exist independently of the traditional remedy of damages at common law.[30] By initiating injunctive relief, therefore, the employee as plaintiff, is limiting himself to a maximum period of damages for wrongful dismissal to between three and six months. I wonder do plaintiffs really know that

[29] [2007] I.E.H.C. 312.
[30] *Parsons v. Iarnród Éireann* [1997] E.L.R. 203.

before coming in before the High Court? There is no implied term in a contract that an employer must act reasonably and fairly in the case of dismissal for grounds other than misconduct.[31]

My conclusion, therefore, is that those who choose the wrongful dismissal option, part of and preliminary to an application for an interlocutory injunction in the High Court, are possibly not choosing the best remedy. Sometimes they may succeed in obtaining a stay on their dismissal. It would be rare that they are reinstated, as this is a mandatory injunction at interlocutory stage. The remedies under the Unfair Dismissals Acts, 1977 to 2007 are much more satisfactory.

CONCLUSION

Employment injunctions should not be approached as if they concerned the building of a wall or any of the other traditional sets of circumstances which occupy the courts of equity exercising its injunctive jurisdiction. Instead, I believe the following points should be borne in mind. An application for an interlocutory injunction in employment matters often seeks mandatory relief. The test is not, therefore, whether there is a fair, or reasonably arguable, issue to be tried. Instead, the test is that it is necessary for the plaintiff to establish a strong case that his dismissal was wrongful. For other forms of injunctive relief, where the court is effectively being asked to reverse a decision, the mandatory test, and not the prohibitory test, will apply. Both the High and Supreme Court authorities preserve the relevance of the test for granting injunctive relief in employment matters as to whether the parties continue to have confidence in one and another. In an employment matter the court should think very carefully about forcing parties back to work together who, for whatever reason, engaged in a bitter feud. The test of the balance of convenience should take into account the temporary nature of an injunctive remedy, and whether by ordering wages to be paid to a dismissed employee, or prohibiting that his or her position be filled, the balance of harm in an injunction order may

[31] *R.v. Orrvzonx* [2004] E.L.R. 486.

play out markedly against the defendant instead of in favour of the plaintiff.

Consider it in the round, 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.