



ADVISORY  
Industry Information

## IRELAND UPDATE: Court Of Appeal Overturns High Court Decision On Dismissal Of Underperforming Employee During Probation

19 February, 2021

The Irish Court of Appeal has found that the constitutional right to fair procedures does not apply to the assessment of an employee's performance by an employer during the probationary period, as this would negate the whole purpose of a probationary period.

In this article, we consider the genesis of this decision and its implications for probationary dismissals more generally.

### Probation Periods

A probationary period is often used by employers in Ireland to assess a new employee's performance and suitability for their role before confirming their employment. "Probation" is not currently a feature of statutory Irish employment law and must be included in the contract of employment to apply in the employment relationship. Although an employer can currently provide for a probationary period to operate as long as the employer chooses in the contract, the Unfair Dismissal Acts 1977 to 2015 will apply once an employee attains twelve months' service and the employee will be entitled to full fair procedures before their employment can be lawfully terminated. For this reason, employers generally seek to conclude probation (including any extension) prior to the employee attaining eleven months' service (to allow for the employee's notice period to expire prior to twelve months' service).

Although there is currently no legislation regarding the use of probation in employment relationships, it is expected that statutory limits to the duration of probationary periods will be introduced before August 2022 in order to give effect to Directive (EU) 2019/1152 on Transparent and Predictable Working Conditions Directive ("Directive"). The Directive imposes a cap of six months on probation periods though it states that in exceptional circumstances, such as managerial or executive positions or public service posts, it may be permissible to provide for longer probationary periods. The Directive further provides that in the case of fixed-term contracts, the probationary period must be proportionate to the expected duration of the contract and the nature of the work. For instance, it is likely that a fixed term contract of one year's duration could facilitate a probationary period of no greater than three months.

### Wrongful Dismissal Claims

Although employees generally cannot succeed in a claim under the Unfair Dismissal Acts 1977 to 2015 prior to their attainment of one year's service, employees can take a wrongful dismissal claim to the civil courts from commencement of employment. Wrongful dismissal claims



must establish that the employer dismissed the employee in breach of their contract of employment, by either not providing the requisite period of notice or terminating in breach of an employee's right to fair procedures. It has long been established that where misconduct allegations have been raised against an employee, the employee has a right to fair procedures before adverse findings are made against them and/or their employment terminated. Compensation for wrongful dismissal is confined to an award equivalent to the notice period the employee should reasonably have received.

However, before the hearing of the main wrongful dismissal action, the employee can apply for an interlocutory injunction directing the continuation of their employment until the hearing of the substantive case. This is a potentially powerful remedy for an employee. In order to be granted an interlocutory injunction, the applicant employee must first establish that they have a "strong case" likely to succeed at trial, that the balance of convenience favours the granting of the injunction and that damages are not an adequate remedy.

Defending such an application can be costly for the employer and, if granted, they can be required to continue paying full salary and benefits to an employee for an extended period of time.

## High Court Decision in *Over-C Technology Ltd & Anor* [2020]

Earlier this year, the High Court granted such an injunction to an employee restraining the employer's dismissal and requiring the employer to pay his full salary and benefits for a period of six months. The injunction was granted on the basis that the employee had a right to fair procedures under his contract of employment before his employment could be terminated for performance reasons. This decision, which we discussed earlier this year in our advisory "[Reducing the Risks of Dismissal during Probation](#)" meant a significant extension of the right to fair procedures for performance-based dismissals during probation.

By way of brief background to the case, performance issues arose during the employee's probationary period. The contract of employment included a six month probationary period, during which time the employee's work performance would be assessed and remedial action taken or the employment terminated if his performance was not up to standard. The employee was dismissed by letter which referred to performance issues and stated that the employee had a right to appeal his dismissal. Although the employee replied confirming his intention to appeal, he objected to the proposed date and time and subsequently did not attend the appeal after the employer failed to reschedule it. His termination was confirmed and he received pay in lieu of his notice entitlement.

The employee applied to the High Court for an interlocutory injunction which was granted on the basis that the employee had a strong case that he was dismissed due to alleged performance issues in breach of his right to fair procedures granted under his contract of employment. Both parties accepted that the relationship of trust and confidence had been destroyed and, for this reason, the High Court directed the employer to pay the employee's full salary for a period of six months rather than reinstate the employee to his position as Chief Financial Officer.

## Court of Appeal Decision

The employer appealed the High Court's decision to grant an injunction. Meanwhile, the employee cross-appealed the High Court's decision to limit the duration of the order to pay his salary to six months.

The Court of Appeal overturned the High Court's decision and distinguished between dismissals during probation for misconduct and dismissals for other reasons, including performance. Although the employee asserted that his dismissal related at least partly to misconduct allegations, both the High Court and the Court of Appeal held that the dismissal was related to performance reasons only. The Court of Appeal held that the High Court gave insufficient weight to the fact that the employee's dismissal occurred during the employee's probationary period which it described as a "critical fact".

The Court of Appeal reiterated that both parties can terminate the contract of employment for no reason, or simply because one party forms the view that the intended employment is, for whatever reason, not something with which they wish to continue. The Court of Appeal held that a court cannot imply a right to fair procedures into the assessment of an employee's performance by an employer during the probationary period, as this would negate the whole purpose of a probationary period.

As no right to fair procedures existed, it was not possible for the employee to establish that he had a strong case likely to succeed at trial and on that basis no injunction could be granted. Furthermore, the only other remedy the employee could be entitled to arising from his wrongful dismissal claim was compensation for his right to reasonable notice of termination of contract. As the employee had been paid in lieu of his notice, this left no claim between the parties.



The Court of Appeal also held that as both parties accepted that the employee's employment had been terminated prior to the institution of proceedings, the court could not order that the employee be reinstated to his position pending the full hearing of the action. It also held that no injunction should have been granted in circumstances where both parties acknowledged that the relationship of trust and confidence had been destroyed. This was because a permanent order reinstating the employee at the main hearing of the action would have been untenable and on this basis damages were the appropriate remedy – therefore, the employee failed to establish the proofs necessary to obtain an injunction as outlined above. The Court of Appeal stated that the injunction application should have failed on this basis alone which demonstrates that even in misconduct dismissal cases the employee must establish that the relationship of trust and confidence has not been destroyed to have any prospect of obtaining an injunction.

Costs generally follow the event in the Irish civil courts and the Court of Appeal also ordered the employee to pay the employer's costs for both the Court of Appeal and High Court cases. Although this costs order may be appealed, this demonstrates the high stakes involved for both parties when an application is made for an injunction restraining an employee's dismissal.

## Not Out of the Woods Entirely

Although the Court of Appeal decision provides clarity for employers that fair procedures are not required when dismissing an employee for performance reasons during probation unless contractually required to do so, there remain a number of other claims that an employee can bring if dismissed during their probation period.

There are several exceptions to the general requirement under the Unfair Dismissals Acts, 1977 to 2015 for an employee to accrue twelve months' continuous service. There is no service requirement for claims in relation to dismissals alleged to relate to an employee's gender, family status, civil status, disability, age, race, religion, sexual orientation, pregnancy or trade union membership.

If dismissal during probation is based on any of the nine protected grounds for discrimination, compensation of up to two years' remuneration may be awarded under the Employment Equality Acts 1998 to 2015.

Employees are protected from penalisation (including dismissal) from their first day of employment under the Organisation of Working Time Act 1997, the Safety, Health and Welfare at Work Acts 2005 and 2014, the Protected Disclosure Act 2014 and parental leave legislation.

Employees can also refer a dispute in relation to their dismissal to the Workplace Relations Commission under the Industrial Relations Acts, 1946 to 2019. If the employer objects to such a claim being heard by an Adjudication Officer, the matter can proceed to the Labour Court which can only issue a non-binding recommendation. In an earlier case, *Beechside Company Limited T/A Park Hotel Kenmare v A Worker* [2018], the Labour Court found that the employer had breached fair procedures by dismissing an employee for performance reasons during their probation period. The Labour Court recommended that the employer pay the employee €90,000 compensation.

## How to Dismiss During Probation

Both the High Court and Court of Appeal clearly stated that an employer may terminate an employee's contract of employment during probation for no reason by providing the notice required under the contract and this would remain the most prudent route to termination during probation. If opting to terminate for no reason, often referred to as a "no fault" termination, it is important that no details are provided as to the reason for the termination other than the decision to terminate with notice in accordance with the terms of the contract. If no prior misconduct issues have arisen, it may be helpful to confirm this fact. Once the employee attains twelve months' service a no fault termination would automatically be considered an unfair dismissal. Employers should be cognisant of notice periods which could tip the employee's service over the twelve month qualification period. Similarly, caution should be exercised before attempting a no fault termination if there are any issues between the parties relating to the employee's protected characteristics, health and safety, working time, protected disclosures, or the other exceptions under the Unfair Dismissal Acts 1977 to 2015. In any case, legal advice should be sought to identify any potential risks and to carefully script and document the dismissal.

The Court of Appeal decision in *Over-C* case has now established that an employer can dismiss for performance reasons during an employee's probation without affording the employee fair procedures. Even so, care should be taken to ensure that performance issues do not stray into the territory of misconduct allegations. It is conceivable that some issues may overlap between performance and misconduct and it is likely that employees will in the future seek to assert that performance issues are in fact misconduct issues.

It is still possible to lawfully dismiss an employee if allegations of misconduct are made, provided the employee is afforded fair procedures. Though it may be possible to apply an abridged investigation and/or disciplinary procedure during the probationary period if the contract or disciplinary procedure provides for the employer to do so.



## Key Takeaways

- The Court of Appeal recognised that a contract of employment can provide for an employee to have a right to fair procedures in the assessment of their performance. Probationary and performance-related clauses in contracts of employment should be checked before any dismissal for performance reasons is attempted during an employee's probation. Review and amend contracts and performance management processes to exclude employees during probation from any contractual obligation to provide fair procedures before dismissal for poor performance.
- If dismissing on the grounds of performance after the employee has attained one year's service, fair procedures require that any performance issues should be raised with the employee, the employee should be given an adequate opportunity to improve to the standard required before any dismissal is attempted. Appropriate training, supervision and support should be provided to help the employee achieve the standard required prior to reaching any decision to dismiss.
- The Over-C case was clear that employees are entitled to fair procedures prior to termination of their employment for misconduct reasons during probation. Where any allegations of misconduct have been raised against the employee, fair procedures must be applied prior to dismissal. It is possible to contractually provide for the employer to apply an abridged form of fair procedures to disciplinary procedures during probation.
- Even in dismissal for misconduct cases, if the employer can establish that the relationship of trust and confidence has been destroyed, the courts will not compel the parties to resume the employment relationship. The only appropriate remedy is damages in such cases, which are limited to compensation for notice.
- Although a maximum duration of six months will be permitted for probation periods from 1 August 2022, employment contracts should still contain a right for the employer to extend the probationary period. The Directive recognises that extension should be permitted in cases where the worker has been absent from work during the probationary period, for instance because of sickness or leave, to enable the employer to assess the suitability of the worker for the task in question.
- The Court of Appeal took account of the employee not being available to attend the appeal scheduled during normal working hours. If an employee is pursuing an appeal of their dismissal, they are expected to act reasonably and engage in the internal processes.

## Contacts

For further advice or information on this topic, please speak with your usual contact at Walkers or with any of the following members of Walkers' Global Employment Group:



**Susan Battye**  
Partner, Ireland  
T: +353 1 863 8541  
E: [susan.battye@walkersglobal.com](mailto:susan.battye@walkersglobal.com)



**Jennifer Bassett**  
Associate, Ireland  
T: +353 1 470 6667  
E: [jennifer.bassett@walkersglobal.com](mailto:jennifer.bassett@walkersglobal.com)

### Disclaimer

The information contained in this advisory is necessarily brief and general in nature and does not constitute legal or taxation advice. Appropriate legal or other professional advice should be sought for any specific matter. Walkers does not accept any responsibility for the contents of any website linked to in this advisory.