

# Ireland Update – Termination of Employment during Probation

- The recent Irish High Court ("the Court") decision in *Anna Buttimer v Oak Fuel Supermarket Limited trading as Costcutter Rathcormac*<sup>1</sup> confirms that fair procedures must be applied where an employee is terminated for misconduct during their probationary period.
- The entitlement to fair procedures arises during probation even where the contract of employment expressly excludes the application of company disciplinary procedures during the probationary period.
- Termination for performance reasons during probation does not engage an implied right to fair procedures.
- Employers must be able to evidence their decision to terminate by reason of performance during probation by reference to contemporaneous notes or records.
- Performance monitoring during probation remains key and should be accurately documented and shared in real time with the employee.

## Case Background

The Plaintiff started working for the Defendant at its retail premises on a probationary basis on 7 March 2022. Within a couple of weeks, another employee alleged that the Plaintiff had bullied them and others.

The employer did not have an in-house human resources function. On 1 April 2022, the Defendant engaged the services of an external

human resources consultancy firm to carry out a formal investigation into these allegations.

## The Investigation

A formal investigation commenced in accordance with the Defendant's *Dignity at Work* policy and based on a written Terms of Reference. While the investigation was ongoing, the Plaintiff was promoted to the position of store manager and signed her contract of employment on 25 April 2022.

The contract of employment provided for a six-month probationary period. It also stated that "*the standard disciplinary procedure will not be used during the probationary period*".

The Defendant received further complaints of alleged bullying from co-workers about the Plaintiff in May. These complaints were similar to the earlier complaints that were the subject of the ongoing investigation.

## Dismissal

The Defendant invited the Plaintiff to a meeting on 17 May 2022. It was not an investigation meeting or a disciplinary meeting. The Plaintiff was not offered the right to representation. They were not advised of the purpose of the meeting in advance. The Defendant communicated to the Plaintiff in that meeting that their contract of employment was terminated because they had not successfully passed probation. There was some discussion about the Plaintiff potentially taking up a new role in another retail outlet operated by the Defendant and the Plaintiff

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<sup>1</sup> [2023] IEHC 126

appeared to indicate they would consider the option.

### The Reaction to the Termination

However, the Plaintiff then issued proceedings. In a stark reminder that the use of the injunction to restrain dismissals is not limited to senior and well-resourced employees, the Plaintiff applied to the Court for a series of Orders granting the following reliefs:

- Restraining the dismissal;
- Restoring salary, all benefits, bonuses and commissions;
- Restraining the appointment of a replacement for her; and
- Restraining the Defendant from publishing or communicating that the Plaintiff was no longer employed.

### The Plaintiff's Case

The Plaintiff argued that her employment was terminated because:

- of the allegations of misconduct made in May 2022 and that these allegations were combined with the earlier allegations in April 2022, all of which amounted to a dismissal for misconduct; and
- that the termination was done in breach of their rights to fair procedures and / or natural justice.

### The Defendant's Case

The Defendant argued that the Plaintiff's employment was terminated because:

- They failed their probationary period due to poor performance;
- They were not a good fit;

- They were not dismissed for misconduct; and
- even if they were, their contract expressly excluded the application of the Defendant's standard disciplinary procedure during their probationary period.

The defendant relied on the *O'Donovan v Over-C Technology Ltd & Anor*<sup>2</sup> case, where it was held that: "There is no suggestion that the principles of natural justice must be applied where an employer terminates the employment contract of an employee on the grounds of poor performance".

### The Legal Test

In summary, to secure some or all of the reliefs sought, the Plaintiff had to establish that they had a 'strong case' that they were 'likely to succeed at the hearing of the action'. In other words, they needed to evidence a strong case that their employment was terminated for misconduct and not performance reasons.

### What did the High Court decide?

The Court did not run a full trial and did not make binding findings on the facts. However, the Court was satisfied the Plaintiff had established a strong case that the misconduct allegations complained of were discussed at the meeting and formed the basis, at least in part, for the decision to terminate their employment.

### The Reasons for that Decision

- The Court rejected the Defendant's evidence that it had expressed concern about their performance and managed them throughout the probationary period. The Court noted there was not a single contemporaneous document recording any feedback, training or instruction given to the Plaintiff, or any recording that they had raised any performance issue with them.

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<sup>2</sup> [2020] IEHC 327

- The Court held that it would be normal to expect such serious concerns to be noted and if goals and dates were set there would be some contemporaneous note or memo of some interaction with the Plaintiff in relation to the expectations on their performance.

## Was the Plaintiff entitled to fair procedures?

If the matters alleged against them and the basis for the decision to terminate their employment were solely "performance" issues, the requirement for fair procedures would not be engaged.

However, the Court had no hesitation concluding that the type of behaviour which was alleged against the Plaintiff amounted to misconduct, as understood by reasonable persons.

The mere fact that it might also be considered as a performance issue does not prevent it from also being misconduct.

## Were Fair Procedures Applied?

No. The Defendant had not given the Plaintiff advance notice of the allegations, offered them the right to representation or given them an opportunity to respond. The only opportunity they had to address the allegations was when they were told of them at the meeting of 17 May 2022, the meeting at which they were dismissed.

## Other Key Points to Note

- The Court held that the right to fair procedures is not confined to cases where the termination is stated to be for misconduct.
- The parties cannot conceal the real reason for a termination by simply stating a different reason.
- The right to fair procedures derive from the Irish Constitution and are personal constitutional rights.

- An employer is still free to terminate an employee's employment for no reason during probation or for performance, but where the termination is for misconduct, fair procedures must be observed regardless of whether the termination occurs during probation or not.

## Were the Interlocutory Orders granted?

- The Court refused to grant an Order reinstating the Plaintiff to the workplace due to the breakdown in trust and confidence between the parties.
- The Court refused to make an Order continuing pay noting the employer could terminate the employment on one week's notice; and
- The Court granted Orders restraining the Defendant from replacing them or from communicating that they no longer work for the Defendant.

## Key Take-Aways

- Carefully consider the true nature of concerns such as 'fit' or 'suitability' of all employees, probationary and otherwise.
- Monitor probationary employees in a fair and reasonable manner.
- Document the monitoring and any feedback.
- Arrange for formal and periodic probationary review meetings.

## How the Maples Group Can Help

Please reach out to your usual Maples Group Employment Team contact for further advice and assistance with any Irish employment and immigration matters.

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