Neutral Citation [2013] IEHC 127

THE HIGH COURT

[2012 No. 7269P]

BETWEEN

BRIAN NERNEY

PLAINTIFF

AND

THOMAS CROSBIE HOLDINGS LIMITED

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on 22nd day of March, 2013.

Factual Background

1. These proceedings arise out of the termination of the employment of the plaintiff as Chief Executive of the "Roscommon Herald", a regional newspaper, by his employer, the defendant. The plaintiff's employment had been created by an agreement dated 18th June, 2004 made between the defendant of the one part and the plaintiff of the other part (the Executive Contract). The execution of the Executive Contract was preceded by the coming into effect of a share purchase agreement between the plaintiff, as vendor, and the defendant, as purchaser, whereby the defendant had acquired all of the issued share capital in Roscommon Herald Limited (the Company), the owner of the newspaper.

2. The plaintiff had worked with the Company from approximately 1986. After the death of his mother, who was the sole owner of the Company, in 1994 the plaintiff took over as the owner and managing director of the Company. The Company ran a successful business. The Roscommon Herald was one of the leading regional newspapers in the country with a circulation in the region of sixteen thousand. In 2003 and 2004, before the defendant expressed an interest in the Company, there had been approaches from two entities, which were not Irish companies, in relation to its acquisition. However, in 2004 the plaintiff entered into an agreement with the defendant, which, being an Irish company, was his preferred purchaser. The plaintiff wanted to stay on as Chief Executive of the newspaper and that became part of the deal. His evidence was that he wanted security in that position and that he was assured by Mr. Anthony Dinan, who was then Chief Executive Officer of the defendant, that he would be kept on as Chief Executive of the Roscommon Herald because the defendant was conscious of the importance of having somebody from the Roscommon locality in that position.

3. The plaintiff served as Chief Executive under the Executive Contract for eight years and one month until he ceased to act in that position on 17th July, 2012 in circumstances which I will outline later. Before doing so, it is necessary to consider the terms of the Executive Contract which are relevant to the issues in these proceedings.

The Executive Contract

4. Solicitors for the defendant and solicitors for the plaintiff were involved in the drafting, approval and execution of the Executive Contract which, in my view, was well drafted and is devoid of lack of clarity or ambiguity.

5. Clause 2 set out the term of the plaintiff's employment and provided as follows:

"The employment of the Chief Executive shall commence on the [18th day of June 2004] and shall be for a period of four years and shall continue for periods of four years unless notice of the [defendant's] intention not to renew the term is served at least 6 months before the expiration of any four year period, unless earlier determined in accordance with the terms hereof. Notwithstanding the foregoing the Chief Executive may terminate this Agreement on six month's notice in writing to the [defendant]. This Agreement shall supersede all other agreements between the parties and the provisions of the Unfair Dismissals Acts shall not apply to the termination of this Agreement solely out of the expiration of the fixed term."

In fact, in the Executive Contract as executed by the parties the date of commencement was left blank. However, it is common case that the date of commencement was 18th June, 2004. The other terms contained in the Executive Contract providing for its determination were contained in Clause 14 which was headed "Summary termination of employment". That clause set out various events on the happening of which the employment of the plaintiff might be terminated without notice or payment in lieu of notice, for example, if the plaintiff should be guilty of gross default of misconduct in connection with the business, or become bankrupt, or become of unsound mind and so forth. None of the relevant events occurred. Moreover, the plaintiff did not exercise his power of terminating on six month's notice. What happened was that when the first period of four years expired without the defendant having given notice of its intention not to renew before 18th December, 2007, the plaintiff's employment continued, and his understanding was that it was continuing for a further period of four years from 18th June, 2008.

6. Remuneration was dealt with in Clause 4, which set out the starting salary and made provision for the salary being increased annually. The succeeding clauses dealt with the pension scheme, the bonus to which the plaintiff was entitled and his entitlement to a payment in respect of the use of his car on company business. The detail of those provisions will be addressed later.

7. The only other provisions of the Executive Contract which are of some, albeit peripheral, relevance in the context of the issues to be determined by the Court are the following:

> (a) Clause 15 provided that upon termination by whatever means of his employment thereunder, the plaintiff would, at the request of the defendant, immediately resign from office as a director in the Thomas Crosbie Holdings Group as might be so requested. The plaintiff was a director of the Company and, at the request of the defendant, he resigned from that position after 17th July, 2012.
>
> (b) Clause 16 provided that if the employment of the plaintiff under the Executive Contract was terminated by reason of the liquidation of the defendant or for the purpose of reconstruction and amalgamation and the plaintiff was offered

employment with any concern or undertaking resulting from the reconstruction or amalgamation on terms and conditions not less favourable than the terms of the Executive Contract, then he should have no claim against the defendant in respect of the termination of his employment under the Executive Contract, but there was a proviso that such alternative employment "shall be within a 50 mile radius of the town of Roscommon". While that provision never came into play, it does illustrate the preference of the plaintiff to remain working and living in the Roscommon area, which remains the case to this day.

(c) As one would expect, the Executive Contract contained provisions designed to protect the goodwill of the Company and the business of the defendant. In Clause 17.1(a) the plaintiff covenanted with the defendant that he would not –

> "In any Relevant Capacity during the Restricted Period directly or indirectly within the Restricted Business Area (and whether from a place of business inside or outside the Restricted Business Area) carry on or be interested in any Restricted Business".
>
> In the definitions clause (Clause 1) –
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> (i) "Restricted Business" was defined as meaning "the businesses of publishing . . . any Print Media";
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> (ii) "Restricted Business Area" was defined as meaning "within a radius of 50 miles from the town of Roscommon or from Boyle"; and
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> (iii) "Restriction Period" was defined as meaning "during the period of the [Executive Contract] and during the period of six months after its termination".
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> That provision restricted the plaintiff in pursuing alternative employment in the area in which he had experience until at least six months had elapsed from the termination of the Executive Contract.

Events of June and July 2012

8. On the evidence I am satisfied that by 2010 the revenues of the various regional newspapers owned by the defendant had fallen and that there was a need for restructuring within the organisation. The evidence was that from 2009 onwards revenues were falling in relation to all of the titles and, in particular, advertising revenue was falling in the property, motoring, and recruitment sectors. Evidence was adduced in relation to ten titles owned by the defendant. Leaving aside the Roscommon Herald, in the case of all but two, the person at chief executive or general manager level had ceased to be employed by the defendant by 2012 and had not been replaced. Some titles had been sold or had ceased publication resulting in redundancy at chief executive level. In the case of other titles, while ownership was retained, the person at chief executive level was either made redundant or retired and was not replaced. In the case of the titles which remained in the ownership of the defendant, in effect, the management level was removed from the staffing structure and the employees who had formerly reported to the employee at chief executive level were now reporting to Mr. Dan Linehan, who had been appointed Chief Executive Officer of Regional Newspapers in September 2009. The exception was the General Manager in charge of Waterford News and Star and of Wexford Echo, of which there are five editions producing significant turnover, with more than forty employees. By June 2012, apart from the plaintiff, only the General Manager of the Waterford News and Star and of the Wexford Echo remained at chief executive level. That is the context in which the events of June and July 2012 occurred.

9. On 14th June, 2012 Mr. Barry Colgan, Group Human Resources Manager with the defendant, had a meeting with the plaintiff in Boyle. On the following day, 15th June, 2012, Mr. Colgan sent a letter to the plaintiff in which he recorded that he had confirmed at the meeting the previous day "that the position of Chief Executive Officer, Roscommon Herald is no longer required due to the significant reduction in the Group's business and the ongoing re-organisation of regional newspaper titles and the broader Company", and that he had informed the plaintiff of the view of the defendant that his position was redundant and that his employment was at risk. It was stated that the next stage of the process was a two week consultation period with the plaintiff, during which the defendant would explore with the plaintiff whether there were any other alternative positions available within the Roscommon Herald or "the wider Group". The plaintiff was invited to make submissions or suggest alternative approaches which could possibly result in his not losing his job. Mr. Colgan queried whether the plaintiff was still "not geographically mobile", which appears to be a reference to Clause 16 of the Executive Contract, and he queried whether any alternative employment opportunity still needed to be "Roscommon-based". In the last paragraph of the letter it was stated that, once the consultation period was at an end, if it was the case that no alternative positions had been identified as available or accepted by the plaintiff, the defendant would have no option but to confirm the plaintiff's redundancy would be carried out and he would be served with official notice of redundancy. A further meeting would be arranged to discuss his redundancy package entitlements and notice period. The plaintiff's solicitors, Reddy Charlton, responded to the letter of 15th June, 2012 on behalf of the plaintiff by letter dated 22nd June, 2012. In that letter it was contended that the redundancy was being used as a cloak to veil the real reasons for the plaintiff's dismissal. It is not necessary to outline the details of that line of argument, because it was made clear at the hearing of these proceedings that the plaintiff is not contending in these proceedings that his redundancy is not a valid redundancy.

10. Nothing positive emerged during the consultation period. Mr. Colgan called the plaintiff to a further meeting at the Landmark Hotel in Carrick-on-Shannon on the afternoon of 17th July, 2012. At that meeting Mr. Colgan handed the plaintiff a letter of that date signed by him. The letter set out the following matters:

> (a) It confirmed that "the position of Chief Executive Officer, Roscommon Herald is being made redundant". It stated that the reasons for the position becoming redundant, and the economic and financial position driving the redundancy, had already been outlined to the plaintiff.
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> (b) The "details of the redundancy" and the package that had been proposed were then outlined as follows:
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> > (i) The defendant had calculated the plaintiff's "exact" statutory redundancy entitlement as being €34,272, which was paid "tax-free" and the basis of that calculation was set out. A cheque for that sum accompanied the letter together with a printout of the statutory redundancy calculation. A Form RP50 accompanied the letter and the plaintiff was asked to complete the relevant declaration and return it to Mr. Colgan.
> >
> > (ii) The notice period for termination was then dealt with as follows:

"Your contract of employment provides for six month's notice. The company will pay you in lieu of notice. Therefore, your last day of employment with the company will be today and your termination date with the company will be on 16th January, 2013, which is the date on which your notice expires. You will remain on the company payroll until 17th July, 2012 and thereafter the company will make a lump sum notice payment to you. The company is required to process your notice payment in the usual way so it will be subject to deduction of all tax PRSI and income levies. These monies will be paid to you through payroll. However, it is open to you to make an application to the Revenue with a view to obtaining tax relief on the payment."

Documentation setting out the calculation of the payment in lieu of notice also accompanied the letter.

(iii) In relation to pension entitlements, it was stated that, as and from the date of the termination of the plaintiff's employment, no further contributions would be made by the defendant on his behalf in that regard.

(iv) A requirement to which the plaintiff took grave exception was that the plaintiff would not be required to work out the notice period and that, except in case of emergency, he should not attend at any offices of the Roscommon Herald from 18th July, 2012 onwards without the advance agreement of Mr. Linehan.

(v) Finally, the plaintiff was informed that he was entitled to appeal the termination of his employment by way of redundancy by writing to the Chairperson of the Board of the defendant.

While the plaintiff did accept the letter from Mr. Colgan, he did not accept the enclosures, which were subsequently sent by the defendant's solicitors, Ronan Daly Jermyn, to the plaintiff's solicitors by letter dated 17th July, 2012. Subsequently, it is not clear when, the defendant paid a sum to the plaintiff in respect of pay in lieu of notice for the six months to 16th January, 2013, the gross amount of which had been calculated at €46,295, representing 50% of the plaintiff's annual salary (€80,590) and of his annual car allowance (€12,000). I understand that an amount which represented that gross amount net of tax, PRSI and income levies was paid by the defendant.

11. The plaintiff accepted the sums paid in respect of the statutory redundancy payment and the payment in lieu of notice in mitigation of his loss.

12. Following some correspondence between the solicitors in the interim, these proceedings were commenced by plenary summons which issued on 24th July, 2012. Simultaneously with the issue of the plenary summons, the plaintiff was given leave to issue a notice of motion for interlocutory injunctive relief on 24th July, 2012 returnable on 25th July, 2012. The application for interlocutory relief was subsequently refused by order of the Court (Peart J.) made on 13th August, 2012. Thereafter, the parties concentrated on the substantive action, which came on for hearing on 22nd January, 2013. There was some departure from the plaintiff's case as pleaded and from the defendant's defence to it as pleaded at the hearing, which I will outline when considering the pleadings.

The pleadings

13. The reliefs claimed by the plaintiff in the prayer in the statement of claim which I understand are being pursued by the plaintiff are as follows:

(a) a declaration that the defendant was obliged to give notice of termination to the plaintiff in accordance with the terms of the Executive Contract, being notice which will expire on 17th June, 2016;

(b) a declaration that the defendant has, by its purported termination of the contract of employment between it and the plaintiff, acted in breach of that contract;

(c) damages for breach of contract; and

(d) interest pursuant to the Courts Act 1981.

In listing the reliefs above, I have omitted the following reliefs originally claimed:

(i) a declaration that the defendant is not by reason of the Executive Contract entitled to pay the plaintiff a sum or sums of money in lieu of the notice period provided for in the Executive Contract, which I have omitted because the basis of the plaintiff's claim for damages is that the plaintiff is entitled to damages to compensate him for the salary and other emoluments he would have received between 17th July, 2012 and 17th June, 2016;

(ii) a declaration that the Executive Contract does not permit the defendant to terminate it for the reason or purported reason of redundancy with the consequence that such purported termination is of no legal effect, which has been omitted because the plaintiff has abandoned the relief sought in the plenary summons for an order that he be immediately reinstated into his position and it was made clear by his counsel that the plaintiff is not pursuing in these proceedings a claim that the purported making of his position as Chief Executive of the Roscommon Herald redundant was not done bona fide;

(iii) an order for payment of sums in respect of historic salary increases alleged to be due, which has been omitted because it was made clear it was not being pursued;

(iv) an order for payment of all bonus amounts due and owing to the plaintiff, which has been omitted because bonus amounts are included in the plaintiff's quantification of damages for loss of remuneration, which will be outlined later; and

(v) a claim for aggravated damages, which has been omitted because it was made clear the plaintiff was not pursuing it.

The plaintiff's claim for damages encompasses damages for loss of remuneration and general damages for alleged reputational damage in consequence of the manner in which the plaintiff's employment was terminated.

14. The breach of contract alleged in support of the reliefs claimed is that the defendant purported to terminate the plaintiff's employment otherwise than in accordance with the terms of Clause 2 of the Executive Contract and that the plaintiff is entitled to special damages which compensate him for the contractual entitlements he would have had, if the term of his contract had run its course until 17th June, 2016. The quantum of special damages claimed has been particularised in a revised schedule of special

damages handed into court at the hearing, the contents of which will be outlined later.

15. Additionally, the plaintiff alleges that the manner in which the defendant breached the plaintiff's contract was designed to, and did in fact, cause maximum reputational damage to the plaintiff, particularising the exclusion of the plaintiff from the offices of the Roscommon Herald from 18th July, 2012, which it is alleged caused him grave reputational damage.

16. The elements of the defendant's defence which address the plaintiff's case as pleaded, and as pursued at the hearing, are as follows:

> (a) It is denied that the Executive Contract is and remains operative until at least 17th June, 2016 and it is denied that the contract may only be terminated on 17th June, 2016 by the defendant giving to the plaintiff at least six month's notice prior to 17th June, 2016 of its intention to terminate the contract.
>
> (b) Although the issue of the validity of the defendant making the plaintiff redundant has not been pursued by the plaintiff at the hearing, I think it is appropriate to record that the defendant's position is that it was entitled to exercise its statutory entitlement to make the plaintiff redundant and in that connection it relies, in particular, on s. 7(2) of the Redundancy Payments Act 1967, as amended (the Act of 1967).
>
> (c) More significantly, the defendant pleads that the plaintiff's contract of employment automatically, by operation of law, became a contract of indefinite duration in accordance with the provisions of the Protection of Employees (Fixed-Term Work) Act 2003 (the Act of 2003) and, in such circumstances, the contract of employment was determinable on the giving of reasonable notice. The position adopted by the defendant at the hearing was that six month's notice was reasonable notice having regard to the circumstances.
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> (d) On the basis that six month's notice was reasonable notice, the position of the defendant, as pleaded, is that the payments it made to the plaintiff reflecting six month's notice was reasonable in all the circumstances.
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> (e) The basis on which the plaintiff has quantified the special damages he alleges he is due in consequence of the alleged breach of the part of the defendant is disputed.
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> (f) As regards the plaintiff's claim for alleged reputational damage, the defendant traverses all aspects of that claim.
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> (g) A further element of the defence to the quantification of the damages alleged by plaintiff to be due to him is the defendant's contention that the plaintiff has not made all reasonable efforts to mitigate his loss.

17. Having regard to what remains in the plaintiff's claim, the most important aspect of the plaintiff's reply is that it is denied that the plaintiff's contract became a contract of indefinite duration automatically by operation of the Act of 2003. Apart from that, the plaintiff has joined issue on all of the matters pleaded by the defendant in the defence, including the allegations in relation to failure to mitigate loss.

The issues on liability

18. The plaintiff having abandoned his challenge to the validity of his redundancy, what remains in this case is a claim for damages for wrongful dismissal at common law. In his closing submissions counsel for the defendant made it clear that the defendant agrees with the proposition advanced on behalf of the plaintiff that the statutory provisions in force in relation to redundancy do not negate the plaintiff's contractual rights under the Executive Contract. He illustrated that point by the hypothesis that, if the defendant had made the plaintiff redundant in 2006, he would have been entitled to two year's notice of termination and, if he did not get it, he would be entitled to compensation for two year's loss of salary and other emoluments. In the light of the approach adopted by the parties, the issue on liability turns primarily on the following questions:

> (a) As a matter of contract what was the term of the plaintiff's employment under the Executive Contract?
>
> (b) Was the plaintiff's contractual entitlement varied by the application of the Act of 2003?

19. Clause 2 of the Executive Contract, which I have quoted fully above, in my view, raises no issue of construction. It is quite clear that, as a matter of contract, the initial term of the plaintiff's employment was to be for four years from 18th June, 2004. Unless notice was given at least six months before 17th June, 2008, which the parties are *ad idem* did not happen, the term was to continue for a further four years to 17th June, 2012. As a matter of contract, the term was to continue for a further four years from 18th June, 2012, unless the defendant had given notice of intention not to renew before 17th December, 2011, which, again, did not happen. Therefore, as a matter of contract, in the circumstances which prevailed on 17th July, 2012 the plaintiff's term of employment was to continue until 17th June, 2016. The issue of summary termination of the plaintiff's employment in accordance with Clause 14 of the Executive Contract did not arise at any time.

20. The letter of 17th July, 2012 handed to the plaintiff by Mr. Colgan on that day effectively gave the plaintiff six month's notice from that day and stipulated that his termination date would be 16th January, 2013. Accordingly, assuming that the duration of the plaintiff's employment was not varied by the application of the Act of 2003, by only giving him six month's notice the defendant purported to terminate the plaintiff's contract of employment in breach of its terms.

21. The Act of 2003, which provided for the implementation of Directive No. 1999/70/EC of 28th June, 1999 concerning the Framework Agreement on fixed-term work, came into operation on 14th July, 2003. Accordingly, it preceded the execution of the Executive Contract.

22. The defendant relied on s. 9 and s. 12 of the Act of 2003.

23. Section 9, insofar as it is relevant for present purposes, provides as follows:

> "(1) Subject to subsection (4), where on or after the passing of this Act a fixed-term employee completes or has completed his or her third year of continuous employment with his or her employer or associated employer, his or her fixed-term contract may be renewed by that employer on only one occasion and any such renewal shall be for a fixed term of no longer than one year.
>
> (2) Subject to subsection (4), where after the passing of this Act a fixed-term employee is employed by his or her

employer or associated employer on two or more continuous fixed-term contracts and the date of the first such contract is subsequent to the date on which this Act is passed, the aggregate duration of such contracts shall not exceed 4 years.

(3) Where any term of a fixed-term contract purports to contravene subsection (1) or (2) that term shall have no effect and the contract concerned shall be deemed to be a contract of indefinite duration.

(4) Subsections (1) to (3) shall not apply to the renewal of a contract of employment for a fixed term where there are objective grounds justifying such a renewal."

Subsection (4) had no application to the contractual relationship of the plaintiff with the defendant either on 17th June, 2008 or 17th June, 2012.

24. Section 12 of the Act of 2003 provides as follows:

> "Save as expressly provided otherwise in this Act, a provision in an agreement (whether a contract of employment or not and whether made before or after the commencement of the provision concerned of this Act) shall be void insofar as it purports to exclude or limit the application of, or is inconsistent with, any provision of the Act."

25. Subject to two exceptions which are stipulated, the term "fixed-term employee" is defined in s. 2 of the Act of 2003 as meaning –

"a person having a contract of employment entered into directly with an employer where the end of the contract of employment concerned is determined by an objective condition such as arriving at a specific date, completing a specific task or the occurrence of a specific event . . .."

The express exceptions have no relevance to the plaintiff's employment.

26. The word "renewal" is defined in s. 2 as including "extension".

27. As a matter of construction of the Act of 2003, in my view, s. 9(3) has not operated so as to deem the plaintiff's contract of employment after 18th June, 2008 to be a contract of indefinite duration, as contended by the defendant for the reasons set out below.

28. First, on the facts, in my view, subs. (1) of s. 9 has no application to the plaintiff's employment with the defendant. Accordingly, the question which has to be considered is whether the plaintiff's contract of employment with the defendant contravenes subs. (2) of s. 9.

29. Secondly, in applying subs. (2), the first question which arises is whether the plaintiff was from the commencement of his employment with the defendant under the Executive Contract "a fixed-term employee". The application of the definition of fixed-term employee to the plaintiff as an employee of the defendant under the Executive Contract raises the question whether the end of the Executive Contract is determined by an objective condition. Having regard to the examples of "objective condition" set out in the definition, and also in s. 8(1) of the Act of 2003, I understand "objective condition" to mean a condition which is identifiable by reference to the object, that is to say, the condition, without reference to the view or perception or intervention of either party to the contract. A contract, such as the Executive Contract, the term of which is expressed to be from the commencement date for a period of four years and continuing for further periods of four years unless determined by six month's notice from the employer given at least six months before the expiration of any four year period cannot be said to be determined by an objective condition, because the intervention of the employer, which may or may not happen, and in this case did not happen over a period of eight years, is necessary to give rise to and identify the determining event.

30. Thirdly, apart from the fact that the plaintiff employee did not come within the definition of "fixed-term employee", the requirement in subs. (2) of s. 9 of two or more continuous fixed-term contracts has not been met on the facts which have been established. Only one contract was entered into between the plaintiff and the defendant, that is to say, the Executive Contract. It commenced on 18th June, 2004 and was still in existence over eight years later when the defendant purported to terminate it in July 2012 with effect from 16th January, 2013.

31. Fourthly, as is frequently reiterated (for example, by Hogan J. in *Holland v. Athlone Institute of Technology* [2012] 23 ELR 1, at p. 5), Recital 14 of the Directive recites that the signatory parties to the Framework Agreement –

> ". . . wished to conclude a Framework Agreement on fixed-term work setting out the general principles and minimum requirements for fixed-term employment contracts and employment relationships; they have demonstrated their desire to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination, and to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships."

The application of the Act of 2003 to the plaintiff's contract of employment with the defendant in the manner contended for by the defendant certainly does not ameliorate the position of the plaintiff as employee. Having said that, it is not necessary, in my view, to go so far as to find, as was advocated by counsel for the plaintiff, that the construction contended for by the defendant would achieve an absurd result, which can hardly have been intended by the Oireachtas. That is because, for the reasons set out above, I have come to the conclusion that, on the proper application of subs. (2) of s. 9 to the plaintiff's conduct of employment with the defendant, that provision is not contravened.

32. Accordingly, I reject the defendant's argument that in June 2012 the plaintiff was employed under a contract of indefinite duration by the operation of s. 9(3) of the Act of 2003. At that time, the plaintiff was still employed by the defendant for the term created by the Executive Contract, which continued from 18th June, 2012 for a further four years and could only be determined by at least six month's notice given by the defendant prior to the expiration of that four year period, that is to say, prior to 17th December, 2015. In purporting to terminate the plaintiff's contract by the notice dated 17th July, 2012 with effect from 16th January, 2013, the defendant was in breach of contract. Accordingly, the defendant is liable in damages for the loss which the plaintiff has incurred as a consequence of his wrongful dismissal.

Damages: general observations

33. Counsel for the plaintiff relied on the commentary on the general principles on which damages are awarded set out in Redmond on *Dismissal Law in Ireland* (2nd Ed.). As it pointed out at paragraph 11.04, where an employee is wrongfully dismissed he is entitled,

subject to the rules of mitigation, to compensation for loss of remuneration during an unexpired fixed period of contractual employment, but generally damages on any other basis are excluded. Compensation covers benefits-in-kind, benefits under pension schemes and so forth, as well as commission. The position in relation to fixed-term contracts is outlined as follows (at para. 11.05):

> "The general principle applied by the courts to fixed-term contracts which cannot be unfixed by notice recognises an employee's right to damages in respect of loss of employment for the remainder of the fixed-term, subject only to the rules concerning mitigation of loss."

In this case there was implicit recognition on the part of the defendant from the outset of the purported termination process that the plaintiff was entitled to be compensated for loss of remuneration for the remainder of the term of his contract, because compensation was proffered (and accepted in mitigation of loss) for the six month's notice period which the defendant contended would terminate his contract, which, on the basis of the finding made above was not correct.

34. Essentially, the following issues arose at the hearing in relation to the quantification of the damages to which the plaintiff claimed he was entitled:

> (a) as regards damages for loss of remuneration, the defendant took issue with the manner in which the plaintiff sought to address taxation issues in the quantification thereof;
>
> (b) the defendant contended that, on the basis of the evidence, the plaintiff had failed to mitigate his loss; and
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> (c) the defendant contended that the damages claimed by the plaintiff as compensation for alleged damage to his reputation having regard to the manner in which the defendant purported to terminate his contract were not recoverable.

Having set out the relevant provisions of the Executive Contract and the plaintiff's revised claim for damages for loss of remuneration, I will consider each of those issues in turn.

Plaintiff's revised schedule of special damages

35. It is common case that as of July 2012 the salary actually being paid to the plaintiff, in accordance with Clause 4 of the Executive Contract, was €80,590 gross per year. Under the provisions of the Executive Contract he was also entitled to:

> (a) payment by the defendant into the executive defined contributions pension scheme established by the plaintiff of a sum equivalent to 7.5% per annum of his basic salary until the age of fifty and 10% per annum of his basic salary until the age of sixty five until the expiration or termination of the Executive Contract (Clause 5);
>
> (b) at a minimum a yearly bonus of 7.5% of his basic salary (Clause 6); and
>
> (c) €1,000 per month in relation to the use of his car on company business (Clause 7).

Further, the plaintiff established that there had been an agreement entered into between the defendant and the plaintiff, which was executed on 31st January, 2011, to the effect that the plaintiff would receive a "minimum 2% pay increase from 1st March, 2012", which had not been implemented when his contract was purported to be terminated.

36. The "revised schedule of special damages" presented at the hearing set out the plaintiff's claim for damages for loss of remuneration on the basis of the remuneration which would have continued to be paid to the plaintiff if the Executive Contract had continued to run its course until 16th June, 2016 as follows:

> (a) contractual entitlements (gross salary including 2% increase
>
> effective from 1st March, 2012, bonus payments, car allowance
>
> and pension contributions for which the defendant would have
>
> been liable from 17th July, 2012 to 16th June, 2016 €421,328.48
>
> (b) arrears of salary increase from 1st March, 2012
>
> to 17th July, 2012 at 2% €613.81
>
> (c) outstanding bonus payment for one year up to July 2012 €6,044.25
>
> (d) total of (a), (b) and (c) €427,986.54
>
> (e) tax which would have been payable on amount at (d) over the
>
> period, i.e. in 2013, 2014, 2015 and 2016 (€150,390.16)
>
> (f) net entitlements under (a), (b) and (c) on an
>
> "after tax" basis €277,596.44
>
> (g) less allowance for payments received (pay in
>
> lieu of notice and statutory redundancy) calculated on
>
> an after tax basis (€56,493.60)
>
> (h) net contractual entitlements after deducting
>
> payments received at (g) if the Executive Contract

had continued until 16th June, 2016 €221,102.84

(i) gross amount in damages required to produce a

sum equivalent to the net "after tax" position €430,611.75

37. The revised schedule was based on a report prepared by Sheila Mullen, a director of Stephens Cooke and Associates, Chartered Accountants, dated 21st January, 2013 which Ms. Mullen put in evidence when she was testifying. The report, which was very clear and comprehensible, and Ms. Mullen's oral testimony revealed the following:

(a) The employer pension contributions, which would not have been subject to tax, were calculated over the period from 17th July, 2012 to 16th June, 2016 at €27,710.04 and were included in the figure at (a) in the revised schedule.

(b) The assumption made by Ms. Mullen in relation to the taxation of damages awarded to the plaintiff was set out in her report as follows:

> "Under s. 123 TCA 1997, the payments being claimed by [the plaintiff] arising from the wrongful termination of his Employment are taxable under Schedule E in the tax year in which they are paid and subject to the normal Income Tax, Prsi and USC provisions. Accordingly [the plaintiff] will only be allowed one year's tax credits and standard rate tax band in relation to any amounts paid. Therefore after the standard rate band has been reached all of Mr. Nerney's income will be taxed at the top rate of tax i.e. 41%."

As will be outlined later, in my view, that assumption is correct. However, the revised schedule was based on Ms. Mullen's calculations in Appendices 1 and 3 to her report of what would have been received by the plaintiff had he continued to be paid on an ongoing basis until 16th June, 2016. Her calculation on the basis of that assumption, that is to say, in accordance with s. 123, is contained in Appendix 2, based on figures in Appendix 1.

(c) One calculation which does not appear in the revised schedule but was addressed in the report in Appendix 2 is the amount which Ms. Mullen calculated as the "after tax" amount which would be receivable if the total amount in respect of contractual entitlements (€427,986.54) was paid in one amount in the year 2013. It would be €254,114.75, which is €23,481.69 less than the amount at (f) in the revised schedule, the reason for the difference being that the plaintiff would only be allowed one year's tax credits and standard rate tax band in 2013, whereas, if the payment was spread out over 2013, 2014, 2015 and 2016, the tax due would be calculated in respect of each year, as the figures in the revised schedule have been.

(d) The "bottom line" figure of €430,611.75 in the revised schedule is based on the proposition that the plaintiff would have a tax liability on his contractual entitlements at current rates for PAYE in the sum of €162,822.82 and a liability in the sum of €46,686.09 in respect of PRSI at 4% and the Universal Social Charge at the current rate had his contract continued until 16th June, 2016. However, that wholly ignores the assumption set out at (b) above.

Taxation issues

38. The revised schedule, in my view, created confusion in relation to the tax situation and the confusion was compounded by the evidence adduced, other than the evidence of Ms. Mullen. In addition to Ms. Mullen, two taxation experts gave evidence, one on behalf of the plaintiff and the other on behalf of the defendant. The plaintiff's objective in calling a tax expert was to demonstrate that the appropriate approach is to assess the plaintiff's damages for loss of remuneration on the basis of his gross "before tax" entitlement, whereas the defendant's position was that the assessment should be on the basis of net "after tax" entitlement, citing the decision of the High Court in *Carey v. Independent Newspapers (Ireland) Ltd.* [2004] 3 I.R. 52, in which Gilligan J. calculated the damages due to the plaintiff as "six months' net pay in lieu" of notice. The final position adopted by counsel for the plaintiff in his closing submissions was that the claim for loss of remuneration could be based on net "after tax" pay provided it was clear that the plaintiff had no liability for tax.

39. Notwithstanding that position, I find it necessary to consider the tax position in depth. The evidence has given rise to a lot of confusion. In particular, I did not find the evidence of either tax expert to be in point, because both seemed to envisage that the payment to the plaintiff would involve an assessment of tax due by the plaintiff in accordance with s. 112 of the Taxes Consolidation Act 1997 (TCA 1997) and that the defendant, as employer, would be making deductions in respect of PAYE, PRSI and the Universal Social Charge from the damages awarded by the Court. That fails to take account of the manner in which the Court awards damages for wrongful dismissal, which has been applied since the decision of the High Court (Kenny J.) in *Glover v. B.L.N. Ltd. (No. 2)* [1973] I.R. 432, by which this Court is bound.

40. Three elements of the plaintiff's claim for damages for wrongful termination in the Glover case which were allowed were sums claimed in respect of salary for twenty months, directors' fees, and commission. It had been contended by the defendant that, when calculating the part of the damages referable to those three elements, the Court should make a deduction for the income tax and surtax which the plaintiff would have had to pay on those elements, if he had remained in the defendant's employment until the expiration of his contract, reliance being placed on the decision of the House of Lords in *British Transport Commission v. Gourley* [1956] A.C. 185. In addressing the issue before him, Kenny J. (at p. 438) stated that ss. 8 and 9 of the Finance Act 1964 (the Act of 1964), which had been in force at the relevant time, had the effect that amounts exceeding £3,000 awarded for damages for wrongful dismissal were taxable. Those sections had been replaced by s. 114 and s. 115 of the Income Tax Act 1967 by the date of the judgment of Kenny J. The relevant corresponding provisions are now contained in s. 123 TCA 1997 and s. 201 of the same Act. The first question which was addressed by Kenny J. was whether damages for loss of earnings, fees and commissions, apart from ss. 8 and 9 of the Act of 1964, were chargeable to tax. In answering that question he stated (at p. 438):

> "In an action for wrongful dismissal, the damages are not an award of the remuneration which would have been earned: they are intended to compensate the plaintiff because he has not been allowed to earn it. . . . This is the justification in principle for the many decisions in which judges have said that damages for wrongful dismissal are not taxable. . . The measure of the damages may be the amount of the remuneration but that does not make them taxable. In so far as the damages in this case consist of a sum calculated by reference to salary, commission and director's fees, they are not taxable in Mr. Glover's hands, apart from ss. 8 and 9 of the Act of 1964."

41. Kenny J. then went on to consider the question whether ss. 8 and 9 of the Act of 1964 had made damages, insofar as they related to salary, directors' fees and commission, chargeable to tax or whether so much thereof as exceeded £3,000 only was taxable. He answered that question as follows (at p. 439):

> "In my view, when the amount of the damages for loss of remuneration exceeds the sum mentioned in s. 9, the first £3,000 is not chargeable to tax. It follows that £3,000 of the damages in this case, insofar as they relate to loss of salary, commission and fees, are not liable to tax under sections 8 and 9."

The current threshold corresponding to the sum of £3,000 stipulated in s. 9 is identifiable in s. 201(5)(a) of TCA 1997, which provides that income tax shall not be charged by virtue of s. 123 in respect of payment of an amount not exceeding the basic exemption and, in the case of a payment which exceeds that amount, shall be charged only in respect of the excess. In s. 201(1)(a) the expression "the basic exemption" is defined as meaning "€10,160 together with €765 for each complete year of service, up to the relevant date, of the holder in the office or employment in respect of which the payment is made".

42. In the *Glover* case it had been argued before Kenny J. that the decision in the *Gourley* case applied only to damages awarded for loss of remuneration in accident cases and not to those given for wrongful dismissal. Kenny J. rejected that argument. He also rejected an argument that the *Gourley* case had been wrongly decided and he stated (at p. 441):

> "An award of damages by a court is intended to compensate the plaintiff for the loss which he has suffered: in some cases the damages may be punitive but compensation or restoration (so far as money can do it) to the position before the accident is the main element. Therefore, it is irrelevant that the defendant will profit by an allowance being made for tax against the loss. If the damages under £3,000 are not chargeable to tax while the lost remuneration would have been, the plaintiff would be getting an award which would exceed the loss which he had suffered by being deprived of the remuneration."

Applying the decision in the *Gourley* case, which he stated accorded with reason and principle, Kenny J. held that it should be applied to the first £3,000 of the damages for loss of salary, fees and commission in the *Glover* case.

43. The effect of the *Glover* decision was considered in the Supreme Court in *Sullivan v. Southern Health Board* [1997] 3 I.R. 123, in which Murphy J. made some observations in relation to the incidents of taxation on damages (at p. 137). He quoted from his own judgment in *Allen v. Ó Súilleabháin* (Unreported, Supreme Court, 11th March, 1997) at p. 11 where he had stated:

> "As I understand it, the principle enunciated by Kenny J. in *Glover v. B.L.N. (No. 2*) . . . and accepted by Finlay P. in *Hickey v. Roches Stores* [1980] ILRM 107, is that where damages (or the actual or notional income to be derived from the investment thereof) are exempt from tax that an appropriate adjustment or reduction in those damages must be made if the plaintiff is being compensated for a loss of income or profits which would have been liable to tax in his hands. The logic of this proposition is clear. The failure to make such an adjustment would result in the plaintiff receiving compensation which might very much exceed the loss which he suffered."

Referring to the *Glover* case, Murphy J. stated that what he described as "the silver handshake" provisions of s. 8 of the Act of 1964 imposed tax on damages awarded as compensation for wrongful dismissal subject to an exemption in respect of the first £3,000 of such damages, which brought into play the deduction of the tax element from all or part of the award.

44. In the *Sullivan* case, the problem with which the Supreme Court was confronted was that the liability to tax in respect of the damages awarded or a part thereof had not been explored in argument at first instance. Murphy J. stated that he considered it would be improper for any court to compute the defendant's liability to damages on the basis of the plaintiff's liability to tax without a convincing case having been made for the adoption of that course. A retrial on the issues of damages was directed.

45. Having reviewed the evidence of the taxation experts and Ms. Mullen's report in the light of the authorities to which I have referred, I think the following observations are pertinent:

> (a) On the authority of the decision of Kenny J. in the *Glover* case, it would appear that s. 112 TCA 1997, to which the experts referred, is not the charging provision for the assessment of tax on damages for wrongful dismissal.
>
> (b) On the basis of the same authority, it would appear that s. 123 TCA 1997 is the charging provision. It applies to any payment not otherwise chargeable to income tax which is made, whether in pursuance of any legal obligation or not, either directly or indirectly in consideration or in consequence of, or otherwise in connection with, the termination of employment. Subject to s. 201, income tax is charged under Schedule E in respect of such payment. In a case such as this, by virtue of subs. (4)(b) of s. 123, the payment is treated as income received on the date of termination and is treated as emoluments of the past holder of the employment assessable to income tax under Schedule E. Sub-section (6) provides that where a payment chargeable to tax under s. 123 is made, it shall be the duty of the person by whom the payment is made to deliver particulars of the payment in writing to the inspector not later than fourteen days after the end of the year of assessment in which the payment is made.
>
> (c) Notwithstanding that s. 192A TCA 1997 was also referred to in evidence, my understanding is that it was accepted that it has no application, because the Court is not concerned with statutory protection of an employee's rights.
>
> (d) While, if it was being assessed, the liability of the plaintiff under s. 123 would be subject to the exemptions and reliefs provided for in s. 201 TCA 1997, which I have outlined in para. 41 above primarily for illustrative purposes, the approach adopted in the *Glover* case to reverse the more benign effect of the application of s. 123, than the effect if the employee continued in employment and s. 112 applied, which must be followed by the Court, means that it is not necessary to assess the effect of s. 201 and I noted that Ms. Mullen did not do so in Appendix 2.
>
> (e) Of course, there remains the consequence of the application of s. 123(4)(b), which is adverse to the plaintiff and the effect of which Ms. Mullen calculated at €23,481.69 as referred to at (c) in para. 37 above. It has been suggested by Redmond (*op. cit*.), (at fn. 82 at p. 224) that a solution to that problem might be to introduce income averaging or "top slicing" provisions to ensure that these damages were not subjected to unduly high rates of tax by virtue of being taxed wholly in one year. As I understand it no such provisions have been enacted and the plaintiff must bear that consequence.

46. To complicate matters even further, counsel for the plaintiff introduced a recent decision of the High Court of England and Wales

into the taxation arguments: the decision in *BSkyB Ltd. v. HP Enterprises U.K. Ltd.* [2010] EWHC 862. Counsel referred the Court to the note on that decision in the Second Supplement to *McGregor on Damages* (18th Ed.), which states the law up to 20th August, 2011. The note states that in the *BSkyB* case –

> ". . . after a very full review of the authorities . . . ending with a reference to our strong approval of *Amstrad Plc. v. Seagate Technology Inc* (at para. 14 – 19 of the main work), Ramsey J. elected to follow Amstrad rather than *Deeny v. Gooda Walker Ltd*.(at para. 14 – 20 of the main work). All three cases were concerned with the profits which, had they been achieved rather than lost, would have been taxable at a higher rate of tax than the rate at which damages representing them were to be taxable. Ramsey J. held that in awarding damages:
>
> > 'An allowance should be made for the difference between the corporation tax treatment which the lost benefit would have received and the corporation tax treatment which the sums awarded as damages are likely to receive'."

As counsel for the defendant pointed out, what was at issue in the *BSkyB* case was a variation of 2% in the context of lost benefits which the defendant accepted were quantifiable at Stg. £270m. In that case, the Court was looking back. Here the Court has to look forward and the reality is that it is impossible to predict with any degree of certainty what the incidence of tax would be on the plaintiff's income from his employment with the defendant, if he were to continue in his employment with the defendant until 16th July, 2016 or such shorter compensatory period as the Court will allow.

47. The evidence adduced and the submissions made in this case bear out the comment in Redmond (*op. cit*.) (at para. 11.46) that the law governing the calculation of the effect of tax liability on damages for loss of earnings or earning capacity is unsatisfactory and controversial. The evidence adduced by the parties in this case suggests that the taxation experts found the law confusing. In particular, the evidence in this case as to the relevant charging provision, whether it is s. 112 or s. 123 TCA 1997, and as to who is responsible for paying the tax, was very confusing. As I have found, the relevant charging provision which the Court has to have regard to is s. 123. Further, although the proposition that, while the Court should ensure that the plaintiff does not get an award which would exceed the loss which he has suffered by being deprived of remuneration, "it is irrelevant that the defendant will profit by allowance being made for tax against the loss" (*per* Kenny J. in the passage in *Glover* quoted at para. 42 above) is somewhat disconcerting in the current economic climate, it is clear that this Court is bound to follow the approach adopted in the *Glover* case. Liability for remission of tax is a matter which concerns the defendant and the Revenue Commissioners, and liability for tax on income received by the plaintiff is a matter which concerns the plaintiff and the Revenue Commissioners. Finally, on the very unusual facts of this case arising, principally, from the unusually long term of the plaintiff's employment under the Executive Contract and the fact that he will be compensated "up front" in respect of prospective loss, the justice of the situation may be met notwithstanding that subs. (4)(b) of s. 123 is applied without any adjustment or "top slicing".

48. However, before reaching any firm conclusion on the quantum of damages for loss of remuneration, it is necessary to address the argument advanced by the defendant that the plaintiff has not mitigated his loss.

Mitigation of loss

49. Each of the parties produced evidence by a person with expertise in recruitment of personnel at senior management level.

50. Mr. Ronan Colleran, who testified on behalf of the plaintiff, was the founder, and is now, effectively, the manager of Accreate which is described as an "executive search" firm. Mr. Colleran identified two issues which will militate against the plaintiff in his search for alternative employment: competition in the print industry, which he described as being "intense" and as being eaten into by social media; and the recession. He also emphasised that there is limited opportunity in the area around Boyle, County Roscommon, where the plaintiff lives with his family, for recruitment at executive level. Mr. Colleran's conclusion was that the likelihood of the plaintiff being in a position to secure similar employment at an appropriate level within the next three to four years is remote. He also raised doubts about other possible options open to the plaintiff. Starting up a new business in the current economic climate would be high risk, he opined, and might not deliver an equivalent executive level salary for a number of years. Even if the plaintiff were to secure lower level employment, not only could his salary be approximately half his final salary with the defendant without the benefit of a car allowance, but he might have to commute a distance from his home in Boyle. Further, the transition from his former position as a Chief Executive Officer to lower level employment could "lead to its own problems".

51. Mr. Pat Beechinor, the founder of Network Personnel Consultants, who testified on behalf of the defendant, while acknowledging that the market is "tight", was of the opinion that, if the plaintiff focused and concentrated his job hunting efforts within the "growing SME sector", he would secure a managerial position within the next three to six months. Mr. Beechinor emphasised the plaintiff's commercial experience in having sold The Roscommon Herald and his managerial skills.

52. Clause 17.1 of the Executive Contract precluded the plaintiff from working in the business of publishing print media for six months after termination. He unsuccessfully canvassed the prospect of employment after January 2013 at management level with two media enterprises in the Border Midland Western area.

53. By way of general observation, endeavouring to resolve the issue of mitigation of loss in this case is difficult, and, like all other difficult aspects of the case, it is difficult because of the extremely unusual basis on which the plaintiff was employed by the defendant, which, in the events which happened*, prima facie*, have entitled the plaintiff to damages for breach of contract which represent three years and eleven month's remuneration. Even in the uncertain economic climate prevailing, it is reasonable to conclude that it is probable that at some time prior to 16th June, 2016 the plaintiff will be in a position, either by obtaining suitable employment or establishing his own business, to obtain an income to replace the remuneration which he would have received from the defendant. As regards setting up his own business, while the evidence as to his current assets is far from precise, it is reasonable to infer that he is in a much more advantageous position than most employees who are made redundant. Finally, apart from the unusual features of the plaintiff's contract of employment with the defendant, another unusual feature of this case is that his claim came on for hearing in the same month as his payment in lieu of notice and his obligations under Clause 17.1 expired. Therefore, his situation is not analogous to the situation which Smyth J. faced in *Sharkey v. Dunnes Stores (Ireland) Ltd.* [2004] IEHC 163, an authority relief upon by counsel for the defendant.

54. Obviously, there is an element of unpredictability involved in determining at what point in time prospectively the plaintiff should reasonably obtain an alternative source of income. However, on the basis of the evidence, I think that a reasonable cut-off point would be the expiration of two years from 17th July, 2012. It is important to emphasise that no finding is being made that up to this point in time the plaintiff has failed to take steps to mitigate his loss.

Quantum of damages characterised as special damages

55. In summary, I consider 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. The benefits under the Executive Contract in respect of which he is entitled to be remunerated or reimbursed are:

(a) the salary including the 2% increase agreed between the parties with effect from 29th February, 2012;

(b) the bonus;

(c) the car allowance; and

(d) the pension contributions.

Items (a) to (c) inclusive are the remuneration elements of the damages.

56. As regards the pension contributions, which Ms. Mullen has classified as not being subject to tax, which for the years 2013 and 2014 (*per* Appendix 1 to Ms. Mullen's report) aggregate €12,376.28, there was no real debate at the hearing as to whether they should be included or excluded in the award of damages. Having regard to the fact that the pension scheme was in being when the Executive Contract was entered into, that the defendant agreed to continue to pay the defined contributions into it at the rate and for the period by reference to the plaintiff's age set out therein and that the plaintiff is now forty eight years of age and will be within the agreed age related period until 16th July, 2014, I think it is reasonable to assume that the plaintiff will continue to pay the contributions, so that for, the period which I have identified, he should recoup those payments from the defendant.

57. The tax exigible on the remuneration element of the damages should be assessed in accordance with the decision in the *Glover* case under the relevant charging provision, that is to say, s. 123 TCA 1997. As it is not the Court's function to attempt to calculate the tax exigible on the remuneration elements under the relevant charging provision (s. 123) from 17th January, 2013 (which I consider to be the "date of termination" for the purposes of s. 123(4)) to 16th July, 2014, factoring in the necessary adjustment in accordance with the Glover decision, unless the parties can agree a figure, that calculation will have to be carried out by Ms. Mullen. If the defendant disputes her calculation, then the matter will have to be the subject of further evidence and submissions to the Court. The objective is to ascertain the net "after tax" amount which will compensate the plaintiff for the loss of salary, car allowance and bonus in the period from 17th January, 2013 to 16th July, 2014, the six month period up to 17th January, 2013 having been already addressed by the defendant in the payment in lieu of notice.

58. Finally, as has been made clear earlier, the Court is not concerned with the issue of redundancy or any entitlement of the plaintiff to a payment under the Act of 1967. Therefore, in assessing the damages for the loss of remuneration of which the plaintiff has been deprived, in my view, the payment of €34,272 made by the defendant to the plaintiff in respect of statutory redundancy should not be deducted, as was done at (g) in the revised schedule.

General damages

59. It was submitted on behalf of the defendant that, as a matter of law, having regard to the decision of the House of Lords in *Addis v. Gramophone Co. Ltd.* [1909] AC 488, which has been followed in this jurisdiction, 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. On the other hand, counsel for the plaintiff made it clear that, while it is the plaintiff's position that the manner in which his employment was terminated had a prejudicial effect on him and was stressful, he is not claiming damages for personal injuries. 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.

60. I do not consider it necessary to consider the current status in this jurisdiction of the principle established in the *Addis Gramophone* case, which was analysed by Gilligan J. in the Carey case (at p. 9 *et seq*.) because I consider that the plaintiff's claim is simply not maintainable on the facts.

61. The fact is that the plaintiff got slightly in excess of a month's notice that he would be made redundant. Following receipt of that notice his solicitors were in correspondence with the defendant. Accordingly, the letter of 17th July, 2012 should not have come as a surprise to him. It is understandable that the defendant was upset by the fact that he was being precluded from access to the offices of the Roscommon Herald from 18th July, 2012. However, despite Mr. Colleran's evidence, I do not think that that factor could have in any way damaged his reputation. If, as suggested by Mr. Colleran, the fact that the plaintiff was given "six hours notice to leave" would "raise suspicions", a person who harboured such suspicions would clearly be unaware of the real situation, namely, that the termination of the plaintiff's employment was part of a restructuring within the Thomas Crosbie Group. Since judgment was reserved in this case there has been a considerable media focus on the restructuring of the companies in the Thomas Crosbie Group following, *inter alia*, the appointment of a receiver to the defendant in early March, so that nobody likely to be engaging with the plaintiff in the future could be unaware of the real situation, and the unfortunate circumstances, not just for the plaintiff, which have flowed from it.

62. As regards the conversation which the plaintiff's wife testified she overheard at a checkout in a supermarket in Boyle to the effect that the termination of the plaintiff's employment suggested that "something must have gone on", in my view, that must be treated as nothing more than idle gossip.

63. Having regard to the foregoing, there will be no award of general damages.

Order

64. I am postponing making any order until the position in relation to the quantum of damages for loss of remuneration is re-assessed by the parties in light of what I have said above. I propose adjourning the proceedings for a sufficient length of time to enable the parties to address the issues I have outlined earlier.