THE HIGH COURT

2002 No. 6893 P

BETWEEN

MARIA CRONIN

PLAINTIFF

AND
EIRCOM LIMITED

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 25th October, 2006.

The parties
1. Since 1999 the plaintiff, who is twenty-nine years of age, has been an employee of the defendant, which is a company operating in the telecommunications sector in the State and elsewhere.

2. The historic background to the evolution of the telecommunications business of the defendant and the emergence of the defendant as a corporate entity is of relevance to the issues in this case. Prior to 1984 postal and telecommunication services in the State were operated by a department of state, the Department of Posts and Telegraphs (the Department). Under the Postal and Telecommunications Services Act, 1983 the State established a telecommunications company known as Bord Telecom Éireann (Telecom), a limited company, with the principal object of providing a national telecommunications service within the State and between the State and places outside the State. With effect from 1st January, 1984 Telecom took over the operation of telecommunication services from the Department.

3. By the mid-1990s there had been major technological changes in the telecommunications sector. Market liberalisation was ongoing. Against that background an agreement was entered into between Telecom and the trade unions representing the employees of Telecom entitled "The Telecom Partnership – A Framework Agreement for the Transformation of Telecom Éireann into a World Class Telecommunications Business". This agreement, which is commonly referred to as the Blue Book, was finalised on 27th April, 1997. Among the strategies which the Blue Book envisaged was what was described as "a head count reduction of approximately 2,500". However, it was made clear that this was intended to be achieved on a voluntary basis. The Blue Book expressly provided that, to overcome barriers to change, the parties were committed to certain specific safeguards, including continuation of Telecom's existing policy "of effecting staff reductions only on a voluntary basis", which was to apply "to all staff". As I understand the current position, employees of the defendant have security of tenure in their employment. The position was put to the plaintiff very starkly in the course of her cross-examination on the basis that her employment could not be terminated otherwise than for misconduct. The Blue Book envisaged the normalisation of industrial relations procedures, providing, *inter alia*, for grievance procedures under which either party could refer a matter to a Rights Commissioner or the Labour Court, and for a new disciplinary code.

4. There was further change in July, 1999 with the floatation of eircom plc (the plc) when employees of Telecom, like the plaintiff, became employees of the new public company. Just over two years later in November 2001, the defendant became the employer of the plaintiff and her co-employees when, in common parlance, the public company was taken private. It remains her employer.

5. Throughout the period of the plaintiff's employment with the defendant and its predecessors a strategy of reducing the number of employees was being pursued. This is illustrated by the fact that 11,000 people were employed in the year 2000 but that number has reduced to 7,200 employees in 2006.

The facts underlying the plaintiff's claim
6. The plaintiff's initial employment with Telecom was on the basis of a letter stating the terms and conditions of her employment dated 25th March, 1999, which was accepted by her on 30th March, 1999. She was employed as a "Telesales and Services Representative Grade III", commonly referred to as TSR 3 grade, from 31st March, 1999 at an initial salary of IR£193.19 per week. While the terms and conditions stipulated that the plaintiff's employment might be terminated on notice, as I understand the position, that provision was overridden by the Blue Book.

7. In April, 2000 the plaintiff was seconded to *eircom* UK Ltd., a subsidiary of the plc, as a "Sales Support Administrator". The terms of her secondment were set out in a letter dated 6th April, 2000, which she accepted on 7th April, 2000 and which provided, *inter alia*, as follows:

> Her secondment would commence on 10th April, 2000 and would continue for a period of two years "with the option of extending the period for a further 1-year".
>
> On the commencement of the secondment she would receive a guaranteed base pay of Stg.£16,000 per annum. Her salary would be reviewed on an annual basis in accordance with assessment of her personal performance and achievements, the first review to take place in June, 2000.
>
> She was to remain an employee of the plc throughout the period of her secondment, and, except as varied by the terms of the letter, her conditions of employment and any further contractual entitlements would remain unchanged. It was expressly provided as follows:
>
> > "At the end of your secondment your employment will continue with Eircom Ireland in accordance with your existing terms and conditions of employment."

8. Following her first performance review, the plaintiff's salary was increased from Stg.£16,000 to Stg.£19,000 with effect from 1st June, 2000 and she became eligible for a bonus of up to 15% of her base salary, the bonus being performance related and based on objectives agreed by her line manager, Kevin O'Sullivan, and herself in the review.

9. Later in the year 2000 the plaintiff was offered the role of "Accounts Manager for Irish Accounts", which was, in effect, a promotion. The offer was made in a letter of 21st November, 2000, the terms of which were accepted by the plaintiff. It was provided that in her new role, which was to take effect from 20th November, 2000, the plaintiff would continue to report to Mr. O'Sullivan. By the end of November Mr. O'Sullivan was to speak to the plaintiff to agree details of her objectives for her new role up to 31st March, 2001 and a revised "performance management" form would be submitted to the Human Resources section of *eircom* UK Ltd. The letter

also stipulated as follows:

> The plaintiff's salary would increase to Stg.£24,000 with effect from 20th November, 2000.
>
> She would remain on her "current bonus scheme", but this would be reviewed with the intention of introducing a commission structure for her role in April, 2001.
>
> All other terms, conditions and benefits remained unchanged.

10. By letter dated 26th April, 2001 from the Chief Executive Officer of *eircom* UK Ltd., to the plaintiff, having stated that that company was undergoing dramatic restructuring and that the scale-back of its operations reflected the difficulties being experienced throughout the sector, and having referred to discussions with the plaintiff's then current manager and consultations with herself, she was informed that the business could no longer sustain her secondment as "Account Manager for Irish Accounts" with the company and that she would be repatriated to the plc effective from 31st May, 2001. The letter went on to provide that, in accordance with a secondment letter, in relation to transportation of her personal effects "the cost of up to 15 cubic metres road/sea freight (including the cost of insurance and packing)" would be covered by the employer. That assurance reflected what was provided in the letter of 6th April, 2000 in relation to the transfer of personal effects.

11. In summary, what happened in relation to the plaintiff's remuneration from the date of that letter onwards was that she continued to be paid the salary in sterling referable to the post of "Account Manager for Irish Accounts" until 9th April, 2003. She was also paid the bonus of 15% of her base salary for the first year of her secondment, that is to say, the year ending on 9th April, 2001. The terms of the intended commission structure referred to in the letter of 21st November, 2000 were never agreed, because events overtook. However, the plaintiff's entitlement to commission from April, 2001 is in issue in these proceedings and I will return to the evidence on this issue later. Relevant to that issue is whether the plaintiff had an entitlement to two years or three years secondment. The plaintiff's evidence was that she wrote to the defendant, for the attention of a named official, by letter dated 15th March, 2002 exercising her option to extend the period of secondment for a third year. The defendant has no record of having received that letter. By letter dated 2nd April, 2003 from the Employee Relations Manager of the defendant, the plaintiff was informed that her current pay treatment would be revised as and from 10th April, 2003. Her substantive grade was TSR3 and her pay would be in accordance with that grade. Payment would be in euro. The opening paragraph of that letter was in the following terms:

> "You will be aware that you were temporarily seconded to *eircom* UK Ltd. with effect from 10th April, 2000. The secondment was to continue for a period of two years with an option of extending the secondment for a further one year. The said three-year period will expire on 9th April, 2003. In these circumstances it is now necessary for the company to realign your pay with your substantive grade."

12. As regards attendance at work, since she finished her secondment in the United Kingdom at the end of May, 2001 the plaintiff has only attended for work with the defendant on one day, 3rd April, 2006. I propose outlining now how that state of affairs came about and summarising the defendant's dealings with the plaintiff in the period since the end of May, 2001.

13. In the letter of 26th April, 2001 in which she was given notice of the termination of the secondment, the plaintiff was informed that, as an employee of the plc, the "HR Manager International" would continue to liaise with her until a suitable "Repatriation Manager" was appointed who would assist her in exploring all possible opportunities that might be available to her in Ireland. I accept the plaintiff's account of what subsequently transpired. In early May, 2001 she met with that official in London and she was told that she had four options: to attend at the defendant's Resource Business Unit (RBU), which had been established in accordance with the terms of the Blue Book, for re-training; to attend at the RBU with a view to preparing for voluntary redundancy; voluntary redundancy; and sponsorship within the defendant with a view to being placed in an alternative position with the defendant. Subsequently, on 18th May, 2001 she had a meeting in Dublin with the "Training and Development Manager", whom she believed was to be her "Repatriation Manager" in accordance with the terms of the letter of 26th April, 2001. However, in his evidence that official disavowed ever having been appointed to the role of "Repatriation Manager". In any event, as a result of that meeting the plaintiff attended interviews for three positions with the defendant.

14. In relation to two of the interviews, she got no feedback whatsoever from the defendant. The third interview, on the plaintiff's evidence, took place on 6th July, 2001, the plaintiff having been invited to attend for interview for the position of "Business Account Manager", which, as I understand the position, was to be filled on the basis of a competitive process which had been advertised internally within the defendant. The plaintiff was successful and was subsequently telephoned and informed that, subject to having a full "clean" driving licence, the job was hers. The plaintiff did not fulfil that requirement, in that she only had a provisional licence. The evidence of the defendant's witnesses was that the position was left unfilled for some time so that the plaintiff could deal with the requirement. However, on the evidence, I am not satisfied that anyone in the defendant's organisation communicated that fact to the plaintiff. In fact, it would appear that despite her endeavours to make contact with the person she understood to be her "Repatriation Manager", she had no other contact from him or from any other official of the defendant in relation to her placement in any position with the defendant in Ireland in 2001 or 2002. Moreover, the defendant was not able to adduce any record of the filling of the post for which the plaintiff had been successful in her interview, which I find astonishing. I find that the promise contained in the letter of 26th April, 2001 that the plaintiff would be assisted in fully exploring all possible opportunities available to her with the defendant in Ireland was not fulfilled.

15. These proceedings were initiated by a plenary summons which issued on 15th May, 2002. However, the existence of the High Court litigation did not result in any steps being taken by the defendant to find a suitable position for the plaintiff.

16. Nothing happened until early June, 2003, over two years after her secondment had ceased, when the Employee Relations Manager of the defendant wrote to the plaintiff, without prejudice to her legal proceedings, setting out the defendant's view that she continued to have a viable career with it and that all that was required was for her to re-engage with the defendant in pursuit of a suitable role commensurate with her skills and experience. She was advised that the most appropriate way to pursue that course of action would be to report to the RBU. In a subsequent letter the plaintiff was effectively directed to attend the RBU each working day until further notice as her place of work. That direction was responded to on behalf of the plaintiff by her solicitors who suggested that these proceedings should be concluded, which I understand to mean compromised, first. It is clear from the correspondence which passed between the parties that at that stage the defendant gave the plaintiff time in which to consult with her legal advisers. However, by letter dated 11th September, 2003 the plaintiff was once again directed to attend the RBU on each working day from 22nd September, 2003 until further notice. She was informed that her line manager would be Mr. Criostoir MacBradaigh until further notice. This provoked another letter from her solicitors on the plaintiff's behalf seeking information in relation to the RBU before she would embark on work there. That letter elicited no reply.

17. Meanwhile, these proceedings were trundling along. Towards the end of 2004 the plaintiff brought a motion for leave to amend her statement of claim. That motion was grounded on the affidavit of her solicitor, who averred that following the termination of her secondment and her return to Dublin in or around November, 2001 she had been given no work whatsoever by the defendant. The proposed amended statement of claim, which sought relief arising out of the failure to provide her with a position in Ireland commensurate with her skills, was exhibited. Leave was granted and the amended statement of claim was delivered on 15th February, 2005. I consider it reasonable to infer that it was that development which led to the next phase in the defendant's dealings as employer with the plaintiff.

18. By letter dated 2nd February, 2005 the new Head of Employee Relations of the defendant wrote to the plaintiff advising her that the defendant had identified a suitable position for her – Product Support Executive. A role profile in relation to the position was enclosed. The plaintiff was given the following further information:

> The assignment would be on a project basis for an initial three-month period, at the end of which a review would be carried out by the writer in consultation with the plaintiff and with the official to whom she would be reporting, the Head of Data Product Support.
>
> The defendant wished to ensure that she received all necessary supports in taking on the role and, in addition to the normal training, skills development and coaching, it was proposed that –
>
> > the services of an independent work counselling professional would be available to her on a confidential basis,
> >
> > a senior manager would be available to provide mentoring support to her in a discreet manner and independent from her normal reporting relationships, and
> >
> > the writer would personally take an interest in her progress and would be available to meet her if any particular issues should arise.

19. In subsequent correspondence the plaintiff was informed that the grade attaching to the role was TSR3, the plaintiff's existing grade, and that her salary would be €25,530 per annum, at the maximum of the scale for the grade, the salary which the plaintiff was then currently receiving.

20. Following the furnishing of that information the plaintiff was instructed to report for duty on 28th February, 2005 to take up the role. She did not do so. The explanation she gave in court for not doing so was that the job proffered was not a good match for her skill sets and that she was entitled to be consulted before she was assigned to a role. Those explanations are reflected in a letter from the plaintiff's solicitors to the defendant's solicitors, which bears the date 5th April, 2005 but was not received by the defendant's solicitors until 25th April, 2005. In that letter, the plaintiff's solicitors asserted that the job offer was not a good match for the plaintiff's experience and skills, that it positioned the plaintiff back to a grade and pay scale that she held in 1999 prior to her secondment and that she was promoted during her secondment. It was also asserted that acceptance of the role would confirm in the minds of the plaintiff's colleagues that "she had committed an offence which had warranted demotion". It was asserted that the plaintiff had been deprived of a meaningful job since May, 2001, resulting in damage to her career. By letter dated 14th June, 2005 the plaintiff was once again instructed to report for duty to take up her assignment in the role of Product Support Executive on 27th June, 2005 and she was advised that, if she failed to do so, the matter would be dealt with pursuant to the defendant's Discipline Code. She did not do so and the procedures under the Discipline Code were commenced. These procedures were, effectively, abandoned in March, 2006.

21. What has been represented by the defendant as giving rise to this change of approach on the part of the defendant was a letter dated 24th February, 2006 from the plaintiff's solicitors. In that letter the plaintiff's solicitors stated that the plaintiff would attend for work on the basis that she was provided with a position which was "commensurable with her experience and skills, was meaningful and would allow her promotion within the defendant". By letter dated 24th March, 2006 the defendant's Head of Employee Relations wrote once again to the plaintiff informing her that she had been assigned to the role of Product Support Executive and enclosing a role profile. The terms and conditions which would apply to the job were the same as pertained to her current grade, TSR3. In the interim since February, 2005 the salary of the TSR3 grade had been increased in accordance with the increases which applied to graded staff in the defendant. The supports which had been promised in the letter of 2nd February, 2005 were proffered again and the plaintiff was invited to contact the writer if she wished to initiate any of the options outlined. The plaintiff was informed that she should report for duty on 3rd April, 2006 to take up her role as Product Support Executive. That letter was responded to on behalf of the plaintiff by her solicitors on 24th March, 2006 in which it was stated that she would attend for work on 3rd April, 2006. However, she viewed the job description as a demotion and she would expect to be employed as a account manager within the defendant.

22. The plaintiff attended for work on 3rd April, 2006. However, her evidence was that when she got home from work that evening she felt unwell. She did not return to work the next day. She attended her general practitioner who issued a medical certificate dated 5th April, 2006 in the following terms:

> "This is to certify that Ms. Cronin has had a stressful reaction after her return to work on Monday, 3rd April 2006.
>
> She will be unfit for work for four weeks from yesterday, 4th April, 2006."

23. That certificate expired on 2nd May, 2006. The plaintiff did not return to work and she did not submit any further certificate or provide any explanation for her failure to return.

24. By letter dated 30th May, 2006, the defendant recommenced the procedures under the Disciplinary Code against the plaintiff and they were ongoing when the hearing of these proceedings commenced on 15th June, 2006.

25. The plaintiff's husband, Pearse Daly, is also an employee of the defendant. He was also seconded to the United Kingdom. In August, 2000 the plaintiff and Mr. Daly bought a house in their joint names in the United Kingdom. Mr. Daly's secondment was also terminated in April, 2001. The plaintiff and Mr. Daly returned to live in Ireland in 2001. He was integrated back into a role in the Irish operations of the defendant in February, 2002. The plaintiff and Mr. Daly sold the house in the United Kingdom in July, 2002 and they incurred costs and expenses in connection with the sale, for example, estate agent's fees, legal fees and a mortgage early redemption penalty.

The claim

26. The reliefs which the plaintiff pursued at the hearing are the following:

> (1) Damages, which, on the basis of the clarification I sought at the hearing, I understand to mean damages for breach of contract.
>
> (2) An injunction restraining the defendant from interfering with the plaintiff's discharge of her duties as Accounts Manager of the defendant.
>
> (3) An injunction requiring the defendant to do all things necessary to permit the plaintiff to carry out the entirety of the duties and functions attaching to the position of Accounts Manager.
>
> (4) In the alternative, and if necessary, an injunction requiring the defendant to provide the plaintiff with a position commensurate with the plaintiff's skills and experience as Accounts Manager.

27. Notwithstanding that the plaintiff pursued the injunctive reliefs outlined above, in her evidence, she was equivocal as to whether she wished to continue in her employment with the defendant. She stated that she had lost all trust in the defendant and does not trust it now. She was isolated for five years but had done nothing wrong. She felt that, even if she were offered a job on a scale and with a job description and features reasonably appropriate to her level of skill and experience, she had no guarantee that she was going to be treated properly.

The issues

28. At the end of the evidence and before the legal submissions, the court was furnished with a list of issues prepared by the defendant's legal team, with which the plaintiff's legal team was in broad agreement. I propose considering the issues in the case by reference to that list, which dealt with the following topics: entitlement to commission under the secondment contract; arrears of salary; entitlement to employment as an account manager after secondment; entitlement to be provided with work; removal expenses; and general damages. I will deal with each topic separately.

Entitlement to Commission

29. The issues identified in relation to the commission to which the plaintiff claims she was entitled under her secondment contract are as follows:

> (1) Whether, as a matter of construction of the plaintiff's employment contract and her secondment contract, she was entitled to payment of any commission in her capacity of accounts manager, having regard to the downsizing of the defendant's business and the termination of the defendant's business in the U.K. and of the plaintiff's secondment thereto.
>
> (2) Whether, as a matter of construction of the plaintiff's secondment contract, the optional third year of the secondment was at the option of the plaintiff or of the defendant.
>
> (3) If the plaintiff was contractually entitled to payment of commission for the second and/or third year of her secondment, the amount of commission that she would have earned.

30. Although the plaintiff is still an employee of the defendant, I consider that a commentary in McGregor on *Damages* (17th Edition, Sweeet and Maxwell, 2003) on the measure of damages for wrongful dismissal is a useful starting point in setting out the legal principles in relation to entitlement to damages for breach by an employer of a contractual obligation to pay commission. The same principles should apply whether a breach of such a contractual obligation arises during the currency of the employment or as a consequence of wrongful dismissal.

31. In the context of the normal measure of damages for wrongful dismissal (*prima facie* the amount that the claimant would have earned had the employment continued according to the contract, subject to a deduction in respect of any amount accruing from any other employment which the claimant, in minimising damages, either had obtained or should reasonably have obtained), in dealing with the amount which the employee would have earned under the contract, the position in relation to commission is summarised as follows at para. 28-004:

> "Where the claimant has been entitled to be paid commission on work done or sales effected by him, or in relation to profits made by the defendant in his business, or on orders received from customers introduced by him, this must also be taken into account, provided always that the defendant's failure to provide the claimant with an opportunity to earn the commission constitutes a breach of contract. This proviso is important, and on the facts of a particular case it is often difficult to ascertain whether there has been such a breach, especially where the wrongful dismissal is occasioned by the defendant closing down the business. The failure to pay the wages or salary constitutes a breach, but the failure to give an opportunity to earn the commission may not. If, however, there is a breach as to commission, and this is more likely to be so where the commission depends on the claimant's own work and efforts than on the defendant's profits, the claimant will be entitled to recover damages in respect thereof, and not only commission proper but also money paid on piece work, and tips."

32. It seems to me to be implicit in the first issue that the defendant recognises that, had her secondment not been terminated, the plaintiff would have been entitled to be paid commission. Even if that is not the case, in my view, she would have been entitled to commission if she had earned it. On its proper construction, the letter of 21st November, 2000 meant that the bonus scheme, as it applied to the plaintiff, would be replaced by a commission scheme from April, 2001. This construction is consistent with the understanding of the plaintiff and of her line manager, Mr. O'Sullivan, at the time.

33. The essence of the first issue is whether the termination of the plaintiff's secondment and the consequent deprivation of the opportunity to earn commission constitute a breach of contract on the part of the defendant. What happened in fact is that the defendant closed down part of its business in the United Kingdom. While reiterating that the passage from McGregor which I have quoted above is concerned with the normal measure of damages for wrongful dismissal, which does not arise here, the principles set out there are apposite to a situation in which an employer terminates a special contract with an employee, but not the underlying contract of employment. There is a footnote in McGregor to the effect that the question whether there has been a breach in a context where the defendant's business has closed down is often put in the form whether the case falls within *Turner v. Goldsmith* [1891] 1 Q.B. 544, CA, on the one hand, or within *Rhodes v. Forwood* (1876) 1 App. CAS. 256, on the other. *Turner v. Goldsmith* was one of the two cases on which counsel for the plaintiff relied in support of the plaintiff's claim for commission, the other being *Devonald v. Rosser & Sons* [1906] 2 K.B. 728.

34. In *Turner v. Goldsmith* the plaintiff had been employed under a contract in writing by the defendant, a shirt manufacturer, as an agent, in reality as a travelling salesman, for a term of five years on the basis that he would be remunerated by commission. After about two years the defendant's manufactory was burned down. The defendant did not resume business and did not employ the plaintiff thereafter. The plaintiff brought an action for damages. The Court of Appeal held that the action was maintainable, and that the plaintiff was entitled to substantial damages because the defendant, having agreed to employ the plaintiff for five years, did not fulfil that agreement unless he sent him a reasonable amount of samples to enable him to earn his commission, and that the defendant was not excused from fulfilling his agreement by destruction of his manufactory by fire. Linley L.J. distinguished *Rhodes v. Forwood* (at p. 549) on the basis that there had not been any express contract to employ the agent in that case and such contract could not be implied. In the case under consideration there was an express contract to employ the plaintiff. Linley L.J. went on at p. 550 to consider the circumstances in which a positive contract would be subject to an implied condition that the parties should be excused in case, before breach, performance becomes impossible without default of the contractor and he stated:

> "… the contract will be treated as subject to an implied condition that it is to be in force only so long as a certain state of things continues, in those cases only where the parties must have contemplated the continuing of that state of things as the foundation of what was to be done."

35. Counsel for the defendant, albeit in a different context, referred to the following passage from the concurring judgment of Kay L.J. in *Turner v. Goldsmith* (at p. 550):

> "If it had been shewn that not only the manufactory but the business of the defendant had been destroyed by vis major, without any default of the defendant, I think the plaintiff could not recover. But there is no proof that it is impossible for the defendant to carry on business in articles of the nature mentioned in the agreement."

36. That passage was clearly *obiter*.

37. As a matter of construction of the secondment contract, in my view, it was not in contemplation of the parties, and the contract was not subject to an implied term, that the plaintiff's secondment would only continue as long as the defendant considered that the operations of its subsidiary in the United Kingdom were financially and commercially advantageous, which, in my view, is as far as the evidence goes in establishing a reason for the almost total withdrawal from the United Kingdom market. Accordingly, in my view, the defendant was in breach of contract in terminating the secondment contract of the plaintiff.

38. In relation to the second issue, while conceding that there is a certain element of ambiguity in the secondment contract, to the extent that it could have explicitly stated that the extension of the period of secondment to three years would be at the option of the company, counsel for the defendant submitted that in order to give business efficacy to the option provision, in construing the contract, it could not be held that the option for an additional year was the option of the employee. On the other hand, counsel for the plaintiff submitted that the *contra proferentem* rule should be applied against the defendant in construing the provisions of the secondment contract, including the option provision. In dealing with this issue, it is difficult not to be influenced by the letter of 2nd April, 2003, which expressly recognised that the period of the plaintiff's secondment was three years, thereby implicitly recognising that the option to extend had been exercised. That said, as a matter of construction, it seems to me that the provision in the secondment letter makes more sense if the option was the plaintiff's option than if it was the defendant's option. The defendant was in control of the situation and, without the option provision, at the end of the two-year period it could have offered an extension to the plaintiff. It did not need to provide for an option exercisable by itself. On the other hand, without an express option to extend the period of secondment, the plaintiff could not be guaranteed an extension. Therefore, as a matter of construction, in my view the third year of the secondment was at the option of the plaintiff.

39. As to the amount of commission which the plaintiff would have earned, on the basis of the evidence of Mr. O'Sullivan, which I found very convincing, I am of the view that, as a matter of probability, the plaintiff would have earned a sum equivalent to 50% of her salary by way of commission in the second year of her secondment and that she would have earned a higher level of commission in the third year of her secondment. I have come to the conclusion that to find that in the third year she would have earned a sum equivalent to 75% of her salary is not disproportionate.

Arrears of salary

40. The issue as posed on the defendant's list is whether the plaintiff has suffered any loss of salary as a result of the premature termination of her secondment contract. The answer, unambiguously, is that she has not.

41. However, this issue has arisen out of a mathematical conundrum which counsel for the plaintiff and counsel for the defendant have not been able to resolve. The plaintiff claimed the sum of €79,711 as representing the difference between what the plaintiff was paid in the three years ending 3rd April, 2003 and what she would have earned if her secondment had continued and she earned commission equivalent to 100% of her salary in the second and third years. Counsel agreed the appropriate figure at €78,000, but as I understand it, that figure includes a figure of €5,151 in addition to the euro equivalent of Stg.£48,000. In the interest of saving time and costs, the defendant has conceded on an arbitrary basis that the sum of €5,151 should be awarded to the plaintiff under the heading of arrears of salary. On that basis, I calculate the aggregate amount due to the plaintiff in respect of commission and arrears of salary at €50,682, of which €45,531 is referable to commission and €5,151 to arrears of salary

Removal/Relocation Expenses

42. This is the only remaining issue which arises directly out of the termination of the plaintiff's secondment, as opposed to the manner in which she was treated by the defendant thereafter. The issue on the defendant's list under this heading is whether the plaintiff is entitled to the sum of €11,672 in respect of removal expenses. That figure is agreed between the parties as representing 50% of the costs actually incurred by the plaintiff and her husband in relation to estate agent's and legal fees and the mortgage redemption penalty in connection with the sale of their home in England, removal and storage costs and flights. The defendant did not accept that it had any liability to the plaintiff for removal or relocation expenses in connection with the termination of her secondment. The defendant went further and contended that the court should not be troubled with this aspect of the claim because there are proceedings pending in this Court (*Pearse Daly v. Eircom Limited* Record No. 15047P/2002) in which Mr. Daly, as plaintiff claims the sum of Stg.£14,234.38 as being the cost of Mr. Daly's premature relocation to Ireland. I assume that the discrepancy between that figure and double the agreed figure put before this Court for removal expenses is primarily attributable to fluctuations in the pound sterling/euro exchange rate.

43. There is a dispute between Mr. Daly and the defendant in relation to Mr. Daly's claim for removal and relocation expenses. That dispute was ventilated in these proceedings. It emerged that the dispute was referred to the Labour Relations Commission in the year 2002 and a hearing before a Rights Commissioner took place on 29th July, 2002. The Rights Commissioner issued his decision on 6th September, 2002. However, he did not address the issue of the removal and relocation expenses. A payment in excess of €10,000

was made by the defendant to Mr. Daly following the proceedings at the Labour Relations Commission. The requisition for payment was put in evidence. That document is headed "Relocation Expenses" and itemised the build up of the payment. All but €369 of the amount requisitioned represented nine months' rent in relation to accommodation in Dublin. There is a conflict on the evidence as to the basis on which that payment was made. I consider that it would be totally inappropriate for me to attempt to resolve that conflict, because to do so would be to embark on the resolution of an issue between Mr. Daly and the defendant which is not before the court. Accordingly, I will express no view on the evidence which was adduced in relation to Mr. Daly's claim.

44. The plaintiff did not claim for relocation expenses either in the statement of claim or the amended statement of claim delivered by her. The particulars of loss set out in the amended statement of claim in relation to the termination of her secondment covered the commission (erroneously referred to as a bonus) she would have earned, if her secondment was not terminated, and also an alleged loss in property value amounting to Stg.£17,000. That latter claim was not pursued, but instead the plaintiff pursued the claim for €11,672 in respect of relocation and removal expenses. I am satisfied that up to the time additional particulars of her claim were furnished to the defendant's solicitors by her solicitors on 13th March, 2006 the sum of €11,672 was not part of her claim. However, the defendant has known since then that this claim was being pursued by the plaintiff. A lot of time was taken up at the hearing with this issue. I am satisfied that the defendant would not be prejudiced in any way by the issue being dealt with in these proceedings and, accordingly, I propose to deal with it.

45. The first point which I think is relevant is that the property acquired in the United Kingdom was acquired by the plaintiff and Mr. Daly jointly. Mr. Daly supported the plaintiff's claim in this Court and, in the circumstances, I think it is reasonable to assume that the plaintiff on her own account incurred half of the costs and expenses in connection with the sale of the property.

46. Secondly, it is clear on the evidence that the sale of the property in 2002 was a direct consequence of the termination of the secondment of the plaintiff and Mr. Daly. In circumstances in which the secondment of the plaintiff was terminated before the agreed period, in my view, the defendant cannot limit the plaintiff to the provision in the secondment contract in relation to the transportation of personal effects. Further, the defendant cannot limit the plaintiff to the provision which is made in the document entitled "Eircom Relocation Scheme (Republic of Ireland)", which was put in evidence. As I have held, the termination of the plaintiff's secondment was in breach of the terms of her secondment contract and she is entitled to recover by way of damages the costs and expenses she has incurred by reason of the breach.

47. I am satisfied that the plaintiff is entitled to recover the sum of €11,672 from the defendant as special damages.

Post-secondment termination issues
48. The issues in relation to the treatment of the plaintiff by the defendant after the termination of her secondment listed by the defendants relate to two alternative positions adopted by the plaintiff, one being her claim that she was entitled to be employed as an account manager following the termination of her secondment and the other being that, not only was the defendant obliged to pay her salary after secondment, but it was obliged to provide her with work.

Entitlement to be employed as an account manager
49. The issues in relation to the plaintiff's claim to be entitled to be employed as an account manager on the termination of her secondment identified by the defendant are:

> (1) Whether as a matter of construction of her employment contract and her secondment contract, the defendant, on the plaintiff's return to Ireland, was contractually obliged to employ her as an account manager having regard to the fact that, for a proportion of her period of secondment, she had worked in such a capacity within *eircom* UK Ltd.
>
> (2) If the answer to (1) is in the affirmative, whether the defendant was obliged to pay the plaintiff's salary and pension contributions at a rate equivalent to that being paid to account managers in Ireland for –
>
> (a) the period between April, 2003 to date, and
>
> (b) for the remainder of her working life or for some other period into the future.
>
> (3) If the answer to (2) is in the affirmative, the loss, (past and future) suffered by the plaintiff by reason of the failure to employ her as an account manager after her secondment to the United Kingdom.

50. The answer to the first issue is in the negative. The terms of the plaintiff's secondment could not be clearer. It was explicitly agreed that at the end of her secondment her employment with the defendant would continue in accordance with her existing terms and conditions of employment. Her existing grade was TSR3. An account manager position is at a higher grade in the defendant's staff structure. Therefore, as a matter of construction of the plaintiff's terms of employment, the defendant was not contractually obliged to employ her as an account manager at the end of her secondment. In fact, as counsel for the defendant correctly pointed out, in her own evidence the plaintiff recognised that she had not such an entitlement. The case she made gives rise to the alternative post termination issues.

51. It follows that the second and third issues set out above do not arise. Further, insofar as it remained relevant at the end of the hearing, the plaintiff's claim for injunctive relief must be refused on the ground that she has not established any contractual entitlement to the position of account manager or a similar position, even if it were appropriate to grant relief of the type claimed.

Entitlement to be provided with work
52. Turning to the alternative post-secondment issues, the issues identified are as follows:

> (a) Whether, as a matter of construction of the plaintiff's employment contract and her secondment contract, the defendant, upon the plaintiff's return to Ireland, was contractually obliged to provide the plaintiff with work in addition to its obligation to pay her salary.
>
> (b) If the answer to (a) is in the affirmative, whether the plaintiff has suffered any loss and, if so, the extent of that loss.
>
> (c) If the answer to the above is in the affirmative, whether the plaintiff herself contributed to that loss, and if so, to what extent. Put another way, this issue raises the question whether the plaintiff has failed to mitigate her loss.

53. Before considering the submissions made by the parties on those issues, I think it worthwhile reiterating that the plaintiff is still an employee of the defendant. The authorities relied on by the parties in the main arose out of dismissal or other termination of employment scenarios. That must be borne in mind in their application to the facts of this case.

54. In essence, the case made on behalf of the plaintiff by her counsel was that there is implied into every contract of employment a term of mutual trust and confidence. The defendant was in breach of its obligations under that term in failing to provide work for the plaintiff which matched her skills and the achievements she has accomplished and thereby deprived her of opportunities which would have been available to her to be promoted and to advance in her career. In consequence, it was submitted, the plaintiff's career prospects have been damaged both within the defendant and generally. Counsel for the defendant contended that this was very much a "fall back" argument, in that the plaintiff's case was that she should have been employed as an account manager on the termination of her secondment, but acknowledged in her evidence that she did not have such an entitlement. It was submitted that the alternative case was not pleaded. I do not accept that. In her statement of claim the plaintiff pleaded that on her return to Dublin the defendant failed to provide her with any posting or position whatsoever within the defendant and, further, that despite attempts on her part to take up duties and functions commensurate with her skills and qualifications, the defendant had failed to provide her with any position whatsoever. It is, of course, significant that the amended statement of claim, in which the foregoing matters were pleaded, was delivered on 15th February, 2005 before the first job offer by the defendant to the plaintiff. I am satisfied that the defendant's pleading point must fail.

55. Counsel for the defendant submitted that at common law there is no obligation on an employer to provide work for an employee in addition to paying his or her salary. He relied on the decision of the English High Court in *Collier v. Sunday Referee Publishing Company* [1940] 2 K.B. 647, the case in which Asquith J., having stated that a contract of employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work, famously remarked that, provided he paid his cook her wages regularly she could not complain if he chose to take any or all of his meals out. Counsel for the defendant also referred to the decision of the Employment Appeals Tribunal in England in *F.T. Breach v. Epsylon Industries Limited* [1976] I.R.L.R. 180, in which the issue was whether an industrial tribunal was correct in finding that Mr. Breach had not been dismissed within the meaning of the Redundancy Payments Act. The Employment Appeals Tribunal remitted the matter to the Industrial Tribunal for rehearing stating obiter that the decision in the *Collier* case might have some bearing, because in that case Asquith J. had held that the very foundation of the contract was the appointment of Collier to a specific office and Mr. Breach had been employed under a contract of employment as a chief engineer. I do not see that either the *Collier* case or the *Breach* case is of much relevance to the facts of this case, in which the plaintiff was engaged to perform what might be described as a general service position in public service parlance. Apart from that, in the broader context of employment law, those cases are of little relevance today because, as counsel for the defendant acknowledged, the remedies which an employee would pursue would be likely to be statutory remedies, and I would suggest that the likelihood is that the remedies would have their origin in a European Union Directive.

56. Although I believe it is not really apposite to the issues I am now discussing, I will refer to the passage from McGregor upon which counsel for the plaintiff relied in making the case that the plaintiff was entitled to damages to compensate her for harm to her career prospects caused by the failure of the defendant to give her meaningful work on the termination of her secondment. The passage relied on starts at para. 28-023 and is in the following terms:

> "Today there have come into prominence claims by employees for breach of an implied term in the contract of employment of trust and confidence and these have important repercussions upon the issue of damages. The leading case is *Mahmud v. Bank of Credit and Commerce International SA* [[1998] A.C. 20] in the House of Lords. The claimants, who were two long-serving employees of the defendant bank which collapsed as a result of a massive and notorious fraud perpetrated by those controlling the bank and who, having been made redundant by the bank's liquidators, thereafter found difficulty in obtaining employment because of their association with the bank, made a claim for what was referred to as 'stigma compensation' arising from their having been put at a disadvantage in the labour market. The House of Lords allowed their claim. It was held that, provided a relevant breach of contract was established, financial loss in respect of damage to reputation could be recovered for breach of a contract of employment. Here the employer was in breach of its obligations to its employees not to conduct a dishonest or corrupt business, this obligation being one particular aspect of the general obligation not to engage in conduct likely to undermine the trust and confidence required in the employment relationship. Thus if it was reasonably foreseeable that conduct in breach of the trust and confidence term would prejudicially affect employees' future employment prospects and loss of that type was sustained in consequence of such a breach, damages would be recoverable. …

57. Thus the decision in *Mahmud* is of great importance as it recognises for the first time that damages may be recoverable for financial loss arising from damage to an employee's reputation resulting from breach of the employment contract, thereby making an inroad upon the common understanding of *Addis v. Gramophone Company* [[1909] A.C. 488]."

58. In the first supplement to the 7th edition of McGregor it is pointed out that the decision in *Mahmud* is taken further in *Eastwood v. Magnox Electric plc* [2004] U.K.H.L. 35.

59. The reason I suggest that the decision of the House of Lords in *Mahmud* is not really apposite is that the plaintiff is still an employee of the defendant, she has not been put in the position of seeking alternative employment, and the question of "stigma" damages does not arise. For the same reason, I consider it unnecessary to express any view on the status in this jurisdiction of the decision in the *Addis* case in the light of recent developments in the United Kingdom, except to point out that it seems to me to be of no relevance here, as it was a case of wrongful dismissal and the issue was whether the dismissed employee was entitled to damages for hurt feelings and loss arising from the manner of his dismissal. However, I do consider that as a matter of principle a contractual term of mutual trust and confidence which was recognised by the House of Lords in the *Mahmud* case should be implied into each contract of employment in this jurisdiction by operation of law.

60. What seems to me to be apposite to the plaintiff's position is a statement made in the commentary in McGregor on the normal measure of damages for wrongful dismissal when dealing with the amount which an employee would have earned, to which I have alluded earlier. McGregor states at para 28-005:

> "That the amount which the employee would have earned under the contract may be subject to the loss of a chance doctrine is shown, as is the computation of the damages when this is so, by *Ministry of Defence v. Wheeler* [[1998] 1 W.L.R. 637, C.A.]. The loss of a chance doctrine, however, must not be carried too far in wrongful dismissal, as indeed in other, cases."

61. As the plaintiff is still an employee of the defendant it seems to me that the issue which arises is whether the defendant as her employer was under a contractual obligation, beyond the payment of her salary, to provide her with work so that she would have an

opportunity to gain experience, pursue promotion in her job and advance her career. In my view, the defendant was under such an obligation, if not expressly (which I believe is the correct interpretation, because under the letter of appointment dated 25th March, 1999 the plaintiff was engaged not only to receive pay but to work in a particular capacity) then under an implied term in the plaintiff's contract of employment, whether as a facet of the obligation to maintain mutual trust and confidence or otherwise. Further, I consider that the defendant was in breach of that obligation. So the answer to issue (a) is in the affirmative. In dealing with the remaining issues, I think the correct approach is to reverse the order of issues (b) and (c) and I propose considering next the extent of the defendant's breach and the extent to which the plaintiff contributed to the factual situation that she has only attended at work on one day since 31st May, 2001.

62. I have no doubt that the defendant was in breach of its contractual obligation to the plaintiff in the two years prior to June, 2003. The defendant should have identified an appropriate position for the plaintiff in Dublin in the TRS3 grade and should have offered it to the plaintiff. It was canvassed with the plaintiff in her cross-examination that she should have taken the initiative with the defendant in relation to her assignment. I am satisfied on the evidence that the plaintiff did all she could be expected to do. It is not clear on the evidence who, if anybody, in the Human Resources division of the defendant had responsibility for placing the plaintiff in an appropriate position after May, 2001. What is clear is that the defendant was wholly responsible for the failure to place the plaintiff.

63. In relation to the period between June, 2003, when the plaintiff was instructed to attend at the RBU, and 22nd February, 2005, when the first job offer was made to her, I am of the view that the plaintiff did not contribute to the failure to assign her to an appropriate position. I have made that finding on the evidence of Mr. MacBradaigh, which I found to be candid and non-partisan. It is clear on the evidence that the RBU was a core element, and a vital facility in, of the restructuring of Telecom under the strategy set out in the Blue Book and, in particular, in redeployment or easing the departure of personnel. However, it is also clear on the evidence that by June, 2003 it was under resourced and it was no longer performing the role which it had performed previously, at any rate, in Dublin. While I consider that one of the concerns voiced by the plaintiff, concern for her safety at the RBU premises in Exchequer Chambers, verged on the ludicrous, I consider that her scepticism as to whether she would get any training there was justified. On the evidence, I am satisfied that she would not have obtained any training had she attended the RBU and I am also satisfied that it is highly improbable that her attendance would have resulted in the early offer of an appropriate position. In reaching that conclusion, I am taking into account the fact that the plaintiff's grade was lower than that of the other attendees at the RBU at the time and that there would have been a greater range of opportunities available to an employee of her age, with her qualifications and at her grade than would have been available for attendees occupying more senior grades. I find it extraordinary that the information sought by the plaintiff's solicitor on her behalf in relation to the RBU was not furnished, although it is consistent with the approach of the defendant to the plaintiff in the four years following the termination of her secondment. I think it would not be unreasonable to infer that the defendant's objective in instructing her to attend at the RBU was with a view to hastening her departure from the defendant.

64. The position offered to the plaintiff in the letter of 2nd February, 2005, in my view, was an appropriate position having regard to her grade and the terms of her employment in general, particularly, in the light of the supports which were offered to her. Therefore, she should have availed of that position and, if she had done so, the adverse effects on her career of which she complains would have been mitigated. Having said that, having spent almost four years without any meaningful approach or support from the defendant, it is understandable that returning to the workplace would prove difficult for the plaintiff, as in fact happened in April, 2006, when her general practitioner certified a stressful reaction. In her evidence the plaintiff acknowledged that it was a mistake on her part not to make contact with the defendant when her medical certificate expired in May, 2006. I think it is only fair to the plaintiff to recognise the additional stress factor inherent in this litigation, which was listed for hearing during the Easter term 2006 around that time, but not reached.

65. The basis of this aspect of the plaintiff's claim is that she has incurred financial loss. Evidence was adduced on her behalf to show the average salary of an account manager and the other terms of an account manager's remuneration package over the period from the year 2000 to date. The thrust of the claim was that, if the plaintiff had been assigned a position by the defendant, she would have moved up into the account manager earning bracket fairly quickly and that, effectively, she has been deprived of the differential between the TRS3 salary and the account manager remuneration package for the past three years and is likely to be deprived of it for five years into the future. An actuary was called to assist in quantifying the future loss.

66. I consider that the defendant by its failure to place, or to offer to place, the plaintiff in an appropriate position between the end of May, 2001 and February, 2005 breached the plaintiff's terms of employment and in consequence her advancement in her career and her capacity to earn has been adversely affected. I think it is probable that the plaintiff would have been promoted in early course had she returned to work. Her success at the interview on 6th July, 2001 suggests that such is the case. But it is necessary to take into account that up to 9th April, 2003, from a financial perspective, taking the salary the plaintiff received and the recompense she is receiving in these proceedings for loss of commission, the plaintiff will have received more income than she would have received in the position of account manager. It seems to me that the proper analysis of what has happened to the plaintiff is that overall her capacity to advance to a position equivalent to account manager has been hindered for somewhere in the region of two to three years. On that basis, I consider that the appropriate award of damages under this heading is €25,000.

General damages
67. The final issue listed by the defendant was whether the plaintiff is entitled to general damages in respect of any matter raised in the other issues and, if so, the amount of such damages. It is not necessary to express any view on the contention of counsel for the defendant that general damages are not recoverable for breach of a contract of employment. In my view, no evidence has been adduced which would support an award of general damages, and, in particular, no medical evidence has been adduced that the defendant's treatment of the plaintiff caused injury to her health rather than ordinary stress.

General observations
68. The plaintiff's case is an unusual case, although not unique. It is unusual because of the commitment of the defendant, arising from the Blue Book, not to invoke compulsory redundancy against an employee. The spectre of voluntary leaving and the financial arrangements which could accompany it, in other words a severance package, overshadowed this case. However, this case is concerned only with measuring the plaintiff's loss while she remains an employee of the defendant. It is not concerned with determination of her employment or voluntary leaving.

The order
69. There will be judgment in the sum of €87,354 made up of the following components:

(a) €50,682 in respect of commission and arrears of salary;

(b) €11,672 in respect of relocation expenses and

(c) €25,000 as loss of chance damages.

70. As regards components (a) and (b), the award is based on the gross figures which were adduced in evidence. It is a matter for the parties to address any taxation implications which ensue.