Neutral Citation Number: [2007] IEHC 386

THE HIGH COURT

[2007 / 5154P]

BETWEEN

PARAIC BERGIN

PLAINTIFF

AND

GALWAY CLINIC DOUGHISKA LTD

DEFENDANT

Judgment of Mr. Justice Clarke delivered the 2nd day of November, 2007

1. Introduction

1.1 The plaintiff ("Mr Bergin") is currently the Chief Executive of the defendant ("Galway Clinic"). He has held that post since the middle of August of 2006. Previous to that, Mr Bergin had held a significant office with ESB International working in Pakistan. In order to take up employment with Galway Clinic, he resigned that post and relocated to Ireland. Issues have arisen between Mr Bergin and Galway Clinic which have led, at a minimum, to a significant disciplinary process being invoked by the Clinic. From Mr Bergin's point of view it is suggested that, in substance, a decision to dismiss him has already been taken.

1.2 It will be necessary to address the circumstances which have led to that state of affairs in due course. However it is important to note at this stage that Mr Bergin commenced proceedings on the 10th day of July, 2007 claiming principally declaratory and injunctive relief and, on the same day, obtained an interim injunction restraining Galway Clinic from dismissing him from his position or publishing or making any statements inconsistent with Mr Bergin continuing to be Chief Executive of Galway Clinic.

1.3 That interim injunction was continued from time to time while the parties exchanged very substantial affidavit evidence. The interlocutory hearing ultimately took place on a number of days in early October. This judgment is directed towards the issues which arose on that interlocutory hearing.

2. Background Facts

2.1 Galway Clinic employs in the region of 360 people, having commenced operations in June 2004. Galway Clinic has a medical advisory committee ("MAC") which is involved in the decision making process in relation to medical matters within the clinic. The precise status of some of the decisions or recommendations of that committee are, potentially, a matter of at least some disagreement between the parties. In any event the issues which give rise to these proceedings can be traced back to the granting of operating and admitting privileges ("privileges") to a consultant surgeon ("EM"). As EM is not a party to these proceedings, I do not consider it necessary to name him. The MAC had recommended against the granting of privileges to EM. Mr Bergin states that he was not satisfied that there was any basis for the refusal of the grant of privileges in that, in his view, EM met the criteria which had been determined for such a grant of privileges. Mr Bergin also states that, in his view, it is clear that the final decision in relation to such matters was to be his (that is to say that of the Chief Executive Officer). This is disputed by Galway Clinic. In those circumstances Mr. Bergin did not follow the advice of the MAC and proceeded to grant the relevant privileges to EM.

2.2 There is no doubt but that this matter led to some significant friction between Mr Bergin and at least some members of the Board of Galway Clinic. It would seem that, on the advice of Galway Clinic's solicitor, a letter was written by Mr Bergin to EM, in which Mr Bergin suggests that his conferring of privileges on EM was in excess of his powers as CEO. However Mr Bergin maintains that this letter was written, not because he truly believed that he had acted in excess of his powers but because Galway Clinic's solicitor had advised that a letter in that form was the best way of attempting to bring about a situation where an agreement could be reached with EM which would lead to a termination of the privileges concerned. The precise circumstances which led to the writing of that letter, and the inferences which it may be proper to draw from same, are not matters which can be resolved on the basis of the affidavit evidence tendered and will have to await a full trial.

2.3 Thereafter, it is common case that certain discussions took place between Mr Bergin and the Chairman of the Board, prior to Mr Bergin going on three weeks holiday in France towards the end of June. On Mr Bergin's case, while the matter of the conferring of privileges remained under discussion, it was not, prior to his return from those holidays, apparent to him that any disciplinary issues had arisen.

2.4 On Mr Bergin's return from holidays he attended a meeting of the Board, which was also attended by Galway Clinic's solicitor. There is some dispute between the parties as to precisely what occurred at that Board meeting. It is common case that issues concerning the grant of privileges to EM were stated to be a significant issue from the Board's point of view. It is also common case that Mr Bergin was not, in express terms, informed that he was dismissed. However on his case it is submitted that the substance of the meeting reasonably conveyed to him that the Board had determined that he was guilty of serious misconduct and was concerned only with the question of whether there might be any mitigation which might lead the Board not to invoke the summary dismissal entitlements set out in his contract. Again a resolution of the factual disputes as to what happened at the Board meeting and a determination of the appropriate inferences to be drawn as to the actions and positions of the parties, will have to await a full hearing.

2.5 It is also important to note the terms of Mr Bergin's contract. The relevant written contract of employment runs to some four pages. Most of the terms are of no relevance to the dispute which has now arisen. Clause 15 deals with "termination of employment" and is in the following terms:

> Termination of Employment:
>
> Either party may terminate this agreement on three months written notice to the other.
>
> In the event of service of a notice of termination by either party, the Employer shall be entitled to require that you not attend your place of work during such period of notice (or any part thereof) or otherwise terminate your employment with immediate effect and pay your salary in lieu of notice.
>
> The Galway Clinic will be entitled to immediately terminate your employment without notice if you:
>
> a) are in gross default or wilful neglect in the discharge of your duties under this contract or commit any serious breach or non observance (or after warning, repeated breaches or non observance) of any terms of this agreement

or any of the policies or regulations made by Galway clinic from time to time, or

b) Commit any grave misconduct or grave default or any conduct tending to bring yourself or Galway Clinic into disrepute or affecting the business of Galway Clinic, or

c) Be incapacitated through accident, ill health or otherwise and are prevented from attending to your duties under the terms of this agreement for any consecutive period of 120 days or more or for periods aggregating 35 weeks or more in any period of 52 weeks consecutive weeks, or

d) Are adjudged bankrupt or make any arrangement or composition with your creditors, or

e) Are convicted of any criminal offence other than an offence which in the reasonable opinion of the Board of Galway Clinic does not affect your position as Chief Executive of Galway Clinic.

2.6 It is also important to note that Clause 12, under the heading of Disciplinary Policy simply states: -

"See Section 12 of the employee manual"

2.7 Section 12 of the employee manual sets out a detailed disciplinary policy which, in the context of this case, includes under the heading "Serious Misconduct" the following:

"There are certain types of conduct which constitute grounds for immediate dismissal without recourse to the disciplinary procedure. They include

· Gross Insubordination

· False declaration of employment/qualification history

· Theft, unauthorised use of property belonging to the Galway Clinic, or to another employee, patient, or visitor

· Being under the influence of alcohol or drugs

· Possession of a weapon

· Physical Violence

· Gross Indecency

· Disclosure of confidential information, pertaining to the activities of the Galway Clinic, patient details, or staff details to an unauthorised source

This list is not exhaustive."

In addition the disciplinary procedure notes that all employees have the right to appeal against any action taken, following application of the disciplinary procedure.

2.8 It does have to be said that Mr Bergin's contract, arguably, suffers from the difficulty that is frequently encountered when one document, of general application, is purported to be incorporated into another document designed for one individual case. Given that Mr Bergin is the Chief Executive Officer, it would seem unlikely that any entity other than the Board or an appropriately appointed sub-committee of the Board, could deal with serious disciplinary issues arising in relation to him. On the other hand it is not immediately apparent how, if that be the case, there could be an effective appeal unless, perhaps, the initial hearing were to be by a sub committee of the Board with an appeal to the full Board excluding those that had served on the sub committee. Again the precise interpretation of the relevant aspects of Mr Bergin's contract of employment are a matter which will have to await, in the light of that ambiguity, a full hearing. Furthermore the application of whatever terms may be determined as being applicable to Mr Bergin in a disciplinary context to the facts is also a matter which cannot be determined at an interlocutory hearing.

2.9 As there was a dispute as to the principles applicable to the grant or refusal of interlocutory relief in relation to employment contracts, such as that of Mr Bergin, I should, therefore, turn first to that issue. However, before doing so, I should set out the principal issues which are put forward on behalf of Mr. Bergin as the basis for his contention that Galway Clinic are in breach of his contract of employment.

3. Issues to be tried

3.1 The principal contentions made by Mr. Bergin are to the following effect:-

(a) It is said that the Board was guilty of a prejudgment in that it determined that he was guilty of misconduct without giving him an opportunity to be heard;

(b) In addition, it is suggested that the appropriate inference to draw from what transpired at the meeting of the Board concerned was that Mr. Bergin was in fact dismissed without being given an opportunity to be heard;

(c) It is suggested that the involvement of at least some members of the Board in the process is such as would give rise to an appearance of bias, thus debarring the members concerned from any further involvement in the disciplinary process relating to Mr. Bergin; and

(d) Finally it is said that by reason of having invoked a disciplinary process based on an allegation of misconduct, the Board is now debarred from exercising its entitlement (which would otherwise arise) to terminate on three months' notice in accordance with the terms of the contract.

3.2 Whatever may be the standard by reference to which Mr. Bergin has to establish a case to be tried under any or all of those issues (and that is a matter to which I will shortly turn), it is, of course, clear that he only has to establish the necessary standard in

respect of any one such ground in order to have met the standard. It follows, therefore, that provided any one ground meets that standard it is unnecessary to consider the status of any of the other grounds put forward.

4. The Legal Issues

4.1 There have been a significant number of decisions over the last number of years both of this Court, and to a lesser extent, of the Supreme Court, in relation to what might loosely be called employment injunctions. I think it is fair to state that this area of the jurisprudence of the courts is in a state of evolution and the precise current state of that jurisprudence is far from clear. This situation is not, in my view, helped by the fact that a great many of the cases do not proceed to trial so that by far the greater number of the authorities consist of decisions of the court at an interlocutory stage rather than after a full hearing. While such authorities may be of very considerable assistance in defining the jurisprudence in relation to the grant or refusal of interlocutory injunctions, same may do little to advance the cause of clarity in respect of employment law generally, for the court is required to approach issues of general employment law, at the interlocutory stage, on the basis of arguability or, perhaps, where the injunction sought is mandatory in substance, likelihood of success. In either case a definitive decision on the legal issues arising (with the exception of those which are relevant solely to the grant or refusal of interlocutory relief) has to await a full trial. In practice the full trial rarely arises. It is the frequent experience of the court dealing with such matters that a great many of the cases which are the subject of an interlocutory ruling are resolved by agreement between the parties before the matter comes to trial. It would be somewhat naïve not to surmise that a significant feature of the interlocutory hearing is concerned with both parties attempting to establish the most advantageous position from which to approach the frequently expected negotiations designed to lead to an agreed termination of the contract of employment concerned. The employee who has the benefit of an interlocutory injunction can approach such negotiations from a position of strength as can the employer who has successfully resisted an interlocutory application.

4.2 The first legal issue which arises between the parties on this application is as to the appropriate standard to be applied in assessing the case which the plaintiff has to make out at this interlocutory stage. It is clear from cases such as *Fennelly v. Assicurazioni Generali* [1985] 3 I.L.T. 73 and *Maha Lingham v. Health Service Executive* [2006] 17 E.L.R. 137, that a plaintiff may be entitled to injunctive relief which would have, to some extent, the effect of continuing his or her employment but only, it would seem, where the plaintiff concerned can establish a strong case. That such can be the case even though damages might well be the appropriate remedy at trial, is clear from, for example, *Shortt v. Data Packaging Ltd* (1994) ELR 251 and *Phelan v. BIC (Ireland) Ltd* (1997) ELR 208. As noted by Fennelly J. in *Maha Lingham* the traditional view at common law was to the effect that, as he put it, :-

> "The employer was entitled to give that notice so long as he complied with the contractual obligation of reasonable notice whether he had good reason or bad for doing it. That is the common law position and it is an entirely different matter as to whether a person has been unfairly dismissed and a different scheme of statutory remedy is available to any person dismissed whether with or without notice under the Unfair Dismissals Act but this is not such an application. This is an action brought at common law for wrongful dismissal in the context of which an injunction was sought."

4.3 It is also important to note that Fennelly J. went on to deal with what he described as "a very strong trend" in those cases in which injunctions had been granted, to the effect that such cases were derived from circumstances where the employee concerned had either a fixed period of employment or a fixed period of notice which had not, at least to the extent that a strong case had been established, been honoured. I expressed similar views in *Carroll v. C.I.E.* (2005) 4 IR 184, concerning those cases where the courts seem to have departed from the view that damages were the appropriate remedy in circumstances where an employee was dismissed in breach of contract.

4.4 Fennelly J. went on to note a second element in the development of employment law which seems to imply an obligation to comply with the rules of natural justice in cases of a dismissal by reason of misconduct. However, as that issue did not arise in the context of the case under consideration, no further comment on that aspect of the jurisprudence was made.

4.5 Applying *Maha Lingham* in *Naujoks v. National Institute of Bioprocessing, Research and Training* [2007] 18 E.L.R. 25, Laffoy J. undoubtedly applied the strong case test in determining that the plaintiff had not discharged the onus in relation to what was described as the first strand of the plaintiff's case.

4.6 Laffoy J. went on to consider a second strand of the plaintiff's claim which related to fair procedures. It is suggested by counsel on behalf of Mr Bergin that Laffoy J., in relation to that strand, applied the ordinary, or lower, standard of fair case to be tried. I am not satisfied that Laffoy J. did, in fact, apply a lower standard. Indeed it would be difficult to see the logic of so doing. The basis for the higher standard is that the substance of the relief sought is a mandatory order requiring the employer to keep the employee in employment. The order remains a mandatory order, even though the plaintiff claims that a purported termination of his employment is unlawful by reason of a finding of wrongdoing having been arrived at in breach of the principles of natural justice. However couched, the substance of the relief is the same. I am not, therefore, satisfied that different standards apply depending on the nature of the claim advanced on behalf of he plaintiff concerned. Where a plaintiff seeks to prevent an employer from exercising a *prima facie* entitlement to terminate a contract of employment, then that employee is, in substance, seeking a mandatory order requiring that his employment continue and that his employment entitlements are met.

4.7 It follows, in my view, that, in order to determine whether the first step towards granting such an order has been met, it is necessary that the plaintiff concerned establish a strong case.

4.8 It does not seem to me, on balance, to be logical to impose a different standard where the purported dismissal of the employee concerned stems from reasons other than misconduct on the one hand, or resulted from a finding of misconduct on the other hand. While proceedings taken before the Employment Appeals Tribunal under the Unfair Dismissals Act, 1977 raise different issues, the existence of an obligation on the part of an employer to comply with the rules of natural justice in considering an allegation of misconduct against an employee, at common law, stem from an implied term in the contract of employment of such employee to that effect (or, indeed, as is the case here, from an express term to like effect). In the case of most contracts of employment, the issues which arise involve no questions of public law. The legal relations between the employer and employee are purely governed by the contract of employment together with any applicable statutory provisions. So far as the common law is concerned there is not, therefore, in my view, in principle, any difference between an allegation that an employer is in breach of contract by having failed to apply an appropriate process in leading to a conclusion of misconduct which in turn might lead to a dismissal on the one hand or had failed to (say) honour a fixed term contract for its full period, on the other hand. Both are allegations of breach of contract.

4.9 I have also considered whether the fact that a finding of misconduct might have an effect on the reputation of the employee concerned, in addition to the consequences for his contract of employment, could be a possible factor for taking the view that different considerations might apply in the grant of interlocutory injunction in such cases. There is no doubt but that a finding of misconduct (particularly if serious) could have a significant effect upon an employee beyond the loss of his contractual entitlements under his contract of employment. Such an eventuality might well, legitimately, permit a court to grant interlocutory relief, without

being satisfied on the higher standard, where such interlocutory relief is designed to prevent any publication of a finding of misconduct or other publication from which persons might reasonably infer that a finding of misconduct had to have been made. A statement to the effect that a person had been summarily dismissed in circumstances where the only inference to drawn from such a statement was that the person had been guilty of significant misconduct would be a case in point.

4.10 However, this issue has to be seen against the background of the fact that an employer can, in principle, at common law, terminate a contract of employment on reasonable notice without giving any reason. There may, of course, in practise, be many reason why an employer may not wish to take that course. Firstly he may be exposed to a liability under the Unfair Dismissals Act, 1977. Secondly there may well, in many cases, be the potentiality for industrial relations difficulties. However, it is important to remember that in proceedings taken before the courts, the employee concerned is asserting his common law rights. Those rights are based on his contract on employment and do not involve any public law element as such even though the principles of natural justice may, for the reasons which I have set out, be imported into that contract. Any breach of the principles of natural justice is, therefore, in the context of an employment injunction, a breach of contract rather than a matter or public law. There does not, therefore, seem to me to be any basis for treating such an allegation of breach of contract in a different fashion from any other.

4.11 I should finally add that it does not seem to me to be appropriate to make a distinction as to the stage at which a disciplinary process has reached, in determining the entitlements of an employee to an injunction. It can hardly be the case that the entitlement or otherwise of an employee to an injunction could depend on whether he happened to get to court before a particular stage had been reached. An employee who has already been summarily dismissed is undoubtedly seeking a mandatory injunction if he seeks to restrain the employer concerned from acting as if he had been dismissed. If, whether by luck, diligence, prescience or a combination of any of those, the employee concerned happens to seek an injunction before the employer has made a final decision (even by, say, a matter of hours) such an application could be couched as one restraining the dismissal but, for reasons similar to those relied upon by Fennelly J. in *Maha Lingham*, I am satisfied that the substance of such an order, if made, remains mandatory. It was, amongst other things, for reasons such as that, that I expressed the view in *Becker v. St.Dominics Secondary School* (Unreported, High Court, Clarke J. 13th April 2006), and further cases which followed it, that the courts should only intervene in the middle of a disciplinary process in a clear case. I note that Feeney J. has expressed a similar view in a subsequent ex tempore judgment.

4.12 I have, therefore, come to the view that in any case in which an employee seeks to prevent a dismissal or a process leading to a dismissal, as a matter of common law, and in whatever terms the claim is couched, the employee concerned is seeking what is, in substance, a mandatory injunction which has the effect of necessarily continuing his contract of employment even though the employer might otherwise be entitled to terminate it. In those circumstances it is necessary for the employee concerned to establish a strong case in order to obtain interlocutory relief. I should emphasise that, at a full trial, the employee concerned is, of course, entitled to whatever relief the court might consider appropriate although, again, on by far the preponderance of the authorities, it is likely that, in most cases, the employee will be confined to a claim in damages. Most of the exceptions stem from special circumstances. For example in *Carroll* I declared void a decision to dismiss but, as is clear from the judgment in that case, it was in circumstances where the real issue was as to whether the plaintiff concerned was required to go straight to an appeal or was entitled to have a "first instance" hearing conducted again. I should also emphasise that there may be cases where, for one reason or another, different considerations apply. It is, for example, at least arguable that public law considerations come into play in at least some offices or employments which are governed directly by statute. It may well be that different considerations apply in such cases. The comments which I have made about the standard to be applied in this case are those which, in my view, are applicable to a purely private contract between two private individuals or entities.

5. Application to the Facts of this Case

5.1 Against that background the first matter which I must address is as to whether Mr Bergin has made out a strong case. In my view he has. I am mindful of the emphasis placed by Laffoy J. in *Naujoks* on the importance of the court refraining from attempting to assess the likely result of contested factual issues. However even on the basis of the evidence put forward on behalf of Galway Clinic, it seems clear that a significant adverse finding in relation to Mr Bergin had been made in advance of his attendance at the Board meeting which is at the centre of these proceedings.

5.2 I accept the submissions made on behalf of Galway Clinic, that the precise operation of the rules of natural justice in the context of contracts of employment is a matter in respect of which the courts must apply a significant degree of flexibility. For example in *Mooney v. An Post* (1998) 4 I.R. 288 Barrington J., speaking for the Supreme Court, noted that the employer who makes a decision will, in a sense, be a judge in his own cause. That fact alone did not prevent the employer in that case from being entitled to make the decision concerned. However it is also clear from cases such as *Charlton v. Aga Khan's Studs* (1999) E.L.R 136 that the proper interpretation of an employees contract of employment may require that certain persons not be involved in a disciplinary process because those individuals, in a personal and direct sense, are involved in the very issues which are under consideration. In the case of a very senior official whose employment is likely to be considered only at Board level it is, in my view, inevitable and acceptable that the Board should give some preliminary consideration to whatever issues may have led to a concern in the first place. How else, it can reasonably be asked, can a process involving a person such as the Chief Executive of a company, be commenced.

5.3 However, even on the basis of the case put forward on the part of Galway Clinic, there is, in my view, a strong argument in this case to the effect that there was a prejudgment of the question of whether there was, in fact, serious wrongdoing, without giving Mr Bergin a chance to be heard. While it might well be argued that Mr Bergin's response at the Board meeting was somewhat precipited, it nonetheless seems, on the evidence currently available, to be the case that the Board had determined that serious wrongdoing had taken place. There is a world of a difference between a conclusion to the effect that there is evidence which requires an answer on the one hand and a decision that there was wrongdoing with an opportunity being given to point to mitigation on the other. On the uncontested parts of the evidence currently available there is a strong case to the effect that the latter is what happened here. The distinction is similar to the difference between "pure" investigations and those which reach conclusions which I noted in *O'Sullivan v. Mercy Hospital* (2005) IEHC 170. In that context there are a number of issues apparent on the papers which would at least have been capable of debate before any determination as to wrongdoing could properly be made.

5.4 There are references in some of the documents before me to a contention that Mr. Bergin's actions in giving privileges to EM were motivated, at least in significant part, by what is contended to have been a friendship between Mr Bergin and EM. A determination in respect of that matter had a very real potential to significantly effect any view taken.

5.5 There also seems to be a significant issue as to whether, in fact, Mr Bergin did have authority to take a different view on the grant of privileges from that of the MAC. The importance of the combined effect of those two matters can be simply illustrated by considering, on the one hand, a situation where a Chief Executive Officer improperly overruled a decision of a body such as the MAC for the purposes of conferning a significant benefit on a friend with, on the other hand, a situation where a court was satisfied that, as a matter of the then existing structure within the hospital, that CEO was well within his rights to form his own independent view on the grant of privileges and where it was also clear that there was an entirely acceptable basis for the conclusion that EM met the

relevant criteria. In the first case it would be difficult to escape the conclusion that very significant misconduct indeed had occurred. In the latter case it would be hard to conclude that any misconduct had occurred and, if the Board was dissatisfied with how things had worked in the case under consideration, a more appropriate response might be to alter the balance between the MAC and the Chief Executive or change the relevant criteria or both. That exercise is designed simply to illustrate that there were important issues, not just those of mitigation, which needed to be considered before any conclusion was reached. With that in mind, there is, in my view, a strong arguable case to the effect that, in order to comply with its contractual obligations, Galway Clinic was required to put the case sought to be relied on to Mr Bergin to afford him a reasonable opportunity to answer those matters before any conclusion was reached which was significantly adverse to his interest. On that basis I am satisfied that there is a strong case to the effect that the Board was not, in this case, involved in a pure investigation.

5.6 I am, therefore, satisfied that Mr Bergin has met the first leg of the test in that he has established a strong arguable case to be tried in relation to that issue. It is not, therefore, necessary to consider the other issues. I now propose to deal with the question of the adequacy of damages and the balance of convenience.

6. The Adequacy of Damages and the Balance of Convenience
6.1 The principal argument put forward on behalf of Galway Clinic under this heading was that the injunction granted at the interim stage and, a *fortiori*, that sought at this interlocutory stage, was far too wide in its scope. Two points in particular are relied on. Firstly it is clear from the terms of Mr Bergin's contract, as referred to at para. 2.5 above, that Galway Clinic is, in any event, entitled to terminate his contract on three months notice. The current injunction would prevent the Board from giving such notice. On that basis it is argued that irreparable harm would be caused to the Board in that, if it should succeed at trial, it would only be able to give notice after that successful conclusion, with a consequent further elongation of Mr Bergin's contract in circumstances where the court would not have found any merit on Mr Bergin's side.

6.2 Secondly it is noted that the form of injunction already in place prevents anyone else carrying out the duties of Chief Executive Officer and, indeed, if the court were persuaded to go further in accordance with the submissions made on behalf of Mr Bergin, the injunction to be granted now would require that he be allowed to return to work. In those circumstances it is said that Galway Clinic would be required to operate for a significant period through a Chief Executive Officer in respect of whom there were highly acrimonious court proceedings in being. It is said that such a situation could lead to irreparable harm being caused to Galway Clinic.

6.3 I am satisfied that there is significant merit to both of those submissions. It seems to me that potentially irreparable harm could be caused to Galway Clinic by requiring that it operate with Mr Bergin as Chief Executive Officer pending the trial of these proceedings. That harm would not be significantly diminished if Galway Clinic succeeded at trial. Any such harm would significantly outweigh any harm that would be done to Mr Bergin in the event that he should not obtain an order allowing him to continue with his duties but should succeed at trial. This latter point seems to me to be particularly strong in this case where, having regard to the breakdown in relations between the parties as evidenced by the affidavits, it seems to me highly improbable that, irrespective of the outcome of the proceedings, a court would be persuaded to make an order which would have the effect of requiring that Mr Bergin be allowed to continue with his duties. This view of the balance of convenience in employment injunction cases seems to me to be consistent with the view taken by McCracken J. in *Gee v. Irish Times* (2001) ELR 249 and O'Donovan J. in *Doyle v. Grangeford Precast Concrete* (1988) ELR 260.

I accept the view that an injunction could never be given in a case where it was suggested by the employer that trust had ceased is "far too sweeping" (see *Robb v. London Borough of Hammersmith and Fulham*) (1991) IRLR 72). This does not, however, mean that the state of relations between an employer and, in particular, key senior personnel must not be a very weighty factor in assessing the balance of convenience.

6.4 For those reasons it would seem to me that any order which, either directly or indirectly, required that Mr Bergin continue with his duties, would not meet the balance of convenience test. Clearly, on that basis, the order sought requiring that he be permitted to continue with his duties cannot be allowed. It also seems to me to follow that someone has to carry out the duties of Chief Executive Officer and that Galway Clinic cannot be prevented from appointing someone to carry out such duties. In those circumstances it seems to me that an order similar to that which I made in *Evans v. I.R.F.B. Services* [2005] IEHC 107 is appropriate. In that case the holder of a senior office with the International Rugby Board persuaded me that he had made out an appropriate case to the effect that he had a fixed term contract which could not be terminated save for limited reasons none of which appeared to exist on the facts of the case. In those circumstances I restrained the International Rugby Board from appointing anyone to the relevant post save on terms which would enable the court at trial, if persuaded that it was appropriate so to do, to direct that the plaintiff return to his duties.

6.5 It seems to me that an order of that type has the potential to minimise the "inconvenience" to both sides. The courts entitlement to make an effective order in favour of a plaintiff at trial is preserved. Any interference with the employers entitlements is also minimised in that he can get on, in a practical way, with making provision for the carrying out of the duties of senior management pending trial, subject only to a limitation that whoever carries out those duties needs to do so on terms which would allow a reversal of the situation in the event that the plaintiff should succeed to sufficient extent at trial to require that he be restored to duties.

6.6 In addition it does not seem to me to be appropriate to restrain the Board, if it should be minded so to do, from purporting to exercise an entitlement to terminate Mr Bergin's contract of employment by giving notice in accordance with the terms of that contract. Whether or not such notice would be effective, in the light of the issues which have arisen in these proceedings, (and in that context I note the argument of counsel for Mr Bergin to the effect that, having instigated a potential dismissal process on the basis of misconduct, Galway Clinic is no longer entitled to invoke the clause providing for termination without reason) there does not seem to me to be any basis for restraining the process from being started at this stage. If such a notice is served then its validity can be considered at the trial of the action.

6.7 This latter point emphasises the need for an early trial in this matter and I propose putting in place measures to ensure that such occurs and to, hopefully, arrange that there be a final resolution of the issues between these parties in a time scale which would mean that the appropriateness or otherwise of the service of a notice of termination without reason (if that is what Galway Clinic chooses to do) can be determined before the expiry of that notice period.

7. Conclusions
7.1 It seems to me, therefore, that while Mr Bergin is entitled to an injunction. It should be confined to one which:-

(a) Restrains his actual dismissal; and

(b) Restrains Galway Clinic from appointing any person to carry out the duties of Chief Executive Officer save in

circumstances where the appointment of such person contains terms sufficient to permit Mr Bergin to return to his duties as Chief Executive Officer should this court, after a full hearing, be persuaded to make an order to that effect.

7.2 I propose hearing counsel as to the measures necessary to ensure that the case be ready for hearing in early course.