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Potential pitfalls in "no-fault" dismissals – recent insights from the High Court

Speedread

A recent application before the High Court to prevent the dismissal of a senior employee, fired for allegedly making an offensive comment to a female co-worker, captured the media's attention. In the case of *Grenet v Electronic Arts Ireland Limited* (**EA**) a number of significant employment law issues for global employers were explored. In particular, the circumstances in which an employee can be terminated, with or without fault, and who within the business has the requisite authority to lawfully effect a dismissal.

A cautionary tale for employers, this High Court decision highlights the important steps to be taken by an employer before triggering a dismissal process. It also confirms that termination of employment on notice is not as simple as it may sound.

So what happened? A tale of two dismissals

Jean-Philippe Grenet, a senior director within EA, was dismissed in November 2018 after allegedly making an inappropriate comment to a female colleague during a one-on-one video conference. The precise specifics of the remark were in dispute, but Mr Grenet conceded that the comment was *"clumsy, inelegant and ill-advised"*. Suspended shortly after this comment, Mr Grenet was dismissed on grounds of gross misconduct in the absence of any investigation or disciplinary process (the **First Dismissal**).

Mr Grenet secured an ex-parte injunction on 6 December 2018 preventing EA from taking further steps to implement his dismissal. The injunction prevented EA from appointing anyone else to his role pending the substantive hearing of his claim.

EA subsequently sent Mr Grenet a letter signed by Mr John Pompei, Head of Player Experience Operations within EA's US parent company. This letter represented a *second* attempt to dismiss Mr Grenet and recast the basis for his dismissal. On the one hand, this withdrew the original fault-based dismissal. On the other hand it terminated Mr Grenet on a "no-fault" basis "*in accordance with [your] contractual entitlements"* (the **Second Dismissal**).

What's the legal position?

Employers in Ireland are permitted to terminate an employee's employment on notice. Such dismissals will, however, be "*unfair*" under the Unfair Dismissals Acts. The existence of performance or conduct issues may, depending on the facts, undermine an employer's ability to simply serve such notice and effect

a "*no fault*" dismissal. In such circumstances, the employee may seek to "*injunct*" or prevent the dismissal on the basis that he or she was not afforded fair procedures in respect of the particular performance or conduct issue.

This implies that their employer effectively short-circuited the applicable process and opted for the seemingly more straightforward option of a no-fault dismissal.

In a 2014 case, *Bradshaw v Murphy*, the High Court refused to grant an injunction to restrain a "*no-fault*" dismissal of a chef/restauranteur - despite the existence of allegations of gross misconduct that had not been investigated. Here Justice Finlay Geoghegan concluded that the employee had failed to satisfy the rigorous test required to secure such an injunction.

In other words he had not established that:

- there was a serious issue for trial
- damages would be an inadequate remedy
- the balance of convenience lay in favour of granting the injunction

Notwithstanding the *Bradshaw* decision, it is our view that it is on the basis of the unusual facts of that case that the recent *Grenet* case pivots in favour of the employee seeking to injunct the purported "no fault" dismissal.

What arguments were made?

EA argued that it could lawfully "*abandon the earlier process and opt for the no-fault dismissal*", provided:

- Mr Grenet's employment was terminated in accordance with his contract
- EA's reason for his dismissal was not linked to any alleged misconduct

In short, provided Mr Grenet's contractual notice period was complied with, there was no entitlement to fair procedures or prior consultation where misconduct was *not* the reason expressly relied upon to justify the dismissal.

Mr Grenet's position focused on a clause within his contract of employment entitling Mr Grenet to a grievance and disciplinary procedure. It was argued that the Second Dismissal was a "*sham…cloaked in a new and relatively see through clothes*".

What did the High Court decide?

The Court was persuaded by Mr Grenet's "*see through clothes*" argument and held that employees can challenge a no-fault termination which is "*dressed up to avoid unlawful conduct such as a breach of contract or a breach of a constitutional right to vindicate one's own name*". The Court concluded that the Second Dismissal was, on the balance of probabilities, a "*cynical contrivance*" equating to a "*deliberate decision to gloss over the serious impact*" on Mr Grenet's reputation.

Mr Grenet secured a second injunction preventing EA from dismissing him (or appointing any replacement) and requiring EA to continue to pay his salary and benefits pending the substantive hearing of the matter.

Another focal point in this decision was the authority of Mr Pompei, the signatory of the Second Dismissal letter, to actually effect Mr Grenet's dismissal. Mr Pompei, an employee of EA's US parent company, was not an employee or officer of the Irish EA entity. In addition, no evidence was submitted that he had been authorised by the board of EA to effect the termination of Mr Grenet's employment.

EA argued that Mr Pompei, to whom Mr Grenet reported, had "*ostensible delegated authority*" to manage the majority of the employees' at EA's Irish site "*including the power to terminate their employment*". The Court was highly critical of this position, stating that Mr Pompei *"somewhat arrogantly…takes upon himself the authority to act on behalf of the defendant without recognising that an ultimate parent corporation and a subsidiary company are separate legal entities."* The Court noted that EA is an Irish entity subject to Irish law and that the global nature of the group's business and management structure did not "*trump*" those obligations.

Although the Court did not make a binding determination on the point, Justice O'Connor was satisfied that Mr Grenet had not agreed that his employment contract could be terminated by anyone other than the Irish EA entity.

Conclusion

There is well-established case-law that confirms employers are entitled to dismiss employees (with notice) on a "no-fault" basis. However, the specific facts of the Grenet case are a useful reminder to employers of the court's ability to look behind the "*see-through clothes*" of a "*dressed-up"* no-fault dismissal.

In this instance the employer's efforts to "*change tack*" and seek to effect Mr Grenet's dismissal on a no-fault basis were totally undermined by its prior gross misconduct dismissal. In connecting the dots between the two dismissals and highlighting the potential irreparable damage to Mr Grenet's reputation, Mr Grenet successfully demonstrated:

- a strong case to be tried
- that damages would be an inadequate remedy
- that the balance of convenience favoured granting the injunction

On a practical note, the decision also serves as a warning for global businesses with Irish subsidiaries and the need to ensure that Is are dotted and the Ts crossed when it comes to effecting "no fault" dismissals if they are to survive High Court scrutiny in an injunction scenario.

For more information in relation to this topic, please contact Ailbhe Dennehy, Senior Associate, or any member of the A&L Goodbody Employment team.