



THE HIGH COURT

Record No. 2024 / 2785 P

Between:

PHILIP NOLAN

Plaintiff

And

SCIENCE FOUNDATION IRELAND

Defendant

**JUDGMENT of Mr Justice Rory Mulcahy delivered on 21 June 2024**

**Introduction**

1. On 27 May 2024, the Board of Science Foundation Ireland (SFI) decided to terminate the plaintiff's employment as Director General of that organisation. The plaintiff was notified of the decision by emailed letter at 9.19 pm that evening.
2. Although there had been an investigation into allegations of misconduct, in particular bullying, against the plaintiff, and a decision had been made to conduct a disciplinary hearing, the plaintiff had been given no prior notice that the Board was meeting to discuss his position, or that any such decision was being contemplated. Following the notification of the decision to dismiss him, the plaintiff sought and obtained an interim injunction to restrain the defendant from taking any further steps on foot of the decision to dismiss him. He claimed that the decision had been reached without affording him any fair procedures. He argued that this was in breach of the defendant's implied contractual obligations.

3. At the hearing of the interlocutory application to continue the injunction and for an order directing that the plaintiff be permitted to return to work pending the determination of these proceedings, the defendant argued that the plaintiff had been dismissed in accordance with the provisions of his employment contract and that he had not been dismissed for misconduct. In those circumstances, it argued, it was entitled to dismiss the plaintiff without any requirement to afford him fair procedures.

4. There is no dispute between the parties that insofar as misconduct was alleged against the plaintiff, he was entitled to be afforded fair procedures prior to any decision being made to terminate his employment based on that alleged misconduct. Equally, the parties acknowledge that the SFI retained a contractual entitlement to terminate the plaintiff's contract and that the defendant could exercise that contractual right without automatically engaging any right to fair procedures. The principal question at this interlocutory stage, therefore, is whether the plaintiff was dismissed for misconduct? Or, more specifically, has the plaintiff made out a sufficient case that he was dismissed for misconduct, notwithstanding the defendant's averments to the contrary, to justify the grant of a mandatory injunction.

### **Science Foundation Ireland**

5. Science Foundation Ireland (SFI) is a body corporate established by the Industrial Development (Science Foundation Ireland) Act 2003, as amended ("the 2003 Act"). Its functions, *per* section 7 of the 2003 Act include promoting, developing and assisting in the carrying out of research in strategic areas of opportunity for the State. It also promotes and supports STEM (science, technology, engineering and mathematics) education and engagement, and creates awareness and understanding of the value of STEM to society and to the growth of the economy.

6. Section 13 of the 2003 Act provides for the position of Director General of SFI:

*13. —(1) There shall be a chief officer of the Foundation who shall be known, and is referred to in this Act, as the Director General.*

*(2) Subject to subsection (9), the Director General shall be appointed by the Board.*

*(3) The Director General shall hold office for such term being not more than a period of 5 years and upon and subject to such terms and conditions (including remuneration) as the Board, with the consent of the Minister and the Minister for Finance, may determine.*

*(4) The Director General may be re-appointed for a second term.*

*(5) The Director General shall, for the duration of his or her appointment, become an ex officio member of the Board and the board of Forfás.*

*(6) The Director General shall carry on and manage and control generally the administration and business of the Foundation and shall perform such other functions as may be determined by the Board.*

*(7) The Director General shall not hold any other office or position or carry on any business without the consent of the Board.*

*(8) For the purposes of appointing the person to be the Director General appointed immediately after the establishment day, the Minister may, before the establishment day, designate a person to be appointed under this section immediately after the establishment day.*

*(9) If a person has been designated in accordance with subsection (8) the Board shall, for the purposes of appointing the first person to be the Director General immediately after the establishment day, appoint that person to be the Director General.*

## **Factual Background**

7. The plaintiff's characterisation of his employment with the defendant prior to the decision to dismiss him contrasts markedly with that of the chairperson of SFI, who has sworn two affidavits on behalf of SFI in this application. I propose first setting out the matters about which there is no significant dispute.

8. By agreement dated 30 November 2021 (“**the employment contract**”), the plaintiff was appointed as Director General of SFI for a five-year term commencing on 17 January

2022. The employment contract provided for a nine month probationary period during which period the plaintiff's performance was subject to review by the Board.

9. Clause 6.1 of the employment contract provided that SFI could, upon the agreement of the Board, terminate the employment contract at any time by giving three months' notice in writing. Clause 11.1 entitled SFI to terminate the employment contract immediately by paying the plaintiff's salary in lieu of notice.

10. Clause 6.4 provided that, notwithstanding clause 6.1, SFI could terminate the plaintiff's employment contract if he was "*guilty of any misconduct or gross default in connection with or affecting the business of [SFI] or in the event of any material breach or non-observance by [the plaintiff] of any of the provisions*" of the contract. Clause 6.5 entitled SFI to suspend the plaintiff pending investigation of any of the matters referred to in Clause 6.4.

11. SFI's Disciplinary Policy is dated December 2020. The formal disciplinary procedure involves two steps. The first is an investigation which is "*solely for the purpose of fact-finding and no decision in respect of disciplinary action will be taken until after a disciplinary hearing has been convened*". The second step is a disciplinary hearing, if SFI considers there are grounds to proceed to such a hearing. The procedures for such a hearing are set out in the policy. The potential sanctions are set out. Dismissal is identified as a potential sanction in the case of a finding of serious misconduct.

12. The plaintiff's first probationary progress review report from April 2022 cited a number of serious deficiencies in the plaintiff's performance and highlighted a number of particular issues which had arisen. Of particular concern was a letter that the plaintiff had written to the Board, dated 9 February 2022, in light of its refusal to permit him to take up a role as chairperson of the Board of St James's Hospital. In the letter, the plaintiff had said the decision raised concerns for him "*about the position and disposition of the Board*". As appears from the minutes of a Board meeting held on 29 March 2022, the Board was extremely concerned about this communication from the plaintiff, for which the plaintiff ultimately apologised, with at least one Board member noting that it was, in principle, grounds for termination.

13. Other issues identified in the review include the plaintiff's decision to issue a press release regarding the humanitarian situation in Ukraine without providing the Board with a copy of the press release, and his decision to accept an appointment to the Government's Covid Advisory Committee without seeking Board approval.

14. The foregoing issues are all rehearsed in the affidavits sworn on behalf of SFI in this application, although it is also noted that the plaintiff "*successfully came through his final probation review meeting at the nine-month mark*". The plaintiff's final review report, from October 2022, noted "*a significant development of DG performance over the probation period*" and noted matters on which the plaintiff should continue to try any make progress.

15. In April 2023, it was announced that SFI and the Irish Research Council would be amalgamated. The new body was to be known as Research Ireland or Taighde Eireann. The plaintiff was announced as CEO designate of the new organisation at the end of May 2023.

16. Just prior to Christmas in 2023, the chair of the Audit and Risk Committee of SFI received five protected disclosures from senior members of staff ("**the Reporters**"), each of which made allegations against the plaintiff. The allegations included complaints of bullying by the plaintiff and of breaches by him of the requirements of good corporate governance.

17. In light of these disclosures, and pursuant to SFI's Whistleblowing Policy and Procedure, the Board of SFI formed a sub-committee, the Protected Disclosures Group ("**the PDG**") comprised of three of its members. The PDG appointed an experienced barrister ("**the Investigator**"), to conduct an independent investigation. In addition, the Board put in place a protocol pursuant to which an independent observer would be present at small group meetings involving the plaintiff and one or more of the Reporters.

18. The Investigator conducted interviews with the Reporters, with the plaintiff and with a number of other members of staff of SFI and produced a report ("**the Investigation Report**") dated 25 March 2024.

19. The Investigation Report sets out the Investigator's findings in respect of each of the Reporters' allegations. However, those findings should be seen in the context of his

*“Conclusions on Preliminary Issues”* set out at page 34 of his Report. In particular, the Report states the Investigator’s conclusion that it was not *“open to [him] to make a formal finding of misconduct on the part of any individual, and that is an issue which must be addressed much more formally by the organisation with such a person”*. He clarifies:

*“For the avoidance of doubt, accordingly, I wish to record that I am not making any findings that any individual is guilty of misconduct or gross misconduct. I am, however, making findings of fact which could be used to ground allegations of misconduct or gross misconduct. That, however, is a matter properly for the Board and/or the Committee.”*

**20.** It is worth pausing to note that the Investigator’s conclusions in this regard reflect the observations of the Court of Appeal (Irvine J, as she then was) in *Iarnród Éireann v McKelvey* [2018] IECA 346 regarding the importance of drawing a distinction between an investigative process and a disciplinary process:

*“45. The decision in Burns, because it focuses upon a charge of misconduct which was immediately to become the subject matter of a formal disciplinary hearing, does not engage with the difference between the rights to which an employee may be entitled depending upon whether they are the subject matter of what is often referred to as a preliminary investigation and a formal disciplinary process. The investigative process is usually conducted to ascertain whether there are issues that an employee should be required to answer in a formal disciplinary process and there are no immediate legal consequences that flow from such investigations. On the other hand, a formal disciplinary inquiry, which often follows on from an investigative process, has the potential to have serious consequences for the employee as it is at the end of this process that sanctions may be employed if misconduct is found. Relevant to the rights of the employee in the course of the preliminary investigation is the fact that the findings of fact made in the course of such an investigation are of significance only insofar as they may lead to a formal disciplinary process. If a formal disciplinary inquiry is later commenced the misconduct alleged will have to be proved in the course of that inquiry and for that reason the employee will be entitled to challenge all of the evidence adduced and will be entitled to call their own evidence. The distinction between these*

*two processes is helpfully considered by Laffoy J. in Maher v. Irish Permanent [1998] 4 I.R. 302.”*

21. The Investigator addressed each of the Reporter’s allegations in detail and sets out his conclusions/findings. The Investigation Report is not in issue for the purpose of determining this application for an interlocutory injunction. For present purposes, it suffices to summarise the Investigator’s conclusions. He concluded that each of the disclosures could, at least in part, be regarded as protected disclosures within the meaning of the Protected Disclosures Act 2014, as amended. In respect of the various allegations which could be said to fall under the heading of “breaches of good corporate governance”, he concluded that there had been no wrongdoing on the part of the plaintiff, though there were instances of poor management or communication. In addition, he found that the allegations of bullying, made by each of the Reporters, were not made out. However, in respect of all five of the protected disclosures, he concluded that, although the plaintiff’s behaviour did not amount to ‘bullying’ within the meaning of SFI’s Dignity at Work Policy, there were instances of inappropriate behaviour by the plaintiff. The Investigator recognised that there was a spectrum of behaviour which could be regarded as inappropriate or bullying, and in respect of two of the Reporters, he concluded that the behaviour was at the upper end of the spectrum of inappropriate behaviour, just below bullying.

22. The Investigation Report was provided to the PDG, which prepared its own report and recommendation which was presented to the Board at a meeting on 4 April 2024 (“**the PDG Report**”). The PDG Report noted that it accepted the findings of the Investigator, and concluded that the plaintiff had a “*serious case to answer under SFI’s Protection of Dignity at Work Policy*” in relation to the two Reporters whose allegations were of conduct at the higher end of the spectrum of inappropriate behaviour.

23. The PDG Report highlighted a number of instances of “*poor management*” and stated that the PDG believes that “*SFI does not currently have a well-functioning, cohesive leadership team. We believe that the situation warrants serious intervention*”.

24. The PDG made a number of recommendations. These included that the plaintiff had a case to answer in relation to his treatment of colleagues, in particular, two of the Reporters and that “*the Board should progress this matter to a disciplinary hearing.*” It recommended

that the management matters be referred to the Management Development & Remuneration Committee.

25. On 8 January 2024, the Board had written to the Minister for Further and Higher Education, Research, Innovation and Science (“**the Minister**”) regarding the fact that the protected disclosures had been made and that the PDG had been appointed to examine the matter. The Board wrote again on 5 April 2024 to update the Minister, setting out the conclusions of the PDG Report which the Board was, at that time, considering. The Minister, through the Secretary General of his Department, replied by letter dated 26 April 2024 to the Board’s letter “*relating to the ongoing internal disciplinary process*”. The letter noted the PDG’s conclusion that the plaintiff had a serious case to answer, but concluded that the Minister had no role in the internal disciplinary matter. The letter noted that since the process involved the CEO designate of Taighde Éireann, these were matters of concern to the Minister and that it would be in the best interests of the new agency that any ongoing process would be resolved in a timely manner. The letter concluded that, in circumstances where there was no finding of a breach of good corporate governance or bullying, the Board may wish to consider whether mediation would be appropriate, in keeping with SFI’s Protection of Dignity at Work Policy.

26. The Board replied to this letter on 15 May 2024, having furnished copies of the PDG Report and a redacted copy of the Investigation Report on 2 May 2024. It must be noted that the Board’s letter appears critical of the Minister’s letter of 26 April 2024, for reasons which are a little difficult to understand. The implied criticism is referenced in the conclusion of the letter which states that as much of what is dealt with in the letter predates the then Minister’s appointment, it should not be seen as a criticism of *him*. In particular, the letter expresses “*surprise*” at the Minister raising the possibility of mediation given his “*admission*” that he had “*no role*”. For my part, I cannot see any reason why the Minister should not have raised the possibility of mediation, which was, as was noted in his letter, expressly provided for in the SFI’s policies.

27. For present purposes, what is of significance is the confirmation in the letter that the Board had accepted the findings of the PDG which recommended a disciplinary process. The letter also states the following:



*“Your Department is aware of the serious nature of the findings of a comprehensive investigation by an Independent barrister and SFI’s own PDG with findings of “inappropriate behaviour” against five senior members of staff in SFI. The findings of the investigation are that the treatment of one staff member was inappropriate and very close to, if not at, the level of bullying. The treatment of another staff member was judged to be “at the upper end of inappropriate behaviour towards them.” Both were judged to be serious breaches of the Protection of Dignity at Work Policy of SFI. We will not prejudge any outcome of a disciplinary process should one commence. However, we can assure you that the Board remains committed to implementing the recommendations of the PDG fairly and appropriately, and according to the policies of SFI. We will continue to do so, having regard to our duty of care to all staff members.”*

**28.** On 12 April 2024, the plaintiff provided a medical certificate to SFI regarding a physical illness from which he was suffering, brought on by stress. Though the plaintiff was reluctant to take time off work and suggested a reduction of duties, the Board of SFI insisted that he not do work for SFI until certified as fully fit to work. In his email explaining the Board’s position, the chairperson stated that he was *“conscious that the recent processes to which you have been a party have, necessarily, been stressful, as you say, and would like to ensure you are fit to engage in relation to the outcome of that process and the recommendations arising from it”*. The plaintiff was requested to attend an occupational health physician, which he did. He was certified as fit to return to work on 20 May 2024.

**29.** During the period that the plaintiff was out of work, significant details of the investigation which had been carried out were published in the national press, including a very significant level of detail regarding the contents of the Investigation Report and the PDG Report. The Deputy Director General wrote to all staff of SFI on 10 May 2024 stating that they *“may be aware of various media reports over the last few days about Science Foundation Ireland. I have been in contact with the Chair of the Board today and we agreed that I would write to staff to assure you that SFI is fully operational and continues to deliver on its mandate”*.

**30.** On 10 May 2024, solicitors for the plaintiff wrote to the chairperson setting out a number of concerns. The letter raised, apparently for the first time, the plaintiff’s concerns about the process leading to the completion of the Investigation Report and of the PDG

Report. The letter noted that the plaintiff rejected the findings of inappropriate behaviour as being “*fundamentally flawed*”. The letter complained about the serious breach of confidentiality regarding the disclosure of the Investigation Report and PDG Report to the media and about the inadequacy of the email to staff. The letter noted the serious impact on the plaintiff’s reputation. The letter concluded that:

*“Our client feels that he has been the subject of a toxic work culture at a senior level in SFI which is evidenced from the Protected Disclosures made against him of breaches of Governance and allegations of bullying, none of which have been upheld. Our client strongly feels that he has been the subject of undermining, exclusion, and inappropriate behaviour by senior colleagues at SFI. Our client reserves his right to raise these matters in due course when he is fit to do so.”*

**31.** Solicitors for the plaintiff and defendant continued to engage over the following two weeks in relation to continued news coverage of the details of the investigation which had been conducted by SFI and the plaintiff’s complaints about the substance of that process. The plaintiff repeatedly requested that SFI correct the record and make clear that there were no allegations of misconduct against him. In a letter from the defendant’s solicitor dated 17 May 2024, it was noted that:

*“As such, it appears to us that it is in order to confirm to the Irish Times that no allegation of misconduct, as such, have been put to your client to date, rather he was the respondent in an investigation pursuant to both the Whistleblowing and Dignity at Work Policies of SFI, but that he is subject to certain findings of fact (which we note he now disputes in part) which an independent investigator noted could give rise to allegations of misconduct. You might confirm whether you wish for our client to request the Irish Times to correct the record accordingly.”*

**32.** The plaintiff did not so confirm, although correspondence continued between the solicitors. On 27 May 2024, the plaintiff’s solicitor suggested that the remaining issues from the Investigation Report did not merit a disciplinary process and could be dealt with through mediation. At the hearing of the injunction application, the plaintiff argued that the matters in respect of which it was suggested that the plaintiff had a case to answer could never justify a decision to dismiss for misconduct.

33. Both the Deputy Director General and the chairperson wrote again to all staff on 16 May 2024, in light of continuing press coverage, both highlighting the importance of respecting the confidentiality of the process. The Deputy Director General's email to staff noted that the media reports were not necessarily accurate or comprehensive.

34. The plaintiff returned to work on 20 May 2024. In light of the extensive media coverage, he sent the following email to all staff:

*"I want to take this opportunity to say that I am deeply sorry for the hurt, upset and disappointment you will have felt reading the recent media reports describing in great detail a confidential investigation within SFI. I know how committed all of you are to or work, and I know you take great professional pride in the role of Science Foundation Ireland in supporting and strengthening our research and innovation ecosystem. I therefore know how difficult it will have been to read these reports, and how deeply affected you may have been by the damage done to the reputation of the Foundation. It is an anxious and troubling period for the organisation as a whole and the people within it: you will, I know, be drawing on each other for support, and I encourage you also to seek support through Human Resources, individually or as a team, as you require it.*

*The disclosure of extensive confidential documentation and information from this investigation allowed serious allegations made in the course of that investigation, which were subsequently not upheld, to be rehearsed sensationally and in full in the national media, doing untold damage to the reputation of Science Foundation Ireland, and irreparable damage to my own health and reputation.*

*Nonetheless, please be assured of my commitment to do everything that I can to repair the situation, and to ensure the successful establishment of Research Ireland for all involved. I look forward to working with you all over the coming weeks and months to these ends.*

*I have always endeavoured to be open and transparent with you all, and to support you through change and transition, and that is my objective in writing to you today; equally,*

*I hope you will understand that I am not in a position to comment further on these matters at this time.*

**35.** The plaintiff says that he reiterated this “*apology and commitment*” at a Senior Staff meeting on 22 May 2024.

**36.** A number of the Reporters complained directly to the chairperson of the Board regarding this email. One sent an email on 20 May 2024 describing the contention that the allegations had not been upheld as a “*lie*” and seeking reassurance that the Board would act on the findings of the Investigation Report. A second Reporter sent an email on 22 May 2024 describing the email as “*completely inappropriate, provocative and fundamentally untrue*”. It criticised the Investigation Report as being very one-sided in favour of the plaintiff. The email referred to the Board’s email to the Reporter of 30 April 2024 that the Board took the findings of the Investigation Report very seriously and was committed to taking appropriate action on foot of them in line with SFI policies. The email sought an update on those actions. A third Reporter noted that the plaintiff’s email could be construed as suggesting that the allegations made against the plaintiff had been vexatious and also sought an update. One of the Reporters had also written a detailed email to the chairperson on 9 May 2024 including a number of observations, critical of the conclusions of the Investigation Report.

**37.** None of these complaints were put to the plaintiff, who was not, it appears, made aware of any issues with his email of 20 May 2024 until receipt of the defendant’s replying affidavits.

**38.** The chairperson’s affidavits record that the Board met on 20 May 2024 in an extraordinary meeting “*to discuss the situation*” and resolved to meet a week later to discuss the situation further. No further information regarding what was discussed on 20 May 2024 have been provided other than that it “*discussed the dysfunction at SFI at this meeting*”. No minutes of that Board meeting or the subsequent meeting on 27 May 2024 have been exhibited by the defendant.

39. At its meeting on 27 May 2024, the Board resolved to terminate the plaintiff's employment. It communicated this decision to him that evening by email which, in relevant part, was in the following terms:

*“The Board of the Foundation met this afternoon and noted the contents of the Report of the Protected Disclosures Group (the “PDG Report”) following the findings of the Investigation Report of Tom Mallon BL (the “Investigation Report”). The Board repeated its great concern about the current functioning of the Foundation. It is the considered view of the Board that there now exists a threat of the most serious kind to the performance by the Foundation of its statutory responsibilities.*

*The findings of the PDG Report, which accept the findings of the Investigation Report, have previously been adopted by the Board. The Board noted that there were no findings of bullying made against you, or breaches of good corporate governance, but that the PDG had recommended the invocation of disciplinary procedures against you in respect of the instances of inappropriate behaviour found in the Investigation Report, which findings we understand you do not accept.*

*The Board must consider whether it is in the interests of the Foundation to prolong this matter and the discord it has produced, including the loss of trust at the Executive level that is a clear threat to the ability of the Foundation to meet its statutory functions. The Board has reached the conclusion that it is neither in the Foundation's interest nor yours to initiate a disciplinary process on foot of the PDG Report but it can't ignore the breakdown in the relationship between you and the Executive Committee. In the Board's view, the management of the Foundation is not functioning effectively, and the Board cannot allow that situation to continue such that the Foundation is at serious risk of being unable to perform its statutory responsibilities. Your position in rejecting certain findings of the Investigation Report is noted but the Board has decided, with regret, that termination of your contract of employment in accordance with both Clause 6.1 and Clause 11.1 thereof is the correct course.*

40. The plaintiff sought and obtained an interim injunction on 30 May 2024 and the matter was returned to the following day. On 31 May 2024, the defendant indicated to the court that its position was that the plaintiff had been dismissed in accordance with the terms of his

employment contract, not for misconduct. The parties agreed a timetable for exchange of affidavits for the hearing of the interlocutory injunction. The matter was heard on 11 June 2024. During the course of the hearing, I made an order preventing the reporting of any matter which might tend to identify the persons who had made protected disclosures. That order remains in force.

## **Issues in Dispute**

41. The above matters are not in dispute. The plaintiff and the defendant are, however, in significant dispute regarding the manner in which SFI was functioning prior to his dismissal, and regarding the reasons for his dismissal.

42. The plaintiff says that he was appointed to achieve and deliver considerable change and reform to SFI and that he met significant resistance to that change from some in senior management. He also says that the Board was opposed to the amalgamation with the Irish Research Council and that his appointment as CEO Designate of Research Ireland led to tension with the Board. It is the resistance to the change which he was trying to deliver which he suggests was behind the difficulties that he faced, and that SFI is facing. He says that he believes that allegations against him were without foundation and alleges that the protected disclosures, all of which were made within the space of three days, were made on a “*co-ordinated basis*” and that the Reporters acted in “*concert in the preparation of the reports and that the reports represented an orchestrated attempt by them to frustrate and avoid change, either by securing [his] dismissal or making it impossible for the changes to be implemented*”.

43. In a particularly serious allegation, he contends that the investigation process was:

“... *part of an orchestrated effort to exit me from SFI. It appears to me that the primary objective of the Board was to deprive me of the position of CEO of Research Ireland in order to undermine or frustrate the Government decision to amalgamate SFI and IRC or to gain control over the amalgamation process and steer it in a direction more aligned with the views of the Board...*”

44. Despite his allegations, the plaintiff contends that there is no good or substantial reason why he cannot return to his job and continue to perform it pending the amalgamation into Research Ireland, noting that the Board of SFI will be dissolved as soon as that amalgamation occurs.

45. The affidavits filed on behalf of the defendant dispute any characterisation of the Board as being resistant to change or opposed to the amalgamation and reject what are described as the plaintiff's "*extraordinary allegations and conspiracy theories*" about an orchestrated attempt to oust him or subvert the amalgamation process. Having rehearsed the issues which had arisen during the plaintiff's probation period, the affidavits set out that issues began to be raised about the plaintiff's performance through "*back channel*" communications to the Board approximately 14 months after his employment commenced.

46. Under the heading "Dysfunction within SFI under the Plaintiff's leadership", it is averred that the "*findings of the reports show the level of dysfunction that was developing at SFI due to the apparent breakdown in trust between the Plaintiff and members of the senior management team and beyond.*" It is said that the situation was "*dire*" prior to completion of the investigation but became "*substantially worse and increasingly unsustainable*" when the investigation was completed. The affidavits then lists thirty one examples of purported dysfunction within SFI, culminating in the plaintiff's email to staff on 20 May 2024. Many, though not all, of these relate to, or at the very least are connected with, the issues which have arisen between the plaintiff and senior management and which were the subject of protected disclosures, or have arisen as a result of the investigation process and the protective measures put in place by the Board. The Board's position is that it was simply not feasible for the plaintiff to remain in his role.

## **Arguments**

47. The plaintiff's contention is that he has been dismissed because of the allegations of inappropriate behaviour made against him, *i.e.* for misconduct. He contends that prior to any such dismissal, he was entitled to fair procedures, that he was afforded no procedures at all and that accordingly his dismissal is unlawful.

48. He accepts that in order to secure, in effect, a mandatory injunction restraining his dismissal, he must meet a high threshold, a strong case likely to succeed, but argues that that is clearly met where he has been afforded no fair procedures. He argues that damages will clearly not be an adequate remedy in circumstances where his reputation will be irreparably harmed if the defendant is permitted to dismiss him for misconduct without having afforded him fair procedures. Moreover, he avers that he believes that he will lose the opportunity of a lifetime, to be CEO of Research Ireland, if dismissed from SFI. The least risk of injustice, he contends, lies with the grant of an injunction.

49. The defendant contends that the plaintiff was not dismissed for misconduct, but, rather, had his contract terminated in accordance with his contract and therefore was not entitled to fair procedures, only compliance by the defendant with the relevant contractual provisions. It says that it complied with those provisions and therefore the plaintiff has no complaint at all. It says that, in any event, given the refusal by some members of the staff of SFI to work with the plaintiff, it is not sustainable for the plaintiff to return to work pending the trial of the action.

50. It argues that, in circumstances where the plaintiff has been dismissed in accordance with his contract, his dismissal cannot be regarded as *wrongful*. If the plaintiff wishes to contend that his dismissal is *unfair*, the appropriate remedy for the plaintiff is to pursue a claim for unfair dismissal before the Workplace Relations Commission.

51. Since the plaintiff accepts that he must establish a strong case likely to succeed at trial and that the question of whether the balance of convenience or balance of justice lies in favour of granting an injunction only arises if a plaintiff meets that threshold, it is convenient to address that threshold question first, before considering, if necessary, where the least risk of injustice lies.



## Applicable law

### *i. Employment injunctions*

52. The principles concerning the grant of an interlocutory injunction are well understood and have recently been clarified in *Merck, Sharp & Dohme Corporation v Clonmel Healthcare Limited* [2019] IESC 65, [2020] 2 IR 1. In that case, the Supreme Court recalibrated the *Campus Oil* test for the grant of an interlocutory injunction and outlined the steps which might be followed in an appropriate case (at p. 36):

*“(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted; (2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the American Cyanimid and Campus Oil approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit; (3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice; (4) The most important element in that balance is, in most cases, the question of adequacy of damages; (5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy; (6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it may be just and convenient*

*to grant an interlocutory injunction, even though damages are an available remedy at trial;*

*(7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;*

*(8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined.”*

**53.** In order to obtain an injunction to prevent termination of the employment relationship, it is necessary to establish not just a fair question to be tried but a strong case likely to succeed at hearing (see *Maha Lingam v HSE* [2005] IESC 89; [2006] 17 ELR 137).

**54.** In *Taite v Beades* [2019] IESC 92, Irvine J sought to explain the somewhat elusive concept of a “strong case”:

*“26. In this context the reference to a “higher standard” is to the degree of assuredness the court should have that the applicant will succeed in his or her claim at the trial of the action. Adjusting that standard shows how courts adapt the test for awarding interlocutory relief where there would be a risk of injustice were such acute relief available too readily.”*

ii. *Entitlement to fair procedures*

**55.** It is well-settled that an employee is entitled to fair procedures in disciplinary matters, though the precise requirements of such a procedure can only be determined on a case-by-case basis (see, for instance, *Rowland v An Post* [2017] IESC 20; [2017] 1 IR 355).

56. However, it is equally well established that an employer is entitled to dismiss an employee on the giving of reasonable notice. In *Sheehy v Ryan* [2008] 4 IR 258, Geoghegan J endorsed the view of Carroll J in the High Court that “*an employer is entitled to dismiss an employee for any reason or no reason on giving reasonable notice*” absent clear terms to the contrary in the employment contract.

57. The leading case, for present purposes, is that of the Court of Appeal in *O’Donovan v Over-C Technology Limited* [2021] IECA 37. The High Court (Keane J) had granted the plaintiff an injunction restraining his dismissal, notwithstanding the court’s conclusion that the plaintiff had not made out a strong case that his dismissal was for misconduct rather than poor performance. The plaintiff did not appeal that finding. This was decisive for the Court of Appeal in allowing the appeal. The Court (Costello J) concluded that there was no requirement for fair procedures where it was accepted that the dismissal was on grounds of poor performance:

“56. *If an employer has a contractual right – in this case a clear express right – to dismiss an employee on notice without giving any reason, the court cannot imply a term that the dismissal may only take place if fair procedures have been afforded to the employee, save where the employee is dismissed for misconduct.*”

58. She referred to the decision of Clarke J in *Carroll v Bus Átha Cliath* [2005] IEHC 1; [2005] 4 I.R. 184, who reiterated that if a contract of employment entitles an employer to dismiss an employee for no reason then the employee is only entitled to payment for the appropriate notice period. It was only where the reason relied on for dismissal was misconduct that a requirement for fair procedures arose. She cited the following passage from that judgment:

“53. *The traditional position at common law was that a contract of employment could be terminated on reasonable notice without giving any reason. In those circumstances it was obvious that the only remedy for a breach of contract by way of dismissal was for the payment of the amount that would have been earned had appropriate notice been given. However, it is now frequently the case that employees cannot be dismissed, as a matter of contract, save for good reason such as incapacity, stated misbehaviour, redundancy or the like. It would appear that the development of*

*the law in relation to affording employees a certain compliance with the rules of natural justice in respect of possible dismissal derives, at least in material part, from this development. If the stated reason for seeking to dismiss an employee is an allegation of misconduct then the courts have, consistently, held that there is an obligation to afford that employee fair procedures in respect of any determination leading to such a dismissal. That does not alter the fact that an employer may still, if he is contractually free so to do, dismiss an employee for no reason. It simply means that where an employer is obliged to rely upon stated misconduct for a dismissal or, where not so obliged chooses to rely upon stated misconduct, the employer concerned is obliged to conduct the process leading to a determination as to whether there was such misconduct in accordance with many of the principles of natural justice.”*

**59.** The Court of Appeal also referred to the decision of the High Court (Laffoy J) in *Naujoks v The Institute of Bioprocessing Research* [2006] IEHC 358; [2007] 18 ELR 25 , a decision relied on by the plaintiff in this case. In *Naujoks*, the plaintiff sought an injunction restraining his dismissal as CEO of the defendant. He was told that his dismissal was due to a loss of confidence in his management style arising from disputes which had arisen between the plaintiff and the head of the research team. The defendant also averred that the plaintiff had not been dismissed by reason of misconduct. As pointed out in *Hughes v Mongoddb Ltd* [2014] IEHC 335, the decision in that case turned, to a significant degree, on the particular contractual provisions at issue, in which “*failure to discharge duties*” was expressly identified as a breach of contract which could be a basis for termination, but only in accordance with fair procedures. The relevant portion of the judgment in that case is as follows:

*23. The second strand is that the plaintiff has not been afforded fair procedures, in that he has not been given an opportunity to put forward his point of view in relation to the management issues which precipitated the action taken by the defendant on 12th October, 2006. The defendant’s answer to that is that the question of fair procedures does not arise, because the defendant has not made any allegation of misconduct against the plaintiff. I have difficulty with the stance adopted by the defendant on this point. It is true that Mr. Gantly has asserted that the plaintiff’s employment was not terminated by reason of misconduct. The fact remains, however, that the reason given for the determination of the plaintiff’s employment is that the Board had lost confidence*

*in his ability to manage the Institute. Insofar as the defendant has explained how the Board reached that conclusion, it has done so by disputing the plaintiff's averments as to the issues which arose in relation to the research team and its head. Mr. Gantly has averred that the plaintiff's management style and his manner of communication with members of the research team led to "serious human resources issues" arising. The inference to be drawn is that Mr. Gantly and the non-executive directors made a judgment as to who was responsible for the "serious human resources issues" which had arisen. It seems to me that that is not far removed from making a judgment that there was a failure on the part of the plaintiff to properly discharge his duties as CEO, which would entitle the defendant to summarily dismiss the plaintiff, but subject to affording him fair procedures. On this point, I can put the matter no further than that, having regard to the facts as disclosed in the affidavits before the court, it is not an answer to the plaintiff's contention that he should have been, but was not, afforded fair procedures that it is the defendant's stated position that his contract was not terminated on the grounds of misconduct."*

**60.** Costello J concluded that this decision was not, as appeared to have been contended by the plaintiff in *O'Donovan*, authority for the proposition that fair procedures were required in the case of termination on the grounds of poor performance. It is plain that this is so. However, it remains authority for the proposition that an assertion by an employer that the reason for termination is a reason which doesn't require the application of fair procedures is not, of itself, sufficient to displace the requirement for fair procedures. Put otherwise, the requirement for fair procedures depends on the reasons for dismissal as a matter of substance, not on the employer's characterisation of those reasons.

**61.** During the course of the hearing, I queried with counsel for the defendant whether there was any case in which an employer had successfully resisted a complaint about the lack of fair procedures, having commenced a disciplinary process but then having "changed course" and terminated an employee's contract for some other stated reason. The defendant pointed to the decision in *Bradshaw v Murphy* [2014] IEHC 146. In that case, the plaintiff had instituted proceedings in circumstances where he apprehended that he was to be dismissed for particular alleged misconduct as indicated to him at a meeting on 11 December 2013. Prior to the hearing of an injunction application, the defendant proffered an undertaking that they would not dismiss the plaintiff for the alleged misconduct referenced at the December

meeting. However, the plaintiff sought an injunction restraining his dismissal *simpliciter*. The High Court (Finlay Geoghegan J) concluded that he was not entitled to such an injunction. Having referred to the decision of Clarke J in *Carroll*, she noted the defendant's submission that he remained entitled to dismiss the plaintiff in accordance with his contract:

*“15. That submission appears to me correct. Whilst the plaintiff may have raised a serious issue to be tried as to whether the Company is entitled to give effect to a dismissal indicated in the meetings of 11<sup>th</sup>/12<sup>th</sup> December, 2013, it has not, on the evidence in the affidavits sworn in the interlocutory proceedings, raised a serious issue to be tried as to the Company's entitlement at common law to terminate the employment of the plaintiff, without cause, in accordance with the relevant contractual provisions. The fact that the defendants previously threatened to dismiss, for the reasons stated on 11<sup>th</sup> December, 2013, does not preclude the defendants from terminating in accordance with the contractual provisions. The defendants have undertaken to the Court not to dismiss by reason of matters raised on 11<sup>th</sup> December, 2013.”*

**62.** Thus, *Bradshaw* is not a case in which the employer had actually “changed course”, having commenced a disciplinary process, but rather a case in which the court recognised that, in principle, the commencement of a disciplinary process against an employee did not preclude an employer from relying on its contractual entitlement to terminate that employee's contract.

**63.** An extreme example of such a change of course was at issue in *Grenet v Electronic Arts Ireland Limited* [2018] IEHC 786. In that case, the plaintiff had been notified in a letter dated 14 November 2018 that his contract had been terminated arising from an allegation of misconduct, an alleged inappropriate comment made during a one-on-one conference call. The plaintiff alleged that this was a breach of his entitlement to fair procedures. He instituted proceedings and was granted an interim injunction restraining his dismissal on 6 December 2018. The defendant then sent a letter dated 10 December 2018 in which it purported to withdraw the letter terminating his employment and said it would not be proceeding further with the matters dealt with in that letter. However, in the same letter, it purported to terminate the plaintiff's contract pursuant to his contractual provisions, which allowed for a ‘no-fault’ dismissal.

64. The court (O'Connor J) noted that at the trial of the action, the court would have to address an issue which had not been addressed in the cases to date, "*Can an employer who alleges and acts upon harassment-type complaints to the point of termination of employment abandon same to avail of a termination provision with no protection of the reputation of the dismissed employee?*"

65. He concluded that the authorities did leave it open for an employee to challenge a no-fault termination which is dressed up as a breach of contract where the evidence suggested that this was not the case. The court granted an injunction concluding that "*the state of the evidence at the moment is that the so-called no-fault termination is, on the balance of probabilities, a cynical contrivance*".

#### **Application of principles – strong case**

66. Although the defendant had engaged in a lengthy investigation process and had taken significant steps, including the appointment of an external expert, to assist in that process, it does not advance an argument that it would have a defence to a claim that it would have been entitled to dismiss the plaintiff for misconduct without affording a further procedure. This is unsurprising. The defendant had conducted step one of the process mandated by its own Disciplinary Policy, and had made a decision to move to step two, the disciplinary hearing, but it had not taken any of the steps involved in step two. It could not, therefore, plausibly have argued that it had complied with the requirements of fair procedures.

67. The defendant argues instead that it was not required to afford the plaintiff any fair procedures because he was dismissed in accordance with the terms of his employment contract in what the defendant's legal submissions characterise as a "no fault" termination. It must be said that this characterisation belies somewhat the arguments advanced on behalf of the defendant and, in particular, the affidavits sworn on its behalf in which multiple instances of alleged dysfunction in the operation of SFI are detailed. It is difficult to avoid the inference that the Board considers that the plaintiff was at "fault" for that dysfunction. At the very least, the defendant seems to suggest that the plaintiff was dismissed for what was described in *O'Donovan* as 'poor performance'.

68. However, the question for the court on this interlocutory application is whether the plaintiff has established a strong case that, notwithstanding the defendant's averments to the contrary, the decision to terminate him was because of the allegations of breaches of SFI's Dignity at Work Policy, *i.e.* of misconduct. Even if characterised as dismissal on grounds of poor performance, *O'Donovan* makes clear, no fair procedures are required and therefore there would be no grounds for the grant of an injunction.

69. The defendant points out that no allegations of misconduct had, in fact, been put to the plaintiff and no disciplinary hearing had in fact been convened. This wasn't, it says, a case of a change of course such as was in issue in *Bradshaw*, still less a case like *Grenet* where there had been a termination on grounds of misconduct in breach of fair procedures, and then the employer purported to terminate on other grounds. I think that the fact that no disciplinary hearing had yet been convened and that allegations of misconduct had not formally been put to the plaintiff preliminary to such a hearing is of no great significance in this case. The first stage of the disciplinary process mandated by SFI's Disciplinary Policy had taken place. The PDG had made a recommendation to progress the matter to a disciplinary hearing. The recommendations of the PDG had been adopted by the Board, consistent with the requirements of the Disciplinary Policy. The Board had confirmed to the Minister that SFI would be following the recommendations of the PDG, and had written to the plaintiff about engaging in the recommendations from the PDG report. Although no formal allegations of misconduct had been put to the plaintiff, a necessary prelude to the holding of a disciplinary hearing *per* the Disciplinary Policy, there was no doubt what allegations were in issue. It is simply not a fair representation of the factual position, therefore, to suggest that there was no disciplinary process in being.

70. *Bradshaw* provides authority for the proposition that, notwithstanding an extant disciplinary process, an employer remains entitled to dismiss an employee in accordance with the terms of the contract and *O'Donovan* makes clear that fair procedures are only required if the actual reason for dismissal is misconduct. But neither is authority for the proposition that the employer's characterisation of the reasons for a dismissal as being for 'poor performance' or 'no fault' means that the court must accept that this is so. Indeed, the question of the reason for the dismissal was the first issue which the court had to address in *O'Donovan*.



71. The evidence does not suggest that the defendant's contention that this was simply a contractual termination is a "*cynical contrivance*", as was the court's conclusion at the interlocutory stage in *Grenet*, or that the decision to dismiss was not made in good faith (cf. *Kearney v Byrne Wallace* [2019] IECA 206). In those circumstances, and in light of the express averments on behalf of the Board as to why it did decide to terminate the plaintiff's contract, the plaintiff faced a formidable hurdle in seeking to establish a strong case that he had been dismissed on grounds of misconduct. In this regard, it is important to emphasise that the court cannot resolve any dispute of facts in an interlocutory application. I am not satisfied that he has overcome the necessary hurdle. In reaching that conclusion, I have had regard, in particular, to the following matters.

72. First, the stated position of the Board *per* its adoption of the recommendations of the PDG Report was that there were allegations against the plaintiff which merited and would be brought to a disciplinary hearing. The Board's letter to the Minister of 14 May 2024 described these as "*serious breaches*" of SFI's Dignity at Work Policy. That disciplinary hearing had not yet been convened.

73. Second, the letter purporting to terminate the plaintiff's employment clearly illustrates that these allegations were part of the Board's consideration when making the decision to dismiss him. The letter references the allegations, the findings of the Investigation Report and the PDG Report and a notional disciplinary hearing. It did, also, reference the contractual provisions entitling the defendant to dismiss the plaintiff without fault on his part. The defendant's submissions, in contending that the plaintiff's dismissal was not "conduct-based", argue that "*there is no extant allegation of misconduct and the letter of termination makes this clear*". Frankly, the letter does not make that clear despite the reference to the relevant contractual provisions. The reference to not "*prolong[ing] this matter and the discord it has produced*" seemed to reference the disciplinary matters which had just been discussed in the letter. The plaintiff, when receiving this letter, clearly understood that the Board's decision to dismiss him related to the allegations against him. In circumstances where concerns about his email of 20 May 2024 had not been raised with him, and he had been given no prior warning that his dismissal was being considered by the Board, in my view, it was reasonable for him to have done so. The defendant's submissions seek to make a virtue of the fact that on the first occasion that SFI were represented in court

in these proceedings, it was made clear that the plaintiff had not been dismissed for misconduct. But the letter communicating the decision to dismiss him had left significant doubt that that was the case.

74. If that were the only evidence from which the court was required to draw an inference as to the reason for the plaintiff's dismissal, it might have been sufficient to draw an inference that the decision to dismiss was on the grounds of misconduct and the plaintiff would, in my view, have met the threshold of establishing a strong case likely to succeed. However, following the institution of the proceedings, the position changed decisively.

75. In the affidavits filed on behalf of SFI, it is stated in the clearest of terms that the Board made the decision to dismiss the plaintiff was not on the grounds of misconduct, but was because of what it calls the "*dire*" situation in SFI and the "*dysfunction*" in the organisation. I accept that the dysfunction described in the SFI's affidavits was, to a perhaps significant extent, related to or was connected with the matters which were the subject of the protected disclosures, the process of investigating them, and ultimately the matters in respect of which the Board had decided to hold a disciplinary hearing. It is also notable that, other than in connection with the matters the subject of the allegations, there is no documentary evidence and no minutes of Board meetings reflecting the concern over dysfunction in SFI which are rehearsed in the affidavits, nor is there any evidence that the Board's apparent concerns about the plaintiff's performance were formally raised with the plaintiff other than those issues which were raised during his probationary period. However, even on the plaintiff's account, it cannot be denied that his relatively short tenure as Director General of SFI had been marked by turbulence.

76. Be that as it may, the Board's affidavits make clear that it did not make a decision that the plaintiff should be dismissed because of misconduct. There is no evidence of such a decision having been made. Despite the lack of clarity in the Board's letter of 27 May 2024, it could not be said that the "*stated reason*" for dismissal, as Clarke J put it in *Carroll*, was misconduct. The authorities are clear that only such a process attracts the requirements of fair procedures. Otherwise, an employee's remedy is with the Workplace Relations Commission.

77. The Board, it is not disputed, was entitled to dismiss the plaintiff, in accordance with his contractual terms, for no reason at all. However, unsurprisingly, it doesn't suggest that it had no reason to do so. The reasons it gives are, no doubt, connected with the disruption in the organisation which had arisen following the making of the protected disclosures. It may be that the reasons for the plaintiff's dismissal and those allegations cannot be decoupled and the plaintiff may, at the trial of the action, be able to show that this was, in substance, a dismissal for misconduct. But on the state of the evidence to date, he has not succeeded in establishing a strong case likely to succeed that the Board's decision was based on its conclusion that he was guilty of misconduct and that that was the basis for dismissing him. The Board had clearly adopted the PDG's recommendation that there was a basis for proceeding to a disciplinary hearing and had made clear its intention to go through the required disciplinary process, but the evidence does not establish that, in effect, it then determined that disciplinary issue and decided to terminate the plaintiff's employment.

78. Although, at first blush, the circumstances of the plaintiff's case bear a striking resemblance to those at issue in *Naujoks*, that case can be distinguished. In that case, the court concluded that the defendant's stated reasons for dismissal were, at least on the evidence at the interlocutory stage, reasons which, *per* the plaintiff's contract, attracted the requirements of fair procedures. That is simply not the case here.

79. It is not made clear in SFI's affidavits when the possibility of terminating the plaintiff's position was first discussed. It appears, however, that the plaintiff's email to staff on 20 May 2024 and the negative reaction to it by the Reporters had a significant bearing on the Board's considerations at its Board meeting the following Monday when it made its decision to dismiss the plaintiff. The plaintiff says that he stands over that email which his counsel described as accurate. I have to say I can understand why it may have been badly received by the Reporters and would have raised concerns for the Board. I don't need to comment further. It may also be that, in having regard to this email and the reaction to it, the Board's decision-making crossed a threshold into considerations of misconduct. But the plaintiff has not established a strong case that he is likely to succeed at trial in such an argument.

80. There may not always be a bright-line distinction to be drawn between allegations of misconduct, and those of poor performance. Certainly, it could not be said that only allegations of misconduct carry implications for an employee's reputation. It would be

tempting to conclude that because the particular circumstances of the plaintiff's dismissal here, exacerbated by the media coverage of what should have remained a confidential process, has potentially impacted on the plaintiff's reputation, his dismissal should be characterised as dismissal for misconduct, thus attracting fair procedures. However, that is to reverse the logic of *O'Donovan*, by which this court is bound. It is the reason for dismissal which can trigger the right to fair procedures, not the potential impact on reputation.

**81.** Finally, it is worth noting that the plaintiff's own argument that the matters in respect of which it was decided to proceed to a disciplinary hearing could never be regarded as sufficiently serious to warrant dismissal also somewhat undermine his contention that those are the very reasons why he was dismissed.

**82.** In the circumstances, the plaintiff has not met the necessary threshold for the grant of mandatory relief.

### **Least risk of injustice**

**83.** It is not strictly necessary, therefore, for me to consider the question of the least risk of injustice but for the sake of completeness, I will address the issue briefly.

**84.** First, it is necessary to observe that the affidavits filed in the proceedings will, no doubt, have damaged the relationship between the Board and the plaintiff. Of course, the plaintiff was entitled to make his case and to describe the situation in SFI as he perceived it, but the accusations he has levelled against the Board certainly undermine his suggestion that there is no good reason why he could not resume his position as Director General. The allegations made in his affidavits seem to be a far more direct challenge to the Board than his letter of 9 February 2022, questioning its position and disposition, to which the Board took such great exception. There must be a very serious question over whether this is an employer/employee relationship which could ever be repaired, even if the plaintiff ultimately succeeded in these proceedings. The plaintiff's suggestion that, in effect, this doesn't matter because the Board is likely to be dissolved soon does not seem to me to be a basis upon which the court could decide to grant relief.

**85.** Even had the plaintiff established a strong case likely to succeed, it would not have been appropriate to make an order requiring that the defendant facilitate the plaintiff's return to work. This would involve the court in micro-managing the plaintiff's employment and would undermine the defendant's ability to ensure that its duty of care to all of its employees of SFI was adequately addressed. I accept that the plaintiff had been able to continue at work while the investigation process was ongoing, subject to certain protective measures being put in place, but things had moved on since then.

**86.** I also note that the plaintiff relies on the statutory duties of the Director General pursuant to section 13(6) of the 2003 Act to support a contention that he must be permitted to return to work to discharge those duties. However, in circumstances where the appointment of the Director General is a matter for the Board, I do not think that this could have a bearing on this issue.

**87.** In light of the decision in *Bradshaw*, it would have been inappropriate to grant an injunction which would have had the effect of restraining the defendant from dismissing the plaintiff in accordance with his contractual provisions. In those circumstances, and given the stated position of the Board of the defendant in these proceedings, one would have to question what purpose any injunction might have served.

**88.** One of the most unusual features of this application, however, is that it appears that the defendant is soon to be amalgamated with another body, the Irish Research Council. The plaintiff's concern seems at least as much with the potential impact on his position as designated CEO of the new organisation, Research Ireland, as with his entitlement to continue as Director General of SFI. In this regard, the plaintiff may have already achieved some of what he sought from these proceedings by having SFI confirm, in clear terms, that he was not dismissed for misconduct.

**89.** In any event, the loss of the CEO Designate role does not flow automatically from his dismissal, and as SFI point out, it has no role in the appointment of the new CEO. Rather, the loss of opportunity is something which the plaintiff apprehends. The timing of the establishment of the new body, and the position of CEO are, of course, matters entirely for the Minister and could not be directly impacted by the grant or refusal of an injunction in these proceedings. Whereas the least risk of injustice might typically lie in favour of an

employee who had established a strong case likely to succeed, given the unusual situation here, that may not have been the case in this instance.

**90.** In those circumstances, the least risk of injustice would certainly not have been served by granting the plaintiff the remedies sought, reinstatement and an injunction restraining his termination. In light of my conclusions on the threshold issue, it is unnecessary to explore with the parties whether some other, very limited, form of injunction might have been appropriate pending trial.

## **Conclusion**

**91.** In the circumstances, I refuse the plaintiff's application for an interlocutory injunction. I propose making an order discharging the interim injunction granted on 30 May 2024. For the avoidance of doubt, the interim injunction will remain in place pending the making of final orders on this application. Should the parties require, I will give directions for the exchange of pleadings to facilitate an early hearing of these proceedings. I will list the matter on 4 July 2024 at 10.30 am for the purpose of finalising these matters and addressing the question of costs.