REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2019-00558**

BETWEEN

KENDRA THOMAS-LONG

Claimant

AND

THE NATIONAL COMMISSION FOR SELF HELP LIMITED

Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Tuesday 18 June 2019

Appearances:

Mr. Lloyd Elcock instructed by Ms. Georgonia Auguste, Attorneys at Law for the Claimant.
Mr. Frederick Gilkes and Mr. Jean-Louis Kelly instructed by Mr. Danté Selman-Carrington, Attorneys at Law for the Defendant.

JUDGMENT

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1. The summary dismissal of an employee is a traumatic event. For the employer, in most cases, such dismissal represents a breakdown in trust and confidence and the culmination of an unproductive working relationship. For the employee, a summary dismissal may represent more than just lost wages but a social stigma and loss of self-esteem. For very good reason the disciplining of an employee ought to be progressive with a dismissal being an option of last resort. In these types of relational disputes, open communication and conciliatory approaches should feature in the management of the relationship between employer and employee. However, recognizing the very sensitive and personal relationship that exists between the employer and the employee enjoined in a symbiotic bond of

productivity, a Court should exercise care in granting interim relief where a fundamental feature of the employment relationship of trust and confidence has broken down.

2. In this matter, the National Commission for Self Help Limited (NCSHL) dismissed its Corporate Secretary and Legal Adviser, Ms. Kendra Thomas-Long by letter 8th January 2019 on grounds of gross misconduct. Since that time another Corporate Secretary has been retained. Kendra challenges this dismissal as a breach of the express and implied terms of her contract and now seeks interim relief in her application, filed approximately one month after her termination, to effectively reinstate her to her former position on NCSHL's payroll until the determination of her claim.[1]

3. For the reasons set out in this judgment the greater risk of injustice lies in granting the injunction. In my view the employer ought not to be compelled to specifically perform a contract of employment in the circumstances of this case where it is clear that there is a breakdown in trust and confidence between the parties and where, given the circumstances of her employment, even if the Claimant is ultimately successful at the trial, her real remedy will lie in common law or equitable damages.

Brief Background

4. At the appropriate stage the Court would investigate the facts of this claim in more detail at the trial. At the moment, it will suffice if I recite some brief facts by way of background to this application.

[1] The Claimant claims against the Defendant for:
   a) A declaration that the purported summary dismissal of the Claimant by the Defendant on 8th January 2019 from her position as its Corporate Secretary and Legal Adviser is null and void and of no effect;
   b) A declaration that she is and continues to be the de jure Corporate Secretary and Legal Adviser of the Defendant on the same terms and conditions on which she was appointed thereto by a contract of employment executed on the 27th of October 2016 by the Claimant and the Defendant;
   c) An order that the Defendant shall pay to the Claimant on or before the 15th February 2019 arrears of salary and other emoluments from the 9th of January 2019 to the 31st of January 2019 and shall continue to keep her on its payroll unless and until her employment is lawfully terminated by the Defendant;
   d) An injunction to restrain the Defendant from continuing to treat the Claimant as a dismissed employee until the hearing and determination of this action or until further order of the Court;
   e) Damages for breach of the Claimant's contract of said employment with the Defendant including exemplary damages and/or aggravated damages;
   f) Costs;
   g) Interest pursuant to sections 25 and 25A of the Supreme Court of Judicature Act;
   h) Such further or other relief as the Court may deem fair and just.

5. Kendra was employed on a fixed contract for a period of three years from 1st November 2016 to 31st October 2019. Pursuant to Clause 2.0 of her contract, Kendra's employment was subject to the Company's general and/or specific regulations and policies and the Company's Code of Conduct, Dress Code and Policies on Disciplinary Actions.

6. By Clause 16 (ii) of her contract, NCSHL was entitled to dismiss her for breach of contract, misconduct and poor performance as reflected in a performance appraisal report by giving her one month's notice or salary in lieu of notice. Clauses 16(iii) and (iv) of the contract permitted NCSHL to dismiss Kendra with immediate effect for breach of contract or misconduct without notice and salary in lieu of notice. There is no contention in this application that her contract ought to be or would be renewed for any future term. Kendra has not suggested that her term of employment may go beyond her contractually fixed term of three (3) years.

7. Kendra contends that NCSHL's Policy and Procedures Manual was incorporated into her terms and conditions of employment, a matter which is disputed by NCSHL. The material terms of that manual set out a detailed grievance procedure. It also sets out a process to effect the dismissal of an employee.

8. Differences arose between her and the Chief Executive Officer (CEO) Mr. Elroy Julien on 14th November 2018 which she contends emanated from the failure of the CEO and/or his delegates to provide an amended Board Note on NCSHL's indebtedness to her. She contends that he threatened to make her life at work "miserable" and proceeded to do so. His conduct was designed to bully, victimize and frustrate her in the performance of her duties and functions to the Board of Directors. Due to this, she raised two grievances against him on 21st November 2018 and 6th December 2018. She contends that in accordance with NCSHL's grievance policy, grievances raised by an employee in relation to a process or decision of Management or against a named person require that an investigation and/or hearing be convened within ten (10) days from receipt of the complaint. NCSHL, however, failed to treat with the several grievances raised by her.

9. Instead of dealing with her grievances, she was subjected to disciplinary action. On 18th

December 2018, she was handed a letter directing her to proceed on administrative leave with pay and answer two allegations of gross misconduct and conflict of interest.

10. Briefly these two allegations are as follows: There was a suspicion of conflict of interest on her part because she recommended payment to an Industrial Relations Consultant who represented NCSHL in a trade dispute at the Industrial Court and also represented her in a private trade dispute with the Unit Trust Corporation of Trinidad and Tobago. She failed to declare her interest as it related to NCSHL's Policy and Procedure Manual where it is stated that employees acting on behalf of the NCSHL should scrupulously avoid any danger of an actual or apparent conflict of interest between their professional duties and their private interests that could adversely influence their judgement, objectivity or loyalty to the company in conducting the NCSHL's business activities and assignments.

11. Secondly, by her email dated 5th December 2018, she demonstrated gross insubordination/gross misconduct when she refused to commence and comply with any of her Board related duties and responsibilities outlined in her job description until the Chairman and the Board of Directors agreed to meet with her. This, the Board considered, as an attempt by her to hold the Company hostage thereby undermining the entire operations of NCSHL.

12. These allegations were also made against the backdrop of her employment history revealing a tense and turbulent relationship with the Board. She was given notice by NCSHL of her past employment history and previous disciplinary actions which briefly were: On 6th June 2017 the former Chairman of the NCSHL had cause to issue a formal warning to her on her conduct and performance in her employment as Corporate Secretary and Legal Adviser to the Commission. She was advised that her unacceptable behaviour at the meeting of the Board of Directors on 18th May 2017 may constitute gross misconduct where she defied and undermined the authority of the Chairman by arguing with him and insisting he could not ask her to leave the meeting in the face of her unacceptable behaviour and by seeking to divide the Board by canvassing targeted Directors in which she disagreed with the ruling of the Chairman. She also instructed her staff to cancel an important meeting of the Board of Approvals and Grants Committee without authorization and reference to the Committee,

the Chairman or the CEO. At a meeting of the Board Grants and Approvals Committee on 3rd May 2017 she was again disrespectful of the Chairman; shouted at Directors and members of staff in a disrespectful manner; issued emails to the Directors threatening to sue; accused a member of staff from lying and wrote an insulting letter to the Board labelling them as unfit in response to the decision to extend her probation. Among other things, she also failed to attend work on time on a number of occasions.

13. By letter dated 19th December, 2018, she was asked to further respond to allegations in the investigative report "Report on investigation into allegation of misconduct on the part of Mrs. Kendra Thomas-Long Corporate Secretary and Legal Advisor on August 29th, 2017". These allegations were:

    a) On 29th August 2017 she wilfully disregarded the lawful instructions of the Administrative Head and Security Officers to remove herself from her office.

    b) On 29th August 2017 she defied and undermined the authority of the Administrative Head by insisting that she will not leave her office until they hold the meeting or a time is fixed.

    c) On 20th August 2017 she conducted herself in a most abusive and offensive manner with her voice raised loudly and making cynical remarks thereby disrupting the work of other members of staff.

    d) She insulted and disrespected Mrs. Janice Phillips-Lynch the Administrative Head during the exchanges in her office.

    e) She brought the company into disrepute by her conduct and having the matter reach to external security and the TTPS.

    f) She violated the principle of proper office decorum by conducting in a most inappropriate manner in Mrs. Janice Phillips-Lynch's office in front of other members of staff.

    g) She failed to exercise good judgment in treating with a situation of conflicting priorities allowing emotions to determine her response.

14. Kendra responded to these allegations by emails dated 19th, 21st and 24th December 2018. The Board deliberated on her responses on 8th January 2019. On 9th January 2019 she was informed by email from the CEO of the immediate termination of her contract of employment from 8th January 2019. She lodged a grievance and appeal against the decision on 15th January 2019. By letter dated 23rd January 2019, NCSHL confirmed its decision to terminate the Claimant's contract of employment from 8th January 2019. The letter of dismissal essentially relied upon her unsatisfactory responses to the allegations of gross misconduct and conflict of interest and their loss of trust and confidence in her ability to effectively discharge her duties and responsibilities as grounds for terminating her contract pursuant to Clause 16 (II, III) of the contract.

15. Kendra contends that her dismissal from NCSHL is null, void and of no effect. She challenges the validity of the dismissal letter issued to her on the grounds that it was ultra vires the "Company's Articles of Association" and/or was not signed by a party with the proper authority to terminate her contract of employment and/or it being effected in reliance upon mutually exclusive clauses in Kendra's contract of employment and/or was not accompanied with direct evidence of authorization from a party having authority to terminate her contract of employment, that is, the Chairman of the Board (in the even such authority can be delegated.) She also contends that the procedure adopted by NCSHL in effecting her dismissal was materially irregular and manifestly unjust and unfair. It is her contention that these procedures contravened NCSHL's policy and procedures on disciplinary actions which are incorporated into her employment agreement by express terms and/or were contrary to the principles of natural justice and fairness and/or were in breach of the implied term of mutual trust and confidence written into her employment contract. She further contends that her dismissal was a direct consequence of two grievances raised by her against CEO on 21st November, 2018 and 16th December 2018 which NCSHL failed to investigate and the reasons provided by NCSHL in support of her dismissal failed to establish sufficient cause in relation to the allegations made against her.

16. The CEO denies that he had any unhappy differences with Kendra and threatened to make her life "miserable". On December 18th 2018, he did visit her office with a letter dated the

same day and informed her that the Board had taken a decision to place her on administrative leave to answer matters of a serious nature. On 8th January 2019, the Board deliberated on the responses received by Kendra and arrived at a unanimous decision that they had lost trust and confidence in her ability to continue operating as the Commission's Corporate Secretary/Legal Advisor. A termination letter was sent to her via email and registered post on 8th January 2019. He contends that her grievance letter dated 15th January 2019 did not address any of the allegations made against her in her letter of dismissal therefore, he was directed by the Board to respond to Kendra's attorney confirming that the Board's decision remained the same and Kendra remained terminated. He further contends that the Commission adhered to its policy and procedure as well as Kendra's contract in making its decision to dismiss her. He denies that Commission operated in any harsh or oppressive manner towards Kendra.

17. NCSHL has since Kendra's dismissal retained Mr. Jameel Kieron Watch to serve as Corporate Secretary effective 7th February, 2019 for a period of three months until 6th May, 2019.

The Court's Approach-The exercise of the discretion

18. It is not appropriate at this stage to conduct a mini trial of the respective rivalling contentions of the reasons for the dismissal. However, it is wrong to say, as contended by NSCHL, that a Court will never grant injunctive relief tantamount to specific performance of a contract. Courts have previously done so if it is warranted after assessing where the risk of greater injustice lie in whether an injunction is granted or not. See **Hill v C.A Parsons and Co. Ltd** (1971) 3 All ER 1345, **Geys v Societe Generale** [2013] 1 AC 523 and **Snell's Equity 2010 at 17-006.** A Court must always be astute to prevent a party from trampling on the rights of others with the impunity that it can pay for its wrong in damages and in the employment context of simply "snapping its fingers" at the employee.

19. However, while the employment context would bring to bear special factors for the Court's consideration in the exercise of its discretion, it is trite law that the Court must at this stage exercise its discretion in a manner which will cause the least risk of irremediable prejudice and is guided by the fundamental question of determining where the balance of justice will

lie in either granting or refusing an injunction. See **National Commercial Bank Jamaica Ltd v Olint Corporation Ltd** [2009] 1 WLR 1405 and **Jetpak Services Ltd v BWIA International Airways Ltd** (1998) 55 WIR 362. Recently, Aboud J (in **Niquan Energy Trinidad Limited v World GTL Trinidad Limited and others** CV2013-02699) examined **Olint** in the context of **American Cyanamid Co. v Ethicon** Ltd [1975] A.C.396 and **Jetpack** and confirmed the approach to injunctions is now a holistic one rather than a "box ticking" exercise. See also the recent Court of Appeal decision in **Petroleum Company on Trinidad and Tobago v Oil Workers' Trade Union** Civil Appeal No. P320 of 2018. Archie J.A considered the principles in **Olint**, the purpose of an interlocutory injunction in preserving the status quo and the importance of the balancing exercise in determining whether the granting or withholding of an injunction is more likely to produce a just result.

20. In **Olint** Lord Hoffman stated at paragraphs 17 and 18:

> "**17** In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408:
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> > "It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."
>
> **18** Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the

injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases." The following general principles culled from **Cyanamid** as explained in **Olint** and **Niquan** provide a useful guide to the Court in exercising its discretion in granting an interim injunction:

a) The essential objective is to preserve the Court's freedom to do justice at the trial;

b) Whether there is a serious issue to be tried is determined upon an evaluation of the relative strength of the parties case;

c) The weaknesses of a party's case must be taken into account;

d) The Court should consider the prejudice the claimant may suffer if no injunction is granted or the defendant may suffer if it is. A claimant can reduce the potential injustice to the defendant by drafting the terms of the injunction as narrowly as is consistent with preserving the claimant's interests, or by offering undertakings to provide extra safeguards for the defendants[2];

e) The likelihood of such prejudice actually occurring;

f) The extent to which a party may be compensated by an award of damages or enforcement of the undertakings in damages. Lord Diplock in **American Cyananid Co. v Ethicon Ltd** said the extent to which the disadvantages to each party would be incapable of being compensated in damages is always a significant factor in assessing where the balance of convenience lies. In **Dyrlund Smith AIS V Tuberville Smith Ltd** [1998] FSR 774 the apparent inability of the defendants to meet an award of damages was regarded as the decisive factor in favour of granting an interim injunction. However, there is no general rule that if damages are an adequate remedy an injunction will not be granted;

g) The likelihood of whether a party is able to satisfy such an award. However, the indigent ought not to be penalised where there are merits in their claim or in the balance it is just to grant interim relief;

[2] See **Blackstone's Civil Practice 2018**

h) In determining this question, the Court should not confine itself to damages in the sense only of special damages, but should also consider damages to reputation and loss of goodwill. In fact, all damages, special and general, are on the table;

i) Where does the balance of convenience lie;

j) The likelihood that the injunctions will turn out to have been wrongly granted or withheld (i.e. the Court's view of the relative strengths of the parties' cases).

k) Other special relevant factors recognising that human activity is too idiosyncratic and the range of disputes and complexity of them are too unpredictable to ignore special factors which will impact in weighing the relative justice in granting or refusing relief. In this case a special factor is the employment context, the relational dispute between the parties. In such relationships, the duty of trust and confidence is an important pillar for a functional working relationship. In exceptional cases interim injunctions may be granted in spite of the breakdown of trust and confidence where the circumstances warrant such an exceptional intervention in the relationship of employers and employees. Such exceptional interventions include the payment of remuneration to the Claimant until trial although not being required to return to work. See **Ryan v ESB International Limited** [2013] IEHC 126.

l) None of these factors are to be considered as isolated modules. The Court adopts "a wide angle lens" to answer the organic question "where does the balance of justice lie" or "what course seems likely to cause the least irremediable prejudice to one party or the other."

m) The overriding objective is relevant in the exercise of the power to grant injunctive relief.

21. In **Public Trustee** Gibson LJ identified some useful principles which should guide the Court in applications for injunctions in the employment context:

"Before considering further the submissions made in this Court, it is necessary to state some principles which, as I understand the cases, have been laid down.

(1) in general, where the Master has claimed to dismiss a servant, the relationship thereupon comes to an end because it is inconsistent with the confidential nature of the relationship that it should continue, contrary to the will of one of the parties thereto. That however is the consequence in the ordinary course of things. The rule is not inflexible and permits of exception: see per Lord Denning, Hill v CA Parsons and Co [1972] 1 Ch 305, [1971] 3 All ER 1345 at 3 to 4 B to E of the former report.

(2) One exception is where, although the master has claimed to dismiss the servant or not to let the servant take up the post, it is shown that in fact the necessary or sufficient trust and confidence exists so that the employer may reasonably be required to permit the servant to continue in his work; examples are Hill v CA Parsons and Co and Powell v Brent.

(3) in considering what exceptions to the general rule can be allowed, or I think whether an established exception can properly be extended, the Court must have regard to any changes in the climate of general opinion as to the necessary protection of servants: see per Sachs LJ in Hill v CA Parsons and Co at page 321 cited in Powell v Brent at page 194.

(4) in the reported cases, save for one to which I shall turn shortly, where the courts have granted injunctions to require a master to treat a servant as still employed under the contract of employment, the servant was intending to render the services required under the contract: see Hill v CA Parsons and Co and Powell v Brent. Since the employer, in those cases, had sufficient confidence in the servant for them to accept the services, enforcement of the contract by injunction it would be mutual because there was nothing to stop the master taking the benefit of the services. In Jones v Lee [1980] ICR 310, [1980] IRLR 67 CA, an injunction was granted which required the manager of a school not to dismiss the plaintiff, the headteacher, without the consent of the County Council given after a proper hearing. It appears that there may well have been on the facts a loss of trust and confidence, and the Court apparently contemplated that the plaintiff would not perform his work while the hearing proceeded. Those matters were, however, not raised by the parties or addressed by the Court.

(5) I come to the exceptional case. In Robb v LB of Hammersmith and Fulham. I will take this from the headnote.

"The plaintiff was appointed as the director of finance for the defendant local authority. Incorporated into his written contract were conditions setting out procedures for the investigation of any disciplinary complaint, including provision for a preliminary investigation into any question of capability to fulfill his duties. In May 1990 the defendants invoked that procedure against the plaintiff on the ground of concern over the management of the finance department and the quality of advice given to councillors and the chief executive. The plaintiff was in fact required to go on special leave, and was therefore suspended on pay. In July 1988, however, in view of negotiations taking place with the plaintiff as to a possible termination of his contract, the defendants abandoned the investigation. They later wrote to the plaintiff inviting him to accept proposed terms for the termination of his contract before a council meeting the next day and, when the plaintiff did not comply, purported to summarily dismiss him."

Morland J acknowledged that there was ample evidence in that case that the employer had lost trust and confidence in the plaintiff's capability to do his job. Since the plaintiff, however, agreed inter alia to be treated as suspended on full pay and to carry out no duties or functions as director of finance unless instructed to do so by his employers, Morland J held that he could grant the injunction. The learned judge concluded as follows, this is at page 520 F C,

"in Chappell v Times Newspapers Ltd [1975] I.C.R 145, 178, Geoffrey Lane L.J stated the classic position:

"Very rarely indeed will a court enforce, either by specific performance or by injunction, a contract for services either at the behest of the employers or of the employee. The reason is obvious: if one party has no faith in the honesty or integrity or the loyalty of the other, to force him to serve or to employ that other is a plain recipe for disaster.""

Then the Judge continued:

"In my judgment, although the courts will only rarely grant the plaintiff injunctive relief against his employer, the all important criterion is whether the order sought is workable."

After citation of passages from the judgment of Sachs LJ in Hill v CA Parsons and Co, Morland J held that lack of trust and confidence in the plaintiff's capability to do his job had no relevance to workability of the para 41 procedure, that is, the procedure which the employers had initiated into his capability to do his job and there was no rule of law or practice which prevented the granting of the relief sought in the circumstances of that case. No argument was advanced that the order would require the employees to pay the plaintiff while he did no work and that it should be regarded as contrary to principle to enforce the obligation of one side only. It is to be noted that in that case, the employers had begun to carry out the investigations, having sent the plaintiff on special leave, and therefore receiving payment and the employers thereafter decided to stop the investigation and in breach of contract as they admitted, to dismiss the plaintiff summarily."[3]

22. Effectively, the injunction being sought is a "mandatory injunction". Lord Hoffman in **Olint** observed that the classification of an injunction as mandatory or prohibitive is unhelpful as it oversimplifies the complexity of a decision as to whether or not to grant an interlocutory injunction. Furthermore, regardless of its classification, in both cases, the underlying principle is the same, namely, that the Court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other:

"**19** There is however no reason to suppose that, in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey in *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* (Case C-213/89) [1991] 1 AC 603, 682–683. What

[3] **Public Trustee as Executor of Onofre Braganza v Nuffield Nursing Homes Trust** (7 May 1993) (CA), pages 4-5

is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670, 680. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in *Shepherd Homes Ltd v Sandham* [1971] Ch 340, 351, "a high degree of assurance that at the trial it will appear that the injunction was rightly granted".

20 For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren: see *Films Rover* [1987] 1 WLR 670, 680. What matters is what the practical consequences of the actual injunction are likely to be. It seems to me that both Jones J and the Court of Appeal proceeded by first deciding how the injunction should be classified and then applying a rule that if it was mandatory, a "high degree of assurance" was required, while if it was prohibitory, all that was needed was a "serious issue to be tried". Jones J thought it was mandatory and refused the injunction while the Court of Appeal thought it was prohibitory and granted it."

23. In deciding whether to grant this injunction the Court must be satisfied that the option of "turning back the hands of the clock" to reinstate the Claimant in her position is likely to cause the Defendant the least irremediable prejudice and the chances that it will turn out to have been wrongly granted are low.

A serious issue to be tried- The relative strength of each parties' case

24. The Claimant identified a number of breaches of NCSHL of its grievance and disciplinary policy and procedures:

    (a) Its failure to conduct a fair, independent and unbiased investigation into possible

acts of misconduct against the Claimant;

(b) Its failure to allow the Claimant a fair opportunity to respond or be heard further to its "investigations" into her conduct;

(c) Its failure to properly set out the nature of accusations as well as provide objective evidence of accusations made;

(d) Its failure to allow access by the Claimant to the records at NCSHL to allow the Claimant an opportunity to provide an adequate respect to accusations made;

(e) Its failure to treat with the objections raised by the Claimant during the investigatory process;

(f) Its failure to initiate a disciplinary process against the Claimant further to its "investigations" into her conduct and prior to her purported dismissal;

(g) Its introduction of false accusations not previously mentioned to the Claimant prior to her purported dismissal ie. "poor performance" for which no performance appraisal was undertaken by the Chairman/Board on prior warnings given;

(h) The undue reliance by NCSHL on expired and erroneous warnings in determining her employment history and the failure to provide any warnings in determining her employment history and the failure to provide any warnings to the Claimant in relation to her alleged acts of misconduct.

(i) The undue reliance by NCSHL on the evidence of one source/witness, the Chief Executive Director who was clearly biased against the Claimant and had an axe to grind and its non-reliance on corroborative, objective and independent evidence during the course of investigations;

(j) The re-opening of a previously discontinued disciplinary action against the Claimant based on incorrect assumptions of fact;

(k) The failure of NCSHL to apply its disciplinary policies and procedures in a fair, consistent and equitable manner with the result that the Claimant was singled out to unfair and unjust treatment;

(l) The failure of NCSHL to issue a valid letter of termination to the Claimant in accordance with the provisions of her employment agreement;

(m) The failure of NCSHL to advise the Claimant of her right to raise a grievance/appeal against its decision;

(n) Its failure to properly consider the Claimant's letter of grievance and appeal and respond to the preliminary objections contained therein;

(o) Its failure to convene a grievance and/or appeal hearing prior to treating its decision to summarily dismiss the Claimant as a final one.

25. The Claimant contends that her chances of success on these issues are strong. However, even so, the fundamental question will still remain "what will be the appropriate relief at the trial?" At that stage, would the employee likely to be awarded specific performance of a contract which would have expired by effluxion of time in October 2019 and in the context of the obvious turbulent employment relationship? Conversely, would the appropriate relief be damages for the period of notice, the remainder of her contractual period or the reasonable period within which the NCHSL could comply with its procedures on effecting a dismissal? In my view, I am persuaded that her ultimate and practical remedy lies in damages.

26. No doubt there are serious issues to be tried which include:

(i) Whether there is a valid existing contract in place between the Claimant and NCSHL and what are the documents constituting the entire Contractual Arrangement between the parties.

(ii) Whether the letter of dismissal of 8th January 2019 signed by the CEO is valid.

(iii) Whether NCSHL's non-adherence to its policies and procedures as outlined in NCSHL's Policies and Procedures Manual and Employee Handbook and its failure to investigate the Claimant's grievances of 21st November, 2018 and 6th December 2018 amounted to a breach of an express term of the Claimant's employment contract and/or was contrary to the principles of natural justice and fairness and/or was in breach of the implied term of mutual trust and confidence written in the Claimant's employment contract.

(iv) Whether the Company's failure to adhere to its disciplinary policies and grievance

policies resulted in a wrongful disciplinary sanction/outcome being rendered by NCSHL.

(v) Whether the NCSHL is entitled to treat the contract of employment of the Claimant as being immediately terminated in light of the fact that a final decision was not rendered by NCSHL under its grievance and appeals procedures (which stipulates that a decision taken by its Board/Management is only considered final after a decision is rendered by the Appeals tribunal within three (3) working days of the appeal hearing).

(vi) Further and/or alternatively whether the several irregularities in the conduct of the purported "investigatory/disciplinary" proceedings against the Claimant by NCSHL and subsequent to her suspension with pay were material enough to render the entire proceedings a nullity and void ab initio?

(vii) Whether the independent and/or combined actions of NCSHL, its employees and/or agents subsequent to the dispute of 14th November 2018 gave rise to a repudiatory breach of the Claimant's employment contract and if so, when did the breach/these breaches occur?

(viii) Whether the Claimant, through her conduct or otherwise, accepted NCSHL's repudiation of her contract of employment.

27. One of the main planks of the Claimant's argument which would make a compelling case for interim relief is the failure by NCSHL to comply with the procedures set out in its Company's manual to effect the dismissal. I have examined the exhibits to Kendra's affidavit and the Statement of Case, however she has not annexed the entirety of these documents. It is critical for the Court if it is to make the leap to incorporate terms of any manual into a contract of employment that it is provided the proper textual context of the documentation. The Court cannot draw any conclusions favourable to Kendra on this issue with the present documentation and it is better left for determination at the trial when the Court would have, after disclosure, the full text of the manual and the evidence relative to the making of the manual and incorporation of its terms.

28. At this stage Kendra's contract of employment Clause 2.0 simply states:

(i) "The person engaged shall be required to perform the normal duties of the position in which he is engaged and any other related duties, which he is called upon to perform for the Company as per Job Description (Appendix A).

(ii) The person engaged shall occupy himself in such manner as the Chairman of the Company or any other duly authorized officer shall direct.

(iii) The person engaged shall not directly or indirectly engage in, carry on or be concerned with any trade or private business whatsoever and shall have no other employment than that of this contract except where specifically declared by the person engaged and authorized by the Company. The person engaged shall wholly commit himself to the particular service of the Company.

(iv) The person engaged shall be subject to the Company's general and/or specific regulations and policies.

(v) The person engaged shall be subject to the Company's Code of Conduct, Dress Code and Policies on Disciplinary Actions."

29. There is no specific mention of the NCSHL's Policy and Procedures Manual and there is no evidence at this stage in relation to whether a manual was existing at that time or was introduced after her employment. The extracts of the Disciplinary Procedure are undated and unsigned attachments. Further, the extract with both the disciplinary and grievance procedures appear to be incomplete documents.

30. **Halsbury Laws of England** provides:

> "Whether a term will be implied is a question of law for the court. A term will not be implied so as to contradict any express term; and, in fact, a term ought not to be implied unless on considering the whole matter in a reasonable manner it is clear that the parties must have intended that there should be the suggested stipulation."

31. In **Claude Albert v Alstons Building Enterprises Ltd**. CvA No. 37 of 2000 the Court considered the question whether a company policy concerning severance pay was incorporated into the express terms of the employee's contract. Both Jones JA and de la

Bastide CJ rejected the view that terms which have no immediate impact on the employee cannot be incorporated into the contract of employment. The Court of Appeal accepted that the question of whether a contract was varied to include a particular term or whether the contract incorporated terms contained in a corporate manual or booklet is a matter to be determined from a proper construction of all the relevant documents and the circumstances:

> "Firstly, I do not agree that the Employee's Manual on which the appellant relies, was simply a policy statement by the management of the Group of companies to which the respondent belonged, and had no contractual effect as between the member companies of that Group and their respective employees. The Manual itself expressly stated that some of the terms of employment of those for whom it was intended, were to be found in it. In section 7.03 under the heading 'Non Unionised Employees' the Manual unambiguously provided: "The terms and conditions of employment are as stipulated in the letters/contracts of employment and the group's Employees' Manual". Moreover, in the foreword of the Manual there is an explanation of its 'raison d'être' which reads in part as follows:
>
> > "It is extremely important that employees are made aware of and understand the organization's position about the various aspects of their work life. Not only will they then grasp our group's objectives but the various employee benefits and terms of employment will be more clearly understood. To achieve this, however, there must be communication. This Manual sets out to do this" (emphasis added).
>
> To the extent, therefore, that the Manual contained sections which properly interpreted promised to provide employees with benefits not found in their individual contracts of employment, the employees concerned, by continuing in employment with the Group, indicated their acceptance of the offer of these benefits and provided the consideration that made the promise of them enforceable as a contractual obligation of the employing

company."[4]

32. In this case, it would be unsafe at this stage to draw a positive inference in favour of the Claimant of the incorporation of the terms of a grievance and disciplinary procedures, the extent of those procedures and the synergy between those two processes given the nature of the evidence as it stands without a full consideration of the relevant documentation.

33. To this extent Kendra's case is distinguishable from **Ryan v ESB International Limited** [2013] IEHC 126. In that case the Court had adopted the exceptional measure of restraining the Defendant from giving effect to the termination of the employee directing the Defendant to continue to pay the employee until trial and restrain it from appointing another person on such terms so as to prevent the employee from resuming duties if at the trial it was held that the contract was in fact breached by the Defendant. One of the main reasons for the Court adopting such an approach was twofold: compelling evidence of the dire need for continuing income due to his personal and family circumstances and secondly, the strength of his case that the Court was convinced that the process adopted was fundamentally flawed in failing to follow the established procedures where it was **common ground** that a company document "Disciplinary Policy/Procedure" was incorporated into his terms and conditions of employment. In this case, there is no such common ground and the extracts are not sufficient to make the leap of incorporating such an important contractual term which would have important consequences on the Defendant.

Adequacy of damages

34. The Claimant contends that damages are not an adequate remedy for her for the following reasons:

    (i) She will suffer non-pecuniary losses due to the damage to her professional reputation, injured feelings, loss of current and future employment opportunities and earning. These losses are not usually recoverable under the head of damages for breach of contract.

[4] **Claude Albert v Alstons Building Enterprises Ltd**. CvA No. 37 of 2000, de la Bastide CJ's judgment, page 2. See also **Selwyn's Law of Employment**, 20th Edition, paragraph 6 page 101.

(ii) She will be denied the salary and benefits owed to her between her dismissal and the time it would have taken for NCSHL to adhere to its investigatory, disciplinary and grievance procedures incorporated by clauses 2.0 (iv) and (v) of her employment agreement.

(iii) The accusations raised against her by NCSHL of gross misconduct, gross insubordination and breaches of disclosure regarding NCSHL's conflict of interest policy, performance issues and loss of confidence will hinder her career progression in the role as Corporate Secretary which will cause irreparable damage which cannot be compensated by an award of damages.

(iv) NCSHL has engaged another person in her position and she will not be adequately compensated for the losses pertaining to her loss of job satisfaction and pride.

(v) An award of damages cannot compensate her for the severe mental and emotional stress and anguish which she has suffered as a result of the inhumane actions of NCSHL.

(vi) There is a possibility that NCSHL does not have sufficient liquidity to honour a monetary judgment in the event that an award of damages is made.

35. These reasons, however, do not go beyond the Court's ability in the appropriate case to make a suitable award of common law or equitable or even exemplary damages. Whereas Courts can, in appropriate circumstances, grant specific performance of employment contracts, in the circumstances of this case the employee ought to be left to her remedy in damages.

36. Several authorities have been referred to me by Counsel for the Claimant which deserve mention underscoring the Court's approach in granting interim injunctions tantamount to the grant of specific performance of contracts.

37. In **Hill v C.A Parsons and Co. Ltd** (1971) 3 All ER 1345 Lord Denning expanded the scope by which an employee could obtain an injunction requiring him/her to work with them by recognising at 1350:

"The court can in a proper case grant a declaration that the relationship still subsists and an injunction to stop the master treating it as at an end….

….

It may be said that, by granting an injunction in such a case, the court is indirectly enforcing specifically a contract for personal services. So be it. Lord St Leonards LC did something like it in *Lumley v Wagner*. And I see no reason why we should not do it here."

38. The Court can grant specific performance of a contract (including a contract of service) if there is a valid enforceable contract in existence and it is available in instances of both actual and threatened breach of contract. See **Snell's Equity 2010 at 17-006.**

39. I am cognisant of the fact that a Court should be wary where the Defendant can purchase a wrong by asking "what will it cost if I breach the contract?" See **Niquan Energy Trinidad Limited v World GTL Trinidad Limited and Others**. In this case, the Claimant may well perceive the actions of the Defendants as riding "roughshod" over her rights, depriving her of continued employment.

40. In **Evans Marshall & Co v Bertola SA** [1973] 1 WLR 349, Sachs LJ noted at 379H:

"That standard question in relation to the grant of an injunction, "Are damages an adequate remedy" might perhaps, in the light of the authorities of recent years, be re-written: "Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?"

41. In some cases damages may be inadequate in circumstances in which an employee is facing dismissal. In **Hughes v London Borough of Southwark** [1988] IRLR 55 at 12, Taylor J noted that damages are not an adequate remedy if the Claimants will suffer damage to reputation, a loss of job satisfaction, emotional distress and other factors as such losses are not capable of being compensated in damages.

42. In **Powell v London Borough of Brent** [1988] ICR 176 an employee was given a promotion by her employers and subsequently told that the recruitment process would start afresh as

a result of a challenge raised concerning the process utilized by the employer by another employee. The Court of Appeal held that damages would not be an adequate remedy for the Claimant if she were to succeed at trial in respect of what she would suffer if she were to be excluded from her promoted post and the Defendant was to advertise to fill it. Ralph Gibson LJ noted at 196:

> "She could be compensated, of course, for loss of earnings between now and then, but she would have lost the satisfaction of doing this more demanding and rewarding job, and I accept that damages for estimated future financial loss would not be full compensation to her.

43. Indeed, there is worth and value to an employee in continued employment, a value which is immeasurable in money terms. See **Roger Carrington v The University of Trinidad and Tobago** CV2016-03482. However, this conflict between Kendra and her employers coming at the end of her contractual term in the face of the clear evidence of acrimony between the parties makes specific performance an unlikely and unsafe option.

44. The difficulty with the Claimant's proposition is that her alleged pecuniary and non-pecuniary losses can be quantifiable and do sound in damages. There is no evidence to suggest that NCSHL is not in position to pay any award of damages if made against it. In any event her contract expires in October 2019 a mere few months away and prior to the determination of this matter at trial. Further, there is no evidence that the Claimant can satisfy an award of damages if she fails at the trial and an injunction was found to have been wrongly granted.

<u>The balance of justice</u>

45. The Claimant contends that the balance of convenience lies in granting an injunction in that:

    (i) She will be rendered impecunious as a result of the actions of NCSHL because of the serious nature of the allegations against her. Also the length of time between the dismissal and trial of action may force her to abandon her claim.

(ii) The grant of an injunction at the interlocutory stage will provide some relief to the Claimant in terms of there being a preliminary assessment on the strength of her claim which may assist her in re-ordering her life regarding re-entry into the job market.

(iii) A refusal to grant equitable relief at this stage will affect her ability to meet her personal expenses due to her personal circumstances. She is estranged from her husband and will be unable to provide for her children in particular her special needs daughter who requires special care, education and therapies on a consistent basis.

(iv) NCSHL will not be placed under undue hardship in carrying on its business as steps have already been taken to replace the Claimant.

(v) The granting on an injunction against NCSHL will provide the Claimant with the opportunity to have NCSHL re-initiate fair and transparent proceedings into the matter by an independent party and in accordance with NCSHL's disciplinary procedures which will more likely than not lead to a full exoneration of false accusations made against the Claimant.

(vi) The continuation of the Claimant's salary until trial will allow the Claimant to receive some form of income until NCSHL is in a position to show just cause for her dismissal or the Claimant can recover all other foreseeable losses owed to her including gratuity payments, exemplary and aggravated damages, monies in lieu of her unutilized vacation days, remaining salary and benefits owned to the end of her contract term and the lost opportunity to renew her contract of employment in keeping with clause 18.0 of her employment agreement.

46. The Claimant further submits that if the injunction is not granted, the Claimant's "rights and advantages" before NCSHL's dismissal of her should be preserved until the hearing and final determination of the substantive matter.

47. As explained earlier, the Court must adopt a course which is likely to cause the least risk of irremediable prejudice to the parties. In this case would the balance of justice lie in favour of forcing an employer to continue to deal with an employee with whom there is a

breakdown of trust and confidence in which there are many unresolved employment issues of rank, status, duties and functions or worse to have her on a payroll and not perform any duties or does the balance of justice lie in having a full determination of the claim and at the end of the trial if Kendra is successful, a full range of relief including equitable and exemplary damages?

48. In my view, the balance of justice does not lie with granting the orders which the Claimant seeks as the Claimant's contract expires on October 2019 and she would therefore have obtained all of the substantive relief that she could ask for in advance of a trial of the issues. In any event, a Court would be reluctant to continue a relationship between these two parties which clearly demonstrates a breakdown in trust and confidence between them.

Special Considerations

49. The Claimant has addressed the issue of injunctions being granted when trust and confidence issues arise with the continued employment of the employee under a contract of service. The Claimant contends that where the order for injunctive relief requires the employee to be treated as if still employed and to receive his pay while not working (for instances regarding injunctions to restrain an employer's breach of disciplinary and capability procedures), the fact that trust and confidence has broken down between the parties has been held not to be relevant to the grant of an injunctive relief or specific performance. See **Public Trustee as Executor of Onofre Braganza v Nuffield Nursing Homes Trust** (7 May 1993) (CA) and **Gryf-Lowezowski v Hinchingbrooke Healthcare NHS Trust** [2006] IRLR 100.

50. In **Gryf-Lowezowski v Hinchingbrooke Healthcare NHS Trust,** the Claimant was a consultant general and colorectal surgeon employed by the NHS trust. His contract of employment provided, inter alia, that should the Trust consider that his professional competence had been called into question, the Trust would resolve the matter through its disciplinary or capability procedures. A number of concerns were raised relating to the claimant and his clinical practice in September 2003. He agreed to a referral to the National Clinical Assessment Authority (NCAA) who had some concerns regarding some of his work and

made a number of recommendations, including that he undertook a clinical re-entry package. The Claimant was offered a re-skilling placement with another health trust, but that offer was subsequently withdrawn. Until he undertook re-skilling, he was unable to carry out his professional duties for the Trust. He therefore issued proceedings and two issues for determination were whether the contract of employment between the Claimant and the Trust was terminated by operation of the doctrine of frustration; and (ii) if not, whether the Claimant was entitled to injunctive or other relief. The Court held that the Claimant's obligations under the contract had not become incapable of performance, since a realistic possibility remained of another trust being found which would agree to re-skill him so as to enable him to resume his duties under the contract and also the fact that trust and confidence between the trust and the Claimant had broken down was not a bar to injunctive relief. The Claimant had a right to require the employer to abide by the disciplinary procedures in his contract. It is important to note that in that case there was a possibility of the Claimant resuming his former duties with the Defendant once he was re-skilled therefore his obligations under his contract were not yet incapable of performance. The grant of the injunction also allowed the recommendations by the NCAA which the Defendants agreed to abide, to be carried out and to prevent any dismissal under the employers followed the contractual disciplinary procedures.

51. In **Irani v Southampton and South-West Hampshire Health Authority** [1985] ICR 590, Warner J granted an injunction restraining the Health Authority from implementing the notice purporting to terminate employment notwithstanding the position of the Defendant that it was unable to continue to employ both Mr. Irani and the consultant in charge with whom he had disagreements with. However, noteworthy in that case was that there was no breakdown in trust and confidence with the employee as is evidence in the instance case. Furthermore, the dismissal had not yet taken effect.

52. Similarly, in **Hendy v Ministry of Justice** [2014] IRLR 856, the Ministry of Justice admitted that there was an implied obligation that an employee should operate a disciplinary policy in good faith or fairness and the Judge considered where the employee had conducted the disciplinary procedure in accordance with the implied duty of fairness. However, the

injunction was granted restraining the employer to effect a dismissal of the employee before the dismissal took effect.

53. In **Ryan v ESB International Limited** [2013] IEHC 126 (ibid) the Court noted that none of the investigations into the Plaintiff's complaints found them to be malicious or vexatious. The Court also found that the disciplinary process which culminated in the Plaintiff's termination of employment as fundamentally flawed. As explained earlier, no such conclusion can be drawn here until after full disclosure of the relevant documentation. See also **Shortt v Date Packaging Limited** (1994) ELR 25 and **Edwards v Chesterfield Royal Hospital NHS Foundation Trust** [2011] UKSC 58.

54. The Claimant further submitted that where an order is granted which does not require the Claimant to physically go back to work, it is suggested that the test for the grant of an interlocutory injunction is whether there is a real prospect of the Plaintiff succeeding at the hearing of the action. The Claimant relied on **Maha Lingham v Heath Service Executive** (2006) ELR 137, where the Supreme Court indicated that much depends on the interpretation of the contractual terms and obligations, the stronger test being required where such terms are implied and/or are ambiguous.

55. In **West London Mental Health NHS Trust v Chhabra** [2013] UKSC 80, [2014] IRLR 227, Dr. Chhabra a consultant forensic psychiatrist, was employed by a NHS trust in September 2009. In 2005 the Secretary of State for Health directed NHS bodies to implement a new framework for disciplinary procedures for doctors and dentists (practitioners) in the NHS contained in a document called "Maintaining High Professional Standards in the Modern NHS" (MHPS). Where concerns arose about a practitioner's performance the medical director was to liaise with the head of human resources to decide the appropriate course of action. Where the concerns related to clinical directors or consultants, the medical director was to be the 'case manager' and was responsible for appointing a 'case investigator'. The case investigator was to investigate the allegations or concerns and report. The report was to give the case manager sufficient information to allow her to decide whether among other things, there was a case of misconduct which should be considered by a disciplinary panel. A complaint was received by the Trust that Dr. Chhabra breached patient confidentiality on

a number of different occasions. The disciplinary process was initiated and a case investigator appointed to investigate the allegations and produce a report of her findings. Dr. Chhabra was notified that the allegations of misconduct had amounted to gross misconduct and would be referred to a disciplinary panel. However, the Trust's Associate Human Resources Director had suggest amendments to the independent report thus strengthening the criticisms made in the report against Dr. Chhabra. The case manager wrote two letters to Dr. Chhabra's solicitors. In one letter he stated that he intended to seek the guidance of the NCAS as to whether an assessment of her capability was needed or whether the trust could proceed to a capability hearing in relation to the concerns about Dr. Chhabra working with her clinical team. In the second letter, he stated that they were potentially very serious allegations of misconduct in relation to the breaches of confidentiality which fell within the disciplinary policy and proposed to put to a disciplinary panel the breaches of confidentiality which Dr. Chhabra had admitted. Dr Chhabra's solicitors objected to the charge of breach of patient confidentiality by disclosing information to her protection society and her legal advisers, which had not been the subject of the case investigator's investigation. At their request, the Trust agreed to instruct the case investigator to investigate that allegation. The case investigator carried out this further investigation and reported that there was no complaint to answer. The case manager informed Dr Chhabra by letter that that charge would not be pursued at the disciplinary hearing. Subsequently, a case conference was held to case conference was held to consider the Trust's capability concerns. Dr Chhabra entered into a tripartite agreement with the trust and the NCAS with under which the Trust referred its concerns to the NCAS for an assessment. The disciplinary process continued on a separate track. However, Dr. Chhabra sought injunctive relief preventing the disciplinary panel from investigating the confidentiality concerns.

56. On appeal by the Trust to the Supreme Court, it was held that there had been a number of irregularities in the proceedings which rendered the convening of the disciplinary process as unlawful as a material breach of her contract of employment. Additionally, the Trust had breached its contract with Dr. Chhabra when the human resources director continued to

take part in the investigatory process as the investigator's report had been altered in ways where it was difficult to clarify the conclusions and the case manager was obliged to reassess the decision that matters were considered a potential gross misconduct after he received the investigator's second report.

57. In that case it is interesting to note that the injunctive relief sought was to stop a disciplinary hearing from proceeding rather than re-instatement of the employee. Further, there were two investigative reports with the latter in favour of Dr. Chhabra informing the Trust that there was no complaint to answer in confidentiality as previously alleged.

58. These cases are therefore distinguishable from the instant case. Ultimately, an award of damages would adequately compensate her for any breach of her contract as common law damages or equitable damages in lieu of specific performance. While it is attractive for the employee to obtain an order for the payment of a salary while this matter is pending, the Court sees such a proposition as unworkable and impractical.

Conclusion

59. For the reasons set out in this judgment the application for interim injunctive relief would be dismissed. Costs will be in the cause.

Vasheist Kokaram

Judge