APPROVED **[2024] IEHC 696**

THE HIGH COURT

JUDICIAL REVIEW

2023 804 JR

BETWEEN

GEORGE MCLOUGHLIN

APPLICANT

AND

THE MINISTER FOR ENTERPRISE, TRADE AND EMPLOYMENT AND THE PROTECTED DISCLOSURES COMMISSIONER

RESPONDENTS

JUDGEMENT of Mr Justice Nolan delivered on the 12th day of December, 2024

Introduction

1. The Applicant in this judicial review seeks orders against the Minister for Enterprise Trade and Employment in his representative capacity of the Department for Enterprise Trade and Employment ("the Department") and the Office of the Protected Disclosure Commissioner ("Commissioner"), in relation to the manner in which they both dealt with a protected disclosure which he made in 2023 in regard to certain matters relating to his time as a labour inspector assigned to the National Employment Rights Authority (NERA), subsequently the Workplace Relations Commission (WRC).

2. His case against the First Named Respondent, the Department, is that it closed this, his fourth protected disclosure, on the basis that it was, to use the language of the statute, *"a repetitive report and did not contain any meaningful new information about a relevant wrongdoing as compared to past reports".*

3. His case against the Second Name Respondent, the Commissioner, is that he failed in his duty to apply the legislation in a fair manner when he decided that the appropriate party to investigate the report was the Secretary General of the First Named Respondent, in circumstances where he alleges, she is clearly implicated in the allegations he makes.

4. Both Respondents deny the allegations and state that their actions were at all material times lawful.

The Applicant's Case

5. The Applicant was a civil servant, who retired in 2017. By his own account he has repeatedly raised concerns regarding the workplace inspection regime. He did this by way of three protected disclosures between 2015 and 2017. In the case of the first and second of these disclosures, he challenged the ineffectiveness of the workplace inspection regime operated by the Department in protecting vulnerable workers from exploitation by abusive employers. In the third disclosure, he alleged that the investigation conducted by the Department in response to his second disclosure was fundamentally flawed in that there was a failure on the part of the investigator to address the detailed evidence of wrongdoing he had previously made available.

6. He has repeatedly alleged that this engagement by way of protected disclosure, has somehow led to his dismissal. In point of fact this is not true since it is clear that he retired, something which I will deal with below. Between 2017 and 2022, he says that he tried to

raise his concerns as to the Department's inadequate response to his three protected disclosures, but without success.

7. The passing of EU DIRECTIVE 2019/1937 on the protection of persons who report breaches of union law ("the Directive"), which was incorporated into Irish law by way of the Protected Disclosures (Amendment) Act 2022 ("the Act"), allowed the Applicant to make a fourth disclosure to Minister Simon Coveney, under Section 8 which, he alleges, allows a worker who "*is or was employed in a public body*" to make a further protected disclosure to a relevant Minister where certain conditions are met. His disclosure ran to over 32 pages of dense argument, much of which formed the basis of his affidavits and submissions in this case.

8. In what he describes as his new disclosure to Minister Coveney, he repeated his three previous disclosures using the words "*a report of substantially the same information*", which comes from at Section 8 (1)(b)(i) of the Act, that he believed that the senior personnel in both the Department and the state's labour inspectorate failed in their statutory duty to protect vulnerable workers from exploitation, and had colluded to prevent appropriate investigation of his prior protected disclosures thus constituting a significant and ongoing risk to the public interest.

9. He alleges that his fourth protected disclosure was transmitted firstly to the Minister, which was unlawful and then in its entirety to the Department, rather than being transmitted directly to the Commissioner. This breached the duty of confidentiality and protection of identity guaranteed to him as a reporting person under Section 16 of the Act and gave the Department full access to his criticisms of their actions in preventing investigation. He also alleges that despite his specific request that the matter not be sent to the Department, the Commissioner did just that.

10. The decision to identify the Secretary General of the Department as a "*suitable person*" to follow-up on his disclosure was fundamentally flawed and in breach of the Act and the Directive. Since he was making serious criticism of them both, this breached the principle of *nemo iudex in causa sua* (no one is judge in their own case), his constitutional right to fair procedure and natural justice and gave the Department the green light to circumvent legitimate scrutiny. This defeated the basic objective of providing robust protections to workers to encourage them to report threats or harm to the public interest that come to their attention in the course of their work.

11. Rather bizarrely, he also alleges that having been identified as a "*suitable person*" to deal with his disclosure, the Secretary General subsequently had no hand, act or part whatsoever in either the assessment, follow-up, or the closure of his report. To be fair to him, he says that what he means by this is that the Secretary General should have sent the matter back to the Commissioner.

12. In relation to the person who did investigate his disclosure, somebody who was designated to deal with the handling of reports received through internal reporting channels, since his report was an external report and therefore, separate from the internal reporting channels, it should not have been sent to him.

13. His disclosure was ultimately closed without investigation as being "*a repetitive report*" by Mr. Pat Phelan, the officer designated to deal with internal reports. He says that Article 11(4) of the Directive and Section 10E (1)(iv)(l) of the Act make it clear that a competent authority may close a disclosure as repetitive of past reports only where "*the relevant procedures were concluded*" in respect of those past reports. However, he says in the three previous disclosures the relevant procedures were not even commenced, in that the Department prevented independent investigation. There was no follow-up, no feedback and no corrective action taken by them to address the wrongdoing reported by him in 2017.

Therefore, to close his disclosure to Minister Coveney on the basis that it is repetitive of the 2017 disclosure, was flawed.

14. He alleges that to cover their tracks, the Department airbrushed the 2017 disclosure from the public record, by deliberately misreporting it in its statutory report under Section 22 of the Act as "*correspondence to the Minister from a member of the public…"* and that this is evidence of concealment and collusion to defeat the purpose of the Act by circumventing the independent investigation that should have followed the protected disclosure. This was a further breach of their legal obligations under the Act which is in itself, a serious relevant wrongdoing justifying further disclosure. Whilst this last issue has been raised, it is not central to the Applicant's case, but I will deal with it.

15. The Applicant relies upon various recitals contained in the Directive and sections of the Act, but no case law.

The Decision of the Commissioner

16. On the 31st of March 2023, Mr. Damien Cowell, the designated person in the Office of the Commissioner, wrote to the Applicant.

17. He noted that the Commissioner had recused himself from consideration of the report due to a previous connection which had the potential to be perceived as a conflict of interest. Therefore, the decision to transmit the report to the Department was made by the principal officer, Mr. Sean Garvey. He said that he had delegated authority to make decisions regarding transmission in accordance with Schedule 5 of the Act. He could not identify an appropriate prescribed person to receive the report and went on to say as follows:-

> *"Having considered your report, the Principal Officer considered that the Secretary General of the Department, appears by reason of the nature of the Department's responsibilities and functions to be the most appropriate recipient of the report and to*

have the competence to provide feedback and follow-up and protect the identity of the reporting person and person concerned.

The Principal Officer, in reaching this conclusion, considered that the wrongdoing related to matters within the Department or bodies within its remit, including that the report was received from the Minister with responsibility for the Department."

18. This prompted an exchange of correspondence between the Applicant and the Commissioner which I do not intend to set out, suffice to say that the matter was then sent forward to the Secretary General of the Department.

19. As I set out above, the Secretary General did not deal with the matter, but instead sent it to Mr. Phelan, who was designated to deal with internal protected disclosure matters.

The Decision of the Department

20. On the 26th of April 2023, Mr. Phelan wrote to him to inform him of his decision in accordance with Section 10(D) of the Act. He, as the designated person within the Department for receipt of protected disclosures, had carried out an initial assessment of his report. He also considered the history and prior involvement of the Department in examining the substance of his three previous reports since 2015. He then set out, in detail, the nature of the claims previously made including an additional claim that in 2017, the WRC management misled or concealed information from the independent company, Resolve, appointed to investigate his earlier disclosure in 2015 and the allegation that the Department had failed in its duty to investigate his claims fairly and had taken alleged punitive actions against him.

21. He then set out in full the disclosure to the Minister at para 43, as follows: -

"*The substance of this disclosure relates (a) to NERA/WRC Director and Deputy Director's failure to discharge their statutory remit to provide vulnerable workers in low-pay sectors of our economy with the robust and effective workplace inspection*

regime required to monitor and enforce compliance by Irish employers with their basic employment rights, and (b), as provided for in Section 8 of the amended Act, to the efforts by the Director and Deputy Director of NERA/WRC and the Assistant Secretary of the Department of Jobs Enterprise & Innovation to shield the inspectorate's senior management from appropriate and legitimate scrutiny, and (c) the failure by Minister Frances Fitzgerald TD to ensure the appropriate investigation of, and response to, the wrongdoings in relation to (a) and (b) which I reported to her under Section 10(4) of the Protected Disclosures Act 2014 in July 2017."

22. He then dealt in further detail with the allegations of alleged penalisation arising out of his earlier reports.

"44. The substance of this current disclosure also extends to the detriments that I and my family were subjected to by senior officials of NERA/WRC and the Department for having made these "protected disclosures" and, in particular, the efforts by Kieran Mulvey and Padraig Dooley to secure my dismissal and the long sequence of punitive actions that followed on from this including the failures by Assistant Secretary Philip Kelly and Minister Frances Fitzgerald TD to investigate and provide appropriate redress when these "relevant wrongdoings" were reported to them -- in Mr Kelly's case, under the department's Protected Disclosures Policy subsequent to my September 2015 disclosure to him and, in Minister Frances Fitzgerald's case, as a further "protected disclosure under Section (10)(4) of the Protected Disclosures Act 2014 in July 2017."

23. He said that penalisation is prohibited by Section 12(1) of the 2014 Act, and that claims could be brought before the WRC and appealed to the Labour Court. He noted that the Applicant had progressed those claims and they had been rejected. He also noted that legal proceedings claiming objective bias by the Labour Court relating to those claims had been

rejected by the High Court (*McLoughlin v the Labour Court and the Minister for Enterprise Trade and Employment* [2022] IEHC 283).

24. He went on to say:-

> *"In relation to your current disclosure, I have considered your claims as outlined above at paragraph 43 and it is my view that the most recent report is a repetitive report and does not contain any meaningful new information about a relevant wrongdoing compared to past reports. Therefore, I intend to close the report in accordance with section 10(E)(1)(iv)(1)"*

He then quoted the section of the Act which I shall set out below.

The Applicant's Response

25. Following receipt of the decision to close his report on the grounds that it was a repetitive report and did not contain any new information, the Applicant responded repeating his many claims including his allegations that senior officials in the department had colluded to suppress evidence and to bring about his dismissal, notwithstanding the decision of Barr J. in *McLoughlin v the Labour Court*, which I will return to, and ultimately threatened this judicial review.

The Independent review

26. Following further correspondence between the Commissioner and the Applicant, an external review of the handling of the protective disclosure was undertaken by Kevin Healy BL, an independent external reviewer. The terms of reference were sent to him and are as follows:-

> "*Whether the Reporting Person's report of 7 March 2023 to the Minister's office was correctly processed.*

Whether the Secretary General's decision to designate Mr Pat Phelan to deal with the report of 7 March 2023 was appropriate and in accordance with the provisions of the Protected Disclosures Act and EU Directive 2019/1937.

Whether the appointment of Mr Pat Phelan as the designated person to receive reports from the Minister's office is appropriate.

Whether Mr Pat Phelan's decision to close the report of 7 March 2023 was appropriate."

27. Thereafter, Mr. Healey's report of August 2023 was also sent to the Applicant. In a very cogently argued and analysed decision, Mr. Healy came to the view that the report was correctly processed, that the designation of Mr. Phelan to deal with the report was appropriate, that the appointment of Mr. Phelan as the designated person to receive the report from the Minister's office was appropriate and that Mr. Phelan's decision to close the report was appropriate.

28. An example of the detail that Mr. Healy went into can be seen from page 14 and 15 of his report where he notes as follows:-

"The Reporting Person responded to the decision by email dated 17 May 2023 in which he disputed the assertion by Mr Phelan that his report did not contain any meaningful new information. He described this as "factually incorrect." and said that "Any objective analysis of the information provided to Minister Fitzgerald in July 2017 and to Minister Coveney in March 2023 will confirm that there is no basis for this assessment." He said the fact that the Department had failed to Investigate or follow-up in any way on his July 2017 disclosure to Minister Fitzgerald itself constituted a relevant wrongdoing necessitating a further disclosure.

He also disputed Mr Phelan's statement that the Reporting Person's claims of penalisation had been rejected and said the only claims of penalisation which were

considered by the Labour Court were those relating to a specific time period from May 2016 to October 2016.

He repeated his previous objections to the referral of his report "against my express wishes" to the Secretary General of the Department of Enterprise Trade and Employment which, he claimed, breached the protections intended for reporting persons in the Protected Disclosures (Amendment) Act 2022 and in EU Directive 2019/1937. He said the OPDC decision "to allow the Department to investigate allegations of wrongdoing against itself clearly breaches the first principles of natural justice and fair procedure."

Mr Phelan told this Reviewer that he had no Involvement with the Reporting person's previous reports and had not read them prior to his designation to deal with the report of 7 March 2023.

This Reviewer has considered the content of the Reporting Person's previous reports. The subject matter of the report in 2015 was set out by the Reporting Person as follows:

"What concerns me is the culture of deference to non-compliant employers that informs so much of the management of the inspectorate to the extent that the organisation is either unable or unwilling to perform the function that it is legally charged with."

The 2015 report was investigated by an external investigator whose report, dated April 2016, concluded "On the basis of the evidence presented to me, I cannot uphold

his complaint that there is a culture of deference within NERA towards non-compliant employees."

Having read the Reporting Person's report of 7 March 2023 and the report of the investigator into the protected disclosure made by the Reporting Person in October 2015, I am satisfied that the March 2023 report does contain repetition of Issues raised by the reporting person in his 2015 report. I am also satisfied that both reports relate to the Reporting Person's perception of a culture of deference within the inspectorate towards non-compliant employers and a "light touch" approach by NERA/WRC management to regulation as well as his well-documented grievances concerning his treatment by his employers which included an allegation of penalisation arising from his previous reports in 2015 and 2017.

From my review of the files furnished to me, I note that the reporting person told a WRC hearing into his claim of penalisation on 27 September 2017 that he had been raising the issues included in his protected disclosure of 2015 since 2009 or 2010. The WRC held that this claim of penalisation was not well founded."

29. The Applicant did not judicially review this review.

<u>The Reliefs Sought</u>

30. The actual orders sought are an order of *certiorari* setting aside the decision by the Department to close his protected disclosure on the basis that it was a repetitive report and does contain any meaningful new information about a relevant wrongdoing as compared to past reports.

31. I amended the Notice of Motion to include an order of *certiorari* as against the Second Named Applicant in relation to the decision to choose the Secretary General of the Department as "*a suitable person*" to investigate the protected disclosure.

The First Named Respondent's case.

32. Ms. Mallon BL, for the Department, says that the Applicant has not satisfied the legal requirements for judicial review. He has made very sweeping allegations against senior officials in the Department and the Minister, alleging collusion and conspiracy without any evidence.

33. She points out that the original legislation was introduced in 2014 and substantially amended in 2022, which introduced a new section dealing with feedback and follow up. That did not appear in the original legislation and any complaints in relation to the three previous protected disclosures in regard to feedback and follow up, cannot be now litigated. She forcibly argues that the amended Act is not retrospective. But even if feedback and follow up were part of the original legislative structure, there was feedback and follow up in the form of an external review in 2016, by Mr. Turlough O'Sullivan of Resolve, who found that the manner in which the protected disclosure had been dealt with was in order. His report was sent to the Applicant but was not judicially reviewed.

34. Further still, the protected disclosure and decision in this case was independently reviewed by Kevin Healy BL. Therefore, there were two independent external reviews.

35. She says that the correct person, Mr. Phelan, received the protected disclosure, pursuant to the Act, particularly in circumstances where he was the designated person to receive protected disclosures from within the Department. It is not uncommon for internal processes to deal with external complaints.

36. She says that whilst the Applicant relies upon various recitals in the Directive, these do not create a legal obligation and that the Applicant makes no complaint in relation to the independence of Mr. Phelan and makes no allegation of bias on his part.

37. Further in his affidavit Mr. Phelan says that only three people had access to his e-mail. He was an independent person, and whilst the Applicant has said that he was only qualified to accept internal reports, that is to misunderstand the legislation.

38. The Applicant has said that he was penalised, but the legislation specifically excludes interpersonal grievances (Section 5A). These matters are not covered by the Act. Either way, the Applicant was not forced out of his job, he retired. This, she says, goes to a lack of candour on his part.

39. Turning to the argument that new information came to hand, she says these matters could not have come to his attention while he was working. He has confirmed in his own words that the protected disclosures were substantially the same information that formed his previous reported disclosures.

The Second Named Respondent's case

40. Mr. O'Regan BL, for the Commissioner notes that the office is newly established in 2023 and this is its first judicial review. He says that in order for the Applicant to succeed he has to show that something irrational occurred. He says the decision to send the matter to the Secretary General was not irrational but correct.

41. The Act requires that once the Commissioner gets a complaint, he must identify a "*prescribed person*" or alternatively "*a suitable person*" as defined. As set out in the affidavits, the Applicant objected to the Commissioner himself dealing with the matter and therefore, Mr. Garvey was appointed to do so.

42. The Commissioner has a broad discretion upon who he decides to identify as an appropriate person. In this regard, the court should have cognizance of the curial deference to decisions of an expert body, such as this office.

43. The Commissioner is also the Ombudsman and the Information Commissioner as well as a number of other statutory roles, which I shall set out below and therefore, is well qualified and experienced. He referred the court to the Supreme Court decisions of *Fitzgibbon v the Law Society* **[**2014] IESC 482 and *Sweeney v Judge Fahey and the DPP* **[**2014] IESC 501 dealing with judicial review.

44. Mr. O'Regan says that the decision was lawful and made within jurisdiction and did not offend against common sense, since the Department was the very body who had the facility to give feedback and follow up, a statutory requirement.

The Protective Disclosures (Amendment) Act 2022

45. The Act was enacted in 2014 in order to afford statutory protection to workers who make disclosures in the public interest (commonly referred to as "whistleblowers"). The Directive was adopted to harmonise whistleblower protection at EU level. The changes made by the Directive were given effect in Irish law by the Protected Disclosures (Amendment) Act 2022.

46. The Commissioner's principal task is provided for in section 10D(1)(b), namely to:

(i) identify—

(I) such prescribed person or persons (other than the Commissioner) as the Commissioner considers appropriate, or

(II) an other suitable person other than a prescribed person (in this section referred to as an "other suitable person") who, in the opinion of the Commissioner, appears,

by reason of the nature of such person's responsibilities or functions, to be appropriate to be the recipient of the report, and to have the competence to provide feedback and follow-up and protect the identity of the reporting person and persons concerned in accordance with sections 16 and 16A, where—

(A) there is no prescribed person whom the Commissioner considers appropriate to be the recipient of the report, or

(B) having regard to the nature of the relevant wrongdoing concerned or the circumstances of the report the Commissioner is of the opinion that the report should not be transmitted to a prescribed person because to do so would create a risk of serious penalisation against the reporting person or that evidence of the relevant wrongdoing would be concealed or destroyed, and

(ii) transmit the report to such prescribed person or other suitable person, as the case may be." (Emphasis added)

47. Section 10D(5) then provides:

"(5) Where a prescribed person or other suitable person cannot be identified under subsection (1), the Commissioner shall accept the report and notify the reporting person accordingly and of the reasons for accepting the report, in writing, as soon as practicable.

48. This function of identifying the appropriate recipient for a report, is required to be carried out in a very short timeframe; 14 calendar days from the date of receipt of the report (see sections 10D(1)(b) and (3)). Therefore, time is of the essence, particularly when one considers that the duty of the ultimate recipient of the report is to provide feedback to the reporter within three or six months of the report being made or acknowledged.

49. In this regard, the definition of "feedback" and "follow up" in Section 3 of the Act (which mirror the definitions in the Directive) are important:

"feedback" means the provision to a reporting person of information on the action envisaged or taken as follow-up and on the reasons for such follow-up;

"follow-up" means any action taken by—

the recipient of a report made in the manner specified in section 6 or 7, or testing BA person to whom a report is transmitted under section 7A, 8, 10C and 10D, to assess the accuracy of the information contained in the report and, where relevant, to address the relevant wrongdoing reported, including, but not limited to, actions such as an internal inquiry, an investigation, prosecution, an action for recovery of funds or the closure of the procedure;

50. The definition Section at 5A of the Act is also of importance in the context of the Applicant's continued assertion that he was penalised. It reads as follows:-

"(*5A) A matter concerning interpersonal grievances exclusively affecting a reporting person, namely, grievances about interpersonal conflicts between the reporting person and another worker, or a matter concerning a complaint by a reporting person to, or about, his or her employer which concerns the worker exclusively, shall not be a relevant wrongdoing for the purposes of this Act and may be dealt with through any agreed procedures applicable to such grievances or complaint to which the reporting person has access or such other procedures, provided in accordance with any rule of law or enactment (other than this Act), to which the reporting person has access*."

51. Section 6A deals with internal reporting channels and procedures. These set out that there should be channels receiving reports which are designed to establish and operate in a secure manner to ensure that the confidentiality of the identity of the reporting person and any third party mentioned in the report is protected. It also sets out a timeline for acknowledgement of the report and provides for a diligent follow up by the designated person.

52. Under Section 7A dealing with external reporting channels and procedures, reference is made to the manner in which such reporting should be made to the reporting person. Notwithstanding the submission of the Applicant, the Act does not exclude the possibility that the person designated to receive internal reports can receive external reports. Indeed, to do so would be illogical, since the expertise in receiving such internal reports clearly apply to external reports as well.

53. In relation to the approach that ought to be taken to the Commissioner's function in this regard, the identity of the Commissioner is relevant. Section 10A(2) of the Act provides:-

> *(2) The holder of the office of Commissioner shall be the person who, for the time being, holds the office of Ombudsman.*

54. The conferral of the function of Protected Disclosures Commissioner on the holder of the office of the Ombudsman is consistent with Recital 64 of the Directive, which specifically identifies Ombudsmen as appropriate competent authorities to deal with protected disclosures. It is clear that the Act envisages that the Commissioner shall be independent in the performance of his or her functions (see Section 10A(4)).

55. The Oireachtas has conferred other functions on the holder of the office of Ombudsman. The Ombudsman is an *ex officio* member of the Commission for Public Service Appointments, the Standards in Public Office Commission and the Electoral Commission, as well as the Information Commissioner and, the Commissioner for Environmental Information, the Appeal Commissioner in respect of open data and re-use of public sector information and, most recently, the Revenue Commissioners in respect of the re-use of protected data.

56. As a result, the Commissioner has a unique knowledge of the public sector and of the position of members of the public who interact with it.

57. Section 7A(iv) (I) deals with the powers of the designated person in dealing with repetitive reports. It reads as follows:-

> "*having carried out an initial assessment-*
>
> *(l) closure of the procedure in the case of repetitive reports where the prescribed person decides that the report does not contain really meaningful new information about irrelevant wrongdoing compared to a previous report (including any report made before the commencement of section 11 of the protected disclosure (amendment) act 2022 (in this clause referred to as a "past report")) made or transmitted to the prescribed person or to any other person in respect of which the relevant procedures (including any procedures that applied at the time any passed report was made) were concluded, unless new legal or factual circumstances justify a different follow up, and*

(II) notification of the reporting person, in writing, as soon as practicable, of the decision referred to in clause (I) and the reasons for it;"

It is clear therefore that a repetitive report is a report which does not contain any meaningful new information about a relevant wrongdoing compared to a previous report made.

<u>The Law Relating to the Standards to be Applied for Judicial Review.</u>

58. I think it is appropriate, particularly in a case brought by a litigant in person, to set out what it is that the court is entitled to review and the test that should apply to that review. As Bradley said in his leading commentary on judicial review (Conleth Bradley, *Judicial Review* (Round Hall, 2000)), "*a judicial review is not an appeal on the merits from the decision of the decision maker*". Quoting from *The Chief Constable of North Wales Police, ex parte Evans* [1982] UKHL 242, Lord Brightman said:-

"*Judicial review is concerned, not with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view under the guise of preventing the abuse of power, be itself guilty of usurping power... judicial review, as the words imply. is not an appeal from a decision, but a review of the manner in which the decision was made".*

59. Kelly J. (as he then was) in *Flood v Garda Síochána Complaints Board* [1997] 3 IR 321, added:-

"*Even if this court would have reached a conclusion different from that of the respondent, it is not entitled on judicial review to substitute its view in that regard for the one formed by the entity charged by statute with forming the appropriate opinion. This limitation on the power of judicial review must be borne in mind so as to ensure that this court does not trespass on matters in respect of which it is neither competence nor jurisdiction. I would not be justified in interfering with the decision of the respondent merely on the grounds that on the facts presented to it, I would have reached different conclusions. Once I am satisfied (as I am) that the appropriate procedures were followed and that the decision impugned was not irrational, the decision of the respondent must be upheld."*

60. In words which seem to me to be particularly relevant to this case, Murphy J. in *Devlin v The Minister for Arts Culture the Gaeltacht* [1999] 1 ILRM said as follows:

"*Judicial review is a valuable legal process. Over a number of years it has been invoked to correct some misunderstandings and occasional abuses in the exercise of statutory powers. The manner in which those powers must be exercised has been stated and restated by the courts in many cases a number of which were referred to in the judgment of the learned our judge…… In the absence of express statutory provision the courts do not have an appellate role by which they can reverse or*

review the actual decision taken. In these circumstances it may be expected that the need to invoke the remedy of judicial review in relation to public officials will diminish significantly. Certainly, it would be regrettable if this procedure, which achieved so much good, is to be invoked unnecessarily or in such a way as to delay or defeat the proper exercise of administrative powers. Public officials may not be permitted to exercise their powers improperly: neither should they be impeded from exercising them properly".

61. He went on to quote from the decision of O'Flaherty J. in *Riordon v An Tánaiste* [1997] 3 IR 502 where he said:

"Judicial review is an essential feature of our legal landscape. However, just as a constitution is not designed to partake of the prolixity of a legal code, so too judicial review should not be regarded as a legal panacea designed to remedy every conceivable grievance cover including that of the appellant in this case".

62. It seems to me that the applicant in this case falls foursquare within the views expressed by O'Flaherty J. Further, the views of the Supreme Court and the case is referred to me by Mr. O'Regan where he remphasizes this point (see *Fitzgibbon v the Law Society* and *Sweeney v Judge Fahey and the DPP).*

McLoughlin v the Labour Court.

63. The Applicant brought a judicial review of three decisions made by the Labour Court on the 12th of February 2020 on the basis that in one decision, it wrongfully held it was bound by an earlier determination of the Labour Court, which he says should not have been followed because there was bias on the part of the chairman. The learned judge noted that much of the Applicant's difficulty with the decisions related to the fact that he had made a

protected disclosure in September of 2015, the first of his four disclosures. The judge said as follows:-

> *"The applicant is convinced that as a result of making that protective disclosure, he has been subjected to a sustained campaign of penalisation by management and the WRC. In particular, he asserts that they actively sought his dismissal from his position of employment, due to the fact that he had made the protected disclosures which were critical of them*."

64. It transpires that the Applicant had brought five different complaints relating to the failure to accede to his request to be retained in his employment beyond the age of 65. He then brought an unfair dismissal's claim which was the subject matter of the Labour Court's decision which, in turn, he judicially reviewed, which the Court dismissed.

65. However crucially from this court's perspective Barr J. noted that the Applicant had a more fundamental problem in relation to his assertion that his application for retention of his employment was improperly refused. He said:-

> "*He made a protected disclosure in September 2015. He is convinced that as a result of that, persons within the management of the WRC took steps to secure his dismissal. However, he was not in fact dismissed. He retired upon reaching his normal retirement date at the age of 65 years. Insofar as he may have felt that he was wrongly excluded from consideration for retention in employment beyond the age of 65 years, that issue became moot when he withdrew his application on 28th November, 2016. He never submitted any further application for retention in employment. Thus, no issue arises as to whether anyone in the WRC, or in the notice party, was correct or incorrect to hold that he was ineligible for retention in employment. The applicant turned 70 years of age on 9th January 2022. The court is*

hopeful that this judgment will bring an end to these acrimonious proceedings and allow the applicant to enjoy his retirement in the company of his wife and daughters".

66. Sadly, that hope was in vain, as this case shows.

Discussion

67. Neither the chronology nor the manner in which it has been presented by the Applicant, are straightforward. He has chosen to rehash and repeat matters which have been the subject matter of other decisions in particular that of Barr J. Whilst I accept that he is a litigant in person, he has been before the courts on a number of occasions including the WRC and the Labour Court and is clearly an intelligent man.

68. Matters were not made easier by his choice to argue his case remotely. Indeed, he seemed to regard it as his right to be able to move his application from the comfort of his home, without having the papers in front of them. When I asked him on a number of occasions to bring me to a particular paragraph in his affidavits or indeed a particular affidavit, he showed a singular indifference to do so, saying that it would be most disruptive for him to have to go to another room to get his papers.

69. In my view, the use of remote applications is brought into disrepute by applicants who believe that they can move applications from their sitting rooms without coming to court or indeed be on top of their paperwork without reason.

70. Therefore, without much assistance from the Applicant, it has been possible to discern the case that he makes. If it were not for the largess on the part of the Commissioner, who informed the court that the Applicant, in his statement of grounds, had not made out any case against the Commissioner, the court would have been left in a situation of being unable to make any order against that party, if it wished. This shows a lack of appreciation of the role of the court to an alarming extent.

71. Turning to the case against the Commissioner, that case is based on one ground, namely that the Commissioner decided to send the matter to the Secretary General of the Department, in circumstances where on the face of it, there were allegations of misconduct against the Department and the Secretary General. If that case could be proven, then in my view it would offend against the principle of *nemo judex in causa sua,* no one is judge in his own case.

72. However, other than the fact that Mr. Garvey, acting for the Commissioner, decided for cogent reasons, to send the matter to the Secretary General, the Applicant has not pointed to any other evidence.

73. The letter of Mr. Garvey to the Applicant makes it clear why he was sending the report to the Secretary General. He said it was because the Secretary General and the Department were in a position to give feedback and follow up, requirements under the Act. In particular, he said that by reason of the nature of its responsibilities and functions and considering that the wrongdoing related to matters within the Department, or bodies within its remit, including that the report was received from the Minister with responsibility for the Department, it seemed to him to be the most appropriate recipient of the report and that it had the competence to provide feedback and follow-up and protect his the identity.

74. The Second Named Respondent, on the other hand, has shown that the Commissioner decided to recuse himself from the matter because of a potential conflict of interest, and that the papers were sent to an individual who did not know the Applicant, Mr. Garvey, and who simply, within a very tight time frame, had to decide to whom the report would be sent.

75. It is clear that there was not an appropriate person available to consider it, within the meaning of the Act, and therefore pursuant to the provisions of Section 10, he was required to find "*an other suitable person*".

76. That is the test which must be applied in a judicial review. Particularly so in circumstances where the Commissioner has a very wide discretion as to who to assign the report to pursuant to statute.

77. Given the obligation to respond quickly within a tight time frame, it seems to me it was not inappropriate to send the matter to the Secretary General. Indeed, it would have been illogical to send the report to any other party or to keep it within the office, which the Applicant urges upon the court, in circumstances where the matter was of a technical nature and because of its history, as Mr. Garvey referred to in his letter. If the matter had been sent to some other third party, who at this point I would find very hard to identify, they would have had to undertake the most intense investigation just be able to ascertain what the matter was about. That would have been a wasteful allocation of resources. While that may have satisfied the Applicant's investigative demands, it is not what the Act demands, nor would it be in any way justified.

78. Therefore, I find that the Commissioner did not act unlawfully and did not breach the principles of natural justice or constitutional justice in following the provisions of the legislation.

79. Matters may have been somewhat different, if the Secretary General had decided to consider the matter herself, and it is at this point that I turn to consider the case against the First Named Respondent.

80. This begs the question as to whether the Minister breached the provisions of the Directive or the Act or the Applicant's constitutional rights or the requirements of natural justice by sending the matter initially to the Department, who in turn sent it on to the Commissioner.

81. I find that there was nothing improper in the manner in which the Minister dealt with the report. The disclosure was first of all, sent by to him by e-mail by the Applicant. He

forwarded it to the Department. The Department, realizing that it was a protected disclosure, acted promptly and sent it on directly to the Commissioner, without examining it or investigating it at that stage and therefore, did not in any way breach the Applicant's rights. They simply forwarded on the e-mail. There was no conspiracy and nobody acted to the Applicant's detriment. Therefore, I find that there is no case to be met in relation to this line of argument and I reject it.

82. The next issue relates to the actions of the Secretary General of the First Named Respondent who decided that she was not an appropriate person to consider the report and nominated Mr. Phelan. The Applicant makes two points. Firstly, he says that the Secretary General should have sent it straight back to the Commissioner, and secondly, that it should never have been sent to Mr. Phelan since his job was simply to receive internal reports in a secure manner to ensure that the confidentiality of the identity of the reporting person and any third party mentioned in the report is protected. He had no role in external reports.

83. If I can deal with the second point first, it seems to me that he is and was the most obvious person who should consider the report. As I have noted above, there is nothing in the legislation which demands two streams of investigations, one for internal reports and the other for external reports (see sections 6 and 7 of the Act). Indeed, it seems to me that Mr. Phelan was clearly the most obvious person to consider the matter. Dealing with the first point, I see no merit in this submission that the Secretary General should have sent the matter back to the Commissioner. That would simply have prolonged the process as well as the expense and would have put in jeopardy the tight timeline which the legislation envisaged that such reports would be dealt within.

84. The Applicant makes no complaint as to Mr. Phelan's independence *per se*, nor could he. It is clear that Mr. Phelan took great care to ensure objectivity, as is obvious from his detailed decision making. Not only did he forensically go through the papers, but he dealt

with the long, detailed and at times incredibly tedious correspondence from the Applicant, who insisted on repeating verbatim the many complaints that he had made in his three previous protected disclosure reports.

85. I do not accept the Applicant's reliance upon either the recitals within the Directive or documents which may explain the Directive as conferring any further rights that are not covered in the legislation. There was nothing inherently wrong in choosing Mr. Phelan to consider the report. In his submissions, the Applicant seems to hint at some form of undue influence which may have affected Mr. Phelan's decision making. There is no evidence whatsoever to support such a suggestion, no matter how tangentially it may have been introduced into argument. Therefore, I reject any such suggestions as having no basis in fact.

86. Whilst the Applicant has said that his three previous disclosures were not properly investigated, I cannot agree. It is clear to me that in fact, they were investigated and that he was involved in that investigation, particularly in relation to Mr. O'Sullivan and the Resolve organization.

87. However, dealing with the fourth protective disclosure, it is clear from the report of Mr. Healy BL, a member of the Independent Referral Bar, that everything that Mr. Phelan did was beyond reproach. The Applicant also had input into this review. It is clear from the Act that it is only in circumstances where new information has come to light, that a further investigation will be warranted.

88. In his submissions, the Applicant refers to publicly disclosed documents as the basis of new information. I cannot accept that these documents which include correspondence from the Director of the Migrants Rights enter in 2015, a report from a body called GRETA in 2017 concerning the implementation of the Council of Europe report against trafficking in human beings, a report from the US State Department on trafficking in persons and a

submission made by the Irish Congress of Trade Unions in 2018 amount to new information within the context of the Act. They are nothing more than public commentary.

89. The Applicant retired in 2017 and therefore, it is patently clear that what he put forward was not new information. It was at best old wine in new bottles, however in reality it was old wine in old bottles. It is not open to the Applicant to simply say that he is making a second or third disclosure and that these are separate and distinct from the first disclosure, when in fact they are simply the same original allegation with ancillary complaints as to how the first disclosures were dealt with.

90. An issue that seems to have entered the case late in the day relates to an allegation that the Department airbrushed the 2017 disclosure from the public record by deliberately misreporting it as correspondence in its statutory report. The Applicant alleges that this is evidence of concealment and a further breach of legal obligations which is in itself serious wrongdoing. This did not form part of his Statement of Grounds, nor does it appear in either his verifying affidavit or supplemental verifying affidavit seeking leave to apply for Judicial Review, both of which run to 22 pages**.**

91. It seems to me that the Applicant's reference to this matter was, in essence, to show corroborating evidence of a cover up. I am afraid I cannot agree with him. Either way I do not believe it is a central issue to his case. At least he takes this as a failure on my part to consider it, I have done so. I do not believe it has merit. The description or otherwise of what clearly was correspondence in the form of a protected disclosure report, does not give rise to a cause of action or to the ability to judicial review the Respondents.

92. It clear that he has revisited the three previous protected disclosures and utilising the wording of the section, the contents are *"substantially similar".* Indeed, having read the disclosures, his affidavits and his submissions he has repeated himself on multiple occasions. I think it would be hard to find a clearer case of a "*repetitive report*" as envisaged by the Act.

Therefore, I find that this disclosure report did not contain "*any meaningful new information about a relevant wrongdoing compared to past reports*" and that Mr. Phelan was perfectly in order to come to the view that the Applicant was putting forward a repetitive report.

93. Since the contents of the three previous disclosures where investigated, I do not accept the argument that, before he closed the report, he had to investigate if relevant procedures were concluded in regard to the 2017 disclosure. That would place far too onerous a burden upon him and the Department. However the information was clear, the previous disclosures were investigated and the appropriate procedures were followed. That being the case I find that his decision to close the report, was not unlawful.

94. The Applicant has submitted that various Recitals in the Directive impose a legal obligation however, as I have set out above, I do not accept that that is the case. I accept the submission made by the First Named Respondent, that the recitals impose no such legal obligation. The law in this case is clear, it is as is set out in the legislation. I also accept the submission of the First Named Respondent that the Act is not retrospective. The issue of feedback and follow up clearly arise from the amended legislation. Even if I am incorrect on this issue, I find that there was feedback and follow up in the manner in which the external investigations interacted with the Applicant and that he received copies of the reports of Mr. O'Sullivan and Mr. Healy.

95. I now turn to his ongoing complaint that he and his family have been the subject of punitive action. This is simply wrong. As Barr J. found in the Labour Court case, the Applicant retired. His continuation of this argument is, in my view, an attempt to portray himself as a victim. This is not the case. Further, I am satisfied, that the Act does not allow for the venting of personal matters (see Section 12(1) and Section 5(A)) and therefore fall outside the provisions of the Act.

96. I now turn to the issue of curial deference. In *Henry Denny & Sons (Ireland) Ltd. v. The Minister for Social Welfare* [1998] 1 I.R. 34, Hamilton CJ said:

> "*I believe it would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise, it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."*

97. Geoghegan J. said in *Orange Communications Ltd. v. The Office of the Director of Telecommunications Regulations* [2000] 4 I.R. 159

> *"It would not make sense that a court of amateurs should have the right to reverse courts of experts in matters pertaining to their expertise."*

98. It is clear that the Commissioner is a most experienced person and that his office is one of expertise, which deserves respect and that this Court, in judicial review proceedings, should have due regard to and appreciation of that expertise.

99. Quite frankly it is a waste of not only the Department's time and the Commissioner's time but also the court's time, for the Applicant to continue to bring these types of reviews. Having read the opinion of Mr. O'Sullivan of Resolve, it is clear to me that he was, in essence, telling the Applicant that this has to stop, where he said at page 10 of his report,

> *"Mr. McLoughlin clearly believes that his colleague inspectors are involved in a conspiracy with management to take it easy on non-compliant employers. He also refers to his suspicion of political interference without being able to provide any*

evidence of this. This is an extremely serious allegation to level against his organization and management and to do so on the basis of suspicion alone is unjustifiable".

100. That was in April 2016. Eight years later it is clear that he is not listening and does not want to listen.

101. That is the difficulty with this case. He has a firmly fixed view, as Barr J. noted, which are not borne out by any evidence. Nonetheless he insists on maintaining these views.

102. In my view, the Applicant has failed to meet the appropriate test that the actions of the Commissioner were irrational in sending the matter forward to the Secretary General of the Department in accordance with law. Therefore, the case against the Second Named Respondent must fail.

103. The case against the First Named Respondent must also fail since the Secretary General cannot be criticised for the steps she took. They could not be considered to be in any way irrational or unlawful. The review undertaken by Mr. Phelan was again carried out in accordance with law. The Applicant was repeating, for the umpteenth occasion, matters which were repetitive in nature and which had been the subject matter of previous protected disclosure reports and which disclosed no new material information. The matters were investigated by any objective standard, just not to his standard. In those circumstances the Second Named Respondent was correct in determining that the fourth protected disclosure, the subject matter of this judicial review, was repetitive in nature and therefore fell foul of Section 7A(iv)(l) of the Act.

104. I should make some further comments, particularly in circumstances where the First Named Respondent has asked me to dismiss the application on the grounds of a lack of candour. It is patently clear from a review of the history of the Applicant's engagement with these matters, his numerous complaints to the Labour Court, his claim for unlawful dismissal,

his previous judicial review and his complaints to the Standards in Public Office that unless restrained by the court, he will continue to return to these matters by way of legal proceedings.

105. Indeed, it transpires he has at least two other protected disclosures in the wings, one of which is to the Standards in Public Office Committee alleging that named senior officials of the Department have colluded in relation to precisely the same matters which were the subject matter of the protected disclosures, his alleged dismissal and overlap with the subject matter of this case. Therefore, there may well be further judicial review proceedings on their way. The time is fast approaching where the parties will have to consider what steps should be taken to end something which is coming close to being an abuse of process.