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No redactions needed

COURT OF APPEAL

CIVIL

Record Number. 2022/122

Noonan J. **Neutral Citation Number [2023] IECA 112**

Ní Raifeartaigh J.

Binchy J.

BETWEEN/

JOHN BARRETT

APPLICANT/APPELLANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

AND

THE MINISTER FOR JUSTICE

RESPONDENTS

JUDGMENT delivered by Ms. Justice Ní Raifeartaigh on the 8th day of May 2023

Introduction

1. This is an appeal in respect of the High Court's refusal of an interlocutory injunction. The appellant, holding the position of Executive Director of Human Resources and People Development within An Garda Síochána, and who is a member of the Senior Leadership Team, was the subject of a disciplinary process which commenced by May 2018 and was expanded by the (then) new Commissioner, Drew Harris in October 2018. The process reached an advanced stage; an investigation was conducted by a Senior Counsel (in which the appellant participated with the assistance of solicitor, junior and senior counsel for a significant amount of time before withdrawing); an investigation report was provided to the Minister by the Senior Counsel (November 2020); and a recommendation was made (December 2020) by the Commissioner to the Minister for Justice that the appellant be dismissed. The appellant had issued proceedings in July 2020 in which he claimed that the disciplinary process was legally flawed in many respects, but he sought interlocutory relief for the first time only on the 30 December 2020, after the recommendation for his dismissal was made. His complaints include what might loosely be characterised as "fair procedures" grounds in respect of the process (both as to the initiation of the process and the manner in which it was conducted), although they were in many respects much more far-reaching than what might be termed the usual type of procedural arguments which often feature before the courts, and they include allegations of conspiracy. He also contends that the disciplinary process itself constituted a "detriment" which he suffered as a result of having made "protected disclosures" within the meaning of the Protected Disclosures Act 2014. The High Court refused to grant an interlocutory injunction (Stack J. [2022] IEHC 86) and this judgment concerns his appeal against the refusal.

2. Notwithstanding the refusal of the interlocutory injunction, the appellant remains in his position, albeit suspended on full pay, by reason of an undertaking given by the respondents pending the determination of this Court.

3. While a large number of issues were argued, and dealt with in considerable detail by the High Court judge, I am of the view that the appellant's delay in seeking interlocutory relief is in and of itself a valid reason for refusing the relief sought. I therefore agree with the High Court judge's conclusion on the issue of delay, although she dealt with the issue of delay after she had disposed of a number of other issues. While it is of course true that in general the courts are reluctant to intervene to halt disciplinary processes (*Rowland v. An Post* [2017] 1 I.R. 355; *McKelvey v. Iarnród Éireann* [2020] I.R. 573), it is also true that there are some circumstances in which prematurity is not a valid reason to refuse an application for interlocutory relief even though the disciplinary process is ongoing. I will here explain very briefly why I am of the view that the present case falls into the latter category, but this will be dealt with in greater detail below.

4. In the present case, many of the appellant's complaints go far beyond assertions of unfair procedures which might be rectified in due course by the process itself and are, instead, of an existential nature; he complains that the entire process was flawed from the outset and deeply unjust in and of itself. He alleges that the process was conceived out of malice and personal *animus* and maintained against him for improper reasons. He maintains that the process amounts to his victimisation for having made protected disclosures. If these complaints have substance, the only cure for the process would be its abandonment. The logic of the appellant's own complaints, therefore, brings the case into a category where, had he moved with reasonable expedition in the ordinary way, he could not have been defeated by a prematurity argument. His failure to do so, with the result that a significant length of time elapsed, is in my view fatal to the exercise of the court's discretion in his favour in the matter of interlocutory relief. All of this will be explained further in due course.

5. Notwithstanding that I consider that the appellant's delay should be dispositive of the application (and appeal), I will also address some of the appellant's protected disclosures arguments. I do so because this is an area in which there is relatively little authority, and an important issue arises with regard to the burden and standard of proof in a case such as this, that is to say, one where there is a statutory presumption which reverses the burden of proof on one particular aspect of the appellant's case.

PART I - Background and Chronology

6. It is necessary to examine the background history and chronology in some detail in order to contextualise both my comments on the protected disclosures issue and my view on delay. However, while it is necessary to provide sufficient information for this purpose, I hope to keep this description as neutral and brief as possible given that the substantive hearing has yet to take place. The appellant swore a large number of affidavits and placed numerous exhibits before the Court, including extensive correspondence and extracts from the Public Accounts Committee and the Tribunal of Inquiry into Protected Disclosures ("the Disclosures Tribunal"). It would not be appropriate in this interlocutory judgment to deal with all of those in detail.

The Templemore Affair

7. The appellant submits that the Court should take into account, as part of the evidential matrix herein, certain events which I will refer to as the Templemore affair. In 2015, the appellant became aware of financial irregularities in the Garda College at Templemore and made a disclosure about these irregularities to his superiors. These matters were publicly investigated by the Oireachtas Committee of Public Accounts (hereinafter "the PAC") over four public meetings in the summer of 2017. Among those who attended at those public meetings were former Commissioner O'Sullivan, former acting Commissioner Donal O'Cualáin (then Deputy Commissioner), Joseph Nugent, Chief Administrative Officer, and Michael Culhane, Executive Director of Finance and Service. The Committee's subsequent

report concluded that there had been a lack of concern about the matters raised by the appellant and a desire to minimise reputational damage to the organisation. It was critical of the manner in which the Commissioner and others had responded to the appellant's complaints. The appellant's position is that from that time onwards, certain senior officers in An Garda Síochána bore him ill-will and that this is connected with subsequent events described below.

8. The appellant points to the fact that no one suffered any disciplinary consequence for the Templemore irregularities which he had brought to light. He contrasts this with his own treatment. In one of his affidavits, he avers that he was furnished for the first time during the PAC investigations with a letter written by Michael Culhane in which the latter accused him (the appellant) of criminally unlawful conduct. In this letter, dated the 24 October 2015, Mr. Culhane wrote to Commissioner O'Sullivan (and another), posing the question, "*in collecting …confidential material and posting it to himself… is JB unwittingly guilty of a criminal offence under the Official Secrets Act*?" and adding: "*The Commissioner may wish to initiate a formal investigation of JB's activities under the Official Secrets Act as his intent may appear to be cause (sic) damage to An Garda Síochána either through unauthorised disclosure or leaks to the press*". The same letter also referred to the author's concern that the appellant was "*attempting to undermine my professional reputation and my record of achievement in An Garda Síochána*". The appellant avers that this letter was withheld from him between October 2016 and May 2017 despite a number of efforts on his part to obtain a copy of it.

9. It is clear from the appellant's affidavits that he believes that these events led to some individuals within An Garda Síochána developing an *animus* towards him, and that he also believes this to be connected with the initiation and maintenance of the disciplinary process against him over the period 2018-2020.

10. It may be noted that, for present purposes, the appellant contends that his disclosure in 2015 to his superiors about the financial irregularities constitutes a protected disclosure within

the meaning of the 2014 Act **("the first protected disclosure"**), and that his evidence to the PAC also constitutes a protected disclosure **("the third protected disclosure").**

Events related to Sergeant Maurice McCabe

11. In February 2017, the appellant made a complaint to the Tánaiste and Minister for Justice and Equality about the conduct of former Commissioner O'Sullivan and Mr. Joseph Nugent, Chief Administrative Officer, in connection with what he characterised as interference by them while he was acting as a protected disclosure manager for former Sergeant Maurice McCabe.

12. The background to this was that the appellant had been appointed some two years earlier by former Commissioner Nóirín O'Sullivan to take on a role (the precise nature of which is in dispute between the parties) with regard to Sergeant Maurice McCabe. He says that on the 17 February 2017, Sergeant Maurice McCabe made a protected disclosure to him which alleged relevant wrongdoing against former Commissioner O'Sullivan. He says that he was then improperly pressurised by the Chief Administrative Officer, Mr. Nugent, to transmit this protected disclosure to the Commissioner notwithstanding Sergeant McCabe's express instructions that the appellant should not do so.

13. The appellant contends that his subsequent communication to the Minister complaining about this event constituted a protected disclosure (**"the second protected disclosure**). It is not necessary for present purposes to set out what subsequently happened to this complaint. What is worth noting for present purposes is the appellant's averment that "*since the making of this protected disclosure, Joseph Nugent has had it in for me and he has taken every opportunity which he thought he could to abuse or to cause serious harm to me*….".

14. In February 2018, the appellant gave evidence at the Disclosures Tribunal concerning Sergeant Maurice McCabe and related matters. He testified that he had been informed that Commissioner O'Sullivan intended to '*go after'* Sergeant Maurice McCabe at the O'Higgins Commission. The Third Interim Report of the Disclosures Tribunal was published on or about

the 11 October 2018 and dealt with this under the heading "*Going after Maurice McCabe*". The Report was critical of the appellant's evidence. The appellant contends that his evidence to the Disclosures Tribunal was a protected disclosure (**"the fourth protected disclosure").** Again, it is clear that the appellant firmly believes that there is some connection between these events and the disciplinary process which was commenced and maintained against him, and that certain individuals in An Garda Síochána hold a grudge against him because of his involvement in the Maurice McCabe-related events.

March – November 2017: The selection process for the armed response unit and the appellant's text to Assistant Commissioner Fanning

15. In March 2017, an internal selection competition was held for the placement of members of An Garda Síochána into the armed support unit. On the 10 April 2017, one particular Garda underwent an interview by the panel and was refused advancement to the next stage of the selection process. In or about November 2017, the Garda in question appealed the interview board's refusal to the appellant's office. The appeal was heard by Former Chief Superintendent McLoughlin and the appellant, who decided to advance this Garda to the next stage of the internal selection process.

16. The Garda Representative Association Central Executive Committee complained about this to Assistant Commissioner Fanning. (Assistant Commissioner Fanning is no longer in An Garda Síochána but for ease of reference I will refer to him in this judgment as Assistant Commissioner Fanning.) This led to interactions between the appellant and Assistant Commissioner Fanning, which culminated on the 18 November 2017 in a text from the appellant which said::

> 'Fintan, we discussed this matter earlier in the course of a call. I understand the issue you raised but your text suggests you fail to understand the appeal made and the outcome of that process. I am advised that I will review the matters raised but I must clearly put you

on notice that your assertion that merit-based selection was not followed is not the case. Consider carefully the matter I raised with you and reflect appropriately. Amplification is neither helpful or becoming. **Be on notice.**. J [sic].*'*

(Emphasis added)

On 19 November 2017, Assistant Commissioner Fanning wrote to the Deputy Commissioner about his interactions with the appellant. He referred to the above text and also said that the appellant had, during a telephone call, advised him to consider carefully a process he was in (the "Quinn process"). The reference to the Quinn process arises in the following way. The appellant had been assigned in May 2017 to investigate a complaint made by Assistant Commissioner Fanning in connection with the latter's relocation from Human Resources Management to Mullingar. The appellant appointed Senior Counsel Oisin Quinn to act as independent expert with regard to this process. Again it is not necessary to set out further details with regard to this; but it is part of the background to the interactions between Assistant Commissioner Fanning and the appellant in 2017.

17. In his letter of 19 November 2017, Assistant Commissioner Fanning said there was a serious issue about the selection process for the armed response unit and suggested that matters should be fully investigated and the Commissioner for Public Service Appointment (hereinafter "the CPSA") advised. He went on to say, with regard to the text of the 18th November 2017:

"This text is a threat to me and I am very concerned about and I am worried about what this means for me. I am asking that the matter be fully investigated and that appropriate safeguards are put in place to protect me. I am concerned that the matter is very serious and ask that you consider the matter under section 42 of the Garda Act. I am concerned that it is linked to a recent matter concerning the investigation of a Bullying &

Harassment etc. by a Garda that is entitled to protection provided by the Protected Disclosures legislation. I am of the view that this is a very serious matter".

18. Before continuing with the narrative of events following this letter, it may be noted that Mr. Nugent, the Chief Administrative Officer, carried out an investigation into the alleged breaches of the framework governing the selection process and wrote a report for the CPSA dated 8th March 2019 which concluded that the appellant had breached the framework. The appellant has averred that he did not know such an investigation was taking place nor was he furnished with a copy of the findings, and only found out about it later.

The initiation of the disciplinary process the subject of these proceedings

19. The appellant was informed of Assistant Commissioner Fanning's complaint by a letter dated 21 November 2017 from Deputy Commissioner Twomey. It said that Assistant Commissioner Fanning "*has made a complaint in relation to the content of a text which you went to him*" and "*has indicated that it is his view this text…amounts to a threat to him*". The Deputy Commissioner then suggested mediation as a solution. However, while the appellant agreed to engage in mediation, Assistant Commissioner Fanning declined to do so.

20. It may be noted that a Detective Chief Superintendent in the Security and Intelligence Division was apparently asked to assess the threat, and reported on 23 November 2017 that "*there is no intelligence or indication whatsoever which gives reasonable cause to foresee any threat or causation of harm to Assistant Commissioner Fanning from Mr. John Barrett*".

21. Assistant Commissioner Fanning retained solicitors Sean Costello & Co. to represent him in connection with his complaint. In late November 2017, his solicitors wrote a letter to Deputy Commissioner Twomey saying that their client regarded the matter as serious and that he was formally requesting a full investigation. In the same letter, the solicitor indicated that their client did not wish to have any interaction with the appellant while the investigation was ongoing. The letter was not copied to the appellant.

22. At the time, Ms. Kate Mulkerrins was Executive Director Legal and Compliance within An Garda Síochána (and also a member of the Senior Leadership Team). There is correspondence between her and Sean Costello Solicitors in November and December 2017, in the course of which she suggested three names of individuals who, she suggested, were suitably qualified to conduct an independent investigation. On 16 January 2018, Sean Costello Solicitors agreed to the appointment of one of them, Senior Counsel Mr. Luán O'Braonáin, to conduct the investigation. There was further correspondence between them over the next few months. However, nobody asked the appellant during this period whether he wished to be involved in the selection of the independent investigator. This did not arise until the letter of 3 May 2018, discussed below.

23. Meanwhile, in February 2018, the appellant gave evidence to the Disclosures Tribunal concerning the matter later described in the Third Interim Report of the Tribunal under the heading "*Going after Maurice McCabe*".

Ms. Mulkerrins' letter of 3 May 2018

24. By letter dated 3 May 2018, Ms. Mulkerrins wrote to Assistant Commissioner Fanning's solicitors pointing out that the views of the appellant had not been sought on the selection of an independent investigator and that he should be afforded an equal opportunity to do so. This was done by letter from her to the appellant by letter of the same date.

25. In her letter to the appellant, Ms. Mulkerrins referred to the previous letter from Deputy Commissioner Twomey of 21 November 2017 and said that Assistant Commissioner Fanning "*has confirmed that he wishes the allegation against you to be treated as a formal complaint*" and that since the initial complaint had been made, "*he has also alleged that this 'threat' extended to him feeling unsafe at work*". She said that following her "*initial review of the matter*", it would appear that the investigation would focus on whether or not the appellant threatened Assistant Commissioner Fanning and/or communicated with him in an

inappropriate manner "*such as to amount to misconduct for the purpose of the Civil Service Disciplinary Code*".

26. She then informed him that it was initially proposed that a person independent of An Garda Síochána would be appointed to investigate the complaint and that Mr. Luán O'Braonáin SC was proposed in this regard. She acknowledged that the appellant was not asked whether he was agreeable to this being the person charged with conducting the investigation into the complaint. She said that, while she did not understand any person to have a veto concerning the appointment of an independent investigator, because Assistant Commissioner Fanning had been asked for his agreement she was now offering the appellant a similar opportunity to accept or reject his appointment. If he was not agreeable to Mr. O'Braonáin, she would consider the appointment of another independent person. She also indicated that the matter would be investigated pursuant to the provisions of the 2016 Civil Service Disciplinary Code.

27. The appellant did not reply to the letter of 3 May 2018. Ms. Mulkerrins wrote again to the appellant on 23 May 2018. Again, the appellant did not reply. By letter dated 21 June 2018, Ms. Mulkerrins wrote to the appellant indicating that, not having received a response to her two previous letters, she would proceed to appoint Mr. O'Braonáin S.C.

28. This elicited a lengthy response by letter from the appellant. The letter has a two-fold significance: first, it is alleged by him to be a protected disclosure, and secondly, it later formed the part of the basis upon which Commissioner Harris would expand the scope of the disciplinary process in October 2018. It will not here be reproduced in detail but I will set out the main points therein as there is a dispute between the parties as to whether or not it constitutes a protected disclosure.

The letter of 29 June 2018 from the appellant to Ms. Mulkerrins (alleged protected disclosure No. 5)

29. The appellant contends that this letter constitutes a protected disclosure (**"the fifth protected disclosure").** The main points made in the letter by him were as follows:

1) Clarification was sought "*as to the identity of who it was that appointed you to address matters as outlined*", as well as "*upon what policy that appointment is grounded and pursuant to what specific policy provisions*".

2) There was a query as to why issues which Assistant Commissioner Fanning had raised were being brought to the appellant's attention "*so vaguely*" and seven months later. It was said that the appellant was "*entirely prejudiced by this delay and the absence of specificity*" with regard to the allegations.

3) A request was made for all correspondence between Assistant Commissioner Fanning and the Acting Commissioner or Deputy Commissioner Twomey since 21 November 2017.

4) The appellant said he was "s*hocked*" that Ms. Mulkerrins had proceeded to nominate a person unknown to him to deal with "*matters of purported gravity and, per your suggestion, possible consequences to me*". He said he was at a loss to understand why she did not first acquaint him with the matters and suggest that he proffer a list of independent persons to address whatever matters were of concern.

5) He expressed himself to be "*perplexed*" by the reference to discipline; saying that "*This definitive reference to this course of action, being in your consciousness already, is clearly prejudicial. It is in the context extraordinary*".

6) He said that what was happening was "*reminiscent of the occlusion which was uncovered by the PAC of complaints made against me with respect to my efforts to*

deal properly and transparently with matters of gross financial irregularities at the Garda College in Templemore" and that the parallels were "*obvious and chilling*".

7) He again referred to the matter "*carrying…the hallmarks of similar events, from October 23rd 2015*….", and as being "*truly extraordinary*" and "*a matter of profound concern*" to him.

30. By letter dated 6 July 2018, Ms. Mulkerrins said that Mr. O'Braonáin was appointed and briefed following the failure of the appellant to respond to her correspondence of 3 and 23 May. Notwithstanding this earlier failure on the part of the appellant, she said, she would give an opportunity to the appellant "*to set out the substantive basis for his out of time objection to the appointment*". She set the time limit for a time after he returned from leave. She said she wished to reassure him that all of his rights would be fully respected and that her reference to discipline was not prejudicial but rather "*is included in deference to those rights, specifically your right to be put on notice that an investigation of this complaint may result in an adverse finding, which may in turn culminate in disciplinary proceedings against you*". She stated that the request for discovery should be taken up with the investigator.

The letter of 1 August 2018 (alleged protected disclosure no. 6)

31. On the 1 August 2018, the appellant wrote a letter to Acting Commissioner Donal O'Cualáin. Again, this letter has a two-fold significance as the appellant contends that it is a protected disclosure (**"the sixth protected disclosure");** and it was part of the basis upon which Commissioner Harris later expanded the scope of the disciplinary process. It was a long letter running to some 6-7 pages and again I will try to summarise the main points only:

(i) It refers to the correspondence from Ms. Mulkerrins in May 2018 to the effect that "s*ome form of investigation is underway into an unspecified formal complaint*" and that an external named party had been appointed. It says that the May 2018 letter put him on notice that an investigation may culminate in disciplinary proceedings

against him, and he comments that this is "*an extraordinary way of An Garda Síochána to proceed in all the circumstances*…".

(ii) He points out the queries he raised in response to Ms. Mulkerrins and comments: "*It was profoundly disturbing to note that no answer has been provided to me since then with respect to any of these essential questions but more recent information received serves to put this fundamental procedural flawed approach in a much more sinister and serious light*".

(iii) He refers to the process as "*an abuse of process*" and that his "*reasonable and obvious questions continue to remain unanswered*". He describes as a "*legal nonsense*" the fact that Ms. Mulkerrins "*has already taken action and retrospectively sought my approval*" to engage with the third party investigator. He says that this approach deprives him of his constitutional rights and "*grossly offends the most basic principles of natural justice*" and is "*prejudicial, fatally flawed, and indeed actionable*".

(iv) He says that because of the failure to receive answers to his queries, he carried out his own inquiries. As part of this, he had "*two specific discussions with Assistant Commissioner Fanning*" and was "*truly shocked and surprised by what I learned*", which was this: "*The Assistant Commissioner clearly and emphatically denies making any formal complaint against me*".

(v) The appellant accuses the addressee of knowing the above: "*It is abundantly clear that you were aware that the suggestion that there was a formal complaint against me made by Assistant Commissioner Fanning was false*". He adds that "*you were aware of this even as the correspondence containing that most serious accusation was being prepared and addressed to me; a complaint which has been notified to me in writing numerous times since May 3rd 2018*". He says that Assistant

Commissioner Fanning "*is adamant that there nothing (sic) of what has been termed a 'formal complaint' against me and statements to the contrary are entirely without foundation*." Later in his letter he refers to Assistant Commissioner Fanning as being "*emphatic in his denials of said complaint*".

(vi) The appellant says that he is deeply concerned by the information and it may explain why his queries have never been answered.

(vii) He adds that Assistant Commissioner Fanning had also communicated that "*he is not cooperating with*" the independent investigator, and again accuses the addressee of having knowledge of this position by reason of extensive correspondence and meetings with Assistant Commissioner Fanning.

(viii) He refers to the failure of the addressee to open a proper investigation of "*spurious criminal allegations made against me in October 2015*", which he contrasts with the action of pressing ahead with "*an unspecified investigation without either process, procedure or assent*" and potential disciplinary consequences. He refers to it as "*bizarre abdication and abuse of fair procedure*" and "*invidious unfairness of process to me*". He also says that none of the findings of the Public Accounts Committee gave rise to "*even the most minor of disciplinary consequences for those with oversight responsibility*". Later in the later he returns to events in October 2015, saying that a letter was sent to the Executive of which the addressee was a member at the time, which suggested that the appellant be investigated "*for some unspecified breach of the Official Secrets Acts*", which was a "*foul and unfounded allegation*". He says that "*then, as now, I was never advised of the charge made against me.*.". He refers to there being a "*pattern of behaviour which I must regrettably note, you are a consistent party to*".

(ix) He describes the situation as "*both extraordinary and outrageous*" and that may "*may well demand to be ventilated publicly*". He continues: "*It gives rise to obvious and profound concerns of abuse of process and trust and a perversion of the power of the office's formal authority.* "

(x) He says that it raises "*the gravest questions as to your motivation*" in allowing the previous correspondence from Ms Mulkerrins to be composed and sent to him. He uses the phrases "*ham-fisted and corrupt approach*" and "*a shameful pattern of response and malevolence for which your office holds ultimate responsibility*".

(xi) The remainder of the letter continues to use phrases such as "*abuse of process*", a disciplinary process which is "*baseless*", and asks for responses to the various questions he has raised. He refers to "*the opacity, vagueness, distortion and failure to answer fundamental questions*" .

The letter of 20 August 2018 (alleged protected disclosure no. 7)

32. On the 20 August 2018, the appellant wrote a second letter to Acting Commissioner O'Cualáin [**"the seventh protected disclosure"**]. Again, the letter is part of the basis upon which Commissioner Harris later expanded the disciplinary process. The letter contains the following:

(i) The appellant complains that the substantive issues and fundamental questions remain unanswered.

(ii) He refers to a letter received on 2 August from Ms. Mulkerrins indicating that the third party investigator had been appointed and briefed, and saying that it was "*truly extraordinary*" that the addressee had permitted her to proceed in this manner,

(iii) He again describes the process as "*legal nonsense*", adding the epithet "*reckless*" on this occasion. He again draws parallels between events in October 2015 and

says that "*it carried the hallmarks of the divisive mischief making which has bedevilled this organisation over the past four years in particular*". He says that "*through all of this undistinguished period you have held office which required of you to role model ethical behaviour and demonstrate a commitment to uphold the law*" and alleges that this is another case where the addressee has failed to do what was right and is instead "*seeking to look the other way in an awkward silence*".

(iv) He again refers to his conversations with Assistant Commissioner Fanning and says there is a "*clear authenticity and consistency in his position*" which stands in stark contrast with "*procedural chaos and legal nonsense*" which the addressee and Ms. Mulkerrins have put forth in respect of "*serious and unfounded allegations*" against him.

(v) He finishes the letter by expressing that, the addressee being but days from retirement, the appellant is both "*surprised and saddened that you would besmirch your long career with such baseless, reckless and ill-considered action"* and that he is engaged in a wilful disregard of standards of ethical behaviour and duty of care.

33. As a shorthand, I will at times refer in this judgment to the conversations between the appellant and Assistant Commissioner Fanning as described in the above letters as "the appellant-Fanning conversations".

34. On 25 August 2018, Ms. Mulkerrins wrote to Sean Costello & Co. seeking clarification as to Assistant Commissioner Fanning's position as a matter of urgency. By a replying letter dated 31 August 2018, she was told that the Assistant Commissioner's complaint against the appellant was being maintained. I pause to note that as of that date, therefore, Ms. Mulkerrins was being formally told that the complaint was being maintained by Assistant Commissioner

Fanning, despite the appellant's letters having asserted that Assistant Commissioner Fanning had told him that it was not.

35. On the 3 September 2018, the new Commissioner, Drew Harris, commenced his role. Needless to say, as he was appointed from outside An Garda Síochána, he had no involvement whatsoever concerning any of the matters which took place prior to this date nor any personal reason to have a grudge against the appellant.

36. By letter of 16 September 2018, Ms. Mulkerrins wrote to the appellant, informing him that on foot of his assertions, she had written to the solicitors for Assistant Commissioner Fanning. She indicated that the reply insisted that Assistant Commissioner Fanning had *not denied* making a formal complaint against the appellant and that he was committed to cooperating with Mr. O'Braonáin SC. She then set out, "*for the avoidance of any doubt*", that the complaint of Assistant Commissioner arose out of his conversation with the appellant on the 18 November and the subsequent "*be on notice*" text.

37. There was further correspondence between Ms. Mulkerrins and Sean Costello & Co, which included a letter dated 16 October 2018 in which the solicitors for Assistant Commissioner Fanning indicated that they might "*take these matters to a different forum*". Again, I pause to note this; far from being told that Assistant Commissioner Fanning was abandoning the complaint, it would have appeared to Ms. Mulkerrins that Assistant Commissioner Fanning was still fully pressing for its investigation.

The expansion of the scope of the disciplinary process in October 2018

38. On the 17 October 2018, Commissioner Harris wrote to the appellant advising him that he was expanding the scope of the disciplinary investigation by reason of the letters written by the appellant dated 29 June, 1 August and 20 August 2018. He referred to the original complaint of Assistant Commissioner Fanning and the appointment of Senior Counsel as investigator, and said while he appreciated that being the subject of a complaint from a senior colleague

must be stressful and unpleasant, and that a person accused of wrongdoing may have concerns about the procedural aspects of an investigation, such matters should be addressed in a "*calm, professional, courteous and considered manner"*. He said that he was "*extremely concerned*" at the recent correspondence from the appellant to Ms. Mulkerrins and Mr. O'Cualáin. He quoted excerpts from the letter of 1 August, commented that he harboured very serious concerns that the attitude, content and tone of the correspondence had any place in a "*respectful working environment*", and grave concerns over how and why the appellant deemed the tone and contents of his correspondence to be appropriate or professional.

39. He indicated that he now proposed to extend the investigation to include those matters, and considered that they might amount to "*serious misconduct*". He added that he proposed to recommend to the Minister that the appellant be immediately suspended as he viewed his behaviour, attitude and interactions as being potentially inconsistent with his position. I pause to note that this letter records the Commissioner's concern as being directed at the "*attitude, contents and tone*" of the appellant's letters.

40. The Commissioner set out the terms of reference he proposed to furnish to the Senior Counsel for investigation: "(a) the allegation that in the course of your interactions with your colleagues and superiors (Assistant Commissioner Fintan Fanning, Kate Mulkerrins, Executive Director Legal and Compliance and Acting Commissioner Donal O'Cualáin) you have conducted yourself in such a manner as to undermine the trust and confidence required to be reposed in you as Executive Director, Human Resources and People Management; (b) the allegation that you threatened Assistant Commissioner Fanning and communicated with him in a manner that was threatening, inappropriate and unprofessional; (c) the allegation that you communicated with and concerning Acting Commissioner Donal O'Cualáin in a manner that was threatening, inappropriate and unprofessional; and (d) the allegation that you communicated with and concerning Ms. Kate Mulkerrins, Executive Director, Legal and

Compliance, in a manner that was threatening, inappropriate and unprofessional". Thus, there were four allegations, and allegation (b) arose out of the text of 18 November 2017.

41. The Minister suspended the appellant on full pay on or about the 25 October 2018 on the recommendation of the Commissioner, pending the outcome of the investigation to be conducted by Senior Counsel. Three days before the suspension, the appellant wrote to the Minister claiming that the suspension was wholly unwarranted and without lawful basis and threatening an application for injunctive relief. However, no such application was made to the court.

42. The investigation was conducted by Senior Counsel between late October 2018 and 9 November 2020. The appellant participated in the investigation and was represented by solicitor, junior and senior counsel until July 2020, a total period of some 20 months. In July 2020, he retained new junior and senior counsel, withdrew from the investigation and instituted the within legal proceedings. Again, he did not seek an injunction at this time.

43. It may be noted that on 31 May 2019, the Terms of Reference were amended so that the allegation of threat by text message was withdrawn. The appellant was informed of this by letter from Mr. Nugent. It seems that Assistant Commissioner Fanning was suspended in December 2018 for unrelated matters. On 15 March 2019, the Commissioner directed Assistant Commissioner Fanning to prepare a statement of evidence he would give to the investigation, but none was provided. Subsequently the Commissioner removed the allegation of threat by text message from the Terms of Reference and so informed the Senior Counsel. I note that by letter dated 31 May 2019, Sean Costello Solicitors protested against the Commissioner's decision to withdraw this allegation, professing themselves to be "*alarmed that you have decided to determine that the investigation into my client's allegation…is to be discontinued*". Nonetheless, the appellant avers that "*the true reason why Allegation B was withdrawn was because it transpired that Assistant Commissioner Fanning had never formalised and/or*

substantiated any such complaint of a threat or extended threat made on my part. Therefore, the position which I had always maintained from the outset was wholly vindicated". This position is difficult to reconcile with the correspondence from Sean Costello solicitors throughout the period and after the amendment of the Terms of Reference.

44. The appellant applied for the recusal of the Mr. O'Braonáin in June 2019, which application was refused. The investigation heard evidence from the Commissioner, who was cross-examined over four days by the appellant's then Senior Counsel in November, December 2019 and January 2020. There was then a further recusal application by the appellant, which was refused. The appellant avers that he sought to have Ms. Mulkerrins and Mr. Nugent called as witnesses but that this was not permitted. He also avers that it was Mr. Nugent who approached the newly appointed Commissioner, shortly after the latter's appointment, about the disciplinary process concerning the appellant, and that the Commissioner had appointed Mr. Nugent to have carriage of the investigation on behalf of the Commissioner.

45. On 18 May 2020, the Protected Disclosures Act 2014 was raised as an issue on behalf of the appellant for the first time in connection with his letters of July and August 2018. This was some 22 months after they had been written. This was raised in correspondence in which he also sought to have Ms. Mulkerrins and Mr. Joseph Nugent called before the investigation, and sought further disclosure. A ruling adverse to him was made on 3 July 2020.

46. The appellant was offered the opportunity to give evidence to the investigation but chose not to do so. On 24 July 2020, he withdrew from the investigation. According to one of the affidavits filed on behalf of the respondents, his lawyers attended the investigation on 27 July 2020 to explain his position and said he was seeking to challenge the investigation process "*at an existential level, rather than at a procedural level*". However, again, no injunctive relief was sought at this stage, despite his own characterisation of the alleged problems as existential

and going far beyond the merely procedural. It may be noted that his Plenary Summons (described below) includes claims for damages for conspiracy and malicious falsehood.

47. By report of the 9 November 2020, the independent investigator upheld the complaints and furnished his opinion that they constituted serious misconduct. No injunctive relief was sought by the appellant at this stage either.

48. By letter the 16 December 2020, the Commissioner furnished the appellant with a copy of his report to the Minister containing his recommendation that the appellant be dismissed. The appellant had previously been invited to attend a disciplinary meeting with the Commissioner but had declined to do so. In correspondence over the next few days, the appellant's solicitors wrote to the Chief State Solicitor seeking an undertaking that the Minister would not take any steps to terminate his employment pending the outcome of proceedings and seeking certain documents. By letter dated 21 December 2020, the Chief State Solicitor said that having regard to the time of year, the Minister would favourably consider an application for an extension of time for the purpose of making submissions to the Minister.

49. In a letter dated 22 December 2020, the solicitors for the appellant complained that the Commissioner had "*quite literally dropped an incomplete report on our client and his family with a deadline of Christmas Eve on which to reply*" and that "*if evidence were need (sic) of the venom and malice with which the process has been pursued by the Commissioner, we would suggest that it is apparent from this timing alone*". Despite the accusation of venom and malice, the letter also said, perhaps somewhat ironically, that the solicitors had advised their client of "*the possibility of using mediation as a mechanism to resolve this matter*". Nothing came of this.

50. There was further correspondence, but on the 24 December 2020, in the absence of any appeal by the appellant to the Civil Service Appeals Tribunal, the Commissioner furnished a copy of the report to the Minister.

51. As we shall see below, the appellant issued his application for interlocutory injunction on 30 December 2020. This was some two years and seven months after he had been informed by Ms. Mulkerrins of the existence of a disciplinary process in May 2018, some two years and two months from the expansion of that process by the Commissioner in October 2018, and some six months after the appellant had commenced legal proceedings and departed from the O'Braonáin investigation.

Commencement of these proceedings

52. As indicated above, proceedings were commenced by plenary summons on 24 July 2020, before the Senior Counsel had written his report. The reliefs sought were:

1) A declaration that disclosures which the appellant made on 29 June, 1 August and 20 August 2018 were **protected disclosures** within the meaning of the 2014 Act;
2) A declaration that in breach of ss. 6 and 8 of the 2014 Act, the Commissioner and Minister their servants or agents had attempted to limit or restrain the manner by which the appellant was entitled to have made protected disclosures on those three dates;
3) A declaration that the Commissioner and Minister their servants or agents **had caused detriment** to the appellant within the meaning of s. 13(3) of the 2014 Act by reason of the three protected disclosures;
4) A declaration that **the commencement and/or maintenance of disciplinary proceedings against the appellant was in breach of contract, unlawful, and in breach of his right to natural and constitutional justice;**
5) A declaration that his suspension was unlawful and breach of contract and in breach of his right to natural and constitutional justice;

6) An order restraining the Commissioner and Minister their servants or agents from causing any continued or further detriment to the appellant as a result of his having made protected disclosures;

7) Damages pursuant to s. 13 of the 2014 Act;

8) Damages of breach of contract and breach of duty to include damages for breach of statutory duty;

9) Damages for **conspiracy**;

10) Damages for **malicious falsehood**.

(Emphasis added)

53. As can be seen from the above, that this was not a case in which the main issue was a challenge to some aspect of the procedures being used in the disciplinary process (such as for example the right to be represented by a lawyer), but rather a profound challenge to the existence of the disciplinary process itself. He was not seeking to have a particular protection within the process; rather he was seeking, *inter alia*, damages for the very initiation and maintenance of the process itself. The claims for damages for conspiracy and malicious falsehood, in addition to the protected disclosures and fair procedures claims, may be noted.

54. The statement of claim was delivered on 5 August 2020, which included an application for interim and/or interlocutory relief. The Defendants delivered a Notice for Particulars on 2 November 2020 but before replies had been furnished, delivered a Defence on or about the 12 November 2020. The appellant obtained short service for a motion seeking interlocutory relief on 30 December 2020. This was some five months after the delivery of the statement of claim and some six months after he had ceased to participate in the investigation. As we have seen, by then the disciplinary process had moved on significantly; the appellant had been suspended, the Senior Counsel had produced the investigation report, the Commissioner had recommended

his dismissal, and he had chosen neither to appeal to the Civil Service Appeals Tribunal nor to make submissions to the Minister.

55. The defendants gave undertakings that they would not take any action for three weeks, which undertakings were later continued until the determination of the application for interlocutory relief.

56. The orders sought in the motion of 30 December 2020 were;

i. An injunction restraining the defendants their respective servants or agents from taking any or any further steps whatsoever, in relation to, on of and//or in reliance of their purported recommendation by the First Named Defendant to the Second Named Defendant on or about the 16 December 2020 to immediately terminate the Plaintiff's employment

ii. An injunction restraining the defendants their respective servants or agents from taking any or any further steps whatsoever, including publishing of any statement, whether verbal or written, internally or externally concerning, in relation to, on foot of and/or in reliance upon the purported 'Relevant Manager's Report' of the First Named Defendant furnished to the Plaintiff on or about the 16 December 2020

iii. An injunction restraining the Second Named Defendant from terminating the employment of the Plaintiff

iv. An injunction restraining the Defendants, their respective servants or agents from taking any or any further steps whatsoever that may cause any or any further detriment, including professional reputational damage to the Plaintiff

57. In support of his application the appellant swore a grounding affidavit and eight supplementary affidavits, with eight volumes of exhibits, in itself an indication of how far the process had come before the interlocutory injunction was sought. Ms. Mary McKenna, Principal Officer in the Criminal Governance Function (Human Resources and Appointments)

in the Department of Justice and Ms. Síle Larkin, Head of Employment Law in An Garda Síochána, swore affidavits on behalf of the respondents.

58. The appellant swore two further affidavits. He was highly critical of the failure of certain individuals, including Ms. Mulkerrins or the current Commissioner, to swear affidavits, and challenged the means of knowledge, hearsay and other aspects of the affidavits of the deponents who had been put forward on behalf of the respondents. In the second of his supplemental affidavits, the appellant *inter alia* informed the court of his having been informed on 20 May 2021 of a criminal investigation into him arising out of the evidence he gave to the Disclosures Tribunal, which he alleged was a "*surreptitious and unlawful criminal investigation*", knowledge of which had been withheld from him for over two years. The two deponents on behalf of the respondents swore replying affidavits on this particular issue but the fact of the investigation was not denied.

The issues arising before the High Court judge and on appeal

59. Following the hearing in the High Court, judgment was delivered by Stack J. on 15 March 2022, refusing the interlocutory injunction sought. In her judgment, she dealt with three main issues: (1) Identification of the relevant threshold test for the injunctive relief sought i.e. whether the *Campus Oil* or the *Maha Lingham* test applied; (2) Whether the relevant threshold been reached (a) in respect of the protected disclosures aspects of the case; and/or (b) the fair procedures aspect of the case; and (3) Whether the appellant's delay in seeking interlocutory relief was such as to warrant refusal of injunction.

60. Concerning the first of these issues, identification of the relevant test, Stack J. considered that there were two distinct limbs to the case, the first involving the "protected disclosures" issue, and the second involving the "fair procedures" arguments. She considered that the *Campus Oil* test should apply to the "protected disclosures" part of the case. and the *Maha Lingham* test to the "fair procedures" part of his case.

61. Applying those tests, she concluded that the appellant had not met the *Campus Oil* threshold with regard to the "protected disclosures" part of the case. While she was prepared to either assume or find (to the relevant threshold) that the first four of the seven communications *did* amount to protected disclosures within the meaning of the 2014 Act, she was not satisfied that there was any evidence of these four communications being *connected* to the disciplinary proceedings which had been commenced. With regard to the remaining three communications, she held, conversely, that although they were *connected* with the disciplinary process and indeed formed the basis for the expansion of the remit of the investigation, it was, in her view, clear that they did *not* amount to protected disclosures, and the appellant had fallen short of establishing that they were, even on the lower *Campus Oil* test. I will return in further detail later to her reasoning on these points.

62. Stack J. described the above as the primary basis on which she was refusing the application for an injunction, but went on to say that she would in any event have refused the application on the grounds of delay on the part of the appellant in bringing the application for interlocutory relief.

63. She also concluded that the appellant had not met the *Maha Lingham* threshold with regard to the "fair procedures" part of the case. The issues included whether the Commissioner (as distinct from the Minister) was entitled to investigate allegations of misconduct against the appellant, and alleged conflict and/or prejudgment on the part of the Commissioner.

64. The appellant appealed on the grounds that the High Court Judge erred (1) by failing to apply or improperly applying the relevant law and legal principles governing injunctions; (2) by deciding that disclosures made in writing by the appellant on 29 June 2018, 1 August 2018 and/or 20 August 2018 were not protected disclosures; (3) by failing to decide and/or by improperly deciding the issue of detriment; (4) by deciding that there was no nexus between protected disclosures and the detriment; (5) by deciding that the defendants, their servants or

agents did not breach the appellant's rights to fair procedures to such an extent that the disciplinary process was irreparably flawed; (6) by misinterpreting and/or misconstruing the framework governing the discipline of high grade civil servants assigned to An Garda Síochána; (7) concerning the allocation of the burden of proof and/or the meeting of such burden; (8) concerning the applicable standard of proof for deciding a case of this nature; (9) by accepting the content of the affidavits adduced on behalf of the respondents over the contents of the affidavits adduced directly by the appellant; (10) by failing to establish or properly establish all of the relevant facts, circumstances, context and/or legal issues of this matter and/or by making incorrect or irrelevant findings of such matters; (11) by improperly expressing views or opinions, which were unnecessary for the disposal of this matter, which were not germane to the *ratio* of the court's judgment and/or that were prejudicial to the appellant; (12) by engaging in matters that were unfair or prejudicial to the Appellant; (13) in holding that the appellant delayed in seeking the protection of the court; (14) and in failing to have regard to the distinction between the roles of the respondents each and either of them and failed in particular to consider the steps taken or not taken by the Minister for Justice.

PART II – The issue of delay on the part of the appellant in seeking the injunction

65. As indicated at the outset of the judgment, I am of the view that the appeal can be disposed of solely on the delay issue and will turn to that issue straight away, notwithstanding that this constitutes a significant departure from the sequence adopted by the High Court judge. On an appeal such as this, the Court should afford "*great weight*" to the views of the High Court judge, although of course the ultimate decision is for the Court (*Betty Martin Financial Services Ltd. V. EBS DAC* [2019] IECA 327, Collins J, paras 35-39). I am of the view that the High Court judge was well within her discretion in taking the view that the delay was such that the interlocutory injunction should be refused. Indeed, I would agree with her assessment in this regard.

66. It is by no means unprecedented for delay to constitute the primary or even sole ground for refusal of an interlocutory injunction. In *Nolan Transport (Oaklands) Ltd. v. Halligan*, 1994 WJSC-HC 1550 , [1994] 3 JIC 2202, Keane J. stated as follows:

> "In all cases of this nature where interlocutory relief is sought the courts expect the parties to move with reasonable expedition where they are seeking interlocutory relief because it is of the essence of such relief that if it turns out that it has been wrongly granted one party has suffered an injustice. It is therefore a remedy which should not be lightly invoked and if invoked, it should be invoked rapidly and where a party simply awaits events as they unfold he cannot expect to find court amenable to the granting of this relief, as it would where a party moves expeditiously to protect its rights."

67. In *Dowling v. the Minister for Finance* [2013] 4 I.R. 576, Clarke J. stated at para. 44:

> "The factors, … which come into play in assessing whether a party has moved with reasonable expedition in applying for an interim or an interlocutory injunction are different, and are governed by much stricter scrutiny, than those which apply when the court is considering whether a party has lost all entitlement to bring proceedings at all, as a result of laches or delay …"

68. In *Irish Times v. Times Newspapers* [2015] IEHC 490, Hedigan J. refused an application for an interlocutory injunction restraining the defendant from launching its new digital paper in Ireland solely on the ground of delay. Hedigan J. was satisfied on the evidence that the defendant's intention to launch their new digital Irish edition had been common knowledge since September 2014, some 8 months before the application (see para 6.4). He noted that "*elaborate, complex and costly preparations*" had been made by the defendants for the proposed launch, including the engagement of an editor and staff, and that there had been on the part of the defendants "*a very substantial commitment to this new digital launch*". He went

to say that delay was a "*well-established and relatively straightforward ground*" for refusing an interlocutory injunction, citing inter alia *Nolan Transport.*

69. In *Teva Pharmaceutical Industries Limited v Mylan Teoranta* [2018] IEHC 324, Barniville J. considered the authorities before reaching his conclusion that Teva had not unreasonably delayed in making its application for an interlocutory injunction, but did not doubt that that in an appropriate case, relief could be refused on that basis.

70. It might be thought that such authorities arise in rather different legal contexts such as commercial or intellectual property law, whereas the present proceedings concern something more akin to an employer-employee relationship in which different considerations may apply. Indeed the appellant maintains that if he had sought interlocutory relief earlier than he did, he would have been blocked by a prematurity argument, citing *Rowland v An Post* [2017] 1 IR 355, for this proposition. It is therefore necessary to carefully examine the parameters of the prematurity issue as set out in that, and subsequent, judgments concerning employer-employee situations.

71. In *Rowland,* the defendant became concerned that the level of activity during a particular year at the plaintiff's post office was significantly out of line with comparable post offices. A process was commenced in which the plaintiff was asked to respond to a number of inquiries. The defendant was not satisfied that all of the information reasonably required had been supplied, and proposed an oral hearing in which the plaintiff could supply further information. Three days before the hearing was due to take place, the plaintiff issued proceedings alleging that the procedures followed by the defendant were unfair and in breach of his contractual terms. He argued that he was entitled to see the data emanating from other post offices which had given rise to the queries, and contended that he ought to be entitled to cross-examine those involved in formulating the queries.

72. I pause here to emphasise the difference between what was sought there and what is alleged in the present case. The plaintiff in *Rowland* sought what were indisputably procedural protections, including the right to cross-examine, and was not challenging the very existence of the disciplinary procedure itself. In the present case, the appellant (whose Senior Counsel cross-examined the Commissioner over four days of hearings and received full procedural protection in that regard) contends that the initiation and maintenance of the disciplinary process was in and of itself fundamentally unfair and legally invalid for the various reasons he identifies.

73. The High Court (Murphy J.) dismissed the claim in *Rowland* on the basis that the relevant process was still at an investigative stage and that it was therefore premature to seek an injunction. On appeal to the Supreme Court (O'Donnell, Clarke and McMenamin JJ), this view was upheld. It was held that a court should intervene in an ongoing disciplinary process only where it was clear the process had gone "*irremediably wrong*" and where it was "*more or less inevitable that any adverse conclusion reached would be bound to be unsustainable in law*". Where a case did not meet that standard, it would ordinarily be inappropriate for a court to intervene and instead the process should be allowed to continue to its natural conclusion.

74. On the facts, the court was satisfied that the High Court judge was correct in finding that this threshold had not been reached in the present case. The process set out in the contractual terms was quite flexible as to the precise procedures to be followed. As of the time of trial there had undoubtedly been a refusal for a period of time to provide information requested or to allow examination of potentially relevant witnesses, but it was not clear that any such initial refusal had created a situation whereby the process had gone irremediably wrong.

75. At paragraph 10 of his judgment, Clarke J. discussed the standard by reference to which a court should intervene, whether by injunction, declaration or any other means, in a process having a disciplinary (or similar) character which is still ongoing. He referred to his own

decision in *Becker v. St. Dominic's Secondary School* [2006] IEHC 130, and commented that there would be practical consequences for any effective disciplinary process, if, "*at every stage of a disciplinary process, a party could secure an interlocutory injunction if there was even an argument about whether the procedures adopted were permissible*". At para. 11, he added-

> "In many cases the proper approach of a court when called on to consider the validity of a disciplinary-like process is to look at the entirety of the procedure and determine whether, taken as a whole, the ultimate conclusion can be sustained having regard to the principles of constitutional justice. Many errors of procedure can be corrected by appropriate measures being taken before the process comes to an end. Decision makers in such a process have a significant margin of appreciation as to how the process is to be conducted."

76. At para. 12, he said-

> "Precisely because procedural problems can be corrected and because there may well be a significant margin of appreciation as to the precise procedures to be followed it will, in a great many cases, be premature for a court to reach any conclusion on the process until it has concluded."

77. However, it is important to note that he qualified this by adding, at paras.13-14-

> "However, the practical consideration which leans against a court interfering with an ongoing process may point in the opposite direction in a limited number of cases where the conduct of the process, up to the point when the court is asked to review it, is such that it is *clear that the process has gone irremediably wrong*….the court must be satisfied that it is clear that the process has gone wrong, *that there is nothing that can be done to rectify it and that it follows that it is more or less inevitable that any adverse conclusion*

reached at the end of the process would be bound to be unsustainable in law". (emphasis added)

78. In *McKelvey v Iarnrod Eireann* [2019] IESC 79, the plaintiff was the subject of an investigation following which Iarnród Éireann proposed to commence disciplinary proceedings alleging, in substance, misuse of a card amounting to theft of fuel. Iarnród Éireann did not propose to permit the appellant to have legal representation, and in those circumstances, he sought an order from the High Court to prevent the disciplinary process going ahead.

79. Again, I pause to contrast what was sought in that case with what is alleged here. The plaintiff in *McKelvey* wanted to be legally represented in the hearing, which is clearly a procedural protection (and one which the appellant availed of during the disciplinary investigation). Mr. McKelvey was not alleging that the initiation or maintenance of the process was itself abusive or improper.

80. The High Court granted the injunction and the Court of Appeal discharged it, allowing the appeal. The Supreme Court upheld the Court of Appeal's decision. In the course of his judgment, Clarke CJ referred (paras 23-24) to *Rowland* as authority for "*the basic principle… to the effect that courts should be reluctant to intervene while a disciplinary process is ongoing but rather should wait until the process has come to an end and then decide whether the result of that process is sustainable in law*". However, he added that the judgment in *Rowland* -

> "…also recognises that there may be cases where it is clear that the process has, as it were, "gone off the rails" to such an extent that there could be no reasonable prospect that any ultimate determination could be sustainable in law. In such cases, it is clear that the court can and should intervene at an interlocutory stage to prevent a process continuing in circumstances where the result of that process will almost certainly be redundant."

81. Clarke CJ. said that the principles in *Rowland* form part of the balance of convenience assessment which is to be made at an interlocutory stage, which in turn leads to the fashioning of a result which runs the least risk of injustice. He pointed out that the regular halting of a disciplinary process because of the possibility that something might have gone wrong, merely on the basis of an arguable case, would operate to defeat the orderly conduct of employer/employee relations, whereas requiring a process to continue in circumstances where it is almost inevitable that the result will have to be set aside at the end, creates a real risk of injustice.

82. He added at para 82:

> "The principles as to allowing a measure of appreciation to tribunals to act in good faith in the choice of procedures, where not obvious from an employment contract, not to assume unfairness and deprecating premature interventions by application to court, as derived from the judgments of Clarke J. in *Becker v. St. Dominic's Secondary School* [2006] IEHC 130 and *Rowland v. An Post* [2017] IESC 20, [2017] 1 I.R. 355, have not been challenged on this appeal. These stand as a proper interpretation of the circumstances where the courts should or should not intervene to divert a disciplinary procedure derived from contract from its ordinary course. Essentially, it is only where something has gone so wrong that contract rights to fair procedures are lost and cannot be corrected that an intervention by the courts is justified."

83. Thus, two principles may be extracted from *Rowland* and *McKelvey:*

1) The court should look at the entirety of the process in question with a view to ascertaining whether the errors of procedure, or other legal errors, alleged by the employee are capable of being corrected by appropriate measures being taken

before the process comes to an end; if they are capable of being rectified, the courts should be reluctant to grant the relief sought on grounds of prematurity.

2) However, if the nature of the complaint is such that the defects complained of cannot be cured as the process unfolds, and it is more or less inevitable that any adverse conclusion reached at the end of the process would be bound to be unsustainable in law, prematurity will not be an obstacle to seeking relief while the process is ongoing.

84. The appellant's case was fundamentally and qualitatively different from the type of complaint that was in issue in *Rowland* and *McKelvey*. Most of his arguments were not directed at some specific aspect of the procedure which he wished to have altered; rather he was arguing that the process should not have been initiated in the first place, maintained thereafter, nor expanded in October 2018. I accept that not all of his arguments were directed at halting the process permanently, and related to matters of procedure which might have been altered before the process came to a conclusion. But many of his arguments sought to strike at the process at its very roots. Indeed, it will be recalled that in his pleadings, he seeks damages in respect of the conduct of the process to date on the basis that it involved conspiracy and malicious falsehood. The issue of prematurity and/or delay, and the application *Rowland/McKelvey* principles, falls to be assessed in the specific context of the case which he has sought to make.

85. In my view, the present case therefore falls within the second of the two principles identified above. The appellant's arguments about the protected disclosures and many of his arguments on fair procedures grounds would, if accepted by the court, be fatal to the disciplinary process at its very core. The challenges to the process were not merely procedural but, to use the words of his own counsel, existential. According to the logic of his own argument, therefore, this was not a situation where allowing the process to unfold might allow for the resolution of procedural problems identified. His arguments were not that the process

should be changed in some way but that it was fundamentally illegal, unfair and utterly incapable of being rectified.

86. This is not to express a view on the strength of the arguments themselves but rather to point to the *nature* of the arguments in the context of the prematurity issue. Given the nature of the appellant's own arguments, he fell within the second of the *Rowland/McKelvey* principles and was not entitled to sit back and allow the process to unfold at inconvenience and expense to An Garda Síochána until the very final stages of the process. On the contrary, it behoved him to move with reasonable expedition to ensure that time, inconvenience and expense were not unnecessarily incurred and the High Court was entitled to take the long lapse of time into account (whether as a stand-alone ground, or part of the balance of convenience) when exercising its discretion.

87. It would be an understatement to say that the appellant did not move with reasonable expedition in seeking interlocutory relief. One can examine various dates to illustrate the point. Two years and seven months elapsed between the institution of the disciplinary process on foot of Assistant Commissioner Fanning's complaint and the seeking of interlocutory relief (May 2018 to December 2020). Alternatively, if one dates the delay from the expansion of the process by the Commissioner in October 2018, based upon the appellant's own letters, the period was one of two years and three months (October 2018 to December 2020). Far from bringing an application for interlocutory relief, the appellant participated in the hearings conducted by the Senior Counsel who had been appointed to investigate until July 2020, which included cross-examination of the Commissioner on his behalf, and multiple applications of various kinds to the independent investigator. Even after the appellant issued his proceedings in July 2020, almost a further six months elapsed before he sought interlocutory relief, during which time the Investigator's Report was finalised (November 2020) and the Commissioner's recommendation for dismissal made (December 2020).

88. The only excuse offered for this delay is the appellant's understanding of the law, namely that the decision in *Rowland* constituted an insurmountable obstacle. A mistaken view of the law does not provide a valid justification for delay, particularly when the appellant had an experienced legal team and the point was not an esoteric one but rather something which followed from the clear logic of his own main complaints, namely that that the entire process was irredeemably tainted because of (as he alleged) entirely improper connections between protected disclosures that he made and the process itself as well as abuse of process, bad faith and indeed conspiracy and malicious falsehood (as he pleaded in his statement of claim). To wait until the entire disciplinary process was almost over before seeking interlocutory relief is a clear case of seeking to close the stable door after the horse has bolted.

89. The appellant contends that he is not too late to challenge the process insofar as the Minister has not yet taken a decision on his dismissal. Of course there is a clear line of demarcation between the disciplinary process which culminated in the Commissioner's recommendation to the Minister, and the Minister's decision. The Minister is free to depart from the recommendation of the Commissioner, and has not made any decision thereon. However, the Minister would undoubtedly take into account the investigation report and the Commissioner's recommendation based on it. The appellant says the entire process to date has been legally invalid and fundamentally unfair. The logic of his argument is that the Minister should therefore not be allowed to rely upon it. Therefore it is, in reality, the process which is under challenge, and that is the horse which has bolted. If the appellant thought the horse should never have been in the stable in the first place, let alone released from it, he should have brought his interlocutory application at a much, much earlier stage.

90. I would therefore conclude that this was not a case where the *Rowland-McKelvey* principles precluded the appellant from seeking interlocutory relief; that on the contrary most of the arguments the appellant was making involved such fundamental challenges to the very

existence of the disciplinary process that it behoved him to move with reasonable expedition; and that his delay in seeking interlocutory relief was a factor which should in and of itself be regarded as a sufficient reason for refusing interlocutory relief, no matter how one views the other variables in the case. I would therefore upheld the view of the High Court judge in this regard.

91. Although this is in my view dispositive of this appeal, I will proceed nonetheless to address the protected disclosure argument. As indicated earlier, this is an area in which there is relatively little authority and an important issue arises in the present case concerning the burden and standard of proof.

Part III - The Protected Disclosure issue

The legal framework

92. Section 5 of the 2015 Act provides:-

> "*(1) For the purposes of this Act "**protected disclosure" means**, subject to subsection (6) and sections 17 and 18 [which have no application in this case] , **a disclosure of relevant information** (whether before or after the date of the passing of this Act) made by a worker in the manner specified in section 6 , 7 , 8 , 9 or 10 .*
>
> *(2) For the purposes of this Act **information is "relevant information" if**—*
>
> > *(a) in the **reasonable belief of the worker**, it tends to show one or more relevant **wrongdoings**, and*
> >
> > *(b) it came to the attention of the worker in connection with the worker's employment.*
>
> *(3) The following matters are relevant wrongdoings for the purposes of this Act—*
>
> > *(a) that an offence has been, is being or is likely to be committed,*

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged,

(f) that an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur,

(g) that an act or omission by or on behalf of a public body is oppressive, *discriminatory or grossly negligent or constitutes gross mismanagement, or*

(h) that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be concealed or destroyed.

(4) For the purposes of subsection (3) it is immaterial whether a relevant wrongdoing occurred, occurs or would occur in the State or elsewhere and whether the law applying to it is that of the State or that of any other country or territory.

(5) A matter is not a relevant wrongdoing if it is a matter which it is the function of the worker or the worker's employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer.

(6) A disclosure of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is not a protected disclosure if it is

made by a person to whom the information was disclosed in the course of obtaining legal advice.

(7) The motivation for making a disclosure is irrelevant to whether or not it is a protected disclosure.

(8) In proceedings involving an issue as to whether a disclosure is a protected disclosure it shall be presumed, until the contrary is proved, that it is.*"*

(Emphasis added)

93. It may be noted that section 3(1) of the Protected Disclosures Act 2014 provides that "[I]n a case in which information disclosed is information of which the person receiving the information is already aware, means bringing to the person's attention".

94. Section 6 provides:

"*(1) A disclosure is made in the manner specified in this section if the worker makes it—*

(a) to the worker's employer, or

(b) where the worker reasonably believes that the relevant wrongdoing which the disclosure tends to show relates solely or mainly—

(i) to the conduct of a person other than the worker's employer, or

(ii) to something for which a person other than the worker's employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure the use of which by the worker is authorised by the worker's employer, makes a disclosure to a person other than the

employer is to be treated for the purposes of this Act as making the disclosure to the employer."

95. Part 3 of the Act (sections 11-16) sets out the specific protections which apply to a person making a protected disclosure: including protection from unfair dismissal, other protection from "penalisation", an action in tort for suffering detriment on foot of making a protected disclosure, and immunity from civil and criminal liability. The term "penalisation" is defined in s.3(1) as-

> "***any act or omission that affects a worker to the worker's detrimen****t, and in particular includes (a) suspension, lay-off or dismissal, (b) demotion or loss of opportunity for promotion, (c) transfer of duties, change of location of place of work, reduction in wages or change in working hours, (d) the imposition or* ***administering of any discipline****, reprimand or other penalty (including a financial penalty), (e) unfair treatment, (f) coercion, intimidation or harassment, (g) discrimination, disadvantage or unfair treatment,(h) injury, damage or loss, and (i) threat of reprisal*." (Emphasis added)

96. In his succinct but incisive judgment in *Clarke v CGI Food Services* [2020] 3 IR 389, Humphreys J. made a number of important points concerning protected disclosures in general, and assessments of whether a protected disclosure is *connected* with detrimental action taken against the employee, in particular. The background to the *Clarke* case was that the plaintiff was working as group financial controller with the defendant. While he was so employed, he raised concerns with them in relation to financial irregularities and food safety issues. He claimed that as a result of this, he fell out of favour, was marginalised and ignored by senior management, subjected to unnecessary performance reviews, suspended, subjected to a disciplinary hearing, and dismissed.

97. He brought a complaint of unfair dismissal to the Workplace Relations Commission and also applied to the Circuit Court pursuant to Schedule 1 to the 2014 Act seeking interim relief. The Circuit Court (Her Honour Judge Hutton) granted interim relief requiring, inter alia, the defendants to maintain the plaintiff's salary pending the hearing of his complaint to the Workplace Relations Commission. The defendants appealed to the High Court arguing, *inter alia*, that the financial irregularities discovered did not constitute a relevant wrongdoing because it was a function of the plaintiff to detect and investigate such matters and that the plaintiff was attempting to retrospectively characterise his complaints as protected disclosures. The High Court rejected that argument.

98. The High Court was alive to the necessity to look behind first appearances. As Humphreys J. put it, if the real reason for the dismissal of an employee is "*hidden behind an invented reason…it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination*". He said that in considering whether there were substantial grounds for contending that an employee's dismissal *resulted* from having made a protected disclosure or whether the alternative basis provided for such dismissal i.e. the alleged performance-related issues, was merely "an invention", relevant factors included: (a) the time when the performance-related issues were raised; (b) the frequency of performance reviews; (c) whether the employer had adopted the appropriate procedure for dismissal for sub-optimal performance; (d) whether the employer adhered to its proposed disciplinary process; (e) whether the disciplinary process was independent; (f) whether the disciplinary process possessed the hallmarks of a genuine process; and (g) whether evidence was given at trial by those involved in the disciplinary process.

99. Applying that to the facts before him, he noted a number of factors: (i) the process seemed to have only emerged after the start of awkward questions by the plaintiff; (ii) it became quite relentless with monthly meetings; (iii) the plaintiff was summarily dismissed as if guilty of

gross misconduct and the procedure for dismissal for sub-optimal performance was not used; thus there was no oral or written warning or final written warning; (iv) the proposal to have an independent barrister as chair of the disciplinary hearing was not followed through; (v) the defendants appointed a person who had already made findings against the plaintiff; (vi) there was a lack of affidavits from those involved in the disciplinary meetings ; (vii) a lack of proper teasing out of the issues at the disciplinary meeting as might have been expected if it was a genuine process — the evidence from the plaintiff's side is that no questions were asked; and (viii) the lack of an answer to the question as to who made the decision to dismiss the plaintiff.

100. I agree with Humphreys J. that a court dealing with an alleged connection between a protected disclosure and subsequent disciplinary action must be alive to the possibility that there may be motivations on the part of the employer which are hidden and not obvious at first sight. A court should look not only for obvious or explicit connections between protected disclosures and subsequent events, but should draw such inferences as may be appropriate from all of the evidence. At the interlocutory stage, this involves doing so to the appropriate standard of proof. However, I also agree with Humphreys J. when he says that on the other side of the equation, it is possible for someone who was dismissed for legitimate reasons to claim that removal was due to some improper purpose, and that a court should be careful to look at the matter from all angles.

101. Humphreys J. also said that an appellant need not need not expressly invoke the 2014 Act when making the communication in question in order for it to be recognised as a protected disclosure. Explaining why this was not "automatically crucial", he said at paras 16-17:

> "… There is no necessity for an individual employee to consider the situation in statutory terms until such time as adverse consequences such as dismissal materialise. Indeed it could be counterproductive to do so. The breakdown of an employment relationship, like that of any relationship, is not necessarily a linear process with entirely logical and

rational steps on all sides. There can be vacillation, mixed feelings, false dawns, reconciliations and setbacks; and sometimes it is only after the person picks themselves up off the ground, if even then, that they start to figure out what actually happened.

The defendants submit that "the plaintiff has attempted to retrospectively characterise matters which are not and cannot be protected disclosures as such in an attempt to avail of the protection provided by s. 11 of the 2014 Act", but that is not how such situations automatically evolve in practice. One can make a protected disclosure without invoking the 2014 Act or without using the language of "protected disclosure". It is often only after the victimisation, dismissal or other adverse consequence arrives that one has to "retrospectively" figure out what really happened and analyse it in the statutory language. There is nothing wrong with that process and it is certainly different from "retrospectively" creating a case from nothing".

102. Again, I would agree with this as a general proposition.

103. Humphreys J. also addressed the question of the informational content of the communications alleged to be protected disclosures. As noted above, the plaintiff's complaints to the defendants fell under two categories: food safety and financial irregularities. The complaints under the heading of food safety include issues relating to alleged serious shortcomings regarding storage and freezing of customer food products, such as failing to freeze products for the required period, or storage of food in areas where animal blood had leaked. The most vivid example, according to Humphreys J., was his complaint that a full container load of 22 pallets of pizza was allowed to thaw and was refrozen again and then sold, this being pizza specifically for consumption by children. His complaints in the second category of financial irregularities included matters such as an invoice which was presented to the defendants from an entity called Celuplast Conservatory Roofs Limited, but which in reality related to accountancy work privately completed by an associate of one of the employer's

directors. There were also complaints that one individual had used company monies to pay for electrical work on his home, expenses for his private properties, driveway resurfacing works, cash withdrawals on the company credit card and personal holidays; there were also complaints that VAT was incorrectly reclaimed on personal expenses and diesel was supplied to directors, their family and employees with no benefit-in-kind being recorded as well as an allegation that another associate's wife was on the payroll without doing any work at all. In those circumstances, it is hardly surprising that the High Court judge found that the plaintiff's communication had been "*sufficiently informational in nature and not merely allegations unharnessed from any factual point*". I agree, however, with the more general proposition of Humphreys J. that there must be at least some informational content for a communication to be considered a protected disclosure.

104. Further guidance on the area of protected disclosures was provided by the Supreme Court in *Baranya v Rosderra Fresh Meats* [2021] IESC 77, delivered on 1 December 2021, after the interlocutory hearing in the High Court had taken place in the present case but before delivery of judgment. The applicant had been employed as a skilled butcher by the respondent and his work consisted of 'scoring' carcasses. On one particular day, he said he was in pain and indicated to his supervisor that he wished for a change of role. Three days later, he was dismissed. The defendant claimed he had been dismissed because he effectively walked off the production line without give the employer an opportunity to consider his request to switch jobs. The appellant claimed it was due to the communication he had made, which he contended was a protected disclosure, namely the concerns he had for his health, safety and welfare at work as a result of injuries he sustained in the course of his employment. He sought to challenge his dismissal before the Workplace Relations Commission.

105. The complaint failed before an Adjudication Officer of the Workplace Relations Commission. She took the view that his communication amounted to the expression of a

grievance and not a protected disclosure. This view was upheld on appeal to the Labour Court which also referred to a distinction between a grievance and a protected disclosure, and also said that the communication did not disclosure any wrongdoing on the part of the employer. The High Court in turn held there was no error of law on the part of the Labour Court.

106. The Supreme Court (judgment delivered by Hogan J.) allowed the appeal for two reasons: (1) The Labour Court applied a 2015 Code of Practice which erroneously stated that purely personal complaints in relation to workplace health and safety fell outside the scope of protected disclosures for the purpose of s. 5 of the 2014 Act, and (2) the Labour Court failed to make sufficiently clear and precise its findings of fact as to what exactly was said by the employee. The matter was remitted to the Labour Court. The Supreme Court said that in the event that the Labour Court were to decide the communication amounted to a protected disclosure, it would then be a matter for it to decide the subsequent question of whether the dismissal was wholly or mainly brought about by virtue of the protected disclosure and was accordingly rendered unfair as a result by reason of the operation of s. 6(2)(ba) of the Unfair Dismissals 1977.

107. For present purposes, what is helpful is the general discussion by the Supreme Court of the nature of protected disclosures. The first point addressed was whether a complaint made by an employee to his or her employer about workplace safety is capable of being regarded as a protected disclosure for the purposes of the 2014 Act. Hogan J. pointed out an apparent anomaly within the legislation in this regard. Having referred to s. 5(3)(b) and (d) of the 2014 Act, he said (para 25):-

> "It is true that what may be termed the exclusionary provisions of s. 5(3)(b) … seek to exclude complaints which relate to the worker's contract of employment. Taken on its own, this might suggest that purely private complaints which are entirely personal to the worker making the complaint fall outside the scope of the Act. But even here the apparent

width of the statutory exclusion is deceptive and, at one level, ineffective. This may be illustrated by the following example. One may suppose that every contract of employment contains obligations regarding pay. It is, of course, clear from these highlighted words that an employee could not make a protected disclosure by means of a complaint in respect of any alleged contractual default on the part of an employer on any matter, including pay. Yet there seems no reason at all why a complaint made by an employee regarding an alleged failure on the part of an employer to comply with his or her statutory obligations regarding the mode and method of payment of wages under the Payment of Wages Act 1991 could not also be regarded – at least in principle – as a protected disclosure for the purposes of s. 5(3)(b) of the 2014 Act. To that extent, therefore, it might be said that s. 5(3)(b) did not achieve the objective it sought to achieve by excluding only contractual complaints which are personal to the employee concerned and it is, to that extent, anomalous."

108. He went to say at paras 27 and 28 :

"The point nevertheless is that many complaints made by employees which are entirely personal to them are nonetheless capable of being regarded as protected disclosures for the purposes of the 2014 Act. This is also true of complaints regarding workplace safety under s. 5(3)(d), a point clearly illustrated by the sheer breadth of the language contained in the sub-section: "health or safety of any individual"… "has been, is being or is likely to be endangered."

28. It is perfectly clear from these words that the complaint does not have to relate to the health or safety of other employees or third parties: a complaint made by an employee that his or her own personal health or safety is endangered by workplace practices is clearly within the remit of the sub-section. Nor does the conduct in question necessarily

have to amount to a breach of any legal obligation (although it would generally probably do so): it is sufficient that the employee complains that his or health or safety has been or is being or is likely to be endangered by reason of workplace practices, as this amounts to an allegation of "wrongdoing" on the part of the employer in the extended (and slightly artificial) sense in which that term has been used by s. 5(2) and s. 5(3) of the 2014 Act. It follows that a complaint made by an employee that his or her own personal health was being affected by being required to work in a particular manner or in respect of a particular task can, in principle, amount to a protected disclosure."

109. While the specific point personal to the employee in that case was one concerning health and safety, the more general point, pertinent to the present case, is that a communication is capable of constituting a protected disclosure even if it concerns wrongful conduct on the part of the employer which affects the complaining employee personally and nobody else.

110. Hogan J. also referred to the necessity for there to be informational content in the communication in order for it to constitute a protected disclosure. This is encapsulated in the following passage. With regard to the fact-finding task the Labour Court should engage in, Hogan J. identified the following as the crucial question (para 43):

"…did those words expressly or by necessary implication amount to an allegation tending to show that workplace health and safety was or would be endangered, even if that complaint was personal to him. The allegation must, of course, contain such information – however basic, pithy or concise – which, to use the language of s. 5(2) of the 2014 Act, "tends to show one or more relevant wrongdoings" on the part of the employer: to adopt the words of Sales LJ regarding a parallel provision in the corresponding UK legislation, the disclosure must have "sufficient factual content and specificity" for this purpose: see *Kilraine v. Wandsworth LBC* [2018] ICR 1850 at 1861, even if it does merely by necessary implication."

111. In relation to the nexus or connection between the alleged protected disclosure and the alleged detriment suffered, the appellant referred the Court to certain English decisions where the precise formulation of the test in this regard was debated: *Chief Constable of West Yorkshire v. Kahn* [2001] 4 All ER 834, *Manchester NHS Trust v. Fecitt* [2011] EWCA 1190, and *Jesudason v. Alder Hey Children's Foundation Trust* [2020] EWCA Civ 73. In the latter case, the court summarised the position as follows:

> "29. There must be a link between the protected disclosure or disclosures and the act, or failure to act, which results in the detriment. Section 47B [of the Employment Rights Act 1996] requires that the act should be "on the ground that" the worker has made the protected disclosure. The leading authority is the decision of the Court of Appeal in Fecitt v NHS Manchester (Public Concern at Work intervening) [2012] ICR 372 where the meaning of this phrase was considered by Elias LJ (with whose judgment Mummery and Davis LJJ agreed). There was a debate whether the test for detriments short of a dismissal should be the same as the test where the alleged victimisation took the form of a dismissal, when the question is whether the protected disclosure is the reason or the principal reason why the action was taken; or whether the test should reflect the much looser link adopted in the discrimination law field. Elias LJ preferred the latter approach and summarised it as follows (para 45):"
>
> > "In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower."
>
> 30. As Lord Nicholls of Birkenhead pointed out in Chief Constable of the West Yorkshire Police v Khan [2001] ICR 1065 , para 29, in the similar context of discrimination on

racial grounds, this is not strictly a causation test within the usual meaning of that term; it can more aptly be described as a "reason why" test:

> "Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in Nagarajan v London Regional Transport [1999] ICR 877 , 884–885, a causation exercise of this type is not required either by section 1(1)(a) or section 2 . The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

31. Liability is not, therefore, established by the claimant showing that, but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had *nothing to do* with the making of the protected disclosures, or that this *was only a trivial factor in his reasoning*, he will not be liable under section 47B."

(Emphasis added)

112. As can be seen from the above, there are various ways of formulating the required 'connection' between the alleged protected disclosure and the alleged detriment. Some are

easier for an applicant to satisfy, and arguably the *Jesudason* formulation is the most favourable to an applicant. This is because the complainant will succeed on the *Jesudason* if he shows merely "some" connection (this is implicit in the idea that the employer must show that there was no connection – "nothing to do with…"). and does not have to go as far as to show a "material" or "substantial" connection. The respondents complain that those authorities were not drawn to the attention of the High Court judge and that this Court should not take them into account. I will return to this issue later in the judgment.

113. I also wish to draw attention to the word "reasonable" in s. 5(3). In the first place, it is important to observe that the word "reasonable" introduces an objective standard. It is not merely a question of what the worker honestly or subjectively or genuinely or emphatically believed. It is a question of whether he had a "reasonable belief", in other words whether his belief was based on reasonable grounds, or to put it another way, whether a reasonable person would have held the belief if he or she had the same information as the worker. Secondly, the reasonableness of the belief of the worker must be tested according to the facts as he or she knew them at the time of the making of the communication alleged to constitute a protected disclosure. Therefore, information coming to the worker's attention after the communication was made is not relevant to the Court's assessment in this regard.

114. A short summary of the main points arising from the above discussion is as follows:

(i) The communication must disclose some wrongdoing on the part of the employer; (s. 5 of the 2014 Act);

(ii) The complainant must have had a reasonable belief that the employer was engaged in wrongdoing (s. 5 of the Act): as always, the term "reasonable" connotes an objective standard;

(iii) The communication must have some informational content; (s. 5, *Baranya*; *CGI*)

(iv) Even if the employer is already aware of the information in question, the communication may still be considered a protected disclosure if it is drawing the employer's attention to the information; (s. 3(1) of the Act)

(v) The fact that a communication concerns the treatment of the employee who is making the complaint (and not, for example, another employee) does not prevent the communication being a protected disclosure; (*Baranya*)

(vi) The fact that the 2014 Act was not expressly invoked at the time of the making of the communication is not an absolute bar to the communication being deemed a protected disclosure after the event; (*CGI*)

(vii) What is prohibited by the Act is the penalisation of an employee as a result of having made a protected disclosure; (s. 5 of the Act)

(viii) Penalisation means any act or omission that affects a worker to the worker's detriment and includes disciplining the worker; (s. 5 of the Act)

(ix) There must be a connection between the communication and the event or treatment said to constitute the penalisation (implicit in s. 5 of the Act; discussed in *CGI* decision); the precise formulation of a test in this regard remains to be definitively determined by an Irish court following full legal argument on the point;

(x) A court should be alive both to the possibility that actions by the employer which ostensibly appear legitimate on their face may in reality be connected to a protected disclosure, and the possibility that an employer is taking *bona fide* steps in respect of an employee who is making unfounded allegations of a connection between the two events.

The presumption in s.5(8) and how it operates in the context of an interlocutory injunction application

115. An important issue is the question of the burden and standard of proof in an application for an interlocutory injunction sought by an applicant who claims that there is a connection between having made a protected disclosure and suffering a detriment (actual or anticipated). Sub-section s. 5(8) of the 2014 Act provides that in proceedings involving an issue as to whether a disclosure is a protected disclosure it shall be presumed, until the contrary is proved, that it is. Thus, there is a statutory presumption in favour of an applicant on this particular issue, although of course it is a rebuttable presumption. The use of the words 'until the contrary is proved' suggests that the burden on a respondent who seeks to rebut the presumption is to establish the contrary on the balance of probabilities.

116. The language of s. 5(8) ("in proceedings involving an issue….") does not confine the presumption to the substantive stage of the proceedings. Therefore, an applicant for an interlocutory injunction has the benefit of this statutory presumption in making the application. It seems to me to follow that if he has to prove a number of different matters in order to establish that all the ingredients of a protected disclosure are present (such as informational content, whether he had a reasonable belief, and so on), he has the benefit of the presumption on each of those ingredients.

117. However, it is also important to recognize the limits of the presumption. It is confined to the issue of whether a disclosure is a protected disclosure. It does not extend beyond that issue. Therefore, for example, the presumption does not apply to the question of whether there is a *connection* between a protected disclosure and an alleged detriment i.e. it is not presumed that there is any such connection between them. The connection must be proved by the applicant in the ordinary way, to the relevant standard of proof. The trial judge here considered that the appropriate test in respect of the protected disclosures part of the case was the *Campus Oil* test,

and as the point was not the subject of much argument on appeal, I propose to proceed on that basis.

118. How does the presumption in s. 5(8) operate in the context of an application for an interlocutory injunction? The presumption clearly tilts the scales in favour of an applicant (on the specific issue of whether a communication is a protected disclosure). How strongly does a respondent have to rebut the presumption in order to defeat it at the interlocutory stage? Some comments were made in *Charleton v. Scriven* [2019] IESC 28 and in *Ryanair v. Skyscanner* [2020] IECA 64 with regard to a somewhat analogous issue, namely that of assessing the strength of a defence or counterclaim in the context of an interlocutory injunction. However, what was in issue in both cases was a mandatory and not a prohibitory injunction, unlike the situation here. In my view, the situation here is relatively straightforward, at least at the level of principle. The presumption in s. 5(8) will in most cases get the applicant over the *Campus Oil* hurdle, and it is only if the respondent can clearly show at interlocutory stage that the communication is, on the balance of probabilities, *not* a protected disclosure that he will be considered to have rebutted the presumption.

119. However, in applying the presumption to the facts of a particular case, I would also bear in mind the following comment of Murray J. in *Ryanair v. Skyscanner:*

> "If one single proposition of law is to be derived from the judgment of the court in Merck it is that at the heart of the interlocutory injunctive order lies a necessary and pragmatic flexibility that sits uncomfortably with the rigid enforcement of strict rules of universal application."

120. I should perhaps say that this allocation in the burden of proof is provided for explicitly in s. 5(8), and I do not think it is necessary to rely upon authorities concerning the "peculiar knowledge" principle, as did the appellant in his submissions.

121. The appellant in his grounds of appeal and submissions to this Court also referred to the EU Working Time Directive (Directive 2019/1937) and the jurisprudence of the CJEU in cases of alleged penalisation of workers under that Directive. Acknowledging that these were not drawn to the attention of the High Court, he argued that he should be entitled to rely upon it in the appeal and that would have a bearing on his chances of success at a full hearing. The respondents object to the introduction of this new material which was not before the High Court and point out that *inter alia* that it came into effect after the matters complained of in the proceedings arose. I agree with the points made by the respondents and therefore do not propose to deal with the appellant's submissions concerning EU law in this regard by reason of the matters identified by the respondents in their objection.

Application to facts of the present case

122. The appellant claimed that he had made a total of **seven** protected disclosures, and in consequence had suffered a detriment, consisting of the initiation, maintenance and expansion of the disciplinary procedures, which had culminated in the recommendation of the Commissioner for his dismissal. As regards the first four communications, the High Court judge concluded that the appellant had failed to establish to the requisite standard of proof that there was a connection between the communication and the alleged detriment suffered; while as regards the last three, she concluded that the appellant had failed to establish to the requisite standard of proof that the communication amounted to a protected disclosure. It will be recalled that the High Court judge considered that the appellant had only to meet the *Campus Oil* test in respect of the protected disclosures part of his case, and that was the standard of proof to which she subjected this part of his case. She concluded that he had not reached even this standard in respect of any of the communications.

Communication 5

123. I will start with the **fifth** communication/alleged protected disclosure because my agreement with the High Court can be briefly stated. This was the letter from the appellant to Ms. Mulkerrins dated the 29 June 2018. The High Court judge first examined whether this letter could constitute an allegation of wrongdoing within the meaning of s. 5 of the 2014 Act. She thought that the relevant subparagraphs of s. 5(3) in this regard were (b) and (g). She referred to the respondent's argument that the letter could not be a protected disclosure because, insofar as the letter makes a complaint that Ms. Mulkerrins or the Garda Commissioner has failed, is failing or is likely to fail to comply with a legal obligation, it could only be one "arising under the worker's contract of employment" and therefore cannot fall within subparagraph (b). She referred to analysis of Hogan J. in *Baranya* of s. 5(3)(b) as excluding only obligations derived from the contract of employment itself, rather than any statutory rights that might be enjoyed by an employee. She said that the appellant here was relying on his implied right to fair procedures, which appeared to her to be an implied contractual right, and therefore could not fall within subparagraph (b). She went to say that that, as regards subparagraph (g), on the basis that the investigation of employees for non-existent complaints from other employees could constitute "oppression" or " gross mismanagement" and that there was a serious issue to be tried in this regard. She pointed out that falling within one of the sub-paragraphs was a necessary but not a sufficient condition, and she went on to consider whether the letter had sufficient informational content to constitute a protected disclosure.

124. Stack J. went on to conclude that no information as such was disclosed and the letter merely contained a variety of complaints about the procedure which had been established to investigate the complaint of Assistant Commissioner Fanning against the appellant. Far from disclosing any information, it was " *in essence a generalised complaint and a request for*

disclosure to the plaintiff". She was clearly aware of the manner in which the Supreme Court had addressed this issue in *Baranya* and she specifically said:

> "There is no doubt whatsoever that the fifth protected disclosure could be characterised as a "grievance", and a strongly expressed one at that. However, that does not preclude it from being also a "protected disclosure" within the meaning of the Act. The question for consideration, therefore, is whether the letter *only* expresses a grievance, or whether it also discloses " information"." (emphasis added)

She concluded that the appellant had not established a serious question to be tried in connection with this communication.

125. The appellant makes a number of arguments. These include the contention that the relevant wrongdoing which he was alleging should have engaged s. 5(3)(a), (b), (c), (f) and/or (g) of the 2014 Act, and that the High Court judge wrongly concluded that the only potentially applicable paragraph was s. 5(3)(g) and even in that regard, wrongly confined the relevant aspect of that sub-paragraph to oppressive conduct. He maintains that this significantly underrepresented the nature and degree of the wrongdoing alleged. He also contends that the High Court judge erred in concluding that the appellant's belief was not reasonable and that she failed to have regard to all of the facts in reaching this conclusion. The appellant criticises the High Court judge's approach in taking into account the appellant's failure to invoke the 2014 Act, despite her having accepted the principle that there was no absolute requirement to invoke it, as stated in the *CGI* case.

126. If my earlier analysis of the burden of proof under s. 5(8) is correct, the High Court judge erred insofar as she appears to have overlooked the presumption in the sub-section. However, I am of the view that this ultimately makes no difference to the 'informational content' point. Even if the burden of proof lay upon the respondent to prove that the communication did *not*

amount to a protected disclosure, in my view that burden was discharged on the balance of probabilities because it is manifestly clear that there was *no* informational content in the letter of 29 June 2018, having regard to the terms of the letter on its face.

127. The terms of the letter are described more fully above at paragraph 29. If one strips back the heightened tone of the letter to reveal the underlying essentials, it can be seen that the letter sought clarification as to who had appointed Ms. Mulkerrins, asked for further particulars of the complaint, complained about its vagueness, complained about delay, sought documents, expressed shock at the appointment of Senior Counsel as investigator, considered the reference to discipline to be prejudicial, and asserted similarities between the ongoing process and the previous Templemore events. There is no informational content in any of this. The appellant was essentially seeking (rather than giving) information and expressing his opinions on the process thus far. It may be noted that the appellant did not, in that particular letter, refer to any conversations with Assistant Commissioner Fanning, in contrast to his two August letters which are discussed below. I agree with the High Court judge's assessment in this regard, and it does not matter that she may have overlooked the statutory presumption, nor whether she unduly confined herself to one sub-paragraph of the section, as it ultimately makes no difference to the outcome in respect of this communication.

128. I accept of course that, as was made clear by Hogan J. in *Baranya*, the fact that a communication contains or amounts to a grievance is not inconsistent with it containing information. However, as Hogan J. pointed out, not all grievances necessarily contain information; this is a matter which has to be examined on a case by case basis. In my view, the letter of 29 June 2018 did not have any informational content and was instead a complaint about the fact that a disciplinary process had been initiated and about the procedures which were being adopted in that disciplinary process. It is entirely artificial to try to characterise such

complaints as having informational content for the purpose of the protected disclosures legislative regime. I agree with the High Court judge in that regard.

Communications 6 and 7

129. Where I part company with the trial judge to some extent is with regard to her analysis of the letters of 1 and 20 August 2018 i.e. **communications 6 and 7**, particularly in light of the statutory presumption in s.5(8) discussed earlier. It is necessary to recall the content of the two letters in question. They have been described in some detail above at paragraphs 31 and 32. Again, stripping back the increasingly intemperate language used by the appellant, the following is a summary of their contents, the same content being common to both letters.

130. First, the appellant complains that the answers to certain questions previously posed by him have not been furnished and he repeats those question (such as: what is the precise detail of the allegation against him; whether Ms. Mulkerrins was authorised to initiate the process and by whom; why it has happened that a third party investigator was appointed and why did the appellant learn about it so late in the day, and so on). Secondly, he reports two conversations which he says he had with Assistant Commissioner Fanning and claim that the latter told him that had not made a formal complaint against him and that he was not co-operating with the investigation. Thirdly, he alleges that Acting Commissioner O'Cualáin must have known about the absence of a formal complaint and accuses him of abuse of process and nefarious motivation. Fourthly, the author seeks to draw parallels between what he characterises as a deeply flawed process and prior events (the Templemore events).

131. The High Court judge again held that these letters essentially constituted complaints by the appellant as to the manner in which the investigation was being pursued and that they did not "*disclose*" any "*information*" and therefore could not be considered protected disclosures. She also held, in the alternative, that the appellant could not have had a *reasonable* belief that either Ms. Mulkerrins or Acting Commissioner O'Cualián was engaged in oppression of the

appellant within the meaning of s. 5(2). Stack J said that even making the assumption that the appellant believed from his own conversations with Assistant Commissioner Fanning that that the latter was not pursuing his complaint, it was difficult to see how the appellant could have believed solely on the basis of those conversations that Ms. Mulkerrins or Acting Commissioner O'Cualáin *was aware* that Assistant Commissioner Fanning had made no complaint against the appellant. The judge said the appellant would have known, from his own position within the force, that the Code required the Commissioner to investigate a complaint once it was made. Nor could he have reasonably believed that no complaint had ever been made merely because he never had sight of correspondence to that effect.

132. Stack J. also took into account that the appellant had never asserted that the letter was a protected disclosure until 18 May 2020, notwithstanding that he was a "*veteran*" of the process of making protected disclosures, having had a role in relation to receiving such disclosures from Sergeant Maurice McCabe. She accepted it was not required that a person must necessarily invoke the protection of the 2014 Act before the communication may be considered a protected disclosure, but she considered that it was not "*entirely irrelevant*" either, in circumstances where he had very particular experience in this area.

133. Unfortunately, in my view, the High Court judge fell into error in failing to factor in the presumption in s. 5(8) into her analysis, which as I have explained, meant that the onus fell on the respondent to prove on the balance of probabilities that this communication was *not* a protected disclosure. She did not refer explicitly to the presumption anywhere in the course of her analysis of these communications, and an overall reading of the relevant passages gives the impression that she considered the burden of proof to fall upon the appellant to establish all matters to the *Campus Oil* standard, rather than on the respondents to rebut the presumption that the communications amounted to protected disclosures.

134. If the High Court judge had applied the reversed burden of proof as required by the statutory provision, would it have made any difference to her conclusion in respect of communications 6 and 7? This is a difficult question to answer. Leaving aside for a moment the question of whether the letters had informational content, which can be decided by looking at the terms of the letters themselves, the question of whether the appellant's belief was "reasonable" requires a consideration of the evidence in its totality. Only by considering what the appellant knew at the time he wrote the two August letters, and all the surrounding circumstances, can one reach a conclusion as to whether he had a "reasonable" belief that there was wrongdoing in progress. Having regard to the evidence, it is true that one could point to various factors (as the High Court judge did) as indicative of a lack of reasonableness on the part of the appellant in believing that the investigation had been motivated by ill-will and that there had never been a formal complaint by Assistant Commissioner Fanning. Thus, for example:

(i) The appellant had been told in November 2017 that Assistant Commissioner Fanning had made a complaint on foot of the text;

(ii) The appellant had been told in May 2018, in effect, that the same complaint was now forming the basis of the disciplinary process;

(iii) The appellant would have been familiar, by virtue of his office, with the circumstances in which disciplinary processes are generally instituted and, indeed, with the fact that there is an obligation to investigate when complaints are made;

(iv) The appellant would have been aware Ms. Mulkerrins was not even in An Garda Síochána at the time of earlier events (and therefore had no motive for subjecting him to unfair or oppressive treatment);

(v) Even if the appellant had been told by Assistant Commissioner Fanning that he had not made a formal complaint, and was not co-operating with the investigation, it

was still something of a leap to deduce from this piece of information that there was a conspiracy afoot to initiate and maintain a wrongful disciplinary process against him.

135. On the other hand, the following matters also appear from the evidence:

(i) At the time the appellant wrote the August 2018 letters, he had not been given a copy of any of the correspondence from Assistant Commissioner Fanning containing the complaint which was said to form the basis for the disciplinary process, despite having his requested it;

(ii) He had apparently been told by Assistant Commissioner Fanning, the alleged complainant, that no such complaint existed and that Assistant Commissioner Fanning was not cooperating with the investigation;

(iii) He had not been told who had directed that the disciplinary process be commenced, although he had also requested that information;

(iv) The appellant had a history of complaints and evidence concerning various matters connected with Templemore and Maurice McCabe which may have made him unpopular with some senior officers of An Garda Síochána who would or might be in a position to influence the decision to commence a disciplinary process against him if they wished to do so.

(v) It had previously been suggested that he should be investigated for possible breaches of the Official Secrets Act arising out of his protected disclosures in respect of Templemore, in circumstances where no one else had been disciplined despite the PAC having found that financial irregularities had taken place at Templemore and there had been a reluctance at high levels to address them. He had slo been refused sight of the document in which this suggestion was made for a considerable period of time.

136. No doubt there are other items of evidence which could be fed into the analysis, and this will be in due course be undertaken by the judge at the trial of the action. The point I wish to make is that the issue of the reasonableness of the appellant's belief is a particularly difficult one in this case, having regard to the complicated history between the appellant and other senior members of the force. It is clear from the evidence as a whole that the appellant was at the centre of a number of different events and processes in the years 2015-2020 in the course of which he locked horns with a number of senior colleagues. I do not wish to express anything that might be interpreted as a concluded view on any of his claims. The test to be applied is whether the respondents have proved, at this interlocutory stage, on the balance of probabilities that the appellant did *not* have a "reasonable belief". The High Court judge unfortunately did not apply that test and I cannot say definitively that it would not have made any difference if she had. Speaking for myself, I would be inclined to the view that the respondents had not discharged the burden of proof on the issue of "reasonable belief" for the purpose of the interlocutory application. Given the complexity of the issue, and how it went to the very core of the appellant's claims, this was a matter upon which such a definitive conclusion should not have been reached before a full hearing of the evidence.

137. I return to the issue of whether the two August letters had any informational content, this being a *sine qua non* of a protected disclosure. If they did not have any informational content, it would follow that the issue of "reasonable belief" would not matter. I consider that the High Court judge was perhaps overly definitive in her conclusion that the two August letters had no informational content, perhaps because she did not consider the statutory presumption as part of her analysis. Bearing in mind that the appellant has the benefit of the presumption in s. 5(8) that the communication is a protected disclosure, the question is whether the respondent has proved on the balance of probabilities that the letter, on its face, did *not* contain any information. It is arguable that some information was being furnished in his two August letters,

namely (a) that Assistant Commissioner Fanning had not made a formal complaint, and (b) that he was not co-operating with the investigation; or at the very least, (c) that Assistant Commissioner Fanning had told the appellant these things. Of course, "relevant" information, as defined by the Act, must consist of information which (in the reasonable belief of the worker) "tends to show one or more relevant wrongdoings". What wrongdoing was being alleged here? Arguably, the wrongdoing being alleged here was that a disciplinary process had been commenced against the appellant without a formal complaint having ever been made by Assistant Commissioner Fanning and that it was being maintained without the latter's support or backing, and was therefore a process commenced and maintained in bad faith by reason of the appellant's prior involvement with regard to the Templemore College affair and/or Maurice McCabe. Having regard to all of this, I would again take the view that the respondent had not, for the purpose of the interlocutory application, discharged the burden of establishing that the communication had no informational content.

Communications 1, 2, 3 and 4

138. This brings me, finally, to the High Court judge's conclusions concerning **communications 1, 2, 3 and 4** (communications related to the Templemore affair and Maurice McCabe). Stack J. accepted that these four communications/category of communication could be characterised as protected disclosures, but she also concluded that there was no evidence of a *connection* between those communications and the subsequent disciplinary process. Here, as I explained earlier, I am of the view that it was not necessary to apply the s. 5(8) presumption because the issue of whether there is a "connection" between protected disclosure and detriment is a separate one from whether the communication amounts to a protected disclosure, and therefore the statutory presumption does not apply. There is no question here of the High Court judge having applied an incorrect burden or standard of proof.

139. The flow of events, as demonstrated by the correspondence, tends to support the narrative that it was Assistant Commissioner Fanning's complaint, and nothing else, which led to the initiation of the disciplinary process; and that it was the appellant's own letters of August 2020 which led to the expansion of the investigation by Commissioner Harris. It is also true that there is no obvious or overt connection between earlier events and the disciplinary process.

140. It might nonetheless be added that there are also some puzzling aspects to the evidence. For example, the appellant's text ("…*be on notice*") of 18 November 2017, on foot of which the disciplinary process was commenced, is not of a manifestly threatening character. Indeed the formal security risk was objectively assessed by a Detective Chief Superintendent in the Security and Intelligence Division, and he found no evidence supporting any reason to suspect any threat. Also worth mentioning is the bizarre failure to involve the appellant in the selection of an investigator until May 2018 (months after Assistant Commissioner Fanning had been asked). Other notable features are the failure to copy the letter of complaint from Assistant Commissioner Fanning to the appellant, and the failure to tell him who had initiated the investigation. Transparency in such matters at an early stage might have prevented much of what ensued. And if Assistant Commissioner Fanning did in fact tell the appellant in August 2018 that he had not made a complaint, and was not co-operating with the investigation, this is most curious, when one contrasts it with the correspondence emanating from his solicitor throughout the period. Such matters suggest that perhaps all might not be quite as appears from first appearances. However, they are no more than hints, and it was a matter for the High Court judge to assess the evidence on the interlocutory application as best she could. I do not think this Court should interfere with her conclusion that the appellant had failed to establish on the *Campus Oil* standard that there was a connection between earlier communications (which did amount to protected disclosures) and the disciplinary process which was initiated and

maintained from 2018-2020. The issue can of course be re-visited at the trial when a fuller picture from all the evidence is available.

141. In reaching this conclusion, I take into account the guidance provided by this Court in *A.K. v. U.S.* [2022] IECA 65 (Murray J.) at paragraphs 51-53, with regard to a category of case (his third or "intermediate" category in terms of his classification in that judgment) in which an appellate court is reviewing the findings of a High Court judge based upon (i) affidavit evidence or (ii) secondary findings of fact such as inferences from admitted facts or those proven otherwise than by way of oral testimony.

> "…[I]n cases to which this standard applies the appellate court is free to correct errors of fact as well as of law, and mistaken inference as well as erroneous application of principle. It is thus not necessary for the appellant to establish that a judge has erred in law or in principle, the appellate court is not concerned to establish that the decision of the trial judge was not one that was reasonably open to him or her, nor will the appellate court be necessarily constrained to affirm a finding which is supported by credible evidence (although obviously where a judge has so erred or there is no credible evidence to support the finding the appellate court will interfere). Instead, the appellate court affords limited deference to the decision of the trial court by beginning its analysis from the firm assumption that the trial judge was correct in the findings or inferences he or she has drawn, and interfering with those conclusions only where it is satisfied that the judge has clearly erred in the findings made or inferences drawn in a material respect."

142. I am not satisfied that the judge clearly erred in her findings made or inferences drawn in a material respect and therefore would uphold her conclusion that the necessary "connection" was not established.

143. I referred earlier to the appellant's submissions concerning the English authorities, including *Jesudason.* As noted, the respondents objected to these authorities being introduced

on appeal. It does not appear to me necessary to rule either on the objection or the question of what precise test of "connection" should be applied in protected disclosures cases. The High Court judge's conclusion was that the appellant had failed to show on the *Campus Oil* standard any connection between communications 1, 2, 3 and 4, and the disciplinary process. She concluded that there was no connection between them, using phrases such as "*simply no evidence*" and "*no evidence*" repeatedly. This was a conclusion, in effect, that the protected disclosure had "nothing to do" with the subsequent disciplinary process, to use the formulation in *Jesudason*. Therefore, if the High Court's conclusion on the evidence should be upheld, and I have said above that it should, it follows that the appellant would fail even if the *Jesudason* formulation he urges upon the Court were to be applied. It is not necessary in those circumstances for the Court to decide whether that formulation is the correct one in Irish law in this context. The questiom of what formulation is the correct one in Irish law should be dealt with in due course as necessary after full argument and consideration at the substantive hearing.

Part IV - Conclusions

144. The following is a summary of my conclusions:

Delay

(i) This was not a case where the *Rowland/McKelvey* principles precluded the appellant from seeking interlocutory relief. On the contrary, most (although not all) of the arguments the appellant was making (both in terms of protected disclosures and fair procedures) involved fundamental challenges to the very existence of the disciplinary process which (on the logic of his arguments) could not be remedied as the process unfolded. In those circumstances, it behoved him to move with reasonable expedition if he wished to seek interlocutory relief.

(ii) The appellant engaged in significant delay before seeking interlocutory relief. He became aware that a disciplinary process had been commenced in May 2018, fully took part in the hearings before the investigator before finally withdrawing in July 2020, underwent suspension on full pay, and did not seek interlocutory relief until the end of December 2020, despite having issued proceedings six months earlier. The appellant's delay in seeking interlocutory relief was a factor which should in and of itself be regarded as a sufficient reason for refusing interlocutory relief, no matter how one views the other variables in the case, and whether one considers delay as a stand-alone ground or as part of the balance of convenience. Accordingly, the appeal should be dismissed.

Protected Disclosures

Although in view of the above it is not strictly necessary to deal with the protected disclosures aspects of the case, I would reach the following conclusions:

(i) The effect of s.5(8) of the 2014 Act is that, where there is a dispute as to whether a communication is a protected disclosure, an applicant for interlocutory relief benefits from the statutory presumption. The respondent can rebut the presumption but must do so by proving that the communication is not a protected disclosure on the balance of probabilities.

(ii) The High Court judge erred insofar as she did not factor the presumption and the standard of proof for rebuttal into her analysis.

(iii) I do not think this error affects the High Court's conclusion in respect of communication/alleged protected disclosure number 5 (the July 2018 letter to Ms. Mulkerrins) because, having regard to the terms of the letter itself, it lacked sufficient informational content to amount to a protected disclosure and therefore,

even applying the reversed burden of proof, fails to satisfy one of the necessary conditions of a protected disclosure.

(iv) I disagree with the High Court judge in certain aspects of her analysis in respect of communications/alleged protected disclosures 6 and 7 (the two August 2018 letters to acting Commissioner O'Cualáin), in particular her finding in respect of the "reasonable belief" aspect of the alleged protected disclosure and her conclusion with regard to its "informational content".

(v) I would uphold the High Court's factual findings in respect of communications 1, 2, 3, and 4, namely that the appellant failed to show a connection between those communications and the alleged detriment.

145. As this judgment is being delivered electronically, I would like to record that my colleagues Noonan J. and Binchy J. are in agreement with it.

146. Since the appellants have not been successful in this appeal, my preliminary view is that the respondents are entitled their costs but if the appellant wishes to contend for a different order, written submissions should be lodged on his behalf within 14 days not exceeding 1500 words, and 14 days for the respondents to reply. In the event that such application is made and is unsuccessful, the appellant may be held responsible for any additional costs thereby incurred.