Garda HR manager's appeal rejected, but High Court 'erred' on disclosures law

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The law on protected disclosures was discussed extensively in this week's Court of Appeal ruling on an injunction sought by the Garda HR manager – although he was refused the injunction on the separate grounds of delay in seeking relief.

An application by the Garda HR manager for an injunction against his dismissal has been rejected by the Court of Appeal, in a judgment which discusses the law on protected disclosures.

The ruling by Ms Justice Ní Raifeartaigh says the appeal by John Barrett, who was appointed in 2014 as the first civilian to be HR manager in An Garda Síochána, must fail because the appellant waited over two years after disciplinary proceedings were initiated against him before applying for an interlocutory injunction against the process.

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However, while the Court of Appeal backed the High Court's ruling against the injunction on the basis of this delay – which was sufficient to reject the appeal – it disagreed with the High Court on several points on the issues around protected disclosures.

In particular, it said the High Court judge, Ms Justice Stack, erred in not factoring in the reversal of the burden and standard of proof on the question of whether a disclosure is a protected disclosure, set out in Section 5(8) of the 2014 Protected Disclosures Act.

The Court of Appeal also disagreed with the High Court judge on whether the appellant had a "reasonable belief" in two of the disclosures, and whether they had enough "informational content".

SEVEN DISCLOSURES

Mr Barrett had made seven disclosures which he believed were protected disclosures and he argued that a disciplinary process initiated in May 2018 – and expanded in October 2018 – was a consequence of those disclosures, causing him a detriment. He has been suspended on full pay since 2018.

The first and third disclosures referred to financial irregularities at the Garda Training College in Templemore, which were investigated by the Oireachtas Committee of Public

Accounts in 2017 (at which the appellant gave evidence), while the second and fourth were in relation to his role as receiver of a protected disclosure from whistleblower Sergeant Maurice McCabe, on which he also gave evidence to the Disclosures Tribunal.

The Court of Appeal noted that the appellant firmly believes that certain individuals in the police force hold grudges against him in relation to these events.

In 2017, an issue emerged between Mr Barrett and the former head of HR, Assistant Commissioner Fintan Fanning, in relation to a successful appeal by a Garda of a decision by the selection panel for the armed support unit.

A text from Mr Barrett to AC Fanning on the issue, noting a disagreement, ended with the words: "Be on notice". AC Fanning saw this language as a threat to him and made a complaint.

By May 2018, the matter was to be the subject of an investigation and three letters – each regarded by the appellant as protected disclosures – were written by him to Ms Kate Mulkerrins, Garda executive director legal and compliance (June 2018) and to Acting Garda Commissioner Donal O Cualáin (both in August 2018).

These were critical of the conduct of the investigation in the issues with AC Fanning, especially on the selection of an investigator and claims by the appellant that AC Fanning told him he had no formal complaint.

'TONE' OF LETTERS

When the new Garda Commissioner Drew Harris was appointed in September 2018, he told the appellant he was concerned about the attitude, tone and content of this correspondence, which may amount to "serious misconduct", so he was widening the process accordingly.

The process got underway with a Senior Counsel but in July 2020, the appellant withdrew, saying he was challenging the process "at an existential level, rather than at a procedural level".

In November 2020, the investigation found serious misconduct and in December the Commissioner said he would recommend the appellant's dismissal to the Minister. At this stage, the appellant sought an interlocutory injunction.

When this was ruled on by the High Court in March 2022, Justice Stack found the first four disclosures to be protected, but there was no connection to the disciplinary proceedings. The other three disclosures were connected to the disciplinary process, but were not protected disclosures. In any case, the delay in bringing the injunction would have been grounds for refusal.

DELAY IN SEEKING RELIEF

On the issue of delay, the appellant argued at the Court of Appeal that if he had sought injunctive relief earlier, he would have done so prematurely, citing *Rowland v An Post* [2017] IR 355.

But Justice Ní Raifeartaigh looked at *Rowland and McKelvey v Iarnrod Eireann* [2019] IESC 79 and said two principles can be extracted on disciplinary investigations: (1) the courts should be slow to stop a process if procedural errors can be remedied during the process; (2) if the defects cannot be cured during the process, prematurity is not an obstacle to an injunction.

It was clear that the appellant's case fell under the second principle, as he argued that the process was fundamentally illegal and unfair and the judge said he "was not entitled to sit back and allow the process to unfold at inconvenience and expense to An Garda Siochána until the very final stages of the process".

PROTECTED DISCLOSURES

In discussing the protected disclosure arguments, Justice Ní Raifeartaigh cited *Clarke v CGI Food Services* [2020] 3 IR 389 and *Baranya v Rosderra Fresh Meats* [2021] IESC 77, among others, summarising the following points:

(i). The protected disclosure must disclose some wrongdoing.

(ii). The complainant must have a reasonable belief that the employer was engaged in wrongdoing.

(iii). The communication must have informational content.

(iv). Even if the employer is already aware of the information, drawing attention to it can be a protected disclosure.

(v). If the disclosure concerns treatment of the employee making the complaint, it can still be protected;

(vi). The 2014 Act does not need to be expressly invoked when making the communication.

(vii). What is prohibited is penalising the employee for making the disclosure.

(viii). Penalisation includes disciplining the worker.

(ix)The communication and penalisation must be connected, but the test for this remains to be determined by an Irish court.

(x)Courts should "be alive" to two contrasting possibilities: ostensibly legitimate employer actions can be connected to a protected disclosure; or employees can make unfounded allegations about good faith actions of an employer.

The Court of Appeal also said Section 5(8) of the 2014 Act puts the burden of proof in any proceedings on a respondent to show that a disclosure is not protected, although this does not extend to proving the connection between a disclosure and an alleged detriment.

The appellant challenged the High Court finding that the first four disclosures had no connection to the disciplinary proceedings, citing a test in an English case, *Jesudason v Alder Hey Children's Foundation Trust* [2020] EWCA Civ 73. But the Court of Appeal said the High Court found no evidence of a connection, so the appellant would fail even under this relatively easy test.

On the fifth disclosure, the Court of Appeal found the High Court overlooked the presumption of a protected disclosure under Section 5(8) – although the lack of informational content in this June 2018 letter means it does not qualify as a protected disclosure anyway.

'DIFFICULT QUESTION'

Asking if the lack of presumption by the High Court would have made a difference to the sixth and seventh disclosures, the Court of Appeal said it was "a difficult question".

The "flow of events" seemed to support the view that it was only AC Fanning's complaint that led to the disciplinary process. Also, Ms Mulkerins had not been in the Gardaí during the earlier events and therefore had no motive to act against him.

But the issue of the "reasonableness" of the appellant's beliefs "is a particularly difficult one in this case, having regard to the complicated history between the appellant and other senior members of the force".

There were "some puzzling aspects to the evidence". For example, the text to AC Fanning was "not of a manifestly threatening character" and the failure to involve the appellant in the selection of an investigator until May 2018 was "bizarre".

There was some informational content about AC Fanning's alleged denial of a complaint in one of the August 2018 letters, although it was "most curious" when compared to the different position set out in AC Fanning's solicitors' correspondence during that period.

But these were "no more than hints" and the Court of Appeal should not interfere with the High Court's conclusion. "The issue can of course be re-visited at the trial when a fuller picture from all the evidence is available." *(John Barrett v Garda Commissioner and Minister for Justice [2023] IECA 112)*