[2020] IEHC 665

THE HIGH COURT

RECORD NO: 2020/22 MCA

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 12 AND SCHEDULE 2 OF THE PROTECTED DISCLOSURES ACT 2014

BETWEEN:

ANDREW CONWAY

APPELLANT

AND

THE DEPARTMENT OF AGRICULTURE, FOOD AND THE MARINE

RESPONDENT

JUDGMENT of Ms. Justice Hyland delivered on 14 December 2020

Summary

1. This case raises two questions: whether the Labour Court acted lawfully in holding that a failure by an employer to act upon a protected disclosure under the Protected Disclosures Act 2014 Act (the "2014 Act") did not constitute penalisation within the meaning of the 2014 Act; and whether the Labour Court erred in failing to take account of the respondent's compliance with its obligations pursuant to the 2014 Act, the Code of Practice established by S.I. 464 of 2015 on protected disclosures, the Guidance to employers adopted pursuant to s. 21(1) of the Act in determining penalisation and the respondent's own policy.

2. For the reasons set out in this judgment, I find that in respect of the first question, the Labour Court found as a matter of fact, after having inquired into the matter, that the appellant had not suffered detriment and had not been penalised for having made a protected disclosure. No basis has been advanced to me to justify setting aside those findings of fact.

3. In respect of the second question, I find that the Labour Court were correct in holding that the treatment by the respondent of the protected disclosure were not matters within its jurisdiction, in circumstances where it had already concluded no penalisation as defined by s.12 had been suffered by the appellant, and where the Act does not confer a jurisdiction on the Labour Court to evaluate the adequacy of an employer's response where penalisation has not been established by the complainant.

4. For those reasons, I reject the appeal.

Summary of facts

5. The appellant, Mr. Conway, is a veterinary practitioner and was previously engaged as a veterinary inspector by the respondent. On 26 October 2016 the Public Appointments Service was engaged by the respondent to carry out a competition for the appointment of a panel of veterinary inspectors. In March 2017 the appellant was invited for interview. In May 2017 the appellant was placed at number 87 on the panel in the order of merit.

6. On 17 May 2017 the appellant made a protected disclosure not the subject of these proceedings to the respondent alleging age discrimination in the competition.

7. On 14 May 2018 the appellant made the protected disclosure the subject matter of these proceedings relating to the appointment of vets by the respondent, on the basis that the appointment process was in breach of EC regulation 854/2004. That disclosure was made to accompany known as "Resolve Ireland", the company that had been nominated by the respondent in its protected disclosures policy to receive complaints. The appellant used the reporting form set out at Appendix A of the respondent's protected disclosures policy and procedure.

8. On 17 May 2018 the protected disclosure was received by the respondent from Resolve Ireland.

9. On 29 May 2018 Mr Gordon Conroy of the respondent acknowledged receipt of the appellant's protected disclosure in the following terms:

> *"I have now fully reviewed your submission submitted under the Department's Protected Disclosure Policy set out in response to the 2014 Protected Disclosure Act. My role in this regard is to ascertain whether the allegations may constitute relevant wrongdoings as defined by the Act. In the event that I decided some or all do indeed constitute relevant wrongdoings, as a Protected Disclosure, the Department is committed to protecting the person who makes the disclosure, in this case you, against possible future actions as a consequence of having made this disclosure as set out in the DAFM policy and guidance.*
>
> *My view is that information provided by you in your submission received by Resolve Ireland on May 14 may constitute a protected disclosure. In light of this and in line with the relevant legislation and policy in place you have the:*
>
> – *right of protection in the event that you are unfairly dismissed, and*
>
> – *right of protection if you are otherwise penalised or threatened with "penalisation"*
>
> *for having made this protected disclosure.*
>
> *I will now send the submission you have made under the protected disclosure act to Mr Kevin Galligan, personnel officer DAF M. Mr Galligan will consider whether further actions are warranted in light of your submission. I have requested that Mr Galligan communicate the outcome of any potential actions directly to you".*

10. Between 20 June 2018 and 2 July 2018 the appellant sent two emails to Mr Conroy stating he had heard nothing from Mr Galligan. Mr. Conroy replied on 20 June saying he had forwarded the appellant's mail on to Mr. Galligan.

11. On 3 July 2018 the appellant emailed Mr Galligan sending a copy of the correspondence with Mr Conroy.

12. On 11 July 2018 the appellant made a complaint to the WRC alleging penalisation for having made a protected disclosure of 17 of May 2017 (not the subject of these proceedings).

13. On 20 August 2018 the appellant wrote to Mr Galligan seeking a response on how his protected disclosure of May 2018 would be addressed.

14. On 29 August 2018 a reminder email was sent by the appellant to Mr Galligan.

15. On 31 August 2018 an email from the appellant to Mr Galligan was sent alleging penalisation for having made a protected disclosure.

16. On 17 September 2018 the appellant lodged the complaint the subject matters of the within proceedings.

17. On 6 March 2019 the WRC adjudication hearing took place in relation to the within complaint. Due to a misunderstanding about dates the respondent was not represented at that hearing but nonetheless the hearing went ahead and a decision in the appellant's favour was made by the adjudication officer on 16 July 2019.

18. On 26 August 2019 the notice of appeal of the respondent to the Labour Court was submitted. On 6 December 2019 the Labour Court hearing in relation to the complaint took place. The appellant gave evidence. No witness from the respondent gave evidence.

19. The determination of the Labour Court was issued on 13 December 2019.

20. On 9 January 2020 the appellant made a formal complaint about the conduct of Mr Galligan. That complaint was referred by the respondent to Mr McMahon its corporate affairs division for investigation.

21. On 23 January 2020 an appeal on a point of law was filed in the High Court against the decision of the Labour Court.

22. On 30 September 2020 the report of Mr McMahon was published, which concluded that the May 2018 disclosure was not processed in accordance with official procedures and would be reviewed by a different official. It was found that Mr Galligan ought to have acknowledged the correspondence but that throughout the same period the Department was actively involved in dealing with related complaints and disclosures from the appellant. The report acknowledged there was an oversight but no ulterior motive.

Protected Disclosures Act 2014

23. The purpose of the 2014 Act is stated to be "*An Act to make provision for and in connection with the protection of persons from the taking of action against them in respect of the making of certain disclosures in the public interest and for connected purposes*".

24. The Act defines penalisation at section 3 as follows:

"penalisation" means any act or omission that affects a worker to the worker's detriment, 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;"

25. There is also a definition of detriment specifically in the context of s.13 of the 2014 act. Section 13 is entitled "*Tort action for suffering detriment because of making protected disclosure*". Section 13 (1) provides:

If a person causes detriment to another person because the other person or third person made a protected disclosure, the person to whom the detriment is caused has a right of action in tort against the person by whom the detriment is caused.

26. Subsection 3 defines "detriment" in subsection 1 as including: –

(a) coercion, intimidation or harassment,

(b) discrimination, disadvantage or adverse treatment in relation to employment (or prospective employment),

(c) injury, damage or loss, and

(d) threat of reprisal.

27. Section 12 is entitled "*Other protection of employees from penalisation for having made protected disclosure*". Section 12 (1) provides as follows:

An employer shall not penalise or threaten penalisation against an employee, or cause or permit any other person to penalise or threaten penalisation against an employee, for having made a protected disclosure"

28. Section 21 is headed up "*Internal procedures for protected disclosures made by workers employed by public bodies*". It provides as follows:

(1) Every public body shall establish and maintain procedures for the making of protected disclosures by workers who are or were employed by the public body and for dealing with such disclosures.

(2) The public body shall provide to workers employed by the body written information relating to the procedures established and maintained under subsection (1).

(3) The Minister may issue guidance for the purpose of assisting public bodies in the performance of their functions under subsection (1) and may from time to time revise or re-issue it.

(4) Public bodies shall have regard to any guidance issued under subsection (3) in the performance of their functions under subsection (1)."

29. Schedule 2 provides for redress for contravention of section 12(1). It specifies how a complaint may be made to the rights commissioner and how an appeal against a decision of the rights commissioner may be brought to the Labour Court. At paragraph 2(6) it provides that a party to proceedings under the Labour Court may appeal to the High Court from a determination of the Labour Court on a point of law and the determination of the High Court shall be final and conclusive.

30. It is also worth noting what is not in the Act. It does not contain any provisions in respect of the obligations of the employer who has received a protected disclosure. There are no time limits within which action must be taken; indeed, there are no obligations to take action at all, or to communicate with the person making the disclosure. As noted above, a limited obligation is placed upon public bodies under s. 21 to establish and maintain procedures for the making of protected disclosures by workers employed by the public body, to provide written information in relation to those procedures and to have regard to guidance issued by the Minister but that is the height of the obligation. There are no sanctions in the Act for failure to comply with these obligations.

DEPR Guidance/Code of Practice/Department Policy

31. A document entitled "*Guidance under s.21(1) of the Protected Disclosures Act 2014 for the purpose of assisting public bodies in the performance of their functions under the Act*" (the "Guidance") has been published to assist public bodies in the performance of their functions. The Guidance provides that certain key principles should be followed. Disclosures of wrongdoing in the workplace should be the subject of an appropriate assessment or investigation. Providing the worker discloses information relating to wrongdoing in an appropriate manner and based on a reasonable belief, no question of penalisation should arise. At paragraph 15 the topic of assessment and investigation is addressed. At paragraph 15.7 it is noted that the incorporation of a detailed and prescriptive investigative process in the procedures may impede the public body's ability to respond flexibly and in a responsible way to disclosures of wrongdoing. At paragraph

15.9 is provided that each public body should also ensure that any complaint of penalisation or breach of confidentiality is assessed and/or investigated as appropriate. Paragraph 18.2 suggests that workers making protected disclosures should be provided with periodic feedback in relation to the matters disclosed but acknowledges that this does not require the public body to give a complete account of what the situation is at a particular point in time but should give reassurance that the matter is receiving attention.

32. Separately, S.I. 464 of 2015 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, was adopted under s. 42 of the Industrial Relations Act 1990, which provides for the preparation of codes of practice. The Code of Practice is intended to assist in practical implementation of the 2014 Act and to give guidance on best principles. The Code goes through the various provisions of the Act in layman's language. Paragraph 45 provides that in the case of a written disclosure, the matter should be acknowledged as quickly as possible. Under the heading "Communication/Feedback," at paragraph 49 is stated:

> *"It is important that the worker making the disclosure has a sense that the complaint is being taken seriously and that action is being taken, not least with a view to ensuring that the concerns raised are dealt with internally. The organisation should ensure that as much feedback as possible is given having regard to sensitivities around, for example, confidentiality. Information in regard to timelines for responses/actions should be communicated to the discloser".*

33. At paragraph 61 under the heading "Protection from Penalisation" it notes that if an employee feels that the employer has penalised him/her for making a protected disclosure, the employee may refer the matter to the Workplace Relations Commission (WRC).

34. The Appendix contains a model whistleblowing policy. This identifies, inter alia, that whistleblowers should be kept informed of steps being taken in response to the disclosure. The policy undertakes to communicate with whistleblowers to acknowledge receipt of the disclosure and arrange to meet with them, to inform them of how the employer proposes to investigate the matter and keep the whistleblower informed of actions where possible including the outcome of any investigation (subject to confidentiality and legal considerations), as well as informing the whistleblower of the likely timescales.

35. Finally, the respondent has its own policy for dealing with complaints under the 2014 Act. Under the heading "*Actions following a disclosure*" at paragraph 10, it is noted that there is no specific provision for investigations and/or actions to be undertaken under the Protected Disclosures legislation and where investigations and/or actions are warranted they will be conducted under the appropriate existing policy or procedure where same exists and if not under the heading of a management investigation. The policy also contains a reporting form at Appendix A and it was this form that was used by the appellant in this case.

Nature of appeal

36. As identified in the Second Schedule to the 2014 Act, referred to above, this is an appeal on a point of law and as such the normal constraints apply to the nature of the review I can carry out. I must defer to the undoubted specialist expertise of the Tribunal in employment matters. In *HSE v. Raouf Sallam* [2014] IEHC 298 Baker J. that observed that the High Court must show appropriate curial deference to the Labour Court, such deference arising when the Labour Court deploys its particular expertise on industrial relations issues. Where findings of fact are at issue, I can only overturn them in circumstances identified in recent Supreme Court jurisprudence (see *Attorney General v. Davis* [2018] 2 I.R. 357 and *Nano Nagle School v. Daly* [2019] 30 E.L.R. 221. The position is of course different insofar as an error of law is concerned.

37. In respect of the considerable deference I should afford to the Labour Court as an expert tribunal, the decision of Humphreys J in *Transdev Ireland Ltd v. Caplis* [2020] IEHC 403 explains why such deference is appropriate:

> *"The centre of gravity of a decision-maker's evaluation of the evidence normally falls into the zone of fact rather than law. That evaluation may potentially stray into irrationality or other legal error, but one must be on guard not to extend that limited doctrine into a wider re-evaluation of the decision-maker's factual conclusions. It must be remembered that the Labour Court had detailed written and oral submissions, saw and heard the witnesses and had the benefit of searching cross-examination. Having seen the witnesses is important because no review on affidavit can properly do justice to that. A statutory appeal such as the present one cannot really recreate the dynamic of the oral hearing or the weight that a decision-maker that actually saw the witnesses might attach to the exculpatory explanations and excuses offered for humanitarian reasons by the employee in this particular case. It also must be borne in mind that the Labour Court is set up to consist of industrial relations experts, and is entitled to some degree of recognition of that fact in the context of reviewing its decisions"*(para. 13).

Grounds of appeal in instant case

38. The notice of motion identifying the appeal on a point of law is lengthy, identifying multiple grounds. Very helpfully, at the hearing of the appeal, counsel for the appellant identified that those grounds could, in essence, be boiled down to two core complaints:

- the respondent's conduct in ignoring the appellant's protected disclosure, failing to take it seriously and failing to investigate it (at all or in a timely manner) as constituting detriment for the purposes of the definition of 'penalisation' under s.3(1) of the 2014 Act;

- whether the Labour Court erred in failing to take any or any adequate account of the respondent's compliance with its obligations pursuant to the 2014 Act, S.I. 464/2015 (the relevant Code of Practice) and the 'Guidance under section 21(1) of the Protected Disclosures Act 2014' in determining penalisation.

A further gloss on the second argument was identified at the hearing before me, to the effect that there was a fair procedure element to the complaint. I deal with this below.

Arguments of the parties

The appellant's submissions

39. The appellant submitted that the issue in this case is whether the Labour Court erred in law by failing to take adequate account of the manner in which the appellant's protected disclosure was ignored, and/or not investigated by the respondent in a timely manner or at all (the "causation – detriment test"), submitting that such conduct can constitute detriment and that the Labour Court erred in law in refusing to recognise this conduct as detriment.

40. The appellant notes that no issue is taken with the "causation – reason why" test as the Labour Court did not get to the stage of determining whether detriment suffered by the appellant was due to the appellant having made the protected disclosure due to the finding of failure to establish detriment.

41. The appellant relied on case law which confirmed that, in the UK, the development of "detriment" initially in the context of discrimination legislation also applies in the context of protected disclosures. It was submitted that, based on Elias J.'s approach in *Moyhing v. Barts and London NHS Trust* [2020] IRLR 860 (UKEAT), the concept of detriment supports an objective test with elements of subjectivity. The appellant also relied on *Deer v. University of Oxford* [2015] IRLR 87 in respect of the definition of detriment.

42. Applying the more developed UK jurisprudence, it was submitted that the respondent's failure to apply its protected disclosures procedures in a timely manner could amount to an omission that affected the appellant to his detriment. In the UK, it is well settled that a failure to investigate a disclosure can constitute detriment for the purposes of protected disclosures law. Reliance was placed in the written submissions on a number of EAT decisions including *Local Government Yorkshire and Humber v. Shah* (UKEAT/0587/11/ZT), *Jhuti v. Royal Mail Group* (ET Case no 2200982/2015, 20 November 2018), *Lingard v. HM Prison Service* (ET Case No 1802862/02, 16 December 2004), *McDonald v. Scottish Police Authority* (ET Case 4101669/17 and 4100208/18, 13 July 2018) *and Ferguson v. Abertawe Bro Morgannwg University Health Board* (ET Case No 1600697, 16 May 2014).

43. The appellant also relied on an Irish decision by an adjudication officer, *A psychiatrist v. A health service provider* ADJ-00017774 (23 September 2019), where the Adjudication Officer found that the complainant had suffered detriment in the respondent's application of its protected disclosures policy and failure to assess the disclosures in a timely manner. The appellant also argued that the court should consider the case law on penalisation within the meaning of s. 27 of the Safety, Health and Welfare at Work Act 2005 where the Labour Court have held, for example, that a complaint of bullying and harassment can constitute penalisation (*Akduman* [2010] 21 ELR 301).

44. The appellant submitted that the Labour Court ought to have taken a purposive approach in interpreting s. 12 and Schedule 2 of the 2014 Act and that it should not have taken the approach it did in limiting its jurisdiction by stating that it was "*not in a position to assess the Complainant's allegations*".

45. Separately, the appellant argued that the respondent did not comply with the Code of Practice adopted under S.I. 464/2015 nor with the commitment given at section 3 of the respondent's protected disclosures policy and procedure in that it failed to treat the disclosure seriously and did not advise the appellant on how his disclosure was to be addressed. The appellant submits that the respondent did not foster an environment suitable for addressing concerns and protected disclosures.

46. The appellant also points to s. 21 (1) of the 2014 Act and argues the respondent was obliged to have regard to the Department of Public Expenditure and Reform Guidance when establishing and maintaining its procedures for dealing with protected disclosures. It is argued that under both the Guidance and the Code the respondent had the power to investigate the disclosure but failed to do so and failed to comply with the Code and Guidance by failing to provide the appellant with feedback and information. Those failures should have been taken into account by the Labour Court in considering whether the appellant had suffered penalisation.

The respondent's submissions

47. The respondent submitted that at the hearing before the Labour Court the appellant was asked by the Court to identify the detriment which he suffered after having made his protected disclosure, and that he failed to identify any particular detriment as a result of making his protected disclosure. The respondent noted that the appellant had made a separate disclosure to the respondent in May 2017 which was investigated and a response issued to the appellant in December 2017. The appellant made a complaint of penalisation to the WRC in relation to the May 2017 disclosure but that complaint was later withdrawn in September 2018. On 30 April 2018 the appellant made a further disclosure to Mr Gordon Conroy, a named recipient under the respondent's protected disclosure policy to be included in his protected disclosure of May 2017.

48. The respondent admits that there was a failure to deal speedily with the disclosure during the relevant time period, being May 2018 to September 2018 (when the complaint of penalisation was brought to the WRC) but as explained in the report of the Department into the appellant's complaint about this failure, at no time was there a deliberate attempt to delay to refusal to investigate the disclosure. Rather the failure was caused by the person charged with investigating it being taken up with the appellant's other disclosures and claims of penalisation.

49. The respondent argued that the Labour Court's decision that no detriment had been identified was a reasonable and correct one, having heard the appellant's evidence and submissions, that the Labour Court was entitled to make same and it was not for this Court to substitute its own views as to what detriment the appellant suffered. Nor was there any error of law. The respondent noted that the Labour Court having made this

finding, it correctly did not proceed to the next limb of the test i.e. the "but for" limb of the test. This stage of the test did not arise in circumstances where no detriment to the appellant had been found.

50. The respondent submits that while the appellant relied on an omission on the part of the respondent in failing to investigate a protected disclosure between 14 May 2018 and 17 September 2018, the 2014 Act makes it clear that such an omission would have to affect the appellant to his detriment in order for penalisation to be established and no such evidence of detriment was put to the Labour Court.

51. The respondent submits that the Labour Court correctly relied upon the ordinary meaning of the word "detriment", meaning "harm" or "damage" to the person, and detriment requires some form of harm or damage to be demonstrated. The respondent also noted the Oxford English Dictionary definition of "detriment" being "harm or damage", defining and also defines the word "harm" as "1. *Physical injury to a person. 2. Damage done to a thing. 3. A bad effect"*. The respondent argues that this definition is also apparent from the use of the term "detriment" in s. 3 of the 2014 Act and the examples thereafter given. These examples point to instances of harm and not some form of occurrence or failure. Failure in and of itself is not sufficient to fulfil the requirements of "detriment" and that there must be some consequent harm which arises. The respondent looks to s. 5 of the Interpretation Act, 2005 to argue that a different interpretation of the word "detriment", whether by the purposive approach argued for by the appellant or otherwise, does not arise.

52. The respondent also notes that there is no further definition or elaboration of the word "detriment" in the English legislation and that for that reason alone the authorities referred to by the appellant are distinguishable. Also. in those authorities, in each of the individual cases there was some level of harm which had been perpetrated upon the applicants (e.g. a demotion, dismissal) and that a mere assertion of detriment does not suffice.

53. In respect of *A Psychiatrist v. A health service provider* and *Akduman*, the respondent notes that in the former, the Adjudication Officer made it clear that the complainant must show he had incurred detriment. In *Akduman*, the protected disclosure was a complaint of bullying and the detriment complained of included delay in addressing that complaint.

Relevant Case Law

UK case law

54. Before considering the relevant UK law, it is worth observing that the provision in English law that protects workers is in quite different terms to s.12 in that it neither prohibits penalisation nor defines detriment.. Section 47B of the Employment Rights Act 1996 provides "*a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure*". Accordingly, the UK case law, while interesting, is of limited relevance.

55. Moreover, in certain of the cases identified in the written submissions of the appellant (the majority of which were not opened at the hearing), although there was a reference to a failure to investigate being itself a detriment, on the facts of each individual case there was usually some level of harm imposed on the complainant, such as a demotion, a dismissal etc. Furthermore, even in those cases where a failure to investigate was found to be the detriment, the complainant in question had given detailed evidence of the effect that this failure to investigate had on them, such as making them feel demeaned, belittled in their profession and/or undermined. The Labour Court does not record any such evidence being given by the appellant in this case.

56. The appellant placed particular emphasis on the case of the decision of the Court of Appeal in the UK in *Deer*. This was not a protected disclosure case but a case based on victimisation under the Sex Discrimination Act 1975, which treats less favourable treatment caused by the bringing of sex discrimination proceedings as discrimination. The claimant, a research fellow, brought at a sex discrimination claim against the University which was settled in 2008. She brought five subsequent claims where she alleged she had been victimised because she had advanced the settled claims. Elias J. noted:

> *"The concept of detriment is determined from the point of view of the claimant: a detriment exists if a reasonable person would or might take the view that the employer's conduct had in all the circumstances been to her detriment; but an unjustified sense of grievance cannot amount to a detriment: see Derbyshire v St Helens MBC [2007] UK HL 16".*

57. He went on to say that there will be few cases where less favourable treatment will be meted out and yet it will not result in a detriment, as being subject to an act of discrimination will reasonably be perceived as a detriment even if there are no other adverse consequences. Given that the appellant has not sought to establish less favourable treatment, that observation is of limited relevance.

Irish case law

58. No decision of the High Court on penalisation in the context of the 2014 Act has been identified. The 2014 Act appears to have been considered in three High Court cases to date *(Baranya v. Rosderra Irish Meats Group* [2020] IEHC 56, *Hosford v. Department of Employment Affairs and Social Protection* [2020] IEHC 138, *Clarke v. CGI Food Services Ltd* [2020] IEHC 368) but none of these consider the concepts of penalisation and detriment.

59. In respect of the adjudication officer decision relied upon by the appellant, *A psychiatrist v. health service provider*, the complainant submitted a claim of penalisation pursuant to the 2014 Act. He made a protected disclosure in 2016 raising patient care issues involving a colleague, a psychologist. He also made a dignity at work complaint. The psychologist then made a dignity at work complaint against the complainant. The complainant asserted that the employer was relying on the information he had disclosed in the protected disclosure and there was a risk of cross contamination between the two processes. The complainant argued the terms of reference into his protected disclosure had not been

agreed, while the investigation into him was at the reporting stage and complained about the delay in investigating his protected disclosure.

60. The adjudication officer referred to the code of practice adopted pursuant to the statutory instrument and the model whistleblowing policy appended to the code. He noted that it was settled law that detriment did not require some physical or economic consequence, that being clear from the wide variety of forms of penalisation set out in the 2014 Act, and observed that the alleged acts of penalisation related to the respondent's handling of the protected disclosure:

> *"As set out above, the complainant emphasised his concern that the substance of his protected disclosure formed the basis of the psychologist's dignity at work complaint against him. The latter was to be determined prior to the former".*

61. He concluded that the difficulty in the case was that the dignity at work process proposed to make findings of fact in relation to the content of the protected disclosure. He also noted that leaving a protected disclosure in a stalled position for so long and seeking to address key factual conflicts via another process represented detriment to someone of the complainant's seniority, in circumstances where he had longstanding and widely disseminated concerns. He concluded that the complainant had incurred detriment in the context of his longstanding issues about clinical practice and patient care, as well as his position of seniority, and therefore concluded that the complaint of penalisation was well founded. In this case, there was clearly evidence of detriment arising from the fact that the dignity at work complaint became intermingled with the protected disclosure. Those facts are not in any similar to those at issue here.

62. *Akduman* was a case about penalisation under the Safety, Health and Welfare Act 2005 where it was held that a delay in dealing with a complaint of bullying and harassment can constitute penalisation. But, as pointed out by the respondent, in *Akduman*, the protected act was the complaint of bullying. The detriment complained of included delay in addressing that complaint. The Labour Court found that a cause of action for penalisation only existed if the conduct or omissions, covered by the statutory definition of penalisation in the 2005 Act, arose because of an act protected by the Act and but for the protected act the employee would not have suffered the detriment complained of, concluding that: "*while any delay in the investigation of a complaint of bullying is to be deprecated the Court cannot…hold that the complainant was penalised within the statutory meaning of that term*." Although relied upon by the appellant, in fact *Akduman* is an example of a case where mere delay alone was not enough to conclude there had been penalisation.

63. Given the relatively recent origin of the 2014 Act, it is perhaps not surprising that the issues the subject of these proceedings have not yet been fully considered in the case law. But because of this, the cases cited, whether UK or Irish, are only of marginal assistance.

Decision of the Labour Court

64. The decision of the Labour Court is short. It notes that the complainant made a protected disclosure within the meaning of s. 5 of the 2014 Act on 14 May 2018. It refers to the substance of the disclosure relating to a recruitment campaign in 2016 and notes that the appellant referred his complaint of penalisation on 17 September 2018, approximately four months after he had made his protected disclosure. It refers to the evidence given by the appellant that he submitted the complaint of penalisation to the WRC rather than to the respondent because he formed the view that his protected disclosure was being ignored by the respondent.

65. The Labour Court recited the Long Title to the 2014 Act and went on to hold as follows:

> *"The Complainant was afforded every opportunity by the Court to outline in evidence what action he perceived had been taken against him, to his detriment, by the Respondent arising from the protected disclosure initiated by him on 14 May 2018. The Complainant was unable to point to any such action or detriment between the date of the making of the protected disclosure and the date on which he referred his complaint of penalisation to the Workplace Relations Commission other than to outline his perception that his protected disclosure was neither being taken seriously by the respondent nor being investigated by it. It was submitted by the complainant's solicitor that the definition of penalisation in the act refers to "any act or omission that affect a worker to the worker's detriment".*
>
> *The Court is not in a position to assess the Complainant's allegations regarding the degree of seriousness or otherwise the Respondent attached to his protected disclosure or the adequacy of the timeframe within which the Respondent investigated them. Quite simply these are not matters that fall within the Court's jurisdiction as provided for in the Act. The combined effect of section 12 and Schedule 2 of the Act, insofar as they relate to the Court's jurisdiction, empower the Court on hearing an appeal from a decision of an adjudication officer under the Act, to determine whether or not there has been a breach of section 12 (1) of the Act in the case of the particular complainant before us".*

66. The Court went on to quote section 12(1) and the definition of penalisation under section 3. It concluded as follows:

> *"In the Court's view and having regard to the wording of the definition of penalisation for the purposes of the Act, the Complainant has failed to establish that any act or omission on the part of the Respondent, that affected him to his detriment, occurred at all and/or ensued as a consequence of the protected disclosure the Complainant made on 14 May 2018".*

67. Accordingly, the Court upheld the appeal and set aside the decision of the adjudication officer.

First ground of appeal

68. Although both parties agreed that the Labour Court had only addressed the question of detriment and had not considered the next part of the penalisation test, what they referred to as the "but for" test, i.e. whether the protected disclosure had caused the detriment, in my view the Labour Court was in fact considering the overall question as to whether penalisation for making a protected disclosure had occurred. The Court referred to the Long Title to the Act which refers to the "ta*king of action against them in respect of the making of certain disclosure*s", which in my view encompasses both the detriment and the cause of the detriment. The Court referred to the complainant being given a chance to outline what action had been taken against him to his detriment arising from the protected disclosure. It notes he was unable to point to any such action or detriment.

69. The appellant complains about the reference by the Labour Court to the appellant outlining "*in evidence what action he perceived had been taken against him, to his detriment" and the conclusion that "the Complainant was unable to point to any such action or detriment"*, submitting that the inclusion of a reference to action being taken against him meant that the wrong legal test had been applied and that only detriment ought to have been identified.

70. But the Labour Court were entitled in my view to refer to the absence of action being taken against the complainant. That phrase was being used by the Labour Court as a shorthand – also employed by the legislature in the Long Title - for penalisation for having made a protected disclosure. That is precisely what s.12(1) requires the Labour Court to do. Section 12(1) prohibits penalisation (which necessitates an inquiry as to whether an act or omission affecting the worker to their detriment exists) where it results from the making of a protected disclosure.

71. Unlike in the UK legislation, there is no separate obligation in the Act to inquire into detriment – rather the obligation is to consider whether penalisation has taken place and the cause of same. That exercise sometimes takes place in a number of steps i.e. to identify the act or omission, to consider whether it constitutes detriment and then to examine whether the cause of such detriment was the making of a protected disclosure. But the wording of the Act identifies that what is prohibited is penalisation for having made a protected disclosure. To reach a conclusion as to whether s.12(1) has been breached, all three concepts identified above must be considered. The Labour Court was therefore perfectly entitled to consider all matters necessary to reach a decision under s.12(1), including whether action had been taken against the appellant.

Application of Section 12(1) by Labour Court

72. Next the Labour Court, having identified the definition of penalisation, evaluated whether s. 12(1) had been breached i.e. whether any act or omission on the part of the respondent that affected the complainant to his detriment had occurred at all or as a consequence of the protected disclosure made. It was satisfied on the basis of the evidence heard before it that the complainant had failed to establish those conditions.

73. That is, in my view, a substantive finding of fact that the Labour Court was entitled to arrive at. Its conclusion accords with the evidence and submissions presented to me. No

evidence of an act or omission that affected the appellant to his detriment occasioned by his protected disclosure was identified in the pleadings or at the oral hearing. There was some suggestion in the written submissions made to the Labour Court that the appellant had suffered a detriment by reason of the fact that his disclosure had not been investigated, whereas an investigation of it and an upholding of his complaint might have altered his position in the promotion competition. However, it was made clear during the oral hearing before me – quite correctly in my view - that the complaint of penalisation was based exclusively on the fact that the respondent was ignoring his protected disclosure, and that the appellant was not making the case that the penalisation in question was his position on the panel.

74. On the facts as identified, there is no basis upon which I can or should upset the finding of fact by the Labour Court in respect of detriment. The appellant gave oral evidence before the Labour Court. He was given the opportunity to identify what action had been taken against him to his detriment by the respondent arising from the protected disclosure. The appellant bears the evidential burden of establishing detriment and penalisation. He complained about the delay in responding, being a period of 4 months, and a failure to take the complaint seriously by the respondent. The evidence set out above shows that Mr. Gordon Conroy of the respondent acknowledged his complaint by email of 20 June 2018. The essence of the appellant's complaint was that Mr Galligan, who had been identified as the person charged with dealing with the disclosure, did not reply to the four emails sent to him by the appellant looking for an update between June and September 2018.

75. Section 12(1) requires penalisation, being an act or omission that affects a worker to the worker's detriment. The ordinary and natural meaning of the word detriment is harm or damage. Thus, the legislature requires that the detriment must be of a nature as to harm or damage the person making the disclosure. One can understand the frustration and annoyance the appellant presumably suffered while waiting for a reply to his emails querying the progress of the investigation. But there is no evidence whatsoever that this lack of response impacted upon the appellant's situation either in the workplace or elsewhere. The types of detriment identified (non exhaustively) at s.3 of the Act or indeed at s.13(3) are entirely absent. The appellant failed to discharge the evidential burden of showing detriment.

76. For the sake of completeness, I note that the appellant was not left without a remedy for the respondent's failure to investigate the disclosure over the four-month period in question. As noted above, the appellant complained against Mr Galligan, that complaint was investigated and a report on the complaint issued on 30 September 2020. This report finds as follows:

> *"… the protected disclosure Mr. Conway made in May 2018 was not processed in accordance with our official procedures. That disclosure correspondence will now be reviewed by an official not involved with the original review procedure … although the investigating official found that Mr. Conway's correspondence to Mr. Galligan*

should have been acknowledged, the official also found that throughout the same period, the Department, including Mr. Galligan, was actively involved in dealing with similar, related complaints and disclosures from Mr. Conway. In the circumstances, the official finds that not acknowledging the correspondence was an oversight and that there was no ulterior motive involved".

Appellant's argument relating to jurisdiction

77. In respect of the appellant's assertion the Labour Court erred in law by ignoring or failing to investigate the respondent's treatment of his complaint as constituting detriment for purposes of penalisation, that argument is based on an erroneous interpretation of the decision. In my view, the Labour Court decision, properly read, encompasses two distinct findings. The first is its conclusion (discussed above) that there was no breach of s. 12(1) and that the appellant's complaints about the respondent's response to the protected disclosure did not constitute detriment and that no penalisation for having made a protected disclosure had been established.

78. Next, the Labour Court went on to consider whether it had any role in evaluating, in the abstract, the adequacy of the respondent's response to the protected disclosure and concluded, quite properly in my view, that this was not a matter within its jurisdiction. Rather, it noted that under s.12 and Schedule 2, it was limited to determining whether there was a breach in the case of the particular complainant before it. In other words, it concluded it was not entitled to adjudicate upon the adequacy of a response to a protected disclosure absent penalisation of a complainant.

79. That is entirely consistent with the scheme established by the Act. Schedule 2 provides that where an employee has made a protected disclosure, she or he may present a complaint to a rights commissioner that the employer has contravened s. 12(1) in relation to the employee. A decision by the rights commissioner may be appealed to the Labour Court. Thus, on appeal, the only power of the Labour Court is to look at the impact upon the employee. It enjoys no jurisdiction to carry out an inquiry into the conduct of the employer in dealing with the protected disclosure. Nor are there any statutory obligations as to how the protected disclosure should be addressed. Section 21 represents the height of a (public) employer's obligations in that regard.

80. Counsel for the appellant argued that where a body is investigating whether penalisation took place, the category of penalisation is not limited to those examples set out at s. 3 of the Act and the Labour Court had wrongly concluded it had no jurisdiction to consider allegations as to how the respondent treated the protected disclosure. It was submitted that the response of a body investigating a disclosure could, in and of itself, potentially constitute penalisation and to exclude that possibility was a breach of law. That is an interesting question and may require to be decided in a future case.

81. But here it does not need to be resolved because it is clear from the terms of its decision that the Labour Court did in fact consider the appellant's complaint - i.e. that he had suffered penalisation because of the treatment of his complaint - and made a finding of fact that he had failed to establish any evidence of same. It did not exclude the treatment

of a complaint as a potential detriment. Rather, it correctly excluded the possibility of investigating how an employer treats a disclosure when no evidence of detriment or penalisation has been advanced by a complainant.

Second ground of appeal

82. The second ground of appeal is that the Labour Court erred in failing to take any or any adequate account of the respondent's compliance with its obligations pursuant to (a) the Code of Practice adopted under S.I. 464/2015 and (b) the Guidance adopted under section 21(1) of the Act 2014 in determining penalisation and (c) the respondent's own policy.

83. In its decision, the Labour Court concluded that the adequacy of the response of the respondent to the protected disclosure was not a matter within its jurisdiction. That is entirely correct. As identified above, the jurisdiction given to a rights commissioner, and to the Labour Court on appeal, is to determine whether there has been a breach of the prohibition on an employer penalising an employee for having made a protected disclosure. That is the limit of its jurisdiction. It is not conferred with a jurisdiction to evaluate the manner in which a protected disclosure has been treated by an organisation.

84. Indeed, as stated above, the Act does not impose any general obligations on employers when responding to a disclosure. The only obligations are those imposed under s. 21 on public bodies, such as the respondent, to (a) establish procedures for the making of disclosures and for dealing with such disclosures; (b) provide information to workers relating to the procedures; and (c) have regard to any guidance issued by the Minister to assist public bodies in respect of the procedures established.

85. Any allegation that the respondent failed to comply with its obligations in this regard in the abstract, cannot be adjudicated upon by an adjudication officer or Labour Court. The Labour Court has not been given that role by the legislation. The purposive interpretation of the Act urged upon me by the appellant cannot operate to confer an entirely new jurisdiction upon the Labour Court to monitor the obligations of public bodies to put in place appropriate procedures to respond to disclosure, or to ensure compliance with such procedures. The jurisdiction that the Labour Court enjoys is of quite a different kind: to evaluate whether an individual worker has been penalised, having regard to the factual circumstances presented to it. The Labour Court did that in this case and no more. That was the correct approach. As pointed out by counsel for the respondent, there is no cause of action under the 2014 Act for failure to investigate a protected disclosure in accordance with an existing policy.

Fair Procedures

86. In respect of the fair procedures argument, it was argued at hearing, though not in the written submissions, that the Labour Court had failed to seek any response from the respondent in respect of the claim that the protected disclosure had not been taken seriously, did not ask the respondent to explain its inaction in investigating and responding to the appellant's emails, that nobody from the respondent had been called to give evidence at the hearing before the Labour Court and that therefore the appellant had

been denied an opportunity to cross-examine a witness from the respondent. The appellant argues that the Labour Court's failure to engage in this process precluded the appellant from challenging evidence as it was not presented and submitted that the Labour Court had therefore failed to comply with fair procedures and acted in breach of its statutory duty.

87. The respondent objected to this argument on the basis that it had not been identified in the Notice of Motion. The appellant sought to persuade me that ground (k) of the notice of motion in fact encompassed a fair procedure argument. I am satisfied that this is not so: ground (k) provides as follows:

> *"The Labour Court fell into an error of law in failing to take any adequate account of the Respondent's obligations pursuant to the Act, including section 21 thereof and pursuant to SI 464/2015, the relevant Codes of Practice and the respondent's own guidance documentation in determining penalisation".*

88. One cannot discern within that ground an objection on fair procedures. Nor did the respondent anticipate that any such argument lay within ground (k) – the legal submissions produced by them did not address fair procedures and rightly so since no such challenge was made.

89. The appellant argued in response that a failure to comply with fair procedures should be permitted to be raised even without pleading and invoked paragraph 74 of the decision of the Supreme Court in *Nano Nagle* in this respect. But that paragraph simply identifies the duty of a tribunal to give reasons for its decision. It does not address the issue here of a failure to plead a wrong that is later sought to be invoked at an oral hearing for the first time. The fact that the wrong alleged would, if proved, constitute a breach of fair procedures, does not mean it does not require to be pleaded. One purpose of pleadings is to ensure fairness i.e. to ensure that each side knows what is alleged against them and can defend themselves. To allow points raised at hearing for the first time to be part of the case would entirely undermine that objective.

The appeal is on a point of law as identified by the appellant in his notice of motion: there is no mechanism by which that can be amended or expanded upon. Accordingly, I must exclude the fair procedures argument.

In any case, as identified by counsel for the respondent, there is no such thing as a stand-alone right to cross examine witnesses: the respondent was entitled to decide not to call witnesses, and to rely upon the documents in its appeal before the Labour Court. I am not aware of any obligation upon the Labour Court to compel a party to call a witness and none was identified to me.

90. This is not a situation such as that in *Kiely v. Minister for Social Welfare* [1977] I.R. 267, where the relevant government Department sought to rely on a report of a doctor in respect of fitness to work without permitting the appellant, a widow, to cross examine the doctor. That was indeed a denial of fair procedures since the tribunal were proposing to

place reliance upon a document where it had precluded the appellant from questioning the author of the document. The Supreme Court held that the failure to permit her to do so constituted a breach of fair procedures. But no such factual contest was played out in this case: there was no request to cross examine a representative of the Department to challenge the veracity or appropriateness of a view expressed by that person.

91. I can see no way in which there was a denial of fair procedures: the appellant gave evidence to the Labour Court and was heard. The fact that the Labour Court did not launch its own inquiry as to why no response had been given to the appellant or what actions had been taken by the respondent does not mean there was a denial of fair procedures: the respondent was not under any statutory obligation to act in any particular way in this respect and it would have been quite inappropriate for the Labour Court to have launched a generalised investigation into the conduct of the respondent where it has no jurisdiction to do so. For that reason, even if I had concluded this ground was admissible, which it is not, it would have been unsuccessful.

Conclusion

92. For the reasons set out above, I reject each of the grounds of appeal raised by the appellant and uphold the decision of the Labour Court of 13 December 2019.