THE HIGH COURT

[2022] IEHC 283

[Record No. 2020/252JR]

BETWEEN

GEORGE MCLOUGHLIN

APPLICANT

AND

THE LABOUR COURT

RESPONDENT

AND

THE MINISTER FOR ENTERPRISE TRADE AND EMPLOYMENT

NOTICE PARTY

JUDGMENT of Mr. Justice Barr delivered electronically on the 12th day of May, 2022.

Introduction

1. In these proceedings, the applicant is challenging three decisions of the Labour Court which were handed down on 12th February, 2020 by the same division of that court. The applicant lodged his papers seeking orders of *certiorari* in respect of each of the decisions in March 2020. He moved his *ex parte* application before the High Court on 20th July, 2020; which hearing was adjourned for one week until 27th July, 2020, at which time he was given leave to seek relief by way of judicial review.

2. The applicant was employed by the notice party as a labour inspector in the National Employee Rights Agency (hereinafter 'NERA') from 1999, until his retirement at age 65 on 9th January, 2017.

3. Much of the applicant's difficulty with the decisions which are the subject matter of the challenge herein, goes back to the fact that he made a protected disclosure in September 2015 in relation to what he perceived as being a pro-employer bias on the part of NERA/WRC. The applicant is convinced that as a result of making that protected disclosure, he has been subjected to a sustained campaign of penalisation by management in the WRC. In particular, he asserts that they actively sought his dismissal from his position of employment, due to the fact that he had made the protected disclosure which was critical of them.

4. In summary, the applicant challenges the three decisions that were made by the Labour Court on 12th February, 2020, on the basis that in one decision, it wrongfully held that it was bound by an earlier determination of the Labour Court, which the applicant asserts should not have been followed, because he alleges that there was bias on the part of the chairman of that division of the Labour Court, which issued its determination in 2018, given the fact that he had previously worked with the then director of the WRC.

5. The applicant alleges that the decisions under challenge are also unsound, due to the fact that the Labour Court in each case came to determinations that were unlawful and effectively refused to have any, or any adequate regard to the fact that both his employer and the WRC had engaged in a concerted practice to remove him from his position of employment, due to the fact that he had made the protected disclosure in September 2015. In particular, it was asserted that they had wrongly refused his application for

retention in employment beyond the age of 65 years, which application had been made on hardship grounds.

6. That is merely a very brief overview of the nature of the challenges that were mounted by the applicant in these proceedings. It will be necessary to go into the impugned decisions in greater detail later in the judgment.

7. The notice party resisted the various challenges brought by the applicant on the following grounds: - As the impugned decisions were handed down on 12th February, 2020 and as the applicant first moved his *ex parte* application seeking leave to proceed by way of judicial review on 20th July, 2020, it was submitted that the applicant was outside the time permitted to bring judicial review proceedings as provided for in O.84, r.21.

8. It was submitted that as no application had been made in the notice of motion, or in the statement of grounds, to extend the time within which to bring the application, there was no basis on which the court could be satisfied of the circumstances necessary to grant an extension of time pursuant to O.84, r.21(3). In these circumstances, it was submitted that the proceedings should be struck out as being out of time.

9. Without prejudice to that objection, the notice party submitted that it was not open to the applicant in these proceedings to seek to challenge the earlier determination that had been made in 2018, on grounds of objective bias, or otherwise. It was pointed out that no challenge to that decision had ever been raised in these proceedings. Indeed, it was pointed out that the applicant had appealed that decision to the High Court, but had subsequently withdrawn his appeal.

10. It was submitted on behalf of the notice party that each of the decisions that had been made by the Labour Court in February 2020, were sound in law and should not be overturned.

11. That is but a very brief overview of the issues that arise for determination. Unfortunately, there has been a long and tortuous history to these proceedings. In order to properly understand the challenges raised by the applicant to the decisions herein, it is necessary to set out the background to those decisions in a little detail.

Background.

12. As already noted, the applicant joined the Civil Service in 1999. He spent most of his working life as a labour inspector attached to NERA. In that position, his job was to carry out inspections of various workplaces to ensure that employers were properly paying their employees and were properly documenting all aspects of the employment, such as the hours worked and the rates of pay. The applicant maintained that much of this work involved the protection of vulnerable employees, such as foreign workers.

13. In May 2015, the applicant communicated concerns that he had in relation to the holding of inspections by NERA; in particular, he was concerned by what he regarded as a pro-employer bias on the part of management of NERA and the WRC. The applicant made his views known to Mr. Kieran Mulvey, who was then director of the WRC and to the Deputy

Director, Mr. Padraig Dooley. The applicant stated that he indicated to them that he intended to make a formal protected disclosure pursuant to the Protected Disclosures Act 2014.

14. In September 2015, the applicant made a protected disclosure to the Secretary General of the notice party. Subsequent to the making of that protected disclosure, an investigation of the matters raised therein, was conducted by Mr. Turlough O'Sullivan. He apparently found that the concerns raised in the protected disclosure were without substance.

15. The applicant maintains that when he made his views known to the director and deputy director of the WRC in May 2015, the director took active steps to have him dismissed by making "trumped up" allegations in respect of his integrity and competence to carry out his role as a labour inspector. The applicant maintains that these efforts were stepped up after he made his protected disclosure in September 2015.

16. In February 2016, the applicant was absent from work, as he had to undergo heart surgery. He remained out sick until June 2016. There was controversy in respect of the period that he was out sick, in relation to the withdrawal of his access to ICT at work during this period and also in relation to the restoration of access to it upon his return to work.

17. In or about August 2016, the applicant made an informal request to be retained in employment beyond his 65th birthday, which would occur on 9th January, 2017. The applicant states that that request was rejected out of hand.

18. On 28th October, 2016, the applicant made a formal application pursuant to Circular 13/1975 to be retained in employment beyond his 65th birthday on hardship grounds. This was on the basis that he required medical attention following his heart surgery and because he had two teenage daughters, who were still in full-time education. However, on 28th November, 2016, the applicant sent an email withdrawing his application for retention in employment.

19. On 9th January, 2017, the applicant retired from his post, as he had reached the mandatory retirement age of 65 years.

20. The applicant had made a number of complaints in relation to what he perceived as being penalisation of him due to the fact that he had made a protected disclosure. On 20th August, 2018 in a determination bearing reference PDD185, the Labour Court, under the chairmanship of Mr. Kevin Foley, ruled on a number of complaints that had been made by the applicant. The first complaint was that there had been a failure on the part of the respondent to reactivate a suspended disciplinary process, which had been initiated by the respondent against the applicant in 2015. The Labour Court accepted the evidence of the respondent that the reasons for continuing the suspension of the disciplinary process were related to the fact of the applicant's absence on sick leave until August 2016, together with the HR manager's absence on annual leave throughout August 2016 and

the fact that consideration was being given to a process of re-engagement to attempt to resolve matters throughout September 2016. In addition, the respondent had stated that the fact of the applicant's impending retirement had been a factor which had led to a decision not to resume the proceedings between October 2016 and his retirement in January 2017. The Labour Court found that the applicant's complaint in this regard had not been made out.

21. The second complaint covered in that determination concerned the denial of access to the respondent's ICT system while the applicant had been absent on sick leave. The court held that the complaint that the removal of ICT access from the applicant in May 2016 constituted penalisation of the applicant within the meaning of the 2014 Act, had not been made out. The applicant's third complaint related to an alleged denial of access to the ICT system upon his return to work. The court noted that access to the ICT system at work had been reactivated. It held that the delay in effecting same did not constitute penalisation within the terms of the Act.

22. The applicant's fourth complaint of penalisation concerned a contention that by seeking legal advice and making enquiries of him in relation to a defamation action that he had instituted against a particular employer, whom he had encountered in his role as a labour inspector, constituted penalisation within the meaning of the Act. The court did not accept that his complaint in relation to that matter had been made out.

23. The applicant's fifth complaint related to the failure to accede to his request to be retained in his employment beyond the retirement age of 65 years. He asserted that that refusal constituted penalisation within the meaning of the Act. The Labour Court noted that the application had been made on 28th October, 2016. On 3rd November, 2016, the notice party had received an email from the Department of Public Expenditure and Reform, which had stated that, at that time, it was not possible to agree to requests to retain officers beyond their retirement age. The court accepted the evidence of the HR manager of the notice party, that that information had been communicated to the applicant. The court noted that the applicant had withdrawn his application for retention on 28th November, 2016. The court noted that the HR manager of the notice party had given evidence that he had subsequently examined the matter and had concluded that the applicant would not, in any event, have met the relevant qualifying criteria to be retained in employment. Subsequent consideration of the matter, at the applicant's request by the Secretary General of the notice party post-dated the making of the complaint. The court held that any matter associated with the actions of the Secretary General in the matter was therefore not before the court as part of the complaint. The court held that the applicant had failed to produce any evidence which would support his contention that there was a connection between the protected disclosure of September 2015 and the employer's assessment in 2016 that he did not meet the qualifying criteria, as set out in the relevant circulars governing retention in employment beyond the age of 65 years. The court further held that as the applicant had withdrawn his application to be retained in employment, the matter was effectively moot. It therefore held that his claim of penalisation had not been made out.

24. The applicant appealed that determination to the High Court pursuant to s.46 of the Workplace Relations Act 2015 ("the 2015 Act"). The applicant subsequently withdrew that appeal. He stated that he had received advice from his counsel that the appeal was unlikely to succeed.

25. The applicant had also brought an unfair dismissal claim in respect of the determination of his employment with the notice party. That resulted in a determination, which was heard by the same division of the Labour Court, which determination was handed down by the Chairman, Mr. Kevin Foley on 12th July, 2018. That determination bore reference number UDD1842. The court held that having regard to the provisions of s.8(1)(b) of the Civil Service Regulation Act 1956, the applicant's mandatory retirement age was 65 years. The court went on to hold that pursuant to the provisions of s.2(1)(b) of the Unfair Dismissals Acts 1977-2015, which provided that the Act shall not apply in relation to any of the following persons; *"(b) an employee who is dismissed and who, on or before the date of his dismissal, had reached the normal retiring age for employees of the same employer in similar employment…"*; on that basis, it was held that the Unfair Dismissals Acts did not apply to the termination of the applicant's employment.

26. The applicant also challenged that determination in proceedings before the High Court. By orders dated 3rd December, 2018 and 7th December, 2018, on consent of the parties, an order was made quashing the determination of the Labour Court under reference UDD1482 and remitting the matter back to the Labour Court "for a full rehearing". The rehearing of that application before the Labour Court, resulted in the subsequent determination of the Labour Court, bearing reference UDD209, which is one of the decisions under challenge in these proceedings.

27. In or about August 2017, the applicant repeated his protected disclosure to the then Minister for Justice, Ms. Frances Fitzgerald.

28. That is but a very brief sketch of the background to these proceedings. Suffice is to say that the disputes between the applicant and his former employer and various persons and bodies, who made determinations on his various complaints, have been extensive and have given rise to a large quantity of documentation.

The Decisions Challenged in these Proceedings.

PDD203.

29. This determination ruled on a complaint made by the applicant that the decision by the respondent not to grant his application for retention in the Civil Service beyond the age of 65, constituted penalisation arising from his protected disclosure and further that the decision by the Secretary General, following review of that decision to uphold same by letter dated 16th January, 2017, also constituted penalisation. The Labour Court noted that the complainant had lodged his complaint with the WRC on 28th September, 2019. Therefore, the "cognisable period" under the 2014 Act in terms of any act of penalisation was 29th March, 2019 to 28th September, 2019.

30. It should be noted that these dates are wrong. They should read 2017 instead of 2019.

31. By way of preliminary issue, the respondent to that complaint (being the applicant's former employer, the notice party herein), had submitted that the complaint was statute barred. The complainant sought an extension of time pursuant to s.41(8) of the 2015 Act, which required that reasonable cause be shown in order for an extension of time to be granted. The applicant had submitted that the delay in submitting the complaint arose from the fact that he had been in mediation with his former employer from January to May 2017. He believed that his complaint in relation to his retention in employment application would be considered as part of that process. It was his submission that he had lodged the complaint within three months of the mediation finishing.

32. The Labour Court noted that s.41(6) of the 2015 Act provided that subject to sub-s. (8), an adjudication officer shall not entertain a complaint referred to him or her under the section, if it had been presented to the Director General after the expiration of the period of six months beginning on the date of the contravention to which the complaint related. Subsection (8) provided that an adjudication officer may entertain a complaint or dispute to which the section applied, presented or referred to the Director General after the expiration of the period referred to in sub-s. (6) or (7) (but not later than six months after such expiration), as the case may be, if he or she was satisfied that the failure to present the complaint, or refer the dispute within that period, was due to reasonable cause.

33. The Labour Court held that the applicant's complaint had been presented to the WRC outside the statutory time limit. The court found that, while the reason proffered by the applicant that he was in mediation, might explain the delay, it did not explain the delay for three months after the end of the mediation, prior to the time when the complaint was lodged, nor did it afford an excuse for that delay.

34. The court found that the complaint made by the applicant under the Act was outside the statutory time limit and therefore must fail. In those circumstances, the Labour Court did not proceed to hear the substantive matter.

35. In his submissions in relation to this determination, the applicant pointed out that his complaint related to the refusal of his application to be retained in employment beyond the age of 65 years. He stated that that refusal had been motivated by a determination on the part of the management of the WRC and NERA to get rid of him, because he had made the protected disclosure in September 2015, which had been critical of them. He stated that he had lodged complaints with the notice party's Assistant Secretary, Mr. Philip Kelly, in relation to each of the acts which he regarded as being punitive acts, which has been motivated by the fact that he had made the protected disclosure. He stated that he had been assured that those complaints would be addressed in an internal mediation process, after he had returned to work after sick leave. He alleged that the assistant secretary ultimately reneged on this undertaking by insisting in September 2016 that the long promised mediation, would be limited to complaints that predated his protected disclosure.

36. The applicant stated that at that stage, he refused to participate in the mediation and instead sought redress by way of a formal penalisation complaint to the WRC under the Protected Disclosures Act 2014. He submitted his formal penalisation complaint to the WRC on 15th December, 2016. He did not specifically include the rejection of his retention application at that stage, because the outcome remained subject to the review being conducted by the Secretary General, which was not completed until January 2017.

37. The applicant stated that in February 2017, when the WRC offered mediation in respect of his December 2016 penalisation complaint, he had made it clear that his participation in mediation was conditional on the notice party's rejection of his retention application, being addressed in the mediation process. He asserted that that condition had been accepted by the WRC director, who had represented the notice party at that mediation.

38. The applicant stated that the mediation had concluded without agreement in June 2017. His complaints were then scheduled for adjudication by the WRC on 27th September, 2017. When he learnt that the notice party was going to argue that his assertions in relation to the refusal to grant him retention in employment was statute barred; to protect his position, he lodged a new penalisation complaint on 28th September, 2017 in relation to the notice party's handling of his application for retention in employment. He stated that his participation in the internal mediation had been conditional on the inclusion of that element of his complaint as part of the mediation. He asserted that in these circumstances there was a reasonable basis on which to extend the time to enable him to bring the complaint before the Labour Court.

39. The applicant submitted that the finding of the Labour Court in PDD203, that the reasons that he had offered for his delay in making the complaint, that he had been in mediation and their finding that while that might explain the delay, it did not explain the delay of three months after the end of the mediation, nor did it afford an excuse for the delay, were findings that were irrational and unreasonable. He stated that those findings failed to acknowledge the fact that the reason that he had not lodged a new complaint at the end of the mediation process, was because he had already submitted the complaint prior to the mediation and, in accepting it as part of the mediation process, both the WRC and the notice party had accepted – well within the six-month time limit – that the retention application was integral to his overall penalisation complaint.

40. The applicant submitted that the Labour Court's dismissal of his appeal in PDD203, in the circumstances outlined and where the adjudication officer had previously determined that he had established reasonable cause justifying an extension of time, was irrational and unfair in all the circumstances. He submitted that it served no purpose beyond allowing the notice party to avoid having to justify their unfair and punitive handling of his valid application for retention on the hardship grounds set out in Civil Service Circular 13/1975.

41. In response, it was submitted by the notice party, that the applicant had submitted his complaint to the WRC in relation to the refusal of his retention application, outside the six-month time period provided for in the statute. In so doing, he had deprived the WRC and the Labour Court on appeal, of jurisdiction to hear the complaint. Under the 2014 Act,

the complaint must be brought within six months of the conduct complained of. The complaint in this case had been made on 28th September, 2017; accordingly, it was only acts of alleged penalisation which occurred in the period 29th March, 2017 to 28th September, 2017, which could come within the complaint. No allegations of penalisation had been made which related to that period.

42. It was submitted that while the time limit for making a claim under the 2015 Act may be extended for up to twelve months under s.41(8) for "reasonable cause", the applicant had made no application for an extension of time in advance of the Labour Court hearing. At the hearing, he had applied for an extension, relying on the mediation process, which had commenced in January 2017. That mediation process had concluded on 22nd June, 2017. At that stage, the applicant's complaint would have been within time if he had lodged it.

43. It was submitted that the reality was that it was only the respondent's submission at the WRC hearing on 27th September, 2017 on the retention complaint being statute barred, which had motivated the lodging of the complaint by the applicant on the following day, which was outside the statutory timeframe. It was submitted that there was no error in the manner in which the Labour Court had made its decision that the applicant's complaint was statute barred.

PDD204

44. In this determination, which was handed down on 12th February, 2020, the Labour Court noted that the applicant's employment had come to an end on 8th January, 2017, due to the fact that he had reached the mandatory retirement age of 65 years. The applicant had lodged his complaint with the WRC on 10th March, 2019. This meant that the cognisable period under the Act in terms of any act of penalisation was the period from 11th September, 2018 to 10th March, 2019. The applicant was not an employee during the cognisable period. The court noted that the applicant had also failed to identify any penalisation as defined by the Act during that period. The court ruled that as the applicant could not identify penalisation as defined by the Act during the cognisable period, his claim must fail.

45. The applicant stated that appeals arising from his original penalisation complaint in December 2016 and his unfair dismissal complaint of June 2017, had been dismissed following a hearing by the Labour Court under the chairmanship of Mr. Kevin Foley in May 2018 in PDD185 and UDD1842. He submitted that the matters at issue in those appeals, centred on efforts that he alleged had been initiated by the WRC Director, Mr. Mulvey, to dismiss him as a labour inspector following his May 2015 disclosure to him, of his concerns regarding his mismanagement of the labour inspectorate and the escalation of those efforts by Mr. Mulvey, following his formal protected disclosure to the assistant secretary in September 2015.

46. The applicant stated that there was a potential for objective bias in respect of those determinations, due to the fact that there was a close personal relationship between Mr. Kevin Foley and Mr. Mulvey, from their time working together in the Labour Relations Commission (hereafter, "LRC"). He stated that he had only become aware of this fact as a

result of reading an article in the Irish Times newspaper, published on 16th February, 2019.

47. The applicant stated that the penalisation that he had identified in PDD204, was the unfairness inherent in the decision by the notice party, his former employer, to permit the Labour Court chairman to proceed with the hearings in PDD185 and UDD1842, in the full knowledge of the chairman's prior longstanding close professional relationship with the WRC Director General, whose efforts to penalise and dismiss the applicant, were the subject of those appeals. He stated that this matter raised issues of objective bias in the hearing of those appeals.

48. The applicant submitted that given the potential for bias that existed and given that the WRC and the Labour Court shared corporate interests in ensuring that the outcome of complaints arising from his protected disclosure vindicated the integrity of the new structures, of which they were both integral parts should, of itself, have required that the proper investigation and adjudication of those complaints, be conducted independently of the WRC and the Labour Court. He submitted that the repeated failure to do so, undermined his right to an independent and impartial hearing.

49. The applicant further submitted that the chairman of the Labour Court, who had heard PDD185 and UDD1842, which were appeals arising from attempts that the applicant alleged to have been initiated by the Director General of the WRC to have him dismissed, had concealed the fact that he had had a long and close personal relationship with the WRC Director General from their years together at the head of the WRC's predecessor, the LRC. The applicant stated that that information was relevant to the hearing of his appeal, but it was not disclosed to him. He stated that that information had remained concealed from him at the time that he had made the decision not to proceed with his appeal of the determination in PDD185 before the High Court. That appeal had been withdrawn in October 2018. The applicant stated that the information concerning the connection between the chairman of the Labour Court in those determinations and the Director General of the WRC, only became available to him in February 2019. Immediately upon becoming aware of that association, he presented a complaint to the WRC, as provided for under the Act.

50. The applicant submitted that the cognisable period applied by the Labour Court in dismissing his appeal in PDD204, failed to take account of the fact that any perceived delay in submitting his complaint, was entirely due to the fact that the Labour Court and the notice party, had successfully concealed his right of action in the matter. The applicant submitted that there were legitimate questions arising from the chairman of the Labour Court failing to recuse himself from hearing the appeals in PDD185 and UDD1842. In addition, he submitted that the decision by the applicant's employer, to permit those hearings to proceed in circumstances that precluded an impartial hearing of those appeals, amounted to "unfair treatment" and "penalisation" within the meaning of the Act.

51. The applicant submitted that none of these questions had been addressed by the WRC at first instance, or by the Labour Court in PDD204. It was submitted that there was no

basis in law or in fact, for the Labour Court's determination in PDD204 that *"as the complainant could not identify penalisation as defined by the Act during the cognisable period his claim must fail".*

52. In response, it was submitted on behalf of the respondent, that the Labour Court had not erred in its finding that the applicant "*could not identify penalisation as defined in the Act during the cognisable period, 11th September, 2018 to 10th March, 2019".*

53. It was submitted that the only act which the applicant relied on in his complaint, was the alleged "concealment" on the part of the chairman of the Labour Court in hearing the applicant's 2018 appeals on 17th May, 2018. It was pointed out that the Labour Court was never the applicant's employer. The applicant had not been employed by the notice party since January 2017. It was submitted that the Labour Court had been entirely correct in finding that the complainant could not identify penalisation as defined by the Act during the cognisable period.

54. It was submitted that in reality, the applicant was seeking to challenge the decision in PDD185 in these proceedings, notwithstanding the fact that the reliefs sought did not relate to that determination.

55. It was submitted that the applicant had failed to proceed with candour when he had moved his leave application, due to the fact that he had not revealed to the court that he had appealed the determination in PDD185 to the High Court pursuant to s.46 of the 2015 Act. It was submitted that as the remedy of judicial review was a discretionary remedy, the lack of candour on the part of the applicant was something which the court could take into consideration. Counsel referred to the decision of Hogan J. in *Oboh & Ors v. Minister for Justice Equality and Law Reform* [2011] IEHC 102, where he had held that any lack of candour or misconduct on an applicant's part must be directly relevant to the case being made by him if it is to disentitle him to relief, to which he would otherwise be entitled. He had stated that the court, being desirous to uphold the integrity of the system of the administration of justice, may withhold relief where it was satisfied that the litigant had told an untruth which, if it had been otherwise accepted by the court, would have materially influenced the disposition of the proceedings. It was submitted that there was no basis on which the court should disturb the finding of the Labour Court in this determination.

UDD209

56. The applicant's complaint concerning this determination, was twofold: (i) that his application for retention after age 65, was not processed in accordance with the circular governing such requests and (ii) that his application for retention was refused because he had made a protected disclosure.

57. The respondent raised a preliminary objection on the basis that there had been no dismissal, as the applicant had retired from his employment on reaching the age of 65 years, as provided for in the 1956 Act. The respondent relied on s.2(1)(b) of the Unfair Dismissals Act 1977 to 2015, which provided that the Act shall not apply in respect of an

employee who is dismissed and who, on or before the date of dismissal, had reached the normal retiring age for employees of the same employer in similar employment. The respondent had submitted that as the applicant had retired at the mandatory retirement age, as set out in s.8 of the 1956 Act, for his category of Civil Servants, he could not maintain a claim under the Unfair Dismissals Acts.

58. In relation to the applicant's second ground of complaint, the respondent had acknowledged that there was an exception to the exclusion in sub-s. (1)(b) of the Unfair Dismissals Acts, which was contained in s.6(2)(b)(a), which provided that without prejudice to the generality of sub-s. (1), the dismissal of an employee shall be deemed for the purposes of the Act, to be an unfair dismissal if it results wholly or mainly from one or more of the following: … "*the employee having made a protected disclosure."*

59. The Labour Court held that the decision not to accede to the applicant's application for retention beyond 65 years and the related protected disclosure, along with the papers relating to same, had been before the Labour Court previously and had been addressed in determination PDD185, which had held "*that the appellant has not made out a complaint that penalisation within the meaning of the Act occurred within the cognisable period".* The court stated that it was their view that, but for the fact that the issue had already been decided, the complainant would have been entitled to take a claim under the Unfair Dismissals Acts. However, it held that the issues that he was seeking to rely on were *res judicata* by way of issue estoppel.

60. In relation to the second issue, it held that the issue which had to be considered was whether or not the complainant had reached the normal retiring age for employees of the same employer in similar employment. The court stated that it was not disputed that the complainant had attained the age of 65 years on 8th January, 2017, the date his employment terminated. It was submitted to the court by the respondent that that was, at the time in question, a mandatory retirement age for Civil Servants, who had commenced work in the Civil Service prior to 1st April, 2004. The complainant in his submission had confirmed that "Civil Servants recruited prior to 1st April, 2004 had a mandatory retirement age of 65". On that basis, the court held that it was not disputed that 65 years was the normal retirement age applying to the applicant.

61. The court made its determination that as the complainant had reached the normal retirement age for employees in his employment, he was debarred by s.2(1)(b) from pursuing a claim for unfair dismissal under the Act.

62. The applicant submitted that the hearing before the Labour Court was supposed to be a "full rehearing" as directed by the High Court. The applicant submitted that the Labour Court had been incorrect in holding that his complaint that he had been unfairly dismissed, was *res judicata* by virtue of the determination in PDD185. It was submitted that such finding on the part of the Labour Court was unsound in fact and in law. He submitted that, as the chairman of the Labour Court had failed to recuse himself from hearing the appeal in PDD185, in circumstances where he had had a close personal and working relationship with Mr. Mulvey, the subject matter of the complaint, the

determination that issued as a result of that hearing in PDD185, was not determinative of the issues that arose before the Labour Court on the rehearing of the matter in January 2020.

63. The applicant further submitted that the determination in PDD209 had completely failed to mention, or to have any regard to the fact that he had pleaded that his forced retirement on reaching age 65, constituted discrimination on grounds of age as prescribed under s.8(1) of the Employment Equality Acts and that that discrimination could not be objectively, or reasonably justified by any legitimate aim as required under Art. 6 of Council Directive 2000/78/EC.

64. In this regard, the applicant referred to a number of cases where it had been held that the Labour Court should not be curtailed in relation to the remedies that it could give, merely by reference to the nature of the form on which the complaint or application was brought before it: see *Galway/Mayo Institute of Technology v. Employment Appeals Tribunal* [2007] IEHC 210; *County Louth VEC v. Equality Tribunal* [2016] IESC 40.

65. The applicant also referred to the judgment of the Court of Justice of the European Union in the reference that had been made to it in Minister for Justice Equality and Law Reform and the *Commissioner of An Garda Síochána v. The Workplace Relations Commission and Boyle, Cotter and Fitzpatrick (notice parties)* (C-378/17). The applicant submitted that the Civil Service Regulation Act 1956, insofar as it conflicted with the EU Equality Directive, should have been disapplied and should not have been relied upon in justifying a forced retirement that was clearly age-discriminatory under Irish and EU law.

66. The applicant also referred to the decision of the adjudication officer in *Geraghty v. Office of the Revenue Commissioners* (ADJ-31), where the adjudication officer had held that having regard to the high standard of proof required in relation to objective justification and appropriate means to justify the refusal to allow the complainant in that case to remain at work until age 70, had not been achieved by the respondents. The adjudicator had held that, in keeping with EU Directive 2000/78/EC and following the decision of the CJEU in the *Boyle* case, confirming the primacy of EU law, s.8 of the Civil Service Regulation Act 1956 must be disapplied, in the circumstances applying to the complainant. He held that the refusal of the complainant's application to remain until age 70, was discriminatory on age grounds. The applicant submitted that that ruling of the adjudication officer and the decision of the CJEU in the *Boyle* case, was strongly supportive of his contention that a mandatory retirement age of 65 years was unlawful and invalid under EU law. He submitted that the determination of the Labour Court in UDD209 had to be struck down, as it had not addressed this issue.

67. The applicant further submitted that at the time of his forced retirement in January 2017, there was, in practice, no "*normal retiring age for employees of the same employer in similar employment*" as set out in s.2(1)(b) of the Unfair Dismissals Acts and that any attempt to exclude his unfair dismissal complaint on that basis was invalid.

68. In response, counsel for the notice party submitted that the assertion by the applicant that the doctrine of *res judicata* should not apply, due to some form of objective bias on the part of the chairman of the Labour Court which had issued determination PDD185, was misconceived. There was no basis on which an allegation of objective bias in relation to that determination, could be used as a means of preventing any issue determined therein being deemed res judicata in subsequent proceedings. It was pointed out that the applicant had never challenged PDD185 on grounds of bias, or otherwise. All he had done, was to appeal that decision and then subsequently withdraw the appeal. Accordingly, it was submitted that the decision in PDD185 was a judicial determination which was final and conclusive.

69. It was submitted that the decision in PDD185 complied with the test for *res judicata* as set down in *Belton v. Carlow County Council* [1997] 1 IR 172, which held that there were two basic tests which had to be satisfied before an issue estoppel could be established: (i) the issue raised in the second action must be the same issue as was determined in the first action; (ii) the issue in the first action must have been necessary to the decision therein. Counsel also referred to the decision in *D. v. C.* [1984] ILRM 173 and extracts from 'The Law on *Res Judicata* and Double Jeopardy' by Paul A. McDermott, published by Bloomsbury (1st April, 1999); and *Barber v. Staffordshire County Council* [1996] 2 AER 748.

70. Counsel referred to extracts from the decision in PDD185 and in particular to the following finding: -

> *"The Court has set out earlier that mere assertions cannot be elevated by the Court to the status of evidence and, in the absence of any other material which makes or supports a contention that there was a connection between his protected disclosure and the Respondent's failure to agree to his request to be retained in employment, the Court finds that the Appellant's complaint that the Respondent's failure to accede to his application to be retained in employment, made in October 2016 and withdrawn on 28th November 2016, was a penalisation within the meaning of the Act has not been made out."*

71. It was submitted that having regard to the findings made in determination PDD185, the issues regarding the applicant's application for retention had already been determined and were *res judicata* at the time of the hearing before the Labour Court in January 2020, which resulted in determination UDD209.

72. In relation to the applicant's assertion that his complaint of discrimination on age grounds had not been addressed in the determination, it was submitted that he had not made any such submission in his application that was before the Labour Court for determination in January 2020. The only issue that was before the Labour Court on that occasion, was whether his dismissal had been an unfair dismissal within the meaning of the Unfair Dismissals Acts. In this regard, counsel pointed out that in *Minister for Justice Equality and Law Reform v. Workplace Relations Commission & Boyle & Ors. (notice parties),* Clarke J. (as he then was) delivering the judgment of the Supreme Court on the reference

decision made it clear at paras. 10.1 and 10.2 of the judgment that statutory tribunals do not have jurisdiction at Irish law to disapply a measure of Irish law on the basis that it is contrary to EU law.

73. It was submitted that on the application that was before the Labour Court, it was only dealing with an application under the Unfair Dismissals Act; it did not have jurisdiction to entertain an application under the Employment Equality Acts and even if it did, it did not have jurisdiction to make a ruling that would effectively disapply s.8 of the 1956 Act. It was submitted that in these circumstances, the applicant's challenge to the determination was unfounded.

Conclusions.

74. The first issue which the court must determine is the objection taken by the notice party that the applicant is out of time to challenge these decisions due to the fact that the decisions were handed down on 12th February, 2020 and the *ex parte* judicial review challenge was moved more than three months after the three decisions were delivered. It was submitted that in these circumstances the applicant's application in these proceedings was outside the time limit provided for in O.84 of the Rules of the Superior Courts.

75. The notice party further submitted that there was no application, either in the notice of motion, or in the applicant's statement of grounds, for an extension of time. Nor had the applicant presented any factual basis why the court should be satisfied of the matters set out in O.84, r.21(3), which would enable it to grant an extension of time in appropriate circumstances.

76. In response to that objection, the applicant stated that he had encountered considerable difficulties in submitting his papers seeking to challenge the impugned decisions. He had first sought to lodge the papers in the Central Office of the Four Courts in early March 2020, but due to various technical and procedural deficiencies in the documents, he had not been able to finally lodge them until 27th March, 2020.

77. During the hearing, the registrar informed the court that from the court records, the *ex parte* application had first come before the High Court on 22nd June, 2020. It had been adjourned from that date to 20th July, 2020 and then further adjourned to 27th July, 2020, at which stage, Simons J. granted leave to the applicant to proceed by way of judicial review.

78. The court is satisfied that in the present case it is appropriate to extend time to bring the within proceedings. It has reached this conclusion for a number of reasons. Firstly, the court is satisfied that the applicant attempted to lodge his papers well within the three-month time limit. The emails, which have been exhibited to the grounding affidavit sworn by the applicant, demonstrate that the applicant had travelled to Dublin to lodge the documentation in the Central Office of the High Court on 9th March, 2020. Thereafter, there had been delays in lodging the papers due to deficiencies in the documents that had been submitted. It appears that the final documentation was submitted on 27th March,

2020. Thus, the relevant papers were lodged a little over one month after the date of the impugned decisions.

79. Secondly, the court has to have regard to the fact that in March 2020 and in the following months, the country was in the grip of the Covid-19 Pandemic. None of the population was vaccinated at that time. As a result, there were extensive restrictions on travel and on work. In particular, there were extensive restrictions on the public gaining access to the Central Office in the Four Courts and to the courts themselves. There were almost no in-person hearings before the courts at that time, save for exceptional emergency matters, such as wardship applications, Article 40 applications and the like.

80. The court is satisfied that given the situation that existed in the country at that time due to the Covid-19 Pandemic, there is sufficient explanation for the delay and the failure to move the *ex parte* application prior to 22nd June, 2020. The court is satisfied that the case comes within the provisions of O.84, r.21(3). The court is satisfied that justice demands that there should be an extension of time to bring the within proceedings. The court grants an extension of time to bring the within proceedings up to and including 20th July, 2020. Accordingly, the applicant's application herein is deemed to be within time.

81. I now turn to deal with the challenges raised by the applicant to the individual determinations. In relation to PDD203, which was dismissed on a preliminary issue, being that as the applicant had lodged his complaint with the WRC on 28th September, 2017 and as he did not complain of any penalisation in the cognisable period under the Act, which was a period of six months prior to the lodging of the complaint, the application had to be dismissed. The court is satisfied that there is no basis on which it can interfere with that decision.

82. The applicant maintained that his delay in lodging the complaint until 28th September, 2017, was due to the fact that he had lodged a prior penalisation complaint with the WRC and that in the course of dealing with that complaint, the WRC had suggested that he might engage in an internal mediation process. The applicant asserted that he had agreed to engage in the mediation process, but only on the condition that the retention refusal would be part of the mediation process. He stated that for that reason he had not lodged any separate complaint in relation to the decision that had been made to refuse him retention in employment within the civil service.

83. The applicant further contended that it was only when the mediation process ended that he decided to lodge the complaint in relation to the refusal to retain him in employment. However, the applicant has not explained why his participation in the mediation process prevented him from lodging a formal complaint of penalisation in relation to the refusal of his retention application, but not processing it while the mediation continued. Furthermore, he has not explained why he did not proceed to lodge the complaint upon the unsuccessful conclusion of the mediation, three months prior to the date on which he actually lodged the complaint.

84. The court is satisfied that in these circumstances, the Labour Court was entitled to reach the conclusion that it did, that the applicant's complaint in relation to the refusal of his retention application was out of time and that there was not a sufficient basis for them to extend the time for the lodging of that complaint. Accordingly, the court refuses to grant *certiorari* of the determination in PDD203.

85. The thrust of the applicant's complaint in relation to the determination in PDD204, was to the effect that his former employer had engaged in an act of penalisation against him due to the fact that he had made the protected disclosure in 2015, by permitting the Labour Court chairman to proceed with the hearing of the appeals that led to the determinations in PDD185 and UDD1842, when his employer knew of a longstanding relationship between the chairman of the Labour Court hearing those matters in 2018 and the WRC Director General, whose alleged efforts to penalise and dismiss the applicant, were the subject of those appeals. It was submitted that this raised an issue of objective bias in relation to the hearing of those appeals.

86. The applicant further complained that the WRC and the Labour Court's shared a corporate interest in ensuring that the outcome of complaints arising from his protected disclosure, vindicated the integrity of the new structures, of which they were both integral parts, should, of itself, have required that the proper investigation and adjudication of those complaints be concluded independently of the WRC and the Labour Court. He alleged that the repeated failures to do so, undermined his right to an independent and impartial hearing.

87. There are effectively two aspects to this allegation of bias. The first is that there was a duty on the chairman of the Labour Court, who dealt with the hearings in PDD185 and UDD1842, to disclose that he had worked with Mr. Kieran Mulvey, who was to some extent the subject of the protected disclosure that had been made by the applicant. The court does not regard this submission as being well founded for a number of reasons. Firstly, given that Mr. Mulvey and Mr. Foley were well known in industrial relations circles, it was inevitable that one or other of them could have to deal with issues that may involve the other in respect of a particular dispute before him. The court is not persuaded that the fact that they had worked together in the LRC could give rise to an apprehension of objective bias in relation to Mr Foley's chairmanship of the Labour Court hearings in 2018.

88. Secondly, when one looks at the actual complaints that were considered by the Labour Court in its determination in PDD185, as summarised earlier in the judgment, it is clear that none of those allegations related to Mr. Mulvey personally. They were much more general allegations, such as a denial of access to the work ICT system while he was out sick; a failure to reinstitute his access to that system promptly on his return to work; a failure on the part of the employer to reactivate a suspended disciplinary process; making enquiries of him in relation to a defamation action that he was pursuing against an employer with business in his catchment area and the failure to accede to his request to be retained in employment beyond the age of 65 years. The court is not persuaded that there was any allegation against Mr. Mulvey directly arising out of any of those

complaints. Therefore, such relationship as there may have been between Mr. Foley and Mr. Mulvey when working in the LRC, was not relevant to the matters that were determined in PDD185.

89. Thirdly, Mr. Foley and Mr. Mulvey were well known figures in industrial relations circles. The applicant worked in the same general area, being a labour inspector within the NERA section of the WRC. In these circumstances, the court finds it difficult to believe that the applicant was unaware that Mr. Foley and Mr. Mulvey had worked together in the LRC some years previously. Fourthly, it is also relevant that the applicant appealed the determination in PDD185, but subsequently, on the advice of his counsel, withdrew that appeal, when an agreement was reached that determination UDD1842 would be set aside and there would be a full rehearing of that matter. Thus, insofar as it may be argued that there was any bias on the part of the chairman of the Labour Court in relation to that determination, that became irrelevant once that determination was set aside and a full rehearing was ordered.

90. In relation to the second allegation of bias, which is one of structural bias given the relationship between the WRC, the Labour Court and the notice party; the court is not satisfied that such connection that there is between these bodies is sufficient to give rise to a reasonable apprehension of objective bias.

91. The WRC and the Labour Court are separate and independent statutory bodies established pursuant to the Workplace Relations Act 2015 and the Industrial Relations Act 1946, respectively. In *Zalewski v. An Adjudication Officer and the Workplace Relations Commission & Ors*. [2021] IESC 24, the Supreme Court recognised the importance of the independence of adjudication officers of the WRC and the members of the Labour Court.

92. The Labour Court is an independent statutory body established in accordance with the provisions of the Industrial Relations Act 1946. The appointment of the chairperson of the Labour Court is in accordance with s.10(3) of the 1946 Act. The chairperson is appointed from among candidates in respect of whom a recommendation for the purposes of the section has been made by the Public Appointments Service consequent upon the holding of a competition in accordance with the Public Service Management (Recruitment and Appointments) Act 2004.

93. The appointment of the deputy chairperson of the Labour Court is in accordance with s.4 of the Industrial Relations Act 1969 (as amended), from among persons in respect of whom recommendations for the purposes of the section have been made by the Public Appointments Service consequent upon the holding of a competition in accordance with the 2004 Act. Persons appointed as ordinary members of the Labour Court are appointed pursuant to s.10(4)(a) of the 1946 Act (as inserted by the 2015 Act), by warrant of appointment, having been nominated for appointment by the relevant nominating bodies.

94. The notice party is a corporation sole having regard to the provisions of s.2 of the Ministers and Secretaries Act 1924, as amended. The notice party does not have a role in

the decision making process which was challenged by the applicant. No evidence has been advanced to support any such claim.

95. The issue of structural bias was discussed by the learned authors of Hogan, Morgan, Daly, "Administrative Law in Ireland", 5th Edition, 2009 at para. 14.41, wherein it was stated that the notion of structural bias was captured in the following passage from the judgment of McKechnie J. in *Greenstar Limited v. Dublin City Council* [2009] IEHC 589, where it was stated: -

> *"[The court was asked] whether the procedure and position of the respondents gave rise, almost automatically, to objective bias; in that regard the Court finds that they do not, given the nature of the decision in question, and the statutory functions of the local authorities in relation thereto. Those features alone could not give rise to objective bias on the part of the authorities."*

96. The court has also had regard to the decision of the adjudication officer *in Iredale v. Workplace Relations Commission*, where the AO refused a request that he recuse himself, holding that it was not appropriate that he do so. He noted that the legislative regime that had been put in place by the Oireachtas to adjudicate upon such matters and considered that it was clear that the complaints must by necessity be heard by an adjudicator. He applied the legal tests in relation to the allegation of objective bias as set down in *O'Callaghan v Mahon* [2008] 2 IR 514 and *Goode Concrete v CRH* [2015] 3 IR 493 and held that objection bias had not been made out.

97. The court is satisfied that given the respective statutory functions of the WRC, the Labour Court and the notice party, that while there must of necessity be some communication between them, given that they are all involved in one way or another in industrial relations matters, that is not sufficient to give rise to an apprehension of structural bias when either the WRC or the Labour Court is adjudicating on a particular complaint.

98. Given that the hearing in relation to PDD204 was carried out in or about January 2020, and given that the applicant was complaining about alleged penalisation by the notice party in failing to draw to his attention the alleged connection between Mr. Mulvey and the chairman of the Labour Court when dealing with PDD185 and UDD1842 in 2018, the Labour Court was correct to hold that given that he had lodged his complaint with the WRC on 10th March, 2019; that the complainant was not an employee during the cognisable period, being six months prior thereto and the complainant had also failed to identify any penalisation as defined by the Act during that period. That finding by the Labour Court cannot be held to be unsound or erroneous. Accordingly, the court refuses to set aside the determination in PDD204.

99. This brings the court to the final decision under challenge, being the determination in UDD209. There are a number of challenges in relation to this determination. The applicant maintained that he had raised equality issues in his appeal hearing before the Labour Court, but these had not been addressed, or even mentioned, in the determination. It is certainly true that there is no mention of any assertion that the applicant alleged that the

mandatory retirement age was a discrimination against him on the grounds of age, contrary to the provisions of the Equality Acts.

100. Two things should be noted about this assertion. Firstly, the applicant was represented by counsel and solicitor at the hearing before the Labour Court. Secondly, when one looks at the actual complaint form that had been submitted in respect of his unfair dismissals complaint, which had been lodged on 13th June, 2017; while the applicant certainly raised an argument in his complaint form to the effect that all retirement ages must, under the Equality Acts, be capable of being justified on a legitimate and objective basis, his actual complaint was summarised in the following way in that form: -

> *"My case is that the mishandling and rejection of my application for retention under 13/1975 was motivated primarily by the Protected Disclosure that I had made in October 2015 to the Directors of NERA/WRC and to Philip Kelly Assistant Secretary DJEI alleging gross mismanagement of the inspectorate by NERA/WRC management and the culmination of a long series of punitive actions taken against me by WRC/DJEI Management for my ongoing criticisms of their failures to properly discharge their remit."*

101. He stated that the actions of the DJEI personnel officer in forcing him to retire at age 65, without properly or adequately outlining, explaining and exploring the legitimate possibilities for retention for a further five years – subject to the normal requirements of fitness and efficiency as provided for in Circular 13/1975 – constituted an unfair dismissal within the meaning of the Act.

102. Thus, the matter which had originally gone before the Labour Court and resulted in determination UDD1842, which was subsequently set aside by order of the High Court, and ordered to be reheard, and which was reheard before the Labour Court in January 2020, was at all times an unfair dismissals claim. It was never a claim based on age discrimination contrary to the Employment Equality Acts.

103. In the course of argument, Ms. Smith SC submitted that it was clear from the judgment of the Supreme Court in *Minister for Justice Equality and Law Reform v. Workplace Relations Commission and Boyle & Ors. (Notice Parties*) [2017] IESC 43, that statutory tribunals do not have the power to disapply measures of domestic law on the basis that they are contrary to EU law. It was submitted that Clarke J. (as he then was) had made that clear at paras. 10.1 and 10.2 of the reference judgment.

104. However, the answer of the CJEU to the reference that had been made to it by the Supreme Court in that case, which was reported at C378/17, was that it followed from the principle of primacy of EU law, that statutory bodies may have to disapply measures of domestic law if they run contrary to the provisions of EU law. The CJEU stated as follows at paras. 48-50:

> *"48. If a body such as the Workplace Relations Commission, entrusted by law with the task of ensuring that the obligations stemming from the implementation of*

Directive 2000/78 are implemented and complied with, were unable to find that a national provision is contrary to that directive and, consequently, were unable to decide to disapply that provision, the EU rules in the area of equality in employment and occupation would be rendered less effective (see, to that effect, judgment of 9 September 2003, CIF, C 198/01, EU:C:2003:430, paragraph 50).

49. Rules of national law, even constitutional provisions, cannot be allowed to undermine the unity and effectiveness of EU law (judgment of 8 September 2010, Winner Wetten, C 409/06, EU:C:2010:503, paragraph 61).

50. It follows from the principle of primacy of EU law, as interpreted by the Court in the case-law referred to in paragraphs 35 to 38 of the present judgment, that bodies called upon, within the exercise of their respective powers, to apply EU law are obliged to adopt all the measures necessary to ensure that EU law is fully effective, disapplying if need be any national provisions or national case-law that are contrary to EU law. This means that those bodies, in order to ensure that EU law is fully effective, must neither request nor await the prior setting aside of such a provision or such case-law by legislative or other constitutional means."

105. In the joined appeals of *An Taisce v. An Bord Pleanála* and *Sweetman v. An Bord Pleanála* [2020] IESC 39, McKechnie J. considered the effect of the ruling of the CJEU in the *Boyle* case and stated as follows in relation to that judgment at para. 162:

> *"It would therefore seem to be the case in accordance with this judgment that a body such as An Bord Pleanála would be required to disapply national measures of whatever type, if inconsistent with EU principles. This decision of the court evidently was contrary to the strong views expressed by the Supreme Court in its reference, and was also contrary to the opinion previously expressed by Advocate General Wahl."*

106. McKechnie J. went on in the following paragraphs to consider some of the problems that could arise when statutory tribunals were called upon to disapply measures of national law and the further problem that could arise when they were called upon to fashion a remedy to ensure compliance with EU law. Having recognised the difficulties that this could cause in a range of areas, he deferred giving a definitive answer on the question, until it should be presented before the Supreme Court in a concrete set of circumstances.

107. In the *Zalewski* case, O'Donnell J. (as he then was) in considering whether the powers enjoyed by the WRC under the 2015 Act could come within the provisions of Art. 37 of the Constitution, noted that it had been said that the power of the WRC to disapply national law which was incompatible with EU law, which power arose as a result of the decision of the CJEU in the *Boyle* case, could not be considered a limited function or power, which had the effect of preventing the jurisdiction of the WRC and the Labour Court under the 2015 Act from being capable of benefitting from the protection of Article 37 of the Constitution: see para. 121 of the judgment.

108. The court notes that the adjudication officer in *Geraghty v. The Office of the Revenue Commissioners* (ADJ-031) also came to the conclusion that he had the power to disapply s.8 of the Civil Service Regulation Act 1956 as it applied to the complainant in that case, on the basis that it was contrary to the provisions of EU law.

109. The court is satisfied that, in light of the decision of the CJEU in the *Boyle* case and in light of the subsequent dicta in the judgments of the Supreme Court in considering that judgment; it would appear that the Labour Court does have the power to disapply provisions of domestic law, if it finds that they are incompatible with the provisions of EU law. However, as the court is satisfied that the issue of age discrimination under the Equality Acts was not raised before the Labour Court in the hearing giving rise to this determination, it is not necessary to consider this aspect of the case further.

110. However, there is a more fundamental problem in relation to the applicant's assertion that his application for retention in employment was improperly refused. This is due to the fact that, while the applicant had submitted an application for retention in employment on 28th October, 2016, he withdrew that application by email sent on 28th November, 2016. That email was in the following terms: -

> *"John,*
>
> *I wish to withdraw my application for retention beyond 65 pending resolution of the issues raised in the protected disclosure which I submitted on 2nd November, 2016 and related matters.*
>
> *I assume that the outcome of this disclosure – at least insofar as the internal departmental investigation is concerned – will have been decided well in advance of 9th January, 2017 and, depending on this and depending also on any change in my material circumstances in the meantime, I will make a decision at that stage as to whether to submit a new application.*
>
> *I would appreciate if, in advance of this, you could clarify the criteria by which qualification for retention under this scheme is determined so that I will be able, if necessary, to make a judgment as to whether I might qualify at that stage.*
>
> *George McLoughlin."*

111. It is common case that no further application was ever submitted by the applicant for retention in employment beyond the age of 65 years. Thus, the issue as to whether any application that he had made was improperly refused, became moot, because he withdrew his application before any formal determination was made thereon.

112. It is certainly true that a deciding officer considered his application irrespective of the withdrawal of it and came to the conclusion that he did not meet the criteria for retention in employment. That decision was confirmed on review. While those are certainly strange steps to have taken, in view of the withdrawal of the application, it does not render them effective or legally binding, due to the fact that at the time that they were made, his

application had been withdrawn. Thus, the entire argument as to whether his application for retention in employment beyond the age of 65 years, was improperly refused and constituted an act of penalisation, is entirely moot, due to the fact that his application had been withdrawn on 28th November, 2016.

113. Insofar as the Labour Court determined that the decision not to accede to the complainant's application for retention beyond 65 years and the related protected disclosure, had been before the Labour Court previously and had been addressed in determination PDD185, which had held that "*the appellant has not made out a complaint that penalisation within the meaning of the Act occurred within the cognisable period";* the Labour Court was entitled to reach the view that the issues that the applicant was seeking to rely on, were *res judicata* by way of issue estoppel.

114. The Labour Court went on to consider the second issue, being whether the applicant's claim for unfair dismissal was barred by the provisions of s.2(1)(b) of the Unfair Dismissals Acts. The Labour Court determined that, as the applicant had reached the normal retirement age for employees in his employment, he was debarred by virtue of s.2(1)(b) from pursuing a claim for unfair dismissal under the Act. The court is satisfied that that was a finding which it was open to the Labour Court to make on the evidence that was before it at the time that it heard the matter in January 2020. Accordingly, the court refuses to set aside the determination in UDD209.

115. For the reasons set out herein, the court declines to grant any of the reliefs sought by the applicant in his notice of motion, or in his statement of grounds.

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

117. The applicant turned 70 years of age on 9th January, 2022. The court is hopeful that this judgment will bring an end to these acrimonious proceedings and allow the applicant to enjoy his retirement in the company of his wife and daughters.

118. As this judgment is being delivered electronically, the parties will have two weeks within which to file brief written submissions in relation to costs.