

**THE HIGH COURT**

[2022] IEHC 153

[Record No. 2020/ 5336 P]

**BETWEEN**

**JOHN BARRETT**

**PLAINTIFF**

**AND**

**THE COMMISSIONER FOR AN GARDA SÍOCHÁNA AND  
THE MINISTER FOR JUSTICE AND EQUALITY (NO. 2)**

**DEFENDANTS**

**Judgment of Ms. Justice Stack delivered on the 15th day of March, 2022.**

**Introduction**

1. This is an application by the plaintiff for the continuation of the undertakings given by the defendants pending determination of the introductory application, which was an application to restrain the dismissal of the plaintiff by the second defendant (“the Minister”) pending the determination of the proceedings. In addition, the defendants have applied for the costs of the interlocutory application, which I determined in their favour in my principal judgment of 14 February 2022. The plaintiff says that costs should be reserved.

**Application to restrain dismissal pending appeal**

2. Although the plaintiff spoke in terms of this court requesting the defendants to continue their undertakings, which will expire on the determination of the interlocutory application, i.e., on the determination of these applications and the making of a final order in the introductory application, I do not think that this is the correct characterisation of what I am being asked to do.
3. In reality, I am being asked to grant an interim or interlocutory injunction restraining the second defendant from dismissing the plaintiff pending determination of his appeal to the Court of Appeal or at least for a period of time which would allow the plaintiff to apply to that court for further relief to restrain a decision by the Minister pending determination of his appeal to that court.
4. In my principal judgment, I found that the plaintiff has not established a serious question to be tried on the first strand of the case, which sought to restrain the plaintiff’s potential dismissal as arising from disciplinary procedures which, in themselves, constituted “detriment” within the meaning of s. 13 of the Protected Disclosures Act, 2014 (hereinafter, “the 2014 Act”), that the plaintiff would in any event be precluded from obtaining interlocutory relief by reason of his delay in challenging the lawfulness of the disciplinary procedures on the basis that they constituted “detriment”, and that the plaintiff has failed to satisfy the *Maha Lingham* test insofar as he sought interlocutory relief on the basis of general illegalities or infirmities in the disciplinary process.
5. In my principal judgement dated 14 February 2022, I refused to grant an injunction. In doing so, I dealt with the case, in which a large number of points were relied upon by the plaintiff, on the basis that it fell naturally into two separate strands, the first being whether the disciplinary proceedings instituted by the first defendant in October 2018,

constituted “detriment” occasioned to the plaintiff because he had made protected disclosures, and the second being whether there was any illegality or infirmity attaching to the disciplinary procedure.

6. In respect of the first strand, I applied the *Campus Oil* test on the basis that the relief sought was essentially prohibitory. In respect of the second strand, I applied the well-established test for a mandatory injunction enunciated by the Supreme Court in *Maha Lingam v. HSE* [2005] IESC 89, which itself concerned an employment injunction. The logic of that decision is that, in seeking to restrain dismissal, the plaintiff seeks, in effect and in substance, to continue his employment and therefore the relief sought is in substance mandatory.
7. I concluded that those aspects of the case which dealt with the alleged detriment within the meaning of the 2014 Act failed because the plaintiff could not show a serious question to be tried. In respect of the more general complaints about the lawfulness and fairness of the disciplinary proceedings, I found that the plaintiff had not met the higher threshold of showing a strong case that he was likely to succeed at trial. I also determined that the complaints about the process did not, as appeared to be contended for by the plaintiff, tend to show that the process was itself a “detriment” for having made protected disclosures.
8. In relation to the first strand, I made an alternative finding based on delay. This was grounded on the fact that the disciplinary proceedings, insofar as they related to the complaints of the Commissioner arising out of the plaintiff’s actions and the manner in which he had expressed himself in correspondence with Ms. Mulkerrins and Acting Commissioner Ó Cualáin, in particular the letters dated 1 and 20 August, 2018, were commenced by letter from the Commissioner dated 17 October 2018. Yet the proceedings were not issued until July, 2020, and no application for interlocutory relief was moved prior to 30 December 2020. I therefore indicated that, even if I had been satisfied that there was a serious question to be tried, I would have refused the injunction on grounds of delay.
9. The matter comes before me now to deal with the position pending an appeal and to deal with the costs of the interlocutory application.

**Relief pending appeal**

10. The defendants opened the judgment of Clarke J. in *Harding v. Cork County Council* [2008] 4 I.R. 318 which establishes that this court has an inherent jurisdiction to grant injunctive relief pending appeal, even where proceedings had been determined against a plaintiff, as had occurred in that case. Although that case was one where the proceedings had been finally determined in this court, there is no doubt that it is authority for the proposition that this court has an inherent jurisdiction to grant an injunction pending appeal notwithstanding a decision of this court to refuse interlocutory relief.
11. The defendants point out that the jurisdiction recognised in *Harding v. Cork County Council* was based on that identified in *Gee, Commercial Injunctions* (5th Ed., Sweet and

Maxwell, 2004) at para. 23.036. They also point out the fact that Harding was a planning case governed by s. 50 of the Planning and Development Act, 2000, and the very existence of the appeal was predicated upon the grant by this court of a certificate that its judgment refusing leave involves the determination of a point of law of exceptional public importance, a factor which is not present here. They also rely on *L.C. v. Minister for Justice*[2007] 2 I.R. 133, where the Supreme Court also confirmed that there is an inherent jurisdiction to grant relief pending the hearing of an appeal but indicated that it would be exceptional.

12. However, while in *Harding*, Clarke J. clearly took into account (at para. 14) the fact that he had certified that his judgment involved a point of law of exceptional public importance, the principal concern seems to have been that the appeal should not become moot before it was heard. Such a concern is live in this case as it is entirely possible that the Minister will determine the matter prior to the determination of the appeal against the principal judgment. If she refuses to accept the recommendation of the Commissioner, the plaintiff will not be dismissed. However, if the Minister does accept that recommendation, the plaintiff could be dismissed before his appeal is heard.
13. In my view, the principal concern of Clarke J. in *Harding* was the risk that the appeal could become moot before determination, and the fact that the High Court judgment involved a point of law of exceptional public importance was not the primary basis upon which the jurisdiction was identified. That being the case, I am satisfied that it is not fatal to the plaintiff's application that it is not asserted in this case - to date, in any event - that the case involves a point of law of exceptional public importance. There may well be an issue about this in the future if the parties, or either of them, decide to apply for leave to appeal to the Supreme Court, but I understood from the plaintiff that he does not intend to make such application, though he will cooperate in any such application by the defendants. In any event, that is for another day and is not a matter for this Court.
14. The defendants also rely on *Novartis AG v. Hospira UK Ltd.* [2014] 1 W.L.R. 1264 at 1272, where the English Court of Appeal held that, in order to obtain injunctive relief pending appeal, the court '*must be satisfied that the appeal has a real prospect of success.*'
15. In support of the application that the plaintiff should be protected by some form of interim order pending appeal, the plaintiff says that he intends to appeal on the basis that the terms of the principal judgement were such as to require him to prove the state of mind of persons who had not sworn affidavits before me. This is a reference, primarily, to the Commissioner, and the reasons why he instituted the disciplinary process.
16. In deciding against the plaintiff, I followed the prior judgment of this court in *Clarke v. CGI Food Services Ltd.* [2020] 3 I.R. 389, where it was said that the correct approach was to look at the objective circumstances surrounding the institution of the disciplinary proceedings, rather than taking the assertions of the respective parties at face value. I did not require the plaintiff to prove the subjective state of mind of the Commissioner or anyone acting on his behalf. I do not believe an appeal on that point could succeed

because that was not how I approached the matter. I of course make these comments on the basis that it is ultimately a matter for the Court of Appeal to assess my reasons for refusing interlocutory relief and to consider whether any of those reasons were erroneous.

17. The plaintiff also says that a significant issue in the appeal will be whether the plaintiff can be dismissed for writing two letters, given that he had previously made protected disclosures. Insofar as this suggests disproportionality of sanction, as pointed out in my principal judgment, this is an issue which the Civil Service Disciplinary Appeals Board had jurisdiction to consider. However, the plaintiff has chosen not to exercise that important procedural right. Disproportionality, in itself, was not a feature of the plaintiff's case, notwithstanding the fact that he took strong objection to what he obviously regards as the absence of any legitimate basis for the disciplinary proceedings, from which he infers that they are in reality a detriment for having made protected disclosures. The problem with that is that the Independent investigator has found that the writing of the letters constituted "*serious misconduct*" which is a matter that can warrant dismissal by reference to the Civil Service Disciplinary Code, 2016 (hereinafter, "the 2016 Code").
18. This brings me to the alternative basis for refusing interlocutory relief insofar as it was contended that the disciplinary proceedings leading to the recommendation that the plaintiff would be dismissed constituted "*detriment*" for the purposes of the 2014 Act. I was of the view that there was very significant delay on the part of the plaintiff in making the case that the complaints of the Commissioner against the plaintiff, as expressed initially in his letter of 17 October 2018, did not lead to the making of an application for interlocutory relief until 30 December 2020. That is an extremely significant delay.
19. I do not believe that the plaintiff can justify this delay on the basis that the recommendation that he be dismissed only issued on 16 December 2020. His case was that the very institution of disciplinary proceedings against him was a retaliation for having made protected disclosures, both in 2018, and in earlier years. If it is the very existence of the disciplinary proceedings which constitutes the "*detriment*" then his cause of action pursuant to s. 13 of the 2014 Act accrued, at the latest, on 17 October 2018.
20. The defendants rely on *Betty Martin Financial Services Ltd v. EBS* [2019] IECA 327, which they said was authority for the proposition that the Court of Appeal would be much slower to overturn this court where its decision to grant or refuse interlocutory relief was grounded on a discretionary matter such as delay. It is true that that case acknowledged a distinction between the question of whether there was a serious issue to be tried on the one hand and discretionary matters and matters affecting the balance of convenience on the other, acknowledging that the Court of Appeal had a greater jurisdiction to revisit a decision of this court on an appeal from an interlocutory decision where it was based on the former.
21. I do not think the case ultimately assists the defendants as I do not think it creates an insuperable barrier for the plaintiff in seeking to overturn my decision to rely on delay as an alternative basis for refusing interlocutory relief. Having said that, I think it is clear

from the dateline that the plaintiff is guilty of very significant and serious delay in this case.

22. As in any discretionary injunction, the overriding concern of this court is, so far as possible, to achieve the most just outcome. If further injunctive relief is rejected at this point in its entirety, there is a risk that the plaintiff would be dismissed pending his appeal, rendering the appeal moot. I do not believe that it is any part of my function to deny the plaintiff his right of appeal.
23. Accordingly, I will grant an injunction in limited terms, as was done in *Harding*, which will protect the plaintiff for a sufficient period of time to allow him to make such application to the Court of Appeal as he feels necessary to protect his position pending appeal to that Court. I therefore grant an interim injunction restraining the Minister from dismissing the plaintiff for a period of three months from today's date. That, I hope, will be sufficient time to allow the plaintiff, who I am told has already prepared in substance his grounds of appeal, to obtain a hearing date before the Court of Appeal and that Court can then consider whether it can afford some kind of expedited hearing date to the plaintiff for consideration of his appeal against my principal judgment, or whether it will grant interim relief to the plaintiff pending determination of that appeal.
24. Before leaving this issue, I wish to deal very briefly with two points made in the plaintiff's written submissions filed in support of this application for injunctive relief pending appeal and in relation to costs.
25. The first is that it was very correctly acknowledged by counsel for the plaintiff that his written submissions were in error in asserting that I had not afforded an opportunity to the plaintiff to make submissions on the Supreme Court decision in *Baranya v. Irish Meats Ltd.* [2021] IESC 77. It was clearly indicated by counsel during the for mention date shortly after the delivery of that judgment that he did not require to make submissions to me on that judgment.
26. Secondly, insofar as the plaintiff introduces, in his written submissions for the purposes of this application, the presumption in Article 21(5) of Council Regulation 2019/1937, it is correctly accepted by all sides that no reference whatsoever was made to this Regulation prior to the filing by the plaintiff of his written submissions dated 2 March, 2022. Apart from the fact that the plaintiff never sought to rely on this Regulation at any time prior to the delivery of my principal judgment, the written submissions do not identify how it could be relevant to this case. However, in oral submissions, counsel for the plaintiff stated that the third protected disclosure, i.e., the evidence of the plaintiff to the Public Accounts Committee in 2017, fell within the financial interests of the European Community as the monies involved or European Union monies. I have to say that it was clear to me on reading the affidavits that there was no evidence to suggest that the Commissioner, in making complaints against the plaintiff in his letter dated 17 October, 2018, had regard to anything other than the letters of 29 June, 1 August and 20 August, 2018, each of which I found were not protected disclosures.

27. As the matter was never argued prior to the delivery of the principal judgment, the introduction of any argument based on Council Regulation 2019/1937 is now a matter for the Court of Appeal to consider, as it was not an argument raised at first instance. It is open to the plaintiff to seek to introduce this new issue at appellate stage if permitted to do so by the Court of Appeal. That is not a matter for this Court.
28. Finally, counsel for the plaintiff asserted at hearing that the Minister is in an untenable position in agitating in these proceedings for the lawfulness of the disciplinary procedures, while maintaining that she has not yet considered the recommendation of the Garda Commissioner. This was raised again at the hearing of the application in relation to the issues the subject of this judgment.
29. It appears to be contended by the plaintiff that a key consideration for the Minister would be the whether the various matters he relies upon are protected disclosures and whether the procedures themselves are a detriment for having made them.
30. In my view, this submission is misconceived. When the matter goes to the Minister she will consider the report of the Investigator and the Relevant Manager's Report. She will have to decide whether the plaintiff should be dismissed on the basis of his serious misconduct in writing the letters of 1 and 20 August, 2018. In other words, the Minister will have to consider the merits or otherwise of the Commissioner's recommendation. She will not be considering whether the disciplinary procedures themselves amount to a "*detriment*" within the meaning of the 2014 Act. As set out in the judgment, the remedies for any form of "*detriment*", "*penalisation*" or dismissal for having made a protected disclosure are set out in ss. 11 to 13 of the 2014 Act. Section 11 provides, in effect, that dismissal for having made a protected disclosure will be an unfair dismissal within the meaning of the Unfair Dismissals Act, 1977, but dismissal has not occurred and may never occur. Section 12 provides for a claim before the Workplace Relations Commissioner for "*penalisation*" for making an unfair dismissal together with a right to seek interim relief from the Circuit Court. The plaintiff did not choose to avail of that procedural right and I have held he was entitled to apply directly to this Court to restrain a tort within the meaning of section 13.
31. However, the Minister, when she comes to consider the Manager's Report, is not engaged in any of the procedures under those sections. In particular, she is not exercising any power or function under s. 13 as the grant of remedies for breach of the statutory tort created by that provision is a matter for the court. The Minister will be exercising her powers under the Civil Service Regulation Act, 1956, as amended, the procedures for which are set out in the 2016 Code.
32. In my view, in making this argument, the plaintiff has conflated two separate matters. At issue in these proceedings is the lawfulness of the disciplinary procedures invoked against the plaintiff and which led to the Commissioner's recommendation to dismiss the plaintiff. The lawfulness of those procedures, which are in being since 2018, includes a consideration of whether they are in reality a detriment occasioned to the plaintiff for having made one or more protected disclosures.

33. The Minister is perfectly entitled to assert that the procedures are lawful and not a detriment within the meaning of the 2014 Act, as alleged, and, if the procedures are upheld and she is not restrained further from acting, she is entitled to then consider the merits or otherwise of the Commissioner's recommendation. In my view, the plaintiff has conflated the issue of the lawfulness of the proceedings, which this court can consider and must decide, with the merits of the recommendation to dismiss, a matter which now rests in the sole hands of the Minister.
34. I do not accept that there is any real prospect of success on this basis as I consider that the argument is misconceived.

**Costs**

35. Order 99, rule 3(1) of the Rules of the Superior Courts provides for the award of costs at interlocutory stage, but only where it is possible to decide the issue of costs justly at that stage.
36. The principal basis, as I understand it, on which the plaintiff seeks that costs would be reserved, is that after full trial it may be found that my conclusions that there was no evidence linking the earlier protected disclosures to the Commissioner's complaints against the plaintiff would be found to have been wrong.
37. This is clearly a possibility, as it is in many interlocutory matters. While I decided the matter on the considerable evidence put before me for the purposes of the interlocutory injunction, it is possible that after full hearing, including pre-trial procedures such as discovery and cross-examination of relevant witnesses, it will be found that the Commissioner made the complaints against the plaintiff not for the ostensible reasons, but because earlier protected disclosures were made. There is no evidence of this at present, in my view, but perhaps evidence will come to light at trial.
38. If that were the only basis upon which I had to refuse the interlocutory injunction, I would reserve costs. However, I have also found that there was very significant delay in bringing the injunction application. The plaintiff's essential case was that the very launching of disciplinary proceedings against him in itself constituted a detriment. If that is so, then an application for relief should have been made in a timely fashion after the receipt of the Commissioner's letter of 17 October 2018.
39. The defendants, in reliance on s. 169(1) of the Legal Services Regulation Act, 2015, and in particular sub-paras. (a), (b) and (c) thereof, pointed to the plaintiff's conduct in making what they described as "*specious*" allegations in his affidavits. I certainly have grave concerns about whether there is any basis for the allegations of bad faith against various individuals in the plaintiff's affidavits, but I prefer not to rest my decision on this point at the interlocutory stage.
40. The defendants also point to the plaintiff's lack of engagement with the disciplinary process, which they characterised as uncooperative. They point out that the plaintiff withdrew from the proceedings before the Investigator when the time came for him to

give evidence, that he refused to participate in the Disciplinary meeting on 30 November, 2020, he failed to exercise his right to appeal to the Civil Servant Disciplinary Appeals Board, a body which is entirely independent of the Commissioner, and that he refused to make any representations to the Minister even though he was offered an extension of time to do so.

41. I will not enter into any determination of that issue given that the proceedings remain at the interlocutory stage. However, it is in my view indisputably the position that if the very launching of disciplinary proceedings against the plaintiff was unlawful, then that unlawfulness existed from 17 October, 2018, and was known to plaintiff. As stated above, I do not accept that it was reasonable to wait until the Relevant Manager's recommendation had been made. That recommendation was made on 16 December 2020, more than two years after the plaintiff was first informed of the Commissioner's complaints against him and more than two and a half years after the plaintiff had been informed that the complaint of Assistant Commissioner Fanning was to be formally investigated and could result in disciplinary sanction.
42. The result of that delay is that it was only more than two years after the Commissioner first made complaints against the plaintiff, that the plaintiff took the necessary steps to challenge the lawfulness of the entire procedure. In the meantime, he has been suspended on full pay since October 2018 and no one can be appointed to replace him. This is an extremely unsatisfactory state of affairs.
43. The plaintiff also points to the fact that he is an individual litigant and an award of costs will be onerous. There is no doubt that the plaintiff probably does not have the deep pockets of many institutional and corporate litigants in this court. However, he had other, effective, causes of action under the 2014 Act which would have allowed him to proceed before the Workplace Relations Commission. Had he chosen those remedies, the same exposure to costs would not arise. He chose, as he is perfectly entitled to do, to apply to this court to restrain a tort within the meaning of s. 13 of the 2014 Act. However, where the legislature has provided for employees an alternative remedy which would, for all sides, be significantly less expensive and which would allow any application for interim relief to be made to the Circuit Court, I do not think that this plea is as persuasive as it would otherwise be.
44. I will accordingly grant the defendants the costs of the introductory application, but I will put a stay on that order for costs pending determination of the proceedings.