An Chúirt Uachtarach

The Supreme Court

O'Donnell CJ
Charleton J
O'Malley J
Woulfe J
Hogan J

Supreme Court appeal number: S:AP:IE:2021:000027
[2021] IESC NN
High Court record number 2019/169 MCA
[2020] IEHC 56

Between/

TIBOR BARANYA

Appellant

AND

ROSDERRA IRISH MEATS GROUP LIMITED

Respondent

Judgment of Mr Justice Peter Charleton delivered on Wednesday December 1st 2021

1. This judgment concurs with that of Hogan J and seeks to add some observations as to how the state of the law clashes with common perceptions of what a whistleblower is. While the principal judgment of Hogan J is unassailable in the logic by which it is concluded that a worker in making a complaint internal to the workplace in relation to his or her own employment conditions them comes within the terms of the Protected Disclosures Act 2014, that situation does not conform with what the ordinary understanding of the protection of whistleblowers requires and, furthermore, it may not be sensible. The terms of s5(3)(b) of the 2014 Act suggest that the Oireachtas intended to exclude purely private matters, but if that is so it was clearly ineffective since that subsection only addressed contractual claims within the workplace and not issues raised as to personal health. The legislative history of the 2014 Act and the specific exclusion in relation to contracts personally touching an employee, means that the levels of protection promulgated, it might reasonably be thought, for those who sacrifice themselves for others are now to be routinely applied to those involved in simple disputes in the

workplace which have no public involvement and which may not even extend to the revelation of issues whereby others working on the same task may be better protected.

2. It is not enough that the principle of statutory interpretation which enables, in instances of ambiguity, a sensible construction is to be preferred to one which leads to an unreasonable application of the law, has been extended by s 5 of the Interpretation Act 2005 so that in construing a provision of any Act that is obscure or ambiguous, or which "on a literal interpretation would be absurd or would fail to reflect the plain intention of" the Oireachtas, a provision may only be construed so as to reflect that intention where same "can be ascertained from the Act as a whole." In reality, the surrounding circumstances are such that an analysis confining, as seems sensible, ordinary and personal workplace complaints to the existing laws enforcing safety, would be for this Court to rule beyond the mandate whereby statutory construction is confined to interpretation and for the Court to, instead, change what the Oireachtas has legislated for; generally see *JC Savage Supermarket Ltd & Another v An Bord Pleanála & Others* [2011] IEHC 488. While the result of this case puts an ordinary internal workplace situation into a category of protection that clashes with what the protection of those who risk their livelihood to publicly expose risk to others would anticipate, and while that might be the preferred option should such a statutory analysis be compelling, or even feasible, the express wording of the legislation renders that confining interpretation impossible. No court can distort what an enactment means. While case C-105/03 *Pupino* [2005] ECR 1-05285 concerns the construction of European Union legislation, the principle applied at para 47 by the European Court of Justice, that judges cannot construe measures *contra legem*, is also a principle of common law:

> The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.

3. The 2014 Act does not use the term whistleblower. Instead the legislation refers to a person making a protected disclosure. That is a whistleblower. That concept is the pivot upon which Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law turns. The recitals to the Directive reference as whistleblowers those who report illegal situations "harmful to the public interest" thus enhancing such matters of moment as transport safety, nuclear safety, protection of the environment, the fight against fraud and food safety. All of these are about public and not personal interests. Yet, as Hogan J rules, it is inescapable that personal interests are covered by the 2014 Act as well as situations of impact on the public interest. In the long title to that legislation, the provisions are introduced as being "to make provision for … the protection of persons from taking actions against them in respect of making certain disclosures in the public interest and for connected purposes." While the long title might anticipate confining the protection of disclosures exclusively to those made with a public interest in mind, that is not what the 2014 Act does.

4. Normally, and on any use of what has now become an ordinary term of speech, a whistleblower is someone who, despite not being authorised and perhaps despite being expressly prohibited, or actively bullied, makes public some significant information about an organisation which discloses wrongdoing within its confines that impacts on public safety or on the public interest in matters of safety or compliance or tax paying. While whistleblowers are seen in the public mind as being motivated by the noblest sentiments, what matters more is that their point of view is reasonably held, whether what impels their revelation is bitterness or genuine selflessness.

5. This is reflected in s 5(7) of the 2014 Act in providing that the "motivation for making a disclosure is irrelevant to whether or not it is a protected disclosure" but the worker who reveals information must, under s 5(2), reasonably hold a belief the there has been wrongdoing. What, essentially, brings the terms of the legislation outside what the ordinary use of language would require is the contrast between s 3(b) in confining legal obligations under a contract of employment to the private sphere but leaving endangerment or potential endangerment to the "health and safety of any individual", under s 3(d) completely unconfined. It therefor means every situation where a worker has a concern about health or safety personally qualifies for the protections attendant on making a protected disclosure. The legislation does not even go so far as to require him or her to make a complaint outside the workplace. It is enough to legally become a whistleblower for a worker to simply indicates his or her concerns through a commonplace report to a supervisor. In doing that, he or she qualifies for the extreme protections attendant on the legislation. And these protections are extreme and are special. It would obviously not be a fair dismissal were an employee let go for reporting safety concerns, since that does not relate to the competence or qualification of the worker for the job, but making a protected disclosure attracts special protections and remedies under the Unfair Dismissals Act 1977 as amended by the 2014 Act. Most strikingly s 6(2)(ba) and s 7(1A) of the 1977 Act increases compensation where a worker is unfairly dismissed from 104 weeks salary, in any ordinary case, to 260 weeks where the reason behind a dismissal is that the worker was a whistleblower.

6. A natural construction of the concept at the heart of the 2014 Act would differentiate between two situations. The facts have not yet been found by the Labour Court, and as Hogan J indicates, the order of the Court must be to revert the matter for a re-hearing in which not simply the law is discussed but actual facts are clearly decided. But, using the setting in which Mr Baranya worked and thus taking two examples in the context of a meat factory: were an employee to publicly disclose that animals were not being properly stunned and that his or her reports to management had been ignored, that would be a matter of safety to other workers and also an inhumane treatment of animals; were an employee to tell his line supervisor that he had cut and possibly infected his foot and needed sick leave. What the 2014 Act might reasonably be anticipated to protect is the first situation but not the second. However, the legislation covers both and with the attendant consequences.

7. Even though a tendency to cut and paste from the legislation of the neighbouring kingdom has been noted, much less in recent generations, by McWilliam J in *Breathnach v McC* [1984] IR 340, 346, foreign legislative history and amendments introduced in consequence of court decisions are of dubious, or no, value in construing Irish legislation, a contrast may usefully be drawn between the 2014 Act and the history of amendment to a parallel enactment in that jurisdiction. In England and Wales, the original legislation was the Public Interest Disclosure Act 1998 in which s 43B(1)

introduced into the Employment Rights Act 1996 concepts very similar to s 3 of the 2014 Act. An amendment was introduced through s 17 of the Enterprise and Regulatory Reform Act 2013 2013 Act, which required a qualifying disclosure, in other words a protected disclosure, to not only require a "reasonable belief of the worker making the disclosure" that the facts involved a breach of the criminal law or, as here relevant, a danger to public safety, etc, but also that the worker additionally reasonably believes that such a disclosure "is made in the public interest".

8. While there has been no such amendment in this jurisdiction, there is no principle of statutory construction whereby the possible vagaries of the amendment of foreign legislation, for perhaps motives outside the reach of accurate analysis, should inform the interpretation of Irish legislation. What is significant, however, is that to read the legislation as it now exists in the manner contended for by the employer Irish Meats, requiring a public interest element or a beyond-personal impact as to health and safety, is outside the boundaries of any principle of statutory construction.

9. Certainly, context informs the purpose of legislation and, even more tellingly, the other provisions within which a measure requires construction. Perhaps it might be argued that the combination of the enhanced protection in the 1977 Act as to remedies for unfair dismissal by the 2014 Act means that something special, that is to say a beyond-personal motive, is required for a simple complaint in the ordinary way to a line manager to be turned into a protected disclosure; but how could any judicial analysis so conclude? The place of an enactment and as to how it fits within the existing corpus of laws is important for discerning the proper meaning; see Bennion, *Statutory Interpretation*, 6th Ed.., (London, 2013) 540. But plainness of wording within legislation and provisions excluding in the case of contract personal considerations which are not repeated for a general statement as to disclosing issues on health and safety specifically related to "any individual" put the insertion of a public interest motive or requirement within the realm of what is beyond the judicial construction of enactments. Hence, while Hogan J's analysis is unassailably correct, the thrust of the 2014 Act does not conform to what might ordinarily be considered to define a whistleblower as a public-minded individual deserving of special protection.